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Backgrounder on U.S. Supreme Court "Sexual Orientation" and "Gender Identity" Cases

by staff to the Subcommittee for the Promotion and Defense of Marriage

Less than five years after changing the definition of the word "marriage" for all Americans, the Supreme Court this term is considering whether to do the same with "sex."

At issue are Title VII employment discrimination cases that respectively ask if the federal Civil Rights Act's prohibition of discrimination on the basis of "sex" includes "sexual orientation" and/or "gender identity." These categories could be interpreted to include approval of the accompanying sexual conduct or personal presentation as the other sex. While no one should be unjustly denied employment, using the power of government in an attempt to redefine a central aspect of humanity – our existence as male and female – and to force everyone to conform to this new ideology is wrong.

Why is the U. S. Supreme Court presently considering these SOGI cases?

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, national origin, religion, and sex. For many years, advocates have sought to add new categories to this law, including "sexual orientation" and "gender identity" (SOGI). Time and again, Congress has rejected these proposals. So, advocates have turned to the courts to achieve the same end. Lower federal courts have come to differing conclusions, so the Supreme Court has agreed to decide.

What are the SOGI cases before the Supreme Court?

There are three cases being considered by the Supreme Court, two of which have been consolidated. *Bostock v. Clayton County, Georgia* arose from the 11th Circuit Court of Appeals, which held that "sex" does not cover sexual orientation, and *Altitude Express v. Zarda* where the 2nd Circuit found the opposite. *R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission*, meanwhile, is an appeal from the 6th Circuit, which ruled that "sex" discrimination includes "gender identity."

What are the questions before the Supreme Court?

(1) Does Title VII of the Civil Rights Act's prohibition of discrimination based on "sex" include "sexual orientation"?
(2) Does Title VII of the Civil Rights Act's prohibition of discrimination based on "sex" include "gender identity"?

What are the consequences in each scenario?

However the Court rules, it will have implications far beyond employment cases, as the interpretation of Title VII will be used to interpret all manner of nondiscrimination and other laws, affecting much of public life.

Ideally, the Court will answer both questions in the negative, as the word "sex" in Title VII has a clear meaning, as indicated by Congress's consideration and rejection of bills to amend it to include SOGI.

If the Court, however, answers the first question in the affirmative, then it could imperil the ability for people to serve the community or earn their livelihood in accord with their conscience on matters of sexuality. Religious organizations (e.g., charities, hospitals, and schools) could be forced to retain personnel who publicly violate their employer's faith by maintaining same-sex relationships. Down the line, outside of Title VII, those who house individuals (be it in faith-based nursing homes, shelters, or schools) would have to honor same-sex relationships as if they were marriages; and faith-based adoption and foster care agencies could have to place children with same-sex couples or shut down. A small businessperson declining to serve a same-sex wedding, a faith-based counselor who supports chastity, or an individual simply speaking about the truth of marriage may be increasingly targeted for vilification or even legal restrictions.

If the Court answers the second question in the affirmative, then, first, biological sex will no longer exist in any meaningful way in federal law. This would be particularly harmful to women who were the contemplated beneficiaries of opportunities created by hard-won laws, such Title IX in education programs, but could be edged out by men who identify as women. Beyond that, individuals would likely ultimately be required – in school, in the workplace, in restrooms and locker rooms, in places of daily commerce – to treat others in conformity with their "gender identity" and ignore real sexual difference. This would, in turn, limit individuals' rights of free speech, thought, and privacy. Doctors, counselors, and even parents could also be forced to facilitate and affirm "gender transitions" even when it goes against their best judgment. Religious institutions would have to engage in costly and uncertain litigation in order to preserve the recognition of male and female within their charitable, health care, and education services.

In all, an affirmative answer to either disputed question would continue to push the general public toward losing the critical understanding of the human person and the family.

When is a decision expected?
The Court will hear oral argument on October 8, 2019 and is expected to rule before the end of the current term (i.e., by June 2020).

For more information on these cases, see the USCCB's *amicus* briefs to the Court at *Bostock v. Clayton County, Georgia* and *Harris Funeral Homes v. EEOC*. For more information on related pastoral and policy issues, see http://www.usccb.org/issues-and-action/marriage-and-family/marriage/promotion-and-defense-of-marriage/marriage-policy-and-advocacy.cfm and http://www.marriageuniqueforareason.org/faq/.