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

BRIEF OF AMICUS CURIAE WILLIAM J. BENNETT IN SUPPORT OF PETITIONER AND REVERSAL

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INTEREST OF AMICUS CURIAE[1]

William J. Bennett, who served as Secretary of Education from 1985 to 1988, is a widely respected commentator on American culture and an expert on educational policy. He has written over 25 books, including THE BOOK OF VIRTUES (1993) and THE MORAL COMPASS (1996). Dr. Bennett has an acute interest in the outcome of this litigation because this Court's construction of Title VII is also likely to strongly influence the lower courts' interpretation of Title IX. And having spent a career working to improve America's schools, Dr. Bennett has a strong interest in the legal requirements imposed on the Nation's educational institutions. In addition to his government service and his private-sector work on the issue of education, Dr. Bennett has taught at Boston University, the University of Texas, and Harvard University.

INTRODUCTION

In February of 1964, near the end of the congressional debate over the landmark Civil Rights Act of 1964, Representative Howard Smith of Virginia proposed an amendment to the legislation: adding the word "sex" to the list of prohibited bases of

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[1] Pursuant to SUP. CT. R. 37.3(a), amicus certifies that all parties have consented to the filing of this brief. Pursuant to SUP. CT. R. 37.6, amicus certifies that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amicus or his counsel made such a monetary contribution.

discrimination in the workplace. 110 CONG. REG. 2577 (Feb. 8, 1964) (statement of Rep. Smith). The legislative debate that ensued was "somewhat bizarre," *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 n.9 (1989) (plurality)—the amendment was apparently offered "in an attempt to *defeat* the bill," *id.*, and its principal opponent was the sponsor and floor manager of the Civil Rights Act, Representative Celler of New York. But after a short discussion the amendment passed the House handily, supported by a coalition of southern conservatives and female Members of Congress who had spent their careers advocating for women's rights. And critically, *both* the opponents *and* the supporters of the amendment shared the same understanding of the word they disagreed about adding: everyone "kn[e]w the biological differences between the sexes." 110 CONG. REC. at 2577 (statement of Rep. Celler).

It could hardly have been otherwise. The *only* understanding of the word "sex" in common use among the general public at the time was the same one it had *always* borne: "[t]he sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these." 9 OXFORD ENGLISH DICTIONARY 578 (1961). No other understanding of "sex"—and certainly not one based on an individual's "inner sense of being male or female" that was at odds with the biological reality, Pet.App.204a—would be conceived for many years in the future.

In July 2013, after working for over five years as a funeral director at Petitioner Harris Funeral Homes, Respondent William Anthony Beasley Stephens informed Petitioner that Stephens had long suffered from "gender identity disorder" and had decided to "live and work full-time as a woman." Pet.App.94a–95a. Stephens planned to adopt a new name, Aimee Australia Stephens, and to dress and otherwise present to coworkers and clients as a woman. Petitioner determined that permitting Stephens to dress and otherwise present as a female funeral director would "disrupt[ ] [the] grieving and healing process" of "clients mourning the loss of their loved ones," Pet.App.198a, and fired Stephens.

From these facts alone, it is clear that Stephens was not "discharge[d] … because of [Stephens'] … sex," in violation of Title VII. First, Stephens was not fired because Stephens is a male. If Petitioner had wanted to fire Stephens because Stephens is a male, Petitioner would not have taken over five years to do so. Second, Stephens was not fired because Stephens is a female. Stephens is not a female, and so firing Stephens for that reason was not possible. This inescapable biological fact cannot be evaded by resorting to euphemisms implying that sex is somehow contingent or discretionary, such as "assigned male at birth." Pet.App.5a. Nor is there any evidence in this case that Petitioner would have treated a similarly situated female employee any differently. That is, if a female funeral director had informed Petitioner that she planned henceforth to present herself to coworkers

and clients as a male, Petitioner would no doubt have fired her too. Stephens' claim of sex-based discrimination is thus meritless, and this case is no more complicated than that.

But in March of 2018, the Sixth Circuit panel below held that "discrimination on the basis of transgender and transitioning status violates Title VII." Pet.App.22a. The court, in effect, amended the Civil Rights Act of 1964, interlineating the words "transgender status" into Title VII. The result of this addition to the Act is no less momentous than the one proposed by Representative Smith in 1964. But this one comes "courtesy of unelected judges," not the People's representatives. *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 360 (7th Cir. 2017) (Sykes, J., dissenting). There was no legislative debate over prohibiting transgender-based discrimination in the workplace, no bicameral passage, and no presentment to the President. The revolutionary policy change that Congress has neglected—indeed, has repeatedly *refused*—to enact has been decreed, instead, by the bang of a gavel.

To be sure, the panel did not openly admit, as one judge has in a closely analogous context, that "today we are rewriting Title VII." *Hively*, 853 F.3d at 354 (Posner, J., concurring). It purported, instead, to find a remedy for transgender discrimination *within* the existing bar on sex discrimination, based on the theory that "[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex." Pet.App.14–15a. That theory is

false. The panel's exercise of legislative power allows plaintiffs to prove a sex discrimination claim under Title VII *without ever showing* that they have been "discriminate[d] against … *because of [their] sex*." 42 U.S.C. § 2000e-2(a) (emphasis added). And that novel interpretation of sex discrimination has implications beyond the debate over the treatment of transgender employees—implications that, if this Court allows the decision below to stand, will reverberate through every corner of the American workplace and beyond.

