Gender Justice | L6506
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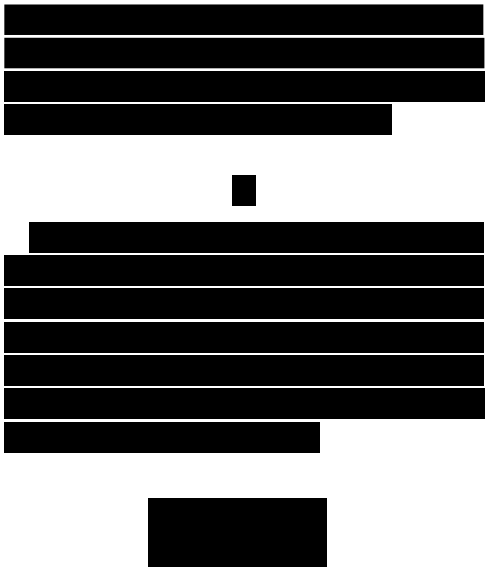
November 12th – The Future of Queer and Trans Rights

- *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F3d 560 (6th Cir. 2017)
- Alliance Defending Freedom, petition for certiorari to the U.S. Supreme Court, in *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*. July 20, 2018
- ACLU, brief in opposition to certiorari, in *R.G. & G.R. Harris Funeral Homes, Inc., v. EEOC*. October 24, 2018



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant,

Aimee Stephens, Intervenor,

v.

R.G. &. G.R. HARRIS FUNERAL HOMES, INC., Defendant-Appellee.

No. 16-2424

United States Court of Appeals, Sixth Circuit.

Argued: October 4, 2017

Decided and Filed: March 7, 2018

Background: Equal Employment Opportunity Commission (EEOC) brought Title VII action against employer alleging that employer fired transitioning, transgender employee based on gender stereotypes and that employer administered discriminatory clothing allowance policy. The United States District Court for the Eastern District of Michigan, No. 2:14-cv-13710, Sean F. Cox, J., 201 F.Supp.3d 837, entered summary judgment in favor of employer. EEOC appealed and employee intervened on appeal.

Holdings: The Court of Appeals, Karen Nelson Moore, Circuit Judge, held that:

(1) employer's decision to fire employee was based on gender stereotyping in violation of Title VII;

(2) EEOC was entitled to bring Title VII claim on ground that employer discriminated against employee on basis of her transgender and transitioning status;

(3) ministerial exception to Title VII did not bar EEOC's claims;

(4) requiring employer to comply with Title VII did not substantially burden his religious practice of operating funeral homes, precluding RFRA defense to Title VII claims; and

(5) requiring employer to comply with Title VII satisfied EEOC's compelling interest in eliminating workplace discrimination, precluding RFRA defense to Title VII claims;

(6) requiring employer to comply with Title VII was least restrictive way to further EEOC's interests, precluding RFRA defense to Title VII claims;

(7) EEOC was authorized to bring Title VII discriminatory clothing-allowance claim against employer.

Affirmed in part, reversed in part, and remanded.

1. Federal Courts ⚿3604(4)

An appellate court reviews a district court's grant of summary judgment de novo.

2. Federal Courts ⚿3675

In reviewing a grant of summary judgment, an appellate court views all

facts and any inferences in the light most favorable to the nonmoving party.

3. Federal Courts ⚿3604(4)

An appellate court reviews all legal conclusions supporting a district court's grant of summary judgment de novo.

4. Civil Rights ⚿1545

A plaintiff can establish a prima facie case of unlawful discrimination under Title VII by presenting direct evidence of discriminatory intent. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

5. Civil Rights ⚿1545

For purposes of a plaintiff's prima facie case of unlawful discrimination under Title VII, a facially discriminatory employment policy or a corporate decision maker's express statement of a desire to remove employees in the protected group is direct evidence of discriminatory intent. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

6. Civil Rights ⚿1536

Once a Title VII plaintiff establishes that the prohibited classification played a motivating part in the adverse employment decision, the employer then bears the burden of proving that it would have terminated the plaintiff even if it had not been motivated by impermissible discrimination. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

7. Civil Rights ⚿1166

Discrimination based on a failure to conform to stereotypical gender norms is no less prohibited under Title VII than discrimination based on the biological differences between men and women. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

8. Civil Rights ⚿1166

Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination under Title VII. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

9. Civil Rights ⚿1193

Employer's decision to fire transitioning, transgender employee was based on gender stereotyping in violation of Title VII, where employer decided to fire employee because she was "no longer going to represent himself as a man" and "wanted to dress as a woman," and employer admitted that employee was not fired for any performance-related issues. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

10. Civil Rights ⚿1166, 1179

An employer engages in unlawful gender-stereotyping discrimination under Title VII even if it expects both biologically male and female employees to conform to certain notions of how each should behave. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

11. Civil Rights ⚿1192

Discrimination on the basis of transgender and transitioning status violates Title VII. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

12. Civil Rights ⚿1193

Equal Employment Opportunity Commission (EEOC) was entitled to bring claim against employer under Title VII on ground that employer discriminated against transgender employee on basis of her transgender and transitioning status, since employer's decision to fire employee was motivated, at least in part, by employee's sex, and discrimination on basis of transgender status necessarily implicated Title VII's proscriptions against sex stereotyping, given that a transgender person was someone who was inherently gender

non-conforming. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

13. Civil Rights ⇐1192

Under Title VII, discrimination "because of sex" inherently includes discrimination against employees because of a change in their sex. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

14. Civil Rights ⇐1192

Discrimination because of a person's transgender, intersex, or sexually indeterminate status is no less actionable under Title VII than discrimination because of a person's identification with two religions, an unorthodox religion, or no religion at all. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

15. Civil Rights ⇐1192

Under Title VII, gender is not being treated as irrelevant to employment decisions if an employee's attempt or desire to change his or her sex leads to an adverse employment decision. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

16. Civil Rights ⇐1192

Under Title VII's proscription against sex-stereotyping discrimination, an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

17. Civil Rights ⇐1192

Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

18. Civil Rights ⇐1166

Under Title VII's proscription against sex discrimination, a trait need not be exclusive to one sex to nevertheless be a function of sex. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

19. Civil Rights ⇐1166

Title VII does not ask whether a particular sex is discriminated against; it asks whether a particular individual is discriminated against because of such individual's sex. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

20. Civil Rights ⇐1166, 1179

Under Title VII's proscription against sex discrimination, the question is not whether discrimination is borne only by men or only by women or even by both men and women; instead, the question is whether an individual is discriminated against because of his or her sex. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

21. Civil Rights ⇐1166, 1179

An employer need not discriminate based on a trait common to all men or women to violate Title VII's proscription against sex discrimination. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

22. Civil Rights ⇐1166

A plaintiff may state a claim under Title VII for discrimination based on gender nonconformance that is expressed outside of work. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

23. Civil Rights ⇐1114

Constitutional Law ⇐1340(2, 3)

The ministerial exception to Title VII is rooted in the First Amendment's religious protections and precludes application of employment discrimination laws such as Title VII to claims concerning the employ-

ment relationship between a religious institution and its ministers. U.S. Const. Amend. 1; Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

24. Civil Rights ⚿1114

In order for the ministerial exception to bar an employment discrimination claim under Title VII, the employer must be a religious institution and the employee must have been a ministerial employee. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

25. Civil Rights ⚿1114

Funeral home was not religious institution, and, thus, ministerial exception to Title VII did not bar claims by Equal Employment Opportunity Commission (EEOC) alleging that employer, who operated funeral homes, violated Title VII by firing transitioning, transgender funeral director, even though funeral home's mission statement declared that "its highest priority is to honor God in all that we do as a company and as individuals," where funeral home did not purport or seek to establish and advance any Christian values, it was not affiliated with any church, its articles of incorporation did not avow any religious purpose, its employees were not required to hold any particular religious views, and it employed and served individuals of all religions. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

26. Civil Rights ⚿1114

Funeral director was not ministerial employee, and, thus, ministerial exception to Title VII did not bar claims by Equal Employment Opportunity Commission (EEOC) alleging that employer, who operated funeral homes, violated Title VII by firing transitioning, transgender funeral director, since job title of "funeral director" conveyed purely secular function, funeral director did not have any religious training, she was not ambassador of any faith, and she did not perform important religious functions. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

27. Civil Rights ⚿1406

Under RFRA's burden-shifting analysis, first, a claimant must demonstrate that complying with a generally applicable law would substantially burden his religious exercise, and upon such a showing, the government must then establish that applying the law to the burdened individual is the least restrictive means of furthering a compelling government interest. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. § 2000bb-1.

28. Federal Courts ⚿3403, 3544

Court of Appeals would not consider argument by intervening employee that action by Equal Employment Opportunity Commission (EEOC) against employer alleging that employer violated Title VII by firing transitioning, transgender employee should be remanded to District Court with instructions barring employer from asserting RFRA as defense to her individual claims, since employee's intervention on appeal was granted, in part, on her assurances that she would only raise arguments already within scope of appeal, and such argument was not briefed by parties at district-court level. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

29. Federal Courts ⚿3391

An appellate court typically will not consider issues raised for the first time on appeal unless they are presented with sufficient clarity and completeness and their resolution will materially advance the process of the litigation.

30. Civil Rights ⚿1371

To assert a viable defense under RFRA, a religious claimant must demonstrate that the government action at issue

would (1) substantially burden (2) a sincere (3) religious exercise. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. § 2000bb-1.

31. Civil Rights ⚿1010, 1032

In reviewing a claim under RFRA, a court must not evaluate whether the asserted religious beliefs are mistaken or insubstantial; rather, the court must assess whether the line drawn reflects an honest conviction. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. § 2000bb-1.

32. Civil Rights ⚿1193, 1529

Requiring employer to comply with Title VII's proscriptions on sex discrimination did not substantially burden his religious practice of operating funeral homes, precluding RFRA defense to claims by Equal Employment Opportunity Commission (EEOC) alleging that employer violated Title VII by firing transitioning, transgender funeral director, since employer could not rely on customers' presumed bias, that they would be disturbed by employee's appearance during and after her transition to point that their healing from their loved ones' deaths would be hindered, to establish substantial burden, and tolerating employee's understanding of her sex and gender identity was not tantamount to supporting it in violation of employer's religious beliefs. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1); Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. § 2000bb-1(b).

33. Civil Rights ⚿1406

A claimant trying to demonstrate that complying with a generally applicable law would substantially burden his religious exercise of operating a business cannot rely on customers' presumed biases to establish a substantial burden under RFRA. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. § 2000bb-1.

34. Civil Rights ⚿1032

A government action that puts a religious practitioner to the choice of engaging in conduct that seriously violates his religious beliefs or facing serious consequences constitutes a substantial burden for the purposes of RFRA. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. § 2000bb-1.

35. Civil Rights ⚿1032

If a claimant under the RFRA demonstrates that complying with a generally applicable law would substantially burden his sincere exercise of religion, the government must demonstrate that its compelling interest is satisfied through application of the challenged law to the particular claimant. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. § 2000bb-1(b).

36. Civil Rights ⚿1032

For the government to demonstrate under RFRA that its compelling interest is satisfied through application of the challenged law to the particular claimant whose sincere exercise of religion is being substantially burdened, it requires looking beyond broadly formulated interests justifying the general applicability of government mandates and scrutinizing the asserted harm of granting specific exemptions to particular religious claimants. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. § 2000bb-1(b).

37. Civil Rights ⚿1193, 1529

Requiring employer to comply with Title VII's proscriptions on sex discrimination, even if it substantially burdened employer's religious belief in operating funeral home, satisfied compelling interest of Equal Employment Opportunity Commission (EEOC) in eliminating workplace discrimination, precluding employer's RFRA defense to EEOC's claims alleging that employer violated Title VII by firing tran-

sitioning, transgender funeral director, since failing to enforce Title VII against employer meant that EEOC would be allowing a particular person to suffer discrimination, even if harm suffered by employee was not unique from generic harm always suffered in employment discrimination cases, such as deprivation of livelihood and harm to sense of self-worth. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1); Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. § 2000bb-1(b).

38. Civil Rights ⚿1172

The stigmatizing injury of discrimination in violation of Title VII, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

39. Civil Rights ⚿1406

The final inquiry under RFRA's burden-shifting analysis is whether there exist other means of achieving the government's desired goal without imposing a substantial burden on the exercise of religion by the objecting party. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. §§ 2000bb-1(a), 2000bb-1(b).

40. Civil Rights ⚿1032

The least-restrictive-means standard under RFRA, in determining whether requiring a claimant to comply with a generally applicable law that substantially burdens the claimant's religious exercise is the least restrictive means of furthering a compelling government interest, is exceptionally demanding. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. §§ 2000bb-1(a), 2000bb-1(b).

41. Civil Rights ⚿1032

Under RFRA's least-restrictive-means standard, where an alternative option exists that furthers the government's interest equally well, the government must use it. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. §§ 2000bb-1(a), 2000bb-1(b).

42. Civil Rights ⚿1529

Requiring employer to comply with Title VII's proscriptions on sex discrimination, even if it substantially burdened employer's religious belief in operating funeral home, was least restrictive way to further interest of Equal Employment Opportunity Commission (EEOC) in eliminating workplace discrimination based on sex stereotypes, precluding employer's RFRA defense to EEOC's claims alleging that employer violated Title VII by firing transitioning, transgender funeral director; Title VII did not include any exemptions for discrimination on basis of sex, and only way to achieve Title VII's objectives was through its enforcement. Religious Freedom Restoration Act of 1993 § 3, 42 U.S.C.A. §§ 2000bb-1(a), 2000bb-1(b).

43. Civil Rights ⚿1516

Equal Employment Opportunity Commission (EEOC) was authorized to bring Title VII discriminatory clothing-allowance claim against employer based on employer's policy to provide suits or stipends to male funeral directors but not to female funeral directors, since transgender employee's charge that she was fired because of her planned change in appearance and presentation contained implicit allegation that employer required its male and female funeral directors to look a particular way, and such allegation could reasonably prompt EEOC to investigate whether such appearance requirements imposed unequal burdens, including fiscal, on male and fe-

male employees. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 2:14-cv-13710—Sean F. Cox, District Judge.

ARGUED: Anne Noel Occhialino, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Appellant. John A. Knight, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Chicago, Illinois, for Intervenor. Douglas G. Wardlow, ALLIANCE DEFENDING FREEDOM, Scottsdale, Arizona, for Appellee. ON BRIEF: Anne Noel Occhialino, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Appellant. John A. Knight, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Chicago, Illinois, Jay D. Kaplan, Daniel S. Korobkin, AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN, Detroit, Michigan, for Intervenor. Douglas G. Wardlow, Gary S. McCaleb, ALLIANCE DEFENDING FREEDOM, Scottsdale, Arizona, for Appellee. Jennifer C. Pizer, Nancy C. Marcus, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., Los Angeles, California, Gregory R. Nevins, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., Atlanta, Georgia, Richard B. Katskee, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, Washington, D.C., Doron M. Kalir, CLEVELAND-MARSHALL COLLEGE OF LAW, Cleveland, Ohio, Elizabeth Reiner Platt, Katherine Franke, PRIVATE RIGHTS / PUBLIC CONSCIENCE PROJECT, New York, New York, Mary Jane Eaton, Wesley R. Powell, Sameer Advani, WILLKIE FARR & GALLAGHER, LLP, New York, New York, Eric Alan Isaacson, LAW OFFICE OF ERIC ALAN ISAACSON, La Jolla, California, William J. Olson, WILLIAM J. OLSON, P.C., Vienna, Virginia, for Amici Curiae.

Before: MOORE, WHITE, and DONALD, Circuit Judges.

OPINION

KAREN NELSON MOORE, Circuit Judge.

Aimee Stephens (formerly known as Anthony Stephens) was born biologically male.[1] While living and presenting as a man, she worked as a funeral director at R.G. & G.R. Harris Funeral Homes, Inc. ("the Funeral Home"), a closely held for-profit corporation that operates three funeral homes in Michigan. Stephens was terminated from the Funeral Home by its owner and operator, Thomas Rost, shortly after Stephens informed Rost that she intended to transition from male to female and would represent herself and dress as a woman while at work. Stephens filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), which investigated Stephens's allegations that she had been terminated as a result of unlawful sex discrimination. During the course of its investigation, the EEOC learned that the Funeral Home provided its male public-facing employees with clothing that complied with the company's dress code while female public-facing employees received no such allowance. The EEOC subsequently brought suit against the Funeral Home in which the EEOC charged the Funeral Home with violating Title VII of the Civil Rights Act of 1964 ("Title VII") by (1) terminating Stephens's employment on the basis of her transgen-

1. We refer to Stephens using female pronouns, in accordance with the preference she has expressed through her briefing to this court.

der or transitioning status and her refusal to conform to sex-based stereotypes; and (2) administering a discriminatory-clothing-allowance policy.

The parties submitted dueling motions for summary judgment. The EEOC argued that it was entitled to judgment as a matter of law on both of its claims. For its part, the Funeral Home argued that it did not violate Title VII by requiring Stephens to comply with a sex-specific dress code that it asserts equally burdens male and female employees, and, in the alternative, that Title VII should not be enforced against the Funeral Home because requiring the Funeral Home to employ Stephens while she dresses and represents herself as a woman would constitute an unjustified substantial burden upon Rost's (and thereby the Funeral Home's) sincerely held religious beliefs, in violation of the Religious Freedom Restoration Act ("RFRA"). As to the EEOC's discriminatory-clothing-allowance claim, the Funeral Home argued that Sixth Circuit case law precludes the EEOC from bringing this claim in a complaint that arose out of Stephens's original charge of discrimination because the Funeral Home could not reasonably expect a clothing-allowance claim to emerge from an investigation into Stephens's termination.

The district court granted summary judgment in favor of the Funeral Home on both claims. For the reasons set forth below, we hold that (1) the Funeral Home engaged in unlawful discrimination against Stephens on the basis of her sex; (2) the Funeral Home has not established that applying Title VII's proscriptions against sex discrimination to the Funeral Home would substantially burden Rost's religious exercise, and therefore the Funeral Home is not entitled to a defense under RFRA; (3) even if Rost's religious exercise were substantially burdened, the EEOC has established that enforcing Title VII is the least restrictive means of furthering the government's compelling interest in eradicating workplace discrimination against Stephens; and (4) the EEOC may bring a discriminatory-clothing-allowance claim in this case because such an investigation into the Funeral Home's clothing-allowance policy was reasonably expected to grow out of the original charge of sex discrimination that Stephens submitted to the EEOC. Accordingly, we **REVERSE** the district court's grant of summary judgment on both the unlawful-termination and discriminatory-clothing-allowance claims, **GRANT** summary judgment to the EEOC on its unlawful-termination claim, and **REMAND** the case to the district court for further proceedings consistent with this opinion.

I. BACKGROUND

Aimee Stephens, a transgender woman who was "assigned male at birth," joined the Funeral Home as an apprentice on October 1, 2007 and served as a Funeral Director/Embalmer at the Funeral Home from April 2008 until August 2013. R. 51-18 (Stephens Dep. at 49–51) (Page ID #817); R. 61 (Def.'s Counter Statement of Disputed Facts ¶ 10) (Page ID #1828). During the course of her employment at the Funeral Home, Stephens presented as a man and used her then-legal name, William Anthony Beasley Stephens. R. 51-18 (Stephens Dep. at 47) (Page ID #816); R. 61 (Def.'s Counter Statement of Disputed Facts ¶ 15) (Page ID #1829).

The Funeral Home is a closely held for-profit corporation. R. 55 (Def.'s Statement of Facts ¶ 1) (Page ID #1683).[2] Thomas

2. All facts drawn from Def.'s Statement of Facts (R. 55) are undisputed. *See* R. 64 (Pl.'s Counter Statement of Disputed Facts) (Page ID #2066–88).

Rost ("Rost"), who has been a Christian for over sixty-five years, owns 95.4% of the company and operates its three funeral home locations. *Id.* ¶¶ 4, 8, 17 (Page ID #1684–85); R. 54-2 (Rost Aff. ¶ 2) (Page ID #1326). Rost proclaims "that God has called him to serve grieving people" and "that his purpose in life is to minister to the grieving." R. 55 (Def.'s Statement of Facts ¶ 31) (Page ID #1688). To that end, the Funeral Home's website contains a mission statement that states that the Funeral Home's "highest priority is to honor God in all that we do as a company and as individuals" and includes a verse of scripture on the bottom of the mission statement webpage. *Id.* ¶¶ 21–22 (Page ID #1686). The Funeral Home itself, however, is not affiliated with a church; it does not claim to have a religious purpose in its articles of incorporation; it is open every day, including Christian holidays; and it serves clients of all faiths. R. 61 (Def.'s Counter Statement of Facts ¶¶ 25–27; 29–30) (Page ID #1832–34). "Employees have worn Jewish head coverings when holding a Jewish funeral service." *Id.* ¶ 31 (Page ID #1834). Although the Funeral Home places the Bible, "Daily Bread" devotionals, and "Jesus Cards" in public places within the funeral homes, the Funeral Home does not decorate its rooms with "visible religious figures . . . to avoid offending people of different religions." *Id.* ¶¶ 33–34 (Page ID #1834). Rost hires employees belonging to any faith or no faith to work at the Funeral Home, and he "does not endorse or consider himself to endorse his employees' beliefs or non-employment-related activities." *Id.* ¶¶ 37–38 (Page ID #1835).

The Funeral Home requires its public-facing male employees to wear suits and ties and its public-facing female employees to wear skirts and business jackets. R. 55 (Def.'s Statement of Facts at ¶ 51) (Page ID #1691). The Funeral Home provides all male employees who interact with clients, including funeral directors, with free suits and ties, and the Funeral Home replaces suits as needed. R. 61 (Def.'s Counter Statement of Disputed Facts ¶¶ 42, 48) (Page ID #1836–37). All told, the Funeral Home spends approximately $470 per full-time employee per year and $235 per part-time employee per year on clothing for male employees. *Id.* ¶ 55 (Page ID #1839).

Until October 2014—after the EEOC filed this suit—the Funeral Home did not provide its female employees with any sort of clothing or clothing allowance. *Id.* ¶ 54 (Page ID #1838–39). Beginning in October 2014, the Funeral Home began providing its public-facing female employees with an annual clothing stipend ranging from $75 for part-time employees to $150 for full-time employees. *Id.* ¶ 54 (Page ID #1838–39). Rost contends that the Funeral Home would provide suits to all funeral directors, regardless of their sex, *id.*, but it has not employed a female funeral director since Rost's grandmother ceased working for the organization around 1950, R. 54-2 (Rost Aff. ¶¶ 52, 54) (Page ID #1336–37). According to Rost, the Funeral Home has received only one application from a woman for a funeral director position in the thirty-five years that Rost has operated the Funeral Home, and the female applicant was deemed not qualified. *Id.* ¶¶ 2, 53 (Page ID #1326, 1336).

On July 31, 2013, Stephens provided Rost with a letter stating that she has struggled with "a gender identity disorder" her "entire life," and informing Rost that she has "decided to become the person that [her] mind already is." R. 51-2 (Stephens Letter at 1) (Page ID #643). The letter stated that Stephens "intend[ed] to have sex reassignment surgery," and explained that "[t]he first step [she] must take is to live and work full-time as a woman for one year." *Id.* To that end,

Stephens stated that she would return from her vacation on August 26, 2013, "as [her] true self, Amiee [sic] Australia Stephens, in appropriate business attire." *Id.* After presenting the letter to Rost, Stephens postponed her vacation and continued to work for the next two weeks. R. 68 (Reply to Def.'s Counter Statement of Material Facts Not in Dispute at 1) (Page ID #2122). Then, just before Stephens left for her intended vacation, Rost fired her. R. 61 (Def.'s Counter Statement of Disputed Facts ¶¶ 10–11) (Page ID #1828). Rost said, "this is not going to work out," and offered Stephens a severance agreement if she "agreed not to say anything or do anything." R. 54-15 (Stephens Dep. at 75–76) Page ID #1455; R. 63-5 (Rost Dep. at 126–27) Page ID #1974. Stephens refused. *Id.* Rost testified that he fired Stephens because "he was no longer going to represent himself as a man. He wanted to dress as a woman." R. 51-3 (Rost 30(b)(6) Dep. at 135–36) (Page ID #667).

Rost avers that he "sincerely believe[s] that the Bible teaches that a person's sex is an immutable God-given gift," and that he would be "violating God's commands if [he] were to permit one of [the Funeral Home's] funeral directors to deny their sex while acting as a representative of [the] organization" or if he were to "permit one of [the Funeral Home's] male funeral directors to wear the uniform for female funeral directors while at work." R. 54-2 (Rost Aff. ¶¶ 42–43, 45) (Page ID #1334–35). In particular, Rost believes that authorizing or paying for a male funeral director to wear the uniform for female funeral directors would render him complicit "in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift." *Id.* ¶¶ 43, 45 (Page ID #1334–35).

After her employment was terminated, Stephens filed a sex-discrimination charge with the EEOC, alleging that "[t]he only explanation" she received from "management" for her termination was that "the public would [not] be accepting of [her] transition." R. 63-2 (Charge of Discrimination at 1) (Page ID #1952). She further noted that throughout her "entire employment" at the Funeral Home, there were "no other female Funeral Director/Embalmers." *Id.* During the course of investigating Stephens's allegations, the EEOC learned from another employee that the Funeral Home did not provide its public-facing female employees with suits or a clothing stipend. R. 54-24 (Memo for File at 9) (Page ID #1513).

The EEOC issued a letter of determination on June 5, 2014, in which the EEOC stated that there was reasonable cause to believe that the Funeral Home "discharged [Stephens] due to her sex and gender identity, female, in violation of Title VII" and "discriminated against its female employees by providing male employees with a clothing benefit which was denied to females, in violation of Title VII." R. 63-4 (Determination at 1) (Page ID #1968). The EEOC and the Funeral Home were unable to resolve this dispute through an informal conciliation process, and the EEOC filed a complaint against the Funeral Home in the district court on September 25, 2014. R. 1 (Complaint) (Page ID #1–9).

The Funeral Home moved to dismiss the EEOC's action for failure to state a claim. The district court denied the Funeral Home's motion, but it narrowed the basis upon which the EEOC could pursue its unlawful-termination claim. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F.Supp.3d 594, 599, 603 (E.D. Mich. 2015). In particular, the district court agreed with the Funeral Home that transgender status is not a protected trait under Title VII, and therefore held that the EEOC

could not sue for alleged discrimination against Stephens based solely on her transgender and/or transitioning status. *See id.* at 598–99. Nevertheless, the district court determined that the EEOC had adequately stated a claim for discrimination against Stephens based on the claim that she was fired because of her failure to conform to the Funeral Home's "sex- or gender-based preferences, expectations, or stereotypes." *Id.* at 599 (quoting R. 1 (Compl. ¶ 15) (Page ID #4–5)).

The parties then cross-moved for summary judgment. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F.Supp.3d 837, 840 (E.D. Mich. 2016). With regard to the Funeral Home's decision to terminate Stephens's employment, the district court determined that there was "direct evidence to support a claim of employment discrimination" against Stephens on the basis of her sex, in violation of Title VII. *Id.* at 850. However, the court nevertheless found in the Funeral Home's favor because it concluded that the Religious Freedom Restoration Act ("RFRA") precludes the EEOC from enforcing Title VII against the Funeral Home, as doing so would substantially burden Rost and the Funeral Home's religious exercise and the EEOC had failed to demonstrate that enforcing Title VII was the least restrictive way to achieve its presumably compelling interest "in ensuring that Stephens is not subject to gender stereotypes in the workplace in terms of required clothing at the Funeral home." *Id.* at 862–63. Based on its narrow conception of the EEOC's compelling interest in bringing the claim, the district court concluded that the EEOC could have achieved its goals by proposing that the Funeral Home impose a gender-neutral dress code. *Id.* The EEOC's failure to consider such an accommodation was, according to the district court, fatal to its case. *Id.* at 863. Separately, the district court held that it lacked jurisdiction to consider the EEOC's discriminatory-clothing-allowance claim because, under long-standing Sixth Circuit precedent, the EEOC may pursue in a Title VII lawsuit only claims that are reasonably expected to grow out of the complaining party's—in this case, Stephens's—original charge. *Id.* at 864–70. The district court entered final judgment on all counts in the Funeral Home's favor on August 18, 2016, R. 77 (J.) (Page ID #2235), and the EEOC filed a timely notice of appeal shortly thereafter, *see* R. 78 (Notice of Appeal) (Page ID #2236–37).

Stephens moved to intervene in this appeal on January 26, 2017, after expressing concern that changes in policy priorities within the U.S. government might prevent the EEOC from fully representing Stephens's interests in this case. *See* D.E. 19 (Mot. to Intervene as Plaintiff-Appellant at 5–7). The Funeral Home opposed Stephens's motion on the grounds that the motion was untimely and Stephens had failed to show that the EEOC would not represent her interests adequately. D.E. 21 (Mem. in Opp'n at 2–11). We determined that Stephens's request was timely given that she previously "had no reason to question whether the EEOC would continue to adequately represent her interests" and granted Stephens's motion to intervene on March 27, 2017. D.E. 28-2 (Order at 2). We further determined that Stephens's intervention would not prejudice the Funeral Home because Stephens stated in her briefing that she did not intend to raise new issues. *Id.* Six groups of amici curiae also submitted briefing in this case.

II. DISCUSSION

A. Standard of Review

[1–3] "We review a district court's grant of summary judgment de novo."

Risch v. Royal Oak Police Dep't, 581 F.3d 383, 390 (6th Cir. 2009) (quoting *CenTra, Inc. v. Estrin*, 538 F.3d 402, 412 (6th Cir. 2008)). Summary judgment is warranted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). In reviewing a grant of summary judgment, "we view all facts and any inferences in the light most favorable to the nonmoving party." *Risch*, 581 F.3d at 390 (citation omitted). We also review all "legal conclusions supporting [the district court's] grant of summary judgment *de novo*." *Doe v. Salvation Army in U.S.*, 531 F.3d 355, 357 (6th Cir. 2008) (citation omitted).

B. Unlawful Termination Claim

[4–6] Title VII prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). "[A] plaintiff can establish a *prima facie* case [of unlawful discrimination] by presenting direct evidence of discriminatory intent." *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion)). "[A] facially discriminatory employment policy or a corporate decision maker's express statement of a desire to remove employees in the protected group is direct evidence of discriminatory intent." *Id.* (citation omitted). Once a plaintiff establishes that "the prohibited classification played a motivating part in the [adverse] employment decision," the employer then bears the burden of proving that it would have terminated the plaintiff "even if it had not been motivated by impermissible discrimination." *Id.* (citing, *inter alia*, *Price Waterhouse*, 490 U.S. at 244–45, 109 S.Ct. 1775).

Here, the district court correctly determined that Stephens was fired because of her failure to conform to sex stereotypes, in violation of Title VII. *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F.Supp.3d at 850 ("[W]hile this Court does not often see cases where there is direct evidence to support a claim of employment discrimination, it appears to exist here."). The district court erred, however, in finding that Stephens could not alternatively pursue a claim that she was discriminated against on the basis of her transgender and transitioning status. Discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex, and thus the EEOC should have had the opportunity to prove that the Funeral Home violated Title VII by firing Stephens because she is transgender and transitioning from male to female.

1. Discrimination on the Basis of Sex Stereotypes

In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), a plurality of the Supreme Court explained that Title VII's proscription of discrimination "'*because of* ... sex' ... mean[s] that gender must be irrelevant to employment decisions." *Id.* at 240, 109 S.Ct. 1775 (emphasis in original). In enacting Title VII, the plurality reasoned, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* at 251, 109 S.Ct. 1775 (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978)). The *Price Waterhouse* plurality, along with two concurring Justices, therefore determined that a female employee who faced an adverse employment decision because she failed to "walk ... femininely, talk ... femininely, dress ... femininely, wear make-up, have

her hair styled, [or] wear jewelry," could properly state a claim for sex discrimination under Title VII—even though she was not discriminated against for being a woman *per se*, but instead for failing to be womanly enough. *See id.* at 235, 109 S.Ct. 1775 (plurality opinion) (quoting *Hopkins v. Price Waterhouse*, 618 F.Supp. 1109, 1117 (D.D.C. 1985)); *id.* at 259, 109 S.Ct. 1775 (White, J., concurring); *id.* at 272, 109 S.Ct. 1775 (O'Connor, J., concurring).

[7, 8] Based on *Price Waterhouse*, we determined that "discrimination based on a failure to conform to stereotypical gender norms" was no less prohibited under Title VII than discrimination based on "the biological differences between men and women." *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004). And we found no "reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual." *Id.* at 575. Thus, in *Smith*, we held that a transgender plaintiff (born male) who suffered adverse employment consequences after "he began to express a more feminine appearance and manner on a regular basis" could file an employment discrimination suit under Title VII, *id.* at 572, because such "discrimination would not [have] occur[red] but for the victim's sex," *id.* at 574. As we reasoned in *Smith*, Title VII proscribes discrimination both against women who "do not wear dresses or makeup" and men who do. *Id.* Under any circumstances, "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination." *Id.* at 575.

[9] Here, Rost's decision to fire Stephens because Stephens was "no longer going to represent himself as a man" and "wanted to dress as a woman," *see* R. 51-3 (Rost 30(b)(6) Dep. at 135–36) (Page ID #667), falls squarely within the ambit of sex-based discrimination that *Price Waterhouse* and *Smith* forbid. For its part, the Funeral Home has failed to establish a non-discriminatory basis for Stephens's termination, and Rost admitted that he did not fire Stephens for any performance-related issues. *See* R. 51-3 (Rost 30(b)(6) Dep. at 109, 136) (Page ID #663, 667). We therefore agree with the district court that the Funeral Home discriminated against Stephens on the basis of her sex, in violation of Title VII.

The Funeral Home nevertheless argues that it has not violated Title VII because sex stereotyping is barred only when "the employer's reliance on stereotypes . . . result[s] in disparate treatment of employees because they are either male or female." Appellee Br. at 31. According to the Funeral Home, an employer does not engage in impermissible sex stereotyping when it requires its employees to conform to a sex-specific dress code—as it purportedly did here by requiring Stephens to abide by the dress code designated for the Funeral Home's male employees—because such a policy "impose[s] equal burdens on men and women," and thus does not single out an employee for disparate treatment based on that employee's sex. *Id.* at 12. In support of its position, the Funeral Home relies principally on *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc), and *Barker v. Taft Broadcasting Co.*, 549 F.2d 400 (6th Cir. 1977). *Jespersen* held that a sex-specific grooming code that imposed different but equally burdensome requirements on male and female employees would not violate Title VII. *See* 444 F.3d at 1109–11 (holding that the plaintiff failed to demonstrate how a grooming code that required women to wear makeup and banned men from wearing makeup was a violation of Title VII because the plaintiff failed to produce evidence showing that this sex-specific makeup policy was "more burdensome for women than for men"). *Barker*, for its part,

held that a sex-specific grooming code that was enforced equally as to male and female employees would not violate Title VII. *See* 549 F.2d at 401 (holding that a grooming code that established different hair-length limits for male and female employees did not violate Title VII because failure to comply with the code resulted in the same consequences for men and women). For three reasons, the Funeral Home's reliance on these cases is misplaced.

