No. 18-107

In the Supreme Court of the United States

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

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT SUPPORTING REVERSAL

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
ERIC S. DREIBAND
Assistant Attorneys General
JEFFREY B. WALL
Deputy Solicitor General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
JONATHAN C. BOND
Assistant to the Solicitor General
ERIC TREENE
Special Counsel
CHARLES W. SCARBOROUGH
STEPHANIE R. MARCUS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Statement 2
Summary of argument 12
Argument:
Title VII does not prohibit discrimination against transgender individuals as such 14
A. Title VII does not prohibit discrimination against transgender persons based on their transgender status 16
1. Title VII's prohibition on discrimination because of "sex" does not extend to transgender status 16
2. Discrimination based on transgender status does not inherently entail discrimination because of sex 30
B. Discrimination against transgender persons does not constitute sex stereotyping prohibited by Title VII 44
1. Sex stereotyping by itself is not a Title VII violation 45
2. Discrimination based on transgender status does not constitute sex stereotyping prohibited by Title VII, but a transgender plaintiff may use sex-stereotyping evidence to prove a sex-discrimination claim 50
Conclusion 54
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases: Page

Balmes v. *Daley*, EEOC Doc. 01A05006, 2000 WL 34329672 (Aug. 25, 2000) 28
Bauer v. *Lynch*, 812 F.3d 340 (4th Cir.), cert. denied, 137 S. Ct. 372 (2016) 37
Burlington N. & Santa Fe Ry. Co. v. *White*, 548 U.S. 53 (2006) 31
Chavez v. *Credit Nation Auto Sales, LLC*, 641 Fed. Appx. 883 (11th Cir. 2016) 28
Coleman v. *B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199 (10th Cir. 1997) 41
Department of Homeland Sec. v. *MacLean*, 135 S. Ct. 913 (2015) 23
Doe ex rel. Doe v. *Boyertown Area Sch. Dist.*, 893 F.3d 179 (3d Cir.), vacated on reh'g, 897 F.3d 515 (3d Cir.), superseded by 897 F.3d 518 (3d Cir. 2018), cert. denied, 139 S. Ct. 2636 (2019) 27
Dothard v. *Rawlinson*, 433 U.S. 321 (1977) 43
Etsitty v. *Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) 27
Faulkner v. *Mineta,* EEOC Doc. 01A54932, 2005 WL 3526016 (Dec. 19, 2005) 28
Fort Bend Cnty. v. *Davis*, 139 S. Ct. 1843 (2019) 2
Furnco Constr. Corp. v. *Waters*, 438 U.S. 567 (1978) 31
G.G. ex rel. Grimm v. *Gloucester Cnty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), vacated and remanded, 137 S. Ct. 1239 (2017) 27
General Dynamics Land Sys., Inc. v. *Cline*, 540 U.S. 581 (2004) 29
General Elec. Co. v. *Gilbert*, 429 U.S. 125 (1976) 3
General Motors Corp. v. *Tracy*, 519 U.S. 278 (1997) 32

Cases—Continued: Page

Glenn v. *Brumby*, 663 F.3d 1312 (11th Cir. 2011) 27
Harris v. *Forklift Sys., Inc.*, 510 U.S. 17 (1993) 32
Harris Trust & Sav. Bank v. *Salomon Smith Barney Inc.*, 530 U.S. 238 (2000) 16
Henson v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017) 30
Hively v. *Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017) 18, 39
Holloway v. *Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) 25
Holman v. *Indiana*, 211 F.3d 399 (7th Cir.), cert. denied, 531 U.S. 880 (2000) 42
International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991) 41
Jackson v. *Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) 31
Jespersen v. *Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) 36, 52
Kastl v. *Maricopa Cnty. Cmty. Coll. Dist.*, 325 Fed. Appx. 492 (9th Cir. 2009) 28
LaBate v. *USPS*, EEOC Doc. 01851097, 1987 WL 774785 (Feb. 11, 1987) 25
Loran v. *O'Neill*, EEOC Doc. 01A13538, 2001 WL 966123 (Aug. 17, 2001) 28
Lorillard v. *Pons*, 434 U.S. 575 (1978) 25
Los Angeles Dep't of Water & Power v. *Manhart*, 435 U.S. 702 (1978) 39, 40
Macy v. *Holder*, EEOC Doc. 0120120821, 2012 WL 1435995 (Apr. 20, 2012) 29
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 33
Merck & Co. v. *Reynolds*, 559 U.S. 633 (2010) 25

Cases—Continued: Page

Meritor Sav. Bank, FSB v. *Vinson*, 477 U.S. 57 (1986) 2, 19
Michael M. v. *Superior Court*, 450 U.S. 464 (1981) 36, 37
Mt. Healthy City Sch. Dist. Bd. of Educ. v. *Doyle*, 429 U.S. 274 (1977) 47
Newport News Shipbuilding & Dry Dock Co. v. *EEOC*, 462 U.S. 669 (1983) 41
Oncale v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) ..... *passim*
Phillips v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) 41
Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989) .... *passim*
Ricci v. *DeStefano*, 557 U.S. 557 (2009) 26
Ross v. *Blake*, 136 S. Ct. 1850 (2016) 16
Sandifer v. *United States Steel Corp.*, 571 U.S. 220 (2014) 17
Schwenk v. *Hartford*, 204 F.3d 1187 (9th Cir. 2000) 25
Smith v. *City of Salem*, 378 F.3d 566 (6th Cir. 2004) 8, 9, 28
Sommers v. *Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982) 25
Texas Dep't of Cmty. Affairs v. *Burdine*, 450 U.S. 248 (1981) 33
Texas Dep't of Hous. & Cmty. Affairs v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015) 26
Trans World Airlines, Inc. v. *Hardison*, 432 U.S. 63 (1977) 32
Ulane v. *Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), cert. denied, 471 U.S. 1017 (1985) 24
United Air Lines, Inc. v. *Evans*, 431 U.S. 553 (1977) 32, 33, 34

Cases—Continued: Page

United States v. *Virginia*, 518 U.S. 515 (1996) 37, 38
University of Tex. Sw. Med. Ctr. v. *Nassar*, 570 U.S. 338 (2013) 27
Whitaker ex rel. Whitaker v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), cert. dismissed, 138 S. Ct. 1260 (2018) 27
Wittmer v. *Phillips 66 Co.*, 915 F.3d 328 (5th Cir. 2019) 23, 36, 38
Young v. *United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015) 32
Zarda v. *Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), cert. granted, 139 S. Ct. 1599 (2019) (oral argument scheduled for Oct. 8, 2019) ..... *passim*

Constitution and statutes:

U.S. Const. Amend. XIV (Equal Protection Clause) 27
Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, 78 Stat. 253 (42 U.S.C. 2000e *et seq.*) ..... *passim*
§ 703(a)(1), 78 Stat. 255 (42 U.S.C. 2000e-2(a)(1) (1964)) 2
42 U.S.C. 2000e 2, 17, 6a
42 U.S.C. 2000e(j) 44, 6a
42 U.S.C. 2000e(k) 44, 6a
42 U.S.C. 2000e-2(a)(1) ..... *passim*, 7a
42 U.S.C. 2000e-2(m) 27, 42, 47, 11a
42 U.S.C. 2000e-3(a) 31
42 U.S.C. 2000e-5(g)(2) 27, 47, 12a
42 U.S.C. 2000e-5(g)(2)(B) 42, 12a

Statutes—Continued: Page

Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 ..... 2, 25
§§ 105-107, 105 Stat. 1074-1076 24
Civil Rights Remedies for Gender-Motivated Violence Act, 34 U.S.C. 12361 ..... 25, 3a
34 U.S.C. 12361(d) 25, 4a
Education Amendments of 1972, Tit. IX, 20 U.S.C. 1681 *et seq.* 27
Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 10-13, 86 Stat. 111-113 2
Fair Housing Act, 42 U.S.C. 3601 *et seq.* 26
Matthew Shepard and James Byrd, Jr. Hate Crime Prevention Act, Pub. L. No. 111-84, Div. E, § 4703(a), 123 Stat. 2836 (28 U.S.C. 994 note) 22, 14a
Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (42 U.S.C. 2000e(k)) 2, 3, 23
Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.* 7
Violent Crime and Law Enforcement Act of 1994, Pub. L. No. 103-322, Tit. XXVIII, § 280003(a), 108 Stat. 2096 ..... 22, 13a
18 U.S.C. 249(a)(2)(A) 22, 1a
18 U.S.C. 249(c)(4) 22, 2a
34 U.S.C. 12291(b)(13)(A) 22, 2a
34 U.S.C. 30503(a)(1)(C) 22, 6a
Cal. Gov't Code § 12940(a) (West Supp. 2019) 24
Conn. Gen. Stat. Ann. § 46a-60(b)(1) (West 2018) 24
D.C. Code § 2-1402.11(a)(1) (LexisNexis Supp. 2019) 24
Del. Code Ann. tit. 19, § 711(a)(1) (Supp. 2018) 24
Haw. Rev. Stat. Ann. § 378-2(a)(1)(A) (LexisNexis 2016) 24

Statutes—Continued: Page

Iowa Code Ann. § 216.6(1)(a) (West Supp. 2018) 24
Mass. Ann. Laws ch. 151B, § 4(1) (LexisNexis Supp. 2019) 24
Md. Code Ann., State Gov't § 20-606(a)(1)(i) (LexisNexis 2014) 24
N.H. Rev. Stat. Ann. § 354-A:7(1) (LexisNexis Supp. 2018) 24
N.J. Stat. Ann. § 10:5-4 (West Supp. 2019) 24
N.M. Stat. Ann. § 28-1-7(A) (2012) 24
N.Y. Exec. Law § 296(1)(a) (McKinney 2018) 24
Nev. Rev. Stat. Ann. § 613.330(1)(a) (LexisNexis Supp. 2018) 24
R.I. Gen. Laws § 28-5-7(1)(i) (Supp. 2018) 24
Utah Code Ann. § 34A-5-106(1)(a)(i) (LexisNexis Supp. 2018) 24
Vt. Stat. Ann. tit. 21, § 495(a)(1) (Supp. 2018) 24

Miscellaneous:

Black's Law Dictionary (4th ed. 1951) 18
EEOC Compl. Man. (CCH 2008) 36
William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 Yale L.J. 332 (2017) 21
2 *Funk & Wagnalls New Practical Standard Dictionary of the English Language* (1955) 18
H.R. 2015, 110th Cong., 1st Sess. (2007) 29
H.R. 3017, 111th Cong., 1st Sess. (2009) 29
H.R. 1397, 112th Cong., 1st Sess. (2011) 29
H.R. 1755, 113th Cong., 1st Sess. (2013) 29
H.R. 3185, 114th Cong., 1st Sess. (2015) 29
H.R. 2282, 115th Cong., 1st Sess. (2017) 29

Miscellaneous—Continued: Page

H.R. 5, 116th Cong., 1st Sess. (2019) 29
Memorandum from Hon. Eric H. Holder, Jr., U.S. Att'y Gen., to United States Attorneys and Heads of Dep't Components (Dec. 15, 2014), https://www.justice.gov/file/188671/download 8
The American College Dictionary (1959) 18
The American Heritage Dictionary of the English Language (1st ed. 1969) 18
IX *The Oxford English Dictionary* (1961) 21
The Random House Dictionary of the English Language (unabridged ed. 1966) 20, 21
Webster's New International Dictionary of the English Language:
(2d ed. 1958) 17, 18, 31
(2d ed. 1961) 21
Webster's Seventh New Collegiate Dictionary (1963) 18

In the Supreme Court of the United States

No. 18-107

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

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT SUPPORTING REVERSAL

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-81a) is reported at 884 F.3d 560. The opinion and order of the district court granting summary judgment to petitioner (Pet. App. 82a-161a) is reported at 201 F. Supp. 3d 837. The amended opinion and order of the district court denying petitioner's motion to dismiss (Pet. App. 162a-187a) is reported at 100 F. Supp. 3d 594.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2018. On May 16, 2018, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including August 3, 2018, and the petition was filed on July 20, 2018. The petition was granted on April 22, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-14a.