SUMMARY OF ARGUMENT

I. Discrimination against an individual because of the individual's transgender status *is not* discrimination because of the individual's biological sex. The panel below—and Respondent Stephens, before this Court—argue that discrimination against transgender employees is "necessarily" sex discrimination because the transgender employee's biological sex is "inherently" a but-for cause of the discrimination. This argument is based on a deeply flawed but-for causation analysis, one that fails to hold constant a key factor—specifically, transgender status—when analyzing whether the allegedly discriminatory act would have occurred if the transgender employee had been the opposite biological sex. When analyzed correctly—holding *all* relevant factors constant, other than biological sex—it is clear that the but-for cause of discrimination against an employee because of the employee's transgender status *is the employee's transgender status*, not the employee's biological sex.

Indeed, biological sex plays no causal role whatsoever in this type of discrimination.

The panel's alternative contention that discrimination based on transgender status constitutes sex discrimination under a "sex stereotype" theory is equally unsound. The principal authority offered by the panel for that theory was this Court's decision in *Price Waterhouse*. But the plurality opinion in that case made clear that the Court *was not* establishing a standalone "sex stereotype" cause of action, and that proof of sex stereotyping could be used to support a Title VII claim only if it resulted in "disparate treatment of men and women." 490 U.S. at 251. An employer's even-handed enforcement of sex-specific dress codes (or restrooms, locker rooms, company sports teams, etc.) against *all* transgender employees, whether male or female, involves no such disparate treatment "because of … sex." Even more fundamentally, Stephens' claim of discrimination based on transgender status *is not a claim of sex stereotyping at all*. Unlike the plaintiff in *Price Waterhouse*—a biological female who objected to being treated discriminatorily because of stereotypes about females—Stephens does not object to being treated unfairly because of stereotypes about males. Rather, Stephens objects to being *identified as a member of the male sex to begin with*. Stephens insists that Petitioner accept and affirm Stephens *as a female employee*. That is not a claim of "sex stereotyping." Indeed, it is analytically *incompatible* with any genuine claim of sex stereotyping.

II. The panel's decision that Title VII prohibits discrimination based on transgender status accordingly can stand only if the word "sex" in that statute means something *more capacious* than "biological sex"—and includes an employee's own "internal, deeply held sense of gender" that conflicts with the employee's biological sex. Brief for Respondent Aimee Stephens 5 (June 26, 2019) ("Respondent's Br."). But the plain meaning of Title VII of the Civil Rights Act of 1964 is clear and unambiguous: discrimination because of someone's "sex" means discrimination because of their *biological* sex—their possession of the physiological characteristics that differentiate males and females. Indeed, it is not as though this was *one possible* understanding of "sex" in 1964. This was, and always had been, the *only* understanding of "sex" available. The legislative history of Title VII conclusively confirms what no one, candidly, could have doubted: when Congress acted in 1964 to prohibit discrimination on the basis of sex, it understood "sex" to refer to an immutable, biological trait, *not* each individual's own self-reported, internal sense of gender.

ARGUMENT

I. DISCRIMINATION BASED ON AN INDIVIDUAL'S TRANSGENDER STATUS DOES NOT CONSTITUTE DISCRIMINATION BECAUSE OF THE INDIVIDUAL'S BIOLOGICAL SEX.

The panel's holding below that "discrimination on the basis of transgender and transitioning status violates Title VII," Pet.App.22a, was based on two

theories: (1) discrimination based on transgender status *inherently involves* discrimination based on biological sex, because sex is the "but-for" cause of the discrimination; and (2) "discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping." Pet.App.24a, 26a. Respondent argues that these theories justify the panel's holding *whether or not* " 'gender identity' is part of 'sex' for purposes of Title VII." Respondent's Br. 20. Both Respondent and the court below are mistaken.

A. "Sex" Is Not an Inherent But-For Cause of Discrimination Based on Transgender Status.

The court below argued, first, that "discrimination 'because of sex' inherently includes discrimination against employees because of a change in their sex." *Id.* 24a. Or, as Respondent puts the point, "even if 'sex' is limited to" its traditional, biological understanding, discrimination based on transgender status is still sex discrimination because the employee's biological sex is "a but-for cause" of the discrimination. Respondent's Br. 24. The theory, as Respondent explains it, is that a transgender person born biologically male and discriminated against for presenting as a female is discriminated against "for two reasons": "for having a male sex assigned at birth *and* for living openly as a woman." *Id.* at 25. Accordingly, "it is impossible to discriminate against a person for being transgender *without* their [biological] sex … being a cause of the decision." *Id.*

This argument is based on a deeply flawed understanding of "but-for" causation. When an employer discriminates against an employee because of the employee's transgender status, the but-for cause of the discrimination is *the employee's transgender status*, not the employee's biological sex; in fact, sex is not a causal factor at all.

As this Court has explained in the Title VII context, "[i]n determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way." *Price Waterhouse*, 490 U.S. at 240 (plurality). In other words, but-for causation requires the court "to hold the world constant except for the deletion of the cause at issue," and then ask whether the relevant effect would still occur. Nancy A. Weston, *The Metaphysics of Modern Tort Theory*, 28 VAL. U. L. REV. 919, 1006 n.12 (1994). "An act or omission is not regarded as a cause of an event if the particular event would have occurred without it." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 (2009).

The proper but-for analysis to determine the cause of an employer's discrimination against a transgender employee is to ask this: if the employee had presented as the sex that accorded with his or her biological sex, and all other variables were held constant, would the adverse employment action have occurred. If the answer is no, as it is in this case, then it is clear that the employee's transgender status is the

cause of the discrimination.[2] And it is especially clear that the employee's biological sex *is not* a causal factor of the discrimination. This can be seen by hypothesizing that the employee's *biological sex* were different but all other factors—including the employee's transgender status—were held constant. In that case, the effect *would remain the same*: the discrimination would still occur.

