

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 63
Place: Washington, D.C.
Date: October 8, 2019

HERITAGE REPORTING CORPORATION

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4 HOMES, INC.,)

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7 EQUAL EMPLOYMENT OPPORTUNITY)

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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 femininely. It can't be that Ann Hopkins

1 would lose her case on the same facts were she
2 transgender.

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

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

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

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

1 anatomy or biological sex.

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

7 In other words, if the objection of a
8 transgender man transitioning to woman is that
9 he should be allowed to use, he or she, should
10 be allowed to use the women's bathroom, now, how
11 do you analyze that? I understand how you
12 analyze status as it were, maybe that's hiring
13 and firing on the basis -- treating it as just
14 on the basis of sex, but when you get to
15 specific policies, does that hold true?

16 MR. COLE: So, first of all, Your
17 Honor, how one -- how you answer this case will
18 not resolve how you answer that case. Whether
19 you rule against us or for us, the next case
20 will arise in the -- in the following sense: A
21 dress code that distinguishes on the basis of
22 sex obviously is because of sex. The question,
23 then, is does it impose a discriminatory term
24 and condition? And as this Court said in
25 Burlington Northern, to discriminate is not just

1 to differentiate, but to differentiate in a way
2 that injures.

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

14 So if the objection of the transgender
15 individual is that I want to use a bathroom
16 consistent with my gender identity, rather than
17 biological sex, do you analyze it as -- the
18 affecting based on the transgender status or do
19 you analyze it on the basis of biological sex?

20 MR. COLE: So the -- the -- I think
21 our argument rests on biological sex or what we
22 think is more accurately referred to as sex
23 assigned at birth.

24 But here's -- here's the thing: If
25 there is a -- this -- this case asks whether

1 when someone fires someone because they're
2 transgender or because they fail to conform to
3 sex-based stereotypes, is that because of sex?
4 That's what this case asks.

5 Obviously, a sex-specific restroom
6 policy is because of sex. So you're -- we're
7 not answering that question. It's because of
8 sex. Then the question is --

9 CHIEF JUSTICE ROBERTS: Just if I
10 could interrupt so I can follow. It's because
11 of sex.

12 MR. COLE: Because of biological sex.

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

16 MR. COLE: Yeah.

17 CHIEF JUSTICE ROBERTS: -- there's no
18 disadvantage, whether you're a man or a woman.
19 But if you analyzed it on the basis of
20 transgender status, there is, because you want
21 to use the women's restroom and be biologically
22 male.

23 So when it's analyzed on the basis of
24 sex, there's no problem, but when it's analyzed
25 on the basis of transgender status, it presents

1 a whole different case.

2 MR. COLE: So I don't think so, Your
3 Honor. I think -- look, anybody can challenge a
4 sex-specific rule. A transgender person can
5 challenge a sex-specific rule. A
6 non-transgender person can challenge a
7 sex-specific rule.

8 What this Court said in Burlington
9 Northern and in Oncale is that to decide whether
10 something discriminates that refers to sex is
11 you have to ask whether -- not just whether it
12 differentiates, but whether it differentiates in
13 a way that injures.

14 And you answer that question by asking
15 would a reasonable person in the plaintiff's
16 position experience a significant or trivial
17 harm? And in most instances --

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

20 MR. COLE: Right.

21 JUSTICE GORSUCH: And we went around
22 the tree a bit, but ultimately came to, I
23 believe, a submission that a reasonable person
24 in the transgender plaintiff's position would be
25 harmed if he or she were fired for failing to

1 follow the -- the bathroom rules or some sort of
2 dress code that's not otherwise objectionable,
3 along the lines of --

4 MR. COLE: Yeah.

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

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

13 Most instances, that's not going to be
14 a significant harm. That's a -- going to be a
15 trivial harm, as the Court talked about in
16 Burlington Northern. Therefore, it's not
17 discrimination, even though it differentiates on
18 the basis of sex.

19 But if you ask you or me to dress as a
20 woman, we would consider that a significant
21 harm. And when you ask a transgender person to
22 dress in a way that is contrary to their sense
23 of gender identity, you have imposed a
24 significant harm. And the harm is because of
25 sex --

1 JUSTICE SOTOMAYOR: Mr. Cole --

2 MR. COLE: -- based on biological sex
3 as Justice -- as Chief Justice Roberts said.

4 JUSTICE SOTOMAYOR: Mr. Cole, let's
5 not avoid the difficult issue, okay? You have a
6 transgender person who rightly is identifying as
7 a woman and wants to use the women's bedroom,
8 rightly, wrongly, not a moral choice, but this
9 is what they identify with. Their need is
10 genuine. I'm accepting all of that --

11 MR. COLE: Yeah.

12 JUSTICE SOTOMAYOR: -- and they want
13 to use the women's bathroom. But there are
14 other women who are made uncomfortable, and not
15 merely uncomfortable, but who would feel
16 intruded upon if someone who still had male
17 characteristics walked into their bathroom.
18 That's why we have different bathrooms.

19 So the hard question is how do we deal
20 with that?

21 MR. COLE: That --

22 JUSTICE SOTOMAYOR: And what in the
23 law will guide judges in balancing those things?
24 That's really what I think the question is
25 about.

1 MR. COLE: Well, that is -- that is --
2 that is a question, Justice Sotomayor. It is
3 not the question in this case.

4 JUSTICE SOTOMAYOR: Mr. Cole,
5 that's -- yes -- because the -- once we decide
6 the case in your favor, then that question is
7 inevitable.