STATEMENT

1. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, 78 Stat. 253 (42 U.S.C. 2000e *et seq.*), prohibits employers from discriminating against individuals based on certain enumerated grounds. *Fort Bend Cnty.* v. *Davis*, 139 S. Ct. 1843, 1846 (2019). As originally enacted, Title VII made it "an unlawful employment practice for an employer" covered by the statute "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." § 703(a)(1), 78 Stat. 255 (42 U.S.C. 2000e-2(a)(1) (1964)). Congress has amended Title VII in various respects in the 55 years since, see, *e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076; Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 10-13, 86 Stat. 111-113, but the text of that core prohibition remains the same today. 42 U.S.C. 2000e-2(a)(1).

Congress has enacted definitions of a number of terms used in the statute, but it has never enacted a Title VII-specific definition of "sex." See 42 U.S.C. 2000e. Indeed, "[t]he prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives." *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 63 (1986). In 1976, this Court held that the prohibition on "discriminat[ion] * * * because of * * * sex" did not cover an employer's exclusion of pregnancy from coverage under

a disability-benefits plan. *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 133 (citation omitted); see *id.* at 135-140. Two years later, Congress added a provision stating that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." Pregnancy Discrimination Act, 92 Stat. 2076 (42 U.S.C. 2000e(k)). Congress has otherwise left "sex" undefined.

2. a. Petitioner Harris Funeral Homes, Inc. (Harris Homes) is a family-owned, for-profit corporation that operates funeral homes at several locations in Michigan. Pet. App. 90a. The principal owner, Thomas Rost, is a Christian who believes "'that God has called him to serve grieving people' and 'that his purpose in life is to minister to the grieving.'" *Id.* at 6a (citation omitted).

Harris Homes has adopted a written, sex-specific dress code for its employees who interact with the public. Pet. App. 7a; J.A. 119-121. The dress code requires male employees to wear suits and ties and female employees to wear skirts and business jackets. *Ibid.*; see J.A. 81, 135-138, 151, 158, 165-166, 172-173, 208-209. In Harris Homes' view, "[m]aintaining a professional dress code that is not distracting to grieving families is an essential industry requirement that furthers their healing process." J.A. 129; see J.A. 28-29, 77; Pet. 3-4. Harris Homes provides suits and ties for male employees and currently provides a clothing stipend to female employees. Pet. App. 7a-8a.[1]

---

[1] When this suit was filed in September 2014, Harris Homes did not provide clothing or a clothing stipend to female employees. Pet. App. 7a. In October 2014, petitioner began providing female employees a clothing stipend. See *id.* at 7a-8a.

Harris Homes "administers its dress code based on [its] employees' biological sex, not based on their subjective gender identity." J.A. 129. Rost has stated that he "believe[s] that the Bible teaches that a person's sex is an immutable God-given gift," and he would "violat[e] God's commands" by "permit[ting] one of [Harris Homes'] funeral directors to deny their sex while acting as a representative of [the] organization" or by permitting a funeral director of either sex to "wear the uniform for" funeral directors of the opposite sex "at work." J.A. 131.

b. Respondent Stephens was employed by Harris Homes from 2007 to 2013—first as an apprentice, and later as a funeral director and embalmer. Pet. App. 5a. Stephens "was born biologically male," with the name William Anthony Beasley Stephens, and Stephens presented as a male when Stephens began working for Harris Homes and for more than five years thereafter. *Id.* at 3a; see *id.* at 5a-6a. Stephens now identifies as a transgender woman and uses the name Aimee Stephens. *Id.* at 3a, 5a, 8a.

In 2013, Stephens submitted a letter to Harris Homes stating that Stephens had "struggled with 'a gender identity disorder' her 'entire life,'" "ha[d] 'decided to become the person that her mind already is,'" and "'intended to have sex reassignment surgery.'" Pet. App. 8a (brackets and citations omitted); see *id.* at 94a-95a. Stephens stated that "[t]he first step [Stephens] must take [wa]s to live and work full-time as a woman for one year," and, following a planned vacation, Stephens "w[ould] return to work as [Stephens's] true self," Aimee Stephens, "in appropriate business attire." Stephens Br. in Opp. App. 2a. Stephens intended to comply with Harris Homes' dress code for female employees, requiring a skirt and suit jacket. See Pet. App. 8a.

Several weeks later, before Stephens's planned vacation, Rost terminated Stephens's employment. Pet. App. 9a; see *id.* at 95a-96a. Rost told Stephens that "this is not going to work out." *id.* at 9a (citation omitted). "Stephens's understanding from" the conversation with Rost "was that 'coming to work dressed as a woman was not going to be acceptable.'" *Id.* at 96a (citation omitted). In this litigation, Rost stated his "belie[f] that Stephens wearing a female uniform in the role of funeral director would have been distracting to [Rost's] clients mourning the loss of their loved ones, would have disrupted their grieving and healing process, and would have harmed [Rost's] clients and [his] business and business relationships." J.A. 130. Rost further stated that he "believe[d] that allowing one of [his] male funeral directors to wear the uniform for female funeral directors would have driven away many of [Rost's] prospective clients because allowing that would have fallen short of those clients' basic expectations for their funeral experience." *Ibid.* Rost averred, however, that he "would not have dismissed Stephens if Stephens had expressed to [him] a belief that [Stephens] is a woman and an intent to dress or otherwise present as a woman outside of work, so long as [Stephens] would have continued to conform to the dress code for male funeral directors while at work." J.A. 132-133. Rost stated that "[i]t was Stephens's refusal to wear the prescribed uniform and intent to violate the dress code while at work that was the decisive consideration in [Rost's] employment decision." J.A. 133. Harris Homes offered Stephens a severance package, which Stephens declined. Pet. App. 9a.

3. a. Stephens filed a charge of sex discrimination with the Equal Employment Opportunity Commission

(EEOC or Commission), alleging that the firing was due to Stephens's "sex and gender identity, female." Stephens Br. in Opp. App. 6a. After investigating, the EEOC's Detroit Field Office issued a letter of determination finding reasonable cause to believe that Harris Homes had discharged Stephens based on sex and gender identity in violation of Title VII. J.A. 202-204.

After informal conciliation efforts proved unsuccessful, the EEOC brought this Title VII suit against Harris Homes. Pet. App. 10a, 87a-88a, 162a-163a; see J.A. 12-18. The EEOC's operative complaint alleged that Harris Homes had "fired Stephens because Stephens is transgender, because of Stephens's transition from male to female, and/or because Stephens did not conform to [Harris Homes'] sex- or gender-based preferences, expectations, or stereotypes." J.A. 15. The EEOC's complaint did not allege that the dress code itself violated Title VII. See J.A. 12-18; see also Pet. App. 112a.[2] The EEOC sought backpay for Stephens as well as injunctive and other relief against Harris Homes. J.A. 16-17.

b. Harris Homes moved to dismiss the complaint. Pet. App. 170a. The district court denied the motion, but it narrowed the scope of the claim on which the suit could proceed. See *id.* at 171a-184a. The court held that the EEOC's claim could not proceed on a theory that Harris Homes had terminated Stephens "based solely upon Stephens's status as a transgender person." *Id.* at

---

[2] The EEOC's complaint did allege that Harris Homes had discriminated against female employees by providing a clothing benefit to male but not female employees. J.A. 15-16. Harris Homes subsequently began providing female employees a clothing benefit, p. 3 n.1, *supra*, and the EEOC's claim based on the clothing benefit is not at issue here.

172a. The court reasoned that, "like sexual orientation, transgender or transsexual status is currently not a protected class under Title VII." *Ibid.*

The district court further held, however, that the EEOC's Title VII suit could proceed on a theory that Harris Homes had engaged in improper "sex-stereotyping." Pet. App. 183a; see *id.* at 173a-184a. The court held that "a transgender person—just like anyone else—can bring a sex-stereotyping gender-discrimination claim under Title VII." *Id.* at 183a. It concluded that, because the EEOC's complaint also "alleged that Stephens's failure to conform to sex stereotypes was the driving force behind [Harris Homes'] decision to fire Stephens, the EEOC ha[d] sufficiently pleaded a sex-stereotyping gender-discrimination claim under Title VII." *Id.* at 184a; see *id.* at 172a-173a, 183a-184a.

c. Following discovery, the district court granted summary judgment for Harris Homes. Pet. App. 82a-161a. The court determined (as relevant) that the EEOC had presented "direct evidence to support a claim of employment discrimination," and the court rejected Harris Homes' contention "that its enforcement of its sex-specific dress code d[id] not constitute impermissible sex stereotyping." *Id.* at 110a; see *id.* at 107a-118a. The court concluded, however, that Harris Homes was entitled to an "exemption from Title VII" based on the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, "under the facts and circumstances of this unique case." Pet. App. 87a; see *id.* at 118a-144a.

4. The EEOC appealed, Pet. App. 12a, and Stephens intervened in the appeal, *id.* at 12a-13a.

a. On October 4, 2017, while the EEOC's appeal was pending, Attorney General Sessions issued a memorandum to United States Attorneys and heads of Department of Justice components stating that "Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*." Pet. App. 193a. The memorandum further stated that "Title VII is not properly construed to proscribe employment practices (such as sex-specific bathrooms) that take account of the sex of employees but do not impose different burdens on similarly situated members of each sex." *Ibid.*; see *id.* at 191a-194a. It explained that "the Department of Justice will take that position in all pending and future matters." *Id.* at 193a. Attorney General Sessions's 2017 memorandum "withdr[ew]" a previous memorandum issued by Attorney General Holder in December 2014, shortly after this litigation began, that had taken a contrary position. *Ibid.*[3]

b. The court of appeals reversed. Pet. App. 1a-81a.

i. The court of appeals agreed with the district court "that Stephens was fired because of her failure to conform to sex stereotypes, in violation of Title VII." Pet. App. 14a; see *id.* at 15a-22a. According to the court of appeals, under *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), and Sixth Circuit precedent construing it, "sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination." Pet. App. 16a (quoting *Smith* v. *City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004)) (brackets omitted).

---

[3] See Memorandum from Hon. Eric H. Holder, Jr., U.S. Att'y Gen., to United States Attorneys and Heads of Dep't Components (Dec. 15, 2014), https://www.justice.gov/file/188671/download.

Price Waterhouse involved the burden of proof in a Title VII suit where the employer's action was purportedly motivated by both prohibited sex-based bias and other, lawful considerations. See 490 U.S. at 237-238 (plurality opinion). In addressing that issue, the plurality observed that evidence that an employer engaged in "sex stereotyping" can be probative of whether the employer was motivated by an employee's sex. *Id.* at 250; see *id.* at 250-252. In *Smith*, the Sixth Circuit construed *Price Waterhouse* to mean "that a transgender plaintiff (born male) who suffered adverse employment consequences after 'he began to express a more feminine appearance and manner on a regular basis'" can bring a Title VII claim "because such 'discrimination would not have occurred but for the victim's sex.'" Pet. App. 16a (quoting *Smith*, 378 F.3d at 572, 574) (brackets omitted).

In this case, the court of appeals further extended its interpretation of *Price Waterhouse*. It held that, "[u]nder *any* circumstances, 'sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination.'" Pet. App. 16a (emphasis added; brackets and citation omitted). Applying that bright-line rule, the court concluded that Harris Homes' "decision to fire Stephens because Stephens was 'no longer going to represent himself as a man' and 'wanted to dress as a woman'" constituted sex stereotyping in violation of Title VII. *Ibid.* (citation omitted).

