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 AND AIMEE STEPHENS, *Respondents*.

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

BRIEF OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT AIMEE STEPHENS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest nonprofit legal organization working for full recognition of the civil rights of lesbian, gay, bisexual and transgender ("LGBT") people and everyone living with HIV through impact litigation, education, and policy advocacy. Lambda Legal has served as counsel of record or *amicus curiae* in seminal cases regarding the rights of LGBT people and people living with HIV. *See*, *e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Romer v. Evans*, 517 U.S. 620 (1996).

More specifically, Lambda Legal has appeared as party counsel or *amicus curiae* in numerous cases addressing the application of employment protections to transgender workers. *See*, *e.g.*, *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 F. App'x 492 (9th Cir. 2009); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (en banc); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001 (D. Nev. 2016); *Hall v. BNSF Ry. Co.*, No. C13-2160, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014); *TerVeer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014); *Lopez*

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653 (S.D. Tex. 2008).

The issue before the Court is of acute concern to Lambda Legal and the community it represents, who stand to be directly affected by the Court's ruling.

INTRODUCTION AND SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination "because of" an individual's "sex." 42 U.S.C. § 2000e-2(a)(1). This provision sets forth a "broad rule of workplace equality," *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993), designed "to strike at the entire spectrum of disparate treatment of men and women in employment," *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986))—even forms of sex discrimination beyond those with which Congress was principally concerned when it enacted Title VII. *Id.* at 79.

Title VII's central purpose—"to achieve equality of employment opportunities"—"is plain from the language of the statute," *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971), and that plain language prohibits a wide range of discriminatory conduct. Specifically with regard to discrimination because of a worker's sex, this Court has held many facets of discrimination to violate Title VII: sexual harassment, *see Meritor*, 477 U.S. at 66, including same-sex harassment, *see Oncale*, 523 U.S. at 79-80; discrimination based on actuarial projections about

men and women's lifespans, *see City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978); and discrimination based on a person's perceived non-conformity with sex stereotypes, *see Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-52 (1989).

In keeping with these principles and the plain language of the statute, the Sixth Circuit reaffirmed in this case what courts across the country have long concluded—that discrimination against a person because she is transgender is discrimination because of that individual's sex. Pet. App. 14a-15a. That court held that Title VII protects transgender workers from discrimination both because it is impossible to discriminate against a transgender person without being motivated in some way by her sex, and because such discrimination is necessarily rooted in impermissible sex stereotypes. Pet. App. 23a, 26a-27a.

The Sixth Circuit's judgment should be affirmed. Applying "the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written," *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (quotation omitted), the Sixth Circuit properly recognized that discrimination against a transgender employee is both literally and intrinsically discrimination "because of such individual's . . . sex." Under any articulation of the causation principles required by the statutory text—whether sex was a "but for" cause of the adverse action or was a motivating factor—at every stage, a transgender employee's sex plays a central role in the employer's calculus. *See, e.g., Manhart*, 435 U.S. at 711 (but for); *Price*

Waterhouse, 490 U.S. at 244-45 (motivating factor). As a result, under the plain meaning of the statutory text, discrimination against a worker because she is transgender constitutes per se discrimination under Title VII.

Efforts to focus the inquiry on whether the word "sex" meant gender identity or would have been thought to apply to transgender status when the statute passed in 1964 seek to distract from the actual question presented: whether the adverse action experienced by the employee was "because of . . . sex." Attempts to recast discrimination based on being transgender as something different and not covered by the statute rely on facile labels rather than examining the underlying conduct. Further, rather than adhering to the text of the statute, these efforts invite the Court to limit its application based on speculation about congressional motives and popular understanding. But "[i]t is the business of Congress to sum up its own debates in its legislation," and once it enacts a statute, "'[w]e do not inquire what the legislature meant; we ask only what the statute means.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018) (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396, 397 (1951) (Jackson, J., concurring)). Title VII's statutory text speaks for itself and, in barring discrimination because of an individual's sex, it also necessarily bars discrimination because an employee is transgender.

