

# Supreme Court Considers Sex Discrimination Claims by Gay and Transgender Workers

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On October 8, 2019, the Supreme Court heard oral argument in *Altitude Express, Inc. v. Zarda*, *Bostock v. Clayton County, Georgia*, and *R.G. & G.R. Harris Funeral Homes, Inc. (Harris Homes) v. EEOC*, a trio of cases in which the Court is considering for the first time whether the prohibition of employment discrimination “because of . . . sex” in [Title VII of the Civil Rights Act of 1964](#) (Title VII) encompasses discrimination based on sexual orientation or gender identity.

This Sidebar provides an overview of *Altitude Express*, *Bostock*, and *Harris Homes* for Congress. The Sidebar first outlines select Supreme Court precedent interpreting Title VII’s prohibition on sex-based discrimination, then summarizes the facts and arguments in the current cases. The Sidebar concludes by discussing the potential implications of the cases, including key considerations for Congress.

## Title VII and Discrimination Because of Sex

Title VII [provides](#) in relevant part that it is “an unlawful employment practice” for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex[.]” The meaning of that statutory language and its application to sexual orientation and transgender status is not entirely clear. Title VII does not explicitly address sexual orientation or transgender status. Moreover, the text of the statute does not include a general definition of what discrimination “because of sex” entails. In addition, there is [limited legislative history](#) related to the inclusion of sex as a protected class under Title VII. As a consequence, interpretation of the phrase “because of sex” has largely fallen to the courts.

The Supreme Court has observed that Title VII’s ban on sex-based discrimination “evinces a congressional intent to [strike at the entire spectrum of disparate treatment](#) of men and women in employment.” Thus, the Court has interpreted Title VII to bar the use of an individual’s [sex as a qualification for employment](#), but has also recognized other forms of prohibited sex-based discrimination. For instance, in *Price Waterhouse v. Hopkins*, a plurality of the Court construed Title VII to prohibit employment decisions grounded on sex-based stereotypes about how men or women should behave. The Supreme Court has also held that [Title VII prohibits sexual harassment](#), including when the harasser and the victim are of the same sex. Thus, in *Oncale v. Sundowner Offshore Servs., Inc.*, Justice Scalia’s

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opinion for the unanimous Court held that sexual harassment of a man by male co-workers, while “assuredly not the principal evil Congress was concerned with when it enacted Title VII,” was a “reasonably comparable evil” that falls within the scope of the statutory text. However, the Supreme Court has not held that all distinctions based on sex constitute unlawful discrimination. For instance, in *General Electric Co. v. Gilbert*, the Court held that discrimination based on pregnancy did not violate Title VII. (Congress later legislatively overruled *General Electric* by passing the [Pregnancy Discrimination Act](#).)

The Supreme Court has not squarely addressed whether Title VII prohibits discrimination based on sexual orientation or transgender status, but numerous federal appeals courts have considered those questions. Until 2017, the courts uniformly held, citing the lack of express language in the statute, that Title VII’s prohibition on discrimination “because of sex” does not apply to discrimination based on [sexual orientation](#) or [gender identity](#). However, a circuit split emerged in 2017, when the U.S. Court of Appeals for the Seventh Circuit, sitting en banc in *Hively v. Ivy Tech Cmty. Coll. of Indiana*, held that “discrimination on the basis of sexual orientation is a form of sex discrimination” prohibited by Title VII. As discussed further below, the circuit split deepened with respect to sexual orientation after the decision in *Altitude Express*, and a split emerged regarding the statute’s application to gender identity discrimination following the decision in *Harris Homes*. The Supreme Court granted certiorari in *Altitude Express*, *Bostock*, and *Harris Homes* to consider both issues.

### ***Altitude Express, Bostock, and Harris Homes***

In *Altitude Express* and *Bostock*, the Supreme Court is considering whether Title VII prohibits employment discrimination based on sexual orientation. *Altitude Express* involves a claim brought by Donald Zarda, a skydiving instructor who alleges his former employer, Altitude Express, violated Title VII by firing him after he told a client that he was gay. (Zarda died in a BASE jumping accident while his case was pending, and the executors of his estate were substituted as plaintiffs; for the sake of simplicity, this Sidebar refers to all the plaintiffs in that case as “Zarda.”) The Second Circuit, sitting en banc, [sided with Zarda on appeal](#). The majority opinion held that discrimination based on sexual orientation violates Title VII on three grounds: (1) “[b]ecause one cannot fully define a person’s sexual orientation without identifying his or her sex, sexual orientation is a function of sex,” and therefore protected by Title VII; (2) discrimination based on sexual orientation constitutes sex stereotyping in violation of *Price Waterhouse*; and (3) such discrimination constitutes associational discrimination comparable to prohibited discrimination against employees in interracial relationships.

*Bostock* involves the claim of Gerald Lynn Bostock, a Clayton County child welfare services coordinator who alleged that the County violated Title VII by firing him after learning he was gay. On appeal, the Eleventh Circuit affirmed the dismissal of Bostock’s case and [denied rehearing en banc](#), relying on prior circuit precedent holding that Title VII does not prohibit discrimination due to sexual orientation.

