

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)
ALTITUDE EXPRESS, INC., ET AL.,)
Petitioners,)
v.) No. 17-1623
MELISSA ZARDA, AS EXECUTOR OF THE)
ESTATE OF DONALD ZARDA, ET AL.,)
Respondents.)

Pages: 1 through 71

Place: Washington, D.C.

Date: October 8, 2019

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- - - - -

Washington, D.C.

Tuesday, October 8, 2019

The above-entitled matter came on
for oral argument before the Supreme Court of the
United States at 10:05 a.m.

1 APPEARANCES:

2

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4 on behalf of the Petitioner in 17-1618

5 and the Respondents in 17-1623.

6 JEFFREY M. HARRIS, Arlington, Virginia;

7 on behalf of the Respondent in 17-1618

8 and the Petitioners in 17-1623.

9 GEN. NOEL J. FRANCISCO, Solicitor General,
10 Department of Justice, Washington, D.C.,
11 for the United States, as amicus curiae,
12 supporting affirmance in 17-1618 and
13 reversal in 17-1623.

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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
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 harassment 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 men
21 and women. Title VII was intended to make sure
22 that men were not disadvantaged relative to
23 women and women were not disadvantaged relative
24 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 -- or you emphasize that
20 you need to know the sex of the individuals
21 involved before you can determine whether or not
22 there's a violation and that that brings it
23 within Title 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 -- the example that was brought up that,
25 unlike race, there are certain distinctions that

1 are 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 was denied the job because of his sex,
16 but because it was a permissible affirmative
17 action program, that was okay. In Dothard
18 against Rawlinson, this Court said Ms. Rawlinson
19 is discriminated against because of sex, but
20 there's a 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? And if I could just begin
17 with an example that I think will show why this
18 is 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 has treated us differently because
23 of sex. But that's not discriminatory because
24 neither of us has been subjected to a
25 disadvantage. And as this Court said in

1 Burlington White against North -- Burlington
2 Northern against White, what the statute means
3 when it says "discriminate against" is to cause
4 an injury and requiring people generally to use
5 separate bathrooms is 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's no categorical
17 rule about these. For example, the fact that
18 all of the men sitting at counsel table knew
19 that they had to wear ties today and I was free
20 not to didn't cause an injury. On the other
21 hand, even the dissenters in the Second Circuit
22 said, if the Court said women who come to argue
23 should argue in Hooters outfits and the men
24 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 --

7 MS. KARLAN: No, but I can --

8 JUSTICE GORSUCH: -- or we can talk
9 real world examples.

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

16 JUSTICE GORSUCH: No, no --

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

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

24 MS. KARLAN: Okay.

25 JUSTICE GORSUCH: You can offer me

1 help if you want to.

2 MS. KARLAN: Yes, yes. No, I'm trying
3 to offer you help. What I'm trying to say --

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

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

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

21 Then you get to what I've said, which
22 is you have to ask whether a reasonable person
23 under these circumstances would be injured by
24 the imposition of the particular sex-specific
25 world. So when the Chief Justice calls me Ms.,

1 I am not injured. When I go to a -- when I --

2 JUSTICE GORSUCH: You are not, but
3 another --

4 MS. KARLAN: It -- it --

5 JUSTICE GORSUCH: -- person might be.

6 MS. KARLAN: Right. And the question
7 --

8 JUSTICE GORSUCH: Are they reasonable
9 or not? And -- and I'm -- I'm -- I'm just --
10 I'm wondering, how do you decide those cases?

11 MS. KARLAN: An idiosyncratic
12 preference does not void an otherwise valid
13 dress code or bathroom rule.

14 JUSTICE GORSUCH: So is it --

15 JUSTICE SOTOMAYOR: Ms. Karlan --

16 JUSTICE GORSUCH: I'm sorry. I --
17 I -- I -- and I apologize.

18 JUSTICE SOTOMAYOR: Go ahead and
19 finish it.

20 JUSTICE GORSUCH: Is it idiosyncratic
21 for a transgender person to prefer a bathroom
22 that's different than the -- the one of their
23 biological sex? Is it idiosyncratic for a
24 transsexual person to wish to dress in a
25 different style of dress than his or her

1 biological --

2 MS. KARLAN: No.

3 JUSTICE GORSUCH: Sex? Okay. So the
4 answer to your question is -- the question then,
5 at the end of the day, if I understand it, is
6 that those are acts of discrimination under
7 Title VII as you understand it?

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

13 JUSTICE SOTOMAYOR: Ms. Karlan.

14 MS. KARLAN: And -- yeah.

15 JUSTICE SOTOMAYOR: But you're begging
16 Justice Gorsuch's question. We were following
17 up on the same thing --

18 MS. KARLAN: I truly am not trying
19 to --

20 JUSTICE SOTOMAYOR: -- which is --

21 MS. KARLAN: -- beg the question.

22 JUSTICE SOTOMAYOR: -- how do we
23 differentiate the two? What is the legal test
24 that you propose to say this is discrimination
25 because of sex, as you said, calling you one

1 thing and your friend another is discriminatory,
2 but it's okay because there's no harm.

3 So what's the test we apply to, say,
4 when it is harm and when it isn't?

5 MS. KARLAN: Let -- let me try to be
6 clear.

7 JUSTICE SOTOMAYOR: Let's be --

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

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

20 So if this Court thinks or if another
21 court --

22 JUSTICE SOTOMAYOR: So why --

23 MS. KARLAN: -- thinks --

24 JUSTICE SOTOMAYOR: -- is a dress code
25 for Hooters that requires all women to wear a

1 scantily -- a scant dress, is that
2 discriminatory?