Put differently, if an employer is truly engaged in discrimination based on transgender status, it will discriminate equally against biological males who present as females and biological females who present as males. The employee's biological sex is wholly irrelevant to the occurrence of the discrimination. Because the discrimination "would have occurred" regardless of the employee's sex, sex cannot be "regarded as a cause" of the discrimination. *Gross*, 557 U.S. at 177.

The facts of this case illustrate the point. Petitioner fired Stephens because Stephens planned to

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[2] Accordingly, discrimination based on transgender status does not present the complicated causal questions raised by "mixed motive" cases. In cases where an employer was motivated by both legitimate and impermissible reasons, either of which would have been sufficient to prompt the challenged action, there is *no* single but-for cause of the action: take *either* motivation away and the action would *still* have occurred. *See Price Waterhouse*, 490 U.S. at 240–41 (discussing this situation); 42 U.S.C. § 2000e-2(m) (providing for liability in mixed-motive cases). With discrimination because of transgender status, by contrast, we *know* the but-for cause of the discrimination: the employee's transgender status.

present as a female, refusing to comply with Petitioner's sex-specific dress code for male funeral directors. Pet.App.101a. But both biological men and women funeral directors are required to abide by sex-specific dress codes—biological males must wear a suit and tie, and biological females must wear a skirt and business jacket. Pet.App.91a–93a. Stephens was fired for vowing to wear a skirt suit and otherwise present as a woman at work; but *the result would have been the same* had Stephens been a biological *female* who vowed to wear a suit and tie. Because the result in this case "would have transpired in the same way" *regardless* of Respondent's biological sex, sex was not "a but-for cause" of the result. *Price Waterhouse*, 490 U.S. at 240 (plurality).

Respondent Stephens' contrary claim that "it is impossible to discriminate against a person for being transgender *without* their [biological] sex … being a cause of the decision," Respondent's Br. 25, is based on a transparent sleight-of-hand. Stephens asserts that biological sex is a but-for cause of transgender-status discrimination because an employer who fires an individual "for being a transgender woman—that is, for having a male sex assigned at birth and living openly as a woman"—"would not have fired" the individual if they had "been assigned the female sex at birth." Respondent's Br. 23; *see also* Pet.App.24a. But the reason that an employee who was born female would not have been fired *is not* her biologically female sex; that can be seen by noting that a biological *female* who "lived openly as a man" *would also* be

fired. Rather, the reason the biological female in Stephens' hypothetical would not be fired is that a biological female "living openly as a woman" *is not living openly as a transgender man.*

Stephens' but-for analysis thus flouts the basic requirement of determining but-for causation: it does not "hold the world constant except for the deletion of the cause at issue." Weston*, supra*, at 929 n.12; *see also Hively*, 853 F.3d at 366 (Sykes, J., dissenting) ("If the aim is to isolate actual discriminatory motive based on the plaintiff's sex, then we must hold everything constant *except* the plaintiff's sex."). To the contrary, when Stephens asks us to imagine a world where Stephens was born female *and* lives as a woman, Stephens has not only hypothetically changed the employee's biological sex in the example but has *also* surreptitiously changed the employee's *transgender status*. And it is easy to see that it is this *latter* factor that exclusively causes the change in result, for in the counterfactual world where Stephens is a biological female *who continues to be transgender*, Stephens would present as a transgender male and the discrimination *would still occur*.

The panel's analogy to religious conversion cannot rescue its flawed analysis. The court imagined "an employer who fires an employee because the employee converted from Christianity to Judaism," and asserted that such an employer "has discriminated against the employee 'because of religion,' regardless of whether the employer feels any animus against either Christianity or Judaism." Pet.App.24a. As an

initial matter, it is far from clear that the employer in this hypothetical has engaged in discrimination because of religion; if the supposed "anti-conversion" policy truly does not involve any animus towards, or disparate treatment of, any particular faith, then it is hard to see how it constitutes "discriminat[ion] … because of [an] individual's … religion," 42 U.S.C. § 2000e-2(a), as opposed to the act of converting from one religion to another.

But even setting that point aside and assuming that discrimination because of a *change* in some trait amounts *per se* to discrimination *because of the trait itself*, that would still not show that discrimination because of transgender status amounts to discrimination because of sex. For while religious belief can indeed change (as evidenced by Abraham, St. Paul, and countless other religious converts throughout history), a person's sex—the biological features embedded in their chromosomes and basic physiology—cannot. Indeed, as this Court has long recognized, the fact that "sex, like race and national origin, is an *immutable characteristic* determined solely by the accident of birth" is one of the *most fundamental reasons our society has rejected it as a basis of discrimination. Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (emphasis added). Accordingly, the panel's analogy to religious conversion succeeds in showing only what was already evident: when an employer discriminates against an employee based on a change in gender identity, the cause of the discrimination *is the employee's transgender status*, not the employee's sex.

The confused but-for analysis adopted by the court below and pressed by Respondent Stephens, if adopted by this Court, would spell the end of common and uncontroversial employment practices that have *never* been understood to violate Title VII. It has long been understood, for example, that the provision of sex-specific restrooms in the workplace does not violate Title VII; where a male employee is barred from using the ladies' room, he has not been discriminated against "because of sex" if biologically female employees are likewise barred from using the men's room. On Stephens' theory, however, such a sex-specific restroom policy *necessarily* violates Title VII. For if the male employee barred from using the ladies' room "had been assigned the female sex at birth," the employee would have been allowed to use the ladies' room. (Never mind that in that counterfactual world, the employee *would be using the restroom that accords with her biological sex*.) By Respondent's lights, biological sex is thus a "but-for" cause of the termination, and the separate restrooms violate "[t]he 'simple test' for sex discrimination under Title VII." Respondent's Br. 20.

