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THE CURRENT: How did a conservative Supreme Court rule for LGBTQ employment rights?

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(MUSIC)

PITA: You're listening to The Current, part of the Brookings Podcast Network.

On Monday, in a landmark ruling, the Supreme Court extended the protection of the 1964 civil rights act against workplace discrimination to lesbian, gay, bisexual and transgender Americans. With us today to talk about this is Jonathan Rauch, a senior fellow in Governance Studies here at Brookings. Jon, thanks very much for talking to us today.

RAUCH: Glad to be here.

PITA: So, before Monday's ruling, it was legal in more than half the states in the country to fire workers for being a lesbian, gay, bisexual, queer or transgender. What was it that finally brought this question of workplace discrimination before the court?

RAUCH: Three consolidated cases came before the court. In the case called *Bostock v. Clayton County, Georgia*, two gay employees and one transgender employee were fired for being gay or transgender. And they sued saying that that violated the 1964 Civil Rights Act discrimination ban on discrimination based on sex saying that they would have been treated differently. Had they been member of the other sex. The lower courts had mixed rulings on that. The Supreme Court weighed in and gave a six to three ruling in favor of the plane of saying that it is against the law under the 1964 Civil Rights Act to fire someone for being gay or transgender.

PITA: I think a lot of people were pretty surprised that conservative Justice Neil Gorsuch was not only one of the deciding votes on this case - as you say it was 6 to 3 – but in writing the opinions of the majority, he wrote a pretty compelling justification. What can you tell us about the reasoning behind that behind the ruling?

RAUCH: You know, I was a bit surprised myself, Adrianna. I've always been a little bit skeptical of the idea that [discriminating against] gays and lesbians and other Q people, although it's obviously a bad thing and it obviously shouldn't go on, I've always been a bit skeptical of the legal argument that it qualified a sex discrimination, per se. I have to say, Judge Gorsuch changed my mind. I think he'll change a lot of people's minds, partly because he who he is. He's a conservative appointee of President Trump. He's a firm believer in carefully interpreting statutes based on what's written in the text, and that's what he does. He does a deep dive into the language of the statute and comes out saying, look the way this statute is written by Congress says you cannot fire an individual based on that individual's sex, and that's what you're doing if you're firing someone for conduct, which, if they were the other sex, they could do. Well, he says the statute doesn't protect groups. It's not about treating gay people, as a group, the same or different; women as a group, the same or different. It's about treating individuals in a certain way.

And that was the clear language of the statute was therefore violated by what happened to those employees. It's a very meticulous literal reading of what Congress actually wrote. Conservatives, I think, have to be pretty compelled by it.

PITA: That is a pretty interesting argument about how you define protections. Some different cities and states as they've passed some of their own protections, absent federal rulings previously, some of them have done so by explicitly naming gender identity or and or sexual orientation as categories. Can you talk a little bit more about your, your thoughts on the merits of categories of people just as race, sex, and religion are protected categories versus this - I don't know if you would call it a more narrow ruling or a language-based approach to the law.

RAUCH: Well, it's important to remember the limits of this particular decision. It is about title seven of the 1964 Civil Rights bill, which addresses specifically employment discrimination in statute. It does not address anything, ranging from public accommodations or things like restaurants or, for example, does a baker have to bake a cake for a gay wedding, or what about transgenders and sports team, it doesn't address any of those things. And what states have tried to do with a lot of their laws is come up with also do address those sorts of things. So what the Supreme Court does here is make a pretty profound argument about what anti-discrimination language means in existing federal law, but it doesn't greatly extend the coverage of that law. So, there's a long road ahead, and there's still plenty of room for states and localities to devise protections of their own and definitions and protected classes have their own. Maybe another way to say what I just said is that this ruling draws a line. It's a new kind of baseline. It says, look, if you want to fire someone because that person is homosexual or transgender, you can't do that. But it still leaves open all the other questions about many things. Short of that, that are still currently legal in many states and that leaves. Lots of room for states and localities to continue working on their own definitions and laws and protections.

PITA: Speaking about some of the other issues that are coming up in terms of rights for LGBTQ Americans, the Trump administration has rolled back a number of transgender rights of recently, including barring most transgender people from serving the military. They recently reversed regulations that prevented medical personnel, hospitals, health insurance companies, etc., from discriminating against transgender patients. So, it sounds like what you're saying is this ruling, while really important, either may not or will not have any effect on some of these other policies, is that correct?

RAUCH: Yes and no. It has no direct effect because none of those other policies are part of title seven of the civil rights bill. They don't involve private sector employment of gay and lesbian or transgender people. What the decision does do, however, is expand the cultural space in which we think about these things, and it does sort of cast a shadow on behaviors which are just blatantly discriminatory against Q people, as I call us- that's my shorthand for all those other things. And it just reduces a bit the amount of oxygen in the air for people who just want to go out and discriminate in a lot of ways, but the direct legal impact I think is pretty narrow, at least initially.

PITA: When the Supreme Court ruled a few years ago, allowing marriage to go forward for Q Americans, that was one of the first landmarks. This is another. What are some of the next goals, the next battles, the next the next frontier, I guess, in rights for LGBTQ people?

RAUCH: Depends who you ask. The next big battle is clearly going to be over the tension between Q rights and religious liberty and since I'm both a Q rights advocate and a First Amendment

deep believer in the importance of religious liberty as a founding value for our country, there are no easy answers, in my opinion. So, although this decision does not change that terrain, it brings us one step closer to the next set of Supreme Court cases which are coming up in the next term and then the term after that over what are the situations in which, say, a Catholic adoption agency can be required by the government to place children in with, say, same sex parents, something Catholics believe is wrong. What are the contours of all that? That is the big next question that is coming up. There's legislation in Congress to deal with it, two different bills taking two very different approaches. And I think that's really the next big thing coming down the line.

PITA: Alright, well, we'll look forward to see what comes next and where we go next. Jonathan, thank you very much for talking to us today.

RAUCH: Thank you.