A GIANT ROBED LADY HOLDING A TINY ROBED LADY

JURISPRUDENCE

The Supreme Court Doesn't Understand Transgender People

Its ignorance could lead to a legal catastrophe.

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Aimee Stephens, who was fired for being transgender, outside the Supreme Court in Washington on Oct. 8.
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Not a single transgender attorney I know felt that the Supreme Court displayed even a basic understanding of transgender people on Oct. 8 when it heard arguments in three blockbuster cases addressing whether workers can be fired for being gay or transgender under federal law. Two of the cases, *Bostock v. Clayton County* and *Altitude Express Inc. v. Zarda*, involve men who were fired when their employers found out they were gay. The third, *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, involves Aimee Stephens, a transgender woman who was fired when she told her employer that she was a woman and, after an interval to begin gender transition treatment, intended to begin presenting as female at work. Although all three cases concern employment discrimination, they have far-reaching implications for whether LGBTQ people will be protected under similar federal laws prohibiting housing, health care, and education discrimination. Unfortunately, many observers came away with the impression that the court may be more likely to protect gay than transgender workers. The court's palpable discomfort with transgender people displayed striking similarities to its discomfort about gay people in 1986 when it heard a landmark gay rights case called *Bowers v. Hardwick*.

In *Bowers*, the Supreme Court upheld a Georgia sodomy statute used to prosecute Michael Hardwick and a male companion for engaging in consensual sex in Hardwick's home. In a 5–4 decision, the court rejected any notion that the Constitution "confers a fundamental right upon homosexuals to engage in sodomy." It was not until 2003 that the Supreme Court revisited that decision in *Lawrence v. Texas*, which recognized that same-sex couples enjoy the same constitutionally protected right to sexual autonomy as others, and which laid the groundwork for the court's 2015 decision striking down state laws barring same-sex marriage in *Obergefell v. Hodges*.

At oral argument in *Bowers*, Hardwick was represented by Laurence Tribe, a renowned constitutional law scholar and Harvard Law School professor. Tribe argued that Georgia's sodomy law was unconstitutional because it violated the right of consenting adults to engage in sexual conduct in the privacy of their own homes, relying heavily on *Stanley v. Georgia*, a 1969 case in which the Supreme Court held that it was unconstitutional to criminalize the private possession of pornographic material. Tribe's strategy reflected the prevailing wisdom of the time—and the consensus of Hardwick's legal

team—that in 1986, the justices of the Supreme Court were not ready to recognize the inherent dignity and worth of gay relationships. Even if some of the justices saw gay relationships as shameful or sordid, Tribe's argument provided a way they could still rule in Hardwick's favor, just as they had protected Stanley's right to view pornography.

Predictably, however, that strategy invited the justices to focus on the constitutionality of prohibiting same-sex intimacy *outside* of the home. Would the same constitutional protections apply, Justice Lewis Powell asked, if the sodomy had occurred in the back of a car? What about a public restroom? Or a hotel room in which two men were staying overnight? Tribe answered that constitutional protections might not apply in any of those places, but he didn't know exactly where the line should be drawn. Having rooted constitutional recognition for gay relationships in the privacy of the home, he was unable to explain why gay couples should have the right to broader legal protections in our society.

Tribe's strategy failed. Rather than recognizing a limited right to same-sex intimacy in the home, the court said that the Constitution did not protect such intimacy at all. By comparing gay intimacy to adultery, incest, and other "sexual crimes" that did not deserve legal protection, the court embraced and reinforced the dehumanizing stigma attached to gay people and same-sex relationships.

When the court revisited this issue in 2003's *Lawrence v. Texas*, John Lawrence's legal team decided on a different strategy from Hardwick's team. For Lawrence's oral advocate, they chose Paul Smith, a well-known Supreme Court advocate who was openly gay. Rather than treating same-sex intimacy as an isolated, private act, Smith argued that the "opportunity to engage in sexual expression" was foundational to the ability of gay people to form "gay families [and] gay partnerships, many of them raising children."

