

# Sex at the Supreme Court: Testing the Textualists' Commitments In *R.G. & G.R. Harris Funeral Homes v. EEOC*

by

Marcia L. McCormick\*

## Introduction

Aimee Stephens had worked for about five years as a funeral director at R.G. & G.R. Harris Funeral Homes in Michigan when she was terminated in the autumn of 2013. The reason she was let go had nothing to do with her performance. Instead it was her request to wear skirt suits to work. Aimee's sex had been designated male at birth and she had been presenting as a man at work, but had finally decided to be herself and present as a woman.<sup>1</sup> A couple of weeks before she was to go on vacation, she gave her employer a letter explaining her identity and that when she returned from her vacation, she would be Aimee and would present as her female gender identity.<sup>2</sup> Her boss said very little when she gave him the letter, but right before she was to leave on vacation, he fired her, telling her that "this was not going to work out."<sup>3</sup>

Stephens filed a charge with the EEOC, which ultimately filed suit against the Funeral Home, alleging that Stephens' termination violated Title VII's prohibition on sex discrimination.<sup>4</sup> The case worked its way through the district court and the Sixth Circuit, which essentially held that the EEOC was entitled to

---

\* Associate Dean for Academic Affairs, Professor, William C. Wefel Center for Employment Law, St. Louis University School of Law.

<sup>1</sup> Meagan Flynn, *A Transgender Woman Wrote a Letter to Her Boss. It Led to Her Firing – and a Trip to the Supreme Court*, WASH. POST (Apr. 30, 2019, 6:03 AM CDT), <https://www.washingtonpost.com/nation/2019/04/30/transgender-woman-wrote-letter-her-boss-it-led-her-firing-trip-supreme-court/>.

<sup>2</sup> Joint Appendix at 90-94, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (filed June 6, 2019).

<sup>3</sup> *Id.* at 94.

<sup>4</sup> *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 595 (E.D. Mich. 2015).

summary judgment on liability.<sup>5</sup> The Funeral Home filed a petition for certiorari, which was granted, and the case was joined with two cases about whether sexual orientation discrimination is sex discrimination under Title VII.<sup>6</sup>

The Court heard oral argument in October and will likely issue its decision in June. In the meantime, those of us who study these issues are analyzing the possible outcome and future developments. This essay is part of that trend. Part I will outline the development of the legal issues leading up to the *Harris Funeral Homes* case. Part II will outline the *Harris Funeral Homes* case in the lower courts, and Part III will outline the issues at the Supreme Court. Part IV will conclude with thoughts about the strategies of resistance to the prospect that discrimination on the basis of sexual orientation and gender identity might be held to violate Title VII.

## I. Background

To really understand the issues in the *Harris Funeral Homes* case, it's necessary to understand how the law has developed in this area. No federal antidiscrimination law explicitly uses the terms "gender identity," "transgender," or even "gender." Instead, Title VII of the Civil Rights Act of 1964, makes it an unlawful employment practice for an employer to "discharge any individual . . . because of such individual's . . . sex."<sup>7</sup> The term "sex" is not defined in the statute,<sup>8</sup> and yet the law has long been clear that employer actions based on stereotypes about what people of different sexes are like or ought to be like is sex discrimination. The most well-known explanation of this principle was in

---

<sup>5</sup> EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018).

<sup>6</sup> R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599 (2019).

<sup>7</sup> 42 U.S.C. § 2000e-2(a) (2012). This provision also prohibits the same kinds of actions taken because of race, national origin, color, or religion.

<sup>8</sup> The identity characteristics in Title VII are not defined with two exceptions. Congress has made clear in the Pregnancy Discrimination Act amendment to Title VII that sex includes but is "not limited to because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). Additionally, the definitions make clear that "'religion' includes all aspects of religious practice, as well as belief." *Id.* § 2000e(j).

the Supreme Court's opinion in *Price Waterhouse v. Hopkins*.<sup>9</sup> In that case, Ann Hopkins was passed over for partner despite her strong performance because, in part, she did not dress, walk, look, or speak femininely enough.<sup>10</sup> In holding that the partners' motives violated Title VII, the Court stated,

we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[i]n 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.”<sup>11</sup>

Before *Hopkins*, a number of courts had considered whether discriminating against a person for transitioning from one sex to another was sex discrimination. Most of them, with little analysis, concluded that the answer was no. They made distinctions between the status of being “transsexual” (gender identity), and the status of being male or female (sex).<sup>12</sup>

*Ulane v. Eastern Airlines* is a representative case. In that case, Eastern Airlines fired a pilot who had worked for it for twelve years because that pilot had gender affirming surgery.<sup>13</sup> The district court heard extensive scientific testimony on the nature of sex and concluded that “sex is not a cut-and-dried matter of chromosomes, and that while there may be some argument about the matter in the medical community, the evidence in this record satisfies me that the term, ‘sex,’ as used in any scientific

---

<sup>9</sup> 490 U.S. 228 (1989).

<sup>10</sup> *Id.* at 235-36.

<sup>11</sup> *Id.* at 251 (citations omitted).

<sup>12</sup> See, e.g., *Ulane v. E. Airlines*, 742 F.2d 1081 (7th Cir. 1984) (considering gender identity); *Sommers v. Budget Mktg.*, 667 F.2d 748 (8th Cir. 1982) (considering gender identity); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977) (considering gender identity); see also *Wood v. C.G. Studios, Inc.*, 660 F. Supp. 176, 177 (E.D. Pa. 1987) (holding that the Pennsylvania Human Rights Act does not prohibit discrimination on the basis of intersex status). The courts made similar distinctions between sex and sexual orientation. *DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327, 329-30 (9th Cir. 1979) (considering sexual orientation); *Smith v. Liberty Mutual Ins. Co.*, 569 F.2d 325, 326-27 (5th Cir. 1978) (considering sexual orientation); see also *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 24 Cal. 3d 458, 490-91 (1979) (holding that sexual orientation was not part of the definition of “sex” in the California Fair Employment Practices Act).