The court of appeals rejected Harris Homes' contention that it could not be held liable on a sex-stereotyping theory because it had not treated male or female employees less favorably than similarly situated members of the opposite sex. Pet. App. 17a-20a. The court did not identify any way in which Harris Homes had treated Stephens less favorably than similarly situated

female employees. Instead, the court of appeals disagreed with Harris Homes' premise that "sex stereotyping violates Title VII *only* when the employer's sex stereotyping resulted in disparate treatment of men and women." *Id.* at 20a (citation and internal quotation marks omitted). The court said that it was "not considering, in this case," either "whether certain sex-specific appearance requirements violate Title VII" in general, or "whether [Harris Homes] violated Title VII by requiring men to wear pant suits and women to wear skirt suits" in particular. *Id.* at 18a. But despite disclaiming any ruling about Harris Homes' dress code, the court concluded "that an employer engages in unlawful discrimination even if it expects both biologically male and female employees to conform to certain notions of how each should behave." *Id.* at 21a.

ii. The court of appeals additionally held that the district court had erred in precluding the EEOC from pursuing its broader theory that gender-identity discrimination categorically violates Title VII. Pet. App. 14a; see *id.* at 22a-36a. The court held, without qualification, "that discrimination on the basis of transgender and transitioning status violates Title VII." *Id.* at 22a.

The court of appeals rejected Harris Homes' contention that "the Congress enacting Title VII understood 'sex' to refer only to a person's 'physiology and reproductive role,' and not a person's 'self-assigned "gender identity."'" Pet. App. 28a (citation omitted). The court did not identify any evidence that the ordinary meaning of "sex" in 1964 encompassed gender identity or transgender status. Instead, the court stated that "the drafters' failure to anticipate that Title VII would cover transgender status is of little interpretive value, be-

cause 'statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.'" *Id.* at 28a (quoting *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)). The court further stated that "*Smith* and *Price Waterhouse* preclude an interpretation of Title VII that reads 'sex' to mean only individuals' 'chromosomally driven physiology and reproductive function.'" *Id.* at 29a (citation omitted).

The court of appeals concluded that "discrimination on the basis of transgender status" per se violates Title VII because it "necessarily entails discrimination on the basis of sex," for "two reasons." Pet. App. 23a, 30a. First, the court reasoned that "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." *Id.* at 23a; see *id.* at 23a-26a. The court concluded that Stephens would not "have been fired if Stephens had been a woman who sought to comply with the women's dress code." *Id.* at 24a. Second, the court reasoned that "discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping," stating that "an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align." *Id.* at 26a-27a; see *id.* at 26a-31a.[4]

---

[4] The court of appeals further concluded that the district court had erred in finding that petitioner was entitled to an exemption from Title VII's requirements in these circumstances under RFRA. Pet. App. 41a-73a. In this Court, petitioner has not sought review of that determination. See Pet. i, 13-35.

SUMMARY OF ARGUMENT

A. Title VII's prohibition on "discriminat[ion] * * * because of * * * sex," 42 U.S.C. 2000e-2(a)(1), does not bar discrimination because of transgender status.

1. In 1964, the ordinary public meaning of "sex" was biological sex. It did not encompass transgender status, which Stephens and the Sixth Circuit describe as a disconnect between an individual's biological sex and gender identity. In the particular context of Title VII—legislation originally designed to eliminate employment discrimination against racial and other minorities—it was especially clear that the prohibition on discrimination because of "sex" referred to unequal treatment of men and women in the workplace.

Congress's actions since 1964 confirm this understanding. It has specifically addressed gender-identity discrimination in multiple other statutes, listing "gender identity" separately from and in addition to "sex" or "gender." Many States have done the same. Yet in the face of (until recently) uniform circuit precedent construing "sex" in Title VII not to encompass transgender status, Congress has consistently declined similarly to expand that statute—even while amending Title VII in other respects.

2. Stephens argues, and the court of appeals held, that transgender-status discrimination constitutes discrimination on the basis of sex because it necessarily entails considering sex. Even assuming their premise, the conclusion does not follow. Under this Court's precedent, proving discrimination because of sex under Title VII requires showing that an employer treated members of one sex less favorably than similarly situated members of the other sex. See *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). Treating

all transgender persons less favorably than non-transgender persons does not violate that rule. The Sixth Circuit's approach, which equates considering sex with discriminating because of sex, would invalidate all sex-specific policies, from restrooms to dress codes.

Stephens contends that sex was a but-for cause of Stephens's termination because Harris Homes would not have fired a female funeral director who (like Stephens) sought to dress as a female. That comparison fails because it does not compare Stephens to a similarly situated individual of the opposite sex. It compares Stephens to a biological female who, unlike Stephens, seeks to dress according to the dress code for her *own* sex. Neither Stephens nor the Sixth Circuit has identified evidence that Harris Homes would have treated a female who sought to dress as a male any differently from the way it treated Stephens. None of the decisions of this Court that Stephens cites supports a contrary conclusion.

B. 1. Stephens and the court of appeals alternatively reason that transgender-status discrimination inherently constitutes sex stereotyping, which they argue is prohibited under *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989). But again assuming their premise, Stephens's and the Sixth Circuit's conclusion does not follow because *Price Waterhouse* did not interpret Title VII to bar sex stereotyping per se. The plurality in that case merely recognized that evidence of sex stereotyping can be relevant in proving a plaintiff's claim that an employment action was motivated by sex. *Price Waterhouse* casts no doubt on the rule, later reaffirmed in *Oncale*, that proving discrimination because of sex requires showing disadvantageous treatment of members of one sex relative to similarly situated members of the other.

2. A transgender plaintiff therefore cannot prevail in a Title VII suit simply by showing that an employer relied on sex stereotypes. The plaintiff must show that the employer treated similarly situated members of the opposite sex more favorably. Like any other plaintiff, a transgender person may use evidence of sex stereotyping in making that showing. But the individual's transgender status does not alter the legal standard.

Here, Harris Homes did not discriminate against Stephens based on sex stereotypes in violation of Title VII. It terminated Stephens for refusing to comply with Harris Homes' sex-specific dress code. Since the court of appeals did not address and Stephens does not challenge that dress code in this Court, it must be assumed that the dress code burdens men and women equally. As a result, neither Stephens nor the Sixth Circuit has identified evidence that Harris Homes treated Stephens, a biological male, less favorably than similarly situated females. That does not mean transgender individuals are excluded from Title VII's protections. It means only that they must make the same showing as any other plaintiff.

ARGUMENT

TITLE VII DOES NOT PROHIBIT DISCRIMINATION AGAINST TRANSGENDER INDIVIDUALS AS SUCH

Title VII makes it an unlawful employment practice for a covered employer to fire, refuse to hire, or "otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex." 42 U.S.C. 2000e-2(a)(1). The question on which this Court granted review is whether that prohibition extends to "discrimination against transgender people" as such. 139 S. Ct. 1599 (2019). It does not. The statutory text

and this Court's decisions make clear that Section 2000e-2(a)(1)'s prohibition on sex-based disparate treatment bars only employment practices that treat women less favorably than similarly situated men because they are women, or vice versa. Treating a transgender person less favorably than a non-transgender person because he or she is transgender does not fall within that bar.

The court of appeals nevertheless concluded, and Stephens contends in this Court, that discrimination against transgender individuals categorically *does* violate Title VII's prohibition on sex discrimination. Pet. App. 22a-36a; Stephens Br. 20-36. They advance a variety of arguments for that position, but ultimately all fail for the same fundamental reason. Section 2000e-2(a)(1) bars only "discriminat[ion] * * * because of * * * sex." 42 U.S.C. 2000e-2(a)(1). It does not bar every workplace practice that considers sex without placing unequal burdens on similarly situated men and women. Neither the Sixth Circuit nor Stephens has shown that discriminating based on transgender status results in treating males or females less favorably than similarly situated members of the opposite sex.

To be clear, the question in this case is not whether employers *ought to be* prohibited from discriminating against individuals who are transgender. It is whether Title VII as written currently bars such discrimination. The court of appeals' discomfort with construing a landmark civil-rights law to allow what the court viewed as inappropriate bias implicates policy questions about whether Title VII should reflect societal changes that Congress in 1964 could not have envisioned. Fundamentally, however, that is a question for Congress, not the courts. Congress has specifically prohibited gender-identity discrimination in multiple other statutes that the

Department of Justice will continue to enforce vigorously. But Congress has not taken that step in Title VII. Unless and until it does so, the proper role of the Executive, and of this Court, is faithfully to enforce the law as written.

A. Title VII Does Not Prohibit Discrimination Against Transgender Persons Based On Their Transgender Status

Title VII's relevant provision, 42 U.S.C. 2000e-2(a)(1), prohibits "discriminat[ion] * * * because of" certain enumerated traits. *Ibid.* Transgender status is not among the traits enumerated. Section 2000e-2(a)(1) does bar discrimination "because of * * * sex," *ibid.*, but when Title VII was enacted in 1964, the ordinary public meaning of "sex" was biological sex, not transgender status. Subsequent action by Congress confirms that it has never understood or intended Title VII to cover transgender individuals as a protected class. Stephens's and the Sixth Circuit's core contention—that discrimination based on transgender status necessarily *entails* sex discrimination—would transform Title VII into a blanket prohibition on all sex-specific workplace practices. That statute would bear no resemblance to how Title VII has been understood by Congress or the public from 1964 to the present.

1. Title VII's prohibition on discrimination because of "sex" does not extend to transgender status

a. *Text.* "Statutory interpretation * * * begins with the text." *Ross* v. *Blake*, 136 S. Ct. 1850, 1856 (2016). "And where the statutory language provides a clear answer" to a particular question, the inquiry "ends there as well." *Harris Trust & Sav. Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 254 (2000) (citation omitted). The

text of Title VII's relevant provision does not bar discrimination based on transgender status.

i. The EEOC's operative complaint alleged that Harris Homes violated 42 U.S.C. 2000e-2(a)(1). J.A. 15. That provision states that it is an "unlawful employment practice for an employer * * * to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). Section 2000e-2(a)(1) nowhere mentions transgender status. See *ibid.* And the provision's prohibition on discrimination because of "sex" cannot fairly be read to encompass transgender status.

Title VII includes statute-specific definitions of various terms, but not "sex." See 42 U.S.C. 2000e (defining "because of sex" and "on the basis of sex" to include pregnancy-related issues but not defining "sex"). The term "sex" thus should "be interpreted as taking [its] ordinary, contemporary, common meaning." *Sandifer* v. *United States Steel Corp.*, 571 U.S. 220, 227 (2014) (citation omitted). When Title VII was enacted in 1964, "sex" meant biological sex. The term "refer[red] to [the] physiological distinction[]" between "male and female." *Webster's New International Dictionary of the English Language* 2296 (2d ed. 1958) (*Webster's Second*). For example, *Webster's Second* defined "sex" in relevant part as "[o]ne of the two divisions of organisms formed on the distinction of male and female; males or females collectively," or "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female, or of pertaining to the distinctive function of the male or female in reproduction." *Ibid.*; see

ibid. (distinguishing "sex," which "refers to physiological distinctions," from "gender," which refers "to distinctions in grammar" (capitalization omitted)). Other contemporaneous dictionaries were in accord.[5]

Historical context confirms that Title VII employs the ordinary meaning of "sex." As Judge Lynch observed in his dissent in *Zarda* v. *Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc), cert. granted, 139 S. Ct. 1599 (2019) (oral argument scheduled for Oct. 8, 2019)—addressing whether Title VII prohibits sexual-orientation discrimination—the "central public meaning" of "sex" in the specific context of Title VII shows that it was understood to afford equal opportunity to women and men. Pet. App. at 88, *Altitude Express, Inc.* v. *Zarda*,

---

[5] See, *e.g.*, *The American Heritage Dictionary of the English Language* 1187 (1st ed. 1969) ("The property or quality by which organisms are classified according to their reproductive functions"; "[e]ither of two divisions, designated male and female, of this classification"; "[m]ales or females, collectively" (emphasis omitted)), quoted in *Hively* v. *Ivy Tech Cmty. Coll.*, 853 F.3d 339, 362-363 (7th Cir. 2017) (en banc) (Sykes, J., dissenting); *Webster's Seventh New Collegiate Dictionary* 795 (1963) ("either of two divisions of organisms distinguished respectively as male or female"; "the sum of the structural, functional, and behavioral peculiarities of living beings that subserve reproduction by two interacting parents and distinguish males and females"); *The American College Dictionary* 1109-1110 (1959) ("the character of being either male or female: persons of different sexes"; "the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished, or the phenomena depending on these differences" (emphasis omitted)); 2 *Funk & Wagnalls New Practical Standard Dictionary of the English Language* 1197 (1955) ("The biological distinction between male and female"; "the character of being male or female"; "Males or females of a group, collectively; especially, men or women"); *Black's Law Dictionary* 1541 (4th ed. 1951) ("The sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female.").

