NO. _____

IN THE
Supreme Court of the United States

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

v.

EQUAL OPPORTUNITY EMPLOYMENT COMMISSION,
Respondent,

and

AIMEE STEPHENS,
Respondent-Intervenor.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the word "sex" in Title VII's prohibition on discrimination "because of . . . sex," 42 U.S.C. 2000e-2(a)(1), meant "gender identity" and included "transgender status" when Congress enacted Title VII in 1964.

2. Whether *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), prohibits employers from applying sex-specific policies according to their employees' sex rather than their gender identity.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is R.G. &. G.R. Harris Funeral Homes, Inc., a closely held, for-profit corporation. The respondents are the Equal Employment Opportunity Commission and Intervenor Aimee Stephens.

CORPORATE DISCLOSURE STATEMENT

The petitioner has no parent corporation or publicly held company that owns 10% or more of its stock.

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JURISDICTION

The judgment of the court of appeals was entered on March 7, 2018. On May 16, this Court extended the time to file this petition until August 3. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in the appendix to this petition. App. 188a.

INTRODUCTION

The "proper role of the judiciary" is "to apply, not amend, the work of the People's representatives." *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017). The Sixth Circuit departed from that role by judicially amending the word "sex" in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), to mean "gender identity." In so doing, the Sixth Circuit usurped the role of Congress, which has repeatedly considered and rejected making such a change to Title VII.

Redefining "sex" to mean "gender identity" is no trivial matter. Doing so shifts what it means to be male or female from a biological reality based in anatomy and physiology to a subjective perception evidenced by what people profess they feel. Far-reaching consequences follow from that. For example, federal law in some parts of the country now mandates that employers, governments, and schools must administer dress codes and assign living facilities, locker rooms, and restrooms based on the "sex" that a person professes.

As for Petitioner R.G. &. G.R. Harris Funeral Homes, Inc. (Harris Homes), the Sixth Circuit ordered it to allow a male funeral director to dress and present as a woman at work. Harris Homes must do that even though its owner reasonably determined that the employee's actions would violate the company's sex-specific dress code and disrupt the healing process of grieving families. The language of Title VII does not mandate that result. This Court should grant review and reverse.

STATEMENT

A. Petitioner Harris Homes

Harris Homes is a small, family-owned funeral business that has helped its clients mourn the loss of loved ones since 1910. App. 90a. Thomas Rost is its current president and owner. *Ibid.*

As a devout Christian, Rost "sincerely believes that his 'purpose in life is to minister to the grieving, and his religious faith compels him to do that important work.'" App. 103a; accord *id.* at 6a. Harris Homes' mission statement, announced on its website, says that the company's "highest priority is to honor God in all that we do." *Id.* at 6a, 102a.

Funerals are somber and solemn events that address transcendent matters, hold deep spiritual significance, and mark some of the most difficult times in life. App. 196a–97a. They often are traumatic and painful experiences, and family and friends need to be able to focus on each other and their grief. *Id.* at 196a. Because of this, Rost requires his employees to conduct and present themselves in a professional manner and to avoid disrupting or distracting clients as they process their grief. *Id.* at 196a, 198a.

Harris Homes' dress code for employees who interact with clients is integral to ensuring that the company meets the high standards it sets. App. 91a–93a, 140a. It is a sex-specific dress code that prescribes certain requirements for male employees (e.g., they must wear suits) and others for female employees (e.g., they must wear dresses or skirts). *Id.* at 91a–93a. The protocol for funeral directors is

that men wear pant suits and women wear skirt suits. *Id.* at 106a. Respondents do not challenge the dress code as improper under Title VII. *Id.* at 112a; see also *id.* at 18a, 21a, 66a–67a, 86a, 111a, 138a.

Harris Homes' funeral directors are "prominent public representatives" of the company. App. 103a. They regularly interact with clients and guests while moving the deceased's body from the place of death "to the funeral home," helping "integrat[e] the clergy" into the funeral, "greeting the guests," and coordinating the family's "final farewell" to their loved one. *Id.* at 41a.

B. Respondent Stephens

Rost hired Respondent Stephens as a funeral director in 2007. App. 93a–94a. During Stephens's six years of employment, it is undisputed that Stephens "presented as a man." *Id.* at 6a. All relevant employment records—"including driver's license, tax records, and mortuary science license—identif[ied] Stephens as a male." *Id.* at 93a–94a. Nothing during Stephens's employment with Harris Homes, as Stephens testified, would have suggested to anyone at work that Stephens was "anything other than a man." *Id.* at 200a.

In a July 2013 letter, Stephens first told Rost that Stephens identifies as female. App. 8a, 94a–95a. "Stephens 'intend[ed] to have sex reassignment surgery,' and explained that '[t]he first step . . . is to live and work full-time as a woman for one year.'" *Id.* at 8a. Stephens's plan was to present as a woman and wear female attire at work. *Id.* at 95a.

A few weeks later, after seeking legal counsel, Rost told Stephens that the situation was "not going to work out." App. 9a, 96a. Because Rost wanted to reach "a fair agreement," he offered Stephens a severance package. *Id.* at 203a. Stephens declined it.

It is undisputed why Rost let Stephens go. He determined that acquiescing in Stephens's proposal would have violated Harris Homes' dress code, App. 9a, 100a–01a, and "disrupted the[] grieving and healing process" of "clients mourning the loss of their loved ones," *id.* at 198a. Rost was also concerned that female clients and staff would be forced to share restroom facilities with Stephens. *Id.* at 65a. Notably, Rost would *not* have reached the same decision had Stephens professed a female gender identity but "continued to conform to the dress code for male funeral directors while at work." *Id.* at 104a–05a; see also *id.* at 138a.

Also, because Rost interprets the Bible as teaching that sex is immutable, he believed that he "would be violating God's commands" if a male representative of Harris Homes presented himself as a woman while representing the company. App. 104a. Were he forced to violate his faith that way, Rost "would feel significant pressure to sell [the] business and give up [his] life's calling of ministering to grieving people as a funeral home director and owner." *Ibid.* The EEOC "does not contest [Rost's] religious sincerity." *Id.* at 124a.

C. Title VII

Congress enacted Title VII in 1964. The Act deems it "an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge

any individual, or otherwise to discriminate . . . , because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). When enacting Title VII, Congress's "major concern" was ending "race discrimination." *Holloway* v. *Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977).

The word "sex" "was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate." *Ulane* v. *E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); see also *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 243 n.9 (1989) (plurality) (sex "was included in an attempt to *defeat* the bill"). The problem Congress sought to address by adding "sex" was the lack of "equal opportunities for women" in employment. *Sommers* v. *Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam). So Congress chose language "ensur[ing] that men and women are treated equally." *Holloway*, 566 F.2d at 663.

Both at the time of Title VII's enactment and today, the word "sex" refers to a person's status as male or female as objectively determined by anatomical and physiological factors, particularly those involved in reproduction.[1] In contrast, gender identity is an altogether different construct. It refers

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[1] *E.g.*, The American College Dictionary 1109 (1970) (defining "sex" as "the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished"); The American Heritage Dictionary 1605 (5th ed. 2011) (classifying male and female "on the basis of their reproductive organs and functions"); American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 451 (5th ed. 2013) (DSM–5) ("'[S]ex' . . . refer[s] to the biological indicators of male and female").

to an "inner sense of being male or female," App. 204a, or "some category *other than* male or female," DSM–5 451 (emphasis added). The term first emerged in 1963 at a medical conference in Europe. David Haig, *The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001*, 33 Archives of Sexual Behavior 87, 93 (2004).

It was not until 1990 that the concept of gender identity appeared in federal law. That occurred with the passage of the Americans with Disabilities Act, which excluded protection for "gender identity disorders." 42 U.S.C. 12211(b)(1). A year later, when Congress reenacted Title VII, it did not amend the word "sex" to mean "gender identity." Civil Rights Act of 1991, Pub. Law 102–166.

Since then, dozens of state and local legislatures have added "gender identity" to nondiscrimination laws that already include "sex."[2] But Congress has considered and rejected at least a dozen proposals to similarly add "gender identity" to Title VII,[3] even

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[2] *E.g.*, Conn. Gen. Stat. § 46a-60(b)(1) (forbidding employment discrimination based on "sex" and "gender identity or expression"); Del. Code Ann. tit. 19, § 711(a)(1)–(2) (including "sex" and "gender identity"); D.C. Code § 2-1402.11(a) (including "sex" and "gender identity or expression").

[3] *E.g.*, Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007); To Prohibit Employment Discrimination Based on Gender Identity, H.R. 3686, 110th Cong. (2007); Employment Non-Discrimination Act of 2009, H.R. 2981, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009); Employment Non-Discrimination Act of 2011, H.R. 1397, 112th

while enacting other nondiscrimination provisions listing either "sex" or "gender" alongside "gender identity."[4]

D. District Court Proceedings

Stephens filed a charge of discrimination with the EEOC in September 2013, alleging an unlawful discharge based on "sex and gender identity" in violation of Title VII. App. 97a. After investigating, the EEOC filed suit against Harris Homes, claiming that the company violated Title VII by discharging Stephens allegedly (1) "because Stephens is transgender" and sought to "transition from male to female" and (2) "because Stephens did not conform to [Harris Homes'] sex- or gender-based preferences, expectations, or stereotypes." *Id.* at 166a. The EEOC sought to enjoin Harris Homes from "discriminat[ing] against an employee or applicant because of

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Cong. (2011); Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011); Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013); Equality Act, H.R. 3185, 114th Cong. (2015); Equality Act, S. 1858, 114th Cong. (2015); Equality Act, H.R. 2282, 115th Cong. (2017); Equality Act, S. 1006, 115th Cong. (2017).

[4] *E.g.*, 34 U.S.C. 12291(b)(13)(A) (prohibiting discrimination based on "sex" and "gender identity") (language added via the Violence Against Women Reauthorization Act of 2013, Pub. Law 113–4); 18 U.S.C. 249(a)(2) (prohibiting crimes committed because of "gender" or "gender identity") (language added via the National Defense Authorization Act for Fiscal Year 2010, Pub. Law 111–84); 34 U.S.C. 30503(a)(1)(C) (authorizing the Attorney General to assist in prosecuting crimes motivated by "gender" or "gender identity") (language added via the National Defense Authorization Act for Fiscal Year 2010).

their sex, including on the basis of gender identity." *Id.* at 168a.[5]

Harris Homes moved to dismiss. The district court agreed that "[t]here is no Sixth Circuit or Supreme Court authority to support the EEOC's position that transgender status is a protected class under Title VII." App. 173a. But the court found Sixth Circuit support for the EEOC's alternative theory—"a sex-stereotyping gender-discrimination claim" based on this Court's plurality opinion in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989). App. 183a. The court declined to dismiss that claim. *Id.* at 187a.

After discovery and cross-motions for summary judgment, the district court ruled for Harris Homes. The court reiterated that the EEOC could not prevail on its claim "that Stephens's termination was due to transgender status or gender identity—because those are not protected classes." App. 83a. But the EEOC raised a viable sex-stereotyping claim because the Sixth Circuit in *Smith* v. *City of Salem*, 378 F.3d 566 (6th Cir. 2004), had expanded those claims "further than other courts"—going so far as to create Title VII protection for "men who wear dresses." *Id.* at 108a, 117a–118a.

Despite this, the district court ruled for Harris Homes because the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb, prohibits the EEOC

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[5] The EEOC also claimed that Harris Homes violated Title VII by providing a more valuable "clothing allowance" to its male employees. App. 167a. Neither the district court nor the court of appeals has addressed the merits of that claim, and it is not the subject of this petition.

from applying "Title VII, and the body of sex-stereotyping case law that has developed under it, under the facts and circumstances of this unique case." App. 142a. Since Rost cannot in good conscience "support the idea that sex is a changeable social construct," forcing him to allow a male funeral director to present as a woman while representing Harris Homes "would impose a substantial burden" on Rost's ability "to conduct his business in accordance with his sincerely-held religious beliefs." *Id.* at 125a.

E. Sixth Circuit Ruling

The Sixth Circuit allowed Stephens to intervene on appeal because of a "concern that changes in policy priorities within the U.S. government might prevent the EEOC from fully representing Stephens's interests." App. 12a–13a. The court then reversed and ordered judgment for the EEOC. *Id.* at 81a.

The Sixth Circuit held that, under *Price Waterhouse*, employers engage in unlawful sex stereotyping when they administer sex-specific policies according to their employees' sex instead of their gender identity. App. 15a–18a. Because the EEOC did not challenge Harris Homes' dress code, the alleged stereotype was not "requiring men to wear pant suits and women to wear skirt suits," but declining to treat a male employee who professes a female gender identity as a woman. *Id.* at 18a. Although classifying all employees consistently with their sex does not disparately affect men or women, the court rejected *Price Waterhouse*'s requirement that a plaintiff prove "disparate treatment of men

and women," *id.* at 15a, because it could not "be squared with" the Sixth Circuit's prior decision in *Smith*, *id.* at 20a–21a.

The Sixth Circuit then judicially amended the word "sex" in Title VII to mean "gender identity" and held that "discrimination on the basis of transgender . . . status violates Title VII." App. 22a. As the court acknowledged, this went beyond what the Sixth Circuit previously held in *Smith*, *id.* at 27a, which did not "recognize Title VII protections for transgender persons based on identity," *id.* at 32a.

The court gave two reasons for rewriting Title VII. For one, employers that apply sex-specific policies based on their employees' sex instead of their gender identity "necessarily" rely on "stereotypical notions of how sexual organs and gender identity ought to align." App. 26a–27a. The Sixth Circuit thus treated the very idea of sex—which determines a person's status as male or female based on reproductive anatomy and physiology—as an illicit stereotype.

In addition, the court said that "it is analytically impossible" to apply sex-specific policies to an employee who asserts a gender identity that differs from his sex "without being motivated, at least in part, by the employee's sex." App. 23a. The mere fact that the employer "consider[s] that employee's biological sex . . . necessarily entails discrimination on the basis of sex." *Id.* at 30a.

The court also held that Title VII protects "transitioning status," App. 22a, and in so doing, left no doubt that it replaced "sex" with "gender identity," see *id.* at 24a–26a. Its opinion did not say

that "a person's sex can[] be changed"; in fact, it said that it "need not decide that issue." *Id.* at 26a. Rather, it emphasized that "gender identity" changes—it is "fluid, variable, and difficult to define"—because it has an "internal genesis that lacks a fixed external referent," and much like religion, should be "authenticat[ed]" through professions of identity rather than "medical diagnoses." *Id.* at 24a–25a n.4.

The Sixth Circuit then dismissed the statutory-construction principles on which Harris Homes relied. It said that the word "sex" includes "gender identity" because "statutory prohibitions often go beyond the principal evil" that Congress sought to remedy. App. 28a (quoting *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)). It also found nothing probative in other federal statutes, like the Violence Against Women Act, 34 U.S.C. 12291(b)(13)(A), that expressly "prohibit discrimination on the basis of [both] 'gender identity'" and "sex" because "Congress may certainly choose to use both a belt and suspender to achieve its objectives." App. 31a. Nor was there any "significance," the court said, in Congress's long-running rejection of bills seeking "to modify Title VII to include . . . gender identity." *Id.* at 31a–32a.

Finished judicially altering Title VII, the Sixth Circuit found that RFRA was not a defense. App. 41a–73a. Forcing Rost to violate his religious beliefs and pressuring him to give up his ministry to the grieving does not "substantially burden" his religious exercise. *Id.* at 46a–56a. Accordingly, the Sixth Circuit granted "summary judgment to the EEOC on its unlawful-termination claim." *Id.* at 81a.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for four reasons. First, the circuits are split into three camps on whether "sex" in Title VII means "gender identity" and includes "transgender status." One group says it does not. Another takes the same position, but subsequent case law casts doubt on that. And in the final category is the Sixth Circuit's decision judicially amending "sex" to mean "gender identity."

Second, the Sixth Circuit's opinion conflicts with—and substantially distorts—this Court's decision in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989). The *Price Waterhouse* plurality recognized that impermissible sex discrimination occurs when an employer treats one sex better than the other, and it identified an employer's reliance on sex stereotypes as one way of evidencing such discrimination. See *id.* at 250–51. But the Sixth Circuit departed from *Price Waterhouse*'s guidance by treating sex as if it were itself a stereotype and by rejecting the plurality's recognition that any action challenged on sex-stereotyping grounds must result in "disparate treatment" favoring one sex over the other. *Id.* at 251. That decision adds to an incomprehensible mishmash of circuit-court cases attempting to apply *Price Waterhouse*—a jumble that has been decades in the making. The need for clarity is long overdue.

Resolution of these circuit conflicts is urgently needed. The issues presented do not warrant further percolation because each new decision only breeds more division and confusion. Employers, employees,

governments, schools, lower courts, and attorneys need clarification now. It is untenable that courts are resolving claims differently depending entirely on the circuit where they arose. If Harris Homes' arguments are correct, courts are subjecting employers in some states to liability that federal law does not impose. And if the EEOC is right, courts in other states are rejecting claims that should be allowed to proceed. Either way, this Court's immediate intervention is required.

Third, the decision below defies this Court's principles of statutory construction. The court of appeals does not ground its analysis in the statutory term "sex" as understood in 1964, opting to read Title VII as if Congress used the term "gender identity" instead. Nor does the decision give sufficient weight to related federal statutes, Congress's repeated rejection of bills attempting to add "gender identity" to Title VII, or the judicial and administrative consensus that Congress ratified when it reenacted Title VII in 1991.

Finally, the Sixth Circuit's startling decision to change what it means to be male and female will have widespread consequences. It threatens to drive out sex-specific policies—ranging from living facilities and dress codes to locker rooms and restrooms—in employment and public education. It undermines critical efforts to advance women's employment and educational opportunities. And it imperils freedom of conscience. The sweeping implications of the Sixth Circuit's ruling counsel strongly in favor of this Court's granting review.

I. The circuits are irreconcilably split on whether "sex" in Title VII means "gender identity" and includes "transgender status."

Three undisputed facts in this case put squarely before this Court the question whether "sex" in Title VII means "gender identity." First, Stephens's sex while employed at Harris Homes was male. App. 6a, 93a-94a. Second, Rost let Stephens go because Stephens's plan to wear female clothing at work violated the company's sex-specific dress code. *Id.* at 9a, 100a–01a. Third, that "dress code policy *has not* been challenged by the EEOC in this action." *Id.* at 112a; see also *id.* at 18a ("We are not considering . . . whether the Funeral Home violated Title VII by requiring men to wear pant suits and women to wear skirt suits."); *id.* at 21a, 66a–67a, 86a, 111a, 138a. Title VII allows Harris Homes' straightforward enforcement of its unchallenged dress code *unless* the statute requires Rost to consider Stephens a woman. Such an obligation exists *only* if "sex" is rewritten to mean "gender identity" and include "transgender status." On that question, the circuits are hopelessly split among three camps.

1. The circuits in the first group—the Eighth and Tenth—have held that Title VII does not include "gender identity" or "transgender status." In 2007, the Tenth Circuit "agree[d] with . . . the vast majority of federal courts to have addressed this issue and conclude[d] [that] discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII." *Etsitty* v. *Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007). The "plain

meaning of 'sex'" refers to the "binary conception" of "male and female," and employers violate Title VII's ban on sex discrimination only when employees "are discriminated against because they are male or because they are female." *Id.* at 1222.

The Eighth Circuit has likewise concluded that "discrimination based on one's transsexualism does not fall within the protective purview of [Title VII]." *Sommers* v. *Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam). Expressing "agreement with the district court," *ibid.*, the Eighth Circuit quoted its rationale:

> [T]he Court does not believe that Congress intended by its laws prohibiting sex discrimination to require the courts to ignore anatomical classification and determine a person's sex according to the psychological makeup of that individual. The problems of such an approach are limitless. One example is the simple practical problem that arose here—which restroom should plaintiff use? [*Id.* at 749.]

2. The circuits in the second camp—the Seventh and Ninth—have previously determined that "sex" in Title VII does not include "gender identity" or "transgender status." But subsequent case law construing other nondiscrimination laws has essentially said otherwise. In *Ulane* v. *Eastern Airlines, Inc.*, the Seventh Circuit held that "Title VII is not so expansive in scope as to prohibit discrimination against transsexuals." 742 F.2d 1081, 1087 (7th Cir. 1984). That ruling overturned the district court's conclusion that the term "sex"

includes "sexual identity." *Id.* at 1084. Refusing to rewrite Title VII, the Seventh Circuit recognized its proper role when construing statutes:

> [T]o include transsexuals within the reach of Title VII far exceeds mere statutory interpretation. Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation. For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating. [*Id.* at 1086.]

Yet recently, the Seventh Circuit distinguished *Ulane* and reached the opposite conclusion when construing the word "sex" in Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a). *Whitaker By Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047 (7th Cir. 2017). The court announced that people who assert a gender identity in conflict with their sex now have categorical protection under *Price Waterhouse* because they, "[b]y definition," do not "conform to the sex-based stereotypes of the[ir] sex" *Id.* at 1047–48. From that premise, the Seventh Circuit told public schools that they must regulate access to sex-specific facilities like locker rooms and restrooms based on gender identity instead of sex. *Id.* at 1049–50. It is hard to say that *Ulane* remains good law after *Whitaker*.

The Ninth Circuit's story is similar. In *Holloway* v. *Arthur Andersen & Co.*, it interpreted "sex" in Title VII according to "its plain meaning" and held that the statute does not include "transsexuals as a class" or "decision[s] to undergo sex change surgery." 566 F.2d 659, 662, 664 (9th Cir. 1977). The court thus denied the claim of a plaintiff who alleged discriminatory treatment not "because she is male or female, but rather because she is a transsexual who chose to change her sex." *Id.* at 664.

Years later, though, when interpreting the word "gender" in the Gender Motivated Violence Act, 34 U.S.C. 12361, the Ninth Circuit said that it was overruling *Holloway*. See *Schwenk* v. *Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000). The late Judge Reinhardt wrote that "*Holloway* has been overruled by the logic and language of *Price Waterhouse*," and that "sex" under Title VII refers to more than "the biological differences between men and women." *Ibid.* That decision dramatically altered the Ninth Circuit's sex-discrimination jurisprudence.

3. In the third group is the Sixth Circuit, which has now definitively interpreted "sex" in Title VII to mean "gender identity" and include "transgender status." App. 14a–15a, 22a, 28a, 30a, 35a–36a. Other circuits have similarly redefined "sex" in related nondiscrimination contexts. The Eleventh Circuit, for instance, used *Price Waterhouse* to hold that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination" that violates the Equal Protection Clause of the Fourteenth Amendment. *Glenn* v. *Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011). In a Title IX case, the Third Circuit "concluded that discriminating

against transgender individuals constitutes sex discrimination." *Doe by & through Doe* v. *Boyertown Area Sch. Dist.*, 893 F.3d 179, 199 (3d Cir. 2018). And the Fourth Circuit, applying *Auer* deference principles, reached a similar conclusion in a now-vacated decision, see *G.G.* v. *Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 720–23 (4th Cir. 2016), *vacated by* 137 S. Ct. 1239 (2017), which lower courts in the circuit—including the district court in that very case—continue to treat as "binding law," *e.g.*, *Grimm* v. *Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 743 n.6 (E.D. Va. 2018); *M.A.B.* v. *Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 712 n.5 (D. Md. 2018).

4. Even the federal government is divided. On the one hand is the Department of Justice. In an October 4, 2017 Memorandum, the Attorney General announced 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*, including transgender status." App. 193a. "'Sex' is ordinarily defined to mean biologically male or female," the Attorney General explained, and "Congress has confirmed this ordinary meaning by expressly prohibiting, in several other statutes, 'gender identity' discrimination, which Congress lists in addition to, rather than within, prohibitions on discrimination based on 'sex' or 'gender.'" *Id.* at 192a–93a. The Attorney General also declared that Title VII does not "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." *Id.* at 193a.

On the other hand is the EEOC. In 2012, it said that a "complaint of discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII." *Macy* v. *Holder*, EEOC DOC 0120120821 (Apr. 20, 2012), 2012 WL 1435995, at *1. That decision "expressly overturn[ed]" the EEOC's prior position, in place since at least 1984. *Id.* at *11 n.16; see, *e.g.*, *Casoni* v. *U.S. Postal Serv.*, EEOC DOC 01840104 (Sept. 28, 1984), 1984 WL 485399, at *3 ("allegation of sex discrimination on account of being a male to female preoperative transsexual" was not a "cognizable claim[] under the provisions of Title VII"). This lawsuit is an effort to write the EEOC's new view into law.

This split of authority has had more than enough time to percolate. Federal courts have been addressing these questions since the late 1970s. See *Holloway*, 566 F.2d at 662–64. The circuit-court confusion emerged decades ago when courts began to misread *Price Waterhouse*. See *Schwenk*, 204 F.3d at 1201–02. And at least five circuits have decided the Title VII issue directly, while many others have addressed similar issues in related contexts. No more development in the lower courts is necessary.

Awaiting additional cases is particularly ill advised because the status quo forces employers, governments, and schools to apply core policies—such as access to living facilities, locker rooms, and restrooms, not to mention compliance with dress codes—differently based on where they find themselves. It is unsustainable that employers' responsibilities under Title VII, governments' obligations under the Equal Protection Clause, and schools' duties under Title IX shift so dramatically

depending on the circuit in which they are located. Only this Court can resolve the cacophony of inconsistent pronouncements on the meaning of sex discrimination in federal law. It should do so now.

II. The Sixth Circuit's decision misreads *Price Waterhouse* and adds to a confusing and inconsistent body of lower-court case law.

Price Waterhouse resolved a circuit split over—and the plurality's holding addressed only—the burden that each party bears in Title VII mixed-motives cases. 490 U.S. at 232, 258. In its opinion, the plurality observed that the plaintiff there—a female employee seeking a promotion—proved sex discrimination through evidence that her employer made employment decisions based on stereotypes about women. *Id.* at 250–52, 255–58. Foremost among those stereotypes was "insisting" that women "must not be" "aggressive" in the workplace. *Id.* at 250–51; see also *id.* at 234–35, 256.

Title VII, the plurality said, forbids "*disparate treatment of men and women* resulting from sex stereotypes." 490 U.S. at 251 (quoting *L.A. Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 707 n.13 (1978)) (emphasis added). Disparate treatment was obvious there because aggressive men were promoted and praised, while aggressive women were passed over and pushed down. *Ibid.* Such stereotyping placed female employees in an "impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not." *Ibid.*

The dissenting opinion "stress[ed] that Title VII creates no independent cause of action for sex stereotyping." 490 U.S. at 294 (Kennedy, J.,

dissenting). Instead, "[e]vidence of use by decision-makers of sex stereotypes is" a *means* of demonstrating "discriminatory intent" and disparate treatment. *Ibid.* Also, the two Justices who "concurred in the judgment only . . . said nothing about sex stereotyping as a 'theory' of sex discrimination." *Hively* v. *Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 369 (7th Cir. 2017) (en banc) (Sykes, J., dissenting).

1. The Sixth Circuit's application of *Price Waterhouse* conflicts with and distorts that case in two fundamental ways.

a. First, the Sixth Circuit rejected what the *Price Waterhouse* plurality said about disparate treatment favoring one sex over the other. The plurality condemned not all sex stereotypes in the workplace, but only the "disparate treatment of men and women resulting from sex stereotypes." 490 U.S. at 251 (quoting *Manhart*, 435 U.S. at 707 n.13). Yet the Sixth Circuit rejected the requirement that plaintiffs prove "disparate treatment" advantaging one sex because it could not "be squared with" that court's own precedent. App. 20a–21a.

By erasing that requirement, the Sixth Circuit unmoored *Price Waterhouse* from Title VII's text, which prohibits "discriminat[ion] . . . because of . . . sex," and it perpetuated the notion that sex stereotyping is an independent cause of action. Cf. *Price Waterhouse*, 490 U.S. at 294 (Kennedy, J., dissenting) ("Title VII creates no independent cause of action for sex stereotyping."); *Hively*, 853 F.3d at 369 (Sykes, J., dissenting) (same). That, in turn, led the court of appeals to announce a federal right for

men to "wear dresses" at work. App. 16a; cf. *Hamm* v. *Weyauwega Milk Prod., Inc.*, 332 F.3d 1058, 1067 (7th Cir. 2003) (Posner, J., concurring) (rejecting "a subtype of sexual discrimination called 'sex stereotyping'" that creates a "federally protected right for male workers to wear nail polish and dresses"). This Court should grant review and clarify that *Price Waterhouse* did not establish a free-standing claim of sex stereotyping that treats as irrelevant whether one sex is favored over the other.

b. Second, the Sixth Circuit's decision adopted a bewildering view of sex stereotyping. It denounced as stereotyping *all* sex-specific policies administered according to sex instead of gender identity. See App. 26a–27a (decrying "stereotypical notions of how sexual organs and gender identity ought to align"). The court thus deemed the very idea of sex—which determines a person's status as male or female based on reproductive anatomy and physiology—as itself a stereotype.

But denouncing "sex as a stereotype" is not the same as identifying "a sex stereotype." Declaring the former undoes Title VII, while rooting out the latter when it burdens one sex more than the other furthers the statute's purpose. The Sixth Circuit's view effectively condemns Congress for stereotyping by even including "sex" in Title VII.

Nothing in *Price Waterhouse* suggests that sex itself is a stereotype. To the contrary, this Court's cases firmly reject that it is. Sex-based "stereotype[s]" consist of "fictional difference[s] between men and women," such as the "assumption[]" that women cannot "perform certain kinds of work."

Manhart, 435 U.S. at 707. In contrast, this Court has squarely held that "[p]hysical differences between men and women" relating to reproduction—the very features that determine sex—are not "gender-based stereotype[s]." *Nguyen* v. *INS*, 533 U.S. 53, 68 (2001).

Nor does *Price Waterhouse* insinuate that Title VII requires employers to treat their employees according to their professed gender identity rather than their biological sex. The plurality said that its "specific references to gender throughout th[e] opinion, and the principles [it] announce[d], apply with equal force to discrimination based on race." 490 U.S. at 243 n.9. No one would suppose that the plurality ordered employers to agree that a white employee who identifies as black is actually African American. Insisting on the equivalent in the sex context shows how far the Sixth Circuit departed from what the *Price Waterhouse* plurality actually said.

2. The Sixth Circuit's opinion adds to "a confusing hodgepodge" of *Price Waterhouse* decisions that have resulted from "an unfortunate tendency to read [the plurality's opinion] for more than it's worth." *Hively*, 853 F.3d at 371 (Sykes, J., dissenting); see, *e.g.*, *Evans* v. *Ga. Reg'l Hosp.*, 850 F.3d 1248, 1262 (11th Cir. 2017) (Rosenbaum, J., dissenting) ("*Price Waterhouse* rocked the world of Title VII litigation."). Some circuits have used *Price Waterhouse* the same way that the Sixth Circuit did. The Third and Seventh Circuits, for example, recently interpreted *Price Waterhouse* to compel schools to administer sex-specific locker-room and restroom policies according to gender identity

instead of sex. *Whitaker*, 858 F.3d at 1047–50; *Boyertown Area Sch. Dist.*, 893 F.3d at 198–99. And district courts in the Fourth Circuit have done likewise. *Grimm*, 302 F. Supp. 3d at 744–47; *M.A.B.*, 286 F. Supp. 3d at 715–17.

Other circuits have properly recognized *Price Waterhouse*'s limits. "However far *Price Waterhouse* reaches," the Tenth Circuit concluded, it does not "require[] employers to allow biological males to use women's restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." *Etsitty*, 502 F.3d at 1224. The Tenth Circuit thus affirmed that employers may administer sex-specific policies according to their employees' sex rather than their gender identity. And the Ninth Circuit—in a decision that the Sixth Circuit labeled "irreconcilable" with its own cases, App. 19a–20a—held that sex-specific dress and grooming policies that impose equal burdens on the sexes do not violate *Price Waterhouse*. *Jespersen* v. *Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1111–13 (9th Cir. 2006) (en banc).

This Court's review is needed to address these conflicting circuit decisions and bring clarity to the muddled mess that has become *Price Waterhouse*'s legacy.

III. The Sixth Circuit's decision conflicts with this Court's directives on statutory construction.

When construing Title VII, as with all statutes, "the starting point" for interpretation "is the statutory text." *Desert Palace, Inc.* v. *Costa*, 539 U.S.

90, 98 (2003). "It is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning'" when they were enacted. *Sandifer* v. *U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (quoting *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)). To illustrate, the fact that the word "blockbuster" meant a large bomb in the early 20th century and refers to a hit movie today, see *Viacom Inc.* v. *Ingram Enters., Inc.*, 141 F.3d 886, 891–92 (8th Cir. 1998), does not mean that a 1930s ban on citizen possession of "blockbusters" now prohibits possession of DVDs.

1. Title VII forbids discrimination "because of . . . sex." 42 U.S.C. 2000e-2(a)(1). "In common, ordinary usage in 1964—and now, for that matter—the word 'sex' means biologically *male* or *female*," *Hively*, 853 F.3d at 362 (Sykes, J., dissenting), as objectively determined by anatomical and physiological factors, particularly those involved in "reproductive functions," *G.G.*, 822 F.3d at 736 (Niemeyer, J., dissenting) (collecting dictionaries); see also note 1, *supra* (collecting sources).

