

Supreme Court justices cite bathroom concerns in debate over workplace protections for gay and transgender people

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When the nine members of the Supreme Court gathered this week to hear three blockbuster cases involving gay rights, the question before them was whether a provision of federal civil rights law, which bars workplace discrimination on the basis of sex, extends to gay and transgender workers.

But peppering the two hours of oral arguments Tuesday were questions focused on sex-specific bathrooms, locker rooms, dress codes, and even sports teams.

The queries weren't unique to one wing of the bench, but instead underscored that justices across the ideological divide were aware of how a ruling in favor of two gay men and a transgender woman challenging the legality of their firings could reverberate.

The "big issue right now raging the country is bathroom usage," Justice Sonia Sotomayor said.

Joining her was Chief Justice John Roberts, who asked, "If the objection of a transgender man transitioning to woman is that he should be allowed to use, he or she, should be allowed the use the women's bathroom, how do you analyze that?"

Justice Neil Gorsuch, who emerged from oral arguments as the pivotal vote, pressed lawyers representing Gerald Bostock and Donald Zarda, two gay men who argued they were fired because of their sexual orientation, and Aimee Stephens, a transgender funeral home director fired after announcing she was going to identify as a woman, about an applicable legal test.

"There are male and female bathrooms, there are dress codes that are otherwise innocuous. Most people would find them innocuous," Gorsuch said. "But the affected communities will not. And they will find harm."

Both Justices Samuel Alito and Ruth Bader Ginsburg — largely ideological opposites — wondered whether it would be a violation of Title IX of the Education Amendments Act of 1972, which prohibits schools that receive federal funding from discriminating on the basis of sex, if transgender women were barred from competing on a woman's college sports team.

"The justices are concerned about the practical effects of a ruling for the challengers," said Ilya Shapiro, a constitutional law scholar at the Cato Institute, a libertarian think tank. "If the challengers are successful in getting a court ruling that says Title VII has protections for gender identity, what does it mean for [sex-specific facilities], rather than if Congress were to pass a law with continuing exemptions. It's a different dynamic if you have a judicial decree."

The Supreme Court has been asked to wade into culture fights involving gay and transgender issues before, and their focus on bathrooms and showers this week suggests the justices are aware of the new questions that could arise if they extended Title VII of the Civil Rights Act's protections against workplace bias to transgender people.

“Let’s not avoid the difficult issue,” Sotomayor told David Cole, who argued on behalf of Stephens. “You have a transgender person who rightly is identifying as a woman and wants to use the women’s bathroom . . . But there are other women who are made uncomfortable, and not merely uncomfortable, but who would feel intruded upon if someone who still had male characteristics walked into their bathroom. That’s why we have different bathrooms. So the hard question is how do we deal with that?”

Kristen Waggoner, an attorney with the conservative Alliance Defending Freedom, said the attention paid by the justices to bathrooms, locker rooms, sports teams, and dress codes indicated they recognize the implications of ruling “on the basis of sex” includes transgender status. Alliance Defending Freedom represented R.G. and G.R. Harris Funeral Homes, where Stephens worked, at the Supreme Court.

“The repercussions will not only impact employment, it will impact several other segments of our society,” she said. “It will have a profound impact on the workplace, it will have a profound impact on our schools, it will have a profound impact on shelters, dorm halls, locker rooms, bathrooms.”

But Kris Hayashi, executive director of the Transgender Law Center, said the rhetoric used during oral arguments about the effects of a ruling in favor of gay and transgender workers was an attempt “to make these cases about something they are not.”

“Sex discrimination laws already cover access to sex-separate facilities. These cases are about employment discrimination,” he said. “We believe the justices will see through the defendants threadbare arguments for what they really are: An attempt to use fear to force transgender people out of public life by taking away legal protections that give us the freedom to sustain ourselves and our families.”

The Supreme Court has been confronted directly with the issue of bathroom usage for transgender people in past cases, but has not ruled in the disputes.

In Spring 2017, the justices were set to hear oral arguments in a case involving Gavin Grimm, a transgender male student at Gloucester High School in Virginia who said his school district’s bathroom policy violated the Constitution and Title IX. While the statute bars discrimination “on the basis of sex,” it permits separate bathrooms, locker rooms, and shower facilities based on sex.

The bathroom policy, adopted in 2014, required students “with gender identity issues” to use “an alternative appropriate privacy facility.” Use of male and female facilities, including restrooms and locker rooms, were limited to corresponding biological genders.

In February 2017, though, weeks before the case was to be argued, the Trump administration reversed guidance issued by the Obama administration that said Title IX allows transgender students to use restrooms and locker rooms that aligned with their gender identities.

In light of that retraction, the Supreme Court sent Grimm’s case back to the lower court.

Then, in May 2018, the high court declined to take up another legal challenge to a policy adopted by the Boyertown Area School District in Pennsylvania that allows some transgender students to use facilities based on their gender identifies rather than biological sex. In rejecting the case, the school district's policy remained intact.

The challenge was brought by a student, identified as Joel Doe and represented by Alliance Defending Freedom, who learned of the policy adopted in the 2016-2017 school year when he encountered a female student wearing only a bra while changing in the men's locker room at his school.

While the justices spent considerable time raising questions about restrooms, dress codes, and sports teams, Cole and Pamela Karlan, a Stanford Law professor who represented Bostock and Zarda, tried to steer the justices back toward employment discrimination, noting that sex-specific facilities can be challenged regardless of how the Supreme Court rules.

“Even if you rule against us, that case can arise because it is a sex-specific rule, and anyone who is affected by a sex-specific rule can argue that it discriminates against them because a reasonable person in their shoes would experience a significant harm,” Cole, the ACLU's national legal director, said.

Chase Strangio, deputy director for Transgender Justice with the ACLU's LGBT & HIV Project, reiterated that Stephens' firing was not because of dress codes, sports teams, or bathrooms, but because she is transgender.

“The questions before the court concern whether firing someone because they are LGBTQ is prohibited discrimination because of the person's sex under Title VII. That is a wholly different question from the questions regarding sex-specific rules in the workplaces and beyond, which are always ‘because of sex’ and whose lawfulness implicate different statutory questions,” he said. “The justices may one day have to answer those latter sets of questions but they are not before them in these three cases.”