No. 18-107

IN THE

Supreme Court of the United States

R.G. AND G.R. HARRIS FUNERAL HOMES, INC.,
Petitioner,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
ET AL., *Respondents*.

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

Brief *Amicus Curiae* of Public Advocate of the United States, Conservative Legal Defense and Education Fund, Poll Watchers, I Belong Amen Ministries, David Arthur, Policy Analysis Center, Eagle Forum Foundation, Pastor Chuck Baldwin, Restoring Liberty Action Committee, and Center for Morality in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

Public Advocate of the United States is a nonprofit social welfare organization, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Conservative Legal Defense and Education Fund, Poll Watchers, Policy Analysis Center, and Eagle Forum Foundation are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3). I Belong Amen Ministries is a ministry headed by David Arthur, a former homosexual and former transgender person. Pastor Chuck Baldwin is Senior Pastor of Liberty Fellowship in Kila, Montana. Restoring Liberty Action Committee and Center for Morality are educational organizations.

Amici nonprofit organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Some of these *amici* previously filed two *amicus* briefs in this case:

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

- Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, in the U.S. Court of Appeals for the Sixth Circuit (May 24, 2017); and
- Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, in the Supreme Court of the United States on Petition for Certiorari (August 23, 2018).

Additionally, some of these *amici* previously filed two briefs addressing a related issue in Altitude Express, Inc. v. Zarda (now before this Court as No. 17-1623; oral argument scheduled for October 8, 2019):

- Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, in the U.S. Court of Appeals for the Second Circuit (*en banc*) (July 26, 2017); and
- Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, in the Supreme Court of the United States on Petition for Certiorari (July 2, 2018).

SUMMARY OF ARGUMENT

William Anthony Beasley Stephens, a biological male, sought to involve his employer, R.G. snd G.R. Harris Funeral Homes, in his effort to transition from male to female. Suffering from "gender dysphoria," Stephens informed his employer by letter that he was under a treatment regimen, including working full-time as a "woman" for a year before undergoing sex reassignment surgery. In order to complete this part of his therapeutic program, Stephens sought to appear

in female attire, conducting himself as a "woman" with the new name "Aimee Stephens." After consideration of Stephens' letter, the funeral home owner, Mr. Rost, offered a severance package and told Stephens that his "services would no longer be needed." Unsuccessful in his effort to persuade Mr. Rost to accept the conditions of employment Stephens demanded, Stephens took his case to the EEOC, claiming that he had been discriminated against. The EEOC took action against the Funeral Home for violation of Title VII of the 1964 Civil Rights Act.[2]

On the facts of this record the Funeral Home did not discriminate against Stephens "because of ... sex." Indeed, Stephens was not even fired because of his gender identity. Nor was the decision to dismiss him based on any evidence of sex-based stereotyping. Rather, Stephens lost his job because he refused to abide by the dress code for males, and because Mr. Rost decided not to support Stephens request based on his moral and religious objections to what Stephens was attempting to do.

Not only is the transgender movement wrong-headed, it is also unreal, contrary to the law of the Creator who made them male and female, and who

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[2] *See* 42 U.S.C. § 2000e-2. "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...." (Emphasis added.)

made them in His image. As a biological male at birth Stephens, neither counseling nor hormones, nor sex reassignment surgery could change him into a biological female. The Court never even discussed whether Stephens' effort to change sexes could be successful. The gender identity disorder which Stephens claimed to be suffering is not a physical problem, but an inability to mentally conform to a a physical reality.

Although the issue before the Court is the limited to the scope of one federal statute, a decision to force those who do not want to cater to the demands of so-called "transgender" persons to do so would have far-reaching consequences. The Sixth Circuit's opinion sets no limits as to who could demand the special rights that Stephens is demanding. The Sixth Circuit gave no respect to the rights of others that would be trampled upon by a decision granting Stephens the relief he sought. A decision in favor of Stephens would only encourage more persons to pursue sex changes — an unobtainable objective. Most importantly, forcing employers to cater to transgender persons would impose dangerous and often irreversible actions imposed on children who may express some natural and temporary sexual confusion prior to and during puberty.

ARGUMENT

I. STEPHENS WAS NOT FIRED "BECAUSE ... OF SEX."

Respondent Aimee Stephens — nee William Anthony Beasley Stephens — claims that he[3] was fired by his funeral home employer either for: (i) "being transgender;" (ii) "living openly as a woman;" or (iii) "failing to conform to its owner's views of how men and women should identify, look, and act" (*i.e.,* violating "sex-based stereotypes"). Brief for Respondent Aimee Stephens ("Resp. Br.") at 3, 5. None of these claims is supported by the facts as they appear in the record.