ARGUMENT

I. Discrimination because an employee is transgender is per se discrimination because of such employee's sex.

The question posed by the Court's grant of certiorari asks whether Title VII prohibits discrimination against transgender people either based on their status as transgender or as a matter of prohibited sex stereotyping under *Price Waterhouse*. *Amicus* agrees that "there is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity" and that therefore, under *Price Waterhouse*, Title VII protects transgender people "because transgender or transitioning status constitutes an inherently gender non-conforming trait." Pet. App. 27a-28a; *see also* Br. of Resp't Aimee Stephens (Part II). There is, however, an additional and perhaps even simpler reason why the Sixth Circuit's judgment must be affirmed. Under a straightforward application of the statutory text, it is inescapable that discrimination because an employee is transgender is per se discrimination "because of such individual's . . . sex" and therefore violates Title VII.

A. The text of Title VII prohibits discrimination because a worker is transgender.

In determining the scope of Title VII's protections, "[a]s in any case of statutory construction, our analysis begins with the language

of the statute. And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (citations omitted). In this case, the Court's analysis can begin and end with the language of Title VII. As that language provides, "[i]t shall be an unlawful employment practice for an employer 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 . . . sex*." 42 U.S.C. § 2000e-2(a) (emphasis added). Discrimination based on an employee's transgender status would not have occurred but for the employee's sex, either in whole or in part. It is therefore per se discrimination "because of such individual's . . . sex."

1. "Because of"

At the time of Title VII's enactment in 1964, "because of" meant, as it does today, "by reason of, on account of." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176-177 (2009) (citing, *e.g.,* Webster's Third New Int'l Dictionary 194 (1966)). This, by its "plain language," connotes at least those employer actions in which a protected characteristic is a "but-for" cause. *See id.*; *see also EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015) ("'because of' appears frequently in antidiscrimination laws" and "imports, at a minimum, the traditional standard of but-for causation"); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350-52 (2013); *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978).

Stated differently, to establish liability, "[w]hatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). It need not be the sole cause of the adverse action, but the statute does not permit separate employment policies based on the protected trait. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971). Thus, where an employer takes an adverse employment action in which sex is a but-for cause, Title VII has been violated.

In addition, Title VII imposes liability when sex "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). Congress added this provision to codify *Price Waterhouse*'s conclusion that sex does not have to be the sole cause of the employer's adverse action, but that it must be a motivating factor. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) (plurality) ("we know that the words 'because of' do not mean '*solely* because of'"); *id.* at 259 (White, J., concurring); *id.* at 279 (O'Connor, J., concurring); *id.* at 284 (Kennedy, J., dissenting); 42 U.S.C. § 2000e-2(m). Although the relief available under this provision may be more limited if the employer can show that the non-sex-based considerations would have resulted in the same decision, *see* 42 U.S.C. § 2000e-5(g)(2), the fundamental principle here is that "gender must be irrelevant to employment decisions." *Price Waterhouse*, 490 U.S. at 240.

2. "Sex"

Having explored the meaning of "because of," we turn to the role that the term "sex" plays in the statutory phrase "because of . . . sex." To be sure, disputes exist regarding what the term "sex" means and whether it encompasses gender identity or transgender status.[2] While the prevailing modern view would conclusively answer that question in the affirmative, the Court need not resolve those disputes to decide the issue here. *See* Resp. Br. at 24. Using a narrow definition of "sex"—*i.e.*, being male or female—discrimination against transgender employees is nonetheless "because of . . . sex." This is so even affording "sex" the narrowest (and scientifically questionable, *supra*) definition put forth by Petitioner R.G. & G.R. Harris Funeral Homes, Inc. ("Harris Homes") and the United States: "biologically male or female . . . as objectively determined by anatomical and physiological factors, particularly those involved in reproductive functions," Pet. 26 (internal quotations and citations omitted), or "'[the] physiological distinction[]' between 'male and female,'" Fed. Resp't Br. Opp'n at

[2] Modern scientific and medical understanding is that gender identity is a sex-related characteristic and that gender identity is the primary determinant of a person's sex. *See*, *e.g.*, *Adams by Kasper v. Sch. Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293, 1298 (M.D. Fla. 2018), *appeal docketed*, No. 18-13592 (11th Cir. Aug. 24, 2018); *Fabian v. Hosp. of Cent. Conn.,* 172 F. Supp. 3d 509, 527 (D. Conn. 2016); *see also* Brief for Transgender Legal Defense & Education Fund and 33 Other Organizations Serving Transgender Individuals as *Amici Curiae* in Support of Respondent Aimee Stephens (Part II).

