

Funeral Homes and Female Athletes

Future of girls' sports may hinge on mortuary case

by JOSHUA DUNN

IN JUNE 2019, three high-school female track athletes from Connecticut filed a complaint with the U.S. Department of Education's Office for Civil Rights. They claimed that Connecticut's policy of allowing transgender females to compete in female athletics violates Title IX, the 1972 law forbidding sex discrimination in education programs. After Connecticut adopted its policy on transgender athletes in 2017, two transgender females competed in girls' track meets, defeating the other competitors by significant margins. Represented by the conservative Alliance Defending Freedom, the female athletes who filed the claim argued that the policy runs afoul of Title IX because now "more boys than girls are experiencing victory and gaining the advantages that follow." Boys, their complaint says, have "physiological advantages" so that when biological males identify and compete as females, biological females will most often lose. Title IX, however, is supposed to create equal educational, including athletic, opportunities for women and prohibit sex discrimination. In short, the female athletes are contending that Connecticut's policy unlawfully crowds girls out of girls' sports.

The Office for Civil Rights is investigating their claims, but the results could hinge on a current U.S. Supreme Court case involving a transgender funeral-parlor employee. In October 2019, the court heard oral argument in *R. G. & G. R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*. At issue in the case is whether Title VII of the 1964 Civil Rights Act, which prohibits employment discrimination "because of sex," also prohibits discrimination based on gender identity.

On the same day, the court also heard two cases addressing whether Title VII prohibits discrimination based on sexual orientation. In those cases, involving the firing of gay employees, Justice Neil Gorsuch appeared willing to entertain the argument that sexual orientation could fit within the definition of sex in Title VII. If he does lean that way, Gorsuch might well cast the swing vote in a 5-4 decision, joining the four justices on the court's liberal "bloc": Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. While it would be unwise to predict that Gorsuch will defect from his conservative colleagues, his questioning gave hope to those who want the

court to interpret Title VII to include sexual orientation. In particular, Gorsuch said that both cases concerned "a man who liked other men," suggesting that the firings could be seen as involving sex discrimination within the text of the law. Hence, his textualism, which allows that statutory language can include harms not envisaged when a law was written, could accommodate sexual orientation.

The controversy in *Harris* started in 2013. Anthony Stephens



AP PHOTO/PAT EATON-ROBB

Bloomfield High School transgender athlete Terry Miller, second from left, wins the final of the 55-meter dash over transgender athlete Andraya Yearwood, far left, and other runners at a track meet at Hillhouse High School in New Haven, Conn.

was hired in 2007 by the Harris Funeral Home in Michigan. After working there for six years, Stephens informed the owners that he was transitioning to female; had a new name, Aimee; and would dress accordingly. The funeral home had a strict dress code for employees, and the owners worried that Stephens dressing as a female would be disconcerting for grieving clients. They also did not want to force female staff and clients to share a restroom with Stephens. Because of these concerns and their own religious beliefs, the owners fired Stephens, who subsequently filed a complaint with the U.S. Equal Employment Opportunity Commission. The commission charged the business with discrimination and filed suit in federal district court. That court ruled in favor of the funeral home, but on appeal, the Sixth Circuit ruled that Title VII also forbids discrimination based on "transgender status," setting the stage for the Supreme Court to hear the case.

Oral argument revealed two significant obstacles for Stephens and the Equal Employment Opportunity Commission. One, when federal lawmakers wrote Title VII, they did not include

gender identity, which was not a public issue in 1964. To say that Title VII now does protect transgender rights would require the court to rewrite the law, the funeral home's lawyer from Alliance Defending Freedom asserted. While Gorsuch appeared amenable to including sexual orientation in the law's definition of sex, he seemed much more reluctant to wrap in gender identity, expressing concern that siding with Stephens would require the court to exercise a "legislative rather than a judicial function." Reinforcing this concern is the fact that in 2019 the House of Representatives passed the Equality Act, which if enacted would officially amend the Civil Rights Act to prohibit discrimination based on gender identity. If Title VII already prohibited transgender discrimination, why would the House have seen the need to change the law?

The second obstacle to Stephens's argument is that adding gender identity to Title VII through this case would generate a host of additional controversies the Supreme Court would have to resolve, including whether letting transgender athletes compete in female sports violates Title IX. Stephens's attorney, recognizing the danger the Title IX question posed for his argument, tried to assure the justices that Title IX is a "different

statute" that raises different questions. He even allowed that excluding transgender athletes might be permissible because of "concerns about competitive skill in contact sports." It is not clear, though, that the two are distinguishable. Just as with Title

VII, when Title IX was written in 1972 no one could have envisaged that it would be invoked decades later to protect transgender rights. Hence, the justices must surely know that if they rule for Stephens, they would be hard-pressed not to apply the same interpretation to Title IX.

A ruling against Stephens, by contrast, would send a strong signal that other attempts to expand the meaning of sex to transgender status are legally dubious.

The Office for Civil Rights would have to take note. Assuming that transgender females will continue to dominate track athletic events, ignoring the fact that biological females are at a serious disadvantage will be difficult. But if the court rules that Title VII does protect gender identity, the office will likely interpret Title IX the same way. If that happens, then any athletic restrictions based on biological sex will face legal jeopardy.

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