

What the Supreme Court Could Have Heard in R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens

Ezra Ishmael Young*

The Supreme Court recently heard oral argument in R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens, a case poised to answer whether transgender people are protected by sex discrimination laws. At the oral argument, the employee’s advocate framed his transgender woman client as an “insufficiently masculine man” and gratuitously conceded that Title VII of the Civil Rights Act of 1964 narrowly prohibits discrimination on account of “biological sex.” Historical and doctrinal context and critique show why this was strategically unwise. This Article reimagines how Harris could have been argued differently by a transgender lawyer.

| | |
|---|----|
| Introduction..... | 10 |
| I. The Case for Transgender Title VII Coverage..... | 13 |
| II. Missed Opportunities in the <i>Harris</i> Oral Argument | 27 |
| III. What the Supreme Court Could Have Heard in <i>Harris</i> | 37 |
| Conclusion | 54 |

DOI: <https://doi.org/10.15779/Z38RR1PN11>.

Copyright © 2020 Author Holds Copyrights.

* Principal, Law Office of Ezra Young. Former director of impact litigation, Transgender Legal Defense and Education Fund, Inc.; Postdoctoral scholar and J.D., Columbia Law School; B.A., Cornell University. I am grateful to Florence Ashley, Lisa Burke, Devon Carbado, Mary Anne Case, Sunu Chandy, Julie Chovanes, Jessica A. Clarke, Joanne Marie Coane, Kimberlé Crenshaw, Paisley Currah, Samuel Dillon, Katie Eyer, Diana K. Flynn, Brian L. Frye, Luke Charles Harris, Trevor Hoppe, Brenda Kiltisch, James Knapp, Jennifer Levi, Nancy Marcus, Seth Marnin, Shannon Minter, Brittany Novotny, Jessica Radbord, Ethan Rice, Harper Jean Tobin, Allan Townsend, Kyle Velte, Alex Webster, Joanie Rae Wimmer, and Andrea Zekis for helpful conversations and comments. Thanks also to Justine Young for her comments, unwavering support, and patience. Lastly, many thanks to Natasha Geiling, Hayley MacMillen, Pooja Shivaprasad, Eliana Machefsky and the *California Law Review* staff for insightful comments and careful editing. All mistakes are my own.

INTRODUCTION

In October 2019, the Supreme Court heard oral argument in *R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens*. At issue is whether Title VII of the Civil Rights Act of 1964 protects transgender people from sex discrimination.¹ *Harris* is poised to be the most consequential transgender rights case since the Court's unanimous decision in favor of a transgender prisoner in *Farmer v. Brennan*² more than two decades ago.

The underlying facts are as follows: Aimee Stephens, a transgender woman, worked as a funeral director at Harris Homes, a regional funeral home chain in Michigan, for six years. Though Aimee knew herself to be female since youth, she presented as male for much of her adult life. In 2013, after deep self-reflection, Aimee transitioned from male to female. In a poignant letter to her colleagues, Aimee asked for “patience, understanding, and support.”³ She just wanted to be known as Aimee and to continue to do her job. Shortly thereafter, Aimee was fired because Thomas Rost, Harris Homes’ owner and operator, thought she would never look right wearing a dress.⁴

Given the five-justice conservative majority on today’s Court, it may seem that Aimee’s case is doomed on arrival. But *Harris* should be an easy win not only with the Court’s liberal block, but also some of the conservative justices. Even if ideologically opposed to transgender rights, several of the conservative justices hold themselves out as faithful textualists.⁵ Under a strict textualist approach, the question of whether Title VII protects transgender people can be easily answered in the affirmative. The statute prohibits discrimination “because

1. Technically, certiorari was granted on two interrelated questions: “Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender [or] (2) sex stereotyping under *Pricewaterhouse v. Hopkins*, 490 U.S. 228 (1989).” See Order Granting Certiorari, *R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens* (No. 18-107), 2019 WL 1756679 (Apr. 22, 2019). Interestingly, the Court rejected the parties’ formulations of the question presented. See Linda Greenhouse, *On L.G.B.T. Rights, the Supreme Court Asks the Question*, N.Y. TIMES, Apr. 25, 2019, <https://www.nytimes.com/2019/04/25/opinion/lgbt-rights-supreme-court.html> (noting significance).

2. 511 U.S. 825 (1994).

3. Appendix to Brief in Opposition of Writ of Certiorari at 1a, *R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens* (No. 18-107), <https://tinyurl.com/yxhchgwv> [hereinafter *Harris Appendix to Brief in Opposition of Writ of Certiorari*].

4. See, e.g., Joint Appendix at 54, *R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens* (No. 18-107), <https://tinyurl.com/y5v53t39> [hereinafter *Harris Joint Appendix*] (“[B]ecause he—was no longer going to represent himself as a man. He wanted to dress as a woman.”); *id.* at 31 (“I’ve yet to see a man dressed up as a woman that I didn’t know was not a man dressed up as a woman, so that it’s very obvious.”).

5. For instance, both Justices Gorsuch and Kavanaugh are on record as embracing textualism. Justice Gorsuch makes an affirmative case for textualism in his recent book. See NEIL GORSUCH, *A Case for Textualism, in A REPUBLIC, IF YOU CAN KEEP IT* 148 (2019). Justice Kavanaugh publicly embraced new textualism before being confirmed to the Supreme Court. See generally Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)).

of . . . sex” in employment.⁶ No provision expressly withholds protection from transgender people. In fact, of all the justices, only one has heard a case like *Harris* before—Justice Gorsuch, who as a circuit judge joined a per curiam opinion construing Title VII to protect transgender people.⁷

Unfortunately, the *Harris* oral argument went sideways. Aimee’s oral advocate, David Cole of the ACLU, repeatedly framed Aimee as being an “insufficiently masculine” man⁸ and gratuitously conceded to the Court that Title VII reaches discrimination on account of “biological sex,” which he defined as being equivalent to “sex assigned at birth.”⁹ Cole likely took this approach on the assumption that it might be easier for some of the justices to think of Aimee as a man and, if legitimated by Cole, they might be willing to see Aimee’s rights-demand as more modest and less socially disruptive. But that view is not well founded. Moreover, so framed, Aimee seems certain to lose much needed buy-in from the Court’s ideologically conservative textualists who appeared unable to grasp how, if Title VII deems Aimee a man, it protects her as a woman. Regrettably this approach also left the Court struggling to grasp who transgender people are and what the real consequences of a win for Aimee entail.

In this Article I reflect on the strong case for transgender protection under Title VII, point to missed opportunities in the *Harris* oral argument, and imagine what the Court could have heard if the case had been argued differently by one of Aimee’s transgender lawyers.

One contribution of this Article is to offer an additional reason why judges ignore the text and construe sex discrimination laws to not protect transgender people. Some commentators argue anti-transgender bias in the judiciary is a key factor.¹⁰ This Article argues that progressive litigators and theorists also bear some blame. For several decades, sex discrimination cases were narrowly litigated and theorized in the image of cisgender victims, making it seem as if transgender workers’ claims were barred.¹¹ Later, when the claims of transgender women were more aggressively pursued, their lawyers often framed them as if they were not women.¹² This move not only offends transgender

6. Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e-2.

7. *Kastl v. Maricopa Cmty. Coll.*, 325 Fed.Appx. 492 (9th Cir. 2009).

8. See, e.g., Transcript of Oral Argument at 27–28, *R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens* (No. 18-107), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_4gcj.pdf [hereinafter *Harris* Oral Argument Transcript] (“but my client can be fired for being insufficiently masculine?”).

9. *Id.* at 4–5 (“sex means at a minimum sex assigned at birth based on visible anatomy or biological sex”).

10. See, e.g., 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).

11. See discussion *infra* Part I.

12. For example, Philecia Barnes and Jimmie Smith are both transgender women, but their complaints alleged they were discriminated against because they were men who failed to conform to sex stereotypes associated with men. Sharon M. McGowan, *Working with Clients to Develop Compatible Visions of What it Means to “Win” A Case: Reflections on Schroer v. Billington*, 45 HAR.

women's dignity, but unhelpfully warps how claims are articulated. This framing also obscures how misogyny fuels the discrimination that both transgender and cisgender women endure, and makes illegible evidence that the victim's femininity or status as a woman led to the discrimination against her.

Another contribution of this Article is to suggest that ideologically conservative jurists are prone to finding that transgender people are protected by sex discrimination laws under certain circumstances. Some commentators have noted that conservative textualists should be receptive to transgender-inclusive constructions of Title VII.¹³ This Article adds to that discussion, arguing that advocates' affirmation of their transgender client's gender reinforces key tenets of textualist methodology and helps rebut a historically dubious claim—that legal sex status was always and exclusively identic with sex assigned at birth.

This Article also illuminates a further tactical advantage of affirming a transgender client's gender in high-stakes oral arguments. Drawing on the successful oral argument in *Farmer v. Brennan* and lessons learned from the doomed strategy in *Bowers v. Hardwick*,¹⁴ this Article argues that affirming that a transgender woman is a woman legitimizes her identity, signals she is worthy of equal dignity, and helps the court better grasp her vulnerability to and experience of discrimination as a woman. In imagining how *Harris* could have been argued differently, this Article shows that affirming Aimee's womanhood would have permitted her advocate to offer more satisfying answers to the justices' questions about Title VII's text, women's restrooms, and the political and social consequences of a win for Aimee.

Additionally, this Article makes an important contribution to literature critiquing the homogeneity of the Supreme Court bar. Several commentators have lamented that the roster of advocates arguing before the Court has been winnowed, largely concentrating advocacy expertise in large firms' appellate practice groups, a handful of non-profit organizations, and elite law school clinics.¹⁵ Others have pointed out that despite greater gender diversity in the legal profession as a whole, men still overwhelmingly outnumber women advocates

C.R.-C.L.L. 205, 212 (2010) (citing *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004)).

13. See, e.g., Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63, 64–67 (2019); Roger Parloff, *Three LGBT Cases Are Set to Put the Supreme Court's Conservative Principles on Trial*, NEWSWEEK, Sept. 24, 2019, <https://www.newsweek.com/2019/10/04/supreme-court-scalia-lgbtq-rights-title-vii-1460838.html>; Emma Margolin, *Despite Drawing Conservative Judge, Gov. McCrory Faces Long Odds in Legal Fight Over HB2*, MSNBC, May 11, 2016, <http://www.msnbc.com/msnbc/despite-drawing-conservative-judge-gov-mccrory-faces-long-odds-legal-fight-over-hb-2>.

14. 478 U.S. 186 (1986).

15. See generally Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487 (2008); Jeffrey L. Fischer, *A Clinic's Place in the Supreme Court Bar*, 65 STAN. L. REV. 137 (2013); Nancy Morawetz, *Counterbalancing Distorted Incentives in Supreme Court Pro Bono Practice: Recommendations for the New Supreme Court Pro Bono Bar and Public Interest Practice Communities*, 86 N.Y.U. L. REV. 131 (2011). See also Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901 (2016).

every term.¹⁶ A related body of literature suggests that when women argue cases, they are held to different standards than men, suggesting that sex stereotypes affect outcomes.¹⁷ This Article adds to these discussions by exploring what difference it might make if an openly transgender advocate argued before the Court in *Harris*, a case where gender stereotypes and questions concerning the capacity of transgender people to contribute to society color arguments opposing statutory protection.

I.

THE CASE FOR TRANSGENDER TITLE VII COVERAGE

I have represented dozens of transgender clients in Title VII sex discrimination cases before federal courts and agencies throughout the nation. Firsthand, I have seen judges and even a jury in the heartland¹⁸ diligently and respectfully follow the letter of our federal civil rights laws. My approach in these cases is richly informed by the battle-tested strategies deployed by transgender lawyers like Shannon Minter and Jennifer Levi and skilled allies including Sharon McGowan, Joseph Wardenski, and Allan Townsend, to name just a few.

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

16. See, e.g., Tammy A. Sarver, Erin B. Kaheny, & John J. Szmer, *The Attorney Gender Gap in U.S. Supreme Court Litigation*, 91 JUDICATURE 238 (2008); Jennifer Crystal Mike (née Mullins), *The Noteworthy Absence of Women Advocates at the United States Supreme Court*, 25 AM. U. J. GENDER SOC'L POL'Y & L. 31 (2017). See also Jimmy Hoover, Amanda James, & Annie Pancack, *Making Her Case: Will the Future of the Supreme Court Be Female?*, LAW360, Oct. 15, 2018, <https://www.law360.com/articles/1087277>.

17. See, e.g., Shane A. Gleason, *Beyond Mere Presence: Gender Norms in Oral Arguments at the U.S. Supreme Court*, 47 POL. RES. Q. 494 (2019) (finding via quantitative textual analysis of October 2004 through 2016 terms that attorneys are more successful when their oral arguments are consistent with gender norms; male attorneys fare better when they use less emotional language whereas female attorneys fare better if they use more emotional language); Tiffany Lindom, Charles Gregory, & Timothy R. Johnson, *Gender Dynamics and Supreme Court Oral Arguments*, 2017 MICH. ST. L. REV. 1033, 1054 (2018) (finding via quantitative textual analysis of October 1986 through 2010 terms that female attorneys do not get to speak as often as male counterparts and otherwise face more negative language from the justices); James C. Phillips & Edward L. Carter, *Gender and U.S. Supreme Court Oral Argument on the Roberts Court: An Empirical Examination*, 41 RUTGERS L.J. 613, 641 (2010) (finding in a survey of 57 oral arguments during the October 2004 through 2009 terms that controlling for ideological incompatibility, liberal justices have higher information-seeking scores and conservative justices have lower information-seeking scores for female attorneys under all circumstances). See also Shane A. Gleason, Jennifer J. Jones, & Jessica Rae McBean, *Gender Performance in Party Brief Success*, 54 WASH. U. J.L. & POL'Y 89, 94–97 (2017) (finding in orally argued non-per curiam cases in which female counsel of record faces a male counsel of record during the October 2010 through 2013 terms that female attorneys are more successful when the language used in their briefs is consistent with female gender norms).

18. Kyle Schwab, *Jurors Award Transgender Woman \$1M in Discrimination Lawsuit Against State University*, OKLAHOMAN, Nov. 21, 2017, <https://oklahoman.com/article/5573019/jurors-award-transgender-woman-1m-in-discrimination-lawsuit-against-state-university>.

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.¹⁹ The best way to overcome this is to teach courts about who transgender people actually are, tell their stories,²⁰ 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.²¹ Once decision-makers are able to see transgender litigants as legitimate legal subjects,²² they are primed to entertain substantive legal arguments.

In Title VII cases in particular, experience bears out that affirming the dignity of transgender people and legitimizing their identities and experiences works well when coupled with a strict textualist approach to the statute. This may seem counterintuitive. After all, textualism is widely regarded as a politically conservative methodology.²³ But Justice Scalia's textualist revolution has dramatically changed how jurists who might otherwise ideologically oppose transgender rights approach these cases. Over the last forty years, federal courts have shifted toward more frequent use of textualist tools.²⁴ As Justice Kagan recently stated, "we're all textualists now."²⁵

19. Cf. RICHARD A. POSNER, *HOW JUDGES THINK* 116 (2008) (observing when judges are confronted with ambiguous facts that touch on charged issues they, like everyone else, "fall back on their intuitions" and display "[t]he kind of telescoped reasoning . . . called . . . 'cultural cognition'").

20. See Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 38-39 (2010) ("Stories can challenge traditional understandings; they can make visible the experiences of outsiders. They can even develop in a reader the capacity to empathize with other people whose experiences are dramatically different than the reader's own.").

21. See Kylar W. Broadus, *The Evolution of Employment Protections for Transgender People*, in *TRANSGENDER RIGHTS* 99 (Paisley Currah et al. eds., 2006) ("Rights both empower transgender people to contest discrimination and allow us to envision ourselves, and to be seen by others, as fully human. As lawyers and litigants continue to struggle to win individual cases and to set precedents that will benefit the community as a whole, we must not lose sight of this fundamental dimension of legal advocacy.").

22. Some of this is achieved through public education outside the courtroom, which "can prime (or prepare) the legal environment by trying to alter the conditions around it. This may alter the pressure under which stakeholders are making decisions, including judges." David L. Trowbridge, *Engaging Hearts and Minds: How and Why Legal Organizations Use Public Education*, 44 LAW & SOC. INQUIRY 1196, 1210 (2019).

23. Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 18-19 (2004) ("One theme you hear in the press, the halls of Congress, and the legal academy is that the move to textualism is political, a conservative reaction to laws enacted by Congresses to the left of those appointing the judges."); Alexander Volokh, *Choosing Interpretative Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 771 (2008) ("Textualism is a 'conservative' method of statutory interpretation, according to the conventional wisdom."). *But see* Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849 (2013) (arguing the link between textualism and conservatism is historically contingent).

24. Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 6-7 (2018).

25. Justice Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes* at 8:28 (Nov. 17, 2015), <https://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation/>.

Textualism's insistence that judges focus on statutory terms and disregard non-textual sources²⁶ makes it particularly well-suited to winning transgender coverage. Under a strict textualist approach, the question of whether Title VII protects transgender people can be easily answered in the affirmative. The statute prohibits discrimination "because of . . . sex" in employment.²⁷ No provision expressly withholds protection from transgender people.²⁸ Congress did not condition rights on a particular dictionary's definition of sex, let alone insist victims produce a birth certificate or submit to genital inspections or genetic testing to get through the courthouse doors. For good reason. The evil Congress put in its crosshairs is not the victim's sex. The point is that one's sex should not matter. What matters is one's right to be free of sex-based discrimination.

It is true that in the 1970s and 1980s, three circuit courts concluded that transgender people were not protected by Title VII.²⁹ But those decisions have since been abrogated by *Pricewaterhouse v. Hopkins*,³⁰ extending Title VII coverage to reach bias premised on sex stereotyping,³¹ as well as *Oncale v. Sundowner Offshore Services*,³² urging that Title VII coverage be extended as far as the text permits even if a particular application was not contemplated by the enacting Congress.

