

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

R.G. & G.R. HARRIS FUNERAL)
HOMES, INC.,)
 Petitioner,)
 v.) No. 18-107
EQUAL EMPLOYMENT OPPORTUNITY)
COMMISSION, ET AL.,)
 Respondents.)

Pages: 1 through 65
Place: Washington, D.C.
Date: October 8, 2019

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7 EQUAL EMPLOYMENT OPPORTUNITY)

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9 Respondents.)

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11 Washington, D.C.

12 Tuesday, October 8, 2019

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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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P R O C E E D I N G S

(11:08 a.m.)

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

Mr. Cole.

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

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

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

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

First, in firing her for failing to conform to its owner's explicitly stated stereotypes about how men and women should behave, it discriminated against her in the same way that Price Waterhouse discriminated against 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 it -- does that argument hold up when
7 you 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: Now I think
8 you're -- I think you're missing my -- my point,
9 maybe because it wasn't carefully expressed, but
10 it's -- it's can the claim be -- I mean, I
11 understand when you say you're dealing with
12 transgender status and you can't discriminate on
13 that basis with -- on the basis of status. But
14 when you get to the actual policy, do you
15 analyze it as discrimination on the basis of sex
16 carrying forward your reasoning from -- at the
17 outset or 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: Right. Now
16 just if I 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 sex
21 --

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

25 MR. COLE: Yeah.

1 CHIEF JUSTICE ROBERTS: -- there's no
2 disadvantage, whether you're a man or a woman.
3 But if you analyzed it on the basis of
4 transgender status, there is, because you want
5 to use the women's restroom and be biologically
6 male.

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

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

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

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

1 harm?

2 MR. COLE: Now and in most instances

3 --

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

6 MR. COLE: Right.

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

15 MR. COLE: Yeah.

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

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

25 Most instances, that's not going to be

1 a significant harm. That's a -- going to be a
2 trivial harm, as the Court talked about in
3 Burlington Northern. Therefore, it's not
4 discrimination, even though it differentiates on
5 the basis of sex.

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

13 JUSTICE SOTOMAYOR: Mr. Cole --

14 MR. COLE: -- based on biological sex
15 as Justice -- as Chief Justice Roberts argues.

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

23 MR. COLE: Yeah.

24 JUSTICE SOTOMAYOR: -- and -- and they
25 want to use the woman's bathroom. But there are

1 other women who are made uncomfortable, and not
2 merely uncomfortable, but who would feel
3 intruded upon if someone who still had male
4 characteristics walked into their bathroom.
5 That's why we have different bathrooms.

6 So the hard question is how do we deal
7 with that?

8 MR. COLE: That --

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

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

16 JUSTICE SOTOMAYOR: Mr. Cole,
17 that's -- yes --

18 MR. COLE: And -- and --

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

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

23 JUSTICE SOTOMAYOR: And it may not
24 be--

25 MR. COLE: -- you decide the case

1 against us --

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

9 That's what the question is saying.

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

13 JUSTICE SOTOMAYOR: It won't decide
14 that case.

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

22 JUSTICE ALITO: Well, I understood
23 you -- I understood you to say -- maybe I didn't
24 understand you correctly -- that if your client
25 had been fired for using the woman's bathroom,

1 that would be a violation of Title VII.

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

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

16 JUSTICE ALITO: Yeah And --

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

19 JUSTICE KAGAN: So what you're --

20 MR. COLE: -- issue.

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

24 MR. COLE: Whether you rule for or
25 against us. This case --

1 CHIEF JUSTICE ROBERTS: Well, but the
2 difference is that part of the argument, at
3 least, is that the term "sex" includes sexual
4 orientation.

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

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

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

25 MR. COLE: I -- Your Honor, for

1 this -- for purposes of this case, all we are
2 arguing is that Title -- Title VII's reference
3 to sex at least includes what you're calling
4 biological sex, what we call sex assigned --

5 JUSTICE KAGAN: Mr. Cole --

6 MR. COLE: -- at birth --

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

10 MR. COLE: Yes, exactly.

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

17 But you're --

18 CHIEF JUSTICE ROBERTS: Okay so then
19 it's -- then it's an easy case, right?

20 MR. COLE: Yes.

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

24 But if you're looking at transgender
25 status, there is a huge problem because it is

1 not biological discrimination --

2 MR. COLE: No.

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

8 MR. COLE: Right.

9 CHIEF JUSTICE ROBERTS: But if the
10 claim is it discriminates against me because I
11 am a transgender individual, that's not your
12 claim?

