The Shower’s Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part VI

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I. THE SHOWER’S WONDER WEAPONIZED

If, at times, gender and sexual confusion operated deceptively lightheartedly during oral arguments in Gerald Bostock and Donald Zarda’s cases, it didn’t lack for prospects of being weaponized against the gay sex-discrimination positions in them. Here it is being turned to advantage as part of a challenge to the claim that anti-gay discrimination is sex discrimination prohibited by Title VII. The official transcript of oral arguments in these cases records a distinctively intense—and important—exchange between Justice Samuel Alito and Pamela Karlan. ¹


At this moment, Justice Alito is conjuring the social figure of a same-sex attracted person whose biological sex as male or female is unknown. In Justice Alito’s estimation, this person embodies the reasons that Karlan’s argument must be rejected.\(^3\) The conceptual point Justice Alito is making by pointing to this homosexual person of unknown sex is that sexuality and sex are wholly independent concepts, and that sexual orientation discrimination cannot, therefore, be equated with sex discrimination under Title VII. In articulating this position, Justice Alito advances the suggestion that, since it’s imaginable that an employer could engage in anti-homosexual discrimination without ever knowing the sex of the homosexual person he’s discriminating against, because it’s unclear in some hypothetical instance whether the homosexual being discriminated against is a he or a she, it cannot be said that anti-homosexual discrimination is categorically “because of sex.” This idea falls apart even as Justice Alito is offering it, in view of the fact that same-sex sexual attraction, as Justice Alito is imagining it, is itself sex-based and sex-dependent—“because of sex” in that respect—even if it isn’t at all certain in which of binary sex’s directions, male or female, it is aimed.\(^4\) Ironically, given how the argument here proceeds from a space of category blurring, bisexuality—as a sexual orientation that includes both cross-sex and same-sex attractions—is nowhere in sight.\(^5\)

Significant for present purposes is not so much how Justice Alito’s argument interfaces with Title VII sex discrimination doctrine, nor, for that

\[^3\] See id. Arguments along those lines appeared earlier. Id. at 8–9 (statement of Chief Justice John Roberts); id. at 29–30 (statement of Justice Samuel Alito); id. at 45–47 (statements of Justice Neil Gorsuch and Jeffrey Harris); id. at 51–52 (statement of Justice Alito); see also infra note 4. It may be worth considering tracing Justice Alito’s thinking on this point with his thinking in \textit{EEOC v. Abercrombie & Fitch Stores, Inc.}, 135 S. Ct. 2028, 2035 (2015) (Alito, J., concurring in the judgment) (“I would hold that an employer cannot be held liable for taking an adverse action because of an employee’s religious practice unless the employer knows that the employee engages in the practice for a religious reason.”). Thanks to Martha Chamallas for pointing out the connection.

\[^4\] This point was precisely expressed by Justice Gorsuch in the oral arguments in \textit{Bostock} this way:

> And I think the response from the other side is: But the statute has a more generous causal -- . . . formulation, a but-for causal formulation, so perhaps you’re right that, at some level, sexual orientation is surely in -- in play here. But isn’t sex also in play here because of the change of the first variable?

Bostock Transcript, \textit{supra} note 2, at 45–46; see also id. at 60 (“[W]e’ve made very clear there’s no search for sole cause in Title VII -- part of that is you fired the person because he was a man.”) (statement of Justice Elena Kagan).

matter, whether it is right or wrong (though it’s wrong), than how it posits a sex-binaristic but sex-uncertain homosexually inclined person as the figure who can be looked to in order to dispositively resolve the gay sex-discrimination cases. Here, that sex uncertainty, which actually, as will be explained, relates to an underlying gender and sexual confusion, is the centerpiece of Justice Alito’s attack. This is the exchange:

JUSTICE ALITO: But what if the decision maker makes a decision based on sexual orientation but does not know the biological sex of the person involved?

MS. KARLAN: Well, there is no reported case that does that. And I --

JUSTICE ALITO: All right. . . But what if it -- . . . [w]hat if it happened? We have had a lot of hypotheticals of things that may or may not have happened.

What if that happens? Is that discrimination on the basis of sex where the decision maker doesn’t even know the person’s sex?

MS. KARLAN: And -- and how do they know the person’s sexual orientation?

JUSTICE ALITO: Because somebody who interviewed the candidates tells them that.