Respondent is thus wrong to claim that "questions regarding sex-specific policies need not, and should not, be resolved here." *Id.* at 50. The legal profile of these policies is *precisely* the same as transgender-based discrimination: biological sex is not a causal factor at all under the proper but-for analysis, but it *is* under Respondent's flawed theory. Adoption of that theory would doom these sex-specific

policies, rendering every sex-specific restroom, locker room, company sports team, etc., in the American workplace a Title VII violation-in-waiting. And this result would likely obtain not just in the employment context, but in every area in which "sex" discrimination is prohibited by federal law. While Congress may have the power to impose that consequence if it chooses, it did not choose to do so in 1964, or since.

B. *PRICE WATERHOUSE* DOES NOT SUPPORT READING TITLE VII TO INCLUDE DISCRIMINATION BASED ON TRANSGENDER STATUS.

Discrimination against an employee based on transgender status also does not violate Title VII under the panel's alternative theory that "discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping." Pet.App.26a. The panel made two arguments: (1) an employer that "requires its employees to conform to a sex-specific dress code" is engaged in impermissible sex stereotyping even if "the employer's sex stereotyping [does not] result[ ] in disparate treatment of men and women," Pet.App.17a (quotation marks omitted); and (2) "discrimination against transgender persons *necessarily* implicates Title VII's proscriptions against sex stereotyping" since "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," *id.* at 26a–27a (emphasis added). The court erred on both scores.

1. The panel's principal authority for its conclusion that transgender-based discrimination violates Title VII under a sex-stereotype theory was the plurality opinion in *Price Waterhouse*. That is a slender reed on which to support so revolutionary an interpretation of Title VII, and it ultimately collapses under the weight.

In *Price Waterhouse*, a partnership candidate, Ann Hopkins, sued when she was passed over for promotion, charging that the decision was based on her sex. Much of the evidence in the record indicated that Hopkins' candidacy had been scuttled because of "her 'interpersonal skills' "—"she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff." 490 U.S. at 234–35 (plurality). But other evidence indicated that at least "some of the partners reacted negatively to Hopkins' personality because she was a woman," and that Price Waterhouse's decision not to promote her thus in part "stemmed from an impermissibly cabined view of the proper behavior of women." *Id.* at 235, 236–37. One partner had "objected to her swearing," for example, "because it's a lady using foul language." *Id.* at 235. Another advised her to "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry." *Id.*

The district court concluded, based on this evidence, that the decision not to promote Hopkins

"resulted from a mixture of legitimate and illegitimate motives," *id.* at 232; and because Price Waterhouse was unable to "show that its legitimate reason, standing alone, would have induced it to make the same decision," *id.* at 252, it held the firm was liable for sex discrimination under Title VII.

This Court voted 6–3 to affirm. No opinion, however, commanded a majority of votes. Indeed, two of the Justices essential to the majority—Justices White and O'Connor—wrote separate opinions that "said nothing about sex stereotyping as a 'theory' of sex discrimination." *Hively*, 853 F.3d at 369 (Sykes, J., dissenting). That leaves only the plurality opinion in *Price Waterhouse* as possible support for the panel's conclusion that discrimination against transgender employees violates Title VII under a sex stereotyping theory. And that opinion, in fact, *refutes* the panel's analysis.

The principal issue addressed by *Price Waterhouse* concerned the degree of causation required in Title VII sex discrimination cases and the respective evidentiary burdens borne by the employee and employer in determining liability. The plurality's relatively brief discussion of sex stereotypes occurred in the narrow context of describing the type of evidence a plaintiff may rely upon to show "that gender played a motivating part in an employment decision." *Price Waterhouse*, 490 U.S. at 244, 250 (plurality). One such type of evidence, the plurality concluded, was "proving

that stereotyping played a motivating role in an employment decision." *Id.* at 252.

> In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender…. [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group …. An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.

Id. at 250–51.

While the plurality thus accepted sex stereotyping as one form of "*evidence* that gender played a part" in an employment decision, *id.* at 251, it *also* emphasized the *limits* of the sex stereotype theory—limits that directly preclude its application here. "Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. *The plaintiff must show that the employer actually relied on her gender in making its decision*." *Id.* (emphasis added). The overriding question, in a sex-stereotype case or any other disparate-treatment Title VII litigation, is thus whether: "if we

asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman." *Id.* at 250. After all, in the sex stereotype context, what Title VII's bar on sex discrimination proscribes—all it proscribes—is the "*disparate treatment of men and women resulting* from sex stereotypes." *Id.* at 251 (emphasis added). Or, as Justice Kennedy explained, "Title VII creates no independent cause of action for sex stereotyping…. The ultimate question [remains] whether discrimination caused the plaintiff's harm." *Id.* at 294 (Kennedy, J., dissenting).

Where an employee's sex-specific policy, whether based on a "sex stereotype" or not, does not result in the "disparate treatment of men and women," *id.* at 251 (plurality), there has thus been no Title VII violation (setting aside the possibility of a "disparate impact" claim). The text and history of Title VII show that the matter could not be otherwise. After all, the text of the Civil Rights Act does not bar the use of sex stereotypes *simpliciter*, nor does it provide a remedy for every harm that befalls a woman (or man) in the workplace. Rather, it forbids employers "to *discriminate* against any individual … *because of such individual's … sex*." 42 U.S.C. § 2000e-2(a) (emphases added).

By its plain meaning, to "discriminate" is to "[m]ake an unjust or prejudicial distinction in the treatment of different categories of people." *Discriminate*, OXFORD DICTIONARY, https://bit.ly/2OVskpW. And the legislative history shows that Congress had

this common understanding of "discrimination" in mind when it enacted Title VII. For instance, according to an influential interpretive memorandum on which this Court has previously placed significant interpretive weight, *see Price Waterhouse*, 490 U.S. at 243 & n.8 (plurality), "[t]o discriminate is to make a distinction, to make a difference in treatment or favor." 110 CONG. REC. 7213 (Apr. 8, 1964).

