

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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R.G. & G.R. HARRIS FUNERAL )  
HOMES, INC., )  
                    Petitioner, )  
                    v. ) No. 18-107  
EQUAL EMPLOYMENT OPPORTUNITY )  
COMMISSION, ET AL., )  
                    Respondents. )  
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Pages: 1 through 65  
Place: Washington, D.C.  
Date: October 8, 2019

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3 R.G. & G.R. HARRIS FUNERAL )

4 HOMES, INC., )

5 Petitioner, )

6 v. ) No. 18-107

7 EQUAL EMPLOYMENT OPPORTUNITY )

8 COMMISSION, ET AL., )

9 Respondents. )

10 - - - - -

11 Washington, D.C.

12 Tuesday, October 8, 2019

13

14 The above-entitled matter came on for  
15 oral argument before the Supreme Court of the  
16 United States at 11:08 a.m.

17 APPEARANCES:

18 DAVID D. COLE, New York, New York;

19 on behalf of Respondent Aimee Stephens.

20 JOHN J. BURSCH, Washington, D.C.;

21 on behalf of the Petitioner.

22 GEN. NOEL J. FRANCISCO, Solicitor General,

23 Department of Justice, Washington, D.C.;

24 on behalf of Respondent EEOC, supporting

25 reversal.

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

2 (11:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next in Case 18-107, R.G. & G.R. Harris  
5 Funeral Homes versus the Equal Employment  
6 Opportunity Commission.

7 Mr. Cole.

8 ORAL ARGUMENT OF DAVID D. COLE  
9 ON BEHALF OF RESPONDENT AIMEE STEPHENS

10 MR. COLE: Mr. Chief Justice, and may  
11 it please the Court:

12 Aimee Stephens is a transgender woman.  
13 She was a valued employee of Harris Funeral  
14 Homes for six years, until she told her boss  
15 that she was going to live and identify as a  
16 woman.

17 When Harris Homes responded by firing  
18 her, it discriminated against her because of her  
19 sex for three reasons:

20 First, in firing her for failing to  
21 conform to its owner's explicitly stated  
22 stereotypes about how men and women should  
23 behave, it discriminated against her in the same  
24 way that Price Waterhouse discriminated against  
25 Ann Hopkins for failing to walk and talk more

1 femininely. It can't be that Ann Hopkins would  
2 lose her case on the same facts were she  
3 transgender.

4           Second, Harris Homes fired her for  
5 identifying as a woman only because she was  
6 assigned a male sex at birth. In doing so, it  
7 fired her for contravening a sex-specific  
8 expectation that applies only to people assigned  
9 male sex at birth; namely, that they live and  
10 identify as a man for their entire lives. That  
11 is disparate treatment on the basis of sex.

12           Third, Harris Homes fired her for, in  
13 its owner's words, changing her sex. That's  
14 discrimination in the same way that firing  
15 someone for changing their religion would be  
16 religious discrimination.

17           That Harris Homes would fire both  
18 transgender men for being insufficiently  
19 feminine and transgender women for being  
20 insufficiently masculine is, as the government  
21 concedes, two acts of sex discrimination, not a  
22 defense.

23           None of these arguments ask this Court  
24 to redefine or, in Judge Posner's words, update  
25 sex. They assume, *arguendo*, that sex means at a

1 minimum sex assigned at birth based on visible  
2 anatomy or biological sex.

3 CHIEF JUSTICE ROBERTS: I understand  
4 -- I understand that as the argument, and I -- I  
5 believe it's the same as in -- in the prior  
6 case. But does that argument hold up when you  
7 get to specific work requirements?

8 In other words, if the objection of a  
9 transgender man transitioning to woman is that  
10 he should be allowed to use, he or she, should  
11 be allowed to use the women's bathroom, now, how  
12 do you analyze that? I understand how you  
13 analyze --

14 MR. COLE: Yeah.

15 CHIEF JUSTICE ROBERTS: -- status as  
16 it were, maybe that's hiring and firing on the  
17 basis -- treating it as just on the basis of  
18 sex, but when you get to specific policies, does  
19 that hold true?

20 MR. COLE: So, first of all, Your  
21 Honor, how one -- how you answer this case will  
22 not resolve how you answer that case. Whether  
23 you rule against us or for us, the next case  
24 will arise in the -- in the following sense: A  
25 dress code that distinguishes on the basis of

1 sex obviously is because of sex. The question,  
2 then, is does it impose a discriminatory term  
3 and condition? And as this Court said in  
4 Burlington Northern, to discriminate is not just  
5 to differentiate, but to differentiate in a way  
6 that injures.

7 CHIEF JUSTICE ROBERTS: I think you're  
8 -- I think you're missing my -- my point, maybe  
9 because it wasn't carefully expressed, but it's  
10 -- it's can the claim be -- I mean, I understand  
11 when you say you're dealing with transgender  
12 status and you can't discriminate on that basis  
13 with -- on the basis of status. But when you  
14 get to the actual policy, do you analyze it as  
15 discrimination on the basis of sex carrying  
16 forward your reasoning from -- at the outset or  
17 on the basis of transgender status?

18 MR. COLE: So --

19 CHIEF JUSTICE ROBERTS: So if the  
20 objection of the transgender individual is that  
21 I want to use a bathroom consistent with my  
22 gender identity, rather than biological sex, do  
23 you analyze it as -- the affecting based on the  
24 transgender status or do you analyze it on the  
25 basis of biological sex?

1 MR. COLE: So the -- the -- I -- I  
2 think our argument rests on biological sex or  
3 what we think is more accurately referred to as  
4 sex assigned at birth.

5 But here's -- here's the thing: If  
6 there is a -- this -- this case asks whether  
7 when someone fires someone because they're  
8 transgender or because they fail to conform to  
9 sex-based stereotypes, is that because of sex?  
10 That's what this case asks.

11 Obviously, a sex-specific restroom  
12 policy is because of sex. That -- so you're --  
13 we're not answering that question. It's because  
14 of sex. Then the question is --

15 CHIEF JUSTICE ROBERTS: Just if I  
16 could interrupt so I can follow.

17 MR. COLE: Yeah.

18 CHIEF JUSTICE ROBERTS: It's because  
19 of sex.

20 MR. COLE: Because of biological --

21 CHIEF JUSTICE ROBERTS: And so -- but  
22 if you analyze it because of sex, then I think,  
23 as has been pointed out --

24 MR. COLE: Yeah.

25 CHIEF JUSTICE ROBERTS: -- there's no



1 disadvantage, whether you're a man or a woman.  
2 But if you analyzed it on the basis of  
3 transgender status, there is, because you want  
4 to use the women's restroom and be biologically  
5 male.

6 So when it's analyzed on the basis of  
7 sex, there's no problem, but when it's analyzed  
8 on the basis of transgender status, it presents  
9 a whole different case.

10 MR. COLE: So I don't think so, Your  
11 Honor. I think -- look, anybody can challenge a  
12 sex-specific rule. A transgender person can  
13 challenge a sex-specific rule. A  
14 non-transgender person can challenge a  
15 sex-specific rule.

16 What this Court said in Burlington  
17 Northern and in Oncale is that to decide whether  
18 something discriminates that refers to sex is  
19 you have to ask whether -- not just whether it  
20 differentiates, but whether it differentiates in  
21 a way that injures.

22 And you answer that question by asking  
23 would a reasonable person in the plaintiff's  
24 position experience a significant or trivial  
25 harm?

1 JUSTICE GORSUCH: Now --

2 MR. COLE: And in most instances --

3 JUSTICE GORSUCH: And that -- that's  
4 the question I posed to Ms. Karlan earlier.

5 MR. COLE: Right.

6 JUSTICE GORSUCH: And we went around  
7 the tree a bit, but ultimately came to, I  
8 believe, a submission that a reasonable person  
9 in the transgender Plaintiff's position would be  
10 harmed if he or she were fired for failing to  
11 follow the -- the bathroom rules or some sort of  
12 dress code that's not otherwise objectionable,  
13 along the lines of --

14 MR. COLE: Yeah.

15 JUSTICE GORSUCH: -- that were present  
16 in the facts of this case, where men and women  
17 had rather traditional options available to  
18 them. But -- so is that your answer as well?