3 MS. KARLAN: Yes, it is.

4 JUSTICE SOTOMAYOR: Is it
5 discriminatory for the woman who just doesn't
6 want to wear it because it's demeaning?

7 MS. KARLAN: Yes, it is.

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

11 MS. KARLAN: Well, you're going to get
12 --

13 JUSTICE SOTOMAYOR: The scant uniform.

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

16 JUSTICE SOTOMAYOR: No, no, no --

17 MS. KARLAN: -- here, but I understand
18 -- I understand.

19 JUSTICE SOTOMAYOR: But I think what
20 you're alluding is, and I still haven't heard --

21 MS. KARLAN: Yeah.

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

25 MS. KARLAN: Well, if --

1 JUSTICE SOTOMAYOR: At what -- when
2 does that discrimination become an issue?

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

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

16 JUSTICE ALITO: Can I ask --

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

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

1 MS. KARLAN: I think it highly
2 unlikely you're going to see cases like that.
3 The bathroom issue has been around since the
4 beginning of Title VII. Title VII has a special
5 provision in 703(a)(ii) that says, when you
6 segregate people, the question is whether that
7 segregation denies them employment
8 opportunities.

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

13 JUSTICE ALITO: May I ask you to --

14 CHIEF JUSTICE ROBERTS: Are these --
15 Justice Alito.

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

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

25 And Congress has been asked repeatedly

1 in the years since 1964 to address this
2 question. The Equality Act is before Congress
3 right now. Congress has declined or failed to
4 act on these requests. And if the Court takes
5 this up and interprets this 1964 statute to
6 prohibit discrimination based on sexual
7 orientation, we will be acting exactly like a
8 legislature.

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

14 What would we -- how would we respond
15 to that question?

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

23 So if in 1964 it would be
24 discrimination to fire a woman who wanted to --
25 you know, a woman who enjoyed sewing, and

1 there's a famous case, it's the foundational
2 case on sexual orientation where they fired a
3 man who said --

4 JUSTICE ALITO: We will --

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

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

11 MS. KARLAN: No more than what you did
12 in Oncale. No more than what you did in Price
13 Waterhouse. No more than what you did in --

14 JUSTICE BREYER: All right.

15 MS. KARLAN: -- Newport News.

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

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

25 I would put it in these terms.

1 Imagine a statute that says policemen, dah, dah,
2 dah, must pay damages. Passed a long time ago.
3 That doesn't apply to German policemen.

4 MS. KARLAN: Doesn't apply to what
5 kind of --

6 JUSTICE BREYER: To German policemen.
7 The meaning is the same. German policemen are
8 policemen. But the statute doesn't apply to
9 them.

10 How do we know? Well, we know through
11 a lot of history, dah, dah, dah. Okay? Now,
12 that's the -- that's the box in which I put the
13 argument that Justice Alito made. It's a
14 serious legal argument, and the argument is that
15 at the time Congress wouldn't have dreamt of
16 this. And, therefore, the words, though they
17 apply, they meant to exclude the gays and
18 transgender. Now, what I need to hear is a
19 clear answer to that question.

20 MS. KARLAN: I think the way to think
21 about this is to ask about the specific behavior
22 that's at issue, which is a man dates a man, and
23 then ask: How does that fit within the
24 language? And the best example I can give --

25 JUSTICE BREYER: It fits.

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

2 JUSTICE BREYER: I give you it fits.

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

5 JUSTICE BREYER: Yeah.

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

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

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

22 CHIEF JUSTICE ROBERTS: Counsel, I --

23 MS. KARLAN: -- rather than children.

24 CHIEF JUSTICE ROBERTS: Several, I
25 think about 23, states have been passing laws to

1 address these -- these issues. And I don't know
2 how many of them, but I think it's a big part of
3 them, when they do extend the coverage against
4 discrimination on the basis of sex to sexual
5 orientation, transgender, they also include an
6 exemption for religious organizations.

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

10 MS. KARLAN: Yeah.

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

16 MS. KARLAN: Well, I -- I -- I would
17 say three things about that:

18 The first is this Court has already
19 created an exemption for sincere religious
20 belief for a large category of employers through
21 the ministerial exception.

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

25 The third thing I would say is to

1 understand this in context, which is 85 percent
2 of American employers are not covered by Title
3 VII at all. So as to those employers, if they
4 have religious objections to hiring someone who
5 is gay, they're free to continue doing that.

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

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

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

1 case. The second one came from a straight man
2 who was fired because -- who was denied a job
3 because he said his hobby was sewing. And the
4 employer said: That's an effeminate hobby, so I
5 bet you're gay.

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

11 JUSTICE ALITO: But you gave your --

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

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

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

1 out.

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

8 MS. KARLAN: Yes.

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

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

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

1 employer who's willing to hire men.

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

8 JUSTICE ALITO: The -- the point is
9 that discrimination on the basis of sex in the
10 sense that Congress understood it in 1964 is a
11 different concept from discrimination on the
12 basis of --

13 MS. KARLAN: Well, in --

14 JUSTICE ALITO: -- sexual orientation.

15 MS. KARLAN: -- in 19 --

16 JUSTICE ALITO: And that's what you're
17 fighting. You're trying to change the meaning
18 of what Congress understood sex to mean and what
19 everybody understood --

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

21 JUSTICE ALITO: -- sex to mean in
22 1964.

23 MS. KARLAN: -- not trying to change
24 that at all. I'm simply saying that if a man
25 and a woman both wanted to sew and you fire the

1 man who loves sewing and you don't fire the
2 woman who loves sewing, that's discrimination
3 pure and simple, sex discrimination. If you
4 fire a -- if you fire the man who -- thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Counsel.

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: Sorry.

10 ORAL ARGUMENT OF JEFFREY M. HARRIS
11 ON BEHALF OF THE RESPONDENT IN 17-1618
12 AND THE PETITIONERS IN 17-1623

13 MR. HARRIS: Mr. Chief Justice, and
14 may it please the Court:

15 (Laughter.)

