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## A Textuary Ray of Hope for LGBTQ+ Workers: Does Title VII Mean What it Says?

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## ARTICLES

### A TEXTUARY RAY OF HOPE FOR LGBTQ+ WORKERS: DOES TITLE VII MEAN WHAT IT SAYS?

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I.	SUPREME COURT PRECEDENT CLARIFIES THE RELEVANCE OF GENDER STEREOTYPING UNDER TITLE VII.....	195
II.	TITLE VII DOES NOT EXCLUDE GENDER STEREOTYPING DISCRIMINATION CLAIMS WHERE THE FACTS SHOW TRANSGENDER DISCRIMINATION.....	198
III.	DISCRIMINATION BECAUSE OF TRANSGENDER STATUS IS ITSELF NECESSARILY DISCRIMINATION BECAUSE OF SEX —AIMEE STEPHENS.....	199
	A. The Sex Stereotyping Claim.....	200
	B. The Claim Based on Transgender and Transitioning Status .....	202
	C. The Sixth Circuit Rejects Arguments Against Interpreting Title VII to Include Transgender Status Discrimination ....	204
IV.	MIXED RESULTS: TITLE VII SEX DISCRIMINATION CLAIMS WHERE FACTS SHOW DISCRIMINATION BASED ON GENDER NON-CONFORMITY DUE TO SEXUAL ORIENTATION .....	205

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194	<i>THE SCHOLAR</i>	[Vol. 22:193]
V. DISCRIMINATION BECAUSE OF SEXUAL ORIENTATION IS NECESSARILY DISCRIMINATION BECAUSE OF SEX		
	—DONALD ZARDA .....	207
VI. SEXUAL ORIENTATION DISCRIMINATION IS NOT PROHIBITED BY TITLE VII BASED ON 39-YEAR-OLD PRECEDENT		
	—GERALD BOSTOCK.....	212
VII. PERSONAL OBSERVATIONS AND PERSPECTIVES .....		
	A. The Court’s Legitimacy and the Credibility of Textualism.....	212
	B. Opportunities Seized and Lost .....	216
	C. Perseverance.....	218

Title VII of the Civil Rights Act of 1964 is a landmark federal law which prohibits employment discrimination based on race, color, religion, sex or national origin.<sup>1</sup> In three momentous cases, argued before the United States Supreme Court in the October 2019 term, the Court will decide whether Title VII’s prohibition of discrimination “because of sex” necessarily includes a prohibition of discrimination based on sexual orientation as well as a prohibition of discrimination based on gender identity or transgender status.<sup>2</sup> The Supreme Court granted petitions for writ of certiorari in *Zarda v. Altitude Express, Inc.*, *Bostock v. Clayton County Board of Commissioners*, and *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*<sup>3</sup> All three cases involve the statutory interpretation of Title VII’s prohibition of employment discrimination

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1. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2020).

2. See *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2nd Cir. 2001), *rev’d en banc*, 883 F.3d 100 (2d Cir. 2018) (en banc), *cert. granted*, 139 S. Ct. 1599 (2019) (examining the parameters of Title VII when an employee revealed his sexual orientation to a customer and was subsequently fired); see also *Bostock v. Clayton Cty. Bd. of Comm’rs*, 723 F. App’x 964 (11th Cir. 2018), (en banc), 894 F.3d 1335 (2018), *cert. granted*, 2019 U.S. LEXIS 2927 (U.S. Apr. 22, 2019) (discussing whether an employee’s termination was lawful when the reasons for termination included his sexual orientation); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 2019 U.S. LEXIS 2846 (U.S. Apr. 22, 2019) (evaluating the lawfulness of a funeral home’s actions when it fired a woman after she informed the funeral home that she was a transgender woman).

3. 883 F.3d 100 (2d Cir. 2018), 139 S. Ct. 1599 (2019); see 723 F. App’x at 964 (holding that binding precedent foreclosed a Title VII action based on sexual orientation discrimination); see also 884 F.3d at 560 (holding that discrimination on the basis of transgender status is necessarily discrimination because of sex under Title VII).

against any individual “because of such individual’s . . . sex.”<sup>4</sup> This article will briefly highlight some of the important decisions holding that Title VII’s prohibition of sex discrimination encompasses discrimination based on gender identity and sexual orientation. As an attorney who worked closely on these issues for the last fifteen or more years and attended the Supreme Court oral arguments for the three cases on October 8, 2019, I will also offer my personal observations and perspectives about these issues. The views expressed in this article are my personal views and not that of my employer.

#### I. SUPREME COURT PRECEDENT CLARIFIES THE RELEVANCE OF GENDER STEREOTYPING UNDER TITLE VII

Gender stereotyping refers generally to beliefs, perceptions, or expectations about the role, appearance, and behavior of men and women.<sup>5</sup> The existence of conduct based on gender stereotypes can provide proof that an employment decision or abusive environment is motivated by a sex-based factor and in violation of Title VII.<sup>6</sup> For example, gender stereotyping provides evidence to prove sex discrimination when an employer denies a promotion to a woman because she walks like a man, talks in a deep voice, does not wear make-up, jewelry, or a traditionally feminine haircut.<sup>7</sup> If the employer considers such “masculine mannerisms and traits” in an adverse employment decision, the employer has taken gender into account in making an employment decision.<sup>8</sup>

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4. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2020).

5. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 256 (1989) (discussing that the Policy Board in making its decision did in fact take into consideration comments from partners that were solely motivated by stereotypical notions about women’s proper department).

6. See *generally id.* (“Price Waterhouse also charges that Hopkins produced no evidence that sex stereotyping played a role in the decision to place her candidacy on hold. As we have stressed, however, Hopkins showed that the partnership solicited evaluations from all of the firm’s partners . . . including the comments that were motivated by stereotypical notions about women’s proper department.”).

7. See *id.* (“[Sex stereotyping does not] require expertise in psychology to know that, if an employee’s flawed “interpersonal skills” can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee’s sex and not her interpersonal skills that has drawn the criticism.”).

8. See *id.* at 239 (evaluating on the many factors that go into an employer’s administrative decisions relating to employees).

Gender stereotyping also may prove a sex-based hostile work environment; for example, an effeminate male repeatedly insulted by co-workers as “she” and “her,” or “faggot” and “female whore” has a legitimate hostile work environment claim.<sup>9</sup> Such harassment occurs “because of sex” in that the employee is harassed because he is a *man* who, in the view of the harassers, looks and acts effeminately.<sup>10</sup> Gender has been taken into account in subjecting the employee to a hostile work environment.<sup>11</sup>

In a 1978 Title VII case, *City of Los Angeles v. Manhart*, the Supreme Court made the following pronouncement:

It is now well recognized that employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females . . . . ‘In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes . . . .’ *Sprogis v. United Air Lines, Inc.*<sup>12</sup> Myths and purely habitual assumptions about [men or women] . . . are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less . . . . Even a true generalization about the [protected] class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.<sup>13</sup>

Later, in *Price Waterhouse v. Hopkins*, the Supreme Court expounded on the legal relevance of such “sex stereotyping,” and how conduct based on sex stereotyping is considered evidence of sex discrimination under Title VII:

In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender . . . . [W]e are beyond the day when

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9. *See Nichols v. Azteca Rest. Enter. Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (describing the systemic abuse suffered by an individual who did not conform to his co-workers’ stereotyped expectations of masculinity).

10. *See id.* (portraying a situation where there was harassment “because of sex”); *see also* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2020) (outlining unlawful employment practices regarding sex discrimination).

11. *See id.* at 871 (holding “it is . . . now clear that sexual harassment in the form of a hostile work environment constitutes sex discrimination”).

