

# SCOTUS To Rule On Whether Title VII Prohibits Sexual Orientation And Gender Identity Discrimination

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Monday, April 22, 2019

On April 22, 2019, the United States Supreme Court granted certiorari in a trio of cases challenging the scope of Title VII of the Civil Rights Act of 1964's ("Title VII") prohibition on discrimination on the basis of sex. The definition of "sex" in Title VII, and particularly whether the term incorporates sexual orientation and/or gender identity, is currently the subject of uncertainty and a hotly debated judicial and administrative divide. Specifically, while the Equal Employment Opportunity Commission ("EEOC") and United States Court of Appeals for the Second and Seventh Circuits have each determined that the term "sex" encompasses sexual orientation, the United States Court of Appeals for the Eleventh Circuit has held that Title VII does not prohibit discrimination on the basis of sexual orientation. While the court has notably declined to hear cases aimed at resolving the meaning of "sex" in Title VII in recent years, its grant of certiorari signals that the Court is now prepared to address the issue.

The three cases that the Supreme Court will hear to resolve this issue are:

(i) [Altitude Express v. Zarda](#), a case from the Second Circuit; [Bostock v. Clayton County, Georgia](#), a case from the United States District Court for the Eleventh Circuit; and (iii) [R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.](#), a case from the United States District Court for the Sixth Circuit. Each case presents a different set of facts and procedural posture. In *Zarda*, the Court will review the Second Circuit's ruling that the estate of a now-deceased gay male skydiving instructor who claimed that he was terminated because of his sexual orientation could pursue a Title VII

claim against his former employer. Conversely, in *Bostock*, the Court will address the Eleventh Circuit's determination that a gay male child welfare services coordinator was barred from bringing Title VII sexual orientation discrimination claims against his former employer. The Court has consolidated *Zarda* and *Bostock*, and will hear the cases together in order to decide whether Title VII prohibits discrimination on the basis of sexual orientation.

Finally, *R.G. & G.R. Harris*, which will be heard separately, raises a related but different question: whether Title VII prohibits discrimination on the basis of gender identity. In *R.G. & G.R. Harris*, the EEOC filed a claim on behalf of Aimee Stephens, a transgender female funeral director. Stephens' employer terminated her for a violation of the company's dress code when she wore women's clothes and otherwise presented as a woman at work. The Sixth Circuit held that Stephens' termination constituted unlawful discrimination on the basis of "sex stereotyping," which the Supreme Court deemed impermissible in 1989 in the case [\*Price Waterhouse v. Hopkins\*](#). The funeral home challenged the Sixth Circuit's decision, and the Supreme Court will now decide whether Title VII's prohibition on discrimination on the basis of sex includes "gender identity" as well.

The Court's decisions in *Zarda*, *Bostock* and *R.G. & G.R. Harris* have the potential to change the landscape of employment discrimination law nationwide, and will be closely watched. Decisions in these cases are expected no later than June 2020.

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