



# *Harris Funeral Homes: Implications for Gender Identity and Athletics under Title IX*

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The [Office for Civil Rights](#) (OCR) in the Department of Education (ED) has [opened an investigation](#) into a [complaint](#) recently filed by several [female high school athletes](#), through their parents, challenging a policy that they allege allows track athletes who identify as female, but remain biologically or hormonally male, to compete in female-only [track competitions](#). The policy as-applied, the complainants contend, denies biologically female athletes equal athletic opportunities in violation of [Title IX of the Education Amendments of 1972](#) (Title IX). The investigation and complaint tread into novel legal questions, including—as related matters—whether Title IX bars discrimination based on gender identity, and how such coverage might interact with claims like the recently filed OCR complaint. How federal courts and agencies like ED address such questions may turn in part on how the Supreme Court resolves several upcoming cases concerning sex discrimination prohibited by *another* statute, [Title VII of the Civil Rights Act of 1964](#) (Title VII).

At present, it is [unsettled](#) whether Title IX, which prohibits discrimination “[on the basis of sex](#)” in federally funded education programs or activities, reaches claims raised by transgender students. To analyze Title IX coverage, some federal courts have looked to precedent arising under Title VII. Among a [trio of Title VII cases](#) before the Supreme Court this upcoming term, one case—*EEOC v. Harris Funeral Homes, Inc.*—addresses whether Title VII’s prohibition of discrimination “[because of...sex](#)” reaches discrimination based on gender identity. This Sidebar provides some legal context for the debate, the [two-part question](#) before the Court in *Harris Funeral Homes*, and possible implications the case may have for claims arising under Title IX, including in the athletics context.

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## Sex Stereotyping and *Price Waterhouse v. Hopkins*

The Supreme Court's 1989 plurality opinion in *Price Waterhouse v. Hopkins* has figured centrally in the debate over the interpretation and application of Title VII's prohibition against sex discrimination, as well as the scope of Title IX.

In *Price Waterhouse*, the Supreme Court addressed a Title VII claim brought by a female senior manager at an accounting firm. The plaintiff, the only female manager nominated for partnership out of 88 managers that year, alleged that the company denied her promotion to partnership because of her sex. To support her claim, the plaintiff presented evidence that partners involved in the decision-making process had criticized her for being "overly aggressive," needing a course in "charm school," and being "too macho;" and that a partner told her she could improve her chances for partnership by walking, talking, and dressing "more femininely," wearing make-up, having her hair styled, and wearing jewelry.

As an illustration of sex stereotyping in the workplace, the four-Justice plurality opinion in *Price Waterhouse* pointed to an employer who "acts on the basis of a belief that a woman cannot be aggressive, or that she must not be." Were such sex stereotyping permitted, the opinion stated, a "catch 22" would result. If an employer "object[ed] to aggressiveness in women" but required that trait for its positions, then women would be "out of a job if they behave aggressively and out of a job if they do not." Title VII, the plurality stated, "lifts women out of this bind." As for "the legal relevance of sex stereotyping" for Title VII, the opinion stated "we are beyond the day when an employer [can] evaluate employees by assuming or insisting that they matched the stereotype associated with their group." Such "stereotyped remarks," the opinion concluded, "can certainly be *evidence* that gender played a part" in the decision being challenged as unlawful under Title VII. The plurality opinion affirmed the district court's factual findings that sex stereotyping played a role in Price Waterhouse's decision to deny the plaintiff's partnership, and remanded for the lower court's determination on a separate issue. Two other Justices concurred in the judgment, and filed opinions that principally addressed other legal issues in the case.

Relying on the *Price Waterhouse* plurality's discussion of sex stereotyping, some federal courts, including the Sixth Circuit Court of Appeals in *Harris Funeral Homes*, have held that Title VII reaches discrimination claims based on gender identity or transgender status. These courts have reasoned that because transgender discrimination is based on the individual's failure to conform to stereotypes about how a man or woman should appear or behave, it likewise amounts to unlawful sex stereotyping under Title VII. Some federal courts have also relied on and cited *Price Waterhouse* to hold that claims raised by transgender students are covered under Title IX. When urged to adopt that application of *Price Waterhouse*, however, other federal courts have declined to do so, citing to binding circuit precedent holding that Title VII does not prohibit discrimination based on transgender status.

### *EEOC v. Harris Funeral Homes, Inc.*

Before the Supreme Court in *Harris Funeral Homes* is a Title VII claim alleging that a funeral home's termination of its funeral director, Aimee Stephens, violated the statute's prohibition against sex discrimination. Stephens, who was born biologically male, had been working at the funeral home as a man and informed the funeral home owner that Stephens intended to live and work as a woman before getting sex-reassignment surgery. Shortly thereafter, the owner fired Stephens. The Sixth Circuit below had held that the funeral home violated Title VII on two legal bases: it discriminated against Stephens based on (1) Stephens' failure to conform to sex-based stereotypes under *Price Waterhouse*; and (2) Stephens' transgender or transitioning status, which the court held Title VII protects.