12. *City of Los Angeles v. Manhart*, 435 U.S. 702, 707–08 (1978) (citing *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

13. *Id.*

an employer could evaluate employees by insisting that they matched the stereotype associated with their group . . . .<sup>14</sup>

In that case, a female employee named Ann Hopkins, was denied partnership at an accounting firm based, in part, on the evaluative comments submitted by several partners to the “Policy Board.”<sup>15</sup> These partners’ comments, according to the Supreme Court, “overtly referred to her failure to conform to certain gender stereotypes as a factor militating against her election to partnership.”<sup>16</sup> For example, “[o]ne partner described her as ‘macho . . . [another] advised her to take ‘a course at charm school.’”<sup>17</sup> Moreover, in what the Supreme Court called the *coup de grace*, the partner, who explained to Ms. Hopkins the reasons for denying her partnership, advised her to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>18</sup>

On appeal, the Supreme Court held that the trial court had clearly erred in finding insufficient evidence of sex stereotyping, and that sex stereotyping had played a part in the partnership decision.<sup>19</sup> First, the Court emphasized that the expert testimony presented on behalf of Hopkins regarding sex stereotyping “was merely icing on Hopkins’ cake,” because the partners’ comments obviously constituted “stereotypical notions about women’s proper deportment.”<sup>20</sup> According to the Court, “[i]t takes no [expert] to discern sex stereotyping in a description of an aggressive female employee as requiring ‘a course at charm school.’”<sup>21</sup> Second, the Court concluded Price Waterhouse undoubtedly took these comments into account in deciding to put Hopkins’ partnership on hold—as it had solicited and relied on its partners’ evaluations and did not disclaim reliance on the sex stereotyping comments.<sup>22</sup> According to the Court, Price Waterhouse was liable for

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14. Price Waterhouse, 490 U.S. at 251.

15. *Id.*

16. *Id.* at 273 (O’Connor, S., concurring).

17. *Id.* at 235.

18. *Id.*

19. *Id.* at 237–38.

20. *See id.* at 256 (elaborating on Hopkins’ testimony and why she interpreted the partner’s written comments evaluating her candidacy for partnership as sex stereotyping).

21. *Id.*

22. *Id.* at 251, 257.

sex discrimination based on sex stereotyping, thus, in violation of Title VII.<sup>23</sup>

II. TITLE VII DOES NOT EXCLUDE GENDER STEREOTYPING  
DISCRIMINATION CLAIMS WHERE THE FACTS SHOW  
TRANSGENDER DISCRIMINATION

*Smith v. City of Salem* is an important Sixth Circuit decision, applying Title VII to factual circumstances which plainly showed discrimination based on transgender status.<sup>24</sup> In *Smith*, a transgender firefighter, Jimmie Smith, contended that the employer had engaged in discrimination based on sex in violation of Title VII, “because of . . . gender non-conforming conduct and, more generally because of . . . identification as a transsexual.”<sup>25</sup> Because Smith failed to state a claim of sex stereotyping under *Price Waterhouse* based on transsexuality, the district court held that Smith was excluded from Title VII’s protection.<sup>26</sup> The Sixth Circuit Court of Appeals reversed and specifically disapproved of the district court’s implication that Smith had disingenuously invoked the sex stereotyping term-of-art to run around the “real” claim, which was based on transgender status.<sup>27</sup>

The Sixth Circuit held that Smith’s complaint sufficiently pled the gender stereotyping claim by alleging (1) that co-workers began commenting on her appearance, expressing a more feminine manner due to being a transgender woman and (2) that her employer schemed to force her resignation.<sup>28</sup>

It follows [from *Price Waterhouse*] that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.<sup>29</sup>

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23. *Id.* at 258.

24. *See* 378 F.3d 566, 568, 571 (6th Cir. 2004) (describing the application of Title VII when a trans woman lieutenant was suspended because of her gender non-conforming behavior).

25. *Smith v. City of Salem*, 378 F.3d 566, 568, 571 (6th Cir. 2004).

26. *Id.* at 569.

27. *Id.* at 571, 575, 578.

28. *Id.* at 572.

29. *Id.* at 574.

In sustaining Smith’s gender stereotyping claim, the court made clear that Smith’s transgender status did not exclude Smith from Title VII coverage:

[D]iscrimination against a plaintiff who is a transsexual—and therefore fails to act like and/or identify with the gender norms associated with his or her sex—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as “transsexual,” is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.<sup>30</sup>

Similar to the Sixth Circuit’s application of *Price Waterhouse* to *Smith*, three other circuit courts of appeals have held that acts of discrimination on the basis of sex include discrimination based on gender identity.<sup>31</sup>

### III. DISCRIMINATION BECAUSE OF TRANSGENDER STATUS IS ITSELF NECESSARILY DISCRIMINATION BECAUSE OF SEX—AIMEE STEPHENS

In *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, the Sixth Circuit held that sex discrimination under Title VII included discrimination of transgender persons based on their transgender or transitioning status.<sup>32</sup> In this case, Aimee Stephens, a transgender funeral director, was terminated from her employment by Thomas Rost, a funeral home’s owner.<sup>33</sup> Shortly before being fired, Stephens informed Rost that, due to her transition from male to female, she should represent and dress as a

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30. *Id.* at 575.

31. See Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2018) (“Discrimination against a transgender individual because of [their] gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”); see also Rosa v. Park W. Bank & Tr. Co., 214 F.3d 213, 215–16 (1st Cir. 2000) (stating that disparate treatment between a man dressed as a woman and a traditionally-dressed woman would fall into a prohibited category); Schwenk v. Hartford, 203 F.3d 1187, 1202 (9th Cir. 2000) (“Under *Price Waterhouse*, ‘sex’ under Title VII encompasses both sex—that is, the biological differences between men and women—and gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.”) (citing *Price Waterhouse*, 490 U.S. at 250).

32. 884 F.3d at 600 (“Discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII.”).

33. *Id.* at 566.



woman in appropriate business attire while at work.<sup>34</sup> Rost admitted that he fired Stephens because she was no longer representing as a man and he wanted her to dress traditionally feminine.<sup>35</sup> The United States Equal Employment Opportunity Commission (EEOC) sued the funeral home alleging, among other things, that the funeral home violated Title VII by terminating Stephens based on her transgender or transitioning status and her refusal to conform to the owner's sex-based stereotypes.<sup>36</sup>

By denying the funeral home's Motion for Failure to State a Claim, the district court determined that Stephens adequately stated a Title VII claim due to her termination because of her failure to conform to sex-based stereotypes.<sup>37</sup> Nevertheless, the district court limited the EEOC's pursuit of its unlawful-termination claim, ruling that "transgender status is not a protected trait under Title VII, and . . . the EEOC could not sue for alleged discrimination . . . based solely on [Stephens'] transgender and/or transitioning status."<sup>38</sup> However, the Sixth Circuit held that narrowing the claim was erroneous because "[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex" in violation of Title VII.<sup>39</sup> Thus, Stephens could indeed claim she was discriminated against on the basis of her transgender and transitioning status alone.<sup>40</sup>

#### A. *The Sex Stereotyping Claim*

In affirming Stephens' sex stereotyping claim, the Sixth Circuit refuted the funeral home's argument that its sex-specific dress code requiring Stephens to abide by the male dress code did not constitute disparate treatment in violation of Title VII—as the dress-code equally applied to and burdened females.<sup>41</sup> The funeral home required women to wear skirt suits and men to wear pant suits, and it viewed Stephens as a male who was required to abide by the male dress code.<sup>42</sup> According to the court,

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34. *Id.* at 569.

35. *Id.*

36. *Id.*

37. *Id.* at 570.

38. *Id.* at 569–70.

