Nos. 17-1618, 17-1623, 18-107

In the Supreme Court of the United States

GERALD LYNN BOSTOCK, *Petitioner*,
v.
CLAYTON COUNTY, GEORGIA, *Respondent*.

ALTITUDE EXPRESS, INC., *et al.*, *Petitioners*,
v.
MELISSA ZARDA, *et al.*, *Respondents*.

R.G. & G.R. HARRIS FUNERAL HOMES, INC., *Petitioner*,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and AIMEE STEPHENS, *Respondents*.

On Writs of Certiorari to the United States Courts of Appeals for the Eleventh, Second, and Sixth Circuits

BRIEF OF *AMICI CURIAE* RELIGIOUS FREEDOM INSTITUTE'S ISLAM & RELIGIOUS FREEDOM ACTION TEAM AND ISLAMIC SCHOLARS IN SUPPORT OF EMPLOYERS

MICHAEL K. WHITEHEAD
Counsel of Record
WHITEHEAD LAW FIRM, LLC
229 SE Douglas Street, Suite 210
Lee's Summit, Missouri 64063
816-398-8967
Mike@TheWhiteheadFirm.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether the term "sex" in the 1964 Title VII prohibition on discrimination "because of . . . sex" applies to homosexual or transgender status.

2. Whether the term "sex stereotyping" under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), extends the 1964 Title VII prohibition on discrimination "because of . . . sex" to sexual orientation or transgender status.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES. iv

INTERESTS OF *AMICI*. 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. Congress, not the Courts, has authority to amend Title VII to encompass behaviors and traits not intended to be protected classes by the plain meaning of the word "sex." 7

A. Common-sense canons of construction compel a meaning of biological sex 7

B. Congress may choose to broaden the statute's coverage by amendment 10

II. Sincere religious views, shared by Muslims and many other people of faith in the marketplace, deserve the protection promised in *Obergefell* and *Masterpiece* 10

A. Muslims believe God created human beings, male and female 10

B. Muslims believe sex is binary, fixed and immutable. 12

C. Muslims must observe privacy requirements as a matter of religious obedience 14

D. Muslims seek reasonable accommodations to practice their faith 17

III. Transgender status or conduct is not protected by *Price-Waterhouse* 19

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Asgrow Seed Co. v. Winterboer,
513 U.S. 179 (1995) 9

Christian Legal Soc'y v. Martinez,
561 U.S. 661 (2010) 19

General Electric Company v. Gilbert,
429 U.S. 125 (1976) 10, 11

Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) 4, 5, 10, 20

Obergefell v. Hodges,
135 S. Ct. 2584 (2015) 3, 4, 10, 19, 20

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989) 19, 20

STATUTES

20 U.S.C. § 1681(a) 9

42 U.S.C. § 2000e-2(a) 8, 9

42 U.S.C. § 2000e-2(a)(1) 7

OTHER AUTHORITIES

110 Cong. Rec. 2577-2584 (1964) 7

117 Cong. Rec. 30407 (1971) 9

118 Cong. Rec. 5807 (1972) 9

Marwan Ibrahim Al-Kaysi. *Morals and Manners in Islam: A Guide to Islamic Adab* . 1986. Leicester (UK) 16

American Heritage Dictionary 1187 (1976) 9

Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act,* 3 Wm. & Mary J. Women & Law, 137 (1997) 8

Lewis Carroll (Charles L. Dodgson), *Through the Looking-Glass* (1934) 6

https://www.theguardian.com/commentisfree/2016/jun/11/gender-bathrooms-transgender-men-women-restrooms 15

P.L. 95-555 10

Quran 11, 14

INTERESTS OF *AMICI*[1]

The Religious Freedom Institute, Islam and Religious Freedom Action Team ("IRF"), amplifies Muslim voices on religious freedom, seeks a deeper understanding of the support for religious freedom inside the teachings of Islam, and protects the religious freedom of Muslims. To this end, the IRF engages in research, education, and advocacy on core issues like freedom of religion, and the freedom to live out one's faith, including in the marketplace, for employers and employees. The IRF explores and supports religious freedom by translating resources by Muslims about religious freedom, fostering inclusion of Muslims in religious freedom work both in places where Muslims are a majority and where they are a minority, and by partnering with the Institute's other teams in advocacy.

