No. 16-2424

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff/Appellant,

and

AIMEE STEPHENS,

Intervenor,

vs.

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

Defendant/Appellee.

Appeal from the United States District Court
for the Eastern District of Michigan,
The Honorable Sean F. Cox
No. 14-13710

BRIEF FOR *AMICI CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., HUMAN RIGHTS CAMPAIGN, INC. AND SERVICE EMPLOYEES INTERNATIONAL UNION IN SUPPORT OF PLAINTIFF/APPELLANT EEOC AND 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. G.R. & R.G. Harris Funeral

Name of counsel: Gregory R. Nevins

Pursuant to 6th Cir. R. 26.1, Lambda Legal Defense and Education Fund, Inc.
Name of Party
makes the following disclosure:

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No.

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s/ Gregory R. Nevins

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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. G.R. & R.G. Harris Funeral

Name of counsel: Gregory R. Nevins

Pursuant to 6th Cir. R. 26.1, Human Rights Campaign, Inc.
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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. G.R. & R.G. Harris Funeral

Name of counsel: Gregory R. Nevins

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amici curiae are Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal"), the Human Rights Campaign, and the Service Employees International Union ("SEIU"). *Amici* respectfully submit this brief in support of Plaintiff/Appellant EEOC and Intervenor Aimee Stephens.[1]

Founded in 1973, Lambda Legal is the nation's oldest and largest nonprofit legal organization working to secure the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and everyone living with HIV through impact litigation, policy advocacy and public education. Lambda Legal prioritizes matters of employment discrimination, as requests for legal help in this area consistently are among the most numerous received. Many are from transgender employees experiencing workplace discrimination due to others' disapproval of their transgender identity and gender expression.

Lambda Legal has extensive experience in the scope of Title VII coverage of discrimination against LGBT employees, including as counsel of record in the first federal appellate court ruling recognizing coverage of sexual orientation discrimination as a form of sex discrimination, *Hively v. Ivy Tech Community*

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

College of Indiana, No. 15-1720, 2017 WL 1230393 (7th Cir. Apr. 4, 2017) (en banc), and a federal appellate court ruling finding the employer liable for sex discrimination for firing an employee about to begin her gender transition at work, *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (decided under Equal Protection Clause but applying Title VII analysis). *See also EEOC v. Scott Med. Health Ctr., P.C.*, No. 16-225, 2016 WL 6569233 at *5 (W.D. Pa. Nov. 4, 2016) (holding sexual orientation discrimination is prohibited sex discrimination under Title VII) (*amicus*); *TerVeer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (same) (*amicus*); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008) (approving transgender woman's Title VII claim based on sex stereotyping) (party counsel); *Mitchell v. Axcan Scandipharm, Inc.*, No. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006) (same) (*amicus*).

The Human Rights Campaign, Inc. ("HRC"), the largest national lesbian, gay, bisexual, transgender, and queer ("LGBTQ") advocacy organization, envisions an America where LGBTQ people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. Equal treatment on the job—including in hiring, consideration for promotions, and termination—is among these basic rights.

The Service Employees International Union ("SEIU") is an organization of more than 2 million men and women who work in the public sector, in healthcare,

and in property services and who are united by their belief in the dignity and worth of all workers and the services they provide. SEIU's membership is among the most diverse in the labor movement and includes workers of every gender, gender expression, and sexual orientation. SEIU's commitment to equal treatment and justice for all, including transgender individuals, is reflected in its mission statement, which affirms that "we must not be divided by forces of discrimination based on gender, race, ethnicity, religion, age, physical ability, sexual orientation or immigration status."

SUMMARY OF ARGUMENT

Amici respectfully submit that the District Court erred in two important respects, and that these errors can be remedied by a careful review of the filings below and straightforward application of this Court's considerable jurisprudence addressing coverage of discrimination against transgender employees under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. ("Title VII"). Correction is necessary both to retain consistency with this Court's precedents and to allow plaintiff Aimee Stephens the day in court to which Title VII entitles her.