39. *Id.* at 571, 574–75.

40. *See id.* at 600 (describing the ways in which Stephens was discriminated because of her transgender and/or her transitioning status).

41. *Id.* at 572–73.

42. *Id.* at 568, 573.

the question as to whether the funeral home's sex-specific dress code violated Title VII was not the issue before it.<sup>43</sup> Rather, the question before the court was whether the funeral home violated Title VII by terminating Stephens—despite her intent to comply with the company's sex-specific dress code—because she refused to conform to the funeral home's notion of her sex.<sup>44</sup>

The Sixth Circuit held that the cases relied upon by the funeral home, *Barker v. Taft Broadcasting Co.* and *Jespersen v. Harrah's Operating Co.*, were incompatible or irreconcilable with *Price Waterhouse and Smith*.<sup>45</sup> *Barker* endorsed the traditional concept of sex, but according to the Sixth Circuit, *Price Waterhouse* eviscerated that traditional concept in its recognition that, under Title VII, “[sex] encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on failure to conform to stereotypical gender norms.”<sup>46</sup>

*Jespersen's* holding that Harrah's grooming standards—requiring only female bartenders to wear makeup—directly conflicted with *Smith*.<sup>47</sup> *Smith* concluded that requiring women to wear makeup does constitute improper sex stereotyping.<sup>48</sup> Moreover, the plaintiff in *Smith* was not required to allege that being expected to adopt a more masculine appearance and manner interfered with job performance.<sup>49</sup>

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43. See *id.* (attempting to narrow the issue in a way that excluded the discussion of Title VII).

44. *Id.* at 573.

45. Compare 549 F.2d 400, 401–02 (6th Cir. 1977) (describing why the sex-specific grooming code allowing women but not men to wear long hair did not violate Title VII), and 444 F.3d 1104, 1109–11 (9th Cir. 2006) (understanding that no Title VII violation occurred where a grooming code imposed different but equally burdensome requirements on males and females), with 490 U.S. 228 (finding a Title VII violation where the decision to promote a senior manager was refused based on sexual stereotypes of women), and 378 F.3d 566 (6th Cir. 2004) (holding that allegations that an employee was discriminated against based upon the employee's gender non-conforming behavior and appearance were actionable pursuant to Title VII).

46. *Barker v. Taft Broad. Co.*, 549 F.2d 400, 402 (6th Cir. 1977) (citing *Price Waterhouse*, 490 U.S. at 256).

47. Compare 444 F.3d at 1112 (holding that grooming standards which required women to wear makeup did not constitute a sex stereotype), with 378 F.3d at 566 (elaborating on why a makeup requirement for women was, in fact, a sex stereotype).

48. *Smith*, 378 F.3d at 571.

49. See *id.* at 572 (stating that the employee need not indicate that the allegedly discriminatory requirement interfered with the employee's job performance).

Finally, the Sixth Circuit repudiated the funeral home's suggested reading of *Price Waterhouse* and *Smith*, in that sex stereotyping violates Title VII *only* when the employer's sex stereotyping results in disparate treatment of men and women.<sup>50</sup> In *Smith*, the court did not compare the difference in treatment between transgender persons transitioning from male to female and transgender persons transitioning from female to male.<sup>51</sup> Indeed, a defense by the employer in *Price Waterhouse* that it fired both a gender non-conforming man and a gender non-conforming woman would have failed because two wrongs do not make a right.<sup>52</sup> According to the Sixth Circuit, *Price Waterhouse* and *Smith* dictate that "an employer engages in unlawful discrimination even if it expects both biologically male and female employees to conform to certain notions of how each should behave."<sup>53</sup>

#### B. *The Claim Based on Transgender and Transitioning Status*

The Sixth Circuit set forth two reasons for its central holding that discrimination on the basis of transgender and transitioning status violates Title VII.<sup>54</sup> First, the court reasoned that it was impossible to discriminate based on an employee's transgender status "without being motivated, at least in part, by the employee's sex."<sup>55</sup> To illustrate this point, the court asked "whether Stephens would have been fired if Stephens had been a woman who sought to comply with the women's dress code."<sup>56</sup> The obvious answer in the negative confirmed that Stephens' sex impermissibly motivated her termination.<sup>57</sup> The court called this "paradigmatic sex discrimination."<sup>58</sup>

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50. See R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d at 574 (describing the court's resistance in using *Price Waterhouse* and *Smith* as limiting discrimination under Title VII).

51. See *id.* (describing that no difference was delineated in what sex was being transitioned to).

52. See *id.* (understanding that a defense as to similar discriminatory treatment will not stand against Title VII).

53. See *id.* (citing Zarda, 883 F.3d at 123)

54. *Id.* at 575–76.

55. *Id.* at 575.

56. *Id.*

57. *Id.*

58. *Id.*

Further, the Court analogized discrimination based on religion to discrimination based on sex in the workplace.<sup>59</sup> In doing so, the Court explained that when an employer fires someone on the basis of their religion, such an act constitutes discrimination under Title VII regardless of an employer's biases.<sup>60</sup> Discrimination on the basis of religion inherently encompasses discrimination on the basis of a change in religion.<sup>61</sup> Using the same logic, it follows that discrimination on the basis of a change of sex is inherently included in sex discrimination.<sup>62</sup>

According to the Sixth Circuit, "discrimination because of a person's transgender, intersex or sexually indeterminate status, is no less actionable than discrimination because of a person's identification with two religions, an unorthodox religion or no religion at all."<sup>63</sup> In *Harris Funeral Homes*, the funeral home argued that the analogy to religion was "structurally flawed" because a person's sex is "a biologically immutable trait" which, unlike religion, cannot be changed.<sup>64</sup> Therefore, the court held this to be an "immaterial" point that it did not need to decide.<sup>65</sup> The Sixth Circuit reaffirmed *Price Waterhouse*'s holding that sex should be irrelevant to employment decisions and added that an employer's adverse employment decision on the basis of a sex-change directly disobeys *Price Waterhouse*.<sup>66</sup>

Second, the court reasoned that discrimination against transgender persons "necessarily implicates Title VII's proscriptions against sex stereotyping."<sup>67</sup> As in *Smith*, the court recognized the American Psychiatric Association recognizes transgender status as a disjunction between one's individual's sexual organs and sexual identity.<sup>68</sup> In other words, "a transgender person is someone who . . . is inherently 'gender non-conforming.'"<sup>69</sup> Because of this, the court concluded that an employer's discrimination because of transgender status always involves

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59. *Id.* at 575–76.

60. *Id.*

61. *Id.* at 575.

62. *Id.*

63. *Id.* at 575 n. 4.

64. *Id.* at 576.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

the employer's imposition of its stereotypes about the alignment of sexual organs and gender identity.<sup>70</sup> Thus, the Sixth Circuit held that discrimination because of transgender or transitioning status is inherently discrimination based on gender non-conformity in violation of Title VII.<sup>71</sup>

C. *The Sixth Circuit Rejects Arguments Against Interpreting Title VII to Include Transgender Status Discrimination*

In *Harris Funeral Homes*, the court specifically rejected several arguments raised by the funeral home regarding Title VII's interpretation.<sup>72</sup> First, the funeral home argued that Congress, in enacting Title VII, understood sex to refer only to physiology and reproductive roles—and not to a person's gender identity.<sup>73</sup> The Sixth Circuit concluded, however, that Congress' failure to anticipate that Title VII would cover transgender status had little interpretative value.<sup>74</sup>

The Supreme Court teaches that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”<sup>75</sup> Such “reasonably comparable evils” include same sex sexual harassment and hostile work environment claims that Title VII now prohibits, but were initially believed to fall outside its scope.<sup>76</sup> Moreover, according to the Sixth Circuit, *Price Waterhouse* eviscerated the narrow or traditional view of sex as referring only to “chromosomally driven physiology and reproductive function” by recognizing that “sex” under Title VII refers not only to biological differences but also to gender norms.<sup>77</sup> Thus, pre-*Price Waterhouse* cases holding otherwise were no longer valid.<sup>78</sup>

Second, the funeral home argued transgender status was not unique to one's biological sex since both biologically male and biologically female

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70. *Id.*

71. *Id.*

72. *Id.* at 578.

