

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

GERALD LYNN BOSTOCK,)
)
) Petitioner,)
)
) v.) No. 17-1618
)
CLAYTON COUNTY, GEORGIA,)
)
) Respondent.)
)
) and)
)
ALTIITUDE EXPRESS, INC., ET AL.,)
)
) Petitioners,)
)
) v.) No. 17-1623
)
MELISSA ZARDA, AS EXECUTOR OF THE)
)
ESTATE OF DONALD ZARDA, ET AL.,)
)
) Respondents.)
)

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 17-1618,
5 Bostock versus Clayton County, and the
6 consolidated case.

7 Ms. Karlan.

8 ORAL ARGUMENT OF PAMELA S. KARLAN
9 ON BEHALF OF THE PETITIONER IN 17-1618
10 AND THE RESPONDENTS IN 17-1623

11 MS. KARLAN: Thank you, Mr. Chief
12 Justice, and may it please the Court:

13 When a employer fires a male employee
14 for dating men but does not fire female
15 employees who date men, he violates Title VII.
16 The employer has, in the words of Section
17 703(a), discriminated against the man because he
18 treats that man worse than women who want to do
19 the same thing. And that discrimination is
20 because of sex, again in the words of
21 Section 703(a), because the adverse employment
22 action is based on the male employee's failure
23 to conform to a particular expectation about how
24 men should behave; namely, that men should be
25 attracted only to women and not to men.

1 There is no analytic difference
2 between this kind of discrimination and forms of
3 discrimination that have been already recognized
4 by every court to have addressed them. For
5 example, discrimination against men who are a
6 effeminate rather than macho. Like the
7 discrimination here, that discrimination is
8 because of non-conformity with an expectation
9 about how men should behave.

10 The attempt to carve out
11 discrimination against men for being gay from
12 Title VII cannot be administered with either
13 consistency or integrity. In the words of the
14 en banc Second Circuit, it forces judges to
15 result -- resort to lexical bean counting where
16 they count up the frequency of epithets, such as
17 "fag," "gay," "queer," "real man," and "fem," to
18 determine whether or not discrimination is based
19 on sex or sexual orientation.

20 That attempt is futile because when a
21 man is discriminated against for being gay, he
22 is discriminated against for not conforming to
23 an expectation about how men should behave.

24 Finally, the possibility that some
25 employers, but not the employers here, may have

1 policies of denying employment opportunities
2 both to gay men and to lesbians does not change
3 the unlawfulness of what was alleged by the
4 employees here.

5 Labeling those policies under an
6 umbrella phrase like "sexual orientation
7 discrimination" cannot hide the fact that such
8 an employer is a double discriminator. It
9 discriminates against men who do not conform to
10 a male stereotype, and it discriminates against
11 women who do not conform to an expectation about
12 female --

13 JUSTICE GINSBURG: Ms. Karlan --
14 Ms. Karlan, how do you answer the argument that
15 back in 1964, this could not have been in
16 Congress's mind because in -- in many states
17 male same-sex relations was a criminal offense;
18 the American Psychiatric Association labeled
19 homosexuality a -- a mental illness?

20 MS. KARLAN: Well, I think you read
21 the words of the statute. And this Court has
22 recognized again and again forms of sex
23 discrimination that were not in Congress's
24 contemplation in 1964.

25 In 1964, those were the days of Mad

1 Men, so the idea that sexual orientation would
2 have been reached, most courts didn't find
3 sexual harassment to be actionable until this
4 Court did. In Price Waterhouse, this Court
5 recognized that discrimination against a woman
6 who cursed like a sailor, walked like a man, and
7 didn't wear makeup was reachable under Title
8 VII. If you had asked members of Congress then
9 what they had thought, they would not have been
10 thinking about women like Ann Hopkins. They --

11 CHIEF JUSTICE ROBERTS: How do you --
12 do you agree or disagree with Judge Posner's
13 statement that the statute should be read to
14 encompass sexual orientation discrimination to
15 "avoid placing the entire burden of updating old
16 statutes on the legislative branch"?

17 MS. KARLAN: I disagree with Judge
18 Posner. I don't think you need to do any
19 updating here. I think you should read the
20 words as they were understood then, which is
21 "men" and "women." Title VII was intended to
22 make sure that men were not disadvantaged
23 relative to women and women were not
24 disadvantaged relative to men.

25 And when you tell two employees who

1 come in, both of whom tell you they married
2 their partner Bill last weekend, when you fire
3 the male employee who married Bill and you give
4 the female employee who married Bill a couple of
5 days off so she can celebrate the joyous event,
6 that's discrimination because of sex.

7 Well, if no one has any further
8 questions, I'll reserve the remainder of my time
9 for rebuttal.

10 (Laughter.)

11 CHIEF JUSTICE ROBERTS: Well, I think
12 we'll have further questions.

13 (Laughter.)

14 CHIEF JUSTICE ROBERTS: What do you do
15 with the argument that this is a
16 non-discriminatory policy because it applies
17 equally to relationships between women and
18 relationships between men? In other words, your
19 friends on the -- or you emphasize that you need
20 to know the sex of the individuals involved
21 before you can determine whether or not there's
22 a violation and that that brings it within Title
23 VII.

24 But what about the response that you
25 do not need to know the sex of the people

1 involved; you just can have a policy against
2 same sex? So you don't care whether the
3 participants are women or men. If they're the
4 same, then that's covered by the policy.

5 MS. KARLAN: I think that's no
6 different than having a policy that says
7 everyone should comply with the stereotype
8 applicable to their sex. And if I can use an
9 example from the Court's prior cases, for
10 example, in Dothard against Rawlinson, the
11 policy on its face said you cannot guard someone
12 of the opposite sex. So a woman who seeks to
13 guard a man is barred from that job; a man who
14 seeks to guard a woman is barred from that job.
15 Just put in, instead of the word "guard," "date"
16 and you get the same kind of rule here, which is
17 a man who wants to date a man can't do it but a
18 woman can, and a woman who wants to date a woman
19 can't do it --

20 JUSTICE GINSBURG: But there's, Ms. --

21 MS. KARLAN: -- but a man can. They
22 are two forms of discrimination.

23 JUSTICE GINSBURG: Ms. Karlan, there's
24 quite a difference. In the Dothard case, it was
25 the disparate impact. There are many more male

1 prisoners to guard than females. So that
2 policy, even though it applied to men guarding
3 women, it had a disproportionate effect on women
4 who wanted to be guards because there were many
5 more jobs guarding male prisoners than female
6 prisoners.

7 MS. KARLAN: Justice Ginsburg, the
8 part of Dothard against Rawlinson that rested on
9 disparate impact was the height and weight
10 requirements. The requirement about guarding
11 the opposite sex was not a disparate impact. At
12 most, the Court noted in a footnote along the
13 way that there were more guard positions
14 available to men, but it was not a disparate
15 impact case. It was a disparate treatment case.

16 And so a male person who had wanted to
17 guard someone at the Julia Tutwiler prison, the
18 prison for women in Alabama, would have had a
19 claim that he had been discriminated against
20 because of sex. Now, he would have lost that
21 claim but on BFOQ grounds, not on because of sex
22 grounds.

23 JUSTICE GINSBURG: What do you do with
24 the example that was brought up that, unlike
25 race, there are certain distinctions that are

1 not only permitted but maybe even required
2 between males and females, like physical fitness
3 tests?

4 MS. KARLAN: So those -- I want to
5 answer that question in two parts. The first is
6 to notice that in those cases, there is no
7 question there's a differential between men and
8 women; that is, men and women are being treated
9 differently.

10 What is at issue there is whether that
11 differential treatment constitutes unlawful
12 discrimination under Title VII. So, for
13 example, in Johnson against Santa Clara County
14 Transportation Agency, everyone recognized Paul
15 Johnson denied the job because of his sex, but
16 because it was a permissible affirmative action
17 program, that was okay. In Dothard against
18 Rawlinson, this Court said Ms. Rawlinson is
19 discriminated because of sex, but there's a
20 BFOQ.

21 So if Congress writes an exemption
22 into the statute, that's one thing. But this
23 Court really shouldn't be writing in an
24 exemption for those purposes.

25 JUSTICE SOTOMAYOR: Do you think we

1 need exemptions for those BFOQs? It's not just
2 the -- physical fitness standards for different
3 sports, but big issue right now raging the
4 country is bathroom usage. Same-sex bathroom
5 usage.