The first error lies in the ruling on the motion to dismiss that purports to immunize sex discrimination against an employee due to the employee undergoing a gender transition if the adverse treatment is characterized as based on "transgender or transsexual status," which the lower court distinguished as "not a

protected class under Title VII." *EEOC v. RG & GR Funeral Homes, Inc*., 100 F. Supp. 3d 594, 598 (E.D. Mich. 2015) ("MTD Status Ruling").[2] The MTD Status Ruling has no analysis of *why* discrimination based on transgender status or gender identity is not discrimination because of an individual's sex, nor of why such bias is not simply another name for, or a manifestation of, gender stereotyping. The District Court's error appears to flow at least in part from its too-narrow focus throughout the case on the dress code issues, overlooking the name and pronoun changes and other changes Ms. Stephens said she needed to make in her gender transition, all of which were unacceptable to defendant R.G. & G.R. Harris Funeral Homes, Inc. and its owner Thomas Rost ("the Funeral Home" or "Rost"). Although Rost's opposition to those changes certainly can be challenged as wrongful gender stereotyping, his opposition to the whole set of gender-related changes through which Ms. Stephens would begin her transition also should be actionable as wrongful transgender status discrimination.

By focusing too narrowly, the MTD Status Ruling committed the error the EEOC identified in *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012)—an improper limiting of the ways a transgender person may

[2] *Amici* use the shorthand "MTD Status Ruling" to refer to the part of the Motion to Dismiss ruling that mistakenly distinguishes discrimination based on transgender status or a non-conforming gender identity from other forms of sex discrimination. *Amici* have no quarrel with the District Court's recognition that sex stereotyping discrimination also is sex discrimination.

establish sex discrimination just to gender-stereotype framings, when a prima facie case of such discrimination actually may be demonstrated "through any number of different formulations," including with evidence of "intentional discrimination against a transgender individual because that person is transgender [which] is, by definition, discrimination 'based on … sex.'" *Id*. at *11.

The EEOC presented these cogent arguments below and the District Court did not identify any errors in the reasoning. Accordingly, this Court should consider them and then confirm that discrimination against a transgender employee based on the employee's non-stereotypical gender identity, gender transition, or transgender status is sex discrimination under Title VII *because* of the targeted gender identity or expression, not despite it.

Amici further submit that the District Court's summary judgment ruling accepting the Funeral Home's defense under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*., also focused too narrowly, resulting in misapplication of RFRA's strict scrutiny test. First, although it has been well established in case law that Title VII's ban on sex discrimination serves compelling government interests, the court below assumed without deciding the point, thereby suggesting that Title VII actually might serve lesser interests in this context. There is no basis for such a distinction and *Amici* ask this Court to confirm as much.

Second, the District Court's "least restrictive means" analysis is erroneous because it improperly required the EEOC clairvoyantly to hypothesize employer policy changes to avoid conflict *after* an employee already had been fired for gender-based reasons. In addition, the gender-neutral solution the Court decided the EEOC should have imposed misunderstands transgender identity and that erasing gender differentiation in this case would maintain rather than remedy the kind of discrimination that required this transgender employee to continue to hide her female gender identity or be fired.

Correction of these points on appeal is necessary to allow Ms. Stephens a fair opportunity to pursue her Title VII remedies with all of her record evidence, and also to eliminate the seeds of confusion sown by the District Court's analysis, which otherwise will invite further discrimination and harm to transgender workers and will impose additional demands on judicial resources to redress those injuries.

ARGUMENT

I. TITLE VII PROTECTS TRANSGENDER EMPLOYEES FROM DISCRIMINATION BASED ON THE FACT OF A GENDER TRANSITION AS WELL AS ON NONCONFORMING GENDER-EXPRESSIVE CONDUCT.

Ruling on the motions to dismiss and for summary judgment, the District Court maintained a distinction no longer warranted in Title VII sex discrimination jurisprudence between transgender status and stereotype-defying conduct. *See EEOC v. R.G. & G.R. Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 598 (E.D. Mich.

2015) (as noted above, referred to as the "MTD Status Ruling"); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, 840 (E.D. Mich. 2016) ("MSJ Ruling").[3] Other courts have recognized that this distinction is artificial. *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2001) (noting that "There is … a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms."); *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) (holding that "the Library's refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was literally discrimination 'because of ... sex.'").

In maintaining that legal distinction and then focusing primarily on clothing, the lower court took an artificially myopic view of what it is to be transgender and to undergo a gender transition. Its misguided approach has significant problematic implications because approximately 0.6% of adults in the United States, or 1.4 million individuals, identify as transgender. Nearly 33,000 of them live in Michigan. Andrew R. Flores, *et al.*, *How Many Adults Identify as Transgender in the United States* 2-3 (June 2016), https://williamsinstitute.law.ucla.edu/wp-

[3] *See, e.g.*, MSJ Ruling, 201 F. Supp. 3d at 861 ("Significantly, neither transgender status nor gender identity are protected classes under Title VII.").

content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf.