MS. KARLAN: And they are unable to tell anything about the person’s sex?

JUSTICE ALITO: No.

MS. KARLAN: So this is Saturday Night Live Pat, as -- as an example, right?

JUSTICE ALITO: Well, I’m not familiar with that.

MS. KARLAN: Okay.

JUSTICE ALITO: But --

MS. KARLAN: Which is the person named Pat, and you can never tell whether Pat is a man or a woman.

I mean, theoretically that person might be out there. But here is the key --

JUSTICE ALITO: Theoretically what?

MS. KARLAN: Theoretically that person might be out there. But here is the key: The -- the cases that are brought are almost all brought by somebody who
says my employer knew who I was and fired me because I was a man or fired me because I was a woman.

Somebody who comes in and says I’m not going to tell you what my sex is, but, believe me, I was fired for my sexual orientation, that person will lose.

JUSTICE ALITO: Well, if that’s the case, then I think your whole argument collapses because sexual orientation then is a different thing from sex.

MS. KARLAN: Of course it is. No one has claimed that sexual orientation is the same thing as sex. What we are saying is when somebody is fired –

JUSTICE ALITO: Well, let me amend it. Your argument is that sex -- discrimination based on sexual orientation necessarily entails discrimination based on sex.

But if it’s the case that there would be no liability in the situation where the decision maker has no knowledge of sex, then that can’t possibly be true.

MS. KARLAN: If there was that case, it might be the rare case in which sexual orientation discrimination is not a subset of sex.

But in the case where the person knows the sex of the person that they’re firing or refusing to hire, and knows the sex of the people to whom that person is attracted, that is sex discrimination, pure and simple.6

Past Karlan’s attempt at levity—and its painful reminder that, not so long ago, many people found Julia Sweeney’s performance as “Pat” on Saturday Night Live very funny—was the eminently serious effort by Karlan to reach for, and to identify, a concrete social personage who, while perhaps unfamiliar from the caselaw, would nevertheless fit the bill that Justice Alito had in mind. How could Karlan know Justice Alito would not know who “Pat” was?7

What’s striking about this exchange is that it is precisely uncertainty about where a homosexual body sits on which side of what Justice Alito takes to be the two-sided line of sex difference that packs the conceptual punch it is meant to deliver. It is exactly the inability here to say just “who’s who and what’s what” with someone like Saturday Night Live “Pat”—is this person a lesbian woman or a gay man?—that serves as the foundation for saying, along the lines

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of Justice Alito’s thought, that if “Pat” were discriminated against for having a homosexual sexual orientation nobody could then say “Pat” was discriminated against because of his or her sex.\(^8\) Modestly, it seems safe to say not that this exchange involves a “‘wonder’ or epistemic panic,” but that it works by leveraging a “‘wonder’ or epistemic” problematic that is being formulated as the ratio decidendi for the case.\(^9\) Sex uncertainty—gender confusion in homosexuality in this sense—disproves Karlan’s case.

However straightforward Justice Alito’s hypothesized thinking may initially seem, in blurring the lines between lesbians and gay men by means of a figure like Saturday Night Live “Pat,” the Justice’s remarks raise the prospect that recovery from the kind of head-spinning he reported experiencing upon encountering all the comparisons in the parties’ briefs may be slow-going.\(^10\) For, in imagining in his own way, or in searching for, a “Pat”-like figure who defies easy binary sex classification, Justice Alito’s line of questioning doesn’t simply strategically blur the line between lesbians and gay men. The questioning frustrates that line in a more thoroughgoing sense. This is because “Pat” exactly offers no clear same-sex sexual identity reference point to build on to be able to know whether “Pat” is lesbian or gay. In saying this, though it may take a moment to recognize it, Justice Alito’s provocation, plainly aimed at sharpening and shoring up the sexual orientation/sex divide (to say sexual orientation discrimination is not sex discrimination), weakened and even effectively eliminated the distinction between lesbians and gay men and between homosexual and trans identities. “Pat,” after all, in today’s terms is much more likely to be identified first and foremost as gender non-binary, or maybe genderfluid or genderqueer, hence as someone who might well identify and/or be identified as trans, not—certainly not necessarily—as either a lesbian woman or a gay man.\(^11\) This is a reminder now of what many people couldn’t quite get with back in the day: the full humanity, dignity, and equal worth and respect that someone like “Pat” is entitled to—not themselves any properly normative source of amusement. Living outside conventional sex-binaristic gender and sexual boxes and not just surviving but flourishing in one’s own way is a

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\(^{9}\) On the expression “‘wonder’ or epistemic panic,” see id. For some discussion of it, see Spindelman, The Shower’s Return, Part V, supra note 1, at 144–48.

