

No. 17-1618

In The
Supreme Court of the United States

—◆—
GERALD LYNN BOSTOCK,

Petitioner,

v.

CLAYTON COUNTY, GEORGIA,

Respondent.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

—◆—
SUPPLEMENTAL BRIEF OF PETITIONER

—◆—
BRIAN J. SUTHERLAND
Counsel of Record
THOMAS J. MEW IV
BUCKLEY BEAL, LLP
600 Peachtree Street, N.E., Suite 3900
Atlanta, Georgia 30308
Telephone: (404) 781-1100
Facsimile: (404) 781-1101
Email: bsutherland@buckleybeal.com
tmew@buckleybeal.com

*Counsel for Petitioner
Gerald Lynn Bostock*

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ARGUMENT

Pursuant to this Court’s Rule 15.8, Petitioner files this Supplemental Brief in order to call attention to the order of the Court of Appeals for the Eleventh Circuit sua sponte denying rehearing en banc in this case on July 18, 2018. Supp. App. 1. This order – which was published by the Court of Appeals – was not available when Petitioner Bostock filed his Petition for Writ of Certiorari on May 25, 2018.¹ The order also includes an opinion by Judge Robin Rosenbaum, joined by Judge Jill Pryor, dissenting from the denial of rehearing en banc. Supp. App. 2-9. Through this order, the Eleventh Circuit has again refused to consider en banc the important question presented by Mr. Bostock’s petition – whether the prohibition of discrimination “because of . . . sex” contained in Title VII of the Civil Rights Act of 1964, as amended, encompasses discrimination because of sexual orientation. The order thus reconfirms the Circuit split on this question, and underscores the need for this Honorable Court to grant Mr. Bostock’s petition.

The unusual nature of the Eleventh Circuit’s order also highlights the need for this Court to grant certiorari in this case. Specifically, the Eleventh Circuit issued this order sua sponte after Mr. Bostock had already filed his petition for writ of certiorari with this

¹ This Court’s Rule 15.8 provides in pertinent part that “[a]ny party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party’s last filing.”

Court. As set forth in his petition, Pet. at 11, Mr. Bostock presented his appeal of the District Court's dismissal of his claim for sexual orientation discrimination under Title VII to the Eleventh Circuit with a petition for initial hearing en banc pursuant to Fed. R. App. P. 35(b)-(c), *id.*; Pet. App. 60. The Eleventh Circuit first denied his petition for initial hearing en banc on May 3, 2018, Pet. App. 4, and then issued the panel opinion affirming the dismissal of his Second Amended Complaint for failure to state a claim for relief under Title VII, Pet. App. 1. Having already been denied en banc review by the Eleventh Circuit, Mr. Bostock then filed his petition for writ of certiorari with this Court on May 25, 2018. But one or more of the Judges in active service for the Eleventh Circuit then evidently asked his or her colleagues to sua sponte reconsider their refusal to answer the extraordinarily important question presented by Mr. Bostock's case. Yet, instead of doing so, the Eleventh Circuit issued a published order doubling down on that refusal, accompanied by a compelling and persuasive dissenting opinion by Judge Rosenbaum, joined by Judge Pryor.

Judge Rosenbaum's dissenting opinion masterfully explains why this Court must grant the writ of certiorari in Mr. Bostock's case. She begins by noting that both the Second and Seventh Circuits have found the issue of whether Title VII prohibits sexual orientation discrimination to be of such extraordinary importance that they have each addressed it en banc

within the last fifteen months. Supp. App. 3.² Perhaps more importantly, she also reminds us that millions of Americans identify as lesbian, gay, or bisexual and report experiencing workplace discrimination because of their sexual orientation. *Id.* at 4.

Judge Rosenbaum also explains succinctly why the Eleventh Circuit is wrong on the merits to conclude, as it did in *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017), and as it reaffirmed in its May 10, 2018 opinion in this case, that Title VII does not prohibit sexual orientation discrimination. Supp. App. 5-7. She accurately characterizes the Eleventh Circuit's reaffirmance of the old Fifth Circuit's pre-*Price Waterhouse* decision in *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979), as relying on the "precedential equivalent of an Edsel with a missing engine[.]" Supp. App. 6. This is what Mr. Bostock urges this Court to conclude in his petition, and what the Second and Seventh Circuits correctly concluded in their recent en banc decisions – that this Court's decisions in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and other cases effectively abrogated *Blum* and the other pre-*Price Waterhouse* precedents precluding sexual orientation discrimination claims under Title VII. *See Pet.*, pp. 2-5, 26-33.

Finally, Judge Rosenbaum appeals to the conscience of the judiciary, exhorting her Court – and by

² Judge Rosenbaum presents statistical information from the Administrative Office of the United States Courts to show how important the Second and Seventh Circuits must have found this issue to hear and decide it en banc. Supp. App. 3 n.1.

extension this Court – to “at least subject the issue to the ‘crucial’ ‘crucible of adversarial testing,’ and after that trial ‘yield[s] insights or reveal[s] pitfalls we cannot muster guided only by own lights,’ . . . give a reasoned and principled explanation” for a decision. Supp. App. 7-8 (citing *Sessions v. Dimaya*, 138 S. Ct. 1204, 1232 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). “The legitimacy of the law,” she says, demands it. *Id.* at 8 (citations omitted). Indeed, because the Second and Seventh Circuits have decided en banc that claims for discrimination based on sexual orientation are cognizable under Title VII, and the Eleventh Circuit has now refused by a published order to reconsider en banc its prior decision foreclosing such claims, this Court must grant certiorari to protect the legitimacy and uniformity of the law by answering this extraordinarily important question.



CONCLUSION

The published order of the Eleventh Circuit sua sponte denying rehearing en banc in this case confirms the Circuit split on the extraordinarily important question presented by Mr. Bostock’s petition, and for all the reasons set forth therein and in Judge Rosenbaum’s opinion dissenting from the denial of rehearing

en banc, this Court should grant the writ of certiorari in this case.

Respectfully submitted,

BRIAN J. SUTHERLAND

Counsel of Record

THOMAS J. MEW IV

BUCKLEY BEAL, LLP

600 Peachtree Street, N.E., Suite 3900

Atlanta, Georgia 30308

Telephone: (404) 781-1100

Facsimile: (404) 781-1101

Email: bsutherland@buckleybeal.com

tmew@buckleybeal.com

Counsel for Petitioner

Gerald Lynn Bostock