IN THE SUPREME COURT OF THE UNITED STATES

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No. 18-107

R.G. & G.R. HARRIS FUNERAL HOMES, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

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

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MOTION OF THE FEDERAL RESPONDENT FOR DIVIDED ARGUMENT

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Pursuant to Rules 21 and 28.4 of the Rules of this Court, the Solicitor General, on behalf of the federal respondent, respectfully moves for divided argument in this case. The case is scheduled for oral argument on October 8, 2019. Petitioner Harris Funeral Homes, Inc. (Harris Homes) has consented to divided argument and to dividing its argument time equally with the government, with 15 minutes allotted for each. Granting this motion therefore would not require the Court to enlarge the overall time for argument.

1. The question on which the Court granted review in this case is whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., "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)." 139 S Ct. 1599 (2019). Harris Homes operates funeral homes at several locations in Michigan. Pet. App. 90a. Harris Homes has adopted a written, sex-specific dress code for its employees who interact with the public that requires male employees to wear suits and ties and female employees to wear skirts and business jackets. Id. at 7a; J.A. 119-121. Harris Homes "administers its dress code based on [its] employees' biological sex, not based on their subjective gender identity." J.A. 129.

Respondent Stephens was employed by Harris Homes from 2007 to 2013, ultimately as a funeral director and embalmer. Pet. App. 5a. Stephens "was born biologically male," with the name William Anthony Beasley Stephens, and Stephens presented as a male when Stephens began working for Harris Homes and for more than five years thereafter. Id. at 3a; see id. at 5a-6a. Stephens now identifies as a transgender woman and uses the name Aimee Stephens. Id. at 3a, 5a, 8a. In 2013, Stephens informed Harris Homes that Stephens had "struggled with 'a gender identity disorder' her 'entire life,'" "'intended to have sex reassignment surgery,'" and intended to dress at work according to the dress code for females

rather than males. Id. at 8a (brackets and citations omitted). Harris Homes then terminated Stephens's employment. Id. at 9a.

2. Stephens filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC). Pet. App. 9a-10a. The EEOC found reasonable cause to believe that Harris Homes had discharged Stephens based on sex and gender identity in violation of Title VII. Id. at 10a. After informal conciliation efforts failed, the EEOC brought this Title VII suit against Harris Homes, alleging that Harris Homes "fired Stephens because Stephens is transgender, because of Stephens's transition from male to female, and/or because Stephens did not conform to [Harris Homes'] sex- or gender-based preferences, expectations, or stereotypes." J.A. 15.

The district court determined that the EEOC could not proceed on a theory that Harris Homes discriminated against Stephens based on transgender status, holding that "transgender or transsexual status is currently not a protected class under Title VII." Pet. App. 172a. The court concluded, however, that Harris Homes had discriminated against Stephens by engaging in sex stereotyping. See id. at 107a-118a. The court nevertheless granted summary judgment to Harris Homes, holding that it was entitled to an "exemption from Title VII" under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb et seq. Pet. App. 87a; see id. at 118a-144a.

The EEOC appealed, and Stephens intervened in the appeal. Pet. App. 12a-13a. In October 2017, while the appeal was pending, the Attorney General issued a memorandum to United States Attorneys and component heads of the Department of Justice stating that "Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity per se." Id. at 193a. The memorandum stated that "Title VII is not properly construed to proscribe employment practices (such as sex-specific bathrooms) that take account of the sex of employees but do not impose different burdens on similarly situated members of each sex," and the Department "will take that position in all pending and future matters." Ibid.

As relevant here, the court of appeals reversed. Pet. App. 1a-81a. It agreed with the district court "that Stephens was fired because of her failure to conform to sex stereotypes, in violation of Title VII." Id. at 14a; see id. at 15a-22a. The court of appeals further held that the district court had erred by precluding the EEOC from proceeding on its broader theory that gender-identity discrimination categorically violates Title VII. See id. at 22a-36a. The court of appeals held "that discrimination on the basis of transgender and transitioning status violates Title VII" for "two reasons." Id. at 22a-23a. First, the court held 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." Id. at 23a; see id. at 23a-26a. Second, the court reasoned that "discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping." Id. at 26a; see id. at 26a-28a.

3. At the certiorari stage, consistent with the Attorney General's October 2017 memorandum, the government took the position that the court of appeals' decision is erroneous and that Title VII's prohibition on "discriminat[ion] * * * because of * * * sex," 42 U.S.C. 2000e-2(a)(1), does not encompass discrimination based on transgender status. See Gov't Br. in Opp. 12, 15-23. The Court granted certiorari limited to the question "[w]hether 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)." 139 S Ct. 1599. In its brief on the merits, the government has argued (Br. 14-54) that Title VII does not bar discrimination against transgender persons on either basis. Petitioner Harris Homes has taken a similar position. Br. 16-56. Respondent Stephens, who intervened in the court of appeals, has filed a brief defending the Sixth Circuit's judgment and arguing that discrimination based on transgender status constitutes discrimination because of sex in violation of Title VII. Br. 20-47.

4. In cases in which the government as a respondent supports the petitioner, the Court has repeatedly permitted the government to divide argument time with the petitioner. See Smith v. Berryhill, 139 S. Ct. 1765 (2019); Lucia v. SEC, 138 S. Ct. 2044 (2018); McLane Co., Inc. v. EEOC, 137 S. Ct. 1159 (2017); Beckles v. United States, 137 S. Ct. 886 (2017); Welch v. United States, 136 S. Ct. 1257 (2016); Mata v. Lynch, 135 S. Ct. 2150 (2015); Millbrook v. United States, 569 U.S. 50 (2013); Dorsey v. United States, 567 U.S. 260 (2012); Setser v. United States, 566 U.S. 231 (2012).

The same course is appropriate here, including because the United States has a substantial interest in the interpretation and application of Title VII. The federal government enforces Title VII against private and public employers, see 42 U.S.C. 2000e-5(a), (b), and (f)(1), and Title VII also applies to the federal government as an employer, see 42 U.S.C. 2000e-16. Accordingly, the United States has a substantial interest in the statute's proper interpretation.

The United States has participated in oral argument as amicus curiae in prior cases involving the interpretation and application of Title VII. E.g., Fort Bend County, Texas v. Davis, 139 S. Ct. 1843 (2019); Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015); University of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013); Vance v. Ball State Univ., 570 U.S. 421 (2013); Thompson

v. North Am. Stainless, LP, 562 U.S. 170 (2011); Ricci v. DeStefano, 557 U.S. 557 (2009); AT&T Corp. v. Hulteen, 556 U.S. 701 (2009); Crawford v. Metropolitan Gov't of Nashville & Davidson County, 555 U.S. 271 (2009); Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53 (2006); Arbaugh v. Y & H Corp., 546 U.S. 500 (2006). As in those cases, the United States' participation at argument here may be of material assistance to the Court.

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