No. 17-1623 (May 29, 2018) (17-1623 Pet. App.); see *id.* at 87-90. Title VII represented "historic legislation to address bigotry against African-Americans on the basis of race" and was principally designed "to protect African Americans and other racial, national, and religious minorities from similar discrimination." *Id.* at 89-90. Just before Title VII's passage, Congress added "sex" to the list of prohibited grounds of discrimination. See *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 63 (1986). Against that backdrop, "members of Congress" voting on Title VII and "any politically engaged citizen" would have "understood" the inclusion of "sex" as similarly "secur[ing] the rights of women to equal protection in employment" by "eliminat[ing] workplace inequalities that held women back from advancing in the economy" in the same way as other protected classes. 17-1623 Pet. App. at 89 (Lynch, J., dissenting).

To be sure, "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Subjective expectations of Members of Congress as to which particular practices Title VII would prohibit therefore do not control. But the historical context makes clear that, in using the term "sex," Congress was referring to discrimination based on biological sex—*i.e.*, unequal treatment of men and women—consistent with the term's ordinary meaning. Neither the court of appeals nor Stephens has pointed to any evidence that, when Congress used the term "sex" in 1964, it called upon a meaning other than biological sex.

The ordinary public meaning of "sex" in 1964 is dispositive here. Biological sex indisputably is not synon-

ymous with transgender status. Definitions of "transgender" vary, but the court of appeals, Stephens, and the EEOC all have generally understood the term to refer to a disconnect between a person's biological sex at birth and the person's "sexual" or "gender identity." See Pet. App. 26a ("[T]ransgender status is characterized by the American Psychiatric Association as 'a disjunction between an individual's sexual organs and sexual identity'"); Stephens Br. 5 (describing as "transgender" a person whose "gender identity" does not "match[] their sex assigned at birth"); EEOC C.A. Br. 21 n.3 ("The term 'transgender' is defined as relating to 'a person whose gender identity differs from the sex the person had or was identified as having at birth.'" (citation omitted)). Stephens defines "gender identity," in turn, as "'one's internal, deeply held sense of gender.'" Stephens Br. 5 (citation omitted). However the Court defines "transgender," it is not the same as biological sex. To the contrary, in Stephens's view, "transgender" denotes a *discrepancy* between biological sex and gender identity. Neither the Sixth Circuit nor Stephens has attempted to show that the ordinary meaning of "sex" referred to or encompassed such a discrepancy.

ii. Several amici attempt to bridge that gap, arguing that "sex" did not refer exclusively to biological sex in 1964. But none has come close to showing that the well-accepted, ordinary, public meaning of the term referred to such a disconnect. Amici Historians cite dictionaries that defined sex to include "the sum of structural and functional differences by which the male and female are distinguished, or the phenomena or behavior dependent on these differences," Br. 6 (quoting *The Random House Dictionary of the English Language* 1307 (unabridged ed. 1966)), or the "class of phenomena with

which [the differences between male and female] are concerned," *id.* at 7 (quoting IX *The Oxford English Dictionary* 578 (1961)) (brackets in original). But those definitions by their terms merely encompass attributes that are traceable to biological sex.

Other amici cite a law-review article that in turn cites tertiary definitions of sex in *Webster's Second* as including "[t]he sphere of behavior dominated by the relations between male and female," and (in the context of "[p]sychoanalysis") "the whole sphere of behavior related even indirectly to the sexual functions and embracing all affectionate and pleasure-seeking conduct." William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 Yale L.J. 332, 338 & n.62 (2017) (quoting *Webster's New International Dictionary of the English Language* 2296 (2d ed. 1961)), cited in Dellinger Amici Br. 12. Those definitions, however, unmistakably refer to sexual *behavior*. They shed no light on the meaning of "sex" as a classification of persons rather than as a reference to sexual conduct.

Amici Corpus-Linguistics Scholars assert (Br. 16-18)—based on a "pseudorandom sample" of fewer than 100 usages of "sex" "in the 1960s"—that the term "sex" was not always clearly used to denote a "binary classification" between male and female. They further posit that, "in the 1960s, the word 'sex' could have encompassed what we now call gender." *Id.* at 24 (capitalization altered). But even on its own terms, the analysis does not purport to show that "sex" was *ordinarily* understood to refer to a disconnect between one's biological sex and one's perception of one's gender, nor that Congress adopted any uncommon meaning of "sex" in Title VII.

b. *History.* Congress's actions in the ensuing 55 years forcefully confirm that "sex" in Section 2000e-2(a)(1) does not encompass transgender status. In other statutory contexts, Congress has acted affirmatively to address gender-identity discrimination as a distinct category separate from sex discrimination. But it has consistently declined to do the same in Title VII.

i. In multiple statutes enacted after Title VII, Congress has expressly prohibited or otherwise specifically addressed discrimination based on "gender identity," in addition to discrimination based on "sex" or "gender." See, *e.g.*, 18 U.S.C. 249(a)(2)(A) and (c)(4) (prohibiting acts or attempts to cause bodily injury to any person "because of the actual or perceived religion, national origin, *gender, sexual orientation, gender identity*, or disability of any person," and defining "'gender identity'" as "actual or perceived gender-related characteristics" (emphasis added)); 34 U.S.C. 12291(b)(13)(A) (Supp. V 2017) (prohibiting discrimination in certain federally funded programs "on the basis of actual or perceived race, color, religion, national origin, *sex, gender identity* (as defined in [18 U.S.C. 249(c)(4)]), *sexual orientation*, or disability" (emphases added)); 34 U.S.C. 30503(a)(1)(C) (federal assistance to state, local, or tribal investigations of crimes "motivated by prejudice based on the actual or perceived race, color, religion, national origin, *gender, sexual orientation, gender identity*, or disability of the victim" (emphasis added)). And in 2009, Congress amended an existing statute, which already defined "hate crime[s]" to include crimes motivated by "gender," by adding "gender identity." Pub. L. No. 111-84, Div. E, § 4703(a), 123 Stat. 2836 (28 U.S.C. 994 note) (amending Pub. L. No. 103-322, Tit. XXVIII, § 280003(a), 108 Stat. 2096).

Those statutes are significant for two reasons. First, they demonstrate that Congress "kn[ows] how" to prohibit discrimination based on gender identity when it wishes to do so. *Department of Homeland Sec.* v. *MacLean*, 135 S. Ct. 913, 921 (2015). "If Congress had meant to prohibit * * * transgender discrimination" in Title VII, "surely the most straightforward way to do so would have been to say so—to add * * * 'transgender status' or 'gender identity' to the list of classifications protected under Title VII." *Wittmer* v. *Phillips 66 Co.*, 915 F.3d 328, 338 (5th Cir. 2019) (Ho, J., concurring). But Congress has never done so.

Second, the above statutes enumerate "gender identity" as a separate prohibited basis of discrimination, distinct from "sex" or "gender" simpliciter. See p. 22, *supra*. That approach reflects Congress's continued understanding that "sex" and "gender" do not mean transgender status or gender identity. If Congress had viewed "sex" as including gender identity, and had merely meant to clarify that understanding, it could easily have said so. For example, when Congress amended Title VII in 1978 to supersede a decision of this Court that had held that discrimination "because of sex" did not encompass pregnancy-related issues, Congress did so by specifying that "[t]he terms 'because of sex' or 'on the basis of sex' *include*, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." Pregnancy Discrimination Act, 92 Stat. 2076 (42 U.S.C. 2000e(k)) (emphasis added); see pp. 2-3, *supra*. Instead, in the statutes above, Congress separately prohibited discrimination

based on gender identity, reflecting Congress's recognition that the meaning of "sex" as biological sex has endured.[6]

ii. In contrast, Congress has consistently declined to extend Title VII to bar discrimination based on transgender status. It has amended Title VII in various respects in the five decades since its original enactment. But Congress has left undisturbed the longstanding (and until recently uniform) view of the circuits that "sex" in Title VII does not encompass transgender status.

Most significantly, in the Civil Rights Act of 1991, Congress amended Title VII in multiple respects—including to specify methods and burdens of proof for certain sex-discrimination claims. See §§ 105-107, 105 Stat. 1074-1076. At that time, all three courts of appeals to address the issue had concluded that Title VII does not prohibit discrimination based on transgender status. See *Ulane* v. *Eastern Airlines, Inc.*, 742 F.2d 1081, 1085

---

[6] Similarly, a number of States have enacted prohibitions on employment discrimination based on gender identity, and nearly all proscribe gender-identity discrimination in addition to discrimination based on "sex" or "gender." See Cal. Gov't Code § 12940(a) (West Supp. 2019); Conn. Gen. Stat. Ann. § 46a-60(b)(1) (West 2018); D.C. Code § 2-1402.11(a)(1) (LexisNexis Supp. 2019); Del. Code Ann. tit. 19, § 711(a)(1) (Supp. 2018); Iowa Code Ann. § 216.6(1)(a) (West Supp. 2018); Mass. Ann. Laws ch. 151B, § 4(1) (LexisNexis Supp. 2019); Md. Code Ann., State Gov't § 20-606(a)(1)(i) (LexisNexis 2014); N.H. Rev. Stat. Ann. § 354-A:7(1) (LexisNexis Supp. 2018); N.J. Stat. Ann. § 10:5-4 (West Supp. 2019); N.M. Stat. Ann. § 28-1-7(A) (2012); N.Y. Exec. Law § 296(1)(a) (McKinney 2018); Nev. Rev. Stat. Ann. § 613.330(1)(a) (LexisNexis Supp. 2018); R.I. Gen. Laws § 28-5-7(1)(i) (Supp. 2018); Utah Code Ann. § 34A-5-106(1)(a)(i) (LexisNexis Supp. 2018); Vt. Stat. Ann. tit. 21, § 495(a)(1) (Supp. 2018); but see Haw. Rev. Stat. Ann. § 378-2(a)(1)(A) (LexisNexis 2016) (prohibiting discrimination based on "sex including gender identity or expression").

(7th Cir. 1984), cert. denied, 471 U.S. 1017 (1985); *Sommers* v. *Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam); *Holloway* v. *Arthur Andersen & Co.*, 566 F.2d 659, 661-663 (9th Cir. 1977).[7] The EEOC had also taken that position. See *LaBate* v. *USPS*, EEOC Doc. 01851097, 1987 WL 774785, at *2 (Feb. 11, 1987) ("It is settled law that transsexualism is not recognized as a protected basis under Title VII."). In the 1991 amendments, Congress left that consensus undisturbed.

In doing so, Congress effectively ratified that settled view. This Court "normally assume[s] that, when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010); see, *e.g.*, *Lorillard* v. *Pons*, 434 U.S. 575, 580-581

---

[7] Nine years after the Civil Rights Act of 1991 was enacted, the Ninth Circuit stated that the "judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of" *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989). *Schwenk* v. *Hartford*, 204 F.3d 1187, 1201-1202 (9th Cir. 2000). *Schwenk* did not involve Title VII; it addressed whether a state prison guard was entitled to qualified immunity in a suit alleging that the guard had attempted to rape a transsexual prisoner in violation of the Civil Rights Remedies for Gender-Motivated Violence Act (GMVA), 34 U.S.C. 12361. See *Schwenk*, 204 F.3d at 1198-1203. The GMVA is a differently worded statute enacted 30 years after Title VII that provides a remedy for "crime[s] of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." 34 U.S.C. 12361(d). As discussed below, *Schwenk*'s characterization of *Price Waterhouse* is incorrect. See pp. 45-49, *infra*. In any event, the Ninth Circuit's statements in 2000 about the vitality of its previous decision shed no light on the legal landscape in 1991. Indeed, *Schwenk* "presume[d] that Congress, in drafting the GMVA, was aware of the interpretation given by the pre-*Price Waterhouse* federal courts to the terms 'sex' and 'gender' under Title VII and acted intentionally to incorporate the broader concept of 'gender.'" 204 F.3d at 1201 n.12.

