

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

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I. THE SHOWER TODAY: PRELIMINARIES¹

Whatever their outcomes, the LGBT Title VII sex discrimination cases have once again broken new legal ground. For the first time ever, the Supreme Court has directly taken up, both in the same Term and on the same day, multiple cases involving different aspects of the rights of LGBT-identified persons. Few seem to doubt that were Justice Anthony M. Kennedy still an Associate Justice on the Supreme Court, the LGBT Title VII sex discrimination cases would be decided in step with the pro-lesbian and pro-gay equality jurisprudence he authored for the Court, and thus featured as cases involving concrete expressions of the high principles of equality, dignity, autonomy, and respect that his earlier decisions both announced and vindicated. Justice Kennedy's departure from the Court leaves it a relatively more open question whether LGBT rights will be secured under Title VII sex discrimination law at all.

Three cases involving LGBT sex discrimination claims are pending before the Supreme Court. Two, consolidated, involve gay men—Donald Zarda, now deceased, and Gerald Lynn Bostock—who sued former employers for sexual orientation discrimination said to be prohibited by Title VII's sex discrimination

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¹ Part I of this work appears as Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part I*, 81 OHIO ST. L.J. ONLINE 81 (2020).

ban.² The third case involves the suit by a trans woman—Aimee Stephens, now also, sadly, deceased—against her former employer, R.G. & G.R. Harris Funeral Homes, Inc., asserting that she suffered anti-trans discrimination barred as sex discrimination under Title VII.³

These cases moved along two separate tracks at the Supreme Court. One involves whether sexuality-based discrimination is sex discrimination.⁴ The other is about whether trans-based discrimination is.⁵ On different sides of the cases and in different ways, the issue of Title VII's meaning for lesbian women, gay men, and trans people, while in some sense formally distinct, has been notably linked.⁶ This linkage surfaces in arguments about how to interpret Title VII as a statute and how to read relevant Title VII caselaw. But the cases are also importantly connected rhetorically and politically. As the cases, interlocked, proceeded down their ostensibly separate tracks, many pro-LGBT and anti-LGBT forces have been hoping the cases would, respectively, stand or fall together.

Vital as these interconnections are, they imply no symmetries of significance. The linkages between the cases are forged in a fashion that places a distinctively heavy premium on the trans Title VII sex discrimination case. While anti-trans discrimination has been recognized as sex discrimination under Title VII for many years now, in opinions from different federal appellate jurisdictions joined by both conservative and liberal judges, the trans sex-discrimination case before the

² *Bostock v. Clayton Cty.*, 139 S. Ct. 1599, 1599 (2019) (mem.) (consolidating the case with *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2018)); *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 F. App'x 964, 964 (11th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 100 (2d Cir. 2018) (en banc), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.).

³ *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 566 (6th Cir. 2018), *cert. granted in part*, 139 S. Ct. 1599 (2019) (mem.). Among the tributes remembering Aimee Stephens, Dee Farmer's stands out. Press Release, Nat'l Ctr. for Lesbian Rights, Dee Farmer, the First Transgender Plaintiff in a Supreme Court Case, Mourns the Passing of Aimee Stephens (May 15, 2020), <http://www.nclrights.org/press-room/press-release/dee-farmer-the-first-transgender-plaintiff-in-a-supreme-court-case-mourns-the-passing-of-aimee-stephens/> [<https://perma.cc/2SFM-7466>] ("I am saddened by the passing of Aimee Stephens, my sister in faith and love. Yet my heart is filled with warmth knowing that her voice will continue to be heard through her case in the Supreme Court. May this fact comfort us all."); *see also* Aimee Ortiz, *Aimee Stephens, Plaintiff in Transgender Case, Dies at 59*, N.Y. TIMES (May 12, 2020), <https://www.nytimes.com/2020/05/12/us/aimee-stephens-supreme-court-dead.html> [<https://perma.cc/2NZ9-M9RK>].

⁴ *Altitude Express Inc. v. Zarda*, 139 S. Ct. 1599, 1599 (2019); *Bostock*, 139 S. Ct. at 1599.

⁵ *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599, 1599 (2019) (mem.).

⁶ In this respect, the "epistemic contract of bisexual erasure" persists. *See generally* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000). Practically, it may have widened. *See* Spindelman, *supra* note 1, at 81 n.1.