Today, there is no circuit split on whether transgender people are protected by sex discrimination laws.³³ Though some liberal lions of the federal bench have

26. GORSUCH, *supra* note 5, at 132 ("Textualism honors only what's survived bicameralism and presentment—and not what hasn't. The text of the statute and only the text becomes law. Not a legislator's unexpressed intentions, not nuggets buried in the legislative history, and certainly not a judge's policy preferences.")

27. Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e-2.

28. Despite this, the Department of Justice urges in *Harris* that since Title VII does not expressly mention "transgender status" the Court should infer a transgender exclusion. See Brief for the Federal Respondent at 17, *R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens* (No. 18-107), 2019 WL 3942898 [hereinafter *Harris* Brief for Federal Respondent].

29. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984).

30. 490 U.S. 228 (1989).

31. The Ninth Circuit has twice disavowed *Holloway*. See *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) (expressly recognizing *Holloway*'s abrogation); *Kastl*, 325 Fed.Appx. 492 (relying on *Schwenk* as precedential, implicitly affirming *Holloway*'s abrogation).

The Eighth Circuit has twice treated *Sommers*' bar on transgender coverage as if it has been totally abrogated. See *Tovar v. Essentia Health*, 857 F.3d 771, 775 (8th Cir. 2017) (assuming for the purposes of appeal that Title VII sex discrimination "encompasses protection for transgender individuals"); *Hunter v. United Parcel Serv.*, 697 F.3d 697, 702 (8th Cir. 2012) (assuming for purposes of appeal that Title VII transgender plaintiff is protected under a sex-stereotyping theory).

The Seventh Circuit has recognized *Ulane*'s reasoning that transgender persons are unprotected by Title VII as *dicta* that conflicts with intervening precedent and thus cannot foreclose coverage under a sex-stereotyping theory. See *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047–49 (7th Cir. 2017) (deeming *Ulane*'s unduly narrow conception of sex discrimination as *dicta*); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351–52 (7th Cir. 2017) (*en banc*) (similar).

32. 523 U.S. 75 (1998) (Scalia, J.).

33. Every Circuit Court to address whether transgender people may state claims for sex discrimination since *Pricewaterhouse* has agreed that they may—not only under Title VII, but also under

rallied to support transgender litigants,³⁴ in the district courts and most of the circuits, it is the conservatives who have made the strongest case for coverage. Jurists appointed by Republican presidents have repeatedly found transgender people are protected by Title VII and provisions of federal laws that similarly prohibit sex discrimination for the simple reason that they are not expressly excluded.³⁵

In addition to the plain text of the statute, there are three other textualist-friendly reasons to construe Title VII to protect transgender people.

First, discrimination because a person has changed her sex is discrimination “because of sex,” just as discrimination because a person has changed her

other provisions of federal law that similarly prohibit sex discrimination. See *Schwenk*, 204 F.3d at 1202 (9th Cir. 2000) (Gender Motivated Violence Act); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (Equal Credit Opportunity Act); *Smith*, 378 F.3d at 568 (6th Cir. 2004) (Title VII); *Barnes*, 401 F.3d at 738 (2005) (Title VII); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1223–24 (10th Cir. 2007) (Title VII); *Kastl*, 325 Fed.Appx. 492 (9th Cir. 2009) (Title VII); *Glenn v. Brumby*, 663 F.3d 1312, 1314 (11th Cir. 2011) (Equal Protection Clause); *Hunter*, 697 F.3d at 704 (8th Cir. 2012) (assuming Title VII claim viable); *Chavez v. Credit Nation Auto Sales, LLC*, 641 Fed.Appx. 883, 884 (11th Cir. 2016) (Title VII); *Tovar*, 857 F.3d at 775 (8th Cir. 2017) (assuming Title VII claim viable); *Whitaker*, 858 F.3d at 1047–49 (7th Cir. 2017) (Title IX); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 575–76 (6th Cir. 2018) (Title VII).

34. For example, in 2017 then Senior Judge Andre M. Davis of the Fourth Circuit (now retired), took the unusual step in transgender boy Gavin Grimm’s suit of issuing what *The Washington Post* labeled a “passionate statement placing Grimm among the pantheon of human rights leaders who confronted inequities through the courts.” Ann E. Marimow, *There’s a World that No Longer Describes the Federal Appeals Court in Richmond*, WASH. POST, Apr. 13, 2017, https://www.washingtonpost.com/local/public-safety/theres-a-word-that-no-longer-describes-the-federal-appeals-court-in-richmond/2017/04/12/3a82e0e4-193c-11e7-9887-1a5314b56a08_story.html. See *G.G. v. Gloucester Cnty. Sch. Bd.*, 853 F.3d 729, 730 (4th Cir. 2017) (Davis, J., concurring) (“Our country has a long and ignominious history of discriminating against our most vulnerable and powerless. We have an equally long history, however, of brave individuals—Dred Scott, Fred Korematsu, Linda Brown, Mildred and Richard Loving, Edie Windsor, and Jim Obergefell, to name just a few—who refused to accept quietly the injustices that were perpetuated against them. It is unsurprising, of course, that the burden of confronting and remedying injustice falls on the shoulders of the oppressed. These individuals looked to the federal courts to vindicate their claims to human dignity, but as the names listed above make clear, the judiciary’s response has been decidedly mixed. Today, G.G. adds his name to the list of plaintiffs whose struggle for justice has been delayed and rebuffed; as Dr. King reminded us, however, ‘the arc of the moral universe is long, but it bends toward justice’. G.G.’s journey is delayed but not finished. G.G.’s case is about much more than bathrooms. It’s about a boy asking his school to treat him just like any other boy. It’s about protecting the rights of transgender people in public spaces and not forcing them to exist on the margins. It’s about governmental validation of the existence and experiences of transgender people, as well as the simple recognition of their humanity. His case is part of a larger movement that is redefining and broadening the scope of civil and human rights so that they extend to a vulnerable group that has traditionally been unrecognized, unrepresented, and unprotected.”).

35. For instance, in 2011, Judge William H. Pryor of the Eleventh Circuit, a conservative who has been repeatedly floated as a Supreme Court nominee, ruled in *Glenn v. Brumby*, that the Fourteenth Amendment’s proscription of sex discrimination in employment for government employees—which closely tracks Title VII—protects transgender persons. *Glenn* turned on the logic that, “[a]ll persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype” and that “[b]ecause these protections are afforded to everyone, they cannot be denied to a transgender individual.” 663 F.3d at 1318–19. See also decisions discussed *infra* notes 100 and 101.

religion is discrimination “because of religion.”³⁶ Metaphysical inquiries into what makes someone a man or a woman are unnecessary. Title VII does not purport to tell courts or employers how to define an individual person’s sex any more than how to define an individual person’s religion. The only thing that matters is whether an adverse action is taken because of a protected status. If a worker’s sex is taken into account, that is discrimination. Even if there is disagreement about whether a transgender woman is a woman, or a transgender man a man, firing that individual because of a conflict about their sex takes their sex into account and is thus discriminatory.

An analogy to religion helps explain.³⁷ It is not uncommon for someone to be raised in one faith tradition but to adopt a different one later in life. Under Title VII, if an employer takes an adverse action because of the worker’s religion, that is discrimination. So, if an employer refuses to hire Catholics and a Catholic applicant is refused on that basis, that is discrimination. The worker need not prove the bona fides of her faith to merit protection. It would also be discrimination if our worker came to her faith later in life. For instance, if a convert to the Church of Jesus Christ of Latter-day Saints were denied a job because the prospective employer hated Mormons, the convert would also be protected. It simply would not matter that she was born into one faith, but at the time of the discrimination she belonged to another. It is the membership in the latter that triggered the mistreatment. Taking the last example and modifying it a bit, it also would not matter if the Mormon convert was denied a job because the employer discovered she was raised Catholic and he believed one’s faith at birth was most important and, hating Catholics, rejected the worker’s application—that, too, is discrimination.

Second, “discrimination against transgender persons necessarily implicates Title VII’s proscription against sex stereotyping”³⁸ as recognized in *Pricewaterhouse v. Hopkins*. The stereotyping analysis rests on a broad recognition, highlighted by the Sixth Circuit below, that a “transgender person is someone who fails to act and/or identify with his or her gender—i.e., someone who is inherently gender non-conforming.”³⁹ As the Eleventh Circuit noted in *Glenn v. Brumby*, “[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.”⁴⁰ The existence of transgender women dispels the stereotype that in order to be a woman one must be assigned female at birth. When an employer treats an employee adversely based on its unfounded stereotype about who is and is not a woman, it violates Title VII. However, a transgender woman need not be visibly

36. *Harris*, 884 F.3d at 575–76.

37. For a superb exploration of the religion analogy see Dallan Flake, *Using Religion to Protect Transgender Employees from Discrimination*, ILL. L. REV. (forthcoming 2020), <https://ssrn.com/abstract=3178786>.

38. *Harris*, 884 F.3d at 576.

39. *Id.*

40. 663 F.3d at 1316.

gender nonconforming in order to state a claim. Rather, by merely being transgender, a person contravenes a fundamental sex stereotype, including in contexts where the person's appearance is gender typical.

Third, Title VII does not permit employers to mistreat workers on account of their sex assigned at birth. Taking an adverse action against a transgender person because of their sex assigned at birth is discrimination because, but for the person's sex assigned at birth, no discrimination would have occurred.⁴¹ To permit a female-identifying employee who was assigned female at birth to represent herself as a woman while prohibiting a transgender woman from doing the same is to discriminate against the transgender woman because she was considered to have a particular sex at birth and/or because the employer believes that the sex assigned to the employee at birth is the employee's current sex.

Unfortunately, too many lawyers approach Title VII implicitly thinking that legal jujitsu is needed to get courts to protect transgender people. They misjudge the problem, believing there must be something about Title VII's text tripping courts up rather than biases about transgender people.⁴² So why do advocates have the strong impulse to think the problem is with the text and not bias?

Some people narrowly conceive of sex discrimination as being something to do with cisgender women. That type of preferencing makes it seem as if characteristics that distinguish cisgender from transgender women matter.⁴³ As a result, distinguishing characteristics are so highly elevated that they are seen as connoting limits on Title VII's otherwise broad, remedial scope of protection. Consequently, absent any textual support for it, one's sex assigned at birth is deemed important and it seems only natural that Title VII protection only be afforded to persons who embrace prototypical characteristics.⁴⁴ Obviously, this is tautological.

Elsewhere, I call this phenomenon a "frame dispute," a term that describes the process by which particular subgroups are erased within discourse and, in the context of antidiscrimination law, from protections they should be beneficiaries of as constituent members of a larger group.⁴⁵ Frame disputes erupt where

41. *Harris*, 884 F.3d at 576.

42. See Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 39–40 (2000).

43. Cf. Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1117 (2015) ("The history of developments under Title VII's sex discrimination provision suggests that antidiscrimination law can facilitate progress toward equality, but change requires continuing, committed, cohesive activist efforts to challenge essentialist ideas about difference cited to explain and justify inequality.").

44. Cf. Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1292–93 (1991) ("[T]he law of discrimination, to the extent it centers on empirical accuracy of classification and categorization, has targeted inequality's failures of perception such that full human variety is not recognized, above inequality's imposition of commonalities, such that full human variety is not permitted to exist.").

45. Ezra Young, *Demarginalizing Trans Rights*, in *DEPLOYING INTERSECTIONALITY* (Kimberlé W. Crenshaw et al. eds., forthcoming 2021).

multiple groups fall under the same broad umbrella of status-based protection. Each sub-group tends to push self-serving conceptions of what counts as status-based discrimination, often tied to their own discrete sub-group markers. Sub-groups with greater power or positional privilege often prevail, and as a result their unique markers are, over time, elevated as proxy indicia for status-based protection. When this happens, a remedial law's otherwise expansive scope of protection is artificially limited to reach only persons who manifest the victor sub-group's markers.⁴⁶

Transgender women have proven particularly vulnerable in Title VII frame disputes. One reason is that in the first formative decades of litigation the transgender community lacked the political power to secure transgender-inclusive frames. When Title VII was enacted in 1964, the transgender rights movement as we know it today did not exist.⁴⁷ Because there was no impact litigation infrastructure to bring or support transgender cases,⁴⁸ opportunities for courts to encounter transgender plaintiffs were artificially depressed. During this same period, other movement groups aggressively brought test cases to flesh out the metes and bounds of Title VII protection. Though some, like the women's and then-termed gay rights movements, counted transgender women among their constituents, they exclusively brought cases on behalf of cisgender plaintiffs and framed rights demands narrowly in cisgender terms.⁴⁹

As Title VII jurisprudence matured, transgender women's identities and experiences were coopted to pursue other agendas, often times distorting transgender subjects and rights claims in the process. For instance, for much of the 1980s and 1990s, queer legal theorists and advocates recast transgender women as effeminate men, framing the discrimination they endured as being on account of their supposed insufficient masculinity and on that premise deemed

46. My insight closely parallels Kimberlé Crenshaw's in *Demarginalizing*, where she observes how Title VII sex and race discrimination jurisprudence similarly defined discrimination in ways that erase discrimination experienced by Black women. See generally Kimberle W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 140 UNIV. CHI. LEGAL F. 139 (1989) [hereinafter Crenshaw, *Demarginalizing*]. My insight is also parallel to Nancy Marcus' in *Bridging Bisexual Erasure*, where she argues sexual orientation discrimination, a sub-type of sex discrimination, is often framed in ways that erase bisexuals. See generally Nancy C. Marcus, *Bridging Bisexual Erasure in LGBT-Rights Discourse and Litigation*, 22 MICH. J. GENDER & L. 291 (2015).

47. For a succinct history of the U.S. transgender rights movement see SUSAN STRYKER, *TRANSSEXUAL HISTORY* (2d ed. 2017). For a less movement-focused account, see JOANNE MEYEROWITZ, *HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES* (2002).

48. See, e.g., Gabriel Arkles, Pooja Gehi, & Elana Redfield, *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. FOR SOC. JUST. 579, 579 (2010) ("A decade ago, almost no institutionalized legal advocacy around trans issues existed. Mainstream lesbian, gay, bisexual, and transgender (LGBT) legal rights organizations almost entirely excluded transgender people and issues, and no transgender-specific legal organizations existed.").

49. Cf. Kimberle W. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1252 (1991) (articulating political intersectionality as a frame to map how groups at the margins of two or more subordinated identity groups are often erased in competing discourses).

transgender women similarly positioned to cisgender gay men.⁵⁰ Conceptualized in this way, transgender women's cases were valuable only insofar as they could be used to speak to and promote rights framed in androcentric cisgender terms.⁵¹ Even some prominent feminists bought into this approach.⁵²

It is exceedingly problematic to frame transgender women as men. Doing so is insulting and offends transgender women's dignity.⁵³ The injury is profound. It is humiliating because it rejects a transgender woman's deepest personal truth.⁵⁴ It also presumptuously denies transgender women the autonomy to define themselves,⁵⁵ exacts a significant psychological toll,⁵⁶ and mimics the

50. This problem is in part caused by the LGBT movement's litigation strategy wherein "[w]hite gay men in particular, as well as white lesbians, are assumed to represent the entire group, quite unlike bisexual and transgender people." Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 213 (2016).

51. See Raewyn Connell, *Transsexual Women and Feminist Thought: Toward New Understanding and New Politics*, 37 SIGNS 857, 872 (2012) ("[T]here are limits to this politics, as there are limits to the LGBT alignment; there is an overlap, but not a complete correspondence, with the interests of transsexual women.").

Devon Carbado has gestured to a parallel phenomenon, arguing that the LGBT rights movement has historically framed demands to preference the interests of middle- and upper-class white gay men over other members of the LGBT community, the result being that the positionally more privileged group-members' demands ended up playing an outsized role in shaping how the movement framed rights demands. See Devon Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1506 (2000).

52. One example is Katherine Franke's seminal piece *Central Mistake*. There, Franke ignores the marked ways anti-transgender bias animated early decisions denying transgender women Title VII protection and treats those early losses as emblematic of larger, impliedly more important, issues. See Katherine Franke, *Central Mistake of Sex Discrimination Law; The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 63 (1995) ("[I]n this context the rights and lives of transgendered people have provided the battleground upon which the war over gender normativity [of queer folks] has been fought. These cases illustrate even more clearly the judgments about sex and gender that were at work in the more 'regular' cases.").

53. Stephanie Julia Kapusta, *Misgendering and its Moral Contestability*, 31 HYPATHIA 502, 504–05 (2016) ("By being persistently classified as a 'man' according to particular conceptions and descriptions, a transgender woman is denied participation in shaping descriptions of herself.] Besides injustices of an epistemic nature, misgendering undermines self-respect. By this I mean the worth a person recognizes in her own agency and her own life plans, inasmuch as they are her own.")

54. See Meredith Talusan, *Why Trans Women Care About Caitlyn Jenner's Pronouns*, BUZZFEED, June 2, 2015, <https://www.buzzfeed.com/1demerith/why-caitlyn-jenners-pronouns-matter-to-trans-women> ("In public situations, using 'he' to address a trans woman is the easiest way to harass us without consequence, as people often claim that they did so without malice either because they couldn't see how the person they're referring to could possibly be a woman, or because they're only going by a trans woman's legal status. It's how those who knew us before transition are able to say that they accept us, yet don't want to inconvenience themselves, failing to account for how much the right pronouns matter both for our mental health and our physical safety.").

55. Kapusta, *supra* note 53, at 505 ("Because a person's gender identity can be part of her life struggle, and one of the most central values of who she is, misgendering—especially when persistent—can lead to an erosion of a transgender person's plans to lead the life she wishes to lead, indeed, to an erosion of pursuing any of her own plans for life.").