\(^{10}\) See Spindelman, The Shower’s Return, Part V, supra note 1, at 148–49 (discussing Justice Alito’s “frank description of his own experiences encountering the various arguments being made by the parties to the gay sex-discrimination cases”); see also id. at 149 n.59 (discussing work suggesting that the experience of gender confusion in this setting can be understood to be a function of what it is to experience the sublime).

\(^{11}\) Not to say they never would or might, recalling the “strategic” deployments of various labels. See, e.g., Dean Spade, Mutilating Gender, in The Transgender Studies Reader 315, 322 (Susan Stryker & Stephen Whittle eds., 2006) (“I recognize that the use of any word for myself—lesbian, transperson, transgender butch, boy, mister, FTM fag, butch—has always been/will always be strategic”) (italics in original); see also supra note 7.
testament to the power and beautiful variations of humankind and how human beings can live in—and dream—the world.

Importantly, the actual dynamics of Justice Alito’s maneuvering pushed Karlan (perhaps, ironically, partly because of her own invocation of Saturday Night Live “Pat”) onto terrain that she, like David Cole, had carefully avoided treading when making their affirmative cases. Both Bostock and Zarda’s cases, and Aimee Stephens’s, as well, were organized around arguments that placed sex-binaristic sexual orientation and sex-binaristic trans identities at center stage. The basic, pro-LGBT litigation positions in all the LGBT Title VII sex discrimination cases effectively sidelined nonbinary, genderfluid, and genderqueer people. In Justice Alito’s exchange with Karlan, they returned as figures whose role was to help crystallize why the anti-gay sex-discrimination claim should fail.

Among the items importantly illustrated by the dynamics of the Justice Alito-Pamela Karlan exchange is the shared sense, and shared in Stephens’s case, too, that the parties to the litigation functionally agreed that “sex” was and should fundamentally remain organized around a binaristic understanding—an understanding that, critically viewed, participates in the legal construction, legitimation, normalization, and even the naturalization, of male-female sex difference. This understanding of “sex” discrimination requires individuals—cis, straight, lesbian, gay, trans—to identify themselves in Title VII sex discrimination litigation as being male or female, hence at some point as being on one or the other side of the sex-difference divide, if they are to benefit from the safe-harbors of this law. Seen this way, the pro-LGBT claims in the Title VII sex discrimination cases are very important and socially and personally meaningful, but they are ultimately incrementalist law reform efforts that, on their own, do not without more open a radical channel calling sex-binarism as such into doubt. Not even Cole’s position in Stephens’s case did. Instead, it made a provisionally conservative case organized around sex discrimination being understood as discrimination involving the sex one is “assigned at birth.” Karlan’s willingness to bring up Saturday Night Live “Pat,” and to

12 It wasn’t only on the Justices that the Supreme Court, institutionally speaking, was, and in many ways was left to be, a TLIC (a trans-low-information Court). The story here is complicated. Important dimensions of it are traced in Ezra Ishmael Young, What the Supreme Court Could Have Heard in R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens, 11 CALIF. L. REV. ONLINE 9, 11 (2020) (describing the argument “that progressive litigators and theorists also bear some blame” for “why judges ignore the text and construe sex discrimination laws not to protect transgender people”).


make in part, a casual, but not meanspirited, joke of them, in other terms revealed a bid to press this non-binary figure back to the margins of the case and hold them there.

These descriptions of litigation strategy aside, if the differentiations between gay and trans identities, vital for many people including inside the LGBT communities, are taken as readily defeated in the ways that Justice Alito’s remarks can be taken to suggest, then the distinction between the gay and trans shower scenes is subject to being defeated, too. If this is right, it reopens the analytic supplied by Kendall Thomas’s “Shower/Closet” as a tool by which to understand a few final, but still vital, aspects of the case.