To the contrary, Stephens lost his job with Harris Funeral Homes because he refused to conform to the dress code for males. *See* Brief for the Petitioner at 10. Stephens insisted that the funeral home change its established conditions of employment, in an effort to "alleviate the anguish [he is] experienc[ing]" as he undergoes "[the] process, known as gender transition," based on his claim that he was suffering from

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[3] Respondent Anthony Stephens changed his name to Aimee and is occasionally referred to by that name herein. However, these *amici* do not follow the prejudicial nomenclature adopted by the Sixth Circuit in referring to the Respondent "biological male" as "she" and "her." Use of incorrect pronouns at best obscures, but actually concedes, that it is possible for a person to change sex from a man to a woman or *vice versa.* By assuming the truth of a fact never proven, the circuit court's adoption of the Respondent's lexicon of the case constitutes evidence of judicial prejudgment and bias.

"clinically significant distress known as gender dysphoria." Resp. Br. at 6-7. In short, Stephens lost his job because he persistently demanded his employer subordinate its business practices and goals to an experimental treatment program to serve Stephens' personal psychological and sociological desires in pursuit of his utterly unobtainable goal to become a woman. Thus, as the record makes clear, Stephens did not lose his job because of his gender identity, as claimed. (Moreover, even if Stephens had lost his job because of his gender identity, no action lies under Title VII, as discussed in Section II, *infra*.)

A. Stephens Was Not Fired because of His Gender Identity.

Stephens contends that Harris Funeral Homes fired him "for (1) having a male sex assigned at birth and (2) living openly as a woman" (Resp. Br. at 20), that is, for being a "woman ... transgender...." *Id.* Stephens defined the term "woman transgender" earlier in his brief as follows: "assigned a male sex at birth and [having] a female gender identity." Resp. Br. at 4. To be a transgender, then, there must be an intersection of two realities in one person — an initial "assignation" of one sex at birth, and a subsequent discovery of a different sexual reality later in life.

At the time of firing, there was nothing to indicate that Harris Funeral Homes' decision was based upon anything that appears on Stephens' birth certificate. To contend otherwise, as Stephens has done — that Harris Funeral Homes would not have fired Stephens if he "were assigned a female sex at birth" (Resp. Br. at

20) — is illogical. Rather, the Harris Funeral Homes' firing rested upon Stephens' refusal to dress in a manner consistent with his undisputed prior (and accurate) representations of himself to be a man — not upon a sex designation listed on any government-issued record. *See* Resp. Br. at 9. To contend otherwise, as Stephens has done, makes absolutely no sense.

Second, on the date Stephens was fired, he was not, in fact, "living openly as a woman," having "managed to hide" his real female identity "all these years." Resp. Br. at 7-8. Rather, in a letter dated July 31, 2013, he represented that, although he had always lived openly as a man, he now intended to change all that and live openly as a woman when he returned to work on August 26, 2013, at the end of his vacation. *See* Resp. Br. at 8. At best, then, Harris Funeral Homes fired him for his newly declared intent to dress and attempt to act at work as though he were a woman — not for any past conduct or "for identifying and living openly as a woman." Resp. Br. at 20 and 23. Therefore, Stephens has failed to show that Harris Funeral Homes' action was taken "because of ... sex in violation of Title VII." Resp. Br. at 20.

B. Stephens' Firing Was Not Based upon Sex-Based Stereotypes.

1. This Case Is Not Governed by the Price Waterhouse Rule.

Stephens presumes that he was fired "for failing to conform to sex-based stereotypes ... about how men or

women should look and act [in violation of] Title VII." Resp. Br. at 28. In support of this contention, Stephens relies heavily on this Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), wherein a woman was denied a partnership because she "failed to meet her employer's expectations of how men and women should look and behave." Resp. Br. at 29-30. More specifically, this Court found that the only basis for the corporation's action was sexual stereotyping, the decision having been made solely upon preconceived notions on how women should conduct themselves in the corporate world. *Id.*

In contrast, the Funeral Home owner (Mr. Rost)'s objection to the proposition that Aimee, a biological male, would be reassigned female attire did not rest upon a sex-based stereotype. Instead, his objection was based upon a moral conviction that it was just plain wrong for a man to dress in a uniform assigned to be worn by women, just as it is equally wrong for a woman to dress in clothing assigned to men. Resp. Br. at 9.

In sum, Mr. Rost did not "expressly admit[] that he fired Stephens because he was not going to conform to his particular views about how men and women must identify, appear and behave." Resp. Br. at 28-29. His reasons were not based on stereotypes, but based in his well-understood need to act in conformity with his Biblical faith that God created mankind male and female, as revealed in the Holy Scriptures.

2. Being Transgender Is Not Inherently Based on Sex Stereotypes.

Stephens would foist upon Mr. Rost an entirely different worldview with the statement that discriminating "against an employee for being transgender inherently enforces the specific sex-based stereotype that persons **assigned a particular sex at birth** will identify, appear, and behave in ways seen as typical of that sex throughout their entire lives, and therefore always violates Title VII." Resp. Br. at 29 (emphasis added).

