No. 18-107

IN THE
Supreme Court of the United States

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

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,
Respondents.

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

BRIEF OF AMICUS CURIAE FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers.

The Foundation has an interest in this case because many Americans, like the funeral home owners in this case, have religious objections to affirming that a person can change their gender. The Foundation believes that interpreting "sex discrimination" under Title VII to cover "gender identity" will lead inevitably to the punishment of Americans who have such religious objections.

SUMMARY OF ARGUMENT

Believing that Title VII should be interpreted strictly according to its plain language and the intent of Congress, the Foundation fully endorses the legal arguments raised by the Petitioner. Instead of burdening the Court by repeating the same points,

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[1] Pursuant to Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief. The parties were notified of our intent to file this brief more than 10 days before the due date; therefore notice was timely under Rule 37.2(a).

the Foundation raises three additional arguments in support of the funeral home.

First, the Sixth Circuit's decision opens the door to an inevitable conflict with religious liberty. "Gender identity" is not protected by Title VII, but "religion" is. Many Americans have religious objections to affirming that one can change their gender. If the courts rewrite Title VII to cover "gender identity," then religious employees who object to sharing a bathroom with someone of the opposite sex or calling them by their preferred pronouns will be punished, even though their right to object is protected by Title VII. The Sixth Circuit's interpretation of "sex discrimination" will also place employers in a no-win scenario when religious rights and transgederism clash in the workplace, because it will be nearly impossible to satisfy both classes of employees. The Sixth Circuit's decision also raises First Amendment concerns: it construes the ministerial exception too narrowly, and it likely will lead to the denial of unemployment benefits for employees who were fired because of their religious beliefs.

Second, religious liberty is an unalienable right from God, and a person's sex is an immutable gift from God. The American system of government is based on the premise that God gave man certain unalienable rights, the first of which is religious liberty. He also established certain laws of nature that man is powerless to alter, one of which is that a person is either male or female. When Congress passed Title VII, it did not use the terms "religion"

and "sex" in a vacuum, but rather referred to the fixed meanings that these terms already had.

Third, the Sixth Circuit failed to adequately consider the rights of grieving family members to have a funeral in accordance with their religious beliefs. The Sixth Circuit's decision improperly elevated the desires of a person to dress as the opposite sex over the rights of the family members to hold a funeral a way they believe is pleasing to God.

ARGUMENT

I. The Sixth Circuit's erroneous interpretation of "sex discrimination" will lead to religious discrimination in violation of Title VII and the First Amendment.

Title VII prohibits employers from discriminating against employees on the bases of both religion and sex. 42 U.S.C. § 2000e-2(a). The Foundation agrees with the funeral home's argument, which applies the proper canons of statutory construction to Title VII, that "sex" refers to a person's biological sex not their "gender identity." See Petition at 25-30. Rather than repeating the Petitioner's arguments, the Foundation observes that misinterpreting "sex" to mean "gender identity" will cause employers to punish employees who have religious objections to certain aspects of transgenderism, which is the real Title VII violation.

Additionally, allowing the Sixth Circuit's decision to stand will place employers in an impossible

situation when religious liberty and transgenderism clash, subjecting them to religious-discrimination suits if they tell religious employees to get over their objections or sex-discrimination suits if they tell transgender employees that the religious employees do not have to acknowledge their gender identity. The economic impact on employers will be devastating. The Sixth Circuit's decision also will cause First Amendment violations by construing the ministerial exception too narrowly. Finally, another First Amendment violation will follow when the States deny unemployment benefits for people who were fired because of their religious beliefs.

A. The Sixth Circuit's decision will lead to religious discrimination, which violates Title VII.

Title VII makes it unlawful for an employer "to fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, *religion*, *sex*, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). The term "religion" in Title VII "includes *all aspects of religious observance and practice*, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (emphasis added). For this reason, even the EEOC, a respondent in the present case, acknowledges that

"religious practices" under Title VII "include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. § 1605.1.

Many Americans are religious. According to the latest Gallup poll:

- 48.5 % of Americans identify as Protestant;
- 22.7% of Americans identify as Catholic;
- 2.1% of Americans identify as Jewish;
- 1.8% of Americans identify as Mormon; and
- 0.8% of Americans identify as Muslims.