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

20 That is discrimination because of sex.
21 That's all that --

22 JUSTICE ALITO: What if they --

23 MR. COLE: And that doesn't decide the
24 bathroom question because the bathroom
25 question -- there's no doubt that a -- a

1 separate sex bathrooms are because of sex.

2 JUSTICE KAGAN: Because of biological
3 sex.

4 MR. COLE: Because of biological sex,
5 as you use it. It is -- because the question
6 then is, does it impose a de minimis burden, a
7 trivial burden, as the Court said in Burlington
8 Northern, or does it impose a significant
9 burden.

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

15 JUSTICE ALITO: But I imagine --

16 MR. COLE: -- but a worker with kids
17 it would be significant.

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

23 MR. COLE: Exactly.

24 JUSTICE ALITO: Let me move beyond the
25 bathroom to another example. And it's not

1 before us, but it will be coming. So a
2 transgender woman is not permitted to compete on
3 a woman's college sports team. Is that
4 discrimination on the basis of sex in violation
5 of Title IX?

6 MR. COLE: So Title IX is a different
7 statute with regulations that explicitly permit
8 sex-segregated teams when competitive skill
9 or -- or contact sports are involved. So,
10 again --

11 JUSTICE GINSBURG: But this is not --
12 this is a question of someone who has
13 transitioned from male to female --

14 MR. COLE: Right.

15 JUSTICE GINSBURG: -- and wants to
16 play on the female team. She's not questioning
17 separate female/male teams. But she was born a
18 man. She has transitioned. She wants to play
19 on the female team.

20 Does it violate Title IX which
21 prohibits gender-based discrimination?

22 MR. COLE: Right. And I think the
23 question again would not be affected even by the
24 way that the Court decides this case, because
25 the question would be: Is it permissible to

1 have sex-segregated teams? Yes, where they
2 involve competitive skill or -- or contact
3 sports. And then the question would be: How do
4 you apply that permissible sex segregation to a
5 transgender individual?

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

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

21 You would still have to ask, is it
22 fair to keep that person off of the team just
23 like it's fair to keep a -- a -- a -- a man
24 off of that team?

25 The -- the -- the -- the -- the

1 stereotypes in this case are every bit as strong
2 as they were in Price Waterhouse. What Mr. --
3 in fact, they're stronger because in Price
4 Waterhouse, you had to infer from statements
5 that non-decision-makers were making about why
6 Ann Hopkins was fired.

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

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

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

22 And at the end of the day, the
23 objection to someone for being transgender is
24 the ultimate sex stereotype. It is saying, I
25 object to you because you fail to conform to

1 this stereotype: The stereotype that if you are
2 assigned a male sex at birth, you must live and
3 identify for your entire life as a man. That is
4 a true generalization for most of us, but it is
5 not true for 1.5 million transgender Americans.

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

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

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

24 And as we saw from the prior argument,
25 it need not be the only justification. It

1 needn't be only one justification.

2 And -- and -- and -- and the notion
3 that somehow discriminating against someone
4 because they are transgender is not
5 discrimination, discriminating against them
6 because of their sex I think falls apart because
7 to say I'm discriminating against you because
8 you are transgender is to say I am treating you
9 differently from other people who have the same
10 gender identity, because of your sex assigned at
11 birth.

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

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

1 transgender.

2 What -- what should we make of that
3 dispute?

4 MR. COLE: Well, I think, I mean, the
5 Sixth Circuit expressly said that the reasons
6 for firing her extended beyond the dress code.
7 Counsel for Harris Homes conceded at oral
8 argument in the Second Circuit that she would
9 have been fired if she showed up as a woman,
10 even if she were following the dress code. And
11 that's in Petitioner's Appendix 66A from the
12 Sixth Circuit decision.

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

17 So this --

18 JUSTICE GORSUCH: So -- so --

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

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

1 And I guess I -- I'd just like you to
2 have a chance to respond to Judge Lynch in his
3 thoughtful dissent in which he lamented
4 everything you have before us, but suggested
5 that something as drastic a change in this
6 country as bathrooms in every place of
7 employment and dress codes in every place of
8 employment that are otherwise gender neutral
9 would be changed, that that -- that that's an
10 essentially legislative decision.

11 MR. COLE: Your Honor --

12 JUSTICE GORSUCH: Judge Lynch is a
13 very thoughtful judge and -- and wrote a very
14 thoughtful opinion that I -- I think he probably
15 regretted having to write. What do you say to
16 -- to him?