(1978). And when Congress, aware of judicial decisions that have construed a statute consistently, amends the statute in other respects but leaves that settled understanding undisturbed, Congress is ordinarily understood to have accepted that construction. See *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015). For example, in *Inclusive Communities Project*, the Court observed that, when Congress amended the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.*, in 1988, Congress "was aware of th[e] unanimous precedent" of multiple circuits holding that the Act authorized disparate-impact claims and "made a considered judgment to retain the relevant statutory text." 135 S. Ct. at 2519. The Court held that, "[a]gainst this background understanding in the legal and regulatory system, Congress' decision in 1988 to amend the FHA while still adhering to the operative language * * * is convincing support for the conclusion that Congress accepted and ratified" that understanding. *Id.* at 2520.

The same analysis applies here. Indeed, it is especially likely that Congress in 1991 was attuned to the uniform construction of "sex" in Title VII because several of the changes Congress made to the statute in the 1991 amendments responded to judicial decisions with which Congress disagreed. See *Ricci* v. *DeStefano*, 557 U.S. 557, 624 (2009) (Ginsburg, J., dissenting) (noting that 1991 amendments responded to decisions that Congress believed had "sharply cut back on the scope and effectiveness" of Title VII (citation omitted)). For instance, Congress abrogated this Court's decision addressing the standard and burden of proof for mixed-motive cases in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), on which Stephens and the Sixth Circuit also rely for their sex-stereotyping argument. Stephens Br. 28-36; Pet. App. 15a-16a; see

42 U.S.C. 2000e-2(m), 2000e-5(g)(2); *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 348-350 (2013). Yet Congress chose not to overturn the consensus among the circuits and the EEOC that "sex" does not encompass transgender status.

iii. Until this case, that judicial consensus persisted, and Congress has continued to leave it intact. In 2007, the Tenth Circuit joined the Seventh, Eighth, and Ninth in concluding that Title VII does not prohibit gender-identity discrimination. *Etsitty* v. *Utah Transit Auth.*, 502 F.3d 1215, 1220-1221. Before the panel decision in this case, no court of appeals appears to have held that Title VII categorically prohibits such discrimination. Some courts of appeals had held that other statutes or constitutional provisions encompassed gender-identity discrimination and discussed Title VII in doing so.[8] And in some cases courts held that transgender plaintiffs

[8] See *Doe ex rel. Doe* v. *Boyertown Area Sch. Dist.*, 893 F.3d 179 (3d Cir.), slip op. 23-31 (Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*), vacated on reh'g, 897 F.3d 515 (3d Cir.), and superseded by 897 F.3d 518, 533-536 (3d Cir. 2018), cert. denied, 139 S. Ct. 2636 (2019); *Whitaker ex rel. Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046-1054 (7th Cir. 2017) (Title IX and Equal Protection Clause), cert. dismissed, 138 S. Ct. 1260 (2018); *G.G. ex rel. Grimm* v. *Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 720-723 (4th Cir. 2016) (Title IX and implementing regulations), vacated and remanded, 137 S. Ct. 1239 (2017); *Glenn* v. *Brumby*, 663 F.3d 1312, 1315-1321 (11th Cir. 2011) (Equal Protection Clause).

had presented cognizable allegations or factual showings of sex stereotyping.[9] But until 2018, no court of appeals appears to have concluded, as the Sixth Circuit panel did here, that discrimination based on transgender status necessarily violates Title VII.

Likewise, long after this Court's decisions in *Price Waterhouse* and *Oncale*, the EEOC adhered to its established view that Title VII's prohibition on discrimination because of sex did not extend to transgender status. See, *e.g.*, *Faulkner* v. *Mineta*, EEOC Doc. 01A54932, 2005 WL 3526016, at *1 (Dec. 19, 2005); *Loran* v. *O'Neill*, EEOC Doc. 01A13538, 2001 WL 966123, at *1 (Aug. 17, 2001); *Balmes* v. *Daley*, EEOC Doc. 01A05006, 2000 WL 34329672, at *2 (Aug. 25, 2000). The Department of Justice advanced the same position in litigation. See D. Ct. Doc. 51, at 6-8, *Michaels* v. *Akal Sec., Inc.*, No. 09-1300 (D. Colo. Nov. 25, 2009); D. Ct. Doc. 69, at 2-8, *Schroer* v. *Billington*, No. 05-1090 (D.D.C. Aug. 29, 2008).

Only in recent years did the EEOC and the Department of Justice depart from that position. In 2012, the Commission "expressly overturn[ed]" its "contrary ear-

---

[9] See *Chavez* v. *Credit Nation Auto Sales, LLC*, 641 Fed. Appx. 883, 883, 887-892 (11th Cir. 2016) (per curiam) (triable issue of fact existed as to transgender plaintiff's claim that "gender bias" based on "gender nonconformity" was a motivating factor for her termination); *Kastl* v. *Maricopa Cnty. Cmty. Coll. Dist.*, 325 Fed. Appx. 492, 493 (9th Cir. 2009) (transsexual plaintiff "state[d] a prima facie case of gender discrimination under Title VII on the theory that impermissible gender stereotypes were a motivating factor in [her employer's] actions against her," but employer rebutted the prima facie case and plaintiff "did not put forward sufficient evidence demonstrating that [employer] was motivated by [plaintiff's] gender"); *Smith* v. *City of Salem*, 378 F.3d 566, 570-575 (6th Cir. 2004) (transgender plaintiff "properly alleged a claim of sex stereotyping").

lier decisions" and concluded that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex'" in violation of Title VII. *Macy* v. *Holder*, EEOC Doc. 0120120821, 2012 WL 1435995, at *11 & n.16 (Apr. 20, 2012); see *id.* at *4-*11; *id.* at *11 n.16 (noting that EEOC advanced that new position in 2011 district-court amicus brief). In 2014, the Department of Justice embraced the same view. See p. 8 & n.3, *supra*; cf. D. Ct. Doc. 85, at 3-9, *Burnett* v. *City of Philadelphia-Free Library*, No. 09-4348 (E.D. Pa. Apr. 4, 2014) (supporting transgender plaintiff's sex-stereotyping claim). Until those changes of position, the EEOC, Department of Justice, and circuits were in accord.

That consensus has prompted numerous proposals in Congress in recent years to expand Title VII to prohibit discrimination based on gender identity. Bills to that effect have been introduced, but not enacted, in every Congress since 2007.[10] That history further "supports adherence to the traditional view" that discrimination because of sex does not encompass discrimination because of gender identity. *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 593-594 (2004). Given Title VII's text and the longstanding circuit consensus that "sex" does not mean transgender status, Congress could not plausibly have rejected every proposal it received to prohibit gender-identity discrimination based on an (erroneous) assumption that it is already prohibited by Title VII. Cf. 17-1623 Pet. App. at 110

---

[10] See, *e.g.*, H.R. 2015, 110th Cong., 1st Sess. (2007); H.R. 3017, 111th Cong., 1st Sess. (2009); H.R. 1397, 112th Cong., 1st Sess. (2011); H.R. 1755, 113th Cong., 1st Sess. (2013); H.R. 3185, 114th Cong., 1st Sess. (2015); H.R. 2282, 115th Cong., 1st Sess. (2017); H.R. 5, 116th Cong., 1st Sess. (2019).

(Lynch, J., dissenting) ("It is hardly reasonable, in light of the EEOC and judicial consensus that sex discrimination did not encompass sexual orientation discrimination, to conclude that Congress rejected the proposed amendments because senators and representatives believed that Title VII 'already incorporated the offered change.'" (citation omitted)).

Congress of course remains free to revisit the issue at any time. The 55 years since Title VII's original enactment have witnessed societal and cultural change in this area. Congress could eventually conclude that changes since 1964 warrant expanding the statute's scope to reach beyond sex to encompass transgender status. But that is exclusively a question for Congress. New developments "might invite reasonable disagreements on whether Congress should reenter the field and alter the judgments it made in the past," but "the proper role of the judiciary [is] to apply, not amend, the work of the People's representatives." *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725-1726 (2017). That principle applies with particular force here. Reinterpreting Title VII's text to include a new protected class that Congress has repeatedly declined to create in this statute would thwart the judgment that Congress has made to date and thrust courts into the role of resolving policy disputes reserved by the Constitution to our Nation's elected representatives.

2. Discrimination based on transgender status does not inherently entail discrimination because of sex

Neither the Sixth Circuit nor Stephens has attempted to show that Title VII prohibits discrimination based on transgender status as such. Instead, they contend that an employer who discriminates based on transgender status necessarily also discriminates based on "sex,"

because "sex" factors into the employer's decision. That contention is incorrect and reflects a misunderstanding of Title VII's text and this Court's precedent.

a. Section 2000e-2(a)(1) makes it unlawful to "discriminate against an[] individual * * * because of [the] individual's * * * sex." 42 U.S.C. 2000e-2(a)(1); see *ibid.* (making it unlawful "to fail or refuse to hire or to discharge any individual, or *otherwise to discriminate* against any individual" (emphasis added)). Discrimination based on transgender status falls outside that bar.

i. The "'normal definition of discrimination' is 'differential treatment'" or, more specifically, "'less favorable' treatment." *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (citations omitted). The particular phrase Title VII uses—"discriminate *against*," 42 U.S.C. 2000e-2(a)(1) (emphasis added)—even more clearly carries that meaning. See *Webster's Second* 745 (defining "discriminate," *inter alia*, as "[t]o make a difference in treatment or favor (of one as compared with others); as, to discriminate in favor of one's friends; to discriminate against a special class" (emphases omitted)). "[T]he term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals." *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 59 (2006) (quoting 42 U.S.C. 2000e-3(a)).

Thus, in the paradigmatic Title VII "'disparate treatment'" suit, "[t]he central focus of the inquiry" is whether the employer has treated "'some people less favorably than others because of their * * * sex.'" *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 569, 577 (1978) (citations omitted). An individual alleging a disparate-treatment claim must establish that "an employer intentionally treated [the individual] *less favorably* than employees

with the complainant's qualifications but outside the complainant's protected class." *Young* v. *United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1345 (2015) (emphasis added; citation and internal quotation marks omitted). Likewise, in a sexual-harassment suit, "[t]he critical issue," as "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." *Oncale*, 523 U.S. at 80 (quoting *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)); see *Harris*, 510 U.S. at 21 (plaintiff asserting hostile-work-environment claim under Section 2000e-2(a)(1) must show that work environment was "discriminatorily hostile or abusive").

The Court also has long recognized that to "'discriminate against'" members of a protected class "because of" membership in the class means treating an individual in the class less favorably than a "similarly situated" individual outside the class. *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 71 (1977) (citation omitted); cf. *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 298 (1997) ("[A]ny notion of discrimination assumes a comparison of substantially similar entities." (footnote omitted)). "The emphasis of both the language" of Section 2000e-2(a)(1) "and the legislative history of the statute is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin." *Hardison*, 432 U.S. at 71. An employer that treats individuals differently who are not similarly situated does not discriminate based on a prohibited ground. See *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 557-558 (1977).