6 How are those cases going to be dealt
7 with absent a congressional exemption other than
8 BFOQ?

9 MS. KARLAN: Well, I think the way
10 that they get dealt with is everybody agrees if
11 you have men's bathrooms and women's bathrooms,
12 that's because of sex. It treats men one way,
13 it says go to this bathroom. It treats women
14 another way, it says go to this bathroom.

15 Then the question becomes is that
16 permissible to do? If I could just begin with
17 an example that I think will show why this is
18 so. When I got up, the Chief Justice said to
19 me, "Ms." Karlan, I am willing to bet any amount
20 of money I have that when Mr. Harris gets up, he
21 is going to say "Mr." Harris.

22 He treated us differently because of
23 sex. That is not discriminatory because neither
24 of us has been subjected to a disadvantage. And
25 as this Court said in Burlington White against

1 North -- Burlington Northern against White, what
2 the statute means when it says discriminate
3 against is to cause an injury and requiring
4 people generally to use separate bathrooms is
5 not an injury.

6 JUSTICE GORSUCH: Well, I'm -- I'm not
7 sure that maybe how they would see it. And to
8 what -- to what extent should we take that into
9 account? And same thing with a gender-specific
10 uniform requirements.

11 MS. KARLAN: Sure.

12 JUSTICE GORSUCH: How would you deal
13 with those, given that -- that at least those
14 affected might think that they're suffering a
15 harm?

16 MS. KARLAN: So there is no
17 categorical rule about these. For example, the
18 fact that all of the men sitting at counsel
19 table knew that they had to wear ties today and
20 I was free not to didn't cause an injury. On
21 the other hand, even the dissenters in the
22 Second Circuit said, if the Court said women who
23 come to argue should argue in Hooters outfits
24 and the men should wear --

25 JUSTICE GORSUCH: No --

1 MS. KARLAN: -- ties --

2 JUSTICE GORSUCH: -- we're not --
3 we're not -- I mean --

4 MS. KARLAN: I know.

5 JUSTICE GORSUCH: -- we can talk
6 absurd examples or we can talk real world
7 examples.

8 MS. KARLAN: I will give you a real
9 world example, which is, it probably doesn't
10 violate dress code to require men and women in
11 business events for the women to wear skirts,
12 but if you required a telephone lineman to wear
13 a skirt --

14 JUSTICE GORSUCH: No, no --

15 MS. KARLAN: -- while she's still --

16 JUSTICE GORSUCH: I understand that.
17 That's not what I'm getting at. And you know
18 what I'm getting at. The funeral homes
19 example's not a bad -- the case that we're about
20 to take up is -- is -- is more in the realm of
21 my question.

22 MS. KARLAN: Okay.

23 JUSTICE GORSUCH: You can offer me
24 help if you want to.

25 MS. KARLAN: Yes, yes. No, I'm trying

1 to offer you help. What I'm trying to say --

2 JUSTICE GORSUCH: All right. What
3 I'm -- what I'm suggesting, counsel, is that
4 there are male and female bathrooms, there are
5 dress codes that are otherwise innocuous, right,
6 most -- most people would find them innocuous.

7 But the affected communities will not.
8 And they will find harm. And how does your test
9 deal with that one way or the other? That's
10 what I'm asking you to address, if you'd like
11 to.

12 MS. KARLAN: Yes. My test says that
13 you have treated the people differently because
14 of sex, which is what we are asking you to hold
15 here. When you treat a gay man who wants to
16 date a woman differently than a woman who wants
17 to date a woman, that -- that's discrimination.

18 Then you get to what I've said, which
19 is you have to ask whether a reasonable person
20 under these circumstances would be injured by
21 the imposition of the particular sex-specific
22 world. So when the Chief Justice calls me Ms.,
23 I am not injured. When I go to a -- when I --

24 JUSTICE GORSUCH: You are not, but
25 another --

1 MS. KARLAN: It -- it --

2 JUSTICE GORSUCH: -- person might be.

3 MS. KARLAN: Right. And the question

4 --

5 JUSTICE GORSUCH: Are they reasonable

6 or not? And -- and I'm -- I'm -- I'm just --

7 I'm wondering, how do you decide those cases?

8 MS. KARLAN: An idiosyncratic

9 preference does not void an otherwise valid

10 dress code or bathroom rule.

11 JUSTICE GORSUCH: So is it --

12 JUSTICE SOTOMAYOR: Ms. Karlan --

13 JUSTICE GORSUCH: I'm sorry. I --

14 I -- and I apologize.

15 JUSTICE SOTOMAYOR: Go ahead and

16 finish it.

17 JUSTICE GORSUCH: Is it idiosyncratic

18 for a transgender person to prefer a bathroom

19 that's different than the -- the one of their

20 biological sex? Is it idiosyncratic for a

21 transsexual person to wish to dress in a

22 different style of dress than his or her

23 biological --

24 MS. KARLAN: No.

25 JUSTICE GORSUCH: Sex? Okay. So the

1 answer to your question is -- the question then,
2 at the end of the day, if I understand it, is
3 that those are acts of discrimination under
4 Title VII as you understand it?

5 MS. KARLAN: Yes, although I think
6 you'd -- you'd be better advised to ask the
7 question to someone who -- who is representing
8 someone here who is transgender. I am
9 representing someone who is gay.

10 JUSTICE SOTOMAYOR: Ms. Karlan.

11 MS. KARLAN: And -- yeah.

12 JUSTICE SOTOMAYOR: But you're begging
13 Justice Gorsuch's question. We were following
14 up on the same thing --

15 MS. KARLAN: I truly am not trying
16 to --

17 JUSTICE SOTOMAYOR: -- which is --

18 MS. KARLAN: -- beg the question.

19 JUSTICE SOTOMAYOR: -- how do we
20 differentiate the two? What is the legal test
21 that you propose to say this is discrimination
22 because of sex, as you said, calling you one
23 thing and your friend another is discriminatory,
24 but it's okay because there's no harm.

25 So what's the test we apply to, say,

1 when it is harm and when it isn't?

2 MS. KARLAN: Let -- let me try to be
3 clear.

4 JUSTICE SOTOMAYOR: Let's be --

5 MS. KARLAN: It's not discrimination
6 to call me Ms. Karlan and to call Mr. Harris,
7 Mr. Harris. It is -- it is because of sex that
8 we were treated differently.

9 But as this Court has made it clear
10 several times, discrimination consists in an
11 injury that the law is prepared to recognize.
12 And generally across all statutes, this isn't a
13 Title VII, and this is why I'm really not
14 begging the question here, the Court has said de
15 minimis effects are exempted from statutes
16 presumptively.

17 So if this Court thinks or if another
18 court --

19 JUSTICE SOTOMAYOR: So why --

20 MS. KARLAN: -- thinks --

21 JUSTICE SOTOMAYOR: -- is a dress code
22 for Hooters that requires all women to wear a
23 scantily -- a scant dress, is that
24 discriminatory?

25 MS. KARLAN: Yes, it is.

1 JUSTICE SOTOMAYOR: Is it
2 discriminatory for the woman who just doesn't
3 want to wear it because it's demeaning?

4 MS. KARLAN: Yes, it is.

5 JUSTICE SOTOMAYOR: So how about, is
6 it discriminatory for the restaurant not to hire
7 a transgender man who wants to wear the uniform?

8 MS. KARLAN: Well, you're going to get
9 --

10 JUSTICE SOTOMAYOR: The scant uniform.

11 MS. KARLAN: I -- I mean, I do want to
12 get to the question of sexual orientation --

13 JUSTICE SOTOMAYOR: No, no, no --

14 MS. KARLAN: -- here, but I understand
15 -- I understand.

16 JUSTICE SOTOMAYOR: But I think what
17 you are alluding is, and I still haven't heard
18 --

19 MS. KARLAN: Yeah.

20 JUSTICE SOTOMAYOR: -- the
21 explanation, which is the question of how do we
22 tell what's actionable and not?

23 MS. KARLAN: Well, if --

24 JUSTICE SOTOMAYOR: At what -- when
25 does that discrimination become an issue?

1 MS. KARLAN: I'll give an analogy from
2 the race area that may be helpful to the Court,
3 which is, for many years, there was an argument
4 that separate but equal was acceptable. And
5 ultimately this Court concluded that when it
6 came to race, separate but equal was not
7 permissible.