<sup>13</sup> *Ulane*, 742 F.2d at 1082-83.

sense and as used in the statute can be and should be reasonably interpreted to include among its denotations the question of sexual identity,” such that discrimination on the basis of transgender status was discrimination on the basis of sex.<sup>14</sup> The Seventh Circuit disagreed and reversed, holding that Congress could only have intended to give sex its “traditional” and “biological” meaning, which excluded “transsexuals” from coverage.<sup>15</sup> The court specifically rejected the district court’s reliance on evidence of what sex was, stating, “[w]e do not believe that the interpretation of the word ‘sex’ as used in the statute is a mere matter of expert medical testimony or the credibility of witnesses produced in court. Congress may, at some future time, have some interest in testimony of that type, but it does not control our interpretation of Title VII based on the legislative history or lack thereof.”<sup>16</sup> The court concluded, somewhat dismissively,

Ulane is entitled to any personal belief about her sexual identity she desires. After the surgery, hormones, appearance changes, and a new Illinois birth certificate and FAA pilot’s certificate, it may be that society, as the trial judge found, considers Ulane to be female. But even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case. . . . It is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is . . . a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.<sup>17</sup>

Thus, the court essentially reasoned that there was a “traditional” definition of sex that was limited to chromosomes and reproductive organs, that Congress could not possibly have meant sex to mean anything else, and that this subjective intent (that the court inferred) was the only thing that mattered.

That premise was not only undercut by the *Hopkins* decision, it was also weakened by a same-sex harassment case that the Court found stated a claim under Title VII. In *Oncale v. Sundowner Offshore Services, Inc.*, the Court held that harassment between members of the same sex could be because of sex and

---

<sup>14</sup> *Ulane v. E. Airlines*, 581 F. Supp. 821, 825 (N.D. Ill. 1983).

<sup>15</sup> *Ulane*, 742 F.2d at 1085-86.

<sup>16</sup> *Id.* at 1086.

<sup>17</sup> *Id.* at 1087.

thus actionable under Title VII.<sup>18</sup> In reaching that conclusion, Justice Scalia, writing for a unanimous Court, stated,

We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But 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>19</sup>

The Court effectively rejected the reasoning the Seventh Circuit had employed in *Ulane* that some kind of imputed subjective intent of Congress dictated how Title VII should apply. The effect of *Price Waterhouse* and *Oncale* together have opened the door to more interpretations of what counts as “sex” and what kinds of conduct connected to gender-linked behaviors will count as discrimination. As a result, employees penalized for behaviors that do not fit an employer’s gender stereotypes, including transgender employees, more clearly have causes of action.

As the discussion of *Ulane* demonstrates, early cases had defined gender identity – or often “transsexualism” – as something other than and not connected to “biological sex.” The decisions in *Price Waterhouse* and *Oncale* essentially removed that line. If an employer could not penalize a woman for behaving or appearing too manly, how could it penalize any person with two X chromosomes who wore the clothes and expressed the mannerisms we associate with men? The case of gender identity fit neatly into this sex stereotyping box, in part because of the courts’ love of the but-for test for discrimination. But for this person’s presumed biological sex, this behavior would be acceptable to the employer. In other words, if this person was a member of the opposite sex, this behavior would be accepted. It also may be that because the claim of being transgender, or at least a surgical and medical transition, is a claim that a person actually wants to fulfill gendered and stereotypical behaviors and appearance norms for the sex “opposite” the one assigned to them at birth.

---

<sup>18</sup> 523 U.S. 75 (1998).

<sup>19</sup> *Id.* at 79.

After *Price Waterhouse* and *Oncale*, transgender plaintiffs had the opportunity to explain that the discrimination they experienced was because their employers were uncomfortable with the plaintiffs defying stereotypes of the sex they were assigned at birth. By presenting as the other sex, plaintiffs were engaged in gender nonconforming behavior, and penalties for doing so violated Title VII.<sup>20</sup>

In 2004, in *Smith v. City of Salem*, the Sixth Circuit agreed.<sup>21</sup> The court held that the reasoning and conclusion in *Ulane* could not survive *Price Waterhouse*.<sup>22</sup> The plaintiff, whose name was Jimmie Smith, was a lieutenant in the fire department and had worked there for seven years when he began “expressing a more feminine appearance” at work, told his supervisor that he had been diagnosed with Gender Identity Disorder, and said he would eventually be transitioning to female.<sup>23</sup> The chief of the fire department sought to discharge Smith because of his transition, Smith’s counsel warned the mayor, who had taken part in devising the plan to discharge Smith, of the legal ramifications of doing so, and Smith was ultimately disciplined for violating a non-existent rule.<sup>24</sup>

Smith sued the city, alleging that the discipline and attempts to discharge him penalized him for failing to comport with sex stereotypes.<sup>25</sup> The city moved for judgment on the pleadings, and the district court granted it, recognizing that there was tension between *Ulane* and *Price Waterhouse*, but holding that the de-

---

<sup>20</sup> See *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (interpreting the Equal Credit Opportunity Act in line with Title VII and holding that penalizing the plaintiff for dressing in traditionally feminine attire could be sex discrimination for failing to conform to gender norms).

<sup>21</sup> 378 F.3d 566, 572-75 (6th Cir. 2004).