16 CHIEF JUSTICE ROBERTS: Touché.

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

23 According to the plaintiffs here,
24 however, Wisconsin's landmark law actually had
25 little, if any, practical impact because

1 Congress had already banned sexual orientation
2 discrimination nationwide, 18 years earlier in
3 the Civil Rights Act of 1964.

4 To quote Judge Lynch's dissent below,
5 Congress did no such thing. Sex and sexual
6 orientation are independent and distinct
7 characteristics, and sexual orientation
8 discrimination by itself does not constitute
9 discrimination because of sex under Title VII.

10 That's just as true today as it was in
11 1964.

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

24 This case is just the mirror image of
25 *Oncale*. Whereas the lower courts in *Oncale*

1 adopted a categorical exclusion, the Second
2 Circuit adopted a rule of per se inclusion in
3 which plaintiffs alleging sexual orientation
4 discrimination receive a free pass around the
5 critical inquiry into whether men and women are
6 being treated differently because of their sex.

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

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

21 So is that a mixed motive case? And
22 -- and are we going to be trying somehow to
23 parse that there's some sort of substantial
24 legal difference between the belief that you're
25 too effeminate or that a lesbian is too macho,

1 whichever, from you're attracted to the other sex?

2 How do you tease that out?

3 MR. HARRIS: Justice Sotomayor, I
4 don't disagree that there will be tough cases at
5 the margins, but the problem with what the
6 Second Circuit did is they glossed over those
7 hard questions and said: We're just going to
8 adopt --

9 JUSTICE SOTOMAYOR: Well, aren't you
10 --

11 MR. HARRIS -- a per se rule that if
12 you --

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

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

23 Aren't then we moving to the third
24 question, which is: Is there a reason
25 independent of your religious belief or your

1 innate hatred and invidious discrimination for
2 why you're treating this person differently?
3 And if there is, you have a BFOQ. You don't
4 have to hire them. You can fire them.

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

12 So I don't understand why those are
13 hard cases.

14 MR. HARRIS: Well --

15 JUSTICE SOTOMAYOR: Any harder than
16 what the law applies for race discrimination,
17 for religious discrimination, for any of the
18 other forms, national origin discrimination.

19 MR. HARRIS: So, Your Honor, as this
20 Court has emphasized in cases such as Johnson
21 Controls, the BFOQ exception has been
22 interpreted extremely narrowly, and so I think
23 it -- it -- it is important as this Court
24 emphasized in Oncale, the Court emphasized
25 several times the need to ensure strict

1 compliance with all requirements of the statute,
2 including the discrimination element, because
3 once you find discrimination, it gets very hard
4 to make out the BFOQ.

5 JUSTICE GINSBURG: Would Oncale --

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

7 JUSTICE GINSBURG: Would Oncale have
8 come out differently if the employer said, I
9 don't hire women to work on platforms, the only
10 people I hire are men?

11 MR. HARRIS: Well, that -- that
12 obviously would have been discriminatory against
13 the women seeking --

14 JUSTICE GINSBURG: But it's not --

15 MR. HARRIS: -- the job.

16 JUSTICE GINSBURG: -- the woman who is
17 suing --

18 MR. HARRIS: Right.

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

25 MR. HARRIS: So it's, of course --

1 it's -- it's not a complete defense or even a
2 defense to say, I treat it -- in cases like
3 Martin -- like Martin Marietta, it was not a
4 defense for that employer to say, because I
5 hired other women, it excuses this.

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

8 JUSTICE GINSBURG: That -- that was --
9 Martin Marietta was different because it was the
10 plus. The plus applied to women and didn't
11 apply to men. So you had that distinction.

12 Well, take Price Waterhouse. Suppose
13 the employer said, I don't want any men who are
14 not sufficiently macho, and I don't want any
15 women who are not sufficiently feminine.

16 If they -- the -- Price Waterhouse
17 said we will treat a man who isn't sufficiently
18 macho the same way we treated Ann Hopkins, there
19 would be, as I understand your argument, no sex
20 discrimination.

21 MR. HARRIS: I -- I disagree with
22 that, Justice Ginsburg. The way -- I think the
23 best way to think of Price Waterhouse is, when
24 an employer has certain traits or
25 characteristics that it values in promotion and

1 hiring and discharge decisions, there can't be a
2 list of criteria for men and a list of criteria
3 for women.

4 So the Solicitor General offered the
5 hypothetical that Your Honor said. And -- and
6 in that situation, there would be two sets of
7 criteria. And so maybe both a man who doesn't
8 meet the women's criteria and a woman who
9 doesn't meet the men's criteria would have a
10 claim there.

11 But -- but it wouldn't be -- it would
12 not excuse it just to say that there are
13 different criteria for each set.

14 JUSTICE GINSBURG: Well --

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

21 I take it from your argument that
22 there would be no claim?

23 MR. HARRIS: There would, in fact, be
24 a claim, in both --

25 JUSTICE BREYER: Why?

1 MR. HARRIS: -- situations.

2 JUSTICE BREYER: Why? Why? All
3 right.

4 If there is a claim there, why isn't
5 there here?

6 MR. HARRIS: So in the race context,
7 the only difference between --

8 JUSTICE BREYER: I didn't say race. I
9 said religion.

10 MR. HARRIS: Right. In -- in the --
11 in the context of religion, which first of all
12 religion is defined -- is the only one other
13 than pregnancy which has an expansive
14 definition.

15 JUSTICE BREYER: No --

16 MR. HARRIS: Yes, it would be
17 religious discrimination because between a
18 couple that is Catholic and Jewish and two
19 Catholics, the only difference between those
20 couples is their religion.

