



**26th ANNUAL GALA  
& MOCK SUPREME COURT ARGUMENT**

**FIRST MONDAY IN OCTOBER**

**October Term 2019**

***ALTITUDE EXPRESS, INC. v. ZARDA***



# Office of the Appellate Defender's 26th Annual FIRST MONDAY IN OCTOBER A Mock Supreme Court Argument

## THE ADVOCATES

Faith Gay  
Hon. John Gleeson

## THE BENCH

Chief Justice  
**TONY WEST**

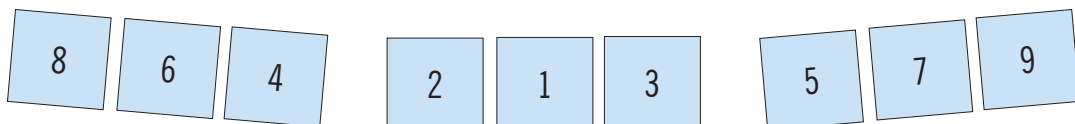
## Associate Justices

Anirudh Bansal  
James J. Benjamin, Jr.  
Carrie H. Cohen  
Daniel M. Gitner  
Katherine R. Goldstein  
Sharon Cohen Levin  
Kelly A. Moore  
John A. Nathanson

## Court Crier

Myrna Felder

## Seating



 Advocates' Podium

Associate Justices' seniority was determined alphabetically.

1—Chief Justice West 2—Anirudh Bansal 3—James J. Benjamin, Jr. 4—Carrie H. Cohen 5—Daniel M. Gitner  
6—Katherine R. Goldstein 7—Sharon Cohen Levin 8—Kelly A. Moore 9—John A. Nathanson

# PROGRAM

## OPENING REMARKS

### **CHRISTINA A. SWARNS**

President & Attorney-in-Charge  
Office of the Appellate Defender

## MASTER OF CEREMONIES

### **JEFFREY TOOBIN**

*CNN/The New Yorker*

## AWARDS PRESENTATION

OAD Beacon of Hope Award

### **FAYOLA McINTOSH**

OAD Gideon Award

### **FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP**

Accepted by Peter L. Simmons, Partner  
OAD Board Member

## THE ORAL ARGUMENT

Setting: The Supreme Court of the United States Courtroom

Time: Monday, October 7, 2019, 10:00 a.m. sharp

## AWARDS PRESENTATION

Gould Award for Outstanding Oral Advocacy

### **FAITH E. GAY**

Partner

Selendy & Gay PLLC

### **HON. JOHN GLEESON**

Partner

Debevoise & Plimpton LLP

Counsel for Justice Award

### **TONY WEST**

Senior Vice President, Chief Legal Officer and Corporate Secretary  
Uber

## THE SECRET DELIBERATIONS

Setting: The Supreme Court of the United States

Chief Justice's Conference Room

Time: Wednesday, October 2, 2019, 3:00 p.m.

There will be no intermission.



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2019 Master of Ceremonies

## JEFFREY TOOBIN

Jeffrey Toobin, Chief Legal Analyst for CNN and a Staff Writer for *The New Yorker*, is one of the most recognized and admired legal journalists in the country. His most recent book, “American Heiress: The Wild Saga of the Kidnapping, Crimes and Trial of Patty Hearst,” was published by Doubleday in 2016 and became an immediate *New York Times* best-seller. His book, “The Run of His Life: The People v. O.J. Simpson,” was the basis for the acclaimed ten-part limited series, “American Crime Story,” starring John Travolta and Cuba Gooding, Jr., on the FX Network, in early 2016.

His book, “The Oath: The Obama White House and the Supreme Court,” was published by Doubleday in 2012 and was also a *New York Times* best-seller. “The Oath” followed “The Nine: Inside the Secret World of the Supreme Court,” which was also a best-seller and earned the 2008 J. Anthony Lukas Prize for Nonfiction from the Columbia Graduate School of Journalism and the Nieman Foundation for Journalism at Harvard University.

Jeffrey Toobin, who is also a noted lecturer, has written several other critically acclaimed, best-selling books including “A Vast Conspiracy: The Real Story of the Sex Scandal that Nearly Brought Down a President,” and “Too Close to Call: The 36-Day Battle to Decide the 2000 Election.”

Previously, Toobin served as an Assistant U.S. Attorney in Brooklyn. He also served as an Associate Counsel in the Office of Independent Counsel Lawrence E. Walsh, an experience that provided the basis for his first book, “Opening Arguments: A Young Lawyer’s First Case—*United States v. Oliver North*.”

Jeffrey Toobin earned his bachelor’s degree from Harvard College and graduated *magna cum laude* from Harvard Law School where he was an editor of the Harvard Law Review.



## 2019 Gould Award Recipient

# FAITH E. GAY

Faith Gay is a founding partner of Selendy & Gay. In a nationally recognized career spanning more than three decades, Faith Gay has been lead counsel in over 30 jury trials and has successfully navigated bet-the-company investigations for scores of Fortune 500 companies. Before founding Selendy & Gay, she was the Co-Chair of National Trial Practice at one of the nation's top litigation firms and a highly respected federal prosecutor. Raised in rural Georgia and a long-time resident of New York City, Faith is comfortable in courtrooms around the country.