Stephens' brief never actually identifies who does the "assigning" of sex at birth, so who would that be? Playing along with his terminology, Stephens would likely respond in accord with the new fantasy lexicon of political correctness that sex is "assigned" by the doctors, nurses, or parents in the delivery room. However, those observing the newborn baby may "recognize" and "record" the sex of the child based on observing the baby's anatomy, but it is insanity to believe that a person in the delivery room "assigns" a particular sex to the child in a random or arbitrary fashion. Those who deny the existence of a Creator could reach any conclusion that their minds may entertain, but it is the Creator God who assigns a person's sex. As to our nation's history, who writes the "Laws of Nature and of Nature's God"? Who endows us with "certain unalienable Rights"? Whose protection did the Framers invoke when they asserted their "firm reliance on the protection of divine Providence?" That same Creator God who oversaw the

creation of the nation also created them "male" and "female."

According to historically understood truths, Stephens' argument is truly ironic. In order to fit his claim of transgender discrimination into the category of sex-based stereotyping, Stephens unwittingly invokes the law of the Creator — that all persons are born either male or female. A transgender accepts that "binary model" and then seeks to switch sexes. Without a binary model, how could one seek to attain transgender status? By his own definition, in order to qualify as a transgender woman, Stephens first must have been marked as born of a member of the "male sex." *See* Resp. Br. at 4.

Thus, whatever the injury suffered by Stephens, it is self-generated. It is no wonder that Stephens suffers "like many transgender people [because of] disparity between her gender identity and the sex she was assigned at birth [which has] led to clinically significant distress known as gender dysphoria." Resp. Br. at 6. Sadly, Stephens' "treating clinicians" (who do not appear to be identified as physicians) recommend that persons with gender dysphoria "take steps to live consistently with their gender identity to alleviate the anguish they experience." Resp. Br. at 6-7. While his decision to dress as a woman is Stephens' choice, he may not use Title VII to force his employer to cooperate and facilitate that choice by ignoring Stephens breach of the business dress code for males.

II. THE COURT'S REFUSAL TO ADDRESS WHETHER A MALE CAN TRANSITION TO FEMALE TOTALLY UNDERMINES ITS RULING.

A. The Circuit Court Found that Stephens Was a Biological Male.

The first sentence of the circuit court's opinion states that Respondent Aimee Stephens "was born biologically male." EEOC v. R.G. & G.R. Harris Funeral Homes, 884 F.3d 560, 566 (6th Cir. 2018). The court could have simply used the present tense to report that Stephens "is" a male. However, to have so stated that enduring truth would have undermined the entire basis for its decision. Of course, the court understood that it had to impose a temporal qualification on the description of Stephens' sex — when "born" — to provide the necessary predicate for its unstated and unproven assumption that sex[4] is a mutable characteristic, changeable based on each person's feelings. The court then refers to Stephens as "she," with a footnote that explained that the court

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[4] Part of the wizardry of the modern effort to promote transgenderism was embraced by the circuit court when its analysis substituted the term "gender" for the statutory term "sex." Following Stephens' lead, and in accordance with modern notions of "political correctness," the court below avoided discussion of the meaning of the word "sex," substituting and focusing on "gender" instead. Until recognized, this technique has provided an effective deception, since it is much easier to envision there being more than two "genders" — a term that most Americans learned in studying the grammar of foreign languages — than more than two "sexes."

chose to defer to Respondent's perception of himself, rather than recognize the biological reality that it had just recited.[5] The court then accepted without question or comment Stephens' assertion that he "intended to transition from male to female..." *Id.*[6] In adopting the Respondent's theory and lexicon of the case, the court began its trip down the rabbit hole of transgenderism, spiraling to its utterly unsurprising assumption — that there "really" is such a thing as a transgendered woman who is no longer a man.

Yet even with the addition of the temporal qualification — when "born" — the court completely failed to lay a factual foundation for its own theory of the case. The record is clear that Stephens was, is, and remains, a biological male who refused to comply with his employer's sex-specific dress code for men (*id.* at 572). Having been found by the court to be a man, Stephens' claim to be the victim of discrimination "because of ... sex" cannot survive a motion to dismiss unless he can prove that he can change his biological sex. No such evidence for biological change can be found in the circuit court's (or district court's) opinion, yet this was the operative, unspoken finding of the circuit court in ruling for Stephens.

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[5] "We refer to Stephens using female pronouns, in accordance with the preference she has expressed through her briefing to this court." *Id.* at 566, n.1.

[6] Later in its opinion, the court makes further rhetorical concessions to Respondent's claims, including the statement that Stephens had "presented as a man" during his employment, and calling him "a transgender woman...." *Id.* at 567.