21 JUSTICE BREYER: And the only
22 difference between the two couples here is that
23 one is a man rather than the woman.

24 MR. HARRIS: Except that it also
25 introduces an independent characteristic, which

1 can be completely --

2 JUSTICE BREYER: All right.

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

4 JUSTICE BREYER: So does it there --

5 why I'm not against Catholics, I am not against
6 Jews, I am against inter-marriage?

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

9 JUSTICE BREYER: Oh, it exists.

10 MR. HARRIS: -- case law.

11 JUSTICE BREYER: I promise you. There
12 are many people, at least in the religious
13 context, who are against inter-marriage and are
14 not against Catholics or Jews. That's not an
15 unrealistic example.

16 And all I find in that example is an
17 identical case to this one.

18 MR. HARRIS: And I -- I think that --
19 I do think that most of the -- most people who
20 would oppose any sort of interreligious marriage
21 would do so for religious reasons. And I would
22 also note in the --

23 JUSTICE KAGAN: Mr. Harris, I think --
24 I think what all of these hypotheticals are
25 about is that in many of our cases, what you

1 find is what you said, what did you say,
2 independent characteristics? They're all over
3 our cases.

4 If you take Manhart, which is the
5 seminal case, Manhart was all about an
6 independent characteristic. It was about life
7 expectancy. But we didn't say, oh, we're going
8 into some different sort of analysis where we
9 don't just say would the same thing have
10 happened to you if you were a man or would the
11 same thing have happened to you if you were a
12 woman, because we had an independent
13 characteristic, which was life expectancy.

14 MR. HARRIS: Right.

15 JUSTICE SOTOMAYOR: And -- and so the
16 same thing here. So all of these hypotheticals
17 are really about the same thing, which is that
18 Manhart gave us a very simple test, and Manhart
19 said, what you do when you look to see whether
20 there is discrimination under Title VII is, you
21 say, would the same thing have happened to you
22 if you were of a different sex?

23 And, Ms. Karlan made all the -- you
24 know, went through all the ways in which,
25 obviously, the -- the same thing would not have

1 happened to you if you were a different sex, you
2 being her client.

3 So, I mean, that's the question.
4 There are independent characteristics in all
5 these cases. We have insisted on this extremely
6 simple test. If you apply that test, I guess it
7 seems to come out against you.

8 MR. HARRIS: A couple things. First,
9 let me address Manhart and then address --
10 address the test more generally.

11 So in Manhart, this Court noted that
12 the -- the policy wasn't just about longevity.
13 That -- that employer made no attempt to do any
14 sort of bona fide underwriting or life
15 expectancy estimates. It simply charged the
16 women more.

17 So even a woman and a man, if they
18 each had a 75-year life expectancy, they would
19 be charged different rates, even though they
20 were totally, similarly situated with respect to
21 that.

22 JUSTICE KAGAN: Yes, but Manhart was
23 very clear that women in the aggregate were
24 probably going to be fine under this policy,
25 because women in the aggregate do have a higher

1 life expectancy. I mean, I think actually
2 Manhart makes clear why another aspect of your
3 argument is -- is wrong, because you say, well,
4 we have to look at these big classes.

5 Well, there was nothing wrong in
6 Manhart when you looked at big classes. What
7 became wrong in Manhart was when you looked at
8 individuals. And when you look at individuals,
9 which Manhart insisted one do, one should do,
10 and when you apply the test that Manhart
11 insisted you apply, would this woman have been
12 treated differently if she were a man? The
13 answer was yes.

14 And, similarly, I guess I'm just going
15 to ask you again, if you applied that test,
16 don't you lose? And if you do lose, why should
17 we not apply that test?

18 MR. HARRIS: Here's the problem with
19 the test. In Manhart, in Newport News, in
20 Martin Marietta, the comparator test makes
21 perfect sense because you know exactly what
22 you're testing for, so the comparator helps you
23 draw inferences from the evidence.

24 The problem here is, unless the
25 Plaintiffs can point to something outside the

1 comparator to tell us why we need to hold sexual
2 orientation -- to -- to tell us why that is
3 irrelevant, they're -- they're just assuming
4 their conclusion.

5 So their comparator would say, you
6 would ask if a gay man has suffered sex
7 discrimination by comparing him to a
8 heterosexual woman, which that version of the
9 comparator can't isolate if it's the sex or the
10 sexual orientation.

11 And so I do think, unless they can
12 point to something outside the comparator, to
13 justify putting sexual orientation off limits --

14 JUSTICE GORSUCH: Well --

15 MR. HARRIS: -- the comparator doesn't
16 -- doesn't answer the ultimate question.

17 JUSTICE GORSUCH: Well, it certainly
18 may not answer -- isolate the sole or proximate
19 cause, but I -- I think the -- the argument on
20 the other side is the language of the statute
21 has a but-for causation standard, a more
22 generous causation standard.

23 So perhaps there are two causal
24 factors at work here. But isn't one of them sex
25 in the narrow sense of -- of -- of biological

1 gender? What's -- what's your response to that?

2 MR. HARRIS: Yeah. So in the -- what
3 I'm arguing is simply that sexual orientation
4 standing alone is not, without more, sex
5 discrimination. And so the -- I'm sorry, remind
6 me of the question one more time?

7 JUSTICE GORSUCH: Sure. So the --

8 MR. HARRIS: Right.

9 JUSTICE GORSUCH: Your -- your
10 response to Justice Kagan was, I need to focus
11 on sexual orientation because that's the sole or
12 primary causal factor here for the firing.

13 And I think the response from the
14 other side is: But the statute has a more
15 generous causal --

16 MR. HARRIS: Okay.

17 JUSTICE GORSUCH: -- formulation, a
18 but-for causal formulation, so perhaps you're
19 right that, at some level, sexual orientation is
20 surely in -- in play here. But isn't sex also
21 in play here because of the change of the first
22 variable?