56. See, e.g., M. Paz Galupo et al., "Every time I get gendered male, I feel a pain in my chest": *Understanding the Social Context for Gender Dysphoria*, 5 STIGMA & HEALTH 7 (2020) ("findings support the contention that not all of the distress originates from gender incongruence per se, but may instead originate from stigma stress associated with negotiating social interactions in a cisnormative

bullying and violence they are subjected to in broader society.⁵⁷ For a transgender woman's own counsel to take this approach is even more unsettling. It is a betrayal of trust and raises the possibility that the court will not only come to view the transgender woman in a negative light but see her as unworthy of basic respect.⁵⁸

It is also strategically unwise for a transgender woman's lawyer to adopt a frame that echoes rather than critiques the perpetrator's discriminatory perspective. The advocate's job is not simply to identify statutory breaches, she must also educate the court as to why conduct that may have long been socially tolerated is in fact illicit. Anti-transgender and misogynistic attitudes are pervasive in our society. If the perpetrator's perspective is centered, proving liability is impossible.⁵⁹ As the Ninth Circuit reasoned in another context, discriminatory "comments or actions may appear innocent or only mildly offensive to one who is not a member of the targeted group, but in reality be intolerably abusive or threatening when understood from the perspective of a plaintiff who is a member of the targeted group."⁶⁰ It is only in "considering both the existence and the severity of discrimination from the perspective of a reasonable person of the plaintiff's [status that] we recognize forms of discrimination that are real and hurtful, and yet may be overlooked if considered solely from the perspective of an adjudicator belonging to a different group than the plaintiff."⁶¹

Androcentric frames are also a poor means to redress the devaluation of transgender women as women.⁶² Recasting transgender women as men warps

context"); Kevin A. McLemore, *Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals*, 14 SELF & IDENTITY 51, 59 (2015) ("feeling stigmatized when misgendered was strongly associated with negative affect").

57. JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 8 (2011), https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf [hereinafter INJUSTICE AT EVERY TURN] ("Nearly every system and institution in the United States [subjects transgender persons to] mistreatment ranging from commonplace disrespect to outright violence, abuse and denial of human dignity. The consequences of these widespread injustices are human and real, ranging from unemployment and homelessness to illness and death.").

58. See also Ryan K. Blake, *Transgender Rights are Human Rights: A Contemplation of Litigation Strategies in Transgender Discrimination Cases*, 33 WISC. J.L. GENDER & SOC'Y 107, 115 (2018) ("Transgender litigants have a history of being treated with disrespect by the court system—treated not just as different or 'other' but as somehow 'lesser'. It is this traditionalist view that advocates must reject most vigorously.").

59. Cf. Note, *Equal Dignity—Heeding Its Call*, 132 HARV. L. REV. 1323, 1337 (2019) ("So long as the framing of a right includes the very basis of discrimination, and the analysis is then chained to history, historical discrimination becomes a justification unto itself.").

60. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1116 (9th Cir. 2004).

61. *Id.*

62. See Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995) (arguing that an androcentric model of gender role oppression is an inherently insufficient framework within which to address the devaluation of women); Meredith Render, *Misogyny, Androgyny, and Sexual Harassment:*

how rights claims are articulated and obscures how misogyny colors the discrimination they endure. If judges are told to see a transgender woman as a man, evidence that she was discriminated against because of her femininity and status as a woman is made illegible.⁶³

As Paisley Currah explains, “there is no especial transsexual politics of gender in [transgender women’s] cases.”⁶⁴ Employers discriminate against both cisgender and transgender women for not acting or looking appropriately feminine.⁶⁵ Similarly, both are denied jobs and promotions traditionally held by men and endure gender pay disparities.⁶⁶ Workplace exclusion is even premised on similarly dubious misogynistic claims. For instance, employers have similarly argued that cisgender and transgender women cannot be fully integrated into the workforce because restroom facilities are too inadequate to accommodate them.⁶⁷

Sex Discrimination in a Gender-Deconstructed World, 29 HARV. J. L. & GENDER 99, 120 (2006) (“[I]n failing to account for the fact that not only were our gendered constructs falsely binary—they were (importantly from a feminist perspective) hierarchically ordered—queer theory gender deconstruction simply allowed the existing dominant gendered paradigm (consisting of an andro-ideal) to subsume the already devalued subordinate paradigm of femininity.”).

63. The Tenth Circuit obliquely made this point in *Etsitty v. Utah Transit Authority*, explaining in a footnote that the transgender woman’s odd decision to plead herself as being a “biological male” and woman simultaneously suggested that she did not “claim protection under Title VII as a woman who fails to conform to social stereotypes about how a woman should act and appear.” 502 F.3d at 1223 n.3.

64. Paisley Currah, *Transgender Rights Without a Theory of Gender*, 52 TULSA L. REV. 441, 446 (2017). Cf. Kavanaugh, *supra* note 5, at 2120 (“Like cases should be treated alike by judges of all ideological and philosophical stripes, regardless of the subject matter and regardless of the identity of the parties to the case.”).

65. See, e.g., Anna M. Archer, *From Legally Blonde to Miss Congeniality: The Femininity Conundrum*, 13 CARDOZO J.L. & GENDER 1, 12 (2006) (“If a female is too feminine, she faces the threat of not being taken seriously; yet if she is not feminine enough, people do not like her—the classic double-bind.”).

66. See, e.g., Kristen Schilt & Matthew Wiswall, *Before and After Gender Transitions, Human Capital, and Workplace Experience*, 8 B.E.J. ECON. ANALYSIS & POL’Y 1, 18–19 (2008) (transgender women experience substantial and statistically significant reductions in job opportunities and earnings).

67. See, e.g., *DeClue v. Central Ill. Light Co.*, 223 F.3d 434, 438–39 (7th Cir. 2000) (Rovner, J., partially dissenting) (“[S]ome employers not only maintain, but deliberately play up, the lack of restroom facilities and similarly inhospitable work conditions as a way to keep women out of the workplace.”) (collecting cases); HIDDEN FIGURES 1:01:42 (20th Century Fox 2016) (“There is no bathroom for me here[.] There is no colored bathroom for me in this building or any building outside the West Campus[.] I have to walk to Timbuktu just to relieve myself[.] So excuse me if I have to go to the bathroom a few times a day.”). Also compare Ruth Bader Ginsburg, *Remarks on Women’s Progress at the Bar and on the Bench*, 89 CORNELL L. REV. 801, 803 (2004) (“Why did law schools wait so long before putting out a welcome mat for women? Arguments ranged from the anticipation that women would not put their law degrees to the same full use as men, to the ‘potty problem’—the absence of adequate bathrooms for women.”) with Deborah Sontag, *Once a Pariah, Now a Judge: The Early Transgender Journey of Phyllis Frye*, N.Y. TIMES, Aug. 29, 2015, <https://www.nytimes.com/2015/08/30/us/transgender-judge-phyllis-fryes-early-transformative-journey.html> (“[As a law student she] tussled with the administration to gain access to the women’s restroom, the kind of fight that continues to this day.”).

Unfortunately, the contemporary transgender rights movement has, at times, done a poor job of representing transgender women's interests in sex discrimination cases. The movement is a diverse coalition, uniting persons with divergent manifestations of gender nonconformity into a coherent political force.⁶⁸ But in impact litigation, and especially in sex discrimination cases, the movement favors using transgender women as representatives of the whole.⁶⁹ There is a good reason for disproportionately bringing cases on behalf of transgender women—they face the highest rates of job discrimination.⁷⁰ The statistics are even bleaker for transgender women of color.⁷¹ But, too often, transgender women's vulnerability to sex discrimination as women is masked.

68. Currah, *Transgender Rights Without a Theory of Gender*, *supra* note 64, at 449–50 (“[T]he category brings together, at times, uneasily, both ascribed and performative notions of identity/subjectivity: people who understand themselves as having been born in the wrong body find themselves working alongside people who reject most gender norms as nothing but a mechanism of power and alongside people who identify as non-binary. A cacophonous crowd, to be sure, yet one that is still imagined as moving forward together under the protective carapace of the transgender umbrella[.] But with the term [transgender], these successes can be written into a new chapter in the story of progress that underwrites the liberal world view in the United States: a previously disdained social group's slow but inevitable (from hindsight) triumph over an oppression enforced by the state and made possible by widespread social animus.”).

69. Transgender women are disproportionately selected by movement litigators to serve as impact plaintiffs in transgender sex discrimination cases. Though transgender women are more vulnerable than other group members to employment discrimination (see sources cited *infra* notes 70 and 71), most suits universalize the experiences of transgender women to all transgender people despite the fact that one's gender modulates how they are targeted by and experience sex discrimination. For instance, of the twelve leading impact cases discussed *supra* note 33, nine were brought by transgender women, one was brought by a transgender man, and two were brought by cisgender mothers of transgender boys.

70. See, e.g., INJUSTICE AT EVERY TURN, *supra* note 57, at 53 (36% of transgender women report job loss due to bias compared to 19% of transgender men); *id.* at 54 (55% of transgender women report discrimination in hiring compared to 40% of transgender men); *id.* at 54–55 (39% of transgender women report denial of promotion due to bias compared to 18% of transgender men).

71. NAT'L CTR. FOR TRANSGENDER EQUAL. ET AL., 2015 U.S. TRANSGENDER SURVEY: REPORT ON THE EXPERIENCES OF BLACK RESPONDENTS 11 (2017), <https://www.transequality.org/sites/default/files/docs/usts/USTSBlackRespondentsReport-Nov17.pdf> (47% of Black transgender women report being denied promotion, and/or not hired in the past year because of their gender compared to 39% of Black transgender men); NAT'L CTR. FOR TRANSGENDER EQUAL. ET AL., 2015 U.S. TRANSGENDER SURVEY: REPORT ON THE EXPERIENCES OF LATINO/A RESPONDENTS 12 (2017), <https://www.transequality.org/sites/default/files/docs/usts/USTSLatinReport-Nov17.pdf> (observing similar gender gap—39% of Latina transgender women compared to 30% of Latino transgender men); NAT'L CTR. FOR TRANSGENDER EQUAL. ET AL., 2015 U.S. TRANSGENDER SURVEY: REPORT ON THE EXPERIENCES OF AMERICAN INDIAN & ALASKA NATIVE RESPONDENTS 11 (2017), <https://transequality.org/sites/default/files/docs/usts/USTS-AIAN-Report-Dec17.pdf> (observing similar gender gap—49% of American Indian and Alaska Native [AIAN] transgender women compared to 37% of AIAN transgender men); NAT'L CTR. FOR TRANSGENDER EQUAL. ET AL., 2015 U.S. TRANSGENDER SURVEY: REPORT ON THE EXPERIENCES OF ASIAN, NATIVE HAWAIIAN, AND PACIFIC ISLANDER RESPONDENTS 14 (2017), <https://transequality.org/sites/default/files/docs/usts/USTS-ANHPI-Report-Dec17.pdf> (observing similar gender gap—31% of Asian and Native Hawaiian/Pacific Islander [ANHPI] transgender women compared to 23% of ANHPI transgender men).

Despite evidence that misogyny is a key cause of transgender women's vulnerability, many movement lawyers frame these cases through the lens of transphobia.⁷² In elevating transphobia as a “but for” cause of discrimination, the movement conceptualizes all community members as equally vulnerable.⁷³ There is rhetorical power in that frame, but it comes at a cost in transgender women's cases. It takes gender out of transgender—obscuring how misogyny fuels bias against transgender women as women.

Whatever the cause, one price of framing a transgender woman as if she were a man in these cases is that it undercuts efforts to refute a faux originalist attack on statutory coverage—application of the so-called “original public meaning canon.” I will first explain the argument for “original meaning” in transgender cases like *Harris* and then explain why the original public meaning canon is inapt.

Some opponents of transgender rights argue that Title VII's sex discrimination proscription cannot reach transgender people *qua* transgender people on the theory that the original public would not have understood the statute as extending so far.⁷⁴ This is originalist because, they claim, in 1964 “sex”

72. Julia Serano has proposed that we use the term “trans-misogyny” to specify how transgender women experience discrimination as women, explaining:

When a trans person is ridiculed or dismissed not merely for failing to live up to gender norms, but for their experiences of femaleness or femininity, they become victims of a specific form of discrimination: *trans-misogyny*. When the majority of jokes made at the expense of trans people center on “men wearing dresses” or “men who want their penises cut off,” that is not transphobia—it is trans-misogyny. When the majority of violence and sexual assaults committed against trans people is directed at trans women, that is not transphobia—it is trans-misogyny.

JULIA SERANO, WHIPPING GIRL: A TRANSSEXUAL WOMAN ON SEXISM AND SCAPEGOATING OF FEMININITY 14–15 (2d ed. 2016).

73. *But see* Florence Ashley, *Don't Be So Hateful: The Insufficiency of Anti-Discrimination and Hate Crime Laws in Improving Trans Well-Being*, 68 U. TORONTO L.J. 1, 21 (2018) (“Men and women, masculinity and femininity, are subject to different norms and values and, thus, transantagonism does not affect transmasculine and transfeminine individuals the same way.”); Viviane Namaste, *Undoing Theory: The ‘Transgender Question’ and the Epistemic Violence of Anglo-American Feminist Theory*, 24 HYPATHIA 11, 20 (2009) (“[C]ontextual analysis of the different ways social relations of race, labor, and gender intersect is required in order to adequately understand violence against trans women of color.”).

74. *But see* Mary Anne Case, *Legal Protections for the ‘Personal Best’ of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, 66 STAN. L. REV. 1333, 1340–41 (2014) (pointing to legislative history reflecting that Congress intended to be “comprehensive” in including “sex as a forbidden ground” such that “discrimination on the basis of one identity category could not be used by an employer to cover up or justify discrimination on the basis of another, and to ensure that no category of person who might face employment discrimination would be excluded from protections”); Nan D. Hunter, *Sex and the Text: What Could Carry the Day in the Supreme Court's Title VII Cases*, NAT'L L.J., Dec. 5, 2019, <https://www.law.com/nationallawjournal/2019/12/05/sex-and-the-text-what-could-carry-the-day-in-the-supreme-courts-title-vii-cases/> (arguing Congress understood “discrimination because of sex” to be capacious in 1964).

was identical with sex assigned at birth.⁷⁵ So defined, they argue that Title VII does not recognize changes of sex, thus for the purposes of the statute transgender women must be deemed men and employers are free to insist transgender women act and behave as men.⁷⁶

There are at least two reasons why the “original public meaning” canon is inapt, neither one of which can be meaningfully elevated if we concede that transgender women are male.

The first reason is that the “original public meaning” canon as deployed in transgender rights cases is not originalist. As Katie Eyer explains, while the concept of “original public meaning” sounds familiar, “it is a term of art that has virtually no pedigree in federal statutory interpretation.”⁷⁷ The Supreme Court first invoked the term in passing in a statutory interpretation case in *Wisconsin Central Ltd. v. United States*,⁷⁸ decided in 2018. There, the Court held that “every statute’s meaning is fixed at the time of enactment, [but] new applications may arise in light of changes in the world” and went on to recognize a specific new application as being within the “statute’s original public meaning.”⁷⁹ With the exception of *Wisconsin Central* and LGBT rights cases, the term has only been used a handful of times in statutory interpretation cases by federal courts.⁸⁰ Eyer also points out something curious—when deployed in LGBT rights cases, jurists have turned “original public meaning” on its head. Rather than deeming the meaning of words fixed and allowing new applications, the canon is invoked to do the opposite—limit statutes to “only those applications that the imagined historical public would have thought included are actionable [] regardless of the meaning of the words ‘because of . . . sex’.”⁸¹ Consequently, in these cases the “original public meaning” canon functions as the discredited congressional expectations canon.⁸²

75. See, e.g., *Harris* Brief for Federal Respondent, *supra* note 28, at 21 (arguing inquiry should narrowly focus on ascertaining original “meaning of ‘sex’ as a classification of persons”).

76. See, e.g., Brief for Petitioner at 37, *R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens* (No. 18-107), 2019 WL 3958416 [hereinafter *Harris* Brief for Petitioner] (“Harris chose to part ways with an employee who declined to follow the (legal and unchallenged) sex-specific dress code that Harris applied to all its employees based on biological sex. Harris would react the exact same way to a female employee who refuses to follow the female dress code.”).

77. Eyer, *supra* note 13, at 68.

78. 138 S.Ct. 2067 (2018).

79. *Id.* at 2074–75.

80. See *Kisor v. Wilkie*, 139 S.Ct. 2400, 2426 (2019) (Gorsuch, J., concurring) (using the term once in passing); *Callahan v. U.S. Dep’t of Health and Human Servs.*, 1:19-cv-1783-AT, 2020 WL 370209, at *16 (N.D. Ga. Jan. 16, 2020) (quoting Gorsuch’s *Kisor* opinion in passing); *Callahan v. U.S. Dep’t of Health and Human Servs.*, 939 F.3d 1251, 1265 n.11 (5th Cir. 2019) (quoting the same in a footnote); *Herrera v. Santa Fe Pub. Sch.*, 41 F.Supp.3d 1188, 1275 n.86 (D.N.M. 2014) (using the term once in a footnote in a one-hundred page opinion); *Swallows Holding Ltd. v. Comm’r*, 126 T.C. 96, 165 (2006) (Holmes, J., dissenting) (using the term once in passing).

