No. 18-107

IN THE
In the Supreme Court of the United States

R.G. & G.R. Harris Funeral Homes, Inc.,
Petitioner,

v.

EEOC,
Respondent,

and

Aimee Stephens,
Respondent-Intervenor

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

BRIEF OF *AMICUS CURIAE* PROFESSOR W. BURLETTE CARTER IN SUPPORT OF PETITIONER

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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).

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THE INTERESTS OF *AMICUS CURIAE*

Amicus Curiae, W. Burlette Carter, is Professor Emerita of Law at the George Washington University Law School in Washington, D.C. ("the University"). She is a historian and legal scholar with expertise in the history of gender and sex discrimination.[1] She files this brief on her own behalf. Any reference to the University is for identification only."

"Amicus is filing a companion brief in the related case of *Altitude Express v. Zarda.* Br. of *Amicus Curiae* Professor W. Burlette Carter, *Altitude Express*, 139 S. Ct. 1599 (2019) (No. 17-1623) ("*Altitude Express* Companion Brief or "Companion Brief").

The interests of *Amicus* are the same here as stated in the *Altitude Express* Companion Brief. In short, *Amicus* has an interest in ensuring that the Court rests its decisions upon a sound legal, historical

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[1]Petitioners and Respondent EEOC have filed a blanket consent for all *amicus* briefs pursuant to Rule 37. Respondent Stephens has granted specific consent for the filing of this brief and such consent is filed herewith. *Amicus* serves and files this brief at her own cost. No counsel for a party authored the brief in whole or in part; no counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief; no person or entity, other than *Amicus Curiae*, made any monetary contribution intended to fund the preparation or submission of this brief.

Amicus retired from her tenured full professorship in 2018, but continues to produce scholarship and engage in other scholarly endeavors under her University title, "Professor Emerita of Law." Any support that she has received is not specific to this brief and is of the type the University or its law school regularly provides to all Professors Emeriti.

and scholarly basis and an interest in protecting free speech and academic freedom. This brief is based substantially upon an article that *Amicus* withdrew from publication after editors conditioned publication upon her deleting certain arguments that discussed conflicts of interest between women and transwomen, criticism of the EEOC and other issues. *Amicus* believes that censorship of academics defending the interests of women, when in conflict with LGBT+, is widespread in the U.S. and abroad. Minorities are also required to be compliant.

Amicus also has an interest in ensuring that governmental processes are well-considered and that citizens have input into them. As noted in the Companion Brief , on March 7, 2019, *Amicus* filed a Freedom of Information Act request with the EEOC seeking information about communications related to the interpretations at issue here. The EEOC initially ruled that granting *amicus* a fee waiver or reduced fee for production was not in the public interest. Letter from Stephanie D. Garner, EEOC Office of Legal Counsel, to W. B. Carter, Professor Emerita, Geo. Wash. U. L. Sch., April 11, 2019. That decision was reversed on appeal. *Amicus* is now in discussions regarding compliance. *Amicus* did not coordinate with anyone in making her FOIA request.

SUMMARY OF THE ARGUMENT

The concept of gender identity apart from sex has long been recognized. Congress did not intend to include Gender Identity in Title VII when it referenced "sex." The EEOC is not entitled to

deference on the question. The EEOC's theory was forged within a noncritical federal sector process, shaded from public view and even from many within that sector. Moreover, the EEOC failed to consider the rights of women and girls, and of religious persons and ignored the First Amendment.

Under Title VII, claims based on gender identity should be considered "derivative" claims, that is, they are not of the type about which Congress was originally concerned but are alleged to fall within Title VII. This Court set out the appropriate test for such claims in *Oncale v. Sundowner Offshore Serv's,* 523 U.S. 75 (1998). Under *Oncale*, courts must first discern whether the claim constitutes an evil "reasonably comparable" to that about which Congress was concerned. To do this, courts must inquire into the motivation behind challenged action. The EEOC's stereotyping theory prevents this inquiry. *Oncale* also requires that Courts consider whether recognizing the derivative claim would conflict with core stakeholder claims about which Congress was principally concerned or with the overall goals of Title VII.

Applying this standard, without question the EEOC was wrong to find that every instance of discrimination (or differentiation) based on gender identity is because of "sex" under the statute. Title VII does not require that an employer allow access to intimate spaces based on gender identity instead of sex. Instead, an employer must provide safe and private intimate spaces for all persons. Title VII does not impose a blanket prohibition on "misgendering." It does not require that an employer require that

every employee and supervisor think as the EEOC thinks.

While the Circuit Court erred in broadly embracing stereotyping theory, *Amicus* would suggest a different approach than that recommended by the government or Petitioner. History reveals four motivations behind the disparate treatment of transgender[2] persons (and sexual minorities generally, as such) that the same as motivations that this Court has often deemed inappropriate, and therefore actionable under Title VII, with respect to sex. They are (1) sexual assault; (2) motivations relating to appropriate appearances or behavior of the sexes (3) motivations about the appropriateness of certain jobs for the sexes, and (4) some motivations related to the morality of legal, sex-related conduct. In addition, history and this Court's precedents confirm five exemptions that that may apply, even if the activity fits one of the categories 1-4 above: (a) accommodation of religion, (b) ensuring safety (including avoidance of employee conflicts); (c) ensuring privacy; (d) ensuring opportunities for underrepresented groups; (e) policies related to procreation. Moreover, by its express terms, Title VII exempts an employer who can show that the challenged distinctions are bona fide occupational qualification or "BFOQ." 42 U.S.C. § 2000e-2(e)(1). A theory based on this framework could satisfy *Oncale*,

[2] The term "transgender" is an umbrella term and not every one who identifies as "transgender" feels a compelling need to dress or present in a way that is contrary to their sex.

allow persons to obtain employment but also impose restraints.

But this framework is not needed for this case. The central question is whether the Funeral Home's BFOQ—that men and women must dress distinctively and present by biological sex—is religiously-based and, thereby, exempts the Petitioner. Based on the district court's findings, that the Sixth Circuit did not dispute, this Court should rule that it is so, and reverse the judgment below.

ARGUMENT

Aimee Stephens is a transgender person, born biologically male. Some time ago, Stephens personally transitioned from a male gender to a female gender.[3] Her then employer, R.G. & G.R. Funeral Homes (the "Funeral Home") had a dress code requiring persons of the male sex and of the female sex to wear different uniforms. Stephens asked to be treated in all respects like a female. The Funeral Home declined and released Stephens.