A. The District Court Erred in Focusing Solely on Clothing.

Although the specifics of a gender transition are shaped by each individual's background, several aspects are common. The social transition is the starting place—an outward representation of the otherwise internalized identity. *See* Human Rights Campaign, *Definitions to Help Understand Gender and Sexual Orientation for Educators and Parents/Guardians*, http://hrc-assets.s3-website-us-east-1.amazonaws.com//welcoming-schools/documents/WS_Gender_Sexual_Orientation_Definitions_Adults.pdf. For many transgender people, wearing gender-appropriate clothing, accessories, and hair styles is an important initial step. *Id.* Doing so provides a tangible sign to others and can be an essential element of the "coming out" process, marking when they begin to live openly and authentically. Many individuals also begin using a name and pronouns that align with their gender identity, and many also pursue a legal name change, affecting all identification documents. *See id.*; National Center for Transgender Equality, *Frequently Asked Questions about Transgender People* (July 9, 2016), http://www.transequality.org/sites/default/files/docs/resources/ Understanding-Trans-Full-July-2016_0.pdf.

The internationally-recognized WPATH standards of care confirm the importance for many individuals who suffer from gender dysphoria of living and working full-time consistently with their true gender identity, and that doing so usually involves "[c]hanges in gender expression and role" far beyond the mere donning of different attire. World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, at 9-10 (7th ver. 2012), http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351&pk_association_webpage=3926.[4]

These changes all defy the gender norms associated with one's birth-assigned sex; however, they also are inextricably tied to the individual's transgender status and are the concrete manifestations of that identity. For a

[4] The Standards of Care WPATH has developed for the treatment of gender dysphoria have been recognized as authoritative by every major medical and mental health association. *See, e.g.*, American Medical Association, *Resolution: Removing Financial Barriers to Care for Transgender Patients* (2008), http://www.tgender.net/taw/ama_resolutions.pdf; American Psychiatric Association, *Position Statement on Access to Care for Transgender and Gender Variant Individuals* (2012), https://www.psychiatry.org/file%20library/about-apa/organization-documents-policies/policies/position-2012-transgender-gender-variant-access-care.pdf; American Psychological Association, *Policy on Transgender, Gender Identity & Gender Expression Non-Discrimination* (2008), http://www.apa.org/about/policy/transgender.aspx. They have been recognized similarly by courts that have considered them. *See, e.g.*, *Kosilek v. Spencer*, 774 F.3d 63, 70 n.3 (1st Cir. 2014); *De'lonta v. Johnson*, 708 F.3d 520, 522-23 (4th Cir. 2013).

transgender woman like Ms. Stephens, the choice to continue to use a male name and to wear the clothing required of male employees or face termination is no choice at all because such restrictions would block her social transition and ability to resolve her gender dysphoria.

In short, being transgender is about much more than clothing. And indeed, the court below itself noted that this Court's seminal opinions regarding transitioning employees involved discrimination based on gender nonconformity other than attire. *See* MSJ Ruling, 201 F. Supp. 3d at 850 n.5 (citations omitted); *see also Ravenwood v. Daines*, No. 06-CV-6355-CJS, 2009 WL 2163105, at *1 (W.D.N.Y. July 17, 2009) (citing aspects of the transitioning process affecting appearance and demeanor but not attire, namely voice therapy and hormone treatment). Likewise, the evidence in the case made clear that the Funeral Home discriminated against Ms. Stephens because of her transgender identity, not just because of how she intended to dress: as the court noted, Rost said "the Bible teaches that God created people male or female"; "the Bible teaches that a person's sex is an immutable God-given gift and that people should not deny or attempt to change their sex"; and that he "'would be violating God's commands' if he were to permit one of the Funeral Home's funeral directors 'to deny their sex while acting as a representative of [the Funeral Home].'" MSJ Ruling, 201 F. Supp. 3d at 847-48. This would violate God's commands, he claimed, because, among other

reasons, "[Rost] would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift." *Id*.

Consequently, to characterize this as a dispute merely about clothing ignores the evidence of Rost's blanket rejection of Ms. Stephens' gender transition process, as if her change of name, pronouns and social role, and her struggle to understand and address her gender dysphoria—something "very difficult for [her] and taking all the courage [she] can muster," *id*. at 844—all could be reduced to a banal announcement of intent to change wardrobes.