First, the central issue in *Jespersen* and Barker—whether certain sex-specific appearance requirements violate Title VII—is not before this court. We are not considering, in this case, whether the Funeral Home violated Title VII by requiring men to wear pant suits and women to wear skirt suits. Our question is instead whether the Funeral Home could legally terminate Stephens, notwithstanding that she fully intended to comply with the company's sex-specific dress code, simply because she refused to conform to the Funeral Home's notion of her sex. When the Funeral Home's actions are viewed in the proper context, no reasonable jury could believe that Stephens was not "target[ed] . . . for disparate treatment" and that "no sex stereotype factored into [the Funeral Home's] employment decision." *See* Appellee Br. at 19–20.

Second, even if we would permit certain sex-specific dress codes in a case where the issue was properly raised, we would not rely on either *Jespersen* or *Barker* to do so. *Barker* was decided before *Price Waterhouse*, and it in no way anticipated the Court's recognition that Title VII "strike[s] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Price Waterhouse*, 490 U.S. at 251, 109 S.Ct. 1775 (plurality) (quoting *Manhart*, 435 U.S. at 707 n.13, 98 S.Ct. 1370). Rather, according to *Barker*, "[w]hen Congress makes it unlawful for an employer to 'discriminate . . . on the basis of . . . sex . . .', without further explanation of its meaning, we should not readily infer that it meant something different than what the concept of discrimination has traditionally meant." 549 F.2d at 401–02 (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076, 52 U.S.C. § 2000e(k), *as recognized in Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 89, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983)). Of course, this is precisely the sentiment that *Price Waterhouse* "eviscerated" when it recognized that "Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms." *Smith*, 378 F.3d at 573 (citing *Price Waterhouse*, 490 U.S. at 251, 109 S.Ct. 1775). Indeed, *Barker*'s incompatibility with *Price Waterhouse* may explain why this court has not cited *Barker* since *Price Waterhouse* was decided.

As for *Jespersen*, that Ninth Circuit case is irreconcilable with our decision in *Smith*. Critical to *Jespersen*'s holding was the notion that the employer's "grooming standards," which required all female bartenders to wear makeup (and prohibited males from doing so), did not on their face violate Title VII because they did "not require [the plaintiff] to conform to a stereotypical image that would objectively impede her ability to perform her job." 444 F.3d at 1113. We reached the exact opposite conclusion in *Smith*, as we explained that requiring women to wear makeup does, in fact, constitute improper sex stereotyping. 378 F.3d at 574 ("After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the

discrimination would not occur but for the victim's sex."). And more broadly, our decision in *Smith* forecloses the *Jespersen* court's suggestion that sex stereotyping is permissible so long as the required conformity does not "impede [an employee's] ability to perform her job," *Jespersen*, 444 F.3d at 1113, as the *Smith* plaintiff did not and was not required to allege that being expected to adopt a more masculine appearance and manner interfered with his job performance. *Jespersen*'s incompatibility with *Smith* may explain why it has never been endorsed (or even cited) by this circuit—and why it should not be followed now.

[10] Finally, the Funeral Home misreads binding precedent when it suggests that sex stereotyping violates Title VII *only* when "the employer's sex stereotyping resulted in 'disparate treatment of men and women.' " Appellee Br. at 18 (quoting *Price Waterhouse*, 490 U.S. at 251, 109 S.Ct. 1775).[3] This interpretation of Title VII cannot be squared with our holding in *Smith*. There, we did not ask whether transgender persons transitioning from male to female were treated differently than transgender persons transitioning from female to male. Rather, we considered whether a transgender person was being discriminated against based on "his failure to conform to sex stereotypes concerning how a man should look and behave." *Smith*, 378 F.3d at 572. It is apparent from both *Price Waterhouse* and *Smith* that an employer engages in unlawful discrimination even if it expects both biologically male and female employees to conform to certain notions of how each should behave. *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 123, No. 15-3775, 2018 WL 1040820 (2d Cir. Feb. 26, 2018) (en banc) (plurality) ("[T]he employer in *Price Waterhouse* could not have defended itself by claiming that it fired a gender-nonconforming man as well as a gender-non-conforming woman any more than it could persuasively argue that two wrongs make a right.").

In short, the Funeral Home's sex-specific dress code does not preclude liability under Title VII. Even if the Funeral Home's dress code does not itself violate Title VII—an issue that is not before this court—the Funeral Home may not rely on its policy to combat the charge that it engaged in improper sex stereotyping when it fired Stephens for wishing to appear or behave in a manner that contradicts the Funeral Home's perception of how she should appear or behave based on her sex. Because the EEOC has presented unrefuted evidence that unlawful sex stereotyping was "at least a motivating factor in the [Funeral Home's] actions," *see White v. Columbus Metro. Hous. Auth.*, 429 F.3d 232, 238 (6th Cir. 2005) (quoting *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999)), and because we reject the Funeral Home's affirmative defenses (*see* Section II.B.3, *infra*), we **GRANT** summary judgment to the EEOC on its sex discrimination claim.

2. Discrimination on the Basis of Transgender/Transitioning Status

[11, 12] We also hold that discrimination on the basis of transgender and tran-

3. *See also* Appellee Br. at 16 ("It is a helpful exercise to think about *Price Waterhouse* and imagine that there was a dress code imposed which obligated Ms. Hopkins to wear a skirt while her male colleagues were obliged to wear pants. Had she simply been fired for wearing pants rather than a skirt, the case would have ended there—both sexes would have been equally burdened by the requirement to comply with their respective sex-specific standard. But what the firm could not do was fire her for being aggressive or macho when it was tolerating or rewarding the behavior among men—and when it did, it relied on a stereotype to treat her disparately from the men in the firm.").

sitioning status violates Title VII. The district court rejected this theory of liability at the motion-to-dismiss stage, holding that "transgender or transsexual status is currently not a protected class under Title VII." *R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F.Supp.3d at 598. The EEOC and Stephens argue that the district court's determination was erroneous because Title VII protects against sex stereotyping and "transgender discrimination is based on the non-conformance of an individual's gender identity and appearance with sex-based norms or expectations"; therefore, "discrimination because of an individual's transgender status is *always* based on gender-stereotypes: the stereotype that individuals will conform their appearance and behavior—whether their dress, the name they use, or other ways they present themselves—to the sex assigned them at birth." Appellant Br. at 24; *see also* Intervenor Br. at 10–15. The Funeral Home, in turn, argues that Title VII does not prohibit discrimination based on a person's transgender or transitioning status because "sex," for the purposes of Title VII, "refers to a binary characteristic for which there are only two classifications, male and female," and "which classification arises in a person based on their chromosomally driven physiology and reproductive function." Appellee Br. at 26. According to the Funeral Home, transgender status refers to "a person's self-assigned 'gender identity' " rather than a person's sex, and therefore such a status is not protected under Title VII. *Id.* at 26–27.

For two reasons, the EEOC and Stephens have the better argument. First, it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex. The Seventh Circuit's method of "isolat[ing] the significance of the plaintiff's sex to the employer's decision" to determine whether Title VII has been triggered illustrates this point. *See Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 345 (7th Cir. 2017). In *Hively*, the Seventh Circuit determined that Title VII prohibits discrimination on the basis of sexual orientation—a different question than the issue before this court—by asking whether the plaintiff, a self-described lesbian, would have been fired "if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same." *Id.* If the answer to that question is no, then the plaintiff has stated a "paradigmatic sex discrimination" claim. *See id.* Here, we ask whether Stephens would have been fired if Stephens had been a woman who sought to comply with the women's dress code. The answer quite obviously is no. This, in and of itself, confirms that Stephens's sex impermissibly affected Rost's decision to fire Stephens.

[13, 14] The court's analysis in *Schroer v. Billington*, 577 F.Supp.2d 293 (D.D.C. 2008), provides another useful way of framing the inquiry. There, the court noted that an employer who fires an employee because the employee converted from Christianity to Judaism has discriminated against the employee "because of religion," regardless of whether the employer feels any animus against either Christianity or Judaism, because "[d]iscrimination 'because of religion' easily encompasses discrimination because of a *change* of religion.'" *Id.* at 306 (emphasis in original). By the same token, discrimination "because of sex" inherently includes discrimination against employees because of a change in their sex. *See id.* at 307–08.[4] Here, there is

4. Moreover, discrimination because of a person's transgender, intersex, or sexually inde-

evidence that Rost at least partially based his employment decision on Stephens's desire to change her sex: Rost justified firing Stephens by explaining that Rost "sincerely believes that 'the Bible teaches that a person's sex (whether male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex,' " and "the Bible teaches that it is wrong for a biological male to deny his sex by dressing as a woman." [5] *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F.Supp.3d at 848 (quoting R. 55 (Def.'s Statement of Facts ¶ 28) (Page ID #1687); R. 53-3 (Rost 30(b)(6) Dep. ¶ 44) (Page ID #936)). As amici point out in their briefing, such statements demonstrate that "Ms. Stephens's sex necessarily factored into the decision to fire her." Equality Ohio Br. at 12; *cf. Hively*, 853 F.3d at 359 (Flaum, J., concurring) (arguing discrimination against a female employee because she is a lesbian is necessarily "motivated, in part, by . . . the employee's sex" because the employer is discriminating against the employee "because she is (A) a woman who is (B) sexually attracted to women").

[15] The Funeral Home argues that *Schroer*'s analogy is "structurally flawed" because, unlike religion, a person's sex cannot be changed; it is, instead, a biologically immutable trait. Appellee Br. at 30. We need not decide that issue; even if true, the Funeral Home's point is immaterial. As noted above, the Supreme Court made clear in *Price Waterhouse* that Title VII requires "gender [to] be irrelevant to employment decisions." 490 U.S. at 240, 109 S.Ct. 1775. Gender (or sex) is not being treated as "irrelevant to employment decisions" if an employee's attempt or desire to change his or her sex leads to an adverse employment decision.

[16] Second, discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping. As we recognized in *Smith*, a transgender person is someone who "fails to act and/or identify with his or her gender"—i.e., someone who is inherently "gender non-conforming." 378 F.3d at 575; *see also id.* at 568 (explaining that transgender status is characterized by the American Psychiatric Association as "a disjunction between an individual's sexual organs and sexual identity"). Thus, an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align. There

terminate status is no less actionable than discrimination because of a person's identification with two religions, an unorthodox religion, or no religion at all. And ''religious identity'' can be just as fluid, variable, and difficult to define as ''gender identity''; after all, both have ''a deeply personal, internal genesis that lacks a fixed external referent.'' Sue Landsittel, *Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII*, 104 NW. U. L. REV. 1147, 1172 (2010) (advocating for ''[t]he application of tests for religious identity to the problem of gender identity [because it] produces a more realistic, and therefore more appropriate, authentication framework than the current reliance on medical diagnoses and conformity with the gender binary'').

5. On the other hand, there is also evidence that Stephens was fired only because of her nonconforming appearance and behavior at work, and not because of her transgender identity. *See* R. 53-6 (Rost Dep. at 136–37) (Page ID #974) (At his deposition, when asked whether ''the reason you fired [Stephens], was it because [Stephens] claimed that he was really a woman; is that why you fired [Stephens] or was it because he claimed – or that he would no longer dress as a man,'' Rost answered: ''That he would no longer dress as a man,'' and when asked, ''if Stephens had told you that he believed that he was a woman, but would only present as a woman outside of work, would you have terminated him,'' Rost answered: ''No.'').

is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender nonconformity, and we see no reason to try.

[17] We did not expressly hold in *Smith* that discrimination on the basis of transgender status is unlawful, though the opinion has been read to say as much—both by this circuit and others. In *G.G. v. Gloucester County School Board*, 654 Fed. Appx. 606 (4th Cir. 2016), for instance, the Fourth Circuit described *Smith* as holding "that discrimination against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes." *Id.* at 607. And in *Dodds v. United States Department of Education*, 845 F.3d 217 (6th Cir. 2016), we refused to stay "a preliminary injunction ordering the school district to treat an eleven-year old transgender girl as a female and permit her to use the girls' restroom" because, among other things, the school district failed to show that it would likely succeed on the merits. *Id.* at 220–21. In so holding, we cited *Smith* as evidence that this circuit's "settled law" prohibits "[s]ex stereotyping based on a person's gender non-conforming behavior," *id.* at 221 (second quote quoting *Smith*, 378 F.3d at 575), and then pointed to out-of-circuit cases for the propositions that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes," *id.* (citing *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011)), and "[t]he weight of authority establishes that discrimination based on transgender status is already prohibited by the language of federal civil rights statutes," *id.* (quoting *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 729 (4th Cir.) (Davis, J., concurring), *cert. granted in part*, —— U.S. ——, 137 S.Ct. 369, 196 L.Ed.2d 283 (2016), *and vacated and remanded*, —— U.S. ——, 137 S.Ct. 1239, 197 L.Ed.2d 460 (2017)).[6] Such references support what we now directly hold: Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait.

The Funeral Home raises several arguments against this interpretation of Title VII, none of which we find persuasive. First, the Funeral Home contends that the Congress enacting Title VII understood "sex" to refer only to a person's "physiology and reproductive role," and not a person's "self-assigned 'gender identity.' " Appellee Br. at 25–26. But the drafters' failure to anticipate that Title VII would cover transgender status is of little interpretive value, because "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998); *see also Zarda*, 883 F.3d at 113–16 (majority opinion) (rejecting the argument that Title VII was not originally intended to protect employees against discrimination on the basis of sexual orientation, in part because the same argument "could also be said of multiple forms of discrimination that are [now] in-

6. We acknowledge that *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005), read *Smith* as focusing on "look and behav[ior]." *Id.* at 737 ("By alleging that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind defendant's actions, Smith stated a claim for relief pursuant to Title VII's prohibition of sex discrimination."). That is not surprising, however, given that only "look and behavior," not status, were at issue in *Barnes*.

disputably prohibited by Title VII ... [but] were initially believed to fall outside the scope of Title VII's prohibition," such as "sexual harassment and hostile work environment claims"). And in any event, *Smith* and *Price Waterhouse* preclude an interpretation of Title VII that reads "sex" to mean only individuals' "chromosomally driven physiology and reproductive function." *See* Appellee Br. at 26. Indeed, we criticized the district court in *Smith* for "relying on a series of pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection because 'Congress had a narrow view of sex in mind' and 'never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex.' " 378 F.3d at 572 (quoting *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984)) (alteration in original). According to *Smith*, such a limited view of Title VII's protections had been "eviscerated by *Price Waterhouse*." *Id.* at 573, 109 S.Ct. 1775. The Funeral Home's attempt to resurrect the reasoning of these earlier cases thus runs directly counter to *Smith*'s holding.

[18–21] In a related argument, the Funeral Home notes that both biologically male and biologically female persons may consider themselves transgender, such that transgender status is not unique to one biological sex. Appellee Br. at 27–28. It is true, of course, that an individual's biological sex does not dictate her transgender status; the two traits are not coterminous. But a trait need not be exclusive to one sex to nevertheless be a function of sex. As the Second Circuit explained in *Zarda*,

> Title VII does not ask whether a particular sex is discriminated against; it asks whether a particular "*individual*" is discriminated against "because of such *individual's* ... sex." Taking individuals as the unit of analysis, the question is not whether discrimination is borne only by men or only by women or even by both men and women; instead, the question is whether an individual is discriminated against because of his or her sex.

883 F.3d at 123 n.23 (plurality opinion) (emphasis in original) (quoting 42 U.S.C. § 2000e-2(a)(1)). Because an employer cannot discriminate against an employee for being transgender without considering that employee's biological sex, discrimination on the basis of transgender status necessarily entails discrimination on the basis of sex—no matter what sex the employee was born or wishes to be. By the same token, an employer need not discriminate based on a trait common to all men or women to violate Title VII. After all, a subset of both women and men decline to wear dresses or makeup, but discrimination against any woman on this basis would constitute sex discrimination under *Price Waterhouse*. *See Hively*, 853 F.3d at 346 n.3 ("[T]he Supreme Court has made it clear that a policy need not affect *every* woman [or every man] to constitute sex discrimination. ... A failure to discriminate against all women does not mean that an employer has not discriminated against one woman on the basis of sex.").

Nor can much be gleaned from the fact that later statutes, such as the Violence Against Women Act, expressly prohibit discrimination on the basis of "gender identity," while Title VII does not, *see* Appellee Br. at 28, because "Congress may certainly choose to use both a belt and suspenders to achieve its objectives," *Hively*, 853 F.3d at 344; *see also Yates v. United States*, —— U.S. ——, 135 S.Ct. 1074, 1096, 191 L.Ed.2d 64 (2015) (Kagan, J., dissenting) (noting presence of two overlapping provisions in a statute "may

have reflected belt-and-suspenders caution"). We have, in fact, already read Title VII to provide redundant statutory protections in a different context. In *In re Rodriguez*, 487 F.3d 1001 (6th Cir. 2007), for instance, we recognized that claims alleging discrimination on the basis of ethnicity may fall within Title VII's prohibition on discrimination on the basis of national origin, *see id.* at 1006 n.1, even though at least one other federal statute treats "national origin" and "ethnicity" as separate traits, *see* 20 U.S.C. § 1092(f)(1)(F)(ii). Moreover, Congress's failure to modify Title VII to include expressly gender identity "lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.' " *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (quoting *United States v. Wise*, 370 U.S. 405, 411, 82 S.Ct. 1354, 8 L.Ed.2d 590 (1962)). In short, nothing precludes discrimination based on transgender status from being viewed both as discrimination based on "gender identity" for certain statutes and, for the purposes of Title VII, discrimination on the basis of sex.

The Funeral Home places great emphasis on the fact that our published decision in *Smith* superseded an earlier decision that stated explicitly, as opposed to obliquely, that a plaintiff who "alleges discrimination based solely on his identification as a transsexual ... has alleged a claim of sex stereotyping pursuant to Title VII." *Smith v. City of Salem*, 369 F.3d 912, 922 (6th Cir.), *opinion amended and superseded*, 378 F.3d 566 (6th Cir. 2004). But such an amendment does not mean, as the Funeral Home contends, that the now-binding *Smith* opinion "directly rejected" the notion that Title VII prohibits discrimination on the basis of transgender status. *See* Appellee Br. at 31. The elimination of the language, which was not necessary to the decision, simply means that *Smith* did not expressly recognize Title VII protections for transgender persons based on identity. But *Smith*'s reasoning still leads us to the same conclusion.

We are also unpersuaded that our decision in *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2006), precludes the holding we issue today. We held in *Vickers* that a plaintiff cannot pursue a claim for impermissible sex stereotyping on the ground that his perceived sexual orientation fails to conform to gender norms unless he alleges that he was discriminated against for failing to "conform to traditional gender stereotypes in any observable way at work." *Id.* at 764. *Vickers* thus rejected the notion that "the act of identification with a particular group, in itself, is sufficiently gender non-conforming such that an employee who so identifies would, by this very identification, engage in conduct that would enable him to assert a successful sex stereotyping claim." *Id.* The *Vickers* court reasoned that recognizing such a claim would impermissibly "bootstrap protection for sexual orientation into Title VII." *Id.* (quoting *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005)). The Funeral Home insists that, under *Vickers*, Stephens's sex-stereotyping claim survives only to the extent that it concerns her "appearance or mannerisms on the job," *see id.* at 763, but not as it pertains to her underlying status as a transgender person.

The Funeral Home is wrong. First, *Vickers* does not control this case because *Vickers* concerned a different legal question. As the EEOC and amici Equality Ohio note, *Vickers* "addressed only whether Title VII forbids sexual orientation discrimination, not discrimination against a transgender individual." Appellant Br. at

30; *see also* Equality Ohio Br. at 16 n.7. While it is indisputable that "[a] panel of this Court cannot overrule the decision of another panel" when the "prior decision [constitutes] controlling authority," *Darrah v. City of Oak Park*, 255 F.3d 301, 309 (6th Cir. 2001) (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)), one case is not "controlling authority" over another if the two address substantially different legal issues, *cf. Int'l Ins. Co. v. Stonewall Ins. Co.*, 86 F.3d 601, 608 (6th Cir. 1996) (noting two panel decisions that "on the surface may appear contradictory" were reconcilable because "the result [in both cases wa]s heavily fact driven"). After all, we do not overrule a case by distinguishing it.

[22] Second, we are not bound by *Vickers* to the extent that it contravenes *Smith*. *See Darrah*, 255 F.3d at 310 ("[W]hen a later decision of this court conflicts with one of our prior published decisions, we are still bound by the holding of the earlier case."). As noted above, *Vickers* indicated that a sex-stereotyping claim is viable under Title VII only if a plaintiff alleges that he was discriminated against for failing to "conform to traditional gender stereotypes *in any observable way at work*." 453 F.3d at 764 (emphasis added). The *Vickers* court's new "observable-at-work" requirement is at odds with the holding in *Smith*, which did not limit sex-stereotyping claims to traits that are observable in the workplace. The "observable-at-work" requirement also contravenes our reasoning in *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005)—a binding decision that predated *Vickers* by more than a year—in which we held that a reasonable jury could conclude that a transgender plaintiff was discriminated against on the basis of his sex when, among other factors, his "ambiguous sexuality and his practice of dressing as a woman *outside of work* were well-known within the [workplace]." *Id.* at 738 (emphasis added).[7] From *Smith* and *Barnes*, it is clear that a plaintiff may state a claim under Title VII for discrimination based on gender nonconformance that is expressed outside of work. The *Vickers* court's efforts to develop a narrower rule are therefore not binding in this circuit.

Therefore, for the reasons set forth above, we hold that the EEOC could pursue a claim under Title VII on the ground that the Funeral Home discriminated against Stephens on the basis of her transgender status and transitioning identity. The EEOC should have had the opportunity, either through a motion for summary judgment or at trial, to establish that the Funeral Home violated Title VII's prohibition on discrimination on the basis of sex by firing Stephens because she was trans-

7. Oddly, the *Vickers* court appears to have recognized that its new "observable-at-work" requirement cannot be squared with earlier precedent. Immediately after announcing this new requirement, the *Vickers* court cited *Smith* for the proposition that "a plaintiff hoping to succeed on a claim of sex stereotyping [must] show that he 'fails to act *and/or identify with* his or her gender' "—a proposition that is necessarily broader than the narrow rule *Vickers* sought to announce. 453 F.3d at 764 (citing *Smith*, 378 F.3d at 575) (emphasis added). The *Vickers* court also seemingly recognized *Barnes* as binding authority, *see id.* (citing *Barnes*), but portrayed the decision as "affirming [the] district court's denial of defendant's motion for summary judgment as a matter of law on discrimination claim where pre-operative male-to-female transsexual was demoted based on his 'ambiguous sexuality and his practice of dressing as a woman' and his co-workers' assertions that he was 'not sufficiently masculine.' " *Id.* This summary is accurate as far as it goes, but it entirely omits the discussion in *Barnes* of discrimination against the plaintiff based on "his practice of dressing as a woman *outside of work*." 401 F.3d at 738 (emphasis added).

gender and transitioning from male to female.

3. Defenses to Title VII Liability

Having determined that the Funeral Home violated Title VII's prohibition on sex discrimination, we must now consider whether any defenses preclude enforcement of Title VII in this case. As noted above, the district court held that the EEOC's enforcement efforts must give way to the Religious Freedom Restoration Act ("RFRA"), which prohibits the government from enforcing a religiously neutral law against an individual if that law substantially burdens the individual's religious exercise and is not the least restrictive way to further a compelling government interest. *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F.Supp.3d at 857–64. The EEOC seeks reversal of this decision; the Funeral Home urges affirmance. In addition, certain amici ask us to affirm the district court's grant of summary judgment on different grounds—namely that Stephens falls within the "ministerial exception" to Title VII and is therefore not protected under the Act. *See* Public Advocate Br. at 20–24.

We hold that the Funeral Home does not qualify for the ministerial exception to Title VII; the Funeral Home's religious exercise would not be substantially burdened by continuing to employ Stephens without discriminating against her on the basis of sex stereotypes; the EEOC has established that it has a compelling interest in ensuring the Funeral Home complies with Title VII; and enforcement of Title VII is necessarily the least restrictive way to achieve that compelling interest. We therefore **REVERSE** the district court's grant of summary judgment in the Funeral Home's favor and **GRANT** summary judgment to the EEOC on the unlawful-termination claim.

a. Ministerial Exception

[23, 24] We turn first to the "ministerial exception" to Title VII, which is rooted in the First Amendment's religious protections, and which "preclude[s] application of [employment discrimination laws such as Title VII] to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012). "[I]n order for the ministerial exception to bar an employment discrimination claim, the employer must be a religious institution and the employee must have been a ministerial employee." *Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829, 833 (6th Cir. 2015) (quoting *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007)). "The ministerial exception is a highly circumscribed doctrine. It grew out of the special considerations raised by the employment claims of clergy, which 'concern[ ] internal church discipline, faith, and organization, all of which are governed by ecclesiastical rule, custom, and law.' " *Gen. Conf. Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 409 (6th Cir. 2010) (quoting *Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986)) (alteration in original).

[25] Public Advocate of the United States and its fellow amici argue that the ministerial exception applies in this case because (1) the exception applies both to religious and non-religious entities, and (2) Stephens is a ministerial employee. Public Advocate Br. at 20–24. Tellingly, however, the Funeral Home contends that the Funeral Home "is not a religious organization" and therefore, "the ministerial exception has no application" to this case. Appellee Br. at 35. Although the Funeral Home has not waived the ministerial-ex-

ception defense by failing to raise it, *see Conlon*, 777 F.3d at 836 (holding that private parties may not "waive the First Amendment's ministerial exception" because "[t]his constitutional protection is . . . structural"), we agree with the Funeral Home that the exception is inapplicable here.

As we made clear in *Conlon*, the ministerial exception applies only to "religious institution[s]." *Id.* at 833. While an institution need not be "a church, diocese, or synagogue, or an entity operated by a traditional religious organization," *id.* at 834 (quoting *Hollins*, 474 F.3d at 225), to qualify for the exception, the institution must be "marked by clear or obvious religious characteristics," *id.* at 834 (quoting *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004)). In accordance with these principles, we have previously determined that the InterVarsity Christian Fellowship/USA ("IVCF"), "an evangelical campus mission," constituted a religious organization for the purposes of the ministerial exception. *See id.* at 831, 833. IVCF described itself on its website as "faith-based religious organization" whose "purpose 'is to establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord.' " *Id.* at 831 (citation omitted). In addition, IVCF's website notified potential employees that it has the right to "hir[e] staff based on their religious beliefs so that all staff share the same religious commitment." *Id.* (citation omitted). Finally, IVCF required all employees "annually [to] reaffirm their agreement with IVCF's Purpose Statement and Doctrinal Basis." *Id.*

The Funeral Home, by comparison, has virtually no "religious characteristics." Unlike the campus mission in *Conlon*, the Funeral Home does not purport or seek to "establish and advance" Christian values. *See id.* As the EEOC notes, the Funeral Home "is not affiliated with any church; its articles of incorporation do not avow any religious purpose; its employees are not required to hold any particular religious views; and it employs and serves individuals of all religions." Appellant Reply Br. at 33–34 (citing R. 61 (Def.'s Counter Statement of Disputed Facts ¶¶ 25–27, 30, 37) (Page ID #1832–35)). Though the Funeral Home's mission statement declares that "its highest priority is to honor God in all that we do as a company and as individuals," R. 55 (Def.'s Statement of Facts ¶ 21) (Page ID #1686), the Funeral Home's sole public displays of faith, according to Rost, amount to placing "Daily Bread" devotionals and "Jesus Cards" with scriptural references in public places in the funeral homes, which clients may pick up if they wish, *see* R. 51-3 (Rost 30(b)(6) Dep. at 39–40) (Page ID #652). The Funeral Home does not decorate its rooms with "religious figures" because it does not want to "offend[ ] people of different religions." R. 61 (Def.'s Counter Statement of Disputed Facts ¶ 33) (Page ID # 1834). The Funeral Home is open every day, including on Christian holidays. *Id.* at 88–89 (Page ID #659–60). And while the employees are paid for federally recognized holidays, Easter is not a paid holiday. *Id.* at 89 (Page ID #660).

[26] Nor is Stephens a "ministerial employee" under *Hosanna-Tabor*. Following *Hosanna-Tabor*, we have identified four factors to assist courts in assessing whether an employee is a minister covered by the exception: (1) whether the employee's title "conveys a religious—as opposed to secular—meaning"; (2) whether the title reflects "a significant degree of religious training" that sets the employee "apart from laypersons"; (3) whether the employee serves "as an ambassador of the faith"

and serves a "leadership role within [the] church, school, and community"; and (4) whether the employee performs "important religious functions ... for the religious organization." *Conlon*, 777 F.3d at 834–35. Stephens's title—"Funeral Director"—conveys a purely secular function. The record does not reflect that Stephens has any religious training. Though Stephens has a public-facing role within the funeral home, she was not an "ambassador of [any] faith," and she did not perform "important religious functions," *see id.* at 835; rather, Rost's description of funeral directors' work identifies mostly secular tasks—making initial contact with the deceased's families, handling the removal of the remains to the funeral home, introducing other staff to the families, coaching the families through the first viewing, greeting the guests, and coordinating the families' "final farewell," R. 53-3 (Rost Aff. ¶¶ 14–33) (Page ID #930–35). The only responsibilities assigned to Stephens that could be construed as religious in nature were, "on limited occasions," to "facilitate" a family's clergy selection, "facilitate the first meeting of clergy and family members," and "play a role in building the family's confidence around the role the clergy will play, clarifying what type of religious message is desired, and integrating the clergy into the experience." *Id.* ¶ 20 (Page ID #932–33). Such responsibilities are a far cry from the duties ascribed to the employee in *Conlon*, which "included assisting others to cultivate 'intimacy with God and growth in Christ-like character through personal and corporate spiritual disciplines.' " 777 F.3d at 832. In short, Stephens was not a ministerial employee and the Funeral Home is not a religious institution, and therefore the ministerial exception plays no role in this case.

b. Religious Freedom Restoration Act

[27] Congress enacted RFRA in 1993 to resurrect and broaden the Free Exercise Clause jurisprudence that existed before the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), which overruled the approach to analyzing Free Exercise Clause claims set forth by *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). *See City of Boerne v. Flores*, 521 U.S. 507, 511–15, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). To that end, RFRA precludes the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb–1. RFRA thus contemplates a two-step burden-shifting analysis: First, a claimant must demonstrate that complying with a generally applicable law would substantially burden his religious exercise. Upon such a showing, the government must then establish that applying the law to the burdened individual is the least restrictive means of furthering a compelling government interest.

The questions now before us are whether (1) we ought to remand this case and preclude the Funeral Home from asserting a RFRA-based defense in the proceedings below because Stephens, a non-governmental party, joined this action as an intervenor on appeal; (2) if not, whether the Funeral Home adequately demonstrated that it would be substantially burdened by the application of Title VII in this case; (3) if so, whether the EEOC nevertheless demonstrated that application of a such a burden to the Funeral Home furthers a compelling governmental interest; and (4) if so, whether the application of such a

burden constitutes the least restrictive means of furthering that compelling interest. We address each inquiry in turn.

i. Applicability of the Religious Freedom Restoration Act

[28] We have previously made clear that "Congress intended RFRA to apply only to suits in which the government is a party." *Seventh-Day Adventists*, 617 F.3d at 410. Thus, if Stephens had initiated a private lawsuit against the Funeral Home to vindicate her rights under Title VII, the Funeral Home would be unable to invoke RFRA as a defense because the government would not have been party to the suit. *See id.* Now that Stephens has intervened in this suit, she argues that the case should be remanded to the district court with instructions barring the Funeral Home from asserting a RFRA defense to her individual claims. Intervenor Br. at 15. The EEOC supports Stephens's argument. EEOC Reply Br. at 31.

The Funeral Home, in turn, argues that the question of RFRA's applicability to Title VII suits between private parties "is a new and complicated issue that has never been a part of this case and has never been briefed by the parties." Appellee Br. at 34. Because Stephens's intervention on appeal was granted, in part, on her assurances that she "seeks only to raise arguments already within the scope of this appeal," D.E. 23 (Stephens Reply in Support of Mot. to Intervene at 8); *see also* D.E. 28-2 (March 27, 2017 Order at 2), the Funeral Home insists that permitting Stephens to argue now in favor of remand "would immensely prejudice the Funeral Home and undermine the Court's reasons for allowing Stephens's intervention in the first place," Appellee Br. at 34–35 (citing *Illinois Bell Tel. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990)).

The Funeral Home is correct. Stephens's reply brief in support of her motion to intervene insists that "no party to an appeal may broaden the scope of litigation beyond the issues raised before the district court." D.E. 23 (Stephens Reply in Support of Mot. to Intervene at 8) (citing *Thomas v. Arn*, 474 U.S. 140, 148, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985)). Though the district court noted in a footnote that "the Funeral Home could not assert a RFRA defense if Stephens had filed a Title VII suit on Stephens's own behalf," *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F.Supp.3d at 864 n.23, this argument was not briefed by the parties at the district-court level. Thus, in accordance with Stephens's own brief, she should not be permitted to argue for remand before this court.

Stephens nevertheless insists that "intervenors ... are permitted to present different arguments related to the principal parties' claims." Intervenor Reply Br. at 14 (citing *Grutter v. Bollinger*, 188 F.3d 394, 400–01 (6th Cir. 1999)). But in *Grutter*, this court determined that proposed intervenors ought to be able to present particular "defenses of affirmative action" that the principal party to the case (a university) might be disinclined to raise because of "internal and external institutional pressures." 188 F.3d at 400. Allowing intervenors to present particular defenses on the merits to judiciable claims is different than allowing intervenors to change the procedural course of litigation by virtue of their intervention.

[29] Moreover, we typically will not consider issues raised for the first time on appeal unless they are "presented with sufficient clarity and completeness and [their] resolution will materially advance the process of th[e] ... litigation." *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir. 1988) (cita-

tion omitted). The merits of a remand have been addressed only in passing by the parties, and thus have not been discussed with "sufficient clarity and completeness" to enable us to entertain Stephens's claim.[8]

ii. Prima Facie Case Under RFRA

[30, 31] To assert a viable defense under RFRA, a religious claimant must demonstrate that the government action at issue "would (1) substantially burden (2) a sincere (3) religious exercise." *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 428, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006). In reviewing such a claim, courts must not evaluate whether asserted "religious beliefs are mistaken or insubstantial." *Burwell v. Hobby Lobby Stores, Inc.*, —— U.S. ——, 134 S.Ct. 2751, 2779, 189 L.Ed.2d 675 (2014). Rather, courts must assess "whether the line drawn reflects 'an honest conviction.' " *Id.* (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981)). In addition, RFRA, as amended by the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).

[32] The EEOC argues that the Funeral Home's RFRA defense must fail because "RFRA protects religious exercise, not religious beliefs," Appellant Br. at 41, and the Funeral Home has failed to "identif[y] how continuing to employ Stephens after, or during, her transition would interfere with any religious 'action or practice,' " *id.* at 43 (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008)). The Funeral Home, in turn, contends that the "very operation of [the Funeral Home] constitutes protected religious exercise" because Rost feels compelled by his faith to "serve grieving people" through the funeral home, and thus "[r]equiring [the Funeral Home] to authorize a male funeral director to wear the uniform for female funeral directors would directly interfere with—and thus impose a substantial burden on—[the Funeral Home's] ability to carry out Rost's religious exercise of caring for the grieving." Appellee Br. at 38.

