

Case No. 16-2424
United States Court of Appeals for the Sixth Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

and

AIMEE STEPHENS,
Intervenor,

v.

R.G. & G.R. HARRIS FUNERAL HOME, Inc.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan

BRIEF OF INTERVENOR AIMEE STEPHENS

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 16-2424

Case Name: EEOC v. R.G. & G.R. Harris Funeral Hor

Name of counsel: John A. Knight, American Civil Liberties Union Foundation

Pursuant to 6th Cir. R. 26.1, Intervenor Aimee Stephens
Name of Party

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1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

TABLE OF AUTHORITIES v-ix

STATEMENT REGARDING ORAL ARGUMENTx

JURISDICTIONAL STATEMENT 1

STATEMENT OF ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 1

 Facts 1

 Procedural History5

SUMMARY OF ARGUMENT 7

ARGUMENT.....8

 I. The Funeral Home’s Termination of Ms. Stephens Because She Is Transgender and Because of her Gender Transition Is Sex Discrimination.8

 II. The District Court Erred in Exempting the Funeral Home From Title VII Because of Its Claim that Allowing Ms. Stephens to Present As A Woman Violated Its Religious Exercise. 15

 A. Ample legal precedent shows that RFRA does not provide an exception based on religion to Title VII and other civil rights laws. 16

 B. Enforcement of Title VII here furthers the government’s compelling interest in eradicating discrimination.20

C. The EEOC met its burden of showing that requiring compliance with Title VII is the least restrictive means of furthering its compelling governmental interest.27

CONCLUSION34

CERTIFICATE OF COMPLIANCE.....35

CERTIFICATE OF SERVICE.....36

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS37

TABLE OF AUTHORITIES

Cases

Adkins v. City of New York,
143 S. Supp. 3d 134 (S.D.N.Y. 2015)23

Am. Friends Serv. Comm. Corp. v. Thornburgh,
951 F.2d 957 (9th Cir. 1991).....21

Bd. of Directors of Rotary Club Int’l v. Rotary Club of Duarte,
481 U.S. 537 (1987).....22

Bd. of Educ. Of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.,
__ F. Supp. 3d __, No. 2:16-CV-524, 2016 WL 5372349 (S.D. Ohio Sept.
25, 2016).....23

Barnes v. City of Cincinnati,
401 F.3d 729 (6th Cir. 2005).....10

Bob Jones University v. United States,
461 U.S. 574 (1983).....17

Burwell v. Hobby Lobby Stores, Inc.,
134 S. Ct. 2751 (2014).....25, 27, 32-33

City of Boerne v. Flores,
521 U.S. 507 (1997).....16

Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos,
483 U.S. 327 (1987).....26

Cutter v. Wilkinson,
544 U.S. 709 (2005).....26

Dawson v. H&H Elec., Inc.,
 No. 4:14CV00583 SWW, 2015 WL 5437101 (E.D. Ark. Sept. 15, 2015).. 12-13

Dodds v. U.S. Dep’t of Educ.,
 845 F.3d 217 (6th Cir. 2016).....10

Dole v. Shenandoah Baptist Church,
 899 F.2d 1389 (4th Cir. 1990).....18-19, 22

East v. Crowdus,
 302 F.2d 645 (8th Cir. 1962).....1

EEOC v. Fremont Christian School,
 781 F.2d 1362 (9th Cir. 1986).....18-19, 22

EEOC v. Mississippi College,
 626 F.2d 477 (5th Cir. 1980).....18

EEOC v. Pac. Press Publ’g Ass’n,
 676 F.2d 1272 (9th Cir. 1982).....18-19, 21

EEOC v. Preferred Mgmt. Corp.,
 216 F. Supp. 2d 763 (S.D. Ind. 2002)..... 20-21

Employment Division v. Smith,
 494 U.S. 872 (1990).....16

Estate of Thornton v. Caldor,
 472 U.S. 703 (1985).....26

F.T.C. v. E.M.A. Nationwide, Inc.,
 767 F.3d 611 (6th Cir. 2014)..... 15-16

Fabian v. Hosp. of Cent. Conn.,
 172 F. Supp. 3d 509 (D. Conn. 2016).....11

General Conf. of Seventh-Day Adventists,
617 F.3d 402 (6th Cir. 2010).....15

Glenn v. Brumby,
663 F.3d 1312 (11th Cir. 2011)..... 10, 23

Hively v. Ivy Tech Community College of Indiana,
__ F.3d __, No. 15-1720, 2017 WL 1230393 (7th Cir. Apr. 4, 2017).....14

Hobbie v. Unemployment Appeals Comm’n of Fla.,
480 U.S. 136 (1987).....26

J.E.B. v. Alabama,
511 U.S. 127 (1994).....23

Newman v. Piggie Park Enters., Inc.,
256 F. Supp. 941 (D.S.C. 1966).....17

N. Coast Women’s Care Med. Grp., Inc. v. Super. Ct.,
189 P.3d 959 (Cal. 2008)27

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989).....6, 8, 12

Redhead v. Conference of Seventh-Day Adventists,
440 F. Supp. 2d 211 (E.D.N.Y. 2006)..... 19-20, 21-22

Roberts v. U.S. Jaycees,
468 U.S. 609 (1984)..... 20, 22, 25

Romer v. Evans,
517 U.S. 620 (1996)..... 20-21

Rumble v. Fairview Health Servs.,
No. 14-2037 (SRN/FLN), 2015 WL 1197415 (D. Minn. Mar. 16, 2015)11

<i>Schroer v. Billington</i> , 577 F. Supp. 2d 293 (D.D.C. 2008).....	11, 12
<i>Scott v. Ambani</i> , 577 F.3d 642 (6th Cir. 2009).....	8
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963).....	16
<i>Smith v. City of Salem</i> , 378 F.3d 566 (6th Cir. 2004).....	<i>passim</i>
<i>United States v. Burke</i> , 504 U.S. 229 (1992).....	20, 25
<i>United States v. Wilgus</i> , 638 F.3d 1274 (10th Cir. 2011).....	30-31
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972).....	16, 25
<u>Statutes</u>	
42 U.S.C. § 1981a.....	29
42 U.S.C. §§ 2000bb et seq.....	<i>passim</i>
42 U.S.C. §§ 2000bb-1(b).....	19
42 U.S.C. § 2000bb(b)(1).....	16
42 U.S.C. §§ 2000e et seq.....	<i>passim</i>
42 U.S.C. § 2000e-2(a)(1).....	8