B. The District Court's Approach Is Contrary to This Court's Case Law and Case Law of Other Circuits.

While the District Court did properly reject the Funeral Home's "dress code defense," recognizing that, like *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), this case involves more sex stereotyping than simple imposition of a non-actionable gendered dress code, *id.* at 853,[5] the court then took an unduly narrow view of that doctrine, causing the unjustified parsing of anti-transgender discrimination from the broader category of sex or gender discrimination.

In so doing, the court made a mistake analogous to that recently critiqued by the Seventh Circuit Court of Appeals in *Hively*, 2017 WL 1230393. *Hively*

[5] As discussed in Section III, however, the Court then inexplicably reversed course and adopted a narrow, dress-code-specific approach in its RFRA least restrictive means analysis.

involves a lesbian woman's claim that she suffered discrimination because of her sex in relation to the sex of her partner. The *en banc* court explained that the case

> represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual. Our panel described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all. Hively's claim is no different from the claims brought by women who were rejected for jobs in traditionally male workplaces, such as fire departments, construction, and policing. The employers in those cases were policing the boundaries of what jobs or behaviors they found acceptable for a woman (or in some cases, for a man).

Id. at *5.

Moreover, pertinently, the Seventh Circuit recognized in *dicta* that sex discrimination is that which takes into account the victim's sex, "either as observed at birth or as modified, *in the case of transsexuals*." *Id*. at *14. The Court continued, "*[a]ny discomfort, disapproval, or job decision based on the fact that the complainant—woman or man—dresses differently, speaks differently,* or dates or marries a same-sex partner, *is a reaction purely and simply based on sex*." *Id*.

Hively thus debunks the false dichotomy some have drawn between sexual orientation discrimination and sex discrimination; its *dicta* indicates, as does common sense, that the same analysis applies to the false division between gender identity discrimination and sex discrimination. *Accord Glenn*, 663 F.3d at 1316; *Schroer*, 577 F. Supp. 2d at 293. Like Kim Hively, Aimee Stephens represents a

particular type of failure to conform to a gender stereotype. Her employer's insistence on seeing her as a man and his disapproval of her gender identity and expression, and her decision to act accordingly and transition, similarly traversed the "gossamer-thin" line between gender nonconformity discrimination and anti-transgender discrimination.

As the EEOC points out, *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004), condemns "discrimination against a plaintiff who is a transsexual—*and therefore* fails to act and/or identify with his or her gender." EEOC Opening Brf. on Appeal at 25, *quoting Smith*, 378 F.3d at 575 (emphasis added). *Smith* broadly forbids "[s]ex stereotyping based on a person's gender non-conforming behavior [as] impermissible discrimination" *Id*. A claim exists "where the victim has suffered discrimination because of his or her gender non-conformity." *Id*. In other words, it is *because* a transgender person is transgender that her actions and identity are gender-non-conforming for Title VII purposes.

Smith's progeny reflect this condemnation of sex discrimination against transgender employees. Although admittedly an unpublished case decided on other grounds, *Myers v. Cuyahoga Cty.*, 182 F. App'x 510, 518-520 (6th Cir. 2006), illustrates the proper approach to assessing a transsexual's sex discrimination claim—and demonstrates the error of immunizing "transgender status discrimination." Susan Myers transitioned approximately eight years before

she began working for Cuyahoga County, and thus "had always been female while she was employed by Cuyahoga County." *Id*. at 513, 518. The opinion's language is noteworthy: "The County was aware that Myers was a transsexual, however, because during the initial hiring process with the County, Myers had explained that her many-year absence from the workforce and her name change were due to her sex change," suggesting that Ms. Myers's only indicia of gender-nonconformity was her revelation of her transition to explain gaps in her resume. *See id.* This Court stressed that the only evidence of discrimination cited by Myers was "that Myers's transsexualism was a topic of office gossip and . . . a private conversation between [Myers's supervisors] . . . in which [one] referred to Myers as a "he/she." *Id*. at 518-19. Despite an absence of evidence that Myers suffered discrimination because she was deemed insufficiently feminine,[6] this Court considered her to have satisfied all aspects of a Title VII prima facie case, except for her failure to establish that the employer's stated nondiscriminatory reason for firing her was pretextual. *Id*. at 519.

