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;
Respondent,

and

AIMEE STEPHENS,
Respondent-Intervenor.

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

BRIEF OF CENTER FOR RELIGIOUS EXPRESSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

INTEREST OF *AMICUS CURIAE*

Amicus curiae Center for Religious Expression ("CRE") is a non-profit legal organization dedicated to the defense of religious expression, including the freedom not to speak in addition to the freedom to speak, according to sincerely-held beliefs.[1] Forming in 2012, CRE has represented individuals and entities in federal courts all over the country in securing these fundamental liberties. The *amicus* is interested in this vitally important case – on behalf of its clients and as an employer itself – because of its conviction that no one should be forced by the government to convey a message he does not wish to convey.

INTRODUCTION AND SUMMARY OF ARGUMENT

The First Amendment to the U.S. Constitution ensures citizens of their right to control their own speech. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995). This right includes an employer's ability to maintain its own branding, and thereby, the image it wants to present to the public, sans governmental interference. In deciding the case at

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[1] In compliance with Supreme Court Rule 37.6, counsel for *amicus curiae* represents that he authored this brief in its entirety and neither the parties, nor their counsel, nor anyone other than *amicus* and *amicus* counsel, made a monetary contribution to fund the preparation or submission of this brief. Also, pursuant to Supreme Court Rule 37.3, counsel for *amicus curiae* represents that he received requisite consent from counsel of record of all parties to file this brief.

hand, *amicus* asks the Court to recognize and uphold this vitally important freedom.

Petitioner R.G. & G.R. Harris Funeral Homes, Inc. ("Harris Homes") is a small, family-owned business. Petioner's Appendix to Petition for Certiorari ("Pet. App.") at 90a. Its principal owner, Thomas Rost ("Rost"), wishes to minister to those who walk through the doors of the funeral home, appreciating the difficulty of the circumstances accompanying the visit. Pet. App. at 103a.[2] This desire is reflected in the branding of Harris Homes. *See* Pet. App. at 102a-104a.

On the home page of its website, Harris Homes promises potential customers that they can "trust" the staff due to its commitment to the "highest quality care and service" and the responsibility it takes to lighten the burden for them. R.G. & G.R. HARRIS FUNERAL HOMES, https://www.rggrharris.com (last visited Aug. 21, 2019). In its published mission, Harris Homes declares that "its highest priority is to honor God" in the provision of caring professionals who exceed expectations in assisting and serving customers, extending the respect, dignity and personal attention they deserve. Pet. App. at 102a. Rost personally guarantees: "If you are dissatisfied with any aspect of our services, we will reduce or eliminate the

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[2] Being an owner of 95.4% of Harris Homes, Rost's beliefs permeate the business. Pet. App. at 90a. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774-75, 2783 (2014) (acknowledging that the views of a closely held for-profit corporation are those of the primary owners).

charge." *Our Guarantee*, R.G. & G.R. HARRIS FUNERAL HOMES, https://www.rggrharris.com/about-us/our-guarantee (last visited Aug. 21, 2019).

Fulfilling the mission and backing up the branding, Rost insists that the employees of Harris Homes, particularly, those who interact with customers, act professionally and in an expected manner, to avoid offense or unnecessary distraction. Pet. App. at 196a, 198a. The protocol includes a dress code for employees who meet with grieving families. Pet. App. at 198a. Among other requirements, Harris Homes expects its employees to dress according to biological sex. Pet. App. at 198a.

This form of branding – informed by Rost's religious beliefs and business judgment – put Harris Homes at odds with Respondent-Intervenor Aimee Stephens ("Stephens"), who filed a complaint with the Equal Employment Opportunity Commission ("EEOC") over the matter. Distorting the meaning of "sex" set out in Title VII, the EEOC subsequently found the funeral home unlawfully discriminated against a biologically male employee with a male dress code. As Harris Homes briefing establishes, this reading of Title VII is untenable, going beyond the wording and spirt of the federal statute. *See* Petition for Certiorari, p. 20. Moreover, the enforcement of Title VII in this manner and context clashes with free speech.