8 MR. COLE: Well, I think even if you
9 decide the case against me --

10 JUSTICE SOTOMAYOR: It may not be --
11 it may not be if there's single-sex bathrooms,
12 there might be one answer, meaning what harm
13 would the other women -- reasonable woman feel
14 if a man is using a single sex bathroom, might
15 be another if it is two locker rooms, men and
16 women, girls and boys and who walks in is
17 something you can't control.

18 That's what the question is.

19 MR. COLE: But, Justice Sotomayor, the
20 reason deciding this case will not decide that
21 case is because --

22 JUSTICE SOTOMAYOR: It won't decide
23 that case.

24 MR. COLE: It won't decide -- but even
25 if you rule against us, that case can arise,

1 because it is a sex-specific rule, and anyone
2 who is affected by a sex-specific rule can argue
3 that it discriminates against them because a
4 reasonable person in their shoes would
5 experience a significant harm.

6 JUSTICE ALITO: I understood you -- I
7 understood you to say -- maybe I didn't
8 understand you correctly -- that if your client
9 had been fired for using the woman's bathroom,
10 that would be a violation of Title VII.

11 MR. COLE: So what I said was, yes,
12 that -- that -- in our view, were we litigating
13 that case here, which we aren't, they admitted
14 that the -- the restroom was a -- was a
15 hypothetical issue and not a -- a reason why she
16 was fired, but were we litigating that case, I
17 think the question would be not whether the --
18 the policy was because of sex, which is the
19 question here, because obviously the restroom is
20 because of sex.

21 The question would be, does imposing
22 that restroom policy, which is obviously because
23 of sex, impose a discriminatory injury on an
24 individual. And if you require me to go to the
25 women's restroom, that's a serious issue.

1 JUSTICE KAGAN: So what you're saying
2 is, we're stuck with that question regardless of
3 how we decide this case.

4 MR. COLE: Whether you rule for or
5 against us. This case --

6 CHIEF JUSTICE ROBERTS: Well, but the
7 difference is that part of the argument, at
8 least, is that the term "sex" includes sexual
9 orientation.

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

19 But the issue seems -- is quite
20 different if you are dealing with a transgender
21 individual who wants to use the restroom of
22 their gender identity, contrary to their
23 biological sex.

24 And the question is, how do you
25 analyze that? You say in each case it is on the

1 basis of sex. Do you analyze it on the basis of
2 biological sex or are you analyzing it on the --
3 a different basis, because they present
4 different issues?

5 MR. COLE: I -- Your Honor, for
6 this -- for purposes of this case, all we are
7 arguing is that Title -- Title VII's reference
8 to sex at least includes what you're calling
9 biological sex, what we call sex --

10 JUSTICE KAGAN: Mr. Cole, you can go
11 further than that. For purposes of the next
12 case, all it includes is biological sex as well.

13 MR. COLE: Yes, exactly.

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

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

22 MR. COLE: Yes.

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

1 But if you're looking at transgender
2 status, there is a huge problem because it is
3 not biological discrimination or the claim is
4 going to be different. Certainly a transgender
5 individual can bring the claim under Title VII
6 that it discriminates on the basis of sex.

7 MR. COLE: Right.

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

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

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

20 JUSTICE ALITO: What if they --

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

25 JUSTICE KAGAN: Because of biological

1 sex.

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

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

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

18 MR. COLE: Exactly.

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

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

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

9 MR. COLE: Right.

10 JUSTICE GINSBURG: -- and wants to
11 play on the female team. She is not questioning
12 separate female/male teams.

13 But she was born a man. She has
14 transitioned. She wants to play on the female
15 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 have
22 sex-segregated teams, yes, where they involve
23 competitive skill or -- or contact sports, and
24 then the question would be, how do you apply
25 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 policy that
13 permits sex segregation, how that applies to
14 transgender people is just a different question.
15 It is not answered one way or the other by this
16 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 are 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 is 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. And at the end of the day, the
18 objection to someone for being transgender is
19 the ultimate sex stereotype. It is saying, I
20 object to you because you fail to conform to
21 this stereotype: The stereotype that if you are
22 assigned a male sex at birth, you must live and
23 identify for your entire life as a man. That is
24 a true generalization for most of us, but it is
25 not true for 1.5 million transgender Americans.

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

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

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

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

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

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

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

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

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

24 MR. COLE: Well, I think, I mean, the
25 Sixth Circuit expressly said that the reasons

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

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

12 So this is a case --

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

19 And I guess I -- I'd just like you to
20 have a chance to respond to Judge Lynch in his
21 thoughtful dissent in which he lamented
22 everything you have before us, but suggested
23 that something as drastic a change in this
24 country as bathrooms in every place of
25 employment and dress codes in every place of

1 employment that are otherwise gender neutral
2 would be changed, that that -- that that's an
3 essentially legislative decision.

4 MR. COLE: Your Honor --

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

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

15 There are transgender lawyers in this
16 courtroom today.

17 JUSTICE GORSUCH: Of -- of course,
18 there are.

19 MR. COLE: And the --

20 JUSTICE GORSUCH: That's not the
21 question, Mr. Cole.

22 MR. COLE: And the -- no, but the --
23 this is --

24 JUSTICE GORSUCH: Mr. Cole, the
25 question is a matter of the judicial role and

1 modesty in interpreting statutes that are old.

2 And that's the question he posed.

3 MR. COLE: Right.

4 JUSTICE GORSUCH: Nobody is
5 questioning, and he certainly did not, the
6 legitimacy of the claims and the importance of
7 them.