<sup>22</sup> *Id.* at 573; see also *Schwenk v. Hartford*, 204 F.3d 1187, 1200-02 (9th Cir. 2000) (discussing *Price Waterhouse* and concluding that it functionally overruled cases which had held that gender identity or performance was not part of sex and importing that into the Gender Motivated Violence Act).

<sup>23</sup> *Smith*, 378 F.3d at 568. I use the male pronoun to refer to Smith because that was the pronoun used by the court in its opinion. There was no indication that at the time of the decision, Smith used a female pronoun in any court filings.

<sup>24</sup> *Id.* at 568-69. The discipline was overturned by the state court on the grounds that the rule Smith had been found to have violated was “not effective.” *Id.* at 569.

<sup>25</sup> *Id.*

endants were clearly motivated by Smith's "transsexuality," so had not been motivated by sex stereotyping.<sup>26</sup> The Sixth Circuit reversed, holding that the decisions which distinguished "transsexualism" from sex could not survive *Price Waterhouse*, noting that "employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are . . . engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."<sup>27</sup> The court noted that other courts had engaged in tortured logic to find that this kind of conduct was not sex discrimination only when it was engaged in by transgender employees.<sup>28</sup>

Similarly, in *Schroer v. Billington*, the District Court for the District of Columbia agreed that discrimination against a person transitioning sexes was sex discrimination, but relied on different reasoning.<sup>29</sup> Diane Schroer, a transwoman, applied for a position with the Congressional Research Service at the Library of Congress before she began presenting as a woman, and she was hired.<sup>30</sup> Having been diagnosed with Gender Dysphoria, Schroer was set to begin presenting as a woman full-time when she actually started working and she informed her supervisor of that fact.<sup>31</sup> The next day, the supervisor called Schroer to terminate her, saying that Schroer would "not be a 'good fit'" any more.<sup>32</sup>

The district court judge initially noted that the discrimination might not be analogous to Ann Hopkins's, reasoning that Schroer did not claim to be an effeminate man, but instead identified as a woman and sought to fulfill the stereotype of being

---

<sup>26</sup> *Smith v. City of Salem*, No. 4:02 CV 1405, 2003 WL 25720984, \*3 (N.D. Ohio Feb. 26, 2003). The court went on to hold that Smith had not suffered an adverse employment action because his suspension was reversed by the state court. *Id.* at \*4-\*5.

<sup>27</sup> *Smith*, 378 F.3d at 674.

<sup>28</sup> *Id.* at 674-75 (citations omitted). The court also held that the suspension was an adverse employment action and that Smith had successfully pled an equal protection sex discrimination claim. *Id.* at 575-78.

<sup>29</sup> 424 F. Supp. 2d 203, 212-13 (D.D.C. 2013) (denying a motion to dismiss under Title VII).

<sup>30</sup> *Id.* at 206.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

one.<sup>33</sup> The court instead relied on the reasoning that the district court in *Ulane* had adopted about what sex is.<sup>34</sup> And relying on the Court's statement in *Oncale* that statutory language should govern, the judge in *Schroer* held that discrimination on the basis of transsexuality might literally be discrimination because of sex.<sup>35</sup>

Per the judge's request, the parties developed a record that reflected the scientific basis of sexual identity and gender dysphoria, and Schroer amended her complaint.<sup>36</sup> The judge was then persuaded that she had also made a claim based on sex stereotyping.<sup>37</sup> After a bench trial, the court held that discriminating on the basis of sexual identity was impermissible sex stereotyping, implicitly referring back to the first decision, stating, "[u]ltimately, I do not think that it matters for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual."<sup>38</sup> Any of those would be sex stereotyping. The court went even further however, holding that discrimination on the basis of transitioning was literally discrimination on the basis of sex. Reasoning that discrimination against an employee because she has converted from one religion to another would be discrimination because of religion, the court held that changing from one sex to another was clearly discrimination because of sex.<sup>39</sup>

This kind of reasoning, drawing from *Price Waterhouse* and *Oncale* has not been limited to Title VII, but has also been used to analyze discrimination under the Equal Protection Clause. In *Glenn v. Brumby*, the Eleventh Circuit reasoned that discrimination on the basis of transgender behavior would always be sex discrimination: "[T]he very acts that define transgender people

---

<sup>33</sup> *Id.* at 209-11. The court did this, in part, to harmonize the decision with cases that held sexual orientation discrimination was not actionable under a sex stereotyping theory and cases that allowed for sex-specific grooming codes under Title VII. *Id.* at 208-09, 213.

<sup>34</sup> *Id.* at 211-12.

<sup>35</sup> *Id.* at 212-13.

<sup>36</sup> *Schroer v. Billington*, 525 F. Supp. 2d 58, 61, 62 (D.D.C. 2007).

<sup>37</sup> *Id.* at 62-63.

<sup>38</sup> *Schroer v. Billington*, 577 F. Supp. 2d 293, 303-06.

<sup>39</sup> *Id.* at 306-07.



as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.” Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.<sup>40</sup>

In light of these cases, in 2012, the EEOC held that discrimination against an individual because that person is transgender is per se discrimination because of sex and therefore is prohibited under Title VII.<sup>41</sup> That same year, the agency’s Strategic Enforcement Plan identified “coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions, as they may apply” an emerging issue that would be an agency priority.<sup>42</sup> Its most recent plan described this priority in a more straightforward manner: “Protecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex.”<sup>43</sup>

## II. *Harris Funeral Homes*

True to that commitment, in September of 2015, the EEOC filed the action against R.G. & G.R. Harris Funeral Homes, Inc., based on Aimee Stephens’s charge.<sup>44</sup> EEOC argued that firing Stephens because she was transgender, because she was transitioning from one sex to another, or because Stephens did not conform to the sex-based stereotypes held by the funeral home owner was sex discrimination under Title VII.<sup>45</sup>

The Funeral Home moved to dismiss the complaint, arguing that Title VII did not prohibit discrimination on the basis of gen-

---

<sup>40</sup> *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (considering sex discrimination under both Title VII and the Equal Protection Clause).

