Before we go into our program and how today will work, I'm pleased to welcome president of the American Bar Association, Judy Perry Martinez and thank her for being with us today and to share her remarks on webinar and discussion on the monumental Title 7 U.S. stroke decision. Judy.

>> Thanks, Skip. And thanks to all of you who have gathered. The commissioners, members of the civil rights sex and the young lawyers division and so many more who care so much about these challenges and issues that have become faced for so, so long.

What a week this has been. An you can tell you that I sell fishily wanted to be with all of you because I wanted to get a sense on seeing the panelist faces right now, a sense of this the smiles and the joy and the pride and just the sense of this moment. Because I have seen the anguish and the hurt and the shard ship and the aches and the legs when people stood tall no matter what and no matter who tried to push them down. But they stood tall for what they believed in. And the ABA at least, some part over the years, I remember the feeling that I had when I saw the decision pop up on my phone this week and it reckoned me back to 1989 standing in the House of delegates when I believe the first policy was passed by the American Bar Association adopted by the ABA on nondiscrimination against the LGBTQ community. And I remember not knowing what was going to happen in that vote and feeling at that moment that sense of finally we are here. And yet it took so long, decades of hard work by so many people on this webinar, not only the panelists, but so many more who worked so hard to just make sure that this day would come that these cases would come forth. So not you have the gratitude for the courage, for your resiliency, for your fortitude to keep pushing on.

The American Bar Association was proud to file an amicus in the cases and to stand with all of you to know that there is so much work to be done, but at this moment, we should celebrate and we should just applaud the fact that now it is the law. And now it will be that workplaces all over this country and the world we hope one day will be able to experience and benefit fully from the extraordinary intellect and talent and dedication of our wonderful community, for the LGBTQ members.

So thank you so much for all you've done, and I'm just delighted to sit back and listen to your words of wisdom.
>> Thank you, Judy, for those amazing words. During today's program, we are encouraging you to ask questions of the panelist through the Q & A function, not the chat function. If you don't see these controls, please ensure the screen is not idle. We'll address questions at the end of the panel as time permits. We'll be sharing a recording of this program to everyone who is registered so you can share it widely with your networks.

And with that, we're thrilled to bring you today's program, Title 7, U.S. Supreme Court decision, a discussion and analysis. My name is Skip Harsch, I'm the director of the commission on sexual orientation and gender identity and I have the humble opportunity are honor of being able to these four fantastic speakers but I'm going to let each one of though them introduce themselves and say a few words. So I'd like to start with Chai if I could.

>> Hello, everyone. Isn't it great to be here? Sorry. So excited. Sorry. So about -- I was a commissioner at the EEOC from 2010 to 2019 when the EEOC issued a series of decisions covering gender orientation and sexual discrimination under Title 7. Prior to that I was a law professor at Hamlin law school for 14 years and during that time served as a consultant to various groups and worked on helping to draft the original act in 1993, worked in terms of expanding that to include not just sexual orientation but also gender identity.

And in 2000, because I went and checked the date, I published a law review article arguing that sexual orientation and gender identity were covered as farms of sex discrimination not a new law in the academy, they had said that in the 1970s but sort of playing that out again in the context of why it made sense to put gender identity in to -- and sorry, now I'm a partner in began Lewis and Bockius and I'm director of workplace consulting. So I'm essentially helping companies and organizations create safe, respect I feel and inclusive diverse workplaces. And that's a good thing to do.

>> Great. Thank you. Camiryn.

>> Hi. I'm Camiryn, I'm the chair and commissioner for New York commission on human rights. We were the city agency that enforces antidiscrimination and anti harassment protection, including those that exist in employment, similar to the issues that were presented in the case. And prior to that I was for three years a partner at Goldman which is an employee side labor and employment law firm where we focussed on various employment issues, but I had the great privilege years back ever with one of my partners cofounding the firm's LGBTQ workplace rights practice group a that at the time was considered one of the first such practice groups because a lot of folks were thinking, you know, there's no rights, what's the business in that, to a law firm, a private law firm? But I had the great privilege of working with folks like Chai and Shannon and some other folks as this some of this law was developing. So it's a real honor and privilege to be here with everyone today.

>> Louis.

>> My I name is Lewis Lopez, I'm the associate counsel at the office of special counsel, OORC. For those of you who don't know, we're the agency that investigates and litigates civil service violations, that includes discrimination and whistle-blower retaliation. Prior to working at OSC I worked at the Department of Justice civil rights division and also at the EEOC for which I am so proud and forever indebted to that amaze experience. And all of those positions, I have worked on LGBTQ issues and cases both in the private and in the public sector. And I just want to say I feel lucky and excited to be a part of this discussion today, for several reasons, I feel privileged to be presenting with people who I consider real heroes to me along this journey, and I think that getting this decision at this particular time in history is meaningful and I mean, don't we really want a do over for 2020 so far except for this week?