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

22 There are transgender lawyers in this
23 courtroom today.

24 JUSTICE GORSUCH: Of -- of course,
25 there are.

1 MR. COLE: And the --

2 JUSTICE GORSUCH: That's not the
3 question, Mr. Cole.

4 MR. COLE: And the -- no, but the --
5 this is --

6 JUSTICE GORSUCH: Mr. Cole, the
7 question is a matter of the judicial role and
8 modesty in interpreting statutes that are old.

9 And that's the question he posed.

10 MR. COLE: Right.

11 JUSTICE GORSUCH: Nobody is
12 questioning, and he certainly did not, the
13 legitimacy of the claims and the importance of
14 them.

15 MR. COLE: So -- so I think that two
16 --

17 JUSTICE GORSUCH: The question is a
18 matter of judicial interpretation.

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

20 JUSTICE GORSUCH: If you wish to
21 address it.

22 MR. COLE: Two -- two -- two answers
23 to that, Your Honor. First, on the question of
24 judicial interpretation, we are not asking you
25 to apply any meaning of sex other than the one

1 that everybody agrees on as of 1964, which is
2 sex assigned at birth or, as -- as they put it,
3 biological sex. We're not asking you to rewrite
4 it.

5 Second --

6 JUSTICE GORSUCH: I agree with that.

7 MR. COLE: Second --

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

10 MR. COLE: Yeah.

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

13 MR. COLE: Yeah.

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

17 MR. COLE: Yeah.

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

23 At the end of the day, should he or
24 she take into consideration the massive social
25 upheaval that would be entailed in such a

1 decision, and the possibility that -- that
2 Congress didn't think about it --

3 MR. COLE: So --

4 JUSTICE GORSUCH: -- and that -- that
5 is more effective -- more appropriate a
6 legislative rather than a judicial function?
7 That's it. It's a question of judicial modesty.

8 MR. COLE: So, first of all, federal
9 courts of appeals have been recognizing that
10 discrimination against transgender people is sex
11 discrimination for 20 years. There's been no
12 upheaval.

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

24 And as to whether this is a question
25 of interpretation, it is absolutely a question

1 of interpretation. How in the world can the
2 Court interpret Title VII to say that Ann
3 Hopkins can't be fired for being insufficiently
4 feminine, but my client can be fired for being
5 insufficiently masculine?

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

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

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

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Bursch.

1 ORAL ARGUMENT OF JOHN J. BURSCH

2 ON BEHALF OF THE PETITIONER

3 MR. BURSCH: Thank you, Mr. Chief

4 Justice, and may it please the Court:

5 Treating women and men equally does
6 not mean employers have to treat men as women.
7 That is because sex and transgender status are
8 independent concepts.

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

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

23 First, my friend's but-for test would
24 mean that a women's overnight shelter must hire
25 a man who identifies as a woman to serve as a

1 counsellor to women who have been raped,
2 trafficked, and abused and also share restroom,
3 shower, and locker room facilities with them.
4 That is because, but for the man's sex, he would
5 be allowed to -- to hold that job and to use
6 those facilities.

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

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

20 What Title VII says is that sex-based
21 differentiation is not the same as sex
22 discrimination. And that's why Ms. Karlan
23 agreed that this Court's sex-specific dress
24 policy doesn't violate Title VII. And though
25 Congress has added classifications to cover

1 transgender status in other statutes, it has
2 rejected more than a dozen proposals here.
3 Title VII --

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

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

25 That's what I've heard. Now, what do

1 you say to that?

2 MR. BURSCH: Justice Breyer, that is
3 incorrect, because when a biological male is
4 refused access to the women's restroom, the --
5 the male would say that was an injury.

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

7 MR. BURSCH: That they were hurt.

8 JUSTICE BREYER: -- he would say it's
9 an injury.

10 MR. BURSCH: And there is no BFOQ.

11 JUSTICE BREYER: And the other side
12 would say: I'm sorry but there's serious
13 injuries on the other side. And, therefore, it
14 is a BFOQ. Okay?

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

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

1 JUSTICE BREYER: All right.

2 MR. BURSCH: It would be --

3 JUSTICE BREYER: And just on the off
4 chance that I feel we do not have to decide that
5 matter in this case --

6 (Laughter.)

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

10 MR. BURSCH: Certainly. Their
11 comparator is a man violating the dress code
12 with a woman who follows the dress code. That
13 is wrong. Our comparator is a man who violates
14 the dress code with a woman who violates the
15 dress code.