A third case, *Harris Homes*, raises the related but distinct question of whether Title VII prohibits employment discrimination based on transgender status. In that case, the Equal Employment Opportunity Commission (EEOC) brought a Title VII suit on behalf of Aimee Stephens. Stephens is a transgender woman, meaning that she was assigned male at birth but identifies as female. Harris Homes hired Stephens while she still presented as a man, and she alleges that she performed her job effectively for six years but was fired after she announced her intent to transition from male to female. On appeal, the Sixth Circuit held that [Stephens’s termination violated Title VII](#) because (1) Harris Homes discriminated against Stephens based on sex stereotypes in violation of *Price Waterhouse* and (2) “discrimination on the basis of transgender and transitioning status” is a *per se* violation of Title VII. The position of the United States has changed over the course of litigation in *Harris Homes*. The EEOC, a federal agency, originally filed suit seeking relief on behalf of Stephens. However, while the appeal was pending, the Attorney General issued [guidance](#) stating that “Title VII’s prohibition on sex discrimination . . . does not

encompass discrimination based on gender identity *per se*.” The United States has adopted that position before the Supreme Court. Stephens intervened in the Sixth Circuit and argues before the Supreme Court that Harris Homes discriminated against her based on sex in violation of Title VII.

Before the Supreme Court, [Zarda](#), [Bostock](#), and [Stephens](#) (together, Employees) argue that discrimination based on sexual orientation or gender identity falls within the scope of Title VII. They contend that discrimination based on those traits *is* discrimination “because of sex” within the plain meaning of the statute because sexual orientation and transgender status can only be understood as a function of an individual’s (assigned) sex. Highlighting the Court’s past precedent, they observe that the Supreme Court has found discrimination “because of sex” in contexts that the enacting Congress would not have foreseen, including [sexual harassment](#) and discrimination due to [sex-based stereotypes](#). The Employees assert that Title VII “focus[es] on fairness to individuals rather than fairness to classes,” and analogize to cases in which the Supreme Court has held that the statute prohibits employment actions that target only some members of a protected class, such as an employer’s refusal to hire [women \(but not men\) with young children](#). In addition, the Employees allege that discrimination based on sexual orientation or transgender status constitutes sex stereotyping in violation of *Price Waterhouse*.

Although there is substantial overlap in the issues presented in these cases, the Employees also raise several arguments unique to either sexual orientation or gender identity. For example, Zarda and Bostock argue that discrimination based on sexual orientation is associational discrimination analogous to discrimination against people in interracial relationships. Stephens, for her part, asserts the Court need not even “decide whether ‘gender identity’ is part of ‘sex’ for purposes of Title VII” because her “male sex assigned at birth was a but-for cause of her discharge,” so the Court may consider her claim as a claim of sex discrimination against a biological male. (Harris Homes and the United States counter that Stephens was fired for the legitimate reason that she refused to comply with Harris Homes’ sex-specific dress code for male employees.)

[Altitude Express](#), [Clayton County](#), and [Harris Homes](#) (together, Employers) and the [United States](#) contend that the text and the subsequent legislative history of Title VII demonstrate that the statute does not prohibit discrimination based on sexual orientation or gender identity. Observing that the text of Title VII does not explicitly address sexual orientation or transgender status, they argue that the “ordinary public meaning” of the word “sex” when the statute was enacted was limited to “the trait of being male or female.” They further assert that by declining to pass subsequent legislation to expressly include sexual orientation or gender identity under Title VII, Congress has “ratified” pre-2017 court decisions holding that Title VII does not protect those characteristics. The Employers and the United States contend that a mere showing that an employer knew or *considered* an individual’s sex in making an employment decision based on sexual orientation or gender identity is not enough—the Supreme Court has consistently required Title VII plaintiffs to show that a challenged action benefits or harms *members of one sex* as compared with the other.

The latter argument ties back to the core dispute in these cases: whether the termination of the Employees based on their sexual orientation or transgender status occurred “because of [their] sex” within the meaning of Title VII. Courts hearing Title VII claims often consider whether an employer treated the plaintiff “[in a manner which but for that person’s sex would be different](#)” by comparing the plaintiff to a similarly situated person of the opposite sex. In the current cases, the parties all encourage the Court to apply that test but disagree on the appropriate comparator. The Employees argue that the proper comparator for a *man* who is attracted to men is a *woman* who is attracted to men, and the proper comparator for a transgender woman—*i.e.*, a person assigned *male* at birth who identifies and/or presents as a woman—is a person assigned *female* at birth who identifies and presents as a woman. The Employers and the United States assert that the proper comparator for a gay man is a lesbian woman, and the proper comparator for a transgender woman is a transgender man. They argue that an employer who disfavors gay or transgender people of both sexes does not selectively disadvantage members of *one sex* but rather

disadvantages *both sexes* based on a separate characteristic, and thus does not discriminate “because of sex” in violation of Title VII.