Frank Newport, *2017 Update on Americans and Religion*, Gallup (Dec. 22, 2017).[2] All of these religions look to the Hebrew Scriptures for religious instruction, at least in some capacity. Thus, 75.9% of Americans have religious views that are influenced by the book of *Genesis*, which says, "So God created man in his own image, in the image of God created he him; *male and female* created he them." *Genesis* 1:27 (emphasis added).[3]

Under Title VII, these Americans are not required to shed their religious views when they enter the workplace. And because a supermajority of

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[2] *Available at* https://news.gallup.com/poll/224642/2017-update-americans-religion.aspx.

[3] All Bible quotations in this brief are from the King James Version unless otherwise noted.

Americans identify with a religion that affirms the gender binary—that the only two genders are male and female—the question is not *whether* their religious views will clash with the Sixth Circuit's interpretation of "sex," but *when*. If the Sixth Circuit's misinterpretation of sex discrimination is allowed to stand, then employers will be forced to call transgender individuals by their preferred names and pronouns and let them use the bathrooms corresponding to their gender identity instead of their biological sex. But in addition, they also will *force their employees* to do the same. Religious employees will object that they consider it is sinful to affirm a theory of gender contrary to what their religion teaches. This will place religious employees in a scenario where they have to choose between their jobs and their faith.

Congress designed Title VII to avoid such a scenario. As this Court has noted, the intent of Senator Randolph, who introduced the 1972 Amendment to Title VII, was "'to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law.'" *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977) (quoting 118 Cong. Rec. 705 (1972)). As recently as 2015, this Court reiterated that not only religious *belief*, but religious *practice*, "is one of the protected characteristics that cannot be afforded disparate treatment and *must be accommodated*." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028, 2033-34 (2015) (emphasis added). Congress enacted Title VII to ensure that religious liberty is protected in the workplace, but if the Sixth Circuit's

decision is allowed to stand, then employers are more likely to believe—incorrectly—that they may not accommodate religious employees' objections to transgender employees' name, pronoun, and bathroom preferences.

Failing to correct the Sixth Circuit's decision will lead to the real Title VII violation: discrimination against religious employees whose rights to object to transgenderism are actually protected by statute instead of judicial fiat. If this Court does not correct the Sixth Circuit's error, then Justice Alito's warning from *Obergefell v. Hodges* will prove true here as well: "I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools." 135 S.Ct. 2584, 2642-43 (2015) (Alito, J., dissenting).

B. Interpreting "sex discrimination" to cover "gender identity" will subject employers to lawsuits from both transgender employees and religious employees.

The Sixth Circuit's interpretation of "sex discrimination" will place not only employees but also *employers* in a no-win scenario. Under the panel's interpretation of "sex discrimination," employers must make a choice when confronted with the clash between transgenderism and religion: they must either tell the transgender employees that the religious employees do not have to recognize their

gender identity (in which case they will be sued for sex discrimination), or they must tell their religious employees that they have to put their objections aside (in which case they will be sued for religious discrimination).[4] That construction of Title VII is incoherent, which violates the canon that a court must "interpret the statute as a symmetrical *and coherent* regulatory scheme ... and fit, if possible, all parts *into a harmonious whole*." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations and internal quotations omitted) (emphasis added).

This will cause severe economic hardship on employers. When placed in this no-win scenario, the cost of business will go up as employers have to find ways to protect themselves from liability and pay out damages from drastic increases in Title VII actions. This will lead to layoffs as employers will no longer be able to pay as many employees. Between the loss of jobs and the disruption in commerce, misinterpreting Title VII to cover gender identity is bad not only for religious employees, but also for employers and the economy. While the Constitution obviously does not give this Court the power to resolve cases based on economic calculus, the Court

[4] An employer's only hope of avoiding a lawsuit would be attempting to offer a "reasonable accommodation" to the religious employees. 42 U.S.C. § 2000e(j) But because so many of their employees are religious, employers will have their hands full trying to accommodate so many of their employees. Under such chaotic circumstances, it is inevitable that employers will not be able to walk the Sixth Circuit's tightrope forever. They will fall on one side or the other—likely on the side of violating their religious employees' rights.

should realize that failing to correct the Sixth Circuit's error will have severe negative economic consequences as well.

