RECENT DEVELOPMENTS IN EMPLOYMENT AND LABOR LAW

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On October 5, 2017, the *New York Times* published an article detailing decades of workplace sexual assault, abuse, and harassment by movie mogul Harvey Weinstein.[1] In the year that followed, an unprecedented number of people have had the courage to report similar workplace concerns, sparking a national conversation and new era of awareness about long-standing employment issues. Any discussion about recent developments in employment and labor law would be remiss not to mention this important moment and the #MeToo movement that followed. While the movement has yet to significantly impact national legislation or rulemaking, many state legislatures are taking proactive steps to bolster training requirements on workplace harassment and bar the use of non-disclosure agreements with a chilling effect on the reporting of abuses.[2] To date, limited empirical evidence exists demonstrating whether employment claims and lawsuits by employees have increased in response to this new dialogue. That said, going forward, we likely can expect to see more national action and developments, both at the legislative and judicial levels.

The most significant employment and labor law judicial precedent this year arises from the review and clarification of longstanding doctrine, particularly under the Americans with Disabilities Act ("ADA") and the National Labor Relations Act ("NLRA"). In addition, the U.S. Supreme Court took a significant step towards removing barriers to arbitration agreements in the employment setting, preempting some more restrictive state laws and resolving a circuit split regarding the enforceability of class action waivers. The high court also addressed an important First Amendment

1. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. Times, Oct. 5, 2017, https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html.

2. Cal. Gov't Code, § 12950 *et seq.* (obliging, *inter alia*, employers with more than five employees to provide sexual harassment training to supervisors and employees); Wash. Rev. Code, § 49.44.210 (prohibiting, *inter alia*, nondisclosure agreements and waivers that prevents an employee "from disclosing sexual harassment or sexual assault occurring in the workplace, at work-related events coordinated by or through the employer, or between employees, or between an employer and an employee, off the employment premises").

case concerning a Colorado statute impacting anti-discrimination law for customers (and, potentially, employees), ultimately issuing a warning to enforcement agencies like the EEOC as they traverse the tension between LGBTQ protections and First Amendment freedoms. This chapter of the survey reviews in detail these four significant developments.

While the focus of this article is on national developments, many states and local jurisdictions have acted to bolster employee protections, such as new sexual harassment training requirements, expanding pay equity laws, and forbidding criminal background checks of applicants. Each practitioner is encouraged to review local developments as well as national trends.

I. THE NINTH CIRCUIT ARTICULATES A STANDARD OF REVIEW FOR INDIVIDUALS "REGARDED-AS" BEING DISABLED

The Ninth Circuit, in *Nunies v. HIE Holdings, Inc.*,[3] recently clarified that, under the Americans with Disabilities Act Amendments Act ("ADAAA"),[4] the scope of the ADA's "regarded-as" definition of disability was indeed expanded.[5] The court, in this regard, reversed a trial court's grant of summary judgment to an employer, holding that the plaintiff had made out a potential case even though he did not present evidence that his employer subjectively believed that he was substantially limited in a major life activity.

In *Nunies*, the plaintiff was a full-time delivery driver for HIE Holdings, Inc., which was in the business of purchasing, selling, and distributing food products for residential and commercial use.[6] Nunies delivered five-gallon water bottles to residential and commercial customers.[7] His primary responsibilities included operating the company vehicle, loading, unloading, and delivering five-gallon water bottles, and occasionally helping out in the warehouse.[8] The position required that he be able to lift and carry a minimum of 50 pounds, as well as conduct other physical tasks.[9]

In mid-June 2013, Nunies requested a transfer to a part-time warehouse position, which he contended was motivated by a pain in his left shoulder that he had developed from repetitive work tasks.[10] His supervisor believed that the request came from Nunies' desire to focus on his independent side business.[11] Regardless, Nunies was able to find a part-time

3. Nunies v. HIE Holdings, Inc., 908 F.3d 428 (9th Cir. 2018).
4. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553 (2008).
5. *Nunies*, 908 F.3d at 435.
6. *Id.* at 431.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 431–32.
11. *Id.* at 431.

warehouse employee willing to "swap positions" with him.[12] Nunies' supervisor contacted HIE's head office and received tentative approval of the "swap," pending resolution of some pay and duties questions.[13] According to Nunies, he was informed on June 14, 2013, that the switch had been approved,[14] and two days later, on June 17, 2013, he informed his supervisor and his operations manager that he was having work-related shoulder pain.[15] Although HIE disputed this assertion, a later-filed human resources report noted that Nunies first reported the injury on that date.[16]

Nunies' manager informed Nunies, two days later, that he would not be given the part-time warehouse job and that Nunies' last day would be July 3, 2013.[17] Nunies' manager told him "[y]ou gotta resign" because "[y]our job no longer exists because of budget cuts."[18] HIE's termination report listed Nunies' separation as a resignation, and listed the reason as follows: "part-time position [was] not available."[19] However, on an email chain regarding Nunies' last day of employment, Nunies' manager sent a message on June 24, 2013, asking if his colleagues could scan a copy for a job opening for a part-time warehouse position.[20] Nunies, in turn, saw an advertisement for the position in the newspaper two days later.[21]

Nunies brought suit on April 6, 2015, alleging that HIE violated the ADA and state employment discrimination laws by discriminating against him because of his disability.[22] The district court held that Nunies did not have a disability under the ADA.[23] The court found that Nunies had not established that his shoulder injury substantially limited any major life activity or that there was a record of impairment.[24] Furthermore, the district court concluded that Nunies had not established that HIE regarded him as having a disability, as Nunies had put forward no evidence that HIE subjectively believed that Nunies was substantially limited in a major life activity.[25] The district court thus granted summary judgment for the defendant employer.[26] Nunies appealed.