8 I don't think the Court has held
9 anything like that with regard to sex, but
10 you're going to have to answer that question
11 about dress codes regardless of how you rule in
12 either my case or in Ms. Stephens' case
13 because --

14 JUSTICE ALITO: Can I ask --

15 JUSTICE GINSBURG: Would you say the
16 test is -- is the person injured? Yes, it's a
17 differential based on gender, but most people
18 are not injured by having separate bathrooms.
19 In fact, they -- most people would prefer it.

20 So are you saying we have to wait for
21 the testing case for the person who might be
22 injured by not being allowed to use the bathroom
23 of the other sex?

24 MS. KARLAN: I think it highly
25 unlikely you're going to see cases like that.

1 The bathroom issue has been around since the
2 beginning of Title VII. Title VII has a special
3 provision in 703(a)(ii) that says, when you
4 segregate people, the question is whether that
5 segregation denies them employment
6 opportunities.

7 And it is hard to see, quite honestly,
8 how requiring men to use a men's room and women
9 to use a women's room denies them employment
10 opportunities.

11 JUSTICE ALITO: May I ask --

12 CHIEF JUSTICE ROBERTS: Are these --
13 Justice Alito.

14 JUSTICE ALITO: May I ask you to
15 respond to what some people will say about this
16 Court if we rule in your favor?

17 And what they will say is that whether
18 Title VII should prohibit discrimination on the
19 basis of sexual orientation is a big policy
20 issue, and it is a different policy issue from
21 the one that Congress thought it was addressing
22 in 1964.

23 And Congress has been asked repeatedly
24 in the years since 1964 to address this
25 question. The Equality Act is before Congress

1 right now. Congress has declined or failed to
2 act on these requests. And if the Court takes
3 this up and interprets this 1964 statute to
4 prohibit discrimination based on sexual
5 orientation, we will be acting exactly like a
6 legislature.

7 We might as well just take the
8 Equality Act and issue that as our opinion and
9 say, as Judge Posner said, that the courts need
10 to intervene on questions like this when the
11 legislative branch simply will not do so.

12 What would we -- how would we respond
13 to that question?

14 MS. KARLAN: Well, the fact that a
15 loose cannon like Judge Posner says, "do
16 whatever you feel like" is not what we're asking
17 for. We're saying, if you read the words
18 "because of sex" and you ask, in 1964, what did
19 those words mean? They meant treating men
20 differently from women.

21 So if in 1964 it would be
22 discrimination to fire a woman who wanted to --
23 you know, a woman who enjoyed sewing, and there
24 is a famous case, it's the foundational case on
25 sexual orientation where they fired a man who

1 said --

2 JUSTICE ALITO: We will --

3 MS. KARLAN: -- his body was --

4 JUSTICE ALITO: We would not be
5 deciding a major policy question that was not in
6 Congress's mind in 1964, and then Congress has
7 repeatedly failed to address in the years since
8 then?

9 MS. KARLAN: No more than what you did
10 in Oncale. No more than what you did in
11 PriceWaterhouse. No more than what you did in
12 --

13 JUSTICE BREYER: All right.

14 MS. KARLAN: Newport News.

15 JUSTICE BREYER: Is there -- is there
16 -- in my mind, there are three basic parts to
17 this case on the other side, to language.
18 You've dealt with that.

19 The parade of horrors, you have
20 dealt with that. And the third one is the one
21 that Alito is bringing up in one form, as it
22 comes out of the -- out of the briefs, as I read
23 it in your opponent's brief.

24 I would put it in these terms.

25 Imagine a statute that says policemen, dah, dah,

1 dah, must pay damages. Passed a long time ago.

2 That doesn't apply to German policemen.

3 MS. KARLAN: Doesn't apply to what

4 kind of --

5 JUSTICE BREYER: To German policemen.

6 The meaning is the same. German policemen are

7 policemen. But the statute doesn't apply to

8 them.

9 How do we know? Well, we know through

10 a lot of history, dah, dah, dah. Okay? Now,

11 that's the -- that's the box in which I put the

12 argument that Justice Alito made. It's a

13 serious legal argument, and the argument is that

14 at the time Congress wouldn't have dreamt of

15 this. And, therefore, the words, though they

16 apply, they meant to exclude the gays and

17 transgender. Now, what I need to hear is a

18 clear answer to that question.

19 MS. KARLAN: I think the way to think

20 about this is to ask about the specific behavior

21 that's at issue, which is a man dates a man, and

22 then ask: How does that fit within the

23 language? And the best example I can give --

24 JUSTICE BREYER: It fits.

25 MS. KARLAN: No, I'm --

1 JUSTICE BREYER: I give you it fits.

2 MS. KARLAN: I'm -- I'm about to
3 explain why --

4 JUSTICE BREYER: Yeah.

5 MS. KARLAN: -- it fits. Which is the
6 idea was that people should not be denied jobs
7 that they're qualified to do, award-winning
8 advocates for child services like Gerald Bostock
9 should not be denied a job, because they are a
10 man who does something that if they were a
11 woman, would cause no problems at all.

12 So just to give an example from the
13 first sex discrimination case this Court had,
14 which was the Phillips against Martin Marietta
15 case, a woman who has children at home should
16 not be denied a job that a man who has children
17 at home.

18 Now, all you have to do is say those
19 words apply also if it is a woman who has a wife
20 at home --

21 CHIEF JUSTICE ROBERTS: Counsel, I --

22 MS. KARLAN: -- rather than children.

23 CHIEF JUSTICE ROBERTS: Several, I
24 think about 23, states have been passing laws to
25 address these -- these issues. And I don't know

1 how many of them, but I think it's a big part of
2 them, when they do extend the coverage against
3 discrimination on the basis of sex to sexual
4 orientation, transgender, they also include an
5 exemption for religious organizations.

6 Now, if we're going to be extending
7 the -- the understanding of what sex
8 encompasses, and I know your argument --

9 MS. KARLAN: Yeah.

10 CHIEF JUSTICE ROBERTS: -- that that's
11 not doing that, how do we address that other
12 concern, that at least, I think almost every
13 state legislature that has extended it has felt
14 compelled to address?

15 MS. KARLAN: Well, I -- I -- I would
16 say three things about that. The first is this
17 Court has already created an exemption for
18 sincere religious belief for a large category of
19 employers through the ministerial exception.

20 The second is that Congress balanced
21 these issues and has rebalanced them several
22 times in the co-religionist exception.

23 The third thing I would say is to
24 understand this in context, which is 85 percent
25 of American employers are not covered by Title

1 VII at all. So as to those employers, if they
2 have religious objections to hiring someone who
3 is gay, they're free to continue doing that.

4 And the fourth is to make it very
5 clear that the question is not whether people
6 have religious objections to homosexuality; it's
7 whether they have religious objections to hiring
8 someone who is gay or lesbian. And there are
9 many employers whose own religious beliefs would
10 tell them this would be immoral for them, who
11 have no problem hiring gays and lesbians who are
12 qualified to do a job.

13 If I could just ask the Court to do
14 one thing in thinking back to 1964, it is to
15 look at the two foundational opinions on which
16 everybody has played a game of telephone ever
17 since.

18 It's like your opinion last term in
19 *Argus Media*, where you ask where did the idea
20 that homosexuality wasn't covered come from? It
21 came from first a case where a gay black man
22 said he was being treated worse than gay white
23 men. It wasn't even a sexual discrimination
24 case. The second one came from a straight man
25 who was fired because -- who was denied a job

1 because he said his hobby was sewing. And the
2 employer said: That's an effeminate hobby, so I
3 bet you're gay.

4 If you look at the reasoning in those
5 cases, you will realize that it was not until
6 Hively that any court did a careful reading of
7 the statute using contemporaneous methods of
8 textual interpretation --

9 JUSTICE ALITO: But you gave your --

10 MS. KARLAN: -- and since then a
11 majority of justices -- I mean a majority of
12 judges have held that sexual orientation is a
13 subset of sex discrimination.

14 JUSTICE ALITO: Justice Breyer
15 characterized what I said earlier as conceding
16 that sexual orientation discrimination fits the
17 words of Title VII, but that we should take a
18 broader view of what Congress had in mind.