Named a "Top 250 Female Litigator" by Benchmark Litigation, a "Leading Lawyer in America" by Lawdragon 500, and a New York Metro "Super Lawyer," Faith has been repeatedly recognized as one of the leading trial, appellate, and white-collar lawyers in the US. In naming her a "Top Female Trial Lawyer," Law360 described Faith as "a great litigator" with "a kind of magnetic charisma, a likeability and intelligence that allow her to present complicated cases in a way that disarms tough judges, hostile witnesses, and skeptical jury members." A former Deputy Chief of the Special Prosecutions Unit and of the Civil Rights Division in the United States Attorney's Office for the Eastern District of New York, Faith has deep experience on offense and defense.

Faith divides her time between complex civil litigation, corporate governance, and white-collar investigations. In her commercial practice, she focuses on antitrust and securities litigation, complex contractual and financing disputes, and consumer class actions. Her long roster of high-profile clients whom she has served as national or lead trial counsel includes CCA, Coca-Cola, Colgate, Domtar, E\*Trade, Home Depot, Novartis, Nuance, Pfizer, Sandoz, and Schwab. In her white-collar practice, Faith has represented individuals and corporations in investigations by the SEC, FINRA, DOJ, FDA, IRS, EPA, DOD, and numerous attorneys general. She has led internal investigations at the request of corporations, boards of directors, and special committees. No individual or corporation that Faith has represented while under investigation has been indicted.

Faith has devoted significant time and energy to public interest litigation. She recently obtained a complete reversal of Marissa Alexander's conviction and mandatory 20-year sentence for allegedly firing a warning shot at her serially abusive spouse. See "Florida Woman Whose 'Stand Your Ground' Defense Was Rejected Is Released," *New York Times*, 2/17/2017. She co-founded the American Immigration Representation Project to provide lawyers to immigrant detainees in response to new federal immigration and deportation policies. See "New Group Turns To BigLaw For Attorneys To Rep Immigrants," *Law360*, 2/6/2017. Faith also represented New York Governor David Patterson in a victory the *New York Times* called "stunning" in upholding the appointment of Richard Ravitch as Lieutenant Governor. See "In 4-3 Vote, Court Says Paterson Can Appoint Lt. Governor," *New York Times*, 9/22/2009. She has litigated numerous other civil rights, criminal, immigration and voting rights matters on a pro bono basis.

Faith earned her J.D. from the Northwestern University School of Law, where she now serves on the Law Board. She is a Trustee of The Public Theater and a Member of the American Law Institute. Faith has also served as a Board Member of the American Constitution Society, the National Center for Access to Justice, the Lawyers' Committee for Civil Rights Under Law, and the Union Theological Seminary Board of Trustees.



## 2019 Gould Award Recipient

# HON. JOHN GLEESON

John Gleeson is a partner at Debevoise & Plimpton in New York, where he is a member of the White Collar & Regulatory Defense and Commercial Litigation Practice Groups. In addition to his active trial and appellate practice, handling both criminal and civil cases in federal and state courts, Mr. Gleeson advises company boards, conducts internal investigations, mediates disputes, and serves both public and private entities and individuals in various expert capacities.

For 22 years before joining Debevoise in 2016, Mr. Gleeson was a United States District Judge in the Eastern District of New York. He authored more than 1,500 published opinions (including 14 opinions for the United States Court of Appeals for the Second Circuit, sitting by designation) and presided over more than 200 civil and criminal jury trials. Mr. Gleeson was a member and Chair of the Defender Services Committee of the Judicial Conference of the United States.

Before his appointment to the bench in 1994, Mr. Gleeson was an Assistant United States Attorney in the same courthouse for 10 years. He served as Chief of Appeals, Chief of Special Prosecutions, Chief of Organized Crime, and Chief of the Criminal Division. He was lead counsel in the successful racketeering/murder trials of John Gotti and Vic Orena, the Bosses of the Gambino and Colombo Crimes Families of La Cosa Nostra, respectively, and he received the Attorney General's Distinguished Service Award for his role in the Gotti case.

Mr. Gleeson has taught law for 30 years. He currently teaches Sentencing at New York University School of Law and Complex Federal Investigations at Harvard Law School. He is a member of the American Law Institute, a trustee of the Vera Institute of Justice, a member of the Advisory Board of the Program on Corporate Compliance and Enforcement at NYU School of Law, a member of the Board of Directors of the Federal Defenders of New York.

Mr. Gleeson's awards include the Thomas Jefferson Foundation Medal in Law, University of Virginia (2016); Honorary Doctor of Laws, Northern Kentucky University (2016); The Distinguished Jurist in Residence, Cornell Law School (2016); The Green Bag Exemplary Writing Award, for United States v. Dossie (2013); The Green Bag Exemplary Writing Award, for United States v. Ovid (2011); and the Hon. Edward Weinfeld Award, New York County Lawyers' Association (2008).

Mr. Gleeson's publications include "Federal Criminal Practice: A Second Circuit Handbook (19th Edition)" (2019) and numerous articles.

Mr. Gleeson earned his law degree from the University of Virginia School of Law and went to college at Georgetown University.



## 2019 Counsel for Justice Award Recipient

# TONY WEST

Tony West is Senior Vice President, Chief Legal Officer, and Corporate Secretary at Uber, where he leads a global team of more than 600 in the company's Legal, Compliance and Ethics, and Security functions.

Previously, Tony was Corporate Secretary and Executive Vice President of Public Policy and Government Affairs of PepsiCo, a Fortune 50 corporation with net revenues of more than \$63 billion and a product portfolio that includes 22 brands like Gatorade, Tropicana, and Frito-Lay.