12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*at 431–32.
16. *Id.* at 432.
17. *Id.* at 431.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 432.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*

A. *"Regarded-As" Before and After the ADAAA*

The ADA prohibits discrimination by covered entities against qualified individuals with disabilities with regard to terms, conditions, and privileges of employment.[27] The ADA defines disability as:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment.[28]

Prior to 2008, the third prong of this definition was interpreted as requiring that the covered entity subjectively regard the individual as having an impairment that substantially limits one or more major life activities.[29] In response to this interpretation, as well as to other court decisions and EEOC regulations that Congress felt interpreted the definition of disability in the ADA too narrowly, Congress passed the ADAAA of 2008.[30]

The ADAAA broadened the scope of the ADA and directed that Congress' intent was that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[31] Under the ADAAA,

> An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.[32]

The amended statute only specifies one exception to the definition of "regarded-as" disabled: a person would not qualify as being regarded as having an impairment if the impairment was transitory (lasting or expected to last six months or less) and minor.[33]

Despite these changes, the Ninth Circuit noted that some district courts have mistakenly continued to apply the narrower pre-ADAAA definition of regarded-as disability and that it had not opined on the issue for the decade

27. Americans with Disabilities Act, 42 U.S.C. § 12112 *et seq.* (2018).
28. *Id.* at § 12102(1).
29. *See, e.g.*, Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2150–51 (1999); Walton v. U.S. Marshals Serv., 492 F.3d 998, 1006 (9th Cir. 2007).
30. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553 (2008); *see also* U.S. Equal Emp. Opportunity Comm'n, Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA (2011).
31. ADA Amendments Act of 2008, § 2.
32. 42 U.S.C. § 12102(3)(A).
33. *Id.* at § 12102(3)(B).

since the ADAAA had been enacted.[34] The court thus wrote to clarify this issue in the *Nunies* opinion.[35]

B. *The Ninth Circuit Clarifies in* Nunies

The Ninth Circuit considered the district court decision in *Nunies*, and noted that while the court had cited the current ADAAA definition for a "regarded-as" disability, the court relied on pre-ADAAA case law to reach its conclusion that Nunies had not established that his employer regarded him as having a disability.[36] Looking to the plain language of the ADAAA, the court found that it was error to require evidence that HIE subjectively believed that Nunies was substantially limited in a major life activity.[37]

Furthermore, the court acknowledged that the ADA excludes individuals from coverage under the "regarded-as" definition if the impairment is both transitory and minor.[38] However, the court noted that the "transitory and minor" exception is an affirmative defense, and thus Nunies was not required to show, as part of his *prima facie* case, that his injuries were not transitory and minor.[39] Indeed, the "transitory and minor" exception had no bearing on whether Nunies was "regarded-as" disabled under the analysis.[40]

Therefore, the court reasoned that, once it was "[a]pplying the correct law," Nunies had established a genuine issue of material fact as to whether HIE regarded him as having a disability.[41] The evidence showed that "everything was going swimmingly for Nunies in terms of transferring to the part-time position until he informed HIE that he had shoulder pain."[42] Once HIE was informed of Nunies' pain, it rescinded any offer it had made, forced Nunies to resign, and misrepresented the availability of a part-time position to him.[43] Thus, the court found "it would be reasonable to infer that HIE forced Nunies to resign 'because of' his shoulder injury," and held that the district court erred in granting summary judgment on the issue.[44]

34. *Nunies*, 908 F.3d at 430.
35. *Id.*
36. *Id.* at 434.
37. *Id.*
38. *Id.* at 435.
39. *Id.*
40. *Id.*
41. *Id.* at 434–35.
42. *Id.* at 434.
43. *Id.* at 435.
44. *Id.*

C. *Conclusion*

With its decision in *Nunies*, the Ninth Circuit clarified that, post-ADAAA, a plaintiff can sustain a regarded-as disability claim without providing evidence that the employer subjectively believed that the plaintiff was substantially limited in a major life activity. Pre-ADAAA interpretations of the definition of a "regarded-as" disability should be considered outdated and supplanted by the broader post-ADAAA definition.

II. NON-UNION PUBLIC-SECTOR EMPLOYEES NOT REQUIRED TO PAY UNION DUES PURSUANT TO U.S. SUPREME COURT RULING

The United States Supreme Court revisited forty years of precedent in its opinion in *Janus v. American Federation of State, County & Municipal Employees, Council 31*.[45] It did so by overruling *Abood v. Detroit Bourd of Education*,[46] which allowed public sector employers to deduct union dues from the wages of non-union employees. The Court found that such an act was an unconstitutional abridgement of the First Amendment's guarantee of free speech because it forced a non-consenting individual to subsidize the positions taken by the union. The Court's opinion was delivered by Justice Alito, who was joined in the opinion by Justices Thomas, Gorsuch, Kennedy, and Chief Justice Roberts. Justice Kagan authored the dissent and was joined by Justices Ginsburg, Breyer, and Sotomayor, who herself wrote a short concurring dissent. The basis for the Court's decision and ideological divide may have lasting implications and foreshadow the dynamic for future decisions on this topic.

The Court's holding will have significant lasting implications for public employers and employees. Now unable to collect dues from all employees, public employee unions are likely to see a reduction in funding and budgets, which may in turn result in a reduction of bargaining power. Perhaps as important as the holding is how the Court reached its conclusion. In particular, the Court's analysis articulates a path for future litigants to challenge longstanding judicial precedent that may be ideologically unpopular with the current Court. For example, the Court's analysis relied heavily on the First Amendment of the U.S. Constitution as a basis for re-evaluating how funding of different causes constitutes speech, suggesting it will be skeptical of efforts to limit or coerce financial speech of any kind. Of course, monetary "speech" examples are ubiquitous and there are many examples of and opportunities for challenges to limitations on such speech today.

45. 138 S. Ct. 2448 (2018).
46. 431 U.S. 209 (1977).

This matter arose from a challenge to The Illinois Public Labor Relations Act,[47] which allows, after a vote, a designated union to be the exclusive representative of all employees of a political subdivision.[48] The Illinois law allows the union to exercise exclusive authority to negotiate with the employer on matters of pay, wages, hours, and other conditions of employment, as well as some policy matters.[49] Employees who choose not to join the union are not assessed full union dues but are assessed an "agency fee," which is a percentage of the union dues.[50] Mr. Janus, who was not a union member,[51] paid a monthly agency fee of $44.58 per month or about $535 per year.[52] Mr. Janus objected to paying this fee, and a case was brought on his behalf by the Governor of Illinois, as the matter had clear political and budgetary consequences.[53] The lower court dismissed the Governor from the lawsuit as lacking standing to bring claims, but allowed Janus and others to pursue the matter as intervenors and to file their own complaint.[54]

The Amended Complaint focused on encouraging the U.S. Supreme Court to revisit its holding in *Abood*[55] by alleging that "all 'nonmember fee deductions are coerced political speech' and that 'the First Amendment forbids coercing any money from nonunion members.'"[56] The Court's reasoning was three-pronged. First, it analyzed the rationale of the *Abood* case; second, it examined whether the current case fit the framework announced in yet another instructive case, *Pickering v. Board of Education*[57]; and third, it analyzed whether *stare decisis* required an upholding of *Abood*.

The Court, notably, had been laying the groundwork to overrule *Abood* in recent decisions. These cases include *Knox v. Service Employees International Union, Local 1000*,[58] calling the holding in *Abood* "something of an anomaly"[59]; and *Harris v. Quinn*,[60] noting "[t]he *Abood* Court's analysis is questionable on several grounds."[61] In *Janus*, the Court took that *dicta* to their logical conclusion.

47. Ill. Comp. Stat., ch. 5, §315/1.
48. Ill. Comp. Stat., ch. 5, §315/3(s)(1), 315/9.
49. Ill. Comp. Stat., ch. 5, §315/4, 315/6(c).
50. *Janus*, 138 S. Ct. at 2461.
51. *Id.*
52. *Id.*
53. *Id.* at 2462.
54. *Id.*
55. Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977).
56. Janus *v.* Am. Fed. of State, County & Mun. Employees, Council 31, 138 S. Ct. 2448, 2462 (2018).
57. Pickering v. Bd. of Educ. , 88 S. Ct. 1731 (1968).
58. 567 U.S. 298 (2012).
59. *Id.* at 312.
60. 573 U.S. 616 (2014).
61. *Id.* at 635.

The Court's First Amendment analysis is based on the principle that free speech is guaranteed protection from government coercion when public issues are discussed. Further, that the right to remain silent is protected[62] and "compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command."[63] On those grounds, the Court opined that "[c]ompelling a person to subsidize the speech of other private speakers raises similar First Amendment concerns."[64] The Court continued: "We have therefore recognized that 'a significant impingement on First Amendment rights' occurs when public employees are required to provide financial support for a union that 'takes many positions during collective bargaining that have powerful political and civic consequences.'"[65] The Court held that the appropriate standard of review was "exacting scrutiny" which requires that "a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'"[66]

The Court noted that in *Abood* "the main defense of the agency-fee arrangement was that it served the state's interest in 'labor peace,'"[67] and that such value was the compelling state interest.[68] The Court found this argument unpersuasive based on examples where unions survived despite prohibitions or restrictions as to mandatory agency fees.[69] The Court therefore concluded that agency fees were inappropriate where unions were capable of maintaining traditional benefits "'through means significantly less restrictive of associational freedoms' than the assessment of agency fees."[70]

Abood also cited the risk of "free riders," as a basis for agency fees. Free riders are those who benefit from the union's efforts (because of the requirement that the union is the exclusive representative of the employer's work force), but who do not share any of its expenses. The Court noted that "avoiding free riders is not a compelling interest."[71] The Court stated, "[i]n simple terms, the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who

62. Janus *v.* Am. Fed. of State, County & Mun. Employees, Council 31, 138 S. Ct. 2448, 2463 (2018).
63. *Id.*
64. *Id.* at 2464.
65. *Id.* (internal citations omitted).
66. *Id.* at 2465 (internal citations omitted).
67. *Id.* (quoting *Abood*, 431 U.S. at 224).
68. *Id.*
69. *Id.* at 2466.
70. *Id.* (citing *Harris*, 573 U.S. at 648–49).
71. *Id.*

does not want to pay."[72] The Court articulated two situations where a state would have a compelling interest in requiring the payment of agency fees: (1) if unions would otherwise be unwilling to represent non-members; and (2) if fundamental unfairness would result to require unions to represent nonmembers if they were not required to pay.[73] The Court dismissed those in the case under consideration by stating that unions would still represent all employees, regardless of whether all employees participated financially, because of the substantial benefits of collective bargaining for a substantial portion of the union, and because other benefits remained for the union to exclusively represent employees, such as obtaining employee information and having dues deducted directly from participating union member wages, and these "benefits greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers."[74] In sum, the Court held that less restrictive ways may exist to ensure nonmembers are appropriately charged for the union's work on their behalf.[75]

The opinion concluded by anticipating concerns that the present decision was not sufficiently deferential to precedent. While acknowledging that *stare decisis* "is the preferred course," for reasons of stability and integrity,[76] the Court further noted, "the doctrine 'is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.'"[77] The Court instead based its analysis on factors from previous cases it opined were most on point. These are: "the quality of *Abood*'s reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down and reliance on the decision."[78]

The Court, as it had in *Harris*,[79] criticized the *Abood* decision as poorly reasoned. It held that the Court had misunderstood the leading precedents,[80] noting that those cases did not directly address the issue of a state's authority to require agency fees in the context of the First Amendment.[81] The Court further noted that the reliance on those cases, *Hanson* and *Street*, led to the error of judging the constitutionality under a deferential standard that is not supported by other free speech cases.[82] Additionally, the Court

72. *Id.* at 2467.
73. *Id.*
74. *Id.*
75. *Id.* at 2468–69 & n.6.
76. *Id.* at 2478.
77. *Id.* (citation omitted).
78. *Id.* at 2478-79.
79. Harris v. Quinn, 573 U.S. 573 U.S. 616, 635–38 (2014).
80. Janus *v.* Am. Fed. of State, County & Mun. Employees, Council 31, 138 S. Ct. 2448, 2479 (2018) (quoting Railway Emps. v. Hanson, 76 S. Ct. 714 (1956); and Machinists v. Street, 81 S. Ct. 1784 (1961)).
81. *Id.*
82. *Id.* at 2479–80.

reasoned that *Abood* failed to account for the difference between private employment agency fees and public employment agency fees and overlooked the difficulty of determining a public employee union's ultimate goals in bargaining.[83]

As submitted at the outset, the *Janus* decision is significant both because it updates prior precedent on the enforceability of charging "agency fees" and because it lays an analytical foundation for how the Court may revisit other constitutional issues going forward.

III. THE UNITED STATES SUPREME COURT AFFIRMS THE USE OF CLASS ACTION WAIVERS IN EMPLOYMENT ARBITRATION AGREEMENTS

On May 21, 2018, the United States Supreme Court issued a much-anticipated decision concerning the enforceability of class action waivers in employment arbitration agreements. In *Epic Systems Corp. v. Lewis*,[84] the Supreme Court, in a 5-4 decision authored by Justice Gorsuch, held that the Federal Arbitration Act's ("FAA") savings clause did not provide a basis for refusing to enforce arbitration agreements waiving class or collective action procedures. The Court similarly held that the NLRA, which guarantees workers the right to engage in concerted activities, did not displace the FAA and prohibit class and collective action waivers. In other words, the Supreme Court affirmed the use of class and collective action waivers in employment arbitration agreements.

This decision will have a significant impact on how employers respond to the threat of class action lawsuits, and is likely to increase the use of arbitration agreements, if for no other reason than to decrease the risks and expense associated with class action litigation. The following discussion addresses the history behind class action waivers; the circuit split; conflicting arguments regarding the relationship between the FAA and the NLRA; the Supreme Court's opinion and reasoning; and future issues involving arbitration agreements.

A. *The United States Supreme Court Has Historically Enforced Class Action Waivers in Arbitration Agreements*

During the 1980s and 1990s, the Supreme Court issued a number of decisions which reinforced and strengthened the enforceability of arbitration agreements under the FAA.[85] In response, companies began adding

83. *Id.* at 2480.

84. 138 S. Ct. 1612 (2018).

85. *See, e.g.*, Allied-Bruce Terminix Co., Inc. v. Dobson, 513 U.S. 265 (1995); Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1989); Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614 (1985).

provisions, initially in consumer contracts, requiring all disputes be submitted to arbitration, and more importantly, on an individual basis. These provisos are known as a class or collective action waivers.

In 2011, the Supreme Court, in *AT&T Mobility LLC v. Concepcion*,[86] ruled that the FAA preempts state laws that prohibit arbitration agreements from disallowing class action lawsuits. In that case, two AT&T customers, Vincent and Liza Concepcion, brought a class action lawsuit alleging that AT&T engaged in false advertising and fraud by charging sales tax on phones it advertised as free. The couple had signed an arbitration agreement with a class action waiver, which AT&T sought to enforce. The district court denied arbitration, relying on the California Supreme Court's decision in *Discover Bank v. Superior Court*,[87] which declared class action waivers unenforceable because they unfairly took away the right of consumers to collectively assert limited damage amounts. The Ninth Circuit Court of Appeals affirmed.

But the Supreme Court reversed in a 5-4 opinion, reasoning that California's rule prohibiting class action waivers as "unconscionable" disfavored arbitration in violation of the FAA. The Court held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[88] Since *Concepcion* only dealt with consumer class actions, however, an open question still existed regarding the enforceability of class action waivers in the employment context.

B. *The Circuit Court of Appeals Soon Created a Sharp Split Regarding Whether Class Action Waivers Were Permitted Within Employment Arbitration Agreements*

As pointed out by Justice Gorsuch and the majority opinion in *Epic Systems*, the FAA and NLRA had "long coexisted," since the FAA was initially passed in 1925 and the NLRA in 1935. Yet in 2012, the National Labor Relations Board concluded for the first time that a class action waiver was unenforceable because it violated Section 7 of the NLRA's right to pursue workplace grievances through "concerted action."[89]

This created a flurry of activity in courts across the United States. The Eighth, Second, and Fifth Circuit rejected the NLRB's interpretation,

86. 563 U.S. 333 (2011).
87. 113 P.3d 1100 (Cal. 2005).
88. *AT&T Mobility*, 563 U.S. at 344.
89. D.R. Horton, Inc., 357 N.L.R.B. 2277, *granting enforcement in part, reversing in part*, 737 F.3d 344 (5th Cir. 2013).

holding that the FAA mandated individualized arbitration, and nothing in the NLRA required a different conclusion.[90]

For example, in *Owen v. Bristol Care, Inc.*, residential care administrator Sharon Owen alleged that her employer had misclassified her and other exempt employees in violation of the Fair Labor Standards Act ("FLSA") by paying them salaries without overtime.[91] The parties had an arbitration agreement in which Owen waived her right to "arbitrat[e] claims subject to [the] Agreement as, or on behalf of, a class."[92] Owen argued the NLRA, passed after the FAA, intended to protect workers' rights to engage in concerted activity, which included the right to pursue a collective grievance through the courts. The Eighth Circuit Court of Appeals rejected this argument, reasoning that Congress reenacted the FAA in 1947, twelve years after the NLRA was passed. The Eighth Circuit explained: "The decision to reenact the FAA suggests that Congress intended its arbitration protections to remain intact even in light of the earlier passage of three major labor relations statutes [citing the NLRA, FLSA, and the Norris-LaGuardia Act]."[93] Thus, the Eighth Circuit rejected the NLRB's interpretation and affirmed the use of a class action waiver in arbitration agreements.

Meanwhile, the Ninth, Sixth, and Seventh Circuits reached the opposite conclusion.[94] In *Morris v. Ernst & Young LLP*, for example, accountant Stephen Morris alleged that the firm misclassified its junior accountants as professional employees in violation of the FLSA and California law.[95] The parties had an arbitration agreement mandating individualized arbitration with claims "pertaining to different [e]mployees [to] be heard in separate proceedings."[96] The district court compelled arbitration, but the Ninth Circuit reversed, holding that an employment agreement requiring individualized arbitration violated the NLRA by barring employees from engaging in the "concerted activity," of pursuing claims as a class or collective action.[97] The court reasoned that under Supreme Court precedent, the NLRA protects employees' right to engage in concerted activity, including through litigation. Thus, an employer who mandates that an employee give

90. Owen v. Bristol Care, Inc., 702 F.3d 1050, 1053 (8th Cir. 2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2nd Cir. 2013); D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013).

91. *Owen*, 702 F.3d at 1051.

92. *Id.*

93. *Id.* at 1053.

94. Lewis v. Epic Systems, 823 F.3d 1147 (7th Cir. 2016); NLRB v. Alt. Entm't, Inc., 858 F.3d 393 (6th Cir. 2017); Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016).

95. *Morris*, 834 F.3d at 979.

96. *Id.* at 990–91.

97. *Id.* at 980.

up the right to engage in concerted activity by filing a class or collective action is in violation of the NLRA.

The Supreme Court granted certiorari in these three cases to resolve the circuit split. One of these cases was *Lewis v. Epic Systems*.[98]

C. Epic Systems v. Lewis *Affirmed the Use of Class Action Waivers, Holding That Such Agreements Do Not Violate the NLRA*

The majority opinion began by reciting the history of the FAA and the Supreme Court's pronouncement that it created "a liberal federal policy favoring arbitration agreements" according to their terms.[99] The Court thereafter discussed the history of the "savings" clause, which "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability."[100] The Court noted that these defenses must apply equally to all contracts, and not "defenses that target arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration.'"[101] Thus, the Court concluded, to claim that an arbitration agreement is "illegal" because it requires individual arbitration instead of class-wide arbitration impermissibly disfavors arbitration in violation of the FAA.

Next, the Court addressed the issue of whether the NLRA overrides the FAA. The Court reasoned that Section 7 of the NLRA focuses on the right to organize unions and bargain collectively, but it does not express approval or disapproval of arbitration, nor mention class or collective action procedures. The Court addressed the history and structure of the NLRA, and concluded that without specific statutory discussion of arbitration or class actions, it was unwilling to read the statutes as conflicting.

D. *The Supreme Court's Docket Includes Three More Arbitration Cases in the 2018–2019 Term*

Arbitration continues to be a hot topic, and the Supreme Court's docket has three additional cases being heard in the 2018-2019 term: *New Prime Inc. v. Oliveira*[102]; *Lamps Plus Inc. v. Varela*[103]; and *Henry Schein Inc. v. Archer and White Sales Inc.*[104]

98. 823 F.3d 1147 (7th Cir. 2016).
99. Epic Sys. v. Lewis, 138 S. Ct. at 1612, 1621 (2018).
100. *Id.* at 1622 (quoting *Concepcion*, 563 U.S. at 339).
101. *Id.* (quoting *Concepcion*, 563 U.S. at 344).
102. Oliveira v. New Prime, Inc., 857 F.3d 7 (1st Cir. 2017), *cert. granted sub nom.* New Prime Inc. v. Oliveira, 138 S. Ct. 1164 (2018).
103. Varela v. Lamps Plus, Inc. 701 F. App'x 670 (9th Cir. 2017), *cert. granted sub nom.* Lamps Plus Inc. v. Varela, 138 S. Ct. 1697 (2018).
104. Archer and White Sales, Inc. v. Henry Schein, Inc., 878 F.3d 488, *cert. granted sub nom* Henry Schien Inc. v. Archer & White Sales Inc, 138 S. Ct. 2678 (2018), *vacated and remanded*, 2019 WL 122164 | (Jan. 8, 2019).

New Prime involves two issues regarding the FAA's statutory exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The first is the "gateway" question: who decides whether the exemption applies when the arbitration agreement delegates questions of arbitrability to the arbitrator and not the courts.[105] The second is whether the FAA's exemption, which applies to "contracts of employment" is limited to employer/employee relationships or whether they also include contracts of independent contractors.[106]

Lamps Plus involves whether an arbitration agreement that does not specifically provide for a class action waiver, but requires all lawsuits be submitted to arbitration, mandates individual or class-wide arbitration. The Supreme Court had previously ruled that courts could not require class-wide arbitrations unless there was a "contractual basis" to believe both parties had agreed to submit class actions to arbitration.[107] The *Lamps Plus* arbitration agreement stated, "arbitration shall be in lieu of any and all lawsuits" and did not specify whether the arbitration must be individualized.[108] The Ninth Circuit concluded this language did not waive class action arbitration, but instead compelled class arbitration. The issue presented to the Supreme Court is whether the FAA forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements.[109]

Finally, *Henry Schein Inc.* will decide whether the FAA allows a court to decline to enforce an arbitration agreement that delegates the question of arbitrability to the arbitrator if the court believes the claim being arbitrated is "wholly groundless."[110]

E. *Conclusion*

Outside the Supreme Court, issues regarding arbitration agreements and class action waivers likely will turn on traditional questions regarding formation of arbitration agreements, unconscionability, and related state-law issues. Nevertheless, it appears that unless Congress amends the FAA, class action waivers in employment agreements will continue to be enforced.

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105. *New Prime Inc. v. Oliveira*, Pet. for Writ of Cert., 2017 WL 3948478, *I.

106. *Id.*

107. *Varela v. Lamps Plus, Inc.*, 701 F. App'x at 673 (quoting Nielson S.A. v. Animal Feeds Int'l Corp., 130 S. Ct. 1758, 1775 (2010)).

108. *Id.* at 672.

109. *Varela v. Lamps Plus, Inc.*, Pet. for Writ of Cert., 2018 WL 389119, *I.

110. *Henry Schien Inc. v. Archer and White Sales Inc.*, Pet. for Writ of Cert., 2018 WL 1304871, *I.

IV. THE SUPREME COURT'S LIMITED CONSIDERATION OF FIRST AMENDMENT FREEDOMS AND STATUTORY CIVIL RIGHTS

Employment law jurisprudence is a reasonably well-defined body of law. The auspices of federal statutes, state laws, and regulations leave little open for interpretation. However, the current scope of Title VII, and its conflict with interpretive guidance issued by the Equal Employment Opportunity Commission ("EEOC") on LGBTQ protections, has created such an issue; this unsettled area of employment law rests on a balance of workplace protections and fundamental free exercise rights protected by the Constitution. The impact of this issue on employment law cannot be understated. Left unchecked, virtually every Title VII workplace protection could be negated on the basis of religious belief.

In its 2018 term, the United States Supreme Court took up *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[111] a controversial case which balanced freedoms guaranteed by the First Amendment and anti-discrimination requirements of state public accommodation laws. Although the Court's holding and opinion did not resolve the substantive constitutional issues at hand, it issued a viable warning to administrative adjudicators and gave a brief indication to service providers that the law holds both First Amendment freedoms and same-sex rights in high esteem.

Though determined on narrow grounds, the Supreme Court expressly emphasized the significance of First Amendment religious freedoms in *Masterpiece Cakeshop*. Without reaching the substance of the same-sex rights versus religious freedoms debate, the Court found that the Colorado Civil Rights Commission's procedural disrespect of the petitioner's religious beliefs was enough to reverse the lower decisions. Not only does this raise a question as to how the high court will treat sincerely-held religious beliefs as against same-sex protections, both in consumer and employment contexts, it also is a cautionary warning to the adjudicatory agencies that evaluate discrimination claims.

The Equal Employment Opportunity Commission ("EEOC") currently interprets Title VII as protective of LGBTQ rights pursuant to its prohibitions against sex discrimination.[112] The EEOC takes the position that "Title VII's prohibition of sex discrimination means that employers may not 'rely upon sex-based considerations' . . . when making employment decisions" and "[t]his applies equally in claims brought by lesbian, gay, and bisexual individuals under Title VII."[113] Because of the Court's reprimand

111. 135 S. Ct. 1719 (2018).

112. U.S. Equal Employment Opportunity Commission, What You Should Know About EEOC and the Enforcement Protections for LGBT Workers (2019), https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.

113. Baldwin v. Dep't of Transportation, EEOC Appeal No. 0120133080 at 5 (July 15, 2015); *see also* Macy v. Dep't of Justice, EEOC Appeal No. 012012821, 2012 WL 1435995, at

to the Colorado Civil Rights Commission in *Masterpiece Cakeshop*, agencies like the EEOC and state regulatory agencies must proceed with caution and respect when evaluating sincerely held religious beliefs when they clash with civil liberties such as LGBTQ protections.

Additionally, though not directly implicating Title VII nor other employment laws, the Court's reasoning and holding in *Masterpiece Cakeshop* potentially influences the scope of such laws as they govern discrimination and accommodation. The issue of whether refusal to serve a consumer is discriminatory begs the related and expected question of whether refusal to hire based on an employer's religious beliefs is discriminatory. As the high court continues to acknowledge and validate LGBTQ rights and the public accommodation laws that protect them, a jurisprudential landscape arises where addition of these categories to employment discrimination laws becomes warranted and proper. Title VII being an accommodation law of sorts, it is not unreasonable to predict that as same-sex rights are continually held in high-esteem, it can only be expected that sexual orientation will be universally recognized as a protected category under Title VII.

A. *Facts and Procedural History*

Colorado baker Jack Phillips ("Phillips") was owner and operator of Masterpiece Cakeshop.[114] In 2012, Phillips refused to bake a wedding cake for a same-sex couple's wedding celebration, basing his refusal on "religious opposition to same-sex marriages."[115] The state of Colorado did not recognize the legality of same-sex marriage at that time.[116]

Frustrated by the refusal, Charlie Craig and Dave Mullins, the same-sex couple wanting to purchase the cake ("the couple"), filed a discrimination complaint against Masterpiece Cakeshop pursuant to the Colorado Anti-Discrimination Act ("CADA").[117] CADA prohibits providers of accommodations, goods, or services to the public from discriminating based on sexual orientation.[118] As members of a protected class under CADA, the couple argued that Phillips' actions violated the law since he refused to produce a wedding cake for them solely because of their sexual orientation.[119] Phillips maintained that the scope of CADA's protections violated his First Amendment rights to free speech and his right of free exercise of

*11 (April 20, 2012) (stating that "we conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex,' and such discrimination therefore violates Title VII").

114. *Id.*
115. *Id.*at 1723.
116. *Id.* at 1724.
117. *Id.* at 1725.
118. Colo. Rev. Stat. § 24-34-601(1), (2)(a) (2017).
119. *Masterpiece Cakeshop*, 138 S. Ct. at 1725.

religion under the United States Constitution.[120] He argued that in order to comply with CADA he would be compelled to "exercise his artistic talents to express a message with which he disagreed," in violation of his First Amendment right to free speech.[121] He further argued that forced compliance with CADA would violate his First Amendment right to the free exercise of religion since his religious beliefs precluded him from supporting or endorsing same-sex marriage.[122]

Pursuant to CADA's administrative system for the resolution of claims, the couples' complaint was reviewed by the Colorado Civil Rights Commission ("the Commission").[123] After its customary investigation, the Commission recommended that a formal hearing be conducted based on a finding of probable cause that Phillips and Masterpiece Cakeshop had violated CADA.[124] A Colorado Administrative Law Judge ("ALJ") ruled in favor of the same-sex couple, finding that "Phillips' actions constituted prohibited discrimination on the basis of sexual orientation," although Phillips argued that his actions stemmed from opposition to same-sex marriage, not discrimination based on sexual orientation.[125]

Addressing Phillips' free speech claim, the ALJ found that preparing a wedding cake is not protected speech under the First Amendment, and that being compelled to create a certain cake did not constitute Phillips' forced adherence to a certain viewpoint.[126] Addressing the Free Exercise Clause argument, the ALJ determined that "CADA is a 'valid and neutral law of general applicability'" and its application to Masterpiece Cakeshop was consistent with the First Amendment.[127] The Civil Rights Commission ratified the decision of the ALJ.[128]

The Colorado Court of Appeals affirmed, basing its Free Exercise Clause holding on longstanding Supreme Court precedent.[129] The court reaffirmed that "the Free Exercise Clause does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability."[130] The Colorado Supreme Court declined to hear the case,[131] and ultimately the United States Supreme Court granted *certiorari* to Phillips.

120. *Id.* at 1726.
121. *Id.*
122. *Id.*
123. *Id.*; *see* Colo. Rev. Stat. § 24-34-306.
124. *Masterpiece Cakeshop*, 138 S. Ct. at 1726 ("The investigation found that Phillips had declined to sell custom wedding cakes to about six other same-sex couples on this basis.").
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 1727.
130. *Id.* (citing Employment Div., Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872, 879 (1990)).
131. *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

B. *The Law Prior to* Masterpiece Cakeshop, Ltd.

In the religious liberties context, the requirement that laws be neutrally applied to citizens so as to not infringe upon freedom of religious expression is a relatively longstanding mandate. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[132] the Supreme Court outlined the appropriate test for reviewing statutes for constitutionality under the Free Exercise Clause. The Court stated as follows:

> [A] law that burdens religious practice need not be justified by a compelling governmental interest if it is neutral and of general applicability . . . where such a law is not neutral or not of general application, it must undergo the most rigorous scrutiny: It must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.[133]

In *City of Hialeah*, the Court also established criteria for determining whether a law violates the Free Exercise Clause. A reviewing court must examine "the historical background of the decision under challenge, the specific series of events leading to the enactment of a [law], and the legislative or administrative history . . . ."[134] If a law is not neutral in application with respect to religion, courts must then evaluate whether the government has a compelling interest to justify the application.[135] When the Supreme Court heard *Masterpiece Cakeshop*, the standard established in *City of Hialeah* was the proper standard of review, and it was partially applied by the Court.

The taking up of *Masterpiece Cakeshop* also suggested a potential development in the law surrounding same-sex marriage and LGBTQ rights. In 2015, the Court held in *Obergefell v. Hodges* that the Due Process Clause of the Fourteenth Amendment guarantees the right to marry as a fundamental liberty, and that this guarantee applies to homosexual couples with the same effect as it does to heterosexual couples.[136] Potentially expanding upon this precedent, *Masterpiece Cakeshop* inquired as to the scope and force of LGBTQ rights, and whether the right to same-sex marriage and the civil rights afforded to same-sex individuals generally would take precedence when confronted with an infringement on one's fundamental, sincerely-held religious belief, a First Amendment right.

C. *Issues Before the Court and Holding*

In considering *Masterpiece Cakeshop*, the pertinent legal issues before the Supreme Court were Phillips' Free Speech and Free Exercise Clause claims.

132. 113 S. Ct. 2217 (1993).
133. *Id.* at 2223.
134. *Masterpiece Cakeshop*, 187 S. Ct. at 1722.
135. *Id.*
136. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

He (and several *amici curiae*) sought answers as to how First Amendment freedoms coexist and conflict with the freedom from sexual-orientation discrimination expressly guaranteed by CADA and other public accommodation laws.[137] The Court was charged with determining whether the artistic elements involved in the creation of a wedding cake constitute protected speech under the First Amendment, and with determining the scope of rights to express sincerely-held religious beliefs when these rights infringe on the statutory civil rights of others.

In what is considered a narrow holding, the Court concluded that Phillips' free exercise rights were violated because CADA was not applied to him in a neutral fashion with regard to religion.[138] The Court acknowledged both the existence and importance of protections for same-sex individuals[139] and the viability of sincerely-held religious viewpoints as protected forms of expression, although it did not reach or resolve the issue of Phillips' free speech claim.[140]

The Court found that the Colorado authorities applied the law with a "clear and impermissible hostility toward religion" as evidenced by the handling of Phillips' case.[141] Specifically, the Court found that the ALJ and Commission acted with bias towards Phillips' religion, supporting its contention with specific examples in the record of improper comments made about Phillips' beliefs by the Commissioners.[142] Further, the Court found that Phillips' case was treated differently than similarly-situated cases, indicating the Commission's bias against and hostility toward religion.[143] The Court was influenced by the fact that the Commission had held in favor of similar bakers when the message they sought to avoid was one based in secular consciousness as opposed to religious motivations, like those of

137. *See* Reply Br. for Pet'rs at II & III, Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

138. *Masterpiece Cakeshop*, 187 S. Ct. at 1724 (stating that "it is proper to hold that whatever the outcome of some future controversy involving facts similar to these, the Commission's actions here violated the Free Exercise Clause").

139. *Id.* at 1727.

140. *Id.* at 1728.

141. *Id.* at 1729.

142. *Id.* The Commissioners "impl[ied] that religious beliefs and persons are less than fully welcome in Colorado's business community." *Id.* One Commissioner suggested that "Phillips can 'believe what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state.'" *Id.* A different Commissioner accused Phillips of using "freedom of religion to . . . justify discrimination," and "compar[ed] Phillips' invocation of his sincerely-held religious beliefs to defenses of slavery and the Holocaust." *Id.*

143. *Id.* at 1730.