73. *Id.* at 577.

74. *Id.*

75. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

76. *Id.* at 80–81.

77. *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 578–79.

78. *See id.* at 578 (explaining why the reasoning in cases decided before *Price Waterhouse* are directly counter to modern law).

persons may consider themselves transgender.<sup>79</sup> According to the Sixth Circuit, however, “[a] trait need not be exclusive to one sex to nevertheless be a function of sex.”<sup>80</sup> To violate Title VII, an employer need not discriminate based on a trait common to all men or all women.<sup>81</sup> Instead, Title VII focuses on whether a particular *individual* is discriminated against because of his or her sex, not on whether a particular sex is discriminated against.<sup>82</sup> An employer who discriminates against an employee based on transgender status is necessarily considering that employee’s biological sex, and thus discriminating based on sex—this is so no matter what sex the employee was born or wishes to be.<sup>83</sup>

Finally, later statutes, such as the Violence Against Women Act, which expressly prohibits discrimination on the basis of gender identity, were of little interpretative value to the Sixth Circuit.<sup>84</sup> This is because Congress may choose to use a belt and suspenders method to achieve its objectives.<sup>85</sup>

#### IV. MIXED RESULTS: TITLE VII SEX DISCRIMINATION CLAIMS WHERE FACTS SHOW DISCRIMINATION BASED ON GENDER NON-CONFORMITY DUE TO SEXUAL ORIENTATION

Before *Price Waterhouse*’s clarification about the relevance of sex stereotyping and the text-focused approach to statutory construction applied to Title VII by *Oncale v. Sundowner Offshore Services Inc.*, two federal courts of appeals held that sexual orientation was excluded from the purview of Title VII sex discrimination.<sup>86</sup> First, in *Blum v. Gulf Oil*

79. *Id.*

80. *Id.*

81. *Id.*

82. *See id.* at 574 (citing Zarda, 883 F.3d at 123); Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2020).

83. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d at 578.

84. *Id.*

85. *See id.* at 575 (quoting Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 344 (7th Cir. 2017)).

86. *See* 490 U.S. at 251 (describing that “[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender...”); *see also* 523 U.S. 75 (1998) (holding sex discrimination consisting of same-sex sexual harassment is actionable under Title VII); *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979) (*per curiam*) (holding that even if a *prima facie* case of sex discrimination was presented, the employer had a legitimate reason for discharge which did not

*Corp.*, the Fifth Circuit Court of Appeals summarily addressed the issue in one sentence, stating: “[d]ischarge for homosexuality is not prohibited by Title VII . . . .”<sup>87</sup> In coming to this conclusion, the court relied on *Smith v. Liberty Mutual Insurance Co.*<sup>88</sup> However, the *Smith* holding directly conflicts with the *Price Waterhouse* holding.<sup>89</sup> Second, in *DeSantis v. Pacific Telephone & Telegraph Co., Inc.*, the Ninth Circuit Court of Appeals held that Congress had not intended Title VII to apply to sexual orientation and only had “traditional notions of ‘sex’ in mind.”<sup>90</sup> *DeSantis*, similar to *Blum*, also cites and relies on *Smith*.<sup>91</sup>

In the decades following *Price Waterhouse*, courts have grappled with Title VII sex discrimination suits where facts show there is discrimination based on an employee’s failure to conform to their gender due to being gay or lesbian.<sup>92</sup> While parroting and mechanically following the view that sexual orientation was outside of Title VII’s purview, some courts attempted to tease apart evidence of sex stereotyping from evidence of sexual orientation discrimination.<sup>93</sup> For example, in *Prowel v. Wise Business Forms, Inc.*, the Third Circuit Court of Appeals acknowledged “the line between sexual orientation discrimination and discrimination ‘because of sex’ can be difficult to draw.”<sup>94</sup> Other courts have applied a categorical exclusionary rule—dismissing claims based on gender

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involve the employee’s race, sex, or religion); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 333 (9th Cir. 1979) (holding that homosexuals are not a protected class within the statutory meaning).

87. See 597 F.2d 936, 938 (5th Cir. 1979) (citing *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978)).

88. See *id.* (dismissing a Title VII sex discrimination claim by a male who had been terminated for being effeminate).

89. Compare 569 F.2d at 325 (dismissing a Title VII sex discrimination claim by a male who had been terminated for being effeminate), with 490 U.S. at 251 (“In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender . . .”).

90. 608 F.2d 327, 329 (9th Cir. 1979).

91. *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 332 (9th Cir. 1979) (citing *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (per curiam)).

92. See, e.g., *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009) (citing *Price Waterhouse*, 490 U.S. at 228) (noting discrimination under Title VII can be difficult to ascertain).

93. See *id.* at 287, 291–92 (finding sufficient evidence to warrant a claim for harassment or discrimination under Title VII while affirming the district court’s holding that sexual orientation discrimination is not cognizable under Title VII); see, e.g., *Hively*, 853 F.3d at 341 (“[D]iscrimination on the basis of sexual orientation is a form of sex discrimination.”).

94. 579 F.3d 285, 291 (3d Cir. 2009).

stereotyping evidence when such evidence was linked to or associated with sexual orientation.<sup>95</sup> In *Dawson v. Bumble & Bumble*, for example, the court stated as follows:

When utilized by an avowedly homosexual plaintiff, however, gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that ‘[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.’ . . . Like other courts we have therefore recognized that a gender stereotyping claim should not be used to “bootstrap protection for sexual orientation into Title VII.”<sup>96</sup>

Notably, this case law on Title VII’s coverage of sexual orientation as a whole has been described as a “confused hodge-podge of cases,” and “an odd state of affairs”—where, for example, Title VII protects effeminate men from employment discrimination but only if they are straight and not gay.<sup>97</sup>

#### V. DISCRIMINATION BECAUSE OF SEXUAL ORIENTATION IS NECESSARILY DISCRIMINATION BECAUSE OF SEX—DONALD ZARDA

In *Zarda v. Altitude Express, Inc.*, the Second Circuit Court of Appeals confronted this confusion head-on: “we are persuaded that the line between sex discrimination and sexual orientation discrimination is difficult to draw because that line does not exist save as a lingering and faulty judicial construct.”<sup>98</sup> In *Zarda*, the Second Circuit, *en banc*, held sexual orientation discrimination is a form or subset of sex discrimination under Title VII because an employee’s sex is necessarily a motivating factor in sexual orientation discrimination.<sup>99</sup> In the case, a gay sky-diving instructor, Donald Zarda, told a female client while preparing for

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95. See *Hively*, 830 F.3d at 344 (addressing a line of cases applying a categorical rule against recognizing sexual orientation as a cognizable Title VII claim); see also *Magnusson v. Cty. of Suffolk*, No. 14CV3449, 2016 WL 2889002, at \*8 (E.D.N.Y. May 17, 2016) (describing that “[s]exual orientation discrimination is not actionable under Title VII, and plaintiffs may not shoehorn what are truly claims of sexual orientation discrimination into Title VII by framing them as claims of discrimination based on gender stereotypes, as Plaintiff at times attempts to do here”).

96. 398 F. 3d 211, 218 (2d Cir. 2005).

97. *Hively*, 830 F.3d at 342–44.