This point suffices to dispose of the panel's facile rejoinder that no showing of disparate treatment of males and females is necessary because "two wrongs [do not] make a right." Pet.App.21a (quoting *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 123 (2d Cir. 2018) (plurality). While that platitude may be true as a matter of justice or morality, Title VII is not a comprehensive code of morality in the workplace, nor is it a license for federal courts to impose their own. The Civil Rights Act does not provide a remedy for every "wrong" perceived by an appellate court ; it bars a *specific type* of wrong: "discriminat[ion] … because of … sex." 42 U.S.C. § 2000e-2(a). And whether or not two wrongs make a right as a matter of justice, where an employer treats similarly situated male and female employees equally, *there has been no discrimination because of sex*.

In *Price Waterhouse*, as the plurality explained, Hopkins showed that Price Waterhouse engaged in "disparate treatment of men and women resulting from sex stereotypes." That was so for two reasons. *First*, the firm's sex stereotypes disproportionately harmed women as an objective matter because of the

"impermissible catch 22" they inflicted on female employees: on the one hand, Price Waterhouse's culture created the impression that "aggressiveness" was *required* for advancement; but on the other hand, when Hopkins behaved in the assertive manner the company appeared to demand of men, she was told that this behavior was *inappropriate* for a woman. *Price Waterhouse*, 490 U.S. at 251 (plurality). And *second*, the male partners' sex stereotypes also suggested that while their objection to Hopkins was couched in terms of her "interpersonal skills," in reality they "reacted negatively to her personality because she is a woman." *Id.* at 258. After all, "if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism." *Id.* at 256.

For both reasons, Hopkins was able to demonstrate not only that her employer made "[r]emarks at work that are based on sex stereotypes," but *also* "that the employer actually relied on her gender in making its decision," due to the "disparate treatment of men and women resulting from [those] sex stereotypes." *Id.* at 251. Or as Justice O'Connor's concurrence explained,

> Race and gender always "play a role" in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion.... What

> is required is what Ann Hopkins showed here: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.

Id. at 277 (O'Connor, J., concurring).

By contrast, *Price Waterhouse*'s statements about sex stereotypes have no application here. *Price Waterhouse* might apply if Petitioner imposed a dress code of an altogether different kind: requiring, for example, all funeral directors to wear a suit and tie but then refusing to promote women because that apparel is not sufficiently feminine. But no such policy is at issue here. Because Petitioner's dress code involves no "disparate treatment of men and women," *id.* at 251 (plurality), Petitioner's complaint is not one of sex stereotyping at all—instead, it is that Respondent's evenhanded dress code discriminates against *transgender* employees. And as shown above, an employee who has been discriminated against because of the employee's transgender status *cannot* show "that the employer actually relied on her gender in making its decision," *id.*, since biological sex is causally *irrelevant* to this form of discrimination. *See supra*, pp. 9–12. A sex-specific, but evenhanded, policy like Petitioner's simply does not create the "disparate treatment of men and women" needed for any Title VII claim of this sort—whether based on sex stereotypes or any other theory—to get off the ground. *Price Waterhouse*, 490 U.S. at 251 (plurality).

2. Even more fundamentally, an employer that insists on treating employees in accord with their biological sex is simply not engaged in "sex stereotyping" to begin with. Indeed, an understanding of the nature of "sex" as biologically rooted and immutable is in fact necessary *for the idea of sex stereotyping to have any meaning*.

A "stereotype" is simply "[a] widely held but fixed and oversimplified image or idea of a particular type of person or thing." *Stereotype*, OXFORD DICTIONARY, https://bit.ly/2H4oogf. To engage in sex stereotyping is thus to identify an employee as a member of a particular sex and then attribute to the employee a generalization about his or her abilities or preferences. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) (equal protection forbids "overbroad generalizations about the different talents, capacities, or preferences of males and females"). The initial step of identifying an employee as a man or woman is not *itself* stereotyping. It is a matter of *distinguishing males from females in the first place*. Again, "sex" itself is not a stereotype; it is a matter of biological fact. No judicial decree can change the basic physiological distinctions between the sexes. *See id.* ("Physical differences between men and women … are enduring ….").

Not only is the biological distinction between men and women unalterable, it is *itself a premise of any genuine sex-stereotyping claim*. As just described, the necessary first step in identifying a negative stereotype is determining that the victim *is*, as an objective matter, *a member of the group that is subject to*

the pernicious generalization. When Ann Hopkins claimed she was the victim of sex stereotyping, the necessary basis of her claim was that Price Waterhouse had objected to her masculine behavior "*because [she] was a woman*." 490 U.S. at 236. Had she objected to being identified as a woman in the first place—that is, had she insisted that her employer accept and affirm her *as a male employee*—her claim would have made no sense.

Yet that is precisely Stephens' claim in this case. Stephens' claim is not that Petitioner has unfairly evaluated its male employees "by assuming or insisting that they match[ ] the stereotype associated with their group." *Id.* at 251. Rather, Stephens' claim is that Petitioner has *wrongly identified Stephens as a male*. That is, Stephens insists that Petitioner accept and affirm Stephens not as a male employee who does not conform to certain male stereotypes, but *as a female employee*. Indeed, characterizing this as a "sex stereotyping" claim is particularly ironic, given that what Stephens really wants is to be permitted to *behave and dress at work in precisely* the stereotypically feminine way that Hopkins *objected* to. Whatever it is, that is not a "sex stereotyping" claim.