19 But that was not -- that was not the
20 premise of my argument. And your core -- the --
21 the parties have in their briefs, have all of
22 these comparisons, and they will make your head
23 spin if you -- if you try to figure them all
24 out.

25 But let me just go to your core one,

1 which you began with today. A man is attracted
2 to other men. He's fired, let's say. A woman
3 is attracted to men; she is not fired. You say
4 that's all you need to look at. That's
5 discrimination on the basis of sex, right?

6 MS. KARLAN: Yes.

7 JUSTICE ALITO: Okay. That's not --
8 that's not correct, because there are two
9 possible explanations for what happened there.
10 It could be based on sexual orientation, or it
11 could just be based on the fact that the
12 employer wants -- does not want to hire men.

13 Now, if you add in two other cases,
14 that a man who is attracted to women, not fired,
15 a woman who's attracted to women, is fired, then
16 you have a much better idea the basis for the
17 discrimination. And it's sexual orientation.
18 It's not sex.

19 MS. KARLAN: But in a case like the
20 two cases before this Court where the employer
21 had hired these men and they were already there,
22 the supposition you made in your question
23 doesn't apply, which is we know this is an
24 employer who's willing to hire men.

25 Indeed, the employer in Gerald -- I

1 mean the employer in Don Zarda's case had only
2 men as skydiving instructors. So when he fires
3 a man who wants to dates a woman and he -- I
4 mean a man who wants to date a man and he does
5 not fire a woman who wants to date a man --

6 JUSTICE ALITO: The -- the point is
7 that discrimination on the basis of sex in the
8 sense that Congress understood it in 1964 is a
9 different concept from discrimination on the
10 basis of sexual orientation.

11 MS. KARLAN: Well, in -- in 19 --

12 JUSTICE ALITO: And that's what you're
13 fighting. You're trying to change the meaning
14 of what Congress understood sex to mean and what
15 everybody understood --

16 MS. KARLAN: I -- I'm --

17 JUSTICE ALITO: -- sex to mean in
18 1964.

19 MS. KARLAN: -- not trying to change
20 that at all. I'm simply saying that if a man
21 and a woman both wanted to sew and you fire the
22 man who loves sewing and you don't fire the
23 woman who loves sewing, that's discrimination
24 pure and simple, sex discrimination. If you
25 fire a -- if you fire the man who -- thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Counsel.

4 (Laughter.)

5 CHIEF JUSTICE ROBERTS: Sorry.

6 ORAL ARGUMENT OF JEFFREY M. HARRIS
7 ON BEHALF OF THE RESPONDENT IN 17-1618
8 AND THE PETITIONERS IN 17-1623

9 MR. HARRIS: Mr. Chief Justice, and
10 may it please the Court:

11 (Laughter.)

12 CHIEF JUSTICE ROBERTS: Touché.

13 MR. HARRIS: In -- in 1982, Wisconsin
14 became the first state in the country to pass a
15 law banning discrimination because of sexual
16 orientation in private employment. The
17 proponents of that law celebrated its passage as
18 a landmark achievement for gay rights.

19 According to the plaintiffs here,
20 however, Wisconsin's landmark law actually had
21 little, if any, practical impact because
22 Congress had already banned sexual orientation
23 discrimination nationwide, 18 years earlier in
24 the Civil Rights Act of 1964.

25 To quote Judge Lynch's dissent below,

1 Congress did no such thing. Sex and sexual
2 orientation are independent and distinct
3 characteristics, and sexual orientation
4 discrimination by itself does not constitute
5 discrimination because of sex under Title VII.

6 That's just as true today as it was in
7 1964.

8 The core error in the Second Circuit's
9 holding is actually quite similar to the error
10 that led this Court to reverse in *Oncale*. In
11 *Oncale*, the Fifth Circuit had held that same-sex
12 harassment claims were categorically excluded
13 from Title VII. This Court correctly reversed
14 and held that such claims may well be
15 cognizable, as long as the plaintiff meets all
16 requirements of the statute, especially what
17 this Court called the "critical inquiry into
18 whether members of one sex were being treated
19 worse than members of the other sex."

20 This case is just the mirror image of
21 *Oncale*. Whereas the lower courts in *Oncale*
22 adopted a categorical exclusion, the Second
23 Circuit adopted a rule of per se inclusion in
24 which plaintiffs alleging sexual orientation
25 discrimination receive a free pass around the

1 critical inquiry into whether men and women are
2 being treated differently because of their sex.

3 In short, the Second Circuit simply
4 changed the ultimate question from sex to sexual
5 orientation. But because both men and women may
6 have same sex attractions or partners, a
7 stand-alone allegation of sexual orientation
8 discrimination cannot, without more, show
9 discriminatory treatment --

10 JUSTICE SOTOMAYOR: Excuse me. Can I
11 understand your argument in context? Let's
12 answer the question. Employer looks at a man
13 who applies and says: One of my hobbies is
14 sewing. And the employer says: That's an
15 effeminate hobby. You may be gay. You're --
16 I'm not hiring you.

17 So is that a mixed motive case? And
18 -- and are we going to be trying somehow to
19 parse that there's some sort of substantial
20 legal difference between the belief that you're
21 too effeminate or that a lesbian is too macho,
22 whichever, from your attracted to the other sex?
23 How do you tease that out?

24 MR. HARRIS: Justice Sotomayor, I
25 don't disagree that there will be tough cases at

1 the margins, but the problem with what the
2 Second Circuit did is they glossed over those
3 hard questions and said: We're just going to
4 adopt --

5 JUSTICE SOTOMAYOR: Well, aren't you
6 --

7 MR. HARRIS -- a per se rule that if
8 you --

9 JUSTICE SOTOMAYOR: -- aren't you
10 glossing over the BFOQ, meaning, what it seems
11 like you're confusing is three concepts, Title
12 VII has causation and injury. Not hiring, not
13 firing, that's the injury.

14 Now the question is what caused that?
15 Being too effeminate, that's a sexual trait;
16 being attracted to, if you're a man, to another
17 man, that's a sexual trait. It is caused by
18 those two things.

19 Aren't then we moving to the third
20 question, which is, is there a reason
21 independent of your religious belief or your
22 innate hatred and invidious discrimination for
23 why you're treating this person differently?
24 And if there is, you have a BFOQ. You don't
25 have to hire them. You can fire them.

1 But if there isn't, they're doing
2 their job, and they're not bothering you, and
3 they are not bringing their boyfriend or
4 girlfriend, if it's the opposite sex, to a
5 function to your private home because you don't
6 want them there or whatever else is offensive to
7 you, they're just working.

8 So I don't understand why those are
9 hard cases.

10 MR. HARRIS: Well --

11 JUSTICE SOTOMAYOR: Any harder than
12 what the law applies for race discrimination,
13 for religious discrimination, for any of the
14 other forms, national origin discrimination.

15 MR. HARRIS: So, Your Honor, as this
16 Court has emphasized in cases such as Johnson
17 Controls, the BFOQ exception has been
18 interpreted extremely narrowly, and so I think
19 it -- it -- it is important as this Court
20 emphasized in Oncale, the Court emphasized
21 several times the need to ensure strict
22 compliance with all requirements of the statute,
23 including the discrimination element, because
24 once you find discrimination, it gets very hard
25 to make out the BFOQ.

1 JUSTICE GINSBURG: Would Oncale --

2 MR. HARRIS: So you don't --

3 JUSTICE GINSBURG: Would Oncale have
4 come out differently if the employer said, I
5 don't hire women to work on platforms, the only
6 people I hire are men?

7 MR. HARRIS: Well, that -- that
8 obviously would have been discriminatory against
9 the women seeking --

10 JUSTICE GINSBURG: But it's not --

11 MR. HARRIS: -- the job.

12 JUSTICE GINSBURG: -- the woman who is
13 suing --

14 MR. HARRIS: Right.

15 JUSTICE GINSBURG: -- it's the male
16 who is being harassed by other men. And the
17 employer's defense is, you can't compare what
18 I'm doing to someone who discriminates on the
19 basis of sex between men and women because I
20 don't hire women at all.

21 MR. HARRIS: So it's, of course --
22 it's -- it's not a complete defense or even a
23 defense to say, I treat it -- in cases like
24 Martin -- like Martin Marietta, it was not a
25 defense for that employer to say, because I

1 hired other women, it excuses this.