So this decision really is a shiny, happy time during what have been really dark, a very dark period for Americans and so let's take this moment to understand and celebrate this landmark
victory before we reengage in efforts to continue to find discrimination free and more inclusive workplaces for all of us. Thank you.

>> Thanks, Lewis. Shannon.

>> Yeah, I'm with you, Louis. Let's celebrate. It is so amazingly great to be here. Yeah, I'm Shannon Minter, a long time transgender activist and attorney and I'm legal director for the national center of lesbian rights and one of many, many attorneys and advocates who for decades now have been trying so hard to get courts to accept the discrimination against LGBTQ people is part and parcel of sex discrimination, is sex discrimination, and it is pretty awesome to have that theory that argument finally recognized and validated by the highest court in our in such a strong opinion and authored no less by a justice that was on the court by President Trump and I think it's just a real tribute to the power and strength of those arguments.

And I just want to say real quick that it has been such a honor to be doing this work under your leadership, Chai, but and inspired by your incredible intellect and just unwaiving energy and commitment to making this happen. So thank you.

>> Great. Thank you, ern. I'm going to start, Carmelyn, could you give us a quick break down of the decision, the court rule and the essence of the ruling?

>> Sure. So just this past Monday, the Supreme Court ruled that firing employees because of their sexual orientation or gender identity is sex discrimination, that violates federal law or the civil rights act of 19ed 4. And this really resulted pretty much from three separate phases. They were brought by Amy Stevens, Donald Zarda, and Darryl Bostoc. Amy Stevens worked as a funeral director for six years as she was first after telling her boss that she was a transgender woman. Don Zarta was a skydiving instructor and he was fired after he told the customer that he was gay. And Jay rolled Bostok was a social worker working with at risk youth and he was fired from his job after his employer learned that he was gay.

So all three of them sued asserting that it was illegal sex discrimination under Title 7 to fire them for being transgender or gay. And we are here today and we are excited because the Supreme Court agrees. Yay. I have it here, holding that an employee who fires an individual for being LGBTQ fires that person for trace or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title 7 forbids. And that's the language directly from the decision. So stated differently, an employer who first an employee merely for being LGBTQ violates Title 7.

And I think tragically kind of this is that two of the you're rage us plaintiffs Amy Stevens and Don Zarta, they passed away before this decision was released. Mr. Zarta died several years ago in an accident. And Amy Stevens passed away just past month from kidney failure that was exacerbated when she lost her health insurance as a result of being fired. But obviously all of us owe them, their families, just immense gratitude for being courageous enough and brave enough to push these cases forward.

>> Chai, could you talk a little bit about the evolution of the case law and the role, the extremely important role you played in developing it and you know, of the EEOC in that regard?

>> Sure and actually the EEOC played a very important role in the beginning, as well as more recently. Because it does seem so logical when you say you can no longer discriminate based on sex that, well, that means if I transitioned, right, from one sex to another and I'm fired for that reason, what does that because of sex? Or as Carmelyn read from the opinion, you know, if my coworker Martin has a picture of his wife Nancy on the desk and everything is fine and I have a picture of my wife Nancy on the desk and I get fired, what is the difference between me and Martin? Only our sex, right?
So it seemed obvious. And to be honest, in the early 1960s, people thought they could bring those cases we had a gay person bring a those cases to the EEOC, we had a transgender person bring it to the EEOC in 1907s, and EEOC in three paragraphs decision, if that, just said no, you're not covered. I mean, and the entire reasoning was Congress didn't intend it. So that was it. And the Court started agreeing with that.

Then we had a little bit of a shift when we had the Price Waterhouse case where the Supreme Court says, well, gender stereotyping is a form of sex discrimination, that really helped transgender folks, Jenner Levi, Shannon's colleagues, brought one of the first cases where a transgender person got protection under a sex discrimination law. We got that in employment cases, 2011 we got from the 11th circuit really probably the strongest transgender case but all based on gender stereotyping. It wasn't like every case of gender identity is sex discrimination.

Then we sort of had a revolution in terms of the EEOC. The EEOC again, by putting out different analysis helped change the legal landscape. And in 2012 in the Macy decision which was easier for the EEOC to do because there were all of these cases that was applying gender stereotyping to transgender folks, besides the gender stereotyping argument saying it is always based on the gender stereotype if you discriminate against someone based on gender identity, there is also two paragraphs if that decision towards the end that said, and you know what you don't even have to go to gender stereotyping, it's because of sex right off. And we sort of pulled out from the Price Waterhouse case, which had only been quoted for sort of gender stereotyping, the one sentence that said, sex must be irrelevant to the decision.

And then gender stereotyping was simply an example evidence that sex had been taken into account.