<sup>41</sup> *Macy v. Dep’t of Justice*, EEOC Appeal No. 0120120821 (Apr. 20, 2012).

<sup>42</sup> U.S. EQUAL EMP’T OPPORTUNITY COMM’N, STRATEGIC ENFORCEMENT PLAN FY 2013-2016, at 10 (2012), <https://www.eeoc.gov/eeoc/plan/upload/sep.pdf>.

<sup>43</sup> U.S. EQUAL EMP’T OPPORTUNITY COMM’N, STRATEGIC ENFORCEMENT PLAN FY 2017-2021, at 8 (2016), <https://www.eeoc.gov/eeoc/plan/upload/sep-2017.pdf>.

<sup>44</sup> *Complaint, EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 2d 594 (E.D. Mich. 2015) (No. 2:14-cv-13710-SFC-DRG).

<sup>45</sup> *EEOC v. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 595-96 (E.D. Mich. 2015).

der identity.<sup>46</sup> However, the district court denied the motion to dismiss, holding that the EEOC had alleged a viable claim by alleging that Stephens was terminated for failing to conform to the owner's sex stereotypes.<sup>47</sup>

The case proceeded with discovery, and the parties filed cross-motions for summary judgment. The EEOC argued that the Funeral Home's owner, Thomas Rost, had admitted that he fired Stephens because Stephens would be presenting herself as female at work, and this conflicted with how Rost believed that a person whose sex was designated male at birth ought to dress.<sup>48</sup> The Funeral Home made two arguments. The first argument was that forbidding men to wear skirt suits could not form the basis of a sex stereotyping claim because sex specific dress codes had been upheld by other courts.<sup>49</sup> The second argument was that if this kind of discrimination did violate Title VII, it could not be enforced consistent with the Religious Freedom Restoration Act (RFRA), which prohibits the federal government from acting in ways that substantially burden a person's religious practices unless the action is the least restrictive way to serve a compelling governmental interest.<sup>50</sup>

The district court granted summary judgment for the Funeral Home.<sup>51</sup> The court found that the EEOC had proven that Rost discriminated on the basis of sex, noting that this was an unusual case with direct evidence of such discrimination.<sup>52</sup> The court further rejected the Funeral Home's argument that its sex specific dress code somehow insulated it from a sex stereotyping claim, noting that the Sixth Circuit's cases foreclosed such an ar-

---

<sup>46</sup> The Funeral Home characterized the EEOC's legal theory as a claim that "gender identity disorder" was a protected class. Brief in Support of Defendant R.G. & G.R. Harris Funeral Home, Inc.'s Motion to Dismiss at 9-11, *Harris Funeral Homes*, 100 F. Supp. 3d 594.

<sup>47</sup> *Harris Funeral Homes*, 100 F. Supp. 3d at 599-603 (citing *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), and *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005)).

<sup>48</sup> *EEOC v. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, 847 (E.D. Mich. 2016).

<sup>49</sup> *Id.* at 840-41.

<sup>50</sup> *Id.* at 841.

<sup>51</sup> *Id.* at 841-42.

<sup>52</sup> *Id.* at 850.

gument.<sup>53</sup> Despite these two holdings, the court nonetheless granted judgment for the Funeral Home on its RFRA defense. The court first held that the Funeral Home was protected and that the EEOC was limited by RFRA and could not enforce Title VII in a way that would violate the Funeral Homes' "sincerely held religious beliefs."<sup>54</sup> The court then held that Rost (who owned nearly all of the Funeral Home) had demonstrated that having to employ Stephens and allow her to present as female at work would substantially burden his religious beliefs that sex is "an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex."<sup>55</sup> The court further held that the EEOC had not satisfied the strict scrutiny standard that the statute imposed. It assumed that the EEOC had shown that prohibiting sex discrimination was a compelling governmental interest.<sup>56</sup> But the EEOC had not established that enforcing Title VII to require the Funeral Home to allow Stephens to work there, presenting as female, was the least restrictive means to enforce the prohibition on sex stereotyping in the statute.<sup>57</sup> In fact, the court reasoned, the EEOC was reinforcing sex stereotypes by arguing that Stephens should be allowed to conform to stereotypical notions of how women should dress when arguing for a gender neutral dress code would be less restrictive.<sup>58</sup>

The EEOC appealed the decision.<sup>59</sup> After the appeal was filed, and after the 2016 presidential election, Aimee Stephens sought permission to intervene in the appeal, which was granted; she was concerned the election might change the EEOC's priorities so that it might not represent her interests any longer.<sup>60</sup>

The Sixth Circuit reversed. The court agreed with the district court that Stephens was fired for failing to conform to sex stereo-

---

<sup>53</sup> *Id.* at 851-53.

<sup>54</sup> *Id.* at 854 (citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768-69 (2014) and 42 U.S.C. § 2000bb-2(1) (2012)).

<sup>55</sup> *Id.* at 855-56.

<sup>56</sup> *Id.* at 859-60. The court actually said that it wasn't sure how to apply the *Hobby Lobby* standard, which suggested that it should decide how to evaluate the marginal interest in enforcing the law in this particular instance.

<sup>57</sup> *Id.* at 861-64.

<sup>58</sup> *Id.* at 861-63.

<sup>59</sup> *EEOC v. Harris Funeral Homes, Inc.*, 884 F.3d 560, 570 (6th Cir. 2018).