In addition, *Amici* include Sunni Muslim scholars of Islamic Law named below. They submit this brief to explain the meaning of male and female in traditional Sunni Islam, and to explain how the religious practices

[1] *Amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amici* and their counsel—contributed money intended to fund preparing or submitting the brief. All parties have filed blanket consents as to amicus briefs, except for ACLU employees. By separate letter dated July 26, 2019, Mr. John Knight, counsel designated by petitioner in No. 17-1618, respondents in No. 17-1623, and respondent Aimee Stephens in No. 18-107, consented to the filing of this brief. See Sup. Ct. R. 37.6. *Amici* Muslim scholars join this brief as individuals; in so doing, they do not indicate endorsement by their institutional employers of positions advocated.

of Sunni Muslims, particularly women, would be adversely affected by a determination that the term "sex" in Title VII of the 1964 Civil Rights Act means sexual orientation or transgender status rather than biological sex. The title and institutional affiliation of these scholars are provided for identification purposes only.

Abdullah Bin Hamid Ali is the Founding Director of the Lamppost Education Initiative. Since 2007 he has served as an assistant professor of Islamic Law and Prophetic Tradition at Zaytuna College in Berkeley, California. He holds a PhD in Cultural and Historical Studies in Religion and an M.A. in Ethics and Social Theory from the Graduate Theological Union. He obtained his B.A. (ijaza 'ulya) in Islamic Law from al-Qarawiyin University of Fes, Morocco. He also served as full time Islamic chaplain at the State Correctional Institute of Chester, Pennsylvania from 2002 to 2007.

Shaykh Mohammed Amin Kholwadia is Director & President of Darul Qasim, an Islamic institution of higher academic studies in Glendale Heights, Illinois, that he founded in 1998. Regarded internationally as an expert theologian and philosopher, he is a graduate of the renowned Dar al-ʿUlum madrasa in Deoband, India. He also studied at the Jamiʿat al-ʿUlum al-Islamiyyah madrasa of Karachi, Pakistan, and has had decades of training from traditional Islamic scholars. He serves in an advisory capacity to academic think tanks and universities such as the University of Michigan and the University of Chicago, and the Initiative on Islam and Medicine.

Though the facts underlying the instant appeals do not involve Islamic expression or beliefs, the lower courts' decisions to redefine "sex" under Title VII to include sexual orientation or transgender status is of great concern to Islam and other minority religions who cannot approve of these categories on moral and religious grounds. While the focus of this brief relates to the facts in case number 18-107 (herein referred to as *Harris*), your *Amici* are also concerned about the redefinition of the term "sex" by the courts in the other two cases numbered 17-1618 and 17-1623. Therefore, this brief is filed in all three cases, in support of the employers, and in opposition to the parties supporting employees.

SUMMARY OF ARGUMENT

Obergefell v. Hodges, 135 S. Ct. 2584 (2015) promised that religious believers and organizations would remain secure in their constitutional right to believe, teach and live out their sincere religious convictions about human sexuality and same-sex relationships.

> Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world. *Id.*, 2594

> Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged (by the majority's decision.) *Id.*, 2602

> It must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered." *Id.*, 2607

Three years later, in 2018, a Christian baker named Jack Phillips came before this Court, asking that the promise of *Obergefell* be honored. As a small business operator, his rights to live out his faith were being trampled by an aggressive bureaucracy enforcing a state civil rights law that expressly made "sexual orientation" a protected class. The Court seemed astonished by the hostility toward Jack and his belief that he would be morally complicit if he celebrated a relationship that violated divine precepts.

> To describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn

> responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.

Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1729 (2018)

The Commission disputed the claim of moral complicity, saying no one would infer that Phillips was approving of same sex unions just because he obeyed the law. To the contrary, this Court held: "It hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate." *Id.*, 1731.

Today, the statute before the Court is Title VII. It does not expressly define sexual orientation or transgender identity as protected classes. It does, however, expressly protect religion.

Redefining "sex" under Title VII to encompass the sexual orientation and transgender status of employees will not only undermine common-sense canons of statutory construction, but will wreak havoc in the workplace to the detriment of employers and employees who hold "good faith," "reasonable" and "sincere" religious convictions that ignoring God-ordained differences between male and female, and their roles as husband and wife, are not just illogical but in some cases immoral.