Stated overarchingly and programmatically, the trans/gay shower scene is, culturally speaking, the threat that it is because of its capacity to make people, including those accustomed and attached to traditional ways of thinking about gender and sexuality, wonder both about others—and themselves—in ways that can be or anyway feel radical, revolutionary, and crushing.

Consider in this light John Bursch’s characterization of the implications that he thinks necessarily and inevitably follow from judicial recognition of trans sex-discrimination rights. He begins by telling the Supreme Court during his oral argument that: “[T]he Sixth Circuit [in Aimee Stephens’s case] said that sex itself is a stereotype.”15 From that point, Bursch’s thinking rapidly escalates to a highly panicky pitch:

And Mr. Cole agrees with that 100 percent. Everything that he said this morning, sex itself is a stereotype. You can never treat a man who identifies as a woman differently because to do that is sex discrimination. When you do that, there is no sex discrimination standard under Title VII anymore. It’s been completely blown up.16

In saying this, Bursch is formally referring to the “sex discrimination standard under Title VII.”17 That’s what he is technically saying has “been completely blown up.”18 But his anchor for that standard—the meaning of “sex” under Title

Harris Funeral Homes Transcript] (“We are accepting the narrowest -- for purposes of this case, the narrowest definition of sex and -- and arguing that you can’t understand what Harris Homes did here without it treating her differently because of her sex assigned at birth.”); accord Young, supra note 12, at 11, 28–31 (noting and critiquing the litigation strategy).

15 Harris Funeral Homes Transcript, supra note 14, at 44.
16 Id. at 44–45 (emphasis added).
17 Id. at 44.
18 Id. at 45. Bursch made the same basic point earlier on in response to a question from Justice Ruth Bader Ginsburg: “All of the distinctions between men and women are gone forever.” Id. at 38. Thinking like this has at times been placed at the feet of the sex-equality radicalism within second-wave feminism. See RYAN T. ANDERSON, WHEN HARRY BECAME SALLY: RESPONDING TO THE TRANSGENDER MOVEMENT 150–52 (2018) (engaging SHULAMITH FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION (1970), as the “logical (if dystopian) conclusion” of Simone de Beauvoir’s ideas in SIMONE
VII—itself traces back through the “original public meaning” of “sex” under Title VII to sex difference understood as an objective, biological, material fact.19 Bursch’s position had seemed to be that this fact is a rock, an account of sex’s fixed and inalterable nature. Here, however, it stands exposed as nothing more than an incredibly dense, foundational cultural reference point—something that can be, and is being, though it should absolutely not be being, “blown up.”20 And “blown up” by pro-trans sex-discrimination arguments that function as a type of social or cultural dynamite.21 Follow the Sixth Circuit’s lead, he’s telling the Court, and the known world of sex-difference will be “completely” destroyed, cease to exist. What happens in that world? Who’s who and what’s what in it after that cataclysmic event?22

The purportedly clarifying example of this dystopian situation is in a primal scene that involves the violences attendant upon sex difference’s destruction. Significantly, the very next sentence after Bursch says that the Sixth Circuit’s and Cole’s pro-trans positions have “completely blown [sex] up” picks up like this: “One other point on the restroom scenario. . . .”23 And then he’s off to the races, talking about the shower and locker room scene.

Far less feverish, hence less irredeemably panicked, are the still-stirred-up thoughts that Justice Neil Gorsuch shared earlier during the oral arguments in Stephens’s case. An exchange with David Cole that was widely reported in press accounts of the oral arguments begins with Justice Gorsuch remarking how “drastic a change in this country” it would be for the Supreme Court to alter the rules about “bathrooms in every place of employment and dress codes in every place of employment.”24 After some back-and-forth, Justice Gorsuch invites Cole to “assume for the moment” that he’s “with [Cole] on the textual evidence.

DE BEAUVIOR, THE SECOND SEX (1949), “about the oppressiveness of the female body,” and describing Firestone’s work’s aim as not just “eliminating . . . ‘male privilege’ but any distinction at all between the sexes,” and then quoting Firestone’s work, in part, to the effect that “the end goal of feminist revolution must be . . . not just the elimination of male privilege but of the sex distinction itself: genital differences between human beings would no longer matter culturally”) (emphasis in original). For additional discussion of the instability of “sex” as a category, see Spindelman, The Shower’s Return, Part III, supra note 1, at 115 n.53.