The circuit court did make one reference to whether a person's sex is a mutable characteristic. That reference came when rejecting the Funeral Home's argument that "unlike religion, a person's sex cannot be changed; it is, instead, a biologically immutable trait." The court's response was "[w]e need not decide that issue; even if true, the Funeral Home's point is immaterial" under Price Waterhouse, which requires sex to be irrelevant. *Id*. at 576. Thus, the court found that even if the plaintiff could not actually "transition" to being a female and become a transgender female, its ruling would be unaffected. The court actually cited favorably a law review article which pooh-poohed "the current reliance on medical diagnoses" apparently preferring to rely on how a person feels as being "more realistic" and "more appropriate" to know their "gender identity" than medical science. *Id*. at 575, n.4. It is no wonder that the court side-stepped the issue of mutability, asserting that it "need not" decide that issue.

B. Gender Identity Disorder Identifies a Flawed Mental State, not a Flawed Physical State.

The circuit court characterized the issue before it as follows: "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." *Id*. at 573. Actually, Stephens had announced that he would not comply with the Funeral Home's sex-specific dress code to dress according to his sex as a biological male. The

court's attempt to place blame on the Funeral Home for harboring some type of aberrational and antiquated "notion" about sex is unavailing. The truth is that it was the Funeral Home that was operating based on the reality of Stephens' biological sex — which the circuit court (and, indeed, Stephens, *see* Resp. Br. at 8) had already conceded was male.

By contrast, it was Stephens who was asserting a legal theory based on a delusion about his biological sex. It was Stephens who demanded the Funeral Home to bow to that delusion — that his true identity was that of a female — even though the court already had determined that he was a biological male. Stephens recognized that his view of his own sex was aberrational, as his letter to the Funeral Home described his struggle with "a gender identity disorder." To adapt to that disorder, he would return from his vacation as his "true self, Amiee [sic] Australia Stephens," then dress and "live and work full-time as a woman for one year," after which he "intend[ed] to have sex reassignment surgery." Resp. Br. at 8. Even the circuit court cited its earlier case of Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004), for the Sixth Circuit's definition of a "transgender person" as being "someone who 'fails to act and/or identify with his or her gender.'" EEOC at 576. Applying that definition, Stevens is a person who "fails to act and/or identify with his ... gender," which is male. That Sixth Circuit definition identifies the gender as being the reality, and the individual who

"fails to act and/or identify" in conformity with that reality as having a problem of the mind.[7]

The good news is that transgender status is not immutable, and the mind's perspective about the body can, and often does, change over time. Consider the situation of David Arthur, one of the *amici curiae* filing this brief. David Arthur was sexually abused from around the age of five. He was involved in homosexual behavior, and then worked as a transgender prostitute. He contracted HIV/AIDS at age 14, and by age 37 he was on his deathbed. That was in 2009. With his body weakening, in a hospital bed that was placed in his bedroom at home, David Arthur hit rock bottom and turned to God, who rescued him from the captivity of his addictions. Today, he is healthy and strong, and living proof that people are not immutably transgendered or homosexual. On his website,[8] David summarized the matter as follows:

> Using myself as an illustration, as a former homosexual, and former transgender person, with decades of experience in that world, I can say without a shadow of a doubt that homosexuality (including transgenderism) is absolutely mutable and curable!

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[7] Stephens' letter to Harris Funeral Homes said that he "'decided to become the person that [his] mind already is.'" EEOC at 568.

[8] More of David Arthur's story can be found at "Meet David" on the website of I Belong Amen Ministries.

> God has created each one of us in a heterosexual design which cannot be altered. We are born male or female. Our DNA makes us male or female and no surgery in the world can change our DNA. Changing our sex/gender is not possible. Indeed, homosexuality is not truly a sexual orientation at all, but just one type of sin, and a type of bondage. Those who tell us that homosexuality is just one of many sexual orientations seek to keep us in bondage, whether they know it or not.
>
> Once we embrace our heterosexual design, we can find the freedom from the bondage of homosexuality. Being set free from homosexuality (including transgenderism) is just as desirable, just as real, and just as common, as a drug addict being set free from the bondage and hold of drugs. Our "true self" is exactly who we were created to be from conception....[9]

For refusing to accept Stephens' admittedly flawed view of reality, the court would have Harris Funeral Homes penalized, even though it recognized the owner's conviction that to do so would require that he become "complicit 'in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift.'" EEOC at 569.

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[9] *See* website of i belong Amen Ministries

C. Neither Counseling nor Hormones nor Gender Reassignment Surgery Can Cause a Transition from One Biological Sex to Another.

Buried in a footnote which discussed both "'religious identity'" and "'gender identity,'" the court below revealed its own confusion in attempting to determine the class of persons who would benefit from its ruling. The court described gender identity as being "fluid, variable, and difficult to define" with "'a deeply personal, internal genesis that lacks a fixed external referent.'" *Id.* at 575, n.4. Despite its inability to describe the employee beneficiaries of the rule of law it had just articulated, it ruled against the employer here and laid down a rule which would give special privileges to any person claiming to be transgender.

