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,
Respondent,

and

AIMEE STEPHENS,
Respondent-Intervenor.

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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender, or (2) sex stereotyping under *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989).

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. Petitioner is R.G. & G.R. Harris Funeral Homes, Inc., a closely held, for-profit corporation. Respondents are the Equal Employment Opportunity Commission (EEOC) and Intervenor Aimee Stephens.

CORPORATE DISCLOSURE STATEMENT

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

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INTRODUCTION

Federal courts should not usurp Congress's authority by judicially amending the word "sex" in federal nondiscrimination law to include "transgender status." Redefining sex discrimination will cause problems in employment law, reduce bodily-privacy protections for everyone, and erode equal opportunities for women and girls, among many other consequences. Congress, not the courts, is the institution best positioned to balance those considerations.

R.G. & G.R. Harris Funeral Homes is a fifth-generation family business that has helped grieving families heal for more than 100 years. To that end—and to ensure clients focus on processing grief, not on the funeral home and its staff—Harris's employees agree to follow a professional, sex-specific dress code, consistent with industry standards and as federal law allows. In 2007, Harris hired funeral director Anthony Stephens. There were ups and downs in Stephens's tenure, and in early 2013, a manager wanted to end Stephens's employment. But Tom Rost, Harris's owner, intervened to save Stephens's job.

Six months later, Stephens handed Tom a letter. The letter was the first Tom learned that Stephens experienced gender dysphoria, and it announced that Stephens had decided to start presenting and dressing as a woman at work. Tom took two weeks to carefully consider this. He weighed the impact of his decision on Stephens and Stephens's wife. He also thought about his female employees and clients who would be sharing a single-sex restroom with Stephens. Finally, he considered the impact on his clients' grieving process. In the end, Tom could not agree to Stephens's plan to violate the dress code, so he offered Stephens a severance. The EEOC then sued.

The federal government now agrees that Tom's decision to respectfully decline Stephens's demand was not sex discrimination. But Stephens urges this Court to hold Harris liable by redefining the meaning of sex discrimination. So the Court must decide the public meaning of sex discrimination in 1964, the year Congress enacted Title VII.

In 1964, as today, sex discrimination meant differential treatment based on a person's biological sex, something fixed and objectively ascertained based on chromosomes and reproductive anatomy. It occurs when employers favor men over women, or vice versa, because of their sex. That is what Title VII forbids.

While purportedly agreeing on the appropriate interpretive methodology and the meaning of "sex" in 1964, Stephens Br. 24 n.10, Stephens nonetheless argues that sex discrimination does not require disparate treatment of one sex over the other, opening the door to discrimination claims based on transgender status. But Stephens's view drastically expands the meaning of sex discrimination and rewrites Title VII to add protected categories that Congress never included, all without advance notice to employers.

It is not sex discrimination for an employer to apply a sex-specific dress code or provide sex-specific changing and restroom facilities based on biological sex rather than one's internal sense of gender. Here, Harris Funeral Homes would have responded to a female employee who insisted on dressing as a man while working with grieving families the same way it responded to Stephens. Because it does not disfavor one sex compared to the other, Harris does not discriminate based on sex.

It is also wrong to say that the proper comparator for Stephens is a biological female who wants to dress as a female. Stephens is a transgendered biological male, so the proper comparator is a transgendered biological female. Changing the comparator's sex *and* transgender status fails to demonstrate that Harris treats male employees differently than similarly situated female employees. It is a shell game—not a tool for statutory construction.

Similarly, it is not illegal "stereotyping" for an employer to apply a sex-specific dress code based on biological sex. To begin, this Court has never construed Title VII as providing an independent cause of action for sex stereotyping. The plurality in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), held only that stereotyping could be used *as evidence* to show "disparate treatment of men and women." *Id.* at 251 (quoting *L.A. Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 707 n.13 (1978)).

Stephens is not trying to show that stereotyping evidence helps prove that Harris treated Stephens less favorably than a female employee who desired to dress according to the male dress code. What Stephens argues is that "sex" itself is a stereotype. Congress did not share that position, which would require eliminating sex-specific policies altogether, including sex-specific overnight facilities or showers. At the same time, Stephens asks the Court to *force* employers to stereotype by, for example, only allowing a male employee to dress as a female if the employee "meet[s] the expectations" of what a female should look like. J.A. 113–14. These are impossible rules for employers to enforce.

Stephens also advances various policy arguments for why this Court should circumvent Congress and judicially amend the law. These ignore the practical consequences of the legal change Stephens seeks.

First, redefining sex discrimination in Title VII will prohibit employers from maintaining sex-specific privacy in overnight facilities, showers, restrooms, and locker rooms. It will prevent employers from protecting privacy through bona fide occupational qualifications, such as allowing only females to work as a women's sexual-abuse counselor. And it will substantially infringe employers' and employees' rights to free speech and religious freedom.

Second, judicially rewriting sex discrimination in Title VII will spill over into other federal laws that prohibit sex discrimination. It will deny women and girls fair opportunities to compete in sports, to ascend to the winner's podium, and to receive critical scholarships. It will also require domestic-abuse shelters to allow men to sleep in the same room as female survivors of rape and violence. And it may dictate that doctors and hospitals provide transition services even in violation of their religious beliefs.

Finally, redefining sex discrimination by judicial fiat will have broader impacts, including damage to the constitutional separation of powers, potential harm to individuals experiencing gender dysphoria, and new strains on parent-child relationships.

In sum, elected legislative- and executive-branch officials should carefully consider everyone's interests when changing nondiscrimination legislation. Courts are the branch least equipped to do so. This Court should reverse the Sixth Circuit's reimagining of Title VII and direct that judgment be entered for Harris.

STATEMENT OF THE CASE

A. Harris Funeral Homes

Tom Rost owns Harris Funeral Homes, a fifth-generation family business serving families mourning the loss of loved ones since 1910. Pet. App. 90a. The business was founded by Tom's grandfather and grandmother—one of the first licensed female funeral directors in Michigan. Tom's grandparents lived above the funeral home at Harris's original location in downtown Detroit. Tom is a past president of Preferred Funeral Directors International, and his location in Livonia has been recognized as the city's funeral home of the year. J.A. 123.

As a devout Christian for more than 65 years, a former member of the deacon board at Highland Park Baptist Church, and a prayer leader at corporate events, Resp. App. 76a–77a, Tom believes his life's purpose "is to minister to the grieving." Pet. App. 103a. Indeed, "his religious faith compels him to do that important work." *Ibid.*; J.A. 124. Harris's mission statement—posted prominently on its website—confirms that the company's "highest priority is to honor God in all that [they] do." J.A. 176; Resp. App. 77a.

Tom takes that mission seriously. Funerals are solemn events that address transcendent matters, hold deep spiritual significance, and mark difficult times of life. J.A. 123–24. They are often painful experiences, and attendees must be able to focus on each other and their grief. *Ibid.* From placing a rose on the bed when removing the remains of a loved one, to ensuring that all staff are trained in grief counseling, to teaching clients about the stages of grieving, Harris's goal is to "set the tone for a healing transformational experience." *Id.* at 123–25.

Harris follows professional codes of conduct and dress so that clients can focus on processing their grief, not on the funeral home or its employees. J.A. 123–24. As Tom explains, there's an "expectation" for funeral-home representatives, "how they're going to dress and how they're going to look." *Id.* at 28–29.

Harris's dress code for employees interacting with clients is integral to meeting this goal. J.A. 77, 119–21, 129. The dress code—standard for the industry and consistent with federal law—is sex-specific; Harris provides funeral directors with matching suits to wear while working with grieving families: pant suits for male funeral director and skirt suits for female funeral directors. *Id.* at 119–21, 103–05, 133–34; EEOC Compliance Manual 619.4(d) ("[A] dress code may require male employees to wear neckties at all times and female employees to wear skirts or dresses at all times.") (available at Reply App. 1a).[1] Harris also provides suits and ties to other male employees who interact with clients. J.A. 137–39. Tom would have preferred to provide a women's suit to all other female employees who interact with clients as well. But Harris's female employees could not agree on the cut, color, or shape of such outfits. *Id.* at 74–75, 139–40, 173–74. That is what caused Tom to kid that "women are a strange breed." Resp. App. 11a. Accordingly, Tom provides female employees an annual allowance that is equivalent to the value of the suits after accounting for the multiple years a suit will be used before replacement is necessary. J.A. 67–68.

[1] Female employees who do not interact with the public may wear pants. J.A. 160.

Harris maintains its dress code because funeral directors are "prominent public representatives" of the company. J.A. 129. Stephens, for example, would "often" be the first Harris staff person to make face-to-face contact with a family. *Id.* at 125. Funeral directors regularly interact with clients and guests. *Id.* at 124–29. They arrive immediately after a loved one has passed and have the delicate task of removing the deceased's body from the home or hospital. *Id.* at 124–25. They also help "integrat[e] the clergy" into services, greet guests, and coordinate the family's "final farewell" to their loved one. *Id.* at 127–29.

During Tom's first 35 years at the helm, only one female applied for a funeral director position, but that applicant was not qualified. J.A. 133. That recently changed, and one of Harris's current directors is a woman. Contra Stephens Br. 11.

At all times, Harris has administered its dress code based on biological sex, not gender identity. Stephens does not challenge the dress code itself. Stephens Br. 50–51. Instead, Stephens says that it constitutes sex discrimination to apply a dress code based on biological sex rather than an employee's internal sense of gender. Before this case, neither Tom nor Harris had been accused of workplace discrimination of any kind. Dep. of Tom Rost dated Nov. 12, 2015 at 4, ECF No. 54-4.[2]

[2] Stephens accuses Tom of distinguishing between his "key people" and his "lady attendants." Stephens Br. 11. That is inaccurate. One of Tom's most indispensable "key" people, his business manager, is a woman. J.A. 206.