19 MR. COLE: That is -- that is my  
20 answer. And here's why: Let's say we have a  
21 sex-specific dress code. And you require me or  
22 you to follow the male dress code.

23 Most instances, that's not going to be  
24 a significant harm. That's a -- going to be a  
25 trivial harm, as the Court talked about in

1 Burlington Northern. Therefore, it's not  
2 discrimination, even though it differentiates on  
3 the basis of sex.

4 But if you ask you or me to dress as a  
5 woman, we would consider that a significant  
6 harm. And when you ask a transgender person to  
7 dress in a way that is contrary to their sense  
8 of gender identity, you have imposed a  
9 significant harm. And the harm is because of  
10 sex --

11 JUSTICE SOTOMAYOR: Mr. Cole --

12 MR. COLE: -- based on biological sex  
13 as Justice -- as Chief Justice Roberts said.

14 JUSTICE SOTOMAYOR: Mr. Cole, let's  
15 not avoid the difficult issue, okay? You have a  
16 transgender person who rightly is identifying as  
17 a woman and wants to use the women's bedroom,  
18 rightly, wrongly, not a moral choice, but this  
19 is what they identify with. Their need is  
20 genuine. I'm accepting all of that --

21 MR. COLE: Yeah.

22 JUSTICE SOTOMAYOR: -- and -- and they  
23 want to use the women's bathroom. But there are  
24 other women who are made uncomfortable, and not  
25 merely uncomfortable, but who would feel

1 intruded upon if someone who still had male  
2 characteristics walked into their bathroom.  
3 That's why we have different bathrooms.

4 So the hard question is how do we deal  
5 with that?

6 MR. COLE: That --

7 JUSTICE SOTOMAYOR: And what in the  
8 law will guide judges in balancing those things?  
9 That's really what I think the question is  
10 about.

11 MR. COLE: Well, that is -- that is --  
12 that is a question, Justice Sotomayor. It is  
13 not the question in this case, because --

14 JUSTICE SOTOMAYOR: Mr. Cole,  
15 that's -- yes --

16 MR. COLE: And -- and --

17 JUSTICE SOTOMAYOR: -- because the --  
18 once we decide the case in your favor, then that  
19 question is inevitable.

20 MR. COLE: No, I think even if --

21 JUSTICE SOTOMAYOR: And it may not  
22 be--

23 MR. COLE: -- you decide the case  
24 against us --

25 JUSTICE SOTOMAYOR: It may not be in

1 -- if there's single-sex bathrooms, there might  
2 be one answer, meaning what harm would the other  
3 women -- reasonable woman feel if a man is using  
4 a single-sex bathroom, might be another if it is  
5 two locker rooms, men and women, girls and boys  
6 and who walks in is something you can't control.

7 That's what the question is saying.

8 MR. COLE: But, Justice Sotomayor, the  
9 reason deciding this case will not decide that  
10 case is because --

11 JUSTICE SOTOMAYOR: It won't decide  
12 that case.

13 MR. COLE: It won't decide -- but even  
14 if you rule against us, that case can arise,  
15 because it is a sex-specific rule, and anyone  
16 who is affected by a sex-specific rule can argue  
17 that it discriminates against them because a  
18 reasonable person in their shoes would  
19 experience a significant harm.

20 JUSTICE ALITO: Well, I understood  
21 you -- I understood you to say -- maybe I didn't  
22 understand you correctly -- that if your client  
23 had been fired for using the woman's bathroom,  
24 that would be a violation of Title VII.

25 MR. COLE: So I -- what I said was,

1 yes, that -- that -- in our view, were we  
2 litigating that case here, which we aren't, they  
3 admitted that the -- the restroom was a -- was a  
4 hypothetical issue and not a -- a reason why she  
5 was fired, but were we litigating that case, I  
6 think the question would be not whether the --  
7 the policy was because of sex, which is the  
8 question here, because obviously the restroom is  
9 because of sex.

10 The question would be, does imposing  
11 that restroom policy, which is obviously because  
12 of sex, impose a discriminatory injury on an  
13 individual.

14 JUSTICE ALITO: And --

15 MR. COLE: And if you require me to go  
16 to the women's restroom, that's a serious --

17 JUSTICE KAGAN: So what you're --

18 MR. COLE: -- issue.

19 JUSTICE KAGAN: -- saying is, we're  
20 stuck with that question regardless of how we  
21 decide this case.

22 MR. COLE: Whether you rule for or  
23 against us. This case --

24 CHIEF JUSTICE ROBERTS: Well, but the  
25 difference is that part of the argument, at

1 least, is that the term "sex" includes sexual  
2 orientation.

3           And -- and if that is the case, if we  
4 analyze the bathroom case purely on the basis of  
5 biological sex, maybe you have one answer. But  
6 if you analyze it in terms of transgender  
7 status, you have a different answer, because men  
8 and women who identify with their biological sex  
9 aren't disadvantaged whether they use the men's  
10 room, you know, they each can use their own  
11 restroom.

12           But the issue seems -- is quite  
13 different if you are dealing with a transgender  
14 individual who wants to use the restroom of  
15 their gender identity, contrary to their  
16 biological sex.

17           And the question is, how do you  
18 analyze that? You say in each case it's on the  
19 basis of sex. Do you analyze it on the basis of  
20 biological sex or are you analyzing it on the --  
21 a different basis, because they present  
22 different issues?

23           MR. COLE: I -- Your Honor, for  
24 this -- for purposes of this case, all we are  
25 arguing is that Title -- Title VII's reference

1 to sex at least includes what you're calling  
2 biological sex, what we call sex assigned --

3 JUSTICE KAGAN: Mr. Cole --

4 MR. COLE: -- at birth --

5 JUSTICE KAGAN: You can go further  
6 than that. For purposes of the next case, all  
7 it includes --

8 MR. COLE: Yes, exactly.

9 JUSTICE KAGAN: -- is biological sex  
10 as well. All that you're saying is, yes, that  
11 -- because of sex means because of biological  
12 sex, regardless of whether the transgendered  
13 person or whether a non-transgendered person  
14 brings this claim about the restroom.

15 But you're --

16 CHIEF JUSTICE ROBERTS: Then it's --  
17 then it's an easy case, right?

18 MR. COLE: Yes.

19 CHIEF JUSTICE ROBERTS: Because if  
20 it's just biological sex, there's no problem  
21 because there is no disadvantage.

22 But if you're looking at transgender  
23 status, there is a huge problem because it is  
24 not biological discrimination --

25 MR. COLE: No.



1 CHIEF JUSTICE ROBERTS: -- or the  
2 claim is going to be different. Certainly a  
3 transgender individual can bring the claim under  
4 Title VII that it discriminates on the basis of  
5 sex.

6 MR. COLE: Right.

7 CHIEF JUSTICE ROBERTS: But if the  
8 claim is it discriminates because I am a  
9 transgender individual, that's not your claim?

10 MR. COLE: But that's not -- the --  
11 the -- the claim here is that you are  
12 treating -- that Harris Homes is treating Aimee  
13 Stephens differently because of her sex assigned  
14 at birth. If she had a female sex assigned at  
15 birth, she would not be fired. Because she had  
16 a male sex assigned at birth, she is fired.

17 That is discrimination because of sex.  
18 That's all that --

19 JUSTICE ALITO: What if they --

20 MR. COLE: And that doesn't decide the  
21 bathroom question because the bathroom  
22 question -- there's no doubt that a -- separate  
23 sex bathrooms are because of sex.

24 JUSTICE KAGAN: Because of biological  
25 sex.

1 MR. COLE: Because of biological sex,  
2 as you use it. The question then is, does it  
3 impose a de minimis burden, a trivial burden, as  
4 the Court said in Burlington Northern, or does  
5 it impose a significant burden.