Supreme Court is poised to be the first such case the Supreme Court will decide in the era of its own pro-LGBT rights jurisprudence.⁷

Unfortunately, oral arguments in the case demonstrated it is slated to be settled by what might be described as a *TLIC*: a trans-low-information Court.⁸ This means the Supreme Court may be primed to think the trans sex-discrimination case, lacking secure grounding in a distinctively pro-trans Supreme Court jurisprudence, involves the larger jurisprudential leap for it to make compared to the gay sex-discrimination cases, despite both how easily the trans sex-discrimination claim is dispatched under established Title VII rules and how much more solidly grounded it is in lower court caselaw than the gay sex-discrimination claims and so easier to approve in that respect.⁹ The Supreme Court may deliver pro-trans and pro-gay decisions, but not without challenge, including reservations behind a majoritarian front announcing the results. Of course, the Court could keep the cases apart from one another, ruling on their issues differently, but this would generate questions of its own, including whether such a disposition would indicate the Supreme Court is in the business of picking winners and losers in a more or less openly political play to split the baby of the

⁷ For earlier cases involving trans rights at the Supreme Court, see generally *Gloucester Cty. Sch. Bd. v. G.G. ex rel Grimm*, 137 S. Ct. 1239 (2017) (vacating judgment and remanding case to the U.S. Court of Appeals for the Fourth Circuit for further consideration in light of then-new federal guidance from the U.S. Department of Education and the U.S. Department of Justice), and *Farmer v. Brennan*, 511 U.S. 825 (1994) (affirming prospects for a valid Eighth Amendment claim by a trans prisoner). A tally of federal appellate decisions recognizing anti-trans discrimination as sex discrimination is in Brief in Opposition for Respondent Aimee Stephens at 15–18, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Oct. 24, 2018) [hereinafter *Stephens’s Brief in Opposition*].

⁸ Ezra Ishmael Young’s work fills out the relevant point this way:

The biggest challenge by far is that many judges are unfamiliar with transgender people and harbor the same negative stereotypes that employers contesting coverage have—that transgender people are freakish, their asserted identities as women or men are delusional, gender transition amounts to no more than a change of a person’s external appearance, and a transgender woman in particular is little more than a man in a dress. Left unchecked, negative attitudes about transgender people overly influence outcomes. The best way to overcome this is to teach courts about who transgender people actually are, tell their stories, and take every available opportunity to affirm the lived experience of the client and underscore her right to be treated with equal dignity and respect.

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, 13–14 (2020) (footnotes omitted). For further discussion of this point, see also Alexander Chen, *The Supreme Court Doesn’t Understand Transgender People*, SLATE (Oct. 18, 2019), <https://slate.com/news-and-politics/2019/10/supreme-court-transgender-discrimination-sex.html> [<https://perma.cc/L4VT-2W9R>].

⁹ This locution in the text is meant to recognize and account for *Farmer v. Brennan*, 511 U.S. 825 (1994).

cases by giving both pro-LGBT and anti-LGBT forces something to coo about. Nobody ever promised Supreme Court gamecraft would be easy.

The arguments in Stephens's trans sex discrimination case—captioned *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*—addressed the two certiorari questions the case involved. Is anti-trans discrimination sex discrimination under Title VII?¹⁰ And is anti-trans discrimination prohibited as a form of sex stereotyping under precedent tracing to *Price Waterhouse v. Hopkins*, holding sex stereotyping to be actionable sex discrimination in the case of a non-femme and somewhat butch, cis-heterosexual, and married woman?¹¹

Answering “no” to both questions, Harris Funeral Homes's legal defense hewed a conservative jurisprudential line on the statutory interpretation question, then easily leveraged to resolve the sex stereotyping knot.¹² Tracking similar arguments in the sexual orientation cases, the lawyer representing the funeral home at the Supreme Court, John J. Bursch of the Alliance Defending Freedom, took the position that, consistent with its “original public and legal meaning,” Title VII's ban on sex discrimination meant to “promot[e] women's equality” to men.¹³ This group-based understanding of the statute, read in light of certain traditions for thinking about “sex” in 1964, figured two and only two sex classes to which Title VII's sex discrimination ban could possibly refer: “women” and “men,” defined in terms of their natural or biological forms, or, as Bursch's client himself put it at one point, “an immutable God-given gift.”¹⁴

¹⁰ *Harris Funeral Homes*, 139 S. Ct. at 1599.

¹¹ *Id.*; see *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (“One partner described her as ‘macho’ . . . another suggested that she ‘overcompensated for being a woman’ . . . [and] a third advised her to take a ‘course at charm school.’”).

¹² Illuminating important aspects of the history of Title VII interpretation, Jessica A. Clarke, *How the First Forty Years of Circuit Precedent Got Title VII's Sex Discrimination Provision Wrong*, 98 TEX. L. REV. ONLINE 83 (2019), supplies a means by which to trace a genealogy of the defense claims now being made in the LGBT Title VII sex discrimination cases.