B. Stephens

Tom hired Anthony Stephens, a biological male, as a funeral director apprentice in 2007. J.A. 84–85, 88–89. It is a substantial understatement to say—as Stephens does—that at the time of hire, Stephens merely conformed dress and appearance to Stephens's "sex assigned at birth." Stephens Br. 5–6. Every pertinent employment record—including Stephens's driver's and mortuary-science licenses—identified Stephens as male. J.A. 70, 152; Resp. App. 14a-15a.[3]

No one contests that for nearly six years, Stephens wore the suit and tie that Harris provided without questioning the funeral home's sex-specific dress code. J.A. 100, 105, 107, 152. As Stephens admits, nothing would have suggested to anyone at Harris that Stephens was "anything other than a man." *Id.* at 110.

As an employee, Stephens had "ups and downs." Resp. App. 10a. Early 2013 brought "attitude" issues, including refusing to help stack chairs for Dolly, an 80-year-old female coworker. *Ibid.* Tom's manager wanted to fire Stephens. *Ibid.* But because of Tom's concern for Stephens—the same concern he has for all his employees—he talked to Stephens and attempted to solve the problem. *Ibid.*; EEOC Aff. of George Crawford at 4-5, ECF No. 54-19.

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[3] Stephens's counsel indicates it is proper to refer to Stephens as "she" and "a woman." Stephens Br. 9 n.6. Out of respect for Stephens and following this Court's lead in *Farmer* v. *Brennan*, 511 U.S. 825 (1994), Harris tries to avoid use of pronouns and sex-specific terms when referring to Stephens. When such terms must be used, Harris uses sex-based language consistent with Title VII's meaning.

Six months later, Stephens gave Tom a letter informing Tom that Stephens identifies as female. In the letter, Stephens insisted on dressing and presenting as a woman while working with the grieving families that Harris serves. Resp. App. 1a-2a. The letter was signed by both "Anthony Stephens" and "Aimee A. Stephens." *Id.* at 2a. Rather than approach Tom confidentially, Stephens had shown the letter to nearly "everybody else" that worked for Harris before giving it to Tom. J.A. 92.

Tom took two weeks to carefully consider the demand, J.A. 45, which Stephens anticipated was "sure" to be "distressing" to Tom and co-workers. Resp. App. 2a. Tom's first thoughts were for Stephens and Stephens's wife, and he intuited that this situation was difficult for Stephens. Tom also thought about the issues created by Stephens using the single-sex restroom with other female employees. J.A. 34–37, 57; Pet. App. 65a.[4] (The Garden City location where Stephens worked had only single-sex restrooms. J.A. 37.) The same issues would have arisen with female clients and guests. Finally, Tom carefully considered the needs of his clients processing their grief. See *id.* at 176 ("The bereaved families and friends we serve are always our primary consideration.").

[4] It is inaccurate to say that sex-specific restrooms are not at issue under these facts specifically or when interpreting Title VII generally. Contra Stephens Br. 50. Restroom use was "hypothetical" because Tom made his decision based on Stephens's demand to violate the sex-specific dress code. J.A. 36–37. But Tom did consider the restroom issue when processing his decision. *E.g.*, *id.* at 57; Pet. App. 65a.

In the end, Tom said that Stephens's demand was "not going to work out." J.A. 49–50. Because Tom wanted to reach "a fair agreement," he offered Stephens a severance package, but Stephens declined it. *Id.* at 48.

Stephens says that Harris's decision was motivated by Stephens's self-identification as transgender. But the decisive consideration was Stephens's insistence on violating the sex-specific dress code at work. J.A. 54–55, 132–33, 196–97. Tom would *not* have reached the same decision had Stephens "continued to conform to the dress code for male funeral directors while at work." *Id.* at 55, 132–33.[5] And Tom *would* have reached the same decision if a female funeral director had told him that she would not comply with the sex-specific dress code requirements. J.A. 134.[6]

C. Title VII

Congress enacted Title VII in 1964 to prohibit discrimination in employment based on an individual's "race, color, religion, sex, or national origin."

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[5] Stephens tries to create an immaterial fact dispute by citing Tom's ambiguous personal deposition testimony to suggest that Tom would have considered Stephens's *non*-work dress in making employment decisions. Stephens Br. 10; cf. J.A. 78–79. But as Tom unambiguously testified in his 30(b)(6) deposition and declaration, he would *not* consider outside dress a factor. J.A. 55, 132–33.

[6] Stephens wrongly accuses Tom of insisting that all men should look like men and all women like women. *E.g.*, Stephens Br. 11. Tom is not policing the masculinity and femininity of his employees. Tom made the comment Stephens quotes in a deposition when asked to explain why he has a sex-specific dress code. Resp. App. 62a–63a. The testimony had nothing to do with Tom's decision to decline Stephens's demand.

42 U.S.C. 2000e-2(a)(1). Congress's "major concern" was ending "race discrimination." *Holloway* v. *Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977). But one day before the House approved the legislation, the word "sex" was added as a floor amendment. *Ulane* v. *E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

At that time, only two states prohibited sex discrimination in employment, and many states continued to "protect" women from workplace rigors. Todd S. Perdum, *An Idea Whose Time Has Come: Two Presidents, Two Parties, and the Battle for the Civil Rights Act of 1964* 196 (2014). The sex-discrimination prohibition was understood by all to address the lack of "equal opportunities for women" in employment, *Sommers* v. *Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam), to "ensure that men and women are treated equally," *Holloway*, 566 F.2d at 663.

In a disparate treatment case like this one, an employee must prove an employer's "discriminatory intent or motive." *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988). This requires proof that an employer "disadvantage[d]" one sex compared to the other. *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)) (""The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.""). Title VII's sex-discrimination ban requires plaintiffs to show "disparate treatment of men and women." *Price Waterhouse*, 490 U.S. at 251 (plurality) (quoting *Manhart*, 435 U.S. at 707 n.13).

D. Proceedings below

After Stephens filed an EEOC charge against Harris, the EEOC sued, alleging that Harris had violated Title VII by discharging Stephens (1) "because Stephens is transgender" and sought to "transition from male to female," and (2) "because Stephens did not conform to [Harris's] sex- or gender-based preferences, expectations, or stereotypes." Pet. App. 166a. The EEOC sought to enjoin Harris from "discriminat[ing] against an employee or applicant because of their sex, *including* on the basis of gender identity." *Id.* at 168a (emphasis added).

The district court dismissed the transgender-status claim because "transgender or transsexual status is currently not a protected class under Title VII." Pet. App. 172a (citations omitted). The court held that the EEOC could proceed with a sex-stereotyping claim but nonetheless granted Harris summary judgment under the Religious Freedom Restoration Act, 42 U.S.C. 2000bb. Pet. App. 142a.

On appeal, after the Sixth Circuit allowed Stephens to intervene, Pet. App. 12a–13a, the court reversed and ordered judgment for the EEOC on both the transgender-status and sex-stereotyping claims. The Sixth Circuit first held that under *Price Waterhouse* employers *always* engage in unlawful sex stereotyping when they administer sex-specific policies according to biological sex instead of transgender status. *Id.* at 15a–18a. Thus, while federal law allows an employer to maintain a sex-specific dress code, shower and locker-room policy, bona fide occupational qualification, fitness requirement, and medical coverage, the Sixth Circuit will not allow the employer to administer any of those policies based on biological sex. So an employer must allow a

man who identifies as female to dress as a woman, shower with female coworkers, apply for jobs reserved for women (e.g., as a women's sexual-abuse counselor), do fewer pushups than the employer requires of men, and enroll in a health plan that covers drugs for women.

Next, the Sixth Circuit judicially amended the word "sex" in Title VII to include "gender identity," holding that "discrimination on the basis of transgender . . . status violates Title VII." Pet. App. 22a. As the Sixth Circuit explained, the very idea of "sex"—which determines a person's status as male or female based on reproductive anatomy and physiology—is an illicit stereotype about "how sexual organs and gender identity ought to align." *Id.* at 26a–27a. Moreover, said the court, "it is analytically impossible" to apply sex-specific policies to an employee who asserts a gender identity that differs from the employee's sex "without being motivated, at least in part, by the employee's sex." *Id.* at 23a.

The Sixth Circuit also said that Title VII protects "transitioning status," Pet. App. 22a, and in so doing, left no doubt that the court read "gender identity" into the statute. See *id.* at 24a–26a. Dismissing as "immaterial" whether "a person's sex can[ ] be changed," *id.* at 26a, the court emphasized that "gender identity" is "fluid" and "variable." *Id.* at 24a n.4. Gender identity is also "difficult to define," because it has an "internal genesis that lacks a fixed external referent." *Ibid.* Judges should "authenticat[e]" sex through professions of identity rather than "medical diagnoses." *Id.* at 24a–25a n.4.

Finished judicially altering Title VII, the Sixth Circuit held that RFRA was not a defense. Pet. App. 41a–73a. Forcing Tom to violate his religious beliefs

or to give up his ministry to the grieving did not "substantially burden" his religious exercise. *Id.* at 46a–56a. The Sixth Circuit granted the EEOC summary judgment. *Id.* at 81a.

SUMMARY OF THE ARGUMENT

The original public meaning of Title VII's ban on sex discrimination prohibited employers from treating one sex less favorably than the other because of sex. Here, Stephens does not allege that Harris favored one sex over the other or treated Stephens differently than a similarly situated female employee. Accordingly, Stephens's transgender-status claim is not within Title VII's prohibition on sex discrimination.