Smith's argument was central to the Supreme Court's decision in *Lawrence* overturning *Bowers*. Justice Anthony Kennedy's majority opinion explained that in reducing the claim in *Bowers* to an asserted right to "engage in homosexual sodomy," the court had failed to grasp the full scope of the right before it. "When sexuality finds overt expression in intimate conduct with another person," Kennedy wrote, "the conduct can be but one element in a personal bond that is more enduring." By recognizing what Smith called "the realities of gay lives and gay relationships," the *Lawrence* decision turbocharged the growing social and legal acceptance that led to the court's 2015 marriage equality decision in *Obergefell v. Hodges*.

Unfortunately for transgender people, last week's oral argument in *Harris* felt much more like a throwback to *Bowers* than a reflection of the enormous progress that transgender people have made in the past 20 years. That progress includes a virtually unbroken record of federal and state court victories recognizing that discrimination because a person is transgender is discrimination based on sex.

Yet none of these advancements was apparent in last week's Supreme Court argument, which seemed to take a step backward in time to an era when courts and the public struggled to understand transgender identity. Aimee Stephens' counsel, ACLU legal director David Cole, sought to avoid pressing the court to validate her identity as a transgender woman. Instead, Stephens' counsel explained, the court could rule in Stephens' favor simply by viewing her as an "insufficiently masculine" man who was fired for not adhering to male stereotypes.

Just as Tribe's argument conceded that gay intimacy need not be seen as any more intrinsically worthy of protection than pornography, Stephens' counsel's argument conceded that Stephens need not be seen as a woman. In *Bowers*, the argument that gay intimacy should be protected because it takes place inside the privacy of the home provided no way to explain why gay relationships are deserving of protection in the wider society. Similarly, in *Harris*, the framing of Stephens as an "insufficiently masculine" male provided no way to explain why she must be able to live and work as a woman, including when using the restroom or dressing for work.

Unsurprisingly, several justices seized upon the apparent conflict between framing Stephens as "biologically male" and yet urging that she must be permitted to use the women's restroom. As Chief Justice John Roberts put it, if federal law permits employers to provide separate restrooms for employees based on their "biological sex," then prohibiting Stephens from using the women's restroom might be harmful to her, but it would not be

discrimination based on sex. Even Justice Sonia Sotomayor, who usually votes with the court's liberal wing, noted that there are women "who would feel intruded upon" if someone with what she called "male characteristics" walked into the bathroom. Much like the *Bowers* court could not see gay intimacy in the context of wider familial and kinship relations, this court could not see Stephens in a holistic way that did justice to who she really is—not an "insufficiently masculine" man, but a transgender woman.

The alternative in *Harris* would have been to embrace the humanity of transgender people, just as the alternative in *Lawrence* was to portray gay intimacy as inherently worthy of equality and respect. Since the early 2000s, transgender litigants have experienced an almost unbroken record of success in the lower courts by fully embracing the reality of transgender identity, which includes the reality that transgender people thrive when they are permitted to live authentically as the men and women that they are.

Any other answer strips a transgender person like Stephens of any meaningful protection. Even if the court were to rule that Stephens has some limited protection against discrimination as an "insufficiently masculine" male, that might be of little practical use. Such a ruling would not permit Stephens to be who she is—a transgender woman—at work. In fact, by permitting employers to treat transgender employees as members of their sex assigned at birth, such a "victory" would be tantamount to forcing transgender people to choose between their identities and their jobs. Much like President Donald Trump's transgender military ban, such a rule would

effectively prohibit transgender employees from transitioning, permitting them to be "transgender" in name only. And a transgender person who cannot live authentically will never be able to fully participate in American professional and civic life.

That would be a tragedy for transgender people and for American society. Allowing transgender people to live authentically is a positive social good. It allows them to flourish in all facets of their lives. Supporting the rights of transgender people in the workplace should not be a matter of grudging reluctance, but instead, a matter of recognizing that affirming their full humanity is, as Smith put it in his *Lawrence* oral argument, "a fundamental matter of American values."

I was two years from being born when *Bowers* was decided, 15 when *Lawrence* was decided, and I am 31 today. I sincerely hope that when the Supreme Court's decision comes out in *Harris* next year, I will not learn that I will have to wait until I am 48 for the Supreme Court to get it right when it comes to transgender people. As Diane Schroer, the decorated military veteran and transgender woman who won her lawsuit against the Library of Congress for rescinding her job offer when they found out she was transgender, put it: "I haven't gone through all this only to have a court vindicate my rights as a gender-nonconforming man."