2 So the answer to your question is that
3 would not be a defense. But --

4 JUSTICE GINSBURG: That -- that was --
5 Martin Marietta was different because it was the
6 plus. The plus applied to women and didn't
7 apply to men. So you had that distinction.

8 Well, take PriceWaterhouse. Suppose
9 the employer said, I don't want any men who are
10 not sufficiently macho, and I don't want any
11 women who are not sufficiently feminine.

12 If they -- the -- PriceWaterhouse said
13 we will treat a man who isn't sufficiently macho
14 the same way we treated Ann Hopkins, there would
15 be, as I understand your argument, no sex
16 discrimination.

17 MR. HARRIS: I -- I disagree with
18 that, Justice Ginsburg. The way -- I think the
19 best way to think of PriceWaterhouse is, when an
20 employer has certain traits or characteristics
21 that it values in promotion and hiring and
22 discharge decisions, there can't be a list of
23 criteria for men and a list of criteria for
24 women.

25 So the Solicitor General offered the

1 hypothetical that Your Honor said. And -- and
2 in that situation, there would be two sets of
3 criteria. And so maybe both a man who doesn't
4 meet the women's criteria and a woman who
5 doesn't meet the men's criteria would have a
6 claim there.

7 But -- but it wouldn't be -- it would
8 not excuse it just to say that there are
9 different criteria for each set.

10 JUSTICE GINSBURG: Well --

11 JUSTICE BREYER: Suppose -- suppose a
12 Catholic, Jew, want to get married. Employer
13 fires the Catholic. Why? He is not against
14 Catholics. He's against intermarriage. And
15 obviously I can use the same example with race,
16 which is famous.

17 I take it from your argument that
18 there would be no claim?

19 MR. HARRIS: There would, in fact, be
20 a claim, in both --

21 JUSTICE BREYER: Why?

22 MR. HARRIS: -- situations.

23 JUSTICE BREYER: Why? Why? All
24 right.

25 If there is a claim there, why isn't

1 there here?

2 MR. HARRIS: So in the race context,
3 the only difference between --

4 JUSTICE BREYER: I didn't say race. I
5 said religion.

6 MR. HARRIS: Right. In -- in the --
7 in the context of religion, which first of all
8 religion is defined as the only one other than
9 pregnancy which has an expansive definition.

10 JUSTICE BREYER: No --

11 MR. HARRIS: Yes, it would be
12 religious discrimination because between a
13 couple that is Catholic and Jewish and two
14 Catholics, the only difference between those
15 couples is their religion.

16 JUSTICE BREYER: And the only
17 difference between the two couples here is that
18 one is a man rather than the woman.

19 MR. HARRIS: Except that it also
20 introduces an independent characteristic, which
21 can be completely --

22 JUSTICE BREYER: All right.

23 MR. HARRIS: -- neutral to men --

24 JUSTICE BREYER: So does it there --
25 why I'm not against Catholics, I am not against

1 Jews, I am against inter-marriage?

2 MR. HARRIS: I -- if -- if that person
3 or actor exists, I think it's foreign to our --

4 JUSTICE BREYER: Oh, it exists.

5 MR. HARRIS: -- case law.

6 JUSTICE BREYER: I promise you. There
7 are many people, at least in the religious
8 context, who are against inter-marriage and are
9 not against Catholics or Jews. That's not an
10 unrealistic example.

11 And all I find in that example is an
12 identical case to this one.

13 MR. HARRIS: And I -- I think that --
14 I do think that most of the -- most people who
15 would oppose any sort of interreligious marriage
16 would do so for religious reasons. And I would
17 also note in the --

18 JUSTICE KAGAN: Mr. Harris, I think --
19 I think what all of these hypotheticals are
20 about is that in many of our cases, what you
21 find is what you said, what did you say,
22 independent characteristics? They're all over
23 our cases.

24 If you take Manhart, which is the
25 Seminole case, Manhart was all about an

1 independent characteristic. It was about life
2 expectancy. But we didn't say, oh, we're going
3 into some different sort of analysis where we
4 don't just say would the same thing have
5 happened to you if you were a man or would the
6 same thing have happened to you if you were a
7 woman, because we had an independent
8 characteristic, which was life expectancy.

9 And -- and so the same thing here. So
10 all of these hypotheticals are really about the
11 same thing, which is that Manhart gave us a very
12 simple test, and Manhart said, what you do when
13 you look to see whether there is discrimination
14 under Title VII is, you say, would the same
15 thing have happened to you if you were of a
16 different sex?

17 And, Ms. Karlan made all the -- you
18 know, went through all the ways in which,
19 obviously, the -- the same thing would not have
20 happened to you if you were a different sex, you
21 being her client.

22 So, I mean, that's the question.
23 There are independent characteristics in all
24 these cases. We have insisted on this extremely
25 simple test. If you apply that test, I guess it

1 seems to come out against you.

2 MR. HARRIS: A couple things. First,
3 let me address Manhart and then address --
4 address the test more generally.

5 So in Manhart, this Court noted that
6 the -- the policy wasn't just about longevity.
7 That -- that employer made no attempt to do any
8 sort of bona fide underwriting or life
9 expectancy estimates.

10 It simply charged the women more. So
11 even a woman and a man, if they each had a
12 75-year life expectancy, they would be charged
13 different rates, even though they were totally,
14 similarly situated with respect to that.

15 JUSTICE KAGAN: Yes, but Manhart was
16 very clear that women in the aggregate were
17 probably going to be fine under this policy,
18 because women in the aggregate do have a higher
19 life expectancy. I mean, I think actually
20 Manhart makes clear why another aspect of your
21 argument is -- is wrong, because you say, well,
22 we have to look at these big classes.

23 Well, there was nothing wrong in
24 Manhart when you looked at big classes. What
25 became wrong in Manhart was when you looked at

1 individuals. And when you look at individuals,
2 which Manhart insisted one do, one should do,
3 and when you apply the test that Manhart
4 insisted you apply, would this woman have been
5 treated differently if she were a man? The
6 answer was yes.

7 And, similarly, I guess I'm just going
8 to ask you again, if you applied that test,
9 don't you lose? And if you do lose, why should
10 we not apply that test?

11 MR. HARRIS: Here's the problem with
12 the test. In Manhart, in Newport News, in
13 Martin Marietta, the comparator test makes
14 perfect sense because you know exactly what
15 you're testing for, so the comparator helps you
16 draw inferences from the evidence.

17 The problem here is, unless the
18 plaintiffs can point to something outside the
19 comparator to tell us why we need to hold sexual
20 orientation -- to -- to tell us why that is
21 irrelevant, they're -- they're just assuming
22 their conclusion.

23 So their comparator would say, you
24 would ask if a gay man has suffered sex
25 discrimination by comparing him to a

1 heterosexual woman, which that version of the
2 comparator can't isolate if it's the sex or the
3 sexual orientation.

4 And so I do think, unless they can
5 point to something outside the comparator, to
6 justify putting sexual orientation off limits --

7 JUSTICE GORSUCH: Well --

8 MR. HARRIS: -- the comparator doesn't
9 -- doesn't answer the ultimate question.

10 JUSTICE GORSUCH: Well, it certainly
11 may not answer -- isolate the sole or proximate
12 cause, but I -- I think the -- the argument on
13 the other side is the language of the statute
14 has a but-for causation standard, a more
15 generous causation standard.

16 So perhaps there are two causal
17 factors at work here. But isn't one of them sex
18 in the narrow sense of -- of -- of biological
19 gender? What's -- what's your response to that?

20 MR. HARRIS: Yeah. So in the -- what
21 I'm arguing is simply that sexual orientation
22 standing alone is not, without more, sex
23 discrimination. And so the -- I'm sorry, remind
24 me of the question one more time?

25 JUSTICE GORSUCH: Sure. So the --

1 MR. HARRIS: Right.

2 JUSTICE GORSUCH: Your response to
3 Justice Kagan was, I need to focus on sexual
4 orientation because that's the sole or primary
5 causal factor here for the firing.

6 And I think the response from the
7 other side is: But the statute has a more
8 generous causal --

9 MR. HARRIS: Okay.

10 JUSTICE GORSUCH: -- formulation, a
11 but-for causal formulation, so perhaps you're
12 right that, at some level, sexual orientation is
13 surely in -- in play here. But isn't sex also
14 in play here because of the change of the first
15 variable?