42 U.S.C. § 2000e-2(e)(1)..... 15-16

42 U.S.C. § 2000e-2(e)(2)..... 15-16

42 U.S.C. § 2000e-5(g)(1)29

Other Authorities

AM. PSYCHOLOGICAL ASS’N, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 832 (Dec. 2015)..... 8-9

E.L. Lombardi, et al., *Gender Violence: Transgender Experiences With Violence and Discrimination*, 42 Journal of Homosexuality 89 (2001).....24

Eugene Volokh, *Successful Religious Freedom Defense in Title VII Case Brought by Transgender Employee*, Wash. Post (Aug 19, 2016)29, 30

M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 Vt. L. Rev. 943 (2015)13

Rebecca Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 Aggression and Violent Behavior 170 (2009)..... 23-24

Sandy E. James, et al., *The Report of the 2015 U.S. Transgender Survey* (2016) ..24

STATEMENT REGARDING ORAL ARGUMENT

Ms. Stephens requests oral argument because this important case raises the question whether a for-profit business, invoking the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq.*, may use the religious beliefs of its owner as a justification for discrimination against a lay employee in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The case is also important because it concerns the scope of Title VII's ban on sex discrimination as it applies to persons who are transgender. As required by this Court's March 27, 2017 Order, Ms. Stephens will file a motion seeking leave to participate in oral argument.

JURISDICTIONAL STATEMENT

Ms. Stephens adopts the EEOC's Statement of Jurisdiction as her own. In addition, because this Court granted Ms. Stephens' motion to intervene, Mar. 27, 2017 Order, it has jurisdiction over her claims. *East v. Crowdus*, 302 F.2d 645, 647 (8th Cir. 1962) (federal courts "have jurisdiction over intervenors . . . in an action where jurisdiction of a subject matter has once been acquired").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in concluding that firing Ms. Stephens because she is transgender and was undergoing a gender transition was insufficient to show sex discrimination in violation of Title VII.

2. Whether the district court erred in finding that, although R.G. & G.R. Harris Funeral Home, Inc. (the "Funeral Home") discriminated against Ms. Stephens in contravention of Title VII, the Religious Freedom Restoration Act constituted a defense to its Title VII liability on the grounds that the EEOC failed to show that enforcing Title VII was the least restrictive means of achieving the government's compelling interest in ending discrimination.

STATEMENT OF THE CASE

Facts

Aimee Stephens is a woman who served for nearly six years as a funeral director and embalmer at the Funeral Home, until she was fired after informing the

Funeral Home's owner, Thomas Rost, that she is transgender and intended to begin presenting at work as a woman. Stephens Depo. p. 50-51, 59, 74-77, R.54-15, PageID#1451-53, 1455-56, Rost. 30(b)(6) Depo. p. 135-36, R.54-5, PageID#1372, Funeral Home Counter-Facts, R.61, PageID#1825, 1828 (¶¶1, 2, 10).

Ms. Stephens studied and completed a two-year degree to become a funeral director in North Carolina before moving to Michigan. Stephens Depo. p. 20, R.51-18, PageID#815. After completing a six-month internship at the Funeral Home, she received her license as a funeral director by the State of Michigan and the Funeral Home hired her as a director/embalmer. *Id.* at p. 45-46, R.51-18, PageID#816.

For almost six years, Ms. Stephens worked for the Funeral Home presenting as a man, *id.* at p. 48-50, 56, R.51-18, PageID#816, 18, but had known from a young age that she is a woman. Letter, R.54-21, PageID#1494. Four years before Rost terminated her, Ms. Stephens finally began to see a therapist for help with the suffering she had experienced due to the conflict she felt between knowing that she is a woman while presenting as a man. *Id.* Her therapist diagnosed her with a medical condition associated with the distress caused by this mismatch, and Ms. Stephens decided to begin a gender transition to help resolve the symptoms of her condition. *Id.*

The Funeral Home describes itself as a closely-held, for-profit corporation that is owned and operated by Thomas Rost. Def. Facts, R.55, PageID#1683 (¶1).

While Rost is Christian and the Funeral Home has a few references to Christianity in its website and in devotional booklets and cards with bible verses available in the Funeral Home locations, *id.* at PageID#1685-86 (¶¶ 17, 21, 23), the Funeral Home is not affiliated with any church and does not close for Christian holidays. Funeral Home Counter-Facts, R.61, PageID#1832-33 (¶¶25, 29). Nor does it restrict its services to clients of a particular faith. *Id.* at 1833-35 (¶¶30, 37). Rather, it serves clients of every religion. *Id.*

The Funeral Home has a gendered dress code, requiring men to wear dark suits, white shirts, a tie, and dark socks and shoes, while women must wear a conservative suit or dress. Dress Code, R.51-20, PageID#826-28

On July 31, 2013, Ms. Stephens informed Rost of her medical condition and her decision related to that condition to transition to living authentically as her “true self” by “liv[ing] and work[ing] full-time as a woman” and eventually undergoing transition-related surgery. Letter, R.54-21, PageID#1494. On August 15, 2013, prior to Ms. Stephens leaving for a two-week vacation, Rost fired her. Funeral Home Counter-Facts, R.61, PageID#1828 (¶10). He did not fire her because he was dissatisfied with her performance, Kish Aff., R.54-18, PageID#1476 (¶23); Funeral Home Counter-Facts, R.61, PageID#1829 (¶16), but because of her plan to present as a woman. Rost 30(b)(6) Depo. 75-76, 126-27, 135-36, R.54-5, PageID#1365, 1371-72. Rost told Ms. Stephens that “this is not

going to work out [] [a]nd that your services would no longer be needed here.” *Id.* at 126-27, PageID#1371.

At his deposition, Rost testified that “the specific reason” he fired Ms. Stephens was that she “was no longer going to represent [her]self as a man. [Stephens] wanted to dress as a woman.” *Id.* at 135-36, PageID#1372. In support of the Funeral Home’s summary judgment motion, Rost submitted an affidavit in which he stated that he had fired Ms. Stephens because she intended to violate the Funeral Home’s gendered dress code by dressing as a woman. Rost Aff., R.54-2, PageID#1336 (¶50).