If we take Rost's assertions regarding his religious beliefs as sincere, which all parties urge us to do, then we must treat Rost's running of the funeral home as a religious exercise—even though Rost does not suggest that ministering to grieving mourners by operating a funeral home is a tenet of his religion, more broadly. *See United States v. Sterling*, 75 M.J. 407, 415 (C.A.A.F. 2016) (noting that conduct that "was claimed to be religiously motivated at least in part ... falls within RFRA's expansive definition of 'religious exercise' "), *cert. denied*, —— U.S. ——, 137 S.Ct. 2212, 198 L.Ed.2d 657 (2017). The question then

8. For a similar reason, we decline to consider the argument raised by several amici that reading RFRA to "permit a religious accommodation that imposes material costs on third parties or interferes with the exercise of rights held by others" would violate the Establishment Clause of the First Amendment. *See* Private Rights/Public Conscience Br. at 15; *see also id.* at 5–15; Americans United Br. at 6–15. Amici may not raise "issues or arguments [that] ... 'exceed those properly raised by the parties.' " *Shoemaker v. City of Howell*, 795 F.3d 553, 562 (6th Cir. 2015) (quoting *Cellnet Commc'ns, Inc. v. FCC*, 149 F.3d 429, 433 (6th Cir. 1998)). Although Stephens notes that the Establishment Clause "requires the government and courts to account for the harms a religious exemption to Title VII would impose on employees," Intervenor Br. at 26, no party to this action presses the broad constitutional argument that amici seek to present. We therefore will not address the merits of amici's position.

becomes whether the Funeral Home has identified any way in which continuing to employ Stephens would substantially burden Rost's ability to serve mourners. The Funeral Home purports to identify two burdens. "First, allowing a funeral director to wear the uniform for members of the opposite sex would often create distractions for the deceased's loved ones and thereby hinder their healing process (and [the Funeral Home's] ministry)," and second, "forcing [the Funeral Home] to violate Rost's faith ... would significantly pressure Rost to leave the funeral industry and end his ministry to grieving people." Appellee Br. at 38. Neither alleged burden is "substantial" within the meaning of RFRA.

The Funeral Home's first alleged burden—that Stephens will present a distraction that will obstruct Rost's ability to serve grieving families—is premised on presumed biases. As the EEOC observes, the Funeral Home's argument is based on "a view that Stephens is a 'man' and would be perceived as such even after her gender transition," as well as on the "assumption that a transgender funeral director would so disturb clients as to 'hinder healing.'" Appellant Reply Br. at 19. The factual premises underlying this purported burden are wholly unsupported in the record. Rost testified that he has never seen Stephens in anything other than a suit and tie and does not know how Stephens would have looked when presenting as a woman. R. 54-5 (Rost 30(b)(6) Dep. at 60–61) (Page ID #1362). Rost's assertion that he believes his clients would be disturbed by Stephens's appearance during and after her transition to the point that their healing from their loved ones' deaths would be hindered, *see* R. 55 (Def.'s Statement of Facts ¶ 78) (Page ID #1697), at the very least raises a material question of fact as to whether his clients would actually be distracted, which cannot be resolved in the Funeral Home's favor at the summary-judgment stage. *See Tree of Life Christian Sch. v. City of Upper Arlington*, 823 F.3d 365, 371–72 (6th Cir. 2016) (holding that this court "cannot *assume* ... a fact" at the summary judgment stage); *see also Guess? Inc. v. United States*, 944 F.2d 855, 858 (Fed. Cir. 1991) (in case where manufacturer's eligibility for certain statutory refund on import tariffs turned on whether foreign customers preferred U.S.-made jeans more than foreign-made jeans, court held that the manufacturer's averred *belief* regarding foreign customers' preferences was not conclusive; instead, there remained a genuine dispute of material fact as to foreign customers' *actual* preferences). Thus, even if we were to find the Funeral Home's argument legally cognizable, we would not affirm a finding of substantial burden based on a contested and unsupported assertion of fact.

[33] But more to the point, we hold as a matter of law that a religious claimant cannot rely on customers' presumed biases to establish a substantial burden under RFRA. Though we have seemingly not had occasion to address the issue, other circuits have considered whether and when to account for customer biases in justifying discriminatory employment practices. In particular, courts asked to determine whether customers' biases may render sex a "bona fide occupational qualification" under Title VII have held that "it would be totally anomalous ... to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid." *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971); *see also Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 795, 799 (8th Cir. 1993) (holding grooming policy for pizza deliverymen that had disparate impact on African-American employees was not justified by customer preferences for clean-

shaven deliverymen because "[t]he existence of a beard on the face of a delivery man does not affect in any manner Domino's ability to make or deliver pizzas to their customers"); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981) (rejecting claim that promoting a female employee would " 'destroy the essence' of [the defendant's] business"—a theory based on the premise that South American clients would not want to work with a female vice-president—because biased customer preferences did not make being a man a "bona fide occupational qualification" for the position at issue). District courts within this circuit have endorsed these out-of-circuit opinions. *See, e.g.*, *Local 567 Am. Fed'n of State, Cty., & Mun. Emps. v. Mich. Council 25, Am. Fed'n of State, Cty., & Mun. Emps.*, 635 F.Supp. 1010, 1012 (E.D. Mich. 1986) (citing *Diaz*, 442 F.2d 385, and *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969), for the proposition that "[a]ssertions of sex-based employee classification cannot be made on the basis of stereotypes or customer preferences").

Of course, cases like *Diaz*, *Fernandez*, and *Bradley* concern a different situation than the one at hand. We could agree that courts should not credit customers' prejudicial notions of what men and women can do when considering whether sex constitutes a "bona fide occupational qualification" for a given position while nonetheless recognizing that those same prejudices have practical effects that would substantially burden Rost's religious practice (i.e., the operation of his business) in this case. But the Ninth Circuit rejected similar reasoning in *Fernandez*, and we reject it here. In *Fernandez*, the Ninth Circuit held that customer preferences could not transform a person's gender into a relevant consideration for a particular position *even if* the record supported the idea that the employer's business would suffer from promoting a woman because a large swath of clients would refuse to work with a female vice-president. *See* 653 F.2d at 1276–77. Just as the *Fernandez* court refused to treat discriminatory promotion practices as critical to an employer's business, notwithstanding any evidence to that effect in the record, so too we refuse to treat discriminatory policies as essential to Rost's business—or, by association, his religious exercise.

[34] The Funeral Home's second alleged burden also fails. Under *Holt v. Hobbs*, —— U.S. ——, 135 S.Ct. 853, 190 L.Ed.2d 747 (2015), a government action that "puts [a religious practitioner] to th[e] choice" of " 'engag[ing] in conduct that seriously violates [his] religious beliefs' [or] . . . fac[ing] serious" consequences constitutes a substantial burden for the purposes of RFRA. *See id.* at 862 (quoting *Hobby Lobby*, 134 S.Ct. at 2775). Here, Rost contends that he is being put to such a choice, as he either must "purchase female attire" for Stephens or authorize her "to dress in female attire *while representing* [the Funeral Home] and serving the bereaved," which purportedly violates Rost's religious beliefs, or else face "significant[ ] pressure . . . to leave the funeral industry and end his ministry to grieving people." Appellee Br. at 38–39 (emphasis in original). Neither of these purported choices can be considered a "substantial burden" under RFRA.

First, though Rost currently provides his male employees with suits and his female employees with stipends to pay for clothing, this benefit is not legally required and Rost does not suggest that the benefit is religiously compelled. *See* Appellant Br. at 49 ("[T]he EEOC's suit would require only that *if* Rost provides a clothing benefit to his male employees, he provide a comparable benefit (which could be in-kind, or in cash) to his female employ-

ees."); R. 54-2 (Rost Aff.) (Page ID 1326–37) (no suggestion that clothing benefit is religiously motivated). In this regard, Rost is unlike the employers in *Hobby Lobby*, who rejected the idea that they could simply refuse to provide health care altogether and pay the associated penalty (which would allow them to avoid providing access to contraceptives in violation of their beliefs) because they felt religiously compelled to provide their employees with health insurance. *See* 134 S.Ct. at 2776. And while "it is predictable that the companies [in *Hobby Lobby*] would face a competitive disadvantage in retaining and attracting skilled workers" if they failed to provide health insurance, *id.* at 2777, the record here does not indicate that the Funeral Home's clothing benefit is necessary to attract workers; in fact, until the EEOC commenced the present action, the Funeral Home did not provide any sort of clothing benefit to its female employees. Thus, Rost is not being forced to choose between providing Stephens with clothing or else leaving the business; this is a predicament of Rost's own making.

Second, simply permitting Stephens to wear attire that reflects a conception of gender that is at odds with Rost's religious beliefs is not a substantial burden under RFRA. We presume that the "line [Rost] draw[s]"—namely, that permitting Stephens to represent herself as a woman would cause him to "violate God's commands" because it would make him "directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift," R. 54-2 (Rost Aff. ¶¶ 43, 45) (Page ID #1334–35)—constitutes "an honest conviction." *See Hobby Lobby*, 134 S.Ct. at 2779 (quoting *Thomas*, 450 U.S. at 716, 101 S.Ct. 1425). But we hold that, as a matter of law, tolerating Stephens's understanding of her sex and gender identity is not tantamount to supporting it.

Most circuits, including this one, have recognized that a party can sincerely believe that he is being coerced into engaging in conduct that violates his religious convictions without actually, as a matter of law, being so engaged. Courts have recently confronted this issue when non-profit organizations whose religious beliefs prohibit them "from paying for, providing, or facilitating the distribution of contraceptives," or in any way "be[ing] complicit in the provision of contraception" argued that the Affordable Care Act's opt-out procedure—which enables organizations with religious objections to the contraceptive mandate to avoid providing such coverage by either filling out a form certifying that they have a religious objection to providing contraceptive coverage or directly notifying the Department of Health and Human Services of the religious objection—substantially burdens their religious practice. *See Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122, 1132–33, 1143 (11th Cir. 2016).

Eight of the nine circuits to review the issue, including this court, have determined that the opt-out process does not constitute a substantial burden. *See id.* at 1141 (collecting cases); *see also Mich. Catholic Conf. & Catholic Family Servs. v. Burwell*, 807 F.3d 738 (6th Cir. 2015), *cert. granted, judgment vacated sub nom. Mich. Catholic Conf. v. Burwell*, —— U.S. ——, 136 S.Ct. 2450, 195 L.Ed.2d 261 (2016).[9] The courts reached this conclusion by examining the Affordable Care Act's provisions and determining that it was the statute—and not the employer's act of opting out—that "entitle[d] plan participants and

9. Though a number of these decisions have been vacated on grounds that are not relevant to this case, their reasoning remains useful here.

beneficiaries to contraceptive coverage." *See, e.g.*, *Eternal Word*, 818 F.3d at 1148–49. As a result, the employers' engagement with the opt-out process, though legally significant in that it leads the government to provide the organizations' employees with access to contraceptive coverage through an alternative route, does not mean the employers are facilitating the provision of contraceptives in a way that violates their religious practice. *See id.*

We view the Funeral Home's compliance with antidiscrimination laws in much the same light. Rost may sincerely believe that, by retaining Stephens as an employee, he is supporting and endorsing Stephens's views regarding the mutability of sex. But as a matter of law, bare compliance with Title VII—without actually assisting or facilitating Stephens's transition efforts—does not amount to an endorsement of Stephens's views. As much is clear from the Supreme Court's Free Speech jurisprudence, in which the Court has held that a statute requiring law schools to provide military and nonmilitary recruiters an equal opportunity to recruit students on campus was not improperly compelling schools to endorse the military's policies because "[n]othing about recruiting suggests that law schools agree with any speech by recruiters," and "students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (citing *Bd. of Ed. of Westside Cmty. Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 250, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (plurality opinion)); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841–42, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (being required to provide funds on an equal basis to religious as well as secular student publications does not constitute state university's support for students' religious messages). Similarly, here, requiring the Funeral Home to refrain from firing an employee with different religious views from Rost does not, as a matter of law, mean that Rost is endorsing or supporting those views. Indeed, Rost's own behavior suggests that he sees the difference between employment and endorsement, as he employs individuals of any or no faith, "permits employees to wear Jewish head coverings for Jewish services," and "even testified that he is *not* endorsing his employee's religious beliefs by employing them." Appellant Reply Br. at 18–19 (citing R. 61 (Def.'s Counter Statement of Disputed Facts ¶¶ 31, 37, 38) (Page ID #1834–36); R. 51-3 (Rost Dep. at 41–42) (Page ID #653)).[10]

At bottom, the fact that Rost sincerely believes that he is being compelled to make such an endorsement does not make it so. *Cf. Eternal Word*, 818 F.3d at 1145 ("We reject a framework that takes away from courts the responsibility to decide what action the government requires and leaves that answer entirely to the religious adherent. Such a framework improperly substitutes religious belief for legal analysis regarding the operation of federal law."). Accordingly, requiring Rost to comply with Title VII's proscriptions on dis-

10. Even ignoring any adverse inferences that might be drawn from the incongruity between Rost's earlier deposition testimony and the Funeral Home's current litigation position, as we must do when considering whether summary judgment is appropriate in the EEOC's favor, we conclude as a matter of law that Rost does not express "support[ ] [for] the idea that sex is a changeable social construct rather than an immutable God-given gift" by continuing to hire Stephens, *see* R. 54-2 (Rost Aff. ¶¶ 43, 45) (Page ID #1334–35)—even if Rost sincerely believes otherwise.

crimination does not substantially burden his religious practice. The district court therefore erred in granting summary judgment to the Funeral Home on the basis of its RFRA defense, and we **REVERSE** the district court's decision on this ground. As Rost's purported burdens are insufficient as a matter of law, we **GRANT** summary judgment to the EEOC with respect to the Funeral Home's RFRA defense.

iii. Strict Scrutiny Test

Because the Funeral Home has not established that Rost's religious exercise would be substantially burdened by requiring the Funeral Home to comply with Title VII, we do not need to consider whether the EEOC has adequately demonstrated that enforcing Title VII in this case is the least restrictive means of furthering a compelling government interest. However, in the interest of completeness, we reach this issue and conclude that the EEOC has satisfied its burden. We therefore **GRANT** summary judgment to the EEOC with regard to the Funeral Home's RFRA defense on the alternative grounds that the EEOC's enforcement action in this case survives strict scrutiny.

(a) Compelling Government Interest

[35, 36] Under the "to the person" test, the EEOC must demonstrate that its compelling interest "is satisfied through application of the challenged law [to] ... the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales*, 546 U.S. at 430–31, 126 S.Ct. 1211 (citing 42 U.S.C. § 2000bb–1(b)). This requires "look[ing] beyond broadly formulated interests justifying the general applicability of government mandates and scrutiniz[ing] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431, 126 S.Ct. 1211.

[37] As an initial matter, the Funeral Home does not seem to dispute that the EEOC "has a compelling interest in the 'elimination of workplace discrimination, including sex discrimination.' " Appellee Br. at 41 (quoting Appellant Br. at 51).[11] However, the Funeral Home criticizes the EEOC for "cit[ing] a general, broadly formulated interest" to support enforcing Title VII in this case. *Id.* According to the Funeral Home, the relevant inquiry is whether the EEOC has a "specific interest in forcing [the Funeral Home] to allow its male funeral directors to wear the uniform for female funeral directors while on the job." *Id.* The EEOC instead asks whether its interest in "eradicating employment discrimination" is furthered by ensuring that Stephens does not suffer discrimination (either on the basis of sex-stereotyping or her transgender status), lose her livelihood, or face the emotional pain and suffering of being effectively told "that as a transgender woman she is not valued or able to make workplace contributions." Appellant Br. at 52, 54 (citing *Lusardi v. McHugh*, EEOC DOC 0120133395, 2015 WL 1607756, at *1 (E.E.O.C. Apr. 1, 2015)). Stephens similarly argues that "Title VII serves a compelling interest in eradicating all the forms of invidious employment discrimination proscribed by the statute," and points to studies demonstrating that transgender people have experienced particularly high rates of "bodily harm, violence, and discrimination because of their transgender status." Intervenor Br. at 21, 23–25.

11. While the district court did not hold that the EEOC had conclusively established the "compelling interest" element of its opposition to the Funeral Home's RFRA defense, it assumed so arguendo. *See R.G. & G.R. Harris Funeral Homes, Inc.,* 201 F.Supp.3d at 857–59.

The Funeral Home's construction of the compelling-interest test is off-base. Rather than focusing on the EEOC's claim—that the Funeral Home terminated Stephens because of her proposed gender nonconforming behavior—the Funeral Home's test focuses instead on its defense (discussed above) that the Funeral Home merely wishes to enforce an appropriate workplace uniform. But the Funeral Home has not identified any cases where the government's compelling interest was framed as its interest in disturbing a company's workplace policies. For instance, in *Hobby Lobby*, the issue, which the Court ultimately declined to adjudicate, was whether the government's "interest in guaranteeing cost-free access to the four challenged contraceptive methods" was compelling—not whether the government had a compelling interest in requiring closely held organizations to act in a way that conflicted with their religious practice. *See* 134 S.Ct. at 2780.

The Supreme Court's analysis in cases like *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), and *Holt* guides our approach. In those cases, the Court ultimately determined that the interests *generally* served by a given government policy or statute would not be "compromised" by granting an exemption to a particular individual or group. *See Holt*, 135 S.Ct. at 863. Thus, in *Yoder*, the Court held that the interests furthered by the government's requirement of compulsory education for children through the age of sixteen (i.e., "to prepare citizens to participate effectively and intelligently in our open political system" and to "prepare[ ] individuals to be self-reliant and self-sufficient participants in society") were not harmed by granting an exemption to the Amish, who do not need to be prepared "for life in modern society" and whose own traditions adequately ensure self-sufficiency. 406 U.S. at 221–22, 92 S.Ct. 1526. Similarly, in *Holt*, the Court recognized that the Department of Corrections has a compelling interest in preventing prisoners from hiding contraband on their persons, which is generally effectuated by requiring prisoners to adhere to a strict grooming policy, but the Court failed to see how the Department's "compelling interest in staunching the flow of contraband into and within its facilities . . . would be seriously compromised by allowing an inmate to grow a ½-inch beard." 135 S.Ct. at 863.

[38] Here, the same framework leads to the opposite conclusion. Failing to enforce Title VII against the Funeral Home means the EEOC would be allowing a particular person—Stephens—to suffer discrimination, and such an outcome is directly contrary to the EEOC's compelling interest in combating discrimination in the workforce. *See, e.g.*, *United States v. Burke*, 504 U.S. 229, 238, 112 S.Ct. 1867, 119 L.Ed.2d 34 (1992) ("[I]t is beyond question that discrimination in employment on the basis of sex . . . is, as . . . this Court consistently has held, an invidious practice that causes grave harm to its victims.").[12] In this regard, this case is

12. Courts have repeatedly acknowledged that Title VII serves a compelling interest in eradicating all forms of invidious employment discrimination proscribed by the statute. *See, e.g., EEOC v. Miss. Coll.*, 626 F.2d 477, 488–89 (5th Cir. 1980). As the Supreme Court stated, the "stigmatizing injury" of discrimination, "and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); *see also EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982) ("By enacting Title VII, Congress clearly targeted the elimination of all forms of discrimination as a 'highest priority.' Con-

analogous to *Eternal Word*, in which the Eleventh Circuit determined that the government had a compelling interest in requiring a particular nonprofit organization with religious objections to the Affordable Care Act's contraceptive mandate to follow the procedures associated with obtaining an accommodation to the Act because

> applying the accommodation procedure *to the plaintiffs in these cases* furthers [the government's] interests because the accommodation ensures that the plaintiffs' female plan participants and beneficiaries—who may or may not share the same religious beliefs as their employer—have access to contraception without cost sharing or additional administrative burdens as the ACA requires.

818 F.3d at 1155 (emphasis added). The *Eternal Word* court reasoned that "[u]nlike the exception made in *Yoder* for Amish children," who would be adequately prepared for adulthood even without compulsory education, the "poor health outcomes related to unintended or poorly timed pregnancies apply to the plaintiffs' female plan participants or beneficiaries and their children just as they do to the general population." *Id.* Similarly, here, the EEOC's compelling interest in eradicating discrimination applies with as much force to Stephens as to any other employee discriminated against based on sex.

It is true, of course, that the specific harms the EEOC identifies in this case, such as depriving Stephens of her livelihood and harming her sense of self-worth, are simply permutations of the generic harm that is always suffered in employment discrimination cases. But *O Centro*'s "to the person" test does not mean that the government has a compelling interest in enforcing the laws only when the failure to enforce would lead to uniquely harmful consequences. Rather, the question is whether "the asserted harm of granting specific exemptions to particular religious claimants" is sufficiently great to require compliance with the law. *O Centro*, 546 U.S. at 431, 126 S.Ct. 1211. Here, for the reasons stated above, the EEOC has adequately demonstrated that Stephens has and would suffer substantial harm if we exempted the Funeral Home from Title VII's requirements.

Finally, we reject the Funeral Home's claim that it should receive an exemption, notwithstanding any harm to Stephens or the EEOC's interest in eradicating discrimination, because "the constitutional guarantee of free exercise[,] effectuated here via RFRA ... [,] is a higher-order right that necessarily supersedes a conflicting statutory right," Appellee Br. at 42. This point warrants little discussion. The Supreme Court has already determined that RFRA does not, in fact, "effectuate ... the First Amendment's guarantee of free exercise," *id.*, because it sweeps more broadly than the Constitution demands. *See Boerne*, 521 U.S. at 532, 117 S.Ct. 2157. And in any event, the Supreme Court has expressly recognized that compelling interests can, at times, override religious beliefs—even those that are squarely protected by the Free Exercise Clause. *See Cutter v. Wilkinson*, 544 U.S. 709, 722, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) ("We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override oth-

gress' purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions."), *abrogation on other grounds recognized by Am. Friends Serv. Comm. Corp. v. Thornburgh,* 951 F.2d 957, 960 (9th Cir. 1991).

er significant interests."). We therefore decline to hoist automatically Rost's religious interests above other compelling governmental concerns. The undisputed record demonstrates that Stephens has been and would be harmed by the Funeral Home's discriminatory practices in this case, and the EEOC has a compelling interest in eradicating and remedying such discrimination.

(b) Least Restrictive Means

[39–41] The final inquiry under RFRA is whether there exist "other means of achieving [the government's] desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]." *Hobby Lobby*, 134 S.Ct. at 2780 (citing 42 U.S.C. §§ 2000bb-1(a), (b)). "The least-restrictive-means standard is exceptionally demanding," *id.* (citing *Boerne*, 521 U.S. at 532, 117 S.Ct. 2157), and the EEOC bears the burden of showing that burdening the Funeral Home's religious exercise constitutes the least restrictive means of furthering its compelling interests, *see id.* at 2779. Where an alternative option exists that furthers the government's interest "equally well," *see id.* at 2782, the government "must use it," *Holt*, 135 S.Ct. at 864 (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 815, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000)). In conducting the least-restrictive-alternative analysis, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Hobby Lobby*, 134 S.Ct. at 2781 n.37 (quoting *Cutter*, 544 U.S. at 720, 125 S.Ct. 2113). Cost to the government may also be "an important factor in the least-restrictive-means analysis." *Id.* at 2781.

[42] The district court found that requiring the Funeral Home to adopt a gender-neutral dress code would constitute a less restrictive alternative to enforcing Title VII in this case, and granted the Funeral Home summary judgment on this ground. According to the district court, the Funeral Home engaged in illegal sex stereotyping only with respect to "the clothing Stephens [c]ould wear at work," and therefore a gender-neutral dress code would resolve the case because Stephens would not be forced to dress in a way that conforms to Rost's conception of Stephens's sex and Rost would not be compelled to authorize Stephens to dress in a way that violates Rost's religious beliefs. *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F.Supp.3d at 861, 863.

Neither party endorses the district court's proposed alternative, and for good reason. The district court's suggestion, although appealing in its tidiness, is tenable only if we excise from the case evidence of sex stereotyping in areas other than attire. Though Rost does repeatedly say that he terminated Stephens because she "wanted to *dress* as a woman" and "would no longer *dress* as a man," *see* R. 54-5 (Rost 30(b)(6) Dep. at 136–37) (Page ID #1372) (emphasis added), the record also contains uncontroverted evidence that Rost's reasons for terminating Stephens extended to other aspects of Stephens's intended presentation. For instance, Rost stated that he fired Stephens because Stephens "was no longer going to *represent himself* as a man," *id.* at 136 (Page ID #1372) (emphasis added), and Rost insisted that Stephens presenting as a female would disrupt clients' healing process because female clients would have to "share a bathroom with a man dressed up as a woman," *id.* at 74, 138–39 (Page ID #1365, 1373). The record thus compels the finding that Rost's concerns extended beyond Stephens's attire and reached Stephens's appearance and behavior more generally.

At the summary-judgment stage, where a court may not "make credibility determi-

nations, weigh the evidence, or draw [adverse] inferences from the facts," *Terry Barr Sales Agency, Inc. v. All-Lock Co.*, 96 F.3d 174, 178 (6th Cir. 1996) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)), the district court was required to account for the evidence of Rost's non-clothing-based sex stereotyping in determining whether a proposed less restrictive alternative furthered the government's "stated interests equally [as] well," *Hobby Lobby*, 134 S.Ct. at 2782. Here, as the evidence above shows, merely altering the Funeral Home's dress code would not address the discrimination Stephens faced because of her broader desire "to represent [her]self as a [wo]man." R. 54-5 (Rost 30(b)(6) Dep. at 136) (Page ID #1372). Indeed, the Funeral Home's counsel conceded at oral argument that Rost would have objected to Stephens's coming "to work presenting clearly as a woman and acting as a woman," regardless of whether Stephens wore a man's suit, because that "would contradict [Rost's] sincerely held religious beliefs." *See* Oral Arg. at 46:50–47:46.

The Funeral Home's proposed alternative—to "permit businesses to allow the enforcement of sex-specific dress codes for employees who are public-facing representatives of their employer, so long as the dress code imposes equal burdens on the sexes and does not affect employee dress outside of work," Appellee Br. at 44–45—is equally flawed. The Funeral Home's suggestion would do nothing to advance the government's compelling interest in preventing and remedying discrimination against Stephens based on her refusal to conform at work to stereotypical notions of how biologically male persons should dress, appear, behave, and identify. Regardless of whether the EEOC has a compelling interest in combating sex-specific dress codes—a point that is not at issue in this case—the EEOC does have a compelling interest in ensuring that the Funeral Home does not discriminate against its employees on the basis of their sex. The Funeral Home's proposed alternative sidelines this interest entirely.[13]

The EEOC, Stephens, and several amici argue that searching for an alternative to Title VII is futile because enforcing Title VII is itself the least restrictive way to further EEOC's interest in eradicating discrimination based on sex stereotypes from the workplace. *See, e.g.*, Appellant Br. at 55–61; Intervenor Br. at 27–33. We agree.

To start, the Supreme Court has previously acknowledged that "there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA." *O Centro*, 546 U.S. at 436, 126 S.Ct. 1211. The Court highlighted *Braunfeld v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961), as an example of a case where the "need for uniformity" trumped "claims for religious exemptions."

13. In its district court briefing, the Funeral Home proposed three additional purportedly less restrictive alternatives: the government could hire Stephens; the government could pay Stephens a full salary and benefits until she secures comparable employment; or the government could provide incentives to other employers to hire Stephens and allow her to dress as she pleases. R. 67 (Def.'s Reply Mem. of Law in Support of Def.'s Mot. for Summ. J. at 17–18) (Page ID #2117–18). Not only do these proposals fail to further the EEOC's interest enabling Stephens to work for the Funeral Home without facing discrimination, but they also fail to consider the cost to the government, which is "an important factor in the least-restrictive-means analysis." *Hobby Lobby*, 134 S.Ct. at 2781. We agree with the EEOC that the Funeral Home's suggestions—which it no longer pushes on appeal—are not viable alternatives to enforcing Title VII in this case, as they do not serve the EEOC's interest in eradicating discrimination "equally well." *See id.* at 2782.

O Centro, 546 U.S. at 435, 126 S.Ct. 1211. In *Braunfeld*, the plurality "denied a claimed exception to Sunday closing laws, in part because . . . [t]he whole point of a 'uniform day of rest for all workers' would have been defeated by exceptions." *O Centro*, 546 U.S. at 435, 126 S.Ct. 1211 (quoting *Sherbert*, 374 U.S. at 408, 83 S.Ct. 1790 (discussing *Braunfeld*)). *Braunfeld* thus serves as a particularly apt case to consider here, as it too concerned an attempt by an employer to seek an exemption that would elevate its religious practices above a government policy designed to benefit employees. If the government's interest in a "uniform day of rest for all workers" is sufficiently weighty to preclude exemptions, *see O Centro*, 546 U.S. at 435, 126 S.Ct. 1211, then surely the government's interest in uniformly eradicating discrimination against employees exerts just as much force.

The Court seemingly recognized Title VII's ability to override RFRA in *Hobby Lobby*, as the majority opinion stated that its decision should not be read as providing a "shield" to those who seek to "cloak[ ] as religious practice" their efforts to engage in "discrimination in hiring, for example on the basis of race." 134 S.Ct. at 2783. As the *Hobby Lobby* Court explained, "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." *Id.* We understand this to mean that enforcement actions brought under Title VII, which aims to "provid[e] an equal opportunity to participate in the workforce without regard to race" and an array of other protected traits, *see id.*, will necessarily defeat RFRA defenses to discrimination made illegal by Title VII. The district court reached the opposite conclusion, reasoning that *Hobby Lobby* did not suggest that "a RFRA defense can never prevail as a defense to Title VII" because "[i]f that were the case, the majority would presumably have said so." *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F.Supp.3d at 857. But the majority *did* say that anti-discrimination laws are "precisely tailored" to achieving the government's "compelling interest in providing an equal opportunity to participate in the workforce" without facing discrimination. *Hobby Lobby*, 134 S.Ct. at 2783.

As Stephens notes, at least two district-level federal courts have also concluded that Title VII constitutes the least restrictive means for eradicating discrimination in the workforce. *See Redhead v. Conf. of Seventh-Day Adventists*, 440 F.Supp.2d 211, 222 (E.D.N.Y. 2006) (holding that "the Title VII framework is the least restrictive means of furthering" the government's interest in avoiding discrimination against non-ministerial employees of religious organization), *adhered to on reconsideration*, 566 F.Supp.2d 125 (E.D.N.Y. 2008); *EEOC v. Preferred Mgmt. Corp.*, 216 F.Supp.2d 763, 810–11 (S.D. Ind. 2002) ("[I]n addition to finding that the EEOC's intrusion into [the defendant's] religious practices is pursuant to a compelling government interest,"—i.e., "the eradication of employment discrimination based on the criteria identified in Title VII"—"we also find that the intrusion is the least restrictive means that Congress could have used to effectuate its purpose.").

We also find meaningful Congress's decision not to include exemptions within Title VII to the prohibition on sex-based discrimination. As both the Supreme Court and other circuits have recognized, "[t]he very existence of a government-sanctioned exception to a regulatory scheme that is purported to be the least restrictive means can, in fact, demonstrate that other, less-restrictive alternatives could exist." *McAllen Grace Brethren Church v. Salazar*, 764

F.3d 465, 475 (5th Cir. 2014) (citing *Hobby Lobby*, 134 S.Ct. at 2781–82); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) ("It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.' " (omission in original) (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 541–42, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) (Scalia, J., concurring))). Indeed, a driving force in the *Hobby Lobby* Court's determination that the government had failed the least-restrictive-means test was the fact that the Affordable Care Act, which the government sought to enforce in that case against a closely held organization, "already established an accommodation for nonprofit organizations with religious objections." *See* 134 S.Ct. at 2782. Title VII, by contrast, does not contemplate any exemptions for discrimination on the basis of sex. Sex may be taken into account only if a person's sex "is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise," 42 U.S.C. § 2000e-2(e)(1)—and in that case, the preference is no longer discriminatory in a malicious sense. Where the government has developed a comprehensive scheme to effectuate its goal of eradicating discrimination based on sex, including sex stereotypes, it makes sense that the only way to achieve the scheme's objectives is through its enforcement.

State courts' treatment of RFRA-like challenges to their own antidiscrimination laws is also telling. In several instances, state courts have concluded that their respective antidiscrimination laws survive strict scrutiny, such that religious claimants are not entitled to exemptions to enforcement of the state prohibitions on discrimination with regard to housing, employment, medical care, and education. *See State v. Arlene's Flowers, Inc.*, 187 Wash.2d 804, 389 P.3d 543, 565–66 (2017) (collecting cases), *petition for cert. filed Arlene's Flowers, Inc. v. Washington*, 86 U.S.L.W. 3047(July14017)). These holdings support the notion that antidiscrimination laws allow for fewer exceptions than other generally applicable laws.

As a final point, we reject the Funeral Home's suggestion that enforcing Title VII in this case would undermine, rather than advance, the EEOC's interest in combating sex stereotypes. According to the Funeral Home, the EEOC's requested relief reinforces sex stereotypes because the agency essentially asks that Stephens "be able to dress in a stereotypical feminine manner." *R.G. & G.R. Funeral Homes, Inc.*, 201 F.Supp.3d at 863 (emphasis omitted). This argument misses the mark. Nothing in Title VII or this court's jurisprudence requires employees to reject their employer's stereotypical notions of masculinity or femininity; rather, employees simply may not be discriminated against for a failure to conform. *See Smith*, 378 F.3d at 572 (holding that a plaintiff makes out a prima facie case for discrimination under Title VII when he pleads that "his *failure to conform* to sex stereotypes concerning how a man should look and behave was the driving force behind" an adverse employment action (emphasis added)). Title VII protects both the right of male employees "to c[o]me to work with makeup or lipstick on [their] face[s]," *Barnes*, 401 F.3d at 734, and the right of female employees to refuse to "wear dresses or makeup," *Smith*, 378 F.3d at 574, without any internal contradiction.

In short, the district court erred in finding that EEOC had failed to adopt the least restrictive means of furthering its compelling interest in eradicating discrimination in the workplace. Thus, even if we

agreed with the Funeral Home that Rost's religious exercise would be substantially burdened by enforcing Title VII in this case, we would nevertheless **REVERSE** the district court's grant of summary judgment to the Funeral Home and hold instead that requiring the Funeral Home to comply with Title VII constitutes the least restrictive means of furthering the government's compelling interest in eradicating discrimination against Stephens on the basis of sex. Thus, even assuming Rost's religious exercise is substantially burdened by the EEOC's enforcement action in this case, we **GRANT** summary judgment to the EEOC on the Funeral Home's RFRA defense on this alternative ground.

C. Clothing-Benefit Discrimination Claim

[43] The district court erred in granting summary judgment in favor of the Funeral Home on the EEOC's discriminatory clothing-allowance claim. We long ago held that the scope of the complaint the EEOC may file in federal court in its efforts to enforce Title VII is "limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination." *EEOC v. Bailey Co.*, 563 F.2d 439, 446 (6th Cir. 1977) (quoting inter alia, *Tipler v. E. I. duPont deNemours & Co.*, 443 F.2d 125, 131 (6th Cir. 1971)), *disapproved of on other grounds by Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). The EEOC now urges us to hold that *Bailey* is incompatible with subsequent Supreme Court precedent and therefore no longer binding on this court. Because we believe that the EEOC may properly bring a clothing-allowance claim under *Bailey*, we need not decide whether *Bailey* has been rendered obsolete.

