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 and AIMEE STEPHENS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT AIMEE STEPHENS

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QUESTION PRESENTED

Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

PARTIES TO THE PROCEEDING

The following were parties to the proceedings in the United States Court of Appeals for the Sixth Circuit:

Petitioner R.G. &. G.R. Harris Funeral Homes, Inc., which is a closely held, for-profit corporation.

Respondent United States Equal Employment Opportunity Commission.

Respondent Aimee Stephens, who is an individual and citizen of Michigan.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

OPENING BRIEF FOR RESPONDENT

Respondent Aimee Stephens respectfully requests that this Court affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a–81a) is published at 884 F.3d 560. The opinion of the United States District Court for the Eastern District of Michigan denying the EEOC's Motion for Summary Judgment and granting in part and denying in part Petitioner's Motion for Summary Judgment (Pet. App. 82a–161a) is published at 201 F. Supp. 3d 837. The opinion of the district court denying Petitioner's Motion to Dismiss (Pet. App. 162a–187a) is published at 100 F. Supp. 3d 594.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2018. Petitioner filed a Petition for Writ of Certiorari on July 20, 2018, which the Court granted on April 22, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 703 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2, provides in pertinent part:

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or 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 . . . .

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer . . . [to] employ any individual . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

INTRODUCTION

Aimee Stephens was a valued employee at Petitioner R.G. & G.R. Harris Funeral Homes, Inc. ("Harris Homes") for six years. She was compassionate, skilled, and well-regarded by management, customers, and fellow employees. But when she informed Harris Homes that she is transgender and would begin living openly as a woman, it fired her. When Harris Homes fired Ms. Stephens for being transgender, it denied her one of the central promises of Title VII: that she would be judged as an employee based on her individual merit, not her sex.

Title VII prohibits discharging an individual employee "because of such individual's . . . sex." This Court has made clear that a firing is "because of sex" where "the evidence shows treatment of a person in a manner which but for that person's sex would be different." *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (internal quotation marks omitted).[1]

Even if Title VII's reference to "sex" encompasses only one's sex assigned at birth, as Harris Homes asserts, the decision to fire Ms. Stephens was "because of sex." Had Ms. Stephens been assigned a female rather than a male sex at birth, Harris Homes would not have fired her for living openly as a woman. Because Harris Homes would have treated Ms. Stephens differently had her assigned sex at birth been different, its decision to fire Ms. Stephens violated Title VII.

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[1] Respondent uses "because of sex" rather than "because of . . . sex" when quoting 42 U.S.C. § 2000e-2(a)(1).

Harris Homes also fired Ms. Stephens for failing to conform to its owner's views of how men and women should identify, look, and act. This Court has long recognized that discharging an employee because of the employer's sex-based stereotypes violates Title VII. There is no basis for excluding transgender people from that protection, and any attempt to do so would undermine Title VII's protections for all workers.

The unambiguous text of Title VII prohibited Harris Homes from firing Ms. Stephens because of her sex. It is irrelevant whether the Congress that enacted Title VII contemplated its application to transgender employees. Statutes must be interpreted based on their text rather than on an assessment of their originally anticipated applications. Any exception to Title VII permitting sex discrimination against transgender employees would have to come from Congress, not this Court.

Under Title VII, sex "must be irrelevant to employment decisions." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (plurality). When Harris Homes fired Aimee Stephens, it violated that basic premise by evaluating her based on sex and not her unquestioned ability to do her job.

STATEMENT OF THE CASE

A. Factual Background

Respondent Aimee Stephens is a woman who is transgender, which means that she was assigned a male sex at birth and has a female gender identity.[2]

[2] The case was decided by the district court on cross-motions for summary judgment. Unless otherwise noted, the Statement of the Case reflects the undisputed facts, with all reasonable

J.A. 88, 180–81. "Sex assigned at birth" refers to the sex an infant is presumed to be at birth, usually based on external reproductive anatomy.[3] Everyone has a gender identity, which is "one's internal, deeply held sense of gender."[4] Most people, whether transgender or not, become aware of their gender identity in early childhood. *Id.* at 3874–76. Ms. Stephens recalls knowing she was a girl when she was five years old. Resp. App. 1a. Although most people have a gender identity that matches their sex assigned at birth, this is not true for the at least 1.55 million transgender people who live in the United States today. *See Amici Curiae* Br. of Scholars Who Study Transgender Population in Support of Respondent Aimee Stephens, (Background).

Ms. Stephens worked in the funeral industry over the course of nearly thirty years. Resp. App. 34a. In October of 2007, she began working for Harris Homes as a licensed funeral director and embalmer. Pet. App. 93a–94a. At first, Ms. Stephens

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inferences drawn in Harris Homes's favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). But to the extent that Harris Homes asks the Court to reverse the judgment below and enter summary judgment in its favor, the facts must be construed in a light most favorable to Ms. Stephens. *See id.* ("[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.") (alterations in original) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

[3] Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. Clinical Endocrinology & Metabolism 3869, 3875 (2017) (hereinafter "Endocrine Society Guidelines").

[4] *Id.* at 3875.

conformed her dress and appearance to her sex assigned at birth. She wore typically male clothing, J.A. 101, and used a typically male name, J.A. 87. She was perceived as male, *see* Resp. App. 12a, but "felt imprisoned in a body that d[id] not match [her] mind." Resp. App. 1a.

Throughout her employment at Harris Homes, Ms. Stephens did exemplary work. It is undisputed that she was not fired for any performance-related reason. Pet. App. 100a. Thomas Rost, the owner of Harris Homes, testified that Ms. Stephens was "able to perform the jobs of a funeral director and embalmer," J.A. 40, and "showed sensitivity and compassion to the clients who came in," J.A. 41. In dealing with families, "Stephens had been solicitous of their feelings" and had "been courteous and compassionate." J.A. 35. She was an "incredible embalmer." J.A. 171; *see also* Resp. App. 72a. "[F]amilies seemed very pleased" with her work. Resp. App. 72a.

Two years after she began working for Harris Homes, Ms. Stephens began treatment with a therapist to address the despair, loneliness, and shame she suffered because of the difference between the sex she understood herself to be and the sex she was assigned at birth. Resp. App. 1a. For Ms. Stephens, like many transgender people, the disparity between her gender identity and the sex she was assigned at birth led to clinically significant distress known as gender dysphoria. Resp. App. 1a–2a; Endocrine Society Guidelines at 3875. The prevailing clinical standards for the treatment of

gender dysphoria [5] recommend that patients take steps to live consistently with their gender identity to alleviate the anguish they experience. WPATH Standards of Care at 9–10. This process, known as gender transition, can include medical and surgical treatment as well as changes to clothing, hair, grooming, name, sex designation on identity documents, and the sex one describes oneself to be when interacting with others. *Id.* Medical standards generally recommend living openly in accordance with one's gender identity for a year before undergoing certain surgical treatment. *Id.* at 59–61.

Following these standards, Ms. Stephens's treating clinicians recommended that she begin living her life consistently with her gender identity for a year before undergoing surgery. Resp. App. 2a. After four years of professional counseling, and with the support of her wife Donna, Ms. Stephens decided she could no longer delay her transition. Resp. App. 1a–2a, 84a.

Ms. Stephens carefully drafted a letter to her "Friends and Co-Workers" explaining that she was a transgender woman. Resp. App. 1a; J.A. 91. She described the challenges she had faced in accepting herself as a woman and outlined her prescribed treatment, which included living openly as a woman. Resp. App. 1a. On July 31, 2013, she provided that

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[5] Eli Coleman et al., World Prof'l Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (7th ed. 2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf (hereinafter "WPATH Standards of Care").

letter to Mr. Rost. Pet. App. 94a–95a. In it, she explained:

> I have known many of you for some time now, and I count you all as my friends. What I must tell you is very difficult for me and is taking all the courage I can muster. . . . I have a gender identity disorder that I have struggled with my entire life. I have managed to hide it very well all these years. . . . With the support of my loving wife, I have decided to become the person that my mind already is. . . . Toward that end, I intend to have sex reassignment surgery. The first step I must take is to live and work full-time as a woman for one year. At the end of my vacation on August 26, 2013, I will return to work as my true self, Amiee Australia Stephens, in appropriate business attire.
>
> I realize that some of you may have trouble understanding this. In truth, I have had to live with it every day of my life and even I do not fully understand it myself. . . . As distressing as this is sure to be to my friends and some of my family, I need to do this for myself and for my own peace of mind and to end the agony in my soul. . . . It is my wish that I can continue to work at R.G. & G.R. Harris Funeral Home doing what I have always done, which is my best!