<sup>60</sup> *Id.*

types,<sup>61</sup> but it went farther, as well. The court held that discrimination on the basis of transgender or transitioning status was per se sex discrimination, noting that “it is analytically impossible to fire an employee based on that employee’s status as a transgender person without being motivated, at least in part, by the employee’s sex.”<sup>62</sup> If Stephens had been assigned the sex female at birth, she would not have been fired for seeking to comply with the women’s dress code.<sup>63</sup> The court also adopted the reasoning from the *Schroer* case, which analogized a transition of sex to religious conversion.<sup>64</sup> The second reason for holding that this was per se sex discrimination was that

discrimination against transgender persons necessarily implicates Title VII’s proscriptions against sex stereotyping. As we recognized in *Smith*, a transgender person is someone who “fails to act and/or identify with his or her gender” – i.e., someone who is inherently “gender non-conforming.” Thus, an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align. There is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity, and we see no reason to try.<sup>65</sup>

Rejecting the Funeral Home’s arguments, the court held that whether Congress intended to anticipate that Title VII might prohibit gender identity discrimination was irrelevant, relying on the principle from *Oncale* 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>66</sup>

The court also rejected the Funeral Home’s religious defenses. On appeal, the Funeral Home argued it was protected by RFRA, and amici for the Funeral Home argued that the ministerial exception to Title VII prevented Stephens from suing for sex

---

<sup>61</sup> *Id.* at 573-74.

<sup>62</sup> *Id.* at 574-75.

<sup>63</sup> *Id.* at 575.

<sup>64</sup> *Id.* at 575-76.

<sup>65</sup> *Id.* at 576-77 (citations omitted).

<sup>66</sup> *Id.* at 577 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)).

discrimination.<sup>67</sup> The court quickly rejected the argument that the ministerial exception applied because the Funeral Home contended that it was not a religious organization and that the ministerial exception did not apply,<sup>68</sup> but further explained why even without that disclaimer, the facts showed that it would not qualify and Stephens could not be considered a minister even if the Funeral Home was a religious organization.<sup>69</sup>

The RFRA claim was more complicated. Stephens argued that the case should be remanded to determine whether RFRA applied now that a private party was involved, but the court rejected that argument as essentially beyond the scope of what it could consider.<sup>70</sup> Thus, it proceeded to consider each element of that claim, and at each step, the court reversed the district court. First, the court of appeals held that Rost had not demonstrated that employing Stephens and allowing her to dress in female clothing would substantially burden his religious exercise of serving mourners.<sup>71</sup> The Funeral Home asserted that Stephens's attire would be a distraction and that Rost would have to consider leaving the funeral industry if forced to employ her.<sup>72</sup> The court held that neither of these were a substantial burden on Rost's religious beliefs. The argument that Stephens's appearance would be a distraction rested on premises that were biased – that Stephens would be perceived as a man in woman's attire and that clients would be disturbed by a transgender funeral director.<sup>73</sup> These were facts that were at the very least in dispute, but more importantly, the court held that like for the Bona Fide Occupational Qualification defense, costumers' assumed biases could not establish a substantial burden under RFRA.<sup>74</sup>

The court further held that Rost's arguments about the choice he faced at the prospect of continuing to employ Stephens were unavailing. His argument that he was confronted with the choice of providing Stephens with clothing that violates his relig-

---

<sup>67</sup> See *id.* at 581.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 582-83.

<sup>70</sup> *Id.* at 584-85.

<sup>71</sup> *Id.* at 585-86.

<sup>72</sup> *Id.* at 586.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 586-87.

ious belief or going out of business was not something compelled by any law. Rost was not required to provide clothing for his employees, nor did he demonstrate that doing so was necessary to attract and retain qualified employees.<sup>75</sup> And simply allowing Stephens to present as female was also not a substantial burden because that would not, as a matter of law, amount to an endorsement of Stephens's views.<sup>76</sup>

Lastly, the court considered whether, even if Rost had demonstrated a substantial burden on his religious beliefs, the EEOC had satisfied strict scrutiny and concluded that it had. The court noted that the compelling interest that the government must satisfy had to focus on the wrong the statute sought to prevent, and not the interests of the defendant in opting out of that statute's enforcement.<sup>77</sup> If the EEOC was not allowed to enforce Title VII against the funeral home, it would allow a specific person to be discriminated against, and that was clearly in conflict with the EEOC's compelling interest in combatting discrimination.<sup>78</sup> Finally, the court concluded that Title VII itself represents the least restrictive means of enforcing the government's interest in preventing and remedying discrimination.<sup>79</sup>

### III. At the Supreme Court and Beyond

The funeral home filed a petition for certiorari, but only on the question of whether Title VII prohibited discrimination on the basis of gender identity; the RFRA defense was not part of the petition.<sup>80</sup> The Supreme Court granted that petition and

---

<sup>75</sup> *Id.* at 587-88.

<sup>76</sup> *Id.* at 588.

<sup>77</sup> *See id.* at 590-91 (framing the distinction as between the EEOC's claim and the Funeral Home's defense).

<sup>78</sup> *Id.* at 591-93.

<sup>79</sup> *Id.* at 593-97.

The court also reversed one last piece of the district court's holding – that the EEOC could not challenge the Funeral Home's policy of providing male funeral directors with clothing but not providing the same benefit to female funeral directors. The district court had held that the claim was not within the facts asserted in Stephens' charge, but the court of appeals held that it was discovered in the investigation and reasonably related to the claim in the charge. *Id.* at 597-600.