In *Bailey*, a white female employee charged that her employer failed to promote her on account of her sex, generally failed to promote women because of their sex, failed to pay equally qualified women as well as men, and failed to recruit and hire black women because of their race. *Id.* at 442. While investigating these claims, the EEOC found there was no evidence to support the complainant's charges of sex discrimination, but there was reasonable cause to believe the company had racially discriminatory hiring and promotion practices. In addition, the EEOC learned that the employer had seemingly refused to hire one applicant on the basis of his religion. After failed efforts at conciliation, the EEOC initiated a lawsuit against the employer alleging both racial and religious discrimination. We held that the EEOC lacked authority to bring an enforcement action regarding alleged religious discrimination because "[t]he portion of the EEOC's complaint incorporating allegations of religious discrimination exceeded the scope of the EEOC investigation of [the defendant employer] reasonably expected to grow out of [the original] charge of sex and race discrimination." *Id.* at 446. We determined, however, that the EEOC was authorized to bring race discrimination claims against the employer because the original charge alleged racial discrimination against black applicants and employees and the charging party—a white woman—had standing under Title VII to file such a charge with the EEOC because she "may have suffered from the loss of benefits from the lack of association with racial minorities at work." *Id.* at 452 (citations omitted).

As we explained in *Bailey*, the EEOC may sue for matters beyond those raised directly in the EEOC's administrative charge for two reasons. First, limiting the EEOC complaint to the precise grounds listed in the charge of discrimination would undercut Title VII's "effective functioning" because laypersons "who are unfamiliar

with the niceties of pleading and are acting without the assistance of counsel" submit the original charge. *Id.* at 446 (quoting *Tipler*, 443 F.2d at 131). Second, an initial charge of discrimination does not trigger a lawsuit; it instead triggers an EEOC investigation. The matter evolves into a lawsuit only if the EEOC is unable "to obtain voluntary compliance with the law. . . . Thus it is obvious that the civil action is much more intimately related to the EEOC investigation than to the words of the charge which originally triggered the investigation." *Id.* at 447 (quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970)).

At the same time, however, we concluded in *Bailey* that allowing the EEOC to sue for matters beyond those reasonably expected to arise from the original charge would undermine Title VII's enforcement process. In particular, we understood that an original charge provided an employer with "notice of the allegation, an opportunity to participate in a complete investigation of such allegation, and an opportunity to participate in meaningful conciliation discussions should reasonable cause be found following the EEOC investigation." *Id.* at 448. We believed that the full investigatory process would be short-circuited, and the conciliation process thereby threatened, if the EEOC did not file a separate charge and undertake a separate investigation when facts are learned suggesting an employer may have engaged in "discrimination of a type other than that raised by the individual party's charge and unrelated to the individual party." *Id.*

The EEOC now insists that *Bailey* is no longer good law after the Supreme Court's decision in *General Telephone Company of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980). In *General Telephone*, the Supreme Court held that Rule 23 of the Federal Rules of Civil Procedure, which governs class actions, does not apply to enforcement actions initiated by the EEOC. *Id.* at 331, 100 S.Ct. 1698. As part of its reasoning, the Court found that various requirements of Rule 23—such as the requirement that "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class," FED. R. CIV. P. 23(a)(3)—are incompatible with the EEOC's enforcement responsibilities under Title VII:

> The typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiff's claims. If Rule 23 were applicable to EEOC enforcement actions, it would seem that the Title VII counterpart to the Rule 23 named plaintiff would be the charging party, with the EEOC serving in the charging party's stead as the representative of the class. Yet the Courts of Appeals have held that EEOC enforcement actions are not limited to the claims presented by the charging parties. Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable. The latter approach is far more consistent with the EEOC's role in the enforcement of Title VII than is imposing the strictures of Rule 23, which would limit the EEOC action to claims typified by those of the charging party.

Gen. Tel., 446 U.S. at 330–31, 100 S.Ct. 1698 (internal citations omitted). The EEOC argues that this passage directly contradicts the holding in *Bailey*, in which we rejected the EEOC's argument that it "can investigate evidence of any other discrimination called to its attention during the course of an investigation." *See* 563 F.2d at 446.

Though there may be merit to the EEOC's argument, *see EEOC v. Kronos*

Inc., 620 F.3d 287, 297 (3d Cir. 2010) (citing *General Telephone* for the proposition that "[o]nce the EEOC begins an investigation, it is not required to ignore facts that support additional claims of discrimination if it uncovers such evidence during the course of a reasonable investigation of the charge" (citing *Gen. Tel.*, 446 U.S. at 331, 100 S.Ct. 1698)), we need not resolve *Bailey*'s compatibility with *General Telephone* at this time because our holding in *Bailey* does not preclude the EEOC from bringing a clothing-allowance-discrimination claim in this case.

First, the present case is factually distinguishable from *Bailey*. In *Bailey*, the court determined that allegations of religious discrimination were outside the scope of an investigation "reasonably related" to the original charge of sex and race discrimination because, in part, "[t]he evidence presented at trial by the EEOC to support its allegations of religious discrimination did not involve practices affecting [the original charger]." 563 F.2d at 447. Here, by contrast, Stephens would have been directly affected by the Funeral Home's allegedly discriminatory clothing-allowance policy had she not been terminated, as the Funeral Home's current practice indicates that she would have received either no clothing allowance or a less valuable clothing allowance once she began working at the Funeral Home as a woman.[14] And, unlike the EEOC's investigation of religious discrimination in *Bailey*, the EEOC's investigation into the Funeral Home's discriminatory clothing-allowance policy concerns precisely the same type of discrimination—discrimination on the basis of sex—that Stephens raised in her initial charge.

Second, we have developed a broad conception of the sorts of claims that can be "reasonably expected to grow out of the initial charge of discrimination." *See Bailey*, 563 F.2d at 446. As we explained in *Davis v. Sodexho*, 157 F.3d 460 (6th Cir. 1998), "where facts related with respect to the charged claim would prompt the EEOC to investigate a different, uncharged claim, the plaintiff is not precluded from bringing suit on that claim." *Id.* at 463. And we have also cautioned that "EEOC charges must be liberally construed to determine whether . . . there was information given in the charge that reasonably should have prompted an EEOC investigation of [a] separate type of discrimination." *Leigh v. Bur. of State Lottery*, 1989 WL 62509, at *3 (6th Cir. June 13, 1989) (Table) (citing *Bailey*, 563 F.2d at 447). Here, Stephens alleged that she was fired after she shared her intention to present and dress as a woman because the Funeral Home "management [told her that it] did not believe the public would be accepting of [her] transition" from male to female. R. 63-2 (Charge of Discrimination at 1) (Page ID #1952). It was reasonable to expect, in light of this allegation, that the EEOC would investigate the Funeral Home's employee-appearance requirements and expectations, would learn about the Funeral Home's sex-specific dress code, and would thereby uncover the Funeral Home's seemingly discriminatory clothing-allowance policy. As much is clear from our decision in *Farmer v. ARA Services, Inc.*, 660 F.2d 1096 (6th Cir. 1981), in which "we held that the plaintiffs could bring equal pay claims alleging that their union discriminated in negotiating pay scales for different job designations, despite the fact that the plaintiffs' EEOC charge alleged only that the union failed to

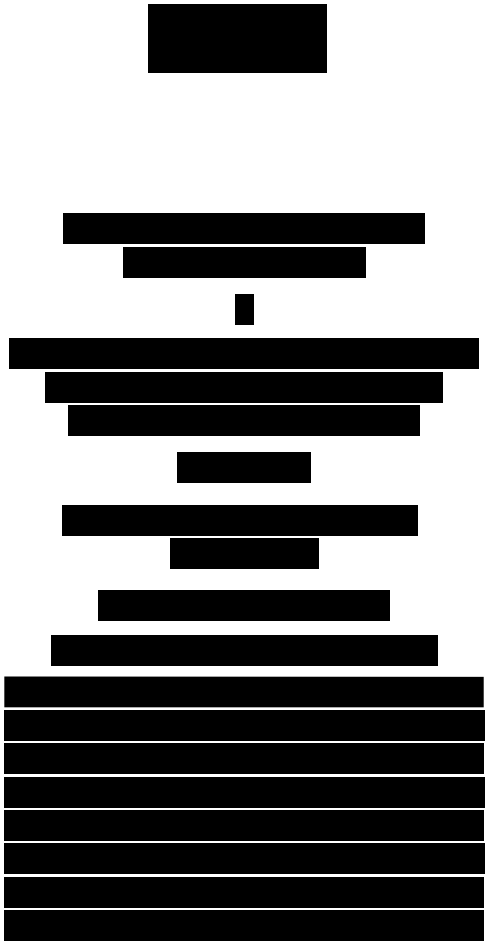
14. The Funeral Home insists that it would provide female funeral directors with a company-issued suit if it had any female Funeral Directors. *See* R. 53-3 (Rost Aff. ¶ 54) (Page ID #939). This is a factual claim that we cannot credit at the summary-judgment stage.

represent them in securing the higher paying job designations." *Weigel v. Baptist Hosp. of E. Tenn.*, 302 F.3d 367, 380 (6th Cir. 2002) (citing *Farmer*, 660 F.2d at 1105). As we recognized then, underlying the *Farmer* plaintiffs' claim was an implicit allegation that the plaintiffs were as qualified and responsible as the higher-paid employees, and this fact "could reasonably be expected to lead the EEOC to investigate why different job designations that required the same qualifications and responsibilities used disparate pay scales." *Id.* By the same token, Stephens's claim that she was fired because of her planned change in appearance and presentation contains an implicit allegation that the Funeral Home requires its male and female employees to look a particular way, and this fact could (and did) reasonably prompt the EEOC to investigate whether these appearance requirements imposed unequal burdens—in this case, fiscal burdens—on its male and female employees.

We therefore **REVERSE** the district court's grant of summary judgment to the Funeral Home on the EEOC's discriminatory-clothing-allowance claim and **REMAND** with instructions to consider the merits of the EEOC's claim.

III. CONCLUSION

Discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII. The unrefuted facts show that the Funeral Home fired Stephens because she refused to abide by her employer's stereotypical conception of her sex, and therefore the EEOC is entitled to summary judgment as to its unlawful-termination claim. RFRA provides the Funeral Home with no relief because continuing to employ Stephens would not, as a matter of law, substantially burden Rost's religious exercise, and even if it did, the EEOC has shown that enforcing Title VII here is the least restrictive means of furthering its compelling interest in combating and eradicating sex discrimination. We therefore **REVERSE** the district court's grant of summary judgment in favor of the Funeral Home and **GRANT** summary judgment to the EEOC on its unlawful-termination claim. We also **REVERSE** the district court's grant of summary judgment on the EEOC's discriminatory-clothing-allowance claim, as the district court erred in failing to consider the EEOC's claim on the merits. We **REMAND** this case to the district court for further proceedings consistent with this opinion.



NO. _____

IN THE
Supreme Court of the United States

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,
Petitioner,

v.

EQUAL OPPORTUNITY EMPLOYMENT COMMISSION,
Respondent,

and

AIMEE STEPHENS,
Respondent-Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the word "sex" in Title VII's prohibition on discrimination "because of . . . sex," 42 U.S.C. 2000e-2(a)(1), meant "gender identity" and included "transgender status" when Congress enacted Title VII in 1964.

2. Whether *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), prohibits employers from applying sex-specific policies according to their employees' sex rather than their gender identity.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is R.G. &. G.R. Harris Funeral Homes, Inc., a closely held, for-profit corporation. The respondents are the Equal Employment Opportunity Commission and Intervenor Aimee Stephens.

CORPORATE DISCLOSURE STATEMENT

The petitioner has no parent corporation or publicly held company that owns 10% or more of its stock.

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JURISDICTION

The judgment of the court of appeals was entered on March 7, 2018. On May 16, this Court extended the time to file this petition until August 3. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in the appendix to this petition. App. 188a.

INTRODUCTION

The "proper role of the judiciary" is "to apply, not amend, the work of the People's representatives." *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017). The Sixth Circuit departed from that role by judicially amending the word "sex" in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), to mean "gender identity." In so doing, the Sixth Circuit usurped the role of Congress, which has repeatedly considered and rejected making such a change to Title VII.

Redefining "sex" to mean "gender identity" is no trivial matter. Doing so shifts what it means to be male or female from a biological reality based in anatomy and physiology to a subjective perception evidenced by what people profess they feel. Far-reaching consequences follow from that. For example, federal law in some parts of the country now mandates that employers, governments, and schools must administer dress codes and assign living facilities, locker rooms, and restrooms based on the "sex" that a person professes.

As for Petitioner R.G. &. G.R. Harris Funeral Homes, Inc. (Harris Homes), the Sixth Circuit ordered it to allow a male funeral director to dress and present as a woman at work. Harris Homes must do that even though its owner reasonably determined that the employee's actions would violate the company's sex-specific dress code and disrupt the healing process of grieving families. The language of Title VII does not mandate that result. This Court should grant review and reverse.

STATEMENT

A. Petitioner Harris Homes

Harris Homes is a small, family-owned funeral business that has helped its clients mourn the loss of loved ones since 1910. App. 90a. Thomas Rost is its current president and owner. *Ibid.*

As a devout Christian, Rost "sincerely believes that his 'purpose in life is to minister to the grieving, and his religious faith compels him to do that important work.'" App. 103a; accord *id.* at 6a. Harris Homes' mission statement, announced on its website, says that the company's "highest priority is to honor God in all that we do." *Id.* at 6a, 102a.

Funerals are somber and solemn events that address transcendent matters, hold deep spiritual significance, and mark some of the most difficult times in life. App. 196a–97a. They often are traumatic and painful experiences, and family and friends need to be able to focus on each other and their grief. *Id.* at 196a. Because of this, Rost requires his employees to conduct and present themselves in a professional manner and to avoid disrupting or distracting clients as they process their grief. *Id.* at 196a, 198a.

Harris Homes' dress code for employees who interact with clients is integral to ensuring that the company meets the high standards it sets. App. 91a–93a, 140a. It is a sex-specific dress code that prescribes certain requirements for male employees (e.g., they must wear suits) and others for female employees (e.g., they must wear dresses or skirts). *Id.* at 91a–93a. The protocol for funeral directors is

that men wear pant suits and women wear skirt suits. *Id.* at 106a. Respondents do not challenge the dress code as improper under Title VII. *Id.* at 112a; see also *id.* at 18a, 21a, 66a–67a, 86a, 111a, 138a.

Harris Homes' funeral directors are "prominent public representatives" of the company. App. 103a. They regularly interact with clients and guests while moving the deceased's body from the place of death "to the funeral home," helping "integrat[e] the clergy" into the funeral, "greeting the guests," and coordinating the family's "final farewell" to their loved one. *Id.* at 41a.

B. Respondent Stephens

Rost hired Respondent Stephens as a funeral director in 2007. App. 93a–94a. During Stephens's six years of employment, it is undisputed that Stephens "presented as a man." *Id.* at 6a. All relevant employment records—"including driver's license, tax records, and mortuary science license—identif[ied] Stephens as a male." *Id.* at 93a–94a. Nothing during Stephens's employment with Harris Homes, as Stephens testified, would have suggested to anyone at work that Stephens was "anything other than a man." *Id.* at 200a.

In a July 2013 letter, Stephens first told Rost that Stephens identifies as female. App. 8a, 94a–95a. "Stephens 'intend[ed] to have sex reassignment surgery,' and explained that '[t]he first step . . . is to live and work full-time as a woman for one year.'" *Id.* at 8a. Stephens's plan was to present as a woman and wear female attire at work. *Id.* at 95a.

A few weeks later, after seeking legal counsel, Rost told Stephens that the situation was "not going to work out." App. 9a, 96a. Because Rost wanted to reach "a fair agreement," he offered Stephens a severance package. *Id.* at 203a. Stephens declined it.

It is undisputed why Rost let Stephens go. He determined that acquiescing in Stephens's proposal would have violated Harris Homes' dress code, App. 9a, 100a–01a, and "disrupted the[] grieving and healing process" of "clients mourning the loss of their loved ones," *id.* at 198a. Rost was also concerned that female clients and staff would be forced to share restroom facilities with Stephens. *Id.* at 65a. Notably, Rost would *not* have reached the same decision had Stephens professed a female gender identity but "continued to conform to the dress code for male funeral directors while at work." *Id.* at 104a–05a; see also *id.* at 138a.

Also, because Rost interprets the Bible as teaching that sex is immutable, he believed that he "would be violating God's commands" if a male representative of Harris Homes presented himself as a woman while representing the company. App. 104a. Were he forced to violate his faith that way, Rost "would feel significant pressure to sell [the] business and give up [his] life's calling of ministering to grieving people as a funeral home director and owner." *Ibid.* The EEOC "does not contest [Rost's] religious sincerity." *Id.* at 124a.

C. Title VII

Congress enacted Title VII in 1964. The Act deems it "an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge

any individual, or otherwise to discriminate . . . , because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). When enacting Title VII, Congress's "major concern" was ending "race discrimination." *Holloway* v. *Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977).

The word "sex" "was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate." *Ulane* v. *E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); see also *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 243 n.9 (1989) (plurality) (sex "was included in an attempt to *defeat* the bill"). The problem Congress sought to address by adding "sex" was the lack of "equal opportunities for women" in employment. *Sommers* v. *Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam). So Congress chose language "ensur[ing] that men and women are treated equally." *Holloway*, 566 F.2d at 663.

Both at the time of Title VII's enactment and today, the word "sex" refers to a person's status as male or female as objectively determined by anatomical and physiological factors, particularly those involved in reproduction.[1] In contrast, gender identity is an altogether different construct. It refers

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[1] *E.g.*, The American College Dictionary 1109 (1970) (defining "sex" as "the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished"); The American Heritage Dictionary 1605 (5th ed. 2011) (classifying male and female "on the basis of their reproductive organs and functions"); American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 451 (5th ed. 2013) (DSM–5) ("'[S]ex' . . . refer[s] to the biological indicators of male and female").

to an "inner sense of being male or female," App. 204a, or "some category *other than* male or female," DSM–5 451 (emphasis added). The term first emerged in 1963 at a medical conference in Europe. David Haig, *The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001*, 33 Archives of Sexual Behavior 87, 93 (2004).

It was not until 1990 that the concept of gender identity appeared in federal law. That occurred with the passage of the Americans with Disabilities Act, which excluded protection for "gender identity disorders." 42 U.S.C. 12211(b)(1). A year later, when Congress reenacted Title VII, it did not amend the word "sex" to mean "gender identity." Civil Rights Act of 1991, Pub. Law 102–166.

Since then, dozens of state and local legislatures have added "gender identity" to nondiscrimination laws that already include "sex."[2] But Congress has considered and rejected at least a dozen proposals to similarly add "gender identity" to Title VII,[3] even

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[2] *E.g.*, Conn. Gen. Stat. § 46a-60(b)(1) (forbidding employment discrimination based on "sex" and "gender identity or expression"); Del. Code Ann. tit. 19, § 711(a)(1)–(2) (including "sex" and "gender identity"); D.C. Code § 2-1402.11(a) (including "sex" and "gender identity or expression").

[3] *E.g.*, Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007); To Prohibit Employment Discrimination Based on Gender Identity, H.R. 3686, 110th Cong. (2007); Employment Non-Discrimination Act of 2009, H.R. 2981, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009); Employment Non-Discrimination Act of 2011, H.R. 1397, 112th

while enacting other nondiscrimination provisions listing either "sex" or "gender" alongside "gender identity."[4]

D. District Court Proceedings

Stephens filed a charge of discrimination with the EEOC in September 2013, alleging an unlawful discharge based on "sex and gender identity" in violation of Title VII. App. 97a. After investigating, the EEOC filed suit against Harris Homes, claiming that the company violated Title VII by discharging Stephens allegedly (1) "because Stephens is transgender" and sought to "transition from male to female" and (2) "because Stephens did not conform to [Harris Homes'] sex- or gender-based preferences, expectations, or stereotypes." *Id.* at 166a. The EEOC sought to enjoin Harris Homes from "discriminat[ing] against an employee or applicant because of

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Cong. (2011); Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011); Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013); Equality Act, H.R. 3185, 114th Cong. (2015); Equality Act, S. 1858, 114th Cong. (2015); Equality Act, H.R. 2282, 115th Cong. (2017); Equality Act, S. 1006, 115th Cong. (2017).

[4] *E.g.*, 34 U.S.C. 12291(b)(13)(A) (prohibiting discrimination based on "sex" and "gender identity") (language added via the Violence Against Women Reauthorization Act of 2013, Pub. Law 113–4); 18 U.S.C. 249(a)(2) (prohibiting crimes committed because of "gender" or "gender identity") (language added via the National Defense Authorization Act for Fiscal Year 2010, Pub. Law 111–84); 34 U.S.C. 30503(a)(1)(C) (authorizing the Attorney General to assist in prosecuting crimes motivated by "gender" or "gender identity") (language added via the National Defense Authorization Act for Fiscal Year 2010).

their sex, including on the basis of gender identity." *Id.* at 168a.[5]

Harris Homes moved to dismiss. The district court agreed that "[t]here is no Sixth Circuit or Supreme Court authority to support the EEOC's position that transgender status is a protected class under Title VII." App. 173a. But the court found Sixth Circuit support for the EEOC's alternative theory—"a sex-stereotyping gender-discrimination claim" based on this Court's plurality opinion in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989). App. 183a. The court declined to dismiss that claim. *Id.* at 187a.

After discovery and cross-motions for summary judgment, the district court ruled for Harris Homes. The court reiterated that the EEOC could not prevail on its claim "that Stephens's termination was due to transgender status or gender identity—because those are not protected classes." App. 83a. But the EEOC raised a viable sex-stereotyping claim because the Sixth Circuit in *Smith* v. *City of Salem*, 378 F.3d 566 (6th Cir. 2004), had expanded those claims "further than other courts"—going so far as to create Title VII protection for "men who wear dresses." *Id.* at 108a, 117a–118a.

Despite this, the district court ruled for Harris Homes because the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb, prohibits the EEOC

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[5] The EEOC also claimed that Harris Homes violated Title VII by providing a more valuable "clothing allowance" to its male employees. App. 167a. Neither the district court nor the court of appeals has addressed the merits of that claim, and it is not the subject of this petition.

from applying "Title VII, and the body of sex-stereotyping case law that has developed under it, under the facts and circumstances of this unique case." App. 142a. Since Rost cannot in good conscience "support the idea that sex is a changeable social construct," forcing him to allow a male funeral director to present as a woman while representing Harris Homes "would impose a substantial burden" on Rost's ability "to conduct his business in accordance with his sincerely-held religious beliefs." *Id.* at 125a.

E. Sixth Circuit Ruling

The Sixth Circuit allowed Stephens to intervene on appeal because of a "concern that changes in policy priorities within the U.S. government might prevent the EEOC from fully representing Stephens's interests." App. 12a–13a. The court then reversed and ordered judgment for the EEOC. *Id.* at 81a.

The Sixth Circuit held that, under *Price Waterhouse*, employers engage in unlawful sex stereotyping when they administer sex-specific policies according to their employees' sex instead of their gender identity. App. 15a–18a. Because the EEOC did not challenge Harris Homes' dress code, the alleged stereotype was not "requiring men to wear pant suits and women to wear skirt suits," but declining to treat a male employee who professes a female gender identity as a woman. *Id.* at 18a. Although classifying all employees consistently with their sex does not disparately affect men or women, the court rejected *Price Waterhouse*'s requirement that a plaintiff prove "disparate treatment of men

and women," *id.* at 15a, because it could not "be squared with" the Sixth Circuit's prior decision in *Smith*, *id.* at 20a–21a.

The Sixth Circuit then judicially amended the word "sex" in Title VII to mean "gender identity" and held that "discrimination on the basis of transgender . . . status violates Title VII." App. 22a. As the court acknowledged, this went beyond what the Sixth Circuit previously held in *Smith*, *id.* at 27a, which did not "recognize Title VII protections for transgender persons based on identity," *id.* at 32a.

The court gave two reasons for rewriting Title VII. For one, employers that apply sex-specific policies based on their employees' sex instead of their gender identity "necessarily" rely on "stereotypical notions of how sexual organs and gender identity ought to align." App. 26a–27a. The Sixth Circuit thus treated the very idea of sex—which determines a person's status as male or female based on reproductive anatomy and physiology—as an illicit stereotype.

In addition, the court said that "it is analytically impossible" to apply sex-specific policies to an employee who asserts a gender identity that differs from his sex "without being motivated, at least in part, by the employee's sex." App. 23a. The mere fact that the employer "consider[s] that employee's biological sex . . . necessarily entails discrimination on the basis of sex." *Id.* at 30a.

The court also held that Title VII protects "transitioning status," App. 22a, and in so doing, left no doubt that it replaced "sex" with "gender identity," see *id.* at 24a–26a. Its opinion did not say

that "a person's sex can[] be changed"; in fact, it said that it "need not decide that issue." *Id.* at 26a. Rather, it emphasized that "gender identity" changes—it is "fluid, variable, and difficult to define"—because it has an "internal genesis that lacks a fixed external referent," and much like religion, should be "authenticat[ed]" through professions of identity rather than "medical diagnoses." *Id.* at 24a–25a n.4.

The Sixth Circuit then dismissed the statutory-construction principles on which Harris Homes relied. It said that the word "sex" includes "gender identity" because "statutory prohibitions often go beyond the principal evil" that Congress sought to remedy. App. 28a (quoting *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)). It also found nothing probative in other federal statutes, like the Violence Against Women Act, 34 U.S.C. 12291(b)(13)(A), that expressly "prohibit discrimination on the basis of [both] 'gender identity'" and "sex" because "Congress may certainly choose to use both a belt and suspender to achieve its objectives." App. 31a. Nor was there any "significance," the court said, in Congress's long-running rejection of bills seeking "to modify Title VII to include . . . gender identity." *Id.* at 31a–32a.

Finished judicially altering Title VII, the Sixth Circuit found that RFRA was not a defense. App. 41a–73a. Forcing Rost to violate his religious beliefs and pressuring him to give up his ministry to the grieving does not "substantially burden" his religious exercise. *Id.* at 46a–56a. Accordingly, the Sixth Circuit granted "summary judgment to the EEOC on its unlawful-termination claim." *Id.* at 81a.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for four reasons. First, the circuits are split into three camps on whether "sex" in Title VII means "gender identity" and includes "transgender status." One group says it does not. Another takes the same position, but subsequent case law casts doubt on that. And in the final category is the Sixth Circuit's decision judicially amending "sex" to mean "gender identity."

Second, the Sixth Circuit's opinion conflicts with—and substantially distorts—this Court's decision in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989). The *Price Waterhouse* plurality recognized that impermissible sex discrimination occurs when an employer treats one sex better than the other, and it identified an employer's reliance on sex stereotypes as one way of evidencing such discrimination. See *id.* at 250–51. But the Sixth Circuit departed from *Price Waterhouse*'s guidance by treating sex as if it were itself a stereotype and by rejecting the plurality's recognition that any action challenged on sex-stereotyping grounds must result in "disparate treatment" favoring one sex over the other. *Id.* at 251. That decision adds to an incomprehensible mishmash of circuit-court cases attempting to apply *Price Waterhouse*—a jumble that has been decades in the making. The need for clarity is long overdue.

Resolution of these circuit conflicts is urgently needed. The issues presented do not warrant further percolation because each new decision only breeds more division and confusion. Employers, employees,

governments, schools, lower courts, and attorneys need clarification now. It is untenable that courts are resolving claims differently depending entirely on the circuit where they arose. If Harris Homes' arguments are correct, courts are subjecting employers in some states to liability that federal law does not impose. And if the EEOC is right, courts in other states are rejecting claims that should be allowed to proceed. Either way, this Court's immediate intervention is required.

Third, the decision below defies this Court's principles of statutory construction. The court of appeals does not ground its analysis in the statutory term "sex" as understood in 1964, opting to read Title VII as if Congress used the term "gender identity" instead. Nor does the decision give sufficient weight to related federal statutes, Congress's repeated rejection of bills attempting to add "gender identity" to Title VII, or the judicial and administrative consensus that Congress ratified when it reenacted Title VII in 1991.

Finally, the Sixth Circuit's startling decision to change what it means to be male and female will have widespread consequences. It threatens to drive out sex-specific policies—ranging from living facilities and dress codes to locker rooms and restrooms—in employment and public education. It undermines critical efforts to advance women's employment and educational opportunities. And it imperils freedom of conscience. The sweeping implications of the Sixth Circuit's ruling counsel strongly in favor of this Court's granting review.

I. The circuits are irreconcilably split on whether "sex" in Title VII means "gender identity" and includes "transgender status."

Three undisputed facts in this case put squarely before this Court the question whether "sex" in Title VII means "gender identity." First, Stephens's sex while employed at Harris Homes was male. App. 6a, 93a-94a. Second, Rost let Stephens go because Stephens's plan to wear female clothing at work violated the company's sex-specific dress code. *Id.* at 9a, 100a–01a. Third, that "dress code policy *has not* been challenged by the EEOC in this action." *Id.* at 112a; see also *id.* at 18a ("We are not considering . . . whether the Funeral Home violated Title VII by requiring men to wear pant suits and women to wear skirt suits."); *id.* at 21a, 66a–67a, 86a, 111a, 138a. Title VII allows Harris Homes' straightforward enforcement of its unchallenged dress code *unless* the statute requires Rost to consider Stephens a woman. Such an obligation exists *only* if "sex" is rewritten to mean "gender identity" and include "transgender status." On that question, the circuits are hopelessly split among three camps.

1. The circuits in the first group—the Eighth and Tenth—have held that Title VII does not include "gender identity" or "transgender status." In 2007, the Tenth Circuit "agree[d] with . . . the vast majority of federal courts to have addressed this issue and conclude[d] [that] discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII." *Etsitty* v. *Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007). The "plain

meaning of 'sex'" refers to the "binary conception" of "male and female," and employers violate Title VII's ban on sex discrimination only when employees "are discriminated against because they are male or because they are female." *Id.* at 1222.

The Eighth Circuit has likewise concluded that "discrimination based on one's transsexualism does not fall within the protective purview of [Title VII]." *Sommers* v. *Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam). Expressing "agreement with the district court," *ibid.*, the Eighth Circuit quoted its rationale:

> [T]he Court does not believe that Congress intended by its laws prohibiting sex discrimination to require the courts to ignore anatomical classification and determine a person's sex according to the psychological makeup of that individual. The problems of such an approach are limitless. One example is the simple practical problem that arose here—which restroom should plaintiff use? [*Id.* at 749.]

2. The circuits in the second camp—the Seventh and Ninth—have previously determined that "sex" in Title VII does not include "gender identity" or "transgender status." But subsequent case law construing other nondiscrimination laws has essentially said otherwise. In *Ulane* v. *Eastern Airlines, Inc.*, the Seventh Circuit held that "Title VII is not so expansive in scope as to prohibit discrimination against transsexuals." 742 F.2d 1081, 1087 (7th Cir. 1984). That ruling overturned the district court's conclusion that the term "sex"

includes "sexual identity." *Id.* at 1084. Refusing to rewrite Title VII, the Seventh Circuit recognized its proper role when construing statutes:

> [T]o include transsexuals within the reach of Title VII far exceeds mere statutory interpretation. Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation. For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating. [*Id.* at 1086.]

Yet recently, the Seventh Circuit distinguished *Ulane* and reached the opposite conclusion when construing the word "sex" in Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a). *Whitaker By Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047 (7th Cir. 2017). The court announced that people who assert a gender identity in conflict with their sex now have categorical protection under *Price Waterhouse* because they, "[b]y definition," do not "conform to the sex-based stereotypes of the[ir] sex" *Id.* at 1047–48. From that premise, the Seventh Circuit told public schools that they must regulate access to sex-specific facilities like locker rooms and restrooms based on gender identity instead of sex. *Id.* at 1049–50. It is hard to say that *Ulane* remains good law after *Whitaker*.

The Ninth Circuit's story is similar. In *Holloway* v. *Arthur Andersen & Co.*, it interpreted "sex" in Title VII according to "its plain meaning" and held that the statute does not include "transsexuals as a class" or "decision[s] to undergo sex change surgery." 566 F.2d 659, 662, 664 (9th Cir. 1977). The court thus denied the claim of a plaintiff who alleged discriminatory treatment not "because she is male or female, but rather because she is a transsexual who chose to change her sex." *Id.* at 664.

Years later, though, when interpreting the word "gender" in the Gender Motivated Violence Act, 34 U.S.C. 12361, the Ninth Circuit said that it was overruling *Holloway*. See *Schwenk* v. *Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000). The late Judge Reinhardt wrote that "*Holloway* has been overruled by the logic and language of *Price Waterhouse*," and that "sex" under Title VII refers to more than "the biological differences between men and women." *Ibid.* That decision dramatically altered the Ninth Circuit's sex-discrimination jurisprudence.

3. In the third group is the Sixth Circuit, which has now definitively interpreted "sex" in Title VII to mean "gender identity" and include "transgender status." App. 14a–15a, 22a, 28a, 30a, 35a–36a. Other circuits have similarly redefined "sex" in related nondiscrimination contexts. The Eleventh Circuit, for instance, used *Price Waterhouse* to hold that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination" that violates the Equal Protection Clause of the Fourteenth Amendment. *Glenn* v. *Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011). In a Title IX case, the Third Circuit "concluded that discriminating

against transgender individuals constitutes sex discrimination." *Doe by & through Doe* v. *Boyertown Area Sch. Dist.*, 893 F.3d 179, 199 (3d Cir. 2018). And the Fourth Circuit, applying *Auer* deference principles, reached a similar conclusion in a now-vacated decision, see *G.G.* v. *Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 720–23 (4th Cir. 2016), *vacated by* 137 S. Ct. 1239 (2017), which lower courts in the circuit—including the district court in that very case—continue to treat as "binding law," *e.g.*, *Grimm* v. *Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 743 n.6 (E.D. Va. 2018); *M.A.B.* v. *Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 712 n.5 (D. Md. 2018).

4. Even the federal government is divided. On the one hand is the Department of Justice. In an October 4, 2017 Memorandum, the Attorney General announced that "Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*, including transgender status." App. 193a. "'Sex' is ordinarily defined to mean biologically male or female," the Attorney General explained, and "Congress has confirmed this ordinary meaning by expressly prohibiting, in several other statutes, 'gender identity' discrimination, which Congress lists in addition to, rather than within, prohibitions on discrimination based on 'sex' or 'gender.'" *Id.* at 192a–93a. The Attorney General also declared that Title VII does not "proscribe[] employment practices (such as sex-specific bathrooms) that take account of the sex of employees but do not impose different burdens on similarly situated members of each sex." *Id.* at 193a.

On the other hand is the EEOC. In 2012, it said that a "complaint of discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII." *Macy* v. *Holder*, EEOC DOC 0120120821 (Apr. 20, 2012), 2012 WL 1435995, at *1. That decision "expressly overturn[ed]" the EEOC's prior position, in place since at least 1984. *Id.* at *11 n.16; see, *e.g.*, *Casoni* v. *U.S. Postal Serv.*, EEOC DOC 01840104 (Sept. 28, 1984), 1984 WL 485399, at *3 ("allegation of sex discrimination on account of being a male to female preoperative transsexual" was not a "cognizable claim[] under the provisions of Title VII"). This lawsuit is an effort to write the EEOC's new view into law.

This split of authority has had more than enough time to percolate. Federal courts have been addressing these questions since the late 1970s. See *Holloway*, 566 F.2d at 662–64. The circuit-court confusion emerged decades ago when courts began to misread *Price Waterhouse*. See *Schwenk*, 204 F.3d at 1201–02. And at least five circuits have decided the Title VII issue directly, while many others have addressed similar issues in related contexts. No more development in the lower courts is necessary.