So in 2015, when the EEOC had a case dealing with sexual orientation discrimination, that was the first argument that was you the forward. And those who know me know that that was my favorite argument so that's why it was the first one. And again, simply, it was a very simple textual analysis in the way I described. And then two other theories, the gender stereotyping theory and an association theory.

You know, the agency, though, is just an agency. It made a difference because starting from 2012, EEOC started taking charges. Some LGBTQ people, hundreds and then thousands who came. But it is still just an agency. You needed the courts.

And what happened after 2015 with sexual orientation where all the courts, almost all of the appellate courts had just pronounced, sexual orientation isn't covered, they used the gender stereotyping to help some state people like me as a lesbian, I wouldn't have worked. I look -- I don't -- you know, I conform to gender stereotyping, right? Other than the most core gender stereotype of who I should be attracted to. But otherwise the courts were just not there after Baldwin, courts started using that decision. So suddenly something that had not even been percolating in the courts in any way on sexual orientation started getting brought forward. And let me tell you, this is because of the LGBT legal groups that got in there, EEOC bringing litigation. So then they start coming up and then 7th circuit, you have to go en banc to overturn precedent, they do. 2nd circuit you have to go en banc to overturn precedent, they do. 11th circuit did not overturn and that's what brought the cases to the Supreme Court.

And then at that point, let me tell you the theory is pretty straightforward, and it is what once a court actually has to deal with it, it is sort of like the emperor has no clothes. The arguments against it really just fall. And let me tell you, justice Gorsach is a really good writer and especially when it comes to textualism. So that's how we got here.
Great. Thank you. Shannon, I'm going to turn it every o to you and then to anyone else about how the Court's analysis fits into the evolution that was just described.

Yeah. So I mean, highlighted out, so I'm just going to add a teeny little bit more. But as Chai noted, Price Waterhouse case, you know, reinvigorated this whole emphasis on gender stereotyping and it made us possible for us to start arguing using that and saying hey, gay people, depart from the gender stereotype that a man attracted -- no, man should only be attracted to a woman, sorry, and that a woman should only be attracted to a man and it is a kind of gender nonconformity and the same with transgender people where like, you know, the transgender person is not that different from the plaintiff and Price Waterhouse, it is just kind of an extreme case of gender nonconformity so we should be protected. But the better argument, the one that is more protective of our community and more consistent with who transgender people really are, and I'll say a little bit more about that, is what Chai just referred to as the textualist argument, just a very straightforward claim that by definition, being gay or being transgender has everything to do with your sex. You can't even identify a person as being gay without taking their sex into account. You can't even identify a person as transgender without taking their sex into account. It just rice at the very heart of both of those identities. So one of the potentially pragmatic aspects of using gender stereotyping, particularly for transgender people is that it kind of tends to posit the transgender person as forever a member of their birth sex and just and you're like, some of these assigned male at birth dresses and appears as a woman but it just is, it conceptualize it, again, just a extreme gender nonconformity, which is helpful concept why you willy. It was great to get courts to start opening their minds and thinking about the possibility that we could be covered under sex discrimination law. But has definite limits, particularly when you think about cases that involve whether a transgender woman, for example, should be able to use the woman's restroom or where a transgender girls and boys should be able to play on girls and boys sports team. Then the gender stereotyping theory is not very important because in those instance it is really important to acknowledge that yeah, a transgender woman is a woman, the transgender man is man. So the per se or textualist argument is much more helpful, much more powerful than the gender stereotyping argument for most purposes.

And the wonderful thing, as Chai just noted, one of the really terrific and in some ways somewhat surprising aspect of the decision that we just got from the Supreme Court is that the decision went 100%, 110%, down the per se textual lane of adopting just straight up in the most direct possible way agreeing with our, the long-standing argument that Chai was one of the first to major and that the EEOC had embraced that just by definition when somebody discriminates against a gay or transgender person, they are taking that person's sex into account and that is impermissible sex discrimination under Title 7 and I might add under every other federal sex discrimination law. But I'll -- that does segue to our next topic.

Thanks, Shannon. I don't know if anything else had anything they wanted to chime in on that? If not, I'm going to turn it over to Louis to kind much question for you, is how long do you think it will take to enforce this decision throughout the nation and really what's going to be involved in doing so, including sort of this retroactive application question that's on everybody's mind?

That's a great question. And I think how long enforcement will take and what will be involved, really needs to be unpacked a little bit because I think it strikes at the larger and more fundamental question about when we, as the LGBT community will feel the true impact of this decision.

And speaking for myself, I felt it immediately. I mean using the word from Price Waterhouse, the decision was simple but momentous. It immediately validated people in our community in a dignified and public way that doesn't always happen by our leaders and institutions.
It also immediately empowered us to know that we can be our complete and authentic selves, both in our homes, as well as in our workplaces across the country.