Tony has more than 20 years of experience in the public and private sectors. Prior to joining PepsiCo, Tony was twice confirmed by the Senate to serve as a senior official in the Obama administration. From 2012 to 2014, Tony was the Associate Attorney General of the United States, the US Department of Justice's third-ranking official, where he supervised many of the department's divisions, including the Civil Rights, Antitrust, Tax, Environment and Natural Resources, and Civil Divisions, as well as the Office of Justice Programs, the Office on Violence Against Women, and the Community Oriented Policing Services Office. As Associate Attorney General, Tony pursued several financial institutions for their roles in precipitating the 2009 financial crisis, securing nearly \$37 billion in fines and restitution for Americans who were harmed.

From 2009 to 2012, Tony was the Assistant Attorney General of the Civil Division, the largest litigating division of the Justice Department. As Assistant Attorney General, Tony led the Justice Department's review of the constitutionality of the Defense of Marriage Act (DOMA), advocating strongly and successfully that the department abandon its long-standing defense of the statute because the law was unconstitutional.

When Tony left the Obama administration in 2014, Attorney General Eric Holder presented him with the Edmund J. Randolph Award, the Department of Justice's highest honor.

Earlier in his career, Tony was an Assistant United States Attorney in the Northern District of California, where he prosecuted a variety of federal crimes. He also served as Special Assistant Attorney General at the California Department of Justice and was a litigation partner at Morrison & Foerster LLP in San Francisco.

Tony graduated with honors from Harvard College, where he served as publisher of the *Harvard Political Review*, and received his law degree from Stanford Law School, where he was President of the *Stanford Law Review*.



## 2019 Beacon of Hope Award Recipient

# FAYOLA McINTOSH

Fayola McIntosh is the proud mother of a 22-year-old son. She works as a gas mechanic for conEdison. She holds an Associate's Degree from Nassau County Community College and she is currently in the process of applying for a degree in engineering management.

But in 2006, Ms. McIntosh was charged with Assault after an altercation in a Manhattan nightclub.

Ms. McIntosh was tried twice: the first trial ended with an acquittal on Assault 1 and a hung jury on the remaining charges; and the second trial ended with an Assault 2 conviction and a 5 year prison sentence.

When OAD was assigned to her appeal, Ms. McIntosh had only served approximately 8 months in prison because she was out on bail throughout the pre-trial and trial proceedings. Ms. McIntosh worked as a union construction worker during the pendency of her case, including both trials.

When OAD secured her release on bail pending appeal, Ms. McIntosh returned to her construction job. She continued working there through the appellate proceedings.

OAD filed a successful appeal on Ms. McIntosh's behalf in the First Department but, unfortunately, the Court of Appeals reversed that decision in a heartbreaking 4-3 loss. As a result, Ms. McIntosh was required to return to prison and complete her sentence.

Once she was back at Bedford Hills Correctional Facility, Ms. McIntosh took advantage of every opportunity. She worked in the nursery, taking care of babies that were born in prison, and she completed various educational and training programs, including college courses. Indeed, Ms. McIntosh did so well in prison that she was awarded additional merit time that allowed her an earlier release from a violent felony (a rarely awarded privilege).

After her release, Ms. McIntosh went back to construction for a little while and then applied for a job as gas line worker with conEdison. Initially, her job application was denied and she was told that it was because of her criminal record. Ms. McIntosh contacted OAD and we connected her with the Community Service Society, who, relying on the then-new City Human Rights laws preventing discrimination based on prior conviction, explained that Ms. McIntosh's convictions were unrelated to her ability to do the job for which she applied. OAD also wrote a letter in support of her application. Ultimately, conEdison agreed and offered her the job. Ms. McIntosh has worked as a gas mechanic at Con Ed since 2016, and just this spring was promoted to the "top level in [her] trade, which is an A Mechanic in the company!"

Ms. McIntosh is lucky to have the love and support of not only her son, but also her mother, who all live near one another.



## 2019 OAD Gideon Award Recipient

**FRIED FRANK**

**FRIED, FRANK, HARRIS,  
SHRIVER, & JACOBSON LLP**

Fried, Frank, Harris, Shriver & Jacobson LLP advises leading corporations, investment funds and financial institutions on their most critical legal needs and business opportunities. The Firm is comprised of approximately 500 lawyers in North America and Europe.

Pro bono work is an integral part of Fried Frank's culture, and our lawyers and alumni have served as role models to others in how they give back in numerous ways — including representing individual pro bono clients and nonprofit organizations that provide critical assistance to our communities. For decades, Fried Frank has represented clients on a pro bono basis on a wide variety of legal issues, including immigration, civil rights, family law, criminal defense, and veterans' benefits.

In the 1950s, Fried Frank partner Col. George A. Spiegelberg represented an army staff sergeant accused of treason as a Japanese prisoner of war at the end of World War II in the landmark case of *US v. Provoo*. The Second Circuit determined that accusations about the soldier's homosexuality were used improperly to taint his trial and his conviction was overturned. In the early 1960s, name partner R. Sargent Shriver was instrumental in founding the Peace Corps and served as its first director. In the 1980s, the firm won relief in the US Supreme Court for Haitian refugees seeking political asylum who were being held in US government detention camps.