Stephens then filed a complaint with the EEOC. The district court granted summary judgment to the Funeral Home. The Sixth Circuit reversed, relying heavily on the EEOC's interpretation of Title VII, and finding that Stephens stated a claim of sex stereotyping under *Price Waterhouse v. Hopkins. Zarda v. Altitude Express,* 883 F.3d 100, 112 (2018),

[3] Any references herein to feminine pronouns such as "her," or "she" with respect to Stephens, refers to Stephens' presentation of gender, which *Amicus* distinguishes from Stephen's sex.

cert. granted, 139 U.S. 2049 (2019). *See also Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

I. The Concept of Gender as a Notion Apart from *Biological* Sex Has Been Around for a Long Time

The concept of gender as a notion apart from *biological* sex has been around for quite a long time. In 1756, a *Boston Globe* article referred to a biological male's "affectation" and his "performance" of the "feminine gender." Boston-Gazette, and Country Journal, Oct. 11, 1756. People who behaved contrary to expectations for their presumed biological sex were sometimes referred to as of the "doubtful gender," but, in such days, not the "doubtful sex." *See London, Feb. 11*, Conn. J., June 3, 1778, 2 (referring to London story of "Amazonian" women offering to replace male British military personnel in America of the "doubtful gender"). The term "epicene," meant having gender characteristics of both or neither sex or indeterminate or also male effeminacy. *Messrs Printers*, N.Y. Wkly Museum, Aug. 1, 1789 (referring to those who "throw off a masculine appearance in order to look feminine"). There were other words for persons who acted against sex stereotypes as well: maccaronis [sic], fops, coxcombs, petite maitres. *Id.* But such terms were not the same as another term, (now deemed offensive) "hermaphrodite," which was used to refer to intersex persons.

Before the late nineteenth century, sex was occasionally merged into notions of gender and vice versa. Common instances occurred when an author was referring to a class of persons, type or genus, or a stereotype. *Marshfield, October 16*, New-England

Wkly J. Oct. 23, 1727, 2 (obituary referring to decedent as having the "Ornaments and Endowments of Nature and Grace, which serve to Adorn and Distinguish Her Sex").

As women's fight against sex discrimination, began to take hold, practical or political considerations sometimes accelerated and sometimes decelerated the merger of sex and gender. *See* Ruth Bader Ginsburg*, Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 Sup. Ct. Rev. 1, n. 1 (noting her decision to use "gender" instead of "sex" in Supreme Court arguments, and that in the article "Both terms are used herein always with the meaning of the latter"); Mary Ann Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L. J. 1, 33 (1995) (discussing feminist attempts to separate the notions).

Thus, there *is* a historical trail indicating distinct meanings for gender and sex. But history also shows a merging of the meanings at various times, for various purposes.

II. Congress Did Not Intend to Include Gender Identity as a Protected Class Under Title VII or to Merge Gender and Sex

The earliest references to transsexual and/or transgender persons in *Congressional Record*[4] are a handful of sporadic mentions in or with reference to

[4] Transsexuals are not necessarily transgender. However, in this early period the word "transsexual" was used to refer to anyone who cross-dressed or indicated a desire to be identified contrary to biological sex.

committee proceedings. For example, in 1967, Senator Edward Long (D., MO) referencing hearings on privacy from governmental intrusions, asked that an article referencing "transsexuals" be reprinted in full in the *Congressional Record*. *See* Comments of Sen. Long, 113 Cong. Rec. S9644-45 (1967). In 1980, Professor Sylvia Law discussed transgender care and transitional surgeries in a statement on reproductive freedom practices in Legal Services organizations. *See* 126 Cong. Rec. 10508 (1980) (May 8). Looking at such occasional references and the contemporaneous ongoing battle over sexual orientation inclusion (*see Altitude Express* Companion Br., § II), there is no evidence that Congress intended to treat gender identity as synonymous with sex in Title VII.

Congress first formally considered a bill to address gender identity discrimination concerns under Title VII in 2007. The bill, introduced by Representative Barney Frank as H.R. 2015, the Employment Discrimination Act ("ENDA") of 2007, also addressed sexual orientation discrimination. Employment Non-Discrimination Act of 2007, H.R. 2015, §8(a)(3), 110th Cong. (2007) (introduced by Rep. Barney Frank, April 24, 2007). It recognized a right of transgender persons to dress according to their gender identity even if an employer had a BFOQ. However, it contained exemptions, including for religious groups and the military. It also included restrictions on intimate spaces:

> (3) CERTAIN SHARED FACILITIES.—Nothing in this Act shall be construed to establish an unlawful employment practice based on actual or perceived gender identity

> due to the denial of access to shared shower or dressing facilities in which being seen fully unclothed is unavoidable, provided that the employer provides reasonable access to adequate facilities that are not inconsistent with the employee's gender identity as established with the employer at the time of employment or upon notification to the employer that the employee has undergone or is undergoing gender transition, whichever is later.

Id. at §8(a)(3). But in §15, the Act provided that the ENDA would not invalidate or limit state or local laws (including those requiring intimate spaces access based on gender identity). *Id.*, §15.

Eventually, provisions relating to transgender persons were separated from the bill, because sponsors did not have the votes. Anticipating a Presidential veto anyway, major LGBT+ organizations coalesced around defeating the bill.[5] 153 Cong. Rec. H30360 (2007) (Nov. 7). Lisa Keen, *ENDA Stirs Fiery Controversy Over Transgender Inclusion, Legal Loopholes*, Seattle Gay News, (Oct. 5, 2007), . http://www.sgn.org/sgnnews35_40/page2.cfm [https://perma.cc/4DHK-7KPX] (last visited Aug. 23, 2018). *See also* 153 Cong. Rec. (House) Nov. 7, 2007, at 30357-30359 (discussion of perceived religious discrimination). An impassioned plea by Representative Barney Frank could not save the

[5] It should be noted that these various groups have not always been on the same side regarding the treatment of transgender persons.

resulting bill. Barney Frank, *Our Fight for AntiDiscrimination Laws*, Huff. Post, Sept. 28, 2007, updated May 25, 2011, https://www.huffingtonpost.com/rep-barney-frank/our-fight-for-antidiscrim_b_66390.html.

The restrictive bathroom language, with the liberal grooming language and state & local legislative preservation, was present in other bills considered around that time as well.[6] But with intimate spaces as a major sticking point, some bill writers resorted to ambiguous language. *See* H.R. 1755, § 8(b), 113th Cong., (2013 (Rep. Polis, introduced Apr. 25, 2013; simply stating nothing shall be interpreted as requiring the construction of new facilities); S. 815, § 8(b), 113th Cong. (2013), Congress.gov, https://www.congress.gov/113/bills/s815/BILLS-113s815is.pdf (Sen. Merkley, introduced Apr. 25, 2013). *See also* Statement of C. Olston, Hearing of the Comm. on Health, Educ., Labor and Pensions, 11th Cong., 1st Session, Nov. 2, 2009, 47, 49, 52 (re 2009 ENDA bill, noting ambiguity on restrooms).