¹³ Transcript of Oral Argument at 30, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Oct. 8, 2019), http://www.supremecourt.gov/oral_arguments/argumenttranscripts/2019/18-1074gcj.pdf [<https://perma.cc/8X32-Y5GT>] [hereinafter *Harris Funeral Homes Transcript*]; cf. also *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (venturing a test of “ordinary meaning . . . at the time that Congress enacted the statute”) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

¹⁴ On the argument about sex, see, for example, Petition for a Writ of Certiorari at 6, 6 n.1, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (July 20, 2018) [hereinafter *Harris Cert. Petition*] (defining that sex by stating “‘sex’ refers to a person's status as male or female as objectively determined by anatomical and physiological factors, particularly those involved in reproduction”) (citation omitted). See also, e.g., Brief for the Petitioner at 19, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Aug. 16, 2019) (“In common, ordinary usage in 1964, the word ‘sex’ meant biologically male or female, based on reproductive organs.”); *id.* at 23 (“Moreover, Congress and many members

Resisting pro-trans arguments by Stephens’s lawyers, led by David D. Cole of the American Civil Liberties Union, Bursch insisted that “sex” under Title VII has always been and so must remain a trans-exclusive term.¹⁵ The implication of this argument, of course, was that all those lower court decisions interpreting Title VII’s sex discrimination rule trans-inclusively were wrong and should be corrected. Without more, this effectively counts at naught *stare decisis* values

of this Court have recognized that sex in Title VII refers to the status of male or female as determined by reproductive biology.”). On the description of sex as “an immutable God-given gift,” see *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 569 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599, 1599 (2019) (mem.) (“Rost avers that he ‘sincerely believe[s] that the Bible teaches that a person’s sex is an immutable God-given gift.’”). For an exchange framing Bursch’s position as a group-based account of Title VII’s sex discrimination rule and his reply, see *Harris Funeral Homes Transcript*, *supra* note 13, at 40–44. Thinking about “sex” in these ways is normatively readily associated with thinking about sex as sexual activity. See, e.g., Brief for Ryan T. Anderson as Amicus Curiae Supporting Employees at 9, *Altitude Express, Inc. v. Zarda*; *Bostock v. Clayton Cty.*; and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, Nos. 17-1623, 17-1618, 18-107 (Aug. 21, 2019) (mentioning “conjugal marriage” and noting that it “rests on no masculine or feminine stereotypes”). This point will become relevant as the argument in the work proceeds.

¹⁵ *Harris Funeral Homes Transcript*, *supra* note 13, at 29 (“Treating women and men equally does not mean employers have to treat men as women. That is because sex and transgender status are independent concepts.”). Curiously unexplained by Bursch was how the original public meaning of the measure forever delimits what the Supreme Court must do as the agent of the political institution, the Congress, that had the constitutional authority to make this law. For some relevant commentary, see William N. Eskridge, Jr., *Symposium: Textualism’s Moment of Truth*, SCOTUSBLOG (Sept. 4, 2019), <https://www.scotusblog.com/2019/09/symposium-textualisms-moment-of-truth/> [<https://perma.cc/T2KL-8KVM>]. There is a separate, but related question here of what the original public meaning of this measure was. How does it map onto the original introduction of the measure as an amendment to defeat Title VII? See Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 441–42 (1966). In the original public meaning, was the final inclusion of the term in the law also a joke? See Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 137–38 (1997) (discussing the “[c]onventional wisdom” that the work then goes on to give a “fresh look”). How does original public meaning map onto the deliberations of the measure that showed its pro-women’s equality terms were also not unproblematically and at least partly about leaving white women behind in the march for civil rights, with the problematic racial politics that this involved? See generally Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. REV. 713 (2015). Is that part of the original public meaning as well? For relevant context on the status of homosexuality in 1964 in Washington, D.C., see generally Lee Edelman, *Tearooms and Sympathy, or, the Epistemology of the Water Closet*, in THE LESBIAN AND GAY STUDIES READER 553 (Henry Abelove et al. eds., 1993) [hereinafter Edelman, *Tearooms and Sympathy*] (discussing events in 1964). Additionally, Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63 (2019), provides astute analysis of statutory originalism in the context of LGBT rights, importantly extended to the anti-trans-discrimination-is-sex-discrimination setting of Title VII by Young, *supra* note 8, at 25–27. On the scope of the idea of Title VII sex-discrimination being trans exclusive, see *infra* note 23 and accompanying text. Thanks to Ruth Colker for productive engagement on some of these points.

including the expectation and reliance interests of workers and management alike.¹⁶

Bursch placed his cards upon the table at the outset of his Supreme Court argument. As he did, he inaugurated a miserable procession of highly intentional misgenderings—getting trans people’s pronouns wrong—that, despite their anti-trans negation and insult, the Bench silently tolerated without notable correction, presumably at least in part so as not to show any prejudice against his and his client’s position.¹⁷

Bursch began: “Treating women and men equally [under Title VII] does not mean employers have to treat men as women.”¹⁸ That was the first moment in the argument when Bursch misgendered Stephens as a “man” asking to be “treated” as a woman, denying her the dignity of being recognized and addressed on her own terms.¹⁹ Bursch continued: The reason why Title VII “does not mean

¹⁶ Harris Funeral Homes Transcript, *supra* note 13, at 29 (“[T]he Sixth Circuit imposed a new restriction, and its holding destroys all sex-specific policies.”). For a pro-gay and pro-trans management position, see Brief of 206 Businesses as Amici Curiae in Support of the Employees at 1, *Bostock v. Clayton Cty.*; *Altitude Express, Inc. v. Zarda*; and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, Nos. 17-1618, 17-1623, 18-107 (July 3, 2019) (noting support for LGBT employees, including with specific reference to “sexual orientation and gender identity”).

¹⁷ For some perspective on this sense of what’s prejudicial and to whom, see Mark Joseph Stern, *Anti-LGBTQ Firm Tries to Disqualify Judge Because He Won’t Let It Misgender Trans Kids*, SLATE (May 11, 2020), <https://slate.com/news-and-politics/2020/05/alliance-defending-freedom-student-athlete-misgender.html> [<https://perma.cc/3J2LQTM5>]. The Court’s approach here was far from inevitable. Also, it was not without its harms. For support, consider Young, *supra* note 8, at 20–21 (detailing some of the harms of misgenderings). It may or may not obtain in the Supreme Court’s ruling in the case. *See, e.g., id.* at 33–34 (discussing the affirmative use of Dee Farmer’s female pronouns in oral arguments in *Farmer v. Brennan*, and how the Justices used “female or neutral referents throughout”). Judge Henry F. Floyd’s opinion for the Fourth Circuit in *G.G. ex rel Grimm v. Gloucester County School Board*, 822 F.3d 709, 716 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017), casually, but aptly, describes intentional misgendering as anti-trans “hostility”: “Many of the speakers [at a meeting of the Gloucester County School Board on a proposed “transgender restroom policy”] displayed hostility to G.G., including by referring pointedly to him as ‘young lady.’” *See also id.* (describing how at another meeting on the policy, “[s]peakers again referred to G.G. as a ‘girl’ or ‘young lady[.]’ [o]ne speaker called G.G. a ‘freak’ and compared him to a person who thinks he is a ‘dog’ and wants to urinate on fire hydrants”). Plenty of slip-ups happened at the Supreme Court. An illustrative tally that doesn’t promise exhaustiveness includes Harris Funeral Homes Transcript, *supra* note 13, at 5, 10–12, 19, 32, 37.

¹⁸ Harris Funeral Homes Transcript, *supra* note 13, at 29.

¹⁹ Bursch’s legal defense of this is highly formalistic and has the feel of rationalization. Brief for the Petitioner at 8 n.3, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Aug. 16, 2019) (“Out of respect for Stephens and following this Court’s lead in *Farmer v. Brennan*, 511 U.S. 825 (1994), Harris tries to avoid use of pronouns and sex-specific terms when referring to Stephens. When such terms must be used, Harris uses sex-based language consistent with Title VII’s meaning.”). *Cf.* Ruth Marcus, *We’re at War Over Gender*

employers have to treat men as women” is “because sex and transgender status are independent concepts.”²⁰ “Sex” and “transgender status” being “independent concepts,” anti-trans discrimination is not sex discrimination outlawed by Title VII. *Q.E.D.* Not incidentally, a homologous claim was advanced by the defense in the sexuality cases, where the argument amounted to saying that Title VII’s sex discrimination ban does not outlaw anti-gay discrimination, because sex and sexual orientation are not the same thing.²¹

More aggressive than the conservative jurisprudential argument from “original public meaning” is an alternative line of thinking Bursch offered, grounded not in the soil of conservative jurisprudence so much as the related, wider terrain of social and/or cultural conservative political thought.²² Unbalancing an ostensible, if limited, concession allowing that trans people may in certain limited cases actually have a Title VII sex discrimination claim, the conservative and substantively anti-trans argument that Bursch developed, recommends the sweeping conclusion that there ought to be no pro-trans protections under Title VII.²³ Underwriting this position are logics that, taken seriously, indicate there should be no pro-trans legal protections under that law or any other. Looking immediately ahead, the ultimate reason Bursch offered for why this is so is bound up with what Justice Sonia Sotomayor described in the

Pronouns. Can’t We All Just Show Some Respect?, WASH. POST (Jan. 19, 2020), <https://www.washingtonpost.com/opinions/a-judge-said-calling-a-transgender-woman-her-would-show-bias-oh-please/2020/01/19/7d3a9f3c-3965-11ea-bb7b-265f4554af6d> [<https://perma.cc/6E2Z-MLJL>] (discussing the intentional misgendering in *United States v. Varner*, 948 F.3d 250 (5th Cir. 2020)).

²⁰ Harris Funeral Homes Transcript, *supra* note 13, at 29.

²¹ See Transcript of Oral Argument at 45, *Bostock v. Clayton Cty.*; Altitude Express, Inc. v. Zarda, Nos. 17-1618, 17-1623 (Oct. 8, 2019), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/17-1618_b97c.pdf [<https://perma.cc/9TZZ-FHMR>] [hereinafter Bostock Transcript] (“MR. HARRIS: . . . So . . . what I’m arguing is simply that sexual orientation standing alone is not, without more, sex discrimination.”); *id.* at 46–48 (Jeffrey M. Harris arguing that sex and sexual orientation categories are distinct).

