

Alex Berg ([00:02](#)):

Hi, and welcome to Making The Case with Lambda Legal, a podcast from Lambda Legal highlighting, impactful cases and policy work. I'm Alex Berg, a journalist and host, and I cover all things LGBTQ+, and the issues that impact us. On today's episode of Making The Case, we're going to discuss the Smith v. Avanti case with Lambda Legal counsel, Omar Gonzalez-Pagan. Lambda Legal filed a lawsuit in 2016 on behalf of Rachel Smith, Tanya Smith, and their two children after a property owner in Colorado, refused to rent them a housing unit because they are a same sex couple and Rachel is transgender.

Alex Berg ([00:37](#)):

The property owner was worried their "uniqueness" would jeopardize her standing in the community. As lead counsel and Smith v. Avanti, Gonzalez-Pagan obtained the first court decision in the country, holding that the Federal Housing Act's sex discrimination prohibition covers discrimination against LGBTQ people. Let's get into it to it. Welcome Omar.

Omar Gonzalez-Pagan ([00:58](#)):

Good morning, Alex. And thank you for having me.

Alex Berg ([01:01](#)):

To start us off, briefly tell us what this specific case is about.

Omar Gonzalez-Pagan ([01:04](#)):

Yes. So we're talking about the Smith v. Avanti case. It is actually the first court decision that decided that the Fair Housing Act, the Federal Fair Housing Act applies to LGBTQ people. Specifically in that case, we were representing a family, a same sex couple, two women and their two small children. One of the women, Rachel, she is transgender.

Omar Gonzalez-Pagan ([01:29](#)):

And when this family, for no reason other than that they needed to move was looking for a new home they encountered discrimination because of who they are. Specifically they were told by the landlord in an email that she wouldn't rent to them, because their uniqueness would attract attention and their unique relation would be the talk of town. And that's discrimination that cannot be tolerated. Ultimately, LGBTQ people are part of our community, our families, and our neighbors, and we all deserve a home. And so we brought this case to try to establish this precedent. And we were successful in doing that.

Alex Berg ([02:08](#)):

Now, we will definitely get to the choice word of uniqueness, which is something that really struck me as a euphemism. But I want to back up a little bit and talk more about the Fair Housing Act. You talked about how this was the first time it was applied to LGBTQ plus identity. What is it? How did it come into play here?

Omar Gonzalez-Pagan ([02:25](#)):

So the Fair Housing Act is part of the Civil Rights Act of 1968. This was a landmark expansion of the already historic Civil Rights Act from 1964. The Fair Housing Act was part of a law that was enacted by Congress and signing to law by Lyndon B. Johnson, to seek to address the discrimination that we were

still seeing, even after the landmark Civil Rights Act of 1964. Housing, because it matters for all of us and because it is pervasive. Discrimination in housing is not only pervasive across many communities, but it is also hard to detect and hard to document.

Omar Gonzalez-Pagan ([03:06](#)):

And this historic law prohibits discrimination on a number of bases, including race, national origin and sex. For a long time, Lambda Legal along with others was working to make sure that sex discrimination protections in federal law would be interpreted to protect LGBTQ people. But we hadn't been able to achieve that yet in the housing context. And so by bringing this case, we were able to create a precedent using that law, but using similar arguments as we would have used and did use successfully in the employment education context.

Alex Berg ([03:44](#)):

You talked briefly about the couple at the center of this case. How did they come to Lambda Legal? And can you tell us a little bit more about how their experience as a lesbian couple and with one of them being trans played a role in this case?

Omar Gonzalez-Pagan ([03:58](#)):

Yeah. Tanya and Rachel Smith are the parents that we represented. They were a married couple. They had two small children. I shouldn't say they were. They are a married couple with two small children. So not only are they a same sex couple, but Rachel is transgender. And Rachel came out as transgender later in life, after fully understanding herself. She was already married to Tanya and Rachel's transition occurred with the understanding and support of her family, her wife, and her children.