Awaiting additional cases is particularly ill advised because the status quo forces employers, governments, and schools to apply core policies—such as access to living facilities, locker rooms, and restrooms, not to mention compliance with dress codes—differently based on where they find themselves. It is unsustainable that employers' responsibilities under Title VII, governments' obligations under the Equal Protection Clause, and schools' duties under Title IX shift so dramatically

depending on the circuit in which they are located. Only this Court can resolve the cacophony of inconsistent pronouncements on the meaning of sex discrimination in federal law. It should do so now.

II. The Sixth Circuit's decision misreads *Price Waterhouse* and adds to a confusing and inconsistent body of lower-court case law.

Price Waterhouse resolved a circuit split over—and the plurality's holding addressed only—the burden that each party bears in Title VII mixed-motives cases. 490 U.S. at 232, 258. In its opinion, the plurality observed that the plaintiff there—a female employee seeking a promotion—proved sex discrimination through evidence that her employer made employment decisions based on stereotypes about women. *Id.* at 250–52, 255–58. Foremost among those stereotypes was "insisting" that women "must not be" "aggressive" in the workplace. *Id.* at 250–51; see also *id.* at 234–35, 256.

Title VII, the plurality said, forbids "*disparate treatment of men and women* resulting from sex stereotypes." 490 U.S. at 251 (quoting *L.A. Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 707 n.13 (1978)) (emphasis added). Disparate treatment was obvious there because aggressive men were promoted and praised, while aggressive women were passed over and pushed down. *Ibid.* Such stereotyping placed female employees in an "impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not." *Ibid.*

The dissenting opinion "stress[ed] that Title VII creates no independent cause of action for sex stereotyping." 490 U.S. at 294 (Kennedy, J.,

dissenting). Instead, "[e]vidence of use by decision-makers of sex stereotypes is" a *means* of demonstrating "discriminatory intent" and disparate treatment. *Ibid.* Also, the two Justices who "concurred in the judgment only . . . said nothing about sex stereotyping as a 'theory' of sex discrimination." *Hively* v. *Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 369 (7th Cir. 2017) (en banc) (Sykes, J., dissenting).

1. The Sixth Circuit's application of *Price Waterhouse* conflicts with and distorts that case in two fundamental ways.

a. First, the Sixth Circuit rejected what the *Price Waterhouse* plurality said about disparate treatment favoring one sex over the other. The plurality condemned not all sex stereotypes in the workplace, but only the "disparate treatment of men and women resulting from sex stereotypes." 490 U.S. at 251 (quoting *Manhart*, 435 U.S. at 707 n.13). Yet the Sixth Circuit rejected the requirement that plaintiffs prove "disparate treatment" advantaging one sex because it could not "be squared with" that court's own precedent. App. 20a–21a.

By erasing that requirement, the Sixth Circuit unmoored *Price Waterhouse* from Title VII's text, which prohibits "discriminat[ion] . . . because of . . . sex," and it perpetuated the notion that sex stereotyping is an independent cause of action. Cf. *Price Waterhouse*, 490 U.S. at 294 (Kennedy, J., dissenting) ("Title VII creates no independent cause of action for sex stereotyping."); *Hively*, 853 F.3d at 369 (Sykes, J., dissenting) (same). That, in turn, led the court of appeals to announce a federal right for

men to "wear dresses" at work. App. 16a; cf. *Hamm* v. *Weyauwega Milk Prod., Inc.*, 332 F.3d 1058, 1067 (7th Cir. 2003) (Posner, J., concurring) (rejecting "a subtype of sexual discrimination called 'sex stereotyping'" that creates a "federally protected right for male workers to wear nail polish and dresses"). This Court should grant review and clarify that *Price Waterhouse* did not establish a free-standing claim of sex stereotyping that treats as irrelevant whether one sex is favored over the other.

b. Second, the Sixth Circuit's decision adopted a bewildering view of sex stereotyping. It denounced as stereotyping *all* sex-specific policies administered according to sex instead of gender identity. See App. 26a–27a (decrying "stereotypical notions of how sexual organs and gender identity ought to align"). The court thus deemed the very idea of sex—which determines a person's status as male or female based on reproductive anatomy and physiology—as itself a stereotype.

But denouncing "sex as a stereotype" is not the same as identifying "a sex stereotype." Declaring the former undoes Title VII, while rooting out the latter when it burdens one sex more than the other furthers the statute's purpose. The Sixth Circuit's view effectively condemns Congress for stereotyping by even including "sex" in Title VII.

Nothing in *Price Waterhouse* suggests that sex itself is a stereotype. To the contrary, this Court's cases firmly reject that it is. Sex-based "stereotype[s]" consist of "fictional difference[s] between men and women," such as the "assumption[]" that women cannot "perform certain kinds of work."

Manhart, 435 U.S. at 707. In contrast, this Court has squarely held that "[p]hysical differences between men and women" relating to reproduction—the very features that determine sex—are not "gender-based stereotype[s]." *Nguyen* v. *INS*, 533 U.S. 53, 68 (2001).

Nor does *Price Waterhouse* insinuate that Title VII requires employers to treat their employees according to their professed gender identity rather than their biological sex. The plurality said that its "specific references to gender throughout th[e] opinion, and the principles [it] announce[d], apply with equal force to discrimination based on race." 490 U.S. at 243 n.9. No one would suppose that the plurality ordered employers to agree that a white employee who identifies as black is actually African American. Insisting on the equivalent in the sex context shows how far the Sixth Circuit departed from what the *Price Waterhouse* plurality actually said.

2. The Sixth Circuit's opinion adds to "a confusing hodgepodge" of *Price Waterhouse* decisions that have resulted from "an unfortunate tendency to read [the plurality's opinion] for more than it's worth." *Hively*, 853 F.3d at 371 (Sykes, J., dissenting); see, *e.g.*, *Evans* v. *Ga. Reg'l Hosp.*, 850 F.3d 1248, 1262 (11th Cir. 2017) (Rosenbaum, J., dissenting) ("*Price Waterhouse* rocked the world of Title VII litigation."). Some circuits have used *Price Waterhouse* the same way that the Sixth Circuit did. The Third and Seventh Circuits, for example, recently interpreted *Price Waterhouse* to compel schools to administer sex-specific locker-room and restroom policies according to gender identity

instead of sex. *Whitaker*, 858 F.3d at 1047–50; *Boyertown Area Sch. Dist.*, 893 F.3d at 198–99. And district courts in the Fourth Circuit have done likewise. *Grimm*, 302 F. Supp. 3d at 744–47; *M.A.B.*, 286 F. Supp. 3d at 715–17.

Other circuits have properly recognized *Price Waterhouse*'s limits. "However far *Price Waterhouse* reaches," the Tenth Circuit concluded, it does not "require[] employers to allow biological males to use women's restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." *Etsitty*, 502 F.3d at 1224. The Tenth Circuit thus affirmed that employers may administer sex-specific policies according to their employees' sex rather than their gender identity. And the Ninth Circuit—in a decision that the Sixth Circuit labeled "irreconcilable" with its own cases, App. 19a–20a—held that sex-specific dress and grooming policies that impose equal burdens on the sexes do not violate *Price Waterhouse*. *Jespersen* v. *Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1111–13 (9th Cir. 2006) (en banc).

This Court's review is needed to address these conflicting circuit decisions and bring clarity to the muddled mess that has become *Price Waterhouse*'s legacy.

III. The Sixth Circuit's decision conflicts with this Court's directives on statutory construction.

When construing Title VII, as with all statutes, "the starting point" for interpretation "is the statutory text." *Desert Palace, Inc.* v. *Costa*, 539 U.S.

90, 98 (2003). "It is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning'" when they were enacted. *Sandifer* v. *U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (quoting *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)). To illustrate, the fact that the word "blockbuster" meant a large bomb in the early 20th century and refers to a hit movie today, see *Viacom Inc.* v. *Ingram Enters., Inc.*, 141 F.3d 886, 891–92 (8th Cir. 1998), does not mean that a 1930s ban on citizen possession of "blockbusters" now prohibits possession of DVDs.

1. Title VII forbids discrimination "because of . . . sex." 42 U.S.C. 2000e-2(a)(1). "In common, ordinary usage in 1964—and now, for that matter—the word 'sex' means biologically *male* or *female*," *Hively*, 853 F.3d at 362 (Sykes, J., dissenting), as objectively determined by anatomical and physiological factors, particularly those involved in "reproductive functions," *G.G.*, 822 F.3d at 736 (Niemeyer, J., dissenting) (collecting dictionaries); see also note 1, *supra* (collecting sources).

The Sixth Circuit ignored this undisputed definition. Instead, it assumed that "sex," as understood in 1964, meant "gender identity." That is impossible. Not only is gender identity—defined by the EEOC as the "inner sense of being male or female," App. 204a—very different from sex, see p. 30, *infra*, it was a nascent concept when Congress enacted Title VII, see Haig, *supra*, at 93 ("gender identity" was first introduced at a European medical conference in 1963). It is only through "judicial interpretive updating," *Hively*, 853 F.3d at 353

(Posner, J., concurring)—not faithful statutory construction—that courts have begun recasting "sex" to mean "gender identity."

The Sixth Circuit rejected this Court's text-based method of statutory construction because "statutory prohibitions often go beyond the principal evil" that Congress sought to address. App. 28a (quoting *Oncale*, 523 U.S. at 79). True enough. But that is no excuse for ignoring the text. As this Court explained in *Oncale*, Title VII's language is the ultimate guide when construing that statute. 523 U.S. at 79.

Attempting a textual argument, the Sixth Circuit insisted that Harris Homes "discriminate[d] . . . because of . . . sex," 42 U.S.C. 2000e-2(a)(1), since it had to "consider[] [Stephens's] biological sex" when applying its dress code. App. 30a; accord *id.* at 23a–24a. But "it is not the case that any employment practice that can only be applied by identifying an employee's sex is prohibited." *Zarda* v. *Altitude Express, Inc.*, 883 F.3d 100, 151 (2d Cir. 2018) (en banc) (Lynch, J., dissenting). That would carry in "ramifications that are sweeping and unpredictable," including the effective invalidation of sex-specific living facilities, locker rooms, and restrooms. *Id.* at 134 (Jacobs, J., concurring). The proper application of Title VII, instead, is that employers only "discriminate . . . because of . . . sex" when they treat one sex better than the other. *Manhart*, 435 U.S. at 707 n.13 (requiring "disparate treatment [between] men and women"); *Price Waterhouse*, 490 U.S. at 251 (plurality) (same); *Oncale*, 523 U.S. at 78 (same).

2. "When interpreting a statute, [this Court] examine[s] related provisions in other parts of the U.S. Code." *Boumediene* v. *Bush*, 553 U.S. 723, 776 (2008). For statutes that address discrimination, the analysis often considers other nondiscrimination provisions. *E.g.*, *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 174–75 (2009) (considering Title VII when interpreting the Age Discrimination in Employment Act); *Desert Palace*, 539 U.S. at 99 (considering other provisions in Title 42 when construing Title VII).

Congress has enacted multiple nondiscrimination laws listing either "sex" or "gender" alongside "gender identity." *E.g.*, 34 U.S.C. 12291(b)(13)(A); 18 U.S.C. 249(a)(2); 34 U.S.C. 30503(a)(1)(C). When Congress wants to prohibit discrimination based on gender identity, "it knows exactly how to do so." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1626 (2018). And when Congress uses the term "sex," it does not mean "gender identity," lest federal nondiscrimination law be imbued with "surplusage," *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001), and "redundan[cy]," *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 574 (1995). The Sixth Circuit ignored the established rule against reading redundancy into statutes, choosing instead to adopt the contradictory and heretofore unknown interpretive canon of "belt-and-suspenders [legislative] caution." App. 31a.

3. This Court has recognized that Congress's uniform rejection of "numerous and persistent" legislative proposals sheds some light on the meaning of existing statutes. *E.g.*, *Flood* v. *Kuhn*, 407 U.S. 258, 281–84 (1972) ("Congress, by its positive inaction, . . . clearly evinced a desire" not to change the law). Even the *Price Waterhouse* plurality

cited, as support for its statutory interpretation, Congress's decision not to adopt "an amendment" to Title VII. 490 U.S. at 241 n.7. But the Sixth Circuit found no "significance" in Congress's repeated rejection of bills seeking to add "gender identity" to Title VII. App. 31a–32a; see note 3, *supra* (collecting bills). Though the failure to enact those proposals is not dispositive, it surely "means something," *Zarda*, 883 F.3d at 155 (Lynch, J., dissenting), and bolsters the case against interpreting the word "sex" to mean "gender identity."

4. Finally, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 382 n.66 (1982); accord *Texas Dep't of Hous. and Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) ("If a word or phrase has been given a uniform interpretation by inferior courts, a later version of that act perpetuating the wording is presumed to carry forward that interpretation.") (cleaned up).

Congress reenacted Title VII in 1991. Civil Rights Act of 1991, Pub. Law 102–166. At that time, the unbroken consensus of the circuits—as well as the EEOC—was that "sex" in Title VII did *not* include gender-identity-based classifications like "transgender status." *Holloway*, 566 F.2d at 662–64; *Sommers*, 667 F.2d at 749–50; *Ulane*, 742 F.2d at 1086–87; *Casoni*, 1984 WL 485399 at *3. While the 1991 amendment altered Title VII in myriad ways, it did not amend "sex" to mean "gender identity" or include "transgender status." Congress is thus

presumed to have adopted the uniform judicial and administrative interpretation prevailing at the time. The Sixth Circuit erred in construing "sex" as though Congress had instead amended the statute.

IV. Interpreting "sex" to mean "gender identity"—as the Sixth Circuit did—will have far-reaching consequences.

By replacing "sex" with "gender identity" and denouncing sex as a stereotype, the Sixth Circuit brought about a seismic shift in the law. While "sex" views the status of male and female as an objective fact based in reproductive anatomy and physiology, "gender identity" treats it as a subjective belief determined by internal perceptions without "a fixed external referent." App. 24a–25a n.4. Gender identity is, as the Sixth Circuit acknowledged, "fluid, variable," "difficult to define," and "authenticat[ed]" by simple professions of belief instead of "medical diagnoses." *Ibid.*; cf. *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (sex "is an immutable characteristic determined solely by the accident of birth"). It is not limited to the binary choice between male and female, but includes other categories like gender-fluid, genderless, and many others. DSM–5 451. Trading "gender identity" for "sex" is a sea change in the law.

1. One immediate impact of that change is that federal law now forbids employers and public schools from administering sex-specific policies like dress codes, living facilities, locker rooms, and restrooms

based on sex.[6] Just two years ago, this Court granted review in a similar case where the Fourth Circuit prohibited a school board from regulating access to restrooms based on sex. *Gloucester Cty. Sch. Bd.* v. *G.G.*, 137 S. Ct. 369 (2016). While changed circumstances there prompted a remand before this Court reached the merits, see 137 S. Ct. 1239 (2017), granting review here would raise similar issues about the meaning of "sex" in federal nondiscrimination law.

The Sixth Circuit's mandate that organizations enforce their sex-specific policies based on gender identity raises a host of problems. For one, it fosters inconsistency and opens the door to manipulation. Anyone—not just those with "medical diagnoses"—can profess a gender identity that conflicts with their sex. App. 24a–25a n.4. And as Stephens admitted during deposition, if an employer allows a male employee "to present as a woman," it must permit him to "go[] back to present[ing] as a man later on." *Id.* at 200a.

Stephens's testimony also demonstrates that where gender identity is the prevailing construct, "sex" becomes a mere collection of stereotypes, and employers *are forced to engage in stereotyping*. Stephens testified that while Harris Homes ordinarily must permit "a male funeral director . . .

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[6] The decision here, resolved under Title VII, affects public schools under Title IX because the lower courts regularly consult Title VII case law when applying Title IX. *E.g.*, *Dodds* v. *U.S. Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (per curiam) (citing Title VII cases in the Title IX context); *G.G.*, 822 F.3d at 718 ("We look to case law interpreting Title VII . . . for guidance in evaluating a claim brought under Title IX.").

to present as [a] woman at work," it need not allow that if he is "bald" with a "neatly trimmed beard and mustache." App. 200a–01a. Stephens justified this disparity because that employee's appearance "doesn't meet the expectations" of what a female "[t]ypically" looks like. *Id.* at 201a. When asked "[w]hat meets th[ose] expectations," Stephens replied: "Your guess is as good as mine." *Ibid.*

According to Stephens, then, if employees fail to "adhere to the part [they are] professing to play," their employer may decline to recognize their gender identity. App. 202a. In other words, employers like Harris Homes must consider Stephens a woman because Stephens planned to conform to enough female stereotypes, but they could treat differently another employee who did not. Administering policies under that regime requires decisionmaking based on sex stereotypes. It will entrench rather than eradicate them.

The specific implications of the Sixth Circuit's ruling for sex-specific living facilities, locker rooms, and restrooms raise fundamental privacy concerns. See *United States* v. *Virginia*, 518 U.S. 515, 550 n.19 (1996) (discussing "alterations necessary" in living facilities "to afford members of each sex privacy from the other sex"). For employers and public-school officials that want to protect privacy interests, the decision "will require novel changes to . . . restrooms and locker rooms." *Dodds*, 845 F.3d at 224 (Sutton, J., dissenting). By short-circuiting the legislative process, the court of appeals kept Congress from addressing those sensitive issues before they arose. See, *e.g.*, N.M. Stat. Ann. § 28-1-9(E) (exempting sex-specific "sleeping quarters," "showers," and

"restrooms" from the state's nondiscrimination law); Wis. Stat. § 106.52(3)(b)–(c) (same); 775 Ill. Comp. Stat. 5/5-103(B) (similar).

2. Equally important, the Sixth Circuit's decision undermines the primary purpose for banning discrimination based on sex—to ensure "equal opportunities" for women, *Sommers*, 667 F.2d at 750, and "eliminate workplace inequalities that [have] held women back from advancing," *Zarda*, 883 F.3d at 145 (Lynch, J., dissenting); see also *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429 (1971) ("The objective of Congress . . . was to achieve equality of employment opportunities"). Employment reserved for women—like playing in the WNBA or working at a shelter for battered women, see 42 U.S.C. 2000e-2(e)(1) (authorizing sex as a bona fide occupational qualification)—now must be opened to males who identify as women. The same is true of sports and educational opportunities under Title IX. The Sixth Circuit's ruling impedes women's advancement.

3. Substituting "gender identity" for "sex" in nondiscrimination laws also threatens freedom of conscience. Statutes interpreted that way have the effect, for instance, of forcing doctors to participate in—or employers to pay for—surgical efforts to alter sex in violation of their deeply held beliefs. See *Franciscan All., Inc.* v. *Burwell*, 227 F. Supp. 3d 660, 691–93 (N.D. Tex. 2016) (concluding that a regulation likely violated RFRA by announcing that "sex" in the Patient Protection and Affordable Care Act's nondiscrimination provision, 42 U.S.C. 18116(a), means "gender identity").

And some governments have used those laws to mandate that employers, teachers, students, and others speak pronouns and similar sex-identifying terminology that conflicts with their conscience. *E.g.*, N.Y.C. Comm'n on Human Rights, *Legal Enf't Guidance on Discrimination on the Basis of Gender Identity or Expression* (June 28, 2016), *available at* https://on.nyc.gov/2KRC7e8 (requiring "employers and covered entities to use an individual's preferred name, pronoun and title (*e.g.*, Ms./Mrs.) regardless of the individual's sex assigned at birth, anatomy, . . . or the sex indicated on the individual's identification").

This very case involves freedom-of-conscience concerns. As the district court explained, accepting the EEOC's claim compels Rost—a devout man of faith—to violate his sincere religious beliefs about the immutability of sex. App. 121a–26a.

In sum, the Sixth Circuit ushered in a profound change in federal law accompanied by widespread legal and social ramifications. The stakes are too great—and the impacts on third parties too substantial—for this Court to let that decision go unreviewed.

V. This case is an ideal vehicle for addressing the important questions presented.

This case raises pure questions of law, and no material facts are disputed, not even the reason why Rost parted ways with Stephens. The Court should use this case as the vehicle for bringing clarity to sex-discrimination jurisprudence.

Two petitions for a writ of certiorari pending before this Court raise a similar (but different) question: whether "sex" in Title VII encompasses "sexual orientation." See *Altitude Express, Inc.* v. *Zarda*, Pet. for a Writ of Cert. at i (No. 17–1623) (May 29, 2018), and *Bostock* v. *Clayton Cty.*, Pet. for a Writ of Cert. at i (No. 17–1618) (May 25, 2018). While the questions presented in all three of these cases are important, the issues raised in this one are particularly pressing. The sexual-orientation cases seek to *expand* what is included in the term "sex," whereas this case attempts to *transform* what "sex" means by replacing it with "gender identity." The fallout of that redefinition threatens far-reaching consequences, which should not be imposed without this Court's approval. See section IV, *supra*. Accordingly, the Court should grant review here even if it takes up one of the sexual-orientation cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 2018

No. 18-107

IN THE

Supreme Court of the United States

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,

Petitioner,

—v.—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT AIMEE STEPHENS

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QUESTIONS PRESENTED

1. Given that Respondents prevailed below on an independent sex stereotyping ground accepted by every court of appeals, is this case the wrong vehicle for addressing the question whether discrimination on the basis of transgender status is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964, since a ruling on that question would not change the judgment below?

2. Is this case the wrong vehicle for deciding how sex-specific policies may be applied to transgender employees, given that the courts below found that the employee was terminated based on sex stereotypes about aspects of appearance and behavior other than Petitioner's dress code, the courts below did not adjudicate the legality of the dress code, and no other sex-specific policies were at issue?

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INTRODUCTION

Aimee Stephens was fired from her position as funeral director and embalmer because of her employer's stereotypes about how women and men should appear and behave. Ms. Stephens was assigned a male gender at birth and initially presented in a stereotypically masculine way at work, although she has known that she is female for most of her life.[1] After close to six years of working for Petitioner Harris Funeral Homes, Ms. Stephens told her employer that she would begin living and working openly as a woman. Two weeks later, Petitioner's owner, Thomas Rost, fired her because her appearance and behavior would no longer conform to his sex stereotypes.

Title VII protects employees from discrimination "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1). The court of appeals held that Petitioner's termination of Ms. Stephens was sex discrimination on two independent grounds. First, it concluded that it was sex discrimination because Mr. Rost fired Ms. Stephens based on his belief that her appearance and behavior would no longer match his stereotypes about how women and men should look and act. Second, it held in the alternative that it was

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[1] To be transgender is to have a gender identity different from one's assigned sex at birth. *See Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018); Brief of Amici Curiae American Academy of Pediatrics, American Psychiatric Association, American College of Physicians, and 17 Additional Medical and Mental Health Organizations in Support of Respondent, *Gloucester Cty. Sch. Bd. v. G.G.*, No. 16-273, 2017 WL 1057281, at *5 (Mar. 2, 2017).

sex discrimination to fire her based on her transgender status.

Petitioner asks this Court to review two questions:

First, Petitioner asks this Court to decide whether discrimination based on transgender status is a form of sex discrimination under Title VII. But there is no reason to do so in this case because the court of appeals ruled for Respondents on the independent ground that Petitioner fired Ms. Stephens because her *appearance and behavior* failed to conform to its sex stereotypes. That type of sex discrimination claim, recognized in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), is available to all employees and requires no determination of whether discrimination based on transgender *status* itself constitutes sex discrimination under Title VII. Moreover, there is no circuit split on whether transgender people, like everyone else, may bring sex discrimination claims where the discrimination is based on stereotypes about their sex-related appearance and behavior. Since that holding is sufficient to support the judgment below, resolving the first question presented would not affect the outcome of the case.

Second, Petitioner asks this Court to decide whether Title VII prohibits an employer from enforcing a sex-specific policy—such as Petitioner's dress code—based on the employer's perception of an employee's sex. But this case does not properly present that question either. The court below found that Petitioner fired Ms. Stephens not merely for noncompliance with the dress code as the employer sought to enforce it, but based on a range of

appearance and behavior-related sex stereotypes that go well beyond the dress code. The court of appeals expressly did not rule on the legality of the dress code.

Finally, Petitioner asserts that the court of appeals erred in failing to limit the applicability of Title VII to situations where women or men are disadvantaged as a group, and where an employer's stereotypes are "fictional." Neither of these points is included in the questions presented, and neither identifies a conflict between the court of appeals and this Court's opinions.

In short, this case is not the right vehicle for addressing either of Petitioner's questions because the judgment below stands regardless of how the Court decides those questions.

STATEMENT OF THE CASE

A. Factual Background.

Aimee Stephens worked for nearly six years as a licensed funeral director and embalmer for Petitioner R.G. & G.R. Harris Funeral Homes, Inc., until the primary owner of the funeral home, Thomas Rost, fired her in August 2013.[2] Pet. App. 5a-6a, 9a. Resp. App. 27a-31a. Ms. Stephens had worked in the funeral services industry for nearly thirty years at the time of her termination. *Id.* at 34a.

Ms. Stephens's duties for Petitioner included "embalming, cosmetizing, casketing, [and] dressing"

[2] Thomas Rost owns 95.4% of the company; his children own the rest. Resp. App. 75a.

the bodies of the decedents, facilitating the family and public viewings, and taking the bodies from the families into Petitioner's custody. Resp. App. 81a. Mr. Rost testified that Ms. Stephens was "able to perform the jobs of funeral director and embalmer," and "showed sensitivity and compassion to the clients who came in." *Id.* at 50a. In "dealing with families," Ms. "Stephens had been solicitous of their feelings," "had blended in well," and "had . . . been courteous and compassionate." *Id.* at 46a. She was a "very good embalmer," *Id.* at 72a, and "[f]amilies seemed very pleased" with her work. *Id.* It is undisputed that her termination was unrelated to her job performance. Pet. App. 100a.

Petitioner had a sex-specific dress code that required men to wear dark suits, white shirts, a tie, and dark socks and shoes, while women had to wear a conservative skirt suit or dress. *Id.* at 91a-93a. Mr. Rost required women to wear skirts even though it was not an industry standard. Resp. App. 65a-66a. He said that he was "just old-fashioned" and believes that "a male should look like a . . . man, and a woman should look like a woman." *Id.* at 62a, 63a. Petitioner purchased suits for men, but did not purchase any clothing for women. Resp. App. 65a, 58a-59a. When explaining the difference, Mr. Rost told an EEOC investigator, "You women are a strange breed." Resp. App. 11a. He also distinguished his "key employees" from his "lady attendants." Resp. App. 7a. After the EEOC sued, Petitioner began to offer women a small stipend toward the cost of their clothing, but paid less to women than it spent on the clothing it provided its male employees. Pet. App. 7a-8a.

Although she was assigned male at birth, Ms. Stephens has known from a young age that she is female. Resp. App. 1a. Four years prior to her termination by Petitioner, Ms. Stephens sought professional help from a counselor to address the "great despair" and "suffering" she had lived with. *Id.* After four years of counseling, she wrote a letter to her "Friends and Co-Workers" at Petitioner, and on July 31, 2013, provided that letter to Mr. Rost. Pet. App. 94a-95a.

In her letter, she explained:

> I have known many of you for some time now, and I count you as my friends. What I must tell you is very difficult for me and is taking all the courage I can muster. . . . I have a gender identity disorder that I have struggled with my entire life. I have managed to hide it very well all these years. . . . With the support of my loving wife, I have decided to become the person that my mind already is. . . . Toward that end, I intend to have sex reassignment surgery. The first step I must take is to live and work full-time as a woman for one year. At the end of my vacation on August 26, 2013, I will return to work as my true self, Amiee [sic] Australia Stephens, in appropriate business attire.
>
> * * *
>
> I realize that some of you may have trouble understanding this. In truth, I

> have had to live with it every day of my life and even I do not fully understand it myself. . . . As distressing as this is sure to be to my friends and some of my family, I need to do this for myself and for my own peace of mind and to end the agony in my soul. . . . It is my wish that I can continue to work at R.G. & G.R. Harris Funeral Homes doing what I have always done, which is my best!

Resp. App. 1a-2a.

On August 15, 2013, two weeks after Ms. Stephens informed Mr. Rost that she would come to work as her "true self," "liv[ing] and work[ing] full-time as a woman," *id.*, Mr. Rost told her "this is not going to work out," making clear that her "services would no longer be needed here," Pet. App. 96a. When asked "the specific reason that you terminated Stephens," Mr. Rost responded "because he . . . was no longer going to represent himself as a man." *Id.* at 109a.[3] Mr. Rost also testified that he objected to Ms. Stephens's use of the name "Aimee," saying that this made him "uncomfortable . . . because he's a man." *Id.* at 61a.

While Mr. Rost had never seen Ms. Stephens dressed in a skirt suit, he believed that "there is no way that . . . the person [I] knew . . . would be able to

[3] Mr. Rost consistently referred to Ms. Stephens as "he" and "a man," refusing to respect her gender identity. We quote Mr. Rost's actual words, but note that as a matter of accuracy and respect, Ms. Stephens is properly referred to as "she" and "a woman."

present in such a way that it would not be obvious that it was [a man]." Resp. App. 45a. He expressed concerns regarding customers and his business, stating that families who patronized his business "don't need some type of a distraction . . . . And [Ms. Stephens's] continued employment would negate that." *Id.* at 43a. Mr. Rost believed that Ms. Stephens's feminine appearance and behavior "would have harmed [Petitioner's] clients and its business." *Id.* at 88a.

B. Proceedings Below.

Ms. Stephens filed a charge of discrimination with the EEOC soon after her firing. Resp. App. 3a. On September 25, 2014, the EEOC filed a complaint alleging that Petitioner violated Title VII by firing Ms. Stephens because she is transgender, because of her "transition from male to female, and/or because [she] did not conform to [Petitioner's] sex- or gender-based preferences, expectations, or stereotypes." Pet. App. 166a.

Petitioner moved to dismiss, arguing that Title VII does not protect transgender people from discrimination. The district court granted that motion in part, reasoning that "transgender . . . status is currently not a protected class under Title VII." *Id.* at 172a.

The district court denied the rest of Petitioner's motion to dismiss, ruling that the EEOC had stated a claim that Ms. Stephens was fired in violation of Title VII because Petitioner objected that her appearance and behavior departed from its sex stereotypes. *Id.* at 173a-184a, 187a. The district court reasoned that "any person—without regard to

labels such as transgender—can assert a sex-stereotyping gender-discrimination claim under Title VII, under a *Price Waterhouse* theory, if that person's failure to conform to sex stereotypes was the driving force behind the termination." *Id.* at 164a; *see also id.* at 183a ("[A] transgender person—just like anyone else—can bring a sex-stereotyping gender-discrimination claim under Title VII under a *Price Waterhouse* theory.").

Following discovery, both the EEOC and Petitioner moved for summary judgment. The district court held that Mr. Rost's testimony that he fired Ms. Stephens because she "was no longer going to represent himself as a man," and would "dress as a woman" constituted "direct evidence to support a claim of employment discrimination." *Id.* at 109a-110a. But the district court concluded that the Religious Freedom Restoration Act (RFRA) provided Petitioner an "exemption from Title VII . . . under the facts and circumstances of this unique case," and therefore granted Petitioner summary judgment. *Id.* at 142a.

The EEOC appealed. *Id.* at 12a. Ms. Stephens filed a motion to intervene on appeal, because of her concerns about whether the EEOC would be able to continue fully representing her interests as the case progressed. *Id.* The court of appeals granted that motion and she participated in briefing and argument of the case. *Id.* at 12a-13a.

The court of appeals unanimously reversed. It first agreed with the district court that Petitioner violated Title VII by firing Ms. Stephens because of Mr. Rost's sex stereotypes about her appearance and conduct. *Id.* at 15a-22a. It then went on to rule for

Respondents on an independent ground, finding that discrimination because of Ms. Stephens's transgender status is inherently a form of sex discrimination that violates Title VII. *Id.* at 22a-36a.

In concluding that firing Ms. Stephens for non-conformity with sex stereotypes violated Title VII, the court of appeals rejected Petitioner's argument that its purported reliance on a sex-specific dress code provided it a defense. The court found that Petitioner fired Ms. Stephens for her appearance and behavior well beyond the dress code, and concluded that Petitioner could "not rely on its [dress code] policy to combat the charge that it engaged in improper sex stereotyping when it fired Stephens for wishing to appear or behave in a manner that contradicts the Funeral Home's perception of how she should appear or behave based on her sex." Pet. App. 21a-22a. As the court noted, "Rost's concerns extended beyond Stephens's attire and reached Stephens's appearance and behavior more generally." *Id.* at 65a. As a result, it expressly noted that it was "not considering . . . whether the Funeral Home violated Title VII by requiring men to wear pant suits and women to wear skirt suits." *Id.* at 18a.

Finally, the court of appeals rejected Petitioner's RFRA defense to Title VII liability. *Id.* at 36a-73a.[4]

[4] The court of appeals also rejected an argument that Title VII's ministerial exception applied. Petitioner does not seek review of these rulings.

REASONS FOR DENYING THE WRIT

I. THIS CASE IS A POOR VEHICLE FOR ADDRESSING PETITIONER'S FIRST QUESTION BECAUSE DECIDING IT WOULD NOT AFFECT THE JUDGMENT.

Since *Price Waterhouse,* the circuit courts have uniformly agreed that all people, including those who are transgender, may bring sex discrimination claims under Title VII if their employers discriminate against them because of sex stereotypes related to *behavior and appearance*. Applying that principle here, the court below first held that the funeral home discriminated against Ms. Stephens on the basis of sex when it fired her for failing to conform to her employer's expectations of how men and women should look and behave. It then held in the alternative that discrimination based on a person's transgender *status* is sex discrimination.

Petitioner's first question presented addresses *only* the court of appeals' alternative ground—whether discrimination based on transgender status, standing alone, is "discrimination 'because of . . . sex'" under Title VII.[5] Pet. i. But this case is an

[5] Petitioners pose the question as whether the word "sex" in Title VII means "gender identity." Pet. i. In fact, the courts that have concluded that discrimination based on transgender status violates Title VII have not done so on this ground. Rather, they have reasoned that discrimination based on transgender status is a form of "discrimination because of sex" because transgender status is an intrinsically sex-based characteristic. That reasoning does not depend on whether Congress was specifically contemplating "gender identity" when it enacted Title VII, any more than this Court's reasoning in *Oncale* relied on whether

inappropriate vehicle for reaching that question, because the judgment below rests on the independent holding that Petitioner fired Ms. Stephens because her appearance and behavior departed from sex stereotypes. That type of sex discrimination claim, accepted uniformly by the circuit courts, does not require the Court to decide whether discrimination based on transgender status is sex discrimination. This Court has made clear that Title VII encompasses disparate treatment motivated by sex stereotypes about an employee's appearance and behavior. Thus, even if this Court were to resolve the asserted circuit split regarding status-based claims in Petitioner's favor, the result in this case would not change. The Court should not grant certiorari to decide a question that will not affect the judgment below. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 192 (1997) (declining to resolve split among circuits where doing so would not affect the outcome of the case); Stephen M. Shapiro et al., *Supreme Court Practice* 249 (10th ed. 2013) (citing *Sommerville v. United States*, 376 U.S. 909 (1964)) (certiorari denied where the resolution of a circuit conflict could not change the result reached below).

Congress had specifically contemplated same-sex sexual harassment. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

A. The Courts Below Held That Petitioner Fired Ms. Stephens Because of Its Sex Stereotypes About Her Appearance and Behavior.