The Sixth Circuit ignored this undisputed definition. Instead, it assumed that "sex," as understood in 1964, meant "gender identity." That is impossible. Not only is gender identity—defined by the EEOC as the "inner sense of being male or female," App. 204a—very different from sex, see p. 30, *infra*, it was a nascent concept when Congress enacted Title VII, see Haig, *supra*, at 93 ("gender identity" was first introduced at a European medical conference in 1963). It is only through "judicial interpretive updating," *Hively*, 853 F.3d at 353

(Posner, J., concurring)—not faithful statutory construction—that courts have begun recasting "sex" to mean "gender identity."

The Sixth Circuit rejected this Court's text-based method of statutory construction because "statutory prohibitions often go beyond the principal evil" that Congress sought to address. App. 28a (quoting *Oncale*, 523 U.S. at 79). True enough. But that is no excuse for ignoring the text. As this Court explained in *Oncale*, Title VII's language is the ultimate guide when construing that statute. 523 U.S. at 79.

Attempting a textual argument, the Sixth Circuit insisted that Harris Homes "discriminate[d] . . . because of . . . sex," 42 U.S.C. 2000e-2(a)(1), since it had to "consider[] [Stephens's] biological sex" when applying its dress code. App. 30a; accord *id.* at 23a–24a. But "it is not the case that any employment practice that can only be applied by identifying an employee's sex is prohibited." *Zarda* v. *Altitude Express, Inc.*, 883 F.3d 100, 151 (2d Cir. 2018) (en banc) (Lynch, J., dissenting). That would carry in "ramifications that are sweeping and unpredictable," including the effective invalidation of sex-specific living facilities, locker rooms, and restrooms. *Id.* at 134 (Jacobs, J., concurring). The proper application of Title VII, instead, is that employers only "discriminate . . . because of . . . sex" when they treat one sex better than the other. *Manhart*, 435 U.S. at 707 n.13 (requiring "disparate treatment [between] men and women"); *Price Waterhouse*, 490 U.S. at 251 (plurality) (same); *Oncale*, 523 U.S. at 78 (same).

2. "When interpreting a statute, [this Court] examine[s] related provisions in other parts of the U.S. Code." *Boumediene* v. *Bush*, 553 U.S. 723, 776 (2008). For statutes that address discrimination, the analysis often considers other nondiscrimination provisions. *E.g.*, *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 174–75 (2009) (considering Title VII when interpreting the Age Discrimination in Employment Act); *Desert Palace*, 539 U.S. at 99 (considering other provisions in Title 42 when construing Title VII).

Congress has enacted multiple nondiscrimination laws listing either "sex" or "gender" alongside "gender identity." *E.g.*, 34 U.S.C. 12291(b)(13)(A); 18 U.S.C. 249(a)(2); 34 U.S.C. 30503(a)(1)(C). When Congress wants to prohibit discrimination based on gender identity, "it knows exactly how to do so." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1626 (2018). And when Congress uses the term "sex," it does not mean "gender identity," lest federal nondiscrimination law be imbued with "surplusage," *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001), and "redundan[cy]," *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 574 (1995). The Sixth Circuit ignored the established rule against reading redundancy into statutes, choosing instead to adopt the contradictory and heretofore unknown interpretive canon of "belt-and-suspenders [legislative] caution." App. 31a.

3. This Court has recognized that Congress's uniform rejection of "numerous and persistent" legislative proposals sheds some light on the meaning of existing statutes. *E.g.*, *Flood* v. *Kuhn*, 407 U.S. 258, 281–84 (1972) ("Congress, by its positive inaction, . . . clearly evinced a desire" not to change the law). Even the *Price Waterhouse* plurality

cited, as support for its statutory interpretation, Congress's decision not to adopt "an amendment" to Title VII. 490 U.S. at 241 n.7. But the Sixth Circuit found no "significance" in Congress's repeated rejection of bills seeking to add "gender identity" to Title VII. App. 31a–32a; see note 3, *supra* (collecting bills). Though the failure to enact those proposals is not dispositive, it surely "means something," *Zarda*, 883 F.3d at 155 (Lynch, J., dissenting), and bolsters the case against interpreting the word "sex" to mean "gender identity."

4. Finally, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 382 n.66 (1982); accord *Texas Dep't of Hous. and Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) ("If a word or phrase has been given a uniform interpretation by inferior courts, a later version of that act perpetuating the wording is presumed to carry forward that interpretation.") (cleaned up).

Congress reenacted Title VII in 1991. Civil Rights Act of 1991, Pub. Law 102–166. At that time, the unbroken consensus of the circuits—as well as the EEOC—was that "sex" in Title VII did *not* include gender-identity-based classifications like "transgender status." *Holloway*, 566 F.2d at 662–64; *Sommers*, 667 F.2d at 749–50; *Ulane*, 742 F.2d at 1086–87; *Casoni*, 1984 WL 485399 at *3. While the 1991 amendment altered Title VII in myriad ways, it did not amend "sex" to mean "gender identity" or include "transgender status." Congress is thus

presumed to have adopted the uniform judicial and administrative interpretation prevailing at the time. The Sixth Circuit erred in construing "sex" as though Congress had instead amended the statute.

IV. Interpreting "sex" to mean "gender identity"—as the Sixth Circuit did—will have far-reaching consequences.

By replacing "sex" with "gender identity" and denouncing sex as a stereotype, the Sixth Circuit brought about a seismic shift in the law. While "sex" views the status of male and female as an objective fact based in reproductive anatomy and physiology, "gender identity" treats it as a subjective belief determined by internal perceptions without "a fixed external referent." App. 24a–25a n.4. Gender identity is, as the Sixth Circuit acknowledged, "fluid, variable," "difficult to define," and "authenticat[ed]" by simple professions of belief instead of "medical diagnoses." *Ibid.*; cf. *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (sex "is an immutable characteristic determined solely by the accident of birth"). It is not limited to the binary choice between male and female, but includes other categories like gender-fluid, genderless, and many others. DSM–5 451. Trading "gender identity" for "sex" is a sea change in the law.

1. One immediate impact of that change is that federal law now forbids employers and public schools from administering sex-specific policies like dress codes, living facilities, locker rooms, and restrooms

based on sex.[6] Just two years ago, this Court granted review in a similar case where the Fourth Circuit prohibited a school board from regulating access to restrooms based on sex. *Gloucester Cty. Sch. Bd.* v. *G.G.*, 137 S. Ct. 369 (2016). While changed circumstances there prompted a remand before this Court reached the merits, see 137 S. Ct. 1239 (2017), granting review here would raise similar issues about the meaning of "sex" in federal nondiscrimination law.

The Sixth Circuit's mandate that organizations enforce their sex-specific policies based on gender identity raises a host of problems. For one, it fosters inconsistency and opens the door to manipulation. Anyone—not just those with "medical diagnoses"—can profess a gender identity that conflicts with their sex. App. 24a–25a n.4. And as Stephens admitted during deposition, if an employer allows a male employee "to present as a woman," it must permit him to "go[] back to present[ing] as a man later on." *Id.* at 200a.

Stephens's testimony also demonstrates that where gender identity is the prevailing construct, "sex" becomes a mere collection of stereotypes, and employers *are forced to engage in stereotyping*. Stephens testified that while Harris Homes ordinarily must permit "a male funeral director . . .

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[6] The decision here, resolved under Title VII, affects public schools under Title IX because the lower courts regularly consult Title VII case law when applying Title IX. *E.g.*, *Dodds* v. *U.S. Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (per curiam) (citing Title VII cases in the Title IX context); *G.G.*, 822 F.3d at 718 ("We look to case law interpreting Title VII . . . for guidance in evaluating a claim brought under Title IX.").

to present as [a] woman at work," it need not allow that if he is "bald" with a "neatly trimmed beard and mustache." App. 200a–01a. Stephens justified this disparity because that employee's appearance "doesn't meet the expectations" of what a female "[t]ypically" looks like. *Id.* at 201a. When asked "[w]hat meets th[ose] expectations," Stephens replied: "Your guess is as good as mine." *Ibid.*

According to Stephens, then, if employees fail to "adhere to the part [they are] professing to play," their employer may decline to recognize their gender identity. App. 202a. In other words, employers like Harris Homes must consider Stephens a woman because Stephens planned to conform to enough female stereotypes, but they could treat differently another employee who did not. Administering policies under that regime requires decisionmaking based on sex stereotypes. It will entrench rather than eradicate them.

The specific implications of the Sixth Circuit's ruling for sex-specific living facilities, locker rooms, and restrooms raise fundamental privacy concerns. See *United States* v. *Virginia*, 518 U.S. 515, 550 n.19 (1996) (discussing "alterations necessary" in living facilities "to afford members of each sex privacy from the other sex"). For employers and public-school officials that want to protect privacy interests, the decision "will require novel changes to . . . restrooms and locker rooms." *Dodds*, 845 F.3d at 224 (Sutton, J., dissenting). By short-circuiting the legislative process, the court of appeals kept Congress from addressing those sensitive issues before they arose. See, *e.g.*, N.M. Stat. Ann. § 28-1-9(E) (exempting sex-specific "sleeping quarters," "showers," and

"restrooms" from the state's nondiscrimination law); Wis. Stat. § 106.52(3)(b)–(c) (same); 775 Ill. Comp. Stat. 5/5-103(B) (similar).

2. Equally important, the Sixth Circuit's decision undermines the primary purpose for banning discrimination based on sex—to ensure "equal opportunities" for women, *Sommers*, 667 F.2d at 750, and "eliminate workplace inequalities that [have] held women back from advancing," *Zarda*, 883 F.3d at 145 (Lynch, J., dissenting); see also *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429 (1971) ("The objective of Congress . . . was to achieve equality of employment opportunities"). Employment reserved for women—like playing in the WNBA or working at a shelter for battered women, see 42 U.S.C. 2000e-2(e)(1) (authorizing sex as a bona fide occupational qualification)—now must be opened to males who identify as women. The same is true of sports and educational opportunities under Title IX. The Sixth Circuit's ruling impedes women's advancement.

3. Substituting "gender identity" for "sex" in nondiscrimination laws also threatens freedom of conscience. Statutes interpreted that way have the effect, for instance, of forcing doctors to participate in—or employers to pay for—surgical efforts to alter sex in violation of their deeply held beliefs. See *Franciscan All., Inc.* v. *Burwell*, 227 F. Supp. 3d 660, 691–93 (N.D. Tex. 2016) (concluding that a regulation likely violated RFRA by announcing that "sex" in the Patient Protection and Affordable Care Act's nondiscrimination provision, 42 U.S.C. 18116(a), means "gender identity").

And some governments have used those laws to mandate that employers, teachers, students, and others speak pronouns and similar sex-identifying terminology that conflicts with their conscience. *E.g.*, N.Y.C. Comm'n on Human Rights, *Legal Enf't Guidance on Discrimination on the Basis of Gender Identity or Expression* (June 28, 2016), *available at* https://on.nyc.gov/2KRC7e8 (requiring "employers and covered entities to use an individual's preferred name, pronoun and title (*e.g.*, Ms./Mrs.) regardless of the individual's sex assigned at birth, anatomy, . . . or the sex indicated on the individual's identification").

This very case involves freedom-of-conscience concerns. As the district court explained, accepting the EEOC's claim compels Rost—a devout man of faith—to violate his sincere religious beliefs about the immutability of sex. App. 121a–26a.

In sum, the Sixth Circuit ushered in a profound change in federal law accompanied by widespread legal and social ramifications. The stakes are too great—and the impacts on third parties too substantial—for this Court to let that decision go unreviewed.

V. This case is an ideal vehicle for addressing the important questions presented.

This case raises pure questions of law, and no material facts are disputed, not even the reason why Rost parted ways with Stephens. The Court should use this case as the vehicle for bringing clarity to sex-discrimination jurisprudence.

Two petitions for a writ of certiorari pending before this Court raise a similar (but different) question: whether "sex" in Title VII encompasses "sexual orientation." See *Altitude Express, Inc.* v. *Zarda*, Pet. for a Writ of Cert. at i (No. 17–1623) (May 29, 2018), and *Bostock* v. *Clayton Cty.*, Pet. for a Writ of Cert. at i (No. 17–1618) (May 25, 2018). While the questions presented in all three of these cases are important, the issues raised in this one are particularly pressing. The sexual-orientation cases seek to *expand* what is included in the term "sex," whereas this case attempts to *transform* what "sex" means by replacing it with "gender identity." The fallout of that redefinition threatens far-reaching consequences, which should not be imposed without this Court's approval. See section IV, *supra*. Accordingly, the Court should grant review here even if it takes up one of the sexual-orientation cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX TABLE OF CONTENTS

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File Name: 18a0045p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

AIMEE STEPHENS,
Intervenor,

v.

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,
Defendant-Appellee.

No. 16-2424

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:14-cv-13710—Sean F. Cox, District Judge.

Argued: October 4, 2017

Decided and Filed: March 7, 2018

Before: MOORE, WHITE, and DONALD, Circuit Judges.

COUNSEL

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OPINION

KAREN NELSON MOORE, Circuit Judge. Aimee Stephens (formerly known as Anthony Stephens) was born biologically male.[1] While living and presenting as a man, she worked as a funeral director at R.G. & G.R. Harris Funeral Homes, Inc. ("the Funeral Home"), a closely held for-profit corporation that operates three funeral homes in Michigan. Stephens was terminated from the Funeral Home by its owner and operator, Thomas Rost, shortly after Stephens informed Rost that she intended to transition from male to female and would represent herself and dress as a woman while at work. Stephens filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), which investigated Stephens's allegations that she had been terminated as a result of unlawful sex discrimination. During the course of its investigation, the EEOC learned that the Funeral Home provided its male public-facing employees with clothing that complied with the company's dress code while female public-facing employees received no such allowance. The EEOC subsequently brought suit against the Funeral Home in which the

[1] We refer to Stephens using female pronouns, in accordance with the preference she has expressed through her briefing to this court.

EEOC charged the Funeral Home with violating Title VII of the Civil Rights Act of 1964 ("Title VII") by (1) terminating Stephens's employment on the basis of her transgender or transitioning status and her refusal to conform to sex-based stereotypes; and (2) administering a discriminatory-clothing-allowance policy.

The parties submitted dueling motions for summary judgment. The EEOC argued that it was entitled to judgment as a matter of law on both of its claims. For its part, the Funeral Home argued that it did not violate Title VII by requiring Stephens to comply with a sex-specific dress code that it asserts equally burdens male and female employees, and, in the alternative, that Title VII should not be enforced against the Funeral Home because requiring the Funeral Home to employ Stephens while she dresses and represents herself as a woman would constitute an unjustified substantial burden upon Rost's (and thereby the Funeral Home's) sincerely held religious beliefs, in violation of the Religious Freedom Restoration Act ("RFRA"). As to the EEOC's discriminatory-clothing-allowance claim, the Funeral Home argued that Sixth Circuit case law precludes the EEOC from bringing this claim in a complaint that arose out of Stephens's original charge of discrimination because the Funeral Home could not reasonably expect a clothing-allowance claim to emerge from an investigation into Stephens's termination.

The district court granted summary judgment in favor of the Funeral Home on both claims. For the

reasons set forth below, we hold that (1) the Funeral Home engaged in unlawful discrimination against Stephens on the basis of her sex; (2) the Funeral Home has not established that applying Title VII's proscriptions against sex discrimination to the Funeral Home would substantially burden Rost's religious exercise, and therefore the Funeral Home is not entitled to a defense under RFRA; (3) even if Rost's religious exercise were substantially burdened, the EEOC has established that enforcing Title VII is the least restrictive means of furthering the government's compelling interest in eradicating workplace discrimination against Stephens; and (4) the EEOC may bring a discriminatory-clothing-allowance claim in this case because such an investigation into the Funeral Home's clothing-allowance policy was reasonably expected to grow out of the original charge of sex discrimination that Stephens submitted to the EEOC. Accordingly, we **REVERSE** the district court's grant of summary judgment on both the unlawful-termination and discriminatory-clothing-allowance claims, **GRANT** summary judgment to the EEOC on its unlawful-termination claim, and **REMAND** the case to the district court for further proceedings consistent with this opinion.

I. BACKGROUND

Aimee Stephens, a transgender woman who was "assigned male at birth," joined the Funeral Home as an apprentice on October 1, 2007 and served as a Funeral Director/Embalmer at the Funeral Home from April 2008 until August 2013. R. 51-18 (Stephens Dep. at 49–51) (Page ID #817); R. 61

(Def.'s Counter Statement of Disputed Facts ¶ 10) (Page ID #1828). During the course of her employment at the Funeral Home, Stephens presented as a man and used her then-legal name, William Anthony Beasley Stephens. R. 51-18 (Stephens Dep. at 47) (Page ID #816); R. 61 (Def.'s Counter Statement of Disputed Facts ¶ 15) (Page ID #1829).

The Funeral Home is a closely held for-profit corporation. R. 55 (Def.'s Statement of Facts ¶ 1) (Page ID #1683).[2] Thomas Rost ("Rost"), who has been a Christian for over sixty-five years, owns 95.4% of the company and operates its three funeral home locations. *Id.* ¶¶ 4, 8, 17 (Page ID #1684–85); R. 54-2 (Rost Aff. ¶ 2) (Page ID #1326). Rost proclaims "that God has called him to serve grieving people" and "that his purpose in life is to minister to the grieving." R. 55 (Def.'s Statement of Facts ¶ 31) (Page ID #1688). To that end, the Funeral Home's website contains a mission statement that states that the Funeral Home's "highest priority is to honor God in all that we do as a company and as individuals" and includes a verse of scripture on the bottom of the mission statement webpage. *Id.* ¶¶ 21–22 (Page ID #1686). The Funeral Home itself, however, is not affiliated with a church; it does not claim to have a religious purpose in its articles of incorporation; it is open every day, including Christian holidays; and it serves clients of all faiths. R. 61 (Def.'s Counter Statement of Facts ¶¶ 25–27;

[2] All facts drawn from Def.'s Statement of Facts (R. 55) are undisputed. *See* R. 64 (Pl.'s Counter Statement of Disputed Facts) (Page ID #2066–88).

29–30) (Page ID #1832–34). "Employees have worn Jewish head coverings when holding a Jewish funeral service." *Id.* ¶ 31 (Page ID #1834). Although the Funeral Home places the Bible, "Daily Bread" devotionals, and "Jesus Cards" in public places within the funeral homes, the Funeral Home does not decorate its rooms with "visible religious figures . . . to avoid offending people of different religions." *Id.* ¶¶ 33–34 (Page ID #1834). Rost hires employees belonging to any faith or no faith to work at the Funeral Home, and he "does not endorse or consider himself to endorse his employees' beliefs or non-employment-related activities." *Id.* ¶¶ 37–38 (Page ID #1835).

The Funeral Home requires its public-facing male employees to wear suits and ties and its public-facing female employees to wear skirts and business jackets. R. 55 (Def.'s Statement of Facts at ¶ 51) (Page ID #1691). The Funeral Home provides all male employees who interact with clients, including funeral directors, with free suits and ties, and the Funeral Home replaces suits as needed. R. 61 (Def.'s Counter Statement of Disputed Facts ¶¶ 42, 48) (Page ID #1836–37). All told, the Funeral Home spends approximately $470 per full-time employee per year and $235 per part-time employee per year on clothing for male employees. *Id.* ¶ 55 (Page ID #1839).

Until October 2014—after the EEOC filed this suit—the Funeral Home did not provide its female employees with any sort of clothing or clothing allowance. *Id.* ¶ 54 (Page ID #1838–39). Beginning

in October 2014, the Funeral Home began providing its public-facing female employees with an annual clothing stipend ranging from $75 for part-time employees to $150 for full-time employees. *Id*. ¶ 54 (Page ID #1838–39). Rost contends that the Funeral Home would provide suits to all funeral directors, regardless of their sex, *id*., but it has not employed a female funeral director since Rost's grandmother ceased working for the organization around 1950, R. 54-2 (Rost Aff. ¶¶ 52, 54) (Page ID #1336–37). According to Rost, the Funeral Home has received only one application from a woman for a funeral director position in the thirty-five years that Rost has operated the Funeral Home, and the female applicant was deemed not qualified. *Id*. ¶¶ 2, 53 (Page ID #1326, 1336).

On July 31, 2013, Stephens provided Rost with a letter stating that she has struggled with "a gender identity disorder" her "entire life," and informing Rost that she has "decided to become the person that [her] mind already is." R. 51-2 (Stephens Letter at 1) (Page ID #643). The letter stated that Stephens "intend[ed] to have sex reassignment surgery," and explained that "[t]he first step [she] must take is to live and work full-time as a woman for one year." *Id*. To that end, Stephens stated that she would return from her vacation on August 26, 2013, "as [her] true self, Amiee [sic] Australia Stephens, in appropriate business attire." *Id*. After presenting the letter to Rost, Stephens postponed her vacation and continued to work for the next two weeks. R. 68 (Reply to Def.'s Counter Statement of Material Facts Not in Dispute at 1) (Page ID #2122).

Then, just before Stephens left for her intended vacation, Rost fired her. R. 61 (Def.'s Counter Statement of Disputed Facts ¶¶ 10–11) (Page ID #1828). Rost said, "this is not going to work out," and offered Stephens a severance agreement if she "agreed not to say anything or do anything." R. 54-15 (Stephens Dep. at 75–76) Page ID #1455; R. 63-5 (Rost Dep. at 126–27) Page ID #1974. Stephens refused. *Id*. Rost testified that he fired Stephens because "he was no longer going to represent himself as a man. He wanted to dress as a woman." R. 51-3 (Rost 30(b)(6) Dep. at 135–36) (Page ID #667).

Rost avers that he "sincerely believe[s] that the Bible teaches that a person's sex is an immutable God-given gift," and that he would be "violating God's commands if [he] were to permit one of [the Funeral Home's] funeral directors to deny their sex while acting as a representative of [the] organization" or if he were to "permit one of [the Funeral Home's] male funeral directors to wear the uniform for female funeral directors while at work." R. 54-2 (Rost Aff. ¶¶ 42–43, 45) (Page ID #1334–35). In particular, Rost believes that authorizing or paying for a male funeral director to wear the uniform for female funeral directors would render him complicit "in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift." *Id*. ¶¶ 43, 45 (Page ID #1334–35).

After her employment was terminated, Stephens filed a sex-discrimination charge with the EEOC, alleging that "[t]he only explanation" she

received from "management" for her termination was that "the public would [not] be accepting of [her] transition." R. 63-2 (Charge of Discrimination at 1) (Page ID #1952). She further noted that throughout her "entire employment" at the Funeral Home, there were "no other female Funeral Director/Embalmers." *Id*. During the course of investigating Stephens's allegations, the EEOC learned from another employee that the Funeral Home did not provide its public-facing female employees with suits or a clothing stipend. R. 54-24 (Memo for File at 9) (Page ID #1513).

The EEOC issued a letter of determination on June 5, 2014, in which the EEOC stated that there was reasonable cause to believe that the Funeral Home "discharged [Stephens] due to her sex and gender identity, female, in violation of Title VII" and "discriminated against its female employees by providing male employees with a clothing benefit which was denied to females, in violation of Title VII." R. 63-4 (Determination at 1) (Page ID #1968). The EEOC and the Funeral Home were unable to resolve this dispute through an informal conciliation process, and the EEOC filed a complaint against the Funeral Home in the district court on September 25, 2014. R. 1 (Complaint) (Page ID #1–9).

The Funeral Home moved to dismiss the EEOC's action for failure to state a claim. The district court denied the Funeral Home's motion, but it narrowed the basis upon which the EEOC could pursue its unlawful-termination claim. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F.

Supp. 3d 594, 599, 603 (E.D. Mich. 2015). In particular, the district court agreed with the Funeral Home that transgender status is not a protected trait under Title VII, and therefore held that the EEOC could not sue for alleged discrimination against Stephens based solely on her transgender and/or transitioning status. *See id.* at 598–99. Nevertheless, the district court determined that the EEOC had adequately stated a claim for discrimination against Stephens based on the claim that she was fired because of her failure to conform to the Funeral Home's "sex- or gender-based preferences, expectations, or stereotypes." *Id.* at 599 (quoting R. 1 (Compl. ¶ 15) (Page ID #4–5)).

The parties then cross-moved for summary judgment. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, 840 (E.D. Mich. 2016). With regard to the Funeral Home's decision to terminate Stephens's employment, the district court determined that there was "direct evidence to support a claim of employment discrimination" against Stephens on the basis of her sex, in violation of Title VII. *Id.* at 850. However, the court nevertheless found in the Funeral Home's favor because it concluded that the Religious Freedom Restoration Act ("RFRA") precludes the EEOC from enforcing Title VII against the Funeral Home, as doing so would substantially burden Rost and the Funeral Home's religious exercise and the EEOC had failed to demonstrate that enforcing Title VII was the least restrictive way to achieve its presumably compelling interest "in ensuring that Stephens is not subject to gender stereotypes in the

workplace in terms of required clothing at the Funeral home." *Id.* at 862–63. Based on its narrow conception of the EEOC's compelling interest in bringing the claim, the district court concluded that the EEOC could have achieved its goals by proposing that the Funeral Home impose a gender-neutral dress code. *Id.* The EEOC's failure to consider such an accommodation was, according to the district court, fatal to its case. *Id.* at 863. Separately, the district court held that it lacked jurisdiction to consider the EEOC's discriminatory-clothing-allowance claim because, under longstanding Sixth Circuit precedent, the EEOC may pursue in a Title VII lawsuit only claims that are reasonably expected to grow out of the complaining party's—in this case, Stephens's—original charge. *Id.* at 864–70. The district court entered final judgment on all counts in the Funeral Home's favor on August 18, 2016, R. 77 (J.) (Page ID #2235), and the EEOC filed a timely notice of appeal shortly thereafter, *see* R. 78 (Notice of Appeal) (Page ID #2236–37).

Stephens moved to intervene in this appeal on January 26, 2017, after expressing concern that changes in policy priorities within the U.S. government might prevent the EEOC from fully representing Stephens's interests in this case. *See* D.E. 19 (Mot. to Intervene as Plaintiff-Appellant at 5–7). The Funeral Home opposed Stephens's motion on the grounds that the motion was untimely and Stephens had failed to show that the EEOC would not represent her interests adequately. D.E. 21 (Mem. in Opp'n at 2–11). We determined that Stephens's request was timely given that she

previously "had no reason to question whether the EEOC would continue to adequately represent her interests" and granted Stephens's motion to intervene on March 27, 2017. D.E. 28-2 (Order at 2). We further determined that Stephens's intervention would not prejudice the Funeral Home because Stephens stated in her briefing that she did not intend to raise new issues. *Id*. Six groups of amici curiae also submitted briefing in this case.

II. DISCUSSION

A. Standard of Review

"We review a district court's grant of summary judgment de novo." *Risch v. Royal Oak Police Dep't*, 581 F.3d 383, 390 (6th Cir. 2009) (quoting *CenTra, Inc. v. Estrin*, 538 F.3d 402, 412 (6th Cir. 2008)). Summary judgment is warranted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). In reviewing a grant of summary judgment, "we view all facts and any inferences in the light most favorable to the nonmoving party." *Risch*, 581 F.3d at 390 (citation omitted). We also review all "legal conclusions supporting [the district court's] grant of summary judgment *de novo*." *Doe v. Salvation Army in U.S.*, 531 F.3d 355, 357 (6th Cir. 2008) (citation omitted).

B. Unlawful Termination Claim

Title VII prohibits employers from "discriminat[ing] 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). "[A] plaintiff can establish a *prima facie* case [of unlawful discrimination] by presenting direct evidence of discriminatory intent." *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion)). "[A] facially discriminatory employment policy or a corporate decision maker's express statement of a desire to remove employees in the protected group is direct evidence of discriminatory intent." *Id.* (citation omitted). Once a plaintiff establishes that "the prohibited classification played a motivating part in the [adverse] employment decision," the employer then bears the burden of proving that it would have terminated the plaintiff "even if it had not been motivated by impermissible discrimination." *Id.* (citing, *inter alia*, *Price Waterhouse*, 490 U.S. at 244–45).

Here, the district court correctly determined that Stephens was fired because of her failure to conform to sex stereotypes, in violation of Title VII. *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d at 850 ("[W]hile this Court does not often see cases where there is direct evidence to support a claim of employment discrimination, it appears to exist here."). The district court erred, however, in finding that Stephens could not alternatively pursue a claim that she was discriminated against on the basis of her transgender and transitioning status. Discrimination on the basis of transgender and

transitioning status is necessarily discrimination on the basis of sex, and thus the EEOC should have had the opportunity to prove that the Funeral Home violated Title VII by firing Stephens because she is transgender and transitioning from male to female.

1. Discrimination on the Basis of Sex Stereotypes

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a plurality of the Supreme Court explained that Title VII's proscription of discrimination "'*because of* . . . sex' . . . mean[s] that gender must be irrelevant to employment decisions." *Id.* at 240 (emphasis in original). In enacting Title VII, the plurality reasoned, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* at 251 (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). The *Price Waterhouse* plurality, along with two concurring Justices, therefore determined that a female employee who faced an adverse employment decision because she failed to "walk . . . femininely, talk . . . femininely, dress . . . femininely, wear make-up, have her hair styled, [or] wear jewelry," could properly state a claim for sex discrimination under Title VII—even though she was not discriminated against for being a woman *per se*, but instead for failing to be womanly enough. *See id.* at 235 (plurality opinion) (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985)); *id.* at 259 (White, J., concurring); *id.* at 272 (O'Connor, J., concurring).

Based on *Price Waterhouse*, we determined that "discrimination based on a failure to conform to stereotypical gender norms" was no less prohibited under Title VII than discrimination based on "the biological differences between men and women." *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004). And we found no "reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual." *Id.* at 575. Thus, in *Smith*, we held that a transgender plaintiff (born male) who suffered adverse employment consequences after "he began to express a more feminine appearance and manner on a regular basis" could file an employment discrimination suit under Title VII, *id.* at 572, because such "discrimination would not [have] occur[red] but for the victim's sex," *id.* at 574. As we reasoned in *Smith*, Title VII proscribes discrimination both against women who "do not wear dresses or makeup" and men who do. *Id.* Under any circumstances, "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination." *Id.* at 575.

Here, Rost's decision to fire Stephens because Stephens was "no longer going to represent himself as a man" and "wanted to dress as a woman," *see* R. 51-3 (Rost 30(b)(6) Dep. at 135–36) (Page ID #667), falls squarely within the ambit of sex-based discrimination that *Price Waterhouse* and *Smith* forbid. For its part, the Funeral Home has failed to establish a non-discriminatory basis for Stephens's termination, and Rost admitted that he did not fire Stephens for any performance-related issues. *See* R.

51-3 (Rost 30(b)(6) Dep. at 109, 136) (Page ID #663, 667). We therefore agree with the district court that the Funeral Home discriminated against Stephens on the basis of her sex, in violation of Title VII.

The Funeral Home nevertheless argues that it has not violated Title VII because sex stereotyping is barred only when "the employer's reliance on stereotypes . . . result[s] in disparate treatment of employees because they are either male or female." Appellee Br. at 31. According to the Funeral Home, an employer does not engage in impermissible sex stereotyping when it requires its employees to conform to a sex-specific dress code—as it purportedly did here by requiring Stephens to abide by the dress code designated for the Funeral Home's male employees—because such a policy "impose[s] equal burdens on men and women," and thus does not single out an employee for disparate treatment based on that employee's sex. *Id.* at 12. In support of its position, the Funeral Home relies principally on *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc), and *Barker v. Taft Broadcasting Co.*, 549 F.2d 400 (6th Cir. 1977). *Jespersen* held that a sex-specific grooming code that imposed different but equally burdensome requirements on male and female employees would not violate Title VII. *See* 444 F.3d at 1109–11 (holding that the plaintiff failed to demonstrate how a grooming code that required women to wear makeup and banned men from wearing makeup was a violation of Title VII because the plaintiff failed to produce evidence showing that this sex-specific makeup policy was "more burdensome for women

than for men"). *Barker*, for its part, held that a sex-specific grooming code that was enforced equally as to male and female employees would not violate Title VII. *See* 549 F.2d at 401 (holding that a grooming code that established different hair-length limits for male and female employees did not violate Title VII because failure to comply with the code resulted in the same consequences for men and women). For three reasons, the Funeral Home's reliance on these cases is misplaced.

First, the central issue in *Jespersen* and *Barker*—whether certain sex-specific appearance requirements violate Title VII—is not before this court. We are not considering, in this case, whether the Funeral Home violated Title VII by requiring men to wear pant suits and women to wear skirt suits. Our question is instead whether the Funeral Home could legally terminate Stephens, notwithstanding that she fully intended to comply with the company's sex-specific dress code, simply because she refused to conform to the Funeral Home's notion of her sex. When the Funeral Home's actions are viewed in the proper context, no reasonable jury could believe that Stephens was not "target[ed] . . . for disparate treatment" and that "no sex stereotype factored into [the Funeral Home's] employment decision." *See* Appellee Br. at 19–20.

Second, even if we would permit certain sex-specific dress codes in a case where the issue was properly raised, we would not rely on either *Jespersen* or *Barker* to do so. *Barker* was decided before *Price Waterhouse*, and it in no way anticipated

the Court's recognition that Title VII "strike[s] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Price Waterhouse*, 490 U.S. at 251 (plurality) (quoting *Manhart*, 435 U.S. at 707 n.13). Rather, according to *Barker*, "[w]hen Congress makes it unlawful for an employer to 'discriminate . . . on the basis of . . . sex . . .', without further explanation of its meaning, we should not readily infer that it meant something different than what the concept of discrimination has traditionally meant." 549 F.2d at 401–02 (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076, 52 U.S.C. § 2000e(k), *as recognized in Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 89 (1983)). Of course, this is precisely the sentiment that *Price Waterhouse* "eviscerated" when it recognized that "Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms." *Smith*, 378 F.3d at 573 (citing *Price Waterhouse*, 490 U.S. at 251). Indeed, *Barker*'s incompatibility with *Price Waterhouse* may explain why this court has not cited *Barker* since *Price Waterhouse* was decided.