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

24 JUSTICE BREYER: And what they say is
25 the reason we know you're wrong -- I'm not

1 saying this -- nor am I assuming any other
2 person thinks this, I'm just saying that this is
3 what I hear -- that if you are right, then
4 miscegenation does not fall within this statute,
5 that Jews marrying Catholics does not fall
6 within this statute, that any instance where
7 people say or many instances where they say I
8 fired this man because he wasn't a woman -- I
9 fired the woman because it's a man's job, it's
10 okay, as long as sometimes you'd fire a -- a --
11 a man because it's a woman's job. You see the
12 point.

13 MR. BURSCH: I do. Justice Breyer.

14 JUSTICE BREYER: Okay. Now the --
15 what is your answer to that?

16 MR. BURSCH: There is no non-racist
17 reason why you would fire the employee in the
18 interracial marriage. There is no non-religious
19 --

20 JUSTICE BREYER: There isn't? I
21 happen to know people. I won't say who they
22 are, but there are people --

23 (Laughter.)

24 JUSTICE BREYER: -- in my life I have
25 heard say being Jewish is fine, being Catholic

1 is fine, just don't get married.

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

4 JUSTICE BREYER: Right. I mean, does
5 that mean it falls outside the statute that --
6 that -- that -- that forbids discrimination
7 because of religion?

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

17 Let me give you an example here.

18 JUSTICE SOTOMAYOR: That's a
19 ministerial exception that already --

20 MR. BURSCH: No.

21 JUSTICE SOTOMAYOR: -- exists.

22 MR. BURSCH: A ministerial exception
23 if the employer is a church, but not if the
24 employer is a Christian businessman --

25 JUSTICE SOTOMAYOR: But there's still

1 --

2 MR. BURSCH: -- like Mr. Rost.

3 JUSTICE SOTOMAYOR: But there's still
4 religious exceptions that the Court has read
5 into a lot of statutes. Putting that aside,
6 your example, very powerful, woman in -- women
7 in a shelter who you say, if we accept his
8 argument, will have to be guarded by or
9 counseled by a transgendered woman, but isn't
10 that exactly like Dothard? And there we said
11 you can have -- you can't have sex-specific
12 guarding of prisoners, unless you have a BFOQ.

13 And there they found that it was a
14 BFOQ to make only men guard men and women only
15 guard women. So I'm not quite sure that I
16 understand your parade of horrors.

17 MR. BURSCH: Because under Mr. Cole's
18 theory, BFOQs have to go too. So that you have
19 a BFOQ that says --

20 JUSTICE SOTOMAYOR: But it's
21 statutory.

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

23 JUSTICE SOTOMAYOR: They can't -- they
24 can't -- wish it away.

25 MR. BURSCH: If I could explain?

1 JUSTICE SOTOMAYOR: But go ahead.

2 MR. BURSCH: If you have a BFOQ that
3 says only a man can apply for this position, he
4 would say that a woman who is transgender is a
5 man, and, therefore, is eligible for that
6 position, and no BFOQ in the world would be able
7 to keep them out of that position.

8 The problem is they're adding
9 transgender classification to a statute where
10 Congress has never added it.

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

16 But if there is no reason why your
17 gender should matter in the work you're doing,
18 why should you not be hired?

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

20 JUSTICE SOTOMAYOR: That's a very
21 different --

22 MR. BURSCH: No.

23 JUSTICE SOTOMAYOR: -- proposition.

24 MR. BURSCH: But let's go back to the
25 women's overnight shelter. Assume for a moment

1 that the employer had a BFOQ that only women
2 counselors would be able to counsel and stay
3 overnight with the women who have been abused.

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

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

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

19 All of the distinctions between men
20 and women are gone forever. And that's the
21 plain text of the statute.

22 JUSTICE GORSUCH: Do you wish to --

23 MR. BURSCH: But in --

24 JUSTICE GORSUCH: -- address Judge
25 Flaum's argument joined by Judge Ripple which,

1 again is -- is a very thoughtful position too
2 that there may be dual causes here, but the fact
3 that sex is under consideration even as narrowly
4 construed is enough to draw us within the
5 statute?

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

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

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

21 JUSTICE GORSUCH: That -- that's
22 helpful, but I'm also curious what you have to
23 say, Mr. Bursch.

24 MR. BURSCH: Yeah, let's put both of
25 those together, individual and that concept.

1 Say that you have a woman who identifies as a
2 man and they're working at an employer and they
3 get pregnant. They would be entitled to the
4 same pregnancy benefits as any of the women at
5 -- at work because that -- if they didn't get
6 it, that would be sexist.

