KIM FORDE-MAZRUI: What I'm going to do is summarize the cases and their principal arguments on both sides and then make a few observations. And then Professor Rutherglen will correct me when I'm wrong. Everything I know about employment discrimination I learned from teaching out of his book and visiting his office. So I'll do my best, and then he can set the record straight.

OK, there are three cases before the Supreme Court they're actually being argued tomorrow I believe. So this is very timely. Two of them have to do with whether Title VII of the Civil Rights Act of 1964, which prohibits discrimination because of an individual's sex includes in that phrase discrimination on the basis of sexual orientation. And then the third case asks a similar question, but it's whether discrimination on the basis of sex includes gender identity.

So I'll first describe the two sexual orientation cases and then describe the transgender case. Those two cases are Bostock versus Clayton County out of the 11th Circuit and Altitude Express versus Zarda out of the Second Circuit. In Bostock, the employee was a child welfare services coordinator working for the county juvenile court.

I believe he also played on a gay softball league, and the allegation is that he was fired because someone who is fairly influential with the court system learned about his sexual orientation and had him terminated. The county said it was for mismanagement of funds, but he alleges it was because of his sexual orientation and argued that that's also discrimination because of his sex. The district court in the 11th Circuit dismissed on the ground that he fails to state a claim, because Title VII doesn't apply to sexual orientation following a prior circuit precedent.

Altitude Express versus zada creates a circuit split. It reached the opposite conclusion out of the Seventh Circuit. Zarda was a skydiving instructor for Altitude Express where he would do something called tandem dives. I haven't done it, but some of my crazy friends have where you-- he straps himself essentially to a customer and then they jump out of an airplane. And he would on occasion because of the fairly intimate positions you're in tell a female customer that he was gay as a way of assuaging their concern that he may find it sexually interesting.

**GEORGE RUTHERGLEN:** What did he tell the male customers?

**KIM FORDE-MAZRUI:** No, nothing. Nothing And in one particular case, he-- I think he said something and I have an ex-husband to prove it. She then-- the customer told her boyfriend that she thought he had touched her in an inappropriate way, and then he said he was gay to kind of disclaim that he was trying to do anything. The boyfriend reported it to the boss, and the boss terminated him.

Sadly, he after the case was filed died in another skydiving situation. So it's actually his estate that's continuing with the case. We'll see whether that creates any jurisdictional issues. Anyway the trial court, I believe, ruled against m, but the Second Circuit ruled in his favor and ruled that because of sex does include sexual orientation. So the arguments I'll just have to combine them. They're fairly similar and overlapping.

The employer's arguments are in both of these cases are fairly predictable. They rely in a very general way on the understanding or intent of Congress that enacted the 1964 Civil Rights Act. They argue quite accurately that the Congress in 1964 was not intending to prohibit discrimination on the basis of sexual orientation. Indeed at that time every state except for Illinois criminally punished same sex intimacy.

No state protected orientation in their statutes. Today 22 states explicitly protect sexual orientation in addition to sex, so again treating it as a separate. In 1964, the American Psychological Association and the American Psychiatric Association both deemed homosexuality a mental illness. So the idea that Congress was trying to protect what was widely perceived as deviance or mental illness from discrimination is implausible.

They also make a, kind of, related textual argument, which is that the meaning of because of sex was understood to just mean discriminating against primarily women. But because they use general language it would presumably apply to men as well, but it was distinguishing between men or women treating one more favorably than the other. And they argue that sexual orientation is a distinct trait. So for example, in either of these cases they say that the employer was perfectly willing to hire men and was perfectly willing to hire women but not gay men or gay women. So the difference is sexual orientation rather than sex.

And then they make a comparative-- these are, kind of, related of a piece but a comparative argument where they say the difference between how they treat people is basically they treat gay men and gay women the same, straight men and straight women the same. So it's, again, sexual orientation that's [INAUDIBLE]. They say it might be different if, for example, the county was willing to hire lesbians but not gay men. That would be sex discrimination.

But so long as they're distinguishing between men and women who are otherwise similarly situated other than their sexual orientation, it's sexual orientation not sex. The employees counter arguments, which have failed for many decades but have recently just in the last couple of years gotten traction first in the Seventh Circuit and now in the Second Circuit,

there's three associational, second comparative, and third sex stereotypes. Again, you'll see that there's a degree of overlap, because ultimately the statutory question is whether sex played a motivating role in the discrimination. But these are kind of analytical tools or evidentiary tools for establishing that claim.