17 (quoting Webster's New Int'l Dictionary 2296 (2d ed. 1958).[3]

In each and every instance of discrimination because an employee is transgender, the discrimination could not have happened but for the employee's sex. Whether the employer is considering the employee's sex assigned at birth, the sex with which the employee identifies, or the fact that the employee is transitioning from one sex to another, at each of these junctures, the employer is considering the employee's sex. Title VII therefore proscribes all such discrimination.

B. Discrimination against an employee because of the employee's transgender status is literally discrimination "because of such individual's . . . sex" because the discrimination would not have occurred but for the employee's sex.

When an employer takes adverse action against a worker because of the worker's transgender status, the employer is discriminating against the worker "because of such individual's . . . sex." The employer's adverse decision would not have happened but for the sex the worker was identified as at birth.

Consider, for example, Sarah, a woman who is fired when her employer learns she is transgender. Sarah has been fired "because of . . . [her] sex." It is

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[3] *Amicus* will refer to Harris Homes's and the United States's definitions of "sex" as "sex assigned at birth" or "assigned sex."

precisely because Sarah was assigned a male sex at birth that the employer finds objectionable her identification, presentation, and appearance as a woman—the defining features of Sarah's transgender status. Had Sarah been assigned a female sex at birth, she would not have been fired for identifying, presenting, and appearing as a woman. But-for Sarah's assigned sex and the employer's resulting belief that Sarah is male, the employer would not be disturbed by her identifying and wanting to present as female, and the outcome would be different.

This is precisely what Aimee Stephens experienced. She was fired from her job two weeks after announcing she would be identifying as female, presenting herself as Aimee, living and working as a woman, and wearing appropriate business attire as a woman. *See* Resp. App. 1a-2a; Pet. App. 95a-96a. Her employer made clear that she was fired precisely because she, as someone who was assigned the male sex at birth, would be identifying, presenting, and appearing as a woman. *See*, *e.g.*, Pet. App. 109a-110a; Resp. App. 61a; J.A. 131. But for her having been assigned the male sex at birth, Ms. Stephens would not have been fired. Stated another way, Harris Homes was willing to employ Ms. Stephens when she was presenting as a man, but once she began presenting as a woman, they fired her. As the Sixth Circuit correctly concluded, "because an employer cannot discriminate against an employee for being transgender without considering that employee's [assigned] sex, discrimination on the basis of transgender status

necessarily entails discrimination on the basis of sex." Pet. App. 30a.

The employer's very explanation for Ms. Stephens's dismissal demonstrates the primacy of her assigned sex to his decision. The owner of Harris Homes stated that he fired her "because he . . . was no longer going to represent himself as a man." Pet. App. 109a. Throughout these proceedings, he reiterated his view that Ms. Stephens is a man and persistently referred to her as a man. *See*, *e.g.,* Resp. App. 61a; J.A. 30-31, 34-35, 54, 72, 129-134,152. His view of her as a man was the but-for cause for her being fired. Had he viewed her as a woman, she would not have been fired.

That the employer was mistaken in viewing Ms. Stephens as a man makes no difference. Title VII liability turns on the employer's motive rather than his knowledge. *See Abercrombie & Fitch*, 135 S. Ct. at 2032. Further, even *mistakenly* firing someone an employer believes to have a protected characteristic is actionable. For example, suppose an employer who did not a want a Latino employee fired someone who spoke Spanish, but was, in fact, not Latino. That would nonetheless be national origin discrimination. *Cf. Heffernan v. City of Paterson*, 136 S. Ct. 1412 (2016) (firing someone because the employer thought he had exercised his First Amendment Rights was First Amendment retaliation even though the plaintiff had not actually exercised his rights).