8 MR. COLE: So -- so I think that two
9 --

10 JUSTICE GORSUCH: The question is
11 about judicial interpretation.

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

13 JUSTICE GORSUCH: If you wish to
14 address it.

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

23 Second --

24 JUSTICE GORSUCH: I agree with that.

25 MR. COLE: Second --

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

3 MR. COLE: Yeah.

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

6 MR. COLE: Yeah.

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

10 MR. COLE: Yeah.

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

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

21 MR. COLE: So --

22 JUSTICE GORSUCH: -- and that -- that
23 is more effective -- more appropriate a
24 legislative rather than a judicial function?
25 That's it. It's a question of judicial modesty.

1 MR. COLE: So, first of all, federal
2 courts of appeals have been recognizing that
3 discrimination against transgender people is sex
4 discrimination for 20 years. There's been no
5 upheaval. As I was saying, there are
6 transgender male lawyers in this courtroom
7 following the male dress code and going to the
8 men's room and the -- the -- the -- the Court's
9 dress code and sex-segregated restrooms have not
10 fallen. So the notion that somehow this is
11 going to be a huge upheaval, we haven't seen
12 that upheaval for 20 years, there's no reason
13 you -- you would see that upheaval. Transgender
14 people follow the rule that's associated with
15 their gender identity. It's not disruptive.

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

23 There's no textual basis for drawing
24 that distinction whatsoever. And that's because
25 our argument rests on text meaning, at a

1 minimum, sex assigned at birth or biological
2 sex, and everybody agrees --

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

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

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Mr. Bursch.

18 ORAL ARGUMENT OF JOHN J. BURSCH
19 ON BEHALF OF THE PETITIONER

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

22 Treating women and men equally does
23 not mean employers have to treat men as women.
24 That is because sex and transgender status are
25 independent concepts.

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

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

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

24 The purportedly simple test does not
25 get to the ultimate inquiry of whether men are

1 being treated less favorably than similarly
2 situated women because of sex. That does not
3 reflect the original public and legal meaning of
4 a statute promoting women's equality.

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

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

21 JUSTICE BREYER: The first part,
22 you've made the argument which I call the parade
23 of horribles argument, but you've heard, as I
24 have for the last hour and a half, the response,
25 which is that isn't this case, that many of the

1 things that you are worried about would be taken
2 care of by bona fide occupational qualification,
3 that other of those things would be taken care
4 of by the need to show harm, as well as to show
5 difference, and that there could be, though we
6 haven't done it, and I'm not advocating it, yes
7 or no, the possibility of bringing into such
8 cases comparative harms. And all those things
9 are open.

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

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

19 MR. BURSCH: Justice Breyer, that is
20 incorrect, because when a biological male is
21 refused access to the women's restroom, the --
22 the male would say that was an injury.

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

24 MR. BURSCH: That they were hurt.

25 JUSTICE BREYER: -- he would say it's

1 an injury.

2 MR. BURSCH: And there is no BFOQ.

3 JUSTICE BREYER: And the other side
4 would say: I'm sorry but there's serious
5 injuries on the other side. And, therefore, it
6 is a BFOQ. Okay?

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

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

18 JUSTICE BREYER: All right.

19 MR. BURSCH: It would be --

20 JUSTICE BREYER: And just on the off
21 chance that I feel we do not have to decide that
22 matter in this case --

23 (Laughter.)

24 JUSTICE BREYER: -- have you other
25 arguments that would favor your side? I know

1 you do, and I'd just at some point to hear them.

2 MR. BURSCH: Certainly. Their
3 comparator is a man violating the dress code
4 with a woman who follows the dress code. That
5 is wrong. Our comparator is a man who violates
6 the dress code with a woman who violates the
7 dress code.

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

16 JUSTICE BREYER: And what they say is
17 the reason we know you're wrong -- I'm not
18 saying this -- nor am I assuming any other
19 person thinks this, I'm just saying that this is
20 what I hear -- that if you are right, then
21 miscegenation does not fall within this statute,
22 the Jews marrying Catholics does not fall within
23 this statute, that any instance where people say
24 or many instances where they say I fired this
25 man because he wasn't a woman -- I fired the

1 woman because it's a man's job, it's okay, as
2 long as sometimes you'd fire a man because it's
3 a woman's job. You see the point.

4 MR. BURSCH: I do. Justice Breyer --

5 JUSTICE BREYER: Okay. Now what is
6 your answer to that?

7 MR. BURSCH: There is no non-racist
8 reason why you would fire the employee in the
9 interracial marriage. There is no non-religious
10 --

11 JUSTICE BREYER: There isn't? I
12 happen to know people. I won't say who they
13 are, but there are people --

14 (Laughter.)

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

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

20 JUSTICE BREYER: Right. I mean, does
21 that mean it falls outside the statute that --
22 that -- that -- that forbids discrimination
23 because of religion?

24 MR. BURSCH: Yes. Because Title VII
25 allows you to recognize that there are

1 differences between women and men. And that an
2 employer -- switching back to the first case --
3 could terminate a same-sex couple or an employee
4 who is married to a same-sex partner maybe
5 because they are Catholic, and they believe that
6 marriage is only between one man and one woman,
7 and sex doesn't have anything to do with it.