6 In Burlington Northern, the Court said  
7 the same rule can impose a significant burden as  
8 to some people and a trivial burden as to  
9 others. A schedule change might be trivial for  
10 a -- a -- a -- a worker with no kids --

11 JUSTICE ALITO: But I imagine --

12 MR. COLE: -- but a worker with kids  
13 it would be significant.

14 JUSTICE ALITO: I -- I imagine you  
15 would say that excluding a transgender woman  
16 from the woman's bathroom would be far more than  
17 a de minimis burden on that person, but let me  
18 move -- move out of that.

19 MR. COLE: Exactly.

20 JUSTICE ALITO: Let me move beyond the  
21 bathroom to another example. And it's not  
22 before us, but it will be coming. So a  
23 transgender woman is not permitted to compete on  
24 a woman's college sports team. Is that  
25 discrimination on the basis of sex in violation

1 of Title IX?

2 MR. COLE: So Title IX is a different  
3 statute with regulations that explicitly permit  
4 sex-segregated teams when competitive skill  
5 or -- or contact sports are involved. So,  
6 again --

7 JUSTICE GINSBURG: But this is not --  
8 this is a question of someone who has  
9 transitioned from male to female --

10 MR. COLE: Right.

11 JUSTICE GINSBURG: -- and wants to  
12 play on the female team. She's not questioning  
13 separate female/male teams. But she was born a  
14 man. She has transitioned. She wants to play  
15 on the female team.

16 Does it violate Title IX which  
17 prohibits gender-based discrimination?

18 MR. COLE: Right. And I think the  
19 question again would not be affected even by the  
20 way that the Court decides this case, because  
21 the question would be: Is it permissible to  
22 have sex-segregated teams? Yes, where they  
23 involve competitive skill or -- or contact  
24 sports. And then the question would be: How do  
25 you apply that permissible sex segregation to a

1 transgender individual?

2           And it may be that because Title IX  
3 recognizes concerns about competitive skill in  
4 contact sports, that it's permissible. It may  
5 be that it's not permissible. But this -- this  
6 case just asks, when you fire somebody because  
7 you say she -- he was going to represent himself  
8 as a man, because she was using the name Aimee  
9 and that's not permissible because he's a man,  
10 is that sex discrimination? Yes, that is sex  
11 discrimination.

12           Whether -- when you have a -- a -- a  
13 -- a policy that permits sex segregation, how  
14 that applies to transgender people is just a  
15 different question. It is not answered one way  
16 or the other by this case.

17           You would still have to ask, is it  
18 fair to keep that person off of the team just  
19 like it's fair to keep a -- a -- a -- a man  
20 off of that team?

21           The -- the -- the -- the -- the  
22 stereotypes in this case are every bit as strong  
23 as they were in Price Waterhouse. What Mr. --  
24 in fact, they're stronger because in Price  
25 Waterhouse, you had to infer from statements

1 that non-decision-makers were making about why  
2 Ann Hopkins was fired.

3 Here, Mr. Rost has made his sex  
4 stereotypes absolutely clear and the government  
5 and Petitioner concede that transgender people  
6 are not excluded from the statute. It's not  
7 like the German police officer.

8 They concede, transgender people can  
9 bring sex discrimination claims. She has  
10 brought a sex discrimination claim because she  
11 was fired for failing to conform to sex-based  
12 stereotypes, explicitly stated by her employer.

13 That can't be. Again, Ann Hopkins  
14 would lose her case were she transgender. It's  
15 -- it's not okay to employ sex stereotypes  
16 against an employee until that employee becomes  
17 transgender.

18 And at the end of the day, the  
19 objection to someone for being transgender is  
20 the ultimate sex stereotype. It is saying, I  
21 object to you because you fail to conform to  
22 this stereotype: The stereotype that if you are  
23 assigned a male sex at birth, you must live and  
24 identify for your entire life as a man. That is  
25 a true generalization for most of us, but it is

1 not true for 1.5 million transgender Americans.

2 And so to say we're going to fire you  
3 because you fail to -- to accord to a  
4 generalization about how people who are assigned  
5 a particular sex based on visible anatomy at  
6 birth have to live their lives for the rest of  
7 their lives is sex discrimination.

8 It's also sex discrimination because  
9 she was clearly treated differently because of  
10 her sex assigned at birth. Imagine an employer  
11 who had six Aimees and invited all six Aimees in  
12 and he said: You know, I just want to know what  
13 your sex assigned at birth was.

14 And five of them say, well, I was  
15 assigned female at birth. And one says, I was  
16 assigned male at birth. And then he fires the  
17 one who says I was assigned male at birth.  
18 Obviously, that person is fired because of her  
19 sex assigned at birth.

20 And as we saw from the prior argument,  
21 it need not be the only justification. It  
22 needn't be only one justification.

23 And -- and -- and -- and the notion  
24 that somehow discriminating against someone  
25 because they are transgender is not

1 discrimination, discriminating against them  
2 because of their sex I think falls apart because  
3 to say I'm discriminating against you because  
4 you are transgender is to say I am treating you  
5 differently from other people who have the same  
6 gender identity, because of your sex assigned at  
7 birth.

8           So, again, we're not asking that you  
9 update the statute. We're not asking that you  
10 redefine sex. We are accepting the narrowest --  
11 for purposes of this case, the narrowest  
12 definition of sex and -- and arguing that you  
13 can't understand what Harris Homes did here  
14 without it treating her differently because of  
15 her sex assigned at birth.

16           JUSTICE KAGAN: There -- there seems,  
17 Mr. Cole, to be this dispute among the parties  
18 in this case as to what the basis of the firing  
19 was, whether the basis of the firing was the --  
20 the violation of the dress code, particularly,  
21 or whether it was broader than that, was being  
22 transgender.

23           What -- what should we make of that  
24 dispute?

25           MR. COLE: Well, I think, I mean, the

1 Sixth Circuit expressly said that the reasons  
2 for firing her extended beyond the dress code.  
3 Counsel for Harris Homes conceded at oral  
4 argument in the Second Circuit that she would  
5 have been fired if she showed up as a woman,  
6 even if she were following the dress code. And  
7 that's in Petitioner's Appendix 66A from the  
8 Sixth Circuit decision.

9 And he fired her after he got the  
10 letter saying I am coming out as a woman, and  
11 I'm going to heretofore be called Aimee, without  
12 any discussion of the dress code whatsoever.

13 So this --

14 JUSTICE GORSUCH: So -- so --

15 MR. COLE: -- is a case --

16 JUSTICE GORSUCH: So, Mr. Cole,  
17 though, your argument, though, doesn't turn on  
18 that. I mean, it -- as I understand it, again,  
19 that if -- if the firing had been solely what  
20 the employer claims, the basis of the dress code  
21 only, the result would be the same.

22 And I guess I -- I'd just like you to  
23 have a chance to respond to Judge Lynch in his  
24 thoughtful dissent in which he lamented  
25 everything you have before us, but suggested



1 that something as drastic a change in this  
2 country as bathrooms in every place of  
3 employment and dress codes in every place of  
4 employment that are otherwise gender neutral  
5 would be changed, that that -- that that's an  
6 essentially legislative decision.

7 MR. COLE: Your Honor --

8 JUSTICE GORSUCH: Judge Lynch is a  
9 very thoughtful judge and -- and wrote a very  
10 thoughtful opinion that I -- I think he probably  
11 regretted having to write. What do you say to  
12 -- to him?

13 MR. COLE: I -- I say that recognizing  
14 that transgender people have a right to exist in  
15 the workplace and not be turned away because of  
16 who they are does not end dress codes or  
17 restrooms.

18 There are transgender lawyers in this  
19 courtroom today.

20 JUSTICE GORSUCH: Of -- of course,  
21 there are.

22 MR. COLE: And the --

23 JUSTICE GORSUCH: That's not the  
24 question, Mr. Cole.

25 MR. COLE: And the -- no, but the --

1 this is --

2 JUSTICE GORSUCH: Mr. Cole, the  
3 question is a matter of the judicial role and  
4 modesty in interpreting statutes that are old.

5 And that's the question he posed.

6 MR. COLE: Right.

7 JUSTICE GORSUCH: Nobody is  
8 questioning, and he certainly did not, the  
9 legitimacy of the claims and the importance of  
10 them.