Finally, in 2014, advocates gave up and decided to stop using the ENDA compromise model. From that

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[6]See H.R. 2981, §8(a)(3), 111th Cong. (2009), (Rep. Frank, introduced June 19, 2009); S. 1584, §8(a)(3), 111th Cong. (2019) (Sen. Merkley, introduced Aug. 5, 2009); H.R. 3017, §8(a)(3), 111th Cong. (2009) (Rep. Frank, introduced on June 24, 2009); H.R. 2981, §8(a)(3), 111th Cong. (2009) (Rep. Frank, introduced June 19, 2009); H.R. 1397, §8(a)(3), 112 Cong. (2011), Congress.gov., https://www.congress.gov/112/bills/hr1397/BILLS-112hr1397ih.pdf (Rep. Frank, introduced on April 6, 2011); S. 811, §8(a)(3), 112th Cong. (2011), (Sen. Merkley, introduced on April 13, 2011).

year on, they sought the passage of "Equality Acts" which cover both sexual orientation and gender identity, address a broad range of rights, and do not contain restrictions on intimate space access. Congress has still not passed a bill that specifically addresses the rights of sexual minorities.

III. The EEOC's Theory Is Not Entitled to Deference

While the EEOC is not due typical agency deference in any event, it arrives in federal courts with significant goodwill, backed by a long history of vindicating the rights of the vulnerable. Regrettably, the EEOC's behavior in this case was not consistent with that storied history. Thus, not even *Skidmore* deference was due the EEOC here. *Skidmore v. Swift*, 323 U.S. 134, 140 (1944) (though agency ruling lacks the power to control, it may "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" depending "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . .")

A. The EEOC Attempted Agency Amendment of Title VII Through an Uncritical and Opaque Federal Sector Process and Then Asked Courts to Apply Those Amendments to the Private Sector

The *amicus* brief of the former executive officials purports to explain how the federal government

determined that gender identity and sexual orientation were protected classes under Title VII. *Amicus Curiae* Br. of Former Executive Branch Officials and Leaders, *R.G. & G.R. Harris Funeral Homes*, 139 S. Ct. 1599 (2019) (No. 18-107) ("FEO Br.") at 11-15. Several former EEOC officials have signed onto this brief. [7] But *Amici's* research reveals that the brief leaves out key details.

The brief cites to Executive Order 12066 as the source of the EEOC's authority to coordinate the implementation of Title VII within the federal workforce. Exec. Order No. 12066 §§ 1-301(a), 1-201, 43 Fed. Reg. 28965 (June 29, 1978); Former Off. Br. at 12. Notably, it does not mention Executive Order No. 13583, issued by President Barack Obama in August of 2011. Exec. Order 13583, 76 Fed. Reg. 52847 (2011). That Order required the Director of the Office of Personnel Management and the Deputy Director for Management of the Office of Management and Budget ("OMB") (who were the chief overseers of federal personnel) to act in coordination with the President's Management Council and the Chair of the EEOC to create "a coordinated Government-wide initiative to promote diversity and inclusion in the Federal workforce." The Order also stated, "All agencies *shall* implement the Government-wide Plan prepared." *Id.* at § 3

[7] Former Commissioners Chai Feldblum, Jenny Yang, and Stuart J. Ishimaru, former General Counsel David Lopez and former Assistant General Counsel Carolyn Wheeler are signatories on the FEO brief. FEO Br., supra p. 12, at 2, 4, 6. Former Commissioner Jacqueline Berrien passed away in 2015.

(emphasis supplied). It did require that the plan be "consistent with applicable law." *Id.* at § 3(b).

EO 13583 followed the President's use of his recess powers in 2010 to make numerous appointments including three EEOC Commissioners—Jacqueline Berrien, Victorian Lipnic and Chai Feldblum—and a new General Counsel, David Lopez. *Obama Makes 15 Recess Appointments*, CBS News, Mar. 27, 2010, https://www.cbsnews.com/news/obama-makes-15-recess-appointments/. The appointments were later confirmed. EEOC, *U.S. Senate Confirms EEOC Chair, Two Commissioners and General Counsel*, Dec. 12, 2010, https://www.eeoc.gov/eeoc/newsroom/release/12-23-10.cfm.

Shortly thereafter the EEOC and its General Counsel's office began to implement a new vision of Title VII. The FEO Brief tells us that in 2011, career lawyers operating on "delegated authority from the Commission" determined that the EEOC could make the claims that gender identity and sexual orientation discrimination always constituted sex discrimination under Title VII. FEO Br., *supra* p. 12, at 15. Departments also shared information about bias claims with the EEOC, sending some of claims it lacked jurisdiction to investigate, directly to the EEOC for processing as charges and otherwise teed up cases for EEOC consideration. An LGBT EEOC working group helped formulate strategies for including sexual orientation discrimination and gender identity discrimination within Title VII. FEO Br. *supra* p. 12, at 16-17.

Out of this overall structure emerged several key decisions relevant to these cases: In *Macy v. Holder*

and *Lusardi v. McHugh*, the EEOC held that transgender persons were protected under Title VII and had a right to be treated according to gender identity, including with respect to bathrooms and other intimate spaces. *Macy v. Holder* No. 0120120821, 2012 WL 1435995 ; (EEOC April 20, 2012); *Lusardi* v. McHugh, Appeal No. 0120133395, 2015 WL 1607756 (EEOC March 27, 2015). In *Baldwin v. Foxx*, the Court determined that "sex" in Title VII included sexual orientation *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 EEOPUB LEXIS 1905, (EEOC July 16, 2015).

Although they cite to a different executive order, the FEO *amici* do not dispute that the EEOC played the central role in crafting the substance of a government-wide plan to press these novel interpretations throughout the federal workforce, *see* FEO Br. *supra* p. 12, at 11-15, and that, other agencies followed it. Indeed, the FEO Brief says departments implemented policies "in tandem" with EEOC determinations. FEO Br., *supra* p. 12 at 27; *id.* at 27-39. For example, while noting conflicts with the caselaw, HHS adopted the position of the EEOC and cited to the EEOC's *Macy* and *Baldwin* decisions. *See Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31375; 31375 n. 43; 31388; 31390 & 31409, n. 151 (May 18, 2016). The Department of Justice took the position that the "best reading" of Title VII, from the "plain language" of the statute and developing "jurisprudence" is that "sex" includes transgender people. Mem. from the Attorney General to U.S. Heads of Dep't Components, Treatment of Transgender Employment Claims Under Title VII of the Civil Rights Act of 1964, Dec.