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

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

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

24 MR. BURSCH: Okay.

25 JUSTICE KAGAN: Title VII is a -- is a

1 -- is a statute about individuals --

2 MR. BURSCH: Correct.

3 JUSTICE KAGAN: -- and whether
4 individuals are being treated differently
5 because of his or her sex. It's not a statute
6 about, well, in the aggregate, does this -- does
7 this act disadvantage men versus women or women
8 versus men?

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

19 Yes, if she had not been a -- if she
20 had not been assigned at birth the sex that she
21 was assigned at birth, she would have been
22 treated differently.

23 MR. BURSCH: We agree with the
24 individual treatment. That's why in Oncale,
25 this Court said basically in the context of a

1 male-only work force that the plaintiff had a
2 cause of action because he was being treated
3 differently than a woman in his position would
4 have been.

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

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

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

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

1 was a dress code.

2 MR. BURSCH: Here's the reason why,
3 Justice Kagan.

4 JUSTICE KAGAN: The why what? The --
5 that the arguments do go that far.

6 MR. BURSCH: Well, that the arguments
7 apply in both situations.

8 JUSTICE KAGAN: Yeah, if there's a
9 dress code or if there's not a dress code?

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

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

25 Now, some jurisdictions, like the

1 District of Columbia, have taken that latitude
2 that Title VII gives away from employers. It
3 says that you cannot, for example, treat someone
4 differently based on their personal appearance,
5 but otherwise when it comes to dress codes,
6 grooming codes, opposite sex facilities, and all
7 those types of things everyone would have
8 understood Title VII at the time of its
9 enactment as -- as those things being equal
10 treatment and not disfavoring either sex over
11 the other, whether on a group basis or an
12 individual basis. It doesn't make any
13 difference.

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

22 And Mr. Cole agrees with that
23 100 percent. Everything that he said this
24 morning, sex itself is a stereotype. You can
25 never treat a man who identifies as a woman

1 differently because to do that is sex
2 discrimination. When you do that, there is no
3 sex discrimination standard under Title VII
4 anymore. It's been completely blown up.

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

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 General Francisco.

19 ORAL ARGUMENT OF GEN. NOEL J. FRANCISCO

20 ON BEHALF OF RESPONDENT EEOC

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

23 I'd like to make three basic points
24 aimed at basically addressing Justice Gorsuch's
25 comment that this was -- this is a close textual

1 case. And I would like to respectfully argue
2 that I don't think it's that close for three
3 reasons.

4 JUSTICE GORSUCH: Oh, neither side
5 ever thinks a case is close.

6 (Laughter.)

7 JUSTICE GORSUCH: Judges always do,
8 don't they?

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

1 The second and related textual issue
2 is that the standard for determining whether or
3 not you're discriminating against somebody
4 because he's a man or because she's a woman is
5 that you're treating that person differently
6 than a similarly situated person of the opposite
7 sex and taking an adverse employment action
8 against them as a result.

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

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

1 Likewise with sexual orientation. The
2 difference between a gay man and a straight
3 woman is that -- is their sexual orientation.
4 And that has nothing to do with stereotypes. It
5 has nothing to do with one -- whether one is
6 better or worse than the other.

7 JUSTICE GORSUCH: A great deal of --

8 GENERAL FRANCISCO: It's a different
9 type of relationship.

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

15 GENERAL FRANCISCO: That is --

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

22 GENERAL FRANCISCO: Right.

23 JUSTICE GORSUCH: I -- I accept
24 there's some delta, but it seems smaller than
25 might first appear.

1 GENERAL FRANCISCO: Sure. And I --
2 what I would say the difference is at what stage
3 of the analysis you're doing it? The way -- the
4 place that stereotypes come up are when you're
5 figuring out whether similarly situated --
6 whether two people are, in fact, similarly
7 situated. An aggressive man -- take Price
8 Waterhouse: An aggressive man is similarly
9 situated to an aggressive woman. They have the
10 exact same trait, aggressiveness, and the only
11 difference is that stereotypical view that women
12 shouldn't be aggressive.

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

21 JUSTICE KAGAN: General --

22 GENERAL FRANCISCO: -- to a straight
23 woman for exactly the same reason.

24 JUSTICE KAGAN: I mean I think one
25 could argue just the opposite, that there is

1 another trait in Price Waterhouse, and the trait
2 is conformity to traditional gender roles.

3 So your argument would suggest, no, we
4 shouldn't look at the aggressive woman and the
5 aggressive man. We should instead say, no,
6 there's this other thing, which is conformity to
7 gender roles.

