

# PUBLICATION

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## Trump's DOJ Says Gender-Identity Discrimination Not Prohibited by Title VII

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**For some time now, we have been covering the debate within the federal court system over whether Title VII of the Civil Rights Act prohibits discrimination based on sexual orientation and gender identity. Last month, the Department of Justice (DOJ) stepped into the ring by filing an opposition brief in the Supreme Court in the case of *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, arguing on the government's behalf that Title VII does *not* protect against discrimination based on gender identity. The DOJ's brief directly contradicts the EEOC's theory and also marks a significant rift between two government agencies charged with interpreting and enforcing workplace laws, which further adds to the uncertainty that employers face in deciphering the legal and administrative treatment of Title VII.**

Title VII prohibits discrimination based on race, color, national origin, religion, and sex. Sexual orientation and gender identity are absent from the statute's express language, so federal courts over the years have had to determine whether either falls within Title VII's definition of "sex." In 1989, the Supreme Court held that sex discrimination based upon sexual stereotyping violates Title VII. Since then, courts have largely agreed that Title VII prohibits discrimination based on an employee not conforming to his or her sex stereotype, e.g., not dressing "like a female." But the Supreme Court has never explicitly held that sexual orientation or gender identity falls under Title VII's definition of "sex." The issue of sexual orientation has been more widely litigated, and the federal courts of appeals are currently split, with some courts holding that Title VII prohibits discrimination on the basis of sexual orientation, and others holding Title VII does not prohibit such discrimination because it is not included in the express language of the statute.

The Supreme Court currently has two options before it to permanently decide the question of sexual orientation under Title VII. The Supreme Court picks and chooses which cases come before it, and the primary means to request that a case be reviewed is to ask the Supreme Court to grant a "writ of certiorari." The two requests currently before the Court on the question of whether Title VII prohibits discrimination on the basis of sexual orientation are *Altitude Express, Inc. v. Zarda* (No. 17-1623) and *Bostock v. Clayton County* (No. 17-1618). The Court is usually not under any obligation to hear cases like these and may grant or decline to review them at any time.

Another request pending before the Supreme Court involves the question of whether Title VII prohibits discrimination on the basis of gender identity. In *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, which arises out of the Sixth Circuit, the EEOC sued a funeral home under Title VII for firing a funeral director, a transgender female, "because [the funeral director] is transgender, because of [the funeral director's] transition from male to female, and/or because [the funeral director] did not conform to [the funeral home's] sex- or gender-based preferences, expectations, or stereotypes." The Sixth Circuit sided with the EEOC's arguments and held that discrimination against employees, either because of their failure to conform to sex stereotypes or because of their transgender and transitioning status, is illegal sex discrimination under Title VII. It is also worth noting that the funeral director joined the EEOC in the lawsuit "after expressing concern that changes in policy priorities within the U.S. government might prevent the EEOC from fully representing Stephens's interests in this case."

In a move that directly contradicts the EEOC's position in the case, the DOJ now appears to side with the employer and argues that Title VII does *not* protect against gender-identity discrimination. However, the DOJ also urges the Supreme Court should hold or deny the funeral home's request for review until the Justices have decided whether or not to grant review in *Zarda* and *Bostock*. In so arguing, the DOJ submits that review of either of those cases "may bear on the proper analysis of the issues [the funeral home] raises."

However, the DOJ makes it clear in its brief that it disagrees with the Sixth Circuit panel and the EEOC: "To be sure, the United States disagrees with the court of appeals' decision." And while the DOJ cites the Attorney General's October 4, 2017 memorandum stating that the DOJ "must and will continue to affirm the dignity of all people, including transgender individuals," and further explains that "[t]he Department also 'has vigorously enforced' and 'will continue to' enforce Title VII and other laws that 'protect against discrimination on the basis of sex that Congress has provided all individuals, including transgender individuals,' as well as laws that specifically prohibit gender-identity discrimination." The DOJ argues that "'the Department of Justice must interpret Title VII as written by Congress'" and that "the court misread the statute and this Court's decisions in concluding that Title VII encompasses discrimination on the basis of gender identity." In addition to making other arguments, the DOJ's main point is that "the ordinary meaning of 'sex' does not refer to gender identity," and that the Sixth Circuit's conclusion "should be rejected for that reason alone." Guidance on the EEOC's website, however, still states that "discrimination against an individual because of gender identity, including transgender status, or because of sexual orientation is discrimination because of sex in violation of Title VII."

Given the current state of judicial and administrative confusion, it is important for employers to be consistent in making employment decisions and stay informed of these developments. Policies, handbooks, training materials, and hiring practices intending to prohibit discrimination and harassment based on sexual orientation or gender identity cannot simply make reference to Title VII. They should include language broader than "sex," and they should expressly mention the prohibited types of discrimination.

For additional information regarding these issues, please contact the author, [Preston Battle](#), or any member of the [Labor & Employment Group](#).