Resp. App. 1a–2a.

On August 15, 2013, two weeks after receiving Ms. Stephens's letter, Mr. Rost told her that her "services would no longer be needed." Pet. App. 95a–96a. When asked "the specific reason that [he] terminated" Ms. Stephens, Mr. Rost responded, "because he . . . was no longer going to represent himself as a man. He wanted to dress as a woman." Pet. App. 109a.[6] Mr. Rost also objected to Ms. Stephens's use of the name "Aimee" "because he's a man." Resp. App. 61a. He further explained his view that one "should not deny or attempt to change their sex" and that it is "wrong for a biological male to deny his sex by dressing as a woman or for a biological female to deny her sex by dressing as a man." J.A. 131.

Ms. Stephens made clear that when she returned from her vacation and began to live fully and openly as Aimee, she would continue to wear "appropriate business attire." Resp. App. 2a; J.A. 116. Mr. Rost testified that Harris Homes would have required a female funeral director to wear a skirt suit instead of a pants suit. J.A. 75, 133. While Mr. Rost had never seen Ms. Stephens dressed in a skirt suit or outwardly expressing herself in other typically feminine ways, he stated that "I've yet to see a man dressed up as a woman that I didn't know was not a man dressed up as a woman" and therefore

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[6] Mr. Rost consistently referred to Ms. Stephens as "he" and "a man," refusing to address her with feminine pronouns, consistent with his view that a "biological male" should not adopt typically feminine names or other signifiers. J.A. 129–134; Pet. App. 109a. In this brief, Ms. Stephens quotes Mr. Rost's actual words, but notes that as a matter of accuracy and respect, Ms. Stephens is properly referred to as "she" and "a woman."

"there is no way that" Ms. Stephens "would be able to present in such a way that it would not be obvious that it was [a man]." J.A. 31. He said that families who patronized his business "don't need some type of a distraction" and Ms. Stephens's "continued employment would negate that." J.A. 30. Mr. Rost testified that even if Ms. Stephens adhered to the dress code for men at work, if a customer saw her dressed in a feminine way outside of work and complained, he "probably would have" considered that a factor in how to address her "situation." J.A. 78–79. When asked whether he would have fired her for that reason, he responded, "Perhaps, yes."[7] *Id.*

In his deposition, Mr. Rost speculated that women might not feel comfortable in a restroom with Ms. Stephens. J.A. 57. However, he conceded that any concern about restroom use was "hypothetical" and that at no point did he discuss restroom use with Ms. Stephens or anyone else before he made his decision to fire her. J.A. 37. He made clear he would have fired Ms. Stephens regardless of any concerns about restrooms because she was no longer going to "represent himself as a man." Pet. App. 109a–110a.

Harris Homes currently includes three funeral home locations and a cremation business. J.A. 122–23. The company maintains a sex-specific dress code that requires women to wear skirts instead of pants, even though its owner is aware that female funeral

[7] While Mr. Rost contradicted the statement he made during his deposition testimony in a subsequent affidavit, "[a] party may not create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts her earlier deposition testimony." *Reid v. Sears, Roebuck & Co*., 790 F.2d 453, 460 (6th Cir. 1986).

directors wear pants suits at other funeral homes. J.A. 78. Mr. Rost, however, requires women to wear skirts because he believes that "a male should look like a . . . man, and a woman should look like a woman." Resp. App. 62a–63a.

Harris Homes purchased suits for male funeral directors to wear to work, but required women to pay out of pocket for their work clothing. J.A. 14. Asked to explain this discrepancy, Mr. Rost replied, "women are a strange breed." Resp. App. 11a. After Ms. Stephens filed a charge of discrimination with the EEOC in this case, Mr. Rost began providing a stipend for clothing to women, although the stipend was significantly less than the value of the clothes he provided to men. Pet. App. 7a–8a.

In the thirty-five years Harris Homes has been owned by Mr. Rost, the company hired only funeral directors it believed to be men. J.A. 122, 133. Although Harris Homes has operated as many as six locations at once, the company has not employed anyone it understood to be a woman as a funeral director at any location since Mr. Rost's grandmother stopped working in 1950. J.A. 122–23, 133. With respect to the staff generally, Mr. Rost distinguished between his "key people" and his "lady attendents [sic]." Resp. App. 7a.

B. Proceedings Below

Ms. Stephens filed a charge of discrimination with the EEOC soon after she was fired. Resp. App. 4a–6a. On September 25, 2014, the EEOC filed a complaint against Harris Homes, alleging that it violated Title VII by firing Ms. Stephens because she is transgender, because of her "transition from male

to female, and/or because [she] did not conform to [Harris Homes's] sex- or gender-based preferences, expectations, or stereotypes." Pet. App. 164a, 166a. The EEOC's complaint also alleged discrimination in compensation because of Harris Homes's policy of paying for men's work clothing but not women's. *Id.* at 167a.

Harris Homes moved to dismiss, arguing that Title VII does not protect transgender people from discrimination. Pet. App. 170a. The district court rejected one of the EEOC's sex discrimination theories—that anti-transgender discrimination is inherently a form of sex discrimination—holding that "transgender . . . status is currently not a protected class under Title VII." Pet. App. 172a. But the district court held that the EEOC had stated a claim that Ms. Stephens was fired in violation of Title VII because Harris Homes fired her based on its objections that her appearance and behavior departed from its sex stereotypes. Pet. App. 173a–184a. The district court reasoned that "any person—without regard to labels such as transgender—can assert a sex-stereotyping gender-discrimination claim under Title VII . . . if that person's failure to conform to sex stereotypes was the driving force behind the termination." Pet. App. 164a.

Following discovery, both the EEOC and Harris Homes moved for summary judgment. Pet. App. 83a–84a. The district court held that Mr. Rost's testimony that he fired Ms. Stephens because "he was no longer going to represent himself as a man," and would "dress as a woman" constituted "direct evidence to support a claim of employment discrimination." Pet. App. 109a–110a. But the district court concluded that the Religious Freedom

Restoration Act ("RFRA") provided Harris Homes an "exemption from Title VII . . . under the facts and circumstances of this unique case," and therefore granted summary judgment to Harris Homes. Pet. App. 142a. The district court also dismissed without prejudice the discriminatory compensation claim related to clothing, holding that Harris Homes could not reasonably expect that claim to arise from the charge Ms. Stephens filed. Pet. App. 160a.

The EEOC appealed. Pet. App. 12a. Ms. Stephens, who had not been a party before the district court, filed a motion to intervene on appeal because of her concerns about whether the EEOC would be able to continue fully representing her interests as the case progressed. *Id.* The Sixth Circuit granted that motion, and she participated in briefing and argument of the case on appeal. Pet. App. 12a–13a.

A panel of the Sixth Circuit unanimously reversed. Pet. App. 80a–81a. It ruled for Ms. Stephens and the EEOC on two independent sex discrimination theories. First, it agreed with the district court that Harris Homes violated Title VII by firing Ms. Stephens because she did not conform to Mr. Rost's sex stereotypes about how men and women should appear and behave. Pet. App. 15a–22a. Relying on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the court "found no reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual." Pet. App. 16a (internal quotation marks omitted).

Second, the Sixth Circuit separately held that discrimination because Ms. Stephens is transgender is inherently a form of sex discrimination that

violates Title VII. Pet. App. 22a–36a. The court reasoned that "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." Pet. App. 23a. As part of this holding, the court also concluded that "Rost at least partially based his employment decision on Stephens's desire to change her sex." Pet. App. 25a. Noting that it is "immaterial" whether it is actually possible to change one's sex, the court held that "[g]ender (or sex) is not being treated as 'irrelevant to employment decisions' if an employee's attempt or desire to change his or her sex leads to an adverse employment decision." Pet. App. 26a (quoting *Price Waterhouse*, 490 U.S. at 240).