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

24 JUSTICE GORSUCH: And isn't that
25 enough? It -- you know, the statute talks about

1 a material causal factor or some formulation
2 like that, not the sole cause, not the proximate
3 cause, but a cause.

4 And one -- one would -- in what -- in
5 what linguistic formulation would one -- would
6 one say that sex, biological gender, has nothing
7 to do with what happened in this case?

8 MR. HARRIS: Yes, Your Honor. So what
9 you're referring to, I believe, is the
10 motivating factor language. And so, in what I
11 just referred to as the sort of benchmark
12 scenario, sex would not be a motivating factor
13 there.

14 If you look at Mr. Bostock's
15 complaint, for example, and you strip out any
16 mention of his sex as being a man, again, we --
17 we dispute the allegations, of course, but it
18 would still make perfect sense. But if you
19 stripped out any reference to his sexual
20 orientation, it would make little, if any,
21 sense.

22 And so in Price Waterhouse, this Court
23 helped give guidance about how to do the
24 motivating factor analysis and said imagine you
25 gave the employer truth serum and said what were

1 your true reasons for doing this? Would one of
2 them be the characteristic? And what I would
3 call that -- that benchmark scenario --

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

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

6 JUSTICE GORSUCH: Let's do truth
7 serum, okay? Wouldn't -- wouldn't the employer
8 maybe say it's because this was -- this person
9 was a man who liked other men? And isn't that
10 first part sex?

11 MR. HARRIS: Your Honor, I think in
12 common parlance, we would call that a same-sex
13 attraction. And I want to be clear, if there is
14 some reason to think that employer -- and some
15 of the amicus briefs say that much
16 discrimination against gay and lesbian people is
17 -- is based on sort of animus against gay men or
18 lesbian women.

19 If there's some reason to believe that
20 in that scenario, then that may well be a
21 motivating factor, but when you simply have an
22 employee saying I was fired because of my sexual
23 orientation, that alone does not show that --
24 what -- what this Court called in Oncale the
25 critical -- critical issue of distinguishing

1 between men and women.

2 JUSTICE KAVANAUGH: Are you drawing a
3 distinction between the literal meaning of
4 "because of sex" and the ordinary meaning of
5 "because of sex"? And, if so, how are we
6 supposed to think about ordinary meaning in this
7 case?

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

17 JUSTICE GINSBURG: You have to have
18 someone who's injured. You have to have someone
19 who's injured. And the response to the
20 bathrooms is who is the complaining plaintiff?
21 And for most people, they would not be
22 complaining plaintiff. They would not be
23 eligible because they're not injured by the
24 separate bathrooms. In fact, they like it.

25 MR. HARRIS: Yes, Your Honor,

1 although, of course, if someone, for example, is
2 fired, imagine a factory with hazardous
3 materials where people shower after work and to
4 -- to clean up, and a -- a man used the women's
5 bathroom and is fired. That person would
6 certainly be injured. And I think, under my
7 friend's test, they would say just change the
8 sex and that person wouldn't have been fired.

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

20 And the last thing I'd like to get
21 into is this Court, in Espinoza, Footnote 2 -- I
22 think there was some discussion of the states
23 early on. In Espinoza, in interpreting national
24 origin discrimination, this Court said the state
25 practice interpreting parallel laws is highly

1 instructive. And so I -- I think the fact that
2 22 or 23 states have done this by legislation
3 and zero have done it by judicial
4 interpretation, just shows that this isn't belt
5 and suspenders. It's not redundancy, that sex
6 and sexual orientation both in 1964 and today
7 are different concepts that mean different
8 things, and common users of -- of language both
9 today and in 1964 would have recognized that.

10 JUSTICE SOTOMAYOR: Can they ever be?

11 MR. HARRIS: I'm sorry?

12 JUSTICE SOTOMAYOR: I know -- can they
13 ever be? Justice -- justice -- Judge Lynch
14 below said that homophobic stereotypes are
15 unrelated to sexual orientation. The very first
16 case before us shows that that's just not true,
17 that homosexual orientation is highly correlated
18 to people's stereotypes.

19 If you're too effeminate a man, you're
20 a homosexual. If you're too macho a woman,
21 you're a lesbian. Happens all the time. So I
22 find it somewhat difficult to unwind the two.
23 If not difficult, nearly impossible.

24 MR. HARRIS: It often is, Your Honor,
25 and it's a sad reality that homophobic slurs are

1 often directed at heterosexual or homosexual
2 people to -- to criticize --

3 JUSTICE SOTOMAYOR: And that's okay
4 under your theory?

5 MR. HARRIS: It is absolutely not,
6 Your Honor, if that person can show
7 discrimination because of sex, but what -- what
8 the courts can't do is what the Second Circuit
9 did and the Seventh Circuit did in Hively.
10 Footnote 11 of the Zarda opinion is very candid
11 about this where it talks about operationalizing
12 its holding. The Second Circuit is just going
13 to change the jury instructions to tell juries
14 that if they find sexual orientation
15 discrimination, they've now found sex
16 discrimination.

17 So, Justice Sotomayor, I don't
18 disagree that there will be difficult cases at
19 the margins, but the answer is not to change the
20 ultimate inquiry and replace it with something
21 that Congress never could have intended.

22 JUSTICE ALITO: Well, if you have a
23 minute, let me ask you this: Let's imagine that
24 the decisionmaker in a particular case is behind
25 the veil of ignorance and the subordinate who

1 has reviewed the candidates for a position says:
2 I'm going to tell you two things about this
3 candidate. This is the very best candidate for
4 the job, and this candidate is attracted to
5 members of the same sex.