11 MR. COLE: So -- so I think that two  
12 --

13 JUSTICE GORSUCH: The question is  
14 about judicial interpretation.

15 MR. COLE: Yeah. There's two --

16 JUSTICE GORSUCH: If you wish to  
17 address it.

18 MR. COLE: Two -- two -- two answers  
19 to that, Your Honor. First, on the question of  
20 judicial interpretation, we are not asking you  
21 to apply any meaning of sex other than the one  
22 that everybody agrees on as of 1964, which is  
23 sex assigned at birth or, as -- as they put it,  
24 biological sex. We're not asking you to rewrite  
25 it.

1 Second --

2 JUSTICE GORSUCH: I agree with that.

3 MR. COLE: Second --

4 JUSTICE GORSUCH: The question,  
5 though, again, and I'm sorry to pose it --

6 MR. COLE: Yeah.

7 JUSTICE GORSUCH: -- but I'm going to  
8 give you one more shot.

9 MR. COLE: Yeah.

10 JUSTICE GORSUCH: Right? When a case  
11 is really close, really close, on the textual  
12 evidence, and I -- assume for the moment I'm --

13 MR. COLE: Yeah.

14 JUSTICE GORSUCH: -- I'm with you on  
15 the textual evidence. It's close, okay? We're  
16 not talking about extra-textual stuff. We're --  
17 we're talking about the text. It's close. The  
18 judge finds it very close.

19 At the end of the day, should he or  
20 she take into consideration the massive social  
21 upheaval that would be entailed in such a  
22 decision, and the possibility that -- that  
23 Congress didn't think about it --

24 MR. COLE: So --

25 JUSTICE GORSUCH: -- and that -- that

1 is more effective -- more appropriate a  
2 legislative rather than a judicial function?  
3 That's it. It's a question of judicial modesty.

4 MR. COLE: So, first of all, federal  
5 courts of appeals have been recognizing that  
6 discrimination against transgender people is sex  
7 discrimination for 20 years. There's been no  
8 upheaval.

9 As I was saying, there are transgender  
10 male lawyers in this courtroom following the  
11 male dress code and going to the men's room and  
12 the -- the -- the -- the Court's dress code and  
13 sex-segregated restrooms have not fallen. So  
14 the notion that somehow this is going to be a  
15 huge upheaval, we haven't seen that upheaval for  
16 20 years, there's no reason you -- you would see  
17 that upheaval. Transgender people follow the  
18 rule that's associated with their gender  
19 identity. It's not disruptive.

20 And as to whether this is a question  
21 of interpretation, it is absolutely a question  
22 of interpretation. How in the world can the  
23 Court interpret Title VII to say that Ann  
24 Hopkins can't be fired for being insufficiently  
25 feminine, but my client can be fired for being

1 insufficiently masculine?

2           There's no textual basis for drawing  
3 that distinction whatsoever. And that's because  
4 our argument rests on text meaning, at a  
5 minimum, sex assigned at birth or biological  
6 sex, and everybody agrees --

7           JUSTICE GORSUCH: Did you want to  
8 address Judge Lynch's arguments or not?

9           MR. COLE: I -- I thought I was.  
10 Number 1, it won't -- it's not disruptive that  
11 transgender people exist in this world and we  
12 still have sex-segregated dress codes. And,  
13 Number 2, it's not asking you to address a  
14 policy question that would be more appropriate  
15 to Congress but asking you to interpret the  
16 statute as it is written and as everybody agrees  
17 it applies to sex assigned at birth.

18           Thank you.

19           CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21           Mr. Bursch.

22           ORAL ARGUMENT OF JOHN J. BURSCH

23           ON BEHALF OF THE PETITIONER

24           MR. BURSCH: Thank you, Mr. Chief  
25 Justice, and may it please the Court:

1           Treating women and men equally does  
2 not mean employers have to treat men as women.  
3 That is because sex and transgender status are  
4 independent concepts.

5           Now, in the context of this case,  
6 Title VII gives Tom Rost the ability to consider  
7 how enforcement of a sex-specific dress code  
8 would impact all his employees and grieving  
9 clients. But the Sixth Circuit imposed a new  
10 restriction, and its holding destroys all  
11 sex-specific policies and even BFOQs while  
12 undermining the protections that Title VII  
13 provides.

14           If you accept at face value Stephens'  
15 concession that sex means biological males and  
16 females, then the funeral home wins. So my  
17 friend, Mr. Cole, redefines sex to include  
18 transgender status in two respects.

19           First, my friend's but-for test would  
20 mean that a women's overnight shelter must hire  
21 a man who identifies as a woman to serve as a  
22 counsellor to women who have been raped,  
23 trafficked, and abused and also share restroom,  
24 shower, and locker room facilities with them.  
25 That is because, but for the man's sex, he would

1 be allowed to -- to hold that job and to use  
2 those facilities.

3 The purportedly simple test does not  
4 get to the ultimate inquiry of whether men are  
5 being treated less favorably than similarly  
6 situated women because of sex. That does not  
7 reflect the original public and legal meaning of  
8 a statute promoting women's equality.

9 Second, under my friend's stereotyping  
10 logic, it is always illegal stereotyping to  
11 apply sex-specific policies based on biological  
12 sex. And that's why he's wrong to say case  
13 isn't about showers and overnight facilities and  
14 sports. Every single one of those is impacted  
15 if you're talking about a sex-specific policy.

16 What Title VII says is that sex-based  
17 differentiation is not the same as sex  
18 discrimination. And that's why Ms. Karlan  
19 agreed that this Court's sex-specific dress  
20 policy doesn't violate Title VII. And though  
21 Congress has added classifications to cover  
22 transgender status in other statutes, it has  
23 rejected more than a dozen proposals here.  
24 Title VII --

25 JUSTICE BREYER: The first part,

1 you've made the argument which I call the parade  
2 of horribles argument, but you've heard, as I  
3 have for the last hour and a half, the response,  
4 which is that isn't this case, that many of the  
5 things that you are worried about would be taken  
6 care of by bona fide occupational qualification,  
7 that other of those things would be taken care  
8 of by the need to show harm, as well as to show  
9 difference, and that there could be, though we  
10 haven't done it, and I'm not advocating it, yes  
11 or no, the possibility of bringing into such  
12 cases comparative harms. And all those things  
13 are open.

14 And if you say that the lower court  
15 decided them, this is not the lower court. I  
16 take it that we are deciding simply whether it  
17 falls within the words "sex discrimination" and,  
18 if it does, we are not saying that there hasn't  
19 been harm, whether there has been a BFOQ,  
20 whether there is comparative harm, et cetera.

21 That's what I've heard. Now, what do  
22 you say to that?

23 MR. BURSCH: Justice Breyer, that is  
24 incorrect, because when a biological male is  
25 refused access to the women's restroom, the --



1 the male would say that was an injury.

2 JUSTICE BREYER: Yes, of course, he --

3 MR. BURSCH: That they were hurt.

4 JUSTICE BREYER: -- he would say it's  
5 an injury.

6 MR. BURSCH: And there is no BFOQ.

7 JUSTICE BREYER: And the other side  
8 would say: I'm sorry but there's serious  
9 injuries on the other side. And, therefore, it  
10 is a BFOQ. Okay?

11 And so this is not that case. We do  
12 not have to decide it. And I don't see why or  
13 how you can assume the answer and then build  
14 your argument on an answer that I certainly  
15 haven't given.

16 MR. BURSCH: It's their answer, and  
17 here's why: If Stephens is right that you  
18 cannot apply a sex-specific policy to those who  
19 identify as the opposite sex, then you cannot  
20 apply that policy to anyone because that itself  
21 would be sex discrimination.

22 JUSTICE BREYER: All right.

23 MR. BURSCH: It would be --

24 JUSTICE BREYER: And just on the off  
25 chance that I feel we do not have to decide that

1 matter in this case --

2 (Laughter.)

3 JUSTICE BREYER: -- have you other  
4 arguments that would favor your side? I know  
5 you do, and I'd just at some point to hear them.