The circuit court stated: "We also hold that discrimination on the basis of transgender and transitioning status violates Title VII." *Id.* at 574-75. The court offered no definitions or limiting principles. Nowhere does the court describe what it takes to qualify as "transgender" or "transitioning." In this case, the record does not reflect that Stephens took sex-altering hormones, or that he had ever donned a dress. The court does not impose a requirement for counseling or surgery, accomplished or scheduled. There is no period of time over which an individual must suffer from perceived gender dysphoria. The court's test appears to set the lowest possible threshold to qualify for its philosophically crafted special

protections for transgendered persons: "I feel, therefore I am."[10]

Prior to the advances in the field of plastic surgery, most transgender behavior did not alter anatomy (although cases of self-mutilation certainly occurred), but was limited to cross-dressing as a transvestite, often accompanied by a person acting in a way to emulate the stereotypical behavior of the opposite sex.[11] Transvestite behavior certainly has been found throughout history, and was addressed in Holy Writ.[12] However, the notion that a "biological male" engaged in cross-dressing could in some sense actually become a woman appears to be of more recent origin. For

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[10] *See generally* R. Descartes, Discourse on the Method, Part VI (1637).

[11] An individual's voluntary choice to choose surgical sexual mutilation is quite different from having that choice imposed, as has been done at times historically to slaves and those who serve the state. For example: "All previous caliphates relied on a special class of bureaucrats to provide stability and statesmanship. Those were eunuchs, who were unable to impregnate the women sequestered in the palace. Eunuchs were without family and dependent upon the caliph for support. For four millennia and through many different Asian empires and caliphates, eunuchs proved themselves to be efficient governors. Their presence was, again, a sign of the power and authority of the ruler." "Islamic State lacks key ingredient to make 'caliphate' work: eunuchs," The Conversation (Oct. 20, 2014).

[12] *See Deuteronomy* 22:5 ("The woman shall not wear that which pertaineth unto a man, neither shall a man put on a woman's garment: for all that do so are abomination unto the LORD thy God.").

example, during the post-World War I period of sexual liberation in the Weimar Republic:

> transvestite magazines [debated] what the identity category "transvestite" meant. Authors disagreed over whether it denoted people who only wished to dress in the clothing of the other sex, people whose true sex was not their birth sex and who had transitioned to their true sex or wanted to do so. By the 1950s, sexology considered the former "transvestites" and the later "transsexuals." [L. Marhoeffer, Sex and the Weimar Republic: German Homosexual Emancipation and the Rise of the Nazis (Univ. of Toronto Press: 2015) at 59-60.]

Irrespective of the depth of a person's longing to have been born as the opposite sex, and despite his or her personal religious views, the world is governed by certain unalterable natural laws, including, for example, gravity and creation. *See Genesis* 5:2 ("Male and female created he them; and blessed them...."). Science teaches us that every human cell (other than eggs and sperm) contains 23 pairs of chromosomes, and 22 of those pairs are identical in both males and females. However, one pair of chromosomes differs between males and females — termed the sex chromosomes. Females have two copies of the X chromosome (designated "XX"), while males have one X and one Y chromosome (designated "XY").[13] This

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[13] National Institutes of Health, U.S. National Library of Medicine, "How many chromosomes do people have?"

distinction causes enormous differences throughout the male and female body.

However, today a wide variety of surgeries are available to be performed on men wishing to look more like women and women wishing to look more like men.[14] Anatomical surgeries may change one's visible anatomy, but can never change one's sex.

One plastic surgeon offers a smorgasbord of: "Female-to-Male Top Surgery," "Female-to-Male Transition Top Surgery," "Male-to-Female Transition Top Surgery," "Male to Neutrois[15] Top Surgery," and "Female-to-Neutrois Top Surgery."[16] Another offers Male-to-Female "Scrotal Skin Reduction," "Limited-Depth Vaginoplasty," and "Orchiectomy."[17] One California surgeon offers what he calls "Gender

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[14] One 35-year-old man from Hoboken, New Jersey, seeking to achieve a particular female image, achieved a degree of fame as he endured repeated plastic surgeries costing over $1 million so that he could look like a Barbie doll. A. Klausner, "Transgender 'Barbie' blows $1M on plastic surgery," *New York Post* (Oct. 16, 2017).

[15] One website, Neutrois.com, defines Neutrois as "a non-binary gender identity that falls under the genderqueer or transgender umbrellas," including "Neutral-gender; Null-gender; Neither male nor female; Genderless; Agender."

[16] *See* website of Dr. Sheldon Lincenberg who offers mastectomies for $8,400-$8,600.

[17] *See* website of Dr. Keelee MacPhee.

Nullification" surgery.[18] The American Society of Plastic Surgeons ("ASPS") calls these "Gender Confirmation" surgeries and reports that in 2018, males had such procedures 2,885 times (up from 2,483 in 2017), and females had such procedures 6,691 times (up from 5,821 in 2017), making this a growth industry for that profession.[19] Another earlier report on ASPS data which broke down this category of surgeries by type showed that in 2016, zero females had genital surgery, and only 15 men; only 80 females had breast/chest surgery, and 121 men; while 1,417 females had facial surgery, along with 1,623 men.