With respect to sex stereotyping, the Sixth Circuit cited and discussed earlier precedent—its 2004 decision in *Smith v. City of Salem*—in which it analyzed and applied *Price Waterhouse* to hold that a

transgender plaintiff had stated a viable Title VII claim alleging discrimination based on the plaintiff's non-conformity with norms or stereotypes associated with the plaintiff's sex. Turning to the evidence in *Harris Funeral Homes*, the court cited the funeral home owner's testimony that he fired Stephens because Stephens "was 'no longer going to represent himself as a man' and 'wanted to dress as a woman.'" The court concluded the termination decision "falls squarely within the ambit of sex-based discrimination that *Price Waterhouse* and *Smith* forbid."

Second, and going beyond Title VII coverage based on sex stereotyping, the Sixth Circuit held that discrimination "on the basis of transgender and transitioning status violates Title VII." The Sixth Circuit reasoned that because an employment action taken against an employee for being transgender necessarily involves an action "motivated, at least in part, by the employee's sex," transgender status is protected under Title VII's prohibition of *sex* discrimination. The Sixth Circuit also concluded that Title VII protects transgender and transitioning status because such status "inherently" constitutes a "trait" that does not conform to sex-based stereotypes about how individuals of a certain sex should act or behave. In the Sixth Circuit's view, discrimination based on transgender status is so interrelated with discrimination based on sex and sex stereotyping that Title VII's prohibition of sex discrimination likewise prohibits such conduct.

## SCOTUS Preview: *Harris Funeral Homes*

In granting the petition for certiorari in *Harris Funeral Homes*, the Supreme Court limited [the question before it](#) to "[w]hether Title VII prohibits discrimination against transgender people based on (1) their status as transgender (2) sex stereotyping under *Price Waterhouse* . . . ." Given the formulation of the question, the Court is not only poised to address Title VII's present reach, but also the permissible applications of its *Price Waterhouse* decision.

As a general matter, should the Court hold that Title VII does not prohibit discrimination based on transgender status nor reaches claims alleging such discrimination under a sex stereotyping theory, such a decision would foreclose transgender plaintiffs from raising those claims under the statute.

If the Court, however, answers the first prong of the question in the affirmative—that Title VII prohibits discrimination based on transgender *status*—this would constitute a broader legal basis for statutory protection than sex stereotyping. If transgender status itself is *per se* covered under Title VII's prohibition against sex discrimination, a plaintiff could bring a Title VII claim alleging transgender-based discrimination, much like a plaintiff can bring Title VII claims for discrimination based on traits expressly enumerated in the statute, such as national origin or religion.

In contrast to such categorical protection, Title VII coverage based on sex stereotyping generally requires that a plaintiff allege that discrimination based on his or her failure to conform to sex stereotypes triggers statutory protection under Title VII's prohibition of sex discrimination. With respect to sex stereotyping, the Supreme Court could endorse or foreclose an application of *Price Waterhouse* to permit Title VII claims raised by transgender plaintiffs, or possibly endorse an application of *Price Waterhouse* but with certain limitations. In any case, the Court's holding will clarify the ongoing [judicial debate](#) over the scope of Title VII's prohibition of sex discrimination.

## Possible Implications for Title IX

The Court's holding in *Harris Funeral Homes* is likely to affect how federal courts interpret and apply Title IX's statutory prohibition. Indeed, as noted above, [lower courts](#) already rely on Title VII precedent to inform their analyses of Title IX coverage, and plaintiffs have been asserting Title IX discrimination claims based on gender identity under a sex stereotyping theory. Thus, should the Court determine that Title VII does not reach discrimination claims raised by transgender plaintiffs, including under a sex

stereotyping theory, federal courts may also adopt such an interpretation of Title IX. On the other hand, should the Court determine that Title VII's prohibition of sex discrimination may reach discrimination based on gender identity—under either part 1 or part 2 of the question presented in *Harris Funeral Homes*—plaintiffs will likely argue for, and some federal courts may adopt, a parallel reading of Title IX.

### **Novel Legal Questions and Possible Implications for Athletics under Title IX**

Should the Court in *Harris Funeral Homes* hold that Title VII claims may be raised by transgender plaintiffs—either based on transgender status or a sex stereotyping theory—coverage of such claims under Title IX may present unique and novel legal issues in the athletics context.

As the recently filed OCR complaint reflects, several biologically female athletes have raised a Title IX claim challenging a policy that they allege allows transgender female athletes who remain biologically or hormonally male to compete in female-only track competitions or teams. The athletes contend that permitting transgender athletes who remain biologically male to compete in female-only track competitions denies biologically female athletes equal athletic opportunities under Title IX, given physiological differences between male and female athletes.

Should the Court in *Harris Funeral Homes*, however, determine that Title VII reaches claims alleging gender identity-based discrimination, and courts apply that interpretation to Title IX, a transgender female athlete could also bring a Title IX claim, including in the athletics context. Notably, *how* the Court resolves coverage—under part 1 or part 2 of the question presented in *Harris Funeral Homes*—may have distinct legal implications for such a claim.