Both the district court and the court of appeals squarely held that Petitioner subjected Ms. Stephens to sex discrimination under *Price Waterhouse* when it fired her because her appearance and behavior departed from Mr. Rost's sex stereotypes. Pet. App. 21a-22a (agreeing with the district court that Petitioner had "engaged in improper sex stereotyping when it fired Stephens for wishing to appear or behave in a manner that contradicts the [Petitioner's] perception of how she should appear or behave based on her sex"). Because that independent holding is in accord with all courts of appeals to address the issue, and not challenged by either of Petitioner's questions presented, this case is not a proper vehicle for reaching Petitioner's first question presented, which asks something else: whether discrimination on the basis of transgender status is discrimination because of sex under Title VII.

In *Price Waterhouse*, this Court concluded that Title VII's prohibition on sex discrimination "mean[s] that gender must be irrelevant to employment decisions." 490 U.S. at 240 (plurality opinion); *see also id.* at 258-61 (White, J., concurring); *id.* at 272-73 (O'Connor, J., concurring). Price Waterhouse engaged in sex discrimination when it denied a partnership to Ann Hopkins in part because she did not "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235.

The district court and court of appeals both held that Petitioner fired Ms. Stephens because of its sex-stereotyped concerns about her appearance and behavior. The district court held that Mr. Rost's testimony that he fired Ms. Stephens because she "was no longer going to represent himself as a man" and would "dress as a woman" constituted "direct evidence to support a claim of employment discrimination," Pet. App. 109a-110a, in that it showed that Petitioner "fired Stephens 'because of [Stephens's] failure to conform to sex stereotypes[.]'" *Id.* at 109a (quoting *Barnes v. City of Cincinnati*, 401 F.3d 729, 738 (6th Cir. 2005)). The court of appeals agreed, finding that "Rost's decision to fire Stephens because Stephens was 'no longer going to represent himself as a man' and 'wanted to dress as a woman' . . . falls squarely within the ambit of sex-based discrimination that *Price Waterhouse* . . . forbid[s]." Pet. App. 16a. Petitioner "engaged in improper stereotyping when it fired Stephens for wishing to appear or behave in a manner that contradicts the [Petitioner's] perception of how she should appear or behave based on her sex." *Id.* at 22a.

The lower courts' holdings are amply supported by the record. Mr. Rost made clear his discomfort with Ms. Stephens's appearance as a woman, declaring that he had "yet to see a man dressed up as a woman that I didn't know was not a man dressed up as a woman." Resp. App. 44a; *cf. Lewis v. Heartland Inns of Am., LLC*, 591 F.3d 1033, 1039 (8th Cir. 2010) (finding that terminating a front desk employee for having a masculine appearance rather than a "pretty" "Midwestern girl look" was sufficient to show wrongful sex stereotyping). And Mr. Rost felt that Ms. Stephens "present[ing]" herself

and "dressing" as a woman while some aspects of her appearance or behavior would be perceived as masculine would have been a "distraction to people." Resp. App. 42a-45a.[6]

Thus, the courts below properly found that Mr. Rost himself admitted that his decision to fire Ms. Stephens was based on her departure from sex stereotypes about appearance and behavior. Notably, Petitioner does not challenge these findings.

B. The Circuits Are Uniform in Recognizing That Everyone Who Experiences Discrimination Motivated by Sex Stereotypes Related to Appearance and Behavior May Assert a Claim of Sex Discrimination, Including Transgender People.

The courts of appeals have developed extensive case law applying this Court's sex discrimination decisions to anyone penalized for departing from sex stereotypes in appearance or behavior. The courts agree that federal laws banning sex discrimination provide persons who are transgender the same protection from discrimination based on sex stereotypes as anyone else.

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[6] Customer preference is not a defense here any more than it would be in other contexts. *See Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981) (rejecting defense that promoting a female employee would hurt business based on assumption that South American clients would not want to work with a female vice-president, since biased customer preferences did not make being a man a bona fide occupational qualification).

The courts are unanimous in holding that Title VII protects *everyone* from sex discrimination in employment. That includes men, *see Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 681 (1983) (men are protected from discrimination related to pregnancy benefits, since "Congress had always intended to protect *all* individuals from sex discrimination in employment"), victims of same-sex sexual harassment, *see Oncale*, 523 U.S. at 80-81, and people of any gender or sexual orientation who are perceived as gender nonconforming, *see Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291-92 (3d Cir. 2009) (gay man with a "high voice" who "walk[ed] in an effeminate manner" and whose behavior was otherwise perceived as feminine could bring a claim of sex stereotyping); *EEOC v. Boh Bros. Const. Co.*, 731 F.3d 444, 453-62 (5th Cir. 2013) (en banc) (upholding jury verdict under Title VII for a man who was taunted because he was perceived as effeminate); *Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997), *vacated on other grounds,* 118 S. Ct. 1183 (1998) (employee who faced harassment "in whole or in part because he wore an earring" could sue under Title VII for discrimination due to his non-conformity with sex stereotypes); *Lewis*, 591 F.3d at 1041 (ruling in favor of employee who was fired because she was perceived as "tomboyish").

Every circuit court to address whether transgender people may state claims for discrimination based on gender non-conforming appearance and behavior after *Price Waterhouse* has agreed that they may—not only under Title VII, but also under other provisions of federal law that similarly prohibit sex discrimination.

Long before this case, the Sixth Circuit had concluded that a transgender fire department lieutenant who was fired for "expressing a more feminine appearance" could sue for sex discrimination under Title VII. *Smith v. City of Salem, Ohio*, 378 F.3d 566, 568 (6th Cir. 2004). If "[a]n employer who discriminates against women because . . . they do not wear dresses or makeup, is engaging in sex discrimination" then "[i]t follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination." *Id.* at 574. *See also Barnes*, 401 F.3d at 738 (affirming jury verdict in favor of a transgender woman based on evidence that her employer demoted her because her behavior and appearance failed to conform to its stereotypes of how males should look and act, including evidence that her "practice of dressing as a woman outside of work [was] well-known" among her co-workers and that "[o]ne of [her] supervisors told [her she] was not sufficiently masculine").

There is no circuit split on this question. In *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), the Eleventh Circuit concluded it was sex discrimination where a transgender woman was fired after being told that "her appearance [was] not appropriate '[b]ecause he was a man dressed as a woman and made up as a woman,'" "'it's unsettling to think of someone dressed in women's clothing with male sexual organs inside that clothing,' and that a male in women's clothing is 'unnatural.'" *Id.* at 1314. In *Schwenk v. Hartford*, the Ninth Circuit recognized that violence against a transgender prisoner because the perpetrator "believed . . . the victim was a man

who 'failed to act like' one" constituted sex discrimination prohibited by the Gender Motivated Violence Act. 204 F.3d 1187, 1202 (9th Cir. 2000). And in *Rosa v. Park West Bank & Trust Co.*, the First Circuit held that a transgender person could allege a claim of sex discrimination under the Equal Credit Opportunity Act after being turned away by a loan officer "because she thought that Rosa's [feminine] attire did not accord with his male gender[.]" 214 F.3d 213, 215-16 (1st Cir. 2000). The Seventh Circuit found that a transgender student could bring a sex-stereotyping claim under Title IX. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047-49 (7th Cir. 2017), *cert. dismissed,* 138 S. Ct. 1260 (2018).

The Tenth Circuit cited to *Smith* and assumed that Title VII permits transgender people to bring a claim based on "failure to conform to sex stereotypes" about how they "act and look." *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1223-24 (10th Cir. 2007). The Fifth and Eighth Circuits have also assumed that transgender people could bring sex discrimination claims. *See Tovar v. Essentia Health*, 857 F.3d 771, 775 (8th Cir. 2017); *Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697, 704 (8th Cir. 2012)[7]; *Brandon v. Sage Corp.*, 808 F.3d 266, 270-71 & n.2

[7] The Eighth Circuit's decision that transgender people are not protected from discrimination under Title VII, *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982), has not been revisited since this Court's decision in *Price Waterhouse*, although the Eighth Circuit has, since *Price Waterhouse*, assumed that Title VII includes protection for transgender people from discrimination based on sex-stereotyped concerns about appearance and behavior. *See Hunter*, 697 F.3d at 704.

(5th Cir. 2015).

District courts in the circuits that have not directly considered the question (the Second, Third, Fourth, and District of Columbia Circuits) have uniformly taken the same position: that transgender people may bring Title VII claims based on evidence of sex stereotyping about their appearance and behavior. *See, e.g.*, *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ.A. 05-243, 2006 WL 456173, at *2 (W.D. Pa. Feb. 17, 2006); *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 787-90 (D. Md. 2014); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008).

Thus, since *Price Waterhouse*, there has been no conflict among the courts of appeals over whether transgender people, like all others, can assert a Title VII claim when, like Ms. Stephens, they are subjected to adverse action because their employer objects that their appearance or behavior does not conform to sex stereotypes.

C. The Split Petitioner Identifies Is About a Legal Question That Is Not Necessary to the Judgment Below and in Any Event Merits Further Percolation.

Petitioner asks the Court to resolve a split among the courts of appeals about whether discrimination based on transgender status is sex discrimination. But because the court of appeals decision rests independently on a finding that Petitioner discriminated against Ms. Stephens based

on its sex-stereotyped concerns about her appearance and behavior, no resolution of this alleged split could alter the judgment below, making this a poor vehicle for addressing that issue. Shapiro et al., *supra* at 249. The split is also not nearly as extensive, mature, or complex as Petitioner suggests, and better opportunities will arise to address it.

The Seventh, Ninth, and Eleventh Circuits agree with the Sixth Circuit's alternative holding for Respondents that when a decision maker discriminates against someone for being transgender, that discrimination is inherently based on sex. *See* Pet. App. 22a-23a; *Whitaker*, 858 F.3d at 1049; *Schwenk*, 204 F.3d at 1201-02; *Glenn*, 663 F.3d at 1316.

Only the Tenth Circuit has ruled otherwise, finding that discrimination on the basis of transgender *status* is not a violation of Title VII. *Etsitty*, 502 F.3d at 1224. That court distinguished between claims based on sex stereotypes about appearance and behavior, which it assumed were available to transgender employees, and claims based on status alone. *Id.*

The other cases that Petitioner claims establish a circuit split show no such thing. On rehearing en banc, the Third Circuit removed the portion of the *Boyertown* decision that Petitioner cites. *See Boyertown Area Sch. Dist.*, 897 F.3d at 533. The ruling in *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016), was vacated by this Court and the case is still being litigated in the lower courts on remand. *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017). *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), and

Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662, 664 (9th Cir. 1977), two pre-*Price Waterhouse* decisions cited by Petitioner, have both already been overruled. *See Whitaker*, 858 F.3d at 1047 (acknowledging reasoning of *Ulane* cannot foreclose claim under *Price Waterhouse*); *Schwenk*, 204 F.3d at 1201 ("The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*.").

While resolving Petitioner's first question would have no effect on the judgment in this case, it might be dispositive in other cases. For example, Petitioner's first question might arise in cases that lack evidence that an employer was driven by sex-based concerns related to behavior and appearance. Such a case might involve an employer's failure even to consider an applicant whose job application or background check reveals that she is transgender, where there is no other evidence of the employer's sex-based appearance and behavior-related objections to employing her. In the absence of such evidence, a court might be required to decide a broader question about whether discrimination against transgender people because of their transgender status is a form of discrimination based on sex.

Thus far, it is only in the context of disputes over the use of sex-specific facilities where a decision about whether discrimination based on transgender status is a form of sex discrimination appears to have affected the outcome of a case. When the Tenth Circuit in *Etsitty* distinguished claims based on transgender status from those based on sex stereotypes about how a transgender person looks

and acts, it concluded that the use of sex-specific facilities fell on the status side of the line, and the plaintiff had no sex discrimination claim. In contrast, the Seventh Circuit held in *Whitaker* that discrimination against someone based on their transgender status by denying the use of sex-specific restrooms was a form of discrimination on the basis of sex. 858 F.3d at 1049. In contrast to *Whitaker* and *Etsitty*, however, this case does not present any issue regarding sex-specific facilities. *See infra* Section II.C.

Because the judgment below will not be affected by deciding whether discrimination on the basis of transgender status alone violates Title VII, this Court should deny review here.

II. PETITIONER'S SECOND QUESTION—WHETHER *PRICE WATERHOUSE* PROHIBITS EMPLOYERS FROM ENFORCING SEX-SPECIFIC POLICIES ACCORDING TO THE EMPLOYERS' VIEW OF THEIR EMPLOYEES' SEX—WAS NOT ADJUDICATED BELOW AND IS NOT PROPERLY PRESENTED HERE.

The second question on which Petitioner seeks review is whether *Price Waterhouse* "prohibits employers from applying sex-specific policies according to their employee's sex rather than their gender identity." Pet. i. But that question is also not properly presented, both because it was not decided below and because Petitioner admitted that Mr. Rost fired Ms. Stephens for far more than her intention not to follow Petitioner's dress code as interpreted by Mr. Rost. Thus, even if the dress code by itself were a

legitimate basis for firing Ms. Stephens, the outcome of this case would not change.

A. The Sixth Circuit Held That Mr. Rost Fired Ms. Stephens Based on Multiple Sex Stereotypes, Not Only Those Related to the Dress Code.

The Sixth Circuit held that Petitioner fired Ms. Stephens because of a range of sex stereotypes that go well beyond the dress code. It ruled that the evidence did not permit a conclusion that the only sex stereotype that motivated the termination concerned clothing:

> Though Rost does repeatedly say that he terminated Stephens because she 'wanted to *dress* as a woman' and 'would no longer *dress* as a man', the record also contains uncontroverted evidence that Rost's reasons for terminating Stephens extended to other aspects of Stephens's intended presentation. . . . The record . . . compels the finding that Rost's concerns extended beyond Stephens's attire and reached Stephens's appearance and behavior more generally.

Pet. App. 65a (citations omitted).[8]

[8] While the district court characterized the sex stereotyping as based only on clothing, the Sixth Circuit explicitly rejected that interpretation of the record. Because the case was resolved on

The record supports this conclusion. Mr. Rost's concern was not about which dress code Ms. Stephens would follow, but about having a woman working for him who would not "look like a woman." Resp. App. 62a-63a. He objected not only to Ms. Stephens dressing in a traditionally feminine way, but also to her using a traditionally feminine name or otherwise looking or acting in any way he believed only women should. Mr. Rost described himself as "just old-fashioned." *Id.* at 62a. He believed that "a male should look like a . . . man, and a woman should look like a woman." *Id.* at 62a-63a. He stated that he fired Ms. Stephens because she "was no longer going to represent himself as a man." Pet. App. 109a. He objected to Ms. Stephens calling herself "Aimee" because "he's a man." Resp. App. 61a. Petitioner went so far as to argue that the EEOC charge of discrimination should be dismissed because "Aimee" Stephens never worked there. *Id.* at 13a.

Mr. Rost was concerned that Ms. Stephens's appearance and behavior would be perceived as unacceptably masculine for a woman, regardless of how she dressed. He anticipated that if Ms. Stephens wore traditionally feminine clothing, she would still be perceived as masculine, and that would be "distracting to my clients." Pet. App. 198a. He testified that "[t]here is no way that . . . the person [I] knew as . . . Stephens would be able to present in such a way that it would not be obvious that it was [a man]." Resp. App. 45a.

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cross motions for summary judgment, the district court made no factual findings entitled to deference on appeal.

Petitioner notes that Mr. Rost stated that if Ms. Stephens "would only present as a woman outside of work," he would not have terminated her. Pet. App. 110a; *see also id.* at 104a-05a. But even if true, that statement is fully consistent with the court of appeals' statement that Mr. Rost was concerned with multiple aspects of Ms. Stephens's appearance and behavior because of sex.[9] Given the extent of Mr. Rost's stereotypes about how men and women should look and act, it is not plausible that Petitioner would have retained Ms. Stephens if she appeared at work using her new, traditionally feminine name, wearing makeup, styling her hair in a traditionally feminine way, and displaying traditionally feminine mannerisms, even if she complied completely with the dress code for men.

Thus, even if enforcing a sex-specific dress code against a transgender employee according to the employer's view of the employee's sex were lawful under Title VII, the judgment below would still stand because Mr. Rost fired Ms. Stephens for departing from sex stereotypes that extended well beyond Petitioner's dress code. This case therefore does not present the question about sex-specific policies that Petitioner wants the Court to decide.

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[9] This is not in fact an accurate statement regarding the record below, since Mr. Rost testified that, "if a customer had seen Stephens . . . as female outside of work" and "that person had said that they were not going to come back," then "perhaps, yes," that "could have been reason to let Stephens go." Resp. App. 66a.

B. The Court of Appeals Expressly Did Not Address the Lawfulness of Sex-Specific Dress Codes.

The legality of Petitioner's dress code was never adjudicated below. For that reason, prudential considerations weigh against addressing the question Petitioner poses.

Ms. Stephens had no personal objection to the dress code and planned to comply with it as a woman. Pet. App. 95a. As the district court noted, "the dress code is only being injected because the Funeral Home is using its dress code as a defense to the Title VII sex-stereotyping claim." *Id.* at 112a. And as the Sixth Circuit repeatedly emphasized, "[W]e are not considering, in this case, whether the Funeral Home violated Title VII by requiring men to wear pant suits and women to wear skirt suits." *Id.* at 18a. Ultimately, the Sixth Circuit concluded only that:

> [T]he Funeral Home's sex-specific dress code does not preclude liability under Title VII. Even if the Funeral Home's dress code does not itself violate Title VII—*an issue that is not before this court*—the Funeral Home may not rely on its policy to combat the charge that it engaged in improper sex stereotyping when it fired Stephens for wishing to appear or behave in a manner that contradicts the Funeral Home's perception of how she should appear or behave based on her sex.

Id. at 21a-22a (emphasis added).[10]

It makes little sense to determine how a sex-specific dress code may be enforced as to transgender people when the Court has yet to consider whether sex-specific dress codes may be enforced as to anyone. The question Petitioner proposes might be better presented, for example, in a case that has addressed the threshold question of whether employers may force women to wear skirts and men to wear pants absent any bona fide occupational qualification.

C. Sex-Specific Restroom Policies Are Not at Issue in this Case.

Petitioner invokes concerns about the implications of this case for transgender people's use of sex-specific restrooms. Pet. 2, 5, 14, 17, 19-20, 24-25, 27, 30-33. But that issue was not argued, developed, or decided below, and, by Petitioner's own admission, played no part in Ms. Stephens's termination.

While questions regarding restroom use came up briefly during depositions, it is undisputed that the issue played no role in Petitioner's firing of Ms. Stephens. Mr. Rost himself testified that "there was no discussion of bathrooms with Stephens . . . [t]hat never came up at all." Resp. App. 47a. He also said:

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[10] The court's statement that "even if we would permit certain sex-specific dress codes in a case where the issue was properly raised, we would not rely on either *Jesperson* or *Barker* to do so" and its subsequent discussion of those cases are dicta.

> Q: So the bathroom thing is really hypothetical, I mean, because you never even got to that point?
>
> A: That's true.

Id.

Petitioner did not raise the issue of restrooms before the court of appeals. Neither the district court nor the Sixth Circuit expressed any opinion, even in dicta, about whether Ms. Stephens should have been permitted to use the women's restrooms if she had continued to be employed. The Sixth Circuit mentioned restrooms once briefly as simply one more piece of evidence that Mr. Rost was not comfortable with any aspect of employing Ms. Stephens as a woman. *See* Pet. App. 65a.

III. THE SIXTH CIRCUIT'S HOLDING DOES NOT CONFLICT WITH *PRICE WATERHOUSE* OR ANY COURT OF APPEALS.

Petitioner does not identify as a question presented whether firing a transgender employee for failing to conform to sex stereotypes related to appearance and behavior violates Title VII. Yet it argues, in its "reasons for granting certiorari," that the Sixth Circuit's ruling conflicted with this Court's decision in *Price Waterhouse*. Pet. 21-25. That argument is not within the proper scope of the petition because it is not fairly included in either of the questions presented. *See Barr v. Matteo*, 355 U.S. 171, 172 (1957); *Yee v. City of Escondido.*, 503 U.S. 519, 535 (1992) (declining to consider question not raised in petition for certiorari), Supreme Court Rule

14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). In any event, Petitioner points to no actual conflicting decision, and cites almost exclusively dissenting opinions when asserting a conflict.[11] In fact, the court of appeals properly applied *Price Waterhouse*.

Petitioner first argues that *Price Waterhouse* finds sex discrimination only where employers advantaged one sex over another, and that the court of appeals eliminated that requirement. Pet. 22. But just as Price Waterhouse objected to promoting Ann Hopkins because it perceived her as too masculine, an objection it leveled against her only because it saw her as a woman, so Petitioner objected to retaining Ms. Stephens because it perceived her as too feminine, an objection it leveled against her only because it saw her as a man. In both cases, the employer penalized its employee for behavior that would have been acceptable if the employee's perceived sex were different. So the same differential treatment that existed in *Price Waterhouse* is present here.

Moreover, Title VII makes it unlawful "to discriminate against any *individual* with respect to his . . . sex," *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978), and has

---

[11] Petitioner cites *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1111-13 (9th Cir. 2006) (en banc) and *Etsitty*, but these cases involve issues not present in this case—whether a sex-specific appearance code violates Title VII and whether Title VII protects transgender women's use of women's restrooms, respectively. See *supra* Section I.C and Section II.B.

never been limited to cases where women, as a class, or men, as a class, are harmed. *Id.* The *Price Waterhouse* Court did not require Ms. Hopkins to show that her employer disadvantaged women as a group—only that sex stereotypes were a motivating factor in the way it treated *her*. *Price Waterhouse*, 490 U.S. at 251 (employer may not "assum[e] or insist[ ] that [women] match[ ] the stereotype associated with their group"). An interpretation of "because of sex" that limits it to situations where women as a group are treated worse than men or men worse than women would contradict the plain language of the statute and deny relief to many people who face discrimination because of sex. *See, e.g.*, *Oncale*, 523 U.S. at 80-81 (ruling that man harassed by other men in an all-male work environment could state claim for sex discrimination if that harassment was motivated by sex); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543 (1971) (holding that policy of not hiring women with pre-school age children violated Title VII even though most employees were women and "hence no question of bias against women as such was presented").[12]

---

[12] In the equal protection context, the Court has often declared unconstitutional rules that harm both women and men, but that reinforce sex stereotypes, such as laws providing different benefits to widows and widowers based on stereotypes about women's dependence on men. *See, e.g., Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Califano v. Goldfarb,* 430 U.S. 199 (1977); *Wengler v. Druggists Mut. Ins. Co.,* 446 U.S. 142 (1980). These laws, the Court recognized, harmed both the surviving widower and his deceased spouse because of sex. The fact that the laws simultaneously harmed men and women did not mean that they were not discrimination on the basis of sex. *See also J.E.B. v. Alabama*, 511 U.S. 127 (1994) (rejecting

Second, Petitioner claims that Title VII prohibits discrimination based on sex stereotypes only when they are "fictional." Pet. 23-24. But *Manhart*'s discussion of stereotypes, relied on by Petitioner, condemns not only fictional differences but also "generalization[s] that the parties accept as unquestionably true[.]" *Manhart*, 435 U.S. at 707. This Court stated unequivocally that "[e]ven a *true* generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Id.* at 708 (emphasis added); *see also Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1083 (1983) ("Title VII requires employers to treat their employees as *individuals*, not 'as simply components of a racial, religious, sexual, or national class.'") (quoting *Manhart*, 435 U.S. at 708).

In short, the court of appeals faithfully applied *Price Waterhouse* consistently with this Court's other precedents. For good reason, Petitioner did not ask the Court to review whether the court of appeals properly held that Ms. Stephens, a transgender employee, could assert a Title VII claim where her employer expressly fired her based on its sex stereotypes about her appearance and behavior.[13]

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gender-based peremptory jury strikes without requiring that a strike be shown to disadvantage women or men as a class).

[13] If the Court grants certiorari in *Altitude Express, Inc. v. Zarda*, No. 17-1623, or *Bostock v. Clayton County*, No. 17-1618, the Court should not hold this case pending the issuance of a decision in those cases. While *Zarda* and *Bostock* also concern the scope of sex discrimination under Title VII, in neither case

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 24, 2018

Counsel for Respondent Aimee Stephens

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did the court of appeals base its holding on a separate claim of sex discrimination based on sex stereotypes about appearance and behavior, as the Sixth Circuit did in this case. The Court should deny review in this case because resolution of the petitions in *Zarda* or *Bostock* would not affect the type of sex discrimination claim under which Ms. Stephens prevailed.

APPENDIX

EXHIBIT A

Dear Friends and Co-Workers:

I have known many of you for some time now, and I count you all as my friends. What I must tell you is very difficult for me and is taking all the courage I can muster. I am writing this both to inform you of a significant change in my life and to ask for your patience, understanding, and support, which I would treasure greatly.

I have a gender identity disorder that I have struggled with my entire life. I have managed to hide it very well all these years. It all started when I was about five years old. I knew something was different about me, but I could not have told you what it was then. When I was about ten years old, I started to ask my Mom questions. Mom related to me that all the signs pointed out that she was going to have a baby girl. Mom was so sure that I was going to be a girl that everything she bought was for a girl. So for the first few months of my life I was dressed in girl clothes, because they could not afford to go and buy all new clothes. Perhaps the signs were not wrong after all.

I know this has nothing to do with my condition. It is a birth defect that needs to be fixed. I have been in therapy for nearly four years now and have been diagnosed as a transsexual. I have felt imprisoned in a body that does not match my mind, and this has caused me great despair and loneliness. With the support of my loving wife, I have decided to become the person that my mind already is. I cannot begin to describe the shame and suffering that I have

lived with. Toward that end, I intend to have sex reassignment surgery. The first step I must take is to live and work full-time as a woman for one year. At the end of my vacation on August 26, 2013, I will return to work as my true self, Amiee Australia Stephens, in appropriate business attire.

I realize that some of you may have trouble understanding this. In truth, I have had to live with it every day of my life and even I do not fully understand it myself. I have tried hard all my life, to please everyone around me, to do the right thing and not rock the boat. As distressing as this is sure to be to my friends and some of my family, I need to do this for myself and for my own peace of mind and to end the agony in my soul. Through it all, I have learned that life is an adventure, and I would like to believe that the best is yet to come. I hope we can enjoy it together. It is my wish that I can continue my work at R.G. & G.R. Harris Funeral Homes doing what I have always done, which is my best!

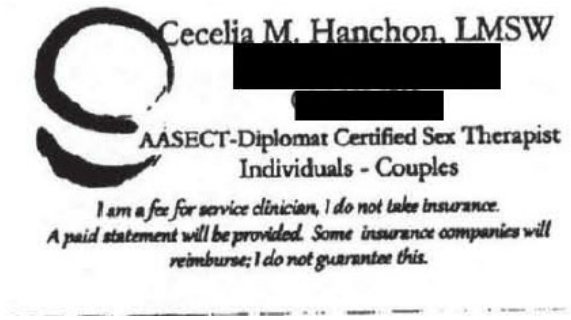
Sincerely,

/s/ Anthony Stephens
Anthony Stephens

/s/ Amiee A. Stephens
Amiee A. Stephens

If you should have questions or need guidance in this, please contact my therapist, Cecelia Hanchon. She has indicated that she would gladly offer assistance to anyone who has questions and can answer questions much better than I. I have enclosed her business card.

Thanks


Cecelia M. Hanchon, LMSW
[redacted]
AASECT-Diplomat Certified Sex Therapist
Individuals - Couples
I am a fee for service clinician, I do not take insurance.
A paid statement will be provided. Some insurance companies will
reimburse; I do not guarantee this.

CHARGE OF DISCRIMINATION This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.	Charge Presented To: ☐ FEPA ☒ EEOC Agency(ies) Charge No(s): **471-2013-03381**
Michigan Department Of Civil Rights **and EEOC** *State or local Agency, if any*	

Name (*indicate Mr., Ms., Mrs.*) **Aimee Stephens**	Home Phone *(Incl. Area Code)* **(586) 838-6623**	Date of Birth **12-07-1960**
Street Address City, State and ZIP Code **17730 Lennane, Redford, Ml 48240**		
Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (*If more than two, list under PARTICULARS below*.)		
Name **R.G. & G. R. HARRIS FUNERAL**	No. Employees, Members **15 - 100**	Phone No. (Include Area Code) **(734) 425-9200**
Street Address City, State and ZIP Code **31551 Ford Rd., Garden City, MI 48135**		

Name	No. Employees, Members Phone No. *(include Area Code)*
Street Address	City, State and ZIP Code
DISCRIMINATION BASED ON *(Check appropriate box(es).)* ☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN ☐ RETALIATION ☐ AGE ☐ DISABILITY ☐ GENETIC INFORMATION ☐ OTHER (Specify)	DATE(S) DISCRIMINATION TOOK PLACE Earliest **07-31-2013** Latest **08-15-2013** ☐ CONTINUING ACTION

THE PARTICULARS ARE *(If additional paper is needed, attach extra sheet(s)):*

I began working for the above-named employer on 01 October 2007; I was last employed as a Funeral Director/Embalmer.

On or about 31 July 2013, I notified management that I would be undergoing gender transitioning and that on 26 August 2013, I would return to work as my true self, a female. On 15 August 2013, my employment was terminated. The only explanation I was given was that management did not believe the public would be accepting of my transition.

Moreover, during my entire employment I know there are no other female Funeral Director/Embalmers. I can only conclude that I have been discharged due to my sex and gender identity, female, in violation of Title VII of the Civil Rights Act of 1964, as amended.	
I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.	NOTARY - *When necessary for State and Local Agency Requirements*
I declare under penalty of perjury that the above is true and correct. Sep 09, 2013 *Date* X Aimee Stephens [SIGNATURE] Charging Party Signature	I swear or affirm that I have read the above charge and that it is true to the best of my knowledge information and belief. SIGNATURE OF COMPLAINANT X Aimee Stephens [SIGNATURE] SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (*month, day, year*) [SIGNATURE] 09 Sept 2013

EEOC002748

EEOC AFFIDAVIT

(This form is affected by the Privacy Act of 1974. See Privacy Act Statement on reverse before completing this form.)

NAME	TELEPHONE NUMBER *(Give area code)*
Thomas Rost	HOME: WORK:

ADDRESS *(Number, street, city, state, zip)*

THE FOLLOWING PERSON CAN ALWAYS CONTACT ME

NAME AND TELEPHONE NUMBER

ADDRESS *(Number, street, city, state, zip)*

STATUS OF EMPLOYMENT

CHECK ONE: [X] WORKING [ ] NOT WORKING [ ] SOUGHT EMPLOYMENT AT

NAME OF EMPLOYER: RG+GR Harris Funeral

TYPE OF BUSINESS: Funeral Home

DATES OF EMPLOYMENT FROM: TO:

WHEN EMPLOYMENT WAS SOUGHT FROM: TO:

POSITION TITLE: President

DEPARTMENT

ADDRESS (Number, street, city, state, zip)

1. I am president here and also owner.
2. I've been employed here for 50 yrs.
3. We have pretty good business - about 30 funerals a month and 60 Cremations on average
4. Cremation is the big one - When I began we only had 5% Creation now it it is 50%. Its a reflection of the culture.
5. Everyone is atypical client. In this City it is a Blue Collar Southern People, Livionia is a little more White Collar. Our business is about 3mile to 5mile Radius, we are a local business.
6. In Family (Repeats) are very common to become their family, or others who have visited and were impressed, some its due to location.
7. They say on average you're making funeral arrangements every 8yrs. It depends.
8. 3 mgrs & 1 Business mgr - Key people; I have 3 other full time females, 10 part time, and 2 Licensed Embalmers who are non-Mgmt - funeral directors. Roughly I have 20 employees.
9. There is not much turn over. In last year or two I've only had Anthony's position open up - no others.
10. It is not an easy thing to do. We are a small specialized industry. I mean our key people not our lady attendents, sometime I keep files of resumes

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for key people. Its mostly local. I would advertise on-line in local newspaper. God supplies the people when I need them most.

10. I don't associate with others in my industry other than at some conventions. Also we have large refrigiration unit - our market is unique we do more cremations than typical funeral Home. Thats through our cremation society of Michigan - which Harris funeral Home owns. Its a sign of the changing times.

11. Average funeral Director tends to be not a type A person. This is an industry where you need to have the heart of a servant and serve people. You need compassion and heart. You cannot come with the personality of a Salesman/Carsalesman. Its nice to be nice we have to draw the line somewhere and not give the shirt off your back. We have a more spiritual person - the heart of what we do is a spiritual accpet. We deal with Clergy and ministers and Hospice. Even people who are not spiritual, at the time of death things change. A person not like this and emapthetic dont have the heart for it and need to do something else.

12. That would be the person I would look for. I'm limited to a small selection. Most of the people in this industry are this type of people The industry has down sized due to the ~~cre~~ cremations. Turning away from family owned towards corporation own business.

13. I have my mgmt people who run and oversee daily actives that are 24/7 not 8 hrs a day. I have 3 rotating Mgrs running business. We dont have General Mgr. we dont have the income for another lvl of mgmt. They ~~have~~ have specific areas they oversee.

I declare under the penalty of perjury that the foregoing is true and correct.

DATE	SIGNATURE OF WITNESS	SIGNATURE OF EEOC REPRESENTATIVE	PAGE OF

PRIVACY ACT STATEMENT: (This form is covered by the Privacy Act of 1974, Public Law 93-579. Authority for requesting and uses of the personal data are given below.)

1. FORM NUMBER/TITLE/DATE: EEOC FORM 133, EEOC AFFIDAVIT, December 1993.
2. AUTHORITY: 42 USC 2000e(9), 29 USC 201, 29 USC 621, 42 U.S.C. 12117.
3. PRINCIPAL PURPOSES. Provides a standardized format for obtaining sworn statements of information relevant to a charge of discrimination.
4. ROUTINE USES. These affidavits are used to: (1) make an official determination regarding the validity of the charge of discrimination; (2) guide the Commission's investigatory activity; and (3) in Commission litigation, to impeach or substantiate a witness's testimony.
5. WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION: Voluntary. Failure to provide an affidavit has no effect upon the jurisdiction of the Commission to process a charge. However, sworn statements submitted by the parties, are, of course, relied upon more heavily than unsworn statements in making a determination as to the existence of unlawful discrimination.

EEOC002760

REVERSE OF EEOC FORM 133 (Test 10/94)

But they rotate between facilities. The other funeral Directors also rotate usually their base is near home. Anthony could be assigned a job for the day. The funeral Director would come in he would do transfer, he will get death certificate, he will meet with doctors or meet family at hospice or Nursing Homes. We are Parking Cars. We take casket down front. Need Licence Funeral Director go to Cemetary. Secratary Reception Area and P/T gopher / drivers - usually retired people. Carry over to what funeral directors do - We have 3 of them and yard people, Matience people, cleaning people.

14. Those are pretty much the duties. They are my go betweens for family, they are the ~~Customers~~ representative, they are educated in the industry and know the options available.

15. 2 people, doing less and less of that, because of the Cremation. There are contract Embalmers that can be used if need be.

16. Right Now Troy & Matt, my son, - I have not there are Some out there. Many are going to school. I think Women would have an affinity more than men. Customers typically widows and other females. I typically use my Receptions for this greeting of customers to pick up for the Funeral directors when need be. They are Typically very Well dress in suits with skirts.

I declare under the penalty of perjury that the foregoing is true and correct.

DATE	SIGNATURE OF WITNESS	SIGNATURE OF EEOC REPRESENTATIVE	PAGE OF

PRIVACY ACT STATEMENT: (This form is covered by the Privacy Act of 1974, Public Law 93-579. Authority for requesting and uses of the personal data are given below.)