8 GENERAL FRANCISCO: Right.

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

16 Now, you yourself, say that that's not
17 right, that, in fact --

18 GENERAL FRANCISCO: Right.

19 JUSTICE KAGAN: -- that's double
20 discrimination and the employer is on the hook
21 twice. But it seems to me that the exact same
22 analysis applies because there is this
23 independent trait, which is just a little bit
24 different from the independent trait here. Here
25 the -- the -- the -- the -- the -- the -- the

1 independent trait, so-called, that you say is
2 the transgender identity. There, the
3 independent trait was the refusal to conform to
4 traditional gender roles.

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

10 What it prohibits is stereotypes that
11 show that you're treating similarly situated men
12 and women differently.

13 JUSTICE GINSBURG: But I thought you
14 --

15 GENERAL FRANCISCO: So in Price
16 Waterhouse --

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

23 GENERAL FRANCISCO: No, Your Honor, I
24 believe we said the opposite of that in our
25 brief. And it was --

1 JUSTICE GINSBURG: That that would be
2 okay?

3 GENERAL FRANCISCO: Yeah, we said the
4 opposite of that in our brief.

5 JUSTICE BREYER: Then I could ask this
6 --

7 JUSTICE GINSBURG: And they could rely
8 on the -- for both cases --

9 GENERAL FRANCISCO: Yes.

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

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

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

1 because of their sex --

2 JUSTICE BREYER: I -- I --

3 GENERAL FRANCISCO: -- since they're
4 similarly situated --

5 JUSTICE BREYER: I -- we got that. I
6 -- I -- I want to know on a totally separate
7 argument.

8 GENERAL FRANCISCO: Yeah.

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

14 And on the one hand, you have these
15 are individuals, individuals four times --

16 GENERAL FRANCISCO: Yeah.

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

21 GENERAL FRANCISCO: Okay.

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

25 GENERAL FRANCISCO: Okay.

1 JUSTICE BREYER: Then I say, well,
2 there seems to be a third set in some of these
3 briefs, that regardless of the first two,
4 Congress -- and that's what I think the
5 dissenting judge was talking about, and Judge
6 Posner, who had a good point. I'm not saying
7 it's a winning point --

8 (Laughter.)

9 JUSTICE BREYER: -- which is what I
10 want to know.

11 GENERAL FRANCISCO: Yeah.

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

17 GENERAL FRANCISCO: No, we are relying
18 on it in this sense.

19 JUSTICE BREYER: Oh, you are.

20 GENERAL FRANCISCO: One -- one, we
21 think it fortifies our other arguments, but I
22 know --

23 JUSTICE BREYER: Of course, it does.

24 GENERAL FRANCISCO: -- you don't -- I
25 know you don't want me to push on that, so I'm

1 not going to push on that. We're relying on it
2 to the sense that to the extent there is any
3 ambiguity here, we think it is strongly
4 dispelled by the history of these statutes.

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

7 JUSTICE BREYER: Yes.

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

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

15 JUSTICE BREYER: ENDA.

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

23 If you look at the states, they've
24 often come to very similar compromises where
25 they found peace amongst otherwise very --

1 JUSTICE BREYER: Got it.

2 GENERAL FRANCISCO: -- groups of very
3 different views.

4 But if you resolve this issue
5 judicially, you are essentially delivering --
6 and I hate to use these types of terms --

7 JUSTICE BREYER: All right.

8 GENERAL FRANCISCO: -- but a complete
9 victory to one side of the fight and nothing to
10 the other side --

11 JUSTICE BREYER: All right. I've got
12 that point.

13 GENERAL FRANCISCO: -- of the fight,
14 you're upsetting that --

15 JUSTICE BREYER: Yeah.

16 GENERAL FRANCISCO: -- legislative
17 balance.

18 JUSTICE BREYER: Look I -- I think
19 that is an argument in your favor.

20 GENERAL FRANCISCO: Yeah.

21 JUSTICE BREYER: Moreover, I think
22 this whole category is the elephant in the room
23 and --

24 GENERAL FRANCISCO: That -- that was
25 actually the --

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

2 GENERAL FRANCISCO: -- third point
3 point I was going to make to Justice Gorsuch.

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

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

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

23 And now, doesn't that fact, which is
24 an overwhelming fact to me about the nature of
25 the country under law, argue that that's a

1 change. That's a change that both explains why
2 they didn't put it in initially and explains why
3 we should, other things being equal, interpret
4 it to include gay people and transgender people
5 now?