<sup>80</sup> Petition for Writ of Certiorari, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC* (filed July 24, 2018) (No. 18-107).

joined the case with two cases that came to different conclusions on whether Title VII prohibits sexual orientation discrimination.<sup>81</sup> The cases were argued on October 8, 2019 and remain pending as of the writing of this article.<sup>82</sup>

The arguments for the Funeral Home and for Stephens were mainly the same, but Stephens's concerns about the government had come to pass during the pendency of the case before the Sixth Circuit.

On October 4, 2017, while the EEOC's appeal was pending, Attorney General Sessions issued a memorandum to United States Attorneys and heads of Department of Justice components stating that "Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity per se." The memorandum further stated that "Title VII is not properly construed to proscribe employment practices (such as sex-specific bathrooms) that take account of the sex of employees but do not impose different burdens on similarly situated members of each sex." It explained that "the Department of Justice will take that position in all pending and future matters."<sup>83</sup>

As a result of this change, the EEOC did not defend its case before the Supreme Court. Instead the Solicitor General filed a brief on behalf of "the Federal Respondent," and that brief supported reversal of the Sixth Circuit's decision.<sup>84</sup> The government argued that in 1964, when Title VII was passed, "the ordinary public meaning of 'sex' was biological sex," and that transgender status was something other than "biological sex."<sup>85</sup> It further argued that if the Court were to hold that discrimination on the basis of gender identity violated Title VII, such a holding would invalidate all of the sex-specific policies that are deeply embedded in American culture and which, in the government's view, did not disadvantage members of one sex in favor of the other, like sex-specific dress codes or sex-segregated bathrooms.<sup>86</sup>

Although this case might look like it only involves a technical question about the meaning of one term in a federal statute

---

<sup>81</sup> 139 S. Ct. 1599 (2019).

<sup>82</sup> See Transcript of Oral Argument, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC* (Oct. 8, 2019) (No. 18-107).

<sup>83</sup> Brief for the Federal Respondent Supporting Reversal at 8, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC* (filed Aug. 16, 2019) (No. 18-107).

<sup>84</sup> *Id.* at cover.

<sup>85</sup> *Id.* at 12.

<sup>86</sup> *Id.* at 13.

focused only on employment discrimination, much more is really at stake in the background. This case concerns how application of statutes might evolve as our understanding of the social ills they address also evolves. It also concerns what constitutes discrimination and who is entitled to equality. And finally, it raises the specter of culture shift and the backlash and resistance such shifts can engender.

Debates over the courts' role vis-à-vis Congress and how to properly interpret statutes are not new. But this case really puts the textualist members of the Court, who are also generally socially conservative, in something of a bind. The statute expressly prohibits discrimination against any individual because of that individual's sex, and it is difficult to see how firing a person for wanting to wear clothing that the employer believes should be reserved for another sex could be something other than discrimination because of this individual's sex. In fact, the questions asked by the Justices suggested as much. In the words of Justice Gorsuch, "When a case is really close, really close, on the textual evidence . . . At the end of the day, should [a judge] take into consideration the massive social upheaval that would be entailed in such a decision, and the possibility that – that Congress didn't think about it."<sup>87</sup>

Counsel for Stephens answered that question by saying that the text was clear, that courts had been applying it to protect transgender employees for twenty years, and that there had been no massive social upheaval.<sup>88</sup> In other words, counsel rejected the premise that massive social upheaval would result if the statute were given its plain meaning. Yet Justice Gorsuch responded that counsel had not addressed the question.<sup>89</sup> The notion of upheaval, without any evidence that upheaval would result, seemed to be enough to make Justice Gorsuch wary of giving the words of the statute their plain meaning.

Moreover, those on the employer-side of the argument never acknowledge that they have not really defined sex when they assert that it has a "traditional" meaning. They use terms like "biological," "men," and "women," without ever really ex-

---

<sup>87</sup> Transcript of Oral Argument at 25, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC* (Oct. 8, 2019) (No. 18-107).

<sup>88</sup> *Id.* at 26-27.

<sup>89</sup> *Id.* at 27.



plaining what those terms mean and why what happened to Aimee Stephens wasn't discrimination on the basis of her sex. There is also no effort to consider whether gender identity is "biological," or what kind of biology is required for someone to be a man or woman. They further fail to acknowledge that they are deciding a fact question that might be contested and subject to evidentiary proof. The closest that the government respondent came in the *Harris Funeral Home* case was to argue that biological sex was different from transgender status because transgender status was defined as a disconnect between a person's sense of their sex and the sex they were designated at birth.<sup>90</sup> By homing in on the term "disconnect," the government tried to set up a concept distinct from sex, but that disconnect cannot itself be disentangled from sex. Thus, this position doesn't really offer anything concrete.

And it is not clear that Congress in 1964 would necessarily have believed that sex was distinct from gender identity. Little legislative history exists on what sex or discrimination mean for purposes of this statute because sex was added just before passage.<sup>91</sup> The first director of the Equal Employment Opportunity Commission, in fact, considered the inclusion of "sex" in the statute a "fluke," and largely sought to ignore it.<sup>92</sup> That proved impossible, however, since more than a third of the charges the agency processed in its first year were sex discrimination charges, and women activists increased the pressure to take sex discrimination seriously, in part through the struggle for ratification of the ERA, beginning in 1972.<sup>93</sup> In fact, one of the rallying cries

---

<sup>90</sup> Brief for the Federal Respondent Supporting Reversal at 19-20, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC* (filed Aug. 16, 2019) (No. 18-107).

<sup>91</sup> Marcia L. McCormick, *Consensus, Dissensus, and Enforcement: Protection of Working Women from the Time of the Triangle Shirtwaist Factory Fire to Today*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 645, 666-68, 675-76 (2011).