81. Eyer, *supra* note 13, at 90–91.

82. *Id.* at 89 (“History always played a variety of roles in statutory interpretation—roles that are arguably expanding the current statutory interpretation milieu. But, it is clear that the primary case law that judges and litigants have relied on [in LGBT rights cases] to claim that their ‘original public

Another important reason why the “original public meaning” canon is inapt in this context is that its deployment depends upon a faulty premise—that one’s sex assigned at birth, as recorded on one’s birth certificate, has always rigidly set one’s legal sex classification. This is simply not true. For much of our history, sex status was socially conferred—the law treated persons who held themselves out as male or female as such. In the mid-twentieth century state level vital statistics and other agencies codified this practice and also developed comprehensive procedures through which transgender people could amend documents like birth certificates, driver’s licenses, and passports to recognize a change in sex. Since 1977, the Model Vital Statistics Act has urged states to articulate policies facilitating amendments.⁸³ Today, every single state permits transgender persons to amend identity documents, like driver’s licenses, to reflect a change in sex.⁸⁴ Similarly, the U.S. Department of State issues passports that reflect a binary change in sex.⁸⁵

There is not now nor has there ever been a state or federal law that defines legal sex exclusively as sex assigned at birth as recorded on one’s original birth certificate. In fact, it is only in the last few years that bills seeking to redefine legal sex as sex assigned at birth have been introduced. Markedly, all of those bills have been rejected at the federal and state levels.⁸⁶ This legislative activity

meaning’ approach is an established form of interpretation does not support their claims. Nor do any of the other potentially analogous ways of looking to history in statutory interpretation—except the discredited approach of relying on congressional expectations—appear to closely resemble opponents’ proposed ‘original public meaning’ approach.”)

83. Kyle C. Velte, *Mitigating the “LGBT Disconnect”: Title IX’s Protection of Transgender Students, Birth Certificate Correction Statutes, and the Transformative Potential of Connecting the Two*, 27 AM. U. J. GENDER SOC. POL’Y & L. 29, 48 (2019) (noting that the U.S. Department of Health and Human Services’ Model Vital Statistics Act has expressly addressed the issue of corrected birth certificates for transgender Americans since its 1977 update, recommending that sex marker correction be permitted upon showing that the applicant underwent surgery to change their sex and upon presentation of a court order noting that fact and observing that recommendation was preserved in the most recent update issued in 1992) (citing Model State Vital Statistics Act and Regulations § 21(e) (Ctr. For Disease Control & Prevention 1992), available at <http://www.cdc.gov/nchs/data/misc/mvsact92b.pdf>).

84. See *ID Documents Center*, NAT’L CTR. FOR TRANSGENDER EQUALITY, <https://transequality.org/documents> (collecting authorities and sharing practical tips for amending identity documents to reflect a change in sex) (last visited Mar. 22, 2020).

85. U.S. DEP’T OF STATE, 8 FOREIGN AFFAIRS MANUAL, 403.3-2(B)(d)(5) (2018), <https://fam.state.gov/FAM/08FAM/08FAM040303.html>. But see Jessica A. Clarke, *They, Them Theirs*, 132 HARV. L. REV. 894, 947–49 (2017) (discussing nonbinary, intersex advocate Dana Zzyym’s legal fight to obtain a U.S. passport with an X gender marker).

86. See, e.g., Civil Rights Uniformity Act, H.R. 5812 §3(a), 114th Cong. (2016), <https://www.congress.gov/114/bills/hr5812/BILLS-114hr5812ih.pdf> (“[T]he words ‘sex’ and ‘gender’ shall not be interpreted to mean ‘gender identity’ or its equivalent, and the words ‘man’ and ‘woman’ and their equivalents shall refer exclusively to a person’s sex.”); Civil Rights Uniformity Act § 3(a), H.R. 2796, 115th Cong. (2017), <https://www.congress.gov/115/bills/hr2796/BILLS-115hr2796ih.pdf> (“[T]he words ‘sex’ and ‘gender’ and their equivalents shall not be interpreted to mean ‘gender identity’ or its equivalent, and the words ‘man’ and ‘woman’ and their equivalents shall refer exclusively to a person’s genetic sex.”); Senate Bill 1619, 2d Sess. (Okla. 2016), http://webserver1.lsb.state.ok.us/cf_pdf/2015-16%20INT/SB/SB1619%20INT.PDF (mandating sex

evidences two things. Legal sex can take into account sex changes, otherwise bills barring recognition of sex changes would not be sought. And given the lack of political will to enact laws that bar changes of sex status, at least in the Title VII context, it appears that the original public meaning canon is being invoked to thwart democratic processes.⁸⁷

In sum, the reflexive impulse to deem transgender people unprotected is not insurmountable. To overcome it, litigators must shape their arguments to resist importing extra-textual biases about who Title VII is intended to protect. At bare minimum, they must explain who transgender people are, affirm their client's gender, and help the court see their client as a human being and a legitimate legal subject. Efforts to overly abstract the statutory question so as to evade probing questions about the client's humanity will not only come off as insincere but may very well signal that there is something suspect about the client and her claim.

II.

MISSED OPPORTUNITIES IN THE *HARRIS* ORAL ARGUMENT

The ACLU's public education campaign supporting Aimee's case often evokes the mantra "transgender women are women, transgender men are men." This simple and pointed messaging uplifts that as a practical matter, perception of whether Aimee is protected turns on whether she is seen as a woman. Aimee did not draw these battle lines. Her employer has waged war by attacking her most fundamental truth. By taking this case to the Supreme Court, Aimee's

segregated restrooms in public schools and defining legal sex for that purpose to be "as identified at birth by that individual's anatomy"); Senate Bill 202, 2017 Sess. (Kan. 2017), <https://tinyurl.com/ubqomjz> (mandating sex segregated restrooms in public school and defining legal sex for that purpose as "objectively determined by anatomy and genetics existing at the time of birth" and further that an "individual's original birth certificate may be relied upon as definitive evidence of the individual's sex"); Senate Bill 6 (Tex. 2017), <https://capitol.texas.gov/tlodocs/85R/billtext/pdf/SB000061.pdf> (prohibiting local governments from adopting policies related to restroom use; requiring school districts to adopt policies requiring that multiuser restrooms be designated for and used by people based on their "biological sex" defined as "the condition of being male or female, which is stated on a person's birth certificate"). See also Marka B. Fleming & Gwendolyn McFadden-Wade, *The Legal Implications under Federal Law when States Enact Biology-Based Transgender Bathroom Laws for Students and Employees*, 29 HASTINGS WOMEN'S L.J. 157, 163–66 n.35 (2018) (collecting other examples of failed state bills between 2013 and 2017).

But see Maayan Sudai, *Toward a Functional Analysis of "Sex" in Federal Antidiscrimination Law*, 42 HARV. J.L. & GENDER 421, 455–56 (2019) (discussing the same failed bills and pointing out that "[a]lthough state legislators expressed a biological essentialist position with respect to the category of 'sex', they nevertheless differed in their list of constitutive elements, thereby demonstrating the social aspects existing even within a biological-essentialist approach").

87. See GORSUCH, *supra* note 5, at 133 ("[W]hen judges do anything other than interpret statutes according to the ordinary meaning of their terms, they risk undoing carefully wrought compromises and robbing political minorities of their constitutionally afforded bargaining chip, handing a victory to a faction that couldn't convince others to go as far as they'd like in the legislative arena.").

employer has upped the ante, putting the legitimacy of all transgender Americans' lives in its crosshairs.

In the days leading up to the *Harris* argument, members of Aimee's legal team publicly underscored the stakes. In one particularly poignant piece, Chase Strangio, one of two out transgender attorneys⁸⁸ who would sit silently at counsel's table during the argument, incisively explained that "transgender people can live only if we can be who we are—that is, our existence depends on our ability to live consistent with the sex with which we identify[.] When the justices see us sitting before them, they will have to contend with the reality that we have declared our truth and are not going back."⁸⁹

Unfortunately, David Cole, Aimee's oral advocate, took a very different tack.⁹⁰ Cole repeatedly labeled Aimee as an "insufficiently masculine" man,⁹¹ ostensibly a man in a dress. Cole also needlessly conceded at the top of his argument that at the very least Title VII prohibits discrimination on account of "biological sex" which he defined as synonymous with "sex assigned at birth."⁹² So framed, Cole indicated Aimee could be considered a male for the purposes of the statute. Making matters worse, as the argument wore on, Cole acquiesced to labeling Aimee as a "biological male,"⁹³ a moniker that is not only offensive, but is also scientifically inaccurate.⁹⁴ Perhaps Cole intended to say only that Title

88. Gabriel Arkles, also a transgender man, is the other attorney.

89. Chase Strangio, Opinion, *I'm a Transgender Attorney Fighting for My Community. Will that Make a Difference to the Supreme Court?*, WASH. POST, Oct. 6, 2019, <https://www.washingtonpost.com/opinions/2019/10/06/im-transgender-attorney-fighting-my-community-will-that-make-difference-supreme-court/>.

90. Some have suggested that Cole did not intend to frame Aimee as a man and that the justices' questions and his answers merely made it appear that was his plan all along. However, Cole published an essay weeks before the oral argument where he previewed the "insufficiently masculine" man and "biological sex" framing. See David Cole, 'Sex' at the Supreme Court, N.Y. REV. BOOKS, Oct. 24, 2019, <https://www.nybooks.com/articles/2019/10/24/sex-at-the-supreme-court/>.

91. *Harris* Oral Argument Transcript, *supra* note 8, at 4 ("Harris Homes would fire both transgender men for being insufficiently feminine and transgender women for being insufficiently masculine"); *id.* at 27–28 ("but my client can be fired for being insufficiently masculine?"); *id.* at 64 ("Harris Homes fired Aimee Stephens because he thought she is a man who is insufficiently masculine.").

92. *Id.* at 4–5 ("sex means at a minimum sex assigned at birth based on visible anatomy or biological sex"). These terms are not, however, synonymous. "Biological sex" is a broad complex concept that consists of a number of variables including gender and gender identity, genital anatomy, secondary characteristics, brain anatomy, hormonal levels, and chromosomal complement. "Sex assigned at birth" refers to the sex marker an individual is designated at birth which is recorded on their birth certificate. See also citations *infra* notes 154 and 155.

93. *Harris* Oral Argument Transcript, *supra* note 8, at 7–8 (Cole's exchange with Chief Justice Roberts).

94. Studies conducted post-mortem on transgender women suggest they possess a female-typical brain structure, supporting the hypothesis that gender identity develops as a result of an interaction of the developing brain and sex hormones. See, e.g., J.N. Zou et al., *A Sex Difference in the Human Brain and its Relation to Transsexuality*, 378 NATURE 68 (1995); F.P. Kruijver et al., *Male-to-Female Transsexuals have Female Neuron Numbers in a Limbic Nucleus*, 85 J. CLIN. ENDOCR. METAB. 2034 (2000). See also Sari M. van Anders et al., *Biological Sex, Gender, and Public Policy*, 4 BEHAV. & BRAIN SCI. 194 (2017) (arguing lay invocations of term "biological sex" in transgender rights context).

VII at minimum prohibits discrimination because of biological sex. But as the argument progressed, he exclusively reinforced the proposition that the statute only reaches “biological sex.”⁹⁵

It is analytically possible to frame the stereotype argument to center a transgender woman, such as Aimee, as an insufficiently masculine man. Central to that articulation is that just as the employer in *Pricewaterhouse* violated Title VII by penalizing Ann Hopkins for not having a stereotypically feminine appearance, an employer violates Title VII by penalizing a person who is assigned male at birth for not having a stereotypically masculine appearance. However, this tack misses the point of Aimee’s years’ long fight.

In an opinion piece published just days before the argument, Aimee made her priorities clear: “If the justices were to ask me what I want from them, it would be simple. I want the court to see me as Aimee, a transgender woman[.]”⁹⁶ Elsewhere, Aimee has said that she brought this case because she is a woman and emphatically believes that employers do not have the right to decree who does and does not count as a woman.⁹⁷ Given her own statements, for Aimee a win premised on the notion that she is man is no win at all. As Diane Schroer, a transgender woman in another case, pointedly explained, “I haven’t gone

fail “to account for scientific understandings of sex and gender, misrepresent[] sex as a single-faceted and binary, and overlook[] scientific consensus about the importance of gender and identity); Emi Koyama, *The Trans Feminist Manifesto*, in *CATCHING A WAVE. RECLAIMING FEMINISM FOR THE 21ST CENTURY* 249 (Rory Dickey & Alison Piepmeier eds., 2003) (arguing that effective advocacy of transgender persons requires challenging the assumption that so-called “biological sex” is unconstructed). *But see* Anne Fausto-Sterling, *Science Won’t Settle Trans Rights*, *BOSTON REV.*, Feb. 10, 2020, <http://bostonreview.net/science-nature-gender-sexuality/anne-fausto-sterling-science-wont-settle-trans-rights> (“Debates about whether one is born with a pre-existing sex or assigned one at birth, as well as the legal disputes about whether sex is fixed and binary or complex and changeable, *appear* to be about scientific truthiness. But they are really part of the for-the-moment unsettled process of world-building[.] If, after battling our way through questions of safe spaces and equal employment, we find a way to accommodate a variety of bodies and identities, then a new science of sex will stabilize, and the war of words that induced me to write this essay will slow to a crawl.”).

95. *Harris* Oral Argument Transcript, *supra* note 8, at 7 (“I think our argument rests on biological sex or what we think is more accurately referred to as sex assigned at birth.”); *id.* at 10 (“based on biological sex”); *id.* at 14–15 (“Title VII’s reference to sex at least includes what you’re calling biological sex, what we call sex assigned—at birth.”) (cleaned up); *id.* at 17 (“Because of biological sex, as you use it.”); *id.* at 25 (“[W]e are not asking you to apply any meaning of sex other than the one that everybody agrees on as of 1964, which is sex assigned at birth or, as—as they put it, biological sex. We’re not asking you to rewrite it.”); *id.* at 28 (“our argument rests on text meaning, at a minimum, sex assigned at birth or biological sex”).

96. Aimee Stephens, Commentary, *My Boss Fired Me for Being Trans. I Took It to the Supreme Court.*, *OUT*, Oct. 3, 2019, <https://www.out.com/commentary/2019/10/03/my-boss-fired-me-being-trans-i-took-it-supreme-court>.

97. Aimee Stephens, Opinion, *I Was Fired for Being Transgender. The Supreme Court Should Make Sure it Doesn’t Happen Again.*, *WASH. POST*, June 25, 2019, https://www.washingtonpost.com/opinions/i-was-fired-for-being-transgender-the-supreme-court-should-make-sure-it-doesnt-happen-again/2019/06/25/59789d72-92b9-11e9-aadb-74e6b2b46f6a_story.html (“My case is about so much more than me—or even transgender people. It’s about anyone who has ever been told they are not enough of a man or not the right kind of woman.”).

through all this only to have a court vindicate my rights as a gender non-conforming man.”⁹⁸

Cole’s approach is also strategically unwise. Past experience in the lower courts reflects that equality claims for transgender people generally rise or fall based on whether we can rebut negative stereotypes and convince courts of a transgender client’s humanity. At a fundamental level, it is a bad idea to describe any client in a way that is not just false or incomplete, but that actively misrepresents the person’s identity. With transgender clients in particular, this tack can be fatal because it reinforces negative stereotypes, signals that it is not worth the effort try to understand their true identity or, worse still, implies that transgender people are deluded or deceptive. It was thus predictable that the justices initially hostile to Aimee’s claim could only be moved if they were convinced to think of Aimee as a human being, a transgender woman, and a legitimate legal subject.⁹⁹

The decision to frame Aimee as a man also reflects a gross misjudgment about how ideologically conservative jurists tend to approach this particular statutory question. A good number of conservatives are actually prone to side with transgender people. When conservatives rule in favor of transgender workers many signal they both see transgender women as women and transgender men as men,¹⁰⁰ and adopt a hard textualist position in rejecting the notion that affixing a transgender label on a worker deprives her of statutory protection.¹⁰¹ Implicitly, these conservatives recognize the reality and dignity of

98. McGowan, *supra* note 12, at 205.

99. See M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights*, 39 VT. L. REV. 943, 947 (2015) (“For transgender people to be recognized as full human beings under the law, the legal system must make room for the existence of transgender people—not as boundary-crossers but as people claiming their birthright as part of a natural variation of human sexual development.”). Cf. Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 416 (1987) (“For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of humanity: rights imply a respect which places one within the referential range of self and others, which elevates one’s status from human body to social being. For blacks, then the attainment of rights signifies the due, the respectful behavior, the collective responsibility properly owed by a society to one of its own.”).

100. Judge Alfred Goodwin’s dissent in *Holloway* is a prime example. There Goodwin, a Nixon appointee, reasoned that “[w]hile I agree with the majority in the belief that Congress probably never contemplated that Title VII would apply to transsexuals . . . I would not limit the right to claim discrimination to those who were born into the victim class. . . . It seems irrelevant under Title VII whether the plaintiff was born female or was born ambiguous and chose to become female. The relevant fact was, on the day she was fired, a purported female.” 566 F.2d at 664.

101. For instance, in a case I litigated in the Western District of Oklahoma, Judge Robin Cauthron, a George H.W. Bush appointee, ruled that a woman who is transgender is protected by Title VII, explaining:

[T]he actions as alleged by Dr. Tudor occurred because she was female, yet Defendants regarded her as male. Thus, the actions Dr. Tudor alleges Defendants took against her were based upon their dislike of her presented gender. . . . Consequently, the Court finds that the discrimination occurred because of Dr. Tudor’s gender, and she falls within a protected class.

United States and Tudor v. Southeastern Okla. State Univ. and Reg’l Univ. Sys. of Okla., 5:15-cv-324-C, 2015 WL 4606079 at *2 (W.D. Okla. July 10, 2015).

transgender lives. These insights are bolstered by the work of Jessica Clarke reflecting that historically, judicial skepticism of transgender-inclusive constructions of Title VII is attributable to stigma and outright animus towards transgender people, not a commitment to textualism let alone conservatism.¹⁰²

Many examples illustrate this phenomenon. But the most critical one for this oral argument is *Kastl v. Maricopa Community College*,¹⁰³ a 2009 per curiam opinion that then Judge Neil Gorsuch joined sitting by designation on the Ninth Circuit. *Kastl* held that a transgender woman can bring a sex discrimination claim under Title VII. The opinion cogently positions the plaintiff as a woman, albeit a transgender woman, and steadfastly rejects the proposition that being transgender deprives workers of statutory protection. *Kastl* reasons that “it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer’s expectations for men or women.”¹⁰⁴ Its logic is straight forward, simple, and frankly pure Gorsuch.¹⁰⁵

It is often said that Supreme Court advocacy is all about counting to five. In *Harris*, it is reasonably assumed the four members of the Court’s liberal block entered the argument siding with Aimee. Justice Gorsuch is thus a much-needed fifth vote and one that, given his vote in *Kastl* a decade earlier, was very much in play. Given this, it is baffling that Cole did not lean heavily on *Kastl* let alone use its analytical framework as a roadmap to help not just secure Gorsuch’s vote but urge him to move his conservative colleagues.