As "judicial observer" Lewis Carroll would say:

> 'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'
>
> 'The question is,' said Alice, 'whether you *can* make words mean so many different things.'
>
> 'The question is,' said Humpty Dumpty, 'which is to be master—that's all.' [2]

The question before this Court is whether the word "sex" can mean so many different things, simply because lower court judges presume to be "master" over meaning.

For purposes of this brief, your *Amici* will use "sex" to mean the classification of being either male or female, based on biological differences, such as genitalia and genetics, related to reproduction. Sex is binary, fixed at conception, and objectively verifiable.

Like other faiths, Islam teaches that God designed and created two distinct and complementary sexes, male and female, for conjugal union and reproduction. God assigns biological sex at creation as a gift, a blessing. Resistance to or rejection of one's assigned sex is rebellion against the created order.

Religious freedom extends to secular vocations, too. Millions of faithful believers in the marketplace seek to integrate work and witness. The secular vocation gives

---

[2] Lewis Carroll (Charles L. Dodgson), *Through the Looking-Glass*, chapter 6, p. 205 (1934). (First published in 1872).

the connections and the context for sharing a divine message with others. If told they cannot witness to the truth, or worse, must affirm a message that is false, they must resist. If the government demands otherwise, many would leave their businesses before they would dishonor God and His call on their lives. They believe they would be complicit if they approved in their business what God has disapproved.

ARGUMENT

I. Congress, not the Courts, has authority to amend Title VII to encompass behaviors and traits not intended to be protected classes by the plain meaning of the word "sex."

A. Common-sense canons of construction compel a meaning of biological sex.

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

On February 8, 1964, merely two days before the bill was to move from the House to the Senate, Congressman Howard W. Smith, a conservative Democrat from Virginia, shocked observers by offering an amendment to add sex to the protected classes of the bill. 110 Cong. Rec. 2577-2584 (1964). Smith was known as a strong opponent of the civil rights bill, but also as a strong supporter of women's rights, with ties

to the National Woman's Party. The amendment would provide all women job rights that were equal to men for the first time in history. Smith said on the record:

> Mr. Chairman this amendment is offered to ... include within our desire to prevent discrimination against another minority group, the women, but a very essential minority group, in the absence of which the majority group would not be here today. Now, I am very serious about this amendment. It has been offered several times before, but it was offered at inappropriate places in the bill. Now, this is the appropriate place for this amendment to come in. I do not think it can do any harm to this legislation; maybe it can do some good. I think it will do some good for the minority sex. [3]

Most thought he did not seem serious, merely determined to sink the entire Civil Rights bill. *Id*. 153. Later in the debate, he rose again to speak seriously that, without his amendment, white women would be disadvantaged in the workplace. When the debate closed, his amendment passed 168 to 133 in the House. The bill ultimately passed the House 290 to 130, and then passed the Senate with the sex amendment intact, with the strong support of conservative NWP and feminist ERA supporters. *Id*., 157-160.

The text of Title VII prohibits invidious discrimination "on the basis of sex." 42 U.S.C.

---

[3] Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act,* 3 Wm. & Mary J. Women & Law, 137, 149-151 (1997)

§ 2000e-2(a). The statute does not define "sex"; thus, the ordinary meaning of the word "sex" prevails. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning."). When Congress enacted Title VII, virtually every dictionary definition of "sex" referred to physiological distinctions between females and males, particularly with respect to their reproductive functions. See, e.g., *American Heritage Dictionary* 1187 (1976).

Clearly, a biologically-grounded meaning of "sex" is what Congress had in mind when it enacted Title VII, and that is what the public at the time undeniably would have understood from its plain language. In fact, eight years after enacting Title VII, Congress passed Title IX, proscribing invidious discrimination on the basis of "sex" in federally funded education programs. 20 U.S.C. § 1681(a). When Title IX passed, "sex" and "gender identity" remained distinct. "Sex" described physiological differences between the sexes, while "gender identity" referred more to social and cultural roles. The debate over Title IX concerned invidious "sex" discrimination and guaranteeing women equal access to education, not "gender identity" discrimination. Lawmakers used the term "sex" repeatedly, referring to the biological distinction between women and men. 117 Cong. Rec. 30407 (1971); 118 Cong. Rec. 5807 (1972). "Gender identity" appears in neither the statute's text nor legislative history.