In addition to the OAD, the Firm works with various nonprofits, including the NAACP Legal Defense Fund, Maryland Office of the Public Defender, Her Justice, CAIR Coalition, Human Rights First, Sanctuary for Families, Immigration Equality, The Lawyers Alliance, Start Small Think Big, and The Legal Aid Society to make a significant difference in the lives of those it serves.

Recently, Fried Frank attorneys secured a major class-action victory in federal court in the District of Columbia on behalf of foreign-born US Army soldiers who enlisted through the Military Accessions Vital to National Interest program and were being denied their promised expedited path to US citizenship based on recent changes in government policy. In Summer 2019, Fried Frank attorneys and summer associates worked at the Mexican border representing detained asylum seekers from Central America. The Firm also participated in election protection initiatives spearheaded by the Lawyers' Committee for Civil Rights Under Law and its coalition partners to provide assistance to voters with problems and guide them through the voting process.

## PREVIOUS HONOREES

### THE MILTON S. GOULD AWARD FOR OUTSTANDING ORAL ADVOCACY

is awarded annually by Office of the Appellate Defender at First Monday in October to two of the nation's most accomplished lawyers. We have proudly presented the Gould Award to the following individuals since 1994:

ELKAN ABRAMOWITZ  
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### THE OAD COUNSEL FOR JUSTICE AWARD

recognizes a prominent in-house counsel who exemplifies OAD's commitment to justice. We have proudly presented the Counsel for Justice Award to the following individuals since 2014:

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AUDREY STRAUSS  
STACEY R. FRIEDMAN  
ELLEN ORAN KADEN

### THE OAD GIDEON AWARD

honors a law firm that has demonstrated exemplary commitment to indigent appellate defense through its participation in OAD's Volunteer Appellate Defender program. We have proudly presented the OAD Gideon Award to the following since 2018:

WEIL GOTSHAL & MANGES

### THE OAD BEACON OF HOPE AWARD

celebrates a former client whose life stands as a powerful example of the human capacity for resilience and highlights the importance of centering the administration of criminal justice around the inherent potential of every person.

We have proudly presented the OAD Beacon of Hope Award to the following since 2018:

KHALIL CUMBERBATCH

## THE BENCH



**Anirudh Bansal** is a partner at Cahill Gordon & Reindel LLP, where he represents financial institutions, multi-national companies, and individuals in criminal and regulatory matters. Before joining Cahill, Anirudh served as an Assistant United States Attorney for the Southern District of New York, and as Chief of the Complex Frauds Unit and International Narcotics Trafficking Unit.



**James J. Benjamin Jr.**, a leader of Akin Gump's white collar defense and global investigations practice group, represents institutional and individual clients in a wide variety of government and regulatory investigations and litigation. He has served as lead counsel in numerous internal investigations and has conducted numerous jury trials. He has been recognized as a leading lawyer by *Chambers USA: America's Leading Lawyers for Business* in the areas of white-collar crime and government investigations. Before joining Akin Gump, Mr. Benjamin served for more than five years as a federal prosecutor in the U.S. Attorney's Office for the Southern District of New York, where he served as deputy chief appellate attorney and as a member of the Securities and Commodities Fraud Task Force. Mr. Benjamin previously served as a law clerk at the U.S. Supreme Court for Justices Lewis F. Powell Jr. and John

Paul Stevens. He received his A.B. magna cum laude in 1987 from Dartmouth College, where he was a member of Phi Beta Kappa, and he earned his J.D. with honors in 1990 from the University of Virginia School of Law, where he was the research and projects editor of the *Virginia Law Review*.



**Carrie H. Cohen** is a partner in Morrison & Foerster's Investigations + White Collar Defense Group in New York where she co-chairs its Workplace Misconduct Task Force and routinely advises and represents corporations, boards, and c-suite executives in sensitive investigative and regulatory matters and bet the company criminal and civil cases. A former federal and state prosecutor, Carrie investigated and tried public corruption, investment fraud, and securities cases while serving as an Assistant United States Attorney in the United States Attorney's Office for the Southern District of New York. She also served as Chief of the Public Integrity Unit in the Criminal Division in the New York State Attorney General's Office and as an Assistant Attorney General in the Civil Rights Bureau, where she received the Louis J. Lefkowitz Memorial Award. She currently serves on the New York State Bar Association's

Wrongful Convictions Task Force and the New York County Lawyer's Association Plea Bargaining Task Force as well as being a Trustee of the Federal Bar Council and a member of the Federal-State Judicial Advisory Council.



**Daniel M. Gitner** is a partner at Lankler Siffert & Wohl LLP. His practice focuses on defending individuals and entities in white-collar criminal and regulatory matters. In 2015 and again in 2019, Chambers USA named Mr. Gitner the White Collar and Government Investigations Lawyer of the Year." From 1997 through 2005, Mr. Gitner served in the Criminal Division of the U.S. Attorney's Office for the Southern District of New York, where he was an Assistant United States Attorney from 1997 to 2005 and chief of the General Crimes Unit from 2003 to 2005. During his tenure as a federal prosecutor, Mr. Gitner was a recipient of the Justice Department's Director's Award for Superior Performance and was named the Federal Prosecutor of the Year by the Federal Law Enforcement Foundation.



