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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Harris Homes seeks to care for people mourning the loss of their loved ones and to ensure that the grieving are free from distractions. Without any concern for that mission, the EEOC targeted Harris Homes through this lawsuit, sought to impose its views about what sex means absent congressional approval, and tried to punish Harris Homes' owner, Thomas Rost, for conduct that neither Title VII nor *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), forbids.

The EEOC now admits that the interpretations of Title VII and *Price Waterhouse* that it persuaded the Sixth Circuit to adopt below are wrong as a matter of law, present important and recurring questions, and conflict with the law of other circuits. Fed. BIO 12, 23–24. That alone warrants this Court's review and reversal.

Yet the EEOC asks this Court to leave in place both the Sixth Circuit's admittedly erroneous decision and the circuit split. That atypical request ignores the fundamental change in Title VII that the Sixth Circuit wrought by declaring sex itself to be a stereotype and by replacing "sex" with "gender identity." Such a seismic shift should not pass by unchecked. Nor should a conceded circuit split remain on an important issue of federal employment law, where national uniformity is vital. Review should be granted.

ARGUMENT

I. The *Price Waterhouse* question presented is important, was wrongly decided below, and implicates broad circuit-court confusion.

The EEOC concedes that the Sixth Circuit squarely held that Harris Homes "violated Title VII by requiring Stephens to comply with the provisions of the dress code applicable to Stephens's biological sex (male) rather than the provisions corresponding to Stephens's gender identity (female)." Fed. BIO 19. The EEOC also admits that that conclusion is wrong, *id.* at 19–21, "reflects a misreading of *Price Waterhouse*," *id.* at 12, presents an "important and recurring" question, *id.* at 23, and "implicate[s] tension among the circuits," including inconsistency "with the Ninth Circuit's decision in *Jespersen*," *ibid.* Such a concededly erroneous decision—adding to the circuits' disarray on *Price Waterhouse*—demands this Court's attention.

1. In contrast, Stephens insists that the Sixth Circuit did not "adjudicate[ ]" the *Price Waterhouse* question presented because Harris Homes acted based on "multiple sex stereotypes, not only those related to the dress code." Stephens BIO 21–22 (cleaned up). But the court of appeals' analysis of that question did not discuss multiple sex stereotypes; it focused on whether Harris Homes could require Stephens to dress according "to the Funeral Home's notion of her sex." Pet. App. 18a. So the question turned on whether Harris Homes could apply its dress code according to Stephens's sex rather than gender identity—the exact question that Harris Homes raises in its petition.

Stephens's efforts to avoid that question are unconvincing. Rather than citing the portion of the Sixth Circuit's opinion that actually addresses *Price Waterhouse*, Stephens relies on passages discussing issues that the petition does not raise. Stephens BIO 22 (quoting Pet. App. 65a (discussing RFRA)). And though both courts below recognized that Rost made the employment decision because Stephens "wanted to dress as a woman" and was "no longer going to represent . . . as a man," Pet. App. 9a, 16a, 100a, 109a, Stephens makes up other motives, referencing facts unsupported by the record or ignored by the court of appeals. Stephens BIO 13–14, 22–24.

For example, Stephens asserts that "Rost's concern was not about which dress code" Stephens would follow. Stephens BIO 23. But in support, Stephens cites Rost's testimony explaining reasons for "the woman's dress code." Resp. App. 62a–63a. Stephens also chastises Rost for his alleged "discomfort" with Stephens's "appearance as a woman." Stephens BIO 13. But Stephens cites testimony where Rost says that he "never saw Stephens present in female attire." Resp. App. 43a–44a. And Stephens discusses Rost's objection to the name "Aimee" Stephens in the EEOC charge. Stephens BIO 23. But that fact could not possibly have informed an employment decision made months earlier. Resp. App. 13a, 61a. Thus, Stephens fails in trying to make this case about something other than Harris Homes' application of its sex-specific dress code.