15, 2014.[8] In 2016 the Department of Justice joined with the Department of Education to issue a "Dear Colleague" joint guidance that implied that educational institutions that receive federal funds would face financial cuts if they did not allow students access to bathrooms based on gender identity. The guidance process is normally used to instruct other federal agencies, although memos are sometimes shared with local authorities. But this guidance had the sound of a directive. Letter from Catherine Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. and Vanita Gupta, Principal Deputy Assistant Attorney General for Civil Rights, U.S. D.O.J. to Colleagues (May 13, 2016), https://www.justice.gov/opa/file/850986/download (last visited Aug. 23, 2018). Gupta is now President and CEO of an advocacy group, the Leadership Conference, and has signed onto its brief. *See* Br. for the Lawyers' Committee for Civil Rights Under Law, and the Leadership Conference on Civil and Human Rights (representing 57 civil rights organizations) . . . *in R.G. & G.R. Harris Funeral Homes*, 139 S. Ct. 1599 (2019) (No. 18-107). (Lhamon is signatory to the FEO Brief. FEO Br. at 4; Gupta is not.)

The FEO discusses other ways that the EEOC's interpretations were engrained into the federal sector as law. FEO brief, p. 12, n. 6 and 27-38 & n.18. While the brief claims that each agency exercised

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[8] This directive, like many others, was reversed by the Trump Administration. *See* Mem. from the Attorney General to U.S. Heads of Dep't Components, Treatment of Transgender Employment Claims Under Title VII of the Civil Rights Act of 1964, Oct. 4, 2017 2017 (Title VII does not prohibit discrimination based on gender identity *per se*) (emphasis in original).

independent judgment, *id.* at 10-11, 27, *Amicus* has yet found little evidence of it. (Indeed, the use of "shall" in Executive Order 13583 could be interpreted to forbid it.)

The EEOC, it seems, gave little thought to the religious freedom or free speech implications of its approaches. In 2017, the EEOC posted proposed "harassment" guidelines applicable to the private sector on the site regulation.gov. *See Proposed Enforcement Guidance on Unlawful Harassment*, Regulation.gov, https://www.regulations.gov/document?D=EEOC-2016-0009-0001. It stated therein, that under Title VII "sex-based harassment" includes not only harassment due to gender identity or intent to transition but also "using a name or pronoun inconsistent with the individual's gender identity in a "persistent *or* offensive manner." (Emphasis added). As support, the EEOC cited its own federal sector case, *Jameson v. U.S. Postal Serv.*, Appeal No. 0120130992, 2013 WL 2368729, at *2 (EEOC May 21, 2013). The guidance evoked numerous challenges, including criticisms that it was contrary to existing law and that the EEOC did not point this fact out. *See Comments to Proposed Harassment Guidance Critical of EEOC's Position on LGBT Bias*, https://www.laboremploymentlawnavigator.com/2017/03/comments-to-proposed-harassment-guidance-critical-of-eeocs-position-on-lgbt-bias/. In comments submitted on February 9, 2017, *Amicus*, herself, noted that the interpretation raised free speech concerns, that the EEOC had failed to distinguish coworkers from supervisors or even to designate whether an individual had to hear or know of the

comments. A new OMB Director in a new Administration, put adopting the EEOC's approaches on hold. Now, on its website the EEOC tells the public (including employers) that Title VII prohibits *"intentionally and persistently* failing to use the name and gender pronoun . . . ." EEOC, *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last visited Aug. 20, 2019) (emphasis added). But it has a different page on "harassment"; it does not mention misgendering. EEOC, *Harassment*, https://www.eeoc.gov/laws/types/harassment.cfm (last visited Aug. 20, 2019).

In *Hillier v. Lew*, Appeal Appeal No. 0120150248, 2016 EEOPUB LEXIS 1108 (EEOC April 21, 2016), the EEOC ruled that an employee affinity group called Christian Fundamentalist Internal Revenue Employees (CFIRE), that met on IRS property to have Bible discussions, harassed a trans female employee and created a hostile environment under Title VII by not accepting her as a member and by not recognizing her gender identity. It concluded the group's "harassment" was attributable to the agency.

Once the EEOC had sufficient rulings in the context of this nontransparent, noncritical federal process, it then leveraged its hard-won history of goodwill and asked federal courts to apply the standards to the private sector. Virtually every Title VII (or Title IX) case that courts have cited in

deference to EEOC emerged out of this nontransparent, noncritical process.

Upon information and belief, partisan nonprofit advocates and partisan nonprofit advocacy groups played key roles in shaping these policies. The EEOC and other agencies may even have coordinated litigation strategies with them.[9] In the meantime, such groups focused on media strategies intent on creating the most accepting environment for EEOC policies, especially the more controversial ones relating to intimate spaces, even if it was contrary to the facts.

The EEOC used its EXCEL training conferences to press its interpretations as law to private employers and their Human Resources staff. It called upon partisan advocacy groups to present in these trainings. And when a new Presidential administration began reversing approaches of the prior one, the EEOC turned to encouraging employers to create so-called "respectful workplaces." EEOC, *EEOC Launches New Training Program On Respectful Workplaces*, https://www.eeoc.gov/eeoc/newsroom/release/10-4-17.cfm.

Private lawyers have expressed concern regarding whether the EEOC's General Counsel's office sought to block private litigation, possibly that which would yield interpretations contrary to its own. *Cf.* Alison

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[9] By "partisan," I mean that their interest was in representing only one side. Such groups have a right, of course, to petition their government for redress of grievances. But if the EEOC surrendered independent judgment or relied upon partisan information, it is not entitled to deference and, as an agency defined by independence, bipartisanship and protection of the vulnerable, it committed serious error.

Frankel, *Want to Kill a Sex Discrimination Class Action? Ford Case is a Blueprint*, Reuters, Oct. 24, 2017 (sexual harassment class action by women stymied by EEOC settlement). The terms of any settlements *before* EEOC litigation are confidential, thus employers have strong incentive to settle. EEOC Regional Attorney's Manual, Part 3 Section 4A (Equal Emp. Opportunity Comm'n), https://www.eeoc.gov/eeoc/litigation/manual/3-4-a_settlement_standards.cfm#section2e (last visited Aug. 24, 2018).

