

No. 16-2424

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff/Appellant, and

AIMEE STEPHENS,
Intervenor/Appellant,

v.

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,
Defendant/Appellee.

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

REPLY BRIEF OF THE EQUAL EMPLOYMENT
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INTRODUCTION

Rost fired Aimee Stephens after six years of service, not for any performance deficiencies, but because she announced her intention to transition from her birth-assigned male sex to female. That constitutes sex discrimination under Title VII. EEOC's opening brief argues that the complaint stated a Title VII claim of sex discrimination based on transgender/transitioning status, as well as sex stereotyping, and that the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1, provides no shield for RGGR's discriminatory firing of Stephens. EEOC also contended that the court erred in dismissing the clothing benefit claim.

RGGR's response overlooks binding precedent, mischaracterizes the record, and offensively insists Stephens is a man. She is a woman. RGGR's argument that "because of . . . sex" under Title VII does not encompass transgender/transitioning discrimination cannot be reconciled with *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), or Sixth Circuit precedent. Apparently recognizing the weakness of the district court's RFRA ruling, RGGR urges this Court to affirm on an alternate ground rejected by the

district court: that its sex-specific dress code does not violate Title VII. This argument is baffling. The issue here is whether Stephens' *termination* violates Title VII, not whether RGGR's sex-specific dress code violates Title VII. Record evidence shows that Rost would have fired Stephens no matter what she wore, as Rost did not want a transgender funeral director working for him.

As for RFRA, RGGR relies almost exclusively on *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), in arguing its "exercise of religion" was "substantially burdened." RGGR does not answer EEOC's arguments that *Hobby Lobby* is not controlling in this context and that RGGR's limitless view of religious exercise and substantial burden would open the door to firing any employee (pregnant, biracial, wearing a hijab, etc.) whose appearance conflicts with an employer's religious beliefs. Even if RGGR could meet its burden, it failed to refute EEOC's argument that this enforcement action *against RGGR* is the least-restrictive means of enforcing Stephens' Title VII right not to be fired because of her sex. RGGR also fails

to refute EEOC's argument that the clothing benefit claim should be reinstated.

ARGUMENT

1. Transitioning and/or transgender discrimination constitutes sex discrimination under Title VII.

RGGR does not dispute that EEOC's complaint stated a Title VII claim of sex discrimination based on sex stereotypes, as the district court held. On this point, the parties agree. But RGGR does dispute that the complaint also stated a sex discrimination claim based on transgender status/transitioning. RGGR's argument relies on a fossilized view of Title VII's prohibition on discrimination "because of . . . sex," 42 U.S.C. § 2000e-2(a), as pertaining only to the binary, chromosomally-based, and immutable traits of "male" and "female." This view of Title VII cannot be reconciled with *Price Waterhouse*, 490 U.S. 228, or *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), both of which RGGR misperceives.

RGGR first observes that "transgender or transitioning status is not on [Title VII's] list of forbidden categories." Resp. 24. While true, this is irrelevant. It is beyond dispute that Title VII forbids discrimination against,

for instance, “Jews,” “Muslims,” or “African-Americans,” although these terms are not listed. Likewise, the Supreme Court long ago made clear that Title VII’s sex discrimination prohibition encompasses “sexual harassment” (*Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)) and “sex stereotyping” (*Price Waterhouse*), although these words do not appear in the statute. Thus, the question is whether the term that *is* in the statute—sex—necessarily encompasses transgender/transitioning discrimination.

RGGR insists it cannot, because in 1964 the dictionary (at least, the 1971 and 1969 dictionaries, it says) defined sex according to physiological and reproductive roles, “either male or female.” Resp. 25. Building on these dictionary definitions, RGGR asserts that sex under Title VII refers exclusively to the fixed, “chromosomally driven,” and binary characteristic of male/female, necessarily excluding transgender/transitioning discrimination. Resp. 26-27.