Regardless, the *Price Waterhouse* question that Stephens says the court of appeals decided—whether Harris Homes may discharge Stephens "for failing to

conform to sex stereotypes related to appearance and behavior," Stephens BIO 27—is "fairly included" in the question that Harris Homes has raised. Sup. Ct. R. 14.1(a). It is really just a different way of saying the same thing. Harris Homes' question—whether *Price Waterhouse*'s sex-stereotyping discussion prohibits an employer from applying its dress code based on sex—easily encompasses Stephens's counter question—whether *Price Waterhouse* bans Harris Homes' alleged "sex stereotypes related to appearance and behavior." Stephens's semantics cannot avoid the question presented.

2. The EEOC agrees that the decision below conflicts with *Price Waterhouse* because the Sixth Circuit found a Title VII violation absent "disparate treatment of similarly situated male or female employees." Fed. BIO 19. Stephens contends that such disparate treatment is not required, citing *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80–81 (1998), and *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 543 (1971) (per curiam). Stephens BIO 29. But neither case says that.

As the EEOC explains, "*Oncale* erases any doubt that '[t]he critical issue' in determining whether an employer has engaged in sex-based '*discrimination*' is 'whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" Fed. BIO 20-21 (quoting *Oncale*, 523 U.S. at 80). And *Phillips*, which challenged a practice of "employ[ing] men with pre-school-age children" but not "women with pre-school-age children," presented a classic example of disparate treatment favoring men over similarly situated women. 400 U.S. at 543–44.

3. Despite Stephens's insistence that Harris Homes has engaged in sex stereotyping, nothing the EEOC challenged below qualifies as sex stereotyping. The court of appeals found that applying a sex-specific policy according to sex instead of gender identity was sex stereotyping because it viewed sex itself—the "notion of how sexual organs" determine maleness or femaleness—as a stereotype. Pet. App. 26a–27a.

But treating a person whose sex is male as a man is no more stereotyping than is classifying someone born in Canada as Canadian. Recognizing the defining feature of class membership is not a stereotype. See *Nguyen* v. *INS*, 533 U.S. 53, 68 (2001) ("[p]hysical differences between men and women" relating to reproduction—the very features that determine sex—are *not* "gender-based stereotype[s]"). Holding otherwise stretches the concept of stereotypes beyond recognition.

4. Stephens also asserts that the EEOC's decision not to separately challenge the dress code is a "prudential consideration[ ]" against addressing Harris Homes' *Price Waterhouse* question. Stephens BIO 25. Quite the contrary—the absence of that issue isolates and squarely presents the issues that Harris Homes raises. See Pet. 15. Were the dress code's legality also at issue, it would complicate—not simplify—the questions presented.

Stephens's argument suggests that sex-specific dress codes like Harris Homes' are of suspect validity. Stephens BIO 26. Not so. Courts widely recognize that those sorts of policies are lawful. *E.g.*, *Jespersen* v. *Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1110

(9th Cir. 2006) (en banc) (collecting cases). Even the EEOC's Compliance Manual affirms that a "dress code may require male employees to wear neckties at all times and female employees to wear skirts or dresses at all times . . . so long as the requirements are equivalent for men and women with respect to the standard or burden that they impose." Reply App. 1a. The absence of a challenge to Harris Homes' dress code is no reason to deny review.

II. The question whether gender-identity discrimination equals sex discrimination is important, was wrongly decided below, and presents a deep circuit split.

The EEOC admits that the Sixth Circuit's "conclusion that gender-identity discrimination necessarily constitutes discrimination because of sex in violation of Title VII" is "inconsistent with the statute's text and this Court's precedent." Fed. BIO 12. And the EEOC agrees that the court of appeals' "position effectively broadens the scope of th[e] term ['sex'] beyond its ordinary meaning," *id.* at 21, the issue presented is "important and recurring," *id.* at 23, and the decision below "is inconsistent with decisions of other circuits," *ibid.* Such an admittedly flawed decision that deepens a circuit split on a significant federal question merits a cert grant.

The Sixth Circuit gave two reasons why gender-identity discrimination equals sex discrimination, Pet. App. 22a–28a, and the EEOC concedes that both "fail[ ] on [their] own terms," Fed. BIO 21. First, "[i]n the court's view, the fact that applying the dress code depended in part on Stephens's sex proved that

[Harris Homes] had discriminated based on sex." *Id.* at 22 (citing Pet. App. 23a–24a). Were that analysis correct, the EEOC aptly reasons, "every sex-specific policy—from dress codes for certain occupations to sex-specific employee restrooms—would automatically violate Title VII." *Ibid.* Second, "[t]he court explained that 'a transgender person is someone who fails to act and/or identify with his or her gender,' and therefore 'an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align.'" *Ibid.* (quoting Pet. App. 26a–27a). But that rationale, the EEOC observes, "merely repeats in more generalized terms the court of appeals' [mistaken] reasoning that applying a sex-specific dress code to Stephens based on Stephens's biological sex inherently constituted improper sex stereotyping under *Price Waterhouse*." *Id.* at 23.