## Supreme Court Oral Arguments

Several key themes emerged from the Justices’ questions during the [consolidated oral argument in \*Bostock and Altitude Express\*](#) and the immediately following [argument in \*Harris Homes\*](#). The question of the appropriate comparators for gay and transgender employees featured prominently during both arguments. The Justices also asked numerous questions about the possible practical effects of their ruling, particularly with respect to practices such as single-sex restrooms, sex-specific dress codes, and sex-segregated athletics.

The Court also explored the possible tension between the text of Title VII and the intent of the Congress that enacted the statute in 1964. For instance, [Justice Sotomayor](#) broadly characterized the objective of Title VII as being “born from the desire to ensure that we treated people equally and not on the basis of invidious reasons,” and suggested that the current claims fit the “clear words” of the statute. [Justice Gorsuch](#) asked questions indicating that the text of Title VII might apply to the Employees’ claims, but also voiced concerns about the implications of such a holding. Assuming “a case is really, really close, on the textual evidence,” he asked, should a judge “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?”

Several Justices expressed apprehension that “updating” Title VII to apply to sexual orientation and gender identity would amount to judicial usurpation of the legislative role. For example, [Justice Alito](#) stated that if the Court “interprets this 1964 statute to prohibit discrimination based on sexual orientation, we will be acting exactly like a legislature. We might as well just take the Equality Act and issue that as our opinion.” (The Equality Act ([H.R. 5](#)), which passed the House in May 2019 and is currently before the Senate, would amend Title VII to apply to discrimination because of “sex (including sexual orientation and gender identity).”) Relatedly, [Chief Justice Roberts](#) asked whether a legislature enacting new protections against discrimination would be better equipped than the Court to define the limits of such protections. As an example, the Chief Justice noted that some [state laws](#) pertaining to sexual orientation or gender identity discrimination include religious exemptions; Title VII does not contain a religious exemption with respect to sex discrimination.

## Implications and Considerations for Congress

The Supreme Court’s rulings in *Altitude Express*, *Bostock*, and *Harris Homes* will affect millions of workers and employers across the country—particularly in [states](#) that have not enacted laws prohibiting discrimination based on sexual orientation or transgender status. Two groups of states have filed amicus briefs in these cases, taking opposing positions. [One group of states](#) argues that Title VII does not prohibit discrimination based on sexual orientation and gender identity, and for the Court to hold otherwise would trespass on Congress’s policymaking role. The [other group of states](#) asserts that employment discrimination based on sexual orientation and gender identity harms the states and their residents; those states ask the Court not to “roll back” Title VII’s protections. A group of [206 businesses](#), including many major corporations such as Google, Bank of America, and Nike, has also filed an amicus brief arguing that federal protection against discrimination based on sexual orientation and gender identity would benefit the economy by fostering a diverse workforce and benefit both businesses and employees through “the clarity, predictability, reliability and efficiency that comes from the uniform application of federal law.”

The rulings in these cases may raise new legal issues. For example, if the Court rules that Title VII forbids employment discrimination based on sexual orientation and transgender status, that could raise questions about the statute’s application to other aspects of romantic and sexual behavior and gender identity. Such

a holding might also cast doubt on the legitimacy of various employment policies that distinguish based on sex, including sex-specific dress codes and fitness tests and single-sex bathroom and housing facilities. On the other hand, a decision that Title VII does not bar discrimination based on sexual orientation and gender identity could exacerbate [difficulties](#) some lower courts have experienced in analyzing suits by gay and transgender employees claiming sex stereotyping under *Price Waterhouse*. The current cases could also affect how courts interpret protections against sex-based discrimination in other statutes, such as [Title IX of the Education Amendments of 1972](#) (Title IX).

The current cases may also shape ongoing legislative debates in the 116th Congress on the proper scope of federal employment discrimination protections. Unlike [recent high-profile cases](#) involving same-sex couples, the current Title VII cases turn on questions of statutory interpretation rather than constitutional law. Therefore, Congress could pass legislation to resolve the issues presented before or after the Supreme Court rules. For instance, at any time, Congress could amend Title VII to specifically enumerate sexual orientation and/or transgender status as separate protected, or excluded, categories under Title VII. As an alternative to amending Title VII, Congress could also pass new standalone legislation to address sexual orientation or gender identity discrimination in the workplace.

In addition, after the Supreme Court decides these cases, Congress could legislate to expressly endorse or reject the judicial interpretation of Title VII. If Congress disagrees with the Supreme Court's decisions in these cases, it could legislatively overrule the decisions in whole or in part. On the other hand, even if Congress generally agrees with the Court's decisions, it can legislate to clarify or adjust Title VII's protections and exemptions, or to provide direction on other related issues. For example, Congress could create or revise a religious exemption for any new protection the Court announces; amend Title VII to explicitly address specific employment practices, such as sex-specific dress codes or restrooms; or amend other statutes, such as Title IX, to clarify their application to gay and transgender individuals.

Decisions in *Altitude Express*, *Bostock*, and *Harris Homes* are expected in the spring of 2020.

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