And finally, not worry that we have no recourse if we are denied employment, harassment, fired, or otherwise discriminated because of our sexual orientation or gender identity.

I think in addition, the culture change around the LGBTQ plus community issues that we’ve been witnessing for some time now will only continue to increase. Indeed, prior to this decision, many employers across the country were already understanding and appreciating the value our community adds to the workplace. Now that it is clear that the same law applies coast to coast, I expect more and more acceptance in workplaces. I think enforcement of personnel actions like hiring and firing are going to be really clear. Other basic terms and conditions of employment that our community cares about, cares deeply about, like bathroom usage and dress codes, they may take more time to flesh out in the courts. I will note, however, that the decision offers signals of hope that these might not be so difficult. For example, the majority clearly said that while it was not deciding those types of issues because they weren’t before the court, it is not going to prejudge those questions, signaling that they’d have an open mind about any decisions when they do come up.

Moreover, the decision used to write pronouns and treated Amy Stevens as the woman she is rather than a gender nonconforming man, perhaps demonstrating that these were maybe nonissues in the end.

But it is, however, these issues do need to be litigated in order to realize full fuller enforcement of these protections, I think the decision offers a few key points. For example, the majority defines discrimination as intentionally treating a person worse. And states that discrimination involves distinctions or differences in treatment that protected individuals. So some of the questions we might think about is what impact, if any, will these definitions have on other cases challenging, for example, bathroom usage or dress codes when, and if, those cases arise? And how will individuals show that their treatment is injurious or worse than others? And what will employers defenses likely be?

Threes are the discussions that have been happening and should continue to happen in the LGBT community and throughout workplaces. And I think we’re going to talk more about these and other issues in the next battle grounds for enforcement of the decision.

And lastly, and quickly, I'll talk about retroactivity. Judicial decisions have a general presumption of retroactively in that they are meant to interpret the law as it exists and indeed, as it has always existed. Here, it is clear that the majority believes that Title 7 prohibits discrimination and has always prohibited discrimination based on sexual orientation or gender identity by virtue of the statute's overt barf sex discrimination. In fact, I found it amazing the justice cited the little known cannon of the elephants in the mouse holes that was first mentioned by justice Scalia in a 2001 opinion to make the point that the supposed elephant that is the holding in Bostoc was never really in a mouse hole and that it was in the plain sight sitting there in the statute since 1964.

And to be clear, EEOC has been accepting and investigating charges as Chai said for some time now, it has codes for such protection, and it is going to process those claims. And courts now should be using this holding to adjudicate all pending Title 7 case that is are before those
courts. So hopefully enforcement will be as swift as necessary and, perhaps more important, fall on the side of equality, fairness, and dignity.

>> Thank you, Louis. Camilyn, could you address the impacts on state law and sort of the state human rights issues?

>> Sure. I also just wanted to quickly add to what Louis was saying, you know, so I'm videoing in from Brooklyn where just a few days ago we had I think over 15,000 people coming out, powering out on the streets in support of black trans lives, so one note that I think is has to be made is that this basically puts LGBT folks at the courthouse door for these sorts of cases. With you for many black and brown trans people, they can't even get a job interview, they're so locked out of employment or the workplace because various forms of discrimination and so for them in terms of the decision, it is paralyzing for our community at the hole and we have to think about the folks who are locked out of the workplace completely.

I'm if Brooklyn so I had to say that.

You know, turning to the effect, you know, for purposes of other states, fair employment practice agencies like mine and other state human rights issues, you know, Bostock only applies to employers with 15 or more employees because that's the jurisdictional threshold for Title 7. In order to be held to obligations under Title 7, an employer must have 15 or more employees. So if you are a business or an employer and you have less than 15 employees, Title 7 doesn't apply to you which would also mean that Bostock doesn't apply to you. And states and localities, they often have their own human rights protections just like New York, New York City and New York State. Some of those protections mirror Title 7 jurisdictional requirements and others have lower thresholds.

So, for instance, in your states, in your city, we only require that businesses have four employees. So if you have four or more employees, you are covered then under our laws.

Now, the states certainly have the ability to interpret their own statutes but Bostoc doesn't necessarily apply in those other spaces.

But in some states, and this is what we were talking about earlier, this case law interpreting their state statutes actually references or goes back to Title 7. It actually says, you know, we're going to, as they said in these Title 7 cases, we're going to apply a Title 7 analysis here. And so in those states, I think there's going to be a really strong argument that Bostoc should apply and that LGBT people should be covered under their own previsions because they're going back to a Title 7 analysis.

You know, the other thing is that state and local FEPAs or human rights agencies, you could issue your own guidance or your own enforcement directive that says explicitly are you interpreting your laws consistent with Bostac, but human rights agencies that also enforce protections in other areas, for instance, the city commission on human rights, we enforce protections in employment and in housing and in public accommodations. You can say very broadly that they were taking the same analysis and applying it across the board in those different areas in order to provide broader protections.