16 MR. HARRIS: Right. So I think --

17 JUSTICE GORSUCH: And isn't that
18 enough? It -- you know, the statute talks about
19 a material causal factor or some formulation
20 like that, not the sole cause, not the proximate
21 cause, but a cause.

22 And one -- one would -- in what -- in
23 what linguistic formulation would one -- would
24 one say that sex, biological gender, has nothing
25 to do with what happened in this case?

1 MR. HARRIS: Yes, Your Honor. So what
2 you're referring to, I believe, is the
3 motivating factor language. And so, in what I
4 just referred to as the sort of benchmark
5 scenario, sex would not be a motivating factor
6 there.

7 If you look at Mr. Bostock's
8 complaint, for example, and you strip out any
9 mention of his sex as being a man, again, we --
10 we dispute the allegations, of course, but it
11 would still make perfect sense. But if you
12 stripped out any reference to his sexual
13 orientation, it would make little, if any,
14 sense.

15 And so in Price Waterhouse, this Court
16 helped give guidance about how to do the
17 motivating factor analysis and said imagine you
18 gave the employer truth serum and said what were
19 your true reasons for doing this? Would one of
20 them be the characteristic? And what I would
21 call that -- that benchmark scenario --

22 JUSTICE GORSUCH: All right, let's --

23 MR. HARRIS: -- sex would not be --

24 JUSTICE GORSUCH: Let's do truth
25 serum, okay? Wouldn't -- wouldn't the employer

1 maybe say it's because this was -- this person
2 was a man who liked other men? And isn't that
3 first part sex?

4 MR. HARRIS: Your Honor, I think in
5 common parlance, we would call that a same-sex
6 attraction. And I want to be clear, if there is
7 some reason to think that employer -- and some
8 of the amicus briefs say that much
9 discrimination against gay and lesbian people is
10 -- is based on sort of animus against gay men or
11 lesbian women.

12 If there's some reason to believe that
13 in that scenario, then that may well be a
14 motivating factor, but when you simply have an
15 employee saying I was fired because of my sexual
16 orientation, that alone does not show that --
17 what -- what this Court called in Oncale the
18 critical -- critical issue of distinguishing
19 between men and women.

20 JUSTICE KAVANAUGH: Are you drawing a
21 distinction between the literal meaning of
22 "because of sex" and the ordinary meaning of
23 "because of sex"? And, if so, how are we
24 supposed to think about ordinary meaning in this
25 case?

1 MR. HARRIS: I don't see a difference
2 between the two as far as -- and the last point,
3 running out of time, I think to go back to some
4 of the questions about bathrooms and fitness
5 standards, I want to be clear, under the
6 Plaintiff's simple but-for test, if you truly
7 simply apply the Manhart test or -- in the way
8 they want to do it, I don't see any way that
9 single-sex bathrooms or showering facilities --

10 JUSTICE GINSBURG: You have to have
11 someone who's injured. You have to have someone
12 who's injured. And the response to the
13 bathrooms is who is the complaining plaintiff?
14 And for most people, they would not be
15 complaining plaintiff. They would not be
16 eligible because they're not injured by the
17 separate bathrooms. In fact, they like it.

18 MR. HARRIS: Yes, Your Honor,
19 although, of course, if someone, for example, is
20 fired, imagine a factory with hazardous
21 materials where people shower after work and to
22 -- to clean up, and a -- a man used the women's
23 bathroom and is fired. That person would
24 certainly be injured. And I think, under my
25 friend's test, they would say just change the

1 sex and that person wouldn't have been fired.

2 But here's the problem: That's not a
3 similarly situated person. The proper analysis
4 would say that a neutral policy, such as use the
5 showering facility that corresponds to your
6 biological sex, the man who uses the women's
7 shower, the -- the comparator is not a woman who
8 uses the woman's shower. It's a woman who uses
9 the men's shower, because otherwise you're not
10 -- otherwise you're -- you're loading the dice
11 or you're not looking at similarly situated
12 people.

13 And the last thing I'd like to get
14 into is this Court, in Espinoza, Footnote 2 -- I
15 think there was some discussion of the states
16 early on. In Espinoza, in interpreting national
17 origin discrimination, this Court said the state
18 practice interpreting parallel laws is highly
19 instructive. And so I -- I think the fact that
20 22 or 23 states have done this by legislation
21 and zero have done it by judicial
22 interpretation, just shows that this isn't belt
23 and suspenders. It's not redundancy, that sex
24 and sexual orientation both in 1964 and today
25 are different concepts that mean different

1 things, and common users of language both today
2 and in 1964 would have recognized that.

3 JUSTICE SOTOMAYOR: Can they ever be?

4 MR. HARRIS: I'm sorry?

5 JUSTICE SOTOMAYOR: Can they ever be?

6 Justice -- justice -- Judge Lynch below said
7 that homophobic stereotypes are unrelated to
8 sexual orientation. The very first case before
9 us shows that that's just not true, that
10 homosexual orientation is highly correlated to
11 people's stereotypes.

12 If you're too effeminate a man, you're
13 a homosexual. If you're too macho a woman,
14 you're a lesbian. Happens all the time. So I
15 find it somewhat difficult to unwind the two.
16 If not difficult, nearly impossible.

17 MR. HARRIS: It often is, Your Honor,
18 and it's a sad reality that homophobic slurs are
19 often directed at heterosexual or homosexual
20 people to -- to criticize --

21 JUSTICE SOTOMAYOR: And that's okay
22 under your theory?

23 MR. HARRIS: It is absolutely not,
24 Your Honor, if that person can show
25 discrimination because of sex, but what -- what

1 the courts can't do is what the Second Circuit
2 did and the Seventh Circuit did in Hively.
3 Footnote 11 of the Zarda opinion is very candid
4 about this where it talks about operationalizing
5 its holding. The Second Circuit is just going
6 to change the jury instructions to tell juries
7 that if they find sexual orientation
8 discrimination, they've now found sex
9 discrimination.

10 So, Justice Sotomayor, I don't
11 disagree that there will be difficult cases at
12 the margins, but the answer is not to change the
13 ultimate inquiry and replace it with something
14 that Congress never could have intended.

15 JUSTICE ALITO: Well, if you have a
16 minute, let me ask you this: Let's imagine that
17 the decisionmaker in a particular case is behind
18 the veil of ignorance and the subordinate who
19 has reviewed the candidates for a position says:
20 I'm going to tell you two things about this
21 candidate. This is the very best candidate for
22 the job, and this candidate is attracted to
23 members of the same sex.

24 And the employer says: Okay, I'm
25 going -- I'm not going to hire this person for

1 that reason.

2 Is that discrimination on the basis of
3 sex, where the employer doesn't even know the
4 sex of the individual involved?

5 MR. HARRIS: May I?

6 CHIEF JUSTICE ROBERTS: Please.

7 MR. HARRIS: That not be
8 discrimination on the basis of sex. And I think
9 that's exactly right. If you get a resume that
10 -- that has a name that could be male or female,
11 and there's something on there suggesting that
12 the person is gay and they're not hired for that
13 reason, that would be sexual orientation
14 discrimination that has absolutely nothing
15 whatsoever to do with sex discrimination.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 General Francisco.

19 ORAL ARGUMENT OF GEN. NOEL J. FRANCISCO
20 FOR THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING
21 AFFIRMANCE IN 17-1618 AND REVERSAL IN 17-1623

22 GENERAL FRANCISCO: Mr. Chief Justice,
23 and may it please the Court:

24 The issue is not whether Congress can
25 or should prohibit employment discrimination

1 because of sexual orientation. The issue,
2 rather, is whether it did so when it prohibited
3 discrimination because of sex.

4 It did not for two reasons. First,
5 sex means whether you're male or female, not
6 whether you're gay or straight. So if you treat
7 all gay and men -- gay men and women exactly the
8 same regardless of their sex, you're not
9 discriminating against them because of their
10 sex.

11 Second, any doubt is removed by the
12 history of Title VII and related statutes since,
13 in the face of unanimous interpretation by the
14 courts and the executive branch that persisted
15 for decades, Congress has repeatedly extended
16 other statutes to specifically cover sexual
17 orientation, yet has refused to do so with
18 respect to Title VII.