At the time he fired Ms. Stephens and throughout the EEOC’s investigation of her discrimination claim, Rost made no mention of religion. However, more than 18 months after this litigation began, Rost asserted by affidavit that allowing Ms. Stephens to continue to work at the Funeral Home would have conflicted with his religious beliefs that “a person’s sex is an immutable God-given gift and that people should not deny or attempt to change their sex.” Rost Aff., R.54-2, PageID#1334 (¶42). He “would be violating God’s commands if [he] were to permit” employees to “deny their sex while acting as a representative of [the Funeral Home],” *id.* at PageID#1334 (¶43), such as by employing someone who “dress[ed] inconsistent with his or her biological sex.” *Id.* at PageID#1335 (¶48). This is because he “would be directly involved in supporting the idea that sex is a

changeable social construct rather than an immutable God-given gift.” *Id.* at PageID#1335 (¶45).

Procedural History

Ms. Stephens filed a charge of discrimination with the EEOC on September 9, 2013. Charge, R.54-22, PageID#1497. On September 25, 2014, the EEOC filed a complaint against the Funeral Home in the U.S. District Court alleging that it violated Title VII by firing Ms. Stephens because she is transgender, because of her “transition from male to female, and/or because [she] did not conform to [the Funeral Home’s] sex- or gender-based preferences, expectations, or stereotypes.” Complaint, R.1, PageID#4-5 (¶15). The Funeral Home filed a motion to dismiss, Motion, R.7, PageID#22-47, which the district court denied as to the EEOC’s claim that Ms. Stephens was fired on the basis of sex stereotypes and granted as to the EEOC’s argument that she was fired because she is transgender and intended to transition to living and presenting as female. Motion to Dismiss Opinion, R.13, PageID#188-95.

Following discovery, the district court granted summary judgment in favor of the Funeral Home based on its conclusion that RFRA provided the Funeral Home with an “exemption from Title VII.” Summary Judgment Opinion, R.76, PageID#2183. In reaching that conclusion, the district court recognized that Rost’s testimony that he fired Ms. Stephens because she “was no longer going to

represent [her]self as a man,” and would “dress as a woman” constituted “direct evidence that the Funeral Home fired Stephens based on sex stereotypes” in contravention of Title VII. *Id.* at PageID#2198-99.¹ The district court further recognized the “odd result” of allowing the Funeral Home a RFRA defense in this case initiated by the EEOC, rather than Ms. Stephens, as the Funeral Home would not have had the defense available to it had the EEOC declined to take action thereby giving Ms. Stephens herself the right to sue. *Id.* at PageID#2222-23 n.23. Nevertheless, the district court concluded, RFRA provided the Funeral Home a complete defense to the EEOC’s Title VII challenge to Ms. Stephens’ termination, because it believed that the EEOC had failed to meet its burden of showing that allowing Ms. Stephens to comply with the Funeral Home’s female dress code was the least restrictive means of achieving the governmental interest in eliminating discrimination on the basis of gender stereotypes. *Id.* at PageID#2216-22. Instead, the district court reasoned, if the EEOC really cared about ending gender

¹ The district court rejected the Funeral Home’s “sex-specific” dress code defense, because it was based on cases involving challenges to the existence of gendered dress codes, whereas the EEOC had not challenged the Funeral Home’s gendered dress code but only the Funeral Home’s refusal to let Ms. Stephens follow the rules applicable to female employees. *Id.* at PageID#2199-204. The district court also distinguished those cases cited by the Funeral Home, because they were decided by other circuits applying reasoning that the court found inconsistent with the reasoning applied by this Court in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), or were decided before *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Id.* at PageID#2201-04.

stereotypes, the district court held that it should have proposed that the Funeral Home get rid of its gendered dress code entirely. *Id.* at PageID#2218-19.

SUMMARY OF ARGUMENT

Title VII covers the full range of gender-based discrimination, including discrimination against persons because they are transgender or undergoing a gender transition. Discrimination against transgender people because they are transgender is founded on sex-based characteristics and motivated by gender-based stereotypes. The district court, therefore, erred by failing to recognize that the EEOC's allegations in its complaint that the Funeral Home discriminated against Aimee Stephens because she is transgender and was moving forward with her gender transition stated a claim for sex discrimination under Title VII. The district court further erred by narrowing the EEOC's case to a challenge to the Funeral Home's decision to fire her because she intended to follow the portion of her employer's dress code applicable to women. Doing so was one source of the district court's flawed RFRA analysis and its erroneous grant of summary judgment on grounds that eliminating the dress code entirely was a less restrictive alternative that would have satisfied the government's narrowly-defined interest in enforcing Title VII.

In addition, the district court erred in concluding that RFRA exempted the Funeral Home from all liability under Title VII for its discriminatory firing of

Aimee Stephens. Its conclusion was based in part on a cramped reading of the government's interests in overcoming the detrimental impacts of employment discrimination, which are particularly acute for transgender persons, and a flawed analysis of government's burden of showing that there is no less restrictive means of achieving its interests.

ARGUMENT

Dismissal of the EEOC's complaint is reviewed by this Court de novo *Scott v. Ambani*, 577 F.3d 642, 646 (6th Cir. 2009); a grant of summary judgment is similarly reviewed de novo. *Id.*

I. The Funeral Home's Termination of Ms. Stephens Because She Is Transgender and Because of her Gender Transition Is Sex Discrimination.

Title VII's prohibition on discrimination "because of ... sex," 42 U.S.C. § 2000e-2(a)(1), means that "gender must be irrelevant to employment decisions." *Price Waterhouse*, 490 U.S. at 240. Aimee Stephens' transgender status is by its very nature a sex-based characteristic, since what makes her transgender is the mismatch between her gender identity (her core internal sense of her gender) and the sex designation assigned to her at birth. *See* Am. Psychological Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 832, 862-63 (Dec. 2015),

<https://www.apa.org/practice/guidelines/transgender.pdf>.² The EEOC’s allegations that the Funeral Home discriminated against Ms. Stephens “because of ... sex,” when it fired her because she “is transgender” and “because of [her] transition from male to female,” Complaint, R.1, PageID#4-5 (¶15), therefore stated a claim that should not have been dismissed.

