

# Health Care in Motion

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## LGBT Employment Discrimination at the Supreme Court What's in it for Health Care?

Tomorrow, the Supreme Court will hear oral arguments on three cases that strike at the heart of how federal law protects LGBT people from discrimination. Specifically, the cases ask whether [Title VII of the 1964 Civil Rights Act](#), which prohibits employment discrimination “on the basis of sex,” also prohibits discrimination on the basis of sexual orientation and gender identity.

HCIM [reported](#) on these cases back in April when the Court first agreed to hear them. Since that time, parties on all sides have submitted briefs outlining their arguments, and numerous organizations have weighed in with amicus briefs. This Health Care in Motion will refresh readers on the backgrounds of the cases and outline key arguments made by the parties and amici as a preview for what's in store at oral argument.

### What's at stake?

Title VII deals with discrimination in employment settings, but the consequences of this ruling could extend beyond the workplace. Courts often look to Title VII jurisprudence to interpret Title IX, another federal law that prohibits sex-based discrimination in education settings. Healthcare advocates may remember that the Affordable Care Act [incorporates Title IX](#) in its [non-discrimination provision](#) for health programs receiving federal funding. If the Court finds that Title VII prohibits discrimination on the basis of sexual orientation and transgender status, this could be useful to healthcare advocates who argue the Affordable Care Act does as well.

### Discrimination and Gender Identity: R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC

At the heart of this case is [Aimee Stephens](#), a transgender woman who worked as a funeral director at R.G. & G.R. Harris Funeral Homes, Inc. (Harris Homes) in Garden City, Michigan. She had worked at Harris Homes for six years, presenting as a man. In 2013, she disclosed her gender identity to her employer and her intention to follow her employer's gender-specific dress code, wearing a jacket and skirt. Two weeks after Ms. Stephens [informed her boss](#) she intended to transition and present as a woman, she was fired.



*Photo Credit: Charles William Kelly/American Civil Liberties Union*

After her employment was terminated, Ms. Stephens filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging she had been fired as a result of unlawful sex discrimination. The EEOC brought a suit against Harris Homes. In its [complaint](#), the EEOC alleged Harris Homes had violated Title VII by firing Ms. Stephens due to her sex, specifically because she is transgender, was transitioning, and because she did not conform to Harris Homes’ sex-based stereotypes.

Harris Homes responded by dismissing the allegation that Title VII was violated and asserting in turn that the Religious Freedom Restoration Act (RFRA) prevented the EEOC from interfering with their sincere religious belief that sex is an immutable binary trait. In April 2015 the District Court ruled in favor of Harris Homes, and the decision was appealed to the Sixth Circuit Court of Appeals.

Then, the 2016 election happened. President Donald Trump brought sweeping changes to how federal agencies would (or would not) continue to defend LGBT rights. [Deleting the page on LGBT rights](#) from the White House website on the day of President Trump’s inauguration sent a clear message of policies to come. This change had important implications for Ms. Stephens because her case was currently being prosecuted by the EEOC. While the EEOC is ostensibly an independent federal agency, it was unclear in 2017 just how deeply the Trump Administration’s political agenda would impact the agency’s operations. Concerned that the EEOC under Trump would not adequately represent her interests on appeal, Ms. Stephens, now represented by the ACLU, [intervened](#) in her own lawsuit. For its part, the EEOC continued filing [briefs](#) arguing that discrimination on the basis of transgender status constituted illegal sex discrimination under Title VII.

The Sixth Circuit [decided](#) in favor of Ms. Stephens in March 2018, finding that the EEOC could pursue claims against Harris Homes for sex discrimination both on the basis of sex stereotyping and transgender status. The court also found that the RFRA did not prevent the EEOC from enforcing Title VII against Harris Homes. Harris Homes appealed that decision and asked for review from the Supreme Court of the United States. The EEOC filed a brief asking the Court not to take the case for review while other important and relevant cases were percolating through the courts. On April 22, 2019, the Court announced it would take the case to [review](#) whether Title VII prohibits discrimination against transgender people based on (1) their status as being transgender, and/or (2) sex stereotyping.

Numerous organizations filed amicus briefs in support of Ms. Stephens this past summer —and not just LGBTQ-focused groups. [Scholars](#), [gender based violence organizations](#), [The Legal Aid Society](#), [the American Bar Association](#), [the American Medical Association](#), [several states including New York, Massachusetts and Illinois](#), [the Muslim Bar Association](#), [former Executive Branch officials](#), and the [Presiding Bishop of the Episcopal Church](#) all submitted briefs supporting the employee-side argument. The briefs collectively highlight how many societal stakeholders support the position that federal law, specifically Title VII, should protect transgender people from employment discrimination.