It is curious that in its motion to dismiss ruling, the District Court relied on *Vickers v. Fairfield Medical Center*, 453 F.3d 757, 762 (6th Cir. 2006), in holding

[6] The offensive "he/she" insult might be an aspersion on Myers's femininity or might be an insulting way of referring to the fact of her transition. Notably, this Court in *Myers* did not feel a need to resolve what type of insult was intended; either intent was sufficient to satisfy that aspect of the prima facie case of sex stereotyping discrimination.

that it would have been permissible if "the Funeral Home [had] fired Stephens based solely upon Stephens's status as a transgender person . . . because, like sexual orientation, transgender or transsexual status is currently not a protected class under Title VII." MTD Status Ruling, 100 F. Supp. 3d at 598, citing *Vickers*, 453 F.3d at 762. *Vickers* specifically reaffirmed *Smith*'s holding that a "claim of sex stereotyping" discrimination is proper where an employee shows mistreatment because he "fails to act and/or identify with his or her gender." *Vickers*, 453 F.3d at 764, *quoting Smith*, 378 F.3d at 575. And, as *Hively* more recently has clarified, *Vickers* took a broad view of what constitutes nonconformity with gender norms. *Id*. at 764 ("all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices."). Thus, *Vickers* condemns rather than supports the rulings below. It can hardly be disputed that one who previously always presented as a male at work contravenes norms for that gender by asking to be called "Aimee" and referred to with feminine pronouns.

Finally, any doubts about the error of the District Court's rulings regarding transgender status discrimination should be removed by this Court's ruling in *Dodds v. United States Department of Education*, 845 F.3d 217, 220-22 (6th Cir. 2016) (refusing to stay preliminary injunction ordering school to treat transgender girl as female and permit her to use girls' restroom). This Court not only again affirmed *Smith*'s rebuke of discrimination based on one's "fail[ure] to act *and/or*

identify with his or her gender" (emphasis added) but also cited two cases of note, both for their holdings and the specific propositions for which this Court cited them. *Dodds*, 845 F.3d at 221.

First, this Court cited Judge Davis's concurring opinion in *G.G. ex rel. Grimm v. Gloucester County. School Bd.*, 822 F.3d 709 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369, and *vacated on other grounds and remanded*, No. 16-273, 2017 WL 855755 (U.S. Mar. 6, 2017), for the proposition that "[t]he weight of authority establishes that *discrimination based on transgender status is already prohibited* by the language of federal civil rights statutes, as interpreted by the Supreme Court." *Dodds*, 845 F.3d at 221, *quoting G.G.*, 822 F.3d at 729 (Davis, J., concurring) (emphasis added). Second, this Court cited *Glenn v. Brumby*, 663 F.3d at 1316, for the proposition that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." *Dodds*, 845 F.3d at 221.

It is no accident that the language in *Glenn* refers to "behavior" generally, with no limitation as to style of dress or mannerism. *Glenn* relied not only on testimony exhibiting hostility to clothing choices, but also the decision-maker's admission "that his decision to fire Glenn was based on 'the sheer fact of the transition.'" *Glenn*, 663 F.3d at 1321.

Applying these precedents, Aimee Stephens should be protected against all discrimination emanating from her letter informing Rost that she would be dressing as a woman and also would "live and work full time" as her "true [feminine] self." MSJ Ruling, 201 F. Supp. 3d at 845. Considering that sequence of events, the present case also is similar to *Schroer*, 424 F. Supp. 2d 203, 206 (D.D.C. 2006), *aff'd*, 577 F. Supp. 2d 293 (D.D.C. 2008), in which Diane Schroer alerted her new employer that "Diane" would be reporting to work with the same bundle of qualifications as when she had interviewed as "David," which had resulted in "the selection committee believ[ing] that Schroer's skills and experience made her application far superior to those of the other candidates."

Similarly, in *Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1290 (N.D. Ga. 2010), *aff'd*, 663 F.3d 1312 (11th Cir. 2011), Vandy Beth Glenn had "informed her direct supervisor [] that she was transgender and was in the process of becoming a woman." But it was not until a year later that she informed the supervisor "that she was ready to proceed with gender transition and would begin coming to work as a woman and was also changing her legal name raising the prospect of an eventual transition." *Id*. at 1291.

There is nothing in Title VII that would limit protections for these women *only if* they had arrived at work as their true selves unannounced one day, instead of the careful, employer-conscious routes they chose. Whether the conduct is

dressing like a woman, walking or talking like a woman, styling one's hair like a woman, wearing makeup like a woman, or—a quintessential example of declaring "transgender status"—simply saying "I'm a woman," any and all of these actions are contrary to gender norms for people who previously presented as men.