In partially granting the Funeral Home’s motion to dismiss, the district court erred in holding that transgender status is not protected by Title VII and in thereby limiting the EEOC’s case to a claim that the Funeral Home discriminated by enforcing sex stereotypes. Motion to Dismiss Opinion, R.13, PageID#188-95. In its summary judgment ruling, the district court further narrowed the EEOC’s case by construing its sex stereotyping claim narrowly to address solely the Funeral Home’s enforcement of its gendered dress code against Ms. Stephens and firing her because of her intention to dress according to the women’s dress code. Summary Judgment Opinion, R.76, PageID#2217-19. This improper narrowing of the EEOC’s case, as solely about her “fail[ure] to conform to the ‘masculine gender stereotypes that Rost expected’” in terms of the clothing Ms. Stephens would wear to work, *id.* at PageID#2218, directly contributed to the district court’s erroneous conclusion at the summary-judgment stage that the EEOC had failed to

² In addition to Ms. Stephens’ argument in Section I, she adopts the EEOC’s argument in Section A at pp. 20-32 of its brief.

meet its burden under RFRA; the court's analysis was premised on the idea that the EEOC had available to it a less restrictive alternative of simply suggesting that the Funeral Home jettison its gendered dress code entirely. *See id.* at PageID#2219-21. The district court's reframing of the EEOC's case around the Funeral Home's gendered dress code ignores the full reach of Title VII as well as the facts of the case.

Gender stereotyping, which is a form of sex discrimination made unlawful in employment by Title VII, broadly comprises discrimination against a person who "fails to act and/or identify with his or her gender." *Smith*, 378 F.3d at 575. By definition, transgender persons are such persons. *Id.*; *see also Dodds v. U. S. Dep't of Educ.*, 845 F.3d 217, 321 (6th Cir. 2016) (recognizing that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes" (quoting *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011)); *Barnes v. City of Cincinnati*, 401 F.3d 729, 738 (6th Cir. 2005) (affirming Title VII judgment for transgender woman who was denied promotion because of the perception that she was a man with an "ambiguous sexuality" whose behavior was "not sufficiently masculine" and included "dressing as a woman outside of work"). Therefore, when an employer terminates an employee because the employee is transgender, or because the employee is transitioning, the employer is discriminating on the basis of sex.

The reasoning of the district court in a recent case involving a surgeon who was denied a position after disclosing that she is transgender and intended to begin work as a woman is instructive. The court reasoned that “[d]iscrimination ‘because of sex’” includes the full range of “discrimination because of the *properties or characteristics* by which individuals may be classified as male or female.” *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 526 (D. Conn. 2016) (emphasis in the original). As such, discrimination against “transgender people because they are transgender people . . . is quite literally discrimination ‘because of sex.’” *Id.* at 525; *see also Rumble v. Fairview Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2015 WL 1197415, at *2, 9-18 (D. Minn. Mar. 16, 2015) (recognizing that “discrimination based on an individual’s transgender status constitutes discrimination based on gender stereotyping”); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008) (sex discrimination includes adverse treatment because of a person’s gender transition).

Here, the evidence amply shows that Ms. Stephens was fired because of who she is—a transgender woman who intended to begin presenting in every way as a woman in the work place. Her statement that she intended to follow the women’s, rather than the men’s, dress code, was simply one aspect of how she would express her female identity. Rost fired Ms. Stephens because she “was no longer going to represent [her]self as a man,” *including* through her decision to “dress as a

woman” and “no longer dress as a man.” Rost. 30(b)(6) Depo. 135-37, R.54-5, PageID#1372. Rost defended his firing of Ms. Stephens based on his religious belief that “a person’s sex is an immutable God-given gift and that people should not deny or attempt to change their sex,” Rost Aff., R.54-2, PageID#1334 (¶42). According to Rost, he “would be violating God’s commands if [he] were to permit” employees to “deny their sex while acting as a representative of [the Funeral Home],” *id.* at PageID#1334 (¶43), *such as* by employing someone who “dress[ed] inconsistent with his or her biological sex.” *Id.* at PageID#1334 (¶48).

This is not to deny that, standing alone, discrimination against employees because of sex-based stereotypes regarding their attire runs afoul of Title VII. After *Price Waterhouse*, courts have repeatedly recognized that an employer’s disparate treatment of an employee because her clothing fails to comport with the employer’s sex-based stereotypes qualifies as illegal sex discrimination. *See, e.g., Smith*, 378 F.3d at 574 (discrimination against employees perceived as men “because they *do* wear dresses and makeup . . . are . . . engaging in sex discrimination”); *Schroer*, 577 F. Supp. 2d at 305 (transgender woman denied job at the Library of Congress because she was perceived as “a man in women’s clothing,” or would be perceived as such by Members of Congress and their staff subjected to sex discrimination); *Dawson v. H&H Elec., Inc.*, No. 4:14CV00583 SWW, 2015 WL 5437101, at *4 (E.D. Ark. Sept. 15, 2015) (finding that there was

“ample evidence from which a reasonable juror could find that [a transgender employee] was terminated because of her sex,” where employer “repeatedly forbade” her to “wear feminine clothes at work” and terminated her employment “soon after she disobeyed [her employer’s] orders and began wearing makeup and feminine attire at work”). The Funeral Home’s claim that it fired Ms. Stephens because she failed to comply with the dress code “based on the biological sex of its employees,” Summary Judgment Memo., R.54, PageID#1304, does not change the analysis. It is simply another way of saying that the Funeral Home perceived Ms. Stephens to be male and fired her because of sex-based stereotypes about how men should dress.³ The district court therefore was correct to reject the Funeral Home’s so-called “biological” dress code defense. Opinion, R.76, PageID#2199-204.