8 Let me give you an example here.

9 JUSTICE SOTOMAYOR: That's a
10 ministerial exception that already --

11 MR. BURSCH: No.

12 JUSTICE SOTOMAYOR: -- exists.

13 MR. BURSCH: A ministerial exception
14 if the employer is a church, but not if the
15 employer is a Christian businessman --

16 JUSTICE SOTOMAYOR: But there's still
17 --

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

19 JUSTICE SOTOMAYOR: But there are
20 still religious exceptions that the Court has
21 read into a lot of statutes. Putting that
22 aside, your example, very powerful, woman in --
23 women in a shelter who you say, if we accept his
24 argument, will have to be guarded by or
25 counseled by a transgendered woman, but isn't

1 that exactly like Dothard? And there we said
2 you can have -- you can't have sex-specific
3 guarding of prisoners, unless you have a BFOQ.

4 And there they found that it was a
5 BFOQ to make only men guard men and women only
6 guard women. So I'm not quite sure that I
7 understand your parade of horrors.

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

11 JUSTICE SOTOMAYOR: But it's
12 statutory.

13 MR. BURSCH: It is --

14 JUSTICE SOTOMAYOR: They can't -- they
15 can't --

16 MR. BURSCH: If I could explain?

17 JUSTICE SOTOMAYOR: -- wish it away.
18 But go ahead.

19 MR. BURSCH: If you have a BFOQ that
20 says only a man can apply for this position, he
21 would say that a woman who is transgender is a
22 man, and, therefore, is eligible for that
23 position, and no BFOQ in the world would be able
24 to keep them out of that position.

25 The problem is they're adding

1 transgender classification to a statute where
2 Congress has never added it.

3 JUSTICE SOTOMAYOR: No. What they're
4 doing is saying if there is an independent
5 reason why a man who's transgendered can't have
6 a job that a woman has, then that reason is good
7 enough, you don't have to hire them.

8 But if there is no reason why your
9 gender should matter in the work you are doing,
10 why should you not be hired?

11 MR. BURSCH: Let's go --

12 JUSTICE SOTOMAYOR: That's a very
13 different proposition.

14 MR. BURSCH: But let's go back to the
15 women's overnight shelter. Assume for a moment
16 that the employer had a BFOQ that only women
17 counselors would be able to counsel and stay
18 overnight with the women who have been abused.

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

21 MR. BURSCH: I -- I agree. But
22 they're applying it broadly and I am using
23 Justice Sotomayor's example. Assume that there
24 is a BFOQ for that and that someone would allow
25 that.

1 Their position is that it's
2 stereotyping not to treat the man who identifies
3 as a woman as a woman. They are arguing that
4 but for the fact that they were born as a man,
5 they could take that women's position, so there
6 is no BFOQ, there is no religious requirement
7 that would stop and draw the line at the
8 argument that they are making.

9 All of the distinctions between men
10 and women are gone forever. And that's the
11 plain text of the statute. But in --

12 JUSTICE GORSUCH: Do you wish to
13 address Judge Flaum's argument joined by Judge
14 Ripple which, again is a very thoughtful
15 position too that there may be dual causes here,
16 but the fact that sex is under consideration
17 even as narrowly construed is enough to draw us
18 within the statute?

19 MR. BURSCH: I think that line drawing
20 inquiries happen all the time in Title VII. And
21 it is entirely appropriate for a judge to
22 instruct the finder of fact to draw that line.

23 And the line that has to be drawn
24 based on Title VII's language is whether women
25 are being treated less favorably than similarly

1 situated men because of sex. And sometimes
2 it'll fall on the line; sometimes it won't.
3 Consider --

4 JUSTICE KAGAN: I think, Mr. Bursch,
5 that that's not quite right, women should be
6 treated less differently than men. You are
7 making Title VII into a statute about groups but
8 Title VII is not a statute about groups.

9 JUSTICE GORSUCH: That -- that's
10 helpful, but I'm also curious what you have to
11 say, Mr. Bursch.

12 MR. BURSCH: Yeah, let's put both of
13 those together, individual and that concept.
14 Say that you have a woman who identifies as a
15 man and they are working at an employer and they
16 get pregnant. They would be entitled to the
17 same pregnancy benefits as any of the women at
18 -- at work because that -- if they didn't get
19 it, that would be sexist.

20 But if the employer applied a
21 sex-specific dress code or sex-specific showers
22 and restrooms, that would not be a statutory
23 violation because of their biological
24 differences. Men and women are not similarly
25 situated, and they're -- no one is being treated

1 disadvantageously compared to someone else.

2 So you could have an employee who
3 might have a sex discrimination claim but they
4 can't bring a claim because of their transgender
5 status. You might have someone who doesn't.
6 Those are the things that we let juries work
7 out. And there is nothing unusual about that in
8 the context of Title VII.

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

12 MR. BURSCH: Okay.

13 JUSTICE KAGAN: Title VII is a -- is a
14 -- is a statute about individuals --

15 MR. BURSCH: Correct.

16 JUSTICE KAGAN: -- and whether
17 individuals are being treated differently
18 because of his or her sex. It's not a statute
19 about, well, in the aggregate, does this -- does
20 this act disadvantage men versus women or women
21 versus men?

22 It's a statute that uses the word
23 "individual" twice and says is a particular
24 person being treated differently because of her
25 sex? And here, Ms. Stephens, was being treated

1 differently because of her sex. And this was
2 Judge Flaum's point in -- in that opinion, is
3 that it's as simple as looking at the language
4 of the statute, applying it to a particular
5 individual, which Title VII insists that you do,
6 and coming up with the obvious answer.

7 Yes, if she had not been a -- if she
8 had not been assigned at birth the sex that she
9 was assigned at birth, she would have been
10 treated differently.

11 MR. BURSCH: We agree with the
12 individual treatment. That's why in Oncale,
13 this Court said basically in the context of a
14 male-only work force that the plaintiff had a
15 cause of action because he was being treated
16 differently than a woman in his position would
17 have been.