Another concern is that the EEOC may have worked with partisan advocacy groups to trade off the interests of women and racial minorities to advance primarily those of male-bodied sexual minorities, in an effort to these groups together in legal doctrine. In a case involving a black woman who was not hired because she wore her hair in the dreadlocks style, the EEOC consistently refused to assert a disparate impact claim, even when invited by the courts, relying solely on a disparate treatment stereotyping mutation. When the EEOC lost twice, the NAACP Legal Defense Fund sought intervention for the purpose of seeking cert. and pressing the EEOC's stereotyping theory. This Court denied the motion. *EEOC v. Catastrophe Mgt. Sol's.*, 11 F. Supp. 3d 1139 (2014), *aff'd,* 837. F.3d 1176 (11th Cir.. 2016), *opinion withdrawn, and substitute inserted,* 852 F.3d 1018 (11th Cir. 2016)*, reh'g denied en banc*, 876 F.3d 1273 (2017), *motion to intervene to file cert. petition denied*, 138 S. Ct. 2015 (2018). The press widely reported that this Court and the 11th Circuit had

determined that employers *could* discriminate on the basis of dreadlocks.

In addition to the closed and lockstep nature of the process used, there are several other reasons why judicial deference is not due the EEOC for these actions. First, the FEO Br. baldly asserts that the EEOC can ignore judicial precedent and independently interpret a statute based on its best judgment, although it concedes that other agencies are bound to follow the judiciary. FEO Br., *supra* p. 12, at 12, n.6. Second, the EEOC's actions were not subjected to the notice and comment requirements of the Administrative Procedure Act. 5 U.S.C. § 553 or a parallel process. Indeed, when some agencies raised questions about new procedures for processing discrimination complaints, the EEOC suggested that the APA did not apply to its rule making regarding interagency activities.[10] Third, the opaqueness of this process with respect to the outside world may have been reinforced by the fact that files "related solely to the internal personnel rules and practices of an agency" and personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy are exempt from FOIA. *See* 5 U.S.C. § 552(b)(2) (personnel files); *id. at* § 552(b)(6) (personal files).

The EEOC has offered courts three theories that gender identity discrimination and sexual orientation discrimination are necessarily because of sex: because (1) they necessarily entail treating an employee less favorably because of the employee's sex; (2) "it

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[10] 77 Fed. Reg. 43498, 43499 (Jan. 25, 2012), https://www.regulations.gov/document?D=EEOC_FRDOC_0001-0140

necessarily involves discrimination based on gender stereotypes"; and (3) sexual orientation discrimination is associational discrimination on the basis of sex" because it references the sex of the person with whom one would associate. *See* EEOC 2d Cir. En Banc Br., Zarda, 884 F.3d 560 (2018), at 5-17. *See also Baldwin v. Foxx*, *14-21. The FEO brief argues that these positions "did not signal any sort of sea change, but instead built on evolving analysis done over the course of many years, both in the courts and by civil service attorneys within the agency." FEO Br., *supra* p. 12, at 13. But it was a sea change. As I show in the *Altitude Express* brief (§ III), these theories simply weren't justified by the plurality opinion in *Price Waterhouse*.

Moreover, for decades, strains of the EEOC's theories had been bubbling up in legal scholarship and among lawyers. So too the notion that Title VII should be reinterpreted so that "sex" means gender identity. Notably, in 1997, then Professor and attorney Chai Feldblum (later EEOC Commissioner Feldblum) discussed using *Price Waterhouse* to support gender stereotyping claims under Title VII. *Memorandum from Chai Feldblum & Shannon Minter to Legal Roundtable Members re Title VII, ENDA and Gender Expression*, Sept. 11, 1997 in Chai Feldblum, *Gay People, Trans People, Women: Is it All About Gender?* 17 N.Y.L.S.J. Hum. Rts. 623, 673-77 (2000) (Appendix A). In 2007, Feldblum was quoted as saying that *Price Waterhouse* "could provide some protection against gender identity discrimination in the workplace, but it's not been anything you can depend on." Lisa Keen, *ENDA Stirs Fiery Controversy Over Transgender Inclusion, Legal*

Loopholes, Seattle Gay News, (Oct. 5, 2007) (quoting Feldblum). She reportedly added, "'"Many courts . . . are saying that [the *Price-Waterhouse* decision applies] if a woman acts in a way that's non-traditional for a woman, but if a woman changes her gender and becomes a man, that is different and is not covered."' *Id.*

B.The EEOC Ignored Its Duty to Protect the Safety, Privacy, Opportunity and Speech Rights of Women and Girls

Before this Court and others, and in the national press, various parties and *amici* have argued that mixed-sex spaces pose no safety risks to women and girls. *E.g.,* GLAAD, *Debunking the "Bathroom Bill" Myth: Accurate Reporting on Nondiscrimination: A Guide for Journalists*, (Feb. 2016) , https://web.archive.org/web/20160310220528/http://www.glaad.org/sites/default/files/Debunking_the_Bathroom_Bill_Myth_2016.pdf (last visited Aug. 17, 2019. *See* W. Burlette Carter, *Sexism in the Bathroom Debates: How Bathrooms First Became Separated by Sex,* supra 37 Yale L. & Pol'y Rev. 227, 234 & n. 12 (2018) (discussing use of "imaginary predator" narrative); *See* Br. of Anti-Sexual Assault and Gender-Based Violence Organizations as Amici Curiae in Support of Respondent*, R.G. & G.R. Harris Funeral Homes*, 139 S. Ct. 1599 (2019), 16-18 ("DV *Funeral Homes* Br."); Br. of Anti-Sexual Assault, Domestic Violence, and Gender-Based Violence Organizations as *Amici Curiae* in Support of Respondent, *Gloucester Cty Sch.* Bd v. G.G., 137 S. Ct. 1239 (No. 160273) ("*Grimm*").

From the start the Court should notice how these arguments disregarding safety concerns, confirm the conflict of interests concerns I raised in the *Altitude Express* Companion Brief at §V(B). Respondents and their *amici* have a vested interest in downplaying any harm women may experience. This will be their position in any future litigation. For women's safety, privacy and opportunity, it is important that the two lines of litigation be kept distinguishable. The proposal I make in the final section helps accomplish that.

We also see a double standard. The studies which show that trans people are at risk rely wholly upon self-reporting. But when women self-report, activists say we conjure up *imaginary predators*. It is an old trope, used for centuries to deny the validity of women's claims. And so Blackstone said of rape, "it is an offense . . . so easily charged, and the negative so difficult to be proved." 4 William Blackstone, *Commentaries*, *215.

The tragic deaths of transwomen of color have also been used to argue for access to intimate spaces based on gender identity. Obviously, some discrimination based on transgender status contributes to marginality and, therefore, to risk. But most of these victims, in addition to being transgender, are also young, economically marginal and racial minorities. Persons making less than $24,999, younger people, and racial minorities generally have higher rates of victimization than persons making more or whites. Morgan & Kena, Dep't. of Justice, *Criminal Victimization 2016*, *supra*, at 9, (Table 8, Rate of Violent Victimization and Serious Violent Victimization and Percent Reported to Police by

Demographic Statistics). Black women and black men also are victimized by violence at higher rates than their white counterparts. In 2014, the rate of violent crime victimization per 1000 persons (over the age of 12 years) was 10.1 for blacks and 7.0 for whites. Jennifer L. Truman & Lynn Langton, Bureau of Justice Statistics, *Criminal Victimization, 2014,* , at 9, https://www.bjs.gov/content/pub/pdf/cv14.pdf [(Table 9). Nor is it at all obvious that death rates for black transgender females are higher than those for black males. There is a reason we don't hear much of such statistics for *white* transgender persons. The numbers don't support the narrative.