No matter how "gender confirming" these surgeries may seem to be, in the words of those surgeons marketing to this population group, that does not make them "gender reassigning" and certainly does not make them sex-changing — and the circuit court never found that they could change their sex.

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[18] *See* website of Dr. Peter Davis ("[G]ender nullification, also known as male to eunuch or "smoothie" procedures. The procedure includes a complete penectomy, orchiectomy, a reduction of the scrotal sac, and shortening of the urethra. The goal is to leave the area as a smooth unbroken transition from the abdomen to the groin.").

[19] American Society of Plastic Surgeons, 2018 Plastic Surgery Statistics Report.

D. The Test Adopted by the Circuit Court Would Not Ensure Equality for Transsexual Persons, but rather Grant Them Special Rights.

The circuit court could not have been more clear as to how its reading of the statutory phrase "because of ... sex" should be understood. As the circuit court explained it, "[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex," which can be proven by a person fired because the person "is transgender and transitioning from male to female." EEOC at 571. In other words, transgender status is now to become a completely protected class. The only possible ways expressly addressed by the court for the Funeral Home to avoid liability were the ministerial exception to Title VII and the Religious Freedom Restoration Act. *See* Brief for the Petitioner at 12.

Thus, under the court's ruling, a Christian funeral home cannot avoid having a funeral director come to work equipped with a beard, lipstick, and a dress, using affected female mannerisms, comforting the uncomfortable bereaved, and using the ladies' room along with the women and girls attending a service. The Funeral Home would be powerless to stop this.

III. ANY DECISION FAVORING RESPONDENT'S TITLE VII CLAIMS WILL PROMOTE SEXUAL ANARCHY AND GENDER TYRANNY.

A. This Court Should Not Defer to Stephens' Professed Female Gender Identity on His Say-So. To Do So Would Be Lawlessness.

Stephens begins his Statement of the Case with his startling and unverifiable recollection of somehow "**knowing** she was a **girl** when she was five years old." Resp. Br. at 5 (emphasis added). This claim is simply preposterous![20] Not only is it contrary to common sense, but it is also contrary to the actual birth record that he himself admits "presumed" him to be a boy, based on his "external reproductive anatomy." *Id.* Indeed, based on his own "sexual stereotype" notions, he may have had what he now describes as "girl" thoughts growing up, but by his own confession, no one can really know one's "gender identity." He insists that "everyone" has one that is tucked away in the deep recesses of the human psyche. *See id.*

But Stephens' vision of himself is more grandiose. He defines himself as "a woman who is transgender, which means that she was **assigned** a male sex at birth and has a female gender identity." Resp. Br. at 4 (emphasis added). With this bold statement,

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[20] At age five, some children believe they are dinosaurs, some believe they are superheroes who can fly, and some believe they are monster trucks.

Stephens stands against the revealed Word of God, which proclaims:

> In the day that God created man, in the likeness of God made he him; Male and female created he them; and blessed them, and called their name Adam, in the day when they were created. [*Genesis* 5:1-2.]

Singlehandedly, by this lawsuit, Stephens would have this Court override the Creator and the order of His universe — and brazenly so: (i) by delimiting God Almighty to the role of an "assignor" as to one's sex, and (ii) by substituting man's self-image for the image of God, thereby subjugating the law of the Creator to the will of the creature. This is lawlessness.

As Sir William Blackstone observed: "Man, considered as a creature, must necessarily be subject to the laws of his creator, for he is entirely a dependent being." I Blackstone's Commentaries on the Laws of England at 39 (Univ. Chi. Facsimile ed: 1765). Stephens would have it just the opposite, and according Blackstone, Stephens is a "being, independent of any other, [with] no rule to pursue, but such as he prescribes to himself." *Id.* For years, as he explains it, Stephens allowed others to define his gender identity, but on July 31, 2013, he exercised his innate power as a "transgender woman" with a letter addressed to his "Friends and Co-Workers" and declared his independence from the male sex to which he had been "assigned" at birth. *See* Resp. Br. at 7-8.

B. This Court Must Not Compel Others to Endorse and Facilitate Stephens' Desired Therapeutic Program. To Do So Would Be Involuntary Conscription.