B. Congress may choose to broaden the statute's coverage by amendment.

In *General Electric Company v. Gilbert*, 429 U.S. 125 (1976), this Court said an employer's disability plan which excluded pregnancy did not invidiously discriminate on the basis of sex. The political branch responded swiftly with the Pregnancy Discrimination Act of 1978, amending Title VII to expand the definition: "(k) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." P.L. 95-555. Even this amendment affirmed Congress's 1964 intention that "sex" refers to biological categories, and not to evolving concepts of self-perception, identity or status. The Court was not wrong in construing the statute as it did in *Gilbert*, but the Congress, not the Court, had the authority to expand coverage by amending the definition. This is how federalism works.

II. Sincere religious views, shared by Muslims and many other people of faith in the marketplace, deserve the protection promised in *Obergefell* and *Masterpiece*.

A. Muslims believe God created human beings, male and female.

Redefinition of "sex" to include sexual orientation and transgender status will revolutionize the workplace to the detriment of people of faith, including millions of Muslim Americans. Safety, privacy and modesty concerns have often been articulated in prior cases where transgender individuals seek to use

intimate facilities such as restrooms, locker rooms, showers, and dormitories, according to their preference and not their biological sex. However, what Sunni Muslims face is a compulsory contradiction of their fundamental religious conviction, or abandonment of the business or vocation to which they feel called. As just one example, if transgender or "all gender" bathrooms are required in workplaces, not only will this cause great hardship for Muslims in America, especially women, but also it could likely lead to more marginalization, exclusion, and division between those who comply and practicing Sunni Muslims in America, especially Muslim women, who cannot conform to what conscience prohibits.

Islam does not invidiously discriminate between men and women, but it does distinguish between the two. For example, in Surah al-Hujurat (49:13) of the *Quran* (emphasis added):

> O Mankind!, We created you all from a male and a female, and made you into nations and tribes so that you may know one another. Verily the noblest of you in the sight of God is the most God-fearing of you.

Distinguishing on the basis of sex by separate male and female bathrooms is not invidious discrimination, rather it is differentiation. There is no subterfuge here to mask invidious animus toward women. *Cf. G.E. Co. v. Gilbert, supra.* The religious belief or practice at issue does not involve denying the human dignity or respect due to an individual who identifies as transgender. Rather, it involves Islam's distinction between men and women and the need to seclude the

sexes in private spaces. Therefore, for Muslims the moral issue is not refusal to accept the person who identifies as homosexual or transgender, but rather it is about the Muslim's religious obligations, rights, and responsibilities in a society that would mandate that people be treated based on their personal identity preference in disregard of their biology.

B. Muslims believe sex is binary, fixed and immutable.

Islamic jurisprudence teaches that a person's sex cannot change. God's creation of male and female is determined by biology, by genitalia and by genetics, related to conjugal union and reproduction.

Islam does recognize the rare abnormality of hermaphroditism, more commonly known as intersex (*khuntha*). A person with this biology is born with sexual ambiguity, that is, with some combination of female and male body parts and functions. When facing this issue, it is up to medical doctors to recognize the intersex condition and make an assignment, based on which sex is more apparent or dominant.

Islam does not recognize "transgender" and other gender identities. This is when a male or female changes his or her outer appearance to the opposite gender or, regardless of external appearance, a person "identifies" as a gender other than his or her biological sex. Because there is no fundamental change in the biology (i.e. biological sex remains at the cellular level as it was at conception), changing the body's features, dressing differently, or requesting to be addressed by a different pronoun is considered differently from the

Islamically permissible category of intersex. Thus, in transgenderism and other gender identities, switching between genders in terms of dress, hormones, or surgeries, even while there is no change at the cellular level. is where the contradiction and the prohibition, from an Islamic perspective, occurs.

A Muslim's obligation to recognize the biological distinctives of males and females does not change because an individual chooses to identify as a gender different from their biological sex. In Islam, such a person will still be considered to be of the sex they have had since conception, or what today is sometimes referred to as the sex they were "assigned at birth."

The Muslim Bar Association of New York (hereinafter, "MuBANY") and other *amici* have filed a brief in support of employees, advocating the position that "sex" in Title VII is changeable, in the same way that religious belief is changeable. (*Br. Amici* MuBANY) MuBANY suggests that transitioning between genders is analogous to converting from one denomination or religion to another. *Br. Amici* MuBANY, p. 11. Your *Amici* RFI, *et al.*, find this comparison deeply flawed, false and repugnant to the Islamic understanding of religion. An individual's discomfort or dysphoria regarding his or her sex, and belief that it can be changed, has nothing whatsoever in common with an individual's search for divine truth and God's pleasure. Discovering revealed truth about God and pleasing Him have no comparison with a person's acting on desires, impulses, preferences or orientation regarding sexual conduct.