19 The employee's position would nullify
20 that conscious choice.

21 And Justice Gorsuch, if I could first
22 address your question about our -- my friend on
23 the other side's argument about the literal
24 meaning of the statute, well, there are
25 essentially two responses to that argument. And

1 they're related.

2 The first is that under that
3 interpretation, you actually couldn't fire a man
4 for using the woman's restroom because in some
5 metaphysical sense, that man's sex is a but-for
6 cause for his firing. The reason --

7 JUSTICE GINSBURG: But he's not
8 injured. He's not injured.

9 GENERAL FRANCISCO: Well, he's fired,
10 Your Honor, in my hypothetical. And the reason
11 why that is permitted --

12 JUSTICE GORSUCH: I think counsel
13 acknowledged all of that.

14 GENERAL FRANCISCO: Yeah. And the
15 reason why that's permitted, though, to do that,
16 is because you're treating -- and this is my
17 second point -- you're treating him the -- the
18 same as a similarly situated woman; that is, a
19 woman who uses the men's room.

20 And that's always the critical
21 analysis when you're trying to determine if
22 somebody is being --

23 JUSTICE GINSBURG: Is it --

24 GENERAL FRANCISCO: -- discriminated
25 against because --

1 JUSTICE GINSBURG: Is it --

2 GENERAL FRANCISCO: -- of their sex.

3 JUSTICE GINSBURG: Is it -- let me
4 give you a not hypothetical case. An airline
5 hires only women as cabin attendants, but it
6 fires them if they marry. The airline's defense
7 is whatever we're doing, it's not sex
8 discrimination against women because we don't
9 hire any men at all, married or unmarried.

10 That case, I take it from your brief,
11 you would say there's no sex -- no violation of
12 Title VII?

13 GENERAL FRANCISCO: Well -- well, no,
14 Your Honor, because I think the problem is that
15 the prohibition on hiring any male flight
16 attendants would in and of itself violate --

17 JUSTICE GINSBURG: That -- but --

18 GENERAL FRANCISCO: -- Title VII.

19 JUSTICE GINSBURG: But the male is not
20 complaining. The complainant is the woman who
21 was fired because she married.

22 GENERAL FRANCISCO: Okay. So then --

23 JUSTICE GINSBURG: The male
24 complainant might have a very good case, but my
25 case --

1 GENERAL FRANCISCO: Right, and my --

2 JUSTICE GINSBURG: -- is the woman.

3 GENERAL FRANCISCO: And my problem
4 with the hypothetical is that the way it is
5 constructed, there is, you know, presumably no
6 men that have the job in the first place. Now,
7 if you say that in theory men should be able to
8 have the job, then the question would be would
9 you also have fired men who were married?

10 And if you only fired women who were
11 married but not men who were married, that would
12 plainly be a violation of Title VII because
13 you're treating similarly situated people
14 differently. But to finish --

15 JUSTICE SOTOMAYOR: General, that --
16 that's an --

17 GENERAL FRANCISCO: -- my answer to
18 Justice --

19 JUSTICE SOTOMAYOR: -- an impossible
20 idea to -- to put into practice by taking out
21 the sex.

22 JUSTICE GINSBURG: May I just continue
23 with it?

24 GENERAL FRANCISCO: Yes, Your Honor.

25 JUSTICE GINSBURG: The hypothetical is

1 not a hypothetical. Its Sprogis against United
2 Airlines. And it was given, and not challenged,
3 that they didn't hire men as cabin attendants.

4 GENERAL FRANCISCO: Right.

5 JUSTICE GINSBURG: But they fired this
6 woman because she married, she didn't look like
7 Cheryl "Fly Me" once she married, she wouldn't
8 be attracted to the male passengers.

9 The court of appeals said, Title VII
10 was meant to strike out the entire spectrum of
11 sex stereotyping, so if this woman was fired
12 because she wasn't -- she would no longer be so
13 attractive to men if she is married, that's sex
14 discrimination.

15 And we don't have to have a -- a -- a
16 male involved. This is a woman who was treated
17 in a very stereotypical way. She is no longer
18 young and attractive when she married.

19 GENERAL FRANCISCO: Your Honor, I --
20 I -- I do think that the question is always, are
21 you treating similarly situated men and women
22 differently. There are times where issues of
23 proof are very difficult.

24 For example, in the PriceWaterhouse
25 case, Ann Hopkins was fired because she was

1 aggressive --

2 JUSTICE GINSBURG: But this was --

3 GENERAL FRANCISCO: -- because she was
4 rude to staff --

5 JUSTICE GINSBURG: -- this was an
6 actual case. This was an actual case and it was
7 given that no males are hiring and no male is
8 complaining.

9 GENERAL FRANCISCO: But, Your Honor,
10 the way that actual case was resolved was
11 because the woman had not brought her claim in a
12 timely fashion on the sex discrimination piece.
13 And so the way this Court resolved that decision
14 was it said, all right --

15 JUSTICE GINSBURG: The -- no. This
16 was --

17 GENERAL FRANCISCO: -- she is being
18 treated the same --

19 JUSTICE GINSBURG: -- never came to
20 this case, never came to this Court.

21 GENERAL FRANCISCO: So I guess I'm
22 thinking of the wrong case.

23 JUSTICE GINSBURG: Sprogis against
24 United Airlines, Seventh Circuit.

25 JUSTICE KAGAN: General, could I go

1 back to your opening statement and particularly
2 to the second part of it?

3 You talked about the history of -- of
4 Title VII and some of the subsequent legislative
5 history, and I guess what strikes me, and I was
6 struck in reading your briefs too, is that the
7 arguments you're making, I would say, are not
8 ones we typically would accept.

9 For many years, the lodestar of this
10 Court's statutory interpretation has been the
11 text of a statute, not the legislative history,
12 and certainly not the subsequent legislative
13 history.

14 And the text of the statute appears to
15 be pretty firmly in Ms. Karlan's corner. Did
16 you discriminate against somebody, against her
17 client, because of sex? Yes, you did. Because
18 you fired the person because this was a man who
19 loved other men.

20 And part of that -- and it only has to
21 be part, we've made very clear there's no search
22 for sole cause in Title VII -- part of that is
23 you fired the person because he was a man. If
24 he were a woman, he wouldn't have been fired.

25 This is the usual kind of way in which

1 we interpret statutes now. We look to laws. We
2 don't look to predictions. We don't look to
3 desires. We don't look to wishes. We look to
4 laws.

5 Why doesn't that mean your argument
6 fail?

7 GENERAL FRANCISCO: Because, Your
8 Honor, I think that what our brief attempts to
9 do, at least, is make a straightforward textual
10 argument. The law distinguishes between sex and
11 sexual orientation.

12 Those are two different traits. And
13 that's precisely why when Congress wants to
14 prohibit discrimination based on sexual
15 orientation, it doesn't define sex as including
16 sexual orientation. It lists it as a different
17 trait.

18 JUSTICE GORSUCH: What -- what is --

19 GENERAL FRANCISCO: And so under Title
20 --

21 JUSTICE GORSUCH: What is your
22 response to the two-comparator problem we've
23 been discussing and the fact that at least one
24 contributing cause appears to be sex?

25 GENERAL FRANCISCO: Well, Your Honor,

1 a couple of responses. First, I don't think
2 that one contributing cause is sex. I think
3 that as long as you're treating gay men and
4 women exactly the same regardless of their sex,
5 the contributing cause is sexual orientation,
6 not sex.