One [brief](#), submitted by the Transgender Law Center, Center for Constitutional Rights, and 44 other Non-Profit and Grassroots Organizations, describes the real-life experiences of individual transgender people who have faced employment discrimination. Through these stories, the brief describes how discrimination against transgender people is always discrimination “because of sex.” It also sheds light on what serious economic hardship befalls people who are victims of this form of discrimination. The brief does more than just bolster the formal legal arguments: it makes the Court aware of the breadth and depth of the problem of discrimination

*“Unfortunately, Mr. Broussard is not the only transgender person who has been illegally denied a job ‘because of . . . sex.’ Jessie Dye, a transgender woman from Alabama, was hired to work at a local nursing home, but was terminated in the middle of orientation because she ‘looked one way’ and was ‘another way’ on paper, according to the employer. Candi, a transgender woman from Illinois, applied for a job as a flight attendant, only to be told that the company does not hire ‘those kinds of people.’ Hana, a non-binary person from Illinois, was denied a receptionist position because they did not have the ‘right look.’”*

Transgender Law Center’s [Amicus Brief](#) (Citations Omitted)

against transgender people. Most of the stories the brief shares are of individuals who have been denied positions or fired because of their transgender status.

Another [brief](#), submitted by Law and History Professors including CHLPI’s Director of Litigation Kevin Costello, analyzes legal and historical realities to argue there is no indication that Congress sought to exclude transgender individuals from the protections of Title VII or its amendments. The brief points to laws that targeted transgender individuals based on their sex, such as anti-cross-dressing laws, judicial decisions, and cultural recognition to show how determinations based on sex were understood to implicate transgender people when Title VII passed and since.

Ms. Stephens [filed her brief](#) in late June 2019. In it, she argues that Harris Homes firing her because she is transgender is discrimination on the basis of sex because her sex was the “but-for” cause of her termination. Simply put: Ms. Stephens would not have been fired for living openly as a woman had she been assigned female at birth. It is because her sex was assigned male that she faced an adverse employment decision. Ms. Stephens also argues that Harris Homes violated Title VII by firing her for departing from sex-based stereotypes about men and women. Sex-stereotyping as a basis for a Title VII sex-discrimination claim stems from a famous case, [Price Waterhouse v. Hopkins](#). (See Health Care in Motion’s explanation of *Price Waterhouse* [here](#).) Ms. Stephens claims that Harris Homes held stereotypes about how “men and women should identify, appear, and behave.” When Ms. Stephens departed from these stereotypes by announcing she would identify, appear, and behave as a woman, she was fired.

Harris Homes challenged Ms. Stephens’ arguments [in its brief](#) in mid-August. Harris Homes argues that “transgender status” is not a valid basis for sex discrimination under Title VII, and that Harris Homes did not violate Title VII because the law prohibits “treating one sex worse than the other” and they did not disfavor one sex with its policies. Harris Homes specifically responds to Stephen’s argument that she was treated worse than cisgender women. Harris Homes instead argues that the “proper comparison” would be to compare how they treated Ms. Stephens with how they would treat a transgender man who refused to comply with the female dress code. In essence, Harris Homes argues that since it would fire transgender men and transgender women *equally*, they do not violate Title VII.

Tied to this argument is the contention that sex, as it is used in Title VII, refers to an immutable, biological trait of being male or female, and not to gender identity. Harris Homes believes that “redefining” sex discrimination to include gender identity will cause uncertainty and harm employers. Unfortunately, Harris Homes supports this argument with age-old anti-trans scare tactics, such as “if the employer allows [a transgender employee who identifies as female] to use the locker room with [cisgender] female employees, the [cisgender] women would certainly bring their own claim of sex discrimination based on a hostile work environment.”<sup>1</sup>

The EEOC, as predicted, [changed its position](#) under the Trump Administration, and now agrees with Harris Homes that Title VII does not prohibit discrimination against transgender individuals. The EEOC argues in its brief that the Court should overturn the Sixth Circuit’s opinion and find in favor of Harris Homes.

