No. 18-107

IN THE

Supreme Court of the United States

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

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*

Respondents.

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

BRIEF FOR *AMICI CURIAE* WOMEN BUSINESS OWNERS AND CEOs IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Lisa Fullerton is the President and CEO of A Novel Idea, LLC, a multi-unit quick serve restaurant chain serving the San Antonio, Texas community since 2000.

Cece Smith is the President and owner of Toolbox Studios located in San Antonio, Texas. Toolbox Studios forges collaborative partnerships with its clients with an array of marketing solutions that connect their brands to the ideal audience and deliver meaningful and measurable returns.

Sherry McKean is the President and CEO of Indian Ink Leasing Inc. ("Indian Ink"), located in Amarillo, Texas. Indian Ink is a regional, commercial finance and leasing company, established in 1989, that serves small businesses across a broad spectrum of industries.

SUMMARY OF THE ARGUMENT

One purpose underlying enactment of Title VII was to eliminate discrimination against women by employers with respect to compensation, terms, conditions or privileges of employment "because of such individual's … sex." 42 U.S.C. 2000 e-2(a)(1). The inclusion of "sex" was intended to provide equal opportunities for women. *Sommers v. Budget Mktg., Inc.*, 667 F2d 748, 750 (8th

1. All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief and no counsel or party made a monetary contribution to its preparation or submission. Only amici and their attorneys have paid for the filing and submission of this brief.

Cir. 1982) (per curiam). An unintended and unwarranted expansion of Title VII's "because of ... sex" language to include gender identification would not just frustrate the statute's purpose but additionally burden and harm women by requiring them to, among other things, compete with biological men for limited resources earmarked for women, and by otherwise reversing measures carefully crafted to "level the playing field" for women.

ARGUMENT

I. REWRITING TITLE VII TO ENCOMPASS TRANSGENDER STATUS WILL HARM WOMEN.

Although apparently intending to support a re-write of Title VII, Employees' CEO and Union Amici[2] make a compelling case for the continued need for rigorous enforcement of Title VII as written in order to address the ongoing effects of pervasive discrimination against women. They review statistical and anecdotal evidence demonstrating that discrimination against women because of their sex remains an endemic problem that seriously inhibits their ability to attain equal pay, to realize other equal conditions of employment, and to penetrate the "glass ceiling" that artificially limits their achievement. ((Employees' CEO Amici Br., p. 27; Employees' Union Br., pp. 9-16).

2. Employees' amici, Women CEOs And Other C-Suite Executives, are referenced as "Employees' CEO Amici," and Service Employees International Union, International Brotherhood Of Teamsters, And Jobs With Justice, are referenced as "Employees' Union Amici."

The data cited by Employees' CEO Amici, and undisputed by amici herein, shows that "'[s]ince 2004, the women's-to-men's earnings ratio has remained in the 80 to 83 percent range'" and, "'in 2018, women working full-time with advanced degrees earned 25.4% less than their male counterparts.'" (Employees' CEO Br., p. 35, citing U.S. DEP'T OF LAB. WOMEN'S BUREAU, Data and Statistics-Earnings, https://www.dol.gov/wb/ stats/ earnings.htm#earningsot (last visited July 1, 2019)). "'[W]omen held only about 10% of the top executive positions (defined as chief executive officers, chief financial officers and the next three highest paid executives) at U.S. companies in 2016-17'" and "'just .51% of chief executives of S&P 1500 companies were women.'" *Id.*, citing Drew Desilver, Women Scarce at Top of U.S. Business—And in the Jobs That Lead There, PEW RES. CTR. (Apr. 30, 2018), https:// www.pewresearch.org/fact-tank/2018/04/30/ women-scarce-at-top-of-u-s-business-and-in-the-jobs-that-lead-there/. None of those circumstances will be improved by requiring business women to compete against biological males for resources intended to ameliorate sex discrimination against women.

Amici herein fully concur that workplace discrimination against women because of their sex remains a significant impediment to the advancement of women in the workplace. It is part of their personal experience and continues as a significant obstacle to achievement they must overcome. Rewriting Title VII as urged by Stephens, however, will harm women rather than ameliorate any of the impacts of sex discrimination against them. Protecting men who identify as women, whose identification in that regard is moored only by self perception and remains potentially fluid, undermines the advances made by women under the protection of Title VII since its passage.