C. The Sixth Circuit construed the ministerial exception of the First Amendment too narrowly.

In 2012, this Court recognized that the First Amendment provides to religious organizations a "ministerial exception" from civil-rights discrimination suits. *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 188 (2012). In that case, a teacher of a school run by the Lutheran Church—Missouri Synod, brought an action under the Americans with Disabilities Act against a church and school that fired her. The religious defendants claimed that she was a "minister" and that she was fired for religious reasons, and therefore her suit was barred by the First Amendment. The Court agreed, reasoning that both the Free Exercise and Establishment Clauses of the First Amendment prohibit the civil government from telling a religious organization that they must "retain an unwanted minister." *Id.* The Court did not limit the ministerial exception to protecting churches only, but held that it protected "religious groups." *Id.* at 196; *cf. Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2769-70 (2014) (holding that "[b]usiness practices that are compelled or limited by the tenants of a religious doctrine fall comfortably" within the definition of "exercise of religion.").[5]

[5] It is worth noting that the funeral home in this case is a closely held for-profit corporation, just like the petitioners in

The Sixth Circuit rejected the funeral home's assertion that its directors are ministerial employees and therefore concluded that these funeral directors do not qualify for the ministerial exception. 884 F.3d at 581-83. The Sixth Circuit based that holding on *Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829 (6th Cir. 2015), which interpreted *Hosanna-Tabor*. In *Conlon*, the Sixth Circuit relied very heavily on the particular facts of *Hosanna-Tabor* to determine the scope of the ministerial exception. 777 F.3d at 834. Thus, by evaluating the funeral home's argument in light of *Conlon*, the Sixth Circuit essentially held that the ministerial exception did not apply to the funeral home because this case was not factually analogous enough to *Hosanna-Tabor*.

The Foundation believes that the Sixth Circuit interpreted the ministerial exception too narrowly. This Court in *Hosanna-Tabor* grounded the ministerial exemption not in Title VII but in the First Amendment itself – "an exception 'rooted in the First Amendment's guarantees of religious freedom,'" 565 U.S. at 181 (citation and quotation omitted), and therefore looked to the unique and rigorous requirements for ordained teachers of Lutheran Church—Missouri Synod schools to establish that the teacher was covered by the ministerial exemption. Most teachers in other religious schools, no matter how seriously committed they were to the religious

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Hobby Lobby. *See* 884 F.3d at 566 (noting that the funeral home is "a closely held for-profit corporation"); 134 S.Ct. at 2764-65 (noting that the petitioner corporations were closely-held and for-profit).

mission of the school, would not be considered ordained teachers under the rigorous requirements of the Lutheran Church—Missouri Synod.

In setting forth the factors that made the plaintiff an ordained teacher covered by the ministerial exception in *Hosanna-Tabor*, this Court, we believe, did not intend to make these Lutheran Church—Missouri Synod requirements the standard test for determining the ministerial exception for all religious and nonreligious institutions. In fact, many of those factors would be irrelevant or inappropriate for other institutions.

In determining whether a First Amendment ministerial exception applies, courts and governmental agencies should give broad deference to the claims of the institution and its employees. *See Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J., concurring) ("the Religion Clauses require civil courts ... to defer to a religious organization's good-faith understanding of who qualifies as its minister."). Second-guessing their claims could cause courts and governmental agencies to determine the doctrine and practices of religious organizations. *See id.* at 197 (noting that the Religion Clauses guarantee "religious organizations autonomy in terms of internal governance" and warning that these rights would be "hollow" if "secular courts could second-guess the organization's sincere determination" of issues like these). The Sixth Circuit crossed that line by basing its denial of the ministerial exception on such facts as that the funeral home serves people of

all religions and that it does not make Easter a paid holiday. 884 F.3d at 582-83.

D. If religious employees are fired because of their convictions about gender, then the States will violate their free exercise rights if they deny them unemployment benefits.