The Sixth Circuit rejected Harris Homes's argument that its purported reliance on a sex-specific dress code provided a defense to liability under Title VII. The court held that Harris Homes fired Ms. Stephens for her sex-related identity, appearance and behavior well beyond the dress code, and further concluded that Harris Homes could "not rely on its [dress code] policy to combat the charge that it engaged in improper sex stereotyping when it fired Stephens for wishing to appear or behave in a manner that contradicts [Harris Homes's] perception of how she should appear or behave based on her sex." Pet. App. 21a–22a. Finally, the Sixth Circuit rejected Harris Homes's RFRA defense to Title VII liability and reversed the district court's ruling on the compensation claim. Pet. App. 36a–73a.

Harris Homes petitioned this Court for certiorari, seeking review only of the question whether Harris Homes had discriminated against Ms. Stephens in violation of Title VII. Harris Homes

did not seek review of the Sixth Circuit's rejection of its RFRA defense. In response to the petition, the United States, representing the EEOC, filed a brief that opposed certiorari while objecting to the reasoning and outcome of the Sixth Circuit's ruling that the EEOC had secured.

After granting certiorari, the Court directed that Ms. Stephens comply with the briefing rules for petitioners, and that Harris Homes comply with the briefing rules for respondents. *See* Order, May 13, 2019. Despite the fact that the EEOC initially brought this case against Harris Homes for firing Ms. Stephens because of her sex, the United States is supporting Harris Homes, and is therefore complying with the briefing rules for respondents.

SUMMARY OF ARGUMENT

I. Title VII was designed to make "sex" and other protected characteristics irrelevant to employment decisions, ensuring that individuals are judged on their own merits, not their sex. It prohibits firing "any individual because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). A discharge is "because of sex" where but for the employee's sex, the employee would not have been fired. Sex need not be the sole cause, as long as it is a cause, for the decision.

Sex was a but-for cause of Ms. Stephens's firing, even assuming arguendo the narrow definition of "sex" offered by Harris Homes and the United States. Ms. Stephens satisfies the "simple test" for discrimination laid out by this Court in *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978), for three related reasons. First, she has shown that Harris Homes would not have fired her

for living openly as a woman if she had been assigned a female sex at birth. Second, Harris Homes's owner, Thomas Rost, repeatedly explained that he fired Ms. Stephens because, in his view, she "was a man." If he had viewed her as a woman, he would not have fired her. And third, just as firing an employee for intending to change her religion is religious discrimination, so Mr. Rost's objection to Ms. Stephens "attempting to change" her sex is sex discrimination. Accordingly, even assuming arguendo that gender identity is not encompassed within the term "sex" in Title VII, and that Ms. Stephens's female gender identity was an additional but-for cause of her firing, her male assigned sex at birth was a but-for cause of her discharge and that is sufficient to establish liability under Title VII.

II. Harris Homes also violated Title VII by firing Ms. Stephens for failing to conform to its sex-based stereotypes about how men and women should identify, appear, and behave.

In the same way that Ann Hopkins was denied partnership because she did not comply with Price Waterhouse's sex stereotypes about how women should walk, talk, dress, and groom, so too was Ms. Stephens fired for failing to fulfill Harris Homes's stereotypes about how men and women should appear and behave. Harris Homes insisted that any "male" employee "should look like a man," and any "female" employee "should look like a woman." Had Harris Homes fired a non-transgender woman for looking, in his view, too much like a man, it would have violated Title VII. Firing a transgender woman for looking, according to her employer, too masculine for a woman and too feminine for a man is no less prohibited.

More broadly, discrimination against someone because they are transgender necessarily enforces a sex-based stereotype: that someone assigned a particular sex at birth will identify, look, and act in ways conventionally associated with that sex for the rest of their lives. While that generalization may hold true for many people, it is false for all transgender people. Firing workers because they are transgender is always based on their departure from this sex-based stereotype and therefore inherently violates Title VII's ban on sex discrimination.

Allowing discrimination against transgender persons for failing to comport with sex stereotypes, but disallowing such discrimination against non-transgender individuals, would not only be unjustified by the statute's text, but would require impossible line-drawing by lower courts. It would risk undermining Title VII's longstanding prohibition on discrimination based on sex stereotypes.

III. Harris Homes and the United States effectively ask this Court to write an exclusion into Title VII to deny transgender people the protection from sex discrimination that the statute provides to *all* employees. The text and structure of Title VII preclude such an exclusion, and speculation that in 1964 Congress would not have anticipated the application of Title VII to transgender workers affords no basis for failing to enforce the plain terms of the statute.

The text of Title VII unambiguously bars discrimination against any "individual" because of such individual's sex, and an employer may not avoid liability under the statute for discrimination against a transgender woman by claiming that it also would

have discriminated against a transgender man. Ms. Stephens has shown that she has suffered disparate treatment as an individual because of her sex.

The fact that Title VII recognizes an exception to its ban on sex discrimination—where sex is a bona fide occupational qualification (BFOQ)—reinforces the impropriety of carving out transgender employees as a class from Title VII. Congress considered whether and what sort of exceptions to craft from the ban on disparate treatment, but did not exclude transgender employees, or indeed any other group of people, from the statute's protections. Harris Homes has never raised a BFOQ defense here, and speculation about customer preference provides no justification for Ms. Stephens's firing.

The meaning of a statute is determined by its text, not by the applications that were specifically anticipated at the time it was passed. This Court has repeatedly found violations of Title VII in circumstances that neither Congress nor the general public would likely have anticipated at the time the law was passed.

Neither Congress's passage of unrelated bills subsequent to the passage of Title VII, nor its failure to pass bills related to the scope of federal civil rights protections, provide any justification for excluding transgender people from Title VII's prohibition on discrimination because of sex. Moreover, even if congressional action or inaction provided a basis for limiting the meaning of sex to the definitions proposed by Harris Homes and the United States, Ms. Stephens's firing would still violate Title VII, as demonstrated in Points I and II.

IV. Harris Homes and the United States have claimed that this case requires the Court to assess the general lawfulness of sex-specific policies, such as dress codes, and the application of such policies to transgender employees. But it does not. As the Sixth Circuit properly held, Harris Homes did not fire Ms. Stephens solely for an anticipated violation of the dress code, but because she is transgender and her name, identification, appearance, and behavior failed to comply with the company's stereotypes regarding how men and women should identify, appear, and behave.

Accordingly, resolution of the question presented here—whether Ms. Stephens's firing was "because of sex"—does not require this Court to assess the validity or application of sex-specific policies. The only question here is whether Ms. Stephens's discharge was "because of sex." There is no dispute that if it is, her discharge is prohibited by Title VII. By contrast, sex-specific dress codes and restrooms present a distinct question. Such policies are indisputably sex-based. The question in cases challenging the lawfulness or application of sex-specific policies is whether such policies "discriminate" in the "terms [or] conditions" of an individual's employment—a question not presented here.

ARGUMENT

I. WHEN HARRIS HOMES FIRED MS. STEPHENS BECAUSE SHE IS TRANSGENDER, IT DID SO BECAUSE OF HER SEX IN VIOLATION OF TITLE VII.

"In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees." *Price Waterhouse*, 490 U.S. at 240. Congress created this statutory framework to ensure that employers evaluate employees as individuals irrespective of sex. Accordingly, Title VII makes it unlawful to fire "any individual because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). The "simple test" for sex discrimination under Title VII is "whether the evidence shows treatment of a person in a manner which but for that person's sex would be different." *Manhart*, 435 U.S. at 711 (internal quotation marks omitted). "Sex" need not be the sole cause of the disparate treatment, so long as it is a cause.

Even if an individual's "sex" for purposes of Title VII is limited to one's sex assigned at birth, as Harris Homes claims, Ms. Stephens was fired because of her sex in violation of the statute. Harris Homes fired her for (1) having a male sex assigned at birth and (2) living openly as a woman. Because it would not have fired Ms. Stephens for identifying and living openly as a woman if she were assigned a female sex at birth, she has met *Manhart*'s "simple test." And because the statute requires only that sex be a cause, rather than the sole cause, of an adverse action, the Court need not decide whether "gender identity" is part of "sex" for purposes of Title VII.