18 A hypothetical comparator, to get back
19 to some of Justice Ginsburg's questions, even if
20 there are no women on the site, you still have
21 that hypothetical comparator.

22 Here it's individual too, but all the
23 employer does in enforcing a sex-specific dress
24 code applied neutrally to everyone, recognizes
25 that there is differences between men and women.

1 And if you say that Tom Ross can't do that, then
2 there is no --

3 JUSTICE KAGAN: Are you pinning your
4 answer on the fact of a dress code? Would your
5 answer be the same if there were no dress code
6 and Ms. Stephens had just been fired for being
7 transgender?

8 Because all your arguments in your
9 brief -- I mean, you keep talking in your brief,
10 as you do here, about the dress code, but the
11 arguments that you make are arguments that would
12 allow the employer to fire Ms. Stephens for
13 being transgender, irrespective of whether there
14 was a dress code.

15 MR. BURSCH: Here's the reason why,
16 Justice Kagan.

17 JUSTICE KAGAN: The why what? The --
18 that the arguments do go that far?

19 MR. BURSCH: Well, that the arguments
20 apply in both situations.

21 JUSTICE KAGAN: Yeah, if there's a
22 dress code or if there's not a dress code?

23 MR. BURSCH: Because if this Court
24 allows a sex-specific dress code because it
25 acknowledges the differences between men and

1 women, it's no different if an employer without
2 a dress code impact -- imposes the same policy
3 on an informal basis. It doesn't change the
4 fact that women are not being treated worse than
5 men, as Ms. Karlan said.

6 It doesn't treat her worse than -- or
7 it doesn't treat men worse than women that we
8 wear a tie in this courtroom and that women do
9 not. Sex-specific policies acknowledge that
10 there are differences, so whether the sex code
11 or the sex-specific dress code is in place or
12 not, employers have that latitude.

13 Now, some jurisdictions, like the
14 District of Columbia, have taken that latitude
15 that Title VII gives away from employers. It
16 says that you cannot, for example, treat someone
17 differently based on their personal appearance,
18 but otherwise when it comes to dress codes,
19 grooming codes, opposite sex facilities, and all
20 those types of things everyone would have
21 understood Title VII at the time of its
22 enactment as -- as those things being equal
23 treatment and not disfavoring either sex over
24 the other, whether on a group basis or an
25 individual basis. It doesn't make any

1 difference.

2 The -- the problem here is that under
3 their theory, the -- the federal agency that
4 brought this claim and -- and then an unelected
5 panel in the Sixth Circuit, changed the law.
6 They added a transgender classification, applied
7 it to a business retroactively. And what's
8 more, the Sixth Circuit said that sex itself is
9 a stereotype.

10 And Mr. Cole agrees with that
11 100 percent. Everything that he said this
12 morning, sex itself is a stereotype. You can
13 never treat a man who identifies as a woman
14 differently because to do that is sex
15 discrimination. When you do that, there is no
16 sex discrimination standard under Title VII
17 anymore. It's been completely blown up.

18 One other point on the restroom
19 scenario. Gender identity is a broad concept.
20 You could have a male employee who identifies as
21 a woman but doesn't dress as a woman, looks like
22 a man, showing up in the shower and the locker
23 room, and, again, the employer wouldn't be able
24 to do anything about that because under Mr.
25 Cole's theory, but for the fact he was a man, he

1 could be there. And it's stereotyping to say
2 men cannot be in the women's bathroom.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 General Francisco.

7 ORAL ARGUMENT OF GEN. NOEL J. FRANCISCO

8 ON BEHALF OF RESPONDENT EEOC

9 GENERAL FRANCISCO: Mr. Chief Justice,
10 and may it please the Court:

11 I'd like to make three basic points
12 aimed at basically addressing Justice Gorsuch's
13 comment that this was -- this is a close textual
14 case. And I would like to respectfully argue
15 that I don't think it's that close for three
16 reasons.

17 JUSTICE GORSUCH: Oh, neither side
18 ever thinks a case is close.

19 (Laughter.)

20 JUSTICE GORSUCH: Judges always do,
21 don't they?

22 GENERAL FRANCISCO: And the first,
23 Your Honor, is the one that I was talking about
24 earlier, that sex and gender identity, like sex
25 and sexual orientation, are different traits.

1 They're defined, they have different
2 definitions, as my friend just said. He agrees
3 that they're different traits. And there's a
4 reason why when Congress wants to prohibit
5 discrimination based on the traits of sexual
6 orientation and gender identity, it lists them
7 separately. It doesn't define sex as including
8 these traits. It's because Congress has
9 recognized there are different traits. So as
10 long as you treat men and women with the same
11 different trait exactly the same regardless of
12 their sex, you're not discriminating against
13 them because of their sex.

14 The second and related textual issue
15 is that the standard for determining whether or
16 not you're discriminating against somebody
17 because he's a man or because she's a woman is
18 that you're treating that person differently
19 than a similarly situated person of the opposite
20 sex and taking an adverse employment action
21 against them as a result.

22 So the threshold question is always
23 are the two people that you're comparing
24 actually similarly situated? Now, my friends on
25 the other side assert that a transgender man is,

1 in fact, similarly situated to cisgender man,
2 just like they assert that a gay woman is
3 similarly situated to a straight man.

4 But that is manifestly not true
5 because, with respect to the transgender issue,
6 the difference between a transgender man and
7 cisgender man is that one identifies with his
8 biological sex and the other identifies with the
9 opposite of his biological sex. And that is a
10 very meaningful difference that is not grounded
11 on stereotypes. It's simply grounded on a
12 difference between a transgender man and a
13 cisgender man.