You know, one thing to note is that many of these state and local human rights agencies, they are highly reliant on federal funding. A lot of them get their money directly from the EEOC. And in order to get that money they basically have to cross file their cases. They're saying they are taking a case that the EEOC could have taken. So the other thing is in order to be -- in order to avail of that EEOC unhad, it could be the case that they would also have to apply their local or state statutes consistent with the Title 7 analysis in Bostac.
>> Thank you. I do want to note we see do see your questions and I think the next couple of topics are going to address a number of them.

Hi, I was hoping you could talk about the precedent impact areas not covered by this case such as you know, healthcare discrimination, housing, education and implications for a transgender individuals in prisons, just really how it is going to effect these areas.

>> Sure and Carmilyn really got us going on that quite well, though, right, but actually, though, quickly, before I do that, because I want to follow-up something on just practically how is this going to work that Louis really got us going on, it is really important that the EEOC, since 2012, I mean, that's eight years, has been taking in these charges. And what was interesting is that you know, like why did people start showing up at the EEOC. I'm like, my god, did they read the Macy, we had the early decisions. No, you know the policy say that most people think it is illegal to fire someone who is gay, right? So people who were tired of being harassed, they would come to the EEOC. Before 2012, they were just sent away and what happened after 2012 after they came, they started being able to have their charges investigated. And that was really important for states that were not like New York or California that didn't have their own laws. So and the codes. There were actually codes under sex since 2012 in the EEOC digital system for gender identity for sexual orientation. So the EEOC folks are ready, you know, to just keep doing what they're doing.

So now the question is what about the folks in education, housing and healthcare. Because you can also go to those agencies for administrative relief. Well, based on the reasoning, there really should not be a difference between Title 7 or Title 9 which is about education or the Affordable Care Act which is about healthcare or the fair housing act which is about sex. So any of those federal laws, in fact, justice Salido listed them in a appendices many, many laws that prohibits sex discrimination, based on how courts have gone in the past, my guess will be, you know, as cases come up, they'll just interpreter is in the same way.

Obviously if it is better if the agency, sort of anything before it goes to court, the agency says oh, yes, so this is now new guidance. Well, you know, I mean, obviously we'll have to see what happens opt federal level if they do that. Even if they don't, it matters ultimately what the court says, but certainly on the state level that's where just reenforcing what Carmilyn said, that's not a heavy lift for state agencies to put out the one pager that says oh, yeah, and here are the 15 law that is prohibit sex discrimination in our states in these areas and Bostac applies. And I think we will see that.

>> Right. A be to add to that, and for state and local agencies, you could go beyond, you could go beyond some of the things that were mentioned in the opinion. One of the resources that I shared for the program was the legal enforcement guidance that my agency had put out in 2015 on discrimination based on gender identity and gender expression that became part of our formal rules just last year. But there's examples across the board, including like we made it actually in to Aledo’s dissent where the different places that could go. So this is a time for states and localities to be board.

>> Thank you. Another question that we've been seeing a lot of and this is sort of for Shannon and Louis and this is pending case that is will be affected, as your for national center of rights, and EEOC, and others. So Shannon, if I can start that question with you and thens to it over to Louis maybe Carmilyn before.

>> Right. And there's a knew piece out that my former colleague that talks about the interplay between the gender stereotyping and per se argument and evolution of that, so I encourage everyone to take a look at that.

And I also just wanted to echo Carmin's comment about the importance and centrality of the issues being raised by the Black lives movement. Black Lives Matter movement at this
moment. And I'm thinking of something that Nadine Smith, the executive director of quality Florida said the other day that whether you're talking about marriage equality or employment equality any of the rights we've worked so hard to achieve don't mean anything to black people if they can't live, if their lives were literally on the line. So it is a very important thing to remember right now.

And then related to that, I also just want to call out something that I think doesn't get enough attention which is black transgender woman have been absolutely at the forefront of the legal movement and the legal cases to establish all of this precedent that we're talking about. I just want to give a real quick shout out to well the very first case I'm aware of and how, you may know differently but that where a court ever recognizes the sex discrimination theory for protecting a transgender person's right to live and dress and just be who were was brought by my colleague Jennifer Levy, it was a state court case, in the late 1990s and the plaintiff was a Jane doe plaintiff, she was a black transgender girl. And the former he with shouldn't forget with her, in the very first openly transgender plaintiff about a being in 1994 and black transgender woman seeking and obtaining rights for incarcerated transgender woman to be protected from sexual violence. And then the precedent setting browned breaks case was brought by Felisa Barnes, another transgender woman, early days, that was a conservative court back then, to embrace the sex discriminating theory. So I wanted to say that stuff really quick.