Harris Homes has also received support from a number of amicus briefs filed by a diverse group of stakeholders. In addition to the expected religious liberty organizations (see [Advocates for Faith and Freedom](#), [Institute for Faith and Family](#), et al.), Harris Homes received support from [Women’s Liberation Front](#), a “radical feminist” organization that also raised classic anti-trans arguments that cisgender women will suffer from trans-inclusive policies that allow transgender women into women’s restrooms and locker rooms. [Women Business Owners and CEOs](#) also argued that finding Title VII encompasses transgender status will harm women by “requiring them to, among other things, compete with [transgender women] for limited resources earmarked for women, and by otherwise reversing measures carefully crafted to ‘level the playing field’ for women.” [Military Spouses United](#) raised similar concerns about women’s safety, framing acceptance of transgender

<sup>1</sup> Brief for Petitioner at 45, R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C., filed, (Aug. 16, 2019) No. 18-107.

individuals as threatening a “right to privacy” and “right to personal security” for cisgender women. All of these arguments rely on a transphobic dismissal of the legitimacy of trans identity: they see transgender rights as an opening for “men who pretend to be women” to invade “women-only” spaces.

There is no science to predicting how the Court will handle these various arguments. LGBT advocates are [speaking out](#) to raise awareness about the seriousness of the cases, and [many plan to protest](#) outside the Court to demonstrate support for the LGBT employees.

## Discrimination and Sexual Orientation: *Altitude Express, Inc. v. Zarda*; *Bostock v. Clayton County, Georgia*

Tomorrow, the Court will also hear consolidated arguments of two cases that focus on individuals who argue that their employers violated Title VII when they were fired because of their sexual orientation.

Don Zarda filed his lawsuit against his former employer, Altitude Express, in 2010, claiming he had been fired for disclosing he was gay to a customer during a tandem skydive in Long Island, New York. Mr. Zarda alleged Altitude Express had violated Title VII by discriminating against him on the basis of his sexual orientation. Mr. Zarda passed away in a skydiving accident in 2014, but [his estate carried on with the lawsuit](#) on his behalf. Shortly thereafter, the District Court ruled against Zarda’s Title VII claim. On appeal, the Second Circuit Court of Appeals [ruled in favor of Zarda](#), finding that sexual orientation discrimination is a valid basis for claiming a Title VII violation since sexual orientation discrimination is motivated, at least in part, by sex.<sup>2</sup> Altitude Express appealed the decision and asked the Supreme Court to grant review.



Don Zarda (left), Photo Credit: ACLU



Gerald Bostock (center), Photo Credit: Bob Andres/The Atlanta Journal-Constitution

Gerald Lynn Bostock filed his lawsuit against his former government employer, Clayton County, Georgia, in 2016. Mr. Bostock had worked for the County as a child welfare services coordinator. He alleged in his complaint that his sexual orientation and his participation in a gay softball league had been disparaged at work multiple times, and that the internal audit leading to his termination was merely a pretext for discrimination on the basis of him being gay. The lawsuit claimed the County had violated Title VII by discriminating against him on the basis of sexual orientation and sex stereotyping. The District Court ruled that Mr. Bostock’s case could not go forward based on previous applicable cases in Georgia.<sup>3</sup> Those cases held that sexual orientation discrimination is not a viable ground for claiming sex-based discrimination. After the Eleventh Circuit Court of Appeals agreed with the District Court’s decision in May 2018,<sup>4</sup> Mr. Bostock appealed the decision to the Supreme Court.

<sup>2</sup> *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112 (2d Cir. 2018), *cert. granted sub nom.* *Altitude Exp., Inc. v. Zarda*, 139 S. Ct. 1599, 203 L. Ed. 2d 754 (2019).

<sup>3</sup> *Bostock v. Clayton Cty.*, No. 1:16-CV-1460-ODE, 2017 WL 4456898, at \*2 (N.D. Ga. July 21, 2017), *aff’d sub nom.* *Bostock v. Clayton Cty. Bd. of Commissioners*, 723 F. App’x 964 (11th Cir. 2018), *cert. granted sub nom.* *Bostock v. Clayton Cty., Ga.*, 139 S. Ct. 1599, 203 L. Ed. 2d 754 (2019).

<sup>4</sup> *Bostock v. Clayton Cty. Bd. of Commissioners*, 723 F. App’x 964 (11th Cir. 2018), *cert. granted sub nom.* *Bostock v. Clayton Cty., Ga.*, 139 S. Ct. 1599, 203 L. Ed. 2d 754 (2019).