Stephens has no claim for sex stereotyping, either. The plurality in *Price Waterhouse* did not judicially amend Title VII to create an independent cause of action for sex stereotyping, and the Court should not do so now. Moreover, the Sixth Circuit was wrong to treat sex itself as a stereotype because the "[p]hysical differences between men and women" relating to reproduction—the very factors that determine sex—are not "gender-based stereotype[s]." *Nguyen* v. *INS*, 533 U.S. 53, 68 (2001). And Stephens's stereotyping arguments do not establish sex discrimination because, unlike the facts in *Price Waterhouse*, they do not show unfavorable treatment of one sex compared to the other. Without such favoritism, there is no actionable claim of sex discrimination under Title VII.

This Court's holdings in *Oncale* and *Newport* do not change things. Both cases hold that courts must interpret Title VII consistent with its public meaning in 1964, not the intent of any individual member of Congress. And neither case judicially amended Title

VII to create a new classification. The Court should decline Stephens's invitation to do so here.

Harris is asking the Court not to rewrite Title VII by adding a classification that Title VII's text omits; Harris is *not* asking the Court to exclude transgender individuals from Title VII. They are protected from sex discrimination just the same as everyone else. The Court made this exact point in declining to add alienage as a Title VII classification in *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 95 (1973).

Finally, Stephens is wrong to say that applying the plain, public meaning of Title VII will undermine the statute. A ruling for Harris will mean that Title VII continues to protect against the same discriminatory employment practices that the statute has outlawed for half a century. Conversely, judicially amending Title VII's sex-discrimination prohibition to include transgender status has many consequences in employment law and other contexts. These consequences show how crucial it is for the courts to defer to the legislative branch when it comes to important policy questions.

Accordingly, the Court should reverse the Sixth Circuit and direct that judgment be entered for Harris as a matter of law.

ARGUMENT

As this Court recently and unanimously reaffirmed, it is a "fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute," i.e., their original public meaning. *New Prime, Inc.* v. *Oliveira*, 139 S. Ct. 532, 539 (2019) (cleaned up). "After all, if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the 'single, finely wrought and exhaustively considered, procedure' the Constitution commands." *Ibid.* (quoting *INS* v. *Chadha*, 462 U.S. 919, 951 (1983)). Accordingly, this Court will not rewrite a statute "under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced." *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (citation omitted).

The Sixth Circuit here did not faithfully apply Title VII's ban on sex discrimination. Instead, the court judicially updated the law to reflect the court's preferred policy choice. That decision was wrong as a matter of original public meaning. And redefining the meaning of sex discrimination creates innumerable problems in federal law. This Court should reverse.

I. Stephens's transgender-status claim falls outside Title VII's prohibition on sex discrimination.

A. Title VII's original public meaning prohibits employers from treating one sex worse than the other because of sex.

Title VII's operative words prohibit discrimination because of sex. The public meaning of the phrase in 1964 is not difficult to discern.

1. Start with the term "discriminate."[7] It means to make a difference in treatment or favor on a class or group basis. *Discriminate*, Random House Dictionary of the English Language 411 (1966) ("to make a distinction in favor of or against a person or thing on the basis of the group, class, or category to which the person or thing belongs"); *Discriminate*, Webster's Third New Int'l Dictionary of the English Language Unabridged 648 (1964) ("to make a difference in treatment or favor on a class or categorical basis").

It is this kind of discrimination—less favorable treatment of people of certain classes—that Title VII targets. *Oncale*, 523 U.S. at 80 (quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring)) (""The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'").

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[7] Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge . . . or otherwise to discriminate against any individual." 42 U.S.C. 2000e-2(a)(1). The phrase "otherwise to discriminate against" is "most naturally understood as a summary of the type[s]" of adverse actions covered. *Paroline* v. *United States*, 572 U.S. 434, 447 (2014).

"Discriminate" can also mean merely discerning or noticing differences, such as to discriminate the individual voices in the choir. *Discriminate*, Random House Dictionary of the English Language 411 (1966) ("to note or observe a difference; distinguish accurately"). But "discriminate" in Title VII is followed by the word "against," which makes clear that this meaning does not apply here. *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 59 (2006) ("No one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals.").

If it did, sex-specific showers, restrooms, and locker rooms would be unlawful, as would sex-specific dress codes, because they all require an employer to notice differences in an employee's sex. Contra *United States* v. *Virginia*, 518 U.S. 515, 556–58 (1996) (recognizing the need to continue separating sex-specific privacy facilities when integrating women into the Virginia Military Institute); *Jespersen* v. *Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1108–13 (9th Cir. 2006) (en banc) (upholding sex-specific dress and appearance policy because it did not treat one sex worse than the other and did not constitute impermissible sex stereotyping); *Etsitty* v. *Utah Transit Auth.*, 502 F.3d 1215, 1225 (10th Cir. 2007) ("Because an employer's requirement that employees use restrooms matching their biological sex does not expose biological males to disadvantageous terms and does not discriminate against employees who fail to conform to gender stereotypes, [the employer's] proffered reason of concern over restroom usage is not discriminatory on the basis of sex.").

2. Next, the prohibited discrimination must be "because of" a protected classification. The phrase "because of" identifies a "reason" for something. *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (collecting definitions).[8] This at a minimum requires an employer to act based on one of the forbidden forms of bias. If an employer treats an employee less favorably because of a different characteristic, such as eye color, that is not unlawful.

3. The protected classification at issue here is "sex." Stephens concedes for purposes of argument that the word "sex" in 1964 meant biological sex, not transgender status. Stephens Br. 24 n.10.[9] And that is the only way the public would have understood the term at the time of Title VII's enactment.

a. In common, ordinary usage in 1964, the word "sex" meant biologically male or female, based on reproductive organs. *Sex*, Webster's New World Dictionary of the American Language (College ed. 1962) ("either of the two divisions of organisms distinguished as male or female"); *Sex*, The American Heritage Dictionary of the English Language (1st ed. 1969) ("[t]he property or quality by which organisms are classified according to their reproductive functions"). Even the American Psychiatric Association's most recent diagnostic manual, the DSM-5, affirms that "sex" "refer[s] to the biological indicators of male and female." DSM-5 451 (5th ed. 2013).

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[8] The import of the "motivating factor" language in 42 U.S.C. 2000e-2(m) is discussed below.

[9] Stephens uses the phrase "sex assigned at birth" as a synonym for "biological sex." Stephens Br. 24 n.10. But Title VII does not reduce sex to something arbitrarily "assigned" at birth, and surely no one would have thought that in 1964.

b. In contrast, Stephens wants Title VII to cover "transgender status" and "gender identity." Stephens uses "transgender" as "an umbrella term for persons whose gender identity, gender expression, or behavior does not conform to that typically associated with the sex to which they were assigned at birth." Am. Psychological Ass'n, *Answers to Your Questions about Transgender People, Gender Identity, and Gender Expression*, https://bit.ly/2BPd9FS (hereinafter "APA, *Answers*") (emphasis omitted). And "gender identity" is meant to refer to a person's "internal, deeply held sense of gender," Stephens Br. 5, which might be "some category *other than* male or female" entirely. DSM-5 451 (emphasis added). As the Sixth Circuit explained, transgender status and gender identity are (1) "fluid" and "variable," (2) non-binary (i.e., not confined to male and female), and (3) "authenticat[ed]" through professions of identity rather than "medical diagnoses." Pet. App. 24a–25a n.4; DSM-5 451. Individuals who claim a gender identity that differs from their sex may live as a woman, as a man, as both, or as neither. See Amici Br. Nat'l Medical and Policy Groups that Study Sex and Gender Identity (Part I) (distinguishing sex from gender identity).

The concept of "gender identity" was not part of the American lexicon in 1964. It first emerged in 1963 at a European medical conference. David Haig, *The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945-2001*, 33 Archives of Sexual Behav. 87, 93 (2004). And no semblance of it appeared in federal law until 1990, when Congress enacted the Americans with Disabilities Act and *excluded* protection for "gender identity disorders." 42 U.S.C. 12211(b)(1).

One year later, when amending Title VII, Congress did not revise the word "sex" to include "gender identity." Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. It was not until well into this century that Congress first enacted a law creating a category known as "gender identity," which it broadly and vaguely defined to mean "actual or perceived gender-related characteristics." 18 U.S.C. 249(c)(4).

c. Other congressional actions confirm that "sex" as a classification is distinct from "transgender status" or "gender identity." Congress has rejected at least a dozen proposals to add "gender identity" to—and thus include transgender status within—Title VII, even while enacting multiple federal laws listing either "sex" or "gender" alongside "gender identity." Pet. 7–8 n.4; 34 U.S.C. 12291(b)(13)(A); 18 U.S.C. 249(a)(2).[10] Ignoring these other statutes and reading transgender status into Title VII not only disregards the "presum[ption] that the same language in related statutes carries a consistent meaning," *United States* v. *Davis*, 139 S. Ct. 2319, 2329 (2019), it also brings surplusage and redundancy into federal law, *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001). Stephens calls the other federal statutes "unrelated." Stephens Br. 45. But like Title VII, those laws prohibit discrimination, bias, and certain motives; thus, the related-statutes canon applies.

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[10] State legislatures have similarly recognized "sex" and "gender identity" as distinct concepts. *E.g.*, Conn. Gen. Stat. 46a-60(b)(1) (forbidding employment discrimination based on "sex" *and* "gender identity or expression"); Iowa Code 216.6(1)(a) (forbidding employment discrimination based on "sex, sexual orientation, [or] gender identity"); see also *Hively* v. *Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 364 (7th Cir. 2017) (Sykes, J., dissenting) (canvassing state laws).

d. Congress's failure to act on proposed amendments to protect transgender status as a protected Title VII classification—and its use of "sex" and "gender identity" as independent concepts in other federal statutes—is significant. Contra Stephens Br. 45–47. In some cases this Court has not placed great weight on post-enactment legislative activity. See *Solid Waste Agency of N. Cook Cty.* v. *U.S. Army Corp. of Eng'rs*, 531 U.S. 159, 170 (2001). But in other cases—such as where (as here) Congress has declined to enact more than a dozen bills during a prolonged period—this Court finds such legislative inaction "significant." *E.g.*, *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 600–01 (1983) (it was "significant" that Congress declined to enact "no fewer than 13 bills" during a 12-year period while Congress "enacted numerous other amendments" to the statute); *Flood* v. *Kuhn*, 407 U.S. 258, 281–84 (1972) (Congress "clearly evinced a desire" to maintain the status quo by rejecting "numerous and persistent" legislative proposals).