And then in terms of pending cases that we have, I can do that really fast. Just like everyone has been saying, like, look, we've -- be this was huge. This was not just Title 7. This is every federal sex discrimination statute. There's no reason the court would have a different analysis in any of them. So we've got a pending case in 8th circuit right now that's been stayed depending the decision in the Bostak from a lesbian couple excluded from a retirement community just because they were a same sex case. There's a fair housing act and I'm feeling good about our chances in light of that there's healthcare claims for transgender people. And the other Title 9, there's a bunch of Title 9 cases out there, including the ones where -- one in Connecticut where the alliance defending treatment is trying to attack Connecticut's very inclusive policy for letting transgender girls play on transgender sports team. I think that case is in trouble, very serious and well deserved trouble after the decision yesterday. So look this goes way beyond employment. It really touches on every sex federal discrimination law.

>> Louis, do you have anything to add?

>> Sure. A couple of things. One is just building on what Shannon said on the trans community and the particularly the black and brown trans community, it's -- it struck me that some of the other questions that we got about why, perhaps, this decision was written by justice Gorsuch and the significance of that, and there was a pick part between the oral argument that showed up in the decision as well that I thought it was worth noting. He suggested that judges should engage in judicial modesty when interpreting statutes that are old, and his idea that maybe that would be better appropriately than through legislation as opposed to interpreting statutes.

And in the decision he sort of modified that position and he used a similar term judicial humility but he said that it requires judges to refrain from adding the statutes just the same it's a requires a refrain from diminishing them will as well. And in those words, in spite of -- -- in other words, I mean, in spite of what I believe so people think may will follow but incidentally haven't materialized at all, Title 7 provides these protections and we shouldn't read them out of the law because they were once or did disfavored or unpopular and that sort of resonated with me and I think for all of those black and brown and trans and other marginalized folks who have come before us, you know, this really speaks to them, I hope, that, you know, these -- we see you, we hear you, and it is important.
I think that in terms of the pending cases I wanted to mention sort of go about a being to sort of where Qi started and that's in the federal sector and that's where the action started with the EEOC at the beginning of the so-called revolution and in the agency where I work now, the office of special council, we, as I mentioned, interpret civil service laws and there have been long held protections in the civil service laws for individuals based on sex orientation and gender identity and there are materials on OSU's website as well as in other parts that talk about how federal workers can make the informed choices about the various different groups that are available to them in order to vindicate their rights including information about the remedial schemes that are available. And so I think this decision will further strengthen those protections and help us counter any lingering doubts about what text discrimination means in the federal sector and there are many pending cases that will be impacted by this decision.

>> Thanks, Louis. Does anybody else have anything to add?

>> I'm not the constitutional scholar here but, you know, I would say black and brown people also have disproportionate at engagement with police, consignment issues, so I would imagine, I hope, this gives boost to constitutional that LGBTQ people would have generally in those situations.

>> Yeah, actually, let me jump in on that, because, again, the fact that this was the definition of sex discrimination, well, then obviously sex discrimination gets heightened scrutiny, right, so sexual orientation, gender discrimination gets heightened. I don't know how would parse it out any differently.

And I think this moment in time, Louis, you said dark moments and that challenge, but, you know, really in the last few weeks, I think we've seen the power of people and the fact that Black Lives Matter and what does it mean to be black in America today and then what does it mean to be LGBT to a black person, a brown person. I total plea believe that this moment now is like the metoo movement which talking to employs that had made a difference and it continues to make a difference. Talking to employs now, I see this movement now in terms of Black lives Matter, that's having an impact. We have to make sure we're part of that coalition, keep it going. And that not only, of course, we in our own community cross over but just as a form of coalition. And the constitutional piece will help. The heightened scrutiny.

>> Thank you, Chai. This is the big question lingering in the room and I know that I and many of our attendees are very concerned about how soon and how broadly employers with religious or moral objections will seek to protect these hard protections under Title 7. So I'd loo to ask the panelists on setting the circumstances where they could perceive a new protections would be able to withstand challenges and what some examples might be. Chai, would you like to start?

>> Sure. I also want to say, because I've been going through the questions, and they're just such good questions. Obviously stuff about religion here, and I love seeing people that I know, Patricia Cain who has -- Pat Cain who has worked so much on this, various issues; Richard Fogan. So about the -- and even the way those questions are said, so Pat Cain is saying predictions about the possible success of a religious liberty to these claims and Richard Fogan who has done huge fan it is I can work on religious liberty, saying, what will this mean for Catholic schools or worship or etc.