6 MR. BURSCH: Certainly. Their  
7 comparator is a man violating the dress code  
8 with a woman who follows the dress code. That  
9 is wrong. Our comparator is a man who violates  
10 the dress code with a woman who violates the  
11 dress code.

12 Now, the reason we know theirs is  
13 wrong because if you were claiming transgender  
14 status discrimination, rather than sex  
15 discrimination, you would compare a transgender  
16 and a non-transgender employee, which is exactly  
17 what they do, which proves that they are adding  
18 a different classification into the statute that  
19 Congress has not added.

20 JUSTICE BREYER: And what they say is  
21 the reason we know you're wrong -- I'm not  
22 saying this -- nor am I assuming any other  
23 person thinks this, I'm just saying that this is  
24 what I hear -- that if you are right, then  
25 miscegenation does not fall within this statute,

1 that Jews marrying Catholics does not fall  
2 within this statute, that any instance where  
3 people say or many instances where they say I  
4 fired this man because he wasn't a woman -- I  
5 fired the woman because it's a man's job, it's  
6 okay, as long as sometimes you'd fire a -- a --  
7 a man because it's a woman's job. You see the  
8 point.

9 MR. BURSCH: I do. Justice Breyer.

10 JUSTICE BREYER: Okay. Now the --  
11 what is your answer to that?

12 MR. BURSCH: There is no non-racist  
13 reason why you would fire the employee in the  
14 interracial marriage. There is no non-religious  
15 --

16 JUSTICE BREYER: There isn't? I  
17 happen to know people. I won't say who they  
18 are, but there are people --

19 (Laughter.)

20 JUSTICE BREYER: -- in my life I have  
21 heard say being Jewish is fine, being Catholic  
22 is fine, just don't get married.

23 MR. BURSCH: But that's a religious  
24 reason. Now in this case --

25 JUSTICE BREYER: Right. I mean, does

1 that mean it falls outside the statute that --  
2 that -- that -- that forbids discrimination  
3 because of religion?

4 MR. BURSCH: Yes. Because Title VII  
5 allows you to recognize that there are  
6 differences between women and men. And that an  
7 employer -- switching back to the first case --  
8 could terminate a same-sex couple or an employee  
9 who is married to a same-sex partner maybe  
10 because they are Catholic, and they believe that  
11 marriage is only between one man and one woman,  
12 and sex doesn't have anything to do with it.

13 Let me give you an example here.

14 JUSTICE SOTOMAYOR: That's a  
15 ministerial exception that already --

16 MR. BURSCH: No.

17 JUSTICE SOTOMAYOR: -- exists.

18 MR. BURSCH: A ministerial exception  
19 if the employer is a church, but not if the  
20 employer is a Christian businessman --

21 JUSTICE SOTOMAYOR: But there's still  
22 --

23 MR. BURSCH: -- like Mr. Ross.

24 JUSTICE SOTOMAYOR: But there are  
25 still religious exceptions that the Court has

1 read into a lot of statutes. Putting that  
2 aside, your example, very powerful, woman in --  
3 women in a shelter who you say, if we accept his  
4 argument, will have to be guarded by or  
5 counseled by a transgendered woman, but isn't  
6 that exactly like Dothard? And there we said  
7 you can have -- you can't have sex-specific  
8 guarding of prisoners, unless you have a BFOQ.

9 And there they found that it was a  
10 BFOQ to make only men guard men and women only  
11 guard women. So I'm not quite sure that I  
12 understand your parade of horribles.

13 MR. BURSCH: Because under Mr. Cole's  
14 theory, BFOQs have to go too. So that if you  
15 have a BFOQ that says --

16 JUSTICE SOTOMAYOR: But it's  
17 statutory.

18 MR. BURSCH: It -- it is --

19 JUSTICE SOTOMAYOR: They can't -- they  
20 can't --

21 MR. BURSCH: If I could explain?

22 JUSTICE SOTOMAYOR: -- wish it away.  
23 But go ahead.

24 MR. BURSCH: If you have a BFOQ that  
25 says only a man can apply for this position, he

1 would say that a woman who is transgender is a  
2 man, and, therefore, is eligible for that  
3 position, and no BFOQ in the world would be able  
4 to keep them out of that position.

5 The problem is they're adding  
6 transgender classification to a statute where  
7 Congress has never added it.

8 JUSTICE SOTOMAYOR: No. What they're  
9 doing is saying if there is an independent  
10 reason why a man who's transgendered can't have  
11 a job that a woman has, then that reason is good  
12 enough, you don't have to hire them.

13 But if there is no reason why your  
14 gender should matter in the work you are doing,  
15 why should you not be hired?

16 MR. BURSCH: Let -- let's go --

17 JUSTICE SOTOMAYOR: That's a very  
18 different --

19 MR. BURSCH: No.

20 JUSTICE SOTOMAYOR: -- proposition.

21 MR. BURSCH: But let's go back to the  
22 women's overnight shelter. Assume for a moment  
23 that the employer had a BFOQ that only women  
24 counselors would be able to counsel and stay  
25 overnight with the women who have been abused.

1 JUSTICE GINSBURG: How does that fit  
2 with BFOQ? BFOQ is a very narrow category.

3 MR. BURSCH: I -- I agree. But  
4 they're applying it broadly and I am using  
5 Justice Sotomayor's example. Assume that there  
6 is a BFOQ for that and that someone would allow  
7 that.

8 Their position is that it's  
9 stereotyping not to treat the man who identifies  
10 as a woman as a woman. They are arguing that  
11 but for the fact that they were born as a man,  
12 they could take that women's position, so there  
13 is no BFOQ, there is no religious requirement  
14 that would stop and draw the line at the  
15 argument that they are making.

16 All of the distinctions between men  
17 and women are gone forever. And that's the  
18 plain text of the statute.

19 JUSTICE GORSUCH: Do you wish to --

20 MR. BURSCH: But in --

21 JUSTICE GORSUCH: -- address Judge  
22 Flaum's argument joined by Judge Ripple which,  
23 again is -- is a very thoughtful position too  
24 that there may be dual causes here, but the fact  
25 that sex is under consideration even as narrowly

1 construed is enough to draw us within the  
2 statute?

3 MR. BURSCH: I think that line drawing  
4 inquiries happen all the time in Title VII. And  
5 it is entirely appropriate for a judge to  
6 instruct the finder of fact to draw that line.

7 And the line that has to be drawn  
8 based on Title VII's language is whether women  
9 are being treated less favorably than similarly  
10 situated men because of sex. And sometimes  
11 it'll fall on the line; sometimes it won't.  
12 Consider --

13 JUSTICE KAGAN: I think, Mr. Bursch,  
14 that that's not quite right, women should be  
15 treated less differently than men. You're  
16 making Title VII into a statute about groups but  
17 Title VII is not a statute about groups.

18 JUSTICE GORSUCH: That -- that's  
19 helpful, but I'm also curious what you have to  
20 say, Mr. Bursch.

21 MR. BURSCH: Yeah, let's put both of  
22 those together, individual and that concept.  
23 Say that you have a woman who identifies as a  
24 man and they're working at an employer and they  
25 get pregnant. They would be entitled to the



1 same pregnancy benefits as any of the women at  
2 -- at work because that -- if they didn't get  
3 it, that would be sexist.

4 But if the employer applied a  
5 sex-specific dress code or sex-specific showers  
6 and restrooms, that would not be a statutory  
7 violation because of their biological  
8 differences. Men and women are not similarly  
9 situated, and they're -- no one is being treated  
10 disadvantageously compared to someone else.

11 So you could have an employee who  
12 might have a sex discrimination claim but they  
13 can't bring a claim because of their transgender  
14 status. You might have someone who doesn't.  
15 Those are the things that we let juries work  
16 out. And there's nothing unusual about that in  
17 the context of Title VII.

18 JUSTICE KAGAN: I -- I -- I think, Mr.  
19 Bursch, maybe you answered Justice Gorsuch's  
20 question now. You didn't answer mine.

21 MR. BURSCH: Okay.

22 JUSTICE KAGAN: Title VII is a -- is a  
23 -- is a statute about individuals --

24 MR. BURSCH: Correct.

25 JUSTICE KAGAN: -- and whether

1 individuals are being treated differently  
2 because of his or her sex. It's not a statute  
3 about, well, in the aggregate, does this -- does  
4 this act disadvantage men versus women or women  
5 versus men?