No one disputes that "sex" under Title VII includes a person's birth-assigned sex. And because Ms. Stephens's male sex assigned at birth was a but-for cause of her discharge, the court of appeals was correct to hold that she prevails under Title VII.

A. When Sex Is a But-For Cause of an Adverse Employment Decision, the Decision Violates Title VII.

Title VII prohibits employers from making adverse employment decisions "because of" sex. 42 U.S.C. § 2000e-2(a)(1). Any time the same decision would not have been made had the employee's sex been different, an employer discriminates "because of sex." *See Manhart*, 435 U.S. at 711. This Court has explained that "'because of' appears frequently in antidiscrimination law" and generally requires "but-for causation." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015); *see also Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013) ("because of" signals but-for causation for Title VII's anti-retaliation prohibition); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176-78 (2009) ("because of" signals but-for causation in the Age Discrimination in Employment Act). Title VII also creates liability where sex is a "motivating factor" behind the employment decision, even if sex is not a but-for cause. 42 U.S.C. § 2000e-2(m). But in such cases, an employee's relief may be limited if the employer can show that it would have made the same decision anyway.[8] By contrast, an employee who satisfies the

[8] As amended in 1991, if an employee shows that a protected characteristic was a motivating factor in an employment decision, Title VII affords the employer the opportunity to show that it would have made the same decision absent consideration of the protected characteristic, *i.e.*, that even though an

"simple test" of but-for causation is entitled to the full range of remedies. 42 U.S.C. § 2000e-5(g)(2).

Under either causation standard, sex need not be the sole cause of an adverse employment decision to trigger liability under Title VII. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam); 42 U.S.C. § 2000e-2(m) (prohibiting employment practices where sex "was a motivating factor . . . , even though other factors also motivated the practice"). This principle was established in the Court's very first Title VII decision, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542. There, an employer claimed that its refusal to hire women with pre-school age children was not sex discrimination because it was willing to hire women without pre-school age children. *Phillips v. Martin Marietta Corp.*, 411 F.2d 1, 2 (5th Cir. 1969), *vacated*, 400 U.S. 542 (1971). The court of appeals agreed, reasoning that "when another criterion of employment is added to one of the characteristics listed in the act," the decision was not "because of" that characteristic. *Id.* at 3–4. But this Court reversed, holding that Ms. Phillips was discriminated against "because of" sex even though she was also discriminated against because she had young children. *Phillips*, 400 U.S. at 544. Under Title VII's "simple test," had Ms. Phillips's sex been different, she would have been treated differently. *Id.*; *see also Price Waterhouse*, 490 U.S. at 241 (plurality) ("[W]e know that the words 'because of' do not mean '*solely* because of'");

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individual employee's sex, for example, was a motivating factor, it was not a "but-for" cause of the employment decision. Where the employer makes this showing, the plaintiff still prevails, but is ineligible for certain forms of relief, including compensatory damages and reinstatement. 42 U.S.C. § 2000e-5(g)(2).

id. at 259 (White, J., concurring); *id.* at 279 (O'Connor, J., concurring); *id.* at 284 (Kennedy, J., dissenting) ("[S]ex is a cause for the employment decision whenever, either by itself or in combination with other factors, it made a difference to the decision"); *cf. Burrage v. United States*, 571 U.S. 204, 211–12 (2014) (noting that but-for causation does not preclude the existence of "other necessary causes").[9]

Thus, to establish that a termination is "because of" sex under Title VII, it suffices for an employee to show that had the employee's sex been different, the employee would have been treated differently. That is precisely the case here.

B. Since Harris Homes Would Not Have Fired Ms. Stephens for Living Openly as a Woman Had She Been Assigned the Female Sex at Birth, Her Discharge Was Because of Sex.

Harris Homes fired Ms. Stephens for being a transgender woman—that is, for having a male sex assigned at birth and living openly as a woman. It would not have fired her for living openly as a woman if she had been assigned the female sex at birth. Therefore, when Harris Homes fired Ms. Stephens it violated Title VII because her male sex assigned at birth was a but-for cause of its decision.

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[9] Notably, "[t]he 1964 Congress specifically rejected an amendment that would have placed the word 'solely' before 'because of [the complainant's] race, color, religion, sex, or national origin.' *See* 110 Cong. Rec. 2728, 13837–38 (1964). Senator Case, a prime sponsor of Title VII, commented that a 'sole cause' standard would render the Act 'totally nugatory.' *Id.* at 13837." *Nassar*, 570 U.S. at 385. (Ginsburg, J., dissenting).

In its petition for certiorari, Harris Homes argued that Title VII does not prohibit discrimination against transgender people because it is "impossible" that "sex" in 1964 could have meant "gender identity." Pet. 26. But this case does not require the Court to decide whether the term "sex" in 1964 included gender identity. Ms. Stephens prevails even if "sex" is limited to the definitions proposed by Harris Homes and the United States, namely "a person's status as male or female as objectively determined by anatomical and physiological factors, particularly those involved in reproduction," Pet. 6 (internal quotations and citations omitted), or "'[the] physiological distinction[]' between 'male and female,'" Fed. Resp't Br. Opp'n at 17 (quoting Webster's New International Dictionary 2296 (2d ed. 1958).[10] *See* Br. for Kenneth B. Mehlman et al. as *Amici Curiae* in Support of the Employees (Part I.A).

That Ms. Stephens's sex was a but-for cause of her termination is illustrated in three interrelated ways. First, when Harris Homes fired her for being

[10] As shorthand for Harris Homes's and the United States's definitions of "sex," Respondent uses "sex assigned at birth." One's sex assigned at birth refers to the designation of male or female that an infant is given at birth typically based on external reproductive anatomy. The anatomical features that generally dictate an infant's sex assigned at birth are the same as those identified by Harris Homes and the United States as determinative of a person's sex (*i.e*, reproductive anatomy visible at birth). Some courts have used the term "biological sex" to refer to a person's sex assigned at birth. *See, e.g., Glenn v. Brumby*, 663 F.3d 1312, 1314 (11th Cir. 2011) (describing transgender female plaintiff as someone who was "born a biological male"); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 568 (6th Cir. 2004) (describing transgender female plaintiff as "biologically and by birth a male").

transgender, it necessarily did so for two reasons: (1) she was assigned a male sex at birth; and (2) she intended to live openly as a woman. Her sex assigned at birth is a necessary cause of the discrimination even if it is not the only cause. Ms. Stephens therefore meets the "simple test" set forth in *Manhart* because she would not have been fired for living openly as a woman if she had been assigned the sex of female at birth. *Manhart,* 435 U.S. at 711. That Harris Homes also fired her for an additional cause does not defeat liability, because her birth-assigned sex was one of the but-for causes. Much as Ms. Phillips was discriminated against for being a woman *and* for having young children, *see Phillips*, 400 U.S. at 544, so Ms. Stephens was fired for having a male sex assigned at birth *and* for living openly as a woman. That is sex discrimination, even accepting arguendo Harris Homes's contention that gender identity is not included in "sex" for purposes of Title VII. In fact, it is impossible to discriminate against a person for being transgender *without* their sex assigned at birth being a cause of the decision.

Second, Harris Homes's owner's repeated explanation that he fired Ms. Stephens because he viewed her as "a man" makes explicit that he fired her "because of sex." While the assertion is not accurate—Ms. Stephens is a transgender woman—it is Harris Homes's reason for firing Ms. Stephens, not her actual sex, that is outcome determinative. *See Abercrombie*, 135 S. Ct. at 2032–33 (Title VII's intentional discrimination prohibition "does not impose a knowledge requirement." The provision "prohibits certain *motives*, regardless of the state of the actor's knowledge." (emphasis in original)). Here, had Harris Homes thought of Ms. Stephens as a

woman, it would have treated her differently. Every time Mr. Rost explained why he fired Ms. Stephens, he reaffirmed that it was because he thought of her as a man. He said that "it is wrong for a biological male to deny his sex," J.A. 131, and that he was uncomfortable with Ms. Stephens using the name Aimee "because he's a man," Resp. App. 61a. He objected to the fact that Ms. Stephens was "no longer going to represent himself as a man," precisely because she was, in his understanding, a "biological male." J.A. 54, 131. When Harris Homes fired her because it thought she was a man, it discriminated against her because of her sex. *See Manhart*, 435 U.S. at 711.