98. 883 F.3d at 122; see *Hively*, 853 F.3d at 346 (concluding “the line between a gender nonconformity claim and one based on sexual orientation . . . does not exist”).

99. 883 F.3d at 122.



a tandem skydive that he was gay.<sup>100</sup> Because of this, the client alleged Zarda “inappropriately touched her and disclosed his sexual orientation to excuse his behavior.”<sup>101</sup> Subsequently, the client told her boyfriend who then informed Zarda’s boss.<sup>102</sup> Zarda was subsequently fired.<sup>103</sup>

Zarda then sued his employer alleging sex discrimination under Title VII on the ground that his non-conformity to male sex stereotypes resulted in his termination.<sup>104</sup> The district court granted summary judgment in favor of the employer, concluding that precedent, such as *Dawson*, indicated that Zarda had failed to establish a prima facie case under Title VII because a gender stereotype claim cannot be predicated on sexual orientation.<sup>105</sup> A Second Circuit panel subsequently affirmed—declining to revisit binding precedent.<sup>106</sup>

Sitting *en banc*, the Second Circuit reversed the panel’s decision.<sup>107</sup> It provided several rationales in support of its holding that sexual orientation discrimination is a form of sex discrimination under Title VII.<sup>108</sup> First, the court emphasized that sexual orientation, by its nature, is sex-dependent: “[s]exual orientation is doubly delineated by sex because it is a function of both a person’s sex and the sex of those to whom he or she is attracted.”<sup>109</sup> Thus, firing a man, like Zarda, who is attracted to men is a decision motivated, at least in part, by sex.<sup>110</sup> “Logically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected.”<sup>111</sup>

Second, the court utilized a comparative test, asking “whether the employee would have been treated differently ‘but for’ his or her sex.”<sup>112</sup>

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100. *Id.* at 108.

101. *Id.*

102. *Id.*

103. *Id.* at 108–09.

104. *Id.* at 107.

105. *Id.* at 109.

106. *Id.* at 109–10.

107. *Id.* at 132.

108. *See generally id.* at 111–32 (providing a thorough analysis on why discrimination based on an individual’s sexual orientation constitutes sex discrimination under Title VII).

109. *Id.* at 113.

110. *Id.* at 114.

111. *Id.* at 113; *see Hively*, 853 F.3d at 358 (Flaum, J., concurring) (“One cannot consider a person’s homosexuality without also accounting for their sex . . .”).

112. *Zarda*, 883 F.3d at 119.

In the context of sexual orientation—a man who is fired because he is attracted to men—would not have been fired had he been a woman attracted to men.<sup>113</sup> Notably, the court rejected the view that the proper comparison should hold everything, including sexual orientation, constant except sex—for example, an employer that discriminates based on sexual orientation treats gay men the same as gay women, showing no sex discrimination.<sup>114</sup>

Accordingly, the court held that the proper purpose of the comparative test is to determine whether a trait, such as sexual orientation, is a proxy for sex.<sup>115</sup> As such, “[t]he trait [sexual orientation] is the control, sex is the independent variable, and employee treatment is the dependent variable.”<sup>116</sup>

Third, the court applied the reasoning in *Price Waterhouse* to sexual orientation: “we concluded that when . . . [an employer] acts on the basis of a belief that [men] cannot be [attracted to men], or that [they] must not be,’ but takes no such action against women who are attracted to men, the employer ‘has acted on the basis of gender.’”<sup>117</sup> The court’s application of *Price Waterhouse* was consistent with the holding in *Hively v. Ivy Tech Community College*—where the Seventh Circuit Court of Appeals held that same-sex orientation represented the “ultimate case of failure to conform” to the gender stereotype “that ‘real’ men should date women, and not other men.”<sup>118</sup> Even where negative views of gay persons are rooted in morality, such moral beliefs cannot be disassociated from beliefs about sex.<sup>119</sup>

Thus, sexual orientation discrimination is sex discrimination under Title VII because it implicates *Price Waterhouse*’s proscription against

113. *Id.* at 116; see *Hively*, 853 F.3d at 345 (describing the comparative test as “paradigmatic sex discrimination”).

114. See *Zarda*, 883 F.3d at 116 (recognizing that changing sex also changes sexual orientation—thus showing that sexual orientation is interconnected with sex).

115. See *id.* at 116–19 (“To determine whether a trait operates as a proxy for sex, we ask whether the employee would have been treated differently ‘but for’ his or her sex.”).

116. *Id.* at 117, 119.

117. See *id.* at 120–21 (quoting *Price Waterhouse*, 490 U.S. at 250).

118. See *id.* at 121 (quoting *Hively*, 853 F.3d at 346 and *Centola v. Potter*, 183 F.Supp.2d 403, 410 (D. Mass. 2002)).

119. See *id.* at 122 (“Beliefs about sexual orientation necessarily take sex into consideration and, by extension, moral beliefs about sexual orientation are necessarily predicated, in some degree, on sex.”).

adverse employment actions based on gender stereotypes.<sup>120</sup> In *Zarda*, the Second Circuit also rejected the view that sexual orientation discrimination “is not barred by *Price Waterhouse* because it treats women no worse than men.”<sup>121</sup> Therefore, it follows that the employer in *Price Waterhouse* could not have defended itself by firing both effeminate men and masculine women.<sup>122</sup>

Finally, the court reasoned that precedent discussing associational discrimination supported its holding that sexual orientation discrimination violated Title VII.<sup>123</sup> In doing so, the court reaffirmed that, “[w]here an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee’s *own* race.”<sup>124</sup> For example, when a white employee is fired for dating a black person, it constitutes racial discrimination.<sup>125</sup>

Such a conclusion is true because “the prohibition on associational discrimination applies with equal force to all the classes protected by Title VII, including sex.”<sup>126</sup> Thus, firing a male employee for dating another man constitutes sex discrimination.<sup>127</sup> “In most contexts, where an employer discriminates based on sexual orientation, the employer’s decision is predicated on opposition to romantic association between

120. *See* *Hively*, 853 F.3d at 346 (“A policy that discriminates on the basis of sexual orientation . . . is based on assumptions about the proper behavior for someone of a given sex”); *cf.* *Price Waterhouse*, 490 U.S. at 250–51 (rejecting the notion that “sex stereotyping” lacks legal relevance).

121. *See Zarda*, 883 F.3d at 123 (“*Price Waterhouse* . . . stands for the proposition that employers may not discriminate against women or men who fail to conform to conventional gender norms.”); *cf.* *Price Waterhouse*, 490 U.S. at 251 (“We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”).

122. *Zarda*, 883 F.3d at 123.

123. *See id.* at 124 (acknowledging that associational discrimination extends to all classes protected by Title VII).

124. *See id.* (quoting *Holcomb v. Iona College*, 521 F.3d 130, 139 (2d Cir. 2008)).

125. *See e.g.*, *Deffenbaugh–Williams v. Wal–Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998) (“A reasonable juror could find that [Plaintiff] was discriminated against because of her race (white), if that discrimination was premised on the fact that she, a white person, had a relationship with a black person.”).

126. *Zarda*, 883 F.3d at 125.