As EEOC explained, *Price Waterhouse* forecloses this argument. EEOC-Br. 22. Six members of the Court agreed in *Price Waterhouse* that Title VII prohibits not only discrimination against “males” and “females,” but

also sex-stereotyping discrimination, i.e., discrimination against an individual who fails to conform to gender stereotypes. 490 U.S. at 250-51 (plurality opinion of four Justices); *id.* at 258-61 (White, J., concurring); *id.* at 272-73 (O'Connor, J., concurring). The plurality emphasized that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.” *Id.* at 251.

Time and again, this Court has applied *Price Waterhouse* to hold that Title VII prohibits sex stereotyping, confirming that RGGR’s dictionary-definition argument fails. EEOC cited three decisions of this Court holding that Title VII forbids discrimination against transgender individuals for failing to conform to sex stereotypes. EEOC-Br. 23-24 (citing *Smith*, 378 F.3d 566; *Myers v. Cuyahoga Cnty.*, 182 F. App’x 510, 519 (6th Cir. 2006); and *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005)). RGGR fails to cite *Barnes* or *Myers* and discusses *Smith* only vis-à-vis its superseded original opinion. RGGR’s failure to grapple with these decisions (or *Price Waterhouse*) is telling. It simply cannot win under these cases.

Smith rejected explicitly RGGR's traditional concept of sex as male/female. In *Smith*, this Court acknowledged that courts had interpreted Title VII "as barring discrimination based only on 'sex' (referring to an individual's anatomical and biological characteristics), but not on 'gender' (referring to socially-constructed norms associated with a person's sex)." 378 F.3d at 573. *Price Waterhouse*, this Court stated, "eviscerated" this view. *Id.* Accordingly, this Court concluded that the plaintiff stated a Title VII claim, as "discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender" is the same as the discrimination directed at Ann Hopkins, who "in sex-stereotypical terms, did not act like a woman." *Id.* at 575 (emphasis added). Thus, this Court has already rejected RGGR's binary interpretation of sex.

EEOC argued that *Smith* essentially recognized that transgender discrimination is inherently based on stereotyping, and therefore always states a Title VII violation. EEOC-Br. 25. Rather than attack this argument on its merits by grappling with *Smith's* holding, RGGR attacks it by discussing *Smith's* superseded opinion, 369 F.3d 912 (6th Cir. 2004). To be

sure, the superseded *Smith* states that “[b]y definition, transsexuals . . . fail to conform to stereotypes about how those assigned a particular sex at birth should act, dress, and self-identify.” 369 F.3d at 921. But RGGR cites no authority for its assertion that the omission of this passage from the amended *Smith* opinion constitutes a “holding” that transgender discrimination is not necessarily sex discrimination. And this Court recently circled back to its original *Smith* opinion in *Dodds v. U.S. Department of Education*, 845 F.3d 217 (6th Cir. 2016). In *Dodds*, this Court refused to stay a preliminary injunction ordering a school to permit a female transgender student to use the girls’ bathroom, stating that “[u]nder settled law in this Circuit, gender nonconformity, as defined in *Smith v. City of Salem*, is an individual’s ‘fail[ure] to act and/or identify with his or her gender. . . . Sex stereotyping based on a person’s gender nonconforming behavior is impermissible discrimination.’” 845 F.3d at 221 (quoting *Smith*, 378 F.3d at 575) (emphasis added).¹

¹ *Dodds*, No. 16-4117, is on appeal and raises the issue of whether sex under Title IX includes transgender status.

RGGR calls EEOC's view "flatly wrong," Resp. 31, but other circuits have embraced it. In *Glenn v. Brumby*—which RGGR ignores, but *Dodds* cites—the Eleventh Circuit recognized that "[t]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." 663 F.3d 1312, 1316 (11th Cir. 2011) (quotation marks and citation omitted); see EEOC-Br. 24-25 (arguing *Glenn*). Relying on *Smith* and *Glenn*, the Seventh Circuit recently held in a Title IX case that "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of" his or her birth-assigned sex. *Whitaker v. Kenosha Unified Sch. Dist.*, _ F.3d _, No. 16-3522, 2017 WL 2331751, at *7 (7th Cir. May 30, 2017) (enjoining bathroom policy restricting transgender student to birth-assigned restroom) (emphasis added). This Court should recognize the same.