19 The precise language is “original public and legal meaning.” Harris Funeral Homes Transcript, supra note 14, at 30.
20 Id. at 45 (“blown up”).
21 Id. (“blown up”).
22 The language of “[w]ho’s who and what’s what” here tracks language found in Thomas, supra note 8, at 81.
23 Id. at 45.
It’s close, okay? We’re not talking about extra-textual stuff. We’re -- we’re talking about the text. It’s close. The judge finds it very close.”

Justice Gorsuch continues:

At the end of the day, should he or she take into consideration the massive social upheaval that would be entailed in such a decision, and the possibility that -- that Congress didn’t think about it --

... and that -- that is more effective -- more appropriate a legislative rather than a judicial function? That’s it. It’s a question of judicial modesty.26

Almost perfectly, the answer Justice Gorsuch reaches on his own question, found in judicial role and function—“[i]t’s a question of judicial modesty”—is an expression that is classically culturally coded as a question of a feminine virtue.27 In this setting, “judicial modesty” is the feminine virtue that Lady Justice properly possesses.28 Knowing that Justice Gorsuch is talking about himself at this moment, it is interesting that he frames the inquiry in the form of what a judge, “he or she,” is supposed to do looking at things the way that he does. Ostensibly a generous reference to the female Justices on the Court, it doesn’t quite work. None of those Justices—even recognizing Justice Elena Kagan’s aphoristic “we’re all textualists now”—precisely shared his commitments to his preferred method of statutory interpretation and his concerns about “massive social upheaval” in the case.29

Alternatively, of course, the observations may mark how easy it is for a male Justice’s identifications to retrace the male-female sex binary and then move seamlessly back and forth between “he or she” in the context of this case, particularly after Cole had expressly invited Justice Gorsuch, earlier on, to imagine a rule asking “you or me to dress as a woman,” which Cole affirmed.


26 Id. at 26–27. This wasn’t the first time during the argument that Justice Gorsuch mentioned modesty. See id. at 25 (“Mr. Cole, the question is a matter of the judicial role and modesty in interpreting statutes that are old.”).

27 For the quoted language, see id. at 27 (“It’s a question of judicial modesty.”). For discussion that includes the answer Justice Gorsuch provides to his own question, see id. at 25–27.


29 The language of “massive social upheaval” is from Harris Funeral Homes Transcript, supra note 14, at 26. For Justice Kagan’s observation that “we’re all textualists now,” see Harvard Law School, The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dPfTezJQtg&feature=emb_title (quoted language arrives at 8:29). See, e.g., Margaret Talbot, Is the Supreme Court’s Fate in Elena Kagan’s Hands?, NEW YORKER (Nov. 11, 2019), https://www.newyorker.com/magazine /2019/11/18/is-the-supreme-courts-fate-in-elena-kagans-hands [https://perma.cc/XA6X-GG7Z] (“In the past few years, she has repeatedly declared an intellectual allegiance to textualism when it comes to interpreting statutes. ‘We are all textualists now,’ she said in 2015, at Harvard Law School. ‘The center of gravity has moved.’”).
both of them “would consider . . . a significant harm.” Still, the feminine identification of the proper modesty a judge is supposed to show when interpreting a federal statute is readily returned to the feminine virtues threatened in the shower scene. The problem with trans sex-discrimination rights, on this level, is that they threaten feminine “modesty” and virtue that ought to be preserved. If so, it looks like Bursch’s argument may have reached home at this moment.

Against that prospect is the considerable distance between Justice Gorsuch’s talk of “massive social upheaval” and Bursch’s impassioned rhetoric of “completely blow[ing] up.” All the important action here seems likely to involve how Justice Gorsuch struggles in a wrestle that moves between the logics of feminine modesty associated with the Court’s institutional authority and the feminine modesty of the shower scene, which implicates Lady Justice herself, but in ways that may not easily be pinned down. Is Lady Justice in the shower the paragon of cis-feminine virtue who must be protected from an invading force? Or is she, in truth, with that famous sword of hers, the trans figure who must be stopped? Might she be both figures at once? A sign of the Court’s capacity to inflict injury that makes it an imaginary victim and perpetrator both? What’s a Member of the Supreme Court to do? Who can tell at this point who’s who here and what’s what?

Seen in terms of some of these deeper and more far-reaching resonances, Cole’s initial reply to Justice Gorsuch’s fears is only partially responsive. The “federal courts of appeals,” Cole tells Justice Gorsuch, “have been recognizing that discrimination against transgender people is sex discrimination for 20 years,” and “[t]here’s been no upheaval,” much less any “massive social upheaval.” As an account of the social world, including the world of the American workplace governed by a developed and developing body of sex discrimination law, Cole is right: Trans sex-discrimination rights have in no way involved a “massive social upheaval.” It is vital to get and stay very clear on that point.

But if, as seems possible, Justice Gorsuch’s concerns didn’t singularly run along the plane of logic and reason that Cole imagined, if, as seems possible, Justice Gorsuch was speaking from and toward rumblings operating on other levels—levels of cultural fantasy, of cultural myth—on which he, like others,

30 Harris Funeral Homes Transcript, supra note 14, at 10; see also id. at 16 (“CHIEF JUSTICE ROBERTS: But if the claim is it discriminates because I am a transgender individual, that’s not your claim?”).
31 Id. at 26–27 (statement of Justice Gorsuch); id. at 45 (statement of John Bursch).
32 This is not to forget Lady Justice’s blindfold, though its implications for and in the scene may for the moment be bracketed.
33 The language of “who’s who here and what’s what” tracks language in Thomas, supra note 8, at 81.
34 The first quote is from Harris Funeral Homes Transcript, supra note 12, at 27; the second, id. at 26.
35 Id.
may have felt a sense that male-female sex difference and the social ways of being it has long organized are implicated by Stephens’s case and may be altered by a pro-trans decision in it in ways he couldn’t fully predict—if that’s where Justice Gorsuch was coming from when expressing his concerns about “massive social upheaval,” then Cole’s initial answer, savvy as it was, did not meet its mark.

Cole, seeming generally aware of this, offers a follow-up. Turning away from all the ways that trans women had been holding and would again hold the Supreme Court’s attention, he showcases for the Court that “there are transgender male lawyers in this courtroom following the male dress code and going to the men’s room and the . . . Court’s dress code and sex-segregated restrooms have not fallen.” After this answer, Justice Gorsuch replies sharply and in a way that indicates Cole’s message has not gotten all the way through, and that it does not register to Justice Gorsuch as responsive. And so Justice Gorsuch testily asks, Does Cole want to answer the question he was being asked about the “drastic” change a ruling for his client would produce—“or not?”

Much as anything else, in re-posing this question Justice Gorsuch indicates he has not resolved and released the sense of unease that he previously expressed—literally, a sense of wonder about what the case involved and what a decision for Stephens would mean for the nation and its people. Needless to say, that wonder may have been a wonder in part about how a pro-trans ruling would impact trans women, and in part about how it might be related to a pro-gay ruling in Bostock and Zarda’s cases. But perhaps only in part.

Another structural possibility that must be considered is whether and how a Justice on a trans-low-information Court might easily come away from an encounter like this one wondering not, or not only, about the effects of a pro-trans and/or a pro-gay decision on others, “out there” in the country, in terms of what the nation is ready for, but also on himself, knowing or sensing that a pro-trans ruling, particularly combined with a pro-gay ruling in the other cases, might require him, either immediately or with time, “to come to terms with the fragile and fluid nature of his own sexual and gender identities.” Happily, “fragile and fluid” is not the same as nonexistent. This is not about a dissolution into nothingness. And that—not nothingness—may prove to be just enough for a momentarily perturbed sexual and gender identity to bounce back with resilience to produce a decision grounded in conventional reasons about statutory interpretation and nothing else.

36 Id.
37 Id. at 27.
38 Id. at 23–24 (“And I guess I -- I’d just like you to have a chance to respond to Judge Lynch in his thoughtful dissent in which he lamented everything you have before us, but suggested that something as drastic a change in this country as bathrooms in every place of employment and dress codes in every place of employment that are otherwise gender neutral would be change, that that - - that that’s an essentially legislative decision.”); id. at 28 (“or not”) (emphasis added).
39 Thomas, supra note 8, at 81.
Here, then, is a wonder about the kind of wonder that may have been afoot at the Supreme Court: Might it have only been Justice Gorsuch who experienced it this way in that courtroom? Going into deliberations after oral arguments, Justice Gorsuch had an active sense that the trans sex discrimination case—and to the extent he thought it tied to, or even on some level the same thing as, the gay sex discrimination cases, possibly all the Title VII sex discrimination cases—involved something portentous, maybe ineffably portentous, something far in excess of what is comfortably within the reach of a conservative Supreme Court Justice’s starting-point sense of how the Court is supposed to move: tentatively, incrementally, surefootedly from “molar to molecular motions,” not in large, bold, pathmarking leaps.40

The imaginary shower scene that, in various ways, was mobilized against pro-LGBT sex-discrimination positions in the cases is unquestionably capable of inspiring a “wonder’ or epistemic panic” that shakes traditional sexual and gender differences to their foundations, along the lines that Bursch and Justice Alito and Justice Gorsuch most clearly gave different kinds of expression.41 But a majority of the Supreme Court need not achieve the level of a full-on panic—or crisis—in order for a number of Justices, even pro-LGBT-inclined Justices, to feel the pull of the cultural forces that the shower’s return organizes.

This could lead the Court from pro-LGBT positions, as Bursch and Jeffrey Harris hoped, or, on reflection, having processed them thoroughly at the level of reason, it could push the Court away from the forms of sex-based and discriminatory thinking the shower scene reflects, hence toward pro-LGBT outcomes in the cases. Quite apart from the Supreme Court’s formal disposition of Gerald Bostock’s, Donald Zarda’s, and Aimee Stephens’s Title VII sex discrimination cases, the litigation they involved at the Court confirms that the shower, itself still related to the closet, still has deep reserves of cultural resonance that may set the conditions under which LGBT persons can be themselves as who they are in the public world at work. Elite legal audiences who pride themselves on their rule-of-law commitments to logic and reason are not entirely immune to the gravitational pull of the shower/closet as a cultural symbol that can anchor traditionally sex-binaristic ways of living and being-in-the-world.

What’s more, as the struggles for LGBT rights go on, the enduring lesson of the LGBT Title VII sex discrimination cases is that old cultural forms like the shower, which may have seemed to have been dead and gone, relegated to the ash heap of history, have an uncanny way of being given new life to carry on. They are among the truly dangerous monsters that the LGBT communities and those committed to their dignity, their equality, and their rights, must confront and do battle with, as evanescent and as trickstery as they are. The full, wide future of LGBT freedom is thus through transphobic, sexist, and

40 The quoted language comes from S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (“molar to molecular motions”).
41 Thomas, supra note 8, at 81.
homophobic fantasies about trans women and gay men in showers with cis-heterosexuals. Those fantasies, whatever their guises, must be confronted, not avoided. This is hard work that must be undertaken inside and outside courtrooms in ways that are big and small, and it must be pursued, when it can be, “[e]very single day, relentlessly.” Until the cultural power of these forms to deny people the freedom they deserve—whenever that is—is no more.

42 The same holds for other forms of freedom—perhaps not yet socially imaginable—that might likewise be regulated by means of logics like those of the shower scene.

43 The quote comes from Chase Strangio’s moving remembrance of Lorena Borjas. Situated in fuller context, the quote reads:

On March 30 at 5:22 a.m., alone in a hospital bed in Coney Island, Lorena Borjas—the mother, guardian, hero and healer of the transgender community in Jackson Heights, Queens—died of complications related to covid-19.

Borjas, 59, was a relentless advocate who seemed to work 24 hours a day.

[S]he opened her home to those who had nowhere to go and hosted events. Her smile, infectious laugh and overall connective presence calmed so much collective trauma. She built countless systems of mutual aid that helped hundreds of people over the past 30 years.

[Lorena] Borjas fought for others even as she struggled to update her personal documents to accurately reflect her female gender, faced deportation or couldn’t access the health care that she needed. She fought for others every day even when she too contended with the precarity of a life on the edge of so many systemic barriers to survival. Even from her hospital bed — as she created an emergency fund for members of the trans community affected by covid-19 — she continued to teach us that we have to look out for each other, which means inconveniencing ourselves to make space for others to thrive.

This current crisis has exposed the many injustices in our health-care and economic systems. Borjas died before she could build the just world she envisioned — a world that would have taken better care of her and those she loved. But she worked every day to look after her community while relentlessly demanding that governmental and nonprofit institutions step up.

Now she is gone, so we must take up that work. Every single day, relentlessly.