However, viewing the EEOC’s claim as *limited* to sex-stereotyping in the enforcement of a dress code was incorrect. Ms. Stephens was in violation of the dress code, only if one accepts Rost’s refusal to respect her identity as female since she was assigned the male sex at birth. Focusing on the sex-based characteristics of Ms. Stephens’ female gender identity and male birth-assigned sex shows that she

³ While it is unnecessary for this Court to resolve this question, it bears pointing out that the Funeral Home’s assertion that Ms. Stephens is “biologically” male is inaccurate—research indicates that gender identity itself has a biological component. See M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 Vt. L. Rev. 943, 944 (2015) (summarizing research).

was subjected to discrimination on the basis of her sex. In an 8-3 en banc ruling just days ago, the Seventh Circuit analyzed a similar question in deciding whether a lesbian's claim of sexual orientation discrimination made out a case of sex discrimination. See *Hively v. Ivy Tech Community College of Indiana*, ___ F.3d ___, No. 15-1720, 2017 WL 1230393 (7th Cir. Apr. 4, 2017) (en banc). The *Hively* court recognized that discrimination against a lesbian is "paradigmatic sex discrimination" because it penalizes her for being a woman married to a woman, whereas a "man married to a woman," would have been treated differently. *Id.* at *5. In the same way, if Aimee Stephens had a female gender identity *and* had been assigned the female (rather than the male) sex at birth, the Funeral Home would not have fired her for non-compliance with its dress code. Isolating the sex-based characteristic of sex assigned at birth, while leaving everything else the same, shows that the Funeral Home's decision to fire Aimee Stephens for non-compliance with its dress code is sex discrimination because of her transgender status and transition.

Discrimination against transgender people, because of their identity, presentation, and gender transition, is sex discrimination, both because it is motivated by a transgender person's sex-based characteristics and because it is based on gender stereotypes. In this case, the district court improperly held that the EEOC's complaint only stated a claim for sex discrimination for the Funeral

Home's refusal to allow Ms. Stephens to dress according to the dress code applicable to women, while rejecting the EEOC's claim that the Funeral Home's termination of Ms. Stephens because she was transgender and transitioning was also sex discrimination. This Court should reverse that ruling.

II. The District Court Erred in Exempting the Funeral Home From Title VII Because of Its Claim that Allowing Ms. Stephens to Present As A Woman Violated Its Religious Exercise.

As the district court recognized, RFRA is not a defense to the actions of private parties, such as Ms. Stephens, against private employers. Opinion, R.76, PageID#2222 (citing *General Conf. of Seventh-Day Adventists*, 617 F.3d 402 (6th Cir. 2010)). Accordingly, now that Ms. Stephens is a party to this action, her Title VII claim should be remanded to the district court, where the Funeral Home should not be allowed to assert RFRA as a defense to her individual claims for relief.

In addition, the district court erred in finding that RFRA provides the Funeral Home a defense to the EEOC's Title VII claims, because the government has a compelling interest in eliminating sex discrimination and there is no less restrictive means of achieving that goal other than finding the Funeral Home liable for discrimination under Title VII.⁴

⁴ Ms. Stephens, in addition to her argument in Section II of her brief, adopts Sections B.1 and B.2 of the EEOC's brief, with the exception of Section B.2.a, as her own. The Funeral Home has also alleged an affirmative defense claiming a defense under the First Amendment free exercise clause. Amended Answer, R.22, PageID#254. However, it waived that defense, as well as any defenses under Title

A. Ample legal precedent shows that RFRA does not provide an exception based on religion to Title VII and other civil rights laws.

For decades, courts have rejected religious exercise defenses to enforcement of anti-discrimination laws. Before the Supreme Court’s decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), courts analyzed religious exemption claims under the Free Exercise Clause by determining whether: (1) the denial of an exemption substantially burdened the claimant’s religious exercise; and (2) if so, whether the denial of an exemption was nevertheless justified by the need to further a compelling government interest. *See Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406-09 (1963). In *Smith*, the Supreme Court held that “neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.” *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997) (citing *Smith*). Because RFRA was meant “to restore the compelling interest test as set forth” in *Sherbert* and *Yoder*, 42 U.S.C. § 2000bb(b)(1), the pre-*Smith* case law is informative with respect to the Funeral Home’s RFRA defense.

Applying this analysis, courts routinely rejected pre-*Smith* Free Exercise Clause challenges by schools, businesses serving the public, and for-profit

VII for hiring coreligionists, 42 U.S.C. § 2000e-2(e)(2), or for positions where religion is a “bona fide occupational qualification,” 42 U.S.C. 2000e-2(e)(1), by failing to present argument on those defenses before the district court. *F.T.C. v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 630 (6th Cir. 2014).

employers asserting religious objections to compliance with nondiscrimination provisions. These courts held that any burdens on the free exercise of religion imposed by antidiscrimination statutes are outweighed by the compelling state interest in eradicating discrimination and promoting equality. In *Bob Jones University v. United States*, 461 U.S. 574 (1983), for example, the Supreme Court held that the IRS's denial of tax exempt status to Bob Jones University and Goldsboro Christian Schools—on the ground that the schools engaged in racial segregation because of their religious belief against interracial relationships—did not violate the Free Exercise Clause, because “the Government has a fundamental, overriding interest in eradicating racial discrimination in education . . . [which] outweighs whatever burden denial of tax benefits places on [the schools'] exercise of their religious beliefs . . . and no less restrictive means . . . are available to achieve the governmental interest.” *Id.* at 604 (citations and quotations omitted). Similarly, in *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941 (D.S.C. 1966) the court “refuse[d] to lend credence or support to [a restaurant owner's position] that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs.” *Id.* at 945, *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968).

In the employment context, courts consistently rejected pre-*Smith* Free Exercise Clause challenges to Title VII and other nondiscrimination statutes. For instance, in *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), the Fifth Circuit held that application of Title VII to a religious university's employment practices did not violate the Free Exercise Clause. *Id.* at 489. Although the College argued that it should be allowed to discriminate on the basis of sex because of its religious belief that only men should teach certain courses, the court concluded that the College was not exempt from Title VII's prohibition against discrimination because of sex and that any claimed burden on religious exercise in complying with the law was justified by the government's "compelling interest in eradicating discrimination in all forms." *Id.* at 488.

To take another example, in *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986), the Ninth Circuit held that a religious school's policy of providing health insurance benefits only to persons it considered to be "head of household"—i.e., single persons and married men, but not married women—violated Title VII and the Fair Labor Standards Act (FLSA). *Id.* at 1364. The school challenged the statutes, as applied, on Free Exercise Clause grounds, arguing that its practice of providing health insurance benefits to single employees and married men, but not married women, was motivated by the sincere religious belief that men should be the head of the household. *Id.* at 1367. The court rejected

the defense, holding that the school's policy discriminated on the basis of sex and that enforcement of the anti-discrimination statutes was the least restrictive means for furthering Congress's compelling interest in eliminating discrimination. *Id.* at 1368-69 (citing *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1279 (9th Cir. 1982)); accord *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990) (holding that enforcement of the FLSA's minimum wage and equal pay provisions against a religious school that paid female teachers less than male teachers did not violate the school's free exercise rights, because enforcement of these provisions was the least restrictive means for furthering the government's compelling interest in preventing discrimination and ensuring fair wages).