Indeed, if the public meaning of sex discrimination included transgender status, it is inexplicable that Congress would fail to clarify that point in response to decades of EEOC and circuit consensus saying that it is *not* included. *Holloway*, 566 F.2d at 662–64; *Sommers*, 667 F.2d at 749–50; *Ulane*, 742 F.2d at 1086–87; *Casoni* v. *U.S. Postal Serv.*, EEOC DOC 01840104, 1984 WL 485399, at *3 (Sept. 28, 1984).

e. Title VII's 1991 amendments are also instructive. Through the 1991 Act, Congress repudiated many judicial decisions construing Title VII. *Landgraf* v. *USI Film Prod.*, 511 U.S. 244, 250–51 (1994). It is telling that Congress did nothing to reject

the then-prevailing circuit and administrative consensus on transgender status. By "perpetuating the [relevant] wording" on sex discrimination, Congress "is presumed to carry forward" that "uniform interpretation." *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015); see also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 324 (2012) (this rule applies to "uniform holdings of lower courts" and "well-established agency interpretations") (citing cases).

f. Moreover, Congress and many members of this Court have recognized that sex in Title VII refers to the status of male or female as determined by reproductive biology. When amending Title VII through the Pregnancy Discrimination Act in 1978, Congress said that "it is the capacity to become pregnant which primarily differentiates the female from the male." S. Rep. No. 95-331, at 2–3 (1977) (quoting *Gen. Elec. Co.* v. *Gilbert*, 429 U.S. 125 (1976) (Stevens, J., dissenting)). And many members of this Court have echoed that same view. *E.g.*, *Coleman* v. *Court of Appeals of Md.*, 566 U.S. 30, 55 (2012) (Ginsburg, J., dissenting) (joined by three Justices) (repeating that quote).

g. Even in this very case, the EEOC recognized that sex and transgender status are different concepts, determining there was reasonable cause to believe Stephens was discharged due to "sex *and* gender identity." Pet. App. 98a (emphasis added). So did Stephens: "I have been discharged due to my sex and gender identity, female, in violation of Title VII." Resp. App. 6a. If sex and transgender status were

transposable, the EEOC and Stephens would not have used them as distinct bases for liability.[11]

h. Finally, reading transgender status into Title VII's ban on sex discrimination would bring about a monumental legal change that, among other things, would forbid employers from administering sex-specific policies according to sex. Congress does not hide "elephants in mouseholes" when fundamentally changing the law. *Wittmer* v. *Phillips 66 Co.*, 915 F.3d 328, 336 (5th Cir. 2019) (Ho, J., concurring) (quoting *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)). It is inconceivable that Congress would have acted so cryptically in effectuating the paradigm shift that Stephens seeks. *Ulane*, 742 F.2d at 1085–86 (canvassing Title VII's legislative record).

4. Putting the statutory words together, Title VII's prohibition on discrimination because of sex had a public meaning in 1964 that an employer could not treat one sex more favorably than the other because of sex. This is the "simple test" to which this Court referred in *Manhart*. Stephens Br. 15, 20. *Manhart* involved a class of 2,000 female employees required to contribute more money into a pension fund than

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[11] One of Stephens's amici contends that both Congress and the public would have "understood the term 'sex' to implicate transgender identity" in 1964. Amici Br. Law & History Professors 10. Not so. The concept of gender identity did not emerge until 1963, Haig, *supra*, at 93; and it did not appear in federal law until 1990, 42 U.S.C. 12211(b)(1). Another amici argues that "sex" cannot be binary because of the "existence of intersex people." Amici Br. interACT 6. But "intersex" is not a third sex. It is a rare medical condition where an individual's "reproductive system has characteristics of both males and females." *Intersex,* Black's Law Dictionary (11th ed. 2019). See Amici Br. Scholars of Family and Sexuality (Part II) (discussing intersex). Nothing suggests that the public meaning of sex in 1964 was non-binary.

10,000 similarly situated male employees. The Court rightly said that such male favoritism violates Title VII, because the statute "precludes treatment of individuals as simply components of a . . . sexual [i.e., female or male] . . . class." *Manhart*, 435 U.S. at 708.

In sum, Title VII's prohibition on sex discrimination prohibits employers from treating one sex more favorably than the other and doing so because of sex. *Manhart*, 435 U.S. at 707 n.13; *Price Waterhouse*, 490 U.S. at 251 (plurality); *Oncale*, 523 U.S. at 78 (Title VII prohibits "disparate treatment of men and women in employment") (quotation omitted); see also *Virginia*, 518 U.S. at 534 (sex "classifications may not be used . . . to create or perpetuate the legal, social, and economic inferiority of women"); *Frontiero* v. *Richardson*, 411 U.S. 677, 690 (1973) (constitutional equal-protection violation to accord "differential treatment to male and female members of the uniformed services"). To prevail here, Stephens must show that Harris treated Stephens less favorably than someone of a *different* sex, and that Harris did so *because of* sex. Absent an amendment to Title VII creating new protected classifications, Stephens's transgender status is legally irrelevant.

B. Stephens does not allege that Harris disfavored one sex over the other.

Once the meaning of the relevant statutory language is understood, it is readily apparent that Stephens's primary Title VII claim is meritless.

1. There is no evidence showing that Harris acted with the intent of treating Stephens worse than a similarly situated female employee because Stephens is male. Rather, Harris acted because Stephens refused to follow the company's sex-specific dress code

for men, just as it would have done had a female employee refused to follow the requirements for women. J.A. 134. Harris did not discriminate based on sex. Contra Stephens Br. 20–27.

Despite purportedly accepting that sex in Title VII means biological sex, Stephens Br. 24 n.10, Stephens's argument rests on membership in a class determined by one's self-declared internal sense of gender. The sleight of hand is immediately apparent. Stephens is *not* comparing a male with a similarly situated female, nor is Stephens alleging that Harris treated males worse than females because they are men. The allegation is that Harris intended to treat men who break the dress code differently than women who follow the dress code. This is not sex discrimination.

2. Seeking a way around this deficiency, Stephens claims worse treatment than a female employee who identifies as a woman. Stephens Br. 23–27. That is the wrong comparator. The proper comparator is not someone who exhibits a different gender identity, but someone of the opposite sex who has all other characteristics in common with Stephens, i.e., someone who is similarly situated. *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977) (Title VII requires proof that an employer "differentiates between similarly situated males and females on the basis of sex"); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 71 (1977) ("[S]imilarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin.").

It is only when a court is "scrupulous about holding *everything* constant except the plaintiff's sex" that the comparator analysis can "do its job of *ruling in* sex discrimination as the actual reason for the

employer's decision." *Hively*, 853 F.3d at 366 (Sykes, J., dissenting). A women who identifies as a woman not only has a different sex (female) than Stephens, but also a different transgender status (non-transgender). Such a comparison cannot show sex discrimination.

The proper comparison puts Stephens, a man who identifies as the opposite sex, alongside a woman who identifies as the opposite sex. Both Stephens and that comparator share the same transgender status (transgender), and only their sex is different. That framing shows that sex discrimination is not at work here because Harris will treat a woman who refuses to comply with the female dress code the same way that it treated Stephens, a man who refused to comply with the male dress code.

Stephens's version of the comparator analysis exhibits another fundamental flaw. It takes an analytical tool "for uncovering the employer's real motive" or "for ferreting out a prohibited discriminatory motive" "*as a factual matter*" and transforms it into an interpretative guide for changing the meaning of the statute. *Hively*, 853 F.3d at 365–66 (Sykes, J., dissenting). In Judge Sykes's words, Stephens's approach is "artifice, not [statutory] interpretation." *Id.* at 367.

Stephens says that the claim here meets the "simple test" set forth in *Manhart* because Stephens "would not have been fired for living openly as a woman if . . . assigned the sex of female at birth." Stephens Br. 25. But considering the proper comparator dispels this argument. Harris acted as it did because Stephens refused to comply with the company's sex-specific dress code for men. The result would have been the same if a female employee declined to

comply with the company's sex-specific dress code for women. Nowhere does Stephens point to evidence showing that Harris favored one sex over the other. There is not even an allegation of such favoritism.

3. Stephens then pivots and analogizes the circumstances here to those of an employer who fires employees for changing their religion. Stephens Br. 26–27. That analogy is inapt under Title VII's plain text. The Act defines religion broadly to "include[ ] all aspects of religious observance and practice." 42 U.S.C. 2000e(j). Because religious observance and practice can change, Title VII covers changes in religion by definition. But there is nothing in Title VII indicating that sex can change or, even if it could, that a change in sex is protected. See *Frontiero*, 411 U.S. at 686 ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."); Amici Br. United States Conference of Catholic Bishops (Part I.B.) (debunking the analogy to employees who change their religion).

4. Stephens also chides Harris for "perceiv[ing] [Stephens] to be, in its words, a 'biological male' because [Stephens] was assigned male at birth." Stephens Br. 27. So after initially conceding that the public meaning of sex discrimination in 1964 is discrimination based on an employee's biological sex, Stephens Br. 24 n.10, Stephens later rejects the notion that Stephens's biological sex is relevant to the Title VII analysis. But there is no textual basis for that contention. And there is zero evidence that Harris treated Stephens worse than similarly situated females who desired to violate the company's sex-specific dress code. Accordingly, Harris is entitled to judgment as a matter of law on Stephens's theory that Harris engaged in unlawful sex discrimination.