In *Evans*, for example, the plaintiff was a female airline employee who alleged that her employer had discriminated against her because of sex by granting her less seniority credit than certain male employees. 431 U.S. at 554-556. The Court upheld the dismissal of the claim because the plaintiff had "failed to allege" that the employer's conduct "differentiate[d] between similarly situated males and females on the basis of sex." *Id.* at 558; see *id.* at 557-558. The plaintiff and other female employees had received less seniority credit because of a policy the employer had in place years earlier—outside the then-applicable limitations period for a Title VII suit, and that it had since abandoned—that forced married female employees to resign. See *id.* at 557-558. The plaintiff undisputedly could no longer challenge the employer's prior policy. See *id.* at 557. And the plaintiff did not allege that, during the limitations period, the employer had treated male and female employees with the same length of service differently. See *id.* at 557-558. Although "some male employees with less total service than [the plaintiff] ha[d] more seniority," that "disparity [wa]s not a consequence of their sex, or of her sex." *Id.* at 557. It was the result of independent differences between the plaintiff and those male employees that caused them not to be "similarly situated." *Id.* at 558; see *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 258 (1981) (under burden-shifting framework set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), "it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally").

ii. Discrimination based on transgender status does not meet that settled understanding of discrimination because of sex. An employer that treats transgender

individuals less favorably based on their transgender status does not expose "'members of one sex * * * to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" *Oncale*, 523 U.S. at 80 (citation omitted). The employer treats transgender individuals less favorably than non-transgender individuals. But so long as the employer treats transgender individuals of both sexes equally, it has not discriminated against either males or females. Put differently, if an employer discriminates against a transgender individual, the less favorable treatment is not the "consequence" of that individual's sex. *Evans*, 431 U.S. at 557. It is instead the result of the employer's policy concerning a different trait—transgender status—that Title VII does not protect.

iii. In this case, Harris Homes did not discriminate against Stephens because of "sex" by terminating Stephens (a biological male) based on Stephens's stated intention to dress as a member of the opposite sex (female). To be sure, Harris Homes treated Stephens less favorably than male employees who dressed as males at work. But neither Stephens nor the Sixth Circuit has identified evidence in the record that Harris Homes did or would treat more favorably a female employee who is otherwise similarly situated to Stephens, *i.e.*, who intended to dress as a member of the opposite sex.

Moreover, Harris Homes' principal owner averred that his religious objection to employing a funeral director who would dress according to the dress code of the opposite sex applies equally to females as to males. Rost stated under oath that he "believe[s] that the Bible teaches that it is wrong for a biological male to deny his sex by dressing as a woman or for a biological female to deny her sex by dressing as a man" and that Rost "would

be violating God's commands if [he] were to permit one of [Harris Homes'] male funeral directors to wear the uniform for female funeral directors while at work, or if [he] were to permit one of [Harris Homes'] female funeral directors to wear the uniform for male funeral directors while at work." J.A. 131. Rost made clear that, "[i]f a female funeral director were to tell [Rost] that she would not comply with the uniform requirement for female funeral directors while at work, [Rost] would discharge her for refusing to comply with [Harris Homes'] dress code." J.A. 134. Harris Homes did not discriminate because of sex by treating a biologically male employee who refused to abide by the dress code the same way it would have treated a similarly situated biologically female employee who refused to abide by the dress code.

b. The court of appeals incorrectly held that discrimination because of transgender status "necessarily entails discrimination on the basis of sex" because one cannot treat a transgender person differently "without *considering* that employee's biological sex." Pet. App. 30a (emphasis added). It is not evident that it is impossible to engage in transgender-status discrimination without considering sex, but even assuming the Sixth Circuit's premise were correct, its conclusion would not follow.

As Judge Lynch observed in his dissent in *Zarda*, "it is not the case that any employment practice that can only be applied by identifying an employee's sex is prohibited." 17-1623 Pet. App. at 102. Section 2000e-2(a)(1) prohibits "'*discrimination* . . . because of . . . sex,'" which requires showing that "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale*, 523 U.S. at 80 (brackets and citation

omitted). Employment practices that depend in part on sex do not violate Section 2000e-2(a)(1) unless they result in less favorable treatment of members of one sex than similarly situated members of the other sex. Here, Harris Homes did not violate Title VII because it did not treat employees of Stephens's sex (male) less favorably than similarly situated employees of the opposite sex (female). See pp. 34-35, *supra*.

Indeed, many commonplace practices that distinguish between the sexes do not violate Section 2000e-2(a)(1) because they account for real physiological differences between the sexes without treating either sex less favorably. Sex-specific restrooms, for example, "are prevalent not because they favor one sex over another, but because they protect the privacy of both sexes." *Wittmer*, 915 F.3d at 334 (Ho, J., concurring). Although "separate bathrooms are obviously not blind to sex," they do not discriminate because of sex within the meaning of Title VII so long as they do not treat men or women disadvantageously compared to the opposite sex. *Ibid.*; see 17-1623 Pet. App. at 102-103 (Lynch, J., dissenting). The same is true of dress codes and other policies that do not impose unequal burdens on men or women. See *Jespersen* v. *Harrah's Operating Co.*, 444 F.3d 1104, 1109-1110 (9th Cir. 2006) (en banc) (collecting cases); EEOC Compl. Man. § 619.4(d), at 3607 (CCH 2008) (Pet. Cert. Reply App. 1a-2a).

Moreover, "the sexes are not similarly situated in certain circumstances," *Michael M.* v. *Superior Court*, 450 U.S. 464, 469 (1981) (plurality opinion), and some practices that might appear to impose unequal burdens may comply with Title VII if they reflect relevant differences between the sexes. Unlike racial classifications—which are almost invariably invidious because race rarely

if ever reflects a relevant distinction—classifications based on sex sometimes are permissible because "[t]he two sexes are not fungible," and certain "differences between men and women" are "enduring." *United States* v. *Virginia*, 518 U.S. 515, 533 (1996); cf. *Michael M.*, 450 U.S. at 478 (Stewart, J., concurring) ("[S]o far as the Constitution is concerned, people of different races are always similarly situated," whereas "there are differences between males and females that the Constitution necessarily recognizes." (citations omitted)). Those differences may in some contexts justify sex-based distinctions.

For example, in *Bauer* v. *Lynch*, 812 F.3d 340 (4th Cir.), cert. denied, 137 S. Ct. 372 (2016), a male trainee in the Federal Bureau of Investigations (FBI) Academy who did not meet the FBI's sex-specific physical-fitness standards brought suit under Title VII. *Id.* at 342. The district court granted summary judgment to the plaintiff because the standards were different for men than women. See *id.* at 346. The Fourth Circuit vacated that ruling, holding that "[m]en and women simply are not physiologically the same for the purposes of physical fitness programs," and "an employer does not contravene Title VII when it utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women, requiring the same level of physical fitness of each." *Id.* at 350-351; see *id.* at 347-352. Sex-specific dress codes may be similarly permissible. For example, the fact that a swimming-pool operator requires male and female lifeguards to wear different styles of swimsuits, by itself, would not violate Section 2000e-2(a)(1); indeed, requiring the same style swimsuit for both sexes might violate Title VII. 17-1623

Pet. App. at 101 (Lynch, J., dissenting) ("[A] pool that required both male and female lifeguards to wear a uniform consisting only of trunks would violate Title VII.").

In contrast, the court of appeals' approach would render unlawful *every* practice that takes account of or turns on sex—from workplace dress codes, to sex-specific restrooms, to different male and female fitness standards. See 17-1623 Pet. App. at 100-103 (Lynch, J., dissenting) (collecting examples). That would transform Title VII from a law "prohibit[ing] favoritism toward men or women" into one "requir[ing] employers to be entirely blind to a person's sex." *Wittmer*, 915 F.3d at 334 (Ho, J., concurring). Indeed, in some circumstances it might put employers to an impossible choice between applying a sex-specific policy and causing a prohibited disparate impact. See 17-1623 Pet. App. at 102 (Lynch, J., dissenting) ("[A] *failure* to impose distinct fitness requirements for men and women may be found to violate Title VII, if it has a disparate impact on one sex and the employer cannot justify the requirement as a business necessity."); cf. *Virginia*, 518 U.S. at 550 n.19 (admitting women to previously all-male military academy "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs"). Title VII cannot plausibly be construed to compel that extreme result.

c. Stephens's argument (Br. 20-27) that sex was "a but-for cause" of Harris Homes' decision to fire Stephens fails for similar reasons. Stephens argues (Br. 20) that Harris Homes would not have fired Stephens if Stephens were biologically female and sought to dress as a female, and therefore Stephens was "fired because of [Stephens's] sex." That analysis, which the court of

appeals also embraced, Pet. App. 23a, is fundamentally flawed because it compares Stephens to a female who is not similarly situated. Stephens is biologically male and sought to dress according to the dress code for the *opposite* sex. In contrast, the hypothetical woman Stephens posits would be dressing according to the dress code for her *own* sex. In other words, the hypothetical woman is not similarly situated to Stephens because the woman differs from Stephens in an additional way beyond sex: the woman (unlike Stephens) is not presenting as transgender.

Because Stephens's hypothetical changes more than just the employee's sex, it does not show Harris Homes treated Stephens differently because of sex. It shows that Harris Homes treated Stephens differently because Stephens intended to dress as a member of the opposite sex, or at most because of Stephens's transgender status. See *Hively* v. *Ivy Tech Cmty. Coll.*, 853 F.3d 339, 366 (7th Cir. 2017) (en banc) (Sykes, J., dissenting) ("[C]omparison can't do its job of *ruling in* sex discrimination as the actual reason for the employer's decision (by *ruling out* other possible motivations) if we're not scrupulous about holding *everything* constant except the plaintiff's sex."). And discrimination based on transgender status itself is not discrimination because of sex. See pp. 16-30, *supra*.

To show that sex was a but-for cause of Harris Homes' treatment of Stephens, Stephens would have to show that changing *only* Stephens's sex would have changed the result. That was the situation in Stephens's lead case, *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978). The employer in *Manhart* required all women to contribute more towards their pension benefits than men, based on

women's longer average life expectancy, regardless of the life expectancy of a particular woman. *Id.* at 705-708. A female employee thus had to pay more than a similarly situated male with an identical life expectancy merely because of her sex. Here, in contrast, neither Stephens nor the Sixth Circuit has identified evidence that Harris Homes did or would treat more favorably a female employee who is similarly situated to Stephens—*i.e.*, a female who intended to dress as a male. And Harris Homes' owner averred under oath that he would have fired a female funeral director who refused to dress as a female. See pp. 34-35, *supra*.

Of course, a "but-for" analysis, even correctly applied, addresses only one part of the inquiry: causation. An employer violates Section 2000e-2(a)(1) by "*discriminat[ing]*" based on sex—treating members of one sex "disadvantageous[ly]" compared to similarly situated members of the other sex—not merely by treating the sexes differently. *Oncale*, 523 U.S. at 80. That is one reason why, as noted above, many long-established practices such as sex-specific restrooms do not violate Title VII, even though their application depends in a but-for sense on an individual's sex. See pp. 35-36, *supra*. In addition to conducting but-for analysis rigorously and properly, courts should not deem but-for causation of differential treatment as sufficient alone to establish discrimination because of sex. That would jeopardize all sex-specific practices.

d. Stephens's remaining arguments lack merit. Stephens argues (Br. 25) that a Title VII plaintiff need not show that sex was "the only cause" of an employer's decision, and the fact that Harris Homes fired Stephens based on transgender status "does not defeat liability" so long as sex was also "one of the but-for causes." As

explained above, Stephens has not shown that sex was even a but-for cause of Harris Homes' decision, because there is no evidence that Harris Homes would have treated a transgender person of the opposite sex any differently. See pp. 38-40, *supra*.