7 And, two, I think it reflects the fact
8 that sex and sexual orientation are different
9 traits. And if you do the analysis the way my
10 friends on the other side suggested, you've
11 completely eliminated the distinction between
12 two very different traits and you've -- and
13 you've essentially rendered -- you nullified
14 Congress's very careful decisions in numerous
15 other statutes to specifically protect sexual
16 orientation and gender identities, we'll --

17 JUSTICE SOTOMAYOR: Is there --

18 JUSTICE GINSBURG: Is there anything
19 --

20 GENERAL FRANCISCO: -- get to in the
21 next case.

22 JUSTICE GINSBURG: -- in this record
23 showing that the employers would not employ
24 lesbian women?

25 GENERAL FRANCISCO: You know, Your

1 Honor, in these cases, and this may have been a
2 better question for my colleague, but I think in
3 these cases, the employers have -- in the
4 cases -- the sexual orientation cases, the
5 employers have generally denied that they
6 discriminate based on --

7 JUSTICE GINSBURG: But all we know on
8 --

9 GENERAL FRANCISCO: -- their sexual
10 orientation.

11 JUSTICE GINSBURG: Did this go --
12 the -- the -- the allegation is that the person
13 was discharged when he announced that he was
14 gay. There's nothing in the record as far as I
15 can see that there was a policy on the
16 employer's part of discharging or not --

17 GENERAL FRANCISCO: Right.

18 JUSTICE GINSBURG: -- discharging
19 lesbian women.

20 GENERAL FRANCISCO: I think that's
21 right. I think basically the employer's
22 defenses here were, one, I didn't fire him
23 because he was gay, but, two, if you think I
24 did, Title VII doesn't prohibit discrimination
25 based on sexual orientation.

1 And if I could address lastly the
2 point that the Chief Justice and Justice Alito
3 were raising about so-called legislative
4 updating that Judge Posner suggested, here I
5 think that a judicial ruling would be
6 particularly pernicious because when Congress
7 seeks to expand the scope of Title VII's
8 liability provisions, it typically couples that
9 itself with an expansion of the religious
10 employers exemption to Title VII, precisely
11 because issues of sexual orientation like issues
12 of gender identity raise different issues from a
13 religious liberty perspective.

14 The employee's position here would
15 only do half of that work. It would expand the
16 scope of liability without giving any
17 consideration to those religious liberty
18 interests on the other side of the balance, and
19 that is precisely why this is the type of issue
20 that is better left to Congress than the courts.

21 Justice Gorsuch, I want to make sure
22 that I fully addressed your -- your textual
23 considerations, though, because I really do
24 think it boils down to the fact that sex and
25 sexual orientation are different traits.

1 And may I finish my answer?

2 CHIEF JUSTICE ROBERTS: Sure.

3 GENERAL FRANCISCO: Title VII
4 prohibits discrimination based on one of those
5 traits, as long as you treat men and women who
6 are similarly situated with respect to the other
7 trait exactly the same, you're not
8 "discriminating" under -- within the meaning of
9 Title VII.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 GENERAL FRANCISCO: Thank you.

13 CHIEF JUSTICE ROBERTS: Five minutes,
14 Ms. Karlan.

15 REBUTTAL ARGUMENT OF PAMELA S. KARLAN
16 ON BEHALF OF THE PETITIONER IN 17-1618 AND THE
17 RESPONDENTS IN 17-1623

18 MS. KARLAN: Thank you.

19 Let me start with the question that
20 Justice Ginsburg asked because I think it's
21 illustrative of contemporary sexual orientation
22 discrimination cases.

23 Virtually none of them involve an
24 employer, and neither of the cases before you
25 does, who claims to have an across-the-board

1 policy of firing both all gay men and all
2 lesbians.

3 What tends to happen, and this case is
4 illustrative of this, is a man who also doesn't
5 conform with some other gender-based stereotypes
6 and who is gay gets fired, which puts them in
7 exactly the position that Justice Sotomayor
8 mentioned, which is really devilishly hard to
9 figure out what's going on here.

10 The second point I just want to leave
11 the Court with is, the entire argument on the
12 other side depends on the idea that men who are
13 gay and women who are lesbians are being treated
14 the same. And that's just not so.

15 Because if you look at what actually
16 causes the problem, it's the man who says, I
17 married my partner, Bill. If any woman who
18 worked there had married Bill, he wouldn't --
19 she would not have been fired. And he is.

20 And you have to look, because the
21 textual language tells you to, at such
22 individual and not at the overall class.

23 JUSTICE SOTOMAYOR: Ms. Karlan, would
24 you address these -- General's statement at the
25 end? He -- he goes back to the comparator

1 should be a woman who -- a -- a man who likes a
2 man and a woman who likes a woman. You're
3 trying to get to that.

4 MS. KARLAN: Yes. I think he -- he is
5 varying two things there. One, he is varying
6 the sex of the employee and, second, he's
7 varying the sex of the person to whom the
8 employee is interested.

9 And if two things that --

10 JUSTICE SOTOMAYOR: So give us an
11 example from a case how you can't do that.

12 MS. KARLAN: I'm not sure -- of course
13 you can do it but you don't have to. Because
14 all you need to do is show that sex played a
15 role here.

16 And if the answer is if a man had --
17 if a woman had come in and said, I like to date
18 men, you wouldn't have fired her, and when a man
19 says, I like to date men, you did, that's enough
20 to show sex discrimination.

21 JUSTICE ALITO: But what if the
22 decisionmaker makes a decision based on sexual
23 orientation but does not know the biological sex
24 of the person involved?

25 MS. KARLAN: Well, there is no

1 reported case that does that. And I think that

2 --

3 JUSTICE ALITO: All right. But what
4 if it happened? We have had a lot of
5 hypotheticals of things that may or may not have
6 happened.

7 What if that happens? Is that
8 discrimination on the basis of sex where the
9 decisionmaker doesn't even know the person's
10 sex?

11 MS. KARLAN: And -- and how do they
12 know the person's sexual orientation?

13 JUSTICE ALITO: Because somebody who
14 interviewed the candidates tells them that.

15 MS. KARLAN: And they are unable to
16 tell anything about the person's sex?

17 JUSTICE ALITO: No.

18 MS. KARLAN: So this is Saturday Night
19 Live Pat, as -- as an example, right?

20 JUSTICE ALITO: Well, I'm not familiar
21 with that.

22 MS. KARLAN: Okay.

23 JUSTICE ALITO: But --

24 MS. KARLAN: Which is the person named
25 Pat, and you can never tell whether Pat is a man

1 or a woman.

2 I mean, theoretically that person
3 might be out there. But here is the key --

4 JUSTICE ALITO: Theoretically what?

5 MS. KARLAN: Theoretically that person
6 might be out there. But here is the key: The
7 -- the cases that are brought are almost all
8 brought by somebody who says my employer knew
9 who I was and fired me because I was a man or
10 fired me because I was a woman.

11 Somebody who comes in and says I'm not
12 going to tell you what my sex is, but, believe
13 me, I was fired for my sexual orientation, that
14 person will lose.

15 JUSTICE ALITO: Well, if that's the
16 case, then I think your whole argument collapses
17 because sexual orientation then is a different
18 thing from sex.

19 MS. KARLAN: Of course it is. No one
20 has claimed that sexual orientation is the same
21 thing as sex. What we are saying is when
22 somebody is fired --

23 JUSTICE ALITO: Let me amend it. Your
24 argument is that sex -- discrimination based on
25 sexual orientation necessarily entails

1 discrimination based on sex.

2 But if it's the case that there would
3 be no liability in the situation where the
4 decisionmaker has no knowledge of sex, then that
5 can't possibly be true.

6 MS. KARLAN: If there was that case,
7 it might be the rare case in which sexual
8 orientation discrimination is not a subset of
9 sex.

10 But in the case where the person knows
11 the sex of the person that they are firing or
12 refusing to hire, and knows the sex of the
13 people to whom that person is attracted, that is
14 sex discrimination, pure and simple.

15 And it's important to understand that
16 -- and -- and this goes back to something that
17 Justice Ginsburg asked during the opening
18 argument, that discrimination against gay men
19 and discrimination against lesbians is not one
20 thing.

21 And in 1964, if you look at the
22 members of Congress's brief, they will tell you
23 if you looked in the dictionary there was no
24 phrase sexual orientation.

25 That is a modern way of combining two

1 kinds of discrimination: Discrimination against
2 gay men, which goes back to Leviticus and the
3 common law, and discrimination against lesbians,
4 which was not part of Leviticus and was not part
5 of the common law.

6 Indeed, in 1964, there were only 16
7 states in the United States that clearly forbid
8 some act in which lesbians could engage.

9 So the idea that this is one large
10 idea about sexual orientation discrimination in
11 the abstract, without reference to sex, simply
12 burkes the history and burkes the understanding.
13 And if you look at the harassment cases, you
14 will see why this is true. Gay men are harassed
15 in a different way than lesbians.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel. The case is submitted.

19 (Whereupon, at 11:07 a.m., the case
20 was submitted.)

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