C. Muslims must observe privacy requirements as a matter of religious obedience.

1. Decency *(Ihtisham)*

An essential part of Muslims' religious life is decency (*ihtisham*). Decency, in Islam, means living a life of modesty and dignity. A Muslim female having to share a bathroom with an unrelated male, i.e. to hear, smell, and potentially see the most private practice of humans, would be considered obscenity (*fahsh* or *fadah*). Thus a Muslim has an obligation not to share a bathroom with a person of the opposite biological sex out of concern for decency.

2. Modesty (*Hijab*)

For Muslims, *hijab* is the principle of modesty that includes behavior as well as dress for both males and females. The most visible manifestation of the *hijab* is the head covering that many Muslim women wear. Muslim women are not allowed to take their *hijab* off in front of unrelated males even if the person present appears to be a woman but is actually biologically a man. For example, according to Surah Nur in the *Quran* (24:31):

> And tell believing women that they should lower their glances, guard their private parts, and not display their charms beyond what [is acceptable] to reveal; they should let their headscarves fall to cover their necklines and not reveal their charms except to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers, their brothers' sons, their sisters' sons, their womenfolk, their

> slaves, such men as attend them who have no sexual desire, or children who are not yet aware of women's nakedness; they should not stamp their feet so as to draw attention to any hidden charms. Believers, all of you, turn to God so that you may prosper.

Muslim women are required to cover their bodies from males who are not blood relatives or husbands. For Muslim women, public bathrooms provide not only a place to take care of biological functions, but also the second main function of public bathrooms is for Muslim women to adjust and make sure their *hijab* is appropriate. To fix a headscarf, for example, women often need to take it off and put it back on. Bathrooms provide a safe, appropriate place for Muslim women to do this.

3. Seclusion (*Khalwa*)

The Arabic word *khalwa* means: the requirement of seclusion in a private area of a man and a woman who are not married or related to each other. Such seclusion is required in Islam and Orthodox Judaism. In other words, a man and a woman who are neither close blood relations nor married are not allowed to be alone with each other in an enclosed space.

Some argue that because gender separated bathrooms did not exist in America until less than 200 years ago, objections to mixed bathrooms are somehow not legitimate.[4] Even if this were a sound argument

[4] See https://www.theguardian.com/commentisfree/2016/jun/11/gender-bathrooms-transgender-men-women-restrooms. (Last accessed: 08/19/2019)

with respect to American culture, gender-based separation and regulation of bathrooms has existed in Islam since the 7th century.

In Islam, bathroom use has regulations and rules, such as not facing Mecca while using a bathroom and the requirement to conduct a specific cleaning of oneself after use. [5] Another regulation is times of using the bathrooms. Since they generally did not have separate areas for using the bathrooms, Muslims in the early days of the religion designated times for men and for women to use the bathrooms and they designated days for when to bathe. Therefore, sex-separated bathrooms are integral to the traditions of Islam. This is not a matter of political maneuvering or cultural conflict, rather, it is an issue of sincere religious belief.

4. Distinctive roles.

Islam considers it sinful for men to imitate women and women to imitate men. If "sex" in the 1964 Civil Rights Act is interpreted to mean "how a person chooses to identify their gender," then Muslim-run businesses, schools, and organizations will be forced to hire those who, during their working hours, openly engage in a practice that Muslims deem to be sinful. This amounts to requiring Muslim-owned businesses to endorse this practice and provide a platform for it.

---

[5] See Marwan Ibrahim Al-Kaysi. *Morals and Manners in Islam: A Guide to Islamic Adab* . 1986. Leicester (UK), 60-61.

5. Objective reality.

Islam requires a belief in a transcendent reality that defies empirical observation, but it also requires an acknowledgement of objective reality. Because, from a reality-based scientific point of view one cannot change one's sex, the notion of gender transitioning involves a denial of objective reality and threatens the acknowledgment of objective reality itself.

D. Muslims seek reasonable accommodations to practice their faith.

Muslims manage in most cases to find ways to practice their faith without resort to the legal system. They accommodate the diversity and pluralism in American culture, and usually seek private accommodations for their unique practices. For example, Sunni Muslim women wearing *hijab* cannot get service in most hair salons in the country because they are not private (glass windows, security cameras, etc.); may have male employees; or may have male customers.