Another sleight of hand occurs when activists compare transwomen's statistics to the *general population*. By combining women with men, the approach distorts women's experiences with violence.[11]

Here is a telling fact. The EEOC was surprised by widespread allegations of sexual harassment in the workplace against women emerging around

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[11] The *amici* also cite to what they call a "peer-reviewed" study" that they claim supports their position. *Id. at 17.* The study was sponsored by the *Williams Institute* which with all due respect, is partisan; it only researches and reports information that advances one side on such issues. The journal is the official online journal of the National Sexuality Resource Center. I could not find it on my scholarly databases, so I cannot be as helpful to the Court as I would like. However, generally, surveys that focus on reports deserve serious scrutiny before accepting such findings. And in this context, one important question is whether the jurisdiction considers it "harassment" to report someone for being in the wrong bathroom. Such a standard would chill overall reporting.

#MeToo.[12] Initially, it quickly denied any increase in harassment claims. Later, as evidence mounted, the it acknowledged that its data was showing a 12% spike in claims, mostly from women. EEOC, *EEOC Releases Preliminary FY 2018 Sexual Harassment Data*, Oct. 4, 2018, https://www.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm; Robin E. Shea, *EEOC Now Says It is Having a #MeToo Spike*, JDSupra, Oct. 12, 2018, https://www.jdsupra.com/legalnews/eeoc-now-says-it-is-having-a-metoo-spike-75620/. Victims don't report when they believe, rightly or wrongly, that authorities are disinterested in what they have to say. Recent college campus studies confirm that sexual harassment remains a serious problem. *AAU Climate Study on Sexual Assault and Sexual Misconduct* (Sept., 2015), https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015 (women disproportionately at risk for sexual assault, predatory behavior). *Cultivating Learning and Safe Environments: An Empirical Study of Prevalence and Perceptions of Sexual Harassment, Stalking, Dating/Domestic Abuse and Violence, and Unwanted Sexual Contact* (2017), *at* https://utexas.app.box.com/v/utaustinclasesurveyreport (hereinafter "U. Texas-Austin Study"). These studies also confirm that LGBT+ persons experience high rates of sexual assault/unwanted touching etc. too (and that includes behavior from within their own communities). Unfortunately, the "woke" AAU study designers merged transgender people into sex

[12] On #MeToo, see Carter, Separated by Sex, supra p. 37, at 235, n. 13.

according to their gender identity—so we have no way of knowing their unique statistics.

A recent study by the *Times* of London found that the nine out of ten of harassment complaints relating from conduct in changing rooms relates to conduct in mixed-sex ones, although these changing rooms make up less than half of all changing room in Britain. Andrew Gilligan*, Sex Pests Target Women in Mixed Changing Rooms*, TIMES (Sunday), Sept. 1, 2018. Numerous stories of assaults on women and girls in bathrooms are found in local media. One need only search for them. But unless they involve a perp-hunt or are otherwise sensational, national media, largely ignores them.

And sometimes trans people *are* perpetrators. I will offer only one example although there are others. A group of women are suing a shelter in Fresno for making them group shower with a transwoman with male genitalia who, they allege, repeatedly leered at and harassed them. McGee v. Poverello House, No. 1:18-cv-0078-LJO-SAB (E.D. Cal. Nov. 5, 2018. In fact, the overwhelming majority of transwomen still have their male reproductive anatomy. Nat'l Center for Transgender Equality, Injustice at Every Turn, National Transgender Discrimination Survey, 26 (only 33% of respondents, male-bodied and female-bodied, had surgically transitioned).[13]

Most trans people are like the rest of us. They are normal and nonviolent. But as a group, like the rest of us, trans people lack the angel wings partisans have insisted we attach to them.

Women have fought for generations for medical care tailored to their needs. We often need intimate

[13] I note that the NCTE is partisan as well.

care provided by someone with whom they are comfortable. We have the right to make those choices. Like the rest of the male-bodied, trans women cannot broadly be substituted for women in studies of the human body without compromising women's care and returning us to an era of substandard care. And transwomen badly need their own care. When surgeons commit malpractice, there is often no place for them to go.

On the question of opportunity, the EEOC's interpretations of Title VII could also undercut *any* remedial action that takes sex into account—and because similar statutes are often read alike, that includes Title IX. Three female student-athletes have filed a federal discrimination complaint under Title IX alleging that by including trans athletes (who have broken records racing against girls but were average athletes against boys), the school is discriminating under Title IX. Dave Collins, *Three Connecticut High School Runners File Lawsuit Over Transgender Policy Saying it Has Cost Them Top Finishes and Scholarships*, Boston Globe, June 19, 2019. *See also* Complaint Letter from Alliance Defending Freedom to U.S. Dept. of Education. June 17, 2019, http://www.adfmedia.org/files/SouleComplaintOCR.pdf.

The EEOC and the government may also have been supported by false information, in particular, the claims that (1) sex separation in bathrooms was rooted in patrimony and Victorian notions of separate spheres and (2) that the first laws mandating sex separation in bathrooms emerged in the nineteenth century. The claims, widely circulated in the Spring of 2016 when the Title IX joint guidance was

distributed, *see* discussion *supra* at 15, relied on scholarship by Professor Terry Kogan. *E.g.,* Br. of *Amicus Curiae* Professor Terry S. Kogan in Support of Respondent, *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (S. Ct. 2017) (No. 16-273),, *vacating and remanding* 822 F.3d 709 (4th Cir. 2016); Br. of *Amici Curiae* National Women's Law Center, et al. in Support of Respondent, *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017) (No. 16-273) at 24 (favorably discussing the Kogan thesis). It was widely circulated.

But in a recent article, I have disproven Kogan's claims. *See* W. Burlette Carter, *Sexism in the Bathroom Debates: How Bathrooms Really Became Separated By Sex*, 37 Yale L. & Pol'y Rev. 227, 247-48 (2018) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3311184 ("*Separated By Sex*"). Bathrooms and other intimate spaces have been separated as far back as we can record. The reason for sex separation was largely safety and privacy, although alternative third options were likely prevented by insistence on this norm. Labor laws were no exception, indeed, I argue that labor laws were the first state-wide laws that sought to counter sexual harassment. *Carter, Sex Separation*, at 228-239. Moreover, I have shown that the reason Kogan erred is that he made the same mistake the EEOC made; he failed to consider women. *Id.* at 289-90.

