

Questions for the Record from Senator Richard J. Durbin
Chair, Senate Judiciary Committee
Hearing on “Protecting Pride: Defending the Civil Rights of LGBTQ+ Americans”
June 21, 2023

Question for Kelley Robinson:

1. What is the relationship between sex, sexual orientation, and gender identity under federal law?

Under federal law, the term “sex” is often referenced within the context of prohibited discrimination. For decades, federal statutes have expressly prohibited discrimination because of an individual’s sex in settings like employment, housing, and education. While most of these laws do not expressly reference “sexual orientation” or “gender identity,” Congress notably likewise did not define the term “sex” across these statutes. Another term referenced by federal civil rights laws prohibiting sex discrimination is “gender.” Federal statutes use these two terms completely interchangeably. Likewise, courts have consistently held that these laws prohibit discrimination regardless of whether the term used is sex or gender. Various federal agencies charged with implementing and enforcing these laws provide through their regulations and other guidance that these sex discrimination statutes prohibit sexual orientation and gender identity discrimination as well, with many doing so following the Supreme Court’s 2020 decision in *Bostock v. Clayton County*.

In *Bostock*, the Supreme Court clarified that statutory prohibitions on discrimination “because of . . . sex” encompass discrimination based on sexual orientation and gender identity. However, that case was far from the first instance of courts, administrative bodies, and other government agencies interpreting existing prohibitions on sex discrimination as being inclusive of sexual orientation and gender identity discrimination. Indeed, in recent decades the trajectory of federal courts and other entities—like the U.S. Equal Employment Opportunity Commission—has been to increasingly permit LGBTQ+ litigants to advance their claims alleging discrimination based on their sexual orientation or gender identity under laws like Title VII of the Civil Rights Act of 1964 or Title IX of the Education Amendments of 1972, both of which bar sex discrimination. Historically, these cases moved forward under theories that such discrimination was impermissible gender stereotyping, which has been widely understood to be a form of sex discrimination prohibited by those statutes since the Supreme Court’s 1989 decision in *Price Waterhouse v. Hopkins*. However, and as detailed by the Supreme Court in *Bostock*, sexual orientation and gender identity cannot be defined or understood without reference to sex, based on the ordinary public meaning of these terms. Under general principles of statutory interpretation, discrimination because of sexual orientation and gender identity is therefore necessarily encompassed by bars on sex discrimination, even without those bases being specifically enumerated in the statutory text.