Omar Gonzalez-Pagan ([04:30](#)):

As a family, I've met them. I've seen them. They are a joy. And what they were seeking in looking for a home was a place where they could be close to nature in Colorado. Where they could be able to take out their kids for walks out in the Hills. Where they were be able to be close to a good quality school, that would provide the type of education that they want for their children. And all of that was in a single instance negated to them, because a landlord didn't want to rent to them because of who they are.

Alex Berg ([05:01](#)):

Speaking of that landlord, she wrote that it was their uniqueness that would jeopardize her standing in the community, which I feel like that one word holds so much meaning in this case. What did you think of that at the time?

Omar Gonzalez-Pagan ([05:14](#)):

It's incredibly rare to see discrimination in writing and it is even more so in the housing context. Housing discrimination historically and at present is one of the most under reported forms of discrimination out there. Tanya and Rachel contacted our help desk for help and our help desk, which listens to, and talks with, and provides resources to thousands of people singled out this one instance as a possibility for us to be able to do litigation.

Omar Gonzalez-Pagan ([05:45](#)):

And we work with them and they showed us the communications they had in writing with this landlord and saw that this email said everything that we needed in order to prove that they were being discriminated against because of who they are. It is no secret that the uniqueness to which a landlord was referring to was that they were a same sex couple that defied gender stereotypes because they were dating somebody of the same sex.

Omar Gonzalez-Pagan (06:08):

And it is no secret that their uniqueness referred to Rachel's status as a transgender woman and defining gender stereotypes by living in accordance with her gender identity and not her sex assigned at birth. And we saw that discrimination in writing and understood that we have a unique opportunity to present to a court a set of facts that is beyond dispute, but clearly shows the discrimination that LGBTQ families face in the housing market.

Alex Berg (06:35):

You said that it is incredibly rare to have this kind of discrimination so clearly in writing. Let's talk about the strategy that went into this case. Were there other cases or other law that you pulled from to build out your strategy?

Omar Gonzalez-Pagan (06:47):

Absolutely. Not only were we building from precedents that we have set in other context, including Title VII and Title IV. So other major Civil Rights law. Title VII being the employment protections that were part of the Civil Rights Act of 1964 and Title IV being part of the 1972 law that prohibits discrimination on the basis of sex and education. So we had already built some precedence in that arena and used those to make the argument as to why discrimination on the basis of sex prohibits discrimination based on sex stereotypes that the Smith family had just encountered.

Omar Gonzalez-Pagan (07:22):

And we were also facing bad precedents from the Court of Appeals, from the [inaudible 00:07:28] circuit that predated this case and came from a time in which LGBTQ people were not protected under law, were not even seen by the courts as being worthy of protection because it predated Lawrence, it predated significant court victories that showed that LGBTQ people have a right to be who they are. And we were trying to both work and build from the precedent, the good precedents that we had created in other contexts, as well as to confront bad precedents that cabined how we would argue our case. And so we were able to make the arguments necessary, focusing on the stereotypes surrounding how people should behave and conform, with regards to their relationships and their identity. And were able to achieve a victory for the Smith family.

Alex Berg (08:19):

You mentioned both the good and bad precedent that existed prior to this case. Did laws protecting gender based discrimination protect same sex couples against this kind of discrimination?

Omar Gonzalez-Pagan (08:29):

Well, the answer from our perspective is since 1968. The reality is that we know that this discrimination is unlawful, because it is a form of sex discrimination that has been prohibited since the Fair Housing Act was first enacted. However, it took a long time for courts to see that as being the reality. And this case was decided in April of 2017. It was a great victory for us, but it wasn't until three years later that the

Supreme Court in Bostock decided that sex discrimination prohibitions also protected discrimination, LGBTQ people from discrimination on the basis of sexual orientation and transgender status.

Omar Gonzalez-Pagan ([09:09](#)):

So it's always been the case, but it took a long time to get courts to recognize that. I should also note though, that there are state laws that protect LGBTQ people. And in Colorado, there's a Colorado anti-discrimination act that explicitly prohibits discrimination based on sexual orientation and gender identity. And we were able to include claims under this Colorado Anti-Discrimination Act along with our Fair Housing Act claims.