As for *Jespersen*, that Ninth Circuit case is irreconcilable with our decision in *Smith*. Critical to *Jespersen*'s holding was the notion that the employer's "grooming standards," which required all female bartenders to wear makeup (and prohibited males from doing so), did not on their face violate

Title VII because they did "not require [the plaintiff] to conform to a stereotypical image that would objectively impede her ability to perform her job." 444 F.3d at 1113. We reached the exact opposite conclusion in *Smith*, as we explained that requiring women to wear makeup does, in fact, constitute improper sex stereotyping. 378 F.3d at 574 ("After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex."). And more broadly, our decision in *Smith* forecloses the *Jespersen* court's suggestion that sex stereotyping is permissible so long as the required conformity does not "impede [an employee's] ability to perform her job," *Jespersen*, 444 F.3d at 1113, as the *Smith* plaintiff did not and was not required to allege that being expected to adopt a more masculine appearance and manner interfered with his job performance. *Jespersen*'s incompatibility with *Smith* may explain why it has never been endorsed (or even cited) by this circuit—and why it should not be followed now.

Finally, the Funeral Home misreads binding precedent when it suggests that sex stereotyping violates Title VII *only* when "the employer's sex stereotyping resulted in 'disparate treatment of men and women.'" Appellee Br. at 18 (quoting *Price Waterhouse*, 490 U.S. at 251).[3] This interpretation of

[3] *See also* Appellee Br. at 16 ("It is a helpful exercise to think about *Price Waterhouse* and imagine that there was a dress code imposed which obligated Ms. Hopkins to wear a skirt while her male colleagues were obliged to wear pants.

Title VII cannot be squared with our holding in *Smith*. There, we did not ask whether transgender persons transitioning from male to female were treated differently than transgender persons transitioning from female to male. Rather, we considered whether a transgender person was being discriminated against based on "his failure to conform to sex stereotypes concerning how a man should look and behave." *Smith*, 378 F.3d at 572. It is apparent from both *Price Waterhouse* and *Smith* that an employer engages in unlawful discrimination even if it expects both biologically male and female employees to conform to certain notions of how each should behave. *See Zarda v. Altitude Express, Inc.*, — F.3d —, No. 15-3775, slip op. at 47 (2d Cir. Feb. 26, 2018) (en banc) (plurality) ("[T]he employer in *Price Waterhouse* could not have defended itself by claiming that it fired a gender-non-conforming man as well as a gender-non-conforming woman any more than it could persuasively argue that two wrongs make a right.").

In short, the Funeral Home's sex-specific dress code does not preclude liability under Title VII. Even if the Funeral Home's dress code does not itself violate Title VII—an issue that is not before this court—the Funeral Home may not rely on its policy

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Had she simply been fired for wearing pants rather than a skirt, the case would have ended there— both sexes would have been equally burdened by the requirement to comply with their respective sex-specific standard. But what the firm could not do was fire her for being aggressive or macho when it was tolerating or rewarding the behavior among men—and when it did, it relied on a stereotype to treat her disparately from the men in the firm.").

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 the Funeral Home's perception of how she should appear or behave based on her sex. Because the EEOC has presented unrefuted evidence that unlawful sex stereotyping was "at least a motivating factor in the [Funeral Home's] actions," *see White v. Columbus Metro. Hous. Auth.*, 429 F.3d 232, 238 (6th Cir. 2005) (quoting *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999)), and because we reject the Funeral Home's affirmative defenses (*see* Section II.B.3, *infra*), we **GRANT** summary judgment to the EEOC on its sex discrimination claim.

2. Discrimination on the Basis of Transgender/Transitioning Status

We also hold that discrimination on the basis of transgender and transitioning status violates Title VII. The district court rejected this theory of liability at the motion-to-dismiss stage, holding that "transgender or transsexual status is currently not a protected class under Title VII." *R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d at 598. The EEOC and Stephens argue that the district court's determination was erroneous because Title VII protects against sex stereotyping and "transgender discrimination is based on the non-conformance of an individual's gender identity and appearance with sex-based norms or expectations"; therefore, "discrimination because of an individual's transgender status is *always* based on gender-

stereotypes: the stereotype that individuals will conform their appearance and behavior—whether their dress, the name they use, or other ways they present themselves—to the sex assigned them at birth." Appellant Br. at 24; *see also* Intervenor Br. at 10–15. The Funeral Home, in turn, argues that Title VII does not prohibit discrimination based on a person's transgender or transitioning status because "sex," for the purposes of Title VII, "refers to a binary characteristic for which there are only two classifications, male and female," and "which classification arises in a person based on their chromosomally driven physiology and reproductive function." Appellee Br. at 26. According to the Funeral Home, transgender status refers to "a person's self-assigned 'gender identity'" rather than a person's sex, and therefore such a status is not protected under Title VII. *Id*. at 26–27.

For two reasons, the EEOC and Stephens have the better argument. First, 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. The Seventh Circuit's method of "isolat[ing] the significance of the plaintiff's sex to the employer's decision" to determine whether Title VII has been triggered illustrates this point. *See Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 345 (7th Cir. 2017). In *Hively*, the Seventh Circuit determined that Title VII prohibits discrimination on the basis of sexual orientation—a different question than the issue before this court—by asking whether the plaintiff, a self-described lesbian, would have been fired "if she

had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same." *Id.* If the answer to that question is no, then the plaintiff has stated a "paradigmatic sex discrimination" claim. *See id.* Here, we ask whether Stephens would have been fired if Stephens had been a woman who sought to comply with the women's dress code. The answer quite obviously is no. This, in and of itself, confirms that Stephens's sex impermissibly affected Rost's decision to fire Stephens.

The court's analysis in *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008), provides another useful way of framing the inquiry. There, the court noted that an employer who fires an employee because the employee converted from Christianity to Judaism has discriminated against the employee "because of religion," regardless of whether the employer feels any animus against either Christianity or Judaism, because "[d]iscrimination 'because of religion' easily encompasses discrimination because of a *change* of religion.'" *Id.* at 306 (emphasis in original). By the same token, discrimination "because of sex" inherently includes discrimination against employees because of a change in their sex. *See id.* at 307–08.[4] Here, there is

[4] Moreover, discrimination because of a person's transgender, intersex, or sexually indeterminate status is no less actionable than discrimination because of a person's identification with two religions, an unorthodox religion, or no religion at all. And "religious identity" can be just as fluid, variable, and difficult to define as "gender identity"; after all, both have "a deeply personal, internal genesis that lacks a fixed external referent." Sue Landsittel, *Strange Bedfellows? Sex,*

evidence that Rost at least partially based his employment decision on Stephens's desire to change her sex: Rost justified firing Stephens by explaining that Rost "sincerely believes that 'the Bible teaches that a person's sex (whether male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex,'" and "the Bible teaches that it is wrong for a biological male to deny his sex by dressing as a woman."[5] *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d at 848 (quoting R. 55 (Def.'s Statement of Facts ¶ 28) (Page ID #1687); R. 53-3 (Rost 30(b)(6) Dep. ¶ 44) (Page ID #936)). As amici point out in their briefing, such statements demonstrate that "Ms. Stephens's sex necessarily factored into the decision to fire her." Equality Ohio Br. at 12; *cf. Hively*, 853 F.3d at 359

Religion, and Transgender Identity Under Title VII, 104 NW. U. L. REV. 1147, 1172 (2010) (advocating for "[t]he application of tests for religious identity to the problem of gender identity [because it] produces a more realistic, and therefore more appropriate, authentication framework than the current reliance on medical diagnoses and conformity with the gender binary").

[5] On the other hand, there is also evidence that Stephens was fired only because of her nonconforming appearance and behavior at work, and not because of her transgender identity. *See* R. 53-6 (Rost Dep. at 136–37) (Page ID #974) (At his deposition, when asked whether "the reason you fired [Stephens], was it because [Stephens] claimed that he was really a woman; is that why you fired [Stephens] or was it because he claimed – or that he would no longer dress as a man," Rost answered: "That he would no longer dress as a man," and when asked, "if Stephens had told you that he believed that he was a woman, but would only present as a woman outside of work, would you have terminated him," Rost answered: "No.").

(Flaum, J., concurring) (arguing discrimination against a female employee because she is a lesbian is necessarily "motivated, in part, by . . . the employee's sex" because the employer is discriminating against the employee "because she is (A) a woman who is (B) sexually attracted to women").

The Funeral Home argues that *Schroer*'s analogy is "structurally flawed" because, unlike religion, a person's sex cannot be changed; it is, instead, a biologically immutable trait. Appellee Br. at 30. We need not decide that issue; even if true, the Funeral Home's point is immaterial. As noted above, the Supreme Court made clear in *Price Waterhouse* that Title VII requires "gender [to] be irrelevant to employment decisions." 490 U.S. at 240. Gender (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.

Second, discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping. As we recognized in *Smith*, a transgender person is someone who "fails to act and/or identify with his or her gender"—i.e., someone who is inherently "gender non-conforming." 378 F.3d at 575; *see also id*. at 568 (explaining that transgender status is characterized by the American Psychiatric Association as "a disjunction between an individual's sexual organs and sexual identity"). Thus, an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how

sexual organs and gender identity ought to align. There is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity, and we see no reason to try.

We did not expressly hold in *Smith* that discrimination on the basis of transgender status is unlawful, though the opinion has been read to say as much—both by this circuit and others. In *G.G. v. Gloucester County School Board*, 654 F. App'x 606 (4th Cir. 2016), for instance, the Fourth Circuit described *Smith* as holding "that discrimination against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes." *Id.* at 607. And in *Dodds v. United States Department of Education*, 845 F.3d 217 (6th Cir. 2016), we refused to stay "a preliminary injunction ordering the school district to treat an eleven-year old transgender girl as a female and permit her to use the girls' restroom" because, among other things, the school district failed to show that it would likely succeed on the merits. *Id.* at 220–21. In so holding, we cited *Smith* as evidence that this circuit's "settled law" prohibits "[s]ex stereotyping based on a person's gender non-conforming behavior," *id.* at 221 (second quote quoting *Smith*, 378 F.3d at 575), and then pointed to out-of-circuit cases for the propositions that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes," *id.* (citing *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011)), and "[t]he weight of authority establishes that

discrimination based on transgender status is already prohibited by the language of federal civil rights statutes," *id.* (quoting *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 729 (4th Cir.) (Davis, J., concurring), *cert. granted in part*, 137 S. Ct. 369 (2016), *and vacated and remanded*, 137 S. Ct. 1239 (2017).[6] Such references support what we now directly hold: Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait.

The Funeral Home raises several arguments against this interpretation of Title VII, none of which we find persuasive. First, the Funeral Home contends that the Congress enacting Title VII understood "sex" to refer only to a person's "physiology and reproductive role," and not a person's "self-assigned 'gender identity.'" Appellee Br. at 25–26. But the drafters' failure to anticipate that Title VII would cover transgender status is of little interpretive value, because "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the

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[6] We acknowledge that *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005), read *Smith* as focusing on "look and behav[ior]." *Id.* at 737 ("By alleging that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind defendant's actions, Smith stated a claim for relief pursuant to Title VII's prohibition of sex discrimination."). That is not surprising, however, given that only "look and behavior," not status, were at issue in *Barnes*.

principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998); *see also Zarda*, slip op. at 24-29 (majority opinion) (rejecting the argument that Title VII was not originally intended to protect employees against discrimination on the basis of sexual orientation, in part because the same argument "could also be said of multiple forms of discrimination that are [now] indisputably prohibited by Title VII . . . [but] were initially believed to fall outside the scope of Title VII's prohibition," such as "sexual harassment and hostile work environment claims"). And in any event, *Smith* and *Price Waterhouse* preclude an interpretation of Title VII that reads "sex" to mean only individuals' "chromosomally driven physiology and reproductive function." *See* Appellee Br. at 26. Indeed, we criticized the district court in *Smith* for "relying on a series of pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection because 'Congress had a narrow view of sex in mind' and 'never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex.'" 378 F.3d at 572 (quoting *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984)) (alteration in original). According to *Smith*, such a limited view of Title VII's protections had been "eviscerated by *Price Waterhouse*." *Id.* at 573. The Funeral Home's attempt to resurrect the reasoning of these earlier cases thus runs directly counter to *Smith*'s holding.

In a related argument, the Funeral Home notes that both biologically male and biologically female persons may consider themselves transgender, such that transgender status is not unique to one biological sex. Appellee Br. at 27–28. It is true, of course, that an individual's biological sex does not dictate her transgender status; the two traits are not coterminous. But a trait need not be exclusive to one sex to nevertheless be a function of sex. As the Second Circuit explained in *Zarda*,

> Title VII does not ask whether a particular sex is discriminated against; it asks whether a particular "*individual*" is discriminated against "because of such *individual's* . . . sex." Taking individuals as the unit of analysis, the question is not whether discrimination is borne only by men or only by women or even by both men and women; instead, the question is whether an individual is discriminated against because of his or her sex.

Slip op. at 46 n.23 (plurality opinion) (emphasis in original) (quoting 42 U.S.C. § 2000e-2(a)(1)). Because an employer cannot discriminate against an employee for being transgender without considering that employee's biological sex, discrimination on the basis of transgender status necessarily entails discrimination on the basis of sex—no matter what sex the employee was born or wishes to be. By the same token, an employer need not discriminate based on a trait common to all men or women to

violate Title VII. After all, a subset of both women and men decline to wear dresses or makeup, but discrimination against any woman on this basis would constitute sex discrimination under *Price Waterhouse*. *See Hively*, 853 F.3d at 346 n.3 ("[T]he Supreme Court has made it clear that a policy need not affect *every* woman [or every man] to constitute sex discrimination. . . . A failure to discriminate against all women does not mean that an employer has not discriminated against one woman on the basis of sex.").

Nor can much be gleaned from the fact that later statutes, such as the Violence Against Women Act, expressly prohibit discrimination on the basis of "gender identity," while Title VII does not, *see* Appellee Br. at 28, because "Congress may certainly choose to use both a belt and suspenders to achieve its objectives," *Hively*, 853 F.3d at 344; *see also Yates v. United States*, 135 S. Ct. 1074, 1096 (2015) (Kagan, J., dissenting) (noting presence of two overlapping provisions in a statute "may have reflected belt-and-suspenders caution"). We have, in fact, already read Title VII to provide redundant statutory protections in a different context. In *In re Rodriguez*, 487 F.3d 1001 (6th Cir. 2007), for instance, we recognized that claims alleging discrimination on the basis of ethnicity may fall within Title VII's prohibition on discrimination on the basis of national origin, *see id.* at 1006 n.1, even though at least one other federal statute treats "national origin" and "ethnicity" as separate traits, *see* 20 U.S.C. § 1092(f)(1)(F)(ii). Moreover, Congress's failure to modify Title VII to include expressly

gender identity "lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'" *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States v. Wise*, 370 U.S. 405, 411 (1962)). In short, nothing precludes discrimination based on transgender status from being viewed both as discrimination based on "gender identity" for certain statutes and, for the purposes of Title VII, discrimination on the basis of sex.

The Funeral Home places great emphasis on the fact that our published decision in *Smith* superseded an earlier decision that stated explicitly, as opposed to obliquely, that a plaintiff who "alleges discrimination based solely on his identification as a transsexual . . . has alleged a claim of sex stereotyping pursuant to Title VII." *Smith v. City of Salem*, 369 F.3d 912, 922 (6th Cir.), *opinion amended and superseded*, 378 F.3d 566 (6th Cir. 2004). But such an amendment does not mean, as the Funeral Home contends, that the now-binding *Smith* opinion "directly rejected" the notion that Title VII prohibits discrimination on the basis of transgender status. *See* Appellee Br. at 31. The elimination of the language, which was not necessary to the decision, simply means that *Smith* did not expressly recognize Title VII protections for transgender persons based on identity. But *Smith*'s reasoning still leads us to the same conclusion.

We are also unpersuaded that our decision in *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2006), precludes the holding we issue today. We held in *Vickers* that a plaintiff cannot pursue a claim for impermissible sex stereotyping on the ground that his perceived sexual orientation fails to conform to gender norms unless he alleges that he was discriminated against for failing to "conform to traditional gender stereotypes in any observable way at work." *Id.* at 764. *Vickers* thus rejected the notion that "the act of identification with a particular group, in itself, is sufficiently gender non-conforming such that an employee who so identifies would, by this very identification, engage in conduct that would enable him to assert a successful sex stereotyping claim." *Id.* The *Vickers* court reasoned that recognizing such a claim would impermissibly "bootstrap protection for sexual orientation into Title VII." *Id.* (quoting *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005)). The Funeral Home insists that, under *Vickers*, Stephens's sex-stereotyping claim survives only to the extent that it concerns her "appearance or mannerisms on the job," *see id.* at 763, but not as it pertains to her underlying status as a transgender person.

The Funeral Home is wrong. First, *Vickers* does not control this case because *Vickers* concerned a different legal question. As the EEOC and amici Equality Ohio note, *Vickers* "addressed only whether Title VII forbids sexual orientation discrimination, not discrimination against a transgender individual." Appellant Br. at 30; *see also* Equality Ohio Br. at 16 n.7. While it is indisputable that "[a]

panel of this Court cannot overrule the decision of another panel" when the "prior decision [constitutes] controlling authority," *Darrah v. City of Oak Park*, 255 F.3d 301, 309 (6th Cir. 2001) (quoting *Salmi v. Sec'y of Health & Human Servs.*, 744 F.2d 685, 689 (6th Cir. 1985)), one case is not "controlling authority" over another if the two address substantially different legal issues, *cf. Int'l Ins. Co. v. Stonewall Ins. Co.*, 86 F.3d 601, 608 (6th Cir. 1996) (noting two panel decisions that "on the surface may appear contradictory" were reconcilable because "the result [in both cases wa]s heavily fact driven"). After all, we do not overrule a case by distinguishing it.

Second, we are not bound by *Vickers* to the extent that it contravenes *Smith*. *See Darrah*, 255 F.3d at 310 ("[W]hen a later decision of this court conflicts with one of our prior published decisions, we are still bound by the holding of the earlier case."). As noted above, *Vickers* indicated that a sex-stereotyping claim is viable under Title VII only if a plaintiff alleges that he was discriminated against for failing to "conform to traditional gender stereotypes *in any observable way at work*." 453 F.3d at 764 (emphasis added). The *Vickers* court's new "observable-at-work" requirement is at odds with the holding in *Smith*, which did not limit sex-stereotyping claims to traits that are observable in the workplace. The "observable-at-work" requirement also contravenes our reasoning in *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005)—a binding decision that predated *Vickers* by more than a year—in which we held that a

reasonable jury could conclude that a transgender plaintiff was discriminated against on the basis of his sex when, among other factors, his "ambiguous sexuality and his practice of dressing as a woman *outside of work* were well-known within the [workplace]." *Id.* at 738 (emphasis added).[7] From *Smith* and *Barnes*, it is clear that a plaintiff may state a claim under Title VII for discrimination based on gender nonconformance that is expressed outside of work. The *Vickers* court's efforts to develop a narrower rule are therefore not binding in this circuit.

Therefore, for the reasons set forth above, we hold that the EEOC could pursue a claim under Title VII on the ground that the Funeral Home

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[7] Oddly, the *Vickers* court appears to have recognized that its new "observable-at-work" requirement cannot be squared with earlier precedent. Immediately after announcing this new requirement, the *Vickers* court cited *Smith* for the proposition that "a plaintiff hoping to succeed on a claim of sex stereotyping [must] show that he 'fails to act *and/or identify with* his or her gender'"—a proposition that is necessarily broader than the narrow rule *Vickers* sought to announce. 453 F.3d at 764 (citing *Smith*, 378 F.3d at 575) (emphasis added). The *Vickers* court also seemingly recognized *Barnes* as binding authority, *see id.* (citing *Barnes*), but portrayed the decision as "affirming [the] district court's denial of defendant's motion for summary judgment as a matter of law on discrimination claim where pre-operative male-to-female transsexual was demoted based on his 'ambiguous sexuality and his practice of dressing as a woman' and his co-workers' assertions that he was 'not sufficiently masculine.'" *Id.* This summary is accurate as far as it goes, but it entirely omits the discussion in *Barnes* of discrimination against the plaintiff based on "his practice of dressing as a woman *outside of work*." 401 F.3d at 738 (emphasis added).

discriminated against Stephens on the basis of her transgender status and transitioning identity. The EEOC should have had the opportunity, either through a motion for summary judgment or at trial, to establish that the Funeral Home violated Title VII's prohibition on discrimination on the basis of sex by firing Stephens because she was transgender and transitioning from male to female.

3. Defenses to Title VII Liability

Having determined that the Funeral Home violated Title VII's prohibition on sex discrimination, we must now consider whether any defenses preclude enforcement of Title VII in this case. As noted above, the district court held that the EEOC's enforcement efforts must give way to the Religious Freedom Restoration Act ("RFRA"), which prohibits the government from enforcing a religiously neutral law against an individual if that law substantially burdens the individual's religious exercise and is not the least restrictive way to further a compelling government interest. *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d at 857–64. The EEOC seeks reversal of this decision; the Funeral Home urges affirmance. In addition, certain amici ask us to affirm the district court's grant of summary judgment on different grounds—namely that Stephens falls within the "ministerial exception" to Title VII and is therefore not protected under the Act. *See* Public Advocate Br. at 20–24.

We hold that the Funeral Home does not qualify for the ministerial exception to Title VII; the

Funeral Home's religious exercise would not be substantially burdened by continuing to employ Stephens without discriminating against her on the basis of sex stereotypes; the EEOC has established that it has a compelling interest in ensuring the Funeral Home complies with Title VII; and enforcement of Title VII is necessarily the least restrictive way to achieve that compelling interest. We therefore **REVERSE** the district court's grant of summary judgment in the Funeral Home's favor and **GRANT** summary judgment to the EEOC on the unlawful-termination claim.

a. Ministerial Exception

We turn first to the "ministerial exception" to Title VII, which is rooted in the First Amendment's religious protections, and which "preclude[s] application of [employment discrimination laws such as Title VII] to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012). "[I]n order for the ministerial exception to bar an employment discrimination claim, the employer must be a religious institution and the employee must have been a ministerial employee." *Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829, 833 (6th Cir. 2015) (quoting *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007)). "The ministerial exception is a highly circumscribed doctrine. It grew out of the special considerations raised by the employment claims of clergy, which 'concern[] internal church discipline,

faith, and organization, all of which are governed by ecclesiastical rule, custom, and law.'" *Gen. Conf. Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 409 (6th Cir. 2010) (quoting *Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986)) (alteration in original).

Public Advocate of the United States and its fellow amici argue that the ministerial exception applies in this case because (1) the exception applies both to religious and non-religious entities, and (2) Stephens is a ministerial employee. Public Advocate Br. at 20–24. Tellingly, however, the Funeral Home contends that the Funeral Home "is not a religious organization" and therefore, "the ministerial exception has no application" to this case. Appellee Br. at 35. Although the Funeral Home has not waived the ministerial-exception defense by failing to raise it, *see Conlon*, 777 F.3d at 836 (holding that private parties may not "waive the First Amendment's ministerial exception" because "[t]his constitutional protection is . . . structural"), we agree with the Funeral Home that the exception is inapplicable here.

As we made clear in *Conlon*, the ministerial exception applies only to "religious institution[s]." *Id.* at 833. While an institution need not be "a church, diocese, or synagogue, or an entity operated by a traditional religious organization," *id.* at 834 (quoting *Hollins*, 474 F.3d at 225), to qualify for the exception, the institution must be "marked by clear or obvious religious characteristics," *id.* at 834 (quoting *Shaliehsabou v. Hebrew Home of Greater*

Wash., Inc., 363 F.3d 299, 310 (4th Cir. 2004)). In accordance with these principles, we have previously determined that the InterVarsity Christian Fellowship/USA ("IVCF"), "an evangelical campus mission," constituted a religious organization for the purposes of the ministerial exception. *See id*. at 831, 833. IVCF described itself on its website as "faith-based religious organization" whose "purpose 'is to establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord.'" *Id*. at 831 (citation omitted). In addition, IVCF's website notified potential employees that it has the right to "hir[e] staff based on their religious beliefs so that all staff share the same religious commitment." *Id*. (citation omitted). Finally, IVCF required all employees "annually [to] reaffirm their agreement with IVCF's Purpose Statement and Doctrinal Basis." *Id*.

The Funeral Home, by comparison, has virtually no "religious characteristics." Unlike the campus mission in *Conlon*, the Funeral Home does not purport or seek to "establish and advance" Christian values. *See id*. As the EEOC notes, the Funeral Home "is not affiliated with any church; its articles of incorporation do not avow any religious purpose; its employees are not required to hold any particular religious views; and it employs and serves individuals of all religions." Appellant Reply Br. at 33–34 (citing R. 61 (Def.'s Counter Statement of Disputed Facts ¶¶ 25–27, 30, 37) (Page ID #1832–35)). Though the Funeral Home's mission statement declares that "its highest priority is to honor God in all that we do as a company and as individuals," R.

55 (Def.'s Statement of Facts ¶ 21) (Page ID #1686), the Funeral Home's sole public displays of faith, according to Rost, amount to placing "Daily Bread" devotionals and "Jesus Cards" with scriptural references in public places in the funeral homes, which clients may pick up if they wish, *see* R. 51-3 (Rost 30(b)(6) Dep. at 39–40) (Page ID #652). The Funeral Home does not decorate its rooms with "religious figures" because it does not want to "offend[] people of different religions." R. 61 (Def.'s Counter Statement of Disputed Facts ¶ 33) (Page ID # 1834). The Funeral Home is open every day, including on Christian holidays. *Id*. at 88–89 (Page ID #659–60). And while the employees are paid for federally recognized holidays, Easter is not a paid holiday. *Id*. at 89 (Page ID #660).

Nor is Stephens a "ministerial employee" under *Hosanna-Tabor*. Following *Hosanna-Tabor*, we have identified four factors to assist courts in assessing whether an employee is a minister covered by the exception: (1) whether the employee's title "conveys a religious—as opposed to secular—meaning"; (2) whether the title reflects "a significant degree of religious training" that sets the employee "apart from laypersons"; (3) whether the employee serves "as an ambassador of the faith" and serves a "leadership role within [the] church, school, and community"; and (4) whether the employee performs "important religious functions . . . for the religious organization." *Conlon*, 777 F.3d at 834–35. Stephens's title—"Funeral Director"—conveys a purely secular function. The record does not reflect that Stephens has any religious training. Though

Stephens has a public-facing role within the funeral home, she was not an "ambassador of [any] faith," and she did not perform "important religious functions," *see id*. at 835; rather, Rost's description of funeral directors' work identifies mostly secular tasks—making initial contact with the deceased's families, handling the removal of the remains to the funeral home, introducing other staff to the families, coaching the families through the first viewing, greeting the guests, and coordinating the families' "final farewell," R. 53-3 (Rost Aff. ¶¶ 14–33) (Page ID #930–35). The only responsibilities assigned to Stephens that could be construed as religious in nature were, "on limited occasions," to "facilitate" a family's clergy selection, "facilitate the first meeting of clergy and family members," and "play a role in building the family's confidence around the role the clergy will play, clarifying what type of religious message is desired, and integrating the clergy into the experience." *Id*. ¶ 20 (Page ID #932–33). Such responsibilities are a far cry from the duties ascribed to the employee in *Conlon*, which "included assisting others to cultivate 'intimacy with God and growth in Christ-like character through personal and corporate spiritual disciplines.'" 777 F.3d at 832. In short, Stephens was not a ministerial employee and the Funeral Home is not a religious institution, and therefore the ministerial exception plays no role in this case.

b. Religious Freedom Restoration Act

Congress enacted RFRA in 1993 to resurrect and broaden the Free Exercise Clause jurisprudence that existed before the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which overruled the approach to analyzing Free Exercise Clause claims set forth by *Sherbert v. Verner*, 374 U.S. 398 (1963). *See City of Boerne v. Flores*, 521 U.S. 507, 511–15 (1997). To that end, RFRA precludes the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb–1. RFRA thus contemplates a two-step burden-shifting analysis: First, a claimant must demonstrate that complying with a generally applicable law would substantially burden his religious exercise. Upon such a showing, the government must then establish that applying the law to the burdened individual is the least restrictive means of furthering a compelling government interest.

The questions now before us are whether (1) we ought to remand this case and preclude the Funeral Home from asserting a RFRA-based defense in the proceedings below because Stephens, a non-governmental party, joined this action as an intervenor on appeal; (2) if not, whether the Funeral Home adequately demonstrated that it would be substantially burdened by the application of Title

VII in this case; (3) if so, whether the EEOC nevertheless demonstrated that application of a such a burden to the Funeral Home furthers a compelling governmental interest; and (4) if so, whether the application of such a burden constitutes the least restrictive means of furthering that compelling interest. We address each inquiry in turn.

i. Applicability of the Religious Freedom Restoration Act

We have previously made clear that "Congress intended RFRA to apply only to suits in which the government is a party." *Seventh-Day Adventists*, 617 F.3d at 410. Thus, if Stephens had initiated a private lawsuit against the Funeral Home to vindicate her rights under Title VII, the Funeral Home would be unable to invoke RFRA as a defense because the government would not have been party to the suit. *See id*. Now that Stephens has intervened in this suit, she argues that the case should be remanded to the district court with instructions barring the Funeral Home from asserting a RFRA defense to her individual claims. Intervenor Br. at 15. The EEOC supports Stephens's argument. EEOC Reply Br. at 31.

The Funeral Home, in turn, argues that the question of RFRA's applicability to Title VII suits between private parties "is a new and complicated issue that has never been a part of this case and has never been briefed by the parties." Appellee Br. at 34. Because Stephens's intervention on appeal was granted, in part, on her assurances that she "seeks

only to raise arguments already within the scope of this appeal," D.E. 23 (Stephens Reply in Support of Mot. to Intervene at 8); *see also* D.E. 28-2 (March 27, 2017 Order at 2), the Funeral Home insists that permitting Stephens to argue now in favor of remand "would immensely prejudice the Funeral Home and undermine the Court's reasons for allowing Stephens's intervention in the first place," Appellee Br. at 34–35 (citing *Illinois Bell Tel. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990)).

The Funeral Home is correct. Stephens's reply brief in support of her motion to intervene insists that "no party to an appeal may broaden the scope of litigation beyond the issues raised before the district court." D.E. 23 (Stephens Reply in Support of Mot. to Intervene at 8) (citing *Thomas v. Arn*, 474 U.S. 140, 148 (1985)). Though the district court noted in a footnote that "the Funeral Home could not assert a RFRA defense if Stephens had filed a Title VII suit on Stephens's own behalf," *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d at 864 n.23, this argument was not briefed by the parties at the district-court level. Thus, in accordance with Stephens's own brief, she should not be permitted to argue for remand before this court.

Stephens nevertheless insists that "intervenors . . . are permitted to present different arguments related to the principal parties' claims." Intervenor Reply Br. at 14 (citing *Grutter v. Bollinger*, 188 F.3d 394, 400–01 (6th Cir. 1999)). But in *Grutter*, this court determined that proposed intervenors ought to be able to present particular

"defenses of affirmative action" that the principal party to the case (a university) might be disinclined to raise because of "internal and external institutional pressures." 188 F.3d at 400. Allowing intervenors to present particular defenses on the merits to judiciable claims is different than allowing intervenors to change the procedural course of litigation by virtue of their intervention.

Moreover, we typically will not consider issues raised for the first time on appeal unless they are "presented with sufficient clarity and completeness and [their] resolution will materially advance the process of th[e] . . . litigation." *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir. 1988) (citation omitted). The merits of a remand have been addressed only in passing by the parties, and thus have not been discussed with "sufficient clarity and completeness" to enable us to entertain Stephens's claim.[8]

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[8] For a similar reason, we decline to consider the argument raised by several amici that reading RFRA to "permit a religious accommodation that imposes material costs on third parties or interferes with the exercise of rights held by others" would violate the Establishment Clause of the First Amendment. *See* Private Rights/Public Conscience Br. at 15; *see also id*. at 5–15; Americans United Br. at 6–15. Amici may not raise "issues or arguments [that] . . . 'exceed those properly raised by the parties.'" *Shoemaker v. City of Howell*, 795 F.3d 553, 562 (6th Cir. 2015) (quoting *Cellnet Commc'ns, Inc. v. FCC*, 149 F.3d 429, 433 (6th Cir. 1998)). Although Stephens notes that the Establishment Clause "requires the government and courts to account for the harms a religious exemption to Title VII would impose on employees," Intervenor Br. at 26, no party to this action presses the broad constitutional argument

ii. Prima Facie Case Under RFRA

To assert a viable defense under RFRA, a religious claimant must demonstrate that the government action at issue "would (1) substantially burden (2) a sincere (3) religious exercise." *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 428 (2006). In reviewing such a claim, courts must not evaluate whether asserted "religious beliefs are mistaken or insubstantial." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014). Rather, courts must assess "whether the line drawn reflects 'an honest conviction.'" *Id.* (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981)). In addition, RFRA, as amended by the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).