Adopting, as a matter of federal law, a redefinition of "sex" to mean "gender identity," will redirect opportunities, intended to be reserved for women to rectify the consequences of the discrimination they suffer, to biological males. For example, the Small Business Administration ("SBA") administers a number of programs intended to "help[] women entrepreneurs launch new business and compete in the marketplace" with "training and funding opportunities specifically for women." https://www.sba.gov/business-guide/grow-your-business/women-owned-businesses (last visited August 22, 2019). These programs include the Women-Owned Small Business Federal Contracting Program, which has the goal "of award[ing] at least five percent of all federal contracting dollars to women-owned small businesses each year." (https://www.sba.gov/federal-contracting/contracting-assistance-programs/women-owned-small-business-federal-contracting-program#section-header-2, last visited August 22, 2019). That program's express purpose is to "help provide a level playing field for women business owners" by limiting "competition for certain contracts to businesses that participate in the women's contracting program." *Id.*

The interpretation of Title VII advanced by Stephens would also upend existing jurisprudence approving of sex-specific physical fitness testing. Such testing affords women an equal opportunity with respect to physically demanding jobs in law enforcement and numerous other fields. The courts recognize "the physiological differences between men and women impact their relative abilities to demonstrate the same levels of physical fitness." *Bauer v. Lynch*, 812 F.3d 340, 351 (4th Cir. 2016). "Gender-normed" physical fitness standards do not violate Title VII because,

"an employer does not contravene Title VII when it utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women, requiring the same level of physical fitness of each." *Id*. The participation of biological men in female "sex-specific testing" fundamentally negates the concept, with the consequence that women will again be pushed out of jobs with physical fitness requirements because they are not physiological men.

In a similar vein, redefining "sex" to mean "gender identity" will harm women by negating Title VII's bona fide occupational exception; no jobs will remain exclusively reserved for women. Title VII expressly excepts "bona fide occupational qualifications" ("BFOQ") from the scope of its ban on discrimination "because of … sex." 42 U.S.C. §2000e-2(e) provides that "[n]otwithstanding any other provision of this subchapter … it shall not be an unlawful employment practice" to make employment decisions "on the basis of … sex … in those certain instances where … sex … is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." If this Court were to construe "sex" to encompass gender identification, the BFOQ exception will be rendered meaningless. All female sex-specific sports will be opened to biological men, as will other jobs previously reserved for women on the basis that their sex constitutes a BFOQ. (See *e.g.*, actress jobs (29 CFR §1604.2); female-only correctional officer positions (*Teamsters Local Union No. 117 v. Washington Dept. of Corrections*, 789 F.3d 979 (9th Cir. 2015)).

II. INTERPRETING "SEX" TO MEAN "GENDER IDENTIFICATION" AND TO ENCOMPASS TRANSSEXUAL STATUS IS UNNECESSARY TO PRESERVE DISCRIMINATION CLAIMS BASED ON EVIDENCE OF SEX STEREOTYPING.

Employees' CEO and Union Amici assert that *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and other precedent establish that sex stereotyping constitutes discrimination prohibited by Title VII. (Employees' CEO Amici Br., pp. 9-32; Employees' Union Amici Br., p. 4). They demonstrate that such stereotypes remain a widespread problem that limit women's opportunities to advance in the workplace, promote continued pay disparities between men and women, and otherwise result in unequal treatment. (Employees' CEO Amici Br., pp. 27-28, 33-36; Employees' Union Br., p. 9-16).

Employees' CEO and Union Amici, however, fail to demonstrate that an expansion of Title VII beyond its express terms and intended purpose is necessary to protect women against workplace discrimination evidenced by the persistence of pernicious sex stereotypes. A premise of Employees' CEO and Union Amici appears to be that a refusal to adopt Stephens' proposed expansion of Title VII to encompass transgender status will somehow remove discrimination based on sex stereotyping from Title VII's reach. *Price Waterhouse*, however, did not recognize sex stereotyping as an independent basis for the imposition of liability under Title VII. Instead, it recognized that sex stereotyping may be evidence of discrimination because of sex. *Price Waterhouse*, 490 U.S. at 251. ("Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment

decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part." [Emphasis in original.]) Expanding Title VII beyond the plain and intended meaning of its text to encompass transgender status is unnecessary to preserve the continued viability of sex stereotypes as evidence of discrimination because of sex. See *e.g.*, *Menchaca v. American Medical Response of Illinois, Inc.*, No. 98-C-547, 2002 WL 48073 (N.D. Ill. 2002), cited by Employees' Union Amici at pp. 15-16.

This Court has not countenanced an interpretation of Title VII unmoored from the language used by Congress, notwithstanding claims to the contrary. See *e.g.*, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 114-115 (2nd Cir. 2019); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 577 (6th Cir. 2018). It should not do so now. As this Court has consistently done in decisions such as *Price Waterhouse* and *Oncale*, in this case, the Court should give effect to the intended meaning of Title VII's express terms and refuse an interpretation that, far from advancing its statutory purposes, will perpetuate employment discrimination against women. See *Oncale v. Sundowner Offshore Services Inc.*, 523 U.S. 75, 79-80 (1998) and *Price Waterhouse*, 490 U.S. at 239-242. See also, *Oncale*, 523 U.S. at 82 (Thomas, J., concurring).

CONCLUSION

For the reasons set forth herein, Amici respectfully request that this Court uphold the decision of the Sixth Circuit. An unwarranted expansion of the text of Title VII to encompass transgender status will harm women rather than provide protection from the endemic discrimination they continue to endure because they are women.

Respectfully submitted,

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