Accordingly, even if *Price Waterhouse* did establish a standalone "sex-stereotyping" cause of action under Title VII (and it did not), discrimination against employees based on transgender status would not fall within its bounds. Treating an employee in accordance with his or her biological sex, rather than the employee's own contrary "internal, deeply held sense of

gender," Respondent's Br. 5, is not "sex stereotyping." What Stephens asks is *not* to be free from "an impermissibly cabined view of the proper behavior" of men or women. 490 U.S. at 236–37. What Stephens seeks is a decree forcing Petitioner to accept and affirm Stephens' claimed identity as a female, regardless of Stephens' male physiology. And as demonstrated above, that has nothing to do with discrimination "because of … sex" in violation of Title VII.

II. THE TEXT AND LEGISLATIVE HISTORY OF TITLE VII MAKE CLEAR THAT "SEX" REFERS TO AN IMMUTABLE PHYSIOLOGICAL CHARACTERISTIC, NOT AN INDIVIDUAL'S INTERNAL SENSE OF GENDER.

Because discrimination based on an employee's transgender status does not constitute discrimination because of biological sex, transgender-based discrimination can violate Title VII only if the meaning of "sex" in that statute includes not only biological sex, but also gender identity. This is not a difficult question of statutory construction, at least not for a court that faithfully adheres to the fundamental principle that its "job is to interpret the words consistent with their ordinary meaning at the time Congress enacted the statute." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (quotation marks and ellipsis omitted); *but see Hively*, 853 F.3d at 352–54 (Posner, J., concurring). By its plain text and legislative history, the Civil Rights Act of 1964 bars discrimination against employees based on their biological

sex, *not* discrimination based on their "internal, deeply held sense of gender." Respondent's Br. 5.

A. TEXT.

Congress's use of the term "sex" in Title VII unambiguously means the sex that an individual possesses by virtue of being born with certain sex-specific physiological characteristics. When Title VII was enacted in 1964, the term "sex" was not understood to refer to an individual's self-reported "fluid, variable, and difficult to define" internal sense of their own "transgender, intersex, or sexually indeterminate status." Pet.App.24a n.4.

"Ordinarily, a word's usage accords with its dictionary definition," *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015), and the dictionaries defining the word "sex" around the time when Title VII was enacted uniformly indicate that the word was then understood the way it had *always* been understood: as referring to the anatomical or physiological characteristics that make a person male or female, not his or her own internal identification with the opposite sex.

The 1961 Oxford English Dictionary, for example, defined "sex" as "[t]he sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these." 9 OXFORD ENGLISH DICTIONARY 578 (1961). Other respected dictionaries were to the same effect. *See, e.g.*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1187 (1969);

WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1335 (1958); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2081 (1961); THE AMERICAN COLLEGE DICTIONARY 1109 (1970).

The definition of "sex" in these contemporary dictionaries was not a novel one. Indeed, until recent academic developments in psychology and gender theory—developments that did not seriously take hold until the last decade or so, *see infra* at pp. 29–30—the word "sex" had always and universally been understood to mean the biologically based distinction between male and female. Congress was thus not faced with a choice between competing conceptions of "sex" when it enacted Title VII; there was simply *no other meaning of the word available* to Congress in 1964.

The meaning of the term "sex" in Title VII is further confirmed by Congress's many other uses of that word. Congress has employed the term "sex" in *literally hundreds* of statutes, enacted both before and after 1964. Never before, to our knowledge, has it seriously been suggested that Congress meant the word "sex" in *any* of these provisions to refer to something other than the biologically based distinction between male and female (with the exception of the related litigation over the meaning of sex discrimination under Title IX). And in most instances, the context makes clear that the traditional biologically based understanding was intended. *See, e.g.*, 46 U.S.C. § 11301(b)(7) (requiring U.S. vessels to maintain a logbook listing "each birth on board, with the sex of the infant and name of the parents"); 10 U.S.C. § 4320

(requiring that the housing provided to army recruits during basic training be limited "to drill sergeants and other training personnel who are of the same sex as the recruits housed in that living area"); 19 U.S.C. § 1582 (authorizing customs officials "to employ female inspectors for the examination and search of persons of their own sex"); 29 U.S.C. § 206(d)(1) (forbidding certain employers from discriminating "between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex"); 36 U.S.C. § 220522(a)(9) (limiting sports organizations that may be recognized as a national governing body of the sport to those led by a board "whose members are selected without regard to … sex, [unless], in sports where there are separate male and female programs, it provides for reasonable representation of both males and females on the board").

Congress's understanding of the meaning of "sex" in Title VII is made even more manifest by looking at the language it has chosen when it *does* mean to reach discrimination based on gender identity. In 2009, for instance, Congress passed "hate crime" legislation that prohibits inflicting "bodily injury to any person, because of [his or her] actual or perceived religion, national origin, gender, sexual orientation, *gender identity*, or disability." 18 U.S.C. § 249(a)(2) (emphasis added). And in 2013, Congress amended portions of the Violence Against Women Act to encompass discrimination "on the basis of actual or perceived race, color, religion, national origin, sex, *gender identity* …,

sexual orientation, or disability." 42 U.S.C. § 12291(b)(13)(A) (emphasis added).

These provisions are *in pari materia* with Title VII's bar on sex discrimination, and Congress's decision *not* to include in Title VII the language it has used to target this kind of discrimination *elsewhere* should be honored. By contrast, the Sixth Circuit's interpretation of Title VII—that "discrimination 'because of sex' inherently includes discrimination against employees because of a change in their sex," Pet.App.24a—renders the phrase "gender identity" in these statutes utterly superfluous.