The EEOC argues that the Funeral Home's RFRA defense must fail because "RFRA protects religious exercise, not religious beliefs," Appellant Br. at 41, and the Funeral Home has failed to "identif[y] how continuing to employ Stephens after, or during, her transition would interfere with any religious 'action or practice,'" *id.* at 43 (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008)). The Funeral Home, in turn, contends that the "very operation of [the Funeral Home]

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that amici seek to present. We therefore will not address the merits of amici's position.

constitutes protected religious exercise" because Rost feels compelled by his faith to "serve grieving people" through the funeral home, and thus "[r]equiring [the Funeral Home] to authorize a male funeral director to wear the uniform for female funeral directors would directly interfere with—and thus impose a substantial burden on—[the Funeral Home's] ability to carry out Rost's religious exercise of caring for the grieving." Appellee Br. at 38.

If we take Rost's assertions regarding his religious beliefs as sincere, which all parties urge us to do, then we must treat Rost's running of the funeral home as a religious exercise—even though Rost does not suggest that ministering to grieving mourners by operating a funeral home is a tenet of his religion, more broadly. *See United States v. Sterling*, 75 M.J. 407, 415 (C.A.A.F. 2016) (noting that conduct that "was claimed to be religiously motivated at least in part . . . falls within RFRA's expansive definition of 'religious exercise'"), *cert. denied*, 137 S. Ct. 2212 (2017). The question then becomes whether the Funeral Home has identified any way in which continuing to employ Stephens would substantially burden Rost's ability to serve mourners. The Funeral Home purports to identify two burdens. "First, allowing a funeral director to wear the uniform for members of the opposite sex would often create distractions for the deceased's loved ones and thereby hinder their healing process (and [the Funeral Home's] ministry)," and second, "forcing [the Funeral Home] to violate Rost's faith . . . would significantly pressure Rost to leave the funeral industry and end his ministry to grieving

people." Appellee Br. at 38. Neither alleged burden is "substantial" within the meaning of RFRA.

The Funeral Home's first alleged burden—that Stephens will present a distraction that will obstruct Rost's ability to serve grieving families—is premised on presumed biases. As the EEOC observes, the Funeral Home's argument is based on "a view that Stephens is a 'man' and would be perceived as such even after her gender transition," as well as on the "assumption that a transgender funeral director would so disturb clients as to 'hinder healing.'" Appellant Reply Br. at 19. The factual premises underlying this purported burden are wholly unsupported in the record. Rost testified that he has never seen Stephens in anything other than a suit and tie and does not know how Stephens would have looked when presenting as a woman. R. 54-5 (Rost 30(b)(6) Dep. at 60–61) (Page ID #1362). Rost's assertion that he believes his clients would be disturbed by Stephens's appearance during and after her transition to the point that their healing from their loved ones' deaths would be hindered, *see* R. 55 (Def.'s Statement of Facts ¶ 78) (Page ID #1697), at the very least raises a material question of fact as to whether his clients would actually be distracted, which cannot be resolved in the Funeral Home's favor at the summary-judgment stage. *See Tree of Life Christian Sch. v. City of Upper Arlington*, 823 F.3d 365, 371–72 (6th Cir. 2016) (holding that this court "cannot *assume* . . . a fact" at the summary judgment stage); *see also Guess? Inc. v. United States*, 944 F.2d 855, 858 (Fed. Cir. 1991) (in case where manufacturer's eligibility for certain statutory

refund on import tariffs turned on whether foreign customers preferred U.S.-made jeans more than foreign-made jeans, court held that the manufacturer's averred *belief* regarding foreign customers' preferences was not conclusive; instead, there remained a genuine dispute of material fact as to foreign customers' *actual* preferences). Thus, even if we were to find the Funeral Home's argument legally cognizable, we would not affirm a finding of substantial burden based on a contested and unsupported assertion of fact.

But more to the point, we hold as a matter of law that a religious claimant cannot rely on customers' presumed biases to establish a substantial burden under RFRA. Though we have seemingly not had occasion to address the issue, other circuits have considered whether and when to account for customer biases in justifying discriminatory employment practices. In particular, courts asked to determine whether customers' biases may render sex a "bona fide occupational qualification" under Title VII have held that "it would be totally anomalous . . . 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); *see also Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 795, 799 (8th Cir. 1993) (holding grooming policy for pizza deliverymen that had disparate impact on African-American employees was not justified by customer preferences for clean-shaven deliverymen because "[t]he existence of a beard on the face of a delivery man

does not affect in any manner Domino's ability to make or deliver pizzas to their customers"); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981) (rejecting claim that promoting a female employee would "'destroy the essence' of [the defendant's] business"—a theory based on the premise that South American clients would not want to work with a female vice-president—because biased customer preferences did not make being a man a "bona fide occupational qualification" for the position at issue). District courts within this circuit have endorsed these out-of-circuit opinions. *See, e.g.*, *Local 567 Am. Fed'n of State, Cty., & Mun. Emps. v. Mich. Council 25, Am. Fed'n of State, Cty., & Mun. Emps.*, 635 F. Supp. 1010, 1012 (E.D. Mich. 1986) (citing *Diaz*, 442 F.2d 385, and *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969), for the proposition that "[a]ssertions of sex-based employee classification cannot be made on the basis of stereotypes or customer preferences").

Of course, cases like *Diaz*, *Fernandez*, and *Bradley* concern a different situation than the one at hand. We could agree that courts should not credit customers' prejudicial notions of what men and women can do when considering whether sex constitutes a "bona fide occupational qualification" for a given position while nonetheless recognizing that those same prejudices have practical effects that would substantially burden Rost's religious practice (i.e., the operation of his business) in this case. But the Ninth Circuit rejected similar reasoning in *Fernandez*, and we reject it here. In *Fernandez*, the Ninth Circuit held that customer

preferences could not transform a person's gender into a relevant consideration for a particular position *even if* the record supported the idea that the employer's business would suffer from promoting a woman because a large swath of clients would refuse to work with a female vice-president. *See* 653 F.2d at 1276–77. Just as the *Fernandez* court refused to treat discriminatory promotion practices as critical to an employer's business, notwithstanding any evidence to that effect in the record, so too we refuse to treat discriminatory policies as essential to Rost's business—or, by association, his religious exercise.

The Funeral Home's second alleged burden also fails. Under *Holt v. Hobbs*, 135 S. Ct. 853 (2015), a government action that "puts [a religious practitioner] to th[e] choice" of "'engag[ing] in conduct that seriously violates [his] religious beliefs' [or] . . . fac[ing] serious" consequences constitutes a substantial burden for the purposes of RFRA. *See id.* at 862 (quoting *Hobby Lobby*, 134 S. Ct. at 2775). Here, Rost contends that he is being put to such a choice, as he either must "purchase female attire" for Stephens or authorize her "to dress in female attire *while representing* [the Funeral Home] and serving the bereaved," which purportedly violates Rost's religious beliefs, or else face "significant[] pressure . . . to leave the funeral industry and end his ministry to grieving people." Appellee Br. at 38–39 (emphasis in original). Neither of these purported choices can be considered a "substantial burden" under RFRA.

First, though Rost currently provides his male employees with suits and his female employees with

stipends to pay for clothing, this benefit is not legally required and Rost does not suggest that the benefit is religiously compelled. *See* Appellant Br. at 49 ("[T]he EEOC's suit would require only that *if* Rost provides a clothing benefit to his male employees, he provide a comparable benefit (which could be in-kind, or in cash) to his female employees."); R. 54-2 (Rost Aff.) (Page ID 1326–37) (no suggestion that clothing benefit is religiously motivated). In this regard, Rost is unlike the employers in *Hobby Lobby*, who rejected the idea that they could simply refuse to provide health care altogether and pay the associated penalty (which would allow them to avoid providing access to contraceptives in violation of their beliefs) because they felt religiously compelled to provide their employees with health insurance. *See* 134 S. Ct. at 2776. And while "it is predictable that the companies [in *Hobby Lobby*] would face a competitive disadvantage in retaining and attracting skilled workers" if they failed to provide health insurance, *id.* at 2777, the record here does not indicate that the Funeral Home's clothing benefit is necessary to attract workers; in fact, until the EEOC commenced the present action, the Funeral Home did not provide any sort of clothing benefit to its female employees. Thus, Rost is not being forced to choose between providing Stephens with clothing or else leaving the business; this is a predicament of Rost's own making.

Second, simply permitting Stephens to wear attire that reflects a conception of gender that is at odds with Rost's religious beliefs is not a substantial burden under RFRA. We presume that the "line

[Rost] draw[s]"—namely, that permitting Stephens to represent herself as a woman would cause him to "violate God's commands" because it would make him "directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift," R. 54-2 (Rost Aff. ¶¶ 43, 45) (Page ID #1334–35)—constitutes "an honest conviction." *See Hobby Lobby*, 134 S. Ct. at 2779 (quoting *Thomas*, 450 U.S. at 716). But we hold that, as a matter of law, tolerating Stephens's understanding of her sex and gender identity is not tantamount to supporting it.

Most circuits, including this one, have recognized that a party can sincerely believe that he is being coerced into engaging in conduct that violates his religious convictions without actually, as a matter of law, being so engaged. Courts have recently confronted this issue when non-profit organizations whose religious beliefs prohibit them "from paying for, providing, or facilitating the distribution of contraceptives," or in any way "be[ing] complicit in the provision of contraception" argued that the Affordable Care Act's opt-out procedure—which enables organizations with religious objections to the contraceptive mandate to avoid providing such coverage by either filling out a form certifying that they have a religious objection to providing contraceptive coverage or directly notifying the Department of Health and Human Services of the religious objection—substantially burdens their religious practice. *See Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of*

Health & Human Servs., 818 F.3d 1122, 1132–33, 1143 (11th Cir. 2016).

Eight of the nine circuits to review the issue, including this court, have determined that the opt-out process does not constitute a substantial burden. *See id.* at 1141 (collecting cases); *see also Mich. Catholic Conf. & Catholic Family Servs. v. Burwell*, 807 F.3d 738 (6th Cir. 2015), *cert. granted, judgment vacated sub nom. Mich. Catholic Conf. v. Burwell*, 136 S. Ct. 2450 (2016).[9] The courts reached this conclusion by examining the Affordable Care Act's provisions and determining that it was the statute—and not the employer's act of opting out—that "entitle[d] plan participants and beneficiaries to contraceptive coverage." *See, e.g.*, *Eternal Word*, 818 F.3d at 1148–49. As a result, the employers' engagement with the opt-out process, though legally significant in that it leads the government to provide the organizations' employees with access to contraceptive coverage through an alternative route, does not mean the employers are facilitating the provision of contraceptives in a way that violates their religious practice. *See id.*

We view the Funeral Home's compliance with antidiscrimination laws in much the same light. Rost may sincerely believe that, by retaining Stephens as an employee, he is supporting and endorsing Stephens's views regarding the mutability of sex. But as a matter of law, bare compliance with Title

[9] Though a number of these decisions have been vacated on grounds that are not relevant to this case, their reasoning remains useful here.

VII—without actually assisting or facilitating Stephens's transition efforts—does not amount to an endorsement of Stephens's views. As much is clear from the Supreme Court's Free Speech jurisprudence, in which the Court has held that a statute requiring law schools to provide military and nonmilitary recruiters an equal opportunity to recruit students on campus was not improperly compelling schools to endorse the military's policies because "[n]othing about recruiting suggests that law schools agree with any speech by recruiters," and "students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006) (citing *Bd. of Ed. of Westside Cmty. Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841–42 (1995) (being required to provide funds on an equal basis to religious as well as secular student publications does not constitute state university's support for students' religious messages). Similarly, here, requiring the Funeral Home to refrain from firing an employee with different religious views from Rost does not, as a matter of law, mean that Rost is endorsing or supporting those views. Indeed, Rost's own behavior suggests that he sees the difference between employment and endorsement, as he employs individuals of any or no faith, "permits employees to wear Jewish head coverings for Jewish services," and "even testified that he is *not* endorsing his employee's religious beliefs by employing them."

Appellant Reply Br. at 18–19 (citing R. 61 (Def.'s Counter Statement of Disputed Facts ¶¶ 31, 37, 38) (Page ID #1834–36); R. 51-3 (Rost Dep. at 41–42) (Page ID #653)).[10]

At bottom, the fact that Rost sincerely believes that he is being compelled to make such an endorsement does not make it so. *Cf. Eternal Word*, 818 F.3d at 1145 ("We reject a framework that takes away from courts the responsibility to decide what action the government requires and leaves that answer entirely to the religious adherent. Such a framework improperly substitutes religious belief for legal analysis regarding the operation of federal law."). Accordingly, requiring Rost to comply with Title VII's proscriptions on discrimination does not substantially burden his religious practice. The district court therefore erred in granting summary judgment to the Funeral Home on the basis of its RFRA defense, and we **REVERSE** the district court's decision on this ground. As Rost's purported burdens are insufficient as a matter of law, we **GRANT** summary judgment to the EEOC with respect to the Funeral Home's RFRA defense.

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[10] Even ignoring any adverse inferences that might be drawn from the incongruity between Rost's earlier deposition testimony and the Funeral Home's current litigation position, as we must do when considering whether summary judgment is appropriate in the EEOC's favor, we conclude as a matter of law that Rost does not express "support[] [for] the idea that sex is a changeable social construct rather than an immutable God-given gift" by continuing to hire Stephens, *see* R. 54-2 (Rost Aff. ¶¶ 43, 45) (Page ID #1334–35)—even if Rost sincerely believes otherwise.

iii. Strict Scrutiny Test

Because the Funeral Home has not established that Rost's religious exercise would be substantially burdened by requiring the Funeral Home to comply with Title VII, we do not need to consider whether the EEOC has adequately demonstrated that enforcing Title VII in this case is the least restrictive means of furthering a compelling government interest. However, in the interest of completeness, we reach this issue and conclude that the EEOC has satisfied its burden. We therefore **GRANT** summary judgment to the EEOC with regard to the Funeral Home's RFRA defense on the alternative grounds that the EEOC's enforcement action in this case survives strict scrutiny.

(a) Compelling Government Interest

Under the "to the person" test, the EEOC must demonstrate that its compelling interest "is satisfied through application of the challenged law [to] . . . the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales*, 546 U.S. at 430–31 (citing 42 U.S.C. § 2000bb–1(b)). This requires "look[ing] beyond broadly formulated interests justifying the general applicability of government mandates and scrutiniz[ing] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431.

As an initial matter, the Funeral Home does not seem to dispute that the EEOC "has a compelling interest in the 'elimination of workplace discrimination, including sex discrimination.'" Appellee Br. at 41 (quoting Appellant Br. at 51).[11] However, the Funeral Home criticizes the EEOC for "cit[ing] a general, broadly formulated interest" to support enforcing Title VII in this case. *Id.* According to the Funeral Home, the relevant inquiry is whether the EEOC has a "specific interest in forcing [the Funeral Home] to allow its male funeral directors to wear the uniform for female funeral directors while on the job." *Id.* The EEOC instead asks whether its interest in "eradicating employment discrimination" is furthered by ensuring that Stephens does not suffer discrimination (either on the basis of sex-stereotyping or her transgender status), lose her livelihood, or face the emotional pain and suffering of being effectively told "that as a transgender woman she is not valued or able to make workplace contributions." Appellant Br. at 52, 54 (citing *Lusardi v. McHugh*, EEOC DOC 0120133395, 2015 WL 1607756, at *1 (E.E.O.C. Apr. 1, 2015)). Stephens similarly argues that "Title VII serves a compelling interest in eradicating all the forms of invidious employment discrimination proscribed by the statute," and points to studies demonstrating that transgender people have experienced particularly high rates of "bodily harm,

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[11] While the district court did not hold that the EEOC had conclusively established the "compelling interest" element of its opposition to the Funeral Home's RFRA defense, it assumed so arguendo. *See R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d at 857–59.

violence, and discrimination because of their transgender status." Intervenor Br. at 21, 23–25.

The Funeral Home's construction of the compelling-interest test is off-base. Rather than focusing on the EEOC's claim—that the Funeral Home terminated Stephens because of her proposed gender nonconforming behavior—the Funeral Home's test focuses instead on its defense (discussed above) that the Funeral Home merely wishes to enforce an appropriate workplace uniform. But the Funeral Home has not identified any cases where the government's compelling interest was framed as its interest in disturbing a company's workplace policies. For instance, in *Hobby Lobby*, the issue, which the Court ultimately declined to adjudicate, was whether the government's "interest in guaranteeing cost-free access to the four challenged contraceptive methods" was compelling—not whether the government had a compelling interest in requiring closely held organizations to act in a way that conflicted with their religious practice. *See* 134 S. Ct. at 2780.

The Supreme Court's analysis in cases like *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Holt* guides our approach. In those cases, the Court ultimately determined that the interests *generally* served by a given government policy or statute would not be "compromised" by granting an exemption to a particular individual or group. *See Holt*, 135 S. Ct. at 863. Thus, in *Yoder*, the Court held that the interests furthered by the government's requirement of compulsory education

for children through the age of sixteen (i.e., "to prepare citizens to participate effectively and intelligently in our open political system" and to "prepare[] individuals to be self-reliant and self-sufficient participants in society") were not harmed by granting an exemption to the Amish, who do not need to be prepared "for life in modern society" and whose own traditions adequately ensure self-sufficiency. 406 U.S. at 221–22. Similarly, in *Holt*, the Court recognized that the Department of Corrections has a compelling interest in preventing prisoners from hiding contraband on their persons, which is generally effectuated by requiring prisoners to adhere to a strict grooming policy, but the Court failed to see how the Department's "compelling interest in staunching the flow of contraband into and within its facilities . . . would be seriously compromised by allowing an inmate to grow a ½-inch beard." 135 S. Ct. at 863.

Here, the same framework leads to the opposite conclusion. Failing to enforce Title VII against the Funeral Home means the EEOC would be allowing a particular person—Stephens—to suffer discrimination, and such an outcome is directly contrary to the EEOC's compelling interest in combating discrimination in the workforce. *See, e.g.*, *United States v. Burke*, 504 U.S. 229, 238 (1992) ("[I]t is beyond question that discrimination in employment on the basis of sex . . . is, as . . . this Court consistently has held, an invidious practice that causes grave harm to its victims.").[12] In this

[12] Courts have repeatedly acknowledged that Title VII serves a compelling interest in eradicating all forms of

regard, this case is analogous to *Eternal Word*, in which the Eleventh Circuit determined that the government had a compelling interest in requiring a particular nonprofit organization with religious objections to the Affordable Care Act's contraceptive mandate to follow the procedures associated with obtaining an accommodation to the Act because

> applying the accommodation procedure *to the plaintiffs in these cases* furthers [the government's] interests because the accommodation ensures that the plaintiffs' female plan participants and beneficiaries—who may or may not share the same religious beliefs as their employer—have access to contraception without cost sharing or additional administrative burdens as the ACA requires.

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invidious employment discrimination proscribed by the statute. *See, e.g.*, *EEOC v. Miss. Coll.*, 626 F.2d 477, 488–89 (5th Cir. 1980). As the Supreme Court stated, the "stigmatizing injury" of discrimination, "and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984); *see also EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982) ("By enacting Title VII, Congress clearly targeted the elimination of all forms of discrimination as a 'highest priority.' Congress' purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions."), *abrogation on other grounds recognized by Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 960 (9th Cir. 1991).

818 F.3d at 1155 (emphasis added). The *Eternal Word* court reasoned that "[u]nlike the exception made in *Yoder* for Amish children," who would be adequately prepared for adulthood even without compulsory education, the "poor health outcomes related to unintended or poorly timed pregnancies apply to the plaintiffs' female plan participants or beneficiaries and their children just as they do to the general population." *Id*. Similarly, here, the EEOC's compelling interest in eradicating discrimination applies with as much force to Stephens as to any other employee discriminated against based on sex.

It is true, of course, that the specific harms the EEOC identifies in this case, such as depriving Stephens of her livelihood and harming her sense of self-worth, are simply permutations of the generic harm that is always suffered in employment discrimination cases. But *O Centro*'s "to the person" test does not mean that the government has a compelling interest in enforcing the laws only when the failure to enforce would lead to uniquely harmful consequences. Rather, the question is whether "the asserted harm of granting specific exemptions to particular religious claimants" is sufficiently great to require compliance with the law. *O Centro*, 546 U.S. at 431. Here, for the reasons stated above, the EEOC has adequately demonstrated that Stephens has and would suffer substantial harm if we exempted the Funeral Home from Title VII's requirements.

Finally, we reject the Funeral Home's claim that it should receive an exemption, notwithstanding any harm to Stephens or the EEOC's interest in

eradicating discrimination, because "the constitutional guarantee of free exercise[,] effectuated here via RFRA . . . [,] is a higher-order right that necessarily supersedes a conflicting statutory right," Appellee Br. at 42. This point warrants little discussion. The Supreme Court has already determined that RFRA does not, in fact, "effectuate . . . the First Amendment's guarantee of free exercise," *id.*, because it sweeps more broadly than the Constitution demands. *See Boerne*, 521 U.S. at 532. And in any event, the Supreme Court has expressly recognized that compelling interests can, at times, override religious beliefs—even those that are squarely protected by the Free Exercise Clause. See *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) ("We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override other significant interests."). We therefore decline to hoist automatically Rost's religious interests above other compelling governmental concerns. The undisputed record demonstrates that Stephens has been and would be harmed by the Funeral Home's discriminatory practices in this case, and the EEOC has a compelling interest in eradicating and remedying such discrimination.

(b) Least Restrictive Means

The final inquiry under RFRA is whether there exist "other means of achieving [the government's] desired goal without imposing a

substantial burden on the exercise of religion by the objecting part[y]." *Hobby Lobby*, 134 S. Ct. at 2780 (citing 42 U.S.C. §§ 2000bb-1(a), (b)). "The least-restrictive-means standard is exceptionally demanding," *id.* (citing *Boerne*, 521 U.S. at 532), and the EEOC bears the burden of showing that burdening the Funeral Home's religious exercise constitutes the least restrictive means of furthering its compelling interests, *see id.* at 2779. Where an alternative option exists that furthers the government's interest "equally well," *see id.* at 2782, the government "must use it," *Holt*, 135 S. Ct. at 864 (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 815 (2000)). In conducting the least-restrictive-alternative analysis, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Hobby Lobby*, 134 S. Ct. at 2781 n.37 (quoting *Cutter*, 544 U.S. at 720). Cost to the government may also be "an important factor in the least-restrictive-means analysis." *Id.* at 2781.

The district court found that requiring the Funeral Home to adopt a gender-neutral dress code would constitute a less restrictive alternative to enforcing Title VII in this case, and granted the Funeral Home summary judgment on this ground. According to the district court, the Funeral Home engaged in illegal sex stereotyping only with respect to "the clothing Stephens [c]ould wear at work," and therefore a gender-neutral dress code would resolve the case because Stephens would not be forced to dress in a way that conforms to Rost's conception of Stephens's sex and Rost would not be compelled to

authorize Stephens to dress in a way that violates Rost's religious beliefs. *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d at 861, 863.

Neither party endorses the district court's proposed alternative, and for good reason. The district court's suggestion, although appealing in its tidiness, is tenable only if we excise from the case evidence of sex stereotyping in areas other than attire. Though Rost does repeatedly say that he terminated Stephens because she "wanted to *dress* as a woman" and "would no longer *dress* as a man," *see* R. 54-5 (Rost 30(b)(6) Dep. at 136–37) (Page ID #1372) (emphasis added), the record also contains uncontroverted evidence that Rost's reasons for terminating Stephens extended to other aspects of Stephens's intended presentation. For instance, Rost stated that he fired Stephens because Stephens "was no longer going to *represent himself* as a man," *id.* at 136 (Page ID #1372) (emphasis added), and Rost insisted that Stephens presenting as a female would disrupt clients' healing process because female clients would have to "share a bathroom with a man dressed up as a woman," *id.* at 74, 138–39 (Page ID #1365, 1373). The record thus compels the finding that Rost's concerns extended beyond Stephens's attire and reached Stephens's appearance and behavior more generally.

At the summary-judgment stage, where a court may not "make credibility determinations, weigh the evidence, or draw [adverse] inferences from the facts," *Terry Barr Sales Agency, Inc. v. All-Lock Co.*, 96 F.3d 174, 178 (6th Cir. 1996) (citing

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)), the district court was required to account for the evidence of Rost's non-clothing-based sex stereotyping in determining whether a proposed less restrictive alternative furthered the government's "stated interests equally [as] well," *Hobby Lobby*, 134 S. Ct. at 2782. Here, as the evidence above shows, merely altering the Funeral Home's dress code would not address the discrimination Stephens faced because of her broader desire "to represent [her]self as a [wo]man." R. 54-5 (Rost 30(b)(6) Dep. at 136) (Page ID #1372). Indeed, the Funeral Home's counsel conceded at oral argument that Rost would have objected to Stephens's coming "to work presenting clearly as a woman and acting as a woman," regardless of whether Stephens wore a man's suit, because that "would contradict [Rost's] sincerely held religious beliefs." *See* Oral Arg. at 46:50–47:46.

The Funeral Home's proposed alternative—to "permit businesses to allow the enforcement of sex-specific dress codes for employees who are public-facing representatives of their employer, so long as the dress code imposes equal burdens on the sexes and does not affect employee dress outside of work," Appellee Br. at 44–45—is equally flawed. The Funeral Home's suggestion would do nothing to advance the government's compelling interest in preventing and remedying discrimination against Stephens based on her refusal to conform at work to stereotypical notions of how biologically male persons should dress, appear, behave, and identify. Regardless of whether the EEOC has a compelling

interest in combating sex-specific dress codes—a point that is not at issue in this case—the EEOC does have a compelling interest in ensuring that the Funeral Home does not discriminate against its employees on the basis of their sex. The Funeral Home's proposed alternative sidelines this interest entirely.[13]

The EEOC, Stephens, and several amici argue that searching for an alternative to Title VII is futile because enforcing Title VII is itself the least restrictive way to further EEOC's interest in eradicating discrimination based on sex stereotypes from the workplace. *See, e.g.*, Appellant Br. at 55–61; Intervenor Br. at 27–33. We agree.

To start, the Supreme Court has previously acknowledged that "there may be instances in which

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[13] In its district court briefing, the Funeral Home proposed three additional purportedly less restrictive alternatives: the government could hire Stephens; the government could pay Stephens a full salary and benefits until she secures comparable employment; or the government could provide incentives to other employers to hire Stephens and allow her to dress as she pleases. R. 67 (Def.'s Reply Mem. of Law in Support of Def.'s Mot. for Summ. J. at 17–18) (Page ID #2117–18). Not only do these proposals fail to further the EEOC's interest enabling Stephens to work for the Funeral Home without facing discrimination, but they also fail to consider the cost to the government, which is "an important factor in the least-restrictive-means analysis." *Hobby Lobby*, 134 S. Ct. at 2781. We agree with the EEOC that the Funeral Home's suggestions—which it no longer pushes on appeal—are not viable alternatives to enforcing Title VII in this case, as they do not serve the EEOC's interest in eradicating discrimination "equally well." *See id*. at 2782.

a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA." *O Centro*, 546 U.S. at 436. The Court highlighted *Braunfeld v. Brown*, 366 U.S. 599 (1961), as an example of a case where the "need for uniformity" trumped "claims for religious exemptions." *O Centro*, 546 U.S. at 435. In *Braunfeld*, the plurality "denied a claimed exception to Sunday closing laws, in part because . . . [t]he whole point of a 'uniform day of rest for all workers' would have been defeated by exceptions." *O Centro*, 546 U.S. at 435 (quoting *Sherbert*, 374 U.S. at 408 (discussing *Braunfeld*)). *Braunfeld* thus serves as a particularly apt case to consider here, as it too concerned an attempt by an employer to seek an exemption that would elevate its religious practices above a government policy designed to benefit employees. If the government's interest in a "uniform day of rest for all workers" is sufficiently weighty to preclude exemptions, *see O Centro*, 546 U.S. at 435, then surely the government's interest in uniformly eradicating discrimination against employees exerts just as much force.

The Court seemingly recognized Title VII's ability to override RFRA in *Hobby Lobby*, as the majority opinion stated that its decision should not be read as providing a "shield" to those who seek to "cloak[] as religious practice" their efforts to engage in "discrimination in hiring, for example on the basis of race." 134 S. Ct. at 2783. As the *Hobby Lobby* Court explained, "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race,

and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." *Id.* We understand this to mean that enforcement actions brought under Title VII, which aims to "provid[e] an equal opportunity to participate in the workforce without regard to race" and an array of other protected traits, *see id.*, will necessarily defeat RFRA defenses to discrimination made illegal by Title VII. The district court reached the opposite conclusion, reasoning that *Hobby Lobby* did not suggest that "a RFRA defense can never prevail as a defense to Title VII" because "[i]f that were the case, the majority would presumably have said so." *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d at 857. But the majority *did* say that anti-discrimination laws are "precisely tailored" to achieving the government's "compelling interest in providing an equal opportunity to participate in the workforce" without facing discrimination. *Hobby Lobby*, 134 S. Ct. at 2783.

As Stephens notes, at least two district-level federal courts have also concluded that Title VII constitutes the least restrictive means for eradicating discrimination in the workforce. *See Redhead v. Conf. of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 222 (E.D.N.Y. 2006) (holding that "the Title VII framework is the least restrictive means of furthering" the government's interest in avoiding discrimination against non-ministerial employees of religious organization), *adhered to on reconsideration*, 566 F. Supp. 2d 125 (E.D.N.Y. 2008); *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 810–11 (S.D. Ind. 2002) ("[I]n addition to

finding that the EEOC's intrusion into [the defendant's] religious practices is pursuant to a compelling government interest,"—i.e., "the eradication of employment discrimination based on the criteria identified in Title VII"—"we also find that the intrusion is the least restrictive means that Congress could have used to effectuate its purpose.").

We also find meaningful Congress's decision not to include exemptions within Title VII to the prohibition on sex-based discrimination. As both the Supreme Court and other circuits have recognized, "[t]he very existence of a government-sanctioned exception to a regulatory scheme that is purported to be the least restrictive means can, in fact, demonstrate that other, less-restrictive alternatives could exist." *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 475 (5th Cir. 2014) (citing *Hobby Lobby*, 134 S. Ct. at 2781–82); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) ("It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'" (omission in original) (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring))). Indeed, a driving force in the *Hobby Lobby* Court's determination that the government had failed the least-restrictive-means test was the fact that the Affordable Care Act, which the government sought to enforce in that case against a closely held organization, "already established an accommodation for nonprofit organizations with

religious objections." *See* 134 S. Ct. at 2782. Title VII, by contrast, does not contemplate any exemptions for discrimination on the basis of sex. Sex may be taken into account only if a person's sex "is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise," 42 U.S.C. § 2000e-2(e)(1)—and in that case, the preference is no longer discriminatory in a malicious sense. Where the government has developed a comprehensive scheme to effectuate its goal of eradicating discrimination based on sex, including sex stereotypes, it makes sense that the only way to achieve the scheme's objectives is through its enforcement.

State courts' treatment of RFRA-like challenges to their own antidiscrimination laws is also telling. In several instances, state courts have concluded that their respective antidiscrimination laws survive strict scrutiny, such that religious claimants are not entitled to exemptions to enforcement of the state prohibitions on discrimination with regard to housing, employment, medical care, and education. *See State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 565–66 (Wash. 2017) (collecting cases), *petition for cert. filed Arlene's Flowers, Inc. v. Washington*, 86 U.S.L.W. 3047 (U.S. July 14, 2017) (No. 17-108). These holdings support the notion that antidiscrimination laws allow for fewer exceptions than other generally applicable laws.

As a final point, we reject the Funeral Home's suggestion that enforcing Title VII in this case would

undermine, rather than advance, the EEOC's interest in combating sex stereotypes. According to the Funeral Home, the EEOC's requested relief reinforces sex stereotypes because the agency essentially asks that Stephens "be able to dress in a stereotypical feminine manner." *R.G. & G.R. Funeral Homes, Inc.*, 201 F. Supp. 3d at 863 (emphasis omitted). This argument misses the mark. Nothing in Title VII or this court's jurisprudence requires employees to reject their employer's stereotypical notions of masculinity or femininity; rather, employees simply may not be discriminated against for a failure to conform. *See Smith*, 378 F.3d at 572 (holding that a plaintiff makes out a prima facie case for discrimination under Title VII when he pleads that "his *failure to conform* to sex stereotypes concerning how a man should look and behave was the driving force behind" an adverse employment action (emphasis added)). Title VII protects both the right of male employees "to c[o]me to work with makeup or lipstick on [their] face[s]," *Barnes*, 401 F.3d at 734, and the right of female employees to refuse to "wear dresses or makeup," *Smith*, 378 F.3d at 574, without any internal contradiction.

In short, the district court erred in finding that EEOC had failed to adopt the least restrictive means of furthering its compelling interest in eradicating discrimination in the workplace. Thus, even if we agreed with the Funeral Home that Rost's religious exercise would be substantially burdened by enforcing Title VII in this case, we would nevertheless **REVERSE** the district court's grant of summary judgment to the Funeral Home and hold

instead that requiring the Funeral Home to comply with Title VII constitutes the least restrictive means of furthering the government's compelling interest in eradicating discrimination against Stephens on the basis of sex. Thus, even assuming Rost's religious exercise is substantially burdened by the EEOC's enforcement action in this case, we **GRANT** summary judgment to the EEOC on the Funeral Home's RFRA defense on this alternative ground.