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5. WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION: Voluntary. Failure to provide an affidavit has no effect upon the jurisdiction of the Commission to process a charge. However, sworn statements submitted by the parties, are, of course, relied upon more heavily than unsworn statements in making a determination as to the existence of unlawful discrimination.

EEOC002761

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EEOC AFFIDAVIT

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NAME	TELEPHONE NUMBER *(Give area code)* HOME: WORK:
ADDRESS *(Number, street, city, state, zip)*	

THE FOLLOWING PERSON CAN ALWAYS CONTACT ME

NAME AND TELEPHONE NUMBER	
ADDRESS *(Number, street, city, state, zip)*	

STATUS OF EMPLOYMENT

CHECK ONE: [ ] NOT WORKING [X] WORKING [ ] SOUGHT EMPLOYMENT AT	NAME OF EMPLOYER	
TYPE OF BUSINESS	DATES OF EMPLOYMENT	FROM: TO:
	WHEN EMPLOYMENT WAS SOUGHT	FROM: TO:
POSITION TITLE	DEPARTMENT	
ADDRESS (Number, street, city, state, zip)		

18. He was here for a reasonably longtime. As with all employees there is ups and downs. He started strong but leveled off. Great hours. 8-5pm for the industry it is a great thing. He did his job with only some issues here and there, Mostly Attitude ~~issues~~. 6 months before he left Mgr wanted to let him go but I'm laid back and spoke with him it was an attitude thing. He refused to help stack chairs for Dolly who is 80yrs. He had a hard time, we knew something was wrong. If we'd had fired ~~him~~ him then we wouldnt have the problem now. George Crawford may have more specifics for you.

19. Thats not my job - but I believe its just the Attitude - job was getting done but over the last year it really became a problem. He was taking Chemicals.

20. I was presented a letter, when I get back I will be dressing as a female and no longer as a male. I thought sericusly for 2weeks and said Anthony we are going to have to part ways.

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21. Everything is all about healing. We are all about healing ~~to~~ No ~~body~~ is excempt from that. If you have something that is going to ~~effect~~ affect that process you don't belong. All male Employees are provided uniform and thus It was going to be and impossibility. There is no questions that dressing as woman would have intrrupted business and business transactions. Dress is paramont here. We are one funeral homes the provide clothing but I want to control what my Men are Wearing. I want them looking uniform and that they are here and apart of the culture. I dont want them wearing other color suits and ties.

You women are a strage breed - they do wear a uniform but trying to have them came to a consenses is too difficult they say this color makes me look fat this one doesnt look good on me. women like variety they dont like to wear the same thing everyday. I lost the fight so long as the look proffessional. A little color and variety is okay. We could get matching Womens suits with red line but I lost that fight years ago.

~~22. Basically that was the only consideration~~

23. no other reason for CP's discharge.

I declare under the penalty of perjury that the foregoing is true and correct.

DATE	SIGNATURE OF WITNESS	SIGNATURE OF EEOC REPRESENTATIVE	PAGE OF

PRIVACY ACT STATEMENT: (This form is covered by the Privacy Act of 1974, Public Law 93-579. Authority for requesting and uses of the personal data are given below.)

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5. WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION: Voluntary. Failure to provide an affidavit has no effect upon the jurisdiction of the Commission to process a charge. However, sworn statements submitted by the parties, are, of course, relied upon more heavily than unsworn statements in making a determination as to the existence of unlawful discrimination.

EEOC002763

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NAME	TELEPHONE NUMBER *(Give area code)* HOME: WORK:
ADDRESS *(Number, street, city, state, zip)*	

THE FOLLOWING PERSON CAN ALWAYS CONTACT ME

NAME AND TELEPHONE NUMBER	
ADDRESS *(Number, street, city, state, zip)*	

STATUS OF EMPLOYMENT

CHECK ONE: [ ] NOT WORKING [X] WORKING [ ] SOUGHT EMPLOYMENT AT	NAME OF EMPLOYER
TYPE OF BUSINESS	DATES OF EMPLOYMENT FROM: TO: WHEN EMPLOYMENT WAS SOUGHT FROM: TO:
POSITION TITLE	DEPARTMENT
ADDRESS (Number, street, city, state, zip)	

24. No deviations with dress code.

25. I never seen the Charging Party presenting as a female.

26. Never heard any third hand knowledge of CP presenting as female nor heard any gossip. People had no idea This was something not commonly known at work at all.

27. Basic employees no communications this has not been discussed here. Spoke with Mgrs about this and they had no idea then spoke w/ Atty and decided to make the cut.

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EOC Form 133 (Test 10/94)

KIRKPATRICK LAW OFFICES, P.C.
Joel J. Kirkpatrick
Attorney at Law
Admitted to practice in Michigan & Ohio

AIMEE STEPHENS
v.
R. G. & G. R. HARRIS FUNERAL HOME, INC.
EEOC CHARGE NO. 471-2013-03381

RESPONSE OF R. G. & G. R. HARRIS FUNERAL HOME. INC.

In response to the *Charge of Discrimination* filed by "Aimee Stephens," R. G. & G. R. Harris Funeral Home, Inc. (hereinafter "Funeral Home"), by and through its attorney Joel J. Kirkpatrick, states as follows:

Identification of R. G. & G. R. Harris Funeral Home: R. G. & G. R. Harris Funeral Home, Inc. is a Michigan corporation in the business of providing embalming, funeral, burial, and related services as allowed under Michigan law. The Funeral Home has been in business since 1932. The Funeral Horne is a closely-held family owned business.

Identification of Complainant: The Complainant is identified as "Aimee Stephens."

1. The Funeral Home has never employed anyone by the name of "Aimee Stephens." Therefore, the Complaint must be dismissed on the basis that the named Complainant has never been employed by the Funeral Home.

2. The Funeral Home *has* employed an employee by the name of "Wm. Anthony B. Stephens." If this is the person who filed the Complaint under the name "Aimee Stephens," then the Complaint must be dismissed as not having been filed under the Complainant' s legal name. If the real Complainant is Wm. Anthony B. Stephens, then the name "Aimee Stephens" is a fictitious name concealing the Complainant's true and legal identity. It is hornbook law that complaining parties are required to file complaints under their legal names so as to clearly identify who the parties are and so as to avoid fraud and confusion. See, for example, Doe v. Frank, 951 F.2d 320 (11th Cir. 1992) quoting Southern Methodist University Ass'n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707 (5th Cir. 1979) (basic fairness dictates that party plaintiffs must participate in suits under their real names); Doe v. State of Alaska, 122 F.3d 1070 (9th Cir. 1997) (a plaintiff must file a complaint in his own name).

Statement of Nonwaiver of Defenses: Without waiving its defense that the Complainant's Charge of Discrimination must be dismissed because either (1) the Funeral Home has never employed anyone by the name of "Aimee Stephens" or (2) if the real name of the Complainant is "Wm. Anthony Stephens" then Mr. Stephens has attempted to bring a claim under an erroneous and fictitious name rather than his true and legal name, the Funeral Home responds to the Charge of Discrimination as follows:

Facts

The Funeral Home has never employed at any time or in any capacity anyone by the name of "Aimee Stephens." Therefore, the Funeral Home denies in their entirety all facts and claims asserted by any such person.

The Funeral Home did employ a "Wm. Anthony B. Stephens" – a male – from September 2007 until August 2013. Mr. Stephens was an at will employee employed as a funeral director. In the summer of 2013, Mr. Stephens advised the Funeral Home in no uncertain terms that he would no longer comply with the Funeral Home's Dress Code, which requires men to wear suits and ties. Due to Mr. Stephens' refusal to abide by the Funeral Home's Dress Code, the Funeral Home terminated Mr. Stephens' employment.

Claims

The Complainant claims he was discharged *"due to my sex and gender identity, female, in violation of Title VII the Civil Rights Act of 1964."*

I. Gender Identity Claim

A. Gender Identity is Not a Protected Class Under Title VII.

Title VII provides:

> *(a) Employer practices: It shall be an unlawful employment practice for an employer:*
>
> *(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against*

any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive, or tend to deprive, any individual of employment opportunities or otherwise adversely affect his status as an employee, on the basis of such individual's race, color, religion, sex or national origin.

42 U.S.C. Sec. 2000e-2.

Due to the fact that Title VII does not list "gender identity" as one of the its protected classes, it is clear from the face of the statute that "gender identity" is not a protected class. If that were not clear enough, Congressional history demonstrates that Congress did not intend to include "gender identity" as a protected class under Title VII. That is evidenced by the fact that the "Employment Non-Discrimination Act"(ENDA) – which would make "sexual orientation" and "gender identity" protected classes under Title VII – has been introduced in Congress every year since 1994 (except the 109th Congress) and has been rejected every year. If "gender identity" was already a protected class under Title VII there would be no reason for sexual orientation and gender identity advocates to introduce ENDA every year. And if Congress intended to include "gender identity" as a protected class it would not have repeatedly rejected the enactment of ENDA for nearly 20 years. (It is also relevant to note that Congress specifically excluded *"transvestism, transexualism, pedophilia,*

exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders" (our emphasis) from the definition of what constitutes a disability under the Americans With Disabilities Act. 42 U.S.C. Sec. 12211(b)(l).)

Case law supports this position. See Etsitty v. Utah Transit Authority, 502 F.3d 1215 (10th Cir. 2007) (the court agrees with the vast majority of federal courts to have addressed this issue and concludes that discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII). See also Vickers v. Fairfield Medical Center. et al., 453 F.3d 757 (6th Cir. 2006) (because sexual orientation is not one of the listed protected classes under Title VII, sexual orientation is not a prohibited basis for discriminatory acts under Title VII).

Therefore, since "gender identity" is not a protected class under Title VII, the Complainant's gender identity claim must fail.

To the extent the Complainant' s claim is that he was discriminated against due to gender stereotyping under Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), that claim must fail as well. Price Waterhouse neither confronted nor addressed the issue of whether a person suffering from gender identity confusion and expressing that confusion in the workplace states a claim under Title VII. Price Waterhouse involved a woman, identifying herself as a woman, whose fellow employees recognized as a woman but who felt was not behaving in a sufficiently feminine manner – not a woman who was claiming to be a man and purporting to change

and express herself accordingly. The two situations are so different that any attempt to stretch the Price Waterhouse holding to encompass transgender claimants is untenable.

Therefore, to the extent the Complainant is asserting a gender stereotyping claim under Price Waterhouse, that claim must fail as well.

B. The EEOC has no Authority to Pursue the Complainant's Claim and, in Doing So, is Acting *Ultra Vires.*

Since "gender identity" is not a protected class under Title VII and because there is no reasoned basis to apply the gender stereotyping theory of Price Waterhouse to transgender claims, the EEOC has no authority to recognize either, and the EEOC sanctions in doing so are *ultra vires,* without legal authority, and therefore null and void.

Therefore, the Complainant's "gender identity" claims must be denied.

C. The Employee's Employment Was Not Terminated On Account of the Employee's Male Sex or Unlawful Gender Stereotyping, but Rather on Account of the Employee's Refusal to Comply with the Funeral Home's Dress Code.

The Complainant's claims must also fail because the complained of employment termination was not based on the employee's male sex or on unlawful gender stereotyping. As

do most if not all funeral homes, the Funeral Home here has a dress code. The Funeral Home's *Dress Code* is in writing and is provided to all Funeral Home staff.

The Funeral Home's *Dress Code* – *a* copy of which is attached hereto – provides that "*To create and maintain our reputation as "Detroit's Finest", it is fundamentally important and imperative that every member of our staff shall always be distinctively attired and impeccably groomed, whenever they are contacting the public as representatives of The Harris Funeral Home. Special attention should be given to the following consideration* [sic], *on all funerals, all viewings, all calls, or on any other funeral work.*"

The *Dress Code* then goes on to distinguish between what men are required to wear and what women are required to wear.

Men are required to wear suits and ties. The suits must be black, gray, or dark blue. Shirts must be white with regular medium length collars. Ties must be Funeral Home issued or similar. Only black or dark blue socks and black or dark blue shoes may be worn. To assist men in complying with the Dress Code, the Funeral Home provides men with Dress Code compliant suits and ties.

It is clear that reasonable regulations requiring male and female employees to conform to different dress and grooming standards do not violate Title VII. Etsitty v. Utah Transit Authority, supra, at 1224-1225. See also Nichols

v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864 (9th Cir. 2001) and Creed v. Family Express Corp., 2009 WL 35237 (N.D. Ind. 2009).

If Anthony Stephens is the true identity of the Complainant in this case, he is a man. He is a male biologically, anatomically, and legally. He was a man when he was hired and a man when he was terminated. All the documentation in the Funeral Home's possession – including Mr. Stephens' *Certificate* from the Conference of Funeral Service Examining Board of the United States, his *Associate of Applied Science in Funeral Service* degree from Fayetteville Technical Community College, his cover letter and resume, his Funeral Service License issued by the State of Michigan, his employment tax records, his driver's license issued by the State of Michigan, his 08/2912013 Unemployment Insurance Claim, all identify Mr. Stephens as a man. In addition, Mr. Stephens is currently married to a woman, which would not be legally possible under the laws of Michigan was Mr. Stephens a woman. Indeed, despite *referring* to himself on occasion as "female," nowhere does Mr. Stephens ever claim he is not biologically, anatomically, and legally a male.

Therefore, the Funeral Home is entitled to treat Mr. Stephens as a man for purposes of the Funeral Home's Dress Code.

Despite being a man, however, Mr. Stephens made it clear to the Funeral Home that he no longer intended to comply with the Dress Code's attire requirements for men.

The Funeral Home did not care *why* one of its employees was refusing to comply with the Funeral Home's Dress Code. It only cared that he *did* refuse. Any male employee of the Funeral Home who refused to comply with the Dress Code's attire requirements for men would be treated the same as Mr. Stephens was treated. The Dress Code is a perfectly appropriate employment requirement – particularly in the funeral services profession – and was applied consistently and non-discriminatorily. All men were treated the same. Any man's refusal to comply with the Man's Dress Code is grounds for termination.

Therefore, Mr. Stephens' refusal to comply with the Funeral Home's Dress Code – not Mr. Stephens' gender identity or unlawful gender stereotyping – was the reason for his termination. That being the case, if Anthony Stephens is the true identity of the Complainant, Mr. Stephens' claim must fail.

II. Sex Discrimination Claim

The Complainant also claims he was discriminated against on the basis of his "female" sex – evidently apart from his gender identity.

Assuming the Complainant is "Wm. Anthony B. Stephens," his sex discrimination claim must fail. His claim is that he was the subject of sex discrimination in that his employment was terminated because he is a "female." This claim is made clear by virtue of the Complainant's statement in the Charge of Discrimination, to wit: "*Moreover, during my entire employment I know there are no*

other female Funeral Directors/Embalmers" (our emphasis). Thus Mr. Stephens is stating, for purposes of his sex discrimination claim, that he was terminated because he is a female.

But Mr. Stephens is not a female. He is biologically, anatomically and legally a male. He may claim he is a female. He may intend to undergo therapy and surgery that would to some extent change his physical appearance to resemble a female. But doing so would not make him a female and, in any event, he has not done so yet. And the Funeral Home is not aware of any change in Mr. Stephens' legal status as a male.

Since it is an undisputable fact that Mr. Stephens is a male – not a female – he cannot claim his employment was terminated *on account of his being female.*

To the extent Mr. Stephens is claiming his employment was terminated not because he *is* a female (something he cannot factually claim), but rather because of his present or anticipated female appearance, his "sex discrimination" claim is not any different than his "gender identity discrimination" claim – which is discussed and refuted above.

Therefore, the Complainant's sex discrimination claim must fail.

Please contact me if you have any questions

Yours very truly,

KIRKPATRICK LAW OFFICES, P.C.

Joel J. Kirkpatrick

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Plaintiff,

-vs- No. 2:14-cv-13740

R.G. & G.R. HARRIS FUNERAL HOMES INC.,

Defendants.

The Deposition of AIMEE A. STEPHENS
Taken at 39111 Six Mile Road,
Livonia, Michigan,
Commencing at 9:28 a.m.,
Wednesday, December 16, 2015,
Before Deborah A. Culver

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Also Present:
Thomas F. Rost

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AIMEE A. STEPHENS

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EXHIBITS

EXHIBIT
(Exhibits attached to transcript.)

D E P O S I T I O N EXHIBIT 1
(Resumé)
D E P O S I T I O N EXHIBIT 2
(Employee Manual)
D E P O S I T I O N EXHIBIT 3
(Letter)
D E P O S I T I O N EXHIBIT 4
(Plaintiff's Witness List)

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A. Yes.
Q. Was that always your name legally when you were employed by R.G. & G.R. Funeral Homes?
A. Yes.
Q. Were you born a male?
MR. PRICE: Objection. I think this is getting to the part of the Protective Order here.
MR. KIRKPATRICK: It's not the Protective Order. I'm asking were you born a male or female.
I'm not asking about any transition, I'm just asking

about sex assigned at birth. Does that assist?
MR. PRICE: You can go ahead and answer.
A. I was assigned male at birth.
BY MR. KIRKPATRICK:
Q. What does that mean to be assigned male at birth, or any sex at birth?
When I say that, what your understanding is.
MR. PRICE: I really think we're getting into the transition phase. I'm going to object. I mean I really think this is relating to the transition from male to female, and I think we are -- it really does fall within the Protective Order.
MR. KIRKPATRICK: I don't believe it does fall in the Protective Order.

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Why don't we go off the record for a minute and maybe the attorneys can have a conversation.
MR. PRICE: Okay.
(Off the record at 10:31 a.m.)
(Back on the record at 10:37 a.m.)
MR. KIRKPATRICK: Back on the record.
BY MR. KIRKPATRICK:

Q. So as we fast forward or actually go back to August of
2007, you testified already that you worked at
R.G. & G.R. Funeral Home; right?
A. As of October 1st.
Q. I'm sorry.
A. 2007.
Q. You're right. October 1st, 2007. What was your
position?
A. When I first started, I would basically have been an
apprentice.
Q. So your job title was apprentice. Was that similar to
the job title you had in the very first funeral home
you worked at back in North Carolina?
A. Yes.
Q. And was it your understanding that at some point you'd
get another job title such as funeral director?
A. Yes.
Q. And how long did you work in that role as apprentice?

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A. Six months.
Q. And after six months, were you then promoted to
funeral director?
A. More or less, yes, because I got my

license.
Q. Let's step back and talk about the hiring process for R.G. & G.R. Did you submit a resumé? How did you go about getting the position at R.G. & G.R. Funeral Home?
A. Yes, resumé was submitted.
MARKED FOR IDENTIFICATION
D E P O S I T I O N EXHIBIT 1
(Resumé)
10:39 a.m.
BY MR. KIRKPATRICK:
Q. Take a look at what's been marked Exhibit 1. Did you have a chance to review that?
A. Yes.
Q. Do you recognize that?
A. Yes.
Q. Would this be the resumé and cover letter you submitted to get the job at R.G. & G.R. Funeral Homes?
A. Yes.
Q. You see the first page down there, it says Anthony B. Stephens. Is that your signature?
A. Yes.

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Q. And this resumé, you prepared

this, I take it, to get
a job at a funeral home?
A. Yes.
Q. So you submitted a resumé. And what happened next
that got you into a position to get the job with
R.G. & G.R. Funeral Home?
A. Well, when I first dropped it off in person, I was
told that there was nothing available.
Q. Okay. When you say you dropped it off, who did you
drop it off to?
A. I dropped it off at the Livonia location.
Q. Do you recall who you gave your resumé to?
A. Actually it went to Sue.
Q. Okay. Do you know if --
A. I think she was the only one there at the time.
Q. Do you know if this Sue is still employed?
A. I have no idea.
Q. And then what happened next?
A. Mr. Rost called and said he'd like to talk to me, that
he had a unique situation, that his son Matt was going
to be going to California to participate in some kind
of reality TV show.
Q. Just for the record, who is Mr. Rost?
A. He's sitting at the end of the table

down there.
25 Q. Would that be Tom Rost?

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1. A. Yes.
2 Q. Is he the owner, as far as you know?
3 A. As far as I know.
4 Q. Of R.G. & G.R. Funeral Homes?
5 A. As far as I know.
6 Q. Do you know if he himself is a funeral director?
7 A. Yes, he is.
8 Q. So he called you and said I need somebody to work
9 here?
10 A. Yes.
11 Q. And then what was the next step, what happened?
12 A. I went in and talked to him and to his son Matt. Then
13 a few days later, I was called by Mr. Cash and went
14 back and talked to him.
15 Q. Mr. Cash is who?
16 A. The manager at Livonia.
17 Q. So you had an interview with these people, Mr. Cash?
18 A. Well, I would call it an interview with him and Mr.
19 Rost.
20 Q. Mr. Rost too. I'm sorry.
21 And obviously you were hired?
22 A. Yes.
23 Q. And what do you recall of that

conversation, what did
24 they tell you your job duties would be or anything
25 like that?

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1. MR. PRICE: Objection. Which they are you
2 referring to? Vague.
3 MR. KIRKPATRICK: That's fair enough.
4 BY MR. KIRKPATRICK:
5 Q. At this meeting -- you were hired at some point;
6 correct?
7 A. Yes.
8 Q. At this interview or meeting, whatever it was, did
9 they, being Mr. Rost and Mr. Cash, discuss with you
10 what your job responsibilities were to be?
11 A. I don't recall, actually.
12 Q. Is it safe to assume, for lack of a better term, that
13 you were going to be a funeral director?
14 A. Basically, yes.
15 Q. And they were comfortable enough knowing that you
16 previously worked in the funeral business?
17 A. That is --
18 Q. You shook your head. It happens. So yes?
19 A. Yes.
20 Q. And when did you start working

there? How long after
21 this interview?
22 A. I actually started on October the 1st.
23 Q. And were you working in the Livonia office?
24 A. For the majority of the time, yes, because that's
25 where Matt was at.

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1. Q. And when you started working there, what were your job
2 duties? Is it similar to what we've been talking
3 about at all your funeral locations?
4 A. Yes.
5 Q. So you were doing the job as an apprentice, which was
6 kind of everything you've already described as a
7 funeral director. I take it you were assisting in
8 embalmings?
9 A. Yes.
10 Q. You were assisting in casketing?
11 A. Yes.
12 Q. And removals?
13 A. Yes.
14 Q. And all the other duties you've already previously
15 described?
16 A. Yes.
17 Q. Did they give you an employee handbook or anything

like that?
A. No.
Q. They never gave you an employee handbook?
A. No, sir.
MARKED FOR IDENTIFICATION:
D E P O S I T I O N EXHIBIT 2
(Employee Manual)
10:44 a.m.

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Q. Is it fair to say you've been involved with the
funeral business for nearly 30 years?
A. Yes.
Q. And I think you've testified at every place there's
been some sort of dress code?
A. Yes.
Q. Why is there a need or why does the funeral business,
why is there a dress code, if you know?
A. Well, I wouldn't think you'd want somebody showing up
in shorts.
Q. Okay.
A. And a t-shirt for a funeral.
Q. Why not?
A. Doesn't look professional.
Q. Okay. So in your experience, the industry standard is
to have professional clothing?

A. Yes.
Q. Have you ever been in a situation where they, they, being a funeral home, have not followed any kind of professional clothing dress code?
A. Other than the ones I've mentioned, no, but it was still perceived.
Q. So there's an understanding of presenting yourself, if you work in the industry, in a professional --
A. Manner, yes.

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Q. Would the term conservative clothing mean something in the industry? If you understand what I'm saying. I could explain that if you need me to.
A. Please do.
Q. Well, I have what I would consider more of a conservative suit on, it's a dark suit, you know, not a very loud tie, at least I don't think it's loud, and shirt, whereas you may see people where wild colors. I say wild colors, they could be orange, whatever, things that might be offensive that still might be a

business suit. Does that make sense?
A. I suppose it does. But I put that in non-professional wear to begin with.
Q. I just want to make sure we're kind of on the same page with professional business attire. So you wouldn't think that somebody would show up -- I could give you all kinds of examples, but I don't know if you'd even know what I'm talking about -- but crazy orange-colored tuxedo as an appropriate funeral business attire?
A. I wouldn't think so.
Q. Well, I just want to know if there's a standard. Now, did you get any training on that or classes on that or instruction during your mortuary science curriculum?

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY)
COMMISSION,)
COMMISSION,)
vs.) Case No. 14-13710
R.G. & G.R. HARRIS FUNERAL) Hon. Sean F. Cox
HOMES, INC.,) United States
Defendants.) District Court Judge
_____)

30(B)(6) DEPOSITION OF THOMAS ROST
PLYMOUTH, MICHIGAN
THURSDAY, NOVEMBER 12, 2015

REPORTED BY: QUENTINA R. SNOWDEN, CSR NO. 5519
JOB NO.: 276003-A

30(B)(6) DEPOSITION OF THOMAS ROST, taken at the offices of Joel J. Kirkpatrick, PC, located at 843 Penniman Avenue, Suite 201, Plymouth, Michigan on Thursday, November 12, 2015, at 9:30 a.m., before Quentina R. Snowden, Certified Court Reporter, in and for the State of Michigan.

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WITNESS: THOMAS ROST

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(No further examination.)

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(Exhibits attached.)

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PLYMOUTH, MICHIGAN;
THURSDAY, NOVEMBER 12, 2015
9:40 A.M.
-oOo-
Whereupon --

THOMAS ROST,
having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. PRICE:

Q Good morning.

A Good morning to you.

Q Yeah, my name is Dale Price, I'm an attorney with the Equal Employment Opportunity Commission here in Detroit and we have two purposes here today. We'll do them in order.

One, we're going to take your 30(b)(6) deposition, what's known as. We sent out a Notice with respect to that designating certain subjects upon which we wish to have a company representative brought forward to testify to.

And then secondly, we'll be doing a deposition of you in your personal capacity.

Hopefully there won't be a whole lot of

your concerns about continuing to employ
Stephens. You have a deep belief in that --
A Yes.
Q -- stemming presumably from Genesis, correct?
A Yes.
Q Male and female, he created them?
A Yes.
Q Okay. So, men and women should dress
accordingly in your opinion, right, men should
dress as men and women should dress as women;
is that one of your concerns with Stephens?
A For employment at the funeral home, yes.
Q Okay. Now, you indicated also that one of the
concerns you had was that people be protected
and safe in the grieving process, I believe so.
How would continuing to employ Stephens affect
that?
A Well, his employment there would be looked upon
as -- well, a -- let me back up.
Let's see. Families come to us

because they want an environment where they can
begin the grieving process and the healing
process and begin the experience of healing.
We're there to meet their emotional, relational
and spiritual needs. They're there with their

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family and friends in an environment that they
don't need some type of a distraction that is
not appropriate for them and their family that
they want to be involved in. And his continued
employment would negate that.
Q So it's your belief that continuing employment
would have posed that kind of distraction to
people who are coming to use your services?
A Absolutely.
Q Okay. You never saw Stephens in anything other
than a suit and tie, correct?
A That is correct.
Q Okay. So, you can't speak as to how Stephens

would have presented – you never saw Stephens
present in female attire, correct?
A Correct.
Q Okay. So you don't know how they would have --
how Stephens would have looked, correct?
A I don't know how he would have looked, no.
Q Okay. So, but nevertheless, despite that it
was your belief that it would have been a
distraction?
A Yes.
Q Why would it be distracting for Stephens to so
present?

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A If he was dressed as a woman?
Q Yes.
A Well, just because I think common sense is
going to tell you that most people identify men
dressed a certain way in a funeral home and
women as a certain way and I've yet to see a
man dressed up as a woman that I didn't know
was not a man dressed up as a woman,

so that
it's very obvious.
Q So it's your belief that there is no way that
Anthony Stephens would be able to present --
the person you knew as Anthony Stephens would
be able to present in such a way that it would
not be obvious that it was --
A That is correct.
Q Okay. And that's based on your personal
experience?
A Yes.
Q What – you said it would be kind of a
distraction, it would be disruptive for the
process. How would you know that someone who
is transgender and presenting would be a
distraction or interruption –
MR. KIRKPATRICK: Objection, foundation on what transgender is.

P75

[Text omitted.]
[Text omitted.]
[Text omitted.]
[Text omitted.]
·Q· ·Certainly nothing about Stephens' manner of

·dealing with families before you received this
·letter raised any concern with you, correct?
A· ·Correct.
·Q· ·Okay. · Stephens had been solicitous of their
feelings. Stephens had blended in well.
Stephens had, you know, been courteous and
compassionate to the people, the clients who
·came into your facility, correct?
·A· ·I would say so, yes.
·Q· ·Do you have any reason to believe that this
would have changed just because of the outward
presentation in female clothing?
A· ·Don't know.
·Q· ·Okay. ·You don't know of anything that would
have -- you can't speculate as to whether
anything would have changed?
A· ·I don't know.
·Q· ·Okay. ·But certainly before that, his manner
was completely appropriate and in --
A· ·It seemed to be, yes.

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Q It conformed with what your

expectations --
A Yes.
Q – and hopes were for this what you call a
ministry?
A Yes.
Q All right. Now, you're talking about
granddaughters and sisters and that sort of
thing, are you talking about your family
members coming in --
A No, I'm talking about families --
Q Oh, extended family members coming in for
funerals?
A Yes.
Q Okay.
A Uh-huh. But specifically the female part.
Q But you never got around to even – there was
no discussion of bathrooms with Stephens,
correct?
A No.
Q That never came up at all?
A No.
Q So the bathroom thing is really hypothetical, I
mean, because you never even got to that point?
A That's true.

25 Q Are there employee bathrooms as well as --

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1. [Text omitted.]
2 [Text omitted.]
3 [Text omitted.]
4 [Text omitted.]
5 Now, were -- you were involved in
6 the hiring of Stephens, correct?
7 A I was.
8 Q What role did you play?
9 A I believe, if I remember, he -- he just came in
10 looking for a job. I don't think he came in
11 from an advertisement. I don't remember the
12 circumstances. But, I believe I was the
13 initial one that interviewed him.
14 Q Okay. And what job was this for?
15 A For a funeral director/embalmer, I guess.
16 Q Did you check-out the resume and references?
17 A Don't know.
18 Q Did you ever have any reason to believe that
19 Stephens did not have the certifications or
20 background to do the job?
21 A No.
22 Q In fact Stephens was able to perform the jobs

of a funeral director and embalmer, correct?
A He was. Uh-huh.
Q All right. Now, was there somebody already

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working as a funeral director and embalmer at
that time?
A Don't know.
(Mr. Schrameck exited the
conference room at 12:19 p.m.)
BY MR. PRICE:
Q Okay. What location was this?
A This is at the Garden City location.
(Jeffrey Schrameck entered the
conference room at 12:19 p.m.)
BY MR. PRICE:
Q All right. Do you recall whether or not
Stephens replaced somebody at that location?
A I don't recall. I don't know.
Q Is it possible?
A Oh sure, it's possible.
Q Okay. During your interview with Mrs.
Dickinson, I believe you said that Stephens
could do the job, correct?
A Yes.
Q All right. We've already talked earlier about,

you know, that Stephens showed sensitivity and
compassion to the clients who came in, correct?
A Yes.
Q Okay. And that there were no – is it safe to

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say then that there were no performance-related
reasons for termination of employment?
A Not at that time, but we did have some issues
beforehand.
Q But they didn't motivate the decision to
terminate the employment, correct?
A No. No.
Q So performance was not the basis for discharge?
A That's right.
[Text omitted.]
[Text omitted.]
[Text omitted.]
[Text omitted.]
[Text omitted.]
[Text omitted.]
[Text omitted.]
[Text omitted.]
[Text omitted.]
[Text omitted.]

[Text omitted.]
[Text omitted.]
[Text omitted.]
[Text omitted.]
[Text omitted.]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY)
COMMISSION,)
Plaintiff,)
vs.) Case No. 14-13710
R.G. & G.R. HARRIS FUNERAL) Hon. Sean F. Cox
HOMES, INC.,) United States
Defendants.) District Court Judge
_____)

DEPOSITION OF THOMAS ROST

PLYMOUTH, MICHIGAN

THURSDAY, NOVEMBER 12, 2015

REPORTED BY: QUENTINA R. SNOWDEN, CSR NO. 5519
JOB NO.: 276003-B

DEPOSITION OF THOMAS ROST, taken at the offices of Joel J. Kirkpatrick, PC, located at 843 Penniman Avenue, Suite 201, Plymouth, Michigan on Thursday, November 12, 2015, at 2:14 p.m., before Quentina R. Snowden, Certified Court Reporter, in and for the State of Michigan.

APPEARANCES:

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I N D E X

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(No further examination.)		
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(Exhibits attached.)		

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Do you know who updated it the last time it was done?
A Do not know.
Q Okay. Now, with respect to -- we talked about a dress code and I'll get back to that in a little bit, but there is a clothing

allowance
policy at R.G. G.R. Harris, correct?
A Well, not for men. No, because we give them
the suits.
Q Okay.
A They don't buy -- we by the suits. We tell
them what to wear.
Q Okay. So the men are told what to wear?
A And we give it to them, we provide it.
Q Okay. Where do you get this -- what are the
men given?
A This is what they're given right here.
Q So it's a blue --
A It's a blue striped shirt and they get a tie.
Q Blue striped suit and tie?
A Yeah.
Q Where do you get the suits from?
A A place on 12 Mile and Middlebelt called Sam
Michael's.
Q And how often are suits issued to the male

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employees?
A Well, it's different for -- let's say -- I get
suits, we'll say, like every three or four
years because I'm not very hard, but I have

some people that are -- they're like animals,
you know, they're --
Q They wear their suits out?
A They wear their suits out, so they require --
Q Okay. So you get -- how many suits are issued
at hire?
A Well, for a full-time person, he gets two. For
a part-time person he gets one.
Q So a full-time male employee gets one -- or two
suits?
A Right.
Q And two ties?
A And two ties.
Q Okay. And the part-time gets one?
A One, right.
Q And then as they wear out they're replaced, is
that correct?
A Well, it's like every couple years normally.
Q Every two years?
A Yeah. But sometimes people have an emergency
or something.

P15

Q But generally speaking every two years?
A Two or three years, yeah.

Q Okay. Now, how much does a suit cost you?
A I'm going to say about 225.
Q And how much does a tie cost?
A Ten bucks.
Q Do you get the ties from the same place?
A Yep.
Q Are they ordered all at once or just kind of --
A No.
Q Just periodically?
A No. We used to do that, but we don't anymore,
no.
Q When did that cease to happen?
A Oh, probably 20 years ago.
Q Okay. With respect to female employees, what
do they get?
A They get a little allowance.
Q Okay. And how is the allowance, how is it
doled out?
A They get a check.
Q Annually?
A They get it annually.
Q Okay. How much -- how is it determined how
much a female employee will get?

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A A female gets 150 bucks -- dollars, and a

part-time gets 75.
Q So full-time gets 150 and part-time 75?
A Right.
Q And who -- how is that calculated; who sets how much the men and woman are going to be getting?
Let's go back to the women. Who determines -- how is it set that women would get 150 if they're full-time and 75 for part-time?
A I guess I set it. Yeah.
Q Okay. How long has that been the case?
A A few years.
Q Do you know how -- was it stretching back before Stephens was employed?
A Just about the same time.
(Mr. Schrameck entered the conference room at 2:28 p.m.)
BY MR. PRICE:
Q Okay. That's when women would get 150 and 75?
A Yeah.
Q All right. Was it different before then?
A No, they -- they didn't get anything before.
MR. PRICE: Okay. Now we were given -- have the following marked as Exhibit 8 here. Am I correct on that?