* * * * *

In sum, to characterize the dispute in this case as being only about clothing is to adopt a mistakenly narrow view of the transition process and the assertions presented by the EEOC. A proper analysis would have recognized that from the day Ms. Stephens revealed her gender identity, the discrimination against her was not just about the feminine clothes she sought to wear, but about her gender identity as a whole. Her transgender status or gender identity claim is actionable under *Price Waterhouse* because being transgender necessarily means not conforming to conventional gender expectations.

Accordingly, this Court should reverse the District Court's flawed ruling that Title VII protects transgender employees from sex discrimination only when the discrimination is described in particular sex-stereotyping terms, and not when it was based on transgender status or identity.

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II. TITLE VII SERVES COMPELLING INTERESTS BY PROTECTING TRANSGENDER EMPLOYEES FROM SEX DISCRIMINATION BASED ON BOTH THEIR GENDER IDENTITY AND THEIR GENDER EXPRESSION.

Under RFRA, a federal law may be enforced even when it imposes a substantial burden on someone's exercise of religion if it serves a compelling interest in the least restrictive manner. 42 U.S.C. § 2000bb-1(b). It is well-established that sex discrimination in employment is harmful and that the interest in eradicating it is compelling. *Amici* join the discussion of this issue at pages 50-54 of the EEOC's brief and at pages 20-26 of Ms. Stephens' brief.

The District Court did not hold that the EEOC had conclusively established this element of its opposition to the Funeral Home's RFRA defense. Instead, it merely assumed the point arguendo without deciding it (MSJ Ruling, 201 F. Supp. 3d at 857-59), as if the interest in protecting transgender employees from sex discrimination might be distinguishable in some way, and is lesser, than the interest recognized in cases involving non-transgender workers. Such a distinction would be unfounded legally and tremendously harmful. It should be rejected explicitly.

Moreover, workplace discrimination against transgender individuals already is pervasive and punishing. In a recent nationwide survey of 28,000 transgender people, one in six respondents who had been employed reported having lost a job because of their gender identity with almost a third of respondents who had held or

applied for a job during that year reporting that they had been fired, denied a promotion, or not hired because of their transgender status. *See* Sandy E. James, *et al*., *2015 U.S. Transgender Survey*, at p. 10, National Center for Transgender Equality (Dec. 2016), http://www.transequality.org/sites/default/files/docs/usts/USTS%20 Full%20Report%20-%20FINAL%201.6.17.pdf. Nearly a quarter of respondents who had had a job in the past year reported having experienced harassment or mistreatment once on the job, and 15 percent reported having been attacked or assaulted at work. *Id.* at 10. Respondents also reported startlingly high unemployment rates, with transgender people of color in particular reporting an unemployment rate four times higher than the national average. *Id.* at 4.

This discrimination against transgender people results in devastatingly high rates of poverty—almost double that of the general population. *Id.* at 56. Transgender people also are far less likely to report owning a home and nearly a third have experienced homelessness. *Id.* at 3. This economic insecurity further marginalizes this vulnerable population and exacerbates already stark mental and physical health disparities, including increased risk for psychiatric disorders, psychological distress, depression and anxiety. *See* Brad Sears & Christy Mallory, *Documented Evidence of Unemployment Discrimination & Its Effects on LGBT People*, at p. 15, The Williams Institute (July 2011), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf.

But instead of considering whether anything about workplace discrimination against transgender people causes the government's interest in stopping it to be any differently compelling, the District Court explicitly avoided the question, choosing instead to assume without deciding that the government had satisfied the "compelling interest" test prong of RFRA in this case. MSJ Ruling, 201 F. Supp. 3d at 857-59. The lower court's minimal compelling interest analysis thus failed to acknowledge that Title VII serves the broad compelling governmental interest in preventing sex discrimination in all its forms. *Id.* As one example, the compelling interest in preventing and remedying sex discrimination does not diminish based on whether sexual harassment is same-sex or different-sex in nature. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998).[7] Nor should the compelling interest in preventing sex discrimination diminish where the discriminatory gender stereotyping at issue is against a transgender woman whose identity or appearance does not conform to her employer's expectations. There is no legal basis for

[7] In that case, it was argued that surely Congress in 1964 did not intend for that type of claim to be entertained. *See id.* at 79. The *Oncale* Court unanimously held that courts must entertain any Title VII claim "that meets the statutory requirements;" it is irrelevant that the particular manifestation of sex discrimination "was assuredly not the principal evil Congress was concerned with when it enacted Title VII" because it is "the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id*. at 79-80. Thus, it is wrong for courts to search for a specific authorization from Congress beyond its broad condemnation of all discrimination that occurs because of an individual's sex.

deeming the interest in ending some forms of sex discrimination less compelling than others.