C. Clothing-Benefit Discrimination Claim

The district court erred in granting summary judgment in favor of the Funeral Home on the EEOC's discriminatory clothing-allowance claim. We long ago held that the scope of the complaint the EEOC may file in federal court in its efforts to enforce Title VII is "limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination." *EEOC v. Bailey Co.*, 563 F.2d 439, 446 (6th Cir. 1977) (quoting inter alia, *Tipler v. E. I. duPont deNemours & Co.*, 443 F.2d 125, 131 (6th Cir. 1971)), *disapproved of on other grounds by Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978)). The EEOC now urges us to hold that *Bailey* is incompatible with subsequent Supreme Court precedent and therefore no longer binding on this court. Because we believe that the EEOC may properly bring a clothing-allowance claim under *Bailey*, we need not decide whether *Bailey* has been rendered obsolete.

In *Bailey*, a white female employee charged that her employer failed to promote her on account of

her sex, generally failed to promote women because of their sex, failed to pay equally qualified women as well as men, and failed to recruit and hire black women because of their race. *Id.* at 442. While investigating these claims, the EEOC found there was no evidence to support the complainant's charges of sex discrimination, but there was reasonable cause to believe the company had racially discriminatory hiring and promotion practices. In addition, the EEOC learned that the employer had seemingly refused to hire one applicant on the basis of his religion. After failed efforts at conciliation, the EEOC initiated a lawsuit against the employer alleging both racial and religious discrimination. We held that the EEOC lacked authority to bring an enforcement action regarding alleged religious discrimination because "[t]he portion of the EEOC's complaint incorporating allegations of religious discrimination exceeded the scope of the EEOC investigation of [the defendant employer] reasonably expected to grow out of [the original] charge of sex and race discrimination." *Id.* at 446. We determined, however, that the EEOC was authorized to bring race discrimination claims against the employer because the original charge alleged racial discrimination against black applicants and employees and the charging party—a white woman—had standing under Title VII to file such a charge with the EEOC because she "may have suffered from the loss of benefits from the lack of association with racial minorities at work." *Id.* at 452 (citations omitted).

As we explained in *Bailey*, the EEOC may sue for matters beyond those raised directly in the EEOC's administrative charge for two reasons. First, limiting the EEOC complaint to the precise grounds listed in the charge of discrimination would undercut Title VII's "effective functioning" because laypersons "who are unfamiliar with the niceties of pleading and are acting without the assistance of counsel" submit the original charge. *Id.* at 446 (quoting *Tipler*, 443 F.2d at 131). Second, an initial charge of discrimination does not trigger a lawsuit; it instead triggers an EEOC investigation. The matter evolves into a lawsuit only if the EEOC is unable "to obtain voluntary compliance with the law. . . . Thus it is obvious that the civil action is much more intimately related to the EEOC investigation than to the words of the charge which originally triggered the investigation." *Id.* at 447 (quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970)).

At the same time, however, we concluded in *Bailey* that allowing the EEOC to sue for matters beyond those reasonably expected to arise from the original charge would undermine Title VII's enforcement process. In particular, we understood that an original charge provided an employer with "notice of the allegation, an opportunity to participate in a complete investigation of such allegation, and an opportunity to participate in meaningful conciliation discussions should reasonable cause be found following the EEOC investigation." *Id.* at 448. We believed that the full investigatory process would be short-circuited, and

the conciliation process thereby threatened, if the EEOC did not file a separate charge and undertake a separate investigation when facts are learned suggesting an employer may have engaged in "discrimination of a type other than that raised by the individual party's charge and unrelated to the individual party." *Id*.

The EEOC now insists that *Bailey* is no longer good law after the Supreme Court's decision in *General Telephone Company of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980). In *General Telephone*, the Supreme Court held that Rule 23 of the Federal Rules of Civil Procedure, which governs class actions, does not apply to enforcement actions initiated by the EEOC. *Id*. at 331. As part of its reasoning, the Court found that various requirements of Rule 23—such as the requirement that "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class," FED. R. CIV. P. 23(a)(3)—are incompatible with the EEOC's enforcement responsibilities under Title VII:

> The typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiff's claims. If Rule 23 were applicable to EEOC enforcement actions, it would seem that the Title VII counterpart to the Rule 23 named plaintiff would be the charging party, with the EEOC serving in the charging party's stead as the representative of

> the class. Yet the Courts of Appeals have held that EEOC enforcement actions are not limited to the claims presented by the charging parties. Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable. The latter approach is far more consistent with the EEOC's role in the enforcement of Title VII than is imposing the strictures of Rule 23, which would limit the EEOC action to claims typified by those of the charging party.

Gen. Tel., 446 U.S. at 330–31 (internal citations omitted). The EEOC argues that this passage directly contradicts the holding in *Bailey*, in which we rejected the EEOC's argument that it "can investigate evidence of any other discrimination called to its attention during the course of an investigation." *See* 563 F.2d at 446.

Though there may be merit to the EEOC's argument, *see EEOC v. Kronos Inc.*, 620 F.3d 287, 297 (3d Cir. 2010) (citing *General Telephone* for the proposition that "[o]nce the EEOC begins an investigation, it is not required to ignore facts that support additional claims of discrimination if it uncovers such evidence during the course of a reasonable investigation of the charge" (citing *Gen. Tel.*, 446 U.S. at 331)), we need not resolve *Bailey*'s compatibility with *General Telephone* at this time because our holding in *Bailey* does not preclude the

EEOC from bringing a clothing-allowance-discrimination claim in this case.

First, the present case is factually distinguishable from *Bailey*. In *Bailey*, the court determined that allegations of religious discrimination were outside the scope of an investigation "reasonably related" to the original charge of sex and race discrimination because, in part, "[t]he evidence presented at trial by the EEOC to support its allegations of religious discrimination did not involve practices affecting [the original charger]." 563 F.2d at 447. Here, by contrast, Stephens would have been directly affected by the Funeral Home's allegedly discriminatory clothing-allowance policy had she not been terminated, as the Funeral Home's current practice indicates that she would have received either no clothing allowance or a less valuable clothing allowance once she began working at the Funeral Home as a woman.[14] And, unlike the EEOC's investigation of religious discrimination in *Bailey*, the EEOC's investigation into the Funeral Home's discriminatory clothing-allowance policy concerns precisely the same type of discrimination—discrimination on the basis of sex—that Stephens raised in her initial charge.

Second, we have developed a broad conception of the sorts of claims that can be "reasonably

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[14] The Funeral Home insists that it would provide female funeral directors with a company-issued suit if it had any female Funeral Directors. *See* R. 53-3 (Rost Aff. ¶ 54) (Page ID #939). This is a factual claim that we cannot credit at the summary-judgment stage.

expected to grow out of the initial charge of discrimination." *See Bailey*, 563 F.2d at 446. As we explained in *Davis v. Sodexho*, 157 F.3d 460 (6th Cir. 1998), "where facts related with respect to the charged claim would prompt the EEOC to investigate a different, uncharged claim, the plaintiff is not precluded from bringing suit on that claim." *Id*. at 463. And we have also cautioned that "EEOC charges must be liberally construed to determine whether ... there was information given in the charge that reasonably should have prompted an EEOC investigation of [a] separate type of discrimination." *Leigh v. Bur. of State Lottery*, 1989 WL 62509, at *3 (6th Cir. June 13, 1989) (Table) (citing *Bailey*, 563 F.2d at 447). Here, Stephens alleged that she was fired after she shared her intention to present and dress as a woman because the Funeral Home "management [told her that it] did not believe the public would be accepting of [her] transition" from male to female. R. 63-2 (Charge of Discrimination at 1) (Page ID #1952). It was reasonable to expect, in light of this allegation, that the EEOC would investigate the Funeral Home's employee-appearance requirements and expectations, would learn about the Funeral Home's sex-specific dress code, and would thereby uncover the Funeral Home's seemingly discriminatory clothing-allowance policy. As much is clear from our decision in *Farmer v. ARA Services, Inc.*, 660 F.2d 1096 (6th Cir. 1981), in which "we held that the plaintiffs could bring equal pay claims alleging that their union discriminated in negotiating pay scales for different job designations, despite the fact that the plaintiffs' EEOC charge alleged only that the

union failed to represent them in securing the higher paying job designations." *Weigel v. Baptist Hosp. of E. Tenn.*, 302 F.3d 367, 380 (6th Cir. 2002) (citing *Farmer*, 660 F.2d at 1105). As we recognized then, underlying the *Farmer* plaintiffs' claim was an implicit allegation that the plaintiffs were as qualified and responsible as the higher-paid employees, and this fact "could reasonably be expected to lead the EEOC to investigate why different job designations that required the same qualifications and responsibilities used disparate pay scales." *Id.* By the same token, Stephens's claim that she was fired because of her planned change in appearance and presentation contains an implicit allegation that the Funeral Home requires its male and female employees to look a particular way, and this fact could (and did) reasonably prompt the EEOC to investigate whether these appearance requirements imposed unequal burdens—in this case, fiscal burdens—on its male and female employees.

We therefore **REVERSE** the district court's grant of summary judgment to the Funeral Home on the EEOC's discriminatory-clothing-allowance claim and **REMAND** with instructions to consider the merits of the EEOC's claim.

III. CONCLUSION

Discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII. The unrefuted facts show

that the Funeral Home fired Stephens because she refused to abide by her employer's stereotypical conception of her sex, and therefore the EEOC is entitled to summary judgment as to its unlawful-termination claim. RFRA provides the Funeral Home with no relief because continuing to employ Stephens would not, as a matter of law, substantially burden Rost's religious exercise, and even if it did, the EEOC has shown that enforcing Title VII here is the least restrictive means of furthering its compelling interest in combating and eradicating sex discrimination. We therefore **REVERSE** the district court's grant of summary judgment in favor of the Funeral Home and **GRANT** summary judgment to the EEOC on its unlawful-termination claim. We also **REVERSE** the district court's grant of summary judgment on the EEOC's discriminatory-clothing-allowance claim, as the district court erred in failing to consider the EEOC's claim on the merits. We **REMAND** this case to the district court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Equal Employment Opportunity Commission,

Plaintiff,

v.

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

Defendant.
_____/

Case No. 14-13710

Sean F. Cox
United States District Court Judge

OPINION & ORDER

In enacting Title VII of the Civil Rights Act of 1964, Congress prohibited employers from discharging or otherwise discriminating against any individual with respect to 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).

In filing this action against Defendant R.G. & G.R. Harris Funeral Homes, Inc. ("the Funeral Home"), the Equal Employment Opportunity Commission sought to expand Title VII to include transgender status or gender identity as protected classes. The EEOC asserted two Title VII claims. First, it asserted a wrongful termination claim on behalf of the Funeral Home's former funeral director

Stephens, who is transgender and transitioning from male to female, claiming that it "fired Stephens because Stephens is transgender, because of Stephens's transition from male to female, and/or because Stephens did not conform to [the Funeral Home's] sex- or gender-based preferences, expectations, or stereotypes." Second, it alleges that the Funeral Home engaged in an unlawful employment practice by providing work clothes to male but not female employees.

This Court previously rejected the EEOC's position that it stated a Title VII claim by virtue of alleging that Stephens's termination was due to transgender status or gender identity — because those are not protected classes. The Court recognized, however, that under Sixth Circuit precedent, a claim was stated under the *Price Waterhouse* sex/gender-stereotyping theory of sex discrimination because the EEOC alleges the termination was because Stephens did not conform to the Funeral Home's sex/gender based stereotypes as to work clothing.

The matter is now before the Court on cross-motions for summary judgment. Neither party believes there are any issues of fact for trial regarding liability and each party seeks summary judgment in its favor. The motions have been fully[1]

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[1] This Court granted all requests by the parties to exceed the normal page limitations for briefs. The Court also granted the sole request for leave to file an amicus brief. Thus, the American Civil Liberties Union and the American Civil Liberties Union of Michigan filed an Amicus Curiae Brief.

briefed by the parties. The motions were heard by the Court on August 11, 2016.

The Court shall deny the EEOC's motion and shall grant summary judgment in favor of the Funeral Home as to the wrongful termination claim. The Funeral Home's owner admits that he fired Stephens because Stephens intended to "dress as a woman" while at work but asserts two defenses.

First, the Funeral Home asserts that its enforcement of its sex-specific dress code, which requires males to wear a pants-suit with a neck tie and requires females to wear a skirt-suit, cannot constitute impermissible sex stereotyping under Title VII. Although pre-*Price Waterhouse* decisions from other circuits upheld dress codes with slightly differing requirements for men and women, the Sixth Circuit has not provided any guidance on how to reconcile that previous line of authority with the more recent sex/gender-stereotyping theory of sex discrimination. Lacking such authority, and having considered the post-*Price Waterhouse* views that have been expressed by the Sixth Circuit, the Court rejects this defense.

Second, the Funeral Home asserts that it is entitled to an exemption under the federal Religious Freedom Restoration Act ("RFRA"). The Court finds that the Funeral Home has met its initial burden of showing that enforcement of Title VII, and the body of sex-stereotyping case law that has developed under it, would impose a substantial burden on its ability to conduct business in accordance with its

sincerely-held religious beliefs. The burden then shifts to the EEOC to show that application of the burden "to the person:" 1) is in furtherance of a compelling governmental interest; and 2) is the least restrictive means of furthering that compelling governmental interest. The Court assumes without deciding that the EEOC has shown that protecting employees from gender stereotyping in the workplace is a compelling governmental interest.

Nevertheless, the EEOC has failed to show that application of the burden on the Funeral Home, under these facts, is the least restrictive means of protecting employees from gender stereotyping. If a least restrictive means is available to achieve the goal, the government must use it. This requires the government to show a degree of situational flexibility, creativity, and accommodation when putative interests clash with religious exercise. It has failed to do so here. The EEOC's briefs do not contain any indication that the EEOC has explored the possibility of any accommodations or less restrictive means that might work under these facts. Perhaps that is because it has been proceeding as if gender identity or transgender status are protected classes under Title VII, taking the approach that the only acceptable solution would be for the Funeral Home to allow Stephens to wear a skirt-suit at work, in order to express Stephens's female gender identity.

In *Price Waterhouse*, the Supreme Court recognized that the intent behind Title VII's inclusion of sex as a protected class expressed

"Congress' intent to forbid employers to take gender into account" in the employment context. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989). That is, the goal of the sex-stereotyping theory of sex discrimination is that "gender" "be *irrelevant*" with respect to the terms and conditions of employment and to employment decisions. *Id.* (emphasis added).

The EEOC claims the Funeral Home fired Stephens for failing to conform to the masculine gender stereotypes expected as to work clothing and that Stephens has a Title VII right *not to be subject to gender stereotypes* in the workplace. Yet the EEOC has not challenged the Funeral Home's sex-specific dress code, that requires female employees to wear a skirt-suit and requires males to wear a pants-suit with a neck tie. Rather, the EEOC takes the position that Stephens has a Title VII right to "dress as a woman" (*ie.*, dress in a stereotypical feminine manner) while working at the Funeral Home, in order to express Stephens's gender identity. If the compelling interest is truly in eliminating gender stereotypes, the Court fails to see why the EEOC couldn't propose a gender-neutral dress code as a reasonable accommodation that would be a *less restrictive* means of furthering that goal under the facts presented here. But the EEOC has not even discussed such an option, maintaining that Stephens must be allowed to wear a skirt-suit in order to *express* Stephens's gender identity. If the compelling governmental interest is truly in *removing or eliminating* gender stereotypes in the workplace in terms of clothing (*i.e.*, making gender "irrelevant"),

the EEOC's chosen manner of enforcement in this action does not accomplish that goal.

This Court finds that the EEOC has not met its demanding burden. As a result, the Funeral Home is entitled to a RFRA exemption from Title VII, and the body of sex-stereotyping case law that has developed under it, under the facts and circumstances of this unique case.

As to the clothing allowance claim, the underlying EEOC administrative investigation uncovered possible unlawful discrimination of a kind not raised by the charging party and not affecting the charging party. As such, under the Sixth Circuit precedent, the proper procedure is for the filing of a charge by a member of the EEOC and for a full EEOC investigation of that new claim. Because the EEOC did not do that, it cannot proceed with that claim in this action. The clothing allowance claim shall be dismissed without prejudice.

BACKGROUND

The EEOC filed this action on September 25, 2014. The First Amended Complaint is the operative complaint. The EEOC asserts two different Title VII claims against the Funeral Home. First, it asserts that the Funeral Home violated Title VII by terminating Stephens because of sex. That is, the EEOC alleges that the Funeral Home's "decision to fire Stephens was motivated by sex-based considerations. Specifically, [the Funeral Home] fired Stephens because Stephens is transgender, because of Stephens's transition from male to

female, and/or because Stephens did not conform to [the Funeral Home's] sex- or gender-based preferences, expectations, or stereotypes." (Am. Compl. at ¶ 15). Second, the EEOC alleges that the Funeral Home violated Title VII "by providing a clothing allowance / work clothes to male employees but failing to provide such assistance to female employees because of sex." (*Id.* at ¶ 17).

Following the close of discovery, each party filed its own motion for summary judgment. This Court's practice guidelines, which are expressly included in the Scheduling Order issued in this case, provide, consistent with Fed. R. Civ. P. 56 (c) and (e), that:

> a. The moving party's papers shall include a separate document entitled Statement of Material Facts Not in Dispute. The statement shall list in separately numbered paragraphs concise statements of each undisputed material fact, supported by appropriate citations to the record. . .
>
> b. In response, the opposing party shall file a separate document entitled Counter-Statement of Disputed Facts. The Counter-Statement shall list in separately numbered paragraphs following the order or the movant's statement, whether each of the facts asserted by the moving party is admitted or denied and shall also be supported by appropriate citations to the record. The Counter-Statement shall also

> include, in a separate section, a list of each issue of material fact as to which it is contended there is a genuine issue for trial.
>
> c. All material facts as set forth in the Statement of Material Facts Not in Dispute shall be deemed admitted unless controverted in the Counter-Statement of Disputed Facts.

(D.E. No. 19 at 2-3).

In compliance with this Court's guidelines, in support of its motion, the EEOC filed a "Statement of Material Facts Not In Dispute" (D.E. No. 52) ("Pl.'s Stmt. A"). In response to that submission, the Funeral Home filed a "Counter-Statement of Disputed Facts" (D.E. No. 61) ("Def's Stmt. A"). In support of its motion, the Funeral Home filed a "Statement of Material Facts Not In Dispute" (D.E. No. 55) (Def.'s Stmt. B"). In response, the EEOC filed a Counter-Statement of Disputed Facts" (D.E. No. 64) ("Pl.'s Stmt. B").

Notably, neither party believes that there are any genuine issues of material fact for trial regarding liability. (*See* D.E. 64 at Pg ID 2087, "The Commission does not believe there are any genuine issues of material fact regarding liability for trial;" D.E. No. 61 at Pg ID 1841, "[the Funeral Home] avers that none of the facts in dispute is material to the legal claims at issue.").

The following relevant facts are undisputed.

The Funeral Home and Its Ownership

The Funeral Home has been in business since 1910. The Funeral Home is a closely-held, for-profit corporation owned and operated by Thomas Rost ("Rost"). (Stmts. B at ¶ 1). Rost owns 94.5 % of the shares of the Funeral Home. (Stmts. A at ¶ 19). The remaining shares are owned by his children. (Stmts. B at ¶ 8). Rost's grandmother was a funeral director for the business up until 1950. (Rost Aff. at ¶ 52). Rost has been the owner of the Funeral Home for over thirty years. Rost has been the President of the Funeral Home for thirty-five years and is the sole officer of the corporation. (Stmts. B at ¶¶ 9-10). The Funeral Home has three locations in Michigan: Detroit, Livonia, and Garden City.

The Funeral Home is not affiliated with or part of any church and its articles of incorporation do not avow any religious purpose. (Stmts. A at ¶¶ 25-26). Its employees are not required to hold any religious views. (*Id.* at ¶ 27). The Funeral Home serves clients of every religion (various Christian denominations, Hindu, Muslim, Jewish, native Chinese religions) or none at all. (Stmts. A at ¶ 30). It employs people from different religious denominations, and of no religious beliefs at all. (*Id.* at ¶ 37).

The Funeral Home's Dress Code

Both parties attached the Funeral Home's written Employee Manual as an exhibit to the

pending motions. It contains the following regarding dress code:

DRESS CODE

September 1998

For all Staff:

To create and maintain our reputation as "Detroit's Finest", it is fundamentally important and imperative that every member of our staff shall always be distinctively attired and impeccably groomed, whenever they are contacting the public as representatives of The Harris Funeral Home. Special attention should be given to the following consideration, on all funerals, all viewings, all calls, or on any other funeral work.

MEN

SUITS BLACK GRAY, OR DARK BLUE ONLY (as selected) with conservative styling. Coats should be buttoned at all times. Fasten only the middle button on a three button coat.

If vests are worn, they should match the suit. Sweaters are not acceptable as a vest. NOTHING should be carried in the breast pocket except glasses which are not in a case.

SHIRTS WHITE OR WHITE ON WHITE ONLY, with regular medium length collars. (Button-down style collars are NOT

acceptable). Shirts should always be clean. Collars must be neat.

TIES	As selected by company, or very similar.
SOCKS	PLAIN BLACK OR DARK BLUE SOCKS.
SHOES	BLACK OR DARK BLUE ONLY. (Sport styles, high tops or suede shoes are not acceptable). Shoes should always be well polished.

. . . .

PART TIME MEN - Should wear conservative, dark, business suits, avoiding light brown, light blue, light gray, or large patterns. All part time personnel should follow all details of dress as specified, as near as possible.

FUNERAL DIRECTORS ON DUTY - Are responsible for the appearance of the staff assisting them on services and are responsible for personnel on evening duty.

WOMEN

Because of the particular nature of our business, please dress conservatively. A suit or a plain conservative dress would be appropriate, or as furnished by funeral home. Avoid prints, bright colored materials and large flashy jewelry. A sleeve is necessary, a below elbow sleeve is preferred.

> Uniformity creates a good impression and good impressions are vitally important for both your own personal image and that of our Company. Our visitors should always associate us with clean, neat and immaculately attired men and women.

(D.E. No. 54-20 at Pg ID 1486-87) (underlining and capitalization in original).

In addition, it is understood at the Funeral Home that men who interact with the public are required to wear a business suit (pants and jacket) with a neck tie, and women who interact with the public are generally[2] required to wear a business suit that consists of a skirt and business jacket. (Stmts. B at 51; D.E. No. 54-11 at Pg ID 1423).

The Funeral Home administers its dress code based upon its employees' biological sex. (Stmts. B at ¶ 51). Employees at the Funeral Home have been disciplined in the past for failing to abide by the dress code. (Stmts. B at ¶ 60).

Stephens's Employment And Subsequent Termination

The Funeral Home hired Stephens in October of 2007. At that time, Stephens's legal name was Anthony Stephens. All of the Funeral Home's

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[2] Rost testified that female employees at the Detroit location do not wear a skirt and jacket "all the time over there," and sometimes wear pants and a jacket. (Rost Dep., D.E. No. 54-11 at Pg ID 1423).

employment records pertaining to Stephens — including driver's license, tax records, and mortuary science license — identify Stephens as a male. (Stmts. B at ¶ 63).

Stephens served as a funeral director/embalmer for the Funeral Home for nearly six years under the name Anthony Stephens. (Stmts. A at ¶¶ 1-2).

On July 31, 2013, Stephens provided the Funeral Home/Rost with a letter that stated, in pertinent part:

> Dear Friends and Co-Workers:
>
> 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 am writing this both to inform you of a significant change in my life and to ask for your patience, understanding, and support, which I would treasure greatly.
>
> 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 . . .
>
> . . . It is a birth defect that needs to be fixed. I have been in therapy for nearly four years now and have been diagnosed as a transexual. I have felt imprisoned in my body that does not match my mind, and this has caused me great despair and loneliness. With the support

> of my loving wife, I have decided to become the person that my mind already is. I cannot begin to describe the shame and suffering that I have lived with. 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 . . . It is my wish that I can continue my work at R.G. & G. R. Harris Funeral Homes doing what I have always done, which is my best!

(D.E No. 53-22) (emphasis added).

It is undisputed that Stephens intended to abide by the Funeral Home's dress code for its female employees — which would be to wear a skirt-suit. (Stmts. A at ¶ 8; Stmts. B at ¶ 51; D.E. No. 54-11 at Pg ID 1423; *see also* D.E. No. 51 at Pg ID 605, and First Am. Compl. at 4).

Stephens hand-delivered a copy of the letter to Rost. (Rost Dep. at 110). Rost made the decision to fire Stephens by himself and did so on August 15, 2013. (Stmts. A at ¶¶ 10, 12-13; Rost Dep. at 117-18). Rost privately fired Stephens in person. (Stmts. A at ¶ 11). Rost testified:

> Q. Okay. How did you fire Stephens: how did you let Ms. Stephens know that she was being released?
> A. Well, I said to him, just before he was — it was right before he was going to go on vacation and I just — I said — I just said "Anthony, this is not going to work out. And that your services would no longer be needed here."

(Rost Dep. at 126). Stephens also testified that Rost said it was not going to work out. (Stephens Dep. at 80). Stephens's understanding from that conversation was that "coming to work dressed as a woman was not going to be acceptable." (*Id.*). It was a brief conversation and Stephens left the facility. (Rost Dep. at 127).

After being terminated, Stephens met with an attorney and ultimately filed a charge of discrimination with the EEOC. (Stephens Dep. at 79-80; D.E. No. 54-22). The EEOC charge filed by Stephens checked the box for "sex" discrimination and indicated that the discrimination took place from July 31, 2013 to August 15, 2013. (D.E. No. 54-22 at Pg ID 1497). The charge stated "the particulars" of the claimed sex discrimination as follows:

> I began working for the above-named employer on 01 October 2007; I was last employed as a Funeral Director/Embalmer.

> On or about 31 July 2013, I notified management that I would be undergoing gender transitioning and that on 26 August 2013, I would return to work as my true self, a female. On 15 August 2013, my employment was terminated. The only explanation I was given was that management did not believe the public would be accepting of my transition. Moreover, during my entire employment I know there are no other female Funeral Directors/Embalmers.
>
> I can only conclude that I have been discharged due to my sex and gender identity, female, in violation of Title VII of the Civil Rights Act of 1964, as amended.

(*Id.*).

Administrative EEOC Proceedings

During the EEOC administrative proceedings, the Funeral Home filed a response to the Charge of Discrimination that stated, among other things, that it has a written dress code policy and that Stephens was terminated because Stephens refused to comply with that dress code. (D.E. No. 63-16).

During the administrative investigation, the EEOC discovered that male employees at the Funeral Home were provided with work clothing and

that female employees were not. (D.E. No. 63-3, March 2014 Onsite Memo).

On June 5, 2014, the EEOC issued its "Determination." (D.E. No. 63-4). It stated, in pertinent part:

> The Charging Party alleged that she was discharged due to her sex and gender identity, female, in violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> Evidence gathered during the course of the investigation reveals that there is reasonable cause to believe that the Charging Party's allegations are true.
>
> Like and related and growing out of this investigation, the Commission found probable cause to believe that the Respondent discriminated against its female employees by providing male employees with a clothing benefit which was denied to females, in violation of Title VII of the Civil Rights Act of 1964, as amended.

(D.E. No. 63-4).

Complaint, Amended Complaint, and Affirmative Defenses

The EEOC filed this civil action against the Funeral Home on September 25, 2014, asserting its two claims.

As its first responsive pleading, the Funeral Home filed a Motion to Dismiss seeking dismissal of the wrongful termination claim. This Court denied that motion, ruling that the EEOC's complaint stated a claim on behalf of Stephens for sex-stereotyping sex-discrimination under binding Sixth Circuit authority. (*See* 4/23/15 Opinion, D.E. No. 13). This Court rejected, however, the EEOC's position that its complaint stated a Title VII claim on behalf of Stephens by virtue of alleging that the Funeral Home fired Stephens because of transgender status or gender identity. (*See* D.E. No. 13 at Pg ID 188) (noting that "like sexual orientation, transgender or transsexual status is currently not a protected class under Title VII.").

On April 29, 2015, the Funeral Home filed its Answer and Affirmative Defenses. (D.E. No. 14).

On May 15, 2015, the EEOC sought to file a First Amended Complaint, in order to correct the spelling of Stephens's first name. That First Amended Complaint, that contains the same two claims, was filed on June 1, 2015. (D.E. No. 21).[3]

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[3] Although this Court rejected the EEOC's position that it could pursue a Title VII claim based on transgender status or gender identity, the EEOC kept those allegations in the First Amended Complaint because it wished to preserve its right to appeal this Court's ruling. (*See* D.E. No. 37 at Pg ID 462-63).

On June 4, 2015, the Funeral Home filed its Answer and Affirmative Defenses to the EEOC's First Amended Complaint, (D.E. No. 22). In it, the Funeral Home included additional affirmative defenses, including: 1) "The EEOC's claims violate the Funeral Home's right to free exercise of religion under the First Amendment to the United States Constitution;" and 2) "The EEOC's claims violate the Funeral Home's rights under the federal Religious Freedom Restoration Act (RFRA)." (*Id.* at Pg ID 254).

Relevant Discovery In This Action

a. Termination Decision

Again, Rost made the decision to terminate Stephens. (Stmts. A at ¶¶ 12-13). It is undisputed that job performance did not motivate Rost's decision to terminate Stephens. (Stmts. A at ¶ 16). During his deposition in this action, Rost testified:

> Q. Okay. Why did you — *what was the specific reason that you terminated Stephens?*
> A. *Well, because he — he was no longer going to represent himself as a man. He wanted to dress as a woman.*
> Q. Okay. So he presented you this letter . . .
> A. Number 7, yes.
> Q. Yeah, Exhibit 7. So just for a little background and pursuant to the question of Mr. Price, you were presented that letter from Stephens?
> A. Correct.

Q. Okay. And did anywhere in that letter indicate that Stephens would continue to dress under your dress code as a man in the workplace?
A. No.
Q. Did he ever tell you during your meeting when he handed you that letter that he would continue to dress as a man?
A. No.
Q. *Did he indicate that he would dress as a woman?*
A. *Yes. Yes.*
Q. Okay. *Is it — the reason you fired him*, was it because he claimed that he was really a woman; is that why you fired him or was it because he claimed — or that he would no longer dress as a man?
A. *That he would no longer dress as a man.*
Q. And why was that a problem?
A. Well, because we — *we have a dress code that is very specific that men will dress as men*; *in appropriate manner, in a suit and tie* that we provide and that women will conform to their dress code that we specify.
Q. So hypothetically speaking, if Stephens had told you that he believed that he was a woman, but would only present as a woman outside of work, would you have terminated him?
A. No.

(Rost Dep. at 135-37) (emphasis added).

b. Rost's Religious Beliefs

Rost also testified that the Funeral Home's dress code comports with his religious views. (Stmts. A at ¶ 18).

Rost has been a Christian for over sixty-five years. (Stmts. B at ¶ 17). He attends both Highland Park Baptist Church and Oak Pointe Church. For a time, Rost was on the deacon board of Highland Park Baptist Church. Rost is on the board of the Detroit Salvation Army, a Christian nonprofit ministry, and has been for 15 years; he was the former Chair of the advisory board. (Smts. B at ¶¶ 18-19).

The Funeral Home's mission statement is published on its website, which reads "R.G. & G.R. Harris Funeral Homes recognize that its highest priority is to honor God in all that we do as a company and as individuals. With respect, dignity, and personal attention, our team of caring professionals strive to exceed expectations, offering options and assistance designed to facilitate healing and wholeness in serving the personal needs of family and friends as they experience a loss of life." (Smts. B at ¶ 21). The website also contains a Scripture verse at the bottom of the mission statement page:

> "But seek first his kingdom and righteousness, and all these things shall be yours as well."
>
> Matthew 5:33

(Stmts. B at ¶ 22; D.E. No. 54-16).

In operating the business, Rost places, throughout the funeral homes, Christian devotional booklets called "Our Daily Bread" and small cards with Bible verses on them called "Jesus Cards." (Stmts. B at ¶ 23).

Rost sincerely believes that God has called him to serve grieving people. He sincerely believes that his "purpose in life is to minister to the grieving, and his religious faith compels him to do that important work." (Stmts. B. at ¶ 31). It is also undisputed that Rost sincerely believes that the "Bible teaches that a person's sex (whether male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex." (Stmt. B at ¶ 28).

In support of the Funeral Home's motion, Rost submitted an affidavit. (D.E. No. 54-2). Rost operates the Funeral Home "as a ministry to serve grieving families while they endure some of the most difficult and trying times in their lives." (*Id.* at ¶ 7).

At the Funeral Home, the funeral directors are the most "prominent public representatives" of the business and are "the face that [the Funeral Home] presents to the world." (*Id.* at ¶ 32). The Funeral Home "administers its dress code based on our employees' biological sex, not based on their subjective gender identity." (*Id.* at ¶ 35).

Rost believes "that the Bible teaches that God creates people male or female." (*Id.* at ¶ 41). He

believes that "the Bible teaches that a person's sex is an immutable God-given gift and that people should not deny or attempt to change their sex." (*Id.* at ¶ 42). Rost believes that he "would be violating God's commands if [he] were to permit one of the [Funeral Home's] funeral directors to deny their sex while acting as a representative of [the Funeral Home]. This would violate God's commands because, among other reasons, [he] would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift." (*Id.* at ¶ 43). Rost believes that "the Bible teaches that it is wrong for a biological male to deny his sex by dressing as a woman." (*Id.* at ¶ 44). Rost believes that he "would be violating God's commands" if he were to permit one of the Funeral Home's male funeral directors to wear the skirt-suit uniform for female directors while at work because Rost "would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift." (*Id.* at ¶ 45). If Rost "were forced as the owner of [the Funeral Home] to violate [his] sincerely held religious beliefs by paying for or otherwise permitting one of [his] employees to dress inconsistent with his or her biological sex, [Rost] would feel significant pressure to sell [the] business and give up [his] life's calling of ministering to grieving people as a funeral home director and owner." (*Id.* at ¶ 48).

