

MONDAY, OCTOBER 7, 2019

## GUEST COLUMNS

## The First Monday

By **Blaine H. Evanson**  
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The U.S. Supreme Court was largely able to avoid controversy in the cases it decided last term, but when the justices return to the bench at One First Street on Monday, the court will find itself — perhaps reluctantly — back in the spotlight, with a docket full of politically charged cases that are bound to make an outsized impact in the upcoming election year.

On Tuesday, the court will take up three Title VII cases — *Bostock v. Clayton County, Georgia*, *Altitude Express Inc. v. Zarda*, and *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC* — which raise the question whether employment discrimination on the basis of sexual orientation or gender identity constitutes discrimination “on the basis of sex.” At a high level, the employees argue that it must be, because they would not have been discriminated against had they been women instead of men. The employers counter that Title VII merely prohibits the preferential treatment of one sex over another. Because adverse employment actions based on sexual orientation or gender identity disadvantage male and female employees equally, they are not discriminatory. The cases have garnered nearly five dozen amicus

briefs, including a brief signed by 206 prominent employers — among them, Amazon, Apple, Disney and Facebook — arguing that there would be little to no cost to business from including sexual orientation and gender identity as protected categories within Title VII. Other amici warn that a ruling in favor of the employees could upend other, often desirable, distinctions on the basis of sex, such as sex-specific fitness, dress, and grooming requirements; sex-specific bathing or sleeping facilities; or voluntary affirmative-action or athletic programs benefiting women.

A month or so later, on November 12, the court will tackle another trio of cases — *Department of Homeland Security v. Regents of the University of California*, *McAleenan v. Batalla Vidal*, and *Trump v. NAACP* — challenging the federal government’s decision to end the DACA program and impose a new immigration enforcement policy on DACA recipients. The key questions in the case are whether the administration’s decision to end the program is judicially reviewable, and if so, whether the administration appropriately justified its attempt to end the program. The case has echoes of last term’s census decision (*Department of Commerce v. New York*), in which Chief



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Justice John Roberts concluded that the specific reasons proffered for the government’s actions were pretextual and therefore invalid. However the case comes out, it is likely to have a significant impact not only on the nearly 800,000 beneficiaries of DACA, but also on the permissible scope of executive action in the immigration arena — a topic of ongoing debate and significance to many, including immigrants, their employers and schools, and the public at large.

The court has also added several constitutional cases to its docket. In *June Medical Services LLC v. Gee*, the court will consider the constitutionality of a Louisiana law that requires doctors who perform abortions in the state to have the right to admit patients at a nearby hospital. The court — which then included Justices Scalia and Kennedy — struck

down a similar law from Texas by a vote of 5-3 in the 2016 decision, *Whole Woman’s Health v. Hellerstedt*. Chief Justice Roberts dissented in that case, but served as the fifth vote here to temporarily enjoin the law from taking effect while the appeal is pending.

In *Espinoza v. Montana Department of Revenue*, the court will decide a question it left open in its 2017 decision in *Trinity Lutheran Church v. Comer*, namely whether a state tax-credit program that is used to fund scholarships is unconstitutional because the scholarships could be used at religious schools (in addition to non-religious schools). Montana contends that the court should not have granted review at all, because its state supreme court struck down the tax-credit program entirely, and thus, no scholarships will be available for students to attend any

private schools, whether religious or secular. The case will be closely watched by those in the eighteen other states with similar tax-credit programs.

The court also agreed to review its first gun rights case in nearly a decade, *New York State Rifle & Pistol Association Inc. v. City of New York, New York*. The case involves a challenge to New York's ban on transporting guns — including those that are licensed and unloaded. Whether the court will actually resolve the matter is something of an open question: The city has argued that the case is moot due to a change in the relevant regulations, but the petitioners counter that the regulatory changes do not solve the constitutional problem, given that the city still claims the authority to regulate the transportation of licensed guns without restriction.

The court also agreed to fast-track a set of cases — *United States v. Aurelius Investment, LLC, Aurelius Investment, LLC v. Commonwealth of Puerto Rico, Financial Oversight & Management Board for*

*Puerto Rico v. Aurelius Investment, LLC, UTIER v. Financial Oversight & Management Board for Puerto Rico and Official Committee of Debtors v. Aurelius Investment, LLC* — involving the constitutionality of President Barack Obama's appointments to the oversight board created to assist Puerto Rico with restructuring its debts. The 1st U.S. Circuit Court of Appeals agreed that the portions of the law that allowed members of the board to be appointed without being confirmed by the Senate were unconstitutional. The court, however, applied the “*de facto* officer doctrine,” which purports to validate the past actions of otherwise unlawful government actors, to uphold all of the actions the board has already taken, and those it now is taking pending Supreme Court review. Each side has appealed from the adverse aspects of the 1st Circuit's ruling.

And there is still more to come. As of the date of this writing, the Supreme Court has taken only 44 cases, and is likely to add another 25 to

30 more. Some of those additional cases may be more business-focused, as the court's commercial litigation docket thus far is fairly light. One exception is a trio of cases led by *Moda Health Plan, Inc. v. United States*, which involves a suit by several health insurers who claim that the federal government reneged on its promise to cover any losses they suffered by providing coverage during the first three years of the Affordable Care Act's implementation.

Whatever the outcomes of these cases, legal observers will have no shortage of fodder for discussion as the new Roberts Court takes center stage to grapple with these important questions. ■

*\*Gibson, Dunn & Crutcher LLP represents the respondents in Department of Homeland Security v. Regents of the University of California, as well as the petitioners in Aurelius Investment, LLC v. Commonwealth of Puerto Rico.*

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