14 Likewise with sexual orientation. The
15 difference between a gay man and a straight
16 woman is that -- is their sexual orientation.
17 And that has nothing to do with stereotypes. It
18 has nothing to do with one -- whether one is
19 better or worse than the other.

20 JUSTICE GORSUCH: A great deal of --

21 GENERAL FRANCISCO: It's a different
22 type of relationship.

23 JUSTICE GORSUCH: A great deal of --
24 of the arguments here could be cast as
25 stereotypes, though, right? That the plaintiff

1 in this case or that case doesn't conform to
2 male or female stereotypes?

3 GENERAL FRANCISCO: That is --

4 JUSTICE GORSUCH: And -- and as I
5 understand your brief, you accept that argument
6 and that those are good claims without respect
7 to comparators of opposite sex. And if -- if
8 that's the case, what's the real difference here
9 between the two sides? I mean, we've --

10 GENERAL FRANCISCO: Right.

11 JUSTICE GORSUCH: I -- I accept
12 there's some delta, but it seems smaller than
13 might first appear.

14 GENERAL FRANCISCO: Sure. And I --
15 what I would say the difference is at what stage
16 of the analysis you're doing it? The way -- the
17 place that stereotypes come up are when you're
18 figuring out whether similarly situated --
19 whether two people are, in fact, similarly
20 situated. An aggressive man -- take Price
21 Waterhouse: An aggressive man is similarly
22 situated to an aggressive woman. They have the
23 exact same trait, aggressiveness, and the only
24 difference is that stereotypical view that women
25 shouldn't be aggressive.

1 But a transgender man and cisgender
2 man do not ever share the same trait in the
3 first place because one identifies with his
4 biological sex, the other identifies with the
5 opposite of his biological sex. And that is
6 simply a different trait that is not grounded in
7 any kind of stereotype. And a gay man is not
8 similarly situated --

9 JUSTICE KAGAN: General --

10 GENERAL FRANCISCO: -- to a straight
11 woman for exactly the same reason.

12 JUSTICE KAGAN: And I think one could
13 argue just the opposite, that there is another
14 trait in Price Waterhouse, and the trait is
15 conformity to traditional gender roles.

16 So your argument would suggest, no, we
17 shouldn't look at the aggressive woman and the
18 aggressive man. We should instead say, no,
19 there's this other thing, which is conformity to
20 gender roles.

21 GENERAL FRANCISCO: Right.

22 JUSTICE KAGAN: We should really look
23 at whether the employer treats the same the
24 aggressive woman and the docile man, the docile
25 effeminate man. And if the employer treats the

1 aggressive woman in the same way that the
2 employer treats the effeminate man, they're both
3 fired, then the employer is off the hook.

4 Now, you yourself, say that that's not
5 right, that, in fact --

6 GENERAL FRANCISCO: Right.

7 JUSTICE KAGAN: -- that's double
8 discrimination and the employer is on the hook
9 twice. But it seems to me that the exact same
10 analysis applies because there is this
11 independent trait, which is just a little bit
12 different from the independent trait here. Here
13 the -- the -- the independent trait, so-called,
14 that you say is the transgender identity.
15 There, the independent trait was the refusal to
16 conform to traditional gender roles.

17 GENERAL FRANCISCO: Right. And -- and
18 I -- the reason I disagree with that analysis,
19 Your Honor, is because I don't think that Price
20 Waterhouse creates some kind of freestanding
21 stereotype claim.

22 What it prohibits is stereotypes that
23 show that you're treating similarly situated men
24 and women differently.

25 JUSTICE GINSBURG: But I thought you

1 --

2 GENERAL FRANCISCO: So in Price
3 Waterhouse --

4 JUSTICE GINSBURG: I thought you
5 answered the question that -- that Price
6 Waterhouse would not have prevailed if it had
7 treated men who were not sufficiently macho in
8 the same way that they treated women who were
9 not sufficiently feminine.

10 GENERAL FRANCISCO: No, Your Honor, I
11 believe we said the opposite of that in our
12 brief. And it was --

13 JUSTICE GINSBURG: That would be okay?

14 GENERAL FRANCISCO: Yeah, we said the
15 opposite of that in our brief.

16 JUSTICE BREYER: Then I could ask this
17 --

18 JUSTICE GINSBURG: And they could rely
19 on the -- for both cases --

20 GENERAL FRANCISCO: Yes.

21 JUSTICE GINSBURG: -- they could rely
22 on the stereotype that the woman doesn't fit,
23 they can rely on the stereotype that the man
24 didn't fit, although the cases have said that
25 the object of Title VII was to get at the entire

1 spectrum of sex stereotypes.

2 GENERAL FRANCISCO: And so as we read
3 Price Waterhouse, which I have no quarrel with
4 in the slightest, if you treat an aggressive
5 woman worse than an aggressive man, you are
6 violating Title VII because you're treating
7 similarly situated people differently.

8 Applying that here, if you treat a
9 transgender man exactly the same as you treat a
10 transgender woman regardless of their sex,
11 you're likewise not discriminating against them
12 because of their sex --

13 JUSTICE BREYER: I -- I --

14 GENERAL FRANCISCO: -- since they're
15 similarly situated --

16 JUSTICE BREYER: I -- we got that. I
17 -- I -- I want to know on a totally separate
18 argument.

19 GENERAL FRANCISCO: Yeah.

20 JUSTICE BREYER: See, one, it's only
21 my characterization, not anybody else's, but I
22 do characterize one set of arguments that you've
23 been through as trying to work with the language
24 of the statute. All right?

