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Red Alert – LGBTQ Legal Protections in the Supreme Court's Crosshairs

News out of the United States Supreme Court yesterday gives cause for advocates to [ring the alarm](#) to rally all of us who care about access to health care. On April 22, 2019, the Supreme Court agreed to hear [three related cases](#) to determine whether discrimination on the basis of sexual orientation and gender identity is prohibited under existing federal law.

The cases likely won't be argued until [next fall](#), with the decisions to follow months after that, but this week's decision is monumental nonetheless.

- First, the Supreme Court accepts only a small fraction of cases for review. Last year, [less than 5% of such requests were accepted](#); opportunities to interpret the law on this scale are relatively few and far between.
- Second, the timing of this decision means that it is certain to be released at the height of the 2020 presidential campaign. While the opinion could be released any time between October 2019 and the end of the Court's term in June 2020, there is [some evidence to suggest](#) that the Supreme Court disproportionately releases its blockbuster opinions on the later side of this timeframe.
- Most importantly, the ideological make-up of this particular group of Justices does not bode well for progressives on paper. In the four years since the Supreme Court [struck down](#) all state laws banning same-sex marriage as unconstitutional, two justices have changed, including one (Justice William Kennedy) who voted with the majority in that case.

Nevertheless, all hope is not lost, and there is reason for advocates to take immediate steps to prepare for the coming battle. This edition of Health Care in Motion will give readers a short summary of the cases, discuss how their outcomes will impact access to health care issues, and conclude with steps to be taken to prepare for the coming ruling.

The Case

The trio of cases arises in the context of employment discrimination. The first case, [Zarda v. Altitude Express](#), involves Donald Zarda, a skydiving instructor on New York's Long Island, who was fired from his job in the summer of 2010 after a complaint of inappropriate contact and disclosure of his sexual orientation with a customer. Zarda responded by suing his employer, Altitude Express, for wrongful termination on the basis of his not conforming to sex stereotypes. Mr. Zarda was openly gay at work. In his [complaint](#), Mr. Zarda described a pattern of hostility to "any expression of sexual orientation that did not

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conform to sex stereotypes.” While the case was still pending in the trial court, [Donald Zarda died in a parachuting accident](#). His family carried on with the lawsuit, and after many rounds of legal battle, Mr. Zarda’s estate triumphed in the United States Court of Appeals for the Second Circuit. The court ruled that sexual orientation discrimination is a subset of actions that are taken on the basis of sex. And because Title VII of the Civil Rights Act prohibits employers from discriminating because of sex, Mr. Zarda’s case was allowed to proceed.

The second case, [Bostock v. Clayton County, Georgia](#), involves a child welfare worker who was also terminated from his job. Gerald Bostock worked for over ten years as a Child Welfare Services Coordinator for the Clayton County Juvenile Court System, advocating for at-risk children. Mr. Bostock alleges that when his employer [found out](#) about his sexual orientation—through, among other things, his participation in a gay softball league—it conducted an audit and accused him of financial mismanagement as pretext for his termination. Both levels of lower courts ruled that Mr. Bostock’s case could not go forward under prior case decisions applicable in Georgia. These cases previously deciding that sexual orientation was not a protected class for the purposes of federal anti-discrimination employment law.

The third case, [R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission](#), also involves the firing of an LGBTQ employee. This time, however, little pretext was offered for the termination, and the employer baldly stood by the discriminatory decision. Aimee Stephens is a transgender woman who worked as a funeral director and embalmer at a funeral home in Livonia, Michigan. Ms. Stephens was assigned male at birth and was hired by Harris Funeral Homes in 2007, prior to her gender transition. After six years of employment, and following years of private counseling, Ms. Stephens sent her boss a letter disclosing her gender identity. The letter indicated that when Ms. Stephens returned from a planned vacation three weeks later, she intended to appear as her true self, presenting herself in accordance with the funeral home’s dress code directive for women. (Ms. Stephens also told her employer that she intended to have gender-affirming surgery, and as a pre-requisite to surgery, needed to [“live and work as a woman for one year.”](#)) Before she returned to work, Ms. Stephens was fired.

After losing in the trial court, Ms. Stephens won her first-level appeal in a federal appellate court. The U.S. Court of Appeals for the Sixth Circuit made two important rulings. First, the court concluded that the funeral home had illegally applied its own sex stereotype, and punished Ms. Stephens’ intention to deviate from that stereotype in her dress and conduct. Second, the court ruled that the funeral home’s discrimination against Ms. Stephens on the basis of her transgender status was inherently a form of sex discrimination prohibited under federal law. In the eyes of the court, “it is analytically impossible to fire an employee based on that employee’s status as a transgender person without being motivated, at least in part, by the employee’s sex.” To illustrate its point, the court considered whether the funeral home would have fired Ms. Stephens for dressing in female business attire if she had been assigned female at birth. Since the answer is “quite obviously” no, it logically follows that this decision is being made “on the basis of sex.”