In April 2019, the Supreme Court announced it would hear both the *Zarda* and *Bostock* cases together to resolve the question of whether Title VII prohibits discrimination on the basis of sexual orientation. The employees ([Bostock](#) and [Zarda](#)) each filed briefs in June arguing that Title VII prohibits sexual orientation discrimination, both because sexual orientation is a sex-based classification and because sexual orientation discrimination is a form of sex-stereotyping. They argue sexual orientation is a sex-based classification because “one simply cannot consider an individual’s sexual orientation without first considering his sex.”<sup>5</sup> Similarly, they argue discrimination on the basis of sexual orientation is a form of sex-stereotyping under *Price Waterhouse* because an employer who acts on the basis of a belief that a woman cannot be attracted to another woman has acted based on a gender stereotype.

More than forty different interested parties submitted amicus briefs in support of the employees. Once again, these briefs came not only from LGBTQ+ advocacy groups, but also [the Muslim Bar Association](#), the [Lawyers’ Committee for Civil Rights Under Law](#), [Women CEOs](#), and the [AFL-CIO](#), to name a few. The states of [Illinois](#), [New York](#), [Colorado](#), [Massachusetts](#), and [seventeen others](#) filed an amicus brief in support of the employees highlighting how employment discrimination based on sexual orientation and transgender status harms those states and their residents. Higher rates of discrimination against LGBT people decreases access to employment and increases poverty rates, which in turn increases Medicaid and public assistance costs for states. These states rely on Title VII to protect their residents from workplace discrimination, and argue for the court to keep those protections in place. The [American Psychological Association](#), along with a number of other psychological and psychiatric associations, filed an amicus brief in support of the employees as well, arguing that stigmatization based on sexual orientation and gender identity are forms of sex-role stereotyping, and that sexual and gender minorities face significant, harmful stigma in the workplace.

The [employers argue](#) for a narrower reading of the law that excludes sexual orientation discrimination as a basis for a Title VII claim. They claim that the “original public meaning” of “sex” as used in Title VII did not include sexual orientation—only the “trait of being male or female.”<sup>6</sup> The employers also attack the arguments that discrimination based on sexual orientation is a form of sex-stereotyping.

Several religious organizations submitted amicus briefs in support of the employers. Groups such as [Faith and Freedom](#) and [Defend My Privacy](#) argued in briefs that the employees are impermissibly expanding Title VII’s scope beyond the text of the law. The [Foundation for Moral Law](#) (otherwise known as “FML”) quotes the framers of the Constitution to support its position that statutes like Title VII should be read narrowly and thus sex should not otherwise include sexual orientation or gender identity. FML insists there is “not a shred of evidence” that legislators were thinking about “homosexual. . . issues” when passing Title VII.

## Where do we go from here?

Oral arguments for all three cases will take place tomorrow starting at 11 AM Eastern. Transgender Law Center and the Center for Constitutional Rights have released a [Social Media Toolkit](#) for these arguments, with key dates and calls to action. Advocates are encouraged to elevate the voices of queer and trans people of color, and to highlight community resilience and resistance. Readers who are interested can also listen to recordings of oral arguments, which will be [posted by the Supreme Court](#) at the end of the week.



<sup>5</sup> Brief for Petitioner at 13, *Bostock v. Clayton Cty., Ga.*, filed, (Jun. 26, 2019) No. 17-1618.

<sup>6</sup> Brief for Petitioners, at 11, *Altitude Express, Inc. v. Zarda*, filed (Aug. 16, 2019) No. 17-1623.

Following oral arguments, the Justices will deliberate before the Court issues its decision. This could take up until the end of the Court's term in late June 2020. In the meantime, readers should watch for updates on the Trump Administration's various other attacks on the rights of LGBT people:

- The Department of Homeland Security's new [public charge rule](#) is set to take effect October 15, 2019, which is likely to discourage LGBT immigrant populations from accessing Medicaid, SNAP, and federally subsidized housing.
- The Department of Housing and Urban Development is expected to release a [new proposed rule](#) permitting homeless shelters that receive federal funding to design sex-based policies that "consider a range of factors in making such determinations [of sex], including . . . religious beliefs", essentially "[formaliz\[ing\] LGBTQ-exclusionary practices\[.\]](#)"
- States are responding to the Center for Medicare & Medicaid's new policy allowing states to implement work requirements for Medicaid enrollees. These requirements [harm LGBT people](#) who are disproportionately vulnerable to job insecurity due to discrimination and harassment.
- The Department of Health and Human Services is currently [processing more than one hundred thousand comments received](#) in response to a proposed rule amending the regulatory protections that transgender people currently enjoy in certain health care settings. If the proposed rule is finalized as written, legal challenges are sure to follow.

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