This is quintessential but-for discrimination "because of . . . sex." As Vandy Beth Glenn, Diane

Schroer, and Mia Macy experienced, it is the employee's sex—however it is perceived by the employer—that resulted in the employer's refusal to employ her. *Glenn v. Brumby*, 663 F. 3d 1312, 1320-21 (11th Cir. 2011); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305-06 (D.D.C. 2008); *Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995, at *10 (Apr. 20, 2012). Whether the focus is on a transgender employee's assigned sex or the sex with which they identify, it is their sex that results in the employer's actions. *See, e.g.*, *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1015 (D. Nev. 2016); *Schroer*, 577 F. Supp. 2d at 305-06. And adverse action against an employee which, "but for that person's sex would be different . . . constitutes discrimination and is unlawful." *Manhart*, 435 U.S. at 711 (internal quotation marks omitted).

Moreover, attempting to reframe discrimination against a transgender employee as merely being about their process of changing their sex cannot alter the conclusion that the discrimination would not have occurred but for the employee's sex. "[D]iscriminating on the basis that an individual was going to, had, or was in the process of changing their sex—or the most pronounced physical characteristics of their sex—is *still* discrimination based on sex." *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 949 (W.D. Wis. 2018).

The same is true in the context of religion. Were an employer to fire an employee who converts from one religion to another, the adverse action clearly would not have happened but for the protected trait of religion. This would be the case even if the

employer has no bias against either the prior religion or the adopted religion, but simply dislikes converts. "No court would take seriously the notion that 'converts' are not covered by the statute. Discrimination 'because of religion' easily encompasses discrimination because of a *change* of religion." *Schroer*, 577 F. Supp. 2d at 306-07. The protections due to employees who adopt new religious beliefs or convert from one faith to another are no different than the protections due employees whose religious practices remain consistent. *See Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 143-44 (1987); *see also Heller v. EBB Auto Co.*, 8 F.3d 1433, 1436 (9th Cir. 1993) (finding employer liable for failing to accommodate Jewish employee's attendance at conversion ceremony); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016) ("discrimination against converts, or against those who practice either religion the 'wrong' way, is obviously discrimination 'because of religion.'"). It is the adoption of a new religion that prompts the employer's discrimination, which is therefore "because of . . . religion." By the same token, discrimination because of a transgender worker's gender transition "constitutes discrimination on the basis of the properties or characteristics typically manifested in sum as male and female—and that discrimination is literally discrimination 'because of sex.'" *Fabian*, 172 F. Supp. 3d at 527.

C. Discrimination against an employee because of the employee's transgender status is intrinsically discrimination "because of such individual's . . . sex" because sex is always being taken into account.

Although discrimination against a transgender employee squarely meets the parameters of but-for discrimination "because of . . . sex," the sex-based nature of this discrimination is underscored by the ways in which any adverse action impermissibly takes an employee's sex "into account." *See Price Waterhouse*, 490 U.S. at 239-40 (plurality). The statute's prohibition of discrimination "because of . . . sex" is linked "to each of the verbs preceding it; an individual's [protected trait] may not be a motivating factor in failing to hire, in refusing to hire, and so on." *Abercrombie & Fitch*, 135 S. Ct. at 2032.

As the Sixth Circuit held, "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." Pet. App. 23a. Being transgender cannot be defined without reference to sex. Transgender people are people whose gender identity—a person's fundamental, internal sense of their gender—diverges from the sex they were assigned at birth. *See* Wylie C. Hembree et al., *Endocrine Treatment of Gender Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. Clinical Endocrinology & Metabolism 3869 (2017); *see also Transgender*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary

/transgender (last visited June 27, 2019) (defining transgender as "of, relating to, or being a person whose gender identity differs from the sex the person had or was identified as having at birth").

Whether the employer focuses on the worker's sex assigned at birth, gender identity, sex reflected on identity documents, anatomy, gender presentation, or other indicia of a person's sex, consideration of any of these in making employment decisions makes sex inherently part of the calculus. There can be no question that sex is a motivating factor and therefore any such adverse employment actions would constitute discrimination "because of . . . sex."

II. Neither selective focus on the meaning of "sex" nor alleged deference to Congressional intent can alter the central statutory inquiry of whether the discrimination occurred "because of . . . sex."