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

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

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

20 JUSTICE GINSBURG: No one ever --

21 GENERAL FRANCISCO: And when courts --

22 JUSTICE GINSBURG: No one ever thought
23 sexual harassment was encompassed by
24 discrimination on the basis of sex back in '64.
25 It wasn't until a book was written in the middle

1 '70s bringing that out.

2 And now we say, of course, harassing
3 someone, subjecting her to terms and conditions
4 of employment she would not encounter if she
5 were a male, that is sex discrimination but it
6 wasn't recognized --

7 GENERAL FRANCISCO: And --

8 JUSTICE GINSBURG: -- to be such in
9 the beginning.

10 GENERAL FRANCISCO: And, Your Honor, I
11 think that that is a straightforward application
12 of Title VII's text.

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

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

24 The legislative process is the process
25 that allows those views to respect -- be

1 respected as well as the very powerful views of
2 my friends on the other side --

3 JUSTICE SOTOMAYOR: May I --

4 JUSTICE KAGAN: General Francisco --

5 GENERAL FRANCISCO: -- which also
6 should be respected.

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

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

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

1 things.

2 At what point does a court say,
3 Congress spoke about this, the original Congress
4 who wrote this statute told us what they meant.
5 They used clear words. And regardless of what
6 others may have thought over time, it's very
7 clear that what's happening fits those words.

8 At what point do we say we have to
9 step in?

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

17 JUSTICE KAGAN: General, these are
18 some --

19 GENERAL FRANCISCO: -- are different
20 traits.

21 JUSTICE KAGAN: -- some thoughtful
22 responses that you have given to this set of
23 questions.

24 But in responding to Justice Breyer,
25 you said, if we thought that there was a clear

1 application of the statute. So I would just ask
2 you, if you thought that this was a clear
3 application of the statute in the same way that
4 sexual harassment was a clear application of the
5 statute, even though nobody recognized it at the
6 time, if you thought that this was a clear
7 application of the statute, would we have to
8 come out against you?

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

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

22 My friends would have this Court
23 essentially reach that same result indirectly.
24 I think all of the textual arguments cut in our
25 favor straight away, but to the extent there is

1 any doubt, there is no way to find that elephant
2 in this mouse hole.

3 Thank you, Your Honor.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Five minutes, Mr. Cole.

7 REBUTTAL ARGUMENT OF DAVID D. COLE
8 ON BEHALF OF RESPONDENT AIMEE STEPHENS

9 MR. COLE: Thank you.

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

16 So there's no deprivation of the
17 democratic process here.

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

23 When Harris Homes fired Aimee Stephens
24 because it learned about her sex assigned at
25 birth being different from her gender identity,

1 it did not make sex irrelevant to her ability to
2 succeed at work. It made it determinative.

3 Think about it this way. If Harris
4 Homes fired a man because he was a man that
5 would be sex discrimination. If it fired an
6 employee because he was insufficiently
7 masculine, that would clearly be sex
8 discrimination.

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

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

21 We are certainly beyond that day today
22 as well, and what Harris Homes did was to insist
23 that she match the stereotypes associated with
24 her group. That's impermissible under this
25 Court's precedence, that's impermissible under

1 the literal terms of the statute and this Court
2 should rule for Aimee Stephens.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel. The case is submitted.

6 (Whereupon, at 12:06 p.m., the case
7 was submitted.)