6 It's a statute that uses the word  
7 "individual" twice and says is a particular  
8 person being treated differently because of her  
9 sex? And here, Ms. Stephens, was being treated  
10 differently because of her sex. And this was  
11 Judge Flaum's point in -- in that opinion, is  
12 that it's as simple as looking at the language  
13 of the statute, applying it to a particular  
14 individual, which Title VII insists that you do,  
15 and coming up with the obvious answer.

16 Yes, if she had not been a -- if she  
17 had not been assigned at birth the sex that she  
18 was assigned at birth, she would have been  
19 treated differently.

20 MR. BURSCH: We agree with the  
21 individual treatment. That's why in Oncale,  
22 this Court said basically in the context of a  
23 male-only work force that the plaintiff had a  
24 cause of action because he was being treated  
25 differently than a woman in his position would

1 have been.

2 A hypothetical comparator, to get back  
3 to some of Justice Ginsburg's questions, even if  
4 there are no women on the site, you still have  
5 that hypothetical comparator.

6 Here it's individual too, but all the  
7 employer does in enforcing a sex-specific dress  
8 code applied neutrally to everyone, recognizes  
9 that there's differences between men and women.  
10 And if you say that Tom Ross can't do that, then  
11 there is no --

12 JUSTICE KAGAN: Are you pinning your  
13 answer on the fact of a dress code? Would your  
14 answer be the same if there were no dress code  
15 and Ms. Stephens had just been fired for being  
16 transgender?

17 Because all your arguments in your  
18 brief -- I mean, you keep talking in your brief,  
19 as you do here, about the dress code, but the  
20 arguments that you make are arguments that would  
21 allow the employer to fire Ms. Stephens for  
22 being transgender, irrespective of whether there  
23 was a dress code.

24 MR. BURSCH: Here's the reason why,  
25 Justice Kagan.

1 JUSTICE KAGAN: The why what? The --  
2 that the arguments do go that far.

3 MR. BURSCH: Well, that the arguments  
4 apply in both situations.

5 JUSTICE KAGAN: Yeah, if there's a  
6 dress code or if there's not a dress code?

7 MR. BURSCH: Because if this Court  
8 allows a sex-specific dress code because it  
9 acknowledges the differences between men and  
10 women, it's no different if an employer without  
11 a dress code impact -- imposes the same policy  
12 on an informal basis. It doesn't change the  
13 fact that women are not being treated worse than  
14 men, as Ms. Karlan said.

15 It doesn't treat her worse than -- or  
16 it doesn't treat men worse than women that we  
17 wear a tie in this courtroom and that women do  
18 not. Sex-specific policies acknowledge that  
19 there are differences, so whether the sex code  
20 or the sex-specific dress code is in place or  
21 not, employers have that latitude.

22 Now, some jurisdictions, like the  
23 District of Columbia, have taken that latitude  
24 that Title VII gives away from employers. It  
25 says that you cannot, for example, treat someone

1 differently based on their personal appearance,  
2 but otherwise when it comes to dress codes,  
3 grooming codes, opposite sex facilities, and all  
4 those types of things everyone would have  
5 understood Title VII at the time of its  
6 enactment as -- as those things being equal  
7 treatment and not disfavoring either sex over  
8 the other, whether on a group basis or an  
9 individual basis. It doesn't make any  
10 difference.

11           The -- the problem here is that under  
12 their theory, the -- the federal agency that  
13 brought this claim and -- and then an unelected  
14 panel in the Sixth Circuit, changed the law.  
15 They added a transgender classification, applied  
16 it to a business retroactively. And what's  
17 more, the Sixth Circuit said that sex itself is  
18 a stereotype.

19           And Mr. Cole agrees with that  
20 100 percent. Everything that he said this  
21 morning, sex itself is a stereotype. You can  
22 never treat a man who identifies as a woman  
23 differently because to do that is sex  
24 discrimination. When you do that, there is no  
25 sex discrimination standard under Title VII

1 anymore. It's been completely blown up.

2 One other point on the restroom  
3 scenario. Gender identity is a broad concept.  
4 You could have a male employee who identifies as  
5 a woman but doesn't dress as a woman, looks like  
6 a man, showing up in the shower and the locker  
7 room, and, again, the employer wouldn't be able  
8 to do anything about that because under Mr.  
9 Cole's theory, but for the fact he was a man, he  
10 could be there. And it's stereotyping to say  
11 men cannot be in the women's bathroom.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 General Francisco.

16 ORAL ARGUMENT OF GEN. NOEL J. FRANCISCO

17 ON BEHALF OF RESPONDENT EEOC

18 GENERAL FRANCISCO: Mr. Chief Justice,  
19 and may it please the Court:

20 I'd like to make three basic points  
21 aimed at basically addressing Justice Gorsuch's  
22 comment that this was -- this is a close textual  
23 case. And I would like to respectfully argue  
24 that I don't think it's that close for three  
25 reasons.

1 JUSTICE GORSUCH: Oh, neither side  
2 ever thinks a case is close.

3 (Laughter.)

4 JUSTICE GORSUCH: Judges always do,  
5 don't they?

6 GENERAL FRANCISCO: And the first,  
7 Your Honor, is the one that I was talking about  
8 earlier, that sex and gender identity, like sex  
9 and sexual orientation, are different traits.  
10 They're defined, they have different  
11 definitions, as my friend just said. He agrees  
12 that they're different traits. And there's a  
13 reason why when Congress wants to prohibit  
14 discrimination based on the traits of sexual  
15 orientation and gender identity, it lists them  
16 separately. It doesn't define sex as including  
17 these traits. It's because Congress has  
18 recognized there are different traits. So as  
19 long as you treat men and women with the same  
20 different trait exactly the same regardless of  
21 their sex, you're not discriminating against  
22 them because of their sex.

23 The second and related textual issue  
24 is that the standard for determining whether or  
25 not you're discriminating against somebody

1 because he's a man or because she's a woman is  
2 that you're treating that person differently  
3 than a similarly situated person of the opposite  
4 sex and taking an adverse employment action  
5 against them as a result.

6 So the threshold question is always  
7 are the two people that you're comparing  
8 actually similarly situated? Now, my friends on  
9 the other side assert that a transgender man is,  
10 in fact, similarly situated to cisgender man,  
11 just like they assert that a gay woman is  
12 similarly situated to a straight man.

13 But that is manifestly not true  
14 because, with respect to the transgender issue,  
15 the difference between a transgender man and  
16 cisgender man is that one identifies with his  
17 biological sex and the other identifies with the  
18 opposite of his biological sex. And that is a  
19 very meaningful difference that is not grounded  
20 on stereotypes. It's simply grounded on a  
21 difference between a transgender man and a  
22 cisgender man.

23 Likewise with sexual orientation. The  
24 difference between a gay man and a straight  
25 woman is that -- is their sexual orientation.



1 And that has nothing to do with stereotypes. It  
2 has nothing to do with one -- whether one is  
3 better or worse than the other.

4 JUSTICE GORSUCH: A great deal of --

5 GENERAL FRANCISCO: It's a different  
6 type of relationship.

7 JUSTICE GORSUCH: A great deal of --  
8 of the arguments here could be cast as  
9 stereotypes, though, right? That the plaintiff  
10 in this case or that case doesn't conform to  
11 male or female stereotypes?

12 GENERAL FRANCISCO: That is --

13 JUSTICE GORSUCH: And -- and as I  
14 understand your brief, you accept that argument  
15 and that those are good claims without respect  
16 to comparators of opposite sex. And if -- if  
17 that's the case, what's the real difference here  
18 between the two sides? I mean, we've --

19 GENERAL FRANCISCO: Right.

20 JUSTICE GORSUCH: I -- I accept  
21 there's some delta, but it seems smaller than  
22 might first appear.

23 GENERAL FRANCISCO: Sure. And I --  
24 what I would say the difference is at what stage  
25 of the analysis you're doing it? The way -- the

1 place that stereotypes come up are when you're  
2 figuring out whether similarly situated --  
3 whether two people are, in fact, similarly  
4 situated. An aggressive man -- take Price  
5 Waterhouse: An aggressive man is similarly  
6 situated to an aggressive woman. They have the  
7 exact same trait, aggressiveness, and the only  
8 difference is that stereotypical view that women  
9 shouldn't be aggressive.