127. *See id.* at 131 (holding that sex discrimination based on a person’s sexual orientation is cognizable under Title VII).

particular sexes.”<sup>128</sup> In *Zarda*, the Second Circuit blatantly rejected the argument that whereas “anti-miscegenation policies are motivated by racism, . . . sexual orientation discrimination is not rooted in sexism.”<sup>129</sup> Such an argument was rejected because Title VII is not limited by the colloquial concept of “sexism.”<sup>130</sup> For example, in *Oncale*, the court held that male-on-male sex harassment—a concept not traditionally seen as sexism—violates Title VII.<sup>131</sup>

Notably, in *Zarda*, the Second Circuit rejected arguments against interpreting Title VII to include discrimination based on sexual orientation.<sup>132</sup> Specifically, in the majority opinion, the court rejected several arguments raised by the employer and the dissenting judges in their opinions regarding Title VII’s interpretation—many of which are addressed above.<sup>133</sup> The court painstakingly rejected the dissent’s principal argument that interpreting Title VII to include sexual orientation discrimination “misconceives the fundamental *public* meaning of the language of” Title VII.<sup>134</sup>

According to Judge Lynch’s dissent in *Zarda*, Congress “intended to secure the rights of women to equal protection in employment . . . [not] to protect an entirely different category of people.”<sup>135</sup> Judge Lynch also argued that the Supreme Court’s interpretation of Title VII regarding the coverage of sex harassment and same-sex harassment “do not say anything about whether discrimination based on *other* social categories is covered . . . ”<sup>136</sup> However, the majority opinion disagreed with this

128. *Id.* at 124; see *Hively*, 853 F.3d at 349 (describing that “to the extent that the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of . . . the sex of the associate.”).

129. *Zarda*, 883 F.3d at 126.

130. *See id.* (“But the Court need not resolve this dispute because the *amici* supporting defendants identify no cases indicating that the scope of Title VII’s protection against sex discrimination is limited to discrimination motivated by what would colloquially be described as sexism”).

131. *See Oncale*, 523 U.S. at 79 (holding that a claim under Title VII is not barred merely because the plaintiff and defendant are of the same sex); *see also id.* at 127 (stating that *Oncale* represents how male-on-male sexual harassment is not traditionally conceptualized as sexism).

132. *See generally Zarda*, 883 F.3d at 115, 126–27 (holding that an employee had a cognizable sex discrimination claim because his employer took adverse action against him due to his failure to “conform to the straight male macho stereotype”).

133. *Id.*

134. *See id.* at 137–39.

135. *Id.* at 145.

136. *Id.* at 147.

statement and, relying on *Oncale*, eschewed reliance on divining legislative intent.<sup>137</sup> Instead, the court was strictly guided by the lodestar of statutory interpretation—the actual text of Title VII.<sup>138</sup> The court viewed sexual orientation discrimination as a “reasonably comparable evil” to sexual harassment and male-on-male harassment, which the Supreme Court has held is plainly covered by the text of Title VII.<sup>139</sup>

#### VI. SEXUAL ORIENTATION DISCRIMINATION IS NOT PROHIBITED BY TITLE VII BASED ON 39-YEAR-OLD PRECEDENT—GERALD BOSTOCK

In *Bostock*, the Eleventh Circuit issued a two-page *per curiam* opinion and held that discrimination because of sexual orientation “is not prohibited by Title VII.”<sup>140</sup> There, a gay man, Gerald Bostock, worked as a child welfare services coordinator for Clayton County.<sup>141</sup> He performed exceedingly well at his job, earning the program multiple accolades.<sup>142</sup> After Bostock joined a gay recreational softball league, he was subjected to disparaging comments about his sexual orientation and later fired.<sup>143</sup> Bostock sued alleging discrimination based on his sexual orientation under Title VII.<sup>144</sup> The district court dismissed his claim, citing *Blum* as binding precedent.<sup>145</sup> Subsequently, the Eleventh Circuit affirmed the dismissal of Bostock’s claim and denied a rehearing.<sup>146</sup>

#### VII. PERSONAL OBSERVATIONS AND PERSPECTIVES

##### A. *The Court’s Legitimacy and the Credibility of Textualism*

Justice Neil M. Gorsuch’s questions to counsel during Supreme Court oral arguments received considerable press coverage over speculation that his vote might be in play in favor of lesbian, gay, bisexual and

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137. *Id.* at 115.

138. *Id.*

139. *Id.* at 132 (quoting *Oncale*, 523 U.S. at 79).

140. 723 F. App’x at 964.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*; see *Blum*, 597 F.2d at 936 (holding that the employer had a legitimate reason for discharge—even if a prima facie case of sex discrimination was presented).

146. *Bostock*, 723 F. App’x at 964, 965.

transgender workers.<sup>147</sup> Specifically, Justice Gorsuch, asked Stephens' counsel the following:

When a case is really close, really close, on the textual evidence, . . . assume for the moment . . . I'm with you on the textual evidence . . . . At the end of the day, should he or she take into consideration the massive social upheaval that would be entailed in such a decision, and the possibility that . . . Congress didn't think about it . . . and that . . . it is . . . more appropriate a legislative rather than a judicial function?<sup>148</sup>

Earlier in his questioning to Stephens' counsel, Justice Gorsuch also asked the following:

I'd just like you to have a chance to respond to Judge Lynch in his thoughtful dissent in which he lamented everything you have before us, but suggested that something as drastic a change in this country as bathrooms in every place of employment and dress codes in every place of employment that are otherwise gender neutral would be changed, . . . that's an essentially legislative decision . . . . It's a question of judicial modesty.<sup>149</sup>

In response, counsel argued that (1) the 20-year-old appellate court's recognition of transgender-based discrimination as sex discrimination has not put an end to sex-specific dress codes and restrooms, and (2) Stephens was requesting the Court to interpret Title VII's text as written and not address a policy question more appropriate for Congress.<sup>150</sup> Justice Gorsuch, however, appeared unsatisfied with this answer when he asked, "[d]id you want to address Judge Lynch's argument or not?"<sup>151</sup>

When read in context, Justice Gorsuch's statement about textual evidence being close appears inconsistent with his focus on Judge Lynch's dissent, which clearly rejected the textualism analysis,

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147. Adam Liptak & Jeremy W. Peters, *Supreme Court Considers Whether Civil Rights Act Protects L.G.B.T. Workers*, N.Y. TIMES (Oct. 8, 2019), <https://www.nytimes.com/2019/10/08/us/politics/supreme-court-gay-transgender.html> [<https://perma.cc/DR5W-HZEH>].

148. Transcript of Oral Argument at 26–27, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 2019 WL 5087134 (2019) [Hereinafter *Harris Funeral Home Transcript*].

149. *See id.* (referencing Judge Lynch's dissenting opinion in *Zarda* concerning the appropriateness of judicial action in altering the meaning of Title VII in a way Congress did not anticipate).

150. *Id.* at 27–28.

151. *Id.* at 28.

describing it as “hyperliteral.”<sup>152</sup> In Judge Lynch’s view, reading Title VII to encompass sexual orientation would not be an application of Title VII’s text, but an amendment to Title VII—a task more appropriate for the legislature.<sup>153</sup> Despite Justice Gorsuch’s statement about textual evidence being close, his focus on Judge Lynch’s dissent could indicate his inclination to outright reject the textualism analysis.<sup>154</sup>

A Supreme Court decision rejecting textual coverage but calling it close will justifiably substantiate criticism about the undue influence of ideological bias in the Court’s decisions.<sup>155</sup> Similarly, such a decision will also add credible evidence to bolster the criticism that textualism, as a method of statutory interpretation, is not neutral—but in crucial respects is subject to sham.<sup>156</sup> The arguments for textual coverage are strong and straightforward.<sup>157</sup> Justice Gorsuch and Justice John Roberts, as conservatives, presumably would wish to shore up the legitimacy of the Court, as well as the credibility of textualism.<sup>158</sup> One of them will likely provide the swing vote (joining the four liberal Justices), which represents the best hope for an opinion to hold that coverage under Title VII’s plain text is clear.<sup>159</sup>

During oral arguments, Justice Gorsuch also presented the issue of whether the Court—where statutory coverage is a close call—should

152. *Id.* at 26–27; *cf.* Zarda, 883 F.3d at 144 n.7 (quoting Justice Antonin Scalia, “[a]dhering to the fair meaning of the text . . . does not limit one to the hyperliteral meaning of each text.”).