1. Again, Stephens runs from the question presented, arguing that the answer to whether gender-identity discrimination equals sex discrimination "would not affect the judgment" because the decision below rests on an "independent" sex-stereotyping holding under *Price Waterhouse*. Stephens BIO 10–11. But as explained in Section I and as the EEOC has recognized, Harris Homes challenged that alternative holding, and Stephens's contrary arguments are unpersuasive. So if Harris Homes succeeds on the *Price Waterhouse* question, the other question will control the case's outcome. That question is both ripe and necessary.

2. While Stephens tries to drive a wedge between the two questions presented, the Sixth Circuit viewed them as inextricably intertwined. It said that "discrimination against transgender persons"—defined as "someone who is inherently 'gender non-conforming'"—"*necessarily* implicates Title VII's proscriptions against sex stereotyping," stressing that "[t]here is *no way* to disaggregate" the two. Pet. App. 26a–27a (emphasis added). Accord, *e.g.*, *Whitaker By Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047–48 (7th Cir. 2017) (using *Price Waterhouse*'s sex-stereotyping discussion to set precedent on the gender-identity-discrimination issue); *Schwenk* v. *Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000) (similar); *Glenn* v. *Brumby*, 663 F.3d 1312, 1316–17 (11th Cir. 2011) (similar). As the Sixth Circuit explained, this link between the issues came directly from Stephens's and the EEOC's arguments.[1] Stephens cannot take the opposite position now in an attempt to avoid review.

What's more, sex stereotyping is inherent under the Sixth Circuit's view. After all, both the Sixth Circuit and the EEOC define a "transgender" person as a "gender nonconforming individual[ ]." Pet. App. 204a; accord Pet. App. 26a. Assessing whether a person is a member of that class thus requires courts to sex stereotype.

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[1] Pet. App. 22a–23a (recognizing that Stephens and the EEOC argued that "discrimination because of an individual's transgender status is *always* based on gender-stereotypes"); Reply App. 11a ("Discrimination against transgender people . . . is sex discrimination . . . because it is based on gender stereotypes.").

Tellingly, Stephens cannot identify an actual case where the question whether gender-identity discrimination equals sex discrimination was raised without a *Price Waterhouse* sex-stereotyping claim. Stephens speculates that such a case might arise if an employer rejects a job applicant simply because her application "reveals that she is transgender" without "other evidence of" sex stereotyping. Stephens BIO 20. But below, Stephens argued that "[d]iscrimination against transgender people because they are transgender is" necessarily "motivated by gender-based stereotypes." Reply App. 4a. So even in that hypothetical case, the plaintiff would have a sex-stereotyping claim under Stephens's view.

3. Quibbling with the phrasing of the question presented, Stephens says that the relevant question is not "whether the word 'sex' in Title VII means 'gender identity,'" since courts have held "that discrimination based on transgender status is a form of 'discrimination because of sex.'" Stephens BIO 10 n.5. But this, yet again, is just semantics. As both the EEOC and Stephens concede, assessing "transgender status" requires courts to ask whether a person is "gender nonconforming," Pet. App. 204a, or has "a gender identity different from" his or her sex, Stephens BIO 1 n.1. Under Stephens's own view, then, allegations of transgender discrimination *cannot* be analyzed without considering gender identity.

4. Stephens also downplays the circuit split but to no avail. Stephens admits that the Tenth Circuit has parted ways with the Sixth and does not deny that the Eighth Circuit has done the same. Stephens

BIO 19. And in claiming that the Seventh and Ninth Circuits align with the Sixth, *ibid.*, Stephens overlooks that those circuits attempted to overturn their Title VII precedents in cases construing other federal statutes, thereby interjecting confusion into their law. See Pet. 16–18. A circuit split of this breadth and depth, which implicates at least five circuits and 40 years of jurisprudence, requires this Court's intervention.