²² For an important example in the tradition of social and/or cultural conservative political thinking about trans people and trans equality, see generally RYAN T. ANDERSON, *WHEN HARRY BECAME SALLY: RESPONDING TO THE TRANSGENDER MOVEMENT* (2018). For one reply, see KELLY R. NOVAK, *LET HARRY BECOME SALLY: RESPONDING TO THE ANTI-TRANSGENDER MOVEMENT* (2018).

²³ For an articulation of the concession, see Brief for the Petitioner at 15, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Aug. 16, 2019) (“Harris is *not* asking the Court to exclude transgender individuals from Title VII. They are protected from sex discrimination just the same as everyone else.”) (emphasis in original). *Accord* Harris Funeral Homes Transcript, *supra* note 13, at 20 (quoting David Cole describing the concession thus: “[T]he government and Petitioner concede that transgender people are not excluded from the statute. . . . They concede, transgender people can bring sex discrimination claims”).

arguments in *Bostock* and *Zarda*'s Title VII cases as an issue that's been "raging the country": "bathroom usage[;] [s]ame-sex bathroom usage."²⁴

Briefly, before detailing Bursch's remarks, Bursch's focus on "[s]ame-sex bathroom usage" might have been thought a doubtful legal strategy. By its own "admi[ssion]," Harris Funeral Homes had allowed that "the restroom [issue] was a . . . hypothetical issue" that had nothing to do with "why [Aimee Stephens] was fired."²⁵ Bursch bypassed this as a factual constraint on his argument to make a deep and crucial play around what he himself referred to at one point as "the restroom scenario."²⁶ By the end of Bursch's oral argument, it was clear that the real focus of the "the restroom scenario" was less on restrooms than on the related, and more culturally charged, sex-segregated spaces of "shower[s] and . . . locker room[s]," specifically, showers and locker rooms for and inhabited by women,

²⁴ *Bostock* Transcript, *supra* note 21, at 12. Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage*, in *THE TRANSGENDER STUDIES READER* 244 (Susan Stryker & Stephen Wittle eds., 2006), supplies a vital trans perspective on this phenomenon.

²⁵ Harris Funeral Homes Transcript, *supra* note 13, at 13 (statement by David Cole). *Accord* *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 566, 569 (6th Cir. 2018) ("Stephens was terminated from the Funeral Home by its owner and operator, Thomas Rost, shortly after Stephens informed Rost that she intended to transition from male to female and would represent herself and dress as a woman while at work. . . . Rost testified that he fired Stephens because 'he was no longer going to represent himself as a man. He wanted to dress as a woman.'"), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.). *But see* Brief for the Petitioner at 9 n.4, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Aug. 16, 2019) [hereinafter *Harris Petitioner Brief*] (discussing the relevance of "sex-specific restrooms" to the facts and the disposition of the case). For Bursch's position during oral argument at the Supreme Court, see *infra* text accompanying notes 26, 35–39. Much more on this "bathroom scenario" and how it plays out in the context of the LGBT Title VII sex-discrimination cases across various vectors is to follow in the text in this and subsequent Parts of the work.

²⁶ Harris Funeral Homes Transcript, *supra* note 13, at 45 (statement by John Bursch: "the restroom scenario"). For support for the idea of there being a case-based "factual constraint" on Bursch's argument, see *id.* at 11–13 (observations by David Cole to this effect). Briefing for Harris Funeral Homes took issue with the idea that the "the restroom scenario" was in fact hypothetical. Harris Petitioner Brief, *supra* note 25, at 9 n.4 (disputing the notion that "[r]estroom use was 'hypothetical'"). *But see* Stephens's Brief in Opposition, *supra* note 7, at 26–27 (arguing that "[s]ex-specific [r]estroom [p]olicies [a]re [n]ot at [i]ssue in this [c]ase").

understood in terms of Bursch's traditional definition of sex.²⁷ To speak of cis-women in this lexicon is redundant: They are the only type of women there are.²⁸

The specter of this “restroom scenario” first surfaced at the Supreme Court in paper filings in the case.²⁹ Mention of ladies' showers and locker rooms surfaced

²⁷ Harris Funeral Homes Transcript, *supra* note 13, at 45. Some of the reasons some may find this distinctive focus of the “restroom scenario” on women surprising are suggested by Lee Edelman's still remarkable work in Edelman, *Tearooms and Sympathy*, *supra* note 14. *Cf. also generally* Lee Edelman, *Men's Room*, in *STUD: ARCHITECTURES OF MASCULINITY* 152 (Joel Sanders ed., 1996). With thanks to Martha Chamallas for the insight, it is possible that, doctrinally, Bursch's focus on showers and locker rooms may have to do with how Title VII's bona fide occupational qualification (BFOQ) defense, enacted at 42 U.S.C. § 2000e-2(e)(1), might work in this setting, particularly as a privacy-based BFOQ, on which, see, for example, *MARTHA CHAMALLAS, PRINCIPLES OF EMPLOYMENT DISCRIMINATION LAW 73–74* (Concise Hornbook Series, West Academic Publishing 2019) (discussing the BFOQ defense focusing on “concerns for protecting women against sexual assault or invasions of privacy[.]” including *Teamsters Local Union v. Washington Department of Corrections*, 789 F.3d 979 (9th Cir. 2015), described as allowing sex-based eligibility criteria for certain prison guard positions in view of “many documented instances of sexual misconduct by male guards at those prisons” when the court “regarded the exclusionary policy as necessary to prevent sexual assaults of female inmates, many of whom had experienced prior sexual abuse before incarceration”). The prospects of lawful sex-specific job requirements, however, does not without more decide whether Title VII's definition of “sex” countenancing of “woman” should be trans inclusive or not. For more on the BFOQ defense as it arose at oral arguments, see *infra* notes 35 and 38. The account to be provided in subsequent Parts reconfigures this doctrinal point in other terms.

²⁸ In a stylized way, this may go some distance toward helping to explain the way Bursch's oral argument focused on the women's shower and locker room and not on the presence of trans men in the men's.

²⁹ This is not, however, the first time talk of showers and locker rooms has surfaced in the context of trans rights, though it is often occluded by—and within—talk of restrooms. For some direct invocations, see for example, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016) (“We agree that it has indeed been commonplace and widely accepted to separate public restrooms, locker rooms, and shower facilities on the basis of sex.”), *vacated and remanded*, 137 S. Ct. 1239 (2017); ANDERSON, *supra* note 22, at 176 (discussing giving “boys unfettered access to girls' bathrooms, locker rooms, dorm rooms, hotel rooms, and shower facilities, if they claim to identify as girls”); *id.* at 182 (mentioning “DOJ . . . prison regulations” that include “the requirement that prison policies generally ‘enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia’”) (footnote omitted); *id.* (talking about sharing “a bedroom, shower, or locker room with a student of the opposite biological sex”); *id.* at 184 (quoting letter by fourteen-year-old-girl discussing “[t]he idea of permitting a person with male anatomy—regardless of whether he identifies as a girl—in girls' locker rooms, showers and changing areas, and restrooms makes me extremely uncomfortable and makes me feel unsafe as well”); *id.* at 184–85 (mentioning a Supreme Court amicus brief by Safe Spaces for Women discussing “women's showers, locker rooms, and bathrooms”) (footnote omitted); *id.* at 200 (referring to “sex-specific bathrooms, locker rooms, showers, and sport teams”). One place that the language of showers and locker rooms finds a legal home is in 34 C.F.R. § 106.33 (2019) (providing for “separate toilet, locker room, and shower facilities on the basis of sex, but such facilities

repeatedly in these papers—so frequently, in fact, that the regularized return to them at some point begins to give off the impression of an undue, perhaps even prurient, interest in these spaces and what takes place in them.³⁰

The official transcript of oral arguments shows Bursch talking about bathrooms, showers, and locker rooms even before he braves to mention the notion of “original public . . . meaning.”³¹ Retrospectively, this lexical priority, reinforced in a just-in-time final return to “the restroom scenario” as his oral argument ends, is a powerful indication that what properly functions here as a, or the, shower and locker room scene, is meant to serve, or in any event functions, as the make-or-break normative touchstone for his case.³²

provided for students of one sex shall be comparable to such facilities for students of the other sex”).

³⁰ See Harris Cert. Petition, *supra* note 14, at 2 (noting that “federal law in some parts of the country now mandates that employers, governments, and schools must administer dress codes and assign living facilities, locker rooms, and restrooms based on the ‘sex’ that a person professes”); *id.* at 14 (maintaining that the Sixth Circuit’s decision in the case “threatens to drive out sex-specific policies—ranging from living facilities and dress codes to locker rooms and restrooms—in employment and public education”); *id.* at 17 (discussing a Seventh Circuit decision that “told public schools that they must regulate access to sex-specific facilities like locker rooms and restrooms based on gender identity instead of sex”); *id.* at 20 (discussing “locker rooms[] and restrooms”); *id.* at 27 (noting concerns about “locker rooms[] and restrooms” discussed by the dissenting circuit judge in *Zarda*); *id.* at 30–31 (mentioning “locker rooms[] and restrooms”); *id.* at 32–33 (commenting that “[t]he specific implications of the Sixth Circuit’s ruling for sex-specific living facilities, locker rooms, and restrooms raise fundamental privacy concerns”); see also Brief for the Petitioner at 2, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Aug. 16, 2019) (mentioning “sex-specific changing and restroom facilities”); *id.* at 3 (observing that “Congress did not share that position [that “sex’ is itself a stereotype”], which would require eliminating sex-specific policies altogether, including sex-specific overnight facilities or showers”); *id.* at 4 (remarking that “redefining sex discrimination in Title VII will prohibit employers from maintaining sex-specific privacy in overnight facilities, showers, restrooms, and locker rooms”); *id.* at 12 (talking about an employer’s ability “to maintain a sex-specific dress code, shower[,] and locker-room policy”); *id.* at 13 (talking about “shower[ing] with female coworkers”); *id.* at 18 (discussing “sex-specific showers, restrooms, and locker rooms”); *id.* at 45 (citing *U.S. v. Virginia*, 518 U.S. 550 n.19 (1996)) (suggesting that “[r]edefining sex discrimination in Title VII would adversely affect employers. . . . [f]or example, it would prohibit organizations from maintaining sex-specific sleeping facilities, showers, restrooms, and locker rooms, all of which ‘afford members of each sex privacy from the other sex.’”); *id.* at 46 (discussing exemptions in New Mexico’s antidiscrimination law involving “sex specific ‘sleeping quarters,’ ‘showers,’ and ‘restrooms’”). This tally doesn’t include all the references to restrooms found in the relevant papers.

³¹ Harris Funeral Homes Transcript, *supra* note 13, at 30.

³² *Id.* at 45. Bursch returned to this argument after oral arguments in an op-ed published in *The Hill*. John Bursch, *Difficult Issues Involving Human Sexuality Require Dialogue, Not Scorn, Misinformation*, HILL (Oct. 15, 2019), <https://thehill.com/blogs/congress-blog/civil-rights/465844-difficult-issues-involving-human-sexuality-require-dialogue> [<https://perma.cc/2FLA-LQYA>] (“And as I explained to the Supreme Court, if the ACLU prevails, every sex-specific shower, restroom, locker room, overnight facility, dress

These are details from near the top of Bursch's oral argument. He's just finished making his categorical point that Title VII doesn't require employers to "treat men as women."³³ Now he's trying to inoculate the Supreme Court against Cole's seductions on the first certiorari question. Cole himself had just been arguing Stephens wouldn't have been fired "but for" the sex she was "assigned at birth," which makes her firing, an adverse employment decision, unlawful Title VII sex discrimination.³⁴

Against this argument, which took Bursch's conservative, sex-binaristic view of "sex" and turned it in pro-trans directions, Bursch maintains that the Supreme Court must reject Cole's position if it is to avoid some awful, terrible, absurd, unthinkable results. Concretely, the results of Cole's pro-trans arguments and their implications for cis-women as Bursch has them in mind are so unspeakably bad—and evidently so obvious—that he does not speak them in terms. His representation of those results on and for cis-women and their bodies remains purely gestural throughout. Cole's argument, Bursch says, would

mean that a women's overnight shelter must hire a man who identifies as a woman to serve as a counsellor to women who have been raped, trafficked, and abused and also share restroom, shower, and locker room facilities with them. That is because, but for the man's sex, he would be allowed to -- to hold that job and to use those facilities.³⁵

code, and sports team in the country will almost certainly have to go."). The stylistics of Bursch's argument further reinforce the operative point. Whereas the statutory originalist claims are, in their way lifeless (flat, affectless, bloodless, abstract institutional arguments about the sources of the authoritative meaning of Title VII's sex discrimination rule as a legislative enactment), the shower and locker room scenes are full of imaginary life in multiple dimensions involving fictive, naked human bodies dramatically pornotroped. See Hortense J. Spillers, *Mama's Baby, Papa's Maybe: An American Grammar Book*, 17 *DIACRITICS* 65, 67 (1987) (articulating the notion of "pornotroping" in the specific context of racialized captivity).

³³ Harris Funeral Homes Transcript, *supra* note 13, at 29.

³⁴ See, e.g., *id.* at 28. For a sharp, pro-trans critique of this approach as a centerpiece of the litigation strategy in Stephens's case, see generally Young, *supra* note 8. Cole repeatedly made clear this was an argument for litigation, the thought being that even on this type of conservative argument about the meaning of "sex" under Title VII, Stephens should prevail in her case. See, e.g., Harris Funeral Homes Transcript, *supra* note 13, at 22 (making argument that "for purposes of this case" "accept[s] the narrowest . . . definition of sex . . . and arguing that you can't understand what Harris Homes did here without it treating her differently because of her sex assigned at birth").