In making its chromosomally-driven, binary, 1964-dictionary-definition argument, RGGR suggests Congress never understood Title VII's sex prohibition to include transgender/transitioning discrimination. This argument fails. In *Oncala v. Sundowner Offshore Services, Inc.*, the Court held

that Title VII bars male-on-male harassment, stating that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” 523 U.S. 75, 79 (1998).

Ironically, RGGR itself identifies another problem with its chromosome-based, binary view of sex: it would exclude from the statute’s protections the millions of individuals whose sex cannot be neatly categorized into male or female. Resp. 30, n. 5. RGGR posits that sex under Title VII is dictated by one’s chromosomes (XX or XY). RGGR acknowledges the “existence of ‘intersex’ conditions or chromosomal aberrations” but dismisses them as “rare.” Resp. 30, n. 30. But they are not rare. According to the Intersex Society of North America, approximately 1/1,666 individuals are neither “XX” nor “XY” and 1/1,000 have Klinefelter syndrome (XXY). <http://www.isna.org/faq/frequency> (last visited June 7, 2017) (also stating 1/100 individuals are born with bodies not matching standard male/female). RGGR’s interpretation of Title VII would thus

exclude hundreds of thousands, if not millions, of individuals from the statute's protection.

Contrary to RGGR's contention, the religious conversion analogy of *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008), supports EEOC's argument. RGGR says the analogy fails because sex—unlike religion—cannot be changed, as it is chromosomally defined. Resp. 30. EEOC disagrees that sex is immutable. Moreover, without citing any authority, RGGR suggests *Schroer's* premise is wrong—that discrimination against a religious convert is permissible under Title VII. Resp. 31. *Schroer* cannot be so easily dismissed. The point is that when an employer fires an employee who undergoes a religious conversion *because* she underwent a conversion, the employer has impermissibly taken the employee's religion into account (the act of changing it), just as an employer who fires a transgender employee has impermissibly taken sex into account (the act of changing it).

RGGR asserts that sex cannot “reasonably be understood to include” transgender discrimination because “transgender status” is a distinct trait from sex. Resp. 27. Because only some men, and some women, are

transgender, RGGR says, and because the “class” of transgender individuals includes men *and* women, “transgender discrimination” cannot be a form of sex discrimination. This makes no sense. No one disputes that “religion” and “race” under Title VII includes various characteristic subsets (Jewish, Catholic, Asian, etc.), or that sexual harassment and sex stereotyping are subsets of sex discrimination.

RGGR contends that Congress’ inclusion of the words “gender identity” in other acts, enacted decades after Title VII, shows that “Congress did not intend sex in Title VII to include transgender/transitioning.” Resp. 28. As discussed, *Oncale* negates this argument; Title VII must be interpreted according to its terms. *Cf. Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (Congressional inaction “lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including” that “existing legislation already incorporated the offered change.”) (quotation marks and citation omitted); *see Whitaker*, 2017 WL 2331751, at *10 (rejecting

argument that Congressional inaction precludes interpreting Title IX as forbidding transgender discrimination).

Finally, RGGR argues *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2006), supports dismissal of the transgender/transitioning claim. Resp. 32-33. RGGR's convoluted argument that *Vickers* does not prohibit all sex stereotyping is beside the point here, given this Court's holding in *Smith* (reaffirmed in *Barnes* and *Myers*) that Title VII forbids discrimination against transgender individuals for gender non-conforming conduct.