Rather than help sway the conservative justices, Cole’s decision to repeatedly frame Aimee as a man appears to have done just the opposite. The textualists who wished to understand why it was that Title VII could protect transgender people if as a class they were not expressly protected in the statute found no help in Cole’s frame.¹⁰⁶

For example, when Cole was asked whether Aimee would have grounds to challenge a sex-based work rule that treated all biological males the same he responded that it would be unlawful to exclude a transgender woman from sex-segregated spaces that only permit women because (in contrast to other biological males) she (as a transgender woman) would be injured by that

102. See generally Clarke, *How the First Forty Years of Circuit Precedent Got Title VII’s Sex Discrimination Provision Wrong*, *supra* note 10. See also Jennifer L. Levi, *Paving the Road, a Charles Hamilton Approach to Securing Trans Rights*, 7 WM. & MARY J. WOMEN & L. 5, 6 (2000) (“[T]he Orwellian rhetoric in [transgender] cases suggests that it is bias and bigotry, rather than logic that determined the outcomes.”).

103. 325 Fed.Appx. 492.

104. *Id.* at 493.

105. See generally Nina Varsava, *Elements of Judicial Style: A Quantitative Guide to Neil Gorsuch’s Opinion Writing*, 93 N.Y.U. L. REV. ONLINE 100 (2018).

106. Paisley Currah pointed this problem out shortly after the *Harris* oral argument. See *The Aimee Stephens Case: On the Problem with Describing a Trans Women as an “Insufficiently Masculine” Biological Male*, PAISLEYCURRAH.COM (Oct. 15, 2019), <https://paisleycurrah.com/2019/10/15/the-aimee-stephens-case-on-the-problem-with-describing-a-trans-woman-as-an-insufficiently-masculine-biological-male/>.

exclusion.¹⁰⁷ It is here that Cole's "biological sex" concession proved problematic. As Chief Justice Roberts pointed out, if Title VII only reaches biological sex (defined as sex assigned at birth), where the employer treats all biological males the same, this cannot be sex discrimination. Hence Roberts' response that "when it's analyzed on the basis of sex, there's no problem, but when it's analyzed on the basis of transgender status, it presents a whole different case."¹⁰⁸

Worse still, rather than reassure the Court that lightning-rod issues like sex-segregated restrooms are not at stake, Cole's framing of Aimee's right had the opposite effect. In arguing Aimee could win her case if she were deemed an "insufficiently masculine man," Cole implied that Aimee's claim turns on her right, as a biological male, to not conform with the employer's sex-based expectations in the workplace. This gave fruit to unanswerable questions about restrooms.

Because Cole acquiesced to labeling Aimee as a biological male, he was forced to come up with a new standard for sex-based work rules. Backed into a corner, Cole argued that sex-segregated restrooms are generally fine but that any person—transgender or cisgender—who is harmed by such a rule can challenge it. But Cole could not define what he meant by harm at oral argument. Unfortunately, Cole's approach made the restroom problem bigger than it need be. His answer conjured up an image of men sneakily fighting for the right to enter women's restrooms, the worst possible terrain.

Strikingly, Cole's approach is at odds with how the ACLU strategized the oral argument in *Farmer v. Brennan*,¹⁰⁹ the first transgender rights case heard by the Supreme Court. Today, *Farmer*'s key holding that a prison official's deliberate indifference to a substantial risk of serious harm to an inmate violates the Eighth Amendment's cruel and unusual punishment clause is hornbook law. But when *Farmer* was argued in early 1994 a win seemed uncertain given the prisoner's identity and the harms she grieved.

The petitioning prisoner Dee Farmer, a Black transgender woman housed in the general population of a federal men's prison, not only identified as female but had undergone hormone therapy, breast reconstruction, and partial genital reconstruction. In addition, Dee was also HIV-positive, a condition that back in 1994 was still highly stigmatized and in many circles was thought to be a punishment rightly visited upon promiscuous gay men.¹¹⁰ After being raped ten

107. *Harris* Oral Argument Transcript, *supra* note 8, at 13.

108. *Id.* at 14.

109. 511 U.S. 825 (1994).

110. See TREVOR HOPPE, PUNISHING DISEASE: HIV AND THE CRIMINALIZATION OF SICKNESS 37 (2016) ("Conservatives capitalized on American's fear and ignorance of the disease, which they heralded as a symbol of America's moral decline. Medical authorities originally called the disease G.R.I.D. (gay-related immunodeficiency), a grave misstep that facilitated the New Right's characterization of the disease as a gay plague—divine retribution for sexual sin, or in the words of Jerry Falwell, 'the wrath of a just God against homosexuals'."). See also Loretta M. Kopelman, *If HIV/AIDS*

days into her placement in a men's prison facility in Indiana, Dee filed a *Bivens* suit *pro se*. In her complaint, Dee alleged that as a transgender woman, her feminine persona and embodiment made her especially vulnerable to sexual assault in a general population men's prison. Dee claimed her vulnerability was so obvious that prison officials should have known she was likely to be raped if under-protected. After certiorari was granted the ACLU came on as counsel.

Elizabeth Alexander, then of the ACLU's Prison Rights Project, argued the case. At the time, not only was understanding of transgender people more limited than today, but "treating prison rape as a joke was far more ingrained in the culture."¹¹¹ Though the legal issues in *Harris* and *Farmer* are different, there are two key similarities. Doctrinally, both Title VII and the Eighth Amendment should equally protect women and men. Strategically, both advocates had to decide whether to emphasize their clients' female identities or acquiesce to the opposition's intent to frame transgender women as men.

Ultimately, Alexander decided to affirm Dee's female identity. In the argument, Alexander referred to Dee exclusively with female pronouns and as a transgender woman or simply a woman. This was Dee's preference.¹¹² But Alexander's semantic choice was strategic.¹¹³ As Alexander later explained, using exclusively female referents permitted her to emphasize the particular vulnerability Dee experienced as a woman placed in a violent male population.¹¹⁴ Conversely, using male referents would have made it difficult for the Court to grasp Dee's special vulnerability as a female prisoner and, more dangerously, could have put Alexander in a poor position to avert negative stereotypes associated with gay men.

Alexander's strategy worked. At the oral argument¹¹⁵ the justices followed Alexander's lead, using female or neutral referents throughout in striking

is Punishment, Who is Bad?, 27 J. MED. & PHIL. 231 (2002) (critiquing religious and secular punishment theories of HIV/AIDS as irrational, dangerous, and bad faith activity of dividing the world into blameworthy and blameless).

111. Allison Flowers, *Dee Farmer Won a Landmark Supreme Court Case on Inmate Rights. But that's Not the Half of It.*, VILLAGE VOICE, Jan. 29, 2014, <https://www.villagevoice.com/2014/01/29/dee-farmer-won-a-landmark-supreme-court-case-on-inmate-rights-but-thats-not-the-half-of-it/>.

112. Brief for Petitioner at 2 n.2, *Farmer v. Brennan*, 511 U.S. 825 (1994) (No. 92-7247), 1993 WL 625980 ("Petitioner was born a male but, due to her transsexual status, she will hereinafter be referred to with feminine pronouns in accordance with her preference.").

113. Flowers, *supra* note 111.

114. *Id.*

115. Transcript of Oral Argument, *Farmer v. Brennan*, 511 U.S. 825 (1994) (No. 92-7247), 1994 WL 662567, <https://www.oyez.org/cases/1993/92-7247> [hereinafter *Farmer* Oral Argument Transcript].

A note to the reader: My citations to the *Farmer* transcript reference the pagination on Westlaw with the following caveat—Westlaw reports the oral argument transcript accurately save for the fact that it strips the names of the justices from their questions. I was able to connect the justices to the questions they posed by cross-referencing with the unpaginated transcript hosted on Oyez.org.

contrast to the government's exclusive use of male referents¹¹⁶ and the "effeminate" male label.¹¹⁷ Interestingly, Chief Justice Rehnquist, a staunch conservative whose jurisprudence was otherwise marked by a deep skepticism of Eighth Amendment protections,¹¹⁸ was among the justices to repeatedly and exclusively refer to Dee as female at oral argument.¹¹⁹ Though Justice Souter's unanimous opinion eventually adopted neutral referents for Dee, it nonetheless turned on recognizing Dee's particular vulnerability to sexual assault as a transgender woman.¹²⁰

Cole would have been wise to follow Alexander's lead. Strategically, the Court needed to see Aimee as female to grasp what happened to her and understand why it should care. Alexander's decision to embrace Dee's female identity helped the Court see her unique vulnerability as a woman, albeit a transgender woman, in a men's prison. It also reinforced the legitimacy of Dee's identity and signaled she is worthy of equal dignity. In contrast, Cole's approach in the *Harris* argument underscores the risk in arguing that a transgender woman could be considered a man. Positioning Aimee as a man, even as alternative argument, cut against her claim that she suffered discrimination as a woman. This tack also undermined Aimee's cause by playing into the idea that she is not actually or truly a woman and implies, even if unintentionally, that she could conceivably change to present herself as more masculine even if she should not have to.

I am aware that some might think Cole's strategy is wise because it was seemingly tailored to meet the conservative justices where they are. The idea being that it might be easier for some justices to think of Aimee as a man and if that view were legitimated by Cole they might be willing to see Aimee's rights-demand as more modest and less socially disruptive. But that view is not well founded.

As my colleague Alexander Chen argues,¹²¹ Cole's strategy in *Harris* is roughly analogous to the doomed strategy Lawrence Tribe deployed in *Bowers v. Hardwick*.¹²² In the *Bowers* oral argument, Tribe rooted Michael Hardwick's

116. See, e.g., *id.* at 24 ("he went into"); *id.* ("he is presently"); *id.* ("prior to that time he"); *id.* at 25 ("because of his HIV-positive status and that fact that he had been involved in consensual sexual activity"); *id.* at 30 ("he was in general population"); *id.* ("one penitentiary that he was in").

117. *Id.* at 42–43.

118. As one example, Chief Justice Rehnquist was infamously the only justice join a portion of Justice Scalia's opinion in *Harmelin v. Michigan*, arguing that the Eighth Amendment includes no proportionality guarantee. 501 U.S. 957, 965 (1991).

119. See, e.g., *Farmer* Oral Argument Transcript, *supra* note 115, at 5 ("Well, where—where would the Government be free to move her if she gets her injunction?"); *id.* ("Well, she was sentenced to a term that would ordinarily end her up in a penitentiary, was she not?"); *id.* ("And so her . . . would . . . her injunction would request that she be confined only in an FCI and not in a penitentiary?").

120. See, e.g., *Farmer*, 511 U.S. at 829–30, 848.

121. See 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>.

122. 478 U.S. 186 (1986).

right to engage in consensual sodomy in a very limited way—a right to privacy in the home—thinking the Court was not yet ready to hear gay couples have a right to broader legal protections in our society. When the justices pushed Tribe on whether gay couples had a right to privacy outside the home he floundered.¹²³ Tribe’s declination to elevate a full-throated defense of gay couples’ right to equal dignity and respect backfired.¹²⁴ The *Bowers* Court not only refused to recognize a limited constitutional right to privacy but went on to conflate same-sex intimacy with adultery, incest, and other “sexual crimes”¹²⁵ reinforcing the dehumanizing stigma sodomy laws conferred on gay people.

The failed approach in *Bowers* was one of the essential lessons learned that shaped Paul Smith’s approach in arguing *Lawrence v. Texas*.¹²⁶ In *Lawrence*, Smith once again argued that state sodomy laws were unconstitutional invasions of privacy. But, this time, Smith did not limit the scope of the rights demand. Instead, Smith urged the Court to recognize the “realities of gay lives and gay relationships,” insisting that the “opportunity to engage in sexual expression” is foundational to the ability of gay people to form “gay families [and] gay partnerships, many of them raising children.”¹²⁷

Though the issues presented in *Bowers* and *Harris* are different, the concern is similar. Trying to avoid what might be uncomfortable questions about Aimee’s humanity is ultimately not persuasive and risks being read as conceding or signaling (even if incorrectly) the advocate’s own discomfort with Aimee and her claim, just as Tribe’s argument did vis-à-vis Michael Hardwick.

123. Transcript of Oral Argument at 24, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), https://www.supremecourt.gov/pdfs/transcripts/1985/85-140_03-31-1986.pdf.

124. Beth Barrett, *Defining Queer: Lesbian and Gay Visibility in the Courtroom*, 12 YALE J.L. & FEMINISM 143, 158 (2000) (“In essence, Tribe argued, the Court should focus only on the constitutional protection granted to private adult consensual sexuality in general. The Court should not concern itself with gays or with gay sex, even though these were the targets of the Georgia statute. This was pure legal argument, not narrative. The argument focused on legal standards, rules, and precedent but did not tell the story of Hardwick and other gay men and lesbians. Tribe’s legalistic approach failed to give the Court a way to understand the human dimension and consequences of the law. Furthermore, the argument did little to counteract the effective appeals to prejudice offered by Georgia (which reinforced views likely held by many of the Justices.); Lynne Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1643 (1987) (charging that Tribe and his colleagues “failed to tell the story of the actual plaintiff and of actual gay people, thus leaving the stereotype unanswered). *But see* Mary Anne Case, *Of “This” and “That” in Lawrence v. Texas*, 55 SUP. CT. REV. 75, 91–92 (2003) (suggesting that in *Bowers* Tribe gave a full-throated endorsement of gay identity before the Court was ready for it which led, not only to the loss, but the opinion’s inability to isolate homosexual sodomy for condemnation despite the sex neutrality of the Georgia statute).

125. 478 U.S. at 195–96.

126. 539 U.S. 558 (2003).

127. Transcript of Oral Argument at 23, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 1702534. *See also* Case, *Of “This” and “That” in Lawrence v. Texas*, *supra* note 124, at 139 (“By freeing the last component of the negative right from the restrictive threat of the criminal law, *Lawrence* seems to have removed the last nail from the coffin that previously locked couples interested in a conjugal relationship into the state-sponsored monopoly institution of marriage.”).

Worse still, the approach taken in *Harris* made it unnecessarily difficult to respond to the justices' questions probing the consequences of a win for Aimee. For instance, early on in the argument, Justice Sotomayor asked how the Court should reconcile the "genuine need" of a transgender woman who wants to use the women's restroom and the competing desire of "other women who are made uncomfortable" or "feel intruded upon."¹²⁸ Rightfully, Justice Sotomayor asked that Cole point to a guide to help "balanc[e]" those competing demands.¹²⁹ Cole ignored Justice Sotomayor's instruction to "not avoid the difficult issue,"¹³⁰ and repeatedly punted the question.¹³¹

A colloquy between Justice Gorsuch and Cole also stands out. Justice Gorsuch queried whether construing Title VII to protect transgender people, even if that result were supported by the text, would nonetheless be inappropriate if it would bring about "massive social upheaval."¹³² Cole tried to assuage Gorsuch's concern by pointing out that there are "transgender lawyers in this courtroom today."¹³³ (Based on context, this appears to be a reference to Cole's nameless co-counsel whose transgender bodies he invoked directly moments later.¹³⁴) Frustrated, Justice Gorsuch responded "of course, there are" and pressed Cole to answer his question.¹³⁵

On balance, Cole's attempt to embrace his transgender colleagues at oral argument fell flat. One key reason is that though some of the justices do not have empathy for transgender people, they all know we exist and, in a case like this, knew that some of us would inevitably be present. Thus, it is possible Cole's response simply came off as insulting the justices' intelligence.

Another problem is that Cole obliquely invoked his "transgender male" colleagues¹³⁶ to try to allay concerns about transgender women such as Aimee.¹³⁷ This very well could have confused the justices given Cole's election to repeatedly reference Aimee, a woman, as if she were a man. In fact, earlier in the

128. *Harris* Oral Argument Transcript, *supra* note 8, at 10–11.

129. *Id.* at 11 ("And what in the law will guide judges in balancing those things? That's really what I think the question is about.")

130. *Id.* at 10.

131. *Id.* at 11–13.

132. *Id.* at 26.

133. *Id.* at 24.

134. *Id.* at 27 ("As I was saying, there are transgender male lawyers in this courtroom following the male dress code and going to the men's room and the—the—the—the Court's dress code and sex-segregated restroom have not fallen.")

135. *Id.* at 24. I realize that some have implied that Justice Gorsuch found the notion that transgender lawyers were present to be surprising based on the transcript alone. However, review of the audio recording of the argument well-captures Justice Gorsuch's frustration in the exchange in question. See Oral Argument Audio Recording at 21:12, *R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens* (No. 18-107), https://www.supremecourt.gov/oral_arguments/audio/2019/18-107.

136. *Harris* Oral Argument Transcript, *supra* note 8, at 27.

137. Deepest thanks to Jennifer Levi for pointing this out.

argument Chief Justice Roberts labeled Aimee a “transgender man,”¹³⁸ evidencing his own confusion as how to label transgender men (who identify as men) and transgender women (who identify as women). So confused, some of the justices may have thought Cole pointed to his colleagues—both of whom sport facial hair, dressed in formal men’s business suits, and otherwise appear stereotypically male—to explain who Aimee is. If this is how Cole’s comment landed, then it would seemingly have reinforced the notion that Aimee could conceivably change to be a more masculine man, like the masculine transgender lawyers at counsel’s table.

III.