Harris Homes focuses myopically on the meaning of the word "sex," asking the Court to reject the notion that "sex" "meant 'gender identity' and included 'transgender status'" at the time of Title VII's enactment in 1964. Pet. i. But this framing seeks to divert the Court's attention from the question actually presented by this case in two significant ways. First, limiting the inquiry to the meaning of "sex" ignores the statutory context and elevates form over function by permitting perfunctory labels to prevent a true examination of the underlying discriminatory conduct. Second,

while seemingly phrased as an inquiry into the meaning of the statutory text, Harris Homes's question is an impermissible attempt to limit the statute's reach based on conjecture about what Congress or the public may have thought about Title VII's future applications, not the meaning of the words "because of such individual's . . . sex" that Congress enacted and that were signed into law.

A. Whether Title VII's use of "sex" means gender identity and includes transgender status are the wrong questions for interpreting and applying the statute.

The proper inquiry required by the plain language of Title VII is not whether "transgender" fits within the definition of "sex," but whether discrimination against a transgender person is discrimination "because of such individual's . . . sex." As a general matter, the words of a statute cannot be viewed in isolation and must be construed "in light of the terms surrounding [them]." *FCC v. AT&T Inc.*, 562 U.S. 397, 405 (2011) (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004)). Specifically, Congress has made clear that Title VII is not to be parsed this way. Focusing narrowly on what "sex" means repeats the same mistake the Court made in *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), in narrowly defining the statute's concept of "discrimination." Congress's amendments to Title VII in 1978 in response to *Gilbert* added a statutory provision to ensure that the definition of discrimination "because of sex" or "on the basis of sex" would "include, but . . . not [be] limited to, because of or on the basis of pregnancy,

childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). In so doing, Congress "unambiguously expressed its disapproval of both the holding and the reasoning" of *Gilbert*, *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983), and properly re-focused the statutory inquiry on what "because of . . . sex" means. As Justice Stevens noted in his dissent in *Gilbert*, 429 U.S. at 161, the "fresh, and rather simple, question of statutory construction" is simply whether an employer's policy "discriminate[s] against certain individuals because of their sex."

Any attempt to recast the discrimination transgender people face as something other than sex discrimination allows superficial labels to obscure the conduct that is at the root of the discrimination. This is a distraction that essentially seeks to create a transgender exception to the straightforward statutory inquiry. "In other words, courts have allowed their focus on the label 'transsexual' to blind them to the statutory language itself." *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008).

Returning to the religion analogy, just as discrimination against a person who changes religions could be described as discrimination because of "apostasy" or discrimination against "converts," such conversion can only be understood in terms of religion. It is the employee's relationship to religion that is the basis of the discrimination and as such the labels "apostasy" or "convert" are of no consequence. By the same token, that an employer can say that they are discriminating on the basis of

an employee's transgender status does not erase the fact that the employer has engaged in discrimination "because of . . . sex." It is the employer's conduct and the factors they considered in making their employment decisions that give rise to liability, not the labels by which they can describe their discriminatory actions. Were the labels enough, Martin Marietta would have been able to avoid liability by claiming it was only discriminating on the basis of motherhood. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971). Instead, this Court examined the underlying conduct and recognized that the employer had separate hiring policies for women and men in violation of Title VII. The same depth of analysis is required here, with the plain result that discrimination against an employee because of their transgender status can only be understood in terms of sex.

The District Court in this case erred on this point, getting tripped up on the terminology of "transgender status" in concluding that anti-transgender discrimination is not inherently a form of sex discrimination. This is despite its recognition that "any person—without regard to labels such as transgender—can assert a sex-stereotyping gender-discrimination claim under Title VII . . . if that person's failure to conform to sex stereotypes was the driving force behind the termination." Pet. App. 164a. The same calculus is true for a straightforward sex discrimination claim: any person—without regard to labels such as transgender—can assert a sex discrimination claim under Title VII if that person's sex was the driving

force behind the termination. The labels do not matter.

B. Whether anyone would have thought Title VII's use of "sex" included transgender status in 1964 is irrelevant.

The second flaw with Petitioner's framing is that, at bottom, their question really goes to whether anyone at the time of Title VII's passage would have considered it to apply to discrimination against a transgender worker. Rather than illuminating the *meaning* of the text, the contention that no "literate American" in 1964 would have understood Title VII in this way, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 143 (2d Cir. 2018) (en banc) (Lynch, J., dissenting), invites the Court to narrow the statute's *application*. Even assuming the correctness of this proposition, it does not mean that the expectations of the 1964 public can be permitted to control. *See Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2075 (2018) ("original public meaning" of statutory terms is not limited to those applications that existed at the time); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("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."). Rather, as this Court has recognized, there are a variety of reasons why observers at the time of enactment might not have anticipated or expected a particular application of broad statutory text.