5. Three additional points warrant brief response.

a. First, Stephens essentially argues that because transgender status is related to sex, a prohibition on sex discrimination must include discrimination based on transgender status. Stephens Br. 23–25. But this Court has already rejected that kind of reasoning when interpreting Title VII.

In *Espinoza*, the plaintiff, reminiscent of Stephens, argued that Title VII's prohibition on national origin discrimination includes discrimination based on alienage status, since alienage is so closely linked to national origin. After all, the primary determiner of alienage is the nation in which a person is born. 8 U.S.C. 1401–1409 (determining citizenship based on where a person is born); *Espinoza*, 414 U.S. at 96 (Douglas, J., dissenting) ("Alienage results from one condition only: being born outside the United States."). The Court rejected that argument because citizenship and national origin, while related, are distinct classifications. 414 U.S. at 95. The same is true of sex and transgender status. Congress chose to ban discrimination based on the former but not the latter. And courts should not conflate the two to rewrite the statute.

Expanding Title VII's protection to any status determined by reference to sex has no statutory tether. Title VII does not prohibit discrimination based on any "classification that references sex," but only based on "sex." Even the Sixth Circuit used to recognize the distinction. *Dillon* v. *Frank*, No. 90-2290, 1992 WL 5436, at *4 (6th Cir. Jan. 15, 1992) (declining "to define 'because of sex' to mean 'because of anything relating to being male or female, sexual roles, or to sexual behavior'") (footnote omitted).

Also, unmooring Title VII claims from the statutory text would go much further than simply adding transgender status. Stephens's arguments must equally insist that the same logic applies to Title VII's race, color, religion, and national origin classifications, necessitating that this Court overrule *Espinoza*.

b. Second, Stephens asserts in passing that Title VII "creates liability where sex is a 'motivating factor' behind the employment decision, even if sex is not a but-for cause." Stephens Br. 21 (citing 42 U.S.C. 2000e-2(m).) This argument does not help Stephens because the motivating-factor provision does not modify the meaning of sex discrimination in 42 U.S.C. 2000e-2(a)(1). Indeed, this Court has said that the motivating-factor provision is *not* "a substantive bar on discrimination" but is simply "the causation standard for proving a violation defined elsewhere in Title VII." *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 355 (2013). That provision does not eliminate the requirement that one sex be treated better than the other.

In addition, this Court has already established that "motivating factor" means more than a simple "causal factor," *Staub* v. *Proctor Hosp.*, 562 U.S. 411, 418–19 (2011), or a "contributing factor," which is the statutory language that Congress considered and rejected, Civil Rights and Women's Equity in Employment Act of 1991, H.R. 1, 102d Cong. § 5(a). While an employer that acts based on transgender status notices the employee's biological sex, that mere noticing of sex does not *motivate* the employer to act—much less does it motivate the employer to prefer one sex over the other. See *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015) ("Motive and

knowledge are separate concepts."); *Nassar*, 570 U.S. at 343 ("one of the employer's motives" must be "the motive to discriminate" based on the protected trait). Under Stephens's broad reading of "motivating factor," employers would violate Title VII whenever they notice their employees' sex while enforcing sex-specific employment policies.

c. Finally, Stephens relies on *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam), to argue that sex "need not be the sole cause of an adverse employment decision." Stephens Br. 22. But *Phillips* did not address causation. Rather, it established that Title VII forbids discrimination against a subclass of women (women with pre-school-aged children) who are treated differently than a similarly situated subgroup of men (men with pre-school-aged children). 400 U.S. at 544. Yet, as explained above, Harris did not treat Stephens (a man who insisted on violating the sex-specific dress code) worse than a similarly situated woman (a woman who insisted on violating the sex-specific dress code).

II. Stephens has no claim for sex stereotyping.

A. This case does not fit within *Price Waterhouse*.

In *Price Waterhouse*, this Court resolved a circuit conflict over the burden each party bears in a Title VII mixed-motive case. 490 U.S. at 232, 258. In addressing that issue, the plurality observed that the plaintiff (a female employee seeking a promotion at a global accounting firm) proved sex discrimination—favoritism of men over women because they are men—*through* evidence that the employer made employment decisions based on stereotypes about women. *Id.* at 250–52, 255–58. Those ugly stereotypes focused on

"insisting" that women "must not be" "aggressive" in the workplace. *Id.* at 250–51; see also *id.* at 234–35, 256.

Stephens says that *Price Waterhouse* forbids Harris from applying its sex-specific dress code based on sex. Stephens Br. 28–34. But this argument does not fit within *Price Waterhouse* for three reasons. First, *Price Waterhouse* did not create an independent claim of sex stereotyping, and this Court should not create one now. Second, nothing in *Price Waterhouse* suggests that sex itself is a stereotype. That is why it was baseless for the Sixth Circuit to treat sex as a stereotype. Third, *Price Waterhouse* dealt with a sex-specific stereotype used to disfavor one sex. Yet Harris does not rely on any sex-specific stereotype to favor members of one sex over the other.

1. The *Price Waterhouse* plurality did not create an independent cause of action for sex stereotyping. See Amici Br. Institute for Faith and Freedom (Part I.A.–I.B.). The plurality held only that sex stereotyping by an employer can be "*evidence*" of sex discrimination; to prevail, the plaintiff must always prove that "the employer *actually* relied on [sex] in making its decision." 490 U.S. at 251 (second emphasis added). Two concurring Justices also said reliance on sex stereotypes could be evidence of discriminatory intent because of sex. *Id.* at 258–61 (White, J., concurring); *id.* at 261–79 (O'Connor, J., concurring). And three dissenting Justices explained that while "use by decisionmakers of sex stereotypes is . . . relevant to the question of discriminatory intent," "Title VII creates no independent cause of action for sex stereotyping." *Id.* at 294 (Kennedy, J., dissenting).

After *Price Waterhouse*, a plaintiff must still show one sex is treated better than the other. As the plurality put it, "Congress intended to strike at the entire spectrum of *disparate treatment* of men and women *resulting* from sex stereotypes." *Id.* at 250–51 (emphasis added) (quoting *Manhart*, 435 U.S. at 707 n.13).

Stephens's argument assumes *Price Waterhouse* judicially amended Title VII to create a new standalone sex-stereotyping claim, one not dependent on employer favoritism for men or women. Stephens Br. 28 ("Harris Homes also violated Title VII by firing [ ] Stephens for failing to conform to sex-based stereotypes."). *Price Waterhouse* did not do that; the plurality's opinion "does not even gesture in that direction." *Hively*, 853 F.3d at 371 (Sykes, J., dissenting).

Stephens makes no effort to explain why the Court should adopt a standalone theory of stereotyping liability. There are many reasons why the Court should not. To begin, creating an independent cause of action for sex stereotyping divorces employment claims from Title VII's text. After all, the statute forbids discrimination "because of sex," not "because of sex stereotypes." Since the legal ban is on sex discrimination, it is not enough to prove sex stereotyping; an employee must prove disparate treatment favoring one sex over the other.

In addition, an independent cause of action for sex stereotyping cannot be cabined. Such a claim could only turn on proof that an employee does not satisfy some generalized and undefined stereotype about what a "man" or "woman" is or should be. It would create legal chaos for employers. Employees, male and female alike, could assert such a claim following termination, alleging that they were terminated

because their voice was too high (or too low), hair was too long (or too short), arms were too muscular (or not muscular enough), gait was too confident (or not enough), and so on. Because sex stereotypes are nebulous and undefined, every employee could claim that they were unlawfully stereotyped based on a characteristic that is arguably different between men and women. Employees could sue their employers over almost every perceived employment grievance.

Moreover, in the specific context of transgender employees, Stephens and supporting amici are *inviting* employers to stereotype. Their position is that because males do not stereotypically wear dresses, those who do must be viewed by their employers as women so long as they otherwise "meet the expectations of a female." J.A. 113–14. As Stephens puts it, "if you're going to present in that fashion, you have to basically adhere to the part you're professing to play." J.A. 114–15. On the flip side, because stereotypes suggest that girls are not risk-takers, a girl who likes to climb trees or play on roofs must be considered a boy. The Court should reject any interpretation of Title VII that requires employers to engage in the very stereotyping that *Price Waterhouse* condemned. See *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 628 (1984) (declining "to indulge in the sexual stereotyping" that underlies "legal decisionmaking" premised on "generalizations about the relative interests and perspectives of men and women").

2. While the employer in *Price Waterhouse* acted based on a stereotype about people of one sex, the decision challenged here—Harris's choice to apply a sex-specific policy based on sex instead of gender identity—rests solely on the category of sex itself. The Sixth Circuit wrongly denounced as stereotyping *all*

sex-specific policies administered according to sex. Pet. App. 26a–27a (decrying "stereotypical notions of how sexual organs and gender identity ought to align"). In so doing, the court deemed the very idea of sex in Title VII—which determines a person's status as male or female based on reproductive biology—as itself a stereotype.

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

Yet this Court has already said that sex is *not* a stereotype. "Physical differences between men and women" relating to reproduction—the very features that determine sex—are not "gender-based stereotype[s]." *Nguyen*, 533 U.S. at 68. As noted above, the Sixth Circuit's view that sex is a stereotype will forbid employers from applying any sex-specific policies based on sex. Because that is the only way sex-specific policies make sense, adopting that construction will nullify those polices everywhere.