III. This Court should grant review regardless of *Zarda* or *Bostock*.

The EEOC requests that the Court deny this petition if it declines review in *Zarda* and *Bostock*, cases asking whether Title VII's prohibition on sex discrimination includes sexual-orientation discrimination. Fed. BIO 25. The Court should reject that course for four reasons.

First, this case is an ideal vehicle. While the respondents have raised factual disputes in *Zarda* and *Bostock*, see *Zarda* BIO 15–16; *Bostock* BIO 34–35, no such dispute exists here. Particularly as to the reason for Harris Homes' employment decision, both lower courts found the record clear. Pet. App. 9a, 16a, 100a, 109a.

Second, a denial here would leave an admitted circuit split concerning important federal questions on which uniformity is essential. It is untenable to subject employers to different demands based solely on their location when they administer basic sex-specific policies like dress codes and restrooms.

Third, the Sixth Circuit's decision is too deeply flawed to stand. Among other errors, the court of appeals treated "sex" itself as an illicit stereotype. Pet. 23–24 (discussing Pet. App. 26a–27a). That holding risks undoing, rather than vindicating, Title VII's ban on sex discrimination.

Fourth, by replacing "sex" with "gender identity"—which the court of appeals confirms is a "fluid, variable," nonbinary, and "difficult to define" concept, Pet. App. 24a–25a n.4—the Sixth Circuit's decision jeopardizes privacy concerns, women's advancement, and freedom of conscience. Pet. 30–34. Such a fundamental transformation of Title VII warrants review, regardless of what happens in *Zarda* or *Bostock*.

The EEOC discounts the need for review because "the panel decision here appears to be the first court of appeals decision to conclude in a Title VII case that gender-identity discrimination categorically constitutes discrimination because of sex." Fed. BIO 12. But the Sixth Circuit's decision is not unique in its reasoning. Other circuits have similarly construed "sex," in related federal statutes and constitutional contexts, to reach the same conclusion. *E.g.*, *Whitaker*, 858 F.3d at 1047–48; *Schwenk*, 204 F.3d at 1201–02; *Glenn*, 663 F.3d at 1316–17. And those rulings have created ambiguity about those circuits' Title VII jurisprudence. Pet. 16–19. Clarity and uniformity is needed.

If review is granted in *Zarda* or *Bostock*, this case should be heard too. The sexual-orientation issue there and the gender-identity question here—though different—are sufficiently related that the Court would benefit from addressing them together. A key unifying factor is that both issues turn in large measure on *Price Waterhouse*. Compare Pet. App. 13a–31a (discussing *Price Waterhouse* in the gender-identity context), with *Bostock* v. *Clayton Cty. Bd. of Comm'rs*, 723 F. App'x 964, 965 (11th Cir. 2018) (per curiam) (noting that *Price Waterhouse* did not support "a cause of action for sexual orientation discrimination"). Moreover, as the EEOC notes, the Sixth Circuit relied in its opinion on the two recent en-banc decisions analyzing the sexual-orientation question. Fed. BIO 14. In fact, both of the Sixth Circuit's reasons for concluding that gender-identity discrimination equals sex discrimination "parallel rationales that were relied upon" in those en-banc rulings. *Id.* at 14-15. Judicial economy would result from hearing the cases together.

Should the Court grant review in *Zarda* or *Bostock* and decline to take up this case, this petition should at least be held, as the EEOC requests. Fed. BIO 25. This Court's decision in either *Zarda* or *Bostock*, as the EEOC persuasively explains, "may bear on the proper analysis of the issues petitioner raises" here. *Id.* at 11. But because the sexual-orientation analysis is ultimately different from the gender-identity analysis, Pet. 35, a grant in this case would be most appropriate.

Stephens argues against even holding this case because neither *Zarda* nor *Bostock* rested on "a separate claim of sex discrimination based on sex stereotypes" under *Price Waterhouse*. Stephens BIO 30-31 n.13. But *Zarda* did base its decision on "gender stereotyping" principles, 883 F.3d at 119–23, as did the judges in *Bostock* who dissented from the denial of en-banc review, *Bostock* v. *Clayton Cty. Bd. of Comm'rs*, 894 F.3d 1335, 1339 (11th Cir. 2018) (Rosenbaum, J., dissenting from denial of rehearing en banc). Therefore, review in one of those cases would almost certainly consider the proper scope of sex stereotyping under *Price Waterhouse* and thus inform both of the questions presented here.