This Court has held repeatedly that if a person is fired for his religious beliefs and the State denies him unemployment benefits, then a Free Exercise violation may be present. *See, e.g., Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). The Sixth Circuit's decision is likely to cause confusion not only for employees, but also for state governments as they attempt to discern whether an employee who was fired for his religious beliefs is entitled to unemployment benefits. If state officials conclude that those employees are not entitled to unemployment compensation, then they may be subject to lawsuits under 42 U.S.C. § 1983.

II. Religious liberty is an unalienable right from God, and one's sex is an immutable gift from God.

A. Religious liberty is an unalienable right from God

Title VII's prohibition of religious discrimination reflects one of America's most fundamental values:

religious liberty is an unalienable right granted to us not by the State, but by our Creator. As the Declaration of Independence states, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." *The Declaration of Independence* para. 2 (U.S. 1776). Among the unalienable rights given to us by God, the most important is religious liberty.

James Madison, sometimes called the "Father of the Constitution," explained how religious liberty is given by God and cannot be taken away by man:

> [W]e hold it for a fundamental and undeniable truth, 'that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.' The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator

> such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.

James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785).[6]

For Madison, and the other Founders, the belief in the sovereignty of God was not merely an individual's subjective way of attempting to "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992). On the contrary, it

[6] *Reprinted in The Founders' Constitution* (Univ. of Chicago Press 1987), *available at* https://bit.ly/1MHiLmr (last visited Aug. 16, 2018)

was an objective truth: the Creator who gave us rights reserved the right to be first in all things. If God gave authority to man, then how could man ever have the authority to take away a person's allegiance to God? A person cannot give away what he does not have in the first place. Because God never gave man the authority to take away religious liberty, man cannot give the civil government the right to take it away either. As this Court has held, "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson,* 343 U.S. 306, 313 (1952). A decade later, the author of *Zorach* again acknowledged the Divine Source of human rights:

> "The institutions of our society are founded on a belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter, and that the individual possesses rights conferred by the Creator, which government must respect."

McGowan v. Maryland, 366 U.S. 420, 562 (1961) (Douglas, J., dissenting).

Notice that in *Memorial and Remonstrance*, Madison did not merely say that the *State* was powerless to take away religious liberty; he also said that "[t]his duty is precedent, both in order of time and in degree of obligation, *to the claims of Civil Society*." *Memorial and Remonstrance*, *supra* (emphasis added). Thus, not only is the State

prohibited from abridging religious liberty, but so is mankind in general.

It therefore follows that neither the State *nor an employer* may take away a person's religious liberty. Thus, Congress's prohibition on religious discrimination was not merely a congressional policy preference, but rather recognition that a person's religious liberty may not be deprived by any man, whether in the form of the State or an employer. Because Title VII protects not a mere *positive* right but rather a *God-given* right, this Court should note the importance of the liberty that the Sixth Circuit's decision has imperiled and grant certiorari to correct its mistake.

B. A person's sex is an immutable gift from God

Not only is religious liberty an unalienable right from God, but a person's sex is also an immutable gift from God. Our Declaration of Independence affirms the existence of "the Laws of Nature and of Nature's God." *The Declaration of Independence* para. 1 (U.S. 1776). Blackstone described the laws of nature this way: "[W]hen the supreme being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be." 1 Blackstone, *Commentaries* *38. Because man is a created being, he is also subject to the laws of His creator. As Blackstone said, "Man, considered as a creature, must necessarily be subject to the laws of his creator, for he is entirely a dependent being....

This will of his maker is called the law of nature." *Id.* at *39-40.

Although the law of nature is discoverable by human reason, the reality of living in a world marred by sin means that man's "reason is corrupt, and his understanding full of ignorance and error." *Id.* at *41. Because of this, God revealed the law of nature through "an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures." *Id.* The law of nature and the law of God are really one in the same, but we can be more certain of these laws through revelation than through reason, "[b]ecause one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law." *Id.* at *42. "Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these." *Id.*[7]

Just as the law of gravity is a law of nature that man is powerless to change, so is the law of sex. The creation account tells us, "So God created man in his own image, in the image of God created he him; male and female created he them." *Genesis* 1:26. The Creator never gave mankind the power to change this law of nature. On the contrary, He prohibited people