The sought-after enforcement coerces Harris Homes to present a biological male funeral director

dressing as a female to its customers, a compulsion that alters the funeral home's branding and betrays its mission, obliging Harris Homes to convey a message about itself that it does not wish to convey. In turn, this enforcement would compel other employers do likewise – under threat of significant financial penalties – unless this Court rejects the claim.

The strained interpretation and misuse of Title VII threatens to make employers of all stripes abandon their branding and their own notions about themselves for the sake of a new orthodoxy on sex and gender that is currently omitted from federal law. This Court has repeatedly repudiated the misuse of government force to compel speech. *See, e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Hurley*, 515 U.S. 557; *Wooley v. Maynard*, 430 U.S. 705 (1977); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974). It is time to do so again.

ARGUMENT

I. Employer Branding through Dress Codes is Protected Speech Under the First Amendment

"Perhaps no facet of business life is more important than a company's place in public estimation." *Fagan v. Nat'l Cash Register Co.*, 481 F.2d 1115, 1124-25 (D.C. Cir. 1973). To secure the coveted public image, companies invest heavily to make sure their branding conveys the precise

message they want people to hear. *See Matal v. Tam*, 137 S.Ct. 1744, 1760 (2017) (trademark for the name of a band). Indeed, businesses frequently promote themselves in ways that bear only tangential relation to their actual products and services to obtain the image they seek.[3] For a business vying for survival in the marketplace, image is truly everything. *See Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 135 (1st Cir. 2004) (emphasizing the important of public image "in our highly competitive business environment.") (citation omitted).

And the message a business chooses to bolster its image through branding – in whatever form – is protected by the First Amendment. *See United Foods, Inc.*, 533 U.S. 405 (mushroom producer's desire to brand its mushrooms as superior to those grown by others entitled to First Amendment protection). Branding need not be verbose or even verbalized to garner protection; "powerful messages can sometimes be conveyed in just a few words," *Matal*, 137 S.Ct. at 1760, or no words at all. *See Hurley*, 515 U.S. at 569 (acknowledging that non-verbal abstract Jackson Pollock paintings send constitutionally-protected messages). Neither does the message need be articulable, since "a narrow,

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[3] As an example, Dawn Dish Soap maintains a marketing campaign informing the public that its soap helps save wildlife endangered by oil spills – and headlines this campaign at the top of its homepage. DAWN, https://dawn-dish.com/en-us (last visited Aug. 21, 2019). Similarly, Pantene features its "I'm BeautifuLGBTQ+" campaign front and center on its homepage. PANTENE, https://pantene.com/en-us, (last visited Aug. 21, 2019).

succinctly articulable message is not a condition of constitutional protection." *Id.* *See also, e.g., Morse v. Frederick,* 551 U.S. 393, 401 (2007) (message "BONG HiTS 4 JESUS" was deemed protected speech even though its meaning is subject to multiple interpretations).[4]

An employer's branding encompasses, among other things, the appearance and dress of public-facing employees. "It is axiomatic that, for better or for worse, employees reflect on their employers. This is particularly true of employees who regularly interact with customers." *Cloutier,* 390 F.3d at 135; *see Fagan*, 481 F.2d at 1125 ("That the image created by its employees dealing with the public when on company assignment affects its relations is so well known that we may take judicial notice of an employer's proper desire to achieve favorable acceptance."). Employees in the public domain function as ambassadors, carrying out the employer's purpose and intended messaging. *Cloutier*, 390 F.3d at 135. Given this linkage, employers are not obliged to accommodate an employee's dress and grooming preferences by exempting them from a neutral appearance code. *Id.* at 131, 136-37 (noting that "Title VII does not

[4] That some might take offense to the message conveyed by branding does not lessen the constitutional protection afforded it. *See Matal*, 137 S.Ct. at 1754, 1763 (trademark of a musical artist's name protected despite being potentially "offensive" to significant portions of the population). Neither can the government regulate branding based on its own sense or society's sense of "decency or propriety." *See Iancu v. Brunetti*, 139 S.Ct. 2294, 2300 (2019) (brand name acronym that spelled an expletive could not be blocked from trademark).

require Costco to grant Cloutier's preferred accommodation"); *see Fagan*, 481 F.2d at 1122, 1125 (business not required to accommodate male's preferred hair length based on self-image, because it interfered with employer's desired public image). Courts have long recognized the legitimacy of employer appearance standards, including dress codes, even in the face of Title VII discrimination challenges. *See Cloutier*, 390 F.3d at 135-36 (upholding dress code banning facial piercings and citing cases upholding grooming and dress codes); *see also Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1106, 1112 (9th Cir. 2006) (upholding company's "image" program that required female employees to wear makeup and prohibited male employees from wearing makeup); *Fagan*, 481 F.2d at 1125-26 (upholding employer's sex-distinctive hair-length policy).