2. RGGR failed to show that employing Stephens substantially burdens Rost's exercise of religion.

EEOC has questioned neither the sincerity nor the reasonableness of Rost's religious beliefs. *Cf. Hobby Lobby*, 134 S. Ct. at 2778 (courts cannot question "reasonable[ness]" of religious beliefs). Rost has every right to his religious views. But RGGR bore the burden of showing its "exercise of religion" was "substantially burdened," not merely that Rost had a religious objection to being transgender. RGGR's argument that it met its burden is based on an impermissibly broad reading of *Hobby Lobby*. If

accepted by this Court, that interpretation would effectively jettison the “exercise of religion” and “substantially burden” requirements from RFRA.

EEOC argued that RGGR failed to meet its RFRA burden because it did not show how enforcing Title VII interfered with conduct required (or prohibited) by a tenet of Rost’s religion. EEOC-Br. 41-46. EEOC explained that *Hobby Lobby* is inapposite because Rost, unlike those plaintiffs, did not have to choose between facilitating what he considered an immoral act (abortion) and incurring crippling economic sanctions. RGGR does not directly answer these arguments. It cites no religious tenet forbidding Rost from employing a transgender woman. It has no answer to EEOC’s argument that Rost was not being compelled to “facilitate” Stephens’ transition, as Rost was not forced to pay for her transition or medication.

RGGR instead reads *Hobby Lobby* as essentially stripping the “religious exercise” requirement from RFRA. According to RGGR, RFRA applies whenever a business is unable to conduct business in accordance with its religious beliefs, regardless of whether the business can point to any actual *conduct* it is being forced to take—or not take—that conflicts

with a religious tenet. RGGR misreads *Hobby Lobby*. To be sure, the Court stated that “RFRA presents” the question of whether government action substantially burdens claimants’ ability “to conduct business in accordance with *their religious beliefs*[.]” *Hobby Lobby*, 134 S. Ct. at 2778. But there still must be some government-coerced act conflicting with a religious belief, as the passage makes clear. The Court explained that being coerced into *providing* contraception that violated the plaintiffs’ religious beliefs constituted a substantial burden on religious exercise. *See id.*; *see also id.* at 2775 (HHS mandate forces plaintiffs to “engage in conduct” violating religious beliefs). *Hobby Lobby* also refers to religious tenets, refuting RGGR’s implicit suggestion that religious exercise need not be rooted in a religious tenet. *See id.* at 2770 (“Business practices . . . compelled or limited by the tenets of a religious doctrine fall comfortably within” religious exercise.).

This Court recently confirmed that RFRA still requires courts to assess whether a particular act is required (or forbidden) by religion. In *United States v. Barnes*, this Court stated that although courts cannot

“decide the centrality of . . . beliefs to canonical texts, that does not prevent this court from determining whether a particular practice is required by a religion as part of the substantial-burden analysis.” No.16-1188, 2017 WL 375629, at *4 (6th Cir. Jan. 26, 2017) (finding no substantial burden on religious exercise where religion considered marijuana medicinal but did not require growing or donating it to church) (quotation marks omitted).

RGGR makes two specific arguments as to religious exercise, both misguided. First, RGGR makes the astonishingly broad assertion that the “very operation” of the business “constitutes protected exercise” because God called Rost to serve grieving people. Resp. 38. RGGR points to no religious doctrine or tenet compelling Rost to run a funeral home. RGGR’s argument therefore is that under *Hobby Lobby*, there is no need to point to a religious tenet compelling (or forbidding) conduct. Under this view, the owner of any business who said God called him to that work could assert his entire business was a religious exercise. RGGR’s argument fails as a matter of statutory construction, as it would effectively render “exercise of

religion” meaningless. *See Conley v. United States*, 556 U.S. 303, 314 (2009) (statutes should be construed to give effect to all provisions).

Second, RGGR argues Rost’s religious exercise includes conducting business in accordance with his belief that sex is God-given and immutable; being forced to purchase, or permit, female attire for Stephens would interfere with that. Resp. 38-39. These arguments fail. In 2013, RGGR did not buy clothes for *any* female employee; