

# Supreme Court Report

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This *Report* summarizes opinions issued on April 24 and 29, 2019 (Part I); and cases granted review on April 22, 2019 (Part II).



## I. Opinions

- *Lamps Plus, Inc. v. Varela*, 17-988. In a 5-4 decision, the Court held that under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, where a contract's arbitration clause is ambiguous as to whether it permits class arbitration, it may not be interpreted to allow class arbitration. A class of 1300 employees sued Lamps Plus based on a data breach in which the employees' tax information had been compromised. Lamps Plus moved to compel arbitration, relying on an arbitration clause in the plaintiffs' employment contracts. The district court granted the motion to compel arbitration, but rejected Lamps Plus's request for individual arbitration, directing arbitration to proceed on a class-wide basis. The Ninth Circuit affirmed, determining that the employees' arbitration agreement was ambiguous as to the availability of class arbitration and following "California law to construe the ambiguity against the drafter," Lamps Plus. In an opinion by Chief Justice Roberts, the Court reversed and remanded.

After determining that it had appellate jurisdiction under the FAA, the Court framed the case as an extension of *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662 (2010), in which it "held that a court may not compel arbitration on a classwide basis when an agreement is 'silent' on the availability of such arbitration." Now the Court was to consider "whether the FAA similarly bars an order requiring class arbitration when an agreement is not silent, but rather 'ambiguous' about the availability of such arbitration." The Court concluded that "an ambiguous agreement" cannot "provide the necessary 'contractual basis' for compelling class arbitration." The Court reasoned that "[c]lass arbitration is not only markedly different from the 'traditional individualized arbitration' contemplated by the FAA, it also undermines the most important benefits of that familiar form of arbitration." The FAA "therefore requires more than ambiguity to ensure that parties actually agreed to arbitrate on a classwide basis."

The Court rejected the Ninth Circuit's reliance on California law to construe ambiguity in an arbitration agreement against its drafter. While noting that "courts may ordinarily . . . rely[] on state contract principles, . . . state law is preempted to the extent it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA." The Court then discussed "crucial differences" between individual and class arbitration: Class arbitration "'sacrifices the principle advantage of arbitration—its informality" and "raises serious due process concerns by adjudicating the rights of absent class members." Given these disadvantageous features of class arbitration, "ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to" sacrifice the benefits of individual arbitration. The *contra proferentem* rule that construes a term against its drafter is a "default rule based on public policy considerations." Therefore, the Court reasoned, the rule cannot form the basis of an obligation to proceed in class arbitration: "[C]ourts may not rely on state contract principles to 'reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent." That the *contra proferentem* rule is a neutral, nondiscriminatory rule does not matter, because it would "impose class

arbitration in the absence of the parties' consent." Instead of applying state law regarding the interpretation of contracts, "the FAA provides the default rule for resolving ambiguity here": requiring an "affirmative 'contractual basis for concluding that the part[ies] agreed to [class arbitration]."

Justice Thomas wrote a concurring opinion in which he described the parties' arbitration agreement as silent, rather than ambiguous, as to class arbitration. Thus, relying on *Stolt-Nielsen*, he would reverse on the grounds that the "agreement provides no 'contractual basis' for concluding that the parties agreed to class arbitration." Justice Thomas added that he "remain[s] skeptical of this Court's implied pre-emption precedents," here employed by the Court to preempt the application of California law, "but join[s] the opinion of the Court because it correctly applies our FAA precedents."

Justice Kagan wrote the principal dissenting opinion, which Justices Ginsburg and Breyer joined in full and Justice Sotomayor joined in part. Initially, she opined that, examining language in the parties' contract, "the arbitration agreement Lamps Plus wrote is best understood to authorize arbitration on a classwide basis." But even if the arbitration agreement is ambiguous, Justice Kagan believed that "[t]he agreement must be read to authorize class arbitration . . . because California—like every other State in the country—applies a default rule construing 'ambiguities' in contracts 'against their drafters.'" And although "the FAA displaces any state rule discriminating on its face against arbitration . . . , California's anti-drafter law is as even-handed as contract rules come." The majority's approach, by disregarding this "universally accepted principle of contract interpretation, . . . subordinates authoritative state law to (at most) the impalpable emanations of federal policy, impossible to see except in just the right light."

Justice Ginsburg wrote a dissent, joined by Justices Breyer and Sotomayor. She wrote "separately to emphasize once again how treacherously the Court has strayed from the principle that 'arbitration is a matter of consent, not coercion.'" In her view, the FAA "was not designed to govern contracts 'in which one of the parties characteristically has little bargaining power.'" She closed by calling upon Congress to amend the FAA: "'Congressional correction of the Court's elevation of the FAA over' the rights of employees and consumers 'to act in concert' remains 'urgently in order.'" Justice Breyer dissented separately to express his view that the Ninth Circuit lacked appellate jurisdiction to hear the case. Justice Sotomayor also issued a separate dissent. She wrote that the "Court went wrong years ago in concluding that a 'shift from bilateral arbitration to class-action arbitration' imposes such 'fundamental changes,' that class-action arbitration 'is not arbitration as envisioned by the' . . . FAA." She also criticized the majority for preempting state law "without actually agreeing that the contract is ambiguous," and thus without determining whether preemption was necessary.

- *Thacker v. Tennessee Valley Authority*, 17-1201. In a unanimous decision, the Court held that the waiver of immunity in the Tennessee Valley Authority Act's sue-and-be-sued clause does not exempt suits based on discretionary functions. The Tennessee Valley Authority (TVA) is a government-owned corporation that supplies electric power to the Tennessee Valley. It "is something of a hybrid, combining traditionally governmental functions with typically commercial ones," exercising government powers like eminent domain and appointing employees as law enforcement agents, as well as producing and selling electricity like any privately-owned power company. One day, while TVA employees were working to replace a power line over the Tennessee River, the line fell into the water. As the employees were lifting the line, a speed boat collided with it, injuring the pilot and killing a passenger.

The pilot sued for negligence, alleging that the TVA had failed to exercise reasonable care in installing the power lines and warning boaters about the hazards created by the lines. The district court granted the TVA's motion to dismiss on sovereign-immunity grounds, reasoning that the employees' actions surrounding the incident were discretionary because "they involve[d] some judgment and choice," and the TVA, like any other government agency, is immune from suit based on discretionary functions. The Eleventh Circuit affirmed on the same ground. In an opinion by Justice Kagan, the Court reversed and remanded.

The Court first considered whether the sue-and-be-sued clause of the TVA Act expressly exempts suits based on discretionary functions. By the Act's terms, "[e]xcept as specifically provided" in the Act itself, the TVA "[m]ay sue and be sued." 16 U.S.C. §831c(b). The Court found that the Act "contains no exceptions relevant to tort claims, let alone one turning on whether the challenged conduct is discretionary." Nor, held the Court, could the TVA rely on the subsequently enacted Federal Tort Claims Act of 1946, which exempts claims based on discretionary functions from its general waiver of immunity from tort suits involving governmental agencies. The Court noted that the Federal Tort Claims Act specifically excludes from its provisions "[a]ny claim arising from the activities of the [TVA]." 28 U.S.C. §2680(l). The TVA Act therefore provides "no express exception for discretionary functions" of the TVA.

The Court then considered whether any implied exception to the sue-and-be-sued provision applies to generally exempt the TVA from suits based on discretionary functions. The Court had previously stated that sue-and-be-sued clauses should be liberally construed to allow suit except where either the "type[] of suit [at issue is] not consistent with the statutory or constitutional scheme" or the restriction is "necessary to avoid grave interference with the performance of a governmental function." *Fed. Hous. Admin. v. Burr*, 309 U.S. 242, 245 (1940). The Court rejected the government's argument that allowing suits against the TVA for discretionary functions would conflict with separation-of-powers principles (and thereby the constitutional scheme) by subjecting the TVA's discretionary conduct to judicial review. The Court explained that Congress's waiver of immunity in the TVA Act eliminates separation-of-powers concerns because "[t]he right governmental actor (Congress) is making a decision within its bailiwick (to waive immunity) that authorizes an appropriate body (a court) to render a legal judgment." The Court declined to use *Burr* to negate Congress's "considered decision *not* to apply the FTCA to the TVA" by "providing a government entity excluded from the FTCA with a replica of that statute's discretionary function exception." Doing so would "let the FTCA in through the back door, when Congress has locked the front one."

The Court also rejected the argument that allowing suits against the TVA for discretionary functions would necessarily interfere with important governmental functions. As a hybrid entity, the TVA acts as both a commercial and governmental actor. The Court explained that "(barring special constitutional or statutory issues not present here) suits based on a public corporation's *commercial* activity may proceed as they would against a private company; only suits challenging the entity's *governmental* activity may run into an implied limit on its sue-and-be-sued clause." Noting that it is "a court of review, not of first review," the Court declined to decide whether the activities at issue in this case were commercial or governmental or fell within an implied exception to sovereign immunity. Instead, the Court remanded for the lower courts to "decide whether the conduct alleged to be negligent is governmental or commercial in nature." If the courts find that "the conduct is commercial—

the kind of thing any power company might do—the TVA cannot invoke sovereign immunity.” Should the courts find the activity governmental, sovereign immunity is available only if the courts find that allowing suit would gravely interfere with the TVA’s governmental function.

## II. Cases Granted Review



- *Bostock v. Clayton County, GA*, 17-1618; *Altitude Express, Inc. v. Zarda*, 17-1623.

At issue in these consolidated cases is whether discrimination against an employee because of sexual orientation constitutes prohibited discrimination “because of . . . sex” under Title VII of the Civil Rights Act of 1964. Title VII prohibits discrimination against an employee “because of such individual’s . . . sex.” 42 U.S.C. §2000e-2(a)(1). In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a plurality of Court explained that Title VII’s prohibition against discrimination on the basis of sex was “intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”

Petitioner Gerald Lynn Bostock is a gay man who alleges that he was fired from his position as the Child Welfare Services Coordinator for the Clayton County Juvenile Court System because of his sexual orientation and for failing to conform to gender stereotypes. In particular, Bostock alleges that the County fired him for “conduct unbecoming a county employee” after it learned of his involvement in a gay softball league. Bostock sued under Title VII, but the district court dismissed the complaint on the ground that Title VII does not protect against discrimination on the basis of sexual orientation. The Eleventh Circuit affirmed, finding that it was bound by circuit precedent. Petitioner Altitude Express is a company that offers tandem skydives, in which an Altitude Express employee is strapped to the client to deploy the parachute during freefall. It alleges that it fired a gay male employee for inappropriate behavior with clients. The employee sued, alleging discrimination because of sexual orientation because other, heterosexual, male employees who made light of the intimate nature of being strapped to members of the opposite sex were not fired. The en banc Second Circuit held that discrimination on the basis of sexual orientation is sex discrimination because it is motivated, at least in part, by the employee’s sex. 883 F.3d 100. The Second Circuit reasoned that “sexual orientation discrimination is a subset of sex discrimination because sexual orientation is *defined* by one’s sex in relation to the sex of those to whom one is attracted.” In addition, sexual orientation discrimination arises from an “assumption of stereotypes about how members of a particular gender should be, including to whom they should be attracted.” Finally, the Second Circuit found sexual orientation discrimination to be “associational discrimination because an adverse employment action that is motivated by the employer’s opposition to association between members of particular sexes discriminates against an employee on the basis of sex.”