Third, Harris Homes's express concern that Ms. Stephens was "attempt[ing] to change" sex further demonstrates that the firing was "because of sex." J.A. 131. One cannot object to a perceived change of sex without basing the objection, at least in part, on a person's sex assigned at birth. As the Sixth Circuit reasoned, it is immaterial whether one can "actually" change one's sex, because "[g]ender (or sex) is not being treated as 'irrelevant to employment decisions' if an employee's attempt or desire to change his or her sex leads to an adverse employment decision." Pet. App. 26a (quoting *Price Waterhouse*, 490 U.S. at 240).

Just as firing someone for wanting to change religion is religious discrimination, so too firing a person for wanting to change sex is sex discrimination. In either case, the protected characteristic is a but-for cause of the employment decision. Consider a Protestant employer who fired employees who were born into a Protestant denomination but converted to Catholicism. Even if

the employer hired both Catholics and Protestants, it would still be discrimination "because of such individual's . . . religion" if the employer fired an employee because the employee intended to convert to Catholicism. The same is true for discrimination against people who state that they plan to change their sex. *See Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008) (Even if the employer "harbors no bias toward either Christians or Jews but only 'converts[,]' . . . [n]o court would take seriously the notion that 'converts' are not [protected]."); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016) ("Because Christianity and Judaism are understood as examples of religions rather than the definition of religion itself, discrimination against converts, or against those who practice either religion the 'wrong' way, is obviously discrimination 'because of religion.'"); *cf. Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 (1987) (declining to treat converts less favorably than others for purposes of First Amendment).

Harris Homes would not have fired Ms. Stephens for living openly as a woman if it had not perceived her to be, in its words, a "biological male" because she was assigned male at birth. In discharging Ms. Stephens for being transgender, Harris Homes contravened Title VII's core premise: that employees should be judged on their merit, not on their sex.

II. HARRIS HOMES VIOLATED TITLE VII BY FIRING MS. STEPHENS FOR DEPARTING FROM SEX-BASED STEREOTYPES ABOUT MEN AND WOMEN.

Harris Homes also violated Title VII by firing Ms. Stephens for failing to conform to sex-based stereotypes.

This Court has long recognized that taking adverse action against an employee based on stereotypes about how men or women should look and act violates Title VII. *Price Waterhouse*, 490 U.S. at 256 ("[I]f an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism."); *see also Manhart*, 435 at 707–09 (even "unquestionably true" generalizations about women and men as classes cannot be used to discriminate against "individuals"); *Phillips*, 400 U.S. at 545 (Marshall, J., concurring) (Title VII prevents "employers from refusing 'to hire an individual based on stereotyped characterizations of the sexes'" (quoting EEOC, Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.1(a)(i)(ii)). This protection applies to transgender employees just as it does to everyone else. *Glenn*, 663 F.3d at 1318 ("All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype.").

Harris Homes's discharge of Ms. Stephens impermissibly rests on sex-based stereotypes for two independent reasons, either of which is sufficient to affirm the decision below. First, Mr. Rost expressly

admitted that he fired Ms. Stephens because she was not going to conform to his particular views about how men and women must identify, appear and behave. Second, and more broadly, discrimination against an employee for being transgender inherently enforces the specific sex-based stereotype that persons assigned a particular sex at birth will identify, appear, and behave in ways seen as typical of that sex throughout their entire lives, and therefore always violates Title VII.

A. Harris Homes Discriminated Against Ms. Stephens Because She Departed from Its Owner's Expressly Articulated Stereotypes About How Men and Women Should Identify, Appear, and Behave.

Sex discrimination includes not merely adverse action taken against an employee for being a woman, but also action taken for failing to conform to sex-based stereotypes about how women should look and act. In *Price Waterhouse,* this Court held that Price Waterhouse violated Title VII when it denied Ann Hopkins a partnership because she failed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Price Waterhouse*, 490 U.S. at 235 (plurality); *id.* at 272 (O'Connor, J., concurring). The Court made clear that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* at 251 (plurality). Just as Ms. Hopkins was denied partnership because she failed to meet her employer's stereotypes about how women should walk, talk, groom and dress, so too was Ms. Stephens fired because she failed to meet her employer's

expectations of how men and women should look and behave.

Harris Homes's owner, Mr. Rost, openly admitted that he fired Ms. Stephens because she departed from his particular stereotypes about men. Mr. Rost objected to Ms. Stephens using the name Aimee because in his view men should not use names associated with women. J.A. 72. He said that "a male should look . . . like a man." Resp. App. 62a–63a. In its petition for certiorari, Harris Homes admitted that it fired Ms. Stephens based on its owner's objection to "a male representative of Harris Homes present[ing] himself as a woman while representing the company." Pet. 5. As Judge William Pryor explained about another employee fired for being a transgender woman, "Glenn 'present[ed]' and 'dressed as a woman' at work . . . . Because Glenn 'was born a biological male,' Glenn's employer believed these choices were 'unsettling,' 'unnatural,' and 'not appropriate.' Title VII would have protected any biological male under those facts." *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1260 (11th Cir.) (Pryor, J., concurring) (first alteration in original) (internal citation omitted), *cert. denied*, 138 S. Ct. 557 (2017).

At the same time, Harris Homes also fired Ms. Stephens for not complying with its sex stereotypes about women. Resp. App. 62a–63a ("a woman should look like a woman"). Mr. Rost objected that Ms. Stephens's appearance and assigned sex at birth made her too masculine for a woman. Though Mr. Rost had never seen Ms. Stephens dressed in a skirt suit or outwardly presenting in other typically feminine ways, he stated that "I've yet to see a man dressed up as a woman that I didn't know was not a

man dressed up as a woman" and therefore "there is no way that" Ms. Stephens "would be able to present in such a way that it would not be obvious that it was [a man]." J.A. 31. Just as Price Waterhouse discriminated against Ms. Hopkins because it deemed her insufficiently feminine for a woman, so Harris Homes fired Ms. Stephens because it considered her insufficiently feminine for a woman. *See* J.A. 130.

In short, Ms. Stephens was fired because she transgressed Mr. Rost's sex-based stereotypes about gender roles: she was both too masculine for his expectations of appropriate womanhood and too feminine for his notions of appropriate manhood. As one court observed in a similar case, "[u]ltimately, . . . it [does not] matter[] for purposes of Title VII liability whether the [employer] withdrew its offer of employment because it perceived [plaintiff] to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual." *Schroer*, 577 F. Supp. 2d at 305. All such discrimination is because of an employee's sex.

There is no basis for denying Ms. Stephens the protections against discrimination based on sex-based stereotypes that Ms. Hopkins enjoyed. If Harris Homes fired a non-transgender male employee for failing to look and act sufficiently masculine, that employee would have a Title VII claim. If it fired a non-transgender female employee for failing to look sufficiently feminine, she, too, would have a Title VII claim. Ms. Stephens is entitled to the same protection from being fired for failing to conform to her employer's stereotypes about how men and women should look and behave. *See*,

e.g., *Glenn*, 663 F.3d at 1316; *Smith*, 378 F.3d at 568; *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000).