After the Supreme Court watered down the free exercise protections in *Smith*, Congress sought to restore them through RFRA. Under RFRA, employers must comply with generally applicable federal laws, including Title VII—even where the requirements of those laws impose a substantial burden on the employer or its owner's religious beliefs—so long as the government “demonstrates that application of the burden to the person . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1(b).

Just as courts refused to grant religious exemptions from Title VII and other civil rights laws under the pre-*Smith* Free Exercise Clause, so too they have held

that such exemptions are improper under RFRA, and appropriately so. *See, e.g., Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 221-22 (E.D.N.Y. 2006) (rejecting religious school's RFRA defense to Title VII sex discrimination claim by teacher who was fired after becoming pregnant outside of marriage); *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 810-13 (S.D. Ind. 2002) (rejecting for-profit company's RFRA defense to Title VII religious discrimination claims). This case is no different. As set forth below, a proper application of the RFRA analysis here leads ineluctably to the conclusion that the Funeral Home has no religious exercise defense to compliance with Title VII.

B. Enforcement of Title VII here furthers the government's compelling interest in eradicating discrimination.

Prevention of invidious employment discrimination is a governmental interest of the highest order. In *United States v. Burke*, 504 U.S. 229 (1992), the Supreme Court noted that “[i]t is beyond question that discrimination in employment on the basis of sex, race, or any of the other classifications protected by Title VII is . . . an invidious practice that causes grave harm to its victims.” *Id.* at 238. Such discrimination “both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). To prevent these evils, Title VII and other civil rights laws ensure equal access to the “transactions and

endeavors that constitute ordinary civic life in a free society.” *Romer v. Evans*, 517 U.S. 620, 631 (1996).

Courts have acknowledged that Title VII serves a compelling interest in eradicating all the forms of invidious employment discrimination proscribed by the statute. In *EEOC v. Pac. Press Publ’g Ass’n*, for example, the Ninth Circuit rejected an employer’s pre-*Smith* free exercise challenge to an EEOC retaliation case because of the government’s compelling interest in preventing employment discrimination. 676 F.2d 1272, 1279 (9th Cir. 1982), *abrogation on other grounds recognized by Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 960 (9th Cir. 1991).⁵ It held that “Congress clearly targeted the elimination of *all forms* of discrimination as a ‘highest priority.’ Congress’ purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions.” *Pac. Press*, 676 F.2d at 1280 (emphasis added) (citations omitted). Courts have similarly rejected RFRA challenges to Title VII liability, explaining that Title VII furthers the government’s compelling interest in “the eradication of employment discrimination based on the criteria identified in Title VII.” *Preferred Mgmt.*

⁵ The employer in *Pacific Press* was a Seventh-day Adventist non-profit publishing house, and maintained that the charging party’s participation in EEOC proceedings violated church doctrines prohibiting lawsuits by members against the church. 676 F.2d at 1280.

Corp., 216 F. Supp. 2d at 810; *see also Redhead*, 440 F. Supp. 2d at 221-22 (stating that the government has a compelling interest in making sure that “Title VII remains enforceable as to [non-ministerial] employment relationships”).

It is well established that the government also has a compelling interest in eradicating discrimination based on sex. As the Supreme Court stated in *Roberts*, the “stigmatizing injury” of discrimination, “and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.” 468 U.S. at 625; *see also Bd. of Directors of Rotary Club Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (acknowledging the State’s “compelling interest in assuring equal access to women extends to the acquisition of leadership skills and business contacts as well as tangible goods and services”). In the employment context, in particular, courts have consistently recognized that the government interest in preventing gender discrimination is “of the highest order.” *Dole*, 899 F.2d at 1398 (internal quotation marks omitted); *accord Fremont Christian Sch.*, 781 F.2d at 1368.

The government’s interest in preventing invidious sex discrimination is no less compelling when the discrimination is directed at transgender persons. Our nation has a long and painful history of sex discrimination against transgender people. *See Smith*, 378 F.3d at 575 (holding that employer engaged in

impermissible sex discrimination when it suspended transgender firefighter after she began to exhibit a more feminine appearance at work); *cf. Glenn*, 663 F.3d at 1319-20 (holding in a case involving employment discrimination against a transgender employee that “governmental acts based upon gender stereotypes—which presume that men and women’s appearance and behavior will be determined by their sex—must be subjected to heightened scrutiny [under the Fourteenth Amendment] because they embody ‘the very stereotype the law condemns’” (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 138 (1994)); *Adkins v. City of New York*, 143 S. Supp. 3d 134, 139-40 (S.D.N.Y. 2015) (holding that transgender people are a quasi-suspect class for purposes of the Fourteenth Amendment, in part because they “have suffered a history of persecution and discrimination”); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, Case No. 2:16-CV-524, ___ F. Supp. 3d ___, 2016 WL 5372349, at *16 (S.D. Ohio Sept. 26, 2016) (same).

Numerous studies have shown that transgender people face a serious risk of bodily harm, violence, and discrimination because of their transgender status. One systematic review of violence against transgender people in the United States up to 2009 found that between 25 and 50% of respondents had been victims of physical attacks because of their transgender status, roughly 15% had reported being victims of sexual assault, and over 80% had reported being victims of verbal abuse

because of their transgender status. Rebecca Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 *Aggression and Violent Behavior* 170 (2009). With respect to employment discrimination in particular, one national study found that 37% of transgender people reported experiencing some form of adverse employment action because of their transgender status. E.L. Lombardi, et al., *Gender Violence: Transgender Experiences With Violence and Discrimination*, 42 *Journal of Homosexuality* 89 (2001). More recently, the National Transgender Discrimination Survey (“Survey”) found that 27% of all those who held or applied for a job in the last year reported not being hired for a job they applied for, being denied or promotion, or being fired from a job they held in the last year because of their gender identity or expression, while 15% who had held a job during the last year reported being verbally harassed, physically attacked, and/or sexually assaulted at work because of their transgender status. Sandy E. James, et al., *The Report of the 2015 U.S. Transgender Survey* at 151, 153 (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>. The Survey found that transgender people report three times the unemployment rate of the general population, and that one-third of respondents were living in poverty—more than twice the rate of the U.S. adult population living in poverty at the time of the survey. *Id.* at 144. There can be no

doubt that the government has a compelling interest in addressing such rampant discrimination.