Not only did the contemporary understanding of "sex" in the 1960s not encompass or depend upon an individual's own internal sense of gender, that understanding of sex *was simply unavailable* to Congress or the general public at the time. While a usage of the word "gender" (traditionally nothing more than a grammatical classification) as referring to "the social and cultural, as opposed to the biological, distinctions between the sexes" began to emerge among feminist theorists in the United States in the mid-twentieth century, 6 OXFORD ENGLISH DICTIONARY 428 (1989) (citing a 1963 book as the earliest example), it remained an uncommon usage until much later. (Webster's Collegiate Dictionary did not list this sense of "gender" until 1993. *Compare* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 484 (10th ed. 1993), *with* MERRIAM-WEBSTER, NINTH NEW COLLEGIATE DICTIONARY 510 (9th ed. 1983)). And the notion that one's sex ultimately depends not on biology but on one's own

internal "sense of gender," Respondent's Br. 5, simply did not exist until long after Title VII was enacted, at least not among the general educated public.

The term "transgender" appears to have been first coined by an obscure magazine in 1969, RICHARD EKINS & DAVE KING, THE TRANSGENDER PHENOMENON 82 (2006), but it did not enter the general lexicon until the late 1980s, *see* "Transgender," Google Books Ngram Viewer, https://goo.gl/snSrqV (showing first significant usage beginning in 1987). The term was first used in the *New York Times* in 1986, Michael Norman, *Suburbs Are a Magnet to Many Homosexuals*, N.Y. TIMES, Feb. 11, 1986, *available at* https://goo.gl/ku77gA, and its first use in the *Los Angeles Times* was not until 1988, John Johnson, *Transsexualism: A Journey Across Lines of Gender*, L.A. TIMES, July 25, 1988, *available at* https://lat.ms/2YTG2hT. Indeed, the first sex-reassignment surgery was not performed in the United States until 1966—*two years after* Title VII was enacted. PRINCIPLES OF TRANSGENDER MEDICINE & SURGERY 251 (Randi Ettner et al. eds, 2d ed. 2016). And even then, it was "perceived as radical" and conducted only for "experimental" reasons. *Hopkins Hospital: A History of Sex Reassignment*, JOHNS HOPKINS NEWSLETTER, May 1, 2014, https://goo.gl/jE2tQR.

There simply can be no doubt—none at all—that if the revisionist understanding of the term "sex" as encompassing gender identity had been disclosed to Congress when Title VII was being debated in 1964, Congress would have taken care to expressly define

the term in the statute to accord with the commonly understood biological meaning of the term.

B. HISTORY.

An examination of the legislative history of Title VII—both of the Civil Rights Act of 1964 itself and of related, roughly contemporaneous legislation considered by Congress on the issue of sex discrimination—unsurprisingly demonstrates that Congress intended the term "sex" in Title VII to bear the only meaning that, given the public understanding of the word, it reasonably could have borne: the possession of either male or female anatomical and other physiological features.

1. "The legislative history of Title VII's prohibition of sex discrimination is notable primarily for its brevity." *General Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, *as recognized in Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). The term "sex" was added to Title VII "at the last minute on the floor of the House of Representatives," with no prior consideration and little debate. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). But even the relatively brief record of the debate over the addition leaves no doubt that Congress uniformly understood the word to refer to the physiological and biological distinction between the sexes.

The congressman who proposed adding "sex" to Title VII, Howard Smith of Virginia, introduced his

amendment with the quip that it would "prevent discrimination against another minority group … in the absence of which the majority group would not be here today," 110 CONG. REC. 2577 (Feb. 8, 1964) (statement of Rep. Smith)—a reference, though spoken in apparent levity, to the unique role of women in childbearing. Other supporters of the amendment made repeated references, often in a similar lighthearted tone, to the biological distinctions between the sexes—including the greater life expectancy of women, *id.* at 2578 (statement of Rep. Bolton ("we live longer, we have more endurance"); *id.* at 2581 (statement of Rep. St. George) ("We outlast you—we outlive you"), and their role in childbearing, *id.* at 2578 (statement of Rep. Bolton) (many woman "after they have had their children and brought them to a certain age, go back into business").

Many of the strongest supporters of the amendment were women. *See, e.g.*, 110 CONG. REC. at 2578 (Rep. Bolton of Ohio), *id.* (Rep. Griffiths of Michigan), *id.* at 2580 (Rep. St. George of New York). And Rep. Smith was in fact lobbied to propose the amendment by women activists in the National Woman's Party. *See* Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J. SOUTHERN HIST. 37, 41–42 (1983). In any event, the understanding of the amendment's supporters that "sex" was rooted in biological reality was *shared* by those who supported the Civil Rights Act but who *opposed* the amendment.

This is perhaps clearest from the remarks of Representative Emmanuel Celler of New York—sponsor of the Civil Rights Act in the House, Chairman of the Judiciary Committee that had reported out the Act, and floor manager of the debate over the legislation in the House. Smith first teased the idea of adding "sex" to Title VII's protections in a hearing of the House Rules Committee on the proposed legislation. Celler, who was appearing before the Committee as the legislation's sponsor, responded by defending the omission of "sex" from Title VII, asserting that "[y]ou cannot treat women the same as men for biological reasons." *Hearing on H.R. 7152 Before the H. Comm. on Rules*, 88th Cong. 125 (1964) (statement of Rep. Celler). After Smith proposed his amendment on the floor of the House, Celler made the same point again, stating that "[y]ou know the biological differences between the sexes," and cautioning that "blanket language requiring total equality" would cause an "upheaval" in the law related to child custody, rape, and compulsory military service. 110 CONG. REC. at 2577 (statement of Rep. Celler). Other supporters of Title VII who opposed Smith's amendment articulated the same, biologically rooted understanding of "sex." Rep. Edith Green of Oregon noted, for instance, that "[b]ecause of biological differences between men and women, there are different problems which will arise in regard to employment." *Id.* at 2584 (statement of Rep. Green); *see also id.* at 2581–82 (statement of Rep. Green).