Muslims have generally addressed this problem by opening their own hair salons, spas, and other beauty services. They did not have to sue anyone for their religious freedom rights. Similar issues such as party venues for single-sex parties often get addressed in the same manner.

However, because public bathrooms are an essential part of day-to-day life, Muslims are forced to seek legal protection to practice their faith in public without compromising fundamental convictions. Sharing the bathroom with a person of the opposite sex would

violate divine law and personal conscience. That cannot be the price to live and work in civil society.

If mixed-sex bathrooms were an issue only in public schools, Muslim communities could open their own schools or home-school their children, even though this would place a significant burden on Muslims. But the effect of such an issue is much larger than that. Muslim women in America are already struggling with discrimination and sometimes harassment. Being compelled to share intimate private spaces like bathrooms, locker rooms, and dormitories with a biological male is an unreasonable demand to make of employers or employees who happen to hold similar religious convictions.

If "sex" in the 1964 Civil Rights Act is interpreted to include transgender status, then a Muslim-run business, school, or organization that has multi-stall sex-specific bathrooms will be required to allow men claiming to be women to use the women's bathroom. This dramatic change in legal obligations will demand violation of religious conscience, cessation of business, or new accommodations that will cause an undue burden on religious employers and their Muslim employees.

It is no response that religious people are free to believe anything they want about human sexuality but that in the commercial sphere government may nevertheless coerce them to engage in conduct that contradicts and violates those beliefs. While it is true that government has compelling reasons for narrowly circumscribing conduct based on invidious racist beliefs, the same is not true of traditional religious

beliefs about human sexuality, which, as this Court expressly recognized in *Obergefell*, are "based on decent and honorable religious or philosophical premises" that are central to the lives of decent and honorable people. 135 S. Ct. at 2607. Those religious beliefs, which for many are an integral part of one's status and personal identity as a religious person, cannot be divorced from the expressive conduct that gives those beliefs meaning. Cf. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010) (in some contexts status and conduct cannot be distinguished). If government may coerce Muslims and those with similar religious beliefs to adopt sex-blind dress codes that are contrary to "divine precepts," then government has effectively excluded those who hold such beliefs from operating a business consistent with their faith.

III. Transgender status or conduct is not protected by *Price-Waterhouse*.

Linguistic evidence found in dictionary definitions confirms that the term "sex" in Title VII turns overwhelmingly on the physiological differences between men and women. Those sources provide no support for the notion that "sex" equates with "gender identity," to the exclusion of physiology. Not a shred of legislative history suggests that Congress considered "gender identity" at all, much less that the concept could supplant physiology.

Moreover, even assuming some dictionaries suggest that purely "behavioral peculiarities" are an aspect of "sex" in a linguistic sense, incorporating those "peculiarities" into Title VII would violate the law. This Court's decision in *Price Waterhouse v. Hopkins*,

490 U.S. 228 (1989) recognizes that discrimination on the basis of conformity with sex stereotypes is a form of sex discrimination. *Id*. at 250. Employers thus cannot consider "behavioral peculiarities" in determining whether someone is male or female. Requiring males to present as males in the workplace is not catering to stereotypes, but is respecting biological distinctives. If Title VII is interpreted to require a Muslim employer to allow a male employee to dress as a stereotypical female, it is not the employer who is acting on or enforcing stereotypes. And to compel the Muslim employer to ignore biological distinctives in applying reasonable, sex-specific employment policies will inevitably multiply the collisions with conscience in the workplace – resulting in escalating litigation and conflict rather than promoting productive work and peaceful labor.

This case provides an opportunity to honor the promises of *Obergefell* and *Masterpiece*, and to encourage mutual respect of cultural and moral differences by allowing for diversity and pluralism in the marketplace, not government-coerced conformity to a new world view.

CONCLUSION

For the foregoing reasons, your *Amici* urge the Court to enter judgment in favor of the employers.

Respectfully submitted,

MICHAEL K. WHITEHEAD
Counsel of Record
WHITEHEAD LAW FIRM, LLC
229 SE Douglas Street, Suite 210
Lee's Summit, Missouri 64063
(816) 398-8967
Mike@TheWhiteheadFirm.com

Counsel for Amici Curiae

August 23, 2019