153. *See* Zarda, 883 F.3d at 165 (relying on the legislature to enact details for broad statutes).

154. *See Harris Funeral Home Transcript*, *supra* note 148 (recognizing the presence of textual evidence, and stating that this case is not about “extra-textual stuff”).

155. *Cf. id.* (rejecting a textualism approach and instead directing the Court towards the “massive social upheaval that would be entailed in such a decision”).

156. *See* William Eskridge, *Symposium: Textualism’s Moment of Truth*, SCOTUS BLOG (Sept. 4, 2019, 2:30 PM), <https://www.scotusblog.com/2019/09/symposium-textualisms-moment-of-truth/> [<https://perma.cc/L43W-GGJH>] (emphasizing the importance of theories such as textualism to be used equally and in the same manner across the cases in order for theories to be considered “neutral”).

157. *See* *Oncale*, 523 U.S. at 78–79 (describing Justice Scalia’s rationale in applying strict textualism to a Title VII dispute resulting in an opinion supporting a more liberal social policy).

158. *See* Eskridge, *supra* note 156 (“The credibility of textualism as a neutral methodology depends on the court’s deciding cases like *Bostock*’s without regard to partisan biases”); *see also* Transcript of Oral Argument at 59, *Bostock v. Clayton Cty.*, 139 S. Ct. 1599 (2019) (No. 17-1618) [*Hereinafter Bostock Transcript*] (demonstrating how a majority of Justice Gorsuch’s questioning revolved around the text).

159. *See Harris Funeral Home Transcript*, *supra* note 148 (providing Justice Gorsuch’s statements agreeing that the textual evidence is close).

consider “the massive social upheaval” caused by its decision.<sup>160</sup> Justice Gorsuch appeared to suggest that when the textual analysis is close and the Court’s decision would entail profound social change, the Court should, out of judicial modesty, decide against coverage and declare the task to be legislative.<sup>161</sup> This approach, however, raises unwieldy questions for textualism as an interpretative methodology.<sup>162</sup>

First, how will the Court determine whether textual coverage is a close call?<sup>163</sup> During oral argument, for example, Justice Elena Kagan described the textual analysis as “firmly” in favor of coverage, whereas Justice Gorsuch called it “close.”<sup>164</sup> Second, how will the Court determine whether its decision would entail “massive social upheaval?”<sup>165</sup> As Justice Ruth Bader Ginsburg pointed out during arguments, “[n]o one ever thought sexual harassment was encompassed by discrimination on the basis of sex in [1964].”<sup>166</sup>

The Supreme Court’s decision in *Meritor Savings Bank, FSB v. Vinson*—holding that sexual harassment is discrimination because of sex under Title VII—undoubtedly entailed profound social change, particularly when viewed from the perspective of the mores of 1964.<sup>167</sup> Indeed, the “social upheaval” of the *Meritor* decision continues to reverberate today.<sup>168</sup> Justice Gorsuch’s suggested approach could call even the *Meritor* decision into question.<sup>169</sup>

160. *Id.* at 26.

161. *Id.* at 26–27.

162. See Eskridge, *supra* note 156 (explaining that the Supreme Court’s legitimacy rests upon a perception that its members are applying existing law in a neutral manner).

163. See *Harris Funeral Home Transcript*, *supra* note 148 (discussing a hypothetical where Justice Gorsuch assumes the textual evidence is very close without describing the methodology to arrive at that conclusion).

164. Compare *Bostock Transcript*, *supra* note 158 (“[T]he text of the statute appears to be firmly in Ms. Karlan’s corner”), with *Harris Funeral Home Transcript*, *supra* note 148 (“[The textual evidence] is close.”).

165. See, e.g., *Harris Funeral Home Transcript*, *supra* note 148 (discussing the change in views on sex discrimination’s relation to sexual harassment from 1964 to today).

166. *Id.* at 58.

167. 477 U.S. 57, 73 (1986).

168. See, e.g., Rafia Zakaria, *The Legal System Needs to Catch Up With the #MeToo Movement*, NATION (Apr. 18, 2018), <https://www.thenation.com/article/archive/the-legal-system-needs-to-catch-up-with-the-metoo-movement/> [<https://perma.cc/ZL97-R6GV>] (demonstrating how *Meritor*’s decision continues to influence the United States today).

169. See *Harris Funeral Home Transcript*, *supra* note 148 at 58 (cautioning the Court on the implications of its decision causing social upheaval).



Moreover, although Justice Gorsuch and oral arguments in general focused on the purported demise of sex-specific bathrooms and dress codes as the “social upheaval” caused by a decision favoring coverage; should the Court also consider the profound social harms implicated by a court decision against coverage?<sup>170</sup> In other words, should the Court shake off its judicial modesty and make the close call for textual coverage because the harms would otherwise be devastating?<sup>171</sup> Justice Sonia Sotomayor raised this point when she asked the question of when the Court should step in to address invidious discrimination against lesbian, gay, bisexual, and transgender persons where—in her view—such discrimination fit the statutory words.<sup>172</sup> A decision by the Court for coverage would address invidious workplace discrimination and clearly promote Title VII’s statutory purpose.

### B. *Opportunities Seized and Lost*

One of the most important ways to dismantle discrimination at its roots is through an effective public education campaign.<sup>173</sup> Considering the national conversation about the lack of federal nondiscrimination protections for LGBTQ+ workers, the Supreme Court’s decision to hear these three cases provides a valuable educational opportunity about this topic.<sup>174</sup> The media coverage about these cases has served to further

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170. See, e.g., *id.* at 60–61 (describing the consequences of decisions which would in turn then cause the social upheaval).

171. See, e.g., *id.* (asking when the Court should step in when it comes to addressing discrimination against LGBTQ+ individuals when the discrimination falls within the relevant statute).

172. See *id.* (“... may I just ask, at what point does a court continue to permit invidious discrimination against groups that, where we have a difference of opinion, we believe the language of the statute is clear.”); see also Brief of William N. Eskridge, Jr. & Andrew M. Koppelman as Amici Curiae in Support of Emps. at 2, *Bostock v. Clayton Cty.*, 139 S. Ct. 1599 (2019) (Nos. 17-1618, 17-1623, 18-107), 2019 WL 2915046 at 2 [Hereinafter *Eskridge & Koppelman Amici Curiae*] (arguing that where textual coverage is ambiguous, the “Court should consider the statutory plan or purpose,” and “Title VII’s stated purpose is to purge the workplace of criteria that Congress found unrelated to an employee’s ‘ability or inability to work’”).

173. See, e.g., U.S. EQUAL EMP. OPPORTUNITY COMM’N, STRATEGIC PLAN FOR FISCAL YEARS 2018–2022 (2018), [https://www.eeoc.gov/eeoc/plan/strategic\\_plan\\_18-22.cfm](https://www.eeoc.gov/eeoc/plan/strategic_plan_18-22.cfm) [<https://perma.cc/Y5NM-M5SE>] (outlining a plan to prevent employment discrimination through education and outreach in order to aid citizens in understanding employment discrimination).