6 And the employer says: Okay, I'm
7 going -- I'm not going to hire this person for
8 that reason.

9 Is that discrimination on the basis of
10 sex, where the employer doesn't even know the
11 sex of the individual involved?

12 MR. HARRIS: May I?

13 CHIEF JUSTICE ROBERTS: Please.

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

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 General Francisco.

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

4 GENERAL FRANCISCO: Mr. Chief Justice,
5 and may it please the Court:

6 The issue is not whether Congress can
7 or should prohibit employment discrimination
8 because of sexual orientation. The issue,
9 rather, is whether it did so when it prohibited
10 discrimination because of sex.

11 It did not for two reasons. First,
12 sex means whether you're male or female, not
13 whether you're gay or straight. So if you treat
14 all gay and men -- gay men and women exactly the
15 same regardless of their sex, you're not
16 discriminating against them because of their
17 sex.

18 Second, any doubt is removed by the
19 history of Title VII and related statutes since,
20 in the face of unanimous interpretation by the
21 courts and the executive branch that persisted
22 for decades, Congress has repeatedly extended
23 other statutes to specifically cover sexual
24 orientation, yet has refused to do so with
25 respect to Title VII.

1 The employee's position would nullify
2 that conscious choice.

3 And Justice Gorsuch, if I could first
4 address your question about our -- my friend on
5 the other side's argument about the literal
6 meaning of the statute, well, there are
7 essentially two responses to that argument. And
8 they're related.

9 The first is that under that
10 interpretation, you actually couldn't fire a man
11 for using the woman's restroom because in some
12 metaphysical sense, that man's sex is a but-for
13 cause for his firing.

14 JUSTICE GINSBURG: But he's not --

15 GENERAL FRANCISCO: The reason --

16 JUSTICE GINSBURG: -- injured. He's
17 not injured.

18 GENERAL FRANCISCO: Well, he's fired,
19 Your Honor, in my hypothetical. And the reason
20 why that is permitted --

21 JUSTICE GORSUCH: I think counsel
22 acknowledged all of that.

23 GENERAL FRANCISCO: Yeah. And the
24 reason why that's permitted, though, to do that,
25 is because you're treating -- and this is my

1 second point -- you're treating him the -- the
2 same as a similarly situated woman; that is, a
3 woman who uses the men's room.

4 And that's always the critical
5 analysis when you're trying to determine if
6 somebody is being --

7 JUSTICE GINSBURG: Is it --

8 GENERAL FRANCISCO: -- discriminated
9 against because --

10 JUSTICE GINSBURG: Is it --

11 GENERAL FRANCISCO: -- of their sex.

12 JUSTICE GINSBURG: Is it -- let me
13 give you a not-hypothetical case. An airline
14 hires only women as cabin attendants, but it
15 fires them if they marry. The airline's defense
16 is whatever we're doing, it's not sex
17 discrimination against women because we don't
18 hire any men at all, married or unmarried.

19 That case, I take it from your brief,
20 you would say there's no sex -- no violation of
21 Title VII?

22 GENERAL FRANCISCO: Well -- well, no,
23 Your Honor, because I think the problem is that
24 the prohibition on hiring any male flight
25 attendants would in and of itself violate --

1 JUSTICE GINSBURG: That -- but --

2 GENERAL FRANCISCO: -- Title VII.

3 JUSTICE GINSBURG: But the male is not
4 complaining. The complainant is the woman who
5 was fired because she married.

6 GENERAL FRANCISCO: Okay. So then --

7 JUSTICE GINSBURG: The male
8 complainant might have a very good case, but my
9 case --

10 GENERAL FRANCISCO: Right, and my --

11 JUSTICE GINSBURG: -- is the woman.

12 GENERAL FRANCISCO: And my problem
13 with the hypothetical is that the way it is
14 constructed, there is, you know, presumably no
15 men that have the job in the first place. Now,
16 if you say that in theory men should be able to
17 have the job, then the question would be would
18 you also have fired men who were married?

19 And if you only fired women who were
20 married but not men who married, that would
21 plainly be a violation of Title VII because
22 you're treating similarly situated people
23 differently. But to finish --

24 JUSTICE SOTOMAYOR: General, that --
25 that's an --

1 GENERAL FRANCISCO: -- my answer to
2 Justice --

3 JUSTICE SOTOMAYOR: -- an impossible
4 idea to -- to put into practice by taking out
5 the sex.

6 JUSTICE GINSBURG: May I just continue
7 with it?

8 GENERAL FRANCISCO: Yes, Your Honor.

9 JUSTICE GINSBURG: The hypothetical is
10 not a hypothetical. Its Sprogis against United
11 Airlines. And it was given, and not challenged,
12 that they didn't hire men as cabin attendants.

13 GENERAL FRANCISCO: Right.

14 JUSTICE GINSBURG: But they fired this
15 woman because she married, she didn't look like
16 Cheryl "Fly Me."

17 GENERAL FRANCISCO: Right.

18 JUSTICE GINSBURG: Once she married,
19 she wouldn't be attracted to the male
20 passengers.

21 The court of appeals said, Title VII
22 was meant to strike out the entire spectrum of
23 sex stereotyping, so if this woman was fired
24 because she wasn't -- she would no longer be so
25 attractive to men if she is married, that's sex

1 discrimination.

2 And we don't have to have a -- a -- a
3 male involved. This is a woman who was treated
4 in a very stereotypical way. She is no longer
5 young and attractive when she married.

6 GENERAL FRANCISCO: Your Honor, I --
7 I -- I do think that the question is always, are
8 you treating similarly situated men and women
9 differently. There are times where issues of
10 proof are very difficult.