25 And on the one hand, you have these

1 are individuals, individuals four times --

2 GENERAL FRANCISCO: Yeah.

3 JUSTICE BREYER: -- and on the other
4 hand, you have -- and the arguments that were
5 made here and, on the other hand, arguments on
6 the other side. I'm putting that to the side.

7 GENERAL FRANCISCO: Okay.

8 JUSTICE BREYER: Then there are the
9 horribles. Okay? And we've discussed that at
10 length. I'm putting that to the side.

11 GENERAL FRANCISCO: Okay.

12 JUSTICE BREYER: Then I say, well,
13 there seems to be a third set in some of these
14 briefs, that regardless of the first two,
15 Congress -- and that's what I think the
16 dissenting judge was talking about, and Judge
17 Posner, who had a good point. I'm not saying
18 it's a winning point --

19 (Laughter.)

20 JUSTICE BREYER: -- which is what I
21 want to know.

22 GENERAL FRANCISCO: Yeah.

23 JUSTICE BREYER: That Congress
24 wouldn't have dreamt of this when it passed the
25 statute. All right? I heard you say, I think,

1 we're not relying on that. Is that so? The
2 government is not relying on that?

3 GENERAL FRANCISCO: No, we are relying
4 on it in this sense.

5 JUSTICE BREYER: Oh, you are.

6 GENERAL FRANCISCO: One -- one, we
7 think it fortifies our other arguments, but I
8 know --

9 JUSTICE BREYER: Of course, it does.

10 GENERAL FRANCISCO: -- you don't -- I
11 know you don't want me to push on that, so I'm
12 not going to push on that. We're relying on it
13 to the sense that to the extent there is any
14 ambiguity here, we think it is strongly
15 dispelled by the history of these statutes.

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

18 JUSTICE BREYER: Yes.

19 GENERAL FRANCISCO: And here, by
20 updating it in the way that my friends on the
21 other side would have you update it, they're
22 actually undermining the manner in which
23 Congress has traditionally considered updating
24 it.

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

1 JUSTICE BREYER: ENDA.

2 GENERAL FRANCISCO: -- refers to the
3 Employment Non-Discrimination Act, for nearly a
4 decade now, when Congress has looked and
5 considered expanding the scope of the liability
6 provisions, it has acknowledged that there are
7 religious liberty issues at stake. And it wants
8 to be able to take those into account too.

9 If you look at the states, they've
10 often come to very similar compromises where
11 they found peace amongst otherwise very --

12 JUSTICE BREYER: Got it.

13 GENERAL FRANCISCO: -- groups of very
14 different views.

15 But if you resolve this issue
16 judicially, you are essentially delivering --
17 and I hate to use these types of terms --

18 JUSTICE BREYER: All right.

19 GENERAL FRANCISCO: -- but a complete
20 victory to one side of the fight and nothing to
21 the other side --

22 JUSTICE BREYER: All right. I've got
23 that point.

24 GENERAL FRANCISCO: -- of the fight,
25 you are upsetting that --

1 JUSTICE BREYER: Yeah.

2 GENERAL FRANCISCO: -- legislative
3 balance.

4 JUSTICE BREYER: I -- I think that is
5 an argument in your favor.

6 GENERAL FRANCISCO: Yeah.

7 JUSTICE BREYER: Moreover, I think
8 this whole category is the elephant in the room
9 and --

10 GENERAL FRANCISCO: That -- that was
11 actually the --

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

13 GENERAL FRANCISCO: -- third point
14 point I was going to make to Justice Gorsuch.

15 JUSTICE BREYER: Well, all right, I
16 think it is. But then on the other side of what
17 you're saying is the following, which is
18 abstract but no more so.

19 In the '60s, we were only ten years
20 away from where people who were real slaves
21 and -- and discriminated against obtained a
22 degree of freedom. And these statutes were all
23 part of a civil rights movement that was
24 designed to give, include in our society, people
25 who had been truly discriminated against for the

1 worst of reasons.

2 And at that time, this civil rights
3 statute, when it was passed, would have put in
4 the category gay people, transgender people, a
5 people who were suffering terrible
6 discrimination. And over time, this Court has
7 moved away from that view finding it
8 unconstitutional.

9 And now, doesn't that fact, which is
10 an overwhelming fact to me about the nature of
11 the country under law, argue that that's a
12 change. That's a change that both explains why
13 they didn't put it in initially and explains why
14 we should, other things being equal, interpret
15 it to include gay people and transgender people
16 now?

17 GENERAL FRANCISCO: No, Your Honor,
18 for a couple of reasons, I would argue against
19 that. And, again, I'm going to put the text to
20 the one side, but though I do think that that is
21 our strongest argument.

22 I -- I -- I -- I actually find it
23 troubling for courts to take that approach
24 because I actually think it deprives the people
25 of the ability to struggle with these issues

1 democratically.

2 And I think it is very important when
3 we have these kinds of big changes, that we
4 actually convince one another that this is the
5 right thing to do.

6 JUSTICE GINSBURG: No one ever --

7 GENERAL FRANCISCO: And when courts --

8 JUSTICE GINSBURG: No one ever thought
9 sexual harassment was encompassed by
10 discrimination on the basis of sex back in '64.
11 It wasn't until a book was written in the middle
12 '70s bringing that out.