174. See, e.g., Adam Liptak, *Can Someone be Fired for Being Gay? The Supreme Court Will Decide*, N.Y. TIMES (Sept. 23, 2019), <https://www.nytimes.com/2019/09/23/us/politics/>

educate the American public about the humanity of lesbian, gay, bisexual and transgender people, and the role of the Supreme Court in addressing the need for nondiscrimination protections.<sup>175</sup>

However, Supreme Court oral arguments in Aimee Stephens' case, in important respects, missed a historic opportunity to provide a platform for correctly educating the public about what it means to be transgender.<sup>176</sup> A transgender person's inherent and deeply held sense of their gender is their authentic identity.<sup>177</sup> That gender identity is deeply felt and inherently sensed—a core aspect of personhood.<sup>178</sup> It means a “transgender woman is a woman” and a “transgender man is a man.”<sup>179</sup> A crucial part of representing transgender persons in discrimination cases is to clearly and consistently present the authenticity of their transgender identity and counter arguments that deny or diminish such.<sup>180</sup>

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supreme-court-fired-gay.html [https://perma.cc/8YV4-6MEL] (“In more than half the states, someone can still be fired for being gay.”).

175. See, e.g., *Because of Sex*, N.Y. TIMES (Nov. 7, 2019), <https://www.nytimes.com/2019/11/07/podcasts/the-daily/transgender-supreme-court.html> [https://perma.cc/HA7R-D4Y3] (humanizing the transgender issue by sharing a deeply personal experience); Roger Parloff, *Three LGBTQ Cases Are Set to Put the Supreme Court's Conservative Principles on Trial*, NEWSWEEK (Sept. 24, 2019, 9:53 AM), <https://www.newsweek.com/2019/10/04/supreme-court-scalia-lgbtq-rights-title-vii-1460838.html> [https://perma.cc/ZGJ5-3F9X] (balancing the roles partisan ideology and impartial interpretation play in Supreme Court decisions—especially for LGBTQ+ issues).

176. See *Harris Funeral Home Transcript*, *supra* note 148 at 64 (framing the issue as Stephens' being discharged for appearing “insufficiently masculine” instead of clarifying that Stephens is a woman).

177. See Brief of AMA, Am. Coll. of Physicians & 14 Additional Med., Mental Health & Health Care Org. as Amici Curiae in Support of Emps. at 4–5, *Bostock v. Clayton Cty.*, 139 S. Ct. 1599 (2019) (Nos. 17-1618, 17-1623, 18-107), 2019 WL 3003459 at 4–5 [Hereinafter *AMA et al.*, *Amici Curiae*] (“[T]ransgender individuals have a ‘gender identity’—a ‘deeply felt, inherent sense’ of their gender—that is not aligned with the sex assigned to them at birth.”).

178. *Cf. id.* at 5 (citing more than four dozen studies demonstrating the consensus among health care professionals regarding what it means to be transgender).

179. *Id.*

180. See Alexander Chen, *The Supreme Court Doesn't Understand Transgender People*, SLATE (Oct. 18, 2019, 3:11 PM), <https://slate.com/news-and-politics/2019/10/supreme-court-transgender-discrimination-sex.html> [https://perma.cc/GZ45-7Q5A] (describing that the presentation of transgender discrimination cases must “embrace[e] the reality of transgender identity, which includes the reality that transgender people thrive when they are permitted to live authentically as the men and women that they are.”); see also Paisley Currah, *The Aimee Stephens Case: On the Problem with Describing a Trans Woman as an “Insufficiently Masculine” Biological Male* (Oct. 15, 2019), <https://paisleycurrah.com/2019/10/15/the-aimee-stephens-case-on-the-problem-with-describing-a-trans-woman-as-an-insufficiently-masculine-biological-male/>

Unfortunately, Stephens' counsel argued that she was fired for being "insufficiently masculine," as opposed to arguing she was in fact, a transgender woman.<sup>181</sup> Justice Roberts, for example, suggested that a transgender employee claiming denial of bathroom access consistent with their gender identity would suffer no injury based on biological sex, but would be injured when the claim is analyzed in terms of transgender status.<sup>182</sup> An alternatively framed argument, such as consistently referring to Stephens as a transgender woman who was fired because she did not meet the gender stereotype that all women are assigned the sex female at birth, would have better reflected the reality that Stephens is a woman.<sup>183</sup> Such a framing would also have facilitated arguing that as a transgender woman Stephens must be permitted to use the women's bathroom.<sup>184</sup>

### C. Perseverance

I often advise prospective law school students that a primary quality for success in law school and in a law career is perseverance. These three Supreme Court cases showcase decades of persevering hard work by countless advocates for LGBTQ+ workplace equality.<sup>185</sup> Indeed, advocacy through strategic litigation is a long road filled with difficulties,

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[<https://perma.cc/SR8Q-MUAJ>] (emphasizing the importance in Title VII cases of consistently referring to a plaintiff who is a transgender woman as female and "to frame the plaintiff in clear and consistent terms that correspond to their actual lived identity and experience").

181. See *Harris Funeral Home Transcript*, *supra* note 148 at 64 (miseducating what it means to be transgender while presenting significant drawbacks to their legal strategy); see also Chen, *supra* note 180 (highlighting the drawbacks of framing Stephens as an insufficiently masculine male by failing "to explain why she must be able to live and work as a woman, including when using the restroom or dressing for work").

182. See *Harris Funeral Home Transcript*, *supra* note 148 at 8–14 (comparing the analysis of the bathroom case on the basis of biological sex with the analysis in terms of transgender status).

183. See Chen, *supra* note 180 (recognizing the inconsistency between arguing Stephens is a biological man and arguing she should be permitted to use the women's restroom).

184. See *Lusardi v. McHugh*, No. 0120133395, 2015 WL 1607756 (EEOC Apr. 1, 2015) (holding a federal agency discriminated based on sex by denying a transgender employee equal access to a common restroom used by other employees of the same gender identity regardless of the negative reactions of other employees).

185. See *Bostock*, 723 F. App'x at 964–65 (11th Cir. 2018) (affirming the lower court's dismissal of Bostock's sex discrimination complaint); see also R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d at 572, 574 (finding discrimination against an employee for failing to conform to the dress code of her perceived gender); Zarda, 883 F.3d at 112–13 (recognizing that discrimination against one's sexual orientation falls under the broader umbrella of "sex discrimination").

failures, opposition, opportunities, and successes.<sup>186</sup> We are at a pivotal and historic juncture in the American LGBTQ+ civil rights movement.<sup>187</sup> The Supreme Court's decisions in these cases could present major and devastating setbacks, surprising and sweeping wins, or muddled and confused compromises. Whatever the outcome, LGBTQ+ legal advocates will continue to have their work cut out for them.<sup>188</sup> For example, the oral arguments showed an utmost need to continue educating ourselves, the judiciary, and the community at large about the shared humanity and authenticity of transgender people.<sup>189</sup> The focus must be to steadfastly continue strategic, prudential, and multifaceted action to achieve LGBTQ+ workplace equality and justice nationwide.<sup>190</sup>

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186. Cf. Parloff, *supra* note 175 (signifying the conflict between the Supreme Court creating precedent by relying on legal principles or by relying on the Court's political biases).

187. See generally *id.* (emphasizing the major consequences that recent Title VII litigation will have on workplace discrimination for the LGBTQ+ community).

188. See Yuki Noguchi, *Sexual Harassment Cases Often Rejected by Courts*, NPR, <https://www.npr.org/2017/11/28/565743374/sexual-harassment-cases-often-rejected-by-courts> (Nov. 28, 2017) [<https://perma.cc/F7P2-XXD7>] (describing the recent increase in sexual harassment claims, but also the increase in dismissals of such cases); see also *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (holding that sexual harassment constitutes sex discrimination).

189. See, e.g., *Harris Funeral Home Transcript*, *supra* note 148 at 8–14 (demonstrating a lack of understanding of what it means to be transgender and lack of education on the rights of transgender individuals).

190. See generally U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 173 (advocating to prevent and remedy unlawful employment discrimination and to advance equality of opportunity in the workplace).