### ***Transgender Status and Athletics under Title IX***

If the Court holds—with respect to part 1 of the question presented—that transgender status is *per se* protected under Title VII, and lower courts apply that reading to Title IX, transgender plaintiffs could raise Title IX claims directly, without relying on a sex stereotyping theory. Such a claim might allege, for example, that a *refusal* to allow a transgender female athlete to compete in female-only track teams or competitions is unlawful gender identity-based discrimination under Title IX. In that circumstance, it appears that conduct that could be challenged under the statute on the one hand—as denying equal athletic opportunities to biological females—could possibly be defended or justified under the statute on the other—a violation of Title IX based on gender identity. If such competing claims arise in the athletics context, it may not be immediately clear to a reviewing court or a federal agency that enforces Title IX—such as ED's OCR—how to resolve them.

### ***Sex Stereotyping under Price Waterhouse and Athletics under Title IX***

With respect to part 2 of the question presented, if the Court holds that Title VII reaches claims raised by transgender plaintiffs on the basis of sex stereotyping, the application of that theory to Title IX claims arising in the athletics context is unclear. As of the publication date of this Sidebar, federal courts have not yet addressed a Title IX claim raised by transgender athletes relying on a sex stereotyping theory, to challenge practices relating to single-sex athletics. Rather, where federal courts have applied the sex stereotyping theory to Title IX claims, they have done so in cases involving the denial of [bathroom](#) or [locker room](#) access to students consistent with their gender identity, as in the Seventh Circuit's 2017 decision *Whitaker by Whitaker v. Kenosha Unified School District*.

Should courts adopt reasoning similar to that in *Whitaker by Whitaker*, courts might broadly apply a sex stereotyping theory to hold that claims raised by transgender students are generally covered under Title IX, and then analyze claims challenging the exclusion of transgender athletes from single-sex athletic teams or competitions consistent with their gender identity. A court could analyze such claims similarly to

Title IX analyses addressing bathroom or locker room access, or a court could—while accepting the general applicability of sex stereotyping for Title IX—otherwise differentiate Title IX claims involving athletic competition and participation. For example, sports competition, unlike access to a shared facility, involves eligibility for athletic scholarships, awards, and other forms of achievement and recognition.

Meanwhile, courts might also turn to another line of precedent arising under Title IX and the Equal Protection Clause addressing equal athletic opportunity for male and female athletes. In these cases, some plaintiffs have brought Title IX or Equal Protection Clause claims challenging policies that excluded athletes of one biological sex from a single-sex team composed of athletes of the other sex. In *Clark, By and Through Clark v. Arizona Interscholastic Association*, for example, male high school students challenged their exclusion from their high schools' girls' volleyball teams while in *O'Connor v. Board of Education of School District No. 23*, a female sixth grade student challenged her exclusion from her school's boys' basketball team. In cases such as these, some federal courts have [held](#) or [observed](#) that physiological differences between male and female athletes that affect athletic competition may justify exclusion of athletes based on sex. Given this precedent, courts could limit or reject the applicability of sex stereotyping in the athletics context, and analyze—based on evidence of physiological differences that affect athletic performance—a challenged exclusion as being based on physiological characteristics rather than gender non-conformity.

In sum, a holding in *Harris Funeral Homes* that resolves coverage of transgender discrimination claims on the basis of sex stereotyping would leave open the question of how courts might apply that theory to claims arising in the athletics context under Title IX.

## Considerations for Congress

Though the Supreme Court will soon address—principally as a matter of statutory interpretation—the scope of Title VII's prohibition against sex discrimination, Congress has a range of legislative options for both resolving the judicial debate and clarifying the statute's reach. Congress could, for example, amend Title VII to expressly include or exclude transgender status as a protected category, or explicitly endorse or reject certain judicial interpretations of Title VII, including the Court's forthcoming decision in *Harris Funeral Homes*. In addition, and more generally with respect to statutory protections based on gender identity, Members could introduce standalone legislation, as they have in the [past](#), that would prohibit workplace discrimination based on gender identity and sexual orientation.

Meanwhile, as [research](#) and [debates](#) about [athletic competition continue](#) to [develop](#), Congress has varied legislative options to resolve potential ambiguities or debates arising under Title IX. At present, Title IX does not expressly refer to gender identity or transgender status, which has led parties, courts, and agencies to debate the scope of Title IX's prohibition against discrimination on the “basis of sex.” Congress could clarify the statute's protections by amending Title IX to either expressly include or exclude a prohibition against discrimination based on gender identity or transgender status.

In addition, Title IX is silent on the requirements of its antidiscrimination mandate regarding athletic participation and competition. Instead, Title IX compliance in the athletics context is set out in [Title IX regulations](#). Among other legislative options, Congress could amend Title IX to codify and address requirements for athletic programs subject to the statute. Congress could also direct the Secretary of ED or another executive branch agency to promulgate additional regulations setting out Title IX's requirements to address athletic participation by transgender athletes, among other issues.