Stephens claimed that he had suffered from "gender dysphoria" most all of his life, a "clinically significant distress" condition wherein he "suffered because of the difference between the sex she understood herself to be and the sex she was assigned at birth." Resp. Br. at 6. Throughout his years of employment by Harris Funeral Homes, Stephens hid the "despair, loneliness, and shame she suffered," and yet, he compiled a record of "exemplary work" showing both "'sensitivity and compassion'" to the Funeral Home's clientele. *Id.* Beginning with the third year of employment, Stephens "began treatment with a therapist to address" this condition, and it was recommended that Stephens "take steps to live consistently with [his] gender identity to alleviate the anguish [he] experience[d]." *Id.* at 6-7. At its core, this process of "gender transition" required Stephens to "liv[e] openly" as a woman for one year before "certain surgical treatment." Resp. Br. at 7. After years of "professional counseling, and with the support of [his] wife Donna, [Stephens] decided [he] could no longer delay [his] transition." *Id.*

So, on July 31, 2013 — without prior notice to his employer or fellow workers — Stephens issued a letter that, in his words, "**described** the challenges [he] had faced in accepting [himself] as a woman and outlined [his] **prescribed treatment,** which included living openly as a woman." Resp. Br. at 7. In his July letter,

Stephens audaciously presumed that his employment environment must be reshaped to accommodate his personal needs. Indeed, on its face the letter began and ended with Stephens' exclusive focus on himself:

- I count you all as my friends.
- I have a gender identity disorder.
- I have decided to become the person that my mind already is.
- I intend to have sex reassignment surgery.
- I must ... 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.
- I need to do this for myself. [Resp. Br. at 8.]

The letter reads like a manifesto by which matters of wages and hours, restroom use, public relations, and, above all, the "appropriate[ness] [of] business attire" would be dictated. Indeed, Stephens' letter appears to anticipate that he and his therapist would unilaterally determine what business attire would be "appropriate" — skirt suit or pants suit — for example. *See* Resp Br. at 9. However, it is clear that Stephens believed that his therapeutic needs would trump the Funeral Home's sartorial standards.

To be sure, Stephens closed his letter, expressing his "**wish** that I can continue to work at R.G. & G.R. Harris Funeral Home doing what I have always done, which is my best!" Resp. Br. at 8 (emphasis added). However, Stephens' "wish" had already been expressed as a demand: "At the end of my vacation on August 26, 2013, I will return to work as my true self, Amiee [sic]

Australia Stephens, in appropriate business attire." *Id.* He had not entered his gender transition with any expectation other than that he would continue his employ with R.G. & G.R. Harris, with the business meeting the terms of his gender transition purpose and plan.

C. This Court Should Not Accede to Stephens' Effort to Compel the Funeral Owner to Upend the Company Dress Code. To Do So Would Violate the Owner's Conscience.

When Stephens expressed in his July letter that it was his "wish" that he "continue to work at R.G. & G.R. Harris Funeral Home," he already knew that, unless the Funeral Home cooperated, he could not satisfy the conditions of his "gender transition." Simply put, unless he remained in the Funeral Home's employ "full-time," there would be no employment from which to "transit," and thus, fulfill the "medical and surgical treatment [and] changes to clothing, hair, grooming, name, sex designation on identity documents, and the sex one describes oneself to be when interacting with others." Resp. Br. at 7. In other words, unless Stephens went through the prescribed transition the first year after announcing his true gender identity, he believed that he could never achieve his goal of thinking and acting as a female, rather than as a male as "assigned [to him] at birth."

Until penning the July letter, Stephens described his life as enshrouded in bondage. He longed for freedom to express his female sexuality. Thus, he

cried out from the depths of his soul: "I **need** to do this **for myself** and for my own **peace of mind** and to end the **agony in my soul**." *Id.* (emphasis added). But at what cost? What Stephens wants is freedom and peace for himself, but at the expense of his co-workers, friends, his employer Mr. Rost, and those families served by the Funeral Home. He agonized over the prospect of Stephens' insistence on wearing feminine attire to reflect his "true" gender identity and ultimately concluded "that it is 'wrong for a biological male to deny his sex by dressing as a woman or for a biological female to deny her sex by dressing as a man.'" Resp. Br. at 9. Mr. Rost's sincerely held Christian, Biblical beliefs and views were clearly recognized by all. *See* EEOC at 568-69, 576, 582-83, 588-89; Brief for the Petitioner at 5, 49 n.16; Brief for the Federal Respondents Supporting Reversal at 3-4, 34-35.

While Mr. Rost did not cite chapter and verse, his expressed moral conviction is rooted in the Law of Moses:

> The woman shall not wear that which pertaineth unto a man, neither shall a man put on a woman's garment: for **all** that do so are abomination unto the Lord thy God. [*Deuteronomy* 22:5 (emphasis added).]

As the Apostle Paul wrote to the church in Rome, "even though the Gentiles do not have the Jewish law there is a law written in their hearts, and 'their conscience *bears witness*' to what they have done...." R.

L. Wilken, Liberty in the Things of God: The Christian Origins of Religious Freedom at 16-17 (Yale Univ. Press: 2019). God Almighty wrote this truth on Mr. Rost's heart so that he dare not violate God's law as he understands it. *See Romans* 1:18-20. As a matter of conscience, God's male/female dress code is simply outside the coercive power of the State. *See* Wilken at 16-19. Stephens would contend otherwise, insisting that the Funeral Home owners' belief in God's unchanging order that all mankind were created male and female must give way to Stephens' current belief that the difference between male and female is an evolving sociological or psychological human construct.