I'll start with the associational even though it may be less direct than comparative, in part, because I think it's the longest standing argument, and it draws on race cases like Loving versus Virginia, which in 1967, as you know, struck down Virginia and 15 other states bans on interracial marriage. Now the Commonwealth of Virginia had argued drawing on earlier Supreme Court precedent that so long as the races were treated the same there wasn't race discrimination. They said because blacks and whites were both prohibited from marrying each other, this didn't constitute race discrimination and, therefore, didn't have to satisfy the higher level of scrutiny applied to race discrimination's strict scrutiny. For anyone else in the class is what the court applies to racial classifications. It virtually invalidates the law almost every time.

And the Supreme Court said, no, we do apply strict scrutiny and strike this down, because regardless of whether it treats the races the same, on the individual case it distinguishes between legal and illegal marriages based on the race of the parties. So before quoting them, I'll just, kind of, paint the picture. So they're, sort of, saying, look, if you have a black and a white woman-- or a black woman fine-- black and a white or a white. A black man and a black woman, that's fine.

A white man and a white woman, that's fine. But in the case, you had a white man and a black woman, and that's what's illegal. So when you change the race of one of the parties, it turns illegal.

To quote the court, the Loving court, the court said there can be no question but that in Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. So it prohibits what's normally accepted, marriage between two consenting adults, but it makes it illegal if they're of different races.

So courts started to-- or advocates started to draw on this first in the same sex marriage context, and it actually prevailed in 1993 in a case in Hawaii-- got the Hawaii Supreme Court to recognize same sex marriage as sex discrimination under the Hawaii constitution. Because again, it's a similar move that you have what would be a legal marriage becomes illegal if you

changed the sex of one of the parties. Only instead of changing it from instead of it being same race OK and then different race not OK, it's different sex OK same sex not OK but it's still changing them.

So to take the loving quote, but I'm only changing the word sex and changing the word different to same, it would say something like, there can be no question but that Virginia's marriage statutes rest solely upon distinction-- this would be laws against same sex marriage-- rests solely upon distinctions drawn according to sex, the statutes proscribed generally accepted conduct if engaged in by members of the same sex.

So this is, then, the associational argument. And Chief Justice Roberts actually articulated it quite succinctly just a couple of years ago in the oral arguments in the *Obergefell versus Hodges* case, which is the case that constitutionalized same sex marriage. During oral argument, he asked, do we even have to discuss whether sexual orientation is protected by the Constitution? We've already to recognize that sex discrimination is prohibited, and isn't this that case?

So this is Chief Justice Roberts' counsel. I'm not sure if it's necessary into to get into sexual orientation to resolve this case. I mean, if Sue loves Joe and Tom loves Joe, Sue can marry him, and Tom can't. And the difference is based upon their different sex. Why isn't that a straightforward question of sexual discrimination?

I thought he articulated very well and logically. Puzzlingly, though, then he dissented in the same sex marriage case--

[LAUGHTER]

--and didn't mention this point at all. But anyway, so this has taken hold, initially, with respect to race in employment discrimination cases. So uniformly, circuits have held that discriminating against an employee because of being in an interracial relationship, whether it's romantic or otherwise, constitutes discrimination against the employee's race in part because it's the relationship between their race and the person they are in a relationship with.

And so the argument goes in the Second Circuit and in the Seventh Circuit that this is similar, that discrimination against a gay employee is discrimination because of sex because it turns on his association with a person of the same sex. So, again, it turns on the relationship between the sexes of the two parties. So that's the associational argument.

The competitive argument-- well, and let me use a metaphor, hopefully, to help clarify. So the associational is kind of comparing the employee with their partner. So if you imagine a boss comes into the office on Valentine's Day and a male employee is at their desk and there's a beautiful bouquet of flowers and on it is a card that says, from your loving husband. And the boss says, what's this about, and then terminates the gay employee. Associational would be because the objection is male employee with male spouse, the association between them.

Comparative is looking more to the employee compared to another employee. So there, the metaphor would be, you come in. And there's a male employee and a female employee. They both have flowers on their desks, and they both say, from loving husband, different husbands, but--

[LAUGHTER]

That's a different-- that's a later case.

