

1 -- is a statute about individuals --

2 MR. BURSCH: Correct.

3 JUSTICE KAGAN: -- and whether  
4 individuals are being treated differently  
5 because of his or her sex. It's not a statute  
6 about, well, in the aggregate, does this -- does  
7 this act disadvantage men versus women or women  
8 versus men?

9 It's a statute that uses the word  
10 "individual" twice and says is a particular  
11 person being treated differently because of her  
12 sex? And here, Ms. Stephens, was being treated  
13 differently because of her sex. And this was  
14 Judge Flaum's point in -- in that opinion, is  
15 that it's as simple as looking at the language  
16 of the statute, applying it to a particular  
17 individual, which Title VII insists that you do,  
18 and coming up with the obvious answer.

19 Yes, if she had not been a -- if she  
20 had not been assigned at birth the sex that she  
21 was assigned at birth, she would have been  
22 treated differently.

23 MR. BURSCH: We agree with the  
24 individual treatment. That's why in Oncale,  
25 this Court said basically in the context of a

1 male-only work force that the plaintiff had a  
2 cause of action because he was being treated  
3 differently than a woman in his position would  
4 have been.

5 A hypothetical comparator, to get back  
6 to some of Justice Ginsburg's questions, even if  
7 there are no women on the site, you still have  
8 that hypothetical comparator.

9 Here it's individual too, but all the  
10 employer does in enforcing a sex-specific dress  
11 code applied neutrally to everyone, recognizes  
12 that there's differences between men and women.  
13 And if you say that Tom Ross can't do that, then  
14 there is no --

15 JUSTICE KAGAN: Are you pinning your  
16 answer on the fact of a dress code? Would your  
17 answer be the same if there were no dress code  
18 and Ms. Stephens had just been fired for being  
19 transgender?

20 Because all your arguments in your  
21 brief -- I mean, you keep talking in your brief,  
22 as you do here, about the dress code, but the  
23 arguments that you make are arguments that would  
24 allow the employer to fire Ms. Stephens for  
25 being transgender, irrespective of whether there