<sup>92</sup> Herman Edelsberg, Exec. Dir., Equal Emp't Opportunity Comm'n, Statement at the New York University Annual Conference on Labor (Aug. 25, 1966), in 62 LAB. REL. REP. (BNA) 253-55 (1966) (referring to the addition as "conceived out of wedlock" and viewing men as entitled to female secretaries); see also FLORA DAVIS, *MOVING THE MOUNTAIN: THE WOMEN'S MOVEMENT IN AMERICA SINCE 1960* 46-47 (1999); JOAN HOFF, *LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN* 235 (1991); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 252-53 (2008).

<sup>93</sup> See HOFF, *supra* note 92, at 235; ROSENBERG, *supra* note 92, at 253-56.

against the ERA was that the term “sex” was thought to protect LGBTQ people.<sup>94</sup> Thus, the notion that sex included both gender expression and affectional preferences was part of the public debate during the relevant time period.

Finally, the cultural backdrop to the case shows the broader issues that social conservatives, in particular but not exclusively, are struggling with – what to do about traditionally sex-segregated places and activities and how to handle claims that religion motivates the discrimination. Sex-segregated sports and bathrooms loomed large at the Supreme Court’s oral arguments. In fact, questions about them were raised in the argument on sexual orientation under Title VII.<sup>95</sup> But these issues have no salience in the context of sexual orientation.

And questions about access for transgender plaintiffs to sex-segregated spaces are where lower courts are having difficulties. As described above, most courts to consider whether terminating someone for being transgender have held that the termination was a violation of Title VII – but for the sex the employee was designated at birth, their manner of dress and appearance would not have caused their termination. But where the issue is not termination, or is termination linked with use of sex-segregated spaces that conform to the employee’s gender identity, not all courts have found a Title VII violation. In *Etsitty v. Utah Transit Authority*, the Tenth Circuit Court of Appeals held that Title VII did not prohibit discrimination against a transgender person.<sup>96</sup> The court’s reasoning was lifted straight from *Ulane* and other pre-*Price Waterhouse* cases, even using the terminology from that case.

In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely

---

<sup>94</sup> See HOFF, *supra* note 92, at 235; ROSENBERG, *supra* note 92, at 253-56; Phyllis Schlafly, Editorial, *Equal Rights Redux; The ERA Is Still a Bad Idea*, L.A. TIMES, Apr. 8, 2007, at M3 (describing how a conference in support of ratification of the ERA adopted “the entire gay rights agenda” as part of “the ERA’s hidden agenda”); *A Short History of E.R.A.*, THE PHYLLIS SCHLAFLY REP., Sept. 1986, <http://eagleforum.org/psr/1986/sept86/psrsep86.html> (positing in a section on the debates about ERA that the use of the term “sex” “would put ‘gay rights’ into the U.S. Constitution” as an argument against it).

<sup>95</sup> Transcript of Oral Argument at 10-21, *Bostock v. Clayton Cty.* (Oct. 8, 2019) (No. 17-1618).

<sup>96</sup> 502 F.3d 1215, 1221-22 (10th Cir. 2007).

on their status as transsexual. Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female.<sup>97</sup>

The court failed to note that its conclusion begged the question of what it means to *be* male or female. In other words, the court assumed the very thing that it was supposed to analyze. It assumed, essentially, that sex means the designation on a person's birth certificate, which, it likely assumed, matched the genetic sex of the person. The court acknowledged that *Price Waterhouse* did potentially open the door to the plaintiff's claim, but only assumed that she had made a prima facie case under that theory without deciding whether a person penalized for transitioning to the opposite sex was penalized for failing to meet gender stereotypes of their presumed "real" sex.<sup>98</sup>

The main impetus for the court's reluctance was the bathroom issue. The court held that the plaintiff could not prove that her employer's reason for terminating her was a pretext. The employer's reason for terminating her was its concern about legal liability related to "her intent to use women's public restrooms while wearing a UTA uniform, despite the fact she still had male genitalia."<sup>99</sup> The court acknowledged that using a restroom consistent with one's gender identity might be an essential part of that identity, but further concluded that refusing to allow an employee to use a restroom assigned to one sex when that employee had genitalia of the opposite sex was discrimination on the basis of transsexualism, rather than discrimination on the basis of sex. All people with penises are kept out of the women's bathroom, and segregating bathrooms on the basis of sex (or genitalia) was not a violation of Title VII.<sup>100</sup> Interestingly, the court merged the but-for analysis with something of an anti-subordination rationale, in line with harassment cases, to reach this conclusion:

The critical issue under Title VII "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to

---

<sup>97</sup> *Id.* at 1222.

<sup>98</sup> *Id.* at 1223-24.

<sup>99</sup> *Id.* at 1224.

<sup>100</sup> *Id.* at 1224-25. Other courts have simply assumed that "require[ing] employees] to conform to the accepted principles established for gender-distinct public restrooms" was not discrimination under Title VII. See *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 1000 (N.D. Ohio 2003), *aff'd per curiam* 98 F. App'x 461 (6th Cir. 2004).

which members of the other sex are not exposed.” Because an employer’s requirement that employees use restrooms matching their biological sex does not expose biological males to disadvantageous terms and does not discriminate against employees who fail to conform to gender stereotypes, [the employer’s] proffered reason of concern over restroom usage is not discriminatory on the basis of sex.<sup>101</sup>

Because the employer’s reason was true – it truly was concerned about the plaintiff’s use of the women’s bathroom – the plaintiff could not show that it was a pretext for discriminating against her because she was “a biological male.”<sup>102</sup>