Rost's Affidavit also states that he "would not have dismissed Stephens if Stephens had expressed [to Rost] a belief that he is a woman and an intent to dress or otherwise present as a woman outside of

work, so long as he would have continued to conform to the dress code for male funeral directors while at work. It was Stephens's refusal to wear the prescribed uniform and intent to violate the dress code while at work that was the decisive consideration in [his] employment decision." (*Id.* at ¶ 50). Rost "would not discharge or otherwise discipline employees who dress as members of the opposite sex on their own time but comply with the dress code while on the job." (*Id.* at ¶ 51).

c. Clothing Benefits

The Funeral Home provides its male employees who interact with clients, including funeral directors, with suits and ties free of charge. (Stmts. A at ¶ 42). Upon hire, full-time male employees who interact with the public are provided two suits and two ties, while part-time male employees who interact with the public are provided one suit and tie. (Stmts. A at ¶ 47). After those initial suits are provided, the Funeral Home replaces them as needed. (*Id.* at ¶ 48). The Funeral Home spends about $225 per suit and $10 per tie. (*Id.* at ¶ 52).

It is undisputed that benefits were not always provided to female employees. Starting in October of 2014, however, the Funeral Home began providing female employees who interact with the public with an annual clothing stipend that ranged from $75.00 for part-time employees to $150.00 for full-time employees. (*See* Stmts. A at ¶ 54; Rost Dep. at 15-16).

In addition, the Funeral Home affirmatively states that it will offer the same type of clothing allowance that it provides to male funeral directors to any female funeral directors in the future: the Funeral Home "will provide female funeral directors with skirt suits in the same manner that it provides pant suits to male funeral directors." (Rost Aff. at ¶ 54).

STANDARD OF DECISION

Summary judgment will be granted where there exists no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). No genuine issue of material fact exists where "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elect. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

ANALYSIS

Under Title VII, it is an "unlawful employment practice" for an employer 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 sex. 42 U.S.C. § 2000e-2(a). "We take these words to mean that *gender must be irrelevant* to employment decisions." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (emphasis added).

Here, the EEOC asserts that the Funeral Home violated Title VII in two ways.

I. Title VII Wrongful Termination Claim On Behalf Of Stephens

The EEOC alleges that Stephens was terminated in violation of Title VII under a *Price Waterhouse* sex-stereotyping theory of sex discrimination. That is, the EEOC alleges that the Funeral Home violated Title VII by firing Stephens because Stephens did not conform to the Funeral Home's sex/gender based stereotypes as to work clothing.[4]

This Court previously denied a Motion to Dismiss filed by the Funeral Home and ruled that the EEOC's complaint stated a *Price Waterhouse* sex/gender-stereotyping claim under Title VII. (*See* D.E. No. 13). That ruling was based on several Sixth Circuit cases that establish that a transgender person — just like anyone else — can bring such a claim under Title VII. *See Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004) ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Myers v.*

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[4] Notably, the parties have confined their claims, defenses, and analysis to *clothing alone.* In addition, unlike many sex-stereotyping cases, this case does not involve any allegations that the Funeral Home discriminated against Stephens based upon any gender-nonconforming *behaviors.*

Cuyahoga County, Ohio, 182 F. App'x 510, 2006 WL 1479081 (6th Cir. 2006).

The Court includes here some aspects of those decisions that bear on the positions advanced by the parties in the pending motions. First, the Sixth Circuit has gone a bit further than other courts in terms of the reach of a sex-stereotyping claim after *Price Waterhouse* and spoke of discrimination against men who wear dresses:

> After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses[5] and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.

Smith, 378 F.3d at 574 (emphasis in original). Second, the cases indicate that Title VII sex-stereotyping claims follow the same analytical framework followed in other Title VII cases, including the *McDonnell Douglas* burden-shifting paradigm. *See e.g., Myers*, 182 F. App'x at 519.

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[5] Neither *Smith* nor *Barnes* appeared to involve a person who was born male wearing a dress in the workplace. *See, e.g., Barnes*, 401 F.3d at 738 (noting the plaintiff had a "practice of dressing as a woman outside of work.").

It is well-established that, at the summary judgment stage, a plaintiff must adduce either direct or circumstantial evidence to proceed with a Title VII claim. *Upshaw v. Ford Motor Co.*, 576 F.3d 576, 584 (6th Cir. 2009); *DiCarlo v. Potter*, 358 F.3d 408, 414 (6th Cir. 2004).

The EEOC's Motion for Summary Judgment asserts that, based on Rost's testimony, it has direct evidence that the Funeral Home fired Stephens based on sex stereotypes and it is therefore entitled to summary judgment. That appears to be a solid argument, as the "ultimate question" as to the Title VII sex-stereotyping claim is whether the Funeral Home fired Stephens "because of [Stephens's] failure to conform to sex stereotypes," *Barnes*, 401 F.3d at 738, and Rost testified:

> Q. Okay. Why did you — *what was the specific reason that you terminated Stephens?*
> A. *Well, because he — he was no longer going to represent himself as a man.*
> *He wanted to dress as a woman.*
> . . . .
> Q. *Did he indicate that he would dress as a woman?*
> A. *Yes. Yes.*
> Q. Okay. *Is it — the reason you fired him*, was it because he claimed that he was really a woman; is that why you fired him or was it because he claimed — or that he would no longer dress as a man?

A. *That he would no longer dress as a man.*
Q. And why was that a problem?
A. Well, because we — *we have a dress code that is very specific that men will dress as men*; *in appropriate manner*, in a suit and tie that we provide and that women will conform to their dress code that we specify.
Q. So hypothetically speaking, if Stephens had told you that he believed that he was a woman, but would only present as a woman outside of work, would you have terminated him?
A. No.

(Rost Dep. at 135-37) (emphasis added). Thus, while this Court does not often see cases where there is direct evidence to support a claim of employment discrimination, it appears to exist here.

The Funeral Home asserts that the EEOC's motion should be denied, and that summary judgment should be entered in its favor, based upon two defenses. First, it asserts that its enforcement of its sex-specific dress code does not constitute impermissible sex stereotyping under Title VII. Second, the Funeral Home asserts that RFRA prohibits the EEOC from applying Title VII to force the Funeral Home to violate its sincerely held religious beliefs.[6]

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[6] The EEOC's Motion, and the ACLU's brief, both address a First Amendment Free Exercise defense by the Funeral Home. (*See, e.g.*, EEOC's motion at 13). The Funeral Home, however, did not respond to the arguments concerning that

A. The Court Rejects The Funeral Home's Sex-Specific Dress-Code Defense.

The Funeral Home argues that its enforcement of its sex-specific dress code cannot constitute impermissible sex stereotyping under Title VII. It asserts that several courts have concluded that sex-specific dress codes and grooming policies that impose equal burdens on men and women do not violate Title VII. The Funeral Home essentially asks the Court to rule that its sex-specific dress code operates as a defense to the wrongful termination claim because the Funeral Home's dress code does not impose an unequal burden on male and female employees. The Funeral Home relies primarily on two cases to support its position: 1) *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (*en banc*); and 2) *Barker v. Taft Broadcasting Co.*, 549 F.2d 400 (6th Cir. 1977).

As explained below, the Court concludes that this defense must be rejected because: 1) the sex-specific dress code cases that the Funeral Home relies on involved claims that challenged an employer's dress code as violative of Title VII, and this case involves no such claim; 2) the Funeral Home's argument is based upon a non-binding decision of the Ninth Circuit; 3) the Ninth Circuit decision is divided and the dissent is more in line with the views expressed by the Sixth Circuit as to

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defense because it believes that RFRA provides it more expansive protection. (*See* D.E. No. 60 at Pg ID 1797, n.4).

post-Price Waterhouse sex-stereotyping claims; and 4) the only Sixth Circuit case on dress codes cited by the Funeral Home is from 1977 — a decade before *Price Waterhouse* was decided.

Unlike the cases that the Funeral Home relies on, as the EEOC and ACLU both note, the EEOC has not asserted any claims in this action based upon the Funeral Home's dress code policy. That is, the Funeral Home's sex-specific dress code policy *has not* been challenged by the EEOC in this action. Rather, the dress code is only being injected because the Funeral Home is using its dress code as a *defense* to the Title VII sex-stereotyping claim asserted on behalf of Stephens. Indeed, the Funeral Home listed this as an affirmative defense:

> The EEOC's claims are barred by virtue of the fact that the Funeral Home was legally justified in any and all acts of which the EEOC complains, including but not limited to the Funeral Home's right to impose sex-specific dress codes on its employees.

(D.E. No. 14 at Pg ID 202).

The primary case the Funeral Home relies on is *Jespersen*. In that case, the Ninth Circuit issued an *en banc* decision in order to clarify its "circuit law concerning appearance and grooming standards, and to clarify [its] evolving law of sex stereotyping claims." *Jespersen*, 444 F.3d at 1105. In that case, the plaintiff was a female bartender who was

terminated from her position after she refused to follow the company's "Personal Best" policy, which required female employees to wear specified make-up[7] and prohibited male employees from wearing any makeup. The plaintiff alleged that the policy discriminated against women by: 1) subjecting them to terms and conditions of employment to which men are not similarly subjected; and 2) requiring that women conform to sex-based stereotypes as a term and condition of employment.

The majority affirmed the district court's dismissal of the plaintiff's claims. In doing so, the majority stated:

> We agree with the district court and the panel majority that on this record, Jespersen has failed to present evidence sufficient to survive summary judgment on her claim that the policy imposes an unequal burden on women. With respect to sex stereotyping, *we hold that appearance standards,* including makeup requirements*, may well be the subject of a Title VII claim for sexual stereotyping*, but that on this record Jespersen has failed to create any triable issue of fact that the challenged policy was part of a policy motivated by sex stereotyping. We therefore affirm.

Id. at 1106 (emphasis added). Even though the majority affirmed the district court, it emphasized

[7] Face powder, blush, mascara, and lip color.

that it was "not preclud[ing], as a matter of law, a claim of sex-stereotyping on the basis of dress or appearance codes. Others may well be filed, and any bases for such claims refined as law in this area evolves." *Id.* at 1113.

Moreover, the dissent lays out a cogent explanation as to why the plaintiff in that case had a sex-stereotyping claim under *Price Waterhouse*:

> I agree with the majority that appearance standards and grooming policies may be subject to Title VII claims. . . I part ways with the majority, however, inasmuch as I believe that the "Personal Best" program was part of a policy motivated by sex stereotyping and that Jespersen's termination for failing to comply with the program's requirements was "because of" her sex. Accordingly, I dissent from Part III of the majority opinion and from the judgment of the court.
>
> Jespersen's evidence showed that Harrah's fired her because she did not comply with a grooming policy that imposed a facial uniform (full makeup) on only female bartenders. Harrah's stringent "Personal Best" policy required female beverage servers to wear foundation, blush, mascara, and lip color, and to ensure that lip color was on at all times. Jespersen and her

> female colleagues were required to meet with professional image consultants who in turn created a facial template for each woman. Jespersen was required not simply to wear makeup; in addition, the consultants dictated where and how the makeup had to be applied. Quite simply, her termination for failing to comply with a grooming policy that imposed a facial uniform on only female bartenders is discrimination "because of" sex. Such discrimination is clearly and unambiguously impermissible under Title VII, which requires that "gender must be irrelevant to employment decisions." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion) (emphasis added).

Jespersen, 444 F.3d at 1113–14. The dissent noted that "*Price Waterhouse* recognizes that gender discrimination may manifest itself in stereotypical notions as to how women should dress and present themselves" and cited the Sixth Circuit's decision in *Smith*, wherein it had stated "[a]fter *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex." *Jespersen,* 444 F.3d at 1115 (quoting *Smith, supra*). The dissent further stated, "I believe that the fact that Harrah's designed and

promoted a policy that required women to conform to a sex stereotype by wearing full makeup is sufficient 'direct evidence' of discrimination." *Id.* The dissent concluded that the plaintiff presented a "classic case" of *Price Waterhouse* discrimination. *Id.* at 1116.

The Funeral Home has not directed the Court to any cases wherein the Sixth Circuit has endorsed the majority view in *Jespersen*. And the only Sixth Circuit dress-code case that it cites is from 1977 — a decade before *Price Waterhouse* was decided.

In pre-*Price Waterhouse* decisions, dating back to the 1970's, other circuits have held that employer personal appearance codes with differing requirements for men and women do not violate Title VII as long as there is "some justification in commonly accepted social norms and are reasonably related to the employer's business needs." *Carroll v. Talman Fed. Savings & Loan*, 604 F.2d 1028, 1032 (7th Cir. 1979); *see also Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755 (9th Cir. 1977) ("regulations promulgated by employers which require male employees to conform to different grooming and dress standards than female employees is not sex discrimination within the meaning of Title VII."). In *Barker v. Taft Broadcasting, Co.,* 549 F.2d 400 (6th Cir. 1977), a majority of a Sixth Circuit panel expressed a similar view, ruling that an employer's grooming code that required a shorter hair length for men than women did not violate Title VII, while the dissent concluded that a Title VII claim was stated.

But the Sixth Circuit has not provided any post-*Price Waterhouse* guidance as to whether sex-specific dress codes, that have slightly differing clothing requirements for men and women, either violate Title VII or provide a defense to a sex stereotyping claim. This evolving area of the law – how to reconcile this previous line of authority regarding sex-specific dress/grooming codes with the more recent sex/gender-stereotyping theory of sex discrimination under Title VII — has not been addressed by the Sixth Circuit.

Lacking such guidance, this Court finds that the dissent in *Jespersen* appears more in line with the post-*Price Waterhouse* views that *have been* expressed by the Sixth Circuit. This is illustrated by a comparison of the majority's ruling in *Jespersen* to the portion of the Sixth Circuit's decision in *Smith* that was quoted by the dissent in *Jespersen:*

The majority in *Jespersen* upheld the dismissal of a sex discrimination claim where the female plaintiff was terminated for not complying with a policy that required women (but not men) to wear makeup.	"After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex." *Smith, supra*, at 1115.

It appears unlikely that the *Smith* court would allow an employer like the employer in *Jespersen* to avoid liability for a Title VII sex-stereotyping claim simply by virtue of having put its gender-based stereotypes into a formal policy.

Accordingly, for all of these reasons, the Court rejects the Funeral Home's sex-specific dress code defense to the Title VII sex-stereotyping claim asserted on behalf of Stephens in this case.

B. The Funeral Home Is Entitled To A RFRA Exemption Under The Unique Facts And Circumstances Presented Here.

The Funeral Home also argues that the Religious Freedom Restoration Act of 1993 ("RFRA") prohibits the EEOC from applying Title VII to force the Funeral Home to violate its sincerely held religious beliefs. It asserts this defense on the heels of the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

"Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty. RFRA's enactment came three years after" the Supreme Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), "which largely repudiated the method of analyzing free-exercise claims that had been used" in cases such as *Sherbert v. Verner* and *Wisconsin v. Yoder*. *Hobby Lobby*, 134 S.Ct. at 2760. In short, in *Smith*, the Supreme Court rejected the previous

balancing test set forth in *Sherbert* and "held that, under the First Amendment, 'neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.'" *Id.*

"Congress responded to *Smith* by enacting RFRA." *Hobby Lobby*, 134 S.Ct. at 2761. "RFRA prohibits the "Government [from] substantially burden[ing] a *person's* exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb–1(a), (b) (emphasis added). The majority in *Hobby Lobby* further held:

> "[L]aws [that are] 'neutral' toward religion," Congress found, "may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2); *see also* § 2000bb(a)(4). In order to ensure broad protection for religious liberty, RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." § 2000bb–1(a). If the Government substantially burdens a person's exercise of religion, under the Act that person is entitled to an

> exemption from the rule unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." § 2000bb–1(b).

Id. at 2761.

One of the stated purposes of RFRA is to provide a "defense to persons whose religious exercise is substantially burdened by the government." 42 U.S.C. § 2000bb(b)(2). RFRA provides that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or *defense in a judicial proceeding*." 42 U.S.C. § 2000bb-1(c) (emphasis added).

By its terms, RFRA "applies to *all Federal law*, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3(a) (emphasis added).

1. The Funeral Home Is Entitled To Protection Under RFRA And RFRA Applies To The EEOC, A Federal Agency.

The majority in *Hobby Lobby* concluded that a for-profit corporation is considered a "person" for

purposes of RFRA protection. *Hobby Lobby*, 134 S.Ct. at 2768-69. The Funeral Home, a for-profit, closely-held corporation, is therefore entitled to protection under RFRA.

RFRA applies to the "government," which is defined to include "a branch, department, *agency*, instrumentality, and official (or other person acting under color of law) of the United States." 42 U.S.C. § 2000bb–2(1) (emphasis added). On its face, the statute applies to the EEOC, a federal agency, and the EEOC has not argued otherwise.

2. The Funeral Home Has Met Its Initial Burden Of Establishing That Compliance With Title VII "Substantially Burdens" Its Exercise Of Religion.

If RFRA applies in this case, then the Court "must next ask" whether the law at issue "substantially burdens" the Funeral Home's exercise of religion. *Hobby Lobby*, 134 S.Ct. at 2775. "Whether a government action substantially burdens a plaintiff's religious exercise is a question of law for a court to decide." *Singh v. McHugh*, __ F.Supp.3d __, 2016 WL 2770874 at *5 (D.C. Cir. 2016).

As the challenging party, the Funeral Home has the initial burden of showing a substantial burden on its exercise of religion. For purposes of RFRA, "exercise of religion" includes "any exercise of religion, whether or not compelled by, or central to, a

system of religious beliefs." *Hobby Lobby*, 134 S.Ct. at 2762.

Moreover, the majority in *Hobby Lobby* explained that the "question that RFRA presents" is whether the law at issue "imposes a substantial burden on the *ability of the objecting parties to conduct business in accordance with their religious beliefs*."[8] *Hobby Lobby*, 134 S.Ct. at 2778 (emphasis in original). Thus, the question becomes whether the law at issue here, Title VII and the body of sex-stereotyping case law that has developed under it, imposes a substantial burden on the ability of the Funeral Home to conduct business in accordance with its religious beliefs. The Court concludes that the Funeral Home has shown that it does.

Rost has been a Christian for over sixty-five years. The Funeral Home's mission statement is published on its website, which reads "R.G. & G.R. Harris Funeral Homes recognize that its highest priority is to honor God in all that we do as a company and as individuals. With respect, dignity, and personal attention, our team of caring professionals strive to exceed expectations, offering options and assistance designed to facilitate healing and wholeness in serving the personal needs of

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[8] The EEOC's brief asserts that RFRA protects only specific religious activities, not beliefs, and that the Funeral Home is still able to engage in its limited religious activities, like the placing of devotional cards in the funeral homes. The EEOC's limited view is not supported by the majority opinion in *Hobby Lobby*.

family and friends as they experience a loss of life." (Smts. B at ¶ 21).

Rost believes that God has called him to serve grieving people and that his purpose in life is to minister to the grieving, and his religious faith compels him to do that important work. (Stmts. B. at ¶ 31). Rost believes that the "Bible teaches that a person's sex (whether male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex." (Stmt. B at ¶ 28).

The EEOC attempts to cast the Funeral Home as asserting that it would only be substantially burdened if it were required to provide female work clothing to Stephens. (D.E. 63 at Pg ID 1935). The Funeral Home's position is not so limited.

Rost believes "that the Bible teaches that God creates people male or female." (*Id.* at ¶ 41). He believes that "the Bible teaches that a person's sex is an immutable God-given gift and that people should not deny or attempt to change their sex." (*Id.* at ¶ 42). Rost believes that he "would be violating God's commands" if he were to permit one of the Funeral Home's funeral directors "to deny their sex while acting as a representative of [the Funeral Home]. This would violate God's commands because, among other reasons, [Rost] would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift." (*Id.* at ¶ 43). Rost believes that "the Bible teaches that it is wrong for a biological male to deny his sex

by dressing as a woman." (*Id.* at ¶ 44). Rost believes that he "would be violating God's commands" if he were to permit one of the Funeral Home's biologically-male-born funeral directors to wear the skirt-suit uniform for female directors while at work, because Rost "would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift." (*Id.* at ¶ 45).

Such beliefs implicate questions of religion and moral philosophy. *Hobby Lobby*, 134 S.Ct. at 2779. Rost sincerely believes that it would be violating God's commands if he were to permit an employee who was born a biological male to dress in a traditionally female skirt-suit at the funeral home because doing so would support the idea that sex is a changeable social construct rather than an immutable God-given gift. The Supreme Court has directed that it is not this Court's role to decide whether those "religious beliefs are mistaken or insubstantial." *Hobby Lobby*, 134 S.Ct. at 2779. Instead, this Court's "narrow function" is to determine if this is "an honest conviction" and, as in *Hobby Lobby*, there is no dispute that it is.

Notably, the EEOC concedes that the Funeral Home's religious beliefs are sincerely held. (*See* D.E. No. 51 at Pg ID 596 & 612, "The Commission does not contest Defendant's religious sincerity.").

The Court finds that the Funeral Home has shown that the burden is "substantial." Rost has a sincere religious belief that it would be violating

God's commands if he were to permit an employee who was born a biological male to dress in a traditionally female skirt-suit at one of his funeral homes because doing so would support the idea that sex is a changeable social construct rather than an immutable God-given gift. Rost objects on religious grounds to: 1) being compelled to provide a skirt to an employee who was born a biological male; and 2) being compelled to allow an employee who was born a biological male to wear a skirt while working as a funeral director for his business. To enforce Title VII (and the sex stereotyping body of case law that has developed under it) by requiring the Funeral Home to provide a skirt to and/or allow an employee born a biological male to wear a skirt at work would impose a substantial burden on the ability of Rost to conduct his business in accordance with his sincerely-held religious beliefs.

If Rost and the Funeral Home do not yield to Title VII and the body of sex stereotyping case law under it, the economic consequences for the Funeral Home could be severe — having to pay back and front pay to Stephens in connection with this case.

Moreover, Rost testified that if he "were forced as the owner of [the Funeral Home] to violate [his] sincerely held religious beliefs by paying for or otherwise permitting one of [his] employees to dress inconsistent with his or her biological sex, [Rost] would feel significant pressure to sell [the] business and give up [his] life's calling of ministering to grieving people as a funeral home director and owner." (Rost Aff. at ¶ 48).

The Court concludes that the Funeral Home has met its initial burden of showing that enforcement of Title VII, and the body of sex-stereotyping case law that has developed under it, would impose a substantial burden on the ability of the Funeral Home to conduct business in accordance with its sincerely-held religious beliefs.

3. The Funeral Home Is Entitled To An Exemption Unless The EEOC Meets Its Demanding Two-Part Burden.

Once a claimant demonstrates a substantial burden to his religious exercise, that person "is entitled to an exemption from" the law unless the Government can meet its burden of showing that application of the burden "to the person:" 1) is in furtherance of a compelling governmental interest; and 2) is the least restrictive means of furthering that compelling governmental interest. *Hobby Lobby,* 134 S.Ct. at 2761.

The Supreme Court has described the dual justificatory burdens imposed on the government by RFRA as "the most demanding test known to constitutional law." *City of Boerne v. P.F. Flores*, 117 S.Ct. 2157, 2171 (1997).

a. The Court Assumes, Without Deciding, That The EEOC Has Met Its Compelling Governmental Interest Burden.

The EEOC appears to take the position that RFRA can never succeed as a defense to a Title VII claim or that Title VII will always be presumed to serve a compelling governmental interest and be narrowly tailored for purposes of a RFRA analysis. (*See* D.E. No. 63 at Pg ID 1899, asserting that RFRA "does not protect employers from the mandates of Title VII" and D.E. No. 51 at Pg ID 628, asserting that the majority in *Hobby Lobby* "*suggested* in a colloquy" with the principal dissent "that Title VII serves a compelling governmental interest which cannot be overridden by RFRA.") (emphasis added).

The majority did reference employment discrimination, in discounting the dissent's concern that the majority's ruling may lead to widespread discrimination cloaked in religion, stating:

> The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. *See post*, at 2804 – 2805. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.

Hobby Lobby, 134 S.Ct. at 2784. This Court does not read that paragraph as indicating that a RFRA

defense can never prevail as a defense to Title VII or that Title VII is exempt from the focused analysis set forth by the majority. If that were the case, the majority would presumably have said so. It did not.

Moreover, the majority stated "[t]he dissent worries about forcing the federal courts to apply RFRA to a host of claims made by litigants seeking a religious exemption from generally applicable laws, and the dissent expresses a desire to keep the courts out of this business" but noted that it was Congress that enacted RFRA and explained "[t]he wisdom of Congress's judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written." *Id.* at 2784-85.[9]

And the dissent surely does not read the majority opinion as exempting Title VII (or other generally-applicable anti-discrimination laws) from a RFRA defense or the focused analysis set forth in the majority opinion:

> Why should decisions of this order be made by Congress or the regulatory authority, and not this Court? Hobby Lobby and Conestoga surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs. *See, e.g., Newman v. Piggie Park Enterprises, Inc.*, 256 F.Supp. 941, 945 (D.S.C. 1966) (owner of restaurant chain refused to serve

[9] The same is true of this Court.

black patrons based on his religious beliefs opposing racial integration), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (C.A.4 1967), *aff'd and modified on other grounds*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968); *In re Minnesota ex rel. McClure*, 370 N.W.2d 844, 847 (Minn.1985) (born-again Christians who owned closely held, for-profit health clubs believed that the Bible proscribed hiring or retaining an "individua[l] living with but not married to a person of the opposite sex," "a young, single woman working without her father's consent or a married woman working without her husband's consent," and any person "antagonistic to the Bible," including "fornicators and homosexuals" (internal quotation marks omitted)), *appeal dismissed*, 478 U.S. 1015, 106 S.Ct. 3315, 92 L.Ed.2d 730 (1986); *Elane Photography, LLC v. Willock*, 2013–NMSC–040, — N.M. —, 309 P.3d 53 (for-profit photography business owned by a husband and wife refused to photograph a lesbian couple's commitment ceremony based on the religious beliefs of the company's owners), *cert. denied*, 572 U.S. —, 134 S.Ct. 1787, 188 L.Ed.2d 757 (2014). Would RFRA require exemptions in cases of this ilk? And if not, how does

> the Court divine which religious beliefs are worthy of accommodation, and which are not? Isn't the Court disarmed from making such a judgment given its recognition that "courts must not presume to determine ... the plausibility of a religious claim"? *Ante,* at 2778.

Id. at 2804–05.

Without any authority to indicate that Title VII is exempted from the analysis set forth in *Hobby Lobby*, this Court concludes that it must be applied here. *See also Holt v. Hobbs*, 135 S.Ct. 853, 858 (2015) (discussing, in a RLUIPA case, how the lower court believed it was somehow bound to defer to the Department of Correction's security policy as a compelling interest that is narrowly tailored and explaining that the statute "does not permit such *unquestioning deference.* RLUIPA, like RFRA, 'makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress.'") (emphasis added).

The majority in *Hobby Lobby* instructed that when determining whether a challenged law serves a compelling interest, it is not sufficient to use "very broad terms," such as "promoting" "gender equality." *Hobby Lobby*, 134 S.Ct. at 2779. That is because "RFRA contemplates a '*more focused inquiry*: It 'requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' — the particular claimant whose sincere exercise of

religion is being substantially burdened." *Id.* (citations omitted) (emphasis added). This is critical because it means the Government's showing must focus on justification of the particular person burdened — here, the Funeral Home. In other words, even if the Government can show that the law is in furtherance of a generalized or broad compelling interest, it must still demonstrate the compelling interest is satisfied through application of the law *to the Funeral Home under the facts of this case.*

The majority in *Hobby Lobby* held that this requires this Court to scrutinize "the asserted harm of granting specific exemptions to [the] particular religious claimant" and "look to the marginal interest in enforcing" the challenged law in this particular context. *Hobby Lobby*, 134 S.Ct. at 2779. The majority in *Hobby Lobby*, however, assumed without deciding that the requisite "to the person" compelling interest existed. Thus, it did not provide any real guidance for how to go about doing that. As the principal dissent noted, the majority opinion provides "[n]ot much help" for "the lower courts bound by" it. *Id.* at 2804.

Here, in response to the Funeral Home's motion, the EEOC very broadly asserts that "Congress's mandate to eliminate workplace discrimination" is the compelling governmental interest that warrants burdening the Funeral Home's exercise of religion. (D.E. No. 63 at Pg ID 1934). In the section of its own motion that deals with the government's burden, the EEOC more specifically asserts that Title VII's prohibitions

against sex discrimination establish that the government has a compelling interest in protecting employees from gender stereotyping in the workplace. (D.E. No. 51 at Pg ID 629).

The Court fails to see how the EEOC has met its requisite "to the person"-focused showing here. But this Court is also at a loss for how this Court is supposed to scrutinize "the asserted harm of granting specific exemptions to [the] particular religious claimant" and "look to the marginal interest in enforcing" the challenged law in this particular context. *Hobby Lobby*, 134 S.Ct. at 2779. This Court will therefore assume without deciding that the EEOC has met its first burden and proceed to the least restrictive means burden.

b. The EEOC Has Failed To Meet Its Burden Of Showing That Application Of The Burden On The Funeral Home, Under The Facts Presented Here, Is The Least Restrictive Means Of Furthering The Compelling Governmental Interest Of Protecting Employees From Gender Stereotyping In The Workplace.

If the EEOC meets its burden regarding showing a compelling interest, then the Court must determine if the EEOC has met its additional, and separate, burden of showing that application of the burden "to the person" is the least restrictive means

of furthering that compelling governmental interest. *Hobby Lobby,* 134 S.Ct. at 2761.

The "least-restrictive means standard is exceptionally demanding." *Hobby Lobby*, 134 S.Ct. at 2780. That standard requires the government to "sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]." *Id.* at 2780.

If a less restrictive means is available for the government to achieve the goal, the government must use it. *Holt v. Hobbs*, 135 S.Ct. 853, 864 (2015). As another district court within the Sixth Circuit has explained, "[t]his 'exceptionally demanding' standard, *Burwell*, 134 S.Ct. at 2780, begs for the Government to show *a degree of situational flexibility, creativity, and accommodation* when putative interests clash with religious exercise." *United States v. Girod*, __ F. Supp.3d __, 2015 WL 10031958 at *8 (E.D. Ky. 2015) (emphasis added).

Again, it is the EEOC that has the burden of showing that enforcement of the religious burden on the Funeral Home is the least restrictive means of furthering its compelling interest of protecting employees from gender stereotyping in the workplace.

As to this burden, the EEOC's position is stated in: 1) a page and a half in its own motion (D.E. No. 51 at Pg ID 629-30); and 2) two paragraphs that respond to the Funeral Home's motion. (D.E.

No. 63 at Pg ID 1939). Essentially, the EEOC asserts, in a conclusory fashion, that Title VII is narrowly tailored:

> Title VII's prohibitions against sex discrimination in the workplace demonstrate that the government has a compelling interest in protecting employees from losing their jobs on the basis of an employer's gender stereotyping, and they are precisely tailored to ensure this.

(D.E. No. 51 at Pg ID 629).[10]

Thus, the EEOC has not provided a focused "to the person" analysis of how the burden on the Funeral Home's religious exercise is the least restrictive means of eliminating clothing[11] gender stereotypes at the Funeral Home under the facts and circumstances presented here.

The Funeral Home argues that "the EEOC does not even attempt to explain" how requiring the Funeral Home to allow a funeral director who was

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[10] The Sixth Circuit could conclude, on appeal, that the more focused analysis set forth in *Hobby Lobby* should not apply in a Title VII case. There is no existing authority to support such a position and it is not this Court's role to create such an exception.

[11] Again, because the parties have confined their claims, defenses, and analysis to work place clothing, and have not discussed hair styles or makeup, this Court also confines its analysis to clothing.

born a biological male to wear a skirt-suit to work could be found to satisfy RFRA's least-restrictive means requirement. (D.E. No. 60 at Pg ID 1797).[12]

Indeed, the EEOC's briefs do not contain *any discussion* to indicate that the EEOC has ever (in either the administrative proceedings or during the course of this litigation) explored the possibility of any solutions or potential accommodations that might work under the unique facts and circumstances presented here. As a practical matter, the EEOC likely did not do so because it has been proceeding as if gender identity or transgender status is a protected class under Title VII,[13] taking

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[12] Although it is not its burden, the Funeral Home asserts that "[a] number of available alternatives" could allow the government to achieve its stated goal without violating the Funeral Home's religious rights. In response to those least-restrictive-means arguments, the EEOC states that the Funeral Home never proposed that Stephens could continue to dress in "men's clothing" while at work, but could dress in "female clothing" outside of work, prior to Rost's deposition. (D.E. No. 63 at 1924). The EEOC further asserts that the Funeral Home was "free to offer counter-proposals" but failed to do so. (D.E. No. 69 at Pg ID 2131). Such arguments overlook that it is *the EEOC's burden* to establish that enforcement of the burden on the Funeral Home is the least restrictive means of furthering its compelling interest under the facts presented here.