**Katherine R. Goldstein** is a partner in the New York office of Milbank LLP and a member of the firm’s Litigation & Arbitration Group. She is a leading advisor to companies, boards of directors and individuals facing high-stakes investigations by the US Department of Justice, SEC and other regulators. She also counsels clients during their most sensitive internal investigations. An experienced trial lawyer, Katie’s practice builds on her nearly 12 years of experience as a federal prosecutor. Most recently, Katie served as the former Chief of the Securities and Commodities Fraud Task Force in the United States Attorney’s Office for the Southern District of New York, where she supervised some of the most complex and high-profile white collar and securities matters in the country. After joining the US Attorney’s Office in 2004, she prosecuted a wide range of securities fraud cases, among others, and was promoted to Chief of the Securities and Commodities Fraud Task Force in 2015 after serving as Deputy Chief for one year, and before that Co-Chief of the General Crimes Unit for two years.



**Sharon Cohen Levin** serves as a Partner in the New York office of WilmerHale. Ms. Levin is a leading authority on anti-money laundering (AML), Bank Secrecy Act (BSA), economic sanctions and asset forfeiture. Prior to joining the firm Ms. Levin served for 19 years as Chief of the Money Laundering and Asset Forfeiture Unit in the US Attorney’s Office for the Southern District of New York. Since 2006, under her leadership, the SDNY forfeited in excess of \$13.9 billion, equal to more than 59% of all federal forfeitures in the United States during this period. During her tenure, Ms. Levin prosecuted and supervised many of the Department of Justice’s most complex and significant money laundering, sanctions and asset forfeiture prosecutions, including the investigation and prosecution of BNP Paribas, SAC Capital, Lebanese Canadian Bank and 650 Fifth Avenue. Ms. Levin earned her BA from Tulane University and her JD from the University of San Diego School of Law.



**Kelly A. Moore** is a former federal prosecutor and Morgan Lewis partner who concentrates her practice on white collar criminal defense, regulatory enforcement matters, and related civil litigation. She represents clients in a wide variety of white collar matters, typically related to securities fraud, healthcare fraud, violations of antitrust laws, the False Claims Act (FCA), and the Foreign Corrupt Practices Act (FCPA). Her investigations experience covers the entire globe, including significant matters in China, India, Africa, Russia, South America, the Middle East, and Europe. In addition to being one of the firm’s leading lawyers, Kelly has been recognized in *Chambers USA* in the New York White Collar Crime category.



**John A. Nathanson** is a partner in the firm’s Litigation practice. His practice focuses on United States Department of Justice inquiries, Securities and Exchange Commission and other regulatory matters, internal investigations and civil securities litigation.

Prior to joining the firm in 2009, Mr. Nathanson served for five years as an Assistant United States Attorney in the Eastern District of New York, where he was assigned to the Business and Securities Fraud Unit for four years. Mr. Nathanson also served as Acting Deputy Chief of the General Crimes Unit. During his time at the U.S. Attorney’s Office, Mr. Nathanson investigated and prosecuted numerous securities fraud matters, including cases involving CDOs (Bear Stearns asset managers), options backdating, private investment in public equity (“PIPE”), insider trading and other complex accounting and securities frauds.

Before the U.S. Attorney’s Office, from 2001 to 2004, Mr. Nathanson served as an Assistant District Attorney in the Frauds Bureau of the Manhattan District Attorney’s Office. While an ADA, Mr. Nathanson investigated and prosecuted securities and other business fraud cases, including the successful prosecution of brokerage D.H. Blair & Co., Inc. and several of its executives. Prior to becoming an ADA, Mr.

## AWARDS PRESENTER



**Nicolas Bourtin** is the Managing Partner of Sullivan & Cromwell’s Criminal Defense and Investigations Group and a co-head of the FCPA and Anti-Corruption Group. His practice focuses on white collar criminal defense and internal investigations, regulatory enforcement matters, and securities and complex litigation. He has conducted numerous jury trials and has represented individuals and corporations in high-profile matters. Previously, he served as an Assistant U.S. Attorney in the Eastern District of New York. He has been recognized by *The National Law Journal* as a White Collar, Regulatory and Compliance Trailblazer, and by Chambers USA as a leader in White-Collar Crime & Government Investigations. Mr. Bourtin is the incoming Chair of the Board of Directors for the Office of the Appellate Defender and serves on the Criminal Justice Act Panel of the U.S. District Court for the Eastern District of New York.

## COURT CRIER



**Myrna Felder** is a matrimonial attorney practicing at both the trial and appellate levels. A former Chair of the New York State Bar Association’s Committee on Courts of Appellate Jurisdiction, Ms. Felder organized the State Bar’s day-long CLE program on New York appellate practice and has been a frequent lecturer on appellate practice for the Appellate Division, First Department; the New York State Bar Association; the American Bar Association; the Women’s Bar Association of the State of New York; and other bar groups. Ms. Felder serves on the Subcommittee on Appellate Practice of the New York State Office of Court Administration’s Advisory Committee on Civil Practice, of which she has been a member since 1983, and authored the chapter, “Special Considerations in Matrimonial Appeals” in Thomas Newman’s *New York Appellate Practice*.

A member of the Board of Directors of the Office of the Appellate Defender, Ms. Felder was one of a number of enthusiastic supporters for the creation of the First Monday in October program, for which she has served as co-chair since its inception twenty-six years ago.

## VOLUNTEER APPELLATE DEFENDER PROGRAM

The Office of the Appellate Defender's Volunteer Appellate Defender Program (VAD) offers associates in sponsoring law firms an opportunity to represent poor people convicted of felonies in appeals to the New York State Appellate Division of the Supreme Court, First Judicial Department, under the intensive supervision of OAD Supervising Attorneys.