11 For example, in the Price Waterhouse
12 case, Ann Hopkins was fired because she was
13 aggressive --

14 JUSTICE GINSBURG: But this was --

15 GENERAL FRANCISCO: -- because she was
16 rude to staff --

17 JUSTICE GINSBURG: -- this was an
18 actual case. This was an actual case and it was
19 given that no males are hiring and no male is
20 complaining.

21 GENERAL FRANCISCO: But, Your Honor,
22 the way that actual case was resolved was
23 because the woman had not brought her claim in a
24 timely fashion on the sex discrimination piece.
25 And so the way this Court resolved that decision

1 was it said, all right --

2 JUSTICE GINSBURG: The -- no. This
3 case --

4 GENERAL FRANCISCO: -- she is being
5 treated the same --

6 JUSTICE GINSBURG: -- never came to
7 this case, never came to this Court.

8 GENERAL FRANCISCO: So I guess I'm
9 thinking of the wrong case.

10 JUSTICE GINSBURG: Sprogis against
11 United Airlines, Seventh Circuit.

12 JUSTICE KAGAN: General, could I go
13 back to your opening statement and particularly
14 to the second part of it?

15 You talked about the history of -- of
16 Title VII and some of the subsequent legislative
17 history, and I guess what strikes me, and I was
18 struck in reading your briefs too, is that the
19 arguments you're making, I would say, are not
20 ones we typically would accept.

21 For many years, the lodestar of this
22 Court's statutory interpretation has been the
23 text of a statute, not the legislative history,
24 and certainly not the subsequent legislative
25 history.

1 And the text of the statute appears to
2 be pretty firmly in Ms. Karlan's corner. Did
3 you discriminate against somebody, against her
4 client, because of sex? Yes, you did. Because
5 you fired the person because this was a man who
6 loved other men.

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

12 This is the usual kind of way in which
13 we interpret statutes now. We look to laws. We
14 don't look --

15 GENERAL FRANCISCO: Right.

16 JUSTICE SOTOMAYOR: -- to predictions.
17 We don't look to desires. We don't look to
18 wishes. We look to laws.

19 Why doesn't that mean your argument
20 failed?

21 GENERAL FRANCISCO: Because, Your
22 Honor, I think that what our brief attempts to
23 do, at least, is make a straightforward textual
24 argument. The law distinguishes between sex and
25 sexual orientation.

1 Those are two different traits. And
2 that's precisely why when Congress wants to
3 prohibit discrimination based on sexual
4 orientation, it doesn't define sex as including
5 sexual orientation. It lists it as a different
6 trait.

7 JUSTICE GORSUCH: What -- what is --

8 GENERAL FRANCISCO: And so under Title
9 --

10 JUSTICE GORSUCH: What is your
11 response to the two-comparator problem we've
12 been discussing and the fact that at least one
13 contributing cause appears to be sex?

14 GENERAL FRANCISCO: Well, Your Honor,
15 a couple of responses. First, I don't think
16 that one contributing cause is sex. I think
17 that as long as you're treating gay men and
18 women exactly the same regardless of their sex,
19 the contributing cause is sexual orientation,
20 not sex.

21 And, two, I think it reflects the fact
22 that sex and sexual orientation are different
23 traits. And if you do the analysis the way my
24 friends on the other side suggested, you've
25 completely eliminated the distinction between

1 two very different traits and you've -- and
2 you've essentially rendered -- you nullified
3 Congress's careful -- very careful decisions in
4 numerous other statutes to specifically protect
5 sexual orientation and gender identities, we'll
6 --

7 JUSTICE SOTOMAYOR: Is there --

8 JUSTICE GINSBURG: Is there anything
9 --

10 GENERAL FRANCISCO: -- get to in the
11 next case.

12 JUSTICE GINSBURG: -- in this record
13 showing that the employers would not employ
14 lesbian women?

15 GENERAL FRANCISCO: You know, Your
16 Honor, in these cases, and this may have been a
17 better question for my colleague, but I think in
18 these cases, the employers have -- in the
19 cases -- the sexual orientation cases, the
20 employers have generally denied that they
21 discriminate based on --

22 JUSTICE GINSBURG: But all we know on
23 --

24 GENERAL FRANCISCO: -- their sexual
25 orientation.

1 JUSTICE GINSBURG: Did this go --
2 the -- the -- the allegation is that the person
3 was discharged when he announced that he was
4 gay. There's nothing in the record as far as I
5 can see that there was a policy on the
6 employer's part of discharging or not --

7 GENERAL FRANCISCO: Right.

8 JUSTICE GINSBURG: -- discharging
9 lesbian women.

10 GENERAL FRANCISCO: I think that's
11 right. I think basically the employer's
12 defenses here were, one, I didn't fire him
13 because he was gay, but, two, if you think I
14 did, Title VII doesn't prohibit discrimination
15 based on sexual orientation.

16 And if I could address lastly the
17 point that the Chief Justice and Justice Alito
18 were raising about so-called legislative
19 updating that Judge Posner suggested, here I
20 think that a judicial ruling would be
21 particularly pernicious because when Congress
22 seeks to expand the scope of Title VII's
23 liability provisions, it typically couples that
24 itself with an expansion of the religious
25 employers exemption to Title VII, precisely

1 because issues of sexual orientation like issues
2 of gender identity raise different issues from a
3 religious liberty perspective.

4 The employee's position here would
5 only do half of that work. It would expand the
6 scope of liability without giving any
7 consideration to those religious liberty
8 interests on the other side of the balance, and
9 that is precisely why this is the type of issue
10 that is better left to Congress than the courts.

11 Justice Gorsuch, I want to make sure
12 that I fully addressed your -- your textual
13 considerations, though, because I really do
14 think it boils down to the fact that sex and
15 sexual orientation are different traits.

