Supreme Court rules that employers cannot fire workers because of sexual orientation or self-identity

Denies review on cases regarding qualified immunity for police

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The US Supreme Court ruled 6–3 yesterday that Title VII of the 1964 Federal Civil Rights Act prohibits employers, both governments and private businesses, from terminating workers because of sexual orientation or gender self-identification.

The ruling, long sought by advocates for the rights of lesbian, gay, bisexual and transgender (LGBT) workers, was opposed by the Trump administration, which seeks to mobilize its neo-fascistic base through appeals to homophobia and religious backwardness. Of the estimated eight million LGBT workers in the United States, the ruling will directly affect the substantial number employed in states that are presently without laws prohibiting LGBT discrimination.

In another action announced Monday morning, the Supreme Court denied multiple petitions for review of "qualified immunity," a judicially invented doctrine that in many egregious cases prevents police officers from being sued for excessive force and other misconduct. Because the petitions were pending for several months, many observers expected one or more to be granted. Instead the Supreme Court denied them all.

Until recently an esoteric legal issue, qualified immunity has catapulted into public consciousness following the George Floyd murder. For the last several years, as Supreme Court and lower court decisions have become more outrageous in their protection of police abuse, qualified immunity has come under relentless criticism. Recently, federal legislation has been introduced to limit or eliminate the defense altogether, but the proposed bill faces an uncertain future.

The Supreme Court also elected to deny several petitions that sought review of various lower court rulings concerning local ordinances regulating the possession, carrying and display of firearms. Trump and his ultra-right supporters were seeking rulings that expanded the Second Amendment, but the court majority declined to weigh in.

Finally, in a direct rebuke to the Trump administration, the Supreme Court denied a review of a lower court ruling that upheld provisions of a California "sanctuary" law that limits local and state law enforcement collaboration with federal immigration enforcement.

Probably the biggest surprise for most court observers was the identity of the associate justice who wrote the opinion in favor of LGBT rights, *Bostock v. Clayton County*. Trump's first nominee, Neil Gorsuch, held that "an employer who fires an individual merely for being gay or transgender defies the law," referring to Title VII of the Civil Rights Act of 1964. Gorsuch was joined by Chief Justice John Roberts and the four so-called liberal associate justices, Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan.

Justice Samuel Alito wrote an angry, petulant, and almost interminable 54-page dissent, joined by Clarence Thomas, to which Alito attached another 50-plus pages of appendices. Brett Kavanaugh dissented separately, striking a more conciliatory tone. The 172 total pages that comprised the ruling made it so bulky that downloads following the 10:00 a.m. announcement temporarily froze the Supreme Court website, and no hard copies were available for the first round of commentary because of COVID-19 measures.

Gorsuch's written opinion affirmed that Title VII's prohibition of discrimination "because of ... race, color, religion, sex, or national origin" embraces claims rooted in sexual orientation and gender self-identification. Yet Gorsuch had virtually nothing to say in defense of the democratic right under attack. There is no reference in his opinion to the democratic rights of workers to socialize outside of the workplace with whomever they choose, free from economic coercion by reactionary cretins and religious

zealots who seek to impose backward and outdated concepts of "morality."

The last time the Supreme Court ruled on LGBT rights was five years ago, when conservative Justice Anthony Kennedy, the "swing" vote before his retirement in 2018, established the right to same-sex marriage. Kennedy analyzed the institution of marriage within its historical development, describing the new rule as essential to "correct inequalities" that had accumulated over decades, and in ringing terms explain why such a ruling was necessary to vindicate "precepts of liberty and equality under the Constitution."

Gorsuch on the other hand, authored a poorly reasoned opinion based solely on what the justice discerned to be "the ordinary public meaning" of the words "because of ... sex," relying on the "originalist" or "textualist" approach of Antonin Scalia, the ultra-right justice whose death created the vacancy Trump ultimately appointed Gorsuch to fill. The decision was deliberately constructed in a manner that would not open any doors to future arguments that federal civil-rights laws and the Constitution should be construed in the light of contemporary standards of justice and decency.

Perhaps as a result of its author's decision to adapt "originalism" for the purpose of defending rather than constricting democratic rights, Gorsuch's approach comes off throughout the opinion as formal and stilted. He begins with the premise that the word "sex," as used in Title VII, refers to the biological characteristics with which an individual is born, not to sexual orientation or gender identity. Gorsuch concludes, however, that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex ... If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague"—that is attraction to men.

Gorsuch's reading of Title VII in a manner that protects LGBT rights enraged Alito, who wrote: "The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should 'update' old statutes so that they better reflect the current values of society."

To support an argument that the drafters of the 1964 Federal Civil-Rights Act did not intend to protect sexual orientation or gender identity from on-the-job discrimination, Alito cited the prevalence of anti-sodomy laws along with standards in the then applicable American Psychiatric Association's "Diagnostic and Statistical Manual of Mental Disorders"—standards discontinued in 1973—that labeled same-sex attraction a "sexual deviation" and a "sociopathic personality disturbance."

In other words, Alito dredged up filthy prejudices that existed over a half century ago, abandoned as the result of scientific and cultural advances, to argue that the landmark civil-rights statute enacted during that era necessarily incorporates those prejudices. Inverting the democratic content of Title VII itself, Alito warned: "The position that the Court now adopts will threaten freedom of religion, freedom of speech, and personal privacy and safety. No one should think that the Court's decision represents an unalloyed victory for individual liberty."

Discerning the reasons underlying this bitter division on LGBT rights among the five right-wing justices that typically form the Supreme Court majority is necessarily somewhat speculative, as justices generally do not discuss the inner workings of the high court.

Chief Justice Roberts, however, is widely viewed as primarily concerned with protecting the Supreme Court's political standing and credibility, and may well fear that a provocatively anti-gay and pro-bigotry decision, under the conditions of the present political upheaval over police violence, would be pouring gasoline on the fire.

Conscious of recent shifts in public opinion—polls show that 83 percent of the population, including 74 percent of Republicans, oppose firing workers because of their sexual orientation—Roberts no doubt assigned the opinion to Gorsuch with instructions to make this grudging concession on the narrowest possible grounds.

More litigation will likely follow because the decision explicitly reserves for later determination whether the Constitution allows an employer to fire an LGBT worker on the ground of the employer's purported religious beliefs.