In formulating the message they wish their brand to convey, employers, like any other speaker, have wide latitude in determining "both what they want to say and how to say it." *Riley v. Nat'l Fed'n of the Blind of NC, Inc.*, 487 U.S. 781, 790-91 (1988). They rightly retain final say over employee appearance on the job – for example, that they appear "clean" or "professional," – and also what, in their estimation, advances the goal. *See Cloutier*, 390 F.3d at 135-37 (emphasizing that employer had the discretion to decide facial piercings other than earrings detract from employer's desired "neat, clean and professional image").[5] Otherwise, an employer

[5] And, in deciding on branding, it is appropriate (as well as wise) for an employer to consider public perception. *See*

would have no control over its own branding. *Cloutier*, 390 F.3d at 137 (calling such result an "undue burden"). That an employee wishes to project a contrary image cannot, by itself, eradicate this right. *See Jesperson*, 444 F.3d at 1107-08, 1112 (upholding makeup requirement for female employee despite the fact that it conflicted with her "self-image" and made her feel "demeaned" because to hold otherwise would come "perilously close" to preventing employer from enforcing any appearance codes affecting its own public image); *Fagan*, 481 F.2d at 1122-25 (upholding employer's hair-length policy despite conflicting with employee's self-image).

Employers have a First Amendment right to control the message (*i.e.*, their branding) conveyed by employee dress codes.

II. The First Amendment Protects Against Misapplication of Title VII to Compel Coerced Branding

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, a private parade organizer was accused of violating a Massachusetts public accommodation law when it declined to include a pro-LGBT parade unit in its annual parade. 515 U.S. at 560-65. The parade organizer did not "exclude homosexuals as such" or prevent

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Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1087 (5th Cir. 1975) (upholding sex-distinctive hair-length policy because employer could appropriately consider popular perception that long-hair males are associated with "counter-culture").

LGBT persons from joining any approved parade unit. *Id.* at 572. Still, the State of Massachusetts determined that the parade organizer's exclusion of the parade unit was illegal discrimination in and of itself. *Id.*

Perceiving the First Amendment rights at stake, this Court held in favor of the parade organizer. *Id.* at 581. So holding, the *Hurley* Court noted constitutional concerns that stemmed from the "peculiar way" in which the anti-discrimination law had been applied to the parade organizer. *Id.* at 572. Massachusetts' enforcement effectively "declar[ed] the sponsors' speech itself to be the public accommodation." *Id.* at 572-73. And, as this Court concluded, the State's action was an abuse of power "violat[ing] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573. Emphasizing the right of the parade organizer to control its own message, this Court recognized a First Amendment defense to the misapplication of the anti-discrimination law. *See id.* at 573-81. *See also Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 209 (3d Cir. 2001) (Alito, J.) ("[A]nti-discrimination laws are [not] categorically immune from First Amendment challenge."). This defense is applicable here.

Like *Hurley*, this case involves the peculiar application of a law (Title VII) to compel protected speech. The enforcement action is not simply requiring Harris Homes to employ persons who identify as transgender, like Stephens; the funeral

home is willing to do so and has done so for several years. Pet. App. at 104a-105a. Nor does the enforcement action challenge a dress code that disadvantages either males or females. *See generally*, Petitioner's Brief at 25-31. Rather, the enforcement action is making Harris Homes put Stephens out front and center to the public – in the prominent, lead position of funeral director – while Stephens flagrantly disregards Harris Homes' dress code. *Equal Employment Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 566, 575 (6th Cir. 2018). This forced circumstance unavoidably crafts and conveys a message that triggers First Amendment protection. *See Hurley*, 515 U.S. at 573 (forced inclusion of expressive parade unit compelled speech itself, not mere conduct).[6]