WHAT THE SUPREME COURT COULD HAVE HEARD IN *HARRIS*

Entertaining “what ifs” can be a productive and illuminating exercise. Historians sometimes “conjectur[e] on what did not happen, or what might have happened, in order to understand what did happen.”¹³⁹ In our field, legal scholars routinely entertain counterfactual histories of seminal Supreme Court opinions.¹⁴⁰ In rewriting the Court’s opinions, we gain new insights into how the original opinions came to be and unearth limits that otherwise remain obscured.

Oral arguments are also a fertile ground to explore “what ifs.” As Cheryl Harris explains, if we focus only on what was said we will come to view a complex landscape of entangled and historically vexed issues as if it were a portrait.¹⁴¹ Entertaining counterfactuals—the strategies not pursued, the information not elevated, the voices not heard—broadens the lens through which we typically come to understand a case, from the issues it involves, to the stakes of its outcome.

Here, let us consider what the Supreme Court could have heard in *Harris* if a different frame were employed and a different advocate argued the case. Specifically, let us consider what difference it could have made if one of Aimee’s transgender male lawyers argued the case and he chose to frame her exclusively as a transgender woman. To ensure this is a productive exercise, let us assume that the background facts of Aimee’s case and briefing remain unchanged, the underlying caselaw is the same, and the justices asked the same types of

138. *Harris* Oral Argument Transcript, *supra* note 8, at 5 (“In other words, if the objection of a transgender man transitioning to a woman is that he should be allowed to use, he or she, should be allowed to use the women’s bathroom, now, how do you analyze that?”).

139. JEREMY BLACK & DONALD M. MACRALID, *STUDYING HISTORY* 125 (2007).

140. *See, e.g.*, WHAT “BROWN V. BOARD OF EDUCATION” SHOULD HAVE SAID (Jack M. Balkin ed., 2002); *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* (Kathryn M. Stanchi et al. eds., 2016).

141. Cheryl I. Harris, *What the Supreme Court Did Not Hear in Grutter and Gratz*, 51 *DRAKE L. REV.* 697, 699 (2003).

questions about Title VII's text, women's restrooms, and the political and social consequences of a win for Aimee.¹⁴²

On the eve of the oral argument, *The Washington Post* ran an opinion piece by Aimee Stephens's lawyer. This editorial stood out: The advocate reflected upon the fact that when he took the podium that coming Tuesday, he would become the first out transgender person to ever argue before the Supreme Court.¹⁴³ He thanked his employer for its confidence in him and the opportunity to break this particular glass ceiling. The irony was not lost on him. Connecting his own journey to Aimee's, he argued that if the highest court in the land had no qualms accommodating him, surely it could see that other workplaces were ready, too. Within hours of the piece hitting the Internet, several of the justices' clerks emailed the piece to their bosses. After skimming it on his phone, Chief Justice Roberts shot a quick group email to his clerks: "Remember—this Court welcomes new faces at oral argument."¹⁴⁴

By argument day, the justices were eager to see how Aimee's lawyer would fare under the pressure. First up were the consolidated arguments in *Zarda* and *Bostock*, two Title VII cases testing a parallel question: whether sexual orientation discrimination is a form of sex discrimination. While the justices anticipated some overlap between the arguments, none predicted that Pamela Karlan, arguing on behalf of the gay employees, would throw an etiquette curveball.

In trying to argue that not all sex discrimination is harmful, Karlan suggested that Chief Justice Roberts' reflexive choice to address her as "Ms. Karlan" was discriminatory in the sense it identified her as female, but not unwelcome.¹⁴⁵ Some of the justices uneasily laughed, realizing that on any day but today the Chief's choice of gender honorific would be unremarkable. Several wondered how the Chief intended to welcome Aimee's advocate. Meanwhile,

142. I believe these parameters are in keeping with Cass Sunstein's suggestion that counterfactual inquiries stay clear of implausible scenarios and not change too many assumptions about the way the world works that the analysis becomes completely intractable. See Cass R. Sunstein, *What If Counterfactuals Never Existed?*, NEW REPUBLIC, Sept. 20, 2014, <https://newrepublic.com/article/119357/alterd-pasts-reviewed-cass-r-sunstein>.

143. I am aware of only one case argued by a transgender person. Prior to her transition, Joanie Rae Wimmer argued and won *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).

144. When Jean Dubofsky, the lawyer who would ultimately argue *Romer v. Evans*, 517 U.S. 620 (1996), asked then Attorney John Roberts whether she or a more seasoned advocate should argue the case he advised that the justices often tired of seeing the same old faces at argument and being a master of the facts and the case's journey might make her the better pick. See SUSAN BERRY CASEY, APPEALING FOR JUSTICE: ONE COLORADO LAWYER, FOUR DECADES, AND THE LANDMARK GAY RIGHTS CASE: *ROMER V. EVANS* 273–74 (2016). Deepest thanks to Kyle Velte for pointing this out.

145. An exchange much like this happened in the actual *Zarda* and *Bostock* argument. Transcript of Oral Argument at 12–13, *Bostock v. Clayton Cnty., Ga.* and *Altitude Express v. Zarda* (Nos. 17-1618 and 17-1623), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/17-1618_b97c.pdf [hereinafter *Bostock* and *Zarda* Oral Argument Transcript].

Roberts quickly jotted a note to himself: “MR.”—the advocate’s preferred honorific, confirmed by the Clerk of Court just that morning.¹⁴⁶

When the time came for the *Harris* argument to be called, Chief Justice Roberts rattled off his traditional opening, but this time made sure to punctuate “Mr.” when he signaled the Court was ready to hear from Aimee’s advocate. The significance of that moment was lost on no one. After taking a deep breath, the advocate opened:

Aimee Stephens is a different kind of woman. She is transgender. Aimee has known herself to be female since youth. She struggled with her truth for much of her life. In 2013, after deep self-reflection, Aimee transitioned from male to female because she wanted the rest of the world to know the real her. In a poignant letter to her colleagues, Aimee asked for “patience, understanding, and support.”¹⁴⁷ She just wanted to be known as Aimee and to continue to do her job. Shortly thereafter, Aimee was fired because her boss thought she would never look right wearing a dress.¹⁴⁸

Aimee’s story is an all too familiar one. Generations of American women have been denied jobs and promotions or run out of the workplace for no better reason that they were deemed the wrong kind of women—shorthand for falling short of arbitrary, antiquated notions of how women should appear and behave in the workplace.

The fact that Aimee is transgender does not deprive her of protection. Title VII prohibits discrimination “because of . . . sex” in employment.¹⁴⁹ No provision expressly excludes transgender people. Though not the prototypical victims Congress imagined at the time of enactment, transgender people nonetheless merit protection.¹⁵⁰ Congress did not condition rights on a particular dictionary’s definition of sex, let alone insist victims produce a birth certificate or submit to genital inspections or genetic testing to get through the courthouse doors. For good reason. The evil Congress put in its crosshairs is not the victim’s sex. The point is that one’s sex should not matter.

146. Cf. R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527, 557 (2006) (“The idea of dignity must be attributable in full and equal measure to all persons. A constitutional democracy cannot allow for a graded hierarchy of the basic dignity of persons.”).

147. *Harris* Appendix to Brief in Opposition of Writ of Certiorari, *supra* note 3, at 1a.

148. See, e.g., *Harris* Joint Appendix, *supra* note 4, at 54 (“[B]ecause he—was no longer going to represent himself as a man. He wanted to dress as a woman.”); *id.* at 31 (“I’ve yet to see a man dressed up as a woman that I didn’t know was not a man dressed up as a woman, so that it’s very obvious.”).

149. 42 U.S.C. § 2000e-2.

150. *Oncale*, 523 U.S. at 79 (construing statutory text to prohibit all forms of sex discrimination that alter the terms or conditions of employment, even permutations that are “not the principal evil Congress was concerned with when it enacted Title VII”).

The advocate's opening repeatedly emphasized Aimee's claim to womanhood¹⁵¹ and drew connections between Aimee and other women who had come before the Court, leading some to wonder how different Aimee really was from those other women. Speaking directly to the textualists, the advocate elevated the strongest argument for coverage—that there is no express transgender exception—and refuted textually unmoored objections by pointing out Congress itself elected not to condition protection on proxies for cisgender status.¹⁵²

After the opening, questions flew. Early on, Chief Justice Roberts asked whether Aimee conceded, as Harris Homes and the Department of Justice urged, that Title VII protected only discrimination on account of “biological sex.”¹⁵³ The advocate responded:

Not in the sense they urge. First, they misapprehend what “biological sex” is, conflating it with a different concept—“sex assigned at birth.” The former is a broad complex concept that consists of a number of variables, including gender and gender identity, genital anatomy, secondary characteristics, brain anatomy, hormone levels, and chromosomal complement.¹⁵⁴ The latter is the sex marker recorded on one's original birth certificate.¹⁵⁵

Second, it is nonsensical to construe Title VII to not reach discrimination based on one's change in sex. An analogy to religion shows why: Title VII protects all persons from religious discrimination, even those who convert to a faith different than the one in which they

151. Janet Mock's powerful reflection on what it means to claim womanhood is helpful. She writes:

When I am asked how I define womanhood, I often quote feminist author Simone de Beauvoir: “One is not born, but rather becomes, a woman.” I've always been struck by her use of *becomes*. Becoming is the action that births our womanhood, rather than the passive act of being *born* (an act none of us has a choice in). This short, powerful statement assured me that I have the freedom, in spite of *and* because of my birth, body, race, gender expectations, and economic resources, to define myself for myself and for others.

JANET MOCK, REDEFINING REALNESS: MY PATH TO WOMANHOOD, IDENTITY, LOVE & SO MUCH MORE 171 (2014).

152. Congress did not, for instance, limit protection to workers who live in accordance with their sex assigned at birth.

153. *Harris* Brief for the Federal Respondent, *supra* note 28, at 19–20 (“The ordinary public meaning of ‘sex’ in 1964 is dispositive here. Biological sex indisputably is not synonymous with transgender status.”); *Harris* Brief for Petitioner, *supra* note 76, at 2 (“In 1964, as today, sex discrimination meant differential treatment based on a person's biological sex, something fixed and objectively ascertained based on chromosomes and reproductive anatomy.”).

154. Sam Winter et al., *Transgender People: Health at the Margins of Society*, 388 LANCET 390, 391 (2016) (defining *sex* as a biological status (chromosomal, hormonal, gonadal, and genital) and cross-referencing *gender*, separately defined as the “attitudes, feelings, and behaviours linked to the experience and expression of one's biological sex”).

155. *Id.* (explaining that an individual's *sex assigned at birth* “is usually determined on the basis of genital appearance, with those present usually assuming that other components of sex are consistent with the newborn's genital sex”). See also Claire Ainsworth, *Sex Redefined*, 518 NATURE 288, 291 (2015) (arguing biologists have “been building a more nuanced view of sex, but society has yet to catch up”).

were raised.

Roberts was not previously aware of the distinction between “biological sex” and “sex assigned at birth,” and he made a mental note to have his clerks research this point. He was, however, prepared for the religion analogy.

Drawing on Harris Homes and the Department of Justice’s briefs,¹⁵⁶ Chief Justice Roberts pointedly asked whether the religion analogy failed because Title VII “capaciously defines” religion to include converts but does not similarly define sex to include “transgenders.” The advocate responded:

The statute does not define religion more capaciously than sex. Section 2000e(j) defines religion to include a variety of things,¹⁵⁷ but it does not expressly state converts are protected; this is inferred because they are not excluded. The same could be said of sex discrimination—transgender people are protected because they are not excluded.

Not satisfied, Roberts pushed further and asked, “In what statutory provision does Congress indicate that sex is capaciously defined?” The advocate was prepared for this one and answered:

Congress signaled as much when it enacted §2000e(k), which clarifies that discrimination “because of sex” “include[s], but not limited to” various forms of sex discrimination.¹⁵⁸ Where Congress uses the nonexclusive “include,” this defeats the negative-implication canon and indicates the terms that follow the “include” are exemplary rather than exhaustive.¹⁵⁹

Roberts thought there might just be something here. Maybe, as the advocate’s answer implied, congressional amendments to Title VII, including the 1972

156. *Harris* Brief for the Federal Respondent *supra* note 28, at 44 (“Title VII defines ‘religion’ to ‘include[] all aspects of religious observance and practice, as well as belief’. That broad, express definition of religion encompasses conversion from one religion to another, which involves ‘religious observance and practice’ and ‘belief’. An employer who fires any employee who converts thus would be discriminating based on religion. Title VII does not contain a similarly capacious definition of ‘sex’[.]”) (cleaned up); *Harris* Brief for Petitioner *supra* note 76, at 28 (“That analogy is inapt under Title VII’s plain text. The Act defines religion broadly to ‘include[] all aspects of religious observance and practice.’ Because religious observance and practice can change, Title VII covers changes in religion by definition. But there is nothing in Title VII indicating that sex can change or, even if it could, that a change in sex is protected.”) (cleaned up).

157. 42 U.S.C. §2000e(j) (“The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”).

158. 42 U.S.C. §2000e(k) (“The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions[.]”).

159. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 132–33 (2012) (discussing the presumption of nonexclusive “include”) (citing *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) (“the term ‘including’ is not one of all-embracing definition, but connotes simply an illustrative application of the general principle”)).

amendment referenced, reflected that Congress meant what it said—Title VII has a broad ambitious plan to prohibit the full spectrum of sex discrimination.¹⁶⁰

Justice Kagan was not yet satisfied. The advocate’s invocation of §2000e(k) was smart, but should he not have to account for the fact that the only examples it provides are of pregnancy sex discrimination? The advocate answered:

The *ejusdem generis* canon¹⁶¹ is not an appropriate tool for this task. To deploy it, the Court must identify a common denominator—the connective tissue that explains what Congress meant. But that too easily slips into simply rewriting what Congress wrote based on assumptions about what it intended rather than interpreting the text as written.

Insofar as §2000e(k) is concerned, to a reasonable reader,¹⁶² while the examples Congress delineated touch on pregnancy, the non-exclusive “include” signals that sex discrimination reaches more broadly than these examples.

This answer made sense to Kagan.¹⁶³ She wondered if some of her more conservative colleagues might come to see the Title VII problem differently now.¹⁶⁴ Even if ideologically inclined to rule against Aimee, they should not fall into the trap of rewriting rather than interpreting the statute.¹⁶⁵

At that point, Justice Alito jumped into the fray. He asked whether Aimee was alleging that she was fired because of negative stereotypes associated with women or transgender people. Surely, Alito insisted, Harris Homes’ desire to not employ a “man in a dress” spoke to anti-transgender animus, not sex discrimination. But the advocate explained:

Aimee was fired because her employer believed that as a transgender woman she was so insufficiently feminine as to not qualify as a woman. This is similar to Ann Hopkins being denied partnership because her employer thought her so insufficiently feminine as to not qualify as a

160. William Eskridge, *Title VII’s Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 *YALE L.J.* 322, 399 (2017) (“It would require a relatively headstrong judge, determined to read her own views into the statute, to ignore this overwhelming history and the democratic legitimation it bestows on such a reading of Title VII’s plan.”).

161. The *ejusdem generis* canon holds that where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind of class specifically mentioned. SCALIA & GARNER, *supra* note 159, at 199.

162. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 *HARV. J.L. & PUB. POL’Y* 59, 65 (1988) (“The meaning of statutes is to be found not in the subjective, multiple mind of Congress but in the understanding of the objectively reasonable person.”).

163. *Yates v. United States*, 135 S.Ct. 1074, 1097 (2015) (Kagan, J., dissenting) (criticizing the *ejusdem generis* canon).

164. Justice Kavanaugh might have found this a helpful exchange. See Kavanaugh, *supra* note 5, at 2161 (expressing support for Kagan’s dissent in *Yates* and arguing he would “consider tossing the *ejusdem generis* canon into the pile of fancy-sounding canons that warrant little weight in modern statutory interpretation”).

165. See *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (Kennedy, J.) (“It is well established that when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”) (cleaned up).

“lady” partner.¹⁶⁶ In both instances, the employers’ adverse actions were influenced by sex-stereotyped evaluations of the workers’ physical appearances. Aimee’s employer claimed firing her was necessary because, in his words, she would always look like a “man dressed up as a woman.”¹⁶⁷ Ann’s employer denied her promotion with the caveat that she would qualify the next time around if she were to “dress more femininely, wear make-up, have her hair styled, and wear jewelry.”¹⁶⁸ That Aimee’s employer deemed her insufficient femininity insurmountable but Ann’s thought hers could be remedied is of no moment. Both women were denied job opportunities because their employers thought they were the wrong kind of women.

Before Justice Alito could follow up, Justice Kavanaugh swooped in.

Justice Kavanaugh was not yet convinced that the advocate’s approach was sufficiently textualist. It seemed to stretch things too far for a transgender woman to be protected as a woman. In that vein, he asked, “Are you drawing a distinction between the literal meaning of ‘because of sex’ and the ordinary meaning of ‘because of sex’? And, if so, how are we supposed to think about ordinary meaning in this case?”¹⁶⁹ The advocate responded:

I do not see a difference between the two. Moreover, if there is any sunlight between them, it’s not pertinent, because it would only speak to whether Aimee made out a prima facie case of discrimination.¹⁷⁰ Because Harris Homes raised a non-discriminatory rationale for firing Aimee, whether Aimee made out a prima facie case is totally irrelevant.¹⁷¹

Justice Kavanaugh was taken aback by this answer. He had long believed that the prima facie case inquiry was an “unnecessary sideshow” “spawning

166. *Pricewaterhouse*, 490 U.S. at 235 (plurality) (citing evidence that even Hopkins’s supporters held her to a different standard than masculine male candidates, including one who tried to justify her candidacy on the premise that Hopkins had “matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing *lady ptr* candidate”) (emphasis added).

167. *Harris* Joint Appendix, *supra* note 4, at 31 (“I’ve yet to see a man dressed up as a woman that I didn’t know was not a man dressed up as a woman, so that it’s very obvious.”).

168. *Pricewaterhouse*, 490 U.S. at 235.