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As one of New York City's oldest providers of appellate representation, and the City's second oldest institutional indigent defense office, OAD challenges Manhattan and Bronx convictions and sentences in the New York Supreme Court, the Appellate Division of the Supreme Court, First Judicial Department, the New York State Court of Appeals, and the federal courts. OAD's Reinvestigation Project identifies potential cases of wrongful conviction and, where appropriate, files petitions for relief.

OAD is a training office that not only provides high-quality representation to individual clients, but also educates attorneys that are likely to make a substantial contribution to the representation of poor people charged with and/or convicted of crimes. Thus, OAD's Staff Attorneys serve limited (three-year) terms; OAD maintains a Criminal Appellate Defender Clinic at New York University Law School; and OAD has a Volunteer Appellate Defender (VAD) program that allows attorneys at private law firms to co-counsel appeals with OAD attorneys.

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## SCENES FROM FIRST MONDAY IN OCTOBER 2018

## A SPECTATOR'S PRIMER ON

Altitude Express, Inc.  
Petitioner

v.

Melissa Zarda and William Moore, Jr.,  
Co-Independent Executors of the Estate of Donald Zarda  
Respondent

### INTRODUCTION

This hypothetical case is based on an actual case scheduled for argument during the United States Supreme Court's 2019 Term: *Altitude Express v. Zarda*, Docket No. 17-1623. At issue is whether Title VII of the Civil Rights Act, which bars employment discrimination based on an "individual's race, color, religion, sex, or national origin," encompasses a claim predicated on sexual orientation.

### FACTUAL & PROCEDURAL BACKGROUND

#### A. Donald Zarda's Termination from Altitude Express

During the summer of 2010, Donald Zarda worked as an instructor for the company Skydive Long Island, operated by Altitude Express, Inc. In that capacity, he took customers on "tandem skydives," where the customer and instructor are strapped hip-to-hip and shoulder-to-shoulder. To break the ice, instructors frequently made jokes about the close physical proximity required for this jump including ones that were sexual in nature or that referenced sexual orientation. Mr. Zarda sometimes referred to his own sexual orientation – as a gay man – in order to assuage the concerns of his female clients.

In June 2010, Mr. Zarda mentioned to a customer that he was gay and had an ex-husband. After the jump, the customer alleged that Mr. Zarda touched her inappropriately and disclosed his sexual orientation to excuse his behavior. Although he denied misconduct, Mr. Zarda was fired shortly thereafter, with the company citing a history of complaints. Altitude Express reported to the New York Department of Labor only that Mr. Zarda was discharged for sharing inappropriate information with customers about his personal life.

Mr. Zarda filed a charge with the EEOC, alleging that he had been discriminated against because of his gender, because he did not conform his appearance and behavior to sex stereotypes, and because he honestly referred to his sexual orientation.

## B. Mr. Zarda's Federal Lawsuit & Trial

In September 2010, Mr. Zarda filed suit in federal court asserting that his firing by Altitude Express violated both Title VII's prohibition on discrimination because of sex and New York's state prohibition on discrimination because of sexual orientation, *see* N.Y. Exec. L. § 296.1(a).

The district court granted Altitude Express's motion for summary judgment as to the Title VII claim because Second Circuit precedent precluded claims based on sexual orientation. *See Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000) ("Because the term 'sex' in Title VII refers only to membership in a class delineated by gender, and not to sexual affiliation, Title VII does not proscribe discrimination because of sexual orientation."); *see also Dawson v. Bumble & Bumble*, 398 F.3d 211, 217–18 (2d Cir. 2005). The district court also found insufficient evidence to support Mr. Zarda's claims that Altitude Express's decision to terminate him relied on (1) the gender stereotype that a male must be guilty of harassment when alleged; and (2) the fact that Mr. Zarda did not dress or behave according to male stereotypes. However, the district court denied summary judgment with respect to the sexual orientation discrimination claim under New York state law.

Before trial began on the state-law claim, the EEOC decided *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015), and held for the first time that "allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex." *Id.* at \*10. Relying on this decision, Mr. Zarda filed a motion for reconsideration, which the district court denied.

At trial, the jury was instructed that, in order to prevail on his state-law claim, Mr. Zarda needed to prove that his sexual orientation was the but-for cause of his termination. The jury returned a verdict for Altitude Express, and Mr. Zarda appealed.

## C. The Second Circuit Decisions

A three-judge panel of the Court of Appeals for the Second Circuit held that it was "entirely possible that a jury thought that Zarda's sexual orientation was 'one of the employer's motives' (i.e. a motivating factor)" in its termination decision" and, as a result, the jury's verdict did not foreclose Mr. Zarda's Title VII claim because the standard of causation under Title VII is whether sex was a "substantial" or "motivating" factor contributing to his termination. *Zarda v. Altitude Express*, 855 F.3d 76, 81–82 (2d Cir. 2017) (noting that jury could have found sexual orientation as motivating factor but not "but-for cause" of Mr. Zarda's discharge). Nevertheless, the panel acknowledged that the Second Circuit precedent of *Simonton* can only be overturned by the entire circuit court sitting *en banc*. *Id.* at 82. The panel, therefore,

held that its only option was to affirm.