Stephens cites (Br. 22, 25) *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam), but it holds only that an employer discriminates because of sex if it treats a subset of one sex less favorably than the corresponding subset of the other sex. *Phillips* involved an employer's policy against hiring women (but not men) with "pre-school-age children." *Id.* at 543; see *id.* at 543-544. Although the challenged policy applied a special rule only to women with children under a certain age, it discriminated against those women by treating them less favorably than similarly situated men, *i.e.*, men with pre-school-age children. *Id.* at 544; see *Coleman* v. *B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1203 (10th Cir. 1997). The same is true of *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991), which Stephens also cites (Br. 34). The Court held there that an employer's "fetal-protection policy" was facially discriminatory because it excluded fertile women (but not fertile men) from certain jobs that would expose them to lead. 499 U.S. at 197; see *id.* at 190-192, 197-200; see also *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 684 (1983) (employer's benefit plan discriminated because of sex by affording "less inclusive" benefits for dependents of male employees than dependents of female employees). *Phillips*, *Johnson Controls*, and *Newport News* thus forbid an employer from discriminating against only male (or only female) transgender employees. Harris

Homes did not do so. It did not treat transgender employees of one sex less favorably than transgender employees of the opposite sex.[11]

Stephens also suggests (Br. 39) that whether Harris Homes would treat female transgender employees the same way that it treats male transgender employees is irrelevant because an employer cannot escape Title VII liability by discriminating against both sexes. But subjecting both sexes to the same undesirable treatment does not constitute *discrimination* against *either* sex. See *Holman* v. *Indiana*, 211 F.3d 399, 403 (7th Cir.) ("[B]ecause Title VII is premised on eliminating *discrimination*, inappropriate conduct that is inflicted on both sexes, or is inflicted regardless of sex, is outside the statute's ambit."), cert. denied, 531 U.S. 880 (2000); *id.* at 402-405 (a supervisor who harasses members of both sexes "is not discriminating on the basis of sex" because the supervisor "is not treating one sex better (or worse) than the other; he is treating both sexes the same (albeit badly)" (emphasis omitted)). Here, Harris Homes did

---

[11] Stephens's reliance (Br. 22) on 42 U.S.C. 2000e-2(m) is similarly misplaced. Section 2000e-2(m) states that, with certain exceptions, "an unlawful employment practice is established when the complaining party demonstrates that * * * sex * * * was a motivating factor for any employment practice, even though other factors also motivated the practice." *Ibid.*; see 42 U.S.C. 2000e-5(g)(2)(B) (court may not order damages, reinstatement, or backpay if plaintiff proves violation under Section 2000e-2(m) but employer shows that it would have taken the same action irrespective of sex). Section 2000e-2(m) is irrelevant here because, as explained in the text, Stephens fails to show that sex was even a motivating factor. Harris Homes terminated Stephens, a male, for a reason that Rost explained would apply equally to females: dressing at work according to the dress code for the opposite sex. See pp. 34-35, *supra*.

not discriminate against either sex because it would apply the same policy to employees of both sexes.

Stephens rejoins (Br. 39) that an employment practice can violate Section 2000e-2(a)(1) even if it applies to both sexes, citing *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977). Stephens misreads that decision. There, a female applicant for employment at a prison challenged both a statute that imposed height and weight requirements for prison employees and a regulation that required employees who had regular contact with prisoners in single-sex prisons to be of the same sex as the inmates. See *id.* at 323-329. In the passage Stephens cites (Br. 39), the Court held that the regulation "explicitly discriminate[d] against women on the basis of their sex" by barring women (but not men) from contact positions in male prisons. 433 U.S. at 332. The regulation facially discriminated on the basis of sex because it allowed men who met the statutory height and weight requirements (and other job prerequisites) to hold contact positions, but not women who met those same requirements. And in operation, "[t]he [r]egulation exclude[d] women from consideration for approximately 75% of the available correctional counselor jobs in the [State's] prison system." *Id.* at 332 n.16. The fact that the regulation also barred men from jobs in female prisons did not excuse that "overt" discrimination against women. *Id.* at 332.

Finally, Stephens argues (Br. 26-27) that even an employer who discriminates against transgender employees of both sexes still is motivated by sex because the employer's action is based on the employees' desire to change their sex. Stephens offers (*ibid.*) an analogy to a "Protestant employer who fire[s] employees who were born into a Protestant denomination but converted to Catholicism." That analogy fails

because, in the hypothetical scenario Stephens describes, it appears that the Protestant employer does discriminate against a particular religion (Catholicism) by treating only individuals who convert to that religion less favorably.

To the extent Stephens instead envisions an employer who discriminates against all religious converts—*i.e.*, who would fire any employee who converted from one religion to another—that comparison only undermines Stephens's argument. Title VII would prohibit discrimination against all religious conversion, but for a reason that does not apply to transgender status. Title VII defines "religion" to "include[] all aspects of religious observance and practice, as well as belief." 42 U.S.C. 2000e(j). That broad, express definition of religion encompasses conversion from one religion to another, which involves "religious observance and practice" and "belief." *Ibid.* An employer who fires any employee who converts thus would be discriminating based on religion. Title VII does not contain a similarly capacious definition of "sex"; apart from its limited-purpose definition of "because of sex" and "on the basis of sex" concerning pregnancy and related issues, 42 U.S.C. 2000e(k), it does not define sex at all. The ordinary meaning of sex therefore controls, and in ordinary usage sex refers to whether a person is male or female, not to a desire to change from one sex to the other.

B. Discrimination Against Transgender Persons Does Not Constitute Sex Stereotyping Prohibited By Title VII

In the alternative, Stephens argues (Br. 28-36), and the court of appeals held, that discrimination based on transgender status inherently constitutes sex stereotyping, which they contend independently violates Title VII as construed in *Price Waterhouse*, *supra*. Pet. App. 26a.

But again, even assuming the premise—that transgender-status discrimination necessarily relies on sex stereotyping in some sense—that alternative rationale still fails to establish prohibited sex discrimination.

1. Sex stereotyping by itself is not a Title VII violation

Stephens's and the Sixth Circuit's sex-stereotyping argument rests on the incorrect premise that *Price Waterhouse* construed Title VII to prohibit sex stereotypes per se. Stephens Br. 28-29; Pet. App. 21a. But that case, which produced no majority opinion, merely recognized that a plaintiff can use evidence that an employer engaged in sex stereotyping to show that the employer discriminated because of sex under the ordinary Title VII rubric. It did not recognize sex stereotyping as a novel, freestanding category of Title VII liability.

a. The question presented in *Price Waterhouse* "concern[ed] the respective burdens of proof of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives." 490 U.S. at 232 (plurality opinion). The plaintiff was a female employee of an accounting firm who was proposed as a candidate for partnership. *Id.* at 233. Despite a sterling record and praise from colleagues and clients, she was passed over for promotion. See *id.* at 233-235. What "doomed [the plaintiff's] bid for partnership" were "perceived shortcomings" in her "'interpersonal skills'" and interactions with others, especially her "relations with staff members." *Id.* at 234-235 (plurality opinion). She was viewed as exhibiting "aggressiveness" that "apparently spilled over into abrasiveness" and "brusqueness," and "[b]oth 'supporters and opponents of her candidacy * * * indicated that she was sometimes overly

aggressive, unduly harsh, difficult to work with and impatient with staff.'" *Id.* at 234-235 (brackets and citation omitted). Although such traits could be problematic in any employee regardless of sex, "[t]here were clear signs" that the perception of the plaintiff was at least partly sex-based and "that some of the partners reacted negatively to [her] personality because she was a woman." *Id.* at 235; see *ibid.* (describing evidence).

As the case came to this Court, the question was precisely how much weight impermissible, sex-based considerations must carry in an employment decision to violate Title VII when lawful factors also were considered. The accounting firm argued that "an employer violates Title VII only if it gives decisive consideration to an employee's gender, race, national origin, or religion in making a decision that affects that employee," and even if an employer relies in part on one of those grounds, the employee must "show that the decision would have been different" had the employer "not discriminated." *Price Waterhouse*, 490 U.S. at 237-238 (plurality opinion). The plaintiff, in contrast, argued that a Title VII violation occurs "whenever [an employer] allows one of th[o]se attributes to play any part in an employment decision." *Id.* at 238.

Writing for a four-Justice plurality, Justice Brennan adopted a middle ground. The plurality reasoned that the plaintiff need only "show[] that an impermissible motive played a motivating part in an adverse employment decision," not that it was the sole cause. *Price Waterhouse*, 490 U.S. at 250; see *id.* at 239-242. The plurality further concluded, however, that "an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person." *Id.* at 242; see *id.* at

242-247. The plurality allocated the parties' burdens accordingly, stating that, once a plaintiff proves that an impermissible consideration was a motivating factor, the burden shifts to the defendant "to show that it would have made the same decision in the absence of the unlawful motive." *Id.* at 250; see *id.* at 258.[12]

The opinions of the other Justices whose votes supported the judgment similarly addressed the standard and burden for proving causation. Justice White, concurring only in the judgment, would have applied the standard set forth in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977). *Price Waterhouse*, 490 U.S. at 258-261. In his view, "[i]t [wa]s not necessary to get into semantic discussions on whether the *Mt. Healthy* approach is 'but-for' causation in another guise or creates an affirmative defense on the part of the employer." *Id.* at 259. Justice O'Connor, also concurring only in the judgment, agreed with the plurality that the burden should have shifted to the employer to show that it would have reached the same decision irrespective of the plaintiff's sex, but she disagreed with the plurality's characterization of the "causation" standard and "broad statements" about the parties' burdens. *Id.* at 261; see *id.* at 261-279.

The plurality in *Price Waterhouse* briefly discussed sex stereotyping in the context of addressing how an employer's improper motivation can be proved. It explained that, in requiring a plaintiff to show that sex "played a motivating part in an employment decision," the plurality "mean[t] that, if we asked the employer at the moment of the decision what its reasons were

---

[12] Two years after *Price Waterhouse*, Congress amended Title VII to modify the framework for proving mixed-motive claims. See 42 U.S.C. 2000e-2(m), 2000e-5(g)(2); see p. 26-27, *supra*.

* * * , one of those reasons would be that the applicant or employee was a woman." 490 U.S. at 250; see *id.* at 250-252. The plurality noted that an employer's use of "sex stereotyp[ing]" can be "*evidence* that gender played a part" in the employer's decision. *Id.* at 251.

Using the specific stereotype at issue in *Price Waterhouse* as an example, the plurality stated that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." 490 U.S. at 250. The plurality explained that "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not." *Id.* at 251. The plurality cautioned, however, that "[r]emarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision." *Ibid.* "The plaintiff must show that the employer actually relied on her gender in making its decision." *Ibid.*; see *id.* at 255-257 (discussing particular evidence of sex stereotypes the plaintiff had presented); *id.* at 272 (O'Connor, J., concurring in the judgment) (same).

b. *Price Waterhouse* thus did not purport to recognize sex stereotyping as a freestanding theory of Title VII liability or an independent category of prohibited conduct. That question was not presented; the case concerned the parties' respective burdens. The plurality's discussion merely addressed how evidence of sex stereotyping may, but will not always, tend to show that an employer was motivated by an individual's sex in taking a particular action. See 490 U.S. at 251. Nor does anything in *Price Waterhouse* cast doubt on the core requirement of a Title VII disparate-treatment claim

based on sex: that the employer has treated members of one sex less favorably than similarly situated members of the opposite sex. Indeed, the plurality underscored that requirement in describing "Congress['s] inten[t] to strike at the entire spectrum of disparate treatment of men and women." 490 U.S. at 251 (citation omitted). As Judge Ho observed in *Wittmer*, "*Price Waterhouse* doesn't make sex stereotyping *per se* unlawful under Title VII." 915 F.3d at 339 (concurring opinion). Instead, "under *Price Waterhouse*, sex stereotyping is actionable only to the extent it provides evidence of favoritism of one sex over the other." *Ibid.*

However one interprets the plurality and concurring opinions in *Price Waterhouse*, the subsequent holding of the unanimous Court in *Oncale* put any lingering doubt to rest. In *Oncale*, the Court rejected concerns that construing Title VII to preclude same-sex harassment would "transform Title VII into a general civility code." 523 U.S. at 80. As the Court explained, that dire prediction was addressed by "careful attention to the requirements of the statute." *Ibid.* "Title VII," the Court observed, "does not prohibit all verbal or physical harassment in the workplace; it is directed only at '*discrimination* . . . because of . . . sex.'" *Ibid.* (brackets omitted). The Court noted that it "ha[d] never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations." *Ibid.* Instead, "[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." *Ibid.* (citation omitted).