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Q Let's double check.
MR. KIRKPATRICK: Here it is.
THE WITNESS: Okay. So he signs both names. Okay.
BY MR. PRICE:
Q Okay. So, was there any confusion on your end as to who was bringing this charge?
A Either Anthony or Aimee Stephens.
Q It would have been the same person, though --
A Would be the same person.
Q -- the person you knew as Anthony Stephens was filing it, right?
A Yes.
Q There's no question as to that?
A That's true.
Q Now, did you -- okay, I apologize. Did you see it before it went out or not?
A Did I see?
Q The position statement?
A Yes.
Q Okay.
A Correct.
Q Did you recommend any changes to it, that you can remember?
I don't believe so.

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Q Okay. Does it fairly reflect your

views as to
the case and the position of the company?
A Yes. Yes. Uh-huh.
Q Were you uncomfortable with the fact that the
name Aimee Stephens was being used in the
charge?
A I'm uncomfortable with the name because he's a
man.
Q Okay. And you wanted to keep referring to
Stephens as Anthony Stephens, correct?
A That's who the employee was.
Q I'm sorry, the employee?
A Yeah. He was the employee.
Q Okay. And we have already talked a little bit
about the fact it doesn't talk about religious
freedom or free exercises and it was that -- it
was your belief that you didn't have to raise
this at this point?
A Yes.
Q Okay. Have you ever disciplined anyone for a
violation of the dress code?
A No. I wouldn't say discipline, no.
Q Okay. Have you ever counseled somebody that
they're -- they weren't adhering to the

dress
25 code?

P24

1. A We have done that.
2 Q Okay. How recently?
3 A It hasn't been very recent.
4 Q Okay. What was the issue?
5 A Hard to say. It might be a woman, possibly, on
6 her dress, or -- pretty hard for a man since we
7 dress them.
8 Q Okay. What is the woman's dress code, what do
9 they have to wear?
10 A Well, they wear a skirt and usually a jacket.
11 Q Okay.
12 A A professional-looking suit.
13 Q Okay. What about pants, no pants?
14 A No pants.
15 Q Why is that?
16 A I guess I'm just old-fashioned and I believe
17 this is a funeral home and there's a certain
18 tradition that we want to keep there. We
19 want -- and I think the consumer out there,
20 families believe that they -- a male should
21 look like a particular individual, like a man,

and a woman should look like a woman. And
dress accordingly.
Q And you think so as well?
A And I think so as well.

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Q Okay. Thanks. Now, Mr. Price asked you about
what would happen and the speculation of
perhaps a customer may have seen Stephens after
work, let's say, outside of the funeral home
wearing a dress or presenting as a woman and
they might be upset what you might do, correct,
do you remember that?
A Yes.
Q I think you said you would be uncomfortable,
right?
A I would be uncomfortable.
Q Would you fire him for that?
A Probably not, but I would ask him some
questions.
Q Okay. How about if a customer maybe saw
another employee outside of the funeral home on
their own time carrying a -- several

pornographic videotapes, would that make you uncomfortable?
A Make me uncomfortable, but I wouldn't fire them.
Q Okay. Why do you have a dress code?
A Well, we have a dress code because it allows us to make sure that our staff is -- is dressed in a professional manner that's acceptable to the

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families that we serve, and that is understood by the community at-large what these individuals would look like.
Q Is that based on the specific profession that you're in?
A It is.
Q And again, tell us why it fits into the specific profession that you're in that you have a dress code?
A Well, it's just the funeral profession in general, if you went to all funeral homes, would have pretty much the same look. Men would be in a dark suit, white shirt and a tie and women would be appropriately attired in a

professional manner.
Q And why do you provide suits to your funeral directors?
A Well, because we want them all dressed exactly the same. We want them to look the same.
Q Is it to comply with the dress code?
A It is to comply with the dress code, yes.
MR. KIRKPATRICK: That's it, guys.
MR. PRICE: Okay.
RE-EXAMINATION
BY MR. PRICE:

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Q It's not just the funeral directors that gets suits, though, it's the funeral director assistants, correct?
A That's what -- yes, the men's, yes.
Q Okay.
A Yeah, because they're -- to the consumer they think they're funeral directors, I mean, any male person.
Q Okay. Now, have you been to funeral homes where there have been women wearing businesslike pants before?
A I believe I have.
Q Okay. So, the fact that you require women to

14 wear skirts is something that you prefer, it's
15 not necessarily an industry requirement?
16 A That's correct.
17 Q Okay. But women could look businesslike and
18 appropriate in pants, correct?
19 A They could.
20 Q Okay. Now you were asked about what if a
21 customer had seen Stephens in this hypothetical
22 about, you know, Stephens only presented as
23 female outside of work, if that person had said
24 that they were not going to come back -- they
25 were not going to use the services of the

P52

1. Harris Funeral Homes what would you have done?
2 A Don't know.
3 Q Okay. But that would have been a factor to
4 consider in how you addressed Stephens'
5 situation in that case, correct?
6 A It probably would have been.
7 Q And it could have been reason to let Stephens
8 go if --
9 A Perhaps, yes.
10 Q Okay. Now, you were asked about 3

and it's
true this was -- letter was drafted by Mr. Kirkpatrick, but you hired him to represent you?
A That is true.
Q You hired him to represent Harris in defense against this charge?
A Yes.
Q Okay. And if you had any questions about what was in the letter, you certainly were encouraged to ask questions; is that the case?
A Yes.
Q Did you choose to ask any questions?
A Do not know.
Q You do not recall?
A I do not recall.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Plaintiff,

-vs- No. 2:14-cv-13740

R.G. & G.R. HARRIS FUNERAL HOMES INC.,

Defendants.

DEPOSITION OF
WITNESS: DAVID CASH

LOCATION: Joel Kirkpatrick, PC
843 Penniman Avenue, Suite 201
Plymouth, Michigan 48170
DATE: Friday, January 22, 2016
9:29 a.m.

APPEARANCES:

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Job no. 285887-A

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INDEX EXHIBIT

EXHIBIT NO.	DESCRIPTION	PAGE NO.

(No exhibits were marked.)

- - -

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Plymouth, Michigan
January 22, 2016
9:29 a.m.

- - -

- DAVID CASH-

called as a witness, being first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. PRICE:

Q. Gooding morning, Mr. Cash.
A. Good morning.
Q. My name is Dale Price. We just introduced ourselves a minute ago. I'm an attorney with the Equal Opportunity Employment Commission in Detroit, and we're here today for your deposition.
Have you ever given testimony before?
A. Never.
Q. Okay. What's going to happen is I'm

going to ask
you a series of questions about what you do or do
not know about the circumstances underlying this
lawsuit.
If you understand my answers -- excuse me -- if you do not understand my question,
please ask me and I'll try to rephrase. I'm the

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with funerals at Livonia?
A. He would help in the parking lot lining up cars.
He would help in the dismissal of the funeral,
opening doors, generally whatever needed to be
done as we do working a funeral.
Q. Can you think about anything else specifically
besides helping out in the parking lot and
dismissals of the families and friends?
A. No.
Q. Now, you would come over to -- you said you would
come over to Garden City. You would be helping
with funerals there?
A. Well, as a manager, all of us managers cover for
each other on our days off. So if the

manager at
15 Garden City was off I would come there and make
16 ·funeral arrangements or direct a funeral.
17 ·Q.· · Do you recall how often you would be covering at
18 ·Garden City while Stephens was employed?
19 ·A.· · Once or twice a week.
20 ·Q.· · So you would have fairly regular contact with
21 ·Stephens, then; is it safe to say?
22 ·A.· · Yes.
23 ·Q.· · What did you ever see -- obviously, then you
24 would have a chance to see Stephens work as an
25 ·embalmer and director, correct?

Line **P32**

1. A.· · Yes.
2 Q.· · How would you describe Stephens' performance in
3 ·that role that you observed?
4 ·A.· · He was a very good embalmer.· He was very, very
5 ·thorough.· Had obviously had a lot of practice
6 ·prior to coming to the Harris Funeral Home.
7 ·Families seemed very pleased with his work.· He
8 did a good job.

(A pause was had in the proceedings.)
BY MR. PRICE:
Q. All right. Back on. At some point did you become aware of Stephens communicating to people at R.G. & G.R. that she had intended to present as female and not as a male?
A. I did hear rumors, yes.
Q. Okay. Now, was this before Stephens was fired?
A. Yes.
Q. Okay. What did you hear?
A. I had heard that he was beginning the process of changing, whatever that includes, hormones or whatever.
Q. Whatever is involved in that process?
A. Whatever is included.
Q. Sure.
A. Right.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Equal Employment
Opportunity Commission,

Plaintiff,

v. Civil Action No.
2:14-cv-14-13710

R.G. & G.R. Harris
Funeral Homes, Inc.,

Defendant. Hon. Sean F. Cox

DEFENDANT R.G. & G.R. HARRIS FUNERAL HOMES, INC.'S STATEMENT OF MATERIALS FACTS NOT IN DISPUTE

Defendant R.G. & G.R. Harris Funeral Homes, Inc. (hereinafter "R.G.") asserts that the following material facts are not in dispute in this case and support its Motion for Summary Judgment.

R.G.'s History and General Operations

1. R.G. is a closely held for-profit corporation owned and operated by Thomas Rost (hereinafter "Rost"). (T. Rost 30(b)(6) Dep. 28:10-15 (Ex. 4)).

2. R.G. has been in business since 1910. (T. Rost 30(b)(6) Dep. 79:19-80:9 (Ex. 4)).

3. Tom Harris, Rost's uncle, was the previous president of R.G. (T. Rost 30(b)(6) Dep. 78:10-13 (Ex. 4)).

4. R.G. has three locations: Detroit, Livonia, and Garden City. (Kish Dep. 33:24-34:3 (Ex. 5)).

5. The company averages around thirty funerals a month. (T. Rost Dep. 43:3-16 (Ex. 3)).

6. Preferred Funeral Directors International gave R.G. the Parker award in 2011 for demonstrating exemplary service. (T. Rost Aff. ¶ 5 (Ex. 1)).

7. R.G.'s Livonia location was recognized as best hometown funeral home of the year in 2016 by Livonia residents in a survey by Friday Musings newspaper. (T. Rost Aff. ¶ 6 (Ex. 1)).

Rost's Experience and Role at R.G.

8. Rost owns 94.5% of R.G., and the remaining 5.5% is split between his two children. (T. Rost 30(b)(6) Dep. 26:20-28:25 (Ex. 4)).

9. Rost has been the owner of R.G. for over thirty years. (T. Rost 30(b)(6) Dep. 28:10-15 (Ex. 4); T. Rost Aff. ¶ 2 (Ex. 1)).

10. Rost has been the president of R.G. for thirty-five years and is the sole officer of the corporation. (T. Rost 30(b)(6) Dep. 78:2-9 (Ex. 4)).

11. Rost received a mortuary science degree from Wayne State in 1967, and a Bachelor of Science in Business from Wayne State in 1968. (T. Rost Dep. 7:9-23 (Ex. 3)).

12. Rost has served thousands of grieving families and arranged thousands of funerals during the time that he has operated R.G. (T. Rost Aff. ¶ 3 (Ex. 1)).

13. Rost served as the President of Preferred Funeral Directors International in 1992. (T. Rost Aff. ¶ 4 (Ex. 1)).

14. Rost or his location-managers handle the hiring for R.G. (T. Rost 30(b)(6) Dep. 53:19-20 (Ex. 4)). Rost personally oversees the hiring and discipline of funeral director embalmers. (Crawford Dep. 11:11-23 (Ex. 6)).

15. R.G. has never before been subject to a charge by the EEOC or Michigan Department of Civil Rights. (T. Rost 30(b)(6) Dep. 19:11-18 (Ex. 4)).

16. Rost has never previously been subject to allegations of discrimination in the workplace. (T. Rost Dep. 11:24-12:1 (Ex. 3)).

R.G.'s and Rost's Religious Beliefs

17. Rost has been a Christian for over sixty-five years. (T. Rost 30(b)(6) Dep. 30:13-22 (Ex. 4)). He attends both Highland Park Baptist Church and Oak Pointe Church. (T. Rost 30(b)(6) Dep. 29:20-30:3 (Ex. 4)).

18. For a time, Rost was on the deacon board at Highland Park Baptist Church. (T. Rost Dep. 10:2-11 (Ex. 3)).

19. Rost is on the board of the Detroit Salvation Army, a Christian nonprofit ministry, and has been for 15 years; he was the former Chair of the advisory board. (T. Rost Dep. 8:21-9:17 (Ex. 3)).

20. Rost's faith informs the way he operates his business, and he "practice[s] [his] faith through [his] businesses." (T. Rost 30(b)(6) Dep. 86:20-22, 87:3-24 (Ex. 4); T. Rost Aff. ¶¶ 7, 10 (Ex. 1)).

21. R.G.'s mission statement is published on its website (T. Rost 30(b)(6) Dep. 80:20-81:3 (Ex. 4)), which reads: "R.G. & G.R. Harris Funeral Homes recognize that its highest priority is to honor God in all that we do as a company and as individuals. With respect, dignity, and personal attention, our team of caring professionals strive to exceed expectations, offering options and assistance designed to facilitate healing and wholeness in serving the personal needs of family and friends as they experience a loss of life." (R.G. Webpage (Ex. 15)).

22. The R.G. website also contains a Scripture verse at the bottom of the mission statement page. (R.G. Webpage (Ex. 15)).

23. Rost ensures that all R.G.'s customers have access to spiritual guidance by placing throughout his funeral homes Christian devotional booklets called "Our Daily Bread" and small cards with Bible verses on them called "Jesus Cards," and by making a Bible available to visitors at all of his funeral homes. (T. Rost 30(b)(6) Dep. 39:23-40:17 (Ex. 4); Nemeth Dep. 27:13-28:2 (Ex. 7); Cash Dep. 47:17-24 (Ex. 8); Kowalewski Dep. 31:17-32:21, 33:5-22 (Ex. 9); M. Rost Dep. 28:20-29:19 (Ex. 10); Peterson Dep. 28:18-30:12 (Ex. 11)).

24. Rost leads prayer at R.G. business meetings and corporate events. (Kowalewski Dep. 60:13-61:18 (Ex. 9); M. Rost Dep. 27:6-15 (Ex. 10)).

25. Funerals are events of deep spiritual significance for many people. (T. Rost Aff. ¶¶ 10, 20, 26, 30 (Ex. 1); EEOC Deliberative After Action Memo at EEOC002785 (Ex. 23); EEOC T. Rost Aff. ¶ 11 (Ex. 16); T. Rost 30(b)(6) Dep. 32:3-13 (Ex. 4)).

26. Having worked at R.G. for over twenty-five years, Livonia location-manager David Cash believes it is a Christian business based on the mission statement, the Bible verse on the website, and his knowledge that Rost has been "affiliated with the church over the years." (Cash Dep. 8:25-9:25, 46:5-18 (Ex. 8); Kish Dep. 35:14-15 (Ex. 5)).

27. Garden City location-manager David Kowalewski considers R.G. to be a Christian business. (Kowalewski Dep. 29:8-10 (Ex. 9); Kish Dep. 35:14-18 (Ex. 5)).

28. Rost sincerely believes that the Bible teaches that a person's sex (whether male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex. (T. Rost Aff. ¶¶ 41-42, 44 (Ex. 1)).

29. Rost sincerely believes that he would be violating God's commands if he were to pay for or otherwise permit one of R.G.'s funeral directors to wear the uniform for members of the opposite sex while at work. (T. Rost Aff. ¶¶ 43-46 (Ex. 1)).

R.G.'s Ministry to the Grieving

30. Rost operates R.G. as a ministry to serve grieving families while they endure some of the most difficult and trying times in their lives. (T. Rost 30(b)(6) Dep. 86:2-19 (Ex. 4); T. Rost Aff. ¶ 7 (Ex. 1)).

31. Rost sincerely believes that God has called him to serve grieving people. He sincerely believes that his purpose in life is to minister to the grieving, and his religious faith compels him to do that important work. (T. Rost Aff. ¶ 10 (Ex. 1); T. Rost 30(b)(6) Dep. 86:2-19 (Ex. 4)).

32. Rost describes R.G.'s ministry as one of healing—to help families on the "worst day of their lives" by "meet[ing] their emotional, relational and spiritual needs . . . in a religious way." (T. Rost 30(b)(6) Dep. 86:2-19 (Ex. 4)).

33. R.G. strives to meet clients' emotional, relational, and spiritual needs by training staff in grief management and maintaining strict codes of conduct and decorum at all times so that grieving clients have a place free of distractions to grieve and heal. (T. Rost Aff. ¶ 8 (Ex. 1)).

34. Part of R.G.'s ministry is performing religious rites, customs, and rituals for families. (T. Rost 30(b)(6) Dep. 32:3-13 (Ex. 4)).

Charging Party Stephens's Employment at R.G.

35. Charging Party Stephens (hereinafter "Stephens") started at R.G. on October 1, 2007 as an apprentice. (Stephens Dep. 50:8-17 (Ex. 14)).

36. After completing the apprenticeship, Stephens was hired as funeral director embalmer. (Stephens Dep. 50:18-51:4 (Ex. 14); Crawford Dep. 16:1-3 (Ex. 6)).

37. Funeral director embalmers' duties include body removal; embalming; dressing, cosmetizing, and casketing bodies; and conducting visitations and funerals. (Stephens Dep. 22:14-24:14

(Ex. 14); Kowalewski Dep. 69:20-70:11, 70:21-24 (Ex. 9); T. Rost Aff. ¶¶ 14-15, 24-31 (Ex. 1)).

38. Funeral director embalmers often meet and interact with grieving families. (Shaffer Dep. 48:23-49:14, 53:4-54:16 (Ex. 12); T. Rost Aff. ¶¶ 14-31 (Ex. 1); EEOC T. Rost Aff. ¶¶13-14 (Ex. 16); EEOC Kish Aff. ¶ 15 (Ex. 17)).

39. Funeral director embalmers are sometimes responsible for meeting with families to set up funeral arrangements (Cash Dep. 27:13-28:9 (Ex. 8); T. Rost Aff. ¶¶ 16-17, 24-25 (Ex. 1)), and for directing funeral ceremonies. (Cash Dep. 28:10-22 (Ex. 8); T. Rost Aff. ¶¶ 28-31 (Ex. 1)).

40. Funeral arrangements involve "meeting with the family, gathering information necessary for death certificates, newspaper notices, making arrangements for services, be it in the funeral home or the church of the family's choice, arranging for visitations if that's something the family has chosen." (Crawford Dep. 14:8-18 (Ex. 6)).

41. Funeral directors are R.G.'s most prominent public representatives. (EEOC T. Rost Aff. ¶¶ 13-14, EEOC 002761 (Ex. 16); T. Rost Aff. ¶ 32 (Ex. 1); EEOC Kish Aff. ¶ 15 (Ex. 17)). They are the face that R.G. presents to the world. (T. Rost Aff. ¶ 32 (Ex. 1)).

42. "A funeral director is one whose profession is assisting surviving families and friends with the planning and carrying out of all aspects of caring for a decedent and the decedent's family, including removal of remains, embalming and cremation, making funeral and memorial arrangements, making sure funerals and memorial

services are carried out in accordance with the decedents' and survivors' desires, and assisting survivors through the emotional distress that accompanies the loss of a loved one." (Def.'s Resp. to Pl.'s First Set of Discovery at Interrogatory No. 6 (Ex. 27)).

43. R.G. requires that "Funeral Directors—in both appearance and behavior—must perform their professional duties without drawing undue attention to themselves or causing the survivors any more stress than absolutely necessary. Indeed, the Funeral Director's job is, to the extent possible, to lessen and protect the survivors from unnecessary stress." (Def.'s Resp. to Pl.'s First Set of Discovery at Interrogatory No. 6 (Ex. 27)).

44. Stephens's duties at R.G. included "embalming, cosmetizing, casketing, [and] dressing" the bodies of the decedents, facilitating the family and public viewings, and taking the bodies from the families into R.G.'s custody. (Stephens Dep. 66:4-17 (Ex. 14); T. Rost Aff. ¶¶ 14-31 (Ex. 1)).

45. Stephens's duties included contact and interaction with the decedents' family members (Stephens Dep. 66:18-20 (Ex. 14); T. Rost Aff. ¶¶ 14-31 (Ex. 1)), and at times involved meeting with families to set up funeral arrangements and directing funeral ceremonies. (Cash Dep. 27:13-28:22 (Ex. 8); T. Rost Aff. ¶¶ 16-31 (Ex. 1)).

46. When hired at R.G., Stephens's immediate supervisor was David Cash. Rost would make rounds to the different locations every day, but was not at Stephens's location full time. (Stephens Dep. 56:14-57:6 (Ex. 14)).

47. David Cash was Stephens's supervisor only for six months before Stephens moved to the Garden City location where George Crawford was the manager. (Stephens Dep. 58:3-17 (Ex. 14)).

48. Within six months prior to Stephens's final day at R.G., Stephens had been reprimanded for job performance issues such as a bad attitude and insubordination. The situation had become so bad that Stephens's immediate supervisor asked Rost to fire Stephens. Rost talked with Stephens about the issue. (EEOC T. Rost Aff. ¶ 18, EEOC002762 (Ex. 16); EEOC Crawford Aff. ¶¶ 23, 25, EEOC002772-74 (Ex. 18)).

R.G.'s Dress Code

49. R.G.'s handbook outlines a general dress code for men requiring that they wear dark suits with nothing in the jacket pockets, white shirts, ties, dark socks, dark polished shoes, dark gloves, and only small pins. (R.G. & G.R. Harris Funeral Home Employee Manual, EEOC002717-19 (Ex. 19)).

50. R.G.'s handbook outlines a general dress code for women requiring "a suit or a plain conservative dress" in muted colors. (R.G. & G.R. Harris Funeral Home Employee Manual, EEOC002717-19 (Ex. 19)).

51. Apart from the handbook, R.G. employees understand that men who interact with the public are to wear suits and ties, and that women who interact with the public are to wear skirts and business jackets. (Peterson Dep. 30:24-31:25, 32:3-8 (Ex. 11); Kish Dep. 17:8-16, 58:5-11 (Ex. 5); Shaffer Dep. 52:12-22 (Ex. 12); Cash Dep. 23:1-4 (Ex. 8);

Kowalewski Dep. 22:10-15 (Ex. 9); McKie Dep. 22:22-25 (Ex. 13); M. Rost Dep. 14:9-19 (Ex. 10)).

52. R.G. administers its dress code based on its employees' biological sex. (T. Rost Aff. ¶ 35 (Ex. 1)).

53. R.G.'s employees understand that the dress code for funeral directors is to wear company-provided suits. (Kish Dep. 17:8-22 (Ex. 5); Crawford Dep. 18:3-11 (Ex. 6)).

54. R.G.'s dress code is consistent with the standard for the industry. (T. Rost 30(b)(6) Dep. 57:20-58:6 (Ex. 4) (stating that R.G.'s "dress code conforms to what is acceptable attire in a professional manner for the services that [R.G.] provide[s]"); T. Rost Dep. 49:22-50:15 (Ex. 3) (stating that the dress code ensures that R.G.'s "staff is . . . dressed in a professional manner that's acceptable to the families that [R.G.] serve[s]")).

55. Maintaining a professional dress code that is not distracting to grieving families is an essential industry requirement that furthers their healing process. (T. Rost Aff. ¶ 34 (Ex. 1); T. Rost Dep. 49:22-50:21 (Ex. 3); T. Rost 30(b)(6) Dep. 59:13-60:5 (Ex. 4); Kish Dep. 63:19-64:7 (Ex. 5)).

56. R.G.'s dress code ensures that R.G. does not violate Rost's religious belief that a person's sex (whether male or female) is an immutable God-given gift or his religious belief that R.G. cannot pay for or otherwise permit one of its funeral directors to wear the uniform for members of the opposite sex while at work. (T. Rost Aff. ¶¶ 41-46 (Ex. 1); T. Rost 30(b)(6) Dep. 57:20-59:12, 69:12-24 (Ex. 4)).

57. Stephens has been involved in the funeral industry for nearly 30 years, and every place Stephens has worked has had a dress code. (Stephens Dep. 90:1-6 (Ex. 14)).

58. Stephens agrees that the industry standard is to dress professionally because of the grieving process. (Stephens Dep. 90:7-25, 91:22-92:9 (Ex. 14)).

59. Stephens agrees that R.G. is entitled under industry standards to require a sex-specific dress code for its employees. (Stephens Dep. 90:7-25, 91:22-92:9, 102:19-103:14, 118:19-25 (Ex. 14)).

60. Employees have been disciplined in the past for failing to abide by R.G.'s dress code. (Kish Dep. 54:1-16, 68:22-69:8 (Ex. 5); M. Rost Dep. 37:22-39:6 (Ex. 10)).

Stephens's Sex

61. Stephens's assigned sex at birth was male. Stephens's legal name was William Anthony Beasley Stephens from the time of birth throughout Stephens's employment at R.G. (Stephens Dep. 49:5-13, 79:22-80:10 (Ex. 14); Order and Petition for Name Change, EEOC002816-17 (Ex. 24)).

62. Stephens was married to a woman, Donna, while employed by R.G. (Stephens Dep. 41:14-21 (Ex. 14)).

63. All R.G.'s employment records regarding Stephens—including driver's license, insurance policy, tax records, unemployment insurance claim, and mortuary-science license—identify "Anthony Stephens" as a male. (T. Rost Dep. 21:1-25 (Ex. 3);

Def.'s Resp. to Charge at 5, EEOC002744-45 (Ex. 22); Kish Dep. 67:9-68:21 (Ex. 5)).

64. Stephens dressed in accordance with the male uniform for funeral directors during Stephens's employment at R.G. (Kowalewski Dep. 57:18-20, 68:11-13 (Ex. 9); Pl.'s First Supp. Resp. to Def.'s First Set of Discovery at Interrogatory No. 10 (Ex. 26)).

65. One of Stephens's supervisors George Crawford always understood Stephens to be a man, and Stephens never indicated to Crawford that Stephens was not a man. (Crawford Dep. 42:1-4 (Ex. 6)).

66. R.G. purchased men's suits for Stephens to wear, and Stephens wore them. (Stephens Dep. 59:14-60:1 (Ex. 14); Pl.'s Resp. to Def.'s First Set of Discovery at Request for Admission No. 2 (Ex. 25) (stating that at "all times during Stephens's employment with [R.G.] Stephens . . . received professional male clothing" from R.G.)).

Stephens's Refusal to Comply with the Dress Code

67. On July 31, 2013, Stephens approached Rost in the Chapel at R.G.'s Garden City location and presented Rost with a letter (hereinafter "the letter") that stated Stephens's intent to transition from presenting as a man to presenting as a woman, including Stephens's intent (starting a few weeks later on August 26, 2013) to wear female attire at work. (T. Rost 30(b)(6) Dep. 110:3-111:15 (Ex. 4); Stephens Dep. 67:3-68:17 (Ex. 14); Stephens's Letter, EEOC000040-41 (Ex. 20)).

68. Before receiving the letter, Rost had no indication that Stephens wanted to dress as a woman. (T. Rost 30(b)(6) Dep. 109:10-19 (Ex. 4); Stephens Dep. 103:16-104:24, 107:20-25 (Ex. 14)).

69. After Stephens gave Rost the letter, Rost told Stephens that he would get back to Stephens about the letter before Stephens's planned vacation. (T. Rost 30(b)(6) Dep. 111:11-112:10 (Ex. 4)).

70. Rost understood from the letter and conversation that Stephens refused to comply with the dress code for male funeral directors. (T. Rost 30(b)(6) Dep. 136:14-23 (Ex. 4)).

71. After considering Stephens's proposal, Rost told Stephens approximately two weeks later, on August 15, 2013, that Stephens could not violate R.G.'s dress code for male funeral directors, and Rost offered Stephens a severance package. (T. Rost 30(b)(6) Dep. 126:1-25 (Ex. 4); Stephens Dep. 74:13-75:24, 76:2-10, 79:22-80:10 (Ex. 14); Charge of Discrimination, EEOC002748 (Ex. 21)).

72. Stephens did not offer to continue to comply with the dress code for male funeral directors, and Stephens planned to return to work in two weeks "wearing . . . female attire." (Stephens Dep. 81:9-16 (Ex. 14)).

73. Stephens rejected the severance package, expressed sorrow "that it wasn't going to work out," and indicated a tentative plan to contact an attorney. Rost replied, "[Y]ou do whatever you feel you have to do." Then the conversation ended, and Stephens left the facility. (T. Rost 30(b)(6) Dep. 127:5-12 (Ex. 4); Stephens Dep. 76:3-12 (Ex. 14)).

74. Stephens was at an attorney's office days later and subsequently filed the EEOC claim that resulted in this suit. (Stephens Dep. 79:12-21 (Ex. 14)).

Reasons for R.G.'s Decision to Dismiss Stephens

75. The specific reasons that Rost dismissed Stephens were (1) that Stephens "refus[ed] to comply with [R.G.'s] male dress/grooming policy" and (2) that allowing Stephens to wear the uniform for female funeral directors would have "violated . . . [Rost's] sincerely held religious beliefs." (Def.'s Resp. to Pl.'s First Set of Discovery at Interrogatory No. 3 (Ex. 27); T. Rost 30(b)(6) Dep. 54:1-17, 55:1-14, 135:24-136:3 (Ex. 4)).

76. Stephens testified that the reason R.G. dismissed Stephens "was that me coming to work dressed as a woman was not going to be acceptable." (Stephens Dep. 80:11-19 (Ex. 14)).

77. Rost would not have dismissed Stephens if Stephens had expressed a belief in being a woman and an intent to dress or otherwise present as a woman outside of work. (T. Rost Aff. ¶ 50 (Ex. 1); T. Rost 30(b)(6) Dep. 137:11-15 (Ex. 4)). It was Stephens's refusal to wear the prescribed uniform and intent to violate the dress code while at work that was the decisive consideration in the employment decision. (T. Rost Aff. ¶¶ 50-51 (Ex. 1)).

78. Based on Rost's lengthy professional experience in the funeral industry and his many years interacting with Stephens at work, Rost believed that if Stephens violated the dress code by

wearing a female uniform in the role of funeral director, it would have been distracting to R.G.'s clients mourning the loss of their loved ones, would have disrupted their grieving and healing process, and would have harmed R.G.'s clients and its business. (T. Rost Aff. ¶¶ 39-40 (Ex. 1); T. Rost 30(b)(6) Dep. 54:8-17, 59:13-60:9, 61:2-18, 139:5-23, 142:23-143:12 (Ex. 4); EEOC T. Rost Aff. ¶ 21, EEOC002763 (Ex. 16)).

79. Allowing Stephens to contravene the dress code by wearing a female uniform in the role of funeral director would have violated Rost's religious belief that a person's sex (whether male or female) is an immutable God-given gift and his religious belief that R.G. cannot pay for or otherwise permit one of its representatives to wear the uniform of the opposite sex while at work. (T. Rost Aff. ¶¶ 41-46 (Ex. 1); T. Rost 30(b)(6) Dep. 54:8-17, 55:1-14 (Ex. 4)).

80. Because R.G. provides suits for all its funeral directors, if Rost would have agreed that Stephens could continue to work at R.G. while dressing in the female uniform, Rost would have been paying for Stephens to wear the female uniform, which would have violated his faith. (T. Rost Aff. ¶¶ 46-47 (Ex. 1)).

81. If Rost were to be compelled as the owner of R.G. to violate his sincerely held religious beliefs by paying for or otherwise permitting one of his employees to dress inconsistently with his or her biological sex at work, he would feel significant pressure to sell the business and give up his life's calling of ministering to grieving people as a funeral home director and owner. (T. Rost Aff. ¶ 48 (Ex. 1)).

82. Rost was also concerned about requiring female customers, grieving family members, and employees to share restroom facilities with a biological male dressed as a woman. (T. Rost 30(b)(6) Dep. 73:17-74:20 (Ex. 4)).

83. Two of R.G.'s three funeral homes have only sex-specific restrooms. They do not have separate employee restrooms. Stephens worked at all three facilities. (T. Rost 30(b)(6) Dep. 76:25-77:14 (Ex. 4); McKie Dep. 13:21-14:22 (Ex. 13); Cash Dep. 30:11-31:5 (Ex. 8)).

R.G.'s Provision of Clothing for Funeral Directors

84. R.G. provides dress-code-conforming suits for all funeral directors, whether male or female (T. Rost Dep. 13:4-14, 47:23-48:11 (Ex. 3); Kish Dep. 64:12-24 (Ex. 5); Def.'s Resp. to Pl.'s Second Set of Discovery at Interrogatory No. 14 (Ex. 28); McKie Dep. 38:19-23 (Ex. 13)).

85. R.G. also provides ties for its male funeral directors. (T. Rost Dep. 13:15-24 (Ex. 3)).

86. R.G. initially provides full-time funeral directors with two suits and two ties and part-time funeral directors with one suit and one tie. These are replaced by R.G. as they wear out, which generally occurs every one to four years for full-time funeral directors (T. Rost Dep. 14:9-15:2, 18:10-19:8 (Ex. 3); Crawford Dep. 19:1-3 (Ex. 6); Kowalewski Dep. 22:21-23:1 (Ex. 9)), and much less frequently (approximately once every five to ten years) for part-time funeral directors. (T. Rost Dep. 18:10-24 (Ex. 3)).

87. R.G. has not employed a female funeral director since 1950. (T. Rost Aff. ¶ 52 (Ex. 1); Def.'s Resp. to Pl.'s First Set of Discovery at Request for Admission No. 5 (Ex. 27); EEOC Kish Aff. ¶ 19, EEOC002768 (Ex. 17); Stephens Dep. 102:4-14) (Ex. 14)).

88. Throughout all Rost's years owning and operating R.G., he has never had a qualified female apply for an open funeral director position. (T. Rost Aff. ¶ 53 (Ex. 1)). During that time, he has had only one female applicant apply for an open funeral director position, but she was not qualified. (T. Rost Aff. ¶ 53 (Ex. 1)).

89. If R.G. one day has the opportunity to hire female funeral directors, R.G. will provide them with skirt suits in the same manner that it provides pant suits to male funeral directors. (T. Rost Aff. ¶ 54 (Ex. 1)).

R.G.'s Clothing Allowance for Other Employees

90. R.G. gives an annual clothing allowance to female employees who interact with the public in positions other than funeral director. The allowance is $150 per year for full-time employees and $75 per year for part-time employees. (T. Rost Dep. 15:16-16:4 (Ex. 3); Nemeth Dep. 13:5-23 (Ex. 7); Kish Dep. 20:16-25 (Ex. 5)).

91. The annual allowance provided to female employees who interact with the public in positions other than funeral director is sufficient to purchase clothing that conforms to R.G.'s dress code for those positions. (Kish Aff. ¶ 5 (Ex. 2)).

92. An outfit that one of these female employees purchases with the clothing allowance typically lasts at least one year. (Kish Aff. ¶ 6 (Ex. 2)).

93. R.G. provides a suit similar to the funeral director suit for male employees who interact with the public in positions other than funeral director. (T. Rost Aff. ¶ 56 (Ex. 1)).

94. All current male employees, other than funeral directors, who interact with the public are part-time and receive one suit that is replaced by R.G. when it is no longer serviceable. (T. Rost Aff. ¶ 57 (Ex. 1)).

95. R.G. does not provide a clothing allowance or suit to employees who are not expected to have client contact such as maintenance personnel (whether male or female). (Kish Dep. 56:14-58:4, 65:17-66:18 (Ex. 5)).

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Respectfully submitted,

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