The district court “assume[d] without deciding that the EEOC ha[d] met its . . . burden [of showing a compelling interest,” while expressing doubt about whether the EEOC had, in fact, met its burden. Summary Judgment Opinion, R.76, PageID#2214. To be sure, RFRA requires a court to “look to the marginal interest in enforcing” the challenged law against a person claiming his exercise of religion is substantially burdened. *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2779 (2014). However, every single instance of sex discrimination “causes grave harm to its victims,” *Burke*, 504 U.S. at 238, and denies society the benefit of their “participation in political, economic, and cultural life,” *Jaycees*, 408 U.S. at 625.

The harm to victims and society imposed by each individual act of discrimination distinguishes the Funeral Home’s request for an exemption to Title VII from those cases where exemptions to uniform laws are allowed. For example, in *Wisconsin v. Yoder*, 406 U.S. 205, 235 (1972), the Amish were exempted from the application of a compulsory school attendance law because they had “carried the . . . difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education.” The government has the same interest in stopping

discrimination each time it occurs—and unlike the circumstances in *Yoder* there simply is no equally effective alternative for achieving the government’s interests in combating discrimination other than uniform enforcement against those who discriminate.

Indeed, the Constitution requires the government and courts to account for the harms a religious exemption to Title VII would impose on employees. As the Supreme Court cautioned in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the Establishment Clause requires courts analyzing religious exemption claims under RFRA and the Religious Land Use and Institutionalized Persons Act to “take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.” *Id.* at 720; *see also Estate of Thornton v. Caldor*, 472 U.S. 703, 709-10 (1985) (holding that the Establishment Clause prohibited a Connecticut law that “arm[ed] Sabbath observers with an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath,” because the statute took “no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath”). Otherwise, “[a]t some point, accommodation may devolve into ‘an unlawful fostering of religion.’” *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334-35 (1987) (quoting *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 144-45 (1987)).

C. The EEOC met its burden of showing that requiring compliance with Title VII is the least restrictive means of furthering its compelling governmental interest.

Because the government has a compelling interest in combating the harms imposed by each individual instance of sex discrimination, there is simply no way to fulfill the government's compelling interest other than through enforcement of civil rights statutes against those who discriminate. *See Hobby Lobby*, 134 S. Ct. at 2783 (“The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.”). *N. Coast Women's Care Med. Grp., Inc. v. Super. Ct.*, 189 P.3d 959, 968 (Cal. 2008) (holding that a state law prohibiting discrimination in places of public accommodation “furthers California’s compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation, and there are no less restrictive means . . . to achieve that goal” other than enforcement of the statute).

In briefing on summary judgment, the Funeral Home proposed two alternatives to enforcement of Title VII that it asserted would be less restrictive of the Funeral Home's religious exercise. First, the Funeral Home suggested that the government could exempt from Title VII compliance all “businesses in industries that serve distressed people in emotionally difficult situations that require its public

representative [to] comply with the dress code at work,” or “prohibit employers from discharging employees simply because they dress inconsistently with their biological sex outside of work, while allowing employers to dismiss employees who refuse to wear sex-specific uniform on the job.” Summary Judgment Memo., R.54, PageID#1316-17. Second, the Funeral Home suggested that the government could “pay Stephens a full salary and benefits from the time of Stephens’s discharge until Stephens acquires comparable employment,” or “provide incentives for other employers . . . to hire Stephens and allow Stephens to dress as a member of the opposite sex on the job.” Summary Judgment Reply, R.67, PageID#2118. Neither of these alternatives addresses the government’s compelling interest in combating sex discrimination in the workplace, since both still plainly allow such discrimination to continue and fail to address the discrimination experienced by Ms. Stephens.

The district court correctly declined to adopt either of the Funeral Home’s proposed less restrictive alternatives. Nonetheless, it held that the EEOC failed to demonstrate that enforcement of Title VII against the Funeral Home is the least restrictive means for furthering the government’s compelling interest in combating sex discrimination. Summary Judgment Opinion, R.76, PageID#2211. Putting forward its own less restrictive alternative, the district court held that the EEOC should have suggested that the Funeral Home get rid of its gendered dress code

entirely, instead of arguing that the Funeral Home must allow Ms. Stephens to comply with the dress code applicable to women. *Id.* at PageID#2219.

The district court's reasoning is seriously flawed. First, the district court's suggestion that the Funeral Home change its work rules going forward could not have undone the firing or remedied the injury Ms. Stephens experienced from being summarily dismissed after she informed Mr. Rost that she is transgender. The EEOC had no part in Ms. Stephens' interactions with the Funeral Home until she had already been fired and had filed a charge of discrimination. The district court's proposal affords no redress for these injuries.⁶ Thus, at the very least, the EEOC is entitled to seek backpay, 42 U.S.C. § 2000e-5(g)(1), as well as compensatory and punitive damages, 42 U.S.C. § 1981a, for Ms. Stephens' firing under Title VII, and RFRA affords the Funeral Home no defense to liability for such damages. Neither the EEOC nor the court can absolve the Funeral Home of liability for discrimination that has already occurred without seriously undermining the government's compelling interest in combating sex discrimination.

⁶ See Eugene Volokh, *Successful Religious Freedom Defense in Title VII Case Brought by Transgender Employee*, Wash. Post (Aug. 19, 2016) ("If the court's proposed less restrictive alternative is that Harris should just implement a gender-neutral dress policy going forward, that alternative wouldn't serve the interest in compensating Stephens for what the court concludes is sex discrimination . . . Harris was still guilty of violating Title VII.") (emphasis in original), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/19/successful-religious-freedom-defense-in-title-vii-case-brought-by-transgender-employee/?utm_term=.dc996d0eeadd.