Whatever probative value evidence of sex stereotyping might have in a particular case, a plaintiff's reliance on such evidence does not change the ultimate inquiry. Such evidence may be relevant in demonstrating that an employer was motivated by sex in taking the challenged employment action. But it does not excuse the plaintiff from the fundamental requirement of proving that the defendant treated members of one sex less favorably than similarly situated members of the opposite sex. Otherwise, countless sex-specific policies would be per se unlawful as based on sex stereotypes. A dress code that required men to wear neckties, for example, would be susceptible to challenge as predicated on sex stereotypes. The same would be true of sex-specific physical-fitness standards, and even sex-specific restrooms. Lower courts have repeatedly upheld such policies, see pp. 36-38, *supra*, but deeming sex stereotypes themselves invalid would place all such policies in jeopardy.

2. Discrimination based on transgender status does not constitute sex stereotyping prohibited by Title VII, but a transgender plaintiff may use sex-stereotyping evidence to prove a sex-discrimination claim

a. These principles apply in the same way to plaintiffs who are transgender as to those who are not. Treating transgender persons disadvantageously based on failure to conform to sex stereotypes, without more, does not violate Section 2000e-2(a)(1) because that provision does not prohibit sex stereotypes in and of themselves. To prevail, like any other plaintiff suing under that provision, a transgender plaintiff must plead and prove that the employer did or would treat members of the plaintiff's sex less favorably than similarly situated members of the other sex. See pp. 31-33, *supra*. Showing that the employer treated all transgender individuals of both

sexes less favorably than non-transgender persons, whatever the employer's motivation, does not suffice.

Like any other plaintiff, however, a transgender plaintiff may use evidence of sex stereotypes in proving a Title VII claim under the ordinarily applicable standards. The "critical issue" under Section 2000e-2(a)(1) is always "whether members of one sex are exposed to disadvantageous terms or conditions of employment" compared to similarly situated members of the opposite sex. *Oncale*, 523 U.S. at 80 (citation omitted). A plaintiff alleging that an employer discriminated because of sex by using sex stereotypes thus must show that the employer did or would treat the plaintiff less favorably than members of the opposite sex who exhibit the particular trait the stereotype targets. For example, in *Price Waterhouse*, the employer denied the plaintiff a promotion based largely on her perceived "aggressiveness." 490 U.S. at 234 (plurality opinion). An employer might penalize that trait in all employees for reasons unrelated to sex, and doing so would not give rise to a Title VII disparate-treatment claim. But in *Price Waterhouse*, there was evidence that the employer penalized the plaintiff's aggressiveness because she was a woman, and that her firing was based in part on "stereotypical notions about women's proper deportment." *Id.* at 256; see *id.* at 235.

If the female plaintiff in *Price Waterhouse* had been transgender, the same claim would have been available and would be analyzed in the same way. The employer would violate Title VII by penalizing aggressiveness in female employees, regardless of their gender identity, if it would not penalize that trait in similarly situated males. And if the employer penalized aggressiveness or another trait only in females who are transgender but

not in males who are transgender, it would violate Title VII by treating that subset of females less favorably than the corresponding subset of males. See pp. 41-42, *supra*.

The same is true of workplace dress codes. An employer violates Section 2000e-2(a)(1) by imposing a dress code that treats women less favorably than similarly situated men, or vice versa. For example, as Judge Lynch observed in his dissent in *Zarda*, a dress code "requiring female employees to wear 'Hooters'-style outfits but male employees doing the same work to wear suit and tie would not stand scrutiny." 17-1623 Pet. App. at 101; see *Jespersen*, 444 F.3d at 1112 (contrasting hotel dress code that required women to wear "'revealing'" attire that was "intended to be sexually provocative, and tending to stereotype women as sex objects," which another court had held unlawful, with challenged sex-specific policy requiring employees to wear "a unisex uniform that covered [the] entire body," which court upheld (citation omitted)). Such a policy would discriminate on the basis of sex by subjecting women to a disadvantageous condition of employment—wearing revealing attire—not imposed on men. That would be true whether or not the plaintiff is transgender.

In short, Title VII's protections apply fully to transgender individuals, but the fact that a plaintiff is transgender does not change the legal standard or analysis. A transgender plaintiff is not exempt from the requirement to show that an employer treated members of one sex less favorably than similarly situated members of the other sex. Indeed, if an individual's transgender status removed the requirement of showing that the employer treated one sex less favorably

than the other, an employer could not apply to transgender individuals a sex-specific dress code or other policy that it may lawfully apply to everyone else. Nothing in Title VII's text or this Court's precedent supports that result.

b. In this case, the district court and court of appeals each determined that Harris Homes fired Stephens for failing to conform to stereotypes about how males should dress in the workplace. See Pet. App. 15a-22a, 107a-118a. But even assuming that Harris Homes relied on sex stereotypes, that alone does not establish sex discrimination in violation of Section 2000e-2(a)(1). If it had been pleaded and proven that Harris Homes' sex-specific dress code treated men or women less favorably than the opposite sex, then the dress code could violate Title VII. But Harris Homes' dress code, in force for more than 20 years, J.A. 119-121, is not at issue. The EEOC's complaint did not challenge the dress code itself. J.A. 12-18; Pet. App. 112a. And the court of appeals made clear that it was not passing on the dress code. Pet. App. 18a. Accordingly, for purposes of this litigation, it must be assumed that Harris Homes' dress code is equally burdensome to men and women. As a result, neither Stephens nor the Sixth Circuit has identified evidence that Harris Homes treated some or all biologically male employees less favorably than similarly situated biologically female employees.

* * * * *

This case does not concern whether, as a matter of policy, Title VII should forbid discriminating on the basis of transgender status. Congress has made that policy choice in other statutes, expressly addressing gender-identity discrimination separately from sex. It has yet to make a similar decision with respect to Title

VII, either in 1964 or at any point since. As it stands, Title VII prohibits treating an individual less favorably than similarly situated individuals of the opposite sex. It simply does not speak to discrimination because of an individual's gender identity or a disconnect between an individual's gender identity and the individual's sex. That does not mean transgender individuals are somehow "exclude[d]" from Title VII's protections. Stephens Br. 36. It means that transgender employees, like all other employees, may not be treated less favorably on any of the grounds Title VII covers. But transgender status is not among them, and restyling a claim of gender-identity discrimination as one based on consideration of sex or sex stereotyping does not change that result.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
ERIC S. DREIBAND
Assistant Attorneys General
JEFFREY B. WALL
Deputy Solicitor General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
JONATHAN C. BOND
Assistant to the Solicitor General
ERIC TREENE
Special Counsel
CHARLES W. SCARBOROUGH
STEPHANIE R. MARCUS
Attorneys

AUGUST 2019

APPENDIX

1. 18 U.S.C. 249 provides in pertinent part:

Hate crime acts

(a) IN GENERAL.—

* * * * *

(2) OFFENSES INVOLVING ACTUAL OR PERCEIVED RELIGION, NATIONAL ORIGIN, GENDER, SEXUAL ORIENTATION, GENDER IDENTITY, OR DISABILITY.—

(A) IN GENERAL.—Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) or paragraph (3), willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person—

(i) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(ii) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—

(I) death results from the offense; or

(II) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

* * * * *

(c) DEFINITIONS.—In this section—

* * * * *

(4) the term "gender identity" means actual or perceived gender-related characteristics; and

* * * * *

2. 34 U.S.C. 12291(b)(13)(A) (Supp. V 2017) provides:

Definitions and grant provisions

(b) Grant conditions

(13) Civil rights

(A) Nondiscrimination

No person in the United States shall, on the basis of actual or perceived race, color, religion, national origin, sex, gender identity (as defined in paragraph 249(c)(4) of title 18), sexual orientation, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under the Violence Against Women Act of 1994 (title IV of Public Law 103-322; 108 Stat. 1902), the Violence Against Women Act of 2000 (division B of Public Law 106-386; 114 Stat. 1491), the Violence Against Women and Department of Justice Reauthorization Act of 2005 (title IX of Pub-

lic Law 109-162; 119 Stat. 3080),[2] the Violence Against Women Reauthorization Act of 2013, and any other program or activity funded in whole or in part with funds appropriated for grants, cooperative agreements, and other assistance administered by the Office on Violence Against Women.

3. 34 U.S.C. 12361 (Supp. V 2017) provides:

Civil rights

(a) Purpose

Pursuant to the affirmative power of Congress to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this part to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.

(b) Right to be free from crimes of violence

All persons within the United States shall have the right to be free from crimes of violence motivated by gender (as defined in subsection (d)).

(c) Cause of action

A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence

---

[2] See References in Text note below.

motivated by gender and thus deprives another of the right declared in subsection (b) shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

(d) Definitions

For purposes of this section—

(1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and

(2) the term "crime of violence" means—[1]

(A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the

---

[1] So in original. The word "means" probably should appear after "(A)" below.

person who takes such action and the individual against whom such action is taken.

(e) Limitation and procedures

(1) LIMITATION

Nothing in this section entitles a person to a cause of action under subsection (c) for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender (within the meaning of subsection (d)).

(2) No prior criminal action

Nothing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c).

(3) Concurrent jurisdiction

The Federal and State courts shall have concurrent jurisdiction over actions brought pursuant to this part.

(4) Supplemental jurisdiction

Neither section 1367 of title 28 nor subsection (c) of this section shall be construed, by reason of a claim arising under such subsection, to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree.

4. 34 U.S.C. 30503(a)(1) (Supp. V 2017) provides:

Support for criminal investigations and prosecutions by State, local, and tribal law enforcement officials

(a) Assistance other than financial assistance

(1) In general

At the request of a State, local, or tribal law enforcement agency, the Attorney General may provide technical, forensic, prosecutorial, or any other form of assistance in the criminal investigation or prosecution of any crime that—

(A) constitutes a crime of violence;

(B) constitutes a felony under the State, local, or tribal laws; and

(C) is motivated by prejudice based on the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim, or is a violation of the State, local, or tribal hate crime laws.

5. 42 U.S.C. 2000e provides in pertinent part:

Definitions

For the purposes of this subchapter—

* * * * *

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice

without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

* * * * *

6. 42 U.S.C. 2000e-2 provides in pertinent part:

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any

individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

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

* * * * *

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institu-

tion of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

* * * * *

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except

that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(*l*) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

* * * * *

7. 42 U.S.C. 2000e-5(g) provides:

Enforcement provisions

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement

or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

8. Pub. L. No. 103-322, Tit. XXVIII, § 280003, 108 Stat. 2096 provides:

DIRECTION TO UNITED STATES SENTENCING COMMISSION REGARDING SENTENCING ENHANCEMENTS FOR HATE CRIMES.

(a) DEFINITION.—In this section, "hate crime" means a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.

(b) SENTENCING ENHANCEMENT.—Pursuant to section 994 of title 28, United States Code, the United States Sentencing Commission shall promulgate guidelines or amend existing guidelines to provide sentencing enhancements of not less than 3 offense levels for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate crimes. In carrying out this section, the United States Sentencing Commission shall ensure that there is reasonable consistency with other guidelines, avoid duplicative punishments for substantially the same offense, and take into account any mitigating circumstances that might justify exceptions.

9. Pub. L. No. 111-84, § 4703(a), 123 Stat. 2836 provides:

DEFINITIONS.

(a) AMENDMENT.—Section 280003(a) of the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103-322; 108 Stat. 2096) is amended by inserting "gender identity," after "gender,".

(b) THIS DIVISION.—In this division—

(1) the term "crime of violence" has the meaning given that term in section 16 of title 18, United States Code;

(2) the term "hate crime" has the meaning given that term in section 280003(a) of the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103-322; 108 Stat. 2096), as amended by this Act;

(3) the term "local" means a county, city, town, township, parish, village, or other general purpose political subdivision of a State; and

(4) the term "State" includes the District of Columbia, Puerto Rico, and any other territory or possession of the United States.