CONCLUSION

For the foregoing reasons, and those stated in the petition, review should be granted.

Respectfully submitted,

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November 2018

APPENDIX

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EXCERPT FROM EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) COMPLIANCE MANUAL SECTION 619 GROOMING STANDARDS

619.4 Uniforms and Other Dress Codes in Charges Based on Sex

(d) Dress Codes Which Do Not Require Uniforms - There may also be instances in which an employer's dress code requires certain modes of dress and appearance but does not require uniforms. For example, the dress code may require male employees to wear neckties at all times and female employees to wear skirts or dresses at all times. So long as these requirements are suitable and are equally enforced and so long as the requirements are equivalent for men and women with respect to the standard or burden that they impose, there is no violation of Title VII.

Example - R requires its male employees to wear neckties at all times. It also requires its female employees to wear dresses or skirts at all times. CP (female) was temporarily suspended when she wore pants to work. She files a charge alleging that the dress code requirement and its enforcement discriminate against her due to her sex. The investigation reveals that one male who had worn a leisure suit with an open collar shirt had also been suspended. There is no evidence of other employees violating the dress code. R also states that it requires this mode of dress for each sex because it wants to promote its image. The investigation has revealed

that the dress code is enforced equally against both sexes and that it does not impose a greater burden or different standard on the employees on the basis of sex. Therefore, there is not reasonable cause to believe that either R's dress code or its enforcement discriminates against CP because of her sex.

Example - R prohibits the wearing of shorts by women who work on the production line and prohibits the wearing of tank tops by men who work on the production line. This is an equivalent standard.

EXCERPT FROM CORRECTED BRIEF OF INTERVENOR AIMEE STEPHENS FILED WITH THE SIXTH CIRCUIT COURT OF APPEALS

Case No. 16-2424
United States Court of Appeals for the Sixth Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

and

AIMEE STEPHENS,
Intervenor,

v.

R.G. & G.R. HARRIS FUNERAL HOME, Inc.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan

BRIEF OF INTERVENOR AIMEE STEPHENS

* * * * * *

SUMMARY OF ARGUMENT

Title VII covers the full range of gender-based discrimination, including discrimination against persons because they are transgender or undergoing a gender transition. Discrimination against transgender people because they are transgender is founded on sex-based characteristics and motivated by gender-based stereotypes. The district court, therefore, erred by failing to recognize that the EEOC's allegations in its complaint that the Funeral Home discriminated against Aimee Stephens because she is transgender and was moving forward with her gender transition stated a claim for sex discrimination under Title VII. The district court further erred by narrowing the EEOC's case to a challenge to the Funeral Home's decision to fire her because she intended to follow the portion of her employer's dress code applicable to women. Doing so was one source of the district court's flawed RFRA analysis and its erroneous grant of summary judgment on grounds that eliminating the dress code entirely was a less restrictive alternative that would have satisfied the government's narrowly-defined interest in enforcing Title VII.

In addition, the district court erred in concluding that RFRA exempted the Funeral Home from all liability under Title VII for its discriminatory firing of Aimee Stephens. Its conclusion was based in part on a cramped reading of the government's interests in overcoming the detrimental impacts of employment discrimination, which are particularly acute for

transgender persons, and a flawed analysis of government's burden of showing that there is no less restrictive means of achieving its interests.

ARGUMENT

Dismissal of the EEOC's complaint is reviewed by this Court de novo *Scott v. Ambani*, 577 F.3d 642, 646 (6th Cir. 2009); a grant of summary judgment is similarly reviewed de novo. *Id.*

I. The Funeral Home's Termination of Ms. Stephens Because She Is Transgender and Because of her Gender Transition Is Sex Discrimination.