In their petitions, Bostock and Altitude Express ask the Court to resolve the split between the circuits, as well as a split between federal agencies empowered to enforce Title VII—the EEOC and the U.S. Department of Justice. On the merits, Bostock argues that the plurality opinion in *Price Waterhouse* dictates that Title VII prohibits discrimination on the basis of sexual orientation. To the extent that there is any distinction between discrimination based on nonconformity with gender stereotypes and discrimination based on sexual orientation, that distinction is beyond the ability of the

judicial process to reliably identify because notions about how men and women should behave necessarily implicate ideas about heterosexuality and homosexuality. Altitude Express argues that construing “sex” in Title VII to include sexual orientation is inconsistent with the plain meaning of the term and the construction of the term by courts in the decades since Title VII’s enactment in 1964. Altitude Express further argues that the Second Circuit improperly used a “but for” test that asked whether the adverse employment action would have occurred “but for” the employee’s sex. Finally, Altitude Express argues that sexual orientation discrimination does not rest on gender stereotypes because heterosexuality is not a female- or male-specific stereotype. It says that as long as an employer discriminates against both male and female employees on the basis of their sexual orientation, it has not discriminated on the basis of sex.

- *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 18-107. The Court will resolve “[w]hether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).” Petitioner Harris Homes is a family-owned funeral business that requires its employees to present themselves in a professional manner to avoid disrupting or distracting grieving clients. As part of that instruction, Harris Homes instituted sex-specific dress codes. Respondent Aimee Stephens, a Harris Homes funeral director who previously presented as a man, informed Harris Homes that she identified as female and would be presenting as a woman and wearing female clothing to work. Harris Homes fired Stephens because Stephens’ planned presentation as a woman would violate the men’s dress code. The owner of Harris Homes further felt that allowing Stephens to present as a woman while representing the funeral home would be contrary to the tenets of his religious faith. After Stephens filed a charge of discrimination with the EEOC, the EEOC filed suit alleging that Harris Homes violated Title VII by firing Stephens because (1) Stevens is transgender and (2) Stephens did not conform to Harris Homes’ “sex- or gender-based preferences, expectations, or stereotypes.” The district court dismissed the first count for lack of authority establishing transgender status as a protected class under Title VII; and granted summary judgment in favor of Harris Homes on the second count because allowing Stephens to present as a woman would impermissibly burden the owner’s ability to conduct his business in accordance with his sincerely-held religious beliefs under the Religious Freedom Restoration Act. The Sixth Circuit allowed Stephens to intervene on appeal, reversed the judgment of the district court, and ordered judgment for the EEOC. 884 F.3d 560.

Sixth Circuit asked “whether the Funeral Home could legally terminate Stephens, notwithstanding that she fully intended to comply with the company’s sex specific dress code, simply because she refused to the conform to the Funeral Home’s notion of her sex.” The Sixth Circuit reasoned that “it is analytically impossible to fire an employee based on that employee’s status as a transgender person without being motivated, at least in part, by the employee’s sex” because “an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align.” Therefore, the Sixth Circuit concluded, “[t]here is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity[.]” In short, Harris Homes fired Stephens “because of . . . sex.”



In its petition, Harris Homes argues that the Sixth Circuit’s holding creates a free-standing sex-stereotyping claim under Title VII, and that such a claim is inconsistent with *Price Waterhouse* and the text of the statute. Harris Homes argues that *Price Waterhouse* did not recognize an independent cause of action for sex stereotyping under Title VII; rather *Price Waterhouse* “recognized that impermissible sex discrimination occurs when an employer treats one sex better than another, and it identified an employer’s reliance on sex stereotypes as one way of evidencing such discrimination.” Harris Homes further argues that allowing sex stereotypes to provide the substantive rather than evidentiary basis for a Title VII claim is inconsistent with the plain language of the statute because, at the time of Title VII’s enactment and presently, the term “sex” refers to “a person’s status as male or female as objectively determined by anatomical and physiological features, particularly those involved in reproduction,” whereas “gender identity” refers to “an inner sense of being male or female” or “some category *other than* male or female.” Finally, Harris Homes asserts that by “judicially amending the word ‘sex in Title VII . . . to mean ‘gender identity,’” the Sixth Circuit effected “a sea change in the law” that casts doubt on the legality of sex-specific policies enacted to benefit women and infringes on employers’ freedom of conscience.

- *Barton v. Barr*, 18-725. At issue is whether a lawfully admitted permanent resident who is not seeking admission to the United States can be “render[ed] . . . inadmissible” such as to render him ineligible under 8 U.S.C. §1229b(d)(1) to apply for cancellation of removal proceedings. When the government initiates removal proceedings, it must charge either that the alien is inadmissible under §1182 or deportable under §1227, charging the former if the alien has not been admitted and the latter if the alien has. 8 U.S.C. §1229a(a)(2). (Section 1182(a)(2) lists the offenses that are grounds for inadmissibility; §§1227(a)(2) and (a)(4) list the offenses that are grounds for deportability.) The Attorney General may cancel removal in the case of an alien “who is inadmissible or deportable from the United States if the alien . . . has resided in the United States continuously for 7 years after having been admitted in any status.” 8 U.S.C. §1229b(a)(2). Eligibility for cancellation often turns on the so-called “stop-time rule” of §1229b(d)(1), which provides that an alien’s “period of continuous residence . . . in the United States shall be deemed to end . . . when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.” The question here is whether an alien who has already been lawfully admitted can be “render[ed] . . . inadmissible” for purposes of the stop-time rule such as to preclude cancellation of removal proceedings.

Petitioner Andre Martello Barton was lawfully admitted to the United States in 1989 and became a lawfully admitted permanent resident. In 1996, a few months before his seventh year in the country, he was arrested and charged with aggravated assault, criminal damage to property, and first-degree possession of a firearm during the commission of a felony. Those offenses fall within the category of offenses that render one inadmissible, but not within the category of offenses that render one deportable. Following an arrest for drug possession in 2008, the government initiated removal proceedings against him, charging him with being deportable. Barton conceded removability and applied for cancellation of the removal proceedings. The government objected, arguing that Barton was ineligible because his arrest in 1996 rendered him inadmissible under §1182 (rather than deportable under §1227), triggering the stop-time rule. The immigration judge found that Barton was ineligible to apply for cancellation because he committed an offense that rendered him inadmissible, but

noted that she “would have granted [his] application for cancellation of removal” were he eligible. The Board of Immigration Appeals dismissed the subsequent appeal, agreeing that the stop-time rule precluded Barton from seeking cancellation of removal. The Eleventh Circuit denied Barton’s petition for review of the Board’s decision on the same basis. 904 F.3d 1294. The Eleventh Circuit reasoned that “an alien can be rendered *inadmissible* regardless of whether he is actually seeking admission” because inadmissibility “is a *status* that an alien assumes by virtue of his having been convicted of a qualifying offense under §1182(a)(2).”

Barton argues that the Eleventh Circuit’s interpretation of the stop-time rule is incorrect because once a person has been lawfully admitted and no longer needs to seek admission, the concept of admissibility becomes inapplicable. He maintains that the Eleventh Circuit’s interpretation of the stop-time rule as precluding cancellation whenever an alien commits an offense appearing in §1182(a)(2) renders superfluous the requirement that an offense not only appear in §1182(a)(2), but also result in inadmissibility under §1182(a)(2) or deportability under §§1227(a)(2), (a)(4). Barton further argues that the Eleventh Circuit’s construction is inconsistent with the structure of federal immigration law, which establishes that “a lawfully admitted permanent resident who is not seeking admission to the country cannot be charged with being inadmissible.” No other section of the Immigration and Nationality Act, he says, makes “the status of being ‘inadmissible’ divorced from the context of an alien seeking admission to the United States.”

- *Citgo Asphalt Refining Co. v. Frescati Shipping Co.*, 18-565. The Court will resolve a disagreement among the circuit courts as to the meaning of “safe berth” (or “safe port”) clauses in contracts to charter ships for a voyage. The Second and Third Circuits have held that such clauses provide a warranty of safety while the Fifth Circuit has interpreted “safe berth” clauses as imposing only a duty of due diligence. This dispute arises out of an accident and oil spill in which the tanker *M/T Athos I* struck an abandoned anchor while preparing to dock at a berth on the Delaware River. The ship had been chartered by petitioners (collectively, CARCO) to deliver oil from Venezuela to their asphalt refinery in Paulsboro, New Jersey. CARCO had entered into a “charter party”—which is a type of contract for the services of a ship—with Star Tankers, a non-party intermediary that was sub-chartering the *Athos I* for respondent Frescati. This contract, employing a standard industry form, contained a “safe berth” warranty stating that “[t]he vessel shall load and discharge at any safe place or wharf, . . . which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat.” Frescati filed an action in the district court pursuant to the court’s admiralty jurisdiction, seeking unreimbursed clean-up costs and additional damages totaling nearly \$56 million. The United States later filed a separate action against CARCO in which it sought to recover the \$88 million of federal funds paid to Frescati from the federal Oil Spill Liability Trust Fund. The cases were consolidated for trial. The district court held that CARCO was not liable. The Third Circuit reversed and remanded after concluding that the “safe berth” warranty was an “express assurance” of a port’s safety “made without regard to the amount of diligence taken by the charterer.” 718 F.3d 184. “In other words, a port is unsafe—and in violation of the safe berth warranty—where the named ship cannot reach it without harm (absent abnormal conditions or those not avoidable by adequate navigation and seamanship).” The court remanded the case to determine whether the “safe berth” warranty was breached. On a second appeal, the Third Circuit concluded that the accident “resulted from a breach of CARCO’s safe berth warranty.” 886 F.3d 291. Thus, the

court deemed CARCO liable to Frescati for its costs in cleaning up the oil spill and liable to the United States on its subrogation claim.

CARCO's petition contends that the Third Circuit's "rulings widen an acknowledged circuit conflict on an important issue of contract law concerning risk-allocation in the maritime setting." The Third Circuit's interpretation of "safe berth" clauses as warranties of safety, CARCO contends, "imposes onerous and unwarranted liability on blameless charterers." CARCO also argues that the Second and Third Circuits are in conflict with *Atkins v. Fibre Disintegrating Co.*, a 19th-century affirmation by the Supreme Court of a case that CARCO describes as "reject[ing] the argument that a safe berth clause [is] a warranty." 2 F. Cas. 78 (E.D.N.Y. 1868), *aff'd*, 85 U.S. (18 Wall.) 272 (1873). CARCO goes on to argue that the interpretation of the safe-berth clause as a warranty has been "sharply criticized" by commentators and "misreads the contractual text." Further, CARCO attacks the "policy reasons" relied upon by the Third Circuit, including disputing that the "charterer . . . is 'normally' in a 'better position' than the ship master 'to appraise a port's more subtle dangers'" and arguing that the ruling "reduces the incentives of masters and vessel owners to exercise due care."

Both Frescati and the United States opposed CARCO's petition. Frescati contends that the Fifth Circuit's holding that a "safe berth" clause imposes only a requirement of due diligence is an "outlier opinion" that "has had no negative consequence for the maritime industry or maritime commerce." This is because charterers can contract around any interpretive rulings: "Charterers . . . routinely choose between the type of unqualified safe-port warranty at issue here and a clause specifying a due-diligence standard of care." And "when a safe-port warranty is included in a charter party and the port turns out to be unsafe, there is nothing unfair about making a charterer stick to its bargain." Frescati also argues that the Third Circuit's ruling is consistent with the Court's ruling in *The Gazelle*, 128 U.S. 474, 485 (1888), in which the Court explained that the "clear meaning" of a "safe berth" clause "is that the charterer must order the ship 'to a port in which she can safely enter with her cargo.'" Lastly, Frescati contests CARCO's arguments that interpreting the "safe berth" clause as a warranty reduces the incentives of masters and vessel owners to exercise due care and that a master is better suited than a charterer to determine the safety of a port. The United States likewise defended the Third Circuit's interpretation of "safe berth" clauses.



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