[7] As Cicero allegedly said, "There is God's Law from which all equitable laws of man emerge and by which men must live if they are not to die in oppression, chaos and despair." Taylor Caldwell, *A Pillar of Iron* 7 (1965).

from attempting change their sex or present themselves as the opposite sex. *See Deuteronomy* 22:5 ("The woman shall not wear that which pertaineth unto a man, neither shall a man put on a woman's garment: for all that do so are abomination unto the LORD thy God."); *see also I Corinthians* 9:9-10 ("Know ye not that the unrighteous shall not inherit the kingdom of God? Be not deceived: neither fornicators, nor idolaters, nor adulterers, *nor effeminate*, nor abusers of themselves with mankind, nor thieves, nor covetous, nor drunkards, nor revilers, nor extortioners, shall inherit the kingdom of God") (emphasis added).[8]

Thus, when Congress prohibited discrimination based on sex in the workplace, it was not referring to "sex" as a social construct, but rather as a fundamental law of nature. As Bastiat said, "It is not because men have enacted laws that personhood, freedom, and property exist. On the contrary, it is because personhood, freedom, and property are already in existence that men enact laws." Frederic Bastiat, *The Law* 2 (Liberty Fund ed. 2016) (1850).[9] In the same way, the gender binary does not exist because Congress meant "biological sex" when it

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[8] The next verse says, "And such were some of you: but ye are washed, but ye are sanctified, but ye are justified in the name of the Lord Jesus, and by the Spirit of our God." *I Corinthians* 9:11. Although God's justice demands that those who practice such things be judged, "God so loved the world, that he gave his only begotten Son, that whosoever believeth in him should not perish, but have everlasting life." *John* 3:16.

[9] *Available at* https://bit.ly/2BeAyCX (uploaded Feb. 27, 2018).

passed the Civil Rights Act. On the contrary, Congress meant "biological sex" when it passed the Civil Rights Act because the gender binary already existed.

The designation of every person as male or female does not detract from man's dignity, but rather adds to it. As Justice Thomas wrote recently,

> "Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that 'all men are created equal' and 'endowed by their Creator with certain unalienable Rights,' they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth."

Obergefell, 135 S.Ct. at 2639 (Thomas, J., dissenting). The basis of human dignity is the fact that man bears the image of God. And as *Genesis* teaches, God made man in His image—both male and female. Thus, one's sex is not a mere accident of biology, but rather part of the image of God that bestows dignity and value on man. Thus, reinterpreting "sex" to mean "gender identity" is not only legally incorrect, but it robs people of the dignity that one's sex bestows upon them as part of the image of God.

Surgical alteration of one's sexual organs does not and cannot change the basic DNA with which a person was born. "It is physiologically impossible to

change a person's sex, since the sex of each individual is encoded in the genes—XX if female, XY if male. Surgery can only create the appearance of the other sex."[10] Dr. George Burou, a surgeon who has performed over 700 sexual reassignment surgeries, stated, "I don't change men into women. I transform male genitals into genitals that have a female aspect. All the rest is in the patient's mind." Janice C. Raymond, *The Transsexual Empire* 10 (1979).

It should be no surprise then that acting on the delusion that one can change his or her sex can produce tragic consequences. For example, a 2015 survey conducted by the National Center for Transgender Equality, which surveyed over 27,000 transgender people, found that nearly 40 percent of the survey respondents had attempted suicide during their lifetime—nearly nine times the attempted suicide rate in the general population (4.6 percent). Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 4, National Center for Transgender Equality (2016).[11] Likewise, in 2013, the University of Louisville conducted a survey of 351 transgender individuals and found that the rates of depression and anxiety "far surpass the rates of those for the general population." Stephanie L. Budge et al., Abstract, *Anxiety and Depression in Transgender Individuals: The Role of Transition Status, Loss,*

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[10] Richard P. Fitzgibbons, M.D., et al., *The Psychopathology of "Sex Reassignment" Surgery*, 9 Nat'l Catholic Bioethics Q. 97, 118 (Apr. 2009).

[11] *Available at* https://goo.gl/1JGDXa (last visited Aug. 15, 2018).

Social Support, and Coping, National Institutes of Health, https://bit.ly/2lIIJxv (last visited Aug. 15, 2018). The Foundation could continue to cite examples, but the point stands: contravening fundamental laws of nature, such as attempting to alter one's sex, can produce tragic consequences.