3. Although *Price Waterhouse* involved a sex-specific stereotype used to favor employees of one sex over the other, this case does not. In *Price Waterhouse*, the employer discriminated against women who showed aggressiveness but not against men who showed the same trait. Reliance on that stereotype disfavored women, thus constituting the type of "*sex-specific* stereotype" that is actionable under Title VII. *Hively*, 853 F.3d at 370 (Sykes, J., dissenting).

In contrast, an employer's belief about transgender status is not sex-specific. It is a belief that applies equally to all men and women. Stephens effectively admits this by focusing on the alleged stereotype that all "individuals will identify, appear, and behave . . . consistently with their assigned sex at birth." Stephens Br. 32. If a hypothetical employer were to act based on transgender status, that employer is not in fact favoring one sex over the other. Nor is the employer motivated to discriminate against women or men as a class. Whereas a sex-specific stereotype that women should not be aggressive harms women because they are women, beliefs about transgender status impact both sexes equally.

Judge Lynch helpfully explained in an analogous case what is meant by "sex stereotyping" that "violates Title VII." *Zarda* v. *Altitude Express, Inc.*, 883 F.3d 100, 156 (2d Cir. 2018) (Lynch, J., dissenting). Refusing to hire or promote someone based on assumptions about what members of a certain sex should not do "is not a separate form of sex . . . discrimination, but is precisely discrimination in hiring or promotion based on sex." *Id.* at 156–57. Doing so "treats applicants or employees not as individuals but as members of a class that is disfavored for purposes of the employment decision by reason of a trait stereotypically assigned to members of that group as a whole." *Id.* at 157. When law firms decline to hire women because they think women do not have the necessary disposition to be lawyers, that is sex discrimination. Full stop.

Stephens's theory is quite different. Harris did not terminate Stephens because Harris believes that most men have a trait that renders them unsuitable for a funeral home. Instead, Harris chose to part ways with

an employee who declined to follow the (legal and unchallenged) sex-specific dress code that Harris applied to all its employees based on biological sex. Harris would react the exact same way to a female employee who refuses to follow the female dress code. J.A. 134. The absence of disparate treatment between similarly situated male and female employees means that Stephens has no claim for sex discrimination.

As Judge Lynch further explains, there are also stereotypes about how members of one sex "should be." *Zarda*, 883 F.3d at 157 (Lynch, J., dissenting). This was the situation in *Price Waterhouse*. But again, the "key element" in such a case "is that one sex is . . . disadvantaged in a particular workplace." *Id.* at 158. Only where sex-specific stereotypes disadvantage one sex versus the other is it possible to say that "sexual stereotyping is sex discrimination." *Ibid.*

An employer like Harris that applies a sex-specific dress code based on biological sex rather than an employee's internal sense of gender is, in Judge Lynch's words, "not deploying a stereotype about men or about women to the disadvantage of either sex." *Ibid.*; accord *Hively*, 853 F.3d at 370 (Sykes, J., dissenting). Rather, Harris is evenhandedly applying a sex-specific policy to both men and women. Such an employment practice is "different from sex discrimination, and therefore something that is not prohibited by Title VII." *Zarda*, 883 F.3d at 158 (Lynch, J., dissenting).

One final point illustrates that the *Price Waterhouse* plurality did not view things the way Stephens does. The plurality announced 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. Yet

no one would say that Stephens' position applies with equal force to race. This shows how far removed Stephens's arguments are from what the *Price Waterhouse* plurality actually said.

B. Stephens's stereotyping arguments do not establish sex discrimination.

Given how this Court has treated sex stereotyping, Stephens's stereotyping arguments do not work. That is because they fail to satisfy the requirements for proving sex discrimination.

1. Stephens's first theory is fact-based, setting out a number of alleged stereotypes that purportedly motivated Harris's employment decision. Stephens Br. 29–32. But these new facts—such as Harris's objection to Stephens's filing the EEOC claim under a different name, *id.* at 30—either are pulled out of context or had nothing to do with Harris's decision to parts ways with Stephens. Tellingly, the Sixth Circuit did not mention any of them in its opinion. In its analysis, the Sixth Circuit identified only one stereotype it viewed as problematic: that Harris denied Stephens's demand because Stephens "was 'no longer going to represent himself as a man' and 'wanted to dress as a woman.'" Pet. App. 16a. Even Stephens testified that the reason for Harris's decision was that Stephens "coming to work dressed as a woman was not going to be acceptable." J.A. 98–99. Thus, the stereotype analysis should focus—as the Sixth Circuit did—on Harris's decision to apply its sex-specific dress code based on sex.

On the merits, it is not possible to say that any alleged stereotyping resulted in unfavorable treatment of one sex. When employees classify themselves based on an internal sense of gender, and the

employer continues to treat the employees based on sex for purposes of applying a sex-specific policy, the employer is neither favoring men nor women.

Stephens nevertheless argues that a male employee *always* has a Title VII claim if terminated for "failing to look and act sufficiently masculine," and a female if terminated "for failing to look sufficiently feminine." Stephens Br. 31. But whether a claim is cognizable under Title VII depends on whether the employer acted with the intent to treat employees of one sex less favorably than those of the other sex. There is no such claim in Stephens's allegations here.

2. Stephens's second theory is categorical, insisting that all "discrimination against employees for being transgender is inherently based on sex stereotypes" and thus violates Title VII. Stephens Br. 32–34. Per Stephens, all such discrimination rests on the alleged "stereotype that individuals will identify, appear, and behave . . . consistently with their assigned sex at birth." *Id.* at 32. This theory asserts that *Price Waterhouse* wrote transgender status into Title VII, even though for decades, *no one* thought this was true because it would be contrary to the public understanding in 1964 and ever since.

This argument lacks merit. For starters, this Court should not read *Price Waterhouse* to contradict Title VII's plain language. In addition, Stephens's categorical theory exhibits many of the shortcomings discussed in the prior section: it rests on the faulty assumption that *Price Waterhouse* established an independent claim of sex stereotyping; and unlike the facts of *Price Waterhouse*, the theory here does not involve a sex-specific stereotype used to treat one sex better than the other. Without that favoritism, there is no actionable claim of sex discrimination.

III. This Court's holdings in *Oncale* and *Newport News*—which correctly focus on Title VII's meaning rather than Congress's subjective intent—do not support judicially creating a new Title VII classification.

Stephens asserts that interpreting Title VII's prohibition on sex discrimination does not depend on what Congress or the general public understood in 1964. Stephens Br. 41–45. Stephens points to *Oncale*, for example, where this Court held that same-sex sexual harassment was prohibited under the plain terms of Title VII, even though same-sex harassment was "not the principal evil Congress was concerned with when it enacted Title VII." 523 U.S. at 79. Accord *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 675 (1983) (policy that treated a male employee with dependents less favorably than a similarly situated female employee with dependents was a Title VII violation, even if such application of the statute was not foreseen at the time of enactment).

But there's something significant missing in Stephens's theory. Whether in the context of same-sex harassment or dependent benefits, an employee must *still* show that an employer is treating an employee of one sex less favorably than a similarly situated employee of the opposite sex, and that it is doing so because of that employee's sex. In *Oncale*, for example, the Court reaffirmed that in *all* sex-discrimination claims—including those based on sexual harassment or even same-sex sexual harassment—"[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." 523 U.S. at 80 (cleaned up).

Explaining itself, the Court indicated that in an opposite-sex harassment case involving "explicit or implicit proposals of sexual activity," an inference of sex discrimination can be easily drawn because "it is reasonable to assume those proposals would not have been made to someone of the same sex." *Ibid.* The same is not true in a case involving same-sex harassment *unless* the plaintiff proved the harasser was homosexual; then it *would* be reasonable to infer the victim was targeted because of sex. (Note that the Court's focus was on the sexual orientation of the harasser, not the victim.) "In short, in authorizing claims of same-sex harassment as a theoretical matter, the Court carefully tethered *all* sexual-harassment claims to the statutory requirement that the plaintiff prove discrimination 'because of sex.'" *Hively*, 853 F.3d at 372 (Sykes, J., dissenting).

Newport News also required favoritism of one sex over the other. That case involved an employer health plan that provided female employees with hospitalization benefits for pregnancy-related conditions to the same extent as other medical conditions but provided fewer benefits for spouses of male employees. The Court ruled in favor of the EEOC, which was representing the interests of the male employees, even though Congress may not have contemplated such a claim at the time it enacted the Pregnancy Discrimination Act. That was because the "plan unlawfully g[ave] married male employees a benefit package for their dependents that [wa]s less inclusive than the dependency coverages provided to married female employees. 462 U.S. at 683–84. This disparate treatment fulfilled Title VII's purpose to prohibit "discrimination on the basis of an employee's sex." *Id.* at 685.

Here, Stephens alleges no employer conduct that treats an employee of one sex less favorably than employees of the other sex and that does so because of sex. Instead, Stephens is trying to add a new classification altogether—transgender status—which Stephens argues is determined in part by sex. Stephens Br. 23. But that legislative addition is something only Congress can do.

Oncale and *Newport News* teach two things. First, courts must focus on a statute's original public meaning, rather than on the subjective intent of legislators. And second, "[w]hile every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world." *Wis. Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2074 (2018). Neither *Oncale* nor *Newport News* (nor any other case) suggests that courts are free to expand Title VII to new classifications or to jettison the requirement that one sex be treated better than the other. The Court should reject Stephens's invitation to judicially rewrite the statute.

IV. Stephens's remaining theories of statutory construction are backwards.

Having misconstrued Title VII's plain text as extending well beyond the meaning and requirements of sex discrimination, Stephens offers a number of passing interpretive arguments. Stephens Br. 36–47. Harris addresses these seriatim.