[LAUGHTER]

Anyhow, so then the idea here is the only difference between these two employees--f the gay male gets fired. The straight female doesn't-- is the only difference is their sex. They both have flowers from their male spouse. So that's the comparative.

And then, applied to these cases, the idea would be that, if the gay male employee had a-- if another employee had a male romantic interest or husband, if it were a female employee, that would have been OK. But because the skydiver's male with an ex-husband-- a female with an ex-husband would've been fine. A male with an ex-husband is not OK.

OK, and then the third is sex stereotypes. And this draws from a case called Price Waterhouse versus Hopkins, which is a 1989 case in which Ann Hopkins is denied a promotion to partnership in an accounting firm because she behaved too aggressively. And the argument was that a male who behaved the same way that she did would have been promoted, but they objected to a woman acting in the kind of aggressive way.

And the court held that that constituted sex discrimination. Literally, because but for her sex-- a male behaving the same way, she wouldn't have been promoted. But the court talked about sex stereotypes, that you can't impose and penalize women for acting in a way that doesn't conform to a sex stereotype. So the argument goes here that in some ways, discriminating

against gay males and lesbian employees is because they're not conforming to gender norms. Because a real man would be with a woman and a real woman would be with a man, not with someone of the same sex.

So with a metaphor, it would be coming in and saying a man with a husband and flowers to boot, you're out of here. So those are kind of the three arguments, and there's some precedents that support them. Some of which, I mentioned-- the Loving case. A case that I didn't see in the briefs is Bob Jones University, but this is a case from 1983 in which Bob Jones University initially was whites only. But eventually it became where it would allow blacks, but it wouldn't allow anyone to be in an interracial relationship.

So if a white or a black student were in interracial relationship-- marriage or not-- they would be expelled. So they allowed blacks. They allowed whites. But they couldn't be in relationships with each other. And the IRS said that's race discrimination, and we're revoking your tax exempt status.

It went to the Supreme Court. They argued that they had a free exercise religious right to discriminate. And the court ruled that the government's interest in eradicating race discrimination was sufficiently compelling to override it. But it just stands for an example of where discrimination on the basis of the relationship was viewed as race discrimination. Another case is Meritor Savings Bank versus Vinson.

This is the first case to recognize sexual harassment, in 1986, as a cause of action. The point just being that it was a cause of action that initially was described as falling outside the intent of Congress of 1964. That sexual harassment is more about sex or power, but it's not really about discrimination on the basis of one's sex. It's more about sexual desire. But the court recognized it.

I mentioned Price Waterhouse. And then the final one is-- I think it's pronounced actually "an kyle" but I've always called "on callie" but--

**GEORGE RUTHERGLEN:** You're right. It is "on callie". I learned that from Scott Ballenger, who worked on the case.

**KIM FORDE-MAZRUI:** It is "on callie"?

**GEORGE RUTHERGLEN:** Yes.

**KIM FORDE-MAZRUI:** Because I looked it up today. And there is this actual website that you can click the audio and it pronounces it. But I'll take Scott Ballenger over a computer. But it's cause of the Supreme Court pronunciation. OK, Oncale-- and this case recognized same sex harassment as a cause of action. Some men were harassing a man on a oil rig, apparently because he was-- they either thought he was gay or effeminate. And the court said, we don't really need to get into sexual orientation but he is being-- if it's because a woman who was effeminate would have been left alone, but because he's a man, it's still discrimination on the basis of sex.

And part of why it's cited a lot is Justice Scalia wrote that, even if male on male harassment was not within the purpose of Congress in 1964. It's the provisions of our statute-- not the principal problem they're trying to address that we're governed by so he's saying it's text trumps sort of purpose or anticipated application. OK those are the two sexual orientation cases. I can be briefer with the transgender case.

In part because a lot of the arguments are similar. This is Harris Funeral Homes versus EEOC, out of Michigan. A funeral home terminated Amy Stevens, who had served as the funeral director for six years presenting as a male, under the name Anthony Stevens. When she told her boss that after vacation she was going to become-- she was going to present as a woman, he terminated her based on his-- he says his religious beliefs. So her claim is that discrimination on the basis of gender identity is also sex discrimination.