Some of these reasons could arise from changes in the semantic meaning of a statute's words. An uncontroversial example from the constitutional context arises from the language of Article IV, § 4, which guarantees to the states protection in case of "domestic violence." U.S. Const. art. IV, § 4. No literate American at the time of the framing of the Constitution would have understood this provision to extend to family-based violence, though people today commonly understand "domestic violence" in this way, because the term "domestic violence" has taken on a new meaning.

But other reasons have nothing to do with the text itself. Observers at the time of a statute's passage might have not anticipated technological advances that would bring particular applications within broad statutory language. *See, e.g., id.* Or, they might simply not have considered or imagined all of the varied ways that a statute's broad language could be applied. *See, e.g., Oncale,* 523 U.S. at 79-80. Or, they might not have imagined that a particularly despised minority might be a beneficiary of a broadly written rights law. *See, e.g., Pa. Dep't of Corrs. v. Yeskey*, 524 U.S. 206 (1998). As this Court has recognized, "[w]ords in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic." *West v. Gibson,* 527 U.S. 212, 218 (1999). Here, there is no change in the semantic meaning of the text, and "the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Yeskey*, 524 U.S. at 212 (quoting *Sedima, S.P.R.L. v.*

Imrex Co., 473 U.S. 479, 499 (1985)). Popular understanding of Title VII in 1964 cannot control the statute's application because "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale*, 523 U.S. at 79.

Additionally, Petitioner's portrayal of arguments that discrimination faced by transgender workers is sex discrimination as being of recent vintage ignores that state and federal courts have recognized this for decades. *See, e.g., Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Lie v. Sky Publ'g Corp.*, 15 Mass. L. Rptr. 412, 2002 WL 31492397 at *3-5 (Mass. Super. Ct. 2002); *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 373 (N.J. Super. Ct. App. Div. 2001); *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391, 396 (N.Y. Sup. Ct. 1995); *Richards v. U.S. Tennis Ass'n*, 400 N.Y.S.2d 267, 272 (N.Y. Sup. Ct. 1977). Courts that have remained true to the statutory text and asked the right questions have concluded that transgender workers fall within Title VII's sex discrimination protections.

Ironically, whatever enactment era audiences would have thought of Ms. Stephens, the kind of discrimination she experienced would have been quite recognizable. It frames up as the most traditional form of sexist employment decision-making. The employer was happy to have an employee of identical skill fill the position as a man,

but not as a woman.[4] Such an employment decision is paradigmatically "the simple decision of an employer not to hire a woman for Job A, or a man for Job B" that Title VII was understood to cover. *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 345 (7th Cir. 2017) (en banc). It reflects the types of "[m]yths and purely habitual assumptions about a woman's inability to perform certain kinds of work [that] are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less." *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978). The earliest applications of Title VII made clear that permitting one hiring policy for women and another for men runs afoul of the statute's requirement "that persons of like qualifications be given employment opportunities irrespective of their sex." *Phillips*, 400 U.S. at 544. Whether other examples of discrimination against transgender workers paint the same "traditional" picture of sex discrimination, this simply underscores that what Ms. Stephens experienced was plainly because of her sex.

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[4] Not only did Harris Homes refuse to have Ms. Stephens continue in her position as a woman, but they had not had a woman in her professional role since 1950. Resp. App. 90a; J.A. 75, 133. Harris Homes also maintained a dress code designed specifically to enforce stereotypical gender roles. J.A. 73-75 (describing approach to dress code requiring women to wear skirts and not pants as "old-fashioned;" "there's a certain tradition that we want to keep"). Furthermore, it was only recently that Harris Homes began providing any allowance to women employees to buy clothes, whereas men have long had their clothes paid for. Even still, the women get significantly less to cover their clothing costs than the men. Resp. App. 55a-59a. These decisions and policies all exemplify the kind of traditional sexism in employment that enactment era observers would have immediately recognized.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully Submitted,

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