Title VII's prohibition on discrimination "because of … sex," 42 U.S.C. § 2000e-2(a)(1), means that "gender must be irrelevant to employment decisions." *Price Waterhouse*, 490 U.S. at 240. Aimee Stephens' transgender status is by its very nature a sex-based characteristic, since what makes her transgender is the mismatch between her gender identity (her core internal sense of her gender) and the sex designation assigned to her at birth. *See* Am. Psychological Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 832, 862-63 (Dec. 2015), https://www.apa.org/practice/guidelines/transgender.pdf.[3] The EEOC's allegations that the Funeral Home discriminated against Ms. Stephens "because of … sex," when it fired her because she "is transgender" and "because of [her] transition from male to female,"

[3] In addition to Ms. Stephens' argument in Section I, she adopts the EEOC's argument in Section A at pp. 20-32 of its brief.

Complaint, R.1, PageID#4-5 (¶15), therefore stated a claim that should not have been dismissed.

In partially granting the Funeral Home's motion to dismiss, the district court erred in holding that transgender status is not protected by Title VII and in thereby limiting the EEOC's case to a claim that the Funeral Home discriminated by enforcing sex stereotypes. Motion to Dismiss Opinion, R.13, PageID#188-95. In its summary judgment ruling, the district court further narrowed the EEOC's case by construing its sex stereotyping claim narrowly to address solely the Funeral Home's enforcement of its gendered dress code against Ms. Stephens and firing her because of her intention to dress according to the women's dress code. Summary Judgment Opinion, R.76, PageID#2217-19. This improper narrowing of the EEOC's case, as solely about her "fail[ure] to conform to the 'masculine gender stereotypes that Rost expected'" in terms of the clothing Ms. Stephens would wear to work, *id.* at PageID#2218, directly contributed to the district court's erroneous conclusion at the summary-judgment stage that the EEOC had failed to meet its burden under RFRA; the court's analysis was premised on the idea that the EEOC had available to it a less restrictive alternative of simply suggesting that the Funeral Home jettison its gendered dress code entirely. *See id.* at PageID#2219-21. The district court's reframing of the EEOCs case around the Funeral Home's gendered dress code ignores the full reach of Title VII as well as the facts of the case.

Gender stereotyping, which is a form of sex discrimination made unlawful in employment by Title VII, broadly comprises discrimination against a

person who "fails to act and/or identify with his or her gender." *Smith*, 378 F.3d at 575. By definition, transgender persons are such persons. *Id.; see also Dodds v. U. S. Dep't of Educ.*, 845 F.3d 217, 321 (6th Cir. 2016) (recognizing that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes" (quoting *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011)); *Barnes v. City of Cincinnati*, 401 F.3d 729, 738 (6th Cir. 2005) (affirming Title VII judgment for transgender woman who was denied promotion because of the perception that she was a man with an "ambiguous sexuality" whose behavior was "not sufficiently masculine" and included "dressing as a woman outside of work"). Therefore, when an employer terminates an employee because the employee is transgender, or because the employee is transitioning, the employer is discriminating on the basis of sex.

The reasoning of the district court in a recent case involving a surgeon who was denied a position after disclosing that she is transgender and intended to begin work as a woman is instructive. The court reasoned that "[d]iscrimination 'because of sex'" includes the full range of "discrimination because of the *properties or characteristics* by which individuals may be classified as male or female." *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 526 (D. Conn. 2016) (emphasis in the original). As such, discrimination against "transgender people because they are transgender people . . . is quite literally discrimination 'because of sex.'" *Id.* at 525; *see also Rumble v. Fairview Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2015 WL 1197415, at *2, 9-18 (D. Minn.

Mar. 16, 2015) (recognizing that "discrimination based on an individual's transgender status constitutes discrimination based on gender stereotyping"); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008) (sex discrimination includes adverse treatment because of a person's gender transition).

Here, the evidence amply shows that Ms. Stephens was fired because of who she is—a transgender woman who intended to begin presenting in every way as a woman in the work place. Her statement that she intended to follow the women's, rather than the men's, dress code, was simply one aspect of how she would express her female identity. Rost fired Ms. Stephens because she "was no longer going to represent [her]self as a man," *including* through her decision to "dress as a woman" and "no longer dress as a man." Rost. 30(b)(6) Depo. 135-37, R.54-5, PageID#1372. Rost defended his firing of Ms. Stephens based on his religious belief that "a person's sex is an immutable God-given gift and that people should not deny or attempt to change their sex," Rost Aff., R.54-2, PageID#1334 (¶42). According to Rost, he "would be violating God's commands if [he] were to permit" employees to "deny their sex while acting as a representative of [the Funeral Home]," *id.* at PageID#1334 (¶43), *such as* by employing someone who "dress[ed] inconsistent with his or her biological sex." *Id.* at PageID#1334 (¶48).