And the EEOC brought the case. I think she's now intervened as a party. In part because the EEOC now is kind of left hanging, because the Justice Department now-- which represents the EEOC before the Supreme Court-- has switched positions. The EEOC was ruling in the employee's favor, but now under the Trump administration, the Justice Department is taking the employer's side. So she has intervened as a party to adequately represent her interests.

And here, the employer's arguments are very similar. Congressional intent wasn't about gender or gender identity. That similar to the sexual orientation. One additional point that the employer argues in this case is, there are a line of cases, notwithstanding Price Waterhouse versus Hopkins, that do allow different dress and groom standards to be imposed on male and female employees. They can't be too burdensome on one sex or the other, or too degrading.

But they have upheld-- for example, the Ninth Circuit upheld imposing where women have to

wear makeup and jewelry and men have to be clean-shaven and not wear makeup. And there's some split among circuit courts on that issue, but several have upheld these dressing and grooming differences-- Notwithstanding Title VII. And notwithstanding that no court would probably allow different dress requirements based on race-- even though the statutory language is the same.

So there's kind of this carve out, and the funeral home directory said, well, she said she's going to start coming to work dressed as a woman and he actually did have a clothing policy that [INAUDIBLE] men have to wear pantsuits, women have to wear skirt suits. And so the employer said that that's violating dress and groom standard. That was in the question presented. The Supreme Court made the question more general, whether transgender identity is protected under Title VII. So it's not clear how much that that argument will actually play out in the case.

And then the employee's arguments are also similar. But I think in some ways more straightforward. It's because in some sense, it's just, of course, this is about sex. The employer actually said he said he's going to start coming to work dressed as a woman.

So he's saying that a man cannot come to work presenting like a woman. If she were a woman coming to work presenting as a woman, that would be fine. So it's really kind of straightforward. And it really doesn't matter, analytically, whether you take his position or her position as to whether she's a man or a woman. His position is he's saying, it's a man, and I won't allow a man to dress like my women employees. So that's sex discrimination, because he would allow the women to.

And she says, I'm a woman-- so by her argument, if I were assigned a female sex at birth, you would be OK with me presenting as a woman. But because I was assigned a male sex at birth, you're not. So again it still distinguishes, in some ways, because of my sex. And then that's comparative. There's also the stereotype argument that a real man is always a man, and will always present as a man.

So that argument is fairly similar. So some concluding observations. I think there is a kind of challenge that this case presents for both conservatives and liberals. For conservatives who typically believe in stricter adherence to text and more formalist approaches, this case is tending to reach results that are inconsistent with many of their policy perspectives. So notwithstanding their argument about the public meaning of the text, there really is a pretty

strong textual argument to cover sex, to cover sexual orientation and gender identity.

This is including that textualists and originalists in the last decades have made a concerted point of saying, it's not about the intent behind the legal, the drafters of the law. It's what the public meaning of the law is, and that's actually what the lower courts have relied as well. The formalists below that have ruled in the employer's favor, they say it's turned on the public meaning, what it would be understood to a reasonable observer. But that actually means that the question isn't whether Congress was anticipating this. Originalists today say it's not about expected applications.

It's about what's the meaning of the term, the semantic or linguistic meaning in the statute or constitution. And that may have applications that the drafters actually don't agree with. So one example is Brown versus Board of Education. There's many originalists who will acknowledge that the framers of the 14th Amendment in 1868, would have thought that separate schools for black and white would be consistent with equality. And so expected application would allow for separate but equal schools.

But many originalists say, nonetheless, originalism supports Brown versus Board of Education because the meaning of equality is such that the consistent pattern over the way separate but equal was implemented was always to the disadvantage of blacks and part of a system of subordinating blacks. So it we've learned, in a sense, that the term as was understood even then-- what does equality mean-- ultimately required eliminating separate but equal schools, even if the people at the time thought that would be consistent with according true equality to black people. So in this case, if you look at dictionaries of sex in 1964 and dictionaries of sex today, it's basically the same so the meaning really hasn't changed. It's that we can think more analytically about the ways in which sexual orientation and sex inherently relate to one another in ways that wasn't understood then But the semantic meaning is still there. So many of their arguments are actually, in some ways, more functionalist.