Like the parade organizer in *Hurley*, Harris Homes is properly considered the speaker of such message. It is well understood that an employment dress code is managed by the employer to convey a message from the employer, and depending on the

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[6] Of course, the implication of First Amendment interests does not render employee appearance codes beyond review. Employers cannot, for instance, impose requirements that unduly burden one sex over another or create a hostile work environment through sexual harassment in the name of branding. *Jesperson*, 444 F.3d at 1109-10, 1112-13. *See, e.g., Baty v. Willamette Indus., Inc.*, 172 F.3d 1232, 1246 (10th Cir. 1999) (holding sexual harassment in the workplace to be unprotected conduct) *overruled in part on other grounds by Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). But any forced alteration of branding must keep these interests in mind.

role of the employee, can act as a message to the public at large. *See Cloutier*, 390 F.3d at 135-36 (noting that the dress code is the employer's and reflects on the employer); *see also Troster v. Penn. State Dep't of Corr.*, 65 F.3d 1086, 1088 (3d Cir. 1995) (noting that prison's guard uniform "project[ed] the image of a professional correctional force" and that American flag patch thereon indicated that prison had granted authority to use firearms).[7] However public-facing employees of Harris Homes might dress while they are off-duty and conducting their own affairs, the manner in which they dress on the job qualifies as speech by the funeral home itself. *See Cloutier*, 390 F.3d at 136 (acknowledging that standards of employee appearance while on the job carried out "the employer's public image."); *see also Fagan*, 481 F.2d at 1125 (noting that "[g]ood grooming regulations reflect a company's policy" and implicate its public image).

Under the threat of severe penalties, the enforcement action contemplated in this matter commandeers Title VII to induce Harris Homes to let a biologically male employee dressed as a female interact with its customers, modifying the employer's

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[7] For example, when an employer provides a specific, labelled uniform, its message, among others, is likely "This is an official employee of [employer]". *See Troster*, 65 F.3d at 1088 (prison guard uniform sent message about prison's grant of authority). When an employer requires formal attire, its message is likely "[Employer] is professional." When an employer allows for more casual attire, the message may be "[Employer] is approachable and friendly." A wide array of messages can be derived from any given dress code.

branding about gender self-identity, appropriateness of dressing opposite of biological features, and the funeral home itself, that Harris Homes does not wish to convey. Akin to the strained inclusion of a pro-LGBT parade unit in a parade seen by the public, the strained inclusion of a transgender-dressing employee compels speech against the wishes of the speaker. The First Amendment is an appropriate defense to this misapplication of Title VII.

III. An Employer Cannot be Compelled to Modify its Dress Code to Alter its Branding and Public Image

The First Amendment prohibition on government compulsion of speech is well-set. Like this Court reasoned in *Wooley v. Maynard*, "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" 430 U.S. at 714 (citation omitted). And, this general right to decline unwanted speech extends to the discretion of employers in deciding what ought be said on its behalf. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361, 2376 (2018) (crisis pregnancy centers protected against compelled notification of state-sponsored abortions); *United Foods, Inc.*, 533 U.S. at 410-411 (mushroom producer protected against compelled advertising subsidy); *Tornillo*, 418 U.S. at 256-58 (newspaper protected against compelled speech). "For corporations as for individuals, the choice to speak includes within it the choice of what not to say." *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 16

(1986) (utility company protected against compelled inclusion of third party's speech on its billing envelopes). The enforcement of Title VII against Harris Homes flies in the face of these principles, unconstitutionally compelling the funeral home to send a message through its employees that it would rather not communicate.

At its core, the disagreement over dress code is ideological: is a person's status as male or female based on biology or self-perception? Harris Home and Stephens have different views on this point. The dispute should remain purely private. But, in conscripting the strength of government authority, Harris Homes is being forced to "participate in the dissemination of [the] ideological message" that male or female status is based on self-perception, and particularly, that Stephens is female by claiming so. *See Wooley*, 430 U.S. at 713. This coerced arrangement directly undermines the funeral home's ability to control its branding and the message it wishes to say to the public, supplanting its voice with that of noncompliant employees. Harris Homes cannot, consistent with the First Amendment, be forced "to be an instrument for fostering public adherence to an ideological point of view [it] finds unacceptable." *Id.* at 715. The funeral home is not and cannot be "a passive receptacle or conduit" for the views of its employees; it is a speaker with First Amendment rights of its own. *Tornillo*, 418 U.S. at 258.