13 And now we say, of course, harassing
14 someone, subjecting her to terms and conditions
15 of employment she would not encounter if she
16 were a male, that is sex discrimination but it
17 wasn't recognized --

18 GENERAL FRANCISCO: And --

19 JUSTICE GINSBURG: -- to be such in
20 the beginning.

21 GENERAL FRANCISCO: And, Your Honor, I
22 think that that is a straightforward application
23 of Title VII's text.

24 With respect to what I was talking
25 about with Justice Breyer where we were putting

1 the text aside, I think it is important to allow
2 the democratic processes to resolve these issues
3 so we have a stable resolution of the issue and
4 one that takes into account what everybody would
5 agree are legitimate interests on all sides.

6 And in Obergefell, this Court made
7 very clear that there were good and decent
8 people who had different views with respect to
9 gay marriage and they should be respected.

10 The legislative process is the process
11 that allows those views to respect -- be
12 respected as well as the very powerful views of
13 my friends on the other side --

14 JUSTICE SOTOMAYOR: May I --

15 GENERAL FRANCISCO: -- which also
16 should be respected.

17 JUSTICE SOTOMAYOR: May -- may I just
18 ask, at what point does a court continue to
19 permit invidious discrimination against groups
20 that, where we have a difference of opinion, we
21 believe the language of the statute is clear.

22 I think Justice Breyer was right that
23 Title VII, the Civil Rights Act, all of our acts
24 were born from the desire to ensure that we
25 treated people equally and not on the basis of

1 invidious reasons.

2 And we can't deny that homosexuals are
3 being fired merely for being who they are and
4 not because of religious reasons, not because
5 they are performing their jobs poorly, not
6 because they can't do whatever is required of a
7 position, but merely because they're a suspect
8 class to some people. They may have power in
9 some regions, but they are still being beaten,
10 they are still being ostracized from certain
11 things.

12 At what point does a court say,
13 Congress spoke about this, the original Congress
14 who wrote this statute told us what they meant.
15 They used clear words. And regardless of what
16 others may have thought over time, it's very
17 clear that what's happening fits those words.

18 At what point do we say we have to
19 step in?

20 GENERAL FRANCISCO: I guess my answer,
21 Your Honor, would be at the point when Congress
22 actually addresses the issue. And the main
23 argument that we are making and have been making
24 from beginning to end is that Congress has not
25 resolved this issue because sex/gender identity,

1 sex/sexual orientation --

2 JUSTICE KAGAN: General, these are
3 some --

4 GENERAL FRANCISCO: -- are different
5 traits.

6 JUSTICE KAGAN: -- some thoughtful
7 responses that you have given to this set of
8 questions.

9 But in responding to Justice Breyer,
10 you said, if we thought that there was a clear
11 application of the statute. So I would just ask
12 you, if you thought that this was a clear
13 application of the statute in the same way that
14 sexual harassment was a clear application of the
15 statute, even though nobody recognized it at the
16 time, if you thought that this was a clear
17 application of the statute, would we have to
18 come out against you?

19 GENERAL FRANCISCO: Yes, Your Honor,
20 if the statute is unambiguously against me, you
21 have to rule against me. I actually think that
22 the statute is unambiguously in my favor for the
23 reasons I was given and the third reason, which
24 is the reason that Justice Breyer alluded to,
25 Justice Scalia's great line about how we don't

1 hide elephants in mouse holes.

2 Everybody here agrees that Congress
3 never thought that by prohibiting discrimination
4 based on sex, they would also be prohibiting
5 discrimination based on two very different
6 traits, sexual orientation and gender identity.

7 My friends would have this Court
8 essentially reach that same result indirectly.
9 I think all of the textual arguments cut in our
10 favor straight away, but to the extent there is
11 any doubt, there is no way to find that elephant
12 in this mouse hole.

13 Thank you, Your Honor.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Five minutes, Mr. Cole.

17 REBUTTAL ARGUMENT OF DAVID D. COLE
18 ON BEHALF OF RESPONDENT AIMEE STEPHENS

19 MR. COLE: Thank you.

20 Interpreting a statute is not
21 depriving the democratic process. It is doing
22 what the Court is supposed to do within the
23 democratic process, and of course if the
24 democratic process disagrees with the Court's
25 interpretation of the statute, it can change it.

1 So there's no deprivation of the
2 democratic process here.

3 Secondly, the purpose of Title VII as
4 this Court defined it was to make sex irrelevant
5 to people's ability to succeed at work, to make
6 sex irrelevant to people's ability to succeed at
7 work.

8 When Harris Homes fired Aimee Stephens
9 because it learned about her sex assigned at
10 birth being different from her gender identity,
11 it did not make sex irrelevant to her ability to
12 succeed at work. It made it determinative.

13 Think about it this way. If Harris
14 Homes fired a man because he was a man that
15 would be sex discrimination. If it fired an
16 employee because he was insufficiently
17 masculine, that would clearly be sex
18 discrimination.

19 In this case, Harris Homes fired Aimee
20 Stephens because he thought she is a man who is
21 insufficiently masculine. That too must be sex
22 discrimination.

23 She's not seeking any special
24 protection. She is seeking and all transgender
25 people are seeking the same protection that

1 everybody else gets under the law. This Court
2 30 years ago said in Price Waterhouse: "We are
3 beyond the day when an employer could evaluate
4 employees by insisting that they match the
5 stereotypes associated with their group."

6 We are certainly beyond that day today
7 as well, and what Harris Homes did was to insist
8 that she match the stereotypes associated with
9 her group. That's impermissible under this
10 Court's precedence, that's impermissible under
11 the literal terms of the statute and this Court
12 should rule for Aimee Stephens.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel. The case is submitted.

16 (Whereupon, at 12:06 p.m., the case
17 was submitted.)

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