B. Discrimination Against Employees for Being Transgender Is Inherently Based on Sex Stereotypes.

Although the judgment below can be affirmed based on Harris Homes's enforcement of its owner's specific stereotypes about men and women, the Sixth Circuit also correctly recognized that firing an individual for being transgender is *inherently* predicated on the stereotype that individuals will identify, appear, and behave throughout life consistently with their assigned sex at birth. Pet. App. 21a–22a. The notion that someone assigned a male sex at birth will identify, look, and behave "as a man" is undeniably a sex-based stereotype. Though this generalization is true for many people, the assumption that everyone will have an identity, appearance, and behavior consistent with expectations for the sex they were assigned at birth is objectively false for at least 1.55 million transgender people in the United States.[11]

Where adverse employment decisions are based on an individual's failure to conform to sex-based generalizations, they are prohibited, regardless of whether those generalizations are accurate. Thus, in *Manhart*, the Court held that requiring women to pay more for pension benefits based on accurate generalizations about the differing life expectancies of men and women was

[11] *Amici Curiae* Br. of Scholars Who Study Transgender Population in Support of Respondent Aimee Stephens, (Background. B).

impermissible sex discrimination under Title VII. "Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Manhart*, 435 U.S. at 702, 708. Indeed, discrimination is prohibited by Title VII because "[p]ractices that classify in terms of . . . sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals." *Id.* at 709. A sex-based generalization that is true about most men or women does not justify discrimination against those who fall "outside the average description." *United States v. Virginia*, 518 U.S. 515, 550 (1996).[12]

At bottom, an objection to someone for being transgender is an objection to the fact that they have departed from the sex-based generalization that persons assigned a particular sex at birth will identify, act, dress, and appear as that sex throughout their entire lives. "A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." *Glenn*, 663 F.3d at 1316. Indeed, "[t]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate

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[12] Although liability under Title VII does not require any showing that women or men as a group were disadvantaged by the enforcement of a sex-based generalization, laws and practices driven by sex stereotypes about how men and women should appear and behave often operate to the detriment of women, in general. *See*, *e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (sex discrimination often "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage"); *see also* Br. of Women CEOs and Other C-Suite Executives as *Amici Curiae* in Support of Petitioner Bostock and Respondents Zarda, Moore, and Stephens, (Part II).

appearance and behavior." *Id.* (internal quotation marks omitted). It does not matter that most men and women are not transgender. The command of Title VII is that "individuals" are protected from discrimination based on generalizations about classes. *See Manhart*, 435 U.S. at 708 ("If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short.").

Accordingly, firing someone for being transgender by definition involves enforcement of a sex-based stereotype, and is therefore prohibited by Title VII.

C. Permitting Employers to Discriminate Against Transgender People for Not Matching Sex-Based Generalizations Would Undermine Title VII Protections for All Workers.

Decades of this Court's precedent would be thrown into doubt if sex-based generalizations were deemed acceptable reasons for firing some employees. *See, e.g.*, *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) (invalidating exclusion of women from certain positions based on assumptions about the importance of their reproductive role in comparison to their economic role); *Manhart*, 435 U.S. at 708 (invalidating requirement that women pay more for pensions plans than men because women on average live longer than men); *Phillips*, 400 U.S. at 545 (Marshall, J., concurring) (invalidating refusal to employ women with pre-school age children based on stereotypes about women's role in raising children).

Excluding transgender people from Title VII's protections against the imposition of sex stereotypes would also lead to inconsistent and unworkable results. Under such a framework, an employer would be permitted to fire a person it perceived as an excessively feminine man if that person were a transgender woman, but not if that person were a non-transgender man. *Compare Smith*, 378 F.3d at 574–75 (finding that transgender woman experiencing discrimination in her workplace because her "appearance and mannerisms" were considered "inappropriate" for her "perceived sex" of male had stated a claim under Title VII), *with Nichols v. Azteca Rest. Enterprises, Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (finding that male employee subjected to "systematic abuse" because of belief he "did not act as a man should act" and had "feminine mannerisms" had stated a claim under Title VII). Similarly, an employer could lawfully refuse to hire or promote someone it perceived as an insufficiently feminine woman if the person were a transgender man, but not if that employee was a non-transgender woman, like Ann Hopkins. *Compare Price Waterhouse,* 490 U.S. at 272, *with EEOC v. A & E Tire, Inc.*, 325 F. Supp. 3d 1129, 1135 (D. Colo. 2018) (finding transgender man had stated a claim for discriminatory failure to hire because he "did not conform to the sex-based expectations of a person born a woman"). Under such a rule, courts would have to police the line between the acceptable gender non-conformity of non-transgender workers and the unacceptable gender non-conformity of transgender workers, which would ultimately weaken Title VII's protections for all workers.

Permitting employers to discriminate against transgender employees for not matching sex-based generalizations would not only eradicate Title VII's protections for the more than 1.5 million transgender people in the United States but would also compromise protections for the far greater number of workers who, like Ann Hopkins, identify with their sex assigned at birth but do not (or might not sufficiently in the eyes of their employer) present or behave in full conformity with expectations of appearance and behavior for that sex.

III. THERE IS NO BASIS FOR EXCLUDING TRANSGENDER INDIVIDUALS FROM TITLE VII'S PROHIBITION ON DISCRIMINATION BECAUSE OF SEX.

Harris Homes and the United States seek to exclude transgender people from Title VII's ban on discrimination because of sex, but there is no basis in the statute or precedent for doing so. The Court need not look further than the statutory text itself, which unambiguously protects all "individuals" from discrimination, and does not carve out transgender employees. Neither speculation about what the 1964 Congress might have assumed about the statute's applications nor subsequent congressional action or inaction supports Harris Homes's invitation to depart from the statute's plain text.

A. Nothing in Title VII's Text or Structure Supports an Exclusion of Transgender Individuals.

Title VII protects all "individuals" from sex discrimination in employment. It makes no exception for any category of employees. Where "the words of a statute are unambiguous, then . . . 'judicial inquiry is

complete.'" *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461–62 (2002) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–254 (1992)). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Looking at the statute as a whole, there is simply "no justification in the statutory language or the Court's precedents for a categorical rule excluding" transgender people from coverage under Title VII. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

1. *Title VII's Plain Language Protects "Individuals" from Discrimination, Not Groups.*

Harris Homes argues that its discharge of Ms. Stephens was justified because Title VII is limited to contexts where "employers . . . treat one sex better than the other." Pet. 27. Presumably because it would fire both a transgender man for not appearing or acting sufficiently feminine, as well as a transgender woman for not appearing or acting sufficiently masculine, Harris Homes contends that firing Ms. Stephens did not violate Title VII because neither men nor women, as a *group*, faced discrimination. *See* Pet. 22; J.A. 131. But this approach contravenes the plain language of Title VII and has been rejected by the Court from *Phillips* onward. Where an individual employee has faced disparate treatment because of her sex, that discrimination is not cured by a second act of disparate treatment in which employees of a different sex also face discrimination.

Title VII creates an "unambiguous" focus on discrimination faced by each individual employee. *Manhart*, 435 U.S. at 708 ("[Title VII] precludes treatment of individuals as simply components of a racial, religious, sexual, or national class."). The statute provides "[i]t shall be an unlawful employment practice for an employer to fail or 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). Under the statute's plain terms, the question is not whether one group was treated better than another, but rather whether an employer denied employment opportunities to *a particular* employee because of *that employee's* sex. *Manhart*, 435 U.S. at 709 ("Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes.").

Title VII applies to any "individual" who experiences discrimination "because of sex," even where the discrimination does not affect all men or all women. 42 U.S.C. § 2000e-2(a)(1). While class-wide disparate treatment on the basis of sex is sufficient to show a violation of the statute, it is not necessary; disparate treatment of an individual because of sex is enough to establish liability. *See Price Waterhouse*, 490 U.S. at 235, 257–58 (finding discrimination against a woman perceived as "macho" but not against all women, violates Title VII); *Phillips*, 400 U.S. at 544 (finding discrimination against women with young children, but not against all, or even most, women, is discrimination because

of sex); *see also* Br. for Kenneth B. Mehlman et al. as *Amici Curiae* in Support of the Employees (Part I.C). "Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her . . . sex were [not injured]." *Connecticut v. Teal*, 457 U.S. 440, 455 (1982).