Phillips.[144] The Court concluded that the Commission was biased against Phillips' specific religious viewpoint.[145]

The Court did not support the test it used with relevant Free Exercise Clause precedent, however. Pursuant to *City of Hialeah*, whether a law is applied neutrally or in a targeted fashion is only the beginning of the analysis. The Court should then determine if the law can pass the strict scrutiny test. In *Masterpiece Cakeshop*, however, the Court merely stated that religious hostility on the part of the Colorado Civil Rights Commission made the substance of the First Amendment issues unresolvable.[146] The first time strict scrutiny analysis is mentioned in the opinion is in Justice Gorsuch's concurrence.[147] Justice Gorsuch suggested that CADA would fail strict scrutiny, but no analysis was conducted.[148]

In sum, the Court found that the Commission's handling of the case "violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint."[149] In rendering this narrow holding, the Court neglected to comment on the relative strengths, weaknesses, and importance of each set of rights (civil rights created by public accommodation laws and First Amendment rights), the constitutionality of public accommodation statutes such as CADA, and whether the provision of services such a baking a wedding cake constitutes protected expression of speech. The Court's decision appears to be an adjudication of the violation of Phillips' procedural Due Process rights, as opposed to his First Amendment rights.

D. *Implications*

A full resolution of the issues before it in *Masterpiece Cakeshop* would have required the Supreme Court to determine whether CADA was neutrally enacted and enforced pursuant to the test set forth in *City of Hialeah*. If CADA was not neutrally applied, as the Court held, the Court should have then conducted the strict scrutiny balancing test to determine if the government could offer a compelling interest for such disparate application. Such an analysis would have clarified and defined the rights of a state to regulate discrimination in the area of public accommodation laws. States, meanwhile, would have then been able to more readily determine, in this

144. *Id.* The Commission found that bakers did not violate CADA when they refused to bake cakes because the language and images requested were deemed "derogatory" or "hateful." *Id.*
145. *Id.*
146. *Id.* at 1724.
147. *Id.* at 1734.
148. *Id.*
149. *Id.*

context, the constitutionality of civil rights proposals and statutes. Further, a more complete resolution would assist individuals and businesses to understand their responsibilities and obligations under state public accommodation statutes and civil rights laws.

Since the Court did not reach such an analysis, it is predicted that more litigation will ensue to define how First Amendment rights should be balanced against public accommodation laws. The Court stated that "[t]he outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities . . . ."[150] Thus, these outcomes will be determined in the future, and are already being adjudicated across the country.

A case currently awaiting a response on a petition for certiorari, *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*,[151] concerns a woman whose employment with the defendant funeral home was terminated because of her transgender status. The funeral home cited its sincerely-held religious beliefs as the reason why it could not treat a transgender employee similar to other employees.[152] The employee filed a sex-discrimination charge against the funeral home with the EEOC, which found that the "Funeral Home 'discharged [complainant] due to her sex and gender identity . . . in violation of Title VII,'" a federal anti-discrimination law similar to CADA.[153] The Sixth Circuit found that the funeral home's actions were in violation of Title VII, and that "requiring an employer to comply with Title VII did not substantially burden his religious practice of operating funeral homes."[154] If the Supreme Court takes this case, it similarly will have to determine if First Amendment freedoms must yield to statutory guarantees of anti-discrimination. Litigants such as these are attempting to determine what factors courts will consider in deciding whether a state's interest in preventing discrimination is sufficiently compelling to justify an infringement upon freedom of speech or exercise of religion.

Further, it is reasonable to anticipate that future litigants will bring similar suits to determine what type of services to the public constitute protected expression under the First Amendment. Although the Court commented on this question, it merely stated that "as Phillips would see

150. *Id.* at 1732.
151. 884 F.3d 560 (6th Cir. 2018) (petition for certiorari filed, No. 18-107, June 24, 2018).
152. *Id.* at 569.
153. *Id.*
154. *Id.*

the case, [his] contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs."[155] As the scope of LGBTQ protections expands, business owners, service providers, and employers need to know what type of actions can constitute discrimination, and which are protected by the First Amendment. These issues seem to raise shadows of questions addressed by holdings such as *Brown v. Board of Education*,[156] *Bowers v. Hardwick*,[157] and *Loving v. Virginia*.[158]

The Court's holding in this case did issue a glaring warning to adjudicatory entities such as ALJs and state Civil Rights Commissions. Phillips won because those entities addressed his beliefs tersely, indicating, in the Court's opinion, a hostility toward and bias against religion. Administrative entities, and even trial courts, should take notice that this type of treatment may amount to a violation of the Free Exercise Clause on the part of the state, as opposed to merely an offense indicating judicial bias. The consequence of such a precedent is that a trial judge's or ALJ's comments could result in the invalidation of a public accommodation law, such as CADA, instead of a mere overturning of that judge's decisions on appeal.

Human rights for the LGBTQ community have been a forefront issue for the last decade. Over this period, American culture has generally grown more accepting and inclusive of LGBTQ people, and LGBTQ issues have become mainstream. Additionally, a rise of legal protections has unfolded relative to this previously vulnerable group of citizens. Now, same-sex marriages are commonplace, and LGBTQ individuals enjoy the same rights as other citizens. Still, the journey to this point has been long and difficult. As future matters are brought before the Court, a decision—one not distracted by peripheral issues—will ultimately issue, to squarely resolve the conflict between Title VII's lack of coverage of LGBTQ rights in the workplace and the EEOC's inclusion of these rights as a form of gender discrimination.

155. *Masterpiece Cakeshop*, 187 S. Ct. at 1728.

156. 74 S. Ct. 686 (1954) (state laws establishing separate public schools for black and white students held unconstitutional).

157. 106 S. Ct. 2841 (1986), *overruled by* Lawrence v. Texas, 123 S. Ct. 2472 (2003) (the latter striking down Texas sodomy law, making same-sex sexual activity legal throughout U.S., and overturning *Bowers*, which case upheld a challenged Georgia law, finding no constitutional protection of sexual privacy).

158. 87 S. Ct. 1817 (1967) (invalidating anti-miscegenation laws).