In seeking behind-the-scenes changes and failing to consider, independently, the needs of female stakeholders the EEOC followed an approach reflected in the work of advocacy groups internationally. Scotland recently backtracked on

announced plans to liberalize rules on gender recognition changes, after women-led groups rose up to express concerns. Karen Andrews, *Law on Gender Recognition is Delayed Amid Concern for Girls*, The Times, June 21,, 2019. Expressing one view, the group Fair Play for Women tweeted in response, "This 'delay' would not have been necessary if policymakers had involved all stakeholders, including women, from the start." @FairplayforWomen, Twitter, June 21, 2019, 4:54 a.m.

The EEOC's actions also contributed to an environment in which the rights of women and girls could not be fully discussed and protected. In such an environment, the Court should be cautious about accepting as true claims about the "consensus" viewpoints of scholars or authorities or about "how a majority feel" in these cases. Each time it does so, it essentially exercises judicial notice. [14]

Amicus notes, for example, that academic Philosophers have filed a brief supporting Petitioner. Brief of Philosophy Professors as *Amicus Curiae* . . ., *in R.G. & G.R. Harris Funeral Homes*, 139 S. Ct. 1599 (2019) (No. 18-107), et al. Right now, Academic Philosophy is in the throes of upheaval as some academics have argued that those who challenge activism for transgender persons, no matter their motivations, should be denied a voice—i.e., publishing papers, conference invitations etc. *See*, *e.g.,* Joint Statement in Response to the Aristotelian Society Talk on 3rd June 2019, https://www.mapforthegap.org.uk/post/statement-in-response-to-the-aristotelian-society-talk-on-3rd-june-

[14] Fed. R. Evid. 201 addresses judicial notice of adjudicative facts. There is no rule on notice of legislative or other facts.

2019; Spencer Case, *When Philosophers Fail to Do Their Job*, Nat'l Rev., July 7, 2016, 8:00 a.m., https://www.nationalreview.com/2016/07/transgender-rights-philosophers-academic-left-germaine-greer/.

Against a outcry from trans activists, Brown University initially pulled from its website peer reviewed research by Dr. Lisa Littman, suggesting that some children develop "rapid onset" gender dysphoria as a result of social suggestions that they are transgender. The article was eventually published with clarifications. Lisa Littman, *Parent Reports of Adolescents and Young Adults Perceived to Show Signs of a Rapid Onset of Gender Dysphoria*, 14 PLOS One (2017). Brown claimed that the issue was not academic freedom but standards. Brown University, Updated, Brown Statements on Gender Dysphoria Study, Mar. 19, 2019, https://www.brown.edu/news/2019-03-19/gender. But has Brown subjected the writings of transgender authors or even male authors to this same rigor?

The UK lacks the vigorous speech protections of the U.S. UK feminists have faced police interrogation and lawsuits from those alleging they have engaged in hate speech. *E.g.*, Dulcie Lee, *Trans-threat Feminist Linda Bellos Faces Private Prosecution*, The Times, Aug. 29, 2018. A minority of students on University campuses are bullying the rest into silence—and attempting to bully professors. *See also Professors Bullied into Silence as Students Cry Transphobia*, The Times, Aug. 17, 2019 (UK feminist academics being silenced).

Womans_Place_UK sponsors debates and discussions. It offered a thread of tweets outlining violence against the group and cancelled bookings

that it attributed to overzealous trans activism. *See* @Womans_Place_UK, https://twitter.com/Womans_Place_UK/status/1018054147399090176?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1018054147399090176&ref_url=http%3A%2F%2Fbjournal.co%2Ftwitter-users-throw-support-behind-womans-place-uk-ahead-of-brighton-meeting%2F.

Social media has been pressured to adopt "hate speech" rules. Twitter has forced women who "misgender" to delete their tweets or be banned. *Twitter-ban Feminist Defends Transgender Views Ahead of Holyrood Meeting*, May 22, 2019, BBC.com, https://www.bbc.com/news/uk-scotland-48366184; Facebook temporarily suspended Women's_Place UK's account after complaints that the group was peddling "hate" because, while it opposed violence against transgender people, it rejected the claim that transgender women are women. Facebook later renewed the account, after online protests.[15] A UK crowdfunding site suspended the parent group Transgender Trend for trying to circulate a packet about transgender children to be used by parents and in schools. An investigation led to a determination that the materials were not "hateful." *See* Transgender Trend, @Transgendertrd,

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[15] Izzy Lyons, *Facebook Accused of Censoring Feminist Campaign Website Concerned With Transgender Self-Identification*, Telegraph, July 21, 2018, https://www.telegraph.co.uk/news/2018/07/21/facebook-accused-censoring-feminist-campaign-website-concerned/; Saquib Shah, *Safe Space? Facebook BLOCKS Links to Women's Rights Group After "Transphobia" Complaints*, Sun, July 23, 2018, https://www.thesun.co.uk/tech/6841801/facebook-block-womens-rights-group-transphobia/

https://twitter.com/Transgendertrd/status/1004713546838618114 (thanking supporters for protesting crowd-funding cut-off).

Professor Kathleen Stock recently published anonymized comments that revealed significant fear of reprisals among UK academics. Kathleen Stock, (@docstockk), TWITTER, (July 8, 2018: 4:31 a.m., https://twitter.com/docstockk/status/1015875958082080769?s=21.

As mentioned in my discussion of the "Interests of *Amicus Curiae*," *Amicus* has faced censorship and sabotage efforts relating to her academic work. In 2015, during the editing process on a law review article, a student editor introduced and errant unmarked edit—the word "false." I discovered it. Thereafter, senior student editors struggled valiantly to protect the integrity of the process. The dean handled the matter handled as a individual disciplinary one.

In 2018, after I signed an offer to publish my article *Sex Separation*, which took on Kogan's thesis, I received a mysterious late-night email stating the signed offer was being revoked on "length" concerns. (The length had not changed.) My offer to shorten it was met with silence. (The students had consulted at least one administrator.) After contacting the dean, I was able bring a shortened piece to publication. If I had not fought for that article, there would be little response to Kogan's claims about how bathrooms became separated by sex. And advocates have spread those claims have been spread all over the internet.

They asserted as fact *Wikipedia*, before I objected, and will likely return.