Each of the losing parties in these cases sought further review from the United States Supreme Court. After an abnormally long review process, the Court decided this week to hear the three cases, consolidating the cases into one argument.

The Impact

Deciphering the [crystal ball](#) of what will happen with these cases in the hands of the Supreme Court is a fool’s errand. No one can predict precisely how the cases will turn out; any promise to the contrary should be viewed with skepticism. With

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that said, [the range of forecasts from legal experts](#) goes from “doom and gloom” to “so you’re telling me there’s a chance.” What we can say now with certainty is just how much is at stake in this court opinion. With each of these cases occurring in the context of employment, it may not be immediately clear how they would impact other areas, such as access to health care. The federal law at issue in each—Title VII—is explicitly addressed to employment. But because of the similarity between the laws, Title VII is often interpreted in parallel with Title IX, which governs educational settings. And Title IX, in turn, is referenced directly by the part of the Affordable Care Act that is addressed to discrimination in health care. We have [written repeatedly](#) about this part of the ACA, known as “[Section 1557](#)” and the Trump Administration’s intention to erase the potential it has to protect permanently against gender identity discrimination in health care settings. All of this is a long way of saying that whatever decision the Supreme Court makes in these cases is likely to be applied to [individuals seeking access to gender affirming care](#), to [patients complaining of mistreatment at hospitals](#) because of their gender identity, to [the babies of same sex couples needing to see pediatricians](#) in their first days of life, and to [countless other health care and health insurance settings](#). The stakes could scarcely be higher – in health care and across the landscape of modern American life.

The Next Steps

As with most high-profile Supreme Court cases, readers can expect that the opposing parties will be well supported on both sides by third-party legal briefs known as “amicus briefs.” The parties themselves are likely to cover much of the basic legal landscape in their arguments. They will fight over whether the Congress that enacted Title VII in 1964 could have possibly intended its prohibition of discrimination because of sex to encompass sexual orientation and transgender discrimination. They will bicker over how far from that original intent the Court should allow itself to stray in deciding these new claims. And the parties will most certainly disagree on the effect and continued import of the Court’s prior cases finding that discrimination based on an individual’s refusal to adhere to sex stereotypes.

Nonetheless, amicus briefs still have an important role to play. One need look no further than the Court’s 2015 same-sex marriage decision to see their potential influence. “As more than 100 *amici* make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question [of same sex marriage].” While it is true that different judges will embrace amicus briefs to varying degrees, they doubtless can play an important role in painting the larger landscape beyond the strict boundaries of the parties’ legal arguments. And progressive advocates can be certain that individuals and institutions who wish to limit anti-discrimination law will be well organized to make their own voices heard. Readers of *Health Care in Motion* who are interested in collaborating to produce an amicus brief should be [in touch with us directly](#).

More intentionally subject to popular pressure and advocacy is Congress. Often overlooked in the legal debate around whether existing law affords anti-discrimination protected class status to sexual orientation and gender identity is the fact that Congress could end the discussion with a short statutory amendment. Since [1974](#), many nascent efforts have taken shape to amend the Civil Rights Act to include sexual orientation as a protected class. The most recent effort, known as “[The Equality Act](#),” or [H.R. 5](#), would add both sexual orientation and gender identity as protected classes, while further expanding the definition of “public accommodations” subject to these rules to include establishments that provide health care. In addition, the Equality Act, as now drafted, would impose limitations on those who would seek to shield discriminatory practices in the cloak of religious freedom. The Equality Act already has 240 co-sponsors in the House of Representatives, including three Republicans. With the Senate now in Republican hands, and President Trump holding the veto pen, much

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more political work remains to be done before the Equality Act's prospects improve. But the incremental steps to build support should [begin now](#).

Advocates can take the following steps right away:

- Support the parties and [their counsel](#) that are bringing the three cases to the Supreme Court.
- Organize within your networks to discuss the impact that anti-discrimination law has on health care consumers. To the extent that you are interested in investigating ways that you can directly impact the Court, [contact the Center for Health Law & Policy Innovation directly](#).
- Be in touch with your [members of Congress](#) and express to them how important their support of The Equality Act is. If they are already a co-sponsor, thank them for their support. If they still need to be convinced, begin to gather stories and evidence necessary to make the case.

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