Alex Berg ([09:34](#)):

Now you mentioned this was a huge victory in 2017. How does this impact future anti-discrimination cases?

Omar Gonzalez-Pagan ([09:41](#)):

Well, it allowed federal agencies like the Department of Housing and Urban Development, which is charged with enforcing the Fair Housing Act to have a legal basis for which it would continue to and start to enforce the Fair Housing Act in a way that was protective of LGBTQ people. HUD, as we would like to call the Department of Housing and Urban Affairs and Urban Development has been a great ally in the enforcement of the Fair Housing Act and in seeking to eradicate discrimination in housing, not just on the basis of race, national origin and sex, but also based on sexual orientation and gender identity and familial status.

Omar Gonzalez-Pagan ([10:17](#)):

That was one example. It also was a victory that allowed us to communicate to the community, "Hey, you're protected and here's why." And so that has worked to create understanding within the community and within the real estate business, that this type of discrimination is unlawful.

Alex Berg ([10:35](#)):

Now, as we start to wind down a little bit, I have to note that the landlord in this case was actually a psychic, but she didn't see this coming.

Omar Gonzalez-Pagan ([10:43](#)):

That is certainly one of my favorite headlines of all time. I don't know that there's been a more fun one, if you will. When we brought this case, there was one headline that read, "Psychic landlord didn't see lawsuit coming." Certainly it is part of the color around the case and certainly it is a fun factoid about it, but really this case is not about the landlord. This case is about the family that we represented. And it's about Tanya, Rachel and their two children and the victory that they achieved through our representation on behalf of themselves and LGBTQ families everywhere.

Alex Berg ([11:20](#)):

Yeah. Omar, I really appreciate you humoring me on that one. This case ultimately reminded me of the saying that, "LGBTQ people can be married on a Sunday and evicted on a Monday." Kind of looking forward, how does it speak to the patchwork of protections that we have at this moment?

Omar Gonzalez-Pagan ([11:35](#)):

Well, I think my colleague, Greg Nevins would always add an amendment to that saying, and I subscribe to it as well, which is, "That may be true, but then on Tuesday they can file a discrimination charge with the Federal Agency charge with enforcing that act." In this case, HUD, or they could call us at Lambda Legal. But it is illustrative of the importance of having strong protections. Even in Colorado, where there were explicit protections, they encountered this discrimination. And there is a patchwork when it comes to state protections around their country, in terms of explicit protections based on sexual orientation and gender identity.

Omar Gonzalez-Pagan ([12:13](#)):

Many states now subscribe to Bostock and also interpret their sex discrimination provisions to protect LGBTQ people. But there is a need for there to be explicit protections, because it is a governmental message that is ultimately sent to our society, that this type of discrimination is not just unlawful. It is wrong.

Omar Gonzalez-Pagan ([12:32](#)):

As I started this conversation, LGBTQ people are part of the fabric of our community. LGBTQ people are part of the fabric of our workplaces, our schools, and our neighborhoods, and denying somebody at home because of who they are is one of the worst things that I can imagine, because ultimately without a home, you don't have a place from which you can raise your children, from which you can go and rest from your work day, from which you can go and take your kids to school. And it is ultimately that roof over your head that allows you to thrive as a person and as a family.

Alex Berg ([13:07](#)):

Well, Omar, thank you so much for taking the time to chat with me. I'm definitely going to have to remember from now on when I use that phrasing of the Sunday and Monday, I'm going to throw in the fighting back on Tuesday.

Omar Gonzalez-Pagan ([13:16](#)):

Absolutely.

Alex Berg ([13:20](#)):

Thank you for listening to this week's episode of Making The Case with Lambda Legal. If you'd like to learn more about the show, head over to [LambdaLegal.org/MakingTheCase](https://LambdaLegal.org/MakingTheCase). Making The Case is hosted by me, Alex Berg, and written and produced by Erika Kramer for Lambda Legal. Our show is recorded and mixed by Erik Monocle for Mouth Media Network. Original music was made for Making The Case by Meghan Rose.

Alex Berg ([13:42](#)):

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