An employer who discriminates against a female employee because of her sex cannot insulate itself from liability by also discriminating against a male employee because of his sex. Price Waterhouse could not have avoided liability by also denying partnership to men who it perceived to act insufficiently masculine. Neither can Harris Homes escape liability for discriminating against Ms. Stephens by maintaining that it would have also fired a transgender man for failing to conform to sex-based stereotypes about how persons assigned a female sex at birth should act. *See Dothard v. Rawlinson*, 433 U.S. 321, 332 & n.16 (1977) (Alabama Board of Corrections policy requiring officers in certain posts to be of the same sex as prisoners in the prison "explicitly discriminate[d]" "on the basis of . . . sex" even though it applied to both men and women); *cf. Flowers v. Mississippi*, No. 17-9572, slip. op. at 14 (U.S. June 21, 2019) (noting that "the *Batson* Court did not accept the argument that race-based peremptories should be permissible because black, white, Asian, and Hispanic defendants and jurors were all 'equally' subject to race-based discrimination" because "[d]iscrimination against one defendant or juror on account of race is not remedied or cured by discrimination against other defendants or jurors on account of race.").

In short, two wrongs do not make a right. Discrimination against transgender women for being perceived as insufficiently masculine is not somehow "cured" by additional acts of discrimination against transgender men for being perceived as insufficiently feminine. Nor is it a defense for Harris Homes to claim that it is not subjecting men or women to disparate treatment, but only those who seek to "change" their sex. An employer who fired an employee for converting from Christianity to Judaism would not be able to escape liability by showing that it fired *all* converts, including those who converted from Judaism to Christianity, or from Hinduism to atheism. In each individual instance, it would be subjecting the individual to disparate treatment "because of religion." Likewise here, Harris Homes's termination subjected Ms. Stephens to disparate treatment because of her sex assigned at birth.

2. *There is Only One Statutory Exception to the Ban on Discrimination Because of Sex and it Does Not Reference Transgender Employees.*

The text of Title VII recognizes only one exception to its ban on disparate treatment claims of sex discrimination—for bona fide occupational qualifications (BFOQ)—and that provision says nothing about transgender employees. That Congress considered and created a single statutory exception to permit disparate treatment because of sex in some circumstances precludes this Court from reading into the statute an additional unwritten exception for transgender employees. The BFOQ exception provides that "it shall not be an unlawful

employment practice" to make an employment decision "on the basis of . . . sex," "where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e). That Congress crafted this "extremely narrow" exception, *Dothard*, 433 U.S. at 334, confirms that there is no basis for finding an additional unwritten exception through judicial fiat.

Notably, Harris Homes has never asserted a BFOQ defense. It has merely alluded to concerns that a transgender employee might hypothetically make customers uncomfortable. Pet. 3; Pet. App. 47a–48a; *see also* Resp. App. at 42a–47a. But absent a legitimate BFOQ defense, concerns about customer preference provide no grounds for discrimination because of an employee's sex. "[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid." *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971), *cert denied*, 404 U.S. 950 (1971). "Indeed, it was, to a large extent, these very prejudices the [Civil Rights] Act was meant to overcome." *Id.*

B. The Meaning of a Statute Is Determined by Its Text, Even if All of Its Applications Were Not Expressly Contemplated at the Time of Its Enactment.

Harris Homes rests much of its argument on the contention that lawmakers or the general public in 1964 would not have anticipated Title VII's application to transgender people. But as this Court has repeatedly reaffirmed, under Title VII and other laws, a statute's plain text is not limited by

speculation about which particular applications of the law Congress or the public may have had in mind at the time of enactment. There is no dispute that Title VII reaches circumstances where a person is treated in a manner which, but for that person's sex, would be different, *Manhart*, 435 U.S. at 708, and situations where a person is subjected to adverse treatment because of sex stereotypes, *Price Waterhouse*, 490 U.S. at 250–51. Harris Homes's discharge of Ms. Stephens violates both of these longstanding principles, and speculation about whether Congress imagined in 1964 that Title VII would apply to transgender workers does not change the outcome.

"The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991). Indeed, as this Court has made clear in the Title VII context specifically, "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale*, 523 U.S. at 79; *see also Pa. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998) (finding it "irrelevant" "that Congress did not envisio[n] that the ADA would be applied to state prisoners" (internal quotation marks omitted)); *Competitive Enter. Inst. v. U.S. Dep't of Transp.*, 863 F.3d 911, 921 (D.C. Cir. 2017) (Kavanaugh, J., concurring) (relying on plain language of statute to apply smoking prohibition to e-cigarettes even though "those who drafted or read the statute in 1987 would not have understood the term 'smoking' to encompass e-cigarettes because e-cigarettes did not exist at that time"); *see generally Wis. Cent. Ltd. v. United States*,

138 S. Ct. 2067, 2074 (2018) ("While every statute's meaning is fixed at the time of enactment, new applications may arise in light of changes in the world."); *accord West v. Gibson*, 527 U.S. 212, 217 (1999) (finding that EEOC had power to grant compensatory damages, even though not contemplated when Title VII was enacted, because "[r]ead literally, the language of the statutes is consistent with a grant of that authority."). "It is not for [this Court] to rewrite the statute so that it covers only what [it] think[s] is necessary to achieve what [it] think[s] Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010).

In accordance with these principles, this Court has found violations of Title VII in circumstances that neither Congress nor the general public likely anticipated at the time the statute was passed. For example, this Court has interpreted Title VII to prohibit different-sex and same-sex sexual harassment though neither were anticipated applications of the statute at the time of passage. When this Court held in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986), that different-sex sexual harassment violated Title VII, the conduct at issue was an accepted, unremarkable part of the American workplace and lower courts were reluctant to recognize such harassment as discrimination "because of sex." *See*, *e.g.*, *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976) (declining to find sexual harassment to be discrimination because of sex because "[t]he attraction of males to female and females to males is a natural sex phenomenon"). Similarly, in *Oncale v. Sundowner Offshore Services., Inc.*, 523 U.S. 75 (1998), this Court held that same-sex sexual harassment was prohibited under the

plain terms of Title VII. In that case, the employer argued that "even if plaintiff was . . . harassed 'because' he was a male, that harassment was not because of gender consistent with the underlying concerns of Congress in enacting Title VII." Br. for Resp'ts at 15, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (No. 96-568), 1997 WL 634147, at *15 (internal quotation marks omitted). Yet as Justice Scalia wrote for a unanimous Court, there is "no justification . . . [for] excluding same-sex harassment claims from the coverage of Title VII," even though it was "not the principal evil Congress was concerned with when it enacted Title VII." *Oncale*, 523 U.S. at 79.

Likewise, in *Newport News*, this Court held that an employment policy that provided more limited pregnancy-related benefits to male employees' spouses than to female employees violated Title VII. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 675 (1983). While "congressional discussion focused on the needs of female members of the work force rather than spouses of male employees," that did not "create a 'negative inference' limiting the scope of the act to the specific problem that motivated its enactment." *Id.* at 679. This Court held that the "simple test of Title VII discrimination" articulated in *Manhart* governed even if the application was not foreseen at the time of enactment. *Id.* at 683. The policy violated Title VII because "it would treat a male employee with dependents 'in a manner which but for that person's sex would be different.'" *Id.* at 682–83 (quoting *Manhart*, 435 U.S. at 711).

In all these cases, the plain text of Title VII and not the "principal concerns of our legislators"

governed. *Oncale*, 523 U.S. at 79. To exclude Ms. Stephens's firing from the ambit of Title VII's protections would require doing what this Court has repeatedly refused to do: to rewrite the statute to include a limitation that does not exist on its face.

C. Neither Subsequent Legislative Action nor Inaction Has Changed the Relevant Text of Title VII.

Subsequent congressional action and inaction also afford no basis for excluding transgender employees from Title VII's protection. Other laws, enacted long after Title VII, provide no guide to the meaning of Title VII. And while Congress has failed to enact laws that would have expressly *included* protection for discrimination based on transgender status, it has also failed to enact laws that would have expressly *precluded* protection for transgender individuals. Neither bears on whether transgender people are excluded from Title VII's prohibition on discrimination because of sex.

Harris Homes argued below that sex discrimination against transgender people is implicitly excluded from Title VII because Congress passed unrelated statutes in 2009 and 2013 that separately enumerated the terms "gender identity" and "sex." But "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011). Congress's use of the term "gender identity" in 2009 and 2013 says nothing about what the terms "because of such individual's . . . sex" mean in Title VII as enacted. It is perfectly natural for Congress to use a belt-and-suspenders approach to ensure that a situation is

covered. That another statute defines a particular term to cover only a subset of its possible meaning "proves only that Congress *can* use the" term in that manner, "not that it did so in [a] particular statute." *Robinson*, 519 U.S. at 341–42 (emphasis in original) (explaining that the fact that other statutes expressly state that they cover "former employees" does not mean that the term "employees" as used in the anti-retaliation provision of Title VII does not also include former employees); *see also* Br. of Members of Congress as *Amici Curiae* in Support of the Employees (Part II.B).

Failed legislative proposals are even less probative. "[N]on-action by Congress affords the most dubious foundation for drawing positive inferences." *United States v. Price*, 361 U.S. 304, 310–11 (1960). The failure of later Congresses to pass a federal civil rights law explicitly adding the term "gender identity" provides no basis for categorically excluding transgender people from Title VII's scope. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001) ("A bill can be proposed for any number of reasons, and it can be rejected for just as many others."). One "reasonable interpretation of that legislative non-history is that some Members of Congress believe that . . . the statute requires, not amendment, but only correct interpretation." *Schroer*, 577 F. Supp. 2d at 308.

Inferences from inaction are doubly inappropriate here, as Congress has also failed to act on bills that attempted to expressly *exclude* transgender individuals from existing federal statutory protections, including Title VII. *See*, *e.g.*, Civil Rights Uniformity Act of 2017, H.R. 2796, 115th Cong. § 3(b) (2017) (proposing that "[n]o

Federal civil rights law shall be interpreted to treat gender identity or transgender status as a protected class, unless such law expressly designates 'gender identity' or 'transgender status' as a protected class").

In any event, even if these subsequent legislative actions and inactions mean that the term "sex" in Title VII is limited in the way Harris Homes and the United States suggest, Ms. Stephens's firing would still violate Title VII, as explained in Points I and II above.

IV. THIS CASE DOES NOT TURN ON THE LAWFULNESS OF SEX-SPECIFIC EMPLOYMENT RULES GENERALLY OR THE APPLICATION OF SUCH RULES TO TRANSGENDER EMPLOYEES.

Though Harris Homes contends in its petition that it would not have fired Ms. Stephens had she stated she would follow the dress code for men, Pet. 5, the Sixth Circuit held, and the record establishes, otherwise. Pet. App. 16a–17a. Harris Homes fired Ms. Stephens not solely for her anticipated failure to abide by the dress code as it sought to enforce it, but more generally because she is transgender and her name, identification, behavior, and appearance did not comport with its expectations for men and women.

Given this record, the Court need not address the lawfulness of sex-specific employment rules generally or how such rules apply to transgender people. Resolution of those issues is not required here, is not contemplated in the questions for which this Court granted certiorari, and would not affect the outcome. *Cf. Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (declining to

address question not decided by the lower courts and not the question on which the Court granted review).

A. Ms. Stephens Was Fired for Being Transgender, Not Solely for How She Was Going to Comply with Harris Homes's Dress Code.

The record shows that Harris Homes fired Ms. Stephens for being transgender and for failing to comport with Mr. Rost's expectations of how men and women should identify, look, and behave, and not exclusively because of concerns about the dress code.

In its petition, Harris Homes made clear that its firing of Ms. Stephens was based on its owner's objection to "a male representative of Harris Homes present[ing] himself as a woman while representing the company." Pet. 5. By Mr. Rost's own testimony, his concern was not limited to the company's dress code. He objected to Ms. Stephens even calling herself "Aimee" because, in Mr. Rost's view, "he's a man." Resp. App. 61a. Mr. Rost objected to having a woman working for him who would not "look like a woman." Resp. App. 62a–63a. He believed that "[t]here is no way that . . . the person . . . [he] knew as . . . Stephens would be able to present in such a way that it would not be obvious that it was [a man]." Resp. App. 45a. Mr. Rost's concern over how Ms. Stephens presented herself extended beyond the workplace, where the dress code does not apply. He admitted that if a customer saw Ms. Stephens dressed as a woman outside of work and complained, he "probably would have" considered that a factor in how to address her "situation" and "perhaps, yes" would have fired her on that basis. J.A. 78–79.

Indeed, Mr. Rost never even discussed the dress code with Ms. Stephens. J.A. 44–45, 49, 93–95.

As this evidence makes clear, and as the court below found, it was not the dress code alone, but a collection of sex-based traits and stereotypes that caused Harris Homes to fire her. As the Sixth Circuit correctly explained,

> [Harris Homes]'s sex-specific dress code does not preclude liability under Title VII. Even if [Harris Homes]'s dress code does not itself violate Title VII—an issue that is not before this court—[Harris Homes] may not rely on its policy to combat the charge that it engaged in improper sex stereotyping when it fired Stephens for wishing to appear or behave in a manner that contradicts [Harris Homes]'s perception of how she should appear or behave based on her sex.

Pet. App. 21a–22a.

The record fully supports the Sixth Circuit's holding. Given the scope of Mr. Rost's stereotypes about how men and women should identify, look, and act, it is not plausible that Harris Homes would have retained Ms. Stephens if she appeared at work using her new, traditionally feminine name, wearing makeup, styling her hair in a traditionally feminine way, and displaying traditionally feminine mannerisms, even if she strictly complied with the dress code for men. J.A. 119–20. Harris Homes fired Ms. Stephens because she intended to express herself as a woman even though she was assigned the male sex at birth, and would therefore never meet Mr.

Rost's expectations of how men and women should look and behave. And although counsel for Harris Homes raised concerns about restrooms in its petition for certiorari, Pet. 5, Mr. Rost testified that any concern about restroom use was "hypothetical," J.A. 37.

B. The Question of Whether Sex-Specific Policies Are Permissible or How They Apply to Transgender Workers Is Not Presented.

Because Ms. Stephens was fired simply for being transgender, and not exclusively due to concerns regarding dress codes or restrooms, questions regarding sex-specific policies need not, and should not, be resolved here. Moreover, resolution of questions about such policies would turn on the meaning of different statutory terms. Here, there is no question that Ms. Stephens's firing is a harm that qualifies as "discrimination" under Title VII; the focus of the dispute is whether Harris Homes fired Ms. Stephens because of her sex. In cases involving sex-specific policies, by contrast, there is no question that such policies are sex-based. The determinative question would instead be whether they fall within the scope of the discriminatory employment practices that Title VII forbids.

Where a policy imposes different rules for men and women, it facially classifies employees because of such employees' sex. The question of liability under Title VII then turns on whether such policies "discriminate" with respect to the "terms" or "conditions" of an individual's employment. 42 U.S.C. § 2000e-2(a)(1). This is true regardless of whether

the employee is transgender. Some lower courts have upheld sex-specific policies on the grounds that, if they do not "unreasonably burden" the employee based on sex, they are not *discriminatory*. *See, e.g.*, *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1110 (9th Cir. 2006) (en banc) (upholding a sex-specific dress code). This case is not an appropriate vehicle for determining whether those opinions are rightly decided, or how sex-specific policies, if permissible, would apply to transgender people. Such review may require further consideration of the meaning of the terms "discriminate" and "terms [or] conditions" under Title VII, but are beyond the scope of this case. The same is true for questions about single-sex restroom usage by transgender employees, a concern that Mr. Rost admitted was "hypothetical," that Harris Homes failed to raise or litigate below, and that neither court below decided.

In its petition, Harris Homes suggests that forbidding employers from discharging employees because they are transgender would somehow automatically invalidate all sex-specific rules. Pet. 27. But that is not true. First, no party challenged any sex-specific policy in this case. Second, regardless of the outcome of this case, questions about such sex-specific policies would still have to be resolved, and the analysis used for those questions would not change. The existence of separate restrooms for men and women, for example, would violate Title VII only if an individual employee could show that the restrooms adversely affected a term or condition of the employee's employment. 42 U.S.C. § 2000e-2(a)(1). Ultimately, questions about the lawfulness and application of sex-specific policies will remain regardless of this Court's determination

of whether Harris Homes fired Ms. Stephens because of her sex in violation of Title VII.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

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