This is not to deny that, standing alone, discrimination against employees because of sex-based stereotypes regarding their attire runs afoul of Title VII. After *Price Waterhouse*, courts have repeatedly recognized that an employer's disparate

treatment of an employee because her clothing fails to comport with the employer's sex-based stereotypes qualifies as illegal sex discrimination. *See, e.g., Smith*, 378 F.3d at 574 (discrimination against employees perceived as men "because they *do* wear dresses and makeup . . . are . . . engaging in sex discrimination"); *Schroer*, 577 F. Supp. 2d at 305 (transgender woman denied job at the Library of Congress because she was perceived as "a man in women's clothing," or would be perceived as such by Members of Congress and their staff subjected to sex discrimination); *Dawson v. H&H Elec., Inc.*, No. 4:14CV00583 SWW, 2015 WL 5437101, at *4 (E.D. Ark. Sept. 15, 2015) (finding that there was "ample evidence from which a reasonable juror could find that [a transgender employee] was terminated because of her sex," where employer "repeatedly forbade" her to "wear feminine clothes at work" and terminated her employment "soon after she disobeyed [her employer's] orders and began wearing makeup and feminine attire at work"). The Funeral Home's claim that it fired Ms. Stephens because she failed to comply with the dress code "based on the biological sex of its employees," Summary Judgment Memo., R.54, PageID#1304, does not change the analysis. It is simply another way of saying that the Funeral Home perceived Ms. Stephens to be male and fired her because of sex-based stereotypes about how men should dress.[4] The district court therefore was

[4] While it is unnecessary for this Court to resolve this question, it bears pointing out that the Funeral Home's assertion that Ms. Stephens is "biologically" male is inaccurate—research indicates that gender identity itself has a biological component. *See* M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 Vt. L. Rev. 943, 944 (2015) (summarizing research).

correct to reject the Funeral Home's so-called "biological" dress code defense. Opinion, R.76, PageID#2199-204.

However, viewing the EEOC's claim as *limited* to sex-stereotyping in the enforcement of a dress code was incorrect. Ms. Stephens was in violation of the dress code, only if one accepts Rost's refusal to respect her identity as female since she was assigned the male sex at birth. Focusing on the sex-based characteristics of Ms. Stephens' female gender identity and male birth-assigned sex shows that she was subjected to discrimination on the basis of her sex. In an 8-3 en banc ruling just days ago, the Seventh Circuit analyzed a similar question in deciding whether a lesbian's claim of sexual orientation discrimination made out a case of sex discrimination. *See Hively v. Ivy Tech Community College of Indiana*, __ F.3d __, No. 15-1720, 2017 WL 1230393 (7th Cir. Apr. 4, 2017) (en banc). The *Hively* court recognized that discrimination against a lesbian is "paradigmatic sex discrimination" because it penalizes her for being a woman married to a woman, whereas a "man married to a woman," would have been treated differently. *Id.* at *5. In the same way, if Aimee Stephens had a female gender identity *and* had been assigned the female (rather than the male) sex at birth, the Funeral Home would not have fired her for non-compliance with its dress code. Isolating the sex-based characteristic of sex assigned at birth, while leaving everything else the same, shows that the Funeral Home's decision to fire Aimee Stephens for noncompliance with its dress code is sex discrimination because of her transgender status and transition.

Discrimination against transgender people, because of their identity, presentation, and gender transition, is sex discrimination, both because it is motivated by a transgender person's sex-based characteristics and because it is based on gender stereotypes. In this case, the district court improperly held that the EEOC's complaint only stated a claim for sex discrimination for the Funeral Home's refusal to allow Ms. Stephens to dress according to the dress code applicable to women, while rejecting the EEOC's claim that the Funeral Home's termination of Ms. Stephens because she was transgender and transitioning was also sex discrimination. This Court should reverse that ruling.

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