1. Harris is not urging the Court to create an "exclusion of transgender individuals" from Title VII. Contra Stephens Br. 36–37. Harris is urging the Court not to *add* a classification that Title VII's plain text omits. In *Espinoza*, this Court made that exact point in declining to add alienage as a Title VII

classification. The Court's holding did not mean that aliens were "excluded" from Title VII protection:

> Certainly it would be unlawful for an employer to discriminate against aliens because of race, color, religion, sex, or national origin . . . . *Aliens are protected* from illegal discrimination under the Act, *but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage*." [*Espinoza*, 414 U.S. at 95 (emphasis added).]

The same logic applies here. Title VII does not apply to claims based on transgender status. But it is still unlawful for any employer to discriminate against a transgender employee because of the employee's sex, race, color, religion, or national origin.

2. Harris agrees that Title VII protects "individuals" within certain groups—not the groups themselves—from discrimination. Stephens Br. 37–40. Harris also agrees that an "employer who discriminates against a female employee because of her sex cannot insulate itself from liability by also discriminating against a male employee because of his sex." Stephens Br. 39. But the key is the phrase "because of sex." In the first example, a female is treated less favorably because she is a female. In the second example, a male is treated less favorably because he is a male. Contrast that with the situation here, where Harris did *not* treat Stephens less favorably than a female who refused to comply with the dress code for women. The individual-group distinction does not help Stephens here.

3. Harris is not asking the Court to create a statutory exception to the ban on discrimination because of sex. Contra Stephens Br. 40–41. Harris's

point is that its decision to part ways with Stephens was not discrimination because of sex in the first instance. It is Stephens asking for a judicial expansion of the statute, not Harris asking for an exemption confining it.

Under Stephens's view, bona fide occupational qualifications will be turned on their head. See generally Stephens Br. 40. If an employer decides that one's status as a male is "a bona fide occupational qualification for [a] job" in a "male maximum-security penitentiary," *e.g., Dothard* v. *Rawlinson*, 433 U.S. 321, 336–37 (1977) (upholding such a qualification), a female applicant can elide that qualification by declaring that she identifies as a male. Again, it is not Harris requesting an exemption, it is Stephens demanding a statutory rewrite.

In sum, Title VII will continue to fully protect individuals, as it always has, from unlawful discrimination based on the protected classifications listed in the statute—regardless of an individual's race, sex, sexual orientation, or gender identity. Contra, *e.g.*, Amici Briefs of Service Employees Int'l Union, Muslim Bar Assoc. of New York, and Lawyers' Committee for Civil Rights Under Law. As in *Espinoza*, the Court should leave it to Congress to add new protected classifications.

V. Redefining sex discrimination will cause problems and create harms.

Stephens says that *Price Waterhouse* must be read to expand Title VII beyond its statutory text or else this Court's ruling will undermine legal protection for *all* workers. Stephens Br. 34–36. Not so. Harris is not asking the Court to throw out "sex-based generalizations" as acceptable evidence of discrimination because of sex. Contra Stephens Br. 34. Rather, Harris is asking the Court to enforce Congress's prohibition on sex discrimination without judicially amending the statute to add other classifications that Congress omitted. Doing so leaves *Price Waterhouse* and its progeny fully in place, allowing any employee to use evidence of sex-specific stereotypes to prove that, because of their sex, they have been treated less favorably than members of the opposite sex.

Conversely, accepting Stephens's invitation to judicially amend Title VII would have many adverse consequences. These include impacts in the employment context, in the context of other federal laws, and outside those laws altogether.

1. Redefining sex discrimination in Title VII would adversely affect employers. Contra Stephens Br. 50–52. See Amici Br. Bus. Orgs. Supporting Employers (Part II) (detailing these effects). For example, it would prohibit organizations from maintaining sex-specific sleeping facilities, showers, restrooms, and locker rooms, all of which "afford members of each sex privacy from the other sex." *Virginia*, 518 U.S. at 550 n.19. If an employer declines to allow a male employee who identifies as female to use the locker room with women, the male employee would have a claim of transgender-status discrimination.

And if the employer allows the male employee to use the locker room with female employees, the women would certainly bring their own claim of sex discrimination based on a hostile work environment. That situation not only is unfair to employers, but also sacrifices the privacy rights of employees based on others' views about their own gender. By short-circuiting the legislative process, the Sixth Circuit prevented Congress from addressing these sensitive concerns and balancing the interests. *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).

Stephens's view of stereotyping heightens the concerns for employers. When asked if Harris was required "to allow a male funeral director who was . . . bald and [had a] neatly trimmed beard and mustache" to "wear a professional[ ] female dress and high heels while meeting with a bereaved family or officiating at a funeral," Stephens said "no." J.A. 113. Why not? Because, as Stephens testified, the male employee "doesn't meet the expectations of a female." J.A. 114. Yet when asked what "meets the expectations of a female," Stephens candidly conceded, "[y]our guess is as good as mine." *Ibid.* If the Court adopts Stephens's approach, every employer's guess when separating permissible from impermissible stereotyping is an invitation for litigation. Employers should not be forced to navigate this vague morass.

Judicially adding transgender status as a Title VII classification would also expand Title VII's coverage in ways that Stephens does not acknowledge. According to the medical community, a transgender individual is not limited to someone diagnosed with

gender dysphoria. As explained above, "transgender" is an umbrella term for persons whose gender *identity*, gender *expression*, or *behavior* does not conform to that typically associated with their biological sex. APA, *Answers*. So if this Court were to judicially rewrite "sex" to include "transgender status," it would create an entirely new panoply of claims for biological men who identify, express, or behave as women, atypical men, non-binary (both male and female), or genderqueer (neither male nor female). And because "gender identity" is "fluid," "internal," and authenticated only by self-profession, Pet. App. 24a–25a n.4, an employee's claimed transgender status could change. DSM-5 451 (defining "transgender" to include "individuals who transiently" identify one way). See Amicus Br. Free Speech Advocates (Part II.B.–II.C.) (discussing the mutability of gender identity and the difficulty of managing its non-binary nature).

Stephens's position would also undermine the critical privacy and safety interests protected by Title VII's bona-fide-occupational-qualification provision. *E.g.*, *Automobile Workers* v. *Johnson Controls, Inc.*, 499 U.S. 187, 206 n.4 (1991) (acknowledging that sex might "constitute a BFOQ when privacy interests are implicated," such as for an obstetrics nurse that "provide[s] sensitive care for patient's intimate" concerns); *id.* at 219 n.8 (White, J., concurring) ("The lower federal courts . . . have consistently recognized that privacy interests may justify sex-based requirements for certain jobs"—such as a restroom attendant—and Title VII's legislative history recognized some examples, including "a female nurse hired to care for an elderly woman" and "a masseur"); *Dothard*, 433 U.S. at 336–37 (holding that sex is a BFOQ for a guard position at a men's maximum-security prison). Under Stephens's logic, men who

identify as women must be allowed to oversee the overnight facilities at a battered women's shelter. See Amici Br. Defend My Privacy (Part I) (discussing the effects on women's shelters).

For similar reasons, adopting Stephens's position would harm the equal opportunities of women in the workplace. Jobs reserved for women that satisfy the bona-fide-occupational-qualification standard, such as playing in the Women's National Basketball Association, would be open to men who identify as women. And scarce jobs requiring fitness tests, such as police and fire positions, will tend to exclude women as they are forced to compete against men who identify as female.

Amending Title VII as Stephens requests will also result in substantial infringements of free speech and religious freedom in the workplace. Recently, a high school in Virginia fired a teacher because his religious beliefs forbid him from using male pronouns when referring to a female student who identifies as male. Although the teacher offered to use the student's first name and to avoid female pronouns, the school rejected that solution, claiming that it would "create[e] a hostile learning environment."[12] A university in Ohio likewise punished a professor under similar circumstances.[13] And the former chair of the University of Louisville's Division of Child and

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[12] *Teacher fired for refusing to use transgender student's pronouns*, NBC News (Dec. 10, 2018), https://nbcnews.to/2QFvQEL.

[13] Pl.'s V. Compl., *Meriwether* v. *The Trustees of Shawnee State Univ.*, No. 1:18-cv-00753 (S.D. Ohio Nov. 5, 2018), https://bit.ly/2Ms8yQb.

Adolescent Psychiatry and Psychology—after three years of perfect scores on his annual reviews—was demoted, harassed, and then terminated for benign comments advising caution on certain treatment approaches for youth experiencing gender dysphoria.[14] See Amicus Br. Center for Arizona Policy (discussing these and similar cases).

Although this compelled-speech problem has already surfaced, it will grow exponentially if the Court judicially amends Title VII as Stephens requests. No matter how accommodating employers and coworkers may be in terms of using a person's legal name or avoiding pronouns, the government will compel them to use sex-identifying terminology that they object to using.[15] What's more, if employers or employees express any religious doubts at work about whether people can or should change their sex, see generally Congregation for Catholic Education, *"Male and Female He Created Them"* (June 2019), https://bit.ly/2WuJZDw, those doubts could elicit lawsuits and punishment under a hostile work environment theory.[16]

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[14] Pl.'s V. Compl., *Josephson* v. *Bendapudi*, No. 3:19-mc-99999 (W.D. Ky. Mar. 28, 2019), https://bit.ly/2Kht0QR.

[15] N.Y.C. Comm'n on Human Rights, *Legal Enf't Guidance on Discrimination on the Basis of Gender Identity or Expression*, https://on.nyc.gov/2KRC7e8.

[16] Although no religious liberty claims remain in this case, it is notable that Tom Rost interprets the Bible as teaching that sex is immutable and believes he "would be violating God's commands" if he acceded to Stephens's demands on how to dress in the workplace. J.A. 131. If forced to violate his faith, Tom "would feel significant pressure to sell [the] business and give up [his] life's calling of ministering to grieving people." *Id.* at 132.