16 May I finish my answer?

17 CHIEF JUSTICE ROBERTS: Sure.

18 GENERAL FRANCISCO: Title VII
19 prohibits discrimination based on one of those
20 traits, as long as you treat men and women who
21 are similarly situated with respect to the other
22 trait exactly the same, you're not
23 "discriminating" under -- within the meaning of
24 Title VII.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 GENERAL FRANCISCO: Thank you.

3 CHIEF JUSTICE ROBERTS: Five minutes,
4 Ms. Karlan.

5 REBUTTAL ARGUMENT OF PAMELA S. KARLAN
6 ON BEHALF OF THE PETITIONER IN 17-1618 AND THE
7 RESPONDENTS IN 17-1623

8 MS. KARLAN: Thank you.

9 Let me start with the question that
10 Justice Ginsburg asked because I think it's
11 illustrative of contemporary sexual orientation
12 discrimination cases.

13 Virtually none of them involve an
14 employer, and neither of the cases before you
15 does, who claims to have an across-the-board
16 policy of firing both all gay men and all
17 lesbians.

18 What tends to happen, and this case is
19 illustrative of this, is a man who also doesn't
20 conform with some other gender-based stereotypes
21 and who is gay gets fired, which puts them in
22 exactly the position that Justice Sotomayor
23 mentioned, which is really devilishly hard to
24 figure out what's going on here.

25 The second point I just want to leave

1 the Court with is, the entire argument on the
2 other side depends on the idea that men who are
3 gay and women who are lesbians are being treated
4 the same. And that's just not so.

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

10 And you have to look, because the
11 textual language tells you to, at such
12 individual and not at the overall class.

13 JUSTICE SOTOMAYOR: Ms. Karlan, would
14 you address these -- General's statement at the
15 end? He -- he goes back to the comparator
16 should be a woman who -- a -- a man who likes a
17 man and a woman who likes a woman. You're
18 trying to get to that.

19 MS. KARLAN: Yes. I think he -- he is
20 varying two things there. One, he is varying
21 the sex of the employee and, second, he's
22 varying the sex of the person to whom the
23 employee is interested.

24 And if two things that --

25 JUSTICE SOTOMAYOR: So give us an

1 example from a case how you can't do that.

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

6 And if the answer is if a man had --
7 if a woman had come in and said, I like to date
8 men, you wouldn't have fired her, and when a man
9 says, I like to date men, you did, that's enough
10 to show sex discrimination.

11 JUSTICE ALITO: But what if the
12 decisionmaker makes a decision based on sexual
13 orientation but does not know the biological sex
14 of the person involved?

15 MS. KARLAN: Well, there is no
16 reported case that does that. And I --

17 JUSTICE ALITO: All right.

18 MS. KARLAN: -- think the Court --

19 JUSTICE ALITO: But what if --

20 MS. KARLAN: -- can wrestle with --

21 JUSTICE ALITO: What if it happened?
22 We have had a lot of hypotheticals of things
23 that may or may not have happened.

24 What if that happens? Is that
25 discrimination on the basis of sex where the

1 decisionmaker doesn't even know the person's
2 sex?

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

5 JUSTICE ALITO: Because somebody who
6 interviewed the candidates tells them that.

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

9 JUSTICE ALITO: No.

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

12 (Laughter.)

13 JUSTICE ALITO: Well, I'm not familiar
14 with that.

15 MS. KARLAN: Okay.

16 JUSTICE ALITO: But --

17 MS. KARLAN: Which is the person named
18 Pat, and you can never tell whether Pat is a man
19 or a woman.

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

22 JUSTICE ALITO: Theoretically what?

23 MS. KARLAN: Theoretically that person
24 might be out there. But here is the key: The
25 -- the cases that are brought are almost all

1 brought by somebody who says my employer knew
2 who I was and fired me because I was a man or
3 fired me because I was a woman.

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

8 JUSTICE ALITO: Well, if that's the
9 case, then I think your whole argument collapses
10 because sexual orientation then is a different
11 thing from sex.

12 MS. KARLAN: Of course it is. No one
13 has claimed that sexual orientation is the same
14 thing as sex. What we are saying is when
15 somebody is fired --

16 JUSTICE ALITO: Well, let me amend it.
17 Your argument is that sex -- discrimination
18 based on sexual orientation necessarily entails
19 discrimination based on sex.

20 But if it's the case that there would
21 be no liability in the situation where the
22 decisionmaker has no knowledge of sex, then that
23 can't possibly be true.

24 MS. KARLAN: If there was that case,
25 it might be the rare case in which sexual

1 orientation discrimination is not a subset of
2 sex.

3 But in the case where the person knows
4 the sex of the person that they're firing or
5 refusing to hire, and knows the sex of the
6 people to whom that person is attracted, that is
7 sex discrimination, pure and simple.

8 And it's important to understand that
9 -- and -- and this goes back to something that
10 Justice Ginsburg asked during the opening
11 argument, that discrimination against gay men
12 and discrimination against lesbians is not one
13 thing.

14 And in 1964, if you look at the
15 members of Congress's brief, they will tell you
16 if you looked in the dictionary there was no
17 phrase "sexual orientation."

18 That is a modern way of combining two
19 kinds of discrimination: Discrimination against
20 gay men, which goes back to Leviticus and the
21 common law, and discrimination against lesbians,
22 which was not part of Leviticus and was not part
23 of the common law.

24 Indeed, in 1964, there were only 16
25 states in the United States that clearly forbid

1 some act in which lesbians could engage.

2 So the idea that this is one large
3 idea about sexual orientation discrimination in
4 the abstract, without reference to sex, simply
5 burkes the history and burkes the understanding.
6 And if you look at the harassment cases, you
7 will see why this is true. Gay men are harassed
8 in a different way than lesbians.

9 Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel. The case is submitted.

12 (Whereupon, at 11:07 a.m., the case
13 was submitted.)

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