Well, well what did people expect? What was their purpose? And in fact, I think the case that I also didn't see cited in the cases below, but I think actually might support them is this decidedly non-functional case. Which is United Steelworkers of America versus Weber. A 1979 case in which a Liberal Supreme Court allowed affirmative action under Title VII, even though a formalist interpretation of Title VII to say, look the text is clear. It says it's illegal to discriminate because of race, and unlike sex-- which has certain exceptions-- there are no exceptions for race. So affirmative action is discrimination by race-- which it is-- and Title VII

doesn't allow it.

And the court literally said something may violate the letter of the law, but not the spirit. So it was seeing the spirit trumps the letter of the law. I mean a formalist should be quite disturbed by that. But in some ways, that's tempting to sort of social conservatives in this context. Because it's more looking to kind of the purpose, the spirit of Title VII-- which was about discrimination, primarily, against women than discrimination against gay males and lesbians.

For liberals, you kind of have the converse challenge, which is they're now hyper textualists and saying, we've got to go with the text and not what the purpose was, and that may get them what they want in this case, but to what extent is that consistent with how they want statutes to be interpreted. Because often text doesn't allow for reaching unforeseen challenges that Liberals often would prefer a more functional approach that can reach to address. And in some ways I think it reveals a certain-- for me at least-- inadequacy or unsatisfying account or nature of formalism. Formalism can have certain value. Formalism meaning more adhering to text and dealing in kind of categories. It can provide clarity and precision and predictability.

I think that can be especially good for statutes, which can be amended if there are more unforeseen circumstances that come along, whereas I think constitutions lend themselves more properly to evolving interpretation. But at least an anti-discrimination law-- which is an area more familiar with-- you see ways in which formalism does lead to in a sense ill-fitting interpretations and statutes. So with constitutional law and then, the enactment of Title VII as well-- they were both responding to social problems that had certain particularities. They were just a social problem initially of discrimination against African-Americans, and then later discrimination against women. And the legislative history of the statute and the Supreme Court cases that constitutionalized heightened protection for race and sex, both relied on the subordination of those groups blacks and women as the justification for the statutes and the justification for heightened protection under the Constitution.

But then formalists have interpreted those statutes and-- formalists in Congress. I suppose-- by applying very general kind of language rather than focused on the particular problem has led then to whites being protected, males being protected. And certainly there's important cases where they should be, But certainly from a constitutional standpoint, the argument that the Constitution protects whites and men, but not disabled people or older people or people with mental illness, when those groups are clearly more vulnerable in the political process, I

think is, in some sense, turning the justification for heightened protection on its head. But it's a product in part of formalism trying to kind of rely on consistency and symmetry, in ways where the social problems don't actually reflect those qualities. And then in this case, I think the formalist approach is one that would say gender identity and sexual orientation are protected. And from a policy perspective, I think that's a good thing.

But there is still something unsatisfactory about it to me at least my preference would be that Congress would have already-- and if not, would do so as soon as possible-- add sexual orientation and gender identity to the statute as have many states. Because as a social problem, as a way we think about these problems, as a way we discuss them, as a way we think about them. Really do think of sexual orientation discrimination, and to some degree, gender identity-- even I think that's closer to sex discrimination-- differently than when we're talking about sex discrimination. When someone's been discriminated against because they're gay, they usually don't say I got fired because I'm a man. They'll say I got fired because I was gay. And I think in some ways, formalism is what they have to rely on, but it reaches a result that, to some degree, is inadequate. Thank you very much.

[APPLAUSE]

**GEORGE RUTHERGLEN:** So I want to say how pleased I've been to work in employment discrimination law, with Kim, and I'm very grateful for his close analysis of these cases. I'm going to take a much more abstract view. As he said-- especially towards the end of his talk-- the argument in these cases turns a lot on formalism. By which I mean, exactly what the text of Title VII of the Civil Rights Act of 1964 says. Formalism can also be used as a term of abuse.

As formalist as opposed to realistic. But let's put that sense to one side. Now, when you have a formalized argument, there are problems of fit that inevitably arise-- and Kim has alluded to those. So one problem of fit is that there are only a few people in the country who really care about statutory interpretation. As are we going to take a formalist, a functionalist, a purpose-ist approach.