10 But a transgender man and cisgender  
11 man do not ever share the same trait in the  
12 first place because one identifies with his  
13 biological sex, the other identifies with the  
14 opposite of his biological sex. And that is  
15 simply a different trait that is not grounded in  
16 any kind of stereotype. And a gay man is not  
17 similarly situated --

18 JUSTICE KAGAN: General --

19 GENERAL FRANCISCO: -- to a straight  
20 woman for exactly the same reason.

21 JUSTICE KAGAN: And I think one could  
22 argue just the opposite, that there is another  
23 trait in Price Waterhouse, and the trait is  
24 conformity to traditional gender roles.

25 So your argument would suggest, no, we

1 shouldn't look at the aggressive woman and the  
2 aggressive man. We should instead say, no,  
3 there's this other thing, which is conformity to  
4 gender roles.

5 GENERAL FRANCISCO: Right.

6 JUSTICE KAGAN: We should really look  
7 at whether the employer treats the same the  
8 aggressive woman and the docile man, the docile  
9 effeminate man. And if the employer treats the  
10 aggressive woman in the same way that the  
11 employer treats the effeminate man, they're both  
12 fired, then the employer is off the hook.

13 Now, you yourself, say that that's not  
14 right, that, in fact --

15 GENERAL FRANCISCO: Right.

16 JUSTICE KAGAN: -- that's double  
17 discrimination and the employer is on the hook  
18 twice. But it seems to me that the exact same  
19 analysis applies because there is this  
20 independent trait, which is just a little bit  
21 different from the independent trait here. Here  
22 the -- the -- the -- the -- the independent  
23 trait, so-called, that you say is the  
24 transgender identity. There, the independent  
25 trait was the refusal to conform to traditional

1 gender roles.

2 GENERAL FRANCISCO: Right. And -- and  
3 I -- the reason I disagree with that analysis,  
4 Your Honor, is because I don't think that Price  
5 Waterhouse creates some kind of freestanding  
6 stereotype claim.

7 What it prohibits is stereotypes that  
8 show that you're treating similarly situated men  
9 and women differently.

10 JUSTICE GINSBURG: But I thought you  
11 --

12 GENERAL FRANCISCO: So in Price  
13 Waterhouse --

14 JUSTICE GINSBURG: I thought you  
15 answered the question that -- that Price  
16 Waterhouse would not have prevailed if it had  
17 treated men who were not sufficiently macho in  
18 the same way that they treated women who were  
19 not sufficiently feminine.

20 GENERAL FRANCISCO: No, Your Honor, I  
21 believe we said the opposite of that in our  
22 brief. And it was --

23 JUSTICE GINSBURG: That that would be  
24 okay?

25 GENERAL FRANCISCO: Yeah, we said the

1 opposite of that in our brief.

2 JUSTICE BREYER: Then I could ask this

3 --

4 JUSTICE GINSBURG: And they could rely  
5 on the -- for both cases --

6 GENERAL FRANCISCO: Yes.

7 JUSTICE GINSBURG: -- they could rely  
8 on the stereotype that the woman doesn't fit,  
9 they can rely on the stereotype that the man  
10 didn't fit, although the cases have said that  
11 the object of Title VII was to get at the entire  
12 spectrum of sex stereotypes.

13 GENERAL FRANCISCO: And so as we read  
14 Price Waterhouse, which I have no quarrel with  
15 in the slightest, if you treat an aggressive  
16 woman worse than an aggressive man, you are  
17 violating Title VII because you're treating  
18 similarly situated people differently.

19 Applying that here, if you treat a  
20 transgender man exactly the same as you treat a  
21 transgender woman regardless of their sex,  
22 you're likewise not discriminating against them  
23 because of their sex --

24 JUSTICE BREYER: I -- I --

25 GENERAL FRANCISCO: -- since they're

1 similarly situated --

2 JUSTICE BREYER: I -- we got that. I  
3 -- I -- I want to know on a totally separate  
4 argument.

5 GENERAL FRANCISCO: Yeah.

6 JUSTICE BREYER: See, one, it's only  
7 my characterization, not anybody else's, but I  
8 do characterize one set of arguments that you've  
9 been through as trying to work with the language  
10 of the statute. All right?

11 And on the one hand, you have these  
12 are individuals, individuals four times --

13 GENERAL FRANCISCO: Yeah.

14 JUSTICE BREYER: -- and on the other  
15 hand, you have -- and the arguments that were  
16 made here and, on the other hand, arguments on  
17 the other side. I'm putting that to the side.

18 GENERAL FRANCISCO: Okay.

19 JUSTICE BREYER: Then there are the  
20 horrors. Okay? And we've discussed that at  
21 length. I'm putting that to the side.

22 GENERAL FRANCISCO: Okay.

23 JUSTICE BREYER: Then I say, well,  
24 there seems to be a third set in some of these  
25 briefs, that regardless of the first two,

1 Congress -- and that's what I think the  
2 dissenting judge was talking about, and Judge  
3 Posner, who had a good point. I'm not saying  
4 it's a winning point --

5 (Laughter.)

6 JUSTICE BREYER: -- which is what I  
7 want to know.

8 GENERAL FRANCISCO: Yeah.

9 JUSTICE BREYER: That Congress  
10 wouldn't have dreamt of this when it passed the  
11 statute. All right? I heard you say, I think,  
12 we're not relying on that. Is that so? The  
13 government is not relying on that?

14 GENERAL FRANCISCO: No, we are relying  
15 on it in this sense.

16 JUSTICE BREYER: Oh, you are.

17 GENERAL FRANCISCO: One -- one, we  
18 think it fortifies our other arguments, but I  
19 know --

20 JUSTICE BREYER: Of course, it does.

21 GENERAL FRANCISCO: -- you don't -- I  
22 know you don't want me to push on that, so I'm  
23 not going to push on that. We're relying on it  
24 to the sense that to the extent there is any  
25 ambiguity here, we think it is strongly

1 dispelled by the history of these statutes.

2           And I want to address that updating  
3 issue because it's a very important question.

4           JUSTICE BREYER: Yes.

5           GENERAL FRANCISCO: And here, by  
6 updating it in the way that my friends on the  
7 other side would have you update it, they're  
8 actually undermining the manner in which  
9 Congress has traditionally considered updating  
10 it.

11           If you look at ENDA, which I think --

12           JUSTICE BREYER: ENDA.

13           GENERAL FRANCISCO: -- refers to the  
14 Employment Non-Discrimination Act, for nearly a  
15 decade now, when Congress has looked and  
16 considered expanding the scope of the liability  
17 provisions, it has acknowledged that there are  
18 religious liberty issues at stake. And it wants  
19 to be able to take those into account too.

20           If you look at the states, they've  
21 often come to very similar compromises where  
22 they found peace amongst otherwise very --

23           JUSTICE BREYER: Got it.

24           GENERAL FRANCISCO: -- groups of very  
25 different views.



1           But if you resolve this issue  
2           judicially, you are essentially delivering --  
3           and I hate to use these types of terms --

4           JUSTICE BREYER: All right.

5           GENERAL FRANCISCO: -- but a complete  
6           victory to one side of the fight and nothing to  
7           the other side --

8           JUSTICE BREYER: All right. I've got  
9           that point.

10          GENERAL FRANCISCO: -- of the fight,  
11          you're upsetting that --

12          JUSTICE BREYER: Yeah.

13          GENERAL FRANCISCO: -- legislative  
14          balance.

15          JUSTICE BREYER: I -- I think that is  
16          an argument in your favor.

17          GENERAL FRANCISCO: Yeah.

18          JUSTICE BREYER: Moreover, I think  
19          this whole category is the elephant in the room  
20          and --

21          GENERAL FRANCISCO: That -- that was  
22          actually the --

23          JUSTICE BREYER: -- I think it is --

24          GENERAL FRANCISCO: -- third point  
25          point I was going to make to Justice Gorsuch.

1 JUSTICE BREYER: Well, all right, I  
2 think it is. But then on the other side of what  
3 you're saying is the following, which is  
4 abstract but no more so.