Thus, not only would letting the Sixth Circuit's decision stand fail to correct an important issue of law, but it would lead to encouraging transgender people to further harm themselves instead of accepting their God-given sex.

III. The Sixth Circuit failed to adequately consider the interests of grieving family members in funeral processions

One important function of an *amicus* brief is to lay before the Court the interests of persons who are not parties to the case but who are nevertheless affected by its outcome. And there is a forgotten person in this case—the client of the funeral home, consisting of the deceased's family and loved ones.

Even more than a wedding, a funeral involves very delicate feelings and emotions, based in large part upon religion, religious and moral training, and sensitivities of many kinds. As loved ones plan a funeral, they are thinking of death, separation, life after death, judgment, faith, and at the root of all of this—God. As they plan, the foremost concerns for many loved ones are, "Is this the way Mother would want it?" and "Will this be pleasing to God?" If these family members believe transgenderism is contrary

to their religious convictions, or if they believe it is contrary to the beliefs of their deceased mother, their feelings could be traumatized if they are forced to have a transgendered person participate as a funeral director.

More often than not, the family will ask a religious leader to conduct the funeral, commonly a pastor who had a close relationship with the deceased. Most churches have rites or rituals that are to be employed during the funeral. Many pastors and many church denominations are opposed to transgenderism and could have difficulty working with a transgender funeral director. These difficulties could be especially burdensome for the family of the deceased.

The Sixth Circuit flippantly dismisses these concerns as "customers' presumed biases" and "prejudices," citing *Diaz v. Pan. Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971), *Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 795, 799 (8th Cir. 1993), and *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981). 884 F.3d at 586. The Circuit's reliance upon these cases is inappropriate because:

(1) None of these cases deal with transgenderism; *Diaz* and *Fernandez* involve sex discrimination, and *Bradley* involved a rule with disparate racial impact.

(2) Taking deep-seated religious and moral convictions about transgenderism, often based on Bible passages such as *Genesis* 1:27 and *Deuteronomy* 22:5, and reducing them to mere "bias" and

"prejudice," does a grave disservice to the "Laws of Nature and of Nature's God" upon which this nation was founded.

(3) A funeral service, with all of the sensitivities involved therein, cannot be compared to airline flights on which passengers might prefer female flight attendants or customers who might prefer their pizza deliverymen to be clean-shaven. In fact, the handling of funeral arrangements is one of the few activities in which the tort of outrage has been held appropriate. In *Quesada v. Oak Hill Improvement Co.*, 213 Cal. App. 3d 596 (1989), the court noted at 605 that "Parties charged with the care, custody and control of the remains of a deceased know or reasonably should know that the surviving friends and relatives are emotionally vulnerable," 213 Cal. App. 3d at 605, and therefore,

> "As a society we want those who are entrusted with the bodies of our dead to exercise the greatest of care. Imposing liability within the limits described will promote that goal. Further, those who come in contact with the bereaved should show the greatest solicitude; it is beyond a simple business relationship -- they have assumed a position of special trust toward the family.... Few among us who have felt the sting of death cannot appreciate the grief of those bereaved by the loss. It is neither unreasonable nor unfair to expect the same appreciation by those who prepare our dead."

Id. at 610 (citation omitted).

Although these clients and family members of the bereaved are not represented in this case, the Foundation urges that they, their deep-seated religious and moral convictions, and sensitivities be considered. They, as much as anyone, are affected by the outcome of this case.

CONCLUSION

The Sixth Circuit's erroneous interpretation of sex discrimination inevitably will lead to religious discrimination in violation of Title VII and the First Amendment, as well as a disregard for the wishes of family members at funerals. Religious liberty is an unalienable right from God, and a person's sex is an immutable gift from God. This Court should not allow religious liberty to be trampled under an interpretation of Title VII that comports with neither Congress's intent nor the law of nature that Title VII presupposes.

For all of those reasons, the Foundation for Moral Law respectfully requests this Court to grant the funeral home's petition for a writ of certiorari and reverse the judgment of the Sixth Circuit.

Respectfully submitted,

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