169. Justice Kavanaugh asked this question in the consolidated *Bostock* and *Zarda* oral argument. See *Bostock and Zarda* Oral Argument Transcript, *supra* note 145, at 48.

170. See *Etsitty*, 502 F.3d at 1220–21 (explaining the pertinence of per se and sex stereotyping questions pertinent to prima facie case showing in a transgender worker’s case).

171. See *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 493–94 (D.C. Cir. 2008) (Kavanaugh, J.) (“once the employer asserts a legitimate, non-discriminatory reason, the question whether the employee actually made out a prima facie case is ‘no longer relevant’ and thus ‘disappear[s]’ and ‘drops out of the picture’”) (first quoting *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 510 (1993); then quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000)). See also D. Wendy Greene, *Categorically Black, White, or Wrong: “Misperception Discrimination” and the State of Title VII Protection*, 47 MICH. J.L. REFORM 87, 143 (2013) (explaining that some lower courts’ insistence in applying a “prima facie actuality requirement indicates a divergence from assessing the ‘critical question of discrimination’ in Title VII intentional discrimination cases”) (citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

enormous confusion and wasting litigant and judicial resources” where, as here, the employer proffered a nondiscriminatory rationale.¹⁷² The advocate might be onto something. After all, the ultimate, dispositive question in every Title VII case is whether the worker has proved discrimination *vel non*, a very different showing than the prima facie case.¹⁷³ Kavanaugh began to wonder whether Harris Homes hammered so hard on Aimee being transgender because it did not wish for the Court to scrutinize her evidence of discrimination *vel non*. Kavanaugh asked no further questions.

Justice Sotomayor took this brief pause as her opening. She knew some of her colleagues worried that if they construed Title VII to protect transgender people, there might be thorny questions down the line about restroom access.¹⁷⁴ In that vein, she asked what framework the Court should use to reconcile a transgender woman’s need to use the women’s restroom with potential opposition from cisgender women.¹⁷⁵ Based on the briefing, Sotomayor had expected the advocate would punt the question. To her surprise, the advocate offered a solution, explaining:

This is not that case, but if it were the Court’s decision in *Ricci v. DeStefano*,¹⁷⁶ a Title VII case where the employer faced competing claims of discrimination, provides an answer.¹⁷⁷

Borrowing the reasoning from *Ricci*, it is permissible for employers to exclude cisgender men, but not transgender women, from women’s restrooms. Excluding cisgender men is necessary because, absent a legitimate reason for them entering the women’s restroom, such as the men’s restroom being out of order, their mere presence is reasonably

172. *Brady*, 520 F.3d at 493–94.

173. *See U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983).

174. Michael Dorf has insightfully argued that the Court can find statutory coverage and reserve restroom and sports accommodation questions. *See The Way to Stop the Title VII Parade of Horribles is to Stop Parading the Horribles*, DORF ON LAW (Oct. 8, 2019), <http://www.dorfonlaw.org/2019/10/the-way-to-stop-title-vii-parade-of.html> (“[T]he restroom concern is mostly hysteria, but . . . if it isn’t, that’s not a reason to reject the plaintiffs’ claims here. I have the same response to the sports objection: If it’s persuasive, that’s a reason to draw the line there, not a reason to reject claims in a totally different context.”).

175. *But see* Rebecca J. Stones, *Which Gender is More Concerned About Transgender Women in Female Bathrooms?*, 34 GENDER ISSUES 275 (2017) (finding cisgender men are 1.55 times more likely than cisgender women to express concerns about safety and privacy; cisgender women are four times more likely than cisgender men to assert that transgender women do not directly cause safety and privacy concerns). *See also* Russell K. Robinson & David M. Frost, *The Afterlife of Homophobia*, 60 ARIZ. L. REV. 213, 286 (2018) (“The general public’s ignorance of transgender people and their struggles with bathroom access facilitate this fundamental inversion of reality in which the very people who are most vulnerable in public bathrooms are reconfigured as a threat to those who restrict their bathroom access—cisgender people.”).

176. 557 U.S. 557 (2009).

177. My colleague Allan Townsend, a former senior trial lawyer in the Civil Rights Division of the U.S. Department of Justice, now in private practice, has long made this point. I am supremely grateful for his help setting out this argument here.

apprehended as harassing.¹⁷⁸ Given this, the employer has a “strong basis in evidence”¹⁷⁹ to believe that if it does not discriminate against cisgender men in this context it will be subject to liability for sexual harassment in suits brought by its women employees. However, it is not permissible for the employer to exclude transgender women¹⁸⁰ from women’s restrooms because there is no countervailing threat of liability justifying discrimination. A transgender woman’s mere presence in women’s facilities is not per se harassing.¹⁸¹ Nor does a transgender woman’s presence give rise to disparate treatment liability, because her presence does not deny a cisgender woman access to the facilities.¹⁸²

At first Sotomayor was taken aback by the invocation of *Ricci*. She knew the case well, having heard it as a member of a three-judge panel of the Second Circuit prior to her elevation to the Supreme Court. As she began to digest the advocate’s answer, Sotomayor followed up: “What if the transgender woman

178. Cf. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 60 (1986) (finding that a male supervisor following female subordinate into women’s restroom when she went there alone, exposing himself to her, and raping her on several occasions gave rise to hostile work environment); *Washington v. White*, 231 F.Supp.2d 71, 81 (D.D.C. 2002) (finding sexual harassment where a woman supervisor repeatedly entered men’s locker room over the objections of male employees).

179. *Ricci*, 557 U.S. at 585.

180. Implicit in this analysis is that both employers and courts can readily distinguish between transgender women and cisgender men and that, on balance, they can concede transgender women have non-predatory reasons to be present in the women’s restroom. Employers should welcome this approach if liability is their only concern. Employers that are inordinately worried about liability could quite easily protect themselves by asking the transgender employee to provide proof of the fact she is transgender. However, as a practical matter, if an employee is actively negotiating restroom access with her employer, the fact she is transgender is likely not reasonably disputed.

181. See, e.g., *Cruzan v. Minn. Pub. Sch. Sys.*, 165 F.Supp.2d 964 (D. Minn. 2001), *aff’d*, 294 F.3d 981, 984 (8th Cir. 2002) (“The school district’s policy was not directed at Cruzan and Cruzan had convenient access to numerous restrooms other than the one Davis used. Cruzan does not assert Davis engaged in any inappropriate conduct other than merely being present in the women’s faculty restroom. Given the totality of the circumstances, we conclude a reasonable person would not have found the work environment hostile or abusive.”). Cf. *Parents for Privacy v. Barr*, 949 F.3d 1210, 1229 (9th Cir. 2020) (“Plaintiffs do not allege that transgender students are making inappropriate comments, threatening them, deliberately flaunting nudity, or physically touching them. Rather, Plaintiffs allegedly feel harassed by the mere presence of transgender students in locker and bathroom facilities. This cannot be enough. The use of facilities for their intended purpose, without more, does not constitute an act of harassment simply because a person is transgender.”); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 531 (3d Cir. 2018), *cert. denied* 139 S.Ct. 2636 (2019) (declining to recognize a constitutional right to privacy that “would be violated by the presence of students who do not share the same birth sex” in public school restrooms; also recognizing that “no court has ever done so”); *Whitaker*, 853 F.3d at 1052 (observing that a “transgender student’s presence in the restroom provides no more risk to the other students’ privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions.”); *Crosby v. Reynolds*, 763 F.Supp. 666, 669–70 (D. Me. 1991) (cisgender woman prisoner’s constitutional right to privacy not violated by virtue of being housed with a transgender woman; also recognizing that this question is distinguishable from the question of whether privacy would be violated if males and females were housed together).

182. *Cruzan*, 165 F.Supp.2d at 969 n.2. Cf. *Lafferty v. Sch. Bd. of Fairfax Cnty.*, 293 Va. 354, 361–62 (2017) (cisgender student’s general distress over public school’s restroom policy permitting transgender students to use restroom facilities in accordance with their gender identity does not allege injury sufficient for standing).

harassed her female coworkers in the women's restroom. Would the employer then be permitted to restrict her restroom use?" The advocate responded:

If a transgender woman harasses her female coworkers in the restroom, then the employer is permitted, if not obliged, to take reasonable actions to correct inappropriate behavior, just as this Court recognized in *Oncale*.¹⁸³

As the advocate's answer unfolded, the parallels between *Ricci* and the restroom dilemma became obvious to Justice Sotomayor. As did the employer in *Ricci*, the employer in the restroom hypothetical may believe that there is no way for it to avoid liability—no matter what choice it makes, it seems to be discriminating against someone. But, of course, the *Ricci* solution points a way forward. Where there are potentially competing claims, the employer can choose to violate one provision of Title VII to avoid violating another. However, it may only do so where there is a "strong basis in evidence" to believe it will violate another provision of Title VII if it does not discriminate.¹⁸⁴ Critically, *Ricci* recognizes that a bare fear of litigation does not suffice—there must be a threat of liability.¹⁸⁵

Justice Gorsuch was struck by the *Ricci* answer. He recalled this same problem arising in *Kastl v. Maricopa County Community College*.¹⁸⁶ Vaguely, he remembered his panel deemed a transgender woman protected by Title VII, but affirmed summary judgment for the employer because it had argued it feared complaints from cisgender women if the worker were to use the women's restroom.¹⁸⁷ He momentarily worried that his panel mistakenly overlooked *Ricci*.¹⁸⁸

But even if *Ricci* were useful here, Justice Gorsuch thought surely the advocate understood there was a big difference between the Ninth Circuit saying transgender people are protected and the Supreme Court saying so. *Kastl* has been mostly forgotten at this point. But a win for Aimee would make shockwaves in certain parts. To that point, Gorsuch asked the advocate whether Title VII should be construed to protect transgender people if that construction would sow "massive social upheaval." Surely, in a "close case" like this one,¹⁸⁹ if a win for

183. 523 U.S. at 79 (recognizing that Title VII reaches same-sex harassment). *See also id.* at 81–82 ("The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.").

184. *Ricci*, 557 U.S. at 585.

185. *Id.* at 592.

186. 325 Fed.Appx. 492 (9th Cir. 2009).

187. *Id.* at 493–94 ("MCCD satisfied its burden of production . . . when it proffered evidence that it banned Kastl from using the women's restroom for safety reasons.").

188. The *Kastl* opinion was issued in April 2009, a few months before *Ricci* was decided in June 2009.

189. *But see* GORSUCH, *supra* note 5, at 136 ("Obviously, there will be some close cases. And in those close cases we can expect that lawyers and judges of good faith will debate vigorously what the

Aimee would disruptively shift the legal and social landscape the justices would be wise to observe a kind of “judicial modesty” and wait for Congress to speak on the transgender issue directly.¹⁹⁰ The advocate paused. In that moment, Justice Gorsuch wondered if the advocate had spotted that implicit in this question was the concern that some Americans oppose a transgender-inclusive construction of Title VII because of their religious beliefs about gender.¹⁹¹ Surely, religious opposition to transgender rights must be accounted for. After taking a deep breath, the advocate resolutely answered:

The Court should honor the law as it is written.¹⁹² Nonetheless, a win for Aimee is the least disruptive course. It would align with the governing decisions of every Circuit Court to hear the issue.¹⁹³ It would affirm the position of the overwhelming majority of Americans who oppose discrimination against transgender people.¹⁹⁴ It would put Aimee, a woman who holds herself out as a woman in every sphere of her private and public life, in the women’s restroom where she belongs.¹⁹⁵

traditional tools of statutory interpretation suggest about a particular text’s meaning. But at least when we use the value-neutral tools of textualism the dispute remains a distinctly legal one carried out in legal terms.”).

190. *Harris* Oral Argument Transcript, *supra* note 8, at 27.

191. That very point was raised in colloquies between John Bursch, the oral advocate for Harris Homes, and Justices Breyer and Sotomayor in the actual argument. *See id.* at 33–35.

192. GORSUCH, *supra* note 5, at 131 (“[W]hen new laws do emerge they must be honored. All people deserve their benefit, not just the popular or powerful. For that reason, Article III assigns the resolution of ‘cases’ and ‘controversies’, including those involving application of federal statutes, not to popularly accountable politicians but to independent judges with life tenure. Nor may judges play any part in the legislative process. When it comes to statutes, Article III authorizes judges only to ensure that the laws Congress adopts are applied neutrally—‘without respect to persons’, as our federal judicial oath says.”).

193. *See* cases cited *supra* note 33.

194. Americans steadfastly oppose employment discrimination against transgender people. In one recent national survey, an astounding seventy-one percent of respondents opposed banning transgender people from serving in the U.S. military, the world’s largest employer. *See* Justin McCarthy, *In U.S., 71% Support Transgender People Serving in Military*, GALLUP, June 20, 2019, <https://news.gallup.com/poll/258521/support-transgender-people-serving-military.aspx>; Henry Taylor, *Who Is the World’s Biggest Employer? The Answer Might Not Be What You Expect.*, WORLD ECON. F., June 17, 2015, <https://www.weforum.org/agenda/2015/06/worlds-10-biggest-employers/?link=mktw>. In another, sixty-two percent of Americans reported being more supportive of transgender rights today than they were five years ago and sixty-seven percent already believed Title VII protects transgender people. Daniel Greenbag et al., *America’s Growing Support for Transgender Rights*, PRRI, June 11, 2019, <https://www.prii.org/research/americas-growing-support-for-transgender-rights/>. In fact, in a survey taken immediately after oral argument in *Harris*, survey respondents favored the Court construing Title VII to protect transgender people by a margin of sixty-one percent to thirty. Press Release, Marquette Law Poll, *New Nationwide Marquette Law School Poll Finds Confidence in U.S. Supreme Court Overall, Though More Pronounced Among Conservatives*, Oct. 21, 2019, <https://law.marquette.edu/poll/category/poll-release/>.

195. Historically, access to gender-segregated restrooms has turned on one’s social gender rather than anatomical differences. *See* Jack B. Harrison, “To Sit or Stand”: *Transgender Persons, Gender Restrooms, and the Law*, 40 U. HAW. L. REV. 49, 61 (2017). Though some federal, state, and local laws allow for the maintenance of separate male and female restrooms, none expressly states that transgender

A win for Aimee would also prove least disruptive to this Court's caselaw on faith-based objections to generally applicable nondiscrimination laws. Religious liberty protections are a shield for exercise of faith, not a sword to impose religious beliefs on others.¹⁹⁶

persons are barred from using restrooms that comport with their identity. See *supra* note 86 for examples of unsuccessful federal and state bills that sought to restrict restroom access on account of transgender status. See also Shannon Price Minter, "Déjà vu All Over Again": *The Recourse to Biology by Opponents of Transgender Equality*, 95 N.C. L. REV. 1161, 1199 (2017) ("[B]y casting gender-segregated restrooms as a mere reflection of biological truths, opponents of transgender equality seek to insulate certain laws and policies—such as those basing restroom access on a person's 'biological sex'—from any meaningful scrutiny[. But] because gender-segregated restrooms are not simple reflections of biology, it cannot be answered simply by pointing to the physiological differences between men and women.").

I am aware that a small segment of scholars contend that transgender rights advocates have misconstrued the historic origins and rationales undergirding sex-segregated restrooms in the West. Some insist that the historic record cleanly establishes that sex-segregated restrooms have existed throughout Western history to combat sexual assault and sexual harassment uniquely experienced by cisgender women, adopting a trans-exclusionary narrative of sexual violence against women. See, e.g., W. Burlette Carter, *Sexism in the "Bathroom Debates": How Bathrooms Really Became Separated by Sex*, 37 YALE L. & POL'Y REV. 227, 228 (2018) (arguing some historical accounts of sex-segregated restrooms "advance[] the interests of some sexual minorities [proffering] a narrative that oppresses women and the female-bodied. They ignore the stories of women's lives and, in particular, their struggles with sexual assault and sexual harassment.").

I wholly support efforts to ensure that women's experiences inform our approach to sex discrimination law. However, I urge my colleagues who see transgender women's rights demands as threats to feminist projects to more fully consider whether that stance is reconcilable with the rich historic records documenting transgender women's vulnerability to sexual violence as women and how transgender-exceptional models of sexual violence have been deployed to deny the sexual terror transgender and cisgender women experience. For instance, Frances Thompson, a Black transgender woman born into slavery, was raped during the Memphis Riots of 1866. She was ultimately one of five Black women to testify in front of Congress about the Riots and believed to be the first transgender person ever to testify before Congress. Thompson's testimony drew national attention to the racial and sexual terror Black women endured in the South during the Reconstruction. See Danielle L. McGuire, "It Was like All of Us Had Been Raped": *Sexual Violence, Community Mobilization, and the African American Freedom Struggle*, 91 J. AM. HIST. 906, 908–09 (2004) (contextualizing Thompson's sexual assault and testimony within Black women's freedom struggle during Reconstruction); Hon. Bernice Bouie Donald, *When the Rule of Law Breaks Down: Implications of the 1866 Memphis Massacre for the Passage of the Fourteenth Amendment*, 98 B.U. L. REV. 1607, 1636 (2018) (contextualizing Thompson's assault and testimony as part of a campaign to pressure Congress to create new legal remedies, ultimately culminating in passage of the Fourteenth Amendment). A decade later Thompson was arrested on cross-dressing charges, and newspapers around the nation ran editorials deeming Thompson's testimony about her sexual assault and the Riots more broadly as discredited by virtue of the fact she was transgender. See Ardel Haefele-Thomas, *That Dreadful Thing That Looked Like a Beautiful Girl: Trans Anxiety/Trans Possibility in Three Late Victorian Werewolf Tales*, in *TRANSGOTHIC IN LITERATURE AND CULTURE* 97, 97–79 (Jolene Zigarovich ed., 2017).