The issue is not a matter of abstract philosophy. The public image of Harris Homes is

inextricably tied to how its public-facing employees (especially those in leadership positions, like funeral directors) dress on the job. Also, in the exercise of its best business judgment, the funeral home believes this sort of dressing would be a needless distraction for grieving customers. Pet. App. 196a, 198a. And aside from these pragmatic reasons, Harris Homes objects due to earnest personal reasons, that the message conveyed runs afoul of its understanding of the Christian faith. Pet. App. 103a-104a. But regardless of the reason, the choosing of what Harris Homes says or does not say should lie solely with Harris Homes. *See Hurley*, 515 U.S. at 574-75 (noting that First Amendment protection does not hinge on whether the reason a speaker wishes to not say something is factual, ideological, or otherwise). The harm wrought with compelled speech is dignitary in nature, causing a speaker to "serve as [an] unwilling mouthpiece" instead of being treated as an independent thinker. *See R.J. Reynolds Tobacco Co. v. FDA*, 845 F.Supp.2d 266, 272 (D.D.C. 2012) *aff'd*, 696 F.3d 1205 (D.C. Cir. 2012) *overruled in part on other grounds in Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014). Compulsion of speech wrongly invades "freedom of mind" and the "sphere of intellect and spirit." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637, 642 (1943).

That many might applaud the contemporary idea that status as male or female is premised on self-perception and that employees should be permitted to dress as they see fit as a form of social liberation is "not the test…The First Amendment

protects the right of individuals to hold a point of view different from the majority and to refuse to foster…an idea they find [] objectionable." *Wooley*, 430 U.S. at 715. As this Court recognized in *Obergefell v. Hodges*, people holding "decent and honorable religious or philosophical [views]" can disagree about the rightness of certain ideas about sex and sexuality, and the proper recourse is "open and searching debate" on such issues. 135 S.Ct. 2584, 2602, 2607 (2015). The enforcement of Title VII against Harris Homes effectively shuts down the debate, requiring employers of all stripes to alter their branding to visibly promote a certain orthodoxy of sex and gender through the dress of their public-facing employees.[8] Such objective is "a decidedly fatal one" under the First Amendment. *Hurley*, 515 U.S. at 579. This Court's rationale in *Wooley* comes to mind:

> The State is seeking to communicate to others an official view as to proper appreciation of [certain social topics]…However, where the State's

[8] That compelling this message effectively constitutes an endorsement by the business cannot be dismissed as "bare compliance with Title VII" as the Sixth Circuit does. *G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 589. As Justice Thomas remarked in his concurrence in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, such reasoning would justify any law that compelled speech and this Court has repeatedly rejected the notion as unsound. 138 S.Ct. 1719, 1744 (2018) (Thomas, J., concurring). Private speakers cannot be required by law "to affirm in one breath that which they [would] deny in the next." *Pacific Gas & Elec. Co.,* 475 U.S. at 16.

> interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.

430 U.S. at 717. Harris Homes cannot be compelled by law "to confess by word or act" the "orthodox" position that male and female are based on self-perception. *Barnette*, 319 U.S. at 642.

The enforcement action against Harris Homes commands that it – as a condition for doing business – display biologically male funeral directors in female clothing when conducting business with families who recently lost loved ones. In that Harris Homes does not want to convey this message in this setting, this action strikes at the heart of the prohibition against compelled speech. *See Hurley*, 515 U.S. at 578 (speakers cannot be required by law "to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own.").

CONCLUSION

Like innumerable other employers in this country, Harris Homes does not want its public-facing employees to dress as members of the opposite biological sex. An employer's dress code sends a message about the employer, affecting its branding, which constitutes protected speech under the First Amendment. Private citizens cannot be compelled

by law to convey the message that male and female are determined by self-perception – no matter how enlightened such notion might be. *See Hurley*, 515 U.S. at 579.

For the reasons set out in this brief, *amicus* respectfully asks this Court to reverse the decision below and protect the First Amendment freedoms of all employers in the process.

Respectfully Submitted,

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