But instead of recognizing the government's compelling interest in preventing sex discrimination in all its forms, the District Court framed its RFRA compelling interest analysis too narrowly, repeating its myopic focus on the dress code and describing the sole relevant interest as "removing or eliminating gender stereotypes in the workplace *in terms of clothing*." MSJ Ruling, 201 F. Supp. 3d at 841 (emphasis supplied); *see also id*. at 861-862 ("If the EEOC truly has a compelling governmental interest in ensuring that Stephens is not subject to gender stereotypes in the workplace *in terms of required clothing at the Funeral Home*, couldn't the EEOC propose a gender-neutral dress code . . .") (emphasis supplied).

The court left no doubt about how this framing affected the judgment: "Understanding the narrow context of the discrimination claim stated in this case is important." *Id*. at 861. "The only reason that the EEOC can pursue a Title VII claim on behalf of Stephens in this case is under the theory that the Funeral Home discriminated against Stephens because Stephens failed to conform to the 'masculine gender stereotypes that Rost expected' *in terms of the clothing Stephens would wear at work*." *Id*. (emphasis added).

This too-narrow approach ignores the many cases in which Title VII has been recognized as serving a broad compelling government interest in combatting

discrimination generally. *See, e.g.*, *Werft v. Desert Southwest Annual Conference of United Methodist Church*, 377 F.3d 1099, 1102 (9th Cir. 2004); *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 810 (S.D. Ind. 2002). As the court helpfully explained in *Preferred Management*, another Title VII case involving a RFRA defense, "even if the EEOC had substantially burdened [the defendant's] religious beliefs or practices in prosecuting this matter, its conduct still comports with the RFRA's mandates. There is a 'compelling government interest' in creating such a burden: *the eradication of employment discrimination* based on the criteria identified in Title VII." 216 F. Supp. 2d at 810 (citing *University of Pennsylvania v. EEOC*, 493 U.S. 182, 202 (1990); *Young v. Northern Illinois Conference of United Methodist Church*, 21 F.3d 184, 185 (7th Cir.), *cert denied*, 513 U.S. 929 (1994)).

The District Court's "compelling interest" RFRA analysis thus was flawed because Title VII protects against sex discrimination in all its forms, including the sex discrimination inherent in discrimination targeting a transgender employee's gender identity or gender expression.

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III. THE "LEAST RESTRICTIVE MEANS" OF REMEDYING SEX DISCRIMINATION IN THIS CASE WAS NOT TO FORBID ALL GENDER DISTINCTIONS IN CLOTHING BUT RATHER TO FORBID ADVERSE TREATMENT OF MS. STEPHENS BASED ON HER FEMALE GENDER IDENTITY AND EXPRESSION.

The second aspect of the District Court's RFRA analysis with troubling implications for transgender employees is the court's tunnel-visioned selection of a gender-neutral dress code as the mandatory resolution of the parties' dispute about gender expression, with the EEOC's purported failure to offer that "compromise" proving fatal to Ms. Stephens' Title VII claim. The lower court's approach missed the mark for at least five reasons.

First, the court's narrow focus on the dress code appears to have been driven at least in part by a misperception of the parties' arguments as being about "clothing alone," MSJ Ruling, 201 F. Supp. 3d at 849 n.4. That characterization ignored the extensive argument and supporting evidence in the EEOC's summary judgment papers that Rost's bias against Ms. Stephens' transition went well beyond what she would wear following her explanation that she was about to start presenting as her "true self," "Aimee Australia Stephens," and that she then would "live and work full-time" as a woman. *See id*. at 844-45.

Second, even if the focus on the dress code were appropriate, the court mistakenly concluded that the least restrictive means of eradicating sex discrimination in this case required the EEOC to propose a gender-*neutral* dress

code. But, the discrimination against Ms. Stephens could not have been alleviated by *erasing* gender differences because the Funeral Home's refusal to allow her to express her true gender was at the core of the discrimination. Therefore, the wrongful insistence that she not express her female identity would not have been remedied by continuing that bar and also barring everyone else from gender-differentiated expression.