196. See, e.g., *Hobby Lobby v. Burwell*, 573 U.S. 682, 733 (2014) (rejecting the notion that the Court will permit "discrimination in hiring, for example on the basis of race, [to] be cloaked as religious practice to escape legal sanction"); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring) ("[T]he authorization of religious discrimination with respect to nonreligious activities goes beyond reasonable accommodation, and has the effect of furthering religion in violation of the Establishment Clause.") (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)); *United States v. Lee*, 455 U.S. 252, 261 (1982) ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on statutory schemes which are

Accepting the argument that discriminatory conduct is exempt from law because of religious beliefs undermines the rule of law.¹⁹⁷ This is precisely why just last term *Masterpiece Cakeshop* rejected the notion that religious or philosophical objections could deprive protected persons of the benefit of neutral nondiscrimination laws.¹⁹⁸ It is also why *Piggie Park* affirmed that “free exercise of one’s beliefs . . . as distinguished from the absolute right to a belief, is subject to regulation when religious acts require accommodation to society.”¹⁹⁹

As the argument wore on, several of the justices were struck by the advocate’s dignified presence and unimpeachable mastery of the subject matter. Some even came to recognize that the opportunity to speak directly with a transgender person helped allay their concerns about the case. A few of the justices had worried the advocate might not pull this off. They had thought that maybe due to inexperience or perhaps as a quirk of being transgender, he would indecently draw attention to his identity as part of the argument, as if that would have been enough to sway them. That prejudgment seemed silly now. As the justices got to know the advocate, it became abundantly clear—he knew how to make his points heard.

In the wake of the *Harris* oral argument, some movement advocates have twisted themselves in knots defending the approach taken by Aimee’s advocate. It is natural to cover for what is already done. But there is something to be said for imagining what the Supreme Court could have heard if Aimee had been framed as a woman and the argument had been made by one of her out transgender lawyers. *Harris* is not yet transgender people’s *Bowers*. Until a decision is issued, the justices are free to explore the interstices between the oral argument that was and the one that could have been. In that space, I believe, Aimee still has a chance to win.

As our counterfactual reveals, there is a considerable gulf between the argument the Court heard and the kind of argument it could have heard in *Harris*. The most significant difference is the framing of the argument. In the counterfactual, our advocate’s frame commits to honoring Aimee’s womanhood.

binding on others in that activity.”); *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., dissenting) (“[The] limitations which of necessity bound religious freedom . . . begin to operate whenever activities begin to affect or collide with liberties of others or of the public.”).

197. Terri B. Day & Danielle Weatherby, *Contemplating Masterpiece Cakeshop*, 74 WASH. & LEE L. REV. ONLINE 86, 97 (2018) (“[L]ongstanding First Amendment principles open the door to governmental restriction of free exercise when a religious practice is against the social order.”). See, e.g., *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (upholding a criminal polygamy law that punished conduct, rather than belief, that was “in violation of social duties or subversive of good order”).

198. *Masterpiece Cakeshop v. Colorado Civil Rights Comm’n*, 138 S.Ct. 1719, 1732 (2018) (“While the issues here are difficult to resolve, it must be concluded that the State’s interests could have been weighed against Phillips’ sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed.”).

199. *Newman v. Piggie Park Enters., Inc.*, 256 F.Supp. 941, 943 (D.S.C. 1966), *aff’d* 390 U.S. 400, 402–03 (1968).

Not only is Aimee exclusively referred to as being a woman, but her experiences are described as paralleling those of cisgender women or as being otherwise indistinguishable. This is intentional. It illustrates for the listener how to make sense of sex-based discrimination experienced by transgender women. It is not, as Harris Homes argued, discrimination of a different and thus unprotected kind,²⁰⁰ but rather a familiar permutation of an evil that Congress has already outlawed.

There is a considerable strategic advantage in approaching the *Harris* oral argument in this manner. It allows our advocate to educate the Court about transgender women's experiences in the workplace as women, and it affirmatively demonstrates that framing the discrimination against Aimee as something other than sex discrimination is unsupported by Title VII's text. Let us examine why this works and, further, why it is such a difficult needle for some advocates to thread.

As I explained in Part I, some lawyers approach Title VII transgender cases predisposed to think that transgender people are not protected by the statute and that if coverage is to be won, it must require some kind of legal jujitsu. They read requirements into the statute that simply are not there. They forget basic rules of grammar and contort the term "sex" in odd ways to try to make the text confirm their extra-textual biases. Title VII in no way asks courts to identify—let alone differentiate—workers by "sex" however that term is defined. Rather, it identifies sex classifications (however drawn) as illicit. In most cases, courts do not struggle with that simple instruction.²⁰¹ But in transgender cases, disputes about what a transgender person's sex is tend to short-circuit the proceedings. Sometimes, as Harris Homes did in Aimee's case, the employer raises an "actuality defense," ostensibly urging the court to turn the inquiry into one of assessing the victim's sub-class rather than whether discrimination actually occurred.²⁰²

As our counterfactual advocate explains to the Court, those kinds of arguments are utter nonsense: "The evil Congress put in its crosshairs is not the victim's sex," he states. "The point is that one's sex should not matter." This critical point, which anchors our advocate's opening salvo, is by far the most important substantive textual argument. That said, in practice, it cannot be made

200. Specifically, counsel for Harris Homes argued that counsel for Aimee "add[ed] a different classification into the statute that Congress has not added." *Harris Oral Argument Transcript*, *supra* note 8, at 33.

201. *But see* Crenshaw, *Demarginalizing*, *supra* note 46, at 141–50 (discussing Title VII sex and race discrimination cases where courts struggled to grasp that Black women plausibly alleged discrimination where they were treated differently than both White women and Black men).

202. These kinds of arguments are not unique to transgender sex discrimination cases. Scholars have urged in the race, national origin, and religious discrimination contexts that courts recognize "misperception" claims and reject employer "actuality" defenses, opining that actual membership in a sub-class is not a prerequisite to statutory coverage. *See, e.g.*, Greene, *supra* note 171, at 133; Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded as" Black, and Why Title VII Should Apply Even if Lakisha and Jamal are White*, 2005 WISC. L. REV. 1283, 1325–43.

unless the bench is primed to hear it. That is why, the critical point is made in combination with statements illustrating that Aimee's sex is settled and knowable (e.g., statements that she is female, that she is a woman) and arguments that her experiences of sex discrimination are very similar to those of other women (e.g., comparisons to the discrimination faced by Ann Hopkins). These statements are not made to *prove* Aimee is female *per se*; proving one is female or male is not a statutory prerequisite to coverage.²⁰³ Rather, they are made to mollify any anxieties decision-makers might have about her sex so that those fears do not frustrate their capacity to hear the critical point.

Another aspect of the counterfactual argument that stands out is the opportunity it provides the Court to hear from an out transgender lawyer. For good reason, concerns about the growing homogeneity of the Supreme Court bar have gathered steam recently. Not only are the vast majority of oral advocates cisgender men,²⁰⁴ but they tend to hail from a small subset of elite law firms, nonprofits, and law school clinics.²⁰⁵ Though some have lauded the so-called professionalization of appellate advocacy,²⁰⁶ pipelines to the august jobs where one is most likely to have the opportunity to argue before the Court have long locked out women and other historically underrepresented minorities.²⁰⁷ A growing body of literature also suggests these structural biases have introduced

203. See Greene, *supra* note 171, at 139–40 (“[A]n anti-anticlassificationist interpretation of Title VII creates a legal fiction that the only rightful beneficiaries of Title VII’s protections against workplace discrimination are individuals who allege invidious, differential treatment on the basis of their self-described identity. Courts are mistaken in their belief that by recognizing misperception discrimination cases, statutory protection will be extended to a new class of individuals. Fundamentally, the only class of individuals unable to benefit from Title VII’s proscriptions consists of those discriminated against by entities not covered by Title VII.”).

204. Janet Roberts, Joan Biskipic & John Shiffman, *Special Report; In Ever-Clubbier Bar, Eight Men Emerge as Supreme Court Confidants*, REUTERS, Dec. 8, 2014, <https://www.reuters.com/article/us-scotus-advocates-specialreport/special-report-in-ever-clubbier-bar-eight-men-emerge-as-supreme-court-confidants-idUSKBN0JM11E20141208> (“A Reuters analysis of high court records shows that a group of eight lawyers, all men, accounted for almost 20 percent of all the arguments made before the court by attorneys in private practice during the past decade. In the decade before, 30 attorneys accounted for that same share.”). See also sources cited *supra* note 16.

205. See sources cited *supra* note 15.

206. See, e.g., John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 68 (2005) (“Over the past generation, roughly the period since 1980, there has been a discernable professionalization among the advocates before the Supreme Court, to the extent that one can speak of the emergence of a real Supreme Court bar.”). But see Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1490 (2008) (explaining that “what has gone wholly unrecognized by all, including legal scholars, is how the re-emergence of a Supreme Court Bar of elite attorneys similar to the early-nineteenth-century Bar in its domination of Supreme Court advocacy is quietly transforming the Court and the nation’s laws”).

207. See, e.g., Alexandra G. Hess, *The Collapse of the House that Ruth Built: The Impact of the Feeder System on Female Judges and the Federal Judiciary, 1970–2014*, 24 AM. J. GENDER SOC. POL’Y & L. 61 (2015) (arguing that the rise of the super-feeder system and underrepresentation of female feeder judges mirrors women’s absence from or underrepresentation in other elite legal roles such as law firm partnership, Supreme Court clerks, Supreme Court advocates, and federal judges).

or simply reinforced latent biases the justices themselves have about women advocates in particular.²⁰⁸

Though an openly transgender person has yet to argue before the Court, our counterfactual advocate gives us the opportunity to reflect on what difference it might make for a transgender person to stake out a meaningful presence at oral argument.

Our thought experiment raises interesting questions about whether underrepresentation of transgender advocates in the Supreme Court bar might, if uncorrected, negatively affect outcomes. Decades ago, the mainstream LGBT rights movement recognized that diversifying the bar was a key part of winning cases seeking to decriminalize sodomy and secure marriage equality. For instance, Pamela Karlan argues that the fact that the bar section of the Court was filled with “former clerks and other frequent participants in the Court’s business who were openly gay” played a critical role in the positive outcome in *Lawrence v. Texas*.²⁰⁹ Karlan explains that “[w]hen the Justices came out from behind the velvet curtain to take their seats, it was clear that at least some of them recognized this fact.”²¹⁰ And yet, movement advocates have failed to invest in promoting transgender lawyers’ careers.

To date, there are no out transgender judges on the federal bench,²¹¹ and only a handful sit on state and local courts.²¹² None of the large firms’ specialized appellate groups counts a transgender lawyer in their ranks. There are no out transgender lawyers employed by the Solicitor General’s office.²¹³ Similarly,

208. See sources cited *supra* note 17.

209. Pamela S. Karlan, *Just Desserts?: Public Accommodations, Religious Accommodations, Racial Equality, and Gay Rights*, 2018 S. CT. REV. 145, 155 (2018).

210. *Id.*

211. This is particularly unfortunate in light of anecdotes from Supreme Court justices that reflect that diversity within their own ranks improves decision-making. See, e.g., SANDRA DAY O’CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 133–35 (2003) (“At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth. [O]ver time, as I heard more clearly what Justice Marshall was saying, I realized that behind most of the anecdotes was a relevant legal point. [. . . H]is story made clear what legal briefs often obscure: the impact of legal rules on human lives. Through his story, Justice Marshall reminded us, once again, that the law is not an abstract concept removed from society it serves, and that judges, as safeguards of the Constitution, must constantly strive to narrow the gap between the ideal of equal justice and the reality of social inequality.”).

212. As of March 2020, I am aware of only five out transgender judges in the United States: Hon. Victoria Kolakowski of the Alameda County Superior Court (Cal.), Hon. Phyllis Frye of the City of Houston Municipal Courts (Tex.), Hon. Katie Sprinkle of the Dallas County Criminal District Court (Tex.), Hon. Tracy Nadzieja of the Maricopa County Superior Court (Ariz.), and Hon. Ginny S. Millas of the Cuyahoga County Juvenile Court (Ohio).

213. In fact, according to Diana Flynn, a transgender woman who worked in a senior position within the U.S. Department of Justice for more than thirty years and transitioned on the job during the George W. Bush administration, no division of the DOJ has knowingly hired an out transgender lawyer. See Sasha Buchert & Ezra Young, *Legal Issues*, in *TRANS BODIES, TRANS SELVES VOL. II* (Laura Erickson-Schroth ed., forthcoming 2020) (interview with Flynn).

none of the law school clinics that regularly file briefs in the Supreme Court is headed by a transgender lawyer. No out transgender lawyers have clerked on the Court,²¹⁴ and every term that goes by with that particular glass ceiling intact is another in which the justices miss out on fresh perspectives that, as proved true in the gay rights cases,²¹⁵ are very much needed.

I think it safe enough to suggest that structural and institutional discrimination at least partly explains the paucity of transgender lawyers in the Supreme Court bar. Exclusionary pipelines, interpersonal bias, and depressed life opportunities make the road to elite appellate practice particularly difficult for minorities.²¹⁶ Unfortunately, the belief that the justices' own biases (whether actual or imagined) should be acquiesced to and thus that "familiar faces" should take the podium over someone new also explains the underinvestment in diversifying the bar. Baked into the "familiar face" preference is a discounting of the social conditions that promote the skills of some and baselessly undervalue those of others.

As far as transgender people are concerned, underrepresentation in elite appellate jobs evidences more than just a leaky career pipeline—it is likely to lead to bad decisions on transgender rights cases in the coming years. Given the underrepresentation of transgender people in the legal profession and elite appellate practice in particular, the justices have likely had little exposure to out

214. Some commentators point out that the justices' hiring preferences could increase clerk diversity not just at the Court but downstream. Cf. Tony Mauro, *Diversity and Supreme Court Law Clerks*, 98 MARQUETTE L. REV. 361, 365–66 (2014) ("I still believe that Justices could set the tone and set the criteria in such a way that their feeder judges and friends would seek out and find a much broader palette of candidates who could be highly effective clerks and bring new perspectives and backgrounds to the important tasks that face them.").

Though none of the justices have spoken publicly about their openness to hiring out transgender clerks, Justices Gorsuch and Kavanaugh have signaled an interest in diversity. See, e.g., Justin Wingerter, *Chickasaw Woman to Become First Native American Clerk for Supreme Court Justice*, OKLAHOMAN, Apr. 16, 2018, <https://oklahoman.com/article/5591072/chickasaw-woman-to-become-first-native-american-and-first-oklahoma-woman-to-clerk-for-supreme-court-justice> (reporting Justice Gorsuch's hiring of Ms. Tobi Young, a citizen of the Chickasaw Nation, to serve as a October 2018 term clerk); Paul Butler, Opinion, *Ruth Bader Ginsburg Can Learn Something from Brett Kavanaugh*, WASH. POST, Oct. 15, 2018, https://www.washingtonpost.com/opinions/ruth-bader-ginsburg-can-learn-something-from-brett-kavanaugh/2018/10/15/b8974a86-cd77-11e8-a360-85875bac0b1f_story.html (observing that "Kavanaugh has engaged in one of the most diverse hiring practices of any federal appellate judge").

215. See Adam Liptak, *Exhibit A for a Major Shift: Justices' Gay Clerks*, N.Y. TIMES, June 8, 2013, <https://www.nytimes.com/2013/06/09/us/exhibit-a-for-a-major-shift-justices-gay-clerks.html>. See also Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51, 53 (2008) (finding that "over and above 'selection effects' due to the Justices choosing like-minded clerks—clerks' ideological predilections exert an additional, and not insubstantial, influence on the Justices' decisions on the merits").

216. See, e.g., *Diversity Challenges in the Supreme Court Bar, Cases and Controversy*, BLOOMBERG LAW (July 17, 2019), <https://news.bloomberglaw.com/us-law-week/podcast-diversity-challenges-in-supreme-court-bar-live> (interview with Jaime Santos).

transgender people in professional contexts. This is unfortunate because research reflects that getting to know transgender people reduces prejudice.²¹⁷

Returning to our counterfactual, I believe that allowing a transgender lawyer to argue *Harris* may have proved particularly beneficial. It would have afforded the justices a rare opportunity to directly interact with an out transgender lawyer, someone who will be directly affected by the ultimate decision. In my experience, being an out transgender lawyer has helped me make a strong affirmative case for my clients. I do not routinely project my own experiences into my substantive arguments, but I will from time to time candidly reflect on them in public fora, like the op-ed I imagined our advocate might write. I have also, on a few occasions, candidly discussed what it is like being transgender with federal judges who have shared that getting to know me through my work helped them better grasp both how transgender people are mistreated and how our legal system might remedy our injuries. If nothing else, these discussions have driven home to me that judges, like all people, can be skeptical and even scared of people they do not know. Sometimes, simply getting to know someone makes all the difference. I imagine that the justices, much like their colleagues on the federal judiciary whom I have met, would similarly benefit from getting to know a transgender lawyer.

CONCLUSION

Whatever the outcome in *Harris*, we should take how the oral argument unfolded as another reminder that we must continue to demand change. The transgender rights movement has made tremendous strides over the last few decades. In my own lifetime, I have witnessed breathtaking advances in the law, as well as, difficult and painful setbacks. One through line has been our community's fierce and ongoing struggle for equality and dignity. We have worked tirelessly to win legal protections and shift public opinion so that we can live openly, safely, and without fear. We need not be relegated to the margins of society. We need not hide in the shadows. But if we expect to see real change in our lifetimes, we must continue to push forward in the courtroom and beyond.

217. See, e.g., Mark Romeo Hoffarth & Gordon Hodson, *When Intergroup Contact is Uncommon and Bias is Strong: The Case of Anti-Transgender Bias*, 9 PSYCHOL. & SEXUALITY 237 (2018) (finding more positive transgender contacts correlated with lower anti-transgender bias); Andrew R. Flores et al., *Transgender Prejudice Reduction and Opinions on Transgender Rights: Results from a Mediation Analysis on Experimental Data*, 18 RES. & POLS. 1 (2018) (finding transphobia reduced where individuals exposed to information about and images of transgender people).