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1	adverse ^[1] 47:7 advocating ^[1] 31:14 affected ^[2] 12:18 18:23 affecting ^[1] 6:23 agency ^[1] 44:15 aggregate ^[1] 41:6 aggressive ^[10] 49:7,8,9,12 50:4,5, 11,13 52:18,19 aggressiveness ^[1] 49:10 ago ^[1] 64:17 agree ^[4] 26:6 38:6 41:23 59:19 agreed ^[1] 30:23 agrees ^[6] 26:1 28:10,20 44:22 46: 14 62:17 ahead ^[1] 37:1 aimed ^[1] 45:24 Aimee ^[12] 1:19 2:5,16 3:9,12 16: 15 19:12 23:15 63:8,23 64:9 65:2 Aimees ^[2] 21:15,15 AL ^[1] 1:8 ALITO ^[6] 12:22 13:16 16:22 17:15, 18,24 allow ^[3] 38:9 42:24 59:15 allowed ^[3] 5:10,11 30:5 allows ^[3] 35:9 43:11 59:25 alluded ^[1] 62:14 already ^[1] 35:19 although ^[1] 52:13 ambiguity ^[1] 55:3 Americans ^[1] 21:5 among ^[1] 22:21 amongst ^[1] 55:25 analysis ^[3] 49:3 50:22 51:6 analyze ^[10] 5:12,13 6:15,23,24 7: 23 14:6,8,20,21 analyzed ^[3] 8:3,7,8 analyzing ^[1] 14:22 anatomy ^[2] 5:2 21:9 Ann ^[5] 3:25 4:1 20:6,17 28:2 another ^[4] 12:6 17:25 50:1 58:18 answer ^[17] 5:21,22 8:23 9:19,22 12:4 14:7,9 32:17,18,20 34:15 40: 23 41:18 42:16,17 61:10 answered ^[3] 19:19 40:22 51:18 answering ^[1] 7:13 answers ^[1] 25:22 anybody ^[2] 8:12 53:10 apart ^[1] 22:6 appeals ^[1] 27:9 appear ^[1] 48:25 appearance ^[1] 44:4 APPEARANCES ^[1] 1:17 Appendix ^[1] 23:11 application ^[5] 59:11 62:1,3,4,7 applied ^[3] 40:7 42:11 44:19 applies ^[4] 4:8 19:18 28:21 50:22 apply ^[7] 19:4 25:25 30:15 32:22, 24 37:3 43:7 applying ^[3] 38:7 41:16 52:22 approach ^[1] 58:12 appropriate ^[3] 27:5 28:18 39:8 aren't ^[2] 13:4 14:11 argue ^[5] 12:18 46:1 49:25 57:25 58:7	arguing ^[3] 15:2 22:16 38:13 argument ^[30] 1:15 2:2,6,9,13 3:4, 8 5:4,6 7:2 14:2 21:24 23:8,21 28: 8 29:1 31:5,6 32:18 36:8 38:18,25 45:19 48:17 50:3 53:7 56:19 58: 10 61:13 63:7 arguments ^[14] 4:23 28:12 33:8 42:20,23,23 43:5,6 48:11 53:11, 18,19 54:21 62:24 arise ^[2] 5:24 12:16 around ^[1] 9:7 aside ^[2] 36:5 59:15 asks ^[3] 7:6,10 19:10 assert ^[2] 47:12,14 assigned ^[24] 4:6,8 5:1 7:4 15:4 16:16,17,19 21:2,8,14,17,19,20,21, 23 22:10,19 26:2 28:9,21 41:20, 21 63:24 associated ^[3] 27:22 64:20,23 assume ^[5] 4:25 26:16 32:17 37: 25 38:8 assuming ^[1] 34:1 available ^[1] 9:18 avoid ^[1] 10:17 away ^[6] 24:19 36:24 44:2 57:9,21 62:25	biological ^[27] 5:2 6:22,25 7:2,20 10:14 14:7,10,18,22 15:4,11,13,22 16:1 17:2,4 26:3 28:9 29:19 30:15 32:3 40:10 47:20,21 49:16,17 biologically ^[1] 8:5 birth ^[24] 4:6,9 5:1 7:4 15:6 16:17, 18,19 21:2,10,14,17,19,20,21,23 22:11,19 26:2 28:9,21 41:20,21 63:25 bit ^[3] 9:8 20:1 50:23 blown ^[1] 45:4 bona ^[1] 31:10 book ^[1] 58:25 born ^[3] 18:17 38:14 60:14 boss ^[1] 3:14 both ^[6] 4:17 39:24 43:7 50:14 52: 8 58:1 boys ^[1] 12:7 BREYER ^[39] 31:4 32:2,6,8,11 33: 1,3,7,24 34:13,14,20,24 35:4 52:5 53:2,5,9,17,22 54:1,9,12,19,23 55: 7,15 56:1,7,11,15,18,21 57:1,4 59: 14 60:12 61:24 62:14 brief ^[5] 42:21,21 48:17 51:25 52:4 briefs ^[1] 54:3 bring ^[3] 16:5 20:13 40:16 bringing ^[2] 31:15 59:1 brings ^[1] 15:16 broad ^[1] 45:6 broader ^[1] 22:25 broadly ^[1] 38:7 brought ^[2] 20:14 44:16 build ^[1] 32:17 burden ^[6] 17:6,7,9,11,12,21 Burlington ^[5] 6:4 8:17 10:3 17:7, 10 BURSCH ^[38] 1:20 2:7 28:25 29:1, 3 32:2,7,10,20 33:2,10 34:13,16 35:2,8,20,22 36:2,17,22,25 37:2, 19,22,24 38:6,23 39:6,16,23,24 40: 22,24 41:2,23 43:2,6,10 business ^[1] 44:19 businessman ^[1] 35:24 but-for ^[1] 29:23
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