Third, it seems odd at best to penalize the EEOC for its failure to challenge the gendered dress code given *Barker v. Taft Broadcasting Co*., 549 F.2d 400 (6th Cir.1977), which approved of gendered dress codes and apparently had not been explicitly questioned or criticized within the Sixth Circuit until the District Court implicitly did so on summary judgment. MSJ Ruling, 201 F. Supp. 3d at 853 (observing that "the Sixth Circuit has not provided any guidance on how to reconcile that previous line of authority with the more recent sex/gender-stereotyping theory of sex discrimination.").

Fourth, although *Amici* agree that the District Court correctly analyzed *Price Waterhouse* and *Smith* to determine that the gendered dress code was not a defense to liability, the lower court's subsequent faulting of the EEOC essentially for a lack of clairvoyance is deeply problematic. It is unprecedented in an analysis of an asserted RFRA defense against an employment discrimination claim for a court to require the EEOC—*after* the allegedly discriminatory firing has occurred—to

hypothesize and pursue in conciliation ways the conflict might have been avoided in the first place.

The court's odd approach of faulting the EEOC for not challenging the "sex-specific dress code" (MSJ Ruling, 201 F. Supp. 3d at 841) is stranger still in that it distinguished *Barker*'s validation of such codes because plaintiff Barker *did* challenge the dress code under Title VII (and lost), while the EEOC did not do so, consistently with *Barker*'s holding. *See id.* at 851.

This leaves a distressing impression that the EEOC was put in a "no win" position: the fact that it did not suggest a gender-neutral dress code was integral to its defeat of the Funeral Home's dress-code defense, but then the fact that it did not do so was deemed fatal against the RFRA defense. The court's approach on this point is unprecedented, and incorrect.

Fifth and in conclusion, Title VII itself *is* the least restrictive means of achieving the compelling interest of preventing discrimination. *See, e.g., Werft*, 377 F.3d at 1102; *Preferred Mgmt. Corp.*, 216 F.Supp. 2d at 810. As one court has explained,

> "[T]here is a compelling interest in ensuring that Title VII remains enforceable as to employment relationships that do not implicate concerns under the Free Exercise and Establishment Clauses of the First Amendment. The analysis the court has performed to eliminate excessive entanglement concerns ensures that *the Title VII framework is the least restrictive means of furthering this compelling interest. Title VII as applied in this case qualifies as an exception to the RFRA*

> *under subsection (b), and defendant may not invoke the RFRA as a defense*.

Redhead v. Conference of Seventh-Day Adventists, 440 F. Supp. 2d 211, 221–22 (E.D.N.Y. 2006), *adhered to on reconsideration*, 566 F. Supp. 2d 125 (E.D.N.Y. 2008) (emphasis added) (denying defendants' RFRA-based summary judgment motion against pregnancy discrimination claim by teacher fired by Seventh Day Adventists-associated school).

In sum, the proper inquiry for the "least restrictive means" element of a RFRA defense against a Title VII claim, as in past such cases, is simply whether the federal rule in question—Title VII—forbids conduct other than discriminatory conduct. It does not. There was no call here for inquiry into whether the EEOC could and should have hypothesized and ordered a gender-neutral compromise, thereby protecting the Funeral Home from any liability for violating the statute's sex discrimination ban. Such a "solution" was requested by neither employee nor employer; and, indeed, it was contrary to Aimee Stephens' interest in continuing to do her job, but as herself, without adverse treatment due to her transgender status and expression of her true gender.

IV. CONCLUSION

Amici ask this Court to confirm that Title VII bars all sex discrimination against employees based on any of their characteristics that contravene stereotypical gender norms, including transgender status, a nonconforming gender

identity, name, dress, appearance, or demeanor. In addition, the doctrine should be clear that, for purposes of RFRA defenses asserted against Title VII claims, that statutory discrimination ban serves equally compelling interests when workers are transgender and when they are not. Likewise, because Title VII's protections forbid only harmful conduct, they are the least restrictive means of serving those compelling interests regardless of a worker's gender identity and the gender-based reason an employer has taken adverse action. Clarity on these points will help to broaden understanding of this form of sex discrimination and what the law requires, thereby serving workers, employers, the judiciary and the general public.

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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 6,431 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
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DATED: April 27, 2017

/s/ Gregory R. Nevins

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 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.

DATED: April 27, 2017

/s/ Gregory R. Nevins