Second, the district court erred in concluding that the EEOC had the burden of proposing alternatives to remedy the Funeral Home's discrimination. The Funeral Home was obligated to suggest alternatives to address the alleged burden on its religious exercise without compromising the government's compelling interest in ending discrimination,⁷ while it was the EEOC's burden to show the inadequacy of the Funeral Home's proposals. *See United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011) (“[T]he government’s burden [under RFRA] is two-fold: it must support its choice of regulation, and it must refuse the alternative schemes *offered by the challenger* A statute that asks whether a regulation is the least restrictive means of achieving an end is not an open-ended invitation to the judicial imagination.” (emphasis added)). Had the Funeral Home suggested prospective injunctive relief that ended its discriminatory conduct while also relieving it of the religious burden it claimed, the EEOC would have been required to show the inadequacy of those proposals in achieving the government’s interest in fighting discrimination. But the Funeral Home never made such a proposal, and the ones it offered were plainly unacceptable. In conducting a least restrictive means analysis, a district court is not required to “go on a fishing expedition . . .

⁷ *See Volokh, Successful Religious Freedom Defense in Title VII Case Brought by Transgender Employee, supra* note 6 (“[E]ven under the court’s proposed less restrictive alternative, Harris could have responded to Stephens’ request to wear a skirt-suit by implementing precisely the policy that the court recommends—but it didn’t.”).

without tethering the inquiry to the evidence in the record.” *Wilgus*, 638 F.3d at 1289. Doing so is a good part of what led the district court to err in its least restrictive alternative analysis.

The district court compounded this error by criticizing the EEOC for failing to suggest alternatives during “the administrative proceedings or . . . the course of this litigation.” Summary Judgment Opinion, R.76, PageID#2215-16. The EEOC could not have suggested alternatives during the administrative proceedings, as the Funeral Home failed to mention any religious basis for firing Ms. Stephens until long after the EEOC had filed a case in district court. And any such suggestions after the case was filed would only be relevant to the scope of injunctive relief, but questions regarding the scope of the injunctive relief had not yet come up in the proceedings, since the EEOC’s motion for summary judgment sought a liability finding only, leaving the question of damages and other relief for subsequent proceedings. Summary Judgment Memo., R.51, PageID#638.

The district court’s third major error was to assume that its proffered alternative would have actually been less burdensome, to any substantial degree, on the Funeral Home’s purported religious exercise. Based on the record, the EEOC had little reason to believe that the Funeral Home would have found a non-gendered dress code sufficient to address its stated position that employing a transgender employee, such as Ms. Stephens, substantially burdened its religious

exercise. Rost stated that he fired Ms. Stephens because of her transition—that she was “no longer going to represent [her]self as a man,” Rost 30(b)(6) Depo., R.54-5, PageID#1372—and claimed to do so because employing a transgender person would violate his religious belief “that God creates people male or female,” Rost Aff. ¶42, R.54-2, PageID#1334, and “that I would be violating God’s command if I were to permit [a] funeral director[] to deny their sex while acting as a representative of my organization.” *Id.* at ¶43. In other words, the record reflects that it was the *fact* that Stephens was transgender and transitioning, not just her intent to adhere to the dress-code requirements for female employees, that substantially burdened Rost’s religious exercise. Switching to a gender-neutral dress code would not have alleviated that burden.

Finally, the district court’s analysis failed to address the government’s compelling interest in ending discrimination against employees because they are transgender, rather than an interest in ridding an employer from a gendered dress code.⁸ In *Hobby Lobby*, the alternative to requiring employers with religious

⁸ As previously noted, *see supra* Argument I, this failure stems, at least in part, from the district court’s decision to narrow the EEOC’s case to a challenge of the Funeral Home’s adherence to sex stereotypes in its application of its gendered dress code to Ms. Stephens. Had the district court recognized that the EEOC stated a claim for Title VII discrimination because Ms. Stephens was fired for being transgender, it would likely not have proposed elimination of the gendered dress code as an acceptable, less restrictive alternative for achieving the government’s compelling interest in eliminating discrimination against transgender employees.

objections to provide insurance coverage for contraception already existed in the plan created for religious non-profits. That alternative would “protect the asserted needs of women [to contraceptive coverage] as effectively as the contraceptive mandate.” 134 S. Ct. at 2782; *see also id.* at 2786 (Kennedy, J., concurring) (stating that the “accommodation equally furthers the Government’s interest [in the health of female employees] but does not impinge on the plaintiffs’ religious beliefs”). In this case, by contrast, neither the district court’s proposal for a non-gendered dress code nor the Funeral Home’s suggestions further the government’s interests in preventing sex discrimination. The district court’s proposal entirely ignores the discriminatory firing of Ms. Stephens as well as the nature of the religious beliefs expressed by Rost, while the Funeral Home’s proposals amount to blanket Title VII exemptions for it and other businesses to discriminate against transgender employees or prospective employees. Under the facts of this case, there is simply no alternative to enforcing Title VII to find the Funeral Home liable for damages and other relief that achieves the important goals of the government in putting an end to the rampant sex discrimination experienced by so many transgender Americans and by Aimee Stephens in particular.

CONCLUSION

For all these reasons, the judgment of the district court should be reversed and the case remanded so that the EEOC and Ms. Stephens may seek damages and other relief to remedy the Funeral Home's discrimination against her.

Dated: April 17, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the word counting feature of counsel's word processing programs shows that this brief contains 7,952 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

/s/ John A. Knight

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2017 I electronically filed the foregoing document through the court's electronic filing system, and that it has been served on all counsel of record through the court's electronic filing system.

/s/ John A. Knight_____

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS**E.D. Mich. Case No. 13-cv-14916**

Record	Description	Page ID Range
1	Complaint	1-9
7	Motion to Dismiss	21-47
13	Amended Opinion & Order	182-198
22	Amended Answer	250-256
51	EEOC Motion for Summary Judgment	591-640
51-18	Stephens Deposition (excerpts)	814-821
51-20	Dress Code	826-828
54	Funeral Home's Motion for Summary Judgment	1285-1321
54-2	Rost Affidavit	1325-1338
54-5	Rost 30(b)(6) Deposition (excerpts)	1354-1378
54-15	Stephens Deposition (excerpts)	1446-1462
54-18	Kish Affidavit	1472-1478
54-21	Stephens' Letter	1493-1495
54-22	Charge	1496-1497
55	Funeral Home's Statement of Facts	1683-1702
61	Funeral Home's Counter Statement of Facts	1824-1843
67	Summary Judgment Reply	2097-2121
76	Summary Judgment Opinion	2179-2234