[13] *See, e.g.*, EEOC Determination, finding reasonable cause to believe that charging party was discharged due to sex and "gender identity" (D.E. No. 63-4); Amended Complaint (D.E. No. 21 at Pg ID 244-45), alleging that the Funeral Home discharged Stephens "because Stephens is transgender," and "because of Stephens's transition from male to female."

the approach that the Funeral Home cannot prohibit Stephens from dressing as a female, in order to express her female gender identity. This is one of the first two cases that the EEOC has ever brought on behalf of a transgender person.[14] The EEOC appears to have taken the position that the only acceptable solution would be for the Funeral Home to allow Stephens to wear a skirt while working as a funeral director at the Funeral Home in order to express Stephens's female gender identity. (*See, e.g.*, D.E. No. 69 at Pg ID, arguing that the Funeral Home cannot require that "an employee dress inconsistently with his or her gender identity;" D.E. No. 63 at Pg ID 1923, arguing that "Defendant's insistence that Stephens wear men's clothing at work, despite knowledge that [Stephens] now identifies as female," violates Title VII; D.E. No. 63 at Pg ID 1927, stating that Stephens would present according to the dress code for females; D.E. No. 63 at Pg ID 1936-37, arguing that the Funeral Home having to provide "female clothing to Stephens" would not impose a substantial burden because doing so would not be unduly costly.).

Understanding the narrow context of the discrimination claim stated in this case is important. The wrongful discharge claim in this case is brought under a very specific theory of sex discrimination under Title VII. The EEOC's claim on behalf of Stephens is brought under a *Price Waterhouse*

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[14] *See, e.g.*, EEOC's 9/25/14 Press Release (stating that this "Lawsuit is One of Two the Agency Filed Today—the First Suits in its History — Challenging Transgender Discrimination Under 1964 Civil Rights Act.").

sex/gender stereotyping theory. *Price Waterhouse* recognized that sex discrimination may manifest itself in stereotypical notions as to how women and men should dress and present themselves in the workplace.

As the Supreme Court recognized in *Price Waterhouse*, the intent behind Title VII's inclusion of sex as a protected class expressed "Congress' intent to forbid employers to take gender into account" in the employment context. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989). The goal of the sex-stereotyping theory of sex discrimination is that "gender" "be *irrelevant*" with respect to the terms and conditions of employment and to employment decisions. *Id.* (emphasis added).

Significantly, neither transgender status nor gender identity are protected classes under Title VII.[15] The only reason that the EEOC can pursue a Title VII claim on behalf of Stephens in this case is under the theory that the Funeral Home discriminated against Stephens because Stephens failed to conform to the "masculine gender stereotypes that Rost expected" in terms of the clothing Stephens would wear at work. The EEOC asserts that Stephens has a "Title VII right *not to be subject to gender stereotypes* in the workplace." (D.E. No. 51 at Pg ID 607) (emphasis added).

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[15] Congress can change that by amending Title VII. It is not this Court's role to create new protected classes under Title VII.

Yet the EEOC has not challenged the Funeral Home's sex-specific dress code, that requires female employees to wear a skirt-suit and requires male employees to wear a suit with pants and a neck tie, in this action. If the EEOC were truly interested in eliminating gender stereotypes as to clothing in the workplace, it presumably would have attempted to do so.

Rather than challenge the sex-specific dress code, the EEOC takes the position that Stephens has the right, under Title VII, to "dress as a woman" or wear "female clothing"[16] while working at the Funeral Home. That is, the EEOC wants Stephens to be permitted to dress in a stereotypical feminine manner (wearing a skirt-suit), in order to express Stephens's gender identity.

If the EEOC truly has a compelling governmental interest in ensuring that Stephens is not subject to gender stereotypes in the workplace in terms of required clothing at the Funeral Home,[17] couldn't the EEOC propose a gender-neutral dress code (dark-colored suit, consisting of a matching business jacket and pants, but without a neck tie) as

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[16] This is the language used by the parties. (See, e.g., D.E. No. 21 at Pg ID 244; D.E. No. 63 at 1935; D.E. No. 59 at Pg ID 1749).

[17] Rost's Affidavit states that he would not dismiss Stephens or other employees if they dressed as members of the opposite sex while *outside* of work. (Rost Affidavit at ¶¶ 50-51). Rost also so testified. (*See* Rost Dep., D.E. No. 54-5 at Pg ID 1372).

a reasonable accommodation that would be a less restrictive means of furthering that goal under the facts presented here?[18] Both women and men wear professional-looking pants and pants-suits in the workplace in this country, and do so across virtually all professions.

The following deposition testimony from Rost supports that such an accommodation could be a less restrictive means of furthering the goal of eliminating sex stereotypes as to the clothing worn at the Funeral Home:

> Q. Now, do you currently have any female funeral directors?
> A. I do not.
> Q. If you did have a female funeral director, what would describe what her uniform would be or what she would be required to wear?
> MR. PRICE: Objection, speculation. But go ahead.
> THE WITNESS: She would have a dark jacket and a dark skirt, matching.
> Matching.
> BY MR. KIRKPATRICK:
> Q. Okay. A skirt. So just like the male funeral director she would have a business suit, but a female business suit?
> A. Yes.

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[18] Similar to the gender-neutral pants, business suit jackets, and white shirts that the male and female Court Security Officers in this building wear.

Q. As a skirt?
A. Yes.
. . . .
Q. Okay. Why do you have a dress code?
A. Well, we have a dress code because it allows us to make sure that our staff — is dressed in a professional manner that's acceptable to the families that we serve, and that is understood by the community at-large what these individuals would look like.
Q. Is that based on the specific profession that you're in?
A. It is.
Q. And again, tell us why it fits into the specific profession that you're in that you have a dress code?
A. Well, it's just the funeral profession in general, if you went to all funeral homes, would have pretty much the same look. Men would be in a dark suit, white shirt and a tie and women would be appropriately attired in a professional manner.
. . . .
Q. Okay. Now, have you been to funeral homes where there have been women wearing businesslike pants before?
A. I believe I have.
Q. Okay. So, the fact that you require women to wear skirts is something that you prefer, it's not necessarily an industry requirement?
A. That's correct.

> Q. Okay. But women could look businesslike and appropriate in pants, correct?
> A. They could.

(D.E. No. 63-11 at Pg ID 1999-2000; *see also* Rost Dep., D.E. 54-11 at Pg ID 1423, wherein Rost testified that female employees at the Funeral Home's Detroit location sometimes wear pants with a jacket to work). In addition, Stephens testified:

> Q. Okay. Did you have a uniform or a dress code that you had to follow while with R.G. & G.R. Funeral Home?
> A. They bought suits.
> Q. Okay.
> A. I wore it.
> Q. So they being the company, bought you a suit or suits?
> A. Yes.
> Q. Were they male suits?
> A. I would assume they were.
> Q. Okay.
> A. I guess a female could have dressed in them.

(Stephens's Dep., D.E. No. 54-15 at Pg ID 1453).[19]

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[19] The Court notes that Rost's affidavit appears to indicate that he would be opposed to allowing a funeral director who was born a biological female to wear a male funeral director uniform (which consists of a pant-suit with a neck tie) while at work. (Rost Aff. at ¶ 45). Notably, however, Rost has *already allowed* female employees to wear a pants-suit to work without a neck tie.

But the EEOC has not even discussed the possibility of any such accommodation or less restrictive means as applied to this case.[20] Rather, the EEOC takes the position that Stephens must be allowed to wear a skirt-suit in order to *express* Stephens's female gender identity. That is, the EEOC wants Stephens to be able to dress in a *stereotypical feminine* manner. If the compelling governmental interest is truly in *removing or eliminating* gender stereotypes in the workplace in terms of clothing (*i.e.*, making gender "irrelevant"), the EEOC's manner of enforcement in this action (insisting that Stephens be permitted to dress in a stereotypical feminine manner at work) does not accomplish that goal.

This Court concludes that the EEOC has not met its demanding burden. As a result, the Funeral Home is entitled to a RFRA exemption from Title VII, and the body of sex-stereotyping case law that has developed under it, under the facts and circumstances of this unique case.

In its amicus brief, the ACLU asserts that the implications of allowing a RFRA exemption to the Funeral Home in this case "are staggering" and

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[20] This potential accommodation or least restrictive means of requiring a gender-neutral uniform may actually be consistent with what the EEOC proposed in the administrative proceedings. (*See* D.E. No. 74-1 at Pg ID 2171, proposing that the Funeral Home reinstate Stephens and agree to "implement a Dress Code policy that *affords equivalent consideration to all sexes with respect to uniform requirements* and allowance/benefits.") (emphasis added).

essentially restates the *Hobby Lobby* principal dissenting opinion's fears about the impact of the majority's decision on employment discrimination and other laws. (*See* D.E. No. 59 at Pg ID 1767). This Court is bound by the majority opinion in *Hobby Lobby* and it makes clear that RFRA exemptions are considered on a case-by-case basis.

Moreover, in *General Conf. of Seventh–Day Adventists*, 617 F.3d 402 (6th Cir. 2010), the Sixth Circuit held, as a matter of first impression, that a RFRA defense does not apply in a suit between private parties.[21] The Seventh Circuit has also so ruled. *See Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 736–37 (7th Cir. 2015). In the vast majority of Title VII employment discrimination cases, the case is brought by the employee, not the EEOC. Accordingly, at least in the Sixth and Seventh Circuits, it appears that there cannot be a RFRA defense in a Title VII case brought by an employee against a private[22] employer because that would be a case between private parties. *See, e.g., Mathis v. Christian Heating and Air Conditioning, Inc.*, 2016 WL 304766 (E.D. PA

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[21] The ACLU noted this ruling in a footnote in its brief. (D.E. No. 59 at Pg ID 1761). None of the parties addressed how that ruling by the Sixth Circuit, as a practical matter, appears to prohibit a RFRA defense in a Title VII case brought by an employee against a private employer.

[22] In Title VII cases brought by an employee against a governmental employer, such as the United States Postal Service, there could not be a RFRA defense because the United States federal government does not hold religious views.

2016) (district court ruled, in Title VII case brought by employee against private employer, that a RFRA defense is not available "because RFRA protects individuals only from the federal government's burden on the free exercise of religion.").[23]

II. Title VII Discriminatory Clothing Allowance Claim

As the second claim in this action, the EEOC alleges that the Funeral Home has violated Title VII by providing a clothing allowance/work clothes to male employees but failing to provide such assistance to female employees. (Am. Compl. at ¶¶ 15 & 17). The EEOC asserts that the effect of the Funeral Home's unlawful practice "has been to deprive a class of female employees of equal employment opportunities and otherwise adversely affect their status as employees because of their sex." (*Id.* at ¶ 18). The EEOC alleges that "[s]ince at least September 13, 2011," the Funeral Home has provided a clothing allowance to male employees but not female employees. (Am. Compl. at ¶ 12).

In the pending motions, each party contends that it is entitled to summary judgment as to this claim. Before reaching the merits of the second

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[23] This Court recognizes that this appears to produce an odd result. Under existing Sixth Circuit precedent, the Funeral Home could not assert a RFRA defense if Stephens had filed a Title VII suit on Stephens's own behalf because no federal agency would be a party to the case. But, because this is one of those rare instances where the EEOC (a federal agency) chose to bring suit on behalf of an individual, a RFRA defense can be asserted.

claim, however, the Court must address the Funeral Home's assertion that the EEOC lacks the authority to bring the second claim in this action.

A. Under *Bailey*, The EEOC Cannot Bring The Second Claim In This Action.

Relying on *EEOC v. Bailey*, 563 F.2d 439 (6th Cir. 1977), the Funeral Home notes that the EEOC may include in a Title VII suit only claims that fall within an "investigation reasonably expected to grow out of the charge of discrimination." (D.E. No. 54 at Pg ID 1317). The Funeral Home asserts that, under *Bailey*, a claim falls outside that scope if: 1) the claim is unrelated to the charging party; and 2) it involves discrimination of a kind other than raised by the charging party. It asserts that those considerations show that the EEOC's clothing allowance claim does not result from an investigation reasonably expected to grow out of Stephens's EEOC charge. In making this argument, the Funeral Home states that the clothing allowance claim on behalf of a class of women is unrelated to Stephens — who *received and accepted* the clothing provided by the Funeral Home at all relevant times. The Funeral Home asserts that the clothing allowance claim alleges discrimination of a kind other than that raised by Stephens, wrongful discharge. In support of that proposition, it directs the Court to *Nelson v. Gen. Elect. Co.*, 2 F. App'x 425, 428 (6th Cir. 2001).

In response, the EEOC does not dispute that *Bailey* is good law. Rather, it attempts to distinguish this case from *Bailey*. (D.E. No. 63 at Pg ID 1942-43). It asserts that the situation here is more akin to *EEOC v. Cambridge Tile Mfg. Co.,* 590 F.2d 205 (6th Cir. 1979). That was a two-page per curiam decision that "involve[d] the scope of the investigatory and subpoena power of the EEOC." *Id.* at 205. It did not address the issue that the Court is presented with here. The EEOC does not direct the Court to any other Sixth Circuit authority regarding this challenge.

In *Bailey*, the underlying charge of discrimination that had triggered the investigation of the employer's employment practices was filed by a white female employee who alleged sex discrimination against women and race discrimination against black women. *Bailey,* 563 F.2d at 441 & 445. The EEOC later brought suit against the employer alleging racial and religious discrimination. The district court held that the employee's charge of discrimination could not support the EEOC's lawsuit and dismissed it.

On appeal, the Sixth Circuit affirmed the dismissal of the religious discrimination charges but reversed as to the race discrimination charges. The opinion began by providing an overview of the process that leads to a civil action being filed by the EEOC:

> "In the Equal Employment Opportunity Act of 1972 Congress established an

integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court." *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 97 S.Ct. 2447, 2451, 53 L.Ed.2d 402 (1977). The procedure is triggered when "a person claiming to be aggrieved" or a member of the EEOC files with the EEOC a charge alleging that an employer has engaged in an unlawful employment practice. Such a charge is to be filed within 180 days after the occurrence of the allegedly unlawful practice, and the EEOC is to serve notice of the charge on the employer within ten days of filing and to investigate the charge. s 706(b) of Title VII, 42 U.S.C. s 2000e-5(b). Under s 709(a) of Title VII, 42 U.S.C. s 2000e-8(a), the EEOC may gain access to evidence that is relevant to the charge under investigation, *see Blue Bell Boots, Inc. v. EEOC*, 418 F.2d 355, 358 (6th Cir. 1969), and under s 710, 42 U.S.C. s 2000e-9, the EEOC may gain access to evidence that relates to any matter under investigation. The EEOC is then required to determine, "as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge, whether there is reasonable cause to believe the charge is true. s 706(b), 42

> U.S.C. s 2000e-5(b). If there is no reasonable cause, the charge must be dismissed and the person claiming to be aggrieved shall be notified. If there is reasonable cause, the EEOC "shall endeavor to eliminate any such unlawful employment practice by informal methods of conference, conciliation, and persuasion." s 706(b), 42 U.S.C. s 2000e-5(b). When the EEOC is unable to secure a conciliation agreement acceptable to the EEOC, the EEOC may bring a civil action. s 706(f)(1), 42 U.S.C. s 2000e-5(f)(1). *See Occidental Life Insurance Co. v. EEOC, supra*, 432 U.S. at --, 97 S.Ct. at 2450-2452; Conference Committee Report, Section-by-Section Analysis of H.R. 1746, The Equal Employment Act of 1972, 118 Cong.Rec. 7168-69 (Mar. 6, 1972).

Id. at 445.

The Sixth Circuit agreed with the district court that it did not have jurisdiction over the allegations of religious discrimination in the EEOC's lawsuit because the "portion of the EEOC's complaint incorporating allegations of religious discrimination exceeded the scope of the EEOC investigation [of the employer] reasonably expected to grow out of the charge of discrimination." *Id.* at 446.

The court noted that the "clearly stated rule in this Circuit is that the EEOC's complaint is 'limited to the scope of the EEOC' investigation reasonably expected to grow out of the charge of discrimination." *Id.* at 446 (citations omitted). The court explained that there are two reasons for that rule:

> There are two reasons for the rule that the EEOC complaint is limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination. The first reason is that the rule permits an effective functioning of Title VII when the persons filing complaints are not trained legal technicians. "(T)his Court has recognized that Title VII of the Civil Rights Act of 1964 should not be construed narrowly," *Blue Bell Boots, Inc. v. EEOC, supra*, 418 F.2d at 358, and thus adopted the rule because "charges of discrimination filed before the EEOC will generally be filed by lay complainants who are unfamiliar with the niceties of pleading and are acting without the assistance of counsel." *Tipler v. E.I. duPont deNemours & Co., supra*, 443 F.2d at 131. Similarly, we stated in *McBride v. Delta Air Lines, Inc., supra*, 551 F.2d at 115:
>
> > Because administrative complaints are filed by completing a form designed to

> elicit specificity in charges, and because the forms are not legal pleadings and are rarely filed with the advice of legal counsel, any other standard would unreasonably limit subsequent judicial proceedings which Congress has determined are necessary for effective enforcement of the legal standards established by Title VII. See House Report No. 92-238, U.S.Code Cong. and Admin.News, pp. 2141, 2147-48 (1972).

The second reason for limiting the scope of the EEOC complaint to the scope of the EEOC investigation that can be reasonably expected to grow out of the private party's charge is explained in *Sanchez v. Standard Brands, Inc., supra*, 431 F.2d at 466.

> The logic of this rule is inherent in the statutory scheme of Title VII. A charge of discrimination is not filed as a preliminary to a lawsuit. On the contrary, the purpose of a charge of discrimination is to trigger the investigatory and conciliatory procedures of the EEOC. Once a charge has been filed, the

> Commission carries out its investigatory function and attempts to obtain voluntary compliance with the law. Only if the EEOC fails to achieve voluntary compliance will the matter ever become the subject of court action. Thus it is obvious that the civil action is much more intimately related to the EEOC investigation than to the words of the charge which originally triggered the investigation.

Bailey, 563 F.2d at 446-47.

The Sixth Circuit then explained that in light of those two reasons, the allegations of religious discrimination in the EEOC's complaint could not reasonably be expected to grow out of the plaintiff's charge.

First, the case simply did not involve the "situation in which a lay person has inadequately set forth in the complaint filed with the EEOC the discrimination affecting that person." *Id.* at 447. That is because the EEOC's allegations regarding religious discrimination did not involve practices affecting the plaintiff who filed the EEOC charge. *Id.*

Second, the court concluded that the present case does not involve a situation in which it would be proper, in view of the statutory scheme of Title VII,

to permit the lawsuit to include the allegations of religious discrimination. The court explained that "to allow the EEOC, as it did in the present case, to issue a reasonable cause determination, to conciliate, and to sue on allegations of religious discrimination unrelated to the private party's charge of sex discrimination would result in undue violence to the legal process that Congress established to achieve equal employment opportunities in country." *Id.* at 447-448.

The Sixth Circuit then held that "[t]he procedure to be followed when instances of discrimination, of a kind other than that raised by a charge filed by an individual party and unrelated to the individual party, come to the EEOC's attention during the course of an investigation of the private party's charge is for the filing of a charge by a member of the EEOC and for a full EEOC investigation of that charge." *Id.* at 448. It explained its rationale for requiring a new charge by the EEOC:

> Then the employer is afforded notice of the allegation, an opportunity to participate in a complete investigation of such allegation, and an opportunity to participate in meaningful conciliation discussions should reasonable cause be found following the EEOC investigation. Section 706(b) of Title VII, 42 U.S.C. s 2000e-5(b), provides for the filing of a charge by a member of the EEOC, and under such a filing, an

> employer will not be stripped of formal notice of the charge and of the opportunity to respond to the EEOC's inquiry into employment practices with respect to allegations of discrimination unrelated to the individual party's charge. In addition, the filing of a charge will permit settlement discussions to take place pursuant to 29 C.F.R. s 1601.19a5 after a preliminary investigation but before any finding of reasonable cause.
>
> Several reasons support this position. The filing of a charge by a member of the EEOC as urged by this Court should lead to a more focused investigation on the facts of possible discrimination by an employer when that possible discrimination is not related to the individual party's charge.

Id. Another reason for that position is "the importance of conciliation to Title VII." *Id.* at 449. The court noted that the EEOC's duty to attempt conciliation is among its "most essential functions" and explained:

> It is our belief that if conciliation is to work properly, charges of discrimination must be fully investigated after the employer receives notice in a charge alleging unlawful discriminatory employment practices.

> *See EEOC v. MacMillan Bloedel Containers, Inc., supra*, 503 F.2d at 1092. The requirement that a member of the EEOC file a charge when facts suggesting unlawful discrimination are discovered that are unrelated to the individual party's charge does serve the purposes of treating the employer fairly and forcing the employer and the EEOC to focus attention during investigation on the facts of such possible discrimination and thereby does serve the goal of obtaining voluntary compliance with Title VII.

Id. at 449. The court rejected the EEOC's position that "it would be a matter of placing form over substance, resulting in the waste of administrative resources and the delay in the enforcement of rights," to require "a member of the EEOC to file a charge with respect to the allegations of discrimination uncovered in an EEOC investigation which were of a kind not raised by the individual party and which did not affect the individual party." *Id.* at 449.

Accordingly, "[i]f an EEOC investigation of an employer uncovers possible unlawful discrimination of a kind not raised by the charging party and not affecting that party, then the employer should be given notice if the EEOC intends to hold the employer accountable before the EEOC and in court." *Id.* at 450.

Finally, the court rejected the EEOC's position that it did not need to file a new charge because the employer received notice of the new alleged discrimination by virtue of having received a reasonable cause determination that included religious discrimination:

> We are unable to accept the EEOC's argument that it was immaterial that appellee received notice and opportunity to comment at the time the EEOC issued its reasonable cause determination and during conciliation rather than before the issuance of the reasonable cause determination. While a court might conclude that the Due Process Clause of the Fifth Amendment was not violated by the procedure followed by the EEOC in the present case, our concern is with the legislative judgment of due process incorporated into the specific statutory scheme of Title VII. Evidence of that legislative intent indicates a concern for fair treatment of employers.

Id. at 450.

As was the situation in *Bailey*, the EEOC investigation here uncovered possible unlawful discrimination: 1) of a kind not raised by the charging party (Stephens); and 2) not affecting Stephens. As such, under *Bailey*, the proper procedure is for the filing of a charge by a member of

the EEOC and for a full EEOC investigation of that charge.

1. The Discrimination Is Of A Kind Not Raised By Stephens In The EEOC Charge.

The Court concludes that the second discrimination claim alleged in this action is "of a kind not raised by the charging party," Stephens.

Again, the rule in this Circuit is that the EEOC's complaint is limited to the scope of the EEOC's investigation reasonably expected to grow out of the charge of discrimination. "The relevant inquiry is the scope of the investigation that the *EEOC charge* would have reasonably prompted." *EEOC v. Wal–Mart Stores, Inc.,* 2010 WL 567316 at *2 (6th Cir. 2010) (emphasis added). Thus, the court looks to the *EEOC charge itself. See, eg., Nelson v. General Elec. Co.*, 2 F. App'x 425, 428 (6th Cir. 2001).

In *Nelson*, the court looked to the EEOC charge, noting that the plaintiff's charge alleged just two discriminatory actions, that the plaintiff was given a bad performance evaluation and was laid off, because of her race and gender, and in retaliation for having complained about race discrimination. Moreover, that EEOC charge expressly confined the charged discrimination to the time period between March 30 and September 22 of 1995. After the EEOC administrative process concluded, the plaintiff filed a complaint that included that her

employer failed to promote her because of her race and gender. The district court concluded that the scope of the investigation reasonably expected to grow out of her EEOC charge would not include failure to promote claims. The Sixth Circuit affirmed.

Here, the EEOC charge filed by Stephens checked the box for "sex" discrimination and indicated that the discrimination took place from July 31, 2013 to August 15, 2013 — a two week period in 2013. (D.E. No. 54-22 at Pg ID 1497). The charge stated "the particulars" of the claimed sex discrimination Stephens experienced as follows:

> I began working for the above-named employer on 01 October 2007; I was last employed as a Funeral Director/Embalmer.
>
> On or about 31 July 2013, I notified management that I would be undergoing gender transitioning and that on 26 August 2013, I would return to work as my true self, a female. On 15 August 2013, my employment was terminated. The only explanation I was given was that management did not believe the public would be accepting of my transition. Moreover, during my entire employment I know there are no other female Funeral Directors/Embalmers.

> I can only conclude that I have been discharged due to my sex and gender identity, female, in violation of Title VII of the Civil Rights Act of 1964, as amended.

(*Id.*).

Thus, Stephens alleged just one discriminatory action — termination — that occurred during a two-week period in 2013. The charge alleged that Stephens alone, who was undergoing a gender transition, was fired due to Stephens's gender identity and the Funeral Home's beliefs as to the public's acceptance of Stephens's transition. Even though the Funeral Home later asserted, during the administrative proceeding, its dress code as a defense to the alleged discriminatory termination, the *EEOC charge itself* mentioned nothing about clothing, a clothing allowance, or a dress code. Thus, this Court fails to see how Stephens's EEOC charge would reasonably lead to an investigation of whether or not the Funeral Home has provided its male employees with clothing that was not provided to females since September of 2011.[24] *Nelson, supra*; *see also EEOC v. Wal–Mart Stores, Inc., supra*, at *2 (noting "this is not a case where the civil complaint alleges different kinds of

[24] The EEOC attempts to characterize the clothing allowance claim as the same type of discrimination in Stephens's EEOC charge because it is alleged sex/gender discrimination. By that logic, the plaintiff in *Nelson* would have been found to have alleged the same type of discrimination (race and gender) even though her EEOC charge did not allege any failure to promote claims. That was not the case.

discriminatory acts than the initial EEOC complaint," as was the case in *Nelson*.)

2. The Alleged Clothing Discrimination Claim Does Not Involve Stephens.

In addition, this is not a case wherein Stephens has a claim for the alleged discriminatory clothing allowance, but inadequately set forth that claim in the EEOC charge by virtue of being a lay person. *Bailey,* 563 F.2d at 447.

Stephens is not included in the class of females who were allegedly discriminated against by the Funeral Home by virtue of not having received clothing that was provided to male employees. That is because, at all relevant times, Stephens was one of the employees who *was provided* the clothing that was not provided to female employees. Stephens was fired before Stephens ever attempted to "dress as a woman" at work. Thus, Stephens cannot claim a denial of this benefit.[25]

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[25] It would not have been a problem if Stephens had asserted a clothing allowance claim on Stephen's own behalf in the EEOC charge and then the EEOC's complaint simply broadened that same claim to assert it on behalf of a class of women. *See EEOC v. Keco Indust. Inc.*, 748 F.2d 1097, 1101 (6th Cir. 1984) (explaining that in *Bailey* the "additional and distinct claim of religious discrimination required a separate investigation, reasonable cause determination, and conciliation effort by the EEOC" and distinguishing it where the EEOC "merely broadened" the scope of the charging party's charge to assert the same claim on behalf of all female employees in the same division).

3. As A Result, Under *Bailey*, The EEOC Cannot Proceed With The Claim In This Action.

The Court concludes that the EEOC investigation here uncovered possible unlawful discrimination: 1) of a kind not raised by the charging party (Stephens); and 2) not affecting the charging party (Stephens). As such, under *Bailey*, the proper procedure[26] is for the filing of a charge by a member of the EEOC and for a full EEOC investigation of that new claim of discrimination. Because the EEOC failed to do that, it cannot proceed with that claim in this civil action. Accordingly, the Court shall dismiss the clothing allowance claim without prejudice.

CONCLUSION & ORDER

For the reasons set forth above, the Court **ORDERS** that the EEOC's Motion for Summary Judgment is **DENIED.**

It is further **ORDERED** that the Funeral Home's Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**.

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[26] The EEOC argues that it is not required to "ignore" discrimination that it inadvertently uncovers during an administrative proceeding. *Bailey* does not require the EEOC to "ignore" discriminatory acts that it uncovers during an administrative investigation that are of a kind not raised by the charging party and not affecting the charging party; it just requires the filing of a new charge by a member of the EEOC and a full investigation of the new claim.

The Court **GRANTS** summary judgment in favor of the Funeral Home as to the wrongful termination claim. The Court rejects the Funeral Home's sex-specific dress code defense but concludes that, under the unique facts and circumstances of this case, the Funeral Home is entitled to a RFRA exemption from Title VII (and the sex-stereotyping body of case law under it).

As to the clothing allowance claim, the Court concludes that the EEOC administrative investigation uncovered possible unlawful discrimination of a kind not raised by the charging party and not affecting the charging party. Under *Bailey*, the proper procedure is for the filing of a charge by a member of the EEOC and for a full EEOC investigation of that new claim of discrimination. Because the EEOC did not do that, it cannot proceed with that claim in this civil action. The Court therefore **DISMISSES WITHOUT PREJUDICE** the clothing allowance claim.

IT IS SO ORDERED.

S/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: August 18, 2016

I hereby certify that a copy of the foregoing document was served upon counsel of record on August 18, 2016, by electronic and/or ordinary mail.

S/Jennifer McCoy
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Equal Employment Opportunity Commission,

Plaintiff,

v.

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

Defendant.
_____/

Case No. 14-13710

Sean F. Cox
United States District Court Judge

AMENDED[1] OPINION & ORDER DENYING DEFENDANT'S MOTION TO DISMISS

The United States Equal Employment Opportunity Commission (the "EEOC") brought this employment discrimination action against R.G. & G.R. Harris Funeral Home, Inc. ("the Funeral Home") asserting two claims against the Funeral Home. First, it asserts a Title VII claim on behalf of the Funeral Home's former Funeral Director/Embalmer Stephens, who is transgender and is transitioning from male to female. The EEOC asserts that the Funeral Home's decision to fire Stephens was motivated by sex-based considerations, in that the Funeral Home fired

[1] Due to a technical error, the previous opinion issued was missing hyphens on pages 2 and 14.

Stephens because Stephens is transgender, because of Stephens's transition from male to female, and/or because Stephens did not conform to the defendant employer's sex- or gender-based preferences, expectations, or stereotypes. Second, the EEOC asserts that the Funeral Home engaged in an unlawful employment practice in violation of Title VII by providing a clothing allowance/work clothes to male employees but failing to provide such assistance to female employees because of sex. This second claim appears to be brought on behalf of an unidentified class of female employees of the Funeral Home.

The Funeral Home filed a Motion to Dismiss, pursuant to Fed. R. Civ. P. 12(b)(6). The parties fully briefed the issues and the Court heard oral argument on April 16, 2015. For the reasons that follow, the Court shall DENY the Funeral Home's Motion to Dismiss.

The pending motion does not challenge the EEOC's claim based on the alleged disparate treatment in relation to a clothing allowance and, therefore, that claim remains.

This Court also concludes that the EEOC's complaint states a Title VII claim against the Funeral Home on behalf of Stephens. As explained below, transgender status is not a protected class under Title VII. Thus, if the EEOC's complaint had alleged that the Funeral Home fired Stephens based solely upon Stephens's status as a transgender person, then this Court would agree with the

Funeral Home that the EEOC's complaint fails to state a claim under Title VII. But the EEOC's complaint also asserts that the Funeral Home fired Stephens "because Stephens did not conform to the [Funeral Home's] sex- or gender-based preferences, expectations, or stereotypes." (Compl. at ¶ 15). And binding Sixth Circuit precedent establishes that any person – without regard to labels such as transgender – can assert a sex-stereotyping gender-discrimination claim under Title VII, under a *Price Waterhouse* theory, if that person's failure to conform to sex stereotypes was the driving force behind the termination. This Court therefore concludes that the EEOC's complaint states a claim as to Stephens's termination.

Finally, the remaining arguments in the Funeral Home's motion are without merit or are improperly raised in a motion to dismiss brought under Fed. R. Civ. P. 12(b)(6).

BACKGROUND

On September 25, 2014, the EEOC filed this action against the Funeral Home. The EEOC's complaint describes the nature of this action as follows:

> This is an action under Title VII of the Civil Rights Act of 1964 to correct unlawful employment practices on the basis of sex and to provide appropriate relief to Amiee Stephens who was adversely affected by such practices. As alleged with greater particularity in paragraphs 8 through 16

> below, Defendant R.G. & G.R. Harris Funeral Home, Inc., fired Stephens, a transgender woman, because of sex. Additionally, as alleged in paragraphs 12 and 17 below, Defendant discriminated against female employees by not providing them work clothing while providing work clothing to male employees.

(Compl. at 1). The EEOC.'s complaint alleges as follows in its "Statement of Facts" section:

> 8. Amiee Stephens had been employed by Defendant as a Funeral Director/Embalmer since October 2007.
>
> 9. Stephens adequately performed the duties of her position.
>
> 10. Stephens is a transgender woman. On or about July 31, 2013, Stephens informed Defendant Employer and her co-workers in a letter that she was undergoing a gender transition from male to female and intended to dress in appropriate business attire at work as a woman from then on, asking for their support and understanding.
>
> 11. On or about August 15, 2013, Defendant Employer's owner fired Stephens, telling her that what she was "proposing to do" was unacceptable.

> 12. Since at least September 13, 2011, the Defendant Employer has provided a clothing allowance to male employees but not female employees. Defendant Employer provides work clothes to male employees but provides no such assistance to female employees.

(*Id.* at 3–4). The EEOC's complaint alleges as follows in its "Statement of Claims" section:

> 13. Paragraphs 8 through 12 are fully incorporated herein.
>
> 14. Defendant engaged in unlawful employment practices at its Garden City, Michigan facility, in violation of Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1), by terminating Stephens because of sex.
>
> 15. Defendant Employer's decision to fire Stephens was motivated by sex-based considerations. Specifically, *Defendant Employer fired Stephens because Stephens is transgender,* because of Stephens's transition from male to female, *and/or because Stephens did not conform to the Defendant Employer's sex- or gender-based preferences, expectations, or stereotypes.*
>
> 16. The effect of the practices complained of in paragraphs 8 through 11 and 14

through 15 above has been to deprive Stephens of equal employment opportunities and otherwise adversely affect her status as an employee because of her sex.