Here's the plus about this. This isn't lick a new law that we, that Congress had to pass and we had to argue about religious exemption, right? This is Title 7. So Title 7 has exemptions already for religious organizations, schools, houses of worship, etc. They already have a religious exemption. To prefer people of their own religion that will have to be litigated, how that's going to apply. But that protection is there. So for the people who are saying oh, mid go, what does that mean now for religion? No-no, they're protected already under Title 7. There's a ministerial exemption, rabbis, priests, imans, we'll have to see what the court will do with that.

And then, finally, without a doubt, we have a freedom restoration act, if you burden someone's religious belief, the government has to have a compelling interest and the law has to
be compelled. People will not to have discrimination against LGBTQ people and the only narrowly tailor way to get there is to have this type of law. But those cases will come.

Handing over to anyone else.

>> Shannon, do you have anything you’d like to add?

>> Not particularly. I think Chai covered it. Of course there's a lot of concern that the court may create some new, seeing new religious exemptions, but I think we just have to be vigilant and make sure that we are doing our job of presenting them with the strongest arguments about why doing that to any significant degree could really be dangerous and could have a lot of unintended consequences.

And I'm encouraged so far. I think, for example, the briefing in the Fulton case that's in front of the court right now, they're encouraging the court to be cautious, even from some of actually pretty conservative or moderate to conservative scholars I think have been very impressive and I think that they will be given those concerns will be given serious consideration by the court.

>> All right. And I think the only thing I would add to what Chai and Shannon said is you look to states and localities for years have had antidiscrimination protections in this area that also have very strong protections against religious discrimination. So these are not mutually exclusive. They can coexist. They've coexisted in many areas of the country. For very lock. And so, again, just to ruse these spaces as an example, you know, but, you know, as Chai said, people -- these are the things that will be brought and we will see the litigation so.

>> Thanks, Camilyn. We have had a couple of people, ask and I just see some type about anybody's thoughts about the but for standard that was in the opinion, and I was wondering if anybody might be able to comment on that.

>> Well but for is what gets us to the results. I mean, the but for is fine here. It is saying right back to the same example, Martin and me with the pictures of our wives, you know, but for the fact that I'm not a man, I wouldn't have been fired for doing that. But for is the strongest thing we can get. And the main thing the court is -- oh, yeah you have to show intentional discrimination and then say if you're discriminating against a gay or transgender person, but for their sex, they would have been discriminated against. That counts as intentional discrimination. You don't need malice, you can say I love LGBT people. But if you discriminate against them because they're gay, lesbian, bisexual, transgender, that is but for, that's because of.

>> Can I add to that, saying it was so wonderful that the court fully embraced the per se or textual which is our strongest argument, it was also wonderful that they went ahead and walked through the but for causation analysis because that is the most demanding test that one could possibly require under Title 7 and they could have kind of ducked that and said well, we're just going to examine whether it is in any way motivated by, they could have just relied on a lesser standard that arguably would pass muster under that statute but they went for the but for test and applying but for because that's going to apply across the board so many other statutes. It is hard to imagine how this decision could be any more helpful to us in litigations under our community under all of the other statutes. 100 plus.

>> Any concerns that and I've heard about them as well that the standard is motivating factor so why is there all of this language about but for. It says Chai and Shannon said, you know, and the decision says, while we understand motivating factors in the statute, you know, it meets the higher threshold of but for causation and so that is for all of the reasons that have been articulated a stronger position for us to be in and I don't think it detracts from the way some might that is now going to be the standard that's going to be used in Title 7 for other things. I don't think we have to be concerned about that. I think it just helps news that, if we can meet this standard, we can certainly meet any other lower standard that's in the statute.
You know. Hi -- thank you. I wasn't quite understanding why people were so concerned about it. Listen, but for does not take away the fact of motivating factor. I mean, that's Price warehouse, they did not overrule Price war house. Let me tell you, certainly this is all my clients know it, right they have, sex if sex, race is a motivating factor, it doesn't matter if there was also some other factor, right, and they know that and that's really clear that this does not change that one iota.

What is sort of -- what I thought was so important about this, and Shannon knows this and others. The hardest thing about the straight per se argument is that causality because they kept saying well, no, no, no, it wasn't because you're not a man or woman, it's because you were gay, that was the other thing and that's what was really going on. And in the dissent in the 7th circuit, that was a really strong argument. And here Gorsich used exactly the cases he needed to use, the one, Martin where they just discriminated against woman who were mothers of small kids so they were discriminated against mothers, not around woman because they had lots of woman. And the Court is like no, that doesn't matter. Because but for the fact that she was a woman, you know, a mother, because you weren't discriminating against fathers, he should shelled have been able to get in to the workplace. So this did not overrule Price Waterhouse motivating factor one bit.