The concerns will even extend to religious organizations directly. Faith-based groups and doctors at religious hospitals will be pressured to violate their beliefs by paying for and participating in medical efforts to alter sex. See *Franciscan All., Inc.* v. *Burwell*, 227 F. Supp. 3d 660, 691–93 (N.D. Tex. 2016) (a regulation redefining "sex" in the Affordable Care Act's nondiscrimination provision, 42 U.S.C. 18116(a), to include "gender identity" likely violated RFRA). This risk arises because Title VII covers employment benefits, see 42 U.S.C. 2000e-2(a)(1) (applying to employee "compensation"); and it is not clear that the statute's existing religious exemptions will provide a safe harbor. See 42 U.S.C. 2000e-1(a) (allowing a "religious corporation" to limit employment to "individuals of a particular religion"); Amici Br. United States Conference of Catholic Bishops (Part IV.B.) (raising concerns about the limitations of the existing statutory protections). While Congress can consider these religious-liberty concerns and balance competing interests, the same is not true of a decision of Article III courts judicially amending Title VII.

2. Adopting Stephens's reasoning will also impact analogous laws that similarly forbid sex discrimination. A prime example is Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, which requires equal opportunities for women and girls in high school and college athletics. 34 C.F.R. Part 106. See *Franklin* v. *Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992) (relying on sex-discrimination principles announced in a Title VII case when interpreting Title IX). If sex discrimination includes transgender-status discrimination, female athletes will be forced to compete against males who identify as female, which will deny women and girls the opportunities, awards, and

scholarships that are rightfully theirs. See Amici Br. Independent Women's Forum (discussing the effects on female athletes).

Indeed, schools and leagues that allow boys who identify as girls to compete in girls' sports have already seen this inequity. In Connecticut, two boys who identify as girls have recently won 15 girls' state track-and-field titles (titles held in 2016 by nine different girls). The same two boys have taken from female athletes more than 40 opportunities to participate in higher level competitions.[17]

The circumstances in Connecticut are hardly unique. A male athlete who used to compete for New Zealand in men's weightlifting but now identifies as a woman took two gold medals and a silver in the women's division at the recent Pacific Games.[18] And a male cyclist who identifies as a woman took first place in a women's bracket of the International Masters Track Cycling World Championships.[19]

Some argue that any "direct competitive advantage" enjoyed by male athletes who identify as and compete against females is a "myth" that "is not

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[17] Title IX Discrimination Complaint on behalf of Selina Soule and additional anonymous complainants (June 17, 2019), https://bit.ly/2Yg0S6A.

[18] *Weightlifter Hubbard becomes lightning rod for criticism of transgender policy*, Reuters (July 29, 2019), https://reut.rs/2SVN6nN.

[19] *McKinnon is first transgender woman to win world title*, Cycling News (Nov. 1, 2018), https://bit.ly/2PPFGQI.

supported by medical science."[20] But that claim is difficult to reconcile with actual science, which concludes that the competitive advantage is an "intolerable unfairness."[21] And it is also difficult to harmonize with real-world outcomes, such as the recent results in Connecticut.[22]

Changing the meaning of sex discrimination will also threaten to change fair housing law. See *Inclusive Communities Project*, 135 S. Ct. at 2525 (looking to Title VII case law when interpreting the Fair Housing Act). The Fair Housing Act makes it illegal to "discriminate" in the sale or rental of a dwelling "because of . . . sex." 42 U.S.C. 3604(b). Under Stephens's rule, if a property owner created affordable group housing for abused women, the owner would be required to lease to a male tenant who identified as a woman.

This is not hypothetical. In Anchorage, Alaska, a federal court had to enjoin the city from using a gender-identity nondiscrimination law to insist that a women's shelter allow a man who identifies as a woman to sleep in a common room mere feet away from women, many of whom have been trafficked,

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[20] Letter from Rep. Ilhan Omar to USA Powerlifting (Jan. 31, 2019), https://bit.ly/2Z7O3Pi.

[21] Taryn Knox et al., *Transwomen in elite sport: scientific and ethical considerations*, 45 J. of Med. Ethics 395, 395 (June 2019), https://bit.ly/332avbN.

[22] Adopting Stephens's view of sex discrimination will have ramifications in education far beyond athletics. See Amicus Br. Women's Liberation Front (Part III) (discussing effects on living facilities and academic scholarships).

abused, or sexually assaulted by men.[23] And under the Sixth Circuit's rewriting of Title VII, that same shelter would similarly be forced to hire a male who identified as female for a position requiring the applicant to stay in a common sleeping area with the women, or to counsel women who have been traumatized by sexual abuse and domestic violence.

3. Redefining sex discrimination by judicial fiat will also have broader impacts. It will directly undermine the separation of powers. See Amici Br. Members of Congress in Support of Employers (Part I.A.). This Court has repeatedly instructed that it is the role of the judiciary "to apply the statute as it is written." *Sandifer* v. *U.S. Steel Corp.*, 571 U.S. 220, 231 (2014) (quoting *Burrage* v. *United States*, 571 U.S. 204, 218 (2014)). And the Court has steadfastly rejected efforts to judicially "amend" statutes. When the passage of time causes some to disagree over whether the law should be changed, this Court admonishes that "the proper role of the judiciary" is to "apply, not amend, the work of the People's representatives." *Henson*, 137 S. Ct. at 1726.

"When interpreting an act of Congress, [the courts] need to respect the choices made by Congress about which social problems to address, and how to address them." *Zarda*, 883 F.3d at 166 (Lynch, J., dissenting). Any other approach fails "to take account of legislative compromises essential to a law's passage" and to "respect the limits up to which Congress was prepared to go." *New Prime*, 139 S. Ct. at 543 (cleaned up).

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[23] Order, *The Downtown Soup Kitchen d/b/a Downtown Hope Center* v. *Municipality of Anchorage*, No. 3:18-cv-00190-SLG (D. Alaska Aug. 9, 2019), https://bit.ly/2KO2miL.

As to the specific gender-identity issues at stake here, it is not at all clear that judicially amending Title VII as the Sixth Circuit did will have the ameliorative effects that some assume. The science regarding gender identity is far from settled, and there are deep disagreements over whether otherwise healthy bodies should be physically modified to align with the mind. See Amici Br. Nat'l Medical and Policy Groups that Study Sex and Gender Identity (Part II) (discussing these disagreements). The opposite approach—aligning one's mind with the body—has traditionally been the preferred method for treating other dysphorias, such as anorexia and xenomelia (believing that one or more limbs do not belong). See Amicus Br. Dr. Paul R. McHugh, M.D. (Part. II.A.1.).

Raising additional reason for caution, one of the most comprehensive scientific studies tracking individuals who underwent sex-reassignment surgery revealed that postoperative outcomes were surprisingly negative.[24] And some doctors question whether it is best to encourage gender-dysphoric children to adopt an opposite-sex identity, given that 80-95% of pre-pubertal children will naturally resolve their gender dysphoria if they are not encouraged to embrace it,[25] while nearly 100% of children who are affirmed in their dysphoria will continue to experience

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[24] Cecilia Dhejne et al., *Long-term follow-up of transsexual persons undergoing sex reassignment surgery* (Feb. 22, 2011), http://bit.ly/2KnhuoE.

[25] Peggy T. Cohen-Kettenis et al., *The Treatment of Adolescent Transsexuals: Changing Insights*, 5 J. Sexual Med. 1892, 1893 (2008).

it.[26] In light of the uncertainty, these are precisely the circumstances where legislative inquiry and study would be most helpful when making policy choices.

Finally, putting the force of this Court behind the Sixth Circuit's views about gender identity risks placing greater strains on parents whose children are experiencing gender dysphoria. Courts have already begun to limit parental rights and even to remove children from custody if parents will not consent to hormone treatments or encourage children to embrace an opposite-sex identity.[27] Upholding the Sixth Circuit's pronouncement that sex itself is a stereotype and that gender identity (rather than sex) determines whether a person is a man or a woman will only

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[26] See, *e.g.,* Annelou L.C. de Vries et al., *Puberty Suppression in Adolescents with Gender Identity Disorder: A Prospective Follow-Up Study*, 8 J. Sexual Med. 2276, 2276–83 (2011), https://bit.ly/2T5ZFNA (70 of 70 children ages 12-16 given hormone blockers continued puberty suppression and moved on to taking cross-sex hormones); see also Kenneth J. Zucker, *The myth of persistence*, 19 Int'l J. of Transgenderism 231, 237 (2018), https://bit.ly/31cs72S (arguing that even mere social transition is a "psychosocial treatment that will increase the odds of long-term persistence" of gender dysphoria).

[27] *E.g.*, *Paul E.* v. *Courtney F.*, 439 P.3d 1169, 1173, 1178 (Ariz. 2019) (overturning an order that prohibited a father from "promot[ing] or discourag[ing] a specific view of gender identification" with his child, but permitting the family court to force the father to "retain a gender expert" and "allow [his child] to gender explore"); Order, *In re JNS*, No. F17-334 X (Hamilton County Juvenile Court Feb. 16, 2018) (awarding custody to a child's grandparents after the parents "object[ed] to the administration of hormone therapy" but "continued to financially support the ongoing therapy sessions for the child" because the court said that the child had "a legitimate right to pursue life with a different gender identity than the one assigned at birth").

increase government intrusion on parents trying to determine what is best for their children.

In sum, courts are the governmental branch least equipped to deal with these many competing interests, let alone to strike a balance that will allow people with highly divergent views about gender identity to live together harmoniously. "Congress alone has the institutional competence" to evaluate all these issues. *Wis. Cent.*, 138 S. Ct. at 2074.

This Court should reaffirm the longstanding meaning of sex discrimination in Title VII, direct that judgment be entered in favor of Harris as a matter of law, and leave it to Congress to decide whether and how to make changes in federal nondiscrimination laws.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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