If a Christian is not allowed to own and operate a Funeral Home according to the principles of his Christian Faith, then why should that same principle not prevent Christians from owning and operating any business if they choose not to yield to those demanding ever more transgender rights? Should the Court put the country on that path, it will be at open war with Christians who take their faith seriously, and move us toward a situation like existed in some Eastern European countries where faith in God was a disqualification from the professions and trades, leaving open only common laborer jobs for Christians.

D. This Court Should Decline the Respondent's Invitation to Endorse Transgenderism. To Do Otherwise Would Be Folly.

Although legal issue in this case may be limited to the application of Title VII to "transgender persons,"

this Court's decision will have far and lasting repercussions affecting transgender issues far beyond matters of employment. Petitioner accurately details some of these effects. *See* Brief for the Petitioner at 45-56. One of these adverse effects requires additional comment.

A ruling of this Court embracing transgenderism could have an extremely adverse effect on children who may be perceived by parents or other adults to exhibit opposite sex characteristics. Although hormone blocking drugs have been used for some years for unrelated purposes, such as in the effort to delay early puberty, use of opposite sex hormones apparently remains an "off label" use that can render children permanently sterile.[21] A University medical bulletin explains:

> [F]uture partners and changes in life circumstances can change people's goals....
> For some transfeminine individuals who are transitioning, the hormones you take during your transition may make it impossible for you to have biological children.
> Procedures like orchiectomies (removing your testicles) can also cause fertility problems.
> Researchers don't know exactly how these hormones can affect sperm in transfeminine people: estrogen; progesterone; spironolactone; flutamide; finasteride; other anti-androgens.

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[21] *See* S. Scutti, "Transgender Youth: Are Puberty-Blocking Drugs an Appropriate Medical Intervention?" *Medical Daily* (June 24, 2013).

> But taking even a short course of these medications may permanently change or stop your body from making sperm. This can make it impossible to have biological children. [University of Utah Transgender Health Program: Fertility.]

It is difficult to see how anyone could not view the sterilization of a child through drugs or surgery or other means to be a grotesque form of child abuse.[22]

Societal affirmation for allowing children to choose their sex is destructive in the extreme. Consider the case of the 11-year-old "Drag Queen" who was exploited on ABC's Good Morning America show. This appearance led to his nationwide fame and a gig "wearing a tank top" while dancing "on stage at a New York gay bar while grown men tossed dollar bills at him."[23] Apparently surprised at what happens when a society encourages the sexualization of children, it was reported that the child's mother objected after a convicted pedophile's blog described her son as "hot," and a "pretty, young boy," and a "sexy kid."[24]

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[22] *See, e.g.,* W. Heyer, "What Parents Should Know About Giving Hormones to Trans Kids," *The Federalist.com* (Feb. 2, 2015).

[23] J. Nolte, "11-Year-Old 'Drag Queen' Dances for Dollar Bills in Gay Bar," *Breitbart* (Dec. 19, 2018).

[24] B. M. Hughes, "11-Year-Old Drag Queen Kid's Mom Shocked To Find a Pedophile Calling Her Son 'Sexy' Online," *MRCTV* (June 28, 2019).

The British Press reported that one school "has an astonishing 17 children changing gender — but a whistleblower claims the students are being tricked into doing so because they're autistic."[25] A Houston television station revealed that a Drag Queen reading to children at a library-sponsored storytime was a registered sex offender.[26]

Transgenderism is not a pathway to happiness. Indeed, a study conducted by the National Centre for Transgender Equality found a 40 percent attempted suicide rate.[27] Yet, if left alone, one compilation of studies shows that from 60 to 90 percent of the children thought to be transgender will no longer view themselves in that way by adulthood.[28] Therefore, the kindest response to feelings of belonging to the opposite sex would seem to be just giving it some time to resolve, avoiding any steps which would be irreversible.

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[25] N. Stow, "School has 17 children changing gender," *The Sun* (Nov. 17, 2018).

[26] L. Talarico, "Houston Public Library admits registered child sex offender read to kids in Drag Queen Storytime," *KHOU*11* (March 15, 2019).

[27] M. Beresford, "Study finds 40% of transgender people have attempted suicide," *PinkNews* (Dec. 11, 2016). *See also* D. Payne, "The Transgender Suicide Rate Isn't Due to Discrimination," *The Federalist.com* (July 7, 2016).

[28] "Do trans- kids stay trans- when they grow up?" Sexologytoday.org (Jan. 11, 2016).

Whether intended or not, should this Court place its imprimatur on transgenderism by granting its adherents special status in matters of employment, that decision will have unforeseen consequences which, for untold numbers of children, will be horribly adverse.[29]

CONCLUSION

For the reasons set out above, the decision of the Sixth Circuit should be reversed and the case remanded to dismiss Stephens' complaint against Harris Funeral Homes.

Respectfully submitted,

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[29] *See generally* R. G. Marshall, Reclaiming the Republic, Appendix III (TAN Books: 2018).

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