5 In the '60s, we were only ten years  
6 away from where people who were real slaves  
7 and -- and discriminated against obtained a  
8 degree of freedom. And these statutes were all  
9 part of a civil rights movement that was  
10 designed to give, include in our society, people  
11 who had been truly discriminated against for the  
12 worst of reasons.

13 And at that time, this civil rights  
14 statute, when it was passed, would have put in  
15 the category gay people, transgender people, of  
16 people who were suffering terrible  
17 discrimination. And over time, this Court has  
18 moved away from that view finding it  
19 unconstitutional.

20 And now, doesn't that fact, which is  
21 an overwhelming fact to me about the nature of  
22 the country under law, argue that that's a  
23 change. That's a change that both explains why  
24 they didn't put it in initially and explains why  
25 we should, other things being equal, interpret

1 it to include gay people and transgender people  
2 now?

3 GENERAL FRANCISCO: No, Your Honor,  
4 for a couple of reasons, I would argue against  
5 that. And, again, I'm going to put the text to  
6 the one side, but, though I do think that that  
7 is our strongest argument.

8 I -- I -- I -- I actually find it  
9 troubling for courts to take that approach  
10 because I actually think it deprives the people  
11 of the ability to struggle with these issues  
12 democratically.

13 And I think it is very important when  
14 we have these kinds of big changes, that we  
15 actually convince one another that this is the  
16 right thing to do.

17 JUSTICE GINSBURG: No one ever --

18 GENERAL FRANCISCO: And when courts --

19 JUSTICE GINSBURG: No one ever thought  
20 sexual harassment was encompassed by  
21 discrimination on the basis of sex back in '64.  
22 It wasn't until a book was written in the middle  
23 '70s bringing that out.

24 And now we say, of course, harassing  
25 someone, subjecting her to terms and conditions

1 of employment she would not encounter if she  
2 were a male, that is sex discrimination but it  
3 wasn't recognized --

4 GENERAL FRANCISCO: And --

5 JUSTICE GINSBURG: -- to be such in  
6 the beginning.

7 GENERAL FRANCISCO: And, Your Honor, I  
8 think that that is a straightforward application  
9 of Title VII's text.

10 With respect to what I was talking  
11 about with Justice Breyer where we were putting  
12 the text aside, I think it is important to allow  
13 the democratic processes to resolve these issues  
14 so we have a stable resolution of the issue and  
15 one that takes into account what everybody would  
16 agree are legitimate interests on all sides.

17 In Obergefell, this Court made very  
18 clear that there were good and decent people who  
19 had different views with respect to gay marriage  
20 and they should be respected.

21 The legislative process is the process  
22 that allows those views to respect -- be  
23 respected as well as the very powerful views of  
24 my friends on the other side --

25 JUSTICE SOTOMAYOR: May I --

1 JUSTICE KAGAN: General Francisco --

2 GENERAL FRANCISCO: -- which also  
3 should be respected.

4 JUSTICE SOTOMAYOR: May -- may I just  
5 ask, at what point does a court continue to  
6 permit invidious discrimination against groups  
7 that, where we have a difference of opinion, we  
8 believe the language of the statute is clear.

9 I think Justice Breyer was right that  
10 Title VII, the Civil Rights Act, all of our acts  
11 were born from the desire to ensure that we  
12 treated people equally and not on the basis of  
13 invidious reasons.

14 And we can't deny that homosexuals are  
15 being fired merely for being who they are and  
16 not because of religious reasons, not because  
17 they are performing their jobs poorly, not  
18 because they can't do whatever is required of a  
19 position, but merely because they're a suspect  
20 class to some people. They may have power in  
21 some regions, but they're still being beaten,  
22 they are still being ostracized from certain  
23 things.

24 At what point does a court say,  
25 Congress spoke about this, the original Congress

1 who wrote this statute told us what they meant.  
2 They used clear words. And regardless of what  
3 others may have thought over time, it's very  
4 clear that what's happening fits those words.

5 At what point do we say we have to  
6 step in?

7 GENERAL FRANCISCO: I guess my answer,  
8 Your Honor, would be at the point when Congress  
9 actually addresses the issue. And the main  
10 argument that we are making and have been making  
11 from beginning to end is that Congress has not  
12 resolved this issue because sex/gender identity,  
13 sex/sexual orientation --

14 JUSTICE KAGAN: General, these are  
15 some --

16 GENERAL FRANCISCO: -- are different  
17 traits.

18 JUSTICE KAGAN: -- some thoughtful  
19 responses that you have given to this set of  
20 questions.

21 But in responding to Justice Breyer,  
22 you said, if we thought that there was a clear  
23 application of the statute. So I would just ask  
24 you, if you thought that this was a clear  
25 application of the statute in the same way that

1 sexual harassment was a clear application of the  
2 statute, even though nobody recognized it at the  
3 time, if you thought that this was a clear  
4 application of the statute, would we have to  
5 come out against you?

6 GENERAL FRANCISCO: Yes, Your Honor,  
7 if the statute is unambiguously against me, you  
8 have to rule against me. I actually think that  
9 the statute is unambiguously in my favor for the  
10 reasons I was given and the third reason, which  
11 is the reason that Justice Breyer alluded to,  
12 Justice Scalia's great line about how we don't  
13 hide elephants in mouse holes.

14 Everybody here agrees that Congress  
15 never thought that by prohibiting discrimination  
16 based on sex, they would also be prohibiting  
17 discrimination based on two very different  
18 traits, sexual orientation and gender identity.

19 My friends would have this Court  
20 essentially reach that same result indirectly.  
21 I think all of the textual arguments cut in our  
22 favor straight away, but to the extent there is  
23 any doubt, there is no way to find that elephant  
24 in this mouse hole.

25 Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Five minutes, Mr. Cole.

4 REBUTTAL ARGUMENT OF DAVID D. COLE  
5 ON BEHALF OF RESPONDENT AIMEE STEPHENS

6 MR. COLE: Thank you.

7 Interpreting a statute is not  
8 depriving the democratic process. It is doing  
9 what the Court is supposed to do within the  
10 democratic process, and of course if the  
11 democratic process disagrees with the Court's  
12 interpretation of the statute, it can change it.

13 So there's no deprivation of the  
14 democratic process here.

15 Secondly, the purpose of Title VII as  
16 this Court defined it was to make sex irrelevant  
17 to people's ability to succeed at work, to make  
18 sex irrelevant to people's ability to succeed at  
19 work.

20 When Harris Homes fired Aimee Stephens  
21 because it learned about her sex assigned at  
22 birth being different from her gender identity,  
23 it did not make sex irrelevant to her ability to  
24 succeed at work. It made it determinative.

25 Think about it this way. If Harris



1 Homes fired a man because he was a man that  
2 would be sex discrimination. If it fired an  
3 employee because he was insufficiently  
4 masculine, that would clearly be sex  
5 discrimination.

6 In this case, Harris Homes fired Aimee  
7 Stephens because he thought she is a man who is  
8 insufficiently masculine. That too must be sex  
9 discrimination.

10 She's not seeking any special  
11 protection. She is seeking and all transgender  
12 people are seeking the same protection that  
13 everybody else gets under the law. This Court  
14 30 years ago said in Price Waterhouse: "We are  
15 beyond the day when an employer could evaluate  
16 employees by insisting that they match the  
17 stereotypes associated with their group."

18 We are certainly beyond that day today  
19 as well, and what Harris Homes did was to insist  
20 that she match the stereotypes associated with  
21 her group. That's impermissible under this  
22 Court's precedence, that's impermissible under  
23 the literal terms of the statute and this Court  
24 should rule for Aimee Stephens.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel. The case is submitted.  
3 (Whereupon, at 12:06 p.m., the case  
4 was submitted.)  
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