And again in 2018, two rogue law review editors were able to overrule other students on a board editing my work. After initial editing, I was required to meticulously documents statements made about the most basic elements of histories of women and blacks in the United States. These students either didn't know these histories or had been taught different ones or didn't care. But similar demands were not made with respect to statements validating LGBT+ rights. When editors demanded that I delete content discussing conflicts between women and trans women and other content (and invited me to withdraw the piece), I withdrew the piece. Then, I contacted the dean. The dean's response was appropriate.

These stories relate only to those of my articles that were accepted. There were others on similar subjects that I didn't even receive offers. Yes, I know, every law professor believes his/her/their article should be met with angels (or cherubs) and Trumpets. But this was different. Moreover, the paucity of law review articles offering different viewpoints on transgender issues—or even on sexual orientation histories—strongly suggests that something is awry. (I suspect students did not come up with these schemes on their own.) Indeed, media suggests the same.

Consider again, the Kogan article which claimed that the origins of bathroom sex separation lie in nineteenth century patriarchy. Before my article was published, Kogan apparently conducted a teach-in training session for the Tenth Circuit. S.J.

Quinney, College of Law, *Kogan to Present on Transgender Rights and Public restrooms at Tenth Circuit Judicial Conference*, May 5, 2017, https://law.utah.edu/snippet/kogan-to-present-on-transgender-rights-and-public-restrooms-at-tenth-circuit-judicial-conference/. After publication, I emailed Kogan a copy of my article. He already had one. I similarly alerted the lawyer who filed the Kogan brief in *Grimm*. Despite this notice, with the help of new lawyers, Kogan has filed substantially the same brief in the Tenth Circuit in a Title IX case. *See* Br. of Professor Terry S. Kogan, *Adams v. School Board*, No. 18-13592-EE (11th Cir. 2019), https://files.eqcf.org/wp-content/uploads/2019/03/110524997-*Amicus*-Brief-Kogan-iso-Adams.pdf. *Cf* Utah Model R. Prof. R. 3.3, https://www.utcourts.gov/resources/rules/ucja/ch13/3_3.htm.

These matters raise ethical concerns. [16] Thankfully, in this case, there is no Kogan brief. But the Court could still have been misled if it read in the past, and believed to be true the filing in *Grimm.*

The Court must recognize that, in these instances the power to accomplish in favor of the male-bodied it is *inherited*, and relates directly back to discrimination against women that to this day elevates the male-bodied—the type of discrimination that Title VII prohibits. The policies that the EEOC and the rest of government embraced regarding how Americans must think and feel in the workplace. supported this suppression and helped to give it life,

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[16] Under Model Rule 3.3. the obligations of an attorney ends when the case ends. Moreover, is legal scholarship "authority?" Or is it opinion under Fed. R. Evid. 703 and subject to *Daubert*?

not just as applied to conservatives, but to others as well.[17]

IV. The Proper Test is *Oncale*

The proper test for claims of gender identity discrimination, as with sexual orientation discrimination, is the one this Court unanimously adopted in *Oncale*, 523 U.S. at 75. The Court held that Title VII extends "beyond the principal evil" about which Congress was concerned to cover reasonably comparable evils". 523 U.S. at 79-80. Herein, I designate claims that fall outside the type that were Congress' original concern but are alleged to be actionable under Title VII as "derivative" claims.

Applying this test, one can see that three EEOC claims fall short: (1) the claim that differentiation on the basis of gender identity and sexual orientation *always* violate Title VII; (2) the claim that Title VII *requires* employers, coworkers and supervisors to always use gender identity instead of sex; and (3) the claim Title VII requires employers to grant access to bathrooms by gender identity or to ignore sex separation completely. In fact, I would argue that Title VII does not require an employer to guarantee anyone a *specific* bathroom. What *is* required is a safe and private space and the means to perform or be

[17] It is not new. Conservatives for decades blocked minority scholarship including LGBT+ scholarship. Some say they are still doing it today.

assisted with intimate tasks and care.[18] In fulfilling these requirements, local resources and risks *do* matter.

As I showed in *Separated by Sex*, division by sex is the way that most localities have come to address the gnawing problems of ensuring safety and privacy in these spaces. Carter, *Separated by Sex*, *supra* p. 28 at 228. Sex separated bathrooms can be justified on privacy and safety grounds; they also are justifiable as a reasonable way to avoid conflicts. And third option bathrooms can be justified on the same grounds. But the Court cannot judge the safety and privacy requirements of America's communities from the sanctuary of One First Street, N.E.

I believe the EEOC's position is clearly erroneous. However, I do not agree with the government that there is *no* relief under Title VII for plaintiffs alleging disparate treatment because of their sexual orientation or gender identity. Considering history, and putting intimate spaces and "misgendering" aside, I suggest that four types of claims should be considered reasonably comparable evils in that the motivations are the same as those abhorred under Title VII's prohibition on discrimination "because … of sex": (1) sexual assault (as in *Oncale*); (2) motivation that only certain sexes should do certain jobs, (3) motivation that the sexes should behave or groom in a particular way (assuming no BFOQ); and (4) morality objections.

I suggest four areas of possible exemption, in addition to the BFOQ: (1) religion; (2) safety

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[18] Activists have attempted to expand the notion of "safe" to include being protected from opinions one dislikes or being affirmed. I do not include these meanings.

(including potentials for employee conflict); (3) privacy, (4) ensuring opportunities for historically deprived groups and (5) limited biology or procreational policies. The Constitution of course also stands.

As for the fifth exemption, this Court and the Pregnancy Nondiscrimination Act have placed limits on biological considerations *See, e.g., United Automobile Workers v. Johnson Controls*, *Inc.,* 499 U.S. 187 (1991). The focus of that item is on issues that may well be Constitutional and not statutory in nature.

There is one other thought. If the Court is going to say that Title VII prohibits employer from not hiring a transgender applicant because the employer saw on Twitter that the person is transgender and is morally offended by the person's existence, (or a person who, he learns is in a same sex marriage to which he objects) then shouldn't it also block an employer who doesn't want to hire a person who discussed on Twitter that he does not think gender and sex are the same or opposes same sex marriage?

V. R.G. & G.R. Funeral Homes Should Prevail Because its BFOQ is Religiously-Based

General guidance is sorely needed in these cases, However, this case can be resolved without *Oncale*. Title VII exempts a standard based on a BFOQ. 42 U. S. C. 2000e-2(e). The question is whether the Funeral Home's BFOQ is justified by religion. The district court below made findings regarding religion in considering the Religious Freedom Restoration Act claim. Those findings may be applied to the BFOQ.

The expectations of or needs of a religious customer base are also valid considerations, given that the business' services (death and burial) have long been so closely associated with religion. The Funeral Home should prevail because of the close connection between the BFOQ and religion.

CONCLUSION

The decision of the U.S. Court of Appeals for the Second Circuit should be *reversed*.

August 21, 2019

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