I don't know where Nancy's question went but it was a great question and I with love to hear what other people think. She said, how is this going to effect someone who uses the pronoun they when they apply, okay. So and I think that's a great question. I actually would hope that and I've been seeing this actually with companies, a lot of them wanting to change, you know, male, female, nonbinary, other very much wanting to say, what do you want in terms of your pronouns, but I think, you know, I feel like I could easily see a way to argue it. But I just think that's a good point. Because we needed to do this female argument for this case but I think we want to make sure the focus on that binary doesn't end up then being hurtful for folks who are nonbinary. So I would love to hear what you think.

I would just going to add, I remember, I was sitting at the argument listening and I kept cringing because I kept thinking to myself, wow nonbinary people are completely nonexistent in this. And it's, you know, fearing and fearing that. So I think it is a great question. I could manage -- I could manage ways of arguing it but I feel like even at the argument we were, you know, we were anticipating that that would be a lingering question.

Yeah, I'm a lot more optimistic but than you all are. Because I don't think -- I don't see how there's any way that the actual analysis the court applied would not fully and completely and plainly apply to someone who says I don't identify as either a male or a female and therefore I want to use a gender neutral or nonbinary pronoun. That is sex based. That is just inherently sex based as transgender person. You can't even conceptualize that identity without taking sex in to account. Is he I think it would be really hard to wiggle out from under that.

I actually want to second that because that is Gorsich is saying, how could you even think about this that was gay transgender without thinking about sex, how can you possibly think about someone saying I'm nonbinary in and then you say, I'm going to discrimination because of that.

Well, clearly you're taking secretary in to account. You're taking the fact that the person isn't identifying as having one of those -- as having male, female sex. However, Shannon, we all know that we have to stay on top of this because there are judges out there that may not think that. So that is why I thought it was a good question.

But I also -- go ahead, Shannon.

No, no, you go.

I also think this is where the education piece of this is going to be so key. I also think one of the reasons we are here is because the law was behind, the law was caught up with what, you
know, the public is living and experiencing. And I think even, I mean, I think it is true that even within our own LGBT communities, people don't have a great understanding of, like, gender fluidity and what it means to be a nonbinary. So I think that the education piece, if going into to the type of arguments, Shannon, that you're talking about, I think is going to require that there's more education on that, more understanding, so that we can normalize what those lived experiences are.

>> I was just going to say the same thing. We were trying to say the same thing. Because yeah, I don't think there's anything at all problematic to the contrary in the actual legal analysis and that decision is a right on square you know, it is exactly what we need. No, the only problem would be the lack of familiarity of the courts with nonbinary people which, by the way, was our same problem that we had for decades with transgender people. It's not like our arguments suddenly got more logical or compelling. It is just the courts became more used to transgender people and we did a good job of educating and humanizing and that's exactly what we have to do. And that just reminds me of one other little thing I want to say about that decision because it is so try and logic choppy and that's fine because that's how they did the argument so I am not campaigning that about that. But I did note that the one place in that decision where there was a little bit of emotion was the paragraph describing Amy Stevens, I just love that, it isjudge stated, it is low-key, but they describe, and in I thought very moving clearly empathetic way, like, her struggle to come out and come to terms with being transgender and to transition and it was just really, it talked about her loneliness and despair. That was really the only show of emotion in all of the decisions. And it was just really beautiful and the fact that the court never didn't falter one time, didn't put any one tiny little foot wrong never referring to her wholeheartedly as a female and a woman. So I think that was so important. And that human, like you were saying, the human side of this is just every bit as important as the law, if not more.

>> We are at the top of the hour and I know all of you are extremely busy. I know that we have a lot of questions that probably went unanswered and we could talk for another you know, two hours. But we just don't have the time. I want to thank everyone for joining us on this free webinar. And I want to express my gratitude, the gratitude of the commission on sexual orientation and gender identity and the commission section of civil rights and social justice for having all of you, this esteemed group of panelists, join us today. You are doing and you have done such critical work and I thank you and we thank you for taking the time out of your schedule to share the experiences.

I know that this was put together very quickly, and I appreciate all of your commitments and willingness to just jump on this panel as quickly as we could possibly get it scheduled to work with all of you.

I want everyone on the program to know that the section of civil rights and social justice continues to provide free webinars and resources for legal professionals and advocates nationwide, and we hope this helps you in your work. And, again, if you can, please consider joining and becoming an active member of the ABA. You can do so on our website at AMBAR.org/CRSJ. Please visit the commission's website. We have free resources and free webinars, you can learn about our awards, along with CSRJ's, nominating the amazing people that are doing the amazing work for the Thurgood Marshall award, for the Stone wall award and everything else that the ABA offers in the realm of diversity and inclusion. We are one family. We work together. And I'm so proud and honored to have been here today.

You'll be able to find more information about the free programs that CRSJ offers on its website and you'll all be receiving information about the recorded program and some of the additional
materials that our panelists mentioned today. So best of luck in your work and stay safe, everyone, and again, thank you, it was great to see your faces.