In the intervening decades since passage of Title VII, Congress has *repeatedly declined* to add gender identity as a prohibited basis for action in the workplace. In 2007, for instance, Rep. Frank of Massachusetts proposed two separate bills to prohibit "employment discrimination on the basis of … gender identity." H.R. 2015, 110th Cong. § 2(1) (2007); *see also* H.R. 3686, 110th Cong. § 1(1) (2007). The legislation was not enacted. Both the House and the Senate rejected substantively identical legislation in 2009. *See* H.R. 2981, 111th Cong. (2009); H.R. 2017, 111th Cong. (2009); S. 1584, 111th Cong. (2009). Both houses again rejected the proposal multiple times in 2011 and 2013. *See* H.R. 1397, 112th Cong. (2011); S. 811, 112th Cong. (2011); H.R. 1755, 113th Cong. (2013); S. 815, 113th Cong. (2013). And Congress rejected attempts to specifically amend Title VII to insert "gender identity" into the list of prohibited bases of discrimination in both 2015 and 2017. *See* H.R. 3185, 114th Cong. § 7 (2015); S. 1858, 114th Cong. § 7 (2015); H.R. 2282, 115th Cong. § 7 (2017); S. 1006, 115th Cong. § 7 (2017).

Despite the sparse nature of the legislative history of Title VII's prohibition of sex discrimination, what history there is confirms that Congress and the public understood the word "sex" in the only way it *could* have been understood at the time: as referring to the immutable biological and anatomical distinction between men and women.

2. Congress's understanding of "sex" in 1964 is confirmed by the history of the Equal Rights

Amendment ("ERA"), which Congress considered at roughly the same time. The ERA would have forbidden the abridgment of the "[e]quality of rights … on account of sex." S.J. Res. 45, 88th Cong. § 1 (1964). It was repeatedly proposed in the 1950s and '60s, passed the House in amended form in 1950 and 1953, and was passed by Congress in 1972. The ERA provides especially persuasive evidence of Congress's understanding of Title VII's bar on sex discrimination for three reasons: (1) it used similar language, including the critical term "sex"; (2) it concerns the same subject: eliminating discrimination on the basis of sex; and (3) it was supported by many of the same legislators and interest groups.

Representative Smith for example, was a strong supporter and sponsor of the ERA. *See* Brauer, *supra*, at 42. The ERA was the primary legislative goal of the National Women's Party until 1963, when President Kennedy's Commission on the Status of Women surprisingly declined to support the proposal, prompting the NWP to shift its energy to obtaining the inclusion of protections against sex discrimination in the then-pending Civil Rights Act. *Id.* at 41. In a very real sense, Title VII's protection against sex discrimination thus *grew out* of the legislative efforts in support of the ERA.

The legislative history of the ERA is unequivocal: Congress intended to forbid discrimination based on *biological* sex, not one's own contrary, internal sense of gender. That understanding is again evident from both the supporters and opponents of the ERA. When

the Senate Committee on the Judiciary favorably reported the proposed amendment in 1964, for example, the committee's report emphasized that the "amendment does not contemplate that women must be treated in all respects the same as men." S. REP. NO. 1558, at 2 (1964). It noted that "granting maternity benefits to women would not be an unlawful discrimination," for instance, since "it would be based on a reasonable classification despite its limitation to members of one sex"; and laws governing military service would likewise continue to take account of "[d]ifferences in physical abilities." *Id.* at 2–3. The members of Congress who spoke out against the ERA during the 1950 and 1953 floor debates shared the same understanding of "sex." *See, e.g.*, 96 CONG. REC. 759 (Jan. 23, 1950) (statement of Sen. Kefauver) (proposing alternative legislation that allowed laws "reasonably justified by differences in physical structure or maternal function"); *id.* at 810 (statement of Sen. Lehman) (discussing "the differences between men and women in physique and function"); 99 CONG. REC. 8967 (July 16, 1953) (statement of Sen. Holland) ("biologically women are not the same as men").

This understanding continued to prevail, unquestioned, through 1972, when Congress as a whole formally proposed the ERA to the States. In the 1970 floor debates in the House, for example, Representative Catherine May from Washington, speaking "in enthusiastic and wholehearted support" of the ERA, acknowledged that "[m]en and women do have obvious physiological differences," even if "they also

perform many of the same or overlapping roles." 116 CONG. REC. 28020 (Aug. 10, 1970) (statement of Rep. May). Another supporter, Representative McClory from Illinois, similarly noted that he did not want his support to be misconstrued as "a denial of any protection of benefits to which women are entitled by reason of their physical and biological differences." *Id.* at 28025 (statement of Rep. McClory). In like form, on the Senate side, Senator Bayh of Indiana clarified that the proposed amendment "would not eliminate all the differences between the sexes. Congressional enactment would not and should not eliminate the natural physiological differences between the sexes." 116 CONG. REC. 35451 (Oct. 7, 1970) (statement of Sen. Bayh).

* * *

Nowhere in the Sixth Circuit's opinion did the court address this revealing—indeed dispositive—legislative history confirming the commonly accepted meaning of the term sex as used in Title VII. Together with the plain text of that provision, this evidence conclusively establishes that when Congress barred "discriminat[ion] … because of [an] individual's … sex," 42 U.S.C. § 2000e-2(a), it proscribed discrimination because of an individual's *biological sex*, not discrimination because of each employee's own "inner sense of being male or female." Pet.App.204a.

CONCLUSION

For the above reasons, this Court should reverse the judgment of the Sixth Circuit.

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