The politics, especially on this issue, is very different. So the groups that are most opposed to a broader reading of Title VII are religious groups. In a related area of discrimination in schools that receive federal funding, some parents groups are concerned about coverage of transgender individuals and the fact that people who present as members of one sex or did, are now using bathrooms and locker rooms for members of another sex. That's the politics of

this issue. It has to do-- in Title VII-- with religious groups and religious employers.

It has to do in education with the concerns of parents. That has nothing whatsoever to do with exactly what method of statutory interpretation one adopts. The second feature of the formalist argument is that it has been around for a long time. I know. The very first time I taught employment discrimination, I found the articles on this subject by Richard Wasserstrum, who was then a professor at UCLA.

He made exactly these arguments. If we take sex discrimination as seriously as we take race discrimination, we are going to have to be much more permissive to people who have different sexual orientations. We're going to have to desegregate bathrooms on the basis of sex-- just as we desegregated them on the basis of race. This argument has been around for approximately 50 years. That leaves us with the question, why did it suddenly become persuasive in the last decade?

And I think there are two answers to that question. One is, the landscape of constitutional law changed dramatically. So that gays from being a criminalized group in this country, gained constitutional protection and the equal right to marriage. Everyone who studies employment discrimination law comes away with the conclusion that what happens in constitutional law is very important for our subject. Even though our subject is mainly a statutory subject.

There has been a seat change in constitutional law. The second point, which is related to the first, is that why didn't Congress protect gays and transsexual people in 1964? None of them are coming out of the closet then. It was illegal. And very few even if trans sexuality itself was not prohibited, my sense is that it was not nearly as prevalent or as publicly acknowledged as it has been in the last decade.

So Congress didn't address the issue because it wasn't an issue it's not that Congress would have prohibited discrimination on the basis of sexual orientation or sexual identity. The issue just never came up and that's a perfectly good explanation of why it took sex in a direction-- it understood it in a direction that is really quite outmoded by our standards. If you doubt me about this-- and you might-- go back and read the debates over putting sex into Title VII. They are the most sexist, condescending arguments that male lawmakers could make on that occasion.

So Congress didn't think that seriously about the implications of what it has done. And issue just didn't come up. So I am persuaded by the formalist argument, but I have to acknowledge,

it is going to raise a lot of political hassles. All of the statutes, both state, local, and local and the federal propose legislation, create large exceptions for religious institutions. So those statutes, which protect gays, lesbians, transgender people.

All say, we're not going to force this down the throats of religious institutions. They get a very broad exemption. So what we can expect if the Supreme Court rules in favor of a broad interpretation of Title VII is language acknowledging the need for broader interpretation of the exceptions and Title VII those are principally for bona fide occupational qualifications on the basis of sex.

You can four anticipate that it will receive a much broader interpretation. Alternatively if the court rules against a broad interpretation of Title VII we. Can expect more legislative pressure to enact an amendment to Title VII-- goes under the name now as the Equality Act. And it almost passed.

It made it through the House, but it didn't make it through the Senate. And notwithstanding the dysfunction is characteristic of Congress in the last few years/ there will be I think enhanced political pressure to respond to the Supreme Court's holding myself would prefer that the pressure come in the opposite direction that the court adopt a broad interpretation and leave it to Congress to legislate exceptions, which I think they would relatively quickly take up. So that leads me to my last point, which is perhaps something you've figured out yourself. The vote is going to be close.

I think the proponents of a broad of Title VII can count on four votes. You can figure out who they Are I think the religious groups can count on at least three votes and I don't know where the justices in the middle are likely to end up. There are all kinds of considerations that might come into play as they make up their minds. First, they have still a growing list of controversies about separation of powers and they don't want to portray themselves as simply the lackeys of the Trump administration. But they might in the end as they have in all the cases challenging Trump's presidential-- they might well in the end might well in the end rule for him.

The second point that comes into play is that the abortion decisions are yet again up for reconsideration by the Supreme Court somewhat ironically a ruling in favor of a broad interpretation of Title VII would make the court look much more impartial if it continued as it might well to cut back on Roe against Wade those I think are the practical considerations notice that those two are completely independent of the formal argument which raises just a

lot of issues about at what level should we look to predictive judgments about what the court does and its political impacts thank you. We look forward to your questions you might look forward to lunch.

[APPLAUSE]