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A milestone in LGBT rights

Alexander Chen '15, founding director of HLS' LGBTQ+ Advocacy Clinic, discusses the significance of the U.S. Supreme Court's landmark decision protecting LGBT workers

By Brett Milano, June 17, 2020



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While calling the United States Supreme Court's ruling this week barring discrimination based on sexual orientation and gender identity "a massive, monumental, landmark decision," **Alexander Chen '15**¹, the founding director of Harvard Law School's **LGBTQ+ Advocacy Clinic**², also warns that the struggle for LGBT rights is not yet won.

In a 6-3 vote, the Court ruled Monday in a case called **Bostock v. Clayton County**³ that Title VII of the 1964 Civil Rights Act, which forbids job discrimination based on a person's race, religion or sex, also

covers sexual orientation and gender identity. Writing for the majority, Justice Neil Gorsuch '91 made the textualist argument that because the Civil Rights Act protects against sex discrimination, members of either sex cannot be penalized for doing something—partnering with a man or a woman, for instance—which would be acceptable in the other.

“We must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear,” Gorsuch wrote. “An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”

He was joined by Chief Justice John G. Roberts Jr. '79 and the four progressive members of the Court.

Chen says that the ruling addresses a longstanding source of discrimination for the LGBTQ community. “Even from the very beginning of the 1960s, employment protections were one of the major priorities of gay and transgender activists even back then, because it really goes to the heart of economic independence and peoples’ ability to survive in this country. Of course, it was incredibly significant that we had the decriminalization of sodomy laws, that we had the recognition of marriage equality. But this set of protections for employment, nondiscrimination, and the doctrinal impacts that are going to follow from that, I think will have a more sweeping impact on people’s lives overall.”



Credit: Lorin Granger

Harvard Law School Lecturer on Law Alex Chen '15 is the founding director of the Harvard Law School LGBTQ+ Advocacy Clinic that launched this January.

After the Court heard oral arguments in October, many observers thought the ruling might go the other way. “A lot of advocates were concerned about the outcome based on some of the questions that the justices asked—about bathrooms and locker room usage,” Chen says. “But the decision said, ‘these are not the issues before us’. The issue is whether you can fire or refuse to hire someone because of their gay or transgender status.”

The *Bostock* decision consolidates three cases, one of which had a transgender plaintiff, Aimee Stephens, who died in May. “It was also important,” Chen argues, “that the Court used the correct pronouns for Aimee Stephens, treating her gender identity as valid and legitimate.”

Chen believes that the Court’s ruling effectively undoes a rule proposed by the Trump Administration last Friday, which would have restricted the definition of sex to that assigned at birth.

“They have really done just about everything possible in this administration to roll back everything the last administration did in terms of sex discrimination,” he says. “So, when you think about backlash [over the current Supreme Court decision], the backlash in many ways already came. And one thing I think is heartening is that the president and the GOP don’t seem to have that much of an appetite for continuing to demonize LGBT people. People can speculate why Chief Justice Roberts and Justice Gorsuch crossed over and made this a 6-3 decision, but it’s possible that they actually just thought this was the right call.”

“Before the decision came out, over 70 percent of Americans supported the idea of extending protection of LGBT people in the workplace,” he says. “I think there has been a massive public opinion shift on that as well. The more people come out to their friends and family, the more it undermines the idea that there’s some kind of hidden agenda. What’s been percolating is the idea that maybe LGBT people are just ordinary people.”

But Chen also warns that racial discrimination has continued more than half a century after it was legally banned by the 1964 Civil Rights Act, and says there will inevitably be battles left to fight. “One

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— Alex Chen

set of areas where I think you'll see some questions is that, if we can't discriminate based on sexual orientation or gender identity, what exactly constitutes that type of discrimination? We have a case now [*Prescott vs. Rady Children's Hospital-San Diego*] involving discrimination against a teenage transgender boy in a hospital where he was repeatedly misgendered; that ended in tragic circumstances. The district court found that this did constitute gender identity discrimination, which constitutes sex discrimination under the Affordable Care Act."

Chen predicts a wave of new litigation as employers and employees attempt to apply the ruling in the workplace. "Suppose for example that you are a transgender woman, and your job says, 'We can't fire you, but we're not going to refer to you by the name that's now your legal name, and we're going to put you in the male uniform, and we're going to make you use the men's bathroom'," he says. "I think we're going to see these kinds of factual situations play out."

"And if you look at what is going on in the country politically with Black Lives Matter," Chen adds. "I think another big area of work for the LBGT movement is to work on intersectional issues, where black and brown LBGT people are more likely to experience employment discrimination, housing discrimination, healthcare discrimination and to have a lower income level than white and Asian LBGT people."

"Being treated as equal in the eyes of the law is absolutely critical," Chen says. "But it is also the beginning of the fight when it comes to all these systematic aspects of inequality that we have in our country."

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