This view of why stereotypes are discriminatory – because they perpetuate negative perceptions of one sex’s abilities and subordinate them in the workplace – is not unusual. The Eastern District of Pennsylvania concluded in a nearly identical case that the discrimination alleged in that case – requiring a “doctor’s note . . . to dress as a female”; being required to instead “dress as a male;” being forbidden from using the women’s restroom; referring to her by her male name; and moving her desk out of the view of the public – “were not due to stereotypic concepts about a woman’s ability to perform a job nor were they due to a condition common to women alone.”<sup>103</sup> And the same view – that a penalty based on a stereotype is only discrimination if it harms all women – animated the argument of the government in *Harris Funeral Homes*.<sup>104</sup>

#### **IV. Conclusion**

It is hard to predict how the Court will rule, but whatever the Court does, most of the same issues will remain to be resolved. If the Court holds that discrimination on the basis of gender identity violates Title VII, courts will still have to grapple with what that means for sex-segregated spaces and activities. If the Court holds that it does not violate Title VII, courts will still have to grapple with whether any particular situation involved discrimination on the basis of sex stereotypes.

---

<sup>101</sup> *Id.* at 1225 (citing *Oncale*, 523 U.S. at 80)

<sup>102</sup> *Id.* at 1225-26.

<sup>103</sup> *Dobre v. Nat’l R.R. Passenger Corp. (Amtrak)*, 850 F. Supp. 284, 286, 287 (E.D. Pa. 1993).

<sup>104</sup> Brief for the Federal Respondent Supporting Reversal at 13-14, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC* (filed Aug. 16, 2019) (No. 18-107).

Moreover, the elephant in the room will remain regardless – the role of religious beliefs about the sexes. Because religious beliefs about the sexes animate the decisions that would be discriminatory, the Funeral Home, the government, and a number of amici argue that Title VII cannot be interpreted to penalize those decisions.<sup>105</sup> Even though the Funeral Home had not sought certiorari on the RFRA issue, religion still mattered.

If the decision that discriminates is motivated by religious beliefs, does that mean a religious employer can discriminate on the basis of sexual orientation and gender identity even if for other kinds of employers, doing so is sex discrimination? Shortly after the DOJ changed its position about whether Title VII prohibited discrimination on the basis of gender identity, it took this position in a Memorandum on Religious Liberty.<sup>106</sup> Title VII allows religious organizations to discriminate on the basis of religion,<sup>107</sup> and the memo suggested that this exemption should apply even to for-profit entities that have religious missions. More importantly, the memo explained what being allowed to discriminate on the basis of religion would allow: “For example, a religious organization might conclude that it cannot employ an individual who fails faithfully to adhere to the organization’s religious tenets, either because doing so might itself inhibit the organization’s exercise of religion or because it might dilute an expressive message.”<sup>108</sup> In other words, if an organization’s religious tenets included that there were two binary sexes and certain behaviors and expression were limited to only one or the other of those sexes, that organization could require employees to conform to the behaviors and expression of the sex the organization believed them to be. The funeral home could require Aimee Stephens to continue presenting as male or be fired.

---

<sup>105</sup> Transcript of Oral Argument at 25-28, 39-40, 63, *Bostock v. Clayton Cty.* (Oct. 8, 2019) (No. 17-1618).; Transcript of Oral Argument at 34, 54, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC* (Oct. 8, 2019) (No. 18-107); *see also id.* at 58 (stating that good and decent people had views that gay marriage was immoral and those views should be respected).

<sup>106</sup> Memorandum on Federal Law Protections for Religious Liberty 12a-13a (Oct. 6, 2017), <https://www.justice.gov/opa/press-release/file/1001891/download>.

<sup>107</sup> 42 U.S.C. § 2000e-1(a) (2012).

<sup>108</sup> Memorandum on Federal Law Protections for Religious Liberty, *supra* note 106, at 12a (citing *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 649-55 (2000)).

The DOJ memo also suggested that the Constitution required that religious organizations be allowed to discriminate. One source of constitutional protection was the ministerial exception, which might protect internal governance decisions. And even where the ministerial exception would not apply, the DOJ memo suggested that a penalty on these kinds of decisions would have to pass strict scrutiny, but, it rather ominously suggested, that “[t]he government may be able to meet that standard with respect to race discrimination, . . . but may not be able to with respect to other forms of discrimination. . . .”<sup>109</sup>

These assertions about strict scrutiny are difficult to square with the Supreme Court’s decision in *Employment Division, Department of Natural Resources v. Smith*, where the Court held that laws of general applicability could be enforced even if they conflicted with religious practices as long as the laws were rationally related to a legitimate government interest.<sup>110</sup> So generally applicable legislative anti-discrimination mandates should not have to pass strict scrutiny. But perhaps the DOJ was focused on federal agencies, which are bound by the RFRA and its strict scrutiny standard. Following the guidance in this memorandum, the Department of Labor proposed a new rule in August on discrimination by religious organizations. The proposed rule makes clear that religious organizations that receive federal funds can require employees to conform their behavior to the organization’s religiously motivated rules.<sup>111</sup>

It could be that these developments are like the wave of state constitutional amendments and state statutes limiting marriage to opposite sex couples in the early 2000s. That wave proved to be a last gasp of resistance to marriage equality that was nullified by the Supreme Court’s 2015 decision in *Obergefell v. Hodges*.<sup>112</sup> As social views about what sex, gender, gender identity, and sexual orientation are and whether they are immutable evolves, so will our view of legal policy. The only question is how soon we’ll get there.

---

<sup>109</sup> Memorandum on Federal Law Protections for Religious Liberty, *supra* note 106, at 13a.

<sup>110</sup> 494 U.S. 872, 882 (1990).

<sup>111</sup> 84 Fed. Reg. 41677 (Aug. 15, 2019).

<sup>112</sup> 135 S. Ct. 2071 (2015).