17. Defendant engaged in unlawful employment practices at its Garden City, Michigan facility, in violation of Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1), by providing a clothing allowance/work clothes to male employees but failing to provide such assistance to female employees because of sex.

18. The effect of the practices complained of in paragraphs 12 and 17 above has been to deprive a class of female employees of equal employment opportunities and otherwise adversely affect their status as employees because of their sex.

19. The unlawful employment practices complained of in paragraphs 8 through 18 above were intentional.

20. The unlawful employment practices complained of in paragraphs 8 through 18 above were done with malice or with reckless indifference to the federally protected rights of Stephens and a class of female employees.

(*Id.* at 4–5) (emphasis added). The prayer for relief in the EEOC's complaint states as follows:

PRAYER FOR RELIEF

> Wherefore, the Commission respectfully requests that this Court:
>
> A. Grant a permanent injunction enjoining Defendant Employer, its officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them, from engaging in any unlawful practice which discriminates against an employee or applicant because of their sex, including on the basis of gender identity.
>
> B. Order Defendant Employer to institute and carry out policies, practices, and programs which provide equal employment opportunities regardless of sex (including gender identity), and which eradicate the effects of its past and present unlawful employment practices.
>
> C. Order Defendant Employer to make Stephens whole by providing appropriate backpay with prejudgment interest, in amounts to be determined at trial, and other affirmative relief necessary to eradicate the effects of its unlawful employment practices, including but not limited to front pay for Stephens.

D. Order Defendant Employer to make Stephens and a class of female employees whole by providing compensation for past and future pecuniary losses resulting from the unlawful employment practices described in paragraphs 8 through 18 above, including medical losses, job search expenses, and lost clothing allowances, in amounts to be determined at trial.

E. Order Defendant Employer to make Stephens and a class of female employees whole by providing compensation for past and future nonpecuniary losses resulting from the unlawful practices complained of in paragraphs 8 through 18 above, including emotional pain, suffering, inconvenience, loss of enjoyment of life, and humiliation, in amounts to be determined at trial.

F. Order Defendant Employer to pay Stephens and a class of female employees punitive damages for its malicious or recklessly indifferent conduct described in paragraphs 8 through 18 above, in amounts to be determined at trial.

G. Grant such further relief as the Court deems necessary and proper in the public interest.

H. Award the Commission its costs of this action.

(*Id.* at 6–8).

On November 19, 2014, the Funeral Home filed a Motion to Dismiss, pursuant to Fed. R. Civ. P. 12(b)(6). The motion has been fully briefed and the Court heard oral argument on April 16, 2015.

STANDARD OF DECISION

When ruling on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the court must construe the complaint in a light most favorable to the plaintiff and accept all the well-pleaded factual allegations as true. *Evans–Marshall v. Board of Educ.,* 428 F.3d 223, 228 (6th Cir. 2005). Although a heightened fact pleading of specifics is not required, the plaintiff must bring forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007).

ANALYSIS

I. The Funeral Home's Motion Does Not Challenge The EEOC's Claims Based On The Alleged Disparate Treatment In Relation To Clothing Allowances For Male And Female Employees.

The EEOC's complaint in this action asserts two different types of claims against the Funeral Home.

First, the EEOC asserts that the Funeral Home's decision to fire Stephens was motivated by sex-based considerations, in that the Funeral Home fired Stephens because Stephens is transgender, because of Stephens's transition from male to female, and/or because Stephens did not conform to the Defendant Employer's sex- or gender-based preferences, expectations, or stereotypes.

Second, the EEOC asserts that the Funeral Home engaged in an unlawful employment practice in violation of Title VII by "providing a clothing allowance/work clothes to male employees but failing to provide such assistance to female employees because of sex." (Compl. at ¶ 17). This second type of claim appears to be brought on behalf of an unidentified class of female employees of the Funeral Home.

Although the Funeral Home's motion is titled a "Motion to Dismiss" and asks the Court to dismiss the EEOC's "complaint," (Def.'s Motion at 1), the motion does not include any challenges to the EEOC's second claim. As such, that claim would remain even if the Court found the Funeral Home's challenges to the first claim to have merit.

III. The EEOC's Complaint States A Title VII Claim Against The Funeral Home On Behalf Of Stephens.

Again, as to its first claim, the EEOC asserts that the Funeral Home's decision to fire Stephens was motivated by sex-based considerations, in that the Funeral Home fired Stephens because Stephens

is transgender, because of Stephens's transition from male to female, and/or because Stephens did not conform to the Defendant Employer's sex- or gender-based preferences, expectations, or stereotypes.

A. Transgender Status Is Not A Protected Class Under Title VII.

If the EEOC's complaint had alleged that the Funeral Home fired Stephens based solely upon Stephens's status as a transgender person, then this Court would agree with the Funeral Home that the EEOC's complaint would fail to state a claim under Title VII. That is because, like sexual orientation, transgender or transsexual status is currently not a protected class under Title VII. *See, e.g., Vickers v. Fairfield Med. Ctr.,* 453 F.3d 757, 762 (6th Cir. 2006) (Stating that "sexual orientation is not a prohibited basis for discriminatory acts under Title VII."); *Etsitty v. Utah Transit Auth.,* 502 F.3d 1215, 1222 (10th Cir. 2007) (Concluding that "transsexuals are not a protected class under Title VII", rejecting the plaintiff's argument for "a more expansive interpretation of sex that would include transsexuals as a protected class," and noting that "[e]ven the Sixth Circuit, which extended protection to transsexuals under the *Price Waterhouse* theory" "explained that an individual's status as a transsexual should be irrelevant to the availability of Title VII protection.").

But the EEOC's complaint does not allege that the Funeral Home fired Stephens based solely upon Stephens's status as a transgender person. The EEOC's complaint also asserts that the Funeral

Home fired Stephens "because Stephens did not conform to the [Funeral Home's] sex- or gender-based preferences, expectations, or stereotypes." (Compl. at ¶ 15).

In its brief, however, the EEOC appears to seek a more expansive interpretation of sex under Title VII that would include transgender persons as a protected class. (Pl.'s Br. at 8) (Arguing that the EEOC's "complaint states a claim of sex discrimination under Title VII because Stephens is transgender and [the Funeral Home] fired her for that reason."). There is no Sixth Circuit or Supreme Court authority to support the EEOC's position that transgender status is a protected class under Title VII.

B. A Transgender Person — Just Like Anyone Else — Can Bring A Sex Stereo–Typing Gender–Discrimination Claim Under Title VII.

Even though transgender/transsexual status is currently not a protected class under Title VII, Title VII nevertheless "protects transsexual persons from discrimination for failing to act in accordance and/or identify with their perceived sex or gender." *Myers v. Cuyahoga Cnty., Ohio,* 183 F. A'ppx 510, (6th Cir. 2006) (Citing *Smith v. City of Salem,* 378 F.3d 566 (6th Cir. 2004) and *Barnes v. City of Cincinnati,* 401 F.3d 729 (6th Cir. 2005)).

The seminal Sixth Circuit case on this issue is *Smith v. City of Salem*. The plaintiff in *Smith* was

born a male and had been employed by the Salem Fire Department for seven years without any negative incidents. After being diagnosed with Gender Identity Disorder, Smith began expressing a more feminine appearance on a full-time basis, including while at work. *Smith,* 378 F.3d at 568. Smith's co-workers began questioning him about his appearance and commenting that his appearance and mannerisms were not "masculine enough." *Id.* Smith then advised his supervisor about his Gender Identity Disorder diagnosis and informed him that his treatment would eventually include "complete physical transformation from male to female." *Id.* The news was not well-received by Smith's employer. Smith's superiors met to devise a plan to terminate Smith, which included requiring him to undergo three separate psychological evaluations in the hope that he would quit.

Smith ultimately filed suit and his claims against the city included a Title VII claim of sex stereotyping, in violation of the Supreme Court's pronouncements in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). The district court dismissed Smith's sex-stereotyping claim under Title VII but the Sixth Circuit reversed.

The Sixth Circuit began its analysis by looking at the Supreme Court's decision in *Price Waterhouse:*

> In *Price Waterhouse,* the plaintiff, a female senior manager in an accounting firm, was denied partnership in the firm, in part, because she was considered "macho." 490

> U.S. at 235, 109 S.Ct. 1775. She was advised that she could improve her chances for partnership if she were to take "a course at charm school," "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* (internal quotation marks omitted). Six members of the Court agreed that such comments bespoke gender discrimination, holding that Title VII barred not just discrimination because Hopkins was a woman, but also sex stereotyping—that is, discrimination because she failed to act like a woman. *Id.* at 250–51, 109 S.Ct. 1775 (plurality opinion of four Justices); *id.* at 258–61, 109 S.Ct. 1775 (White, J., concurring); *id.* at 272–73, 109 S.Ct. 1775 (O'Connor, J., concurring) (accepting plurality's sex stereotyping analysis and characterizing the "failure to conform to [gender] stereotypes" as a discriminatory criterion; concurring separately to clarify the separate issues of causation and allocation of the burden of proof).

Smith, 378 F.3d at 571-72. The *Smith* court further explained that:

> The Supreme Court made clear that in the context of Title VII, discrimination because of "sex" includes gender discrimination: "In the context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she

> must not be, has acted on the basis of gender." *Price Waterhouse,* 490 U.S. at 250, 109 S.Ct. 1775. The Court emphasized 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, 109 S.Ct. 1775.

Id. The *Smith* court concluded that Smith had stated a Title VII claim for relief, pursuant to *Price Waterhouse's* prohibition of sex stereotyping, based on his gender non-conforming behavior and appearance. The court noted that:

> His complaint sets forth the conduct and mannerisms which, he alleges, did not conform with his employers' and co-workers' sex stereotypes of how a man should look and behave. Smith's complaint states that, after being diagnosed with GID, he began to express a more feminine appearance and manner on a regular basis, including at work. The complaint states that his co-workers began commenting on his appearance and mannerisms as not being masculine enough; and that his supervisors at the Fire Department and other municipal agents knew about this allegedly unmasculine conduct and appearance. The complaint then describes a high-level meeting among Smith's supervisors and other municipal officials regarding his employment. Defendants allegedly schemed

> to compel Smith's resignation by forcing him to undergo multiple psychological evaluations of his gender non-conforming behavior. The complaint makes clear that these meetings took place soon after Smith assumed a more feminine appearance and manner and after his conversation about this with Eastek. In addition, the complaint alleges that Smith was suspended for twenty-four hours for allegedly violating an unenacted municipal policy, and that the suspension was ordered in retaliation for his pursuing legal remedies after he had been informed about Defendants' plan to intimidate him into resigning. In short, Smith claims that the discrimination he experienced was based on his failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance.

Id. at 572.

The *Smith* court explained that "[h]aving alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination." *Id.*

The *Smith* court went on to explain that the district court erred in relying on "a series of *pre-Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled

to Title VII protection because 'Congress had a narrow view of sex in mind' and 'never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex.'" *Id.* (citations omitted). In that "earlier jurisprudence, male-to-female transsexuals (who were the plaintiffs in *Ulane*, *Sommers*, and *Holloway*) – as biological males whose outward behavior and emotional identity did not conform to socially-prescribed expectations of masculinity – were denied Title VII protection by courts because they were considered victims of 'gender' rather than 'sex' discrimination." *Smith,* 378 F.3d at 573.

The *Smith* court held that the approach in those cases, and the district court's position below, "has been eviscerated[2] by *Price Waterhouse.*" *Id.* "By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms. *See Price Waterhouse,* 490 U.S. at 251, 109 S.Ct. 1775." *Id.*

Thus, "[a]fter *Price Waterhouse,* an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is

---

[2] Notably, the Funeral Home's motion and brief rely on some of the very same cases that the Sixth Circuit stated were eviscerated by *Price Waterhouse.*

engaging in sex discrimination because the discrimination would not occur but for the victim's sex. *It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination,* because the discrimination would not occur but for the victim's sex." *Smith,* 378 F.3d at 574 (emphasis added).

The Sixth Circuit then rejected the position that, because a person is transgender, that person is somehow less worthy of protection under Title VII as to a sex-stereotyping claim:

> Yet some courts have held that this latter form of discrimination is of a different and somehow more permissible kind. For instance, the man who acts in ways typically associated with women is not described as engaging in the same activity as a woman who acts in ways typically associated with women, but is instead described as engaging in the different activity of being a transsexual (or in some instances, a homosexual or transvestite). Discrimination against the transsexual is then found not to be discrimination "because of ... sex," but rather, discrimination against the plaintiff's unprotected status or mode of self-identification. In other words, these courts superimpose classifications such as "transsexual" on a plaintiff, and then legitimize discrimination based on the plaintiff's gender non-conformity by

formalizing the non-conformity into an ostensibly unprotected classification. *See, e.g., Dillon v. Frank,* No. 90–2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992).

Such was the case here: despite the fact that Smith alleges that Defendants' discrimination was motivated by his appearance and mannerisms, which Defendants felt were inappropriate for his perceived sex, the district court expressly declined to discuss the applicability of *Price Waterhouse*. The district court therefore gave insufficient consideration to Smith's well-pleaded claims concerning his contra-gender behavior, but rather accounted for that behavior only insofar as it confirmed for the court Smith's status as a transsexual, which the district court held precluded Smith from Title VII protection.

Such analyses cannot be reconciled with *Price Waterhouse,* which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. As such, discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse,* who, in sex-stereotypical terms, did not act like a

> woman. Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.

Smith, 378 F.3d at 574–75. "Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination." *Id.*

In *Barnes v. City of Cincinnati,* the Sixth Circuit concluded that the transsexual plaintiff in that case had also sufficiently pleaded a Title VII sex discrimination claim under a *Price Waterhouse* theory. *Barnes v. City of Cincinnati,* 401 F.3d 729 (6th Cir. 2005). The plaintiff in that case, Barnes, was employed by the Cincinnati Police Department. Barnes "was a male-to-female transsexual who was living as a male while on duty but often lived as a woman off duty. Barnes had a reputation throughout the police department as a homosexual, bisexual or cross-dresser." *Id.* at 733.

Following a promotion to sergeant, Barnes was assigned to District One for a probationary period. During that probationary period, Barnes "was living off-duty as a woman, had a French manicure, had arched eyebrows and came to work with makeup or lipstick on his face on some occasions." *Id.* at 734.

After Barnes was demoted from sergeant, he filed suit and asserted a claim under Title VII. After a jury verdict in Barnes's favor, the City appealed. Among other things, the City asserted that Barnes did not sufficiently plead or prove a sex discrimination claim under Title VII. The Sixth Circuit rejected that argument, explaining as follows:

> In this case, Barnes claims that the City intentionally discriminated against him because of his failure to conform to sex stereotypes. The City claims that Barnes failed to establish the first and the fourth elements of a prima facie case, because he was not a member of a protected class and he failed to identify a similarly situated employee who passed probation.
>
> *Smith v. City of Salem, Ohio,* 378 F.3d 566 (6th Cir. 2004), instructs that the City's claim that Barnes was not a member of a protected class lacks merit. In *Smith,* this court held that the district court erred in granting a motion to dismiss by holding that transsexuals, as a class, are not entitled to Title VII protections, stating:
>
> > Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim

> where the victim has suffered discrimination because of his or her gender non-conformity.
>
> *Id.* at 575. By alleging that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind defendant's actions, Smith stated a claim for relief pursuant to Title VII's prohibition of sex discrimination. *Id.* at 573, 575. Following the holding in *Smith,* Barnes established that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes.

Barnes, 401 F.3d at 737.

Accordingly, *Smith* and *Barnes* establish that a transgender person – just like anyone else – can bring a sex-stereotyping gender-discrimination claim under Title VII under a *Price Waterhouse* theory.

Here, the EEOC's complaint alleges that Stephens informed the Funeral Home that Stephens "was undergoing a gender transition from male to female and intended to dress in appropriate business attire at work as a woman from then on," and that the Funeral Home responded by firing Stephens and stating that what Stephens "was 'proposing to do' was unacceptable." (Compl. at ¶¶ 10 & 11). The complaint further alleges that the Funeral Home's "decision to fire Stephens was motivated by sex-based considerations," and that the Funeral Home

fired Stephens because Stephens "did not conform to the [Funeral Home's] sex- or gender-based preferences, expectations, or stereotypes." (Compl. at ¶ 15).

This Court concludes that, having alleged that Stephens's failure to conform to sex stereotypes was the driving force behind the Funeral Home's decision to fire Stephens, the EEOC has sufficiently pleaded a sex-stereotyping gender-discrimination claim under Title VII.

C. The Funeral Home's Remaining Arguments Are Without Merit Or Are Improperly Raised In A Motion To Dismiss Under Fed. R. Civ. P. 12(b)(6).

The Funeral Home's Motion to Dismiss makes numerous arguments. As stated above, this Court concludes that the EEOC has sufficiently pleaded a Title VII claim on behalf of Stephens. Below, the Court addresses challenges made by the Funeral Home that are not encompassed in the above analysis.

1. The Funeral Home's "Gender Identity Disorder" Arguments Are Irrelevant.

In the pending motion, the Funeral Home asserts that "[t]o the extent the EEOC's claim is that [Stephens] was terminated due to his gender identity disorder, the claim must be dismissed." (Def.'s Br. at 11). In making this argument, the Funeral Home also asserts that Gender Identity

Disorder is not a protected class under Title VII. (*Id.* at 3).

The EEOC's complaint never uses the term Gender Identity Disorder; nor does it assert that Gender Identity Disorder is a protected class under Title VII. Moreover, to the extent that the EEOC asks this Court to rule that transgender status is a protected class under Title VII, this Court declines to do so, as set forth in Section II. A. of this Opinion.

2. The Court Rejects The Funeral Home's *Ultra Vires* Arguments.

The Funeral Home also asserts that "'Title VII does not extend its protections to 'gender identity disorder'" and then takes the position that the EEOC's prosecution of this case is an *ultra vires* act. The Court rejects this argument. As stated above, the Court concludes that, having alleged that Stephens's failure to conform to sex stereotypes was the driving force behind the Funeral Home's decision to fire Stephens, the EEOC has sufficiently pleaded a sex-stereotyping gender-discrimination claim under Title VII.

3. The Funeral Home's Defenses Based Upon Its Enforcement Of An Alleged Dress Code Are Not Properly Before The Court On A Motion Brought Under Fed. R. Civ. P. 12(b)(6).

In its motion, the Funeral Home also asserts that "the Complainant [Stephens] was terminated for refusing to comply with the employer's dress and

grooming code" and therefore the claim fails. (Def.'s Br. at 19). It then cites cases that involved plaintiffs who filed suit alleging that their employer's dress codes violated Title VII.

Here, however, the EEOC's complaint does not assert any claims based upon a dress code and it does not contain any allegations as to a dress code at the Funeral Home.

To the extent that the Funeral Home seeks to proffer a defense to the Title VII claim asserted on behalf of Stephen based upon its alleged dress code, this Court agrees with the EEOC that such a defense has no place in the context of a motion brought pursuant to Fed. R. Civ. P. 12(b)(6):

> Essentially, Defendant is injecting a defense into a 12(b)(6) motion and asking the court to accept the defense as true in order to find the complaint legally deficient. This is not the proper use of a motion to challenge a complaint. As noted above, a 12(b)(6) motion is not a vehicle "to resolv[e] . . . the applicability of defenses." *Edwards v. City of Goldsboro,* 178 F.3d 231, 243-44 (4th Cir. 1999). Instead, Rule 12(b)(6) by its terms provides for a defendant to move to dismiss a complaint for "failure to state a claim upon which relief can be granted."

(Pl.'s Br. at 14).[3]

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[3] The Court also notes that although the Funeral Home makes assertions as to it having a dress code, and assertions as

CONCLUSION & ORDER

For the reasons set forth above, IT IS ORDERED that Defendant's Motion to Dismiss is DENIED.

IT IS SO ORDERED.

S/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: April 23, 2015

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to what it entails (*see* Def.'s Br. at 6-7), the Funeral Home did not submit any evidence as to its purported dress code. Thus, even if the Court wished to convert this motion to dismiss into a summary judgment motion, under Fed. R. Civ. P. 12(d), and consider matters outside of the pleadings, there would be no basis for it to do so here.

Excerpts from Title VII of the Civil Rights Act of 1964

42 U.S.C.A. § 2000e-2

§ 2000e-2. Unlawful employment practices

(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; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

October 6, 2017

Office of the Clerk
U.S. Court of Appeals for 6th Circuit
Deborah S. Hunt, Clerk
100 East Fifth Street
Cincinnati, OH 45202

RE: EEOC v. R.G. & G.R. Harris Funeral Homes
Case No. 16-2424

Dear Ms. Hunt:

Per Fed. R. App. P. 28(j), Defendant-Appellee hereby provides the Court with the memorandum issued by the United States Attorney General to all United States Attorneys and Heads of Department Components, dated October 4, 2017, entitled "Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964." The memorandum sets forth the position of the United States with respect to whether Title VII's prohibition of sex discrimination encompasses discrimination based on gender identity. The memorandum formalizes the position that the United States took in its amicus brief in *Zarda v. Altitude Express, Inc.*, No. 15-3775, 2017 WL 3277292 (2d Cir. July 26, 2017). Undersigned

counsel referenced and provided the citation for the amicus brief of the United States in *Zarda* during oral argument.

s/Douglas G. Wardlow
Douglas G. Wardlow
Legal Counsel
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
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Office of the Attorney General
Washington, D. C. 20530

October 4, 2017

MEMORANDUM

TO: UNITED STATES ATTORNEYS
HEADS OF DEPARTMENT
COMPONENTS

FROM: THE ATTORNEY GENERAL

SUBJECT: Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers to discriminate in the employment of an individual "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a) (prohibiting discrimination by private employers and by state and local governments); 42 U.S.C. § 2000e-16(a) (providing that personnel actions by federal agencies "shall be made free from any discrimination based on . . . sex"). Title VII's prohibition of sex discrimination is a strong and vital principle that underlies the integrity of our workforce.

The question of whether Title VII's prohibition on sex discrimination encompasses discrimination based on gender identity *per se,* including discrimination against transgender individuals, arises in a variety of contexts. In a December 15, 2014, memorandum, Attorney General Holder concluded that Title VII does encompass such discrimination, based on his view that Title VII prohibits employers from taking into account "sex-based considerations." Memo. at 2; *see also id.* at 1 n.l (defining "gender identity" and "transgender individuals").

Although federal law, including Title VII, provides various protections to transgender individuals, Title VII does not prohibit discrimination based on gender identity *per se.* This is a conclusion of law, not policy. The sole issue addressed in this memorandum is what conduct Title VII prohibits by its terms, not what conduct should be prohibited by statute, regulation, or employer action. As a law enforcement agency, the Department of Justice must interpret Title VII as written by Congress.

Title VII expressly prohibits discrimination "because of . . . sex" and several other protected traits, but it does not refer to gender identity. "Sex" is ordinarily defined to mean biologically male or female. *See, e.g., Etsitty v. Utah Transit Auth.,* 502 F.3d 1215, 1221-22 (10th Cir. 2007); *Hively v. Ivy Tech Cmty. Coll.,* 853 F.3d 339, 362 (7th Cir. 2017) (en banc) (Sykes, J., dissenting) (citing dictionaries). Congress has confirmed this

ordinary meaning by expressly prohibiting, in several other statutes, "gender identity" discrimination, which Congress lists in addition to, rather than within, prohibitions on discrimination based on "sex" or "gender." *See, e.g.,* 18 U.S.C. § 249(a)(2); 42 U.S.C. § 13925(b)(l3)(A). Furthermore, the Supreme Court has explained that "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment [or other employment actions] to which members of the other sex are not exposed." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 80 (1998). Although Title VII bars "sex stereotypes" insofar as that particular sort of "sex-based consideration[ ]" causes "disparate treatment of men and women," *Price Waterhouse v. Hopkins,* 490 U.S. 228, 242, 251 (1989) (plurality op.), 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, *see, e.g., Jespersen v. Harrah's Operating Co., Inc.,* 444 F.3d 1104, 1109-10 (9th Cir. 2006) (en banc).

Accordingly, Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se,* including transgender status. Therefore, as of the date of this memorandum, which hereby withdraws the December 15, 2014, memorandum, the Department of Justice will take that position in all pending and future matters (except where

controlling lower-court precedent dictates otherwise, in which event the issue should be preserved for potential further review).

The Justice Department must and will continue to affirm the dignity of all people, including transgender individuals. Nothing in this memorandum should be construed to condone mistreatment on the basis of gender identity, or to express a policy view on whether Congress should amend Title VII to provide different or additional protections. Nor does this memorandum remove or reduce the protections against discrimination on the basis of sex that Congress has provided all individuals, including transgender individuals, under Title VII. In addition, the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act and the Violence Against Women Reauthorization Act prohibit gender identity discrimination along with other types of discrimination in certain contexts. 18 U.S.C. § 249(a)(2); 42 U.S.C. § 13925(b)(l3)(A). The Department of Justice has vigorously enforced such laws, and will continue to do so, on behalf of all Americans, including transgender Americans.

If you have questions about this memorandum or its application in a case, please contact your Civil Chief or your Component's Front Office.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Equal Employment Opportunity Commission, Plaintiff, v. R.G. & G.R. Harris Funeral Homes, Inc., Defendant.	Civil Action No. 2:14-cv-14-13710 Hon. Sean F. Cox

AFFIDAVIT OF THOMAS ROST IN SUPPORT OF DEFENDANT R.G. & G.R. HARRIS FUNERAL HOMES, INC.'S MOTION FOR SUMMARY JUDGMENT

Comes Now Affiant Thomas Rost, and presents the following sworn testimony:

1. My name is Thomas Rost. I have been a resident of Bloomfield Hills, Michigan, for the past thirty (30) years. I have personal knowledge of the facts stated herein.

2. I have been working in the funeral home industry for fifty (50) years. I have been the majority owner of R.G. & G.R. Harris Funeral Homes, Inc. for the past thirty-five (35) years. I currently own 94.5% of R.G. & G.R. Harris Funeral Homes, Inc. R.G. & G.R. Harris Funeral Homes, Inc. operates three funeral home locations and the

Cremation Society of Michigan. I have operated up to six different funeral homes at one time.

. . .

7. I operate R.G. & G.R. Harris Funeral Homes, Inc. as a ministry to serve grieving families while they endure some of the most difficult and trying times in their lives.

8. R.G. & G.R. Harris Funeral Homes, Inc. strives to meet clients' emotional, relational, and spiritual needs by training staff in grief management and maintaining strict codes of conduct and decorum at all times so that grieving clients have a place free of distractions to grieve and heal.

9. R.G. & G.R. Harris Funeral Homes, Inc. attempts to create a transformational experience in order to help our clients, their families, and friends begin the healing process when they have lost a loved one.

. . .

15. Stephens, as a funeral director embalmer, was often tasked with removing the remains of a loved one from various facilities including hospitals, nursing homes, hospices, and private residences. When performing this function, he would often be the first member of R.G. & G.R. Harris Funeral Homes, Inc. to make face-to-face contact with the family.

. . .

20. Funeral directors may facilitate the selection of clergy by the family. Funeral directors will also often facilitate the first meeting of clergy and family members. The funeral director can play a role in building the family's confidence about the role the clergy will play, clarifying what type of religious message is desired, and integrating the clergy into the experience. Funeral directors can give the family a voice by permitting them to speak freely about their unique emotional, relational, and spiritual concerns.

. . .

29. As a funeral director embalmer, Stephens was involved in greeting guests. Indeed, he regularly served as a parking attendant for the guests. In addition, on rare occasions, Stephens facilitated the funeral service, and on those occasions he could have been involved in making opening and closing statements as described in the preceding paragraph.

30. The family's final farewell is a highly anticipated moment in the process and in many cases the most difficult moment in the funeral experience. The deceased is no longer the main attraction, the family's exit from the deceased is. The funeral director would be present at the casket, provide as private a place as possible, and gather family for a final prayer with clergy.

. . .

33. The funeral director embalmer position is physically demanding. Funeral director embalmers must be able to move the deceased alone or with assistance, and they may be involved in carrying the casket and remains.

34. Maintaining a professional dress code that is not distracting to grieving families is an essential industry requirement that furthers their healing process.

35. R.G. & G.R. Harris Funeral Homes, Inc. administers its dress code based on our employees' biological sex, not based on their subjective gender identity.

. . .

39. Having known Stephens for more than five years and having observed Stephens in the funeral home environment, I believe that Stephens wearing a female uniform in the role of funeral director would have been distracting to my clients mourning the loss of their loved ones, would have disrupted their grieving and healing process, and would have harmed my clients and my business and business relationships.

. . .

50. I would not have dismissed Stephens if Stephens had expressed to me a belief that he is a woman and an intent to dress or otherwise present as a woman outside of work, so long as he would have continued to conform to the dress code for male funeral

directors while at work. It was Stephens's refusal to wear the prescribed uniform and intent to violate the dress code while at work that was the decisive consideration in my employment decision.

51. I would not discharge or otherwise discipline employees who dress as members of the opposite sex on their own time but comply with the dress code while on the job.

. . .

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

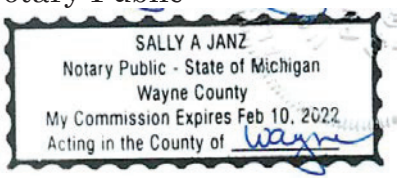
FURTHER, AFFIANT SAYETH NAUGHT.

s/ Thomas Rost
Thomas Rost

SUBSCRIBED AND SWORN TO before me this 6 day of April, 2016, by Thomas Rost.

s/ Sally A. Janz
Notary Public

My commission expires:
2-10-2022



Excerpts from Deposition of Aimee Stephens dated December 16, 2015

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BY MR. KIRKPATRICK:

Q. I just want to follow up on our last questions and ask you, was there anything during your employment with R.G. & G.R. Funeral Home that would let anyone, any of the employees perceive you to be anything other than a man?

A. No.

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Q. Hypothetically speaking, you presented to this letter to Tom Rost and if he would have allowed you, for lack of a better term, to present as a woman, would that preclude you from going back to present as a man later on?

MR. PRICE: Objection, calls for speculation.

To the extent that it's relevant, go ahead and answer.

A. To go back as a male?

BY MR. KIRKPATRICK:

Q: Yes.

A. No.

Q: If a male funeral director, hypothetically speaking, wanted to present as woman at work, is it your position the funeral home must allow him to do so?

MR. PRICE: Objection. Again, same

objection. But go ahead and answer.

A. Yes.

BY MR. KIRKPATRICK:

Q. Why?

A. If that individual is willing to adhere to the female dress code, then I see no problem in it.

Q. Okay. So following that up, what you just told me, would the funeral home be required -- again, hypothetically speaking -- to allow a male funeral director who was, say, bald and neatly trimmed beard and mustache, to wear a professionally female dress and high heels while meeting with a bereaved family or officiating at a funeral?

MR. PRICE: Objection; calls for speculation. No such facts in evidence.

BY MR. KIRKPATRICK:

Q. Hypothetically speaking.

MR. PRICE: Go ahead and answer.

A. If that's the way he was going to present himself, no.

BY MR. KIRKPATRICK:

Q. Why not?

A. Typically doesn't meet the expectations of a female.

Q. What meets the expectations of a female?

A. Your guess is as good as mine. I mean you assume if she has hair, long hair, as long as it's groomed

nicely, what difference does it make what she wears as long as it's within that dress code.

Q. Even though that male believed -- wanted to be perceived as a female?

MR. PRICE: Same objection.

A. I think I've already answered your question.

BY MR. KIRKPATRICK:

Q. Well, actually, that was a new question.

A. The same one you asked before.

Q. Can you answer the question, please?

MR. PRICE: Objection; asked and answered. But you can answer.

MR. KIRKPATRICK: Actually, it has not been asked and answered. But go ahead.

A. Repeat the question.

MR. KIRKPATRICK: Can you repeat the question, please?

(Record read back by reporter as follows:

Q. Even though that male believed -- wanted to be perceived as a female?)

A. I think if you're going to present in that fashion, you have to basically adhere to the part you're professing to play.

Excerpts from the 30(b)(6) Deposition of Thomas Rost dated November 12, 2015

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Q. Okay. Now, why did you decide to offer a severance agreement to Stephens?
A. It was just determined that we would want to approach it that way. I don't really recall why.
Q. Okay. Do you -- have you ever offered severance agreements to any other employees that you've terminated?
A. I have not.
Q. You can't think of any specific reasons why you would choose to do so in this case?
A. Not specifically.

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Q. Generally did you have any mindset behind offering that -- your thinking behind offering an agreement in this case?
A. Well it was just, I would say, to see if there was some kind of a fair agreement that we could come to with his leaving under the circumstances.
Q. Okay.

Excerpts from the EEOC's Response to R.G. & G.R. Harris Funeral Homes' First Set of Interrogatories

Interrogatory No. 3: State in detail and with specificity what you mean, in paragraph 10 of your Amended Complaint, when you state that "Stephens" is a "transgender woman."

REPLY:

Transgender refers generally to gender nonconforming individuals, especially those whose gender identity (i.e., inner sense of being male or female) or gender expression (i.e., outward appearance, behavior, and other such characteristics that are culturally associated with masculinity and femininity) is different from the sex assigned to the person at birth. Stephens is a transgender woman because her gender identity, female, is different than the sex assigned to her at birth, male.