³⁵ Harris Funeral Homes Transcript, *supra* note 13, at 29–30. An earlier and somewhat different version of this example is in Brief for the Petitioner at 52–53, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Aug. 16, 2019) ("[U]nder the Sixth Circuit's rewriting of Title VII, that same [overnight] shelter would similarly be forced to hire a male who identified as female for a position requiring the applicant to stay in a common sleeping area with the women, or to counsel women who have been traumatized by sexual abuse and

This is Bursch's first argument from the shower and locker room scene in substance and sum.³⁶ Having made it, he underscores its significance for the second certiorari question, on sex stereotyping.³⁷ After this, Bursch invokes the scene in different ways several more times, including after the midpoint of his argument, before he returns to it in order to redraw it in a fuller way as his time at the podium ends.³⁸

Like the first sketch, Bursch's final rendition of the shower and locker room scene is brief and gestural. Its account of the horrific thing that a pro-trans ruling will mean for cis-women is unstated as such here, too. The focus of Bursch's attack, however, has now subtly shifted. It has been both expanded and contracted. Expanded, it is taking on both the "but-for-sex" and sex stereotyping claims at once. Contracted, it is spotlighting with greater precision what the operative core of this "restroom scenario" is. At first, Bursch's remarks make it sound like he's

domestic violence."). For some discussion at oral arguments about how this scenario might be avoided under Title VII's BFOQ rule, enacted at 42 U.S.C. § 2000e-2(e)(1), see Harris Funeral Homes Transcript, *supra* note 13, at 35–38.

³⁶ A noteworthy antecedent to this version of the argument is the amicus brief jointly filed by the Women's Liberation Front and the Family Policy Alliance in *Grimm*. Brief of Women's Liberation Front and Family Policy Alliance as Amici Curiae Supporting Petitioner at 1–2, Gloucester Cty. Sch. Bd. v. G.G. *ex rel* Grimm, 137 S. Ct. 1239 (2017) (No. 16-273) (discussing federal "'guidance' expanding the reach of the 'sex' means 'gender identity' doctrine from just restrooms to *all* previously sex-segregated facilities, including locker rooms, showers, and dormitories"); *id.* at 2 (arguing that "male faculty, administrators, other employees, *and any other men who walk onto the campus* of a Title IX institution do not have to notify anyone about anything; they can just show up in any women's restroom, locker room, shower, or dormitory whenever they want"); *id.* at 4 (describing the Family Policy Alliance's "interest in this case [a]s tied directly to its advocacy for policies that protect the privacy and safety of women and children in vulnerable spaces such as showers and locker rooms"); *id.* at 5 (contending that "women who believed that they would have the personal privacy of living only with other women will be surprised to discover that men will be their roommates and will be joining them in the showers"); *id.* at 7 (insisting on the argument holding "[t]hat *any* man can justify his presence in *any* women's restroom, locker room, or shower by saying, 'I identify as a woman,'" and indicating that this prospect "will not escape the notice of those who already harass, assault, and rape tens of thousands of women every day"); *id.* at 29 (commenting parenthetically on "restrooms (or locker rooms, dormitories, or showers)"); *id.* at 32 (that a "DOE . . . Guidance" "extend[s] the 'sex' means 'gender identity' doctrine to showers, locker rooms, dormitories, and beyond").

³⁷ On this point, Bursch notes that it is "wrong to say [the] case isn't about showers and overnight facilities and sports[, because] [e]very single one of those is impacted if you're talking about a sex-specific policy." Harris Funeral Homes Transcript, *supra* note 13, at 30.

³⁸ For other appearances, both direct and subtle, see *id.* at 31–32 (observing "when a biological male is refused access to the women's restroom, the -- the male would say that was an injury"); *id.* at 36–38 (talking about BFOQ in response to Justice Sonia Sotomayor's question about "women in a shelter"); *id.* at 37 (remarking "[b]ut let's go back to the women's overnight shelter . . ."); *id.* at 38–39 (engaging the BFOQ point again); *id.* at 40 (saying, after the midpoint of his oral argument, "[b]ut if the employer applied a sex-specific dress code or sex-specific showers and restrooms, that would not be a statutory violation because of their biological differences"); *id.* at 44 (referring to "opposite sex facilities").

about to talk about bathrooms generally. They conclude the same way. This may lead those who don't pay close attention to think this is just the conventional anti-trans bathroom parlay that's being discussed. Carefully sandwiched in the middle, however, is a concern involving bathrooms euphemistically, but formally, not at all. Here's what Bursch says:

One other point on the restroom scenario. Gender identity is a broad concept. You could have a male employee who identifies as a woman but doesn't dress as a woman, looks like a man, showing up in the shower and the locker room, and, again, the employer wouldn't be able to do anything about that because under Mr. Cole's theory, but for the fact he was a man, he could be there. And it's stereotyping to say men cannot be in the women's bathroom.³⁹

What's to be made of this claim? How should it be read alongside Bursch's earlier depiction of the shower and locker room scene? What does it—intentionally or not—say about trans women? What does it—intentionally or not—say about cis-women? Does a critical understanding of these arguments reveal that Bursch's defense against claims of sex discrimination was itself bound up with, and engaged in, sex discrimination—against women, both trans and not?

³⁹ Harris Funeral Homes Transcript, *supra* note 13, at 45.