Thereafter, in a decision that included eight different opinions, the Second Circuit, sitting *en banc*, overturned its prior precedents and held:

Title VII's prohibition on sex discrimination applies to any practice in which sex is a motivating factor. 42 U.S.C. § 2000e-2(m). As explained above, 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, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account. Sexual orientation discrimination is also based on assumptions or stereotypes about how members of a particular gender should be, including to whom they should be attracted. Finally, sexual orientation discrimination is 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. Each of these three perspectives is sufficient to support this Court's conclusion and together they amply demonstrate that sexual orientation discrimination is a form of sex discrimination.

*Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 131–32 (2d Cir. 2018).

The lead dissent contended that the ordinary, public meaning of the term “sex” in 1964 did not and could not have contemplated sexual orientation. *Id.* at 137–48 (Lynch, J., dissenting). It asserted that Title VII only prohibits discrimination that treats men and women differently, and characterized “the majority’s arguments [as] attempt[s] to . . . find ways to reconceptualize discrimination on the basis of sexual orientation as discrimination on the basis of sex.” *Id.* at 156, 162. Indeed, the dissent stated that “[t]he simplistic argument that discrimination against gay men and women is sex discrimination because targeting persons sexually attracted to others of the same sex requires *noticing* the gender of the person in question is not a fair reading of the text.” *Id.* at 156. Instead, the dissent explained that sexual orientation is not a gender-based stereotype particular to one of the sexes and that any opposition to associations between members of the same sex is not rooted in sexism. *Id.* at 158–62. The rationale for the Second Circuit opinions are discussed more fully below in the arguments of the parties.

## APPLICABLE LAW

### A. Relevant Statute

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, provides in relevant part:

(a) *Employer Practices*

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

(m) *Impermissible consideration of race, color, religion, sex, or national origin in employment practices*

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

### B. Relevant Supreme Court Title VII Cases

In *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), the Supreme Court addressed a Title VII claim brought by Ida Phillips, who was refused a job by a company that refused to hire “women with pre-school-age children,” even though it employed men with similarly young children. *Id.* at 543. The company argued that this policy did not constitute discrimination on the basis of sex because 75-80% of its hires for the position were women. *Id.* The Fifth Circuit ruled that discrimination on the basis of an additional criteria (pre-school-age children) meant that it fell outside Title VII’s “because of sex” protection. *Phillips v. Martin Marietta Corp.*, 411 F.2d 1, 3–4 (5th Cir. 1969). The Supreme Court disagreed, explaining that Title VII does not permit “one hiring policy for women and another for men—each having pre-school-age children.” *Phillips*, 400 U.S. at 544.

In *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978), the Supreme Court concluded that a Los Angeles Department of Water and Power policy requiring female employees to make larger contributions to the pension fund because women, on average, live longer than men violated Title VII. *Id.* at 704. The Court

explained that even if the stereotype at issue was undisputed, the intent of Title VII is to protect individuals from “[p]ractices that classify employees in terms of . . . sex [which] tend to preserve traditional assumptions about groups . . . .” *Id.* at 709; *see also id.* at 707 n.13 (“In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” (internal quotation marks omitted)).

In *General Electric v. Gilbert*, 429 U.S. 125, 135–40 (1976), the Supreme Court upheld a plan denying pregnancy benefits under Title VII because the group of “nonpregnant persons” includes members of both sexes; thus, the plan was not discriminatory “because of sex.” In response, Congress passed the Pregnancy Discrimination Act, an amendment to Title VII, to overrule the *Gilbert* decision. 42 U.S.C. § 2000e(k). Then, in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), the Supreme Court concluded that a company health insurance plan that provided its female employees with pregnancy-related benefits, but denied such benefits to the spouses of male employees, “unlawfully gives married male employees a benefit package for their dependents that is less inclusive than the dependency coverage provided to married female employees.” 462 U.S. at 684. The Court held that because the pregnancy limitation discriminated against male employees, it violated Title VII.

*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), addressed the fact that Ann Hopkins was told that her chances at a partnership with Price Waterhouse would increase if she was less “macho” and if she walked, talked, and dressed “more femininely.” *Id.* at 235. The Court found that this constituted prohibited sex stereotyping because “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” *Id.* at 250–51. The Court asserted that “we are beyond the day where an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.” *Id.* at 251.

And in *Oncale v. Sundowner Offshore Servs., Inc.*, the Court acknowledged that its precedent has applied Title VII to claims of hostile working conditions targeted at one sex, and that Title VII protects men as well as women. 523 U.S. 75, 78 (1998). Joseph Oncale was subjected to physical and verbal sexual harassment while on the job, including threats of rape and being called “a name suggesting homosexuality.” *Id.* at 76. In concluding that this conduct was prohibited by Title VII, the Court wrote:

We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil

Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

*Id.* at 80. The Court went on to state that the “critical issue” for Title VII “is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” *Id.* It concluded that “sex discrimination consisting of same-sex sexual harassment is actionable under Title VII.” *Id.* at 82.

### C. Relevant Decisions of Other Circuit Courts of Appeal

Prior to 2015, the circuit courts were in consensus that “Title VII does not prohibit harassment or discrimination because of sexual orientation.” *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000). However, the EEOC’s decision in *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641 (July 15, 2015), led to a circuit split on this issue. In *Baldwin*, the EEOC provided three reasons for its decision that claims of sexual orientation discrimination are complaints of sex discrimination under Title VII:

We apply the words of the statute Congress has charged us with enforcing. We therefore conclude that Complainant’s allegations of discrimination on the basis of sexual orientation state a claim of discrimination on the basis of sex. We further conclude that allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex. An employee could show that the sexual orientation discrimination he or she experienced was sex discrimination because it involved treatment that would not have occurred but for the individual’s sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex.

*Id.* at \*10.

The Seventh Circuit was the first to follow the EEOC’s ruling after en banc review. *Hively v. Ivy Tech Cmty. College of Indiana*, 853 F.3d 339 (7th Cir. 2017). Relying on canons of statutory interpretation, a majority of the *Hively* Court found that its duty was “to consider what the correct rule of law is now in light of the Supreme Court’s authoritative interpretations, not what someone thought it meant one, ten, or twenty years ago.” *Id.* at 350. As a result, it held that an allegation of employment discrimination on the basis of sexual orientation is a case of sex discrimination under Title VII. *Id.* at 351–52.

Three judges dissented, arguing that statutory interpretation does not allow the court to amend the statute and circumvent the legislative process. *Id.* at 360 (Sykes, J., dissenting). Because the dissent contended that the ordinary meaning of sex is not synonymous with sexual orientation, it reasoned that, regardless of any comparative analysis, Title VII was not drafted to prohibit the motivation behind sexual orientation discrimination:

Sexism (misandry and misogyny) and homophobia are separate kinds of prejudice that classify people in distinct ways based on different immutable characteristics. Simply put, sexual-orientation discrimination doesn't classify people by sex; it doesn't draw male/female distinctions but instead targets homosexual men and women for harsher treatment than heterosexual men and women.

*Id.* at 365.

The Eleventh Circuit, on the other hand, denied en banc review of the issue in *Bostock v. Clayton Cty. Bd. of Comm'rs*, 894 F.3d 1335 (11th Cir. 2018), the case consolidated with *Zarda* at the Supreme Court. As a result, the circuit is still governed by its prior precedent, *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979), which states that “[d]ischarge for homosexuality is not prohibited by Title VII.” *Bostock*, 894 F.3d at 1337 (Rosenbaum, J., dissenting from denial of en banc review).





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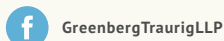
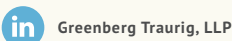
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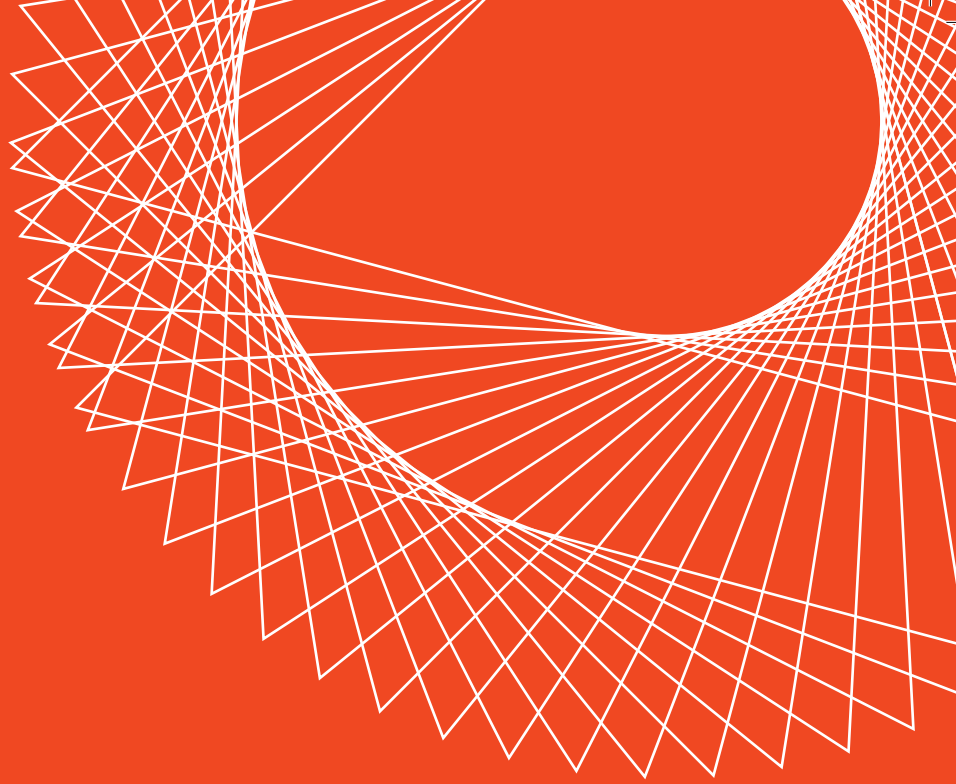
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**and a special shout out to our alum Carrie H. Cohen**

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We congratulate the honorees of the  
26th Annual First Monday in October

Faith E. Gay

Hon. John Gleeson

Tony West

Fried, Frank, Harris, Shriver & Jacobson LLP and

Fayola McIntosh

on their well-deserved awards, and we commend  
the exceptional work of the Office of the  
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— Honoring —

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Gould Award for Outstanding  
Oral Advocacy

**Hon. John Gleeson,  
Debevoise & Plimpton LLP**  
Gould Award for Outstanding  
Oral Advocacy

**Fried, Frank, Harris,  
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Tony West, Senior Vice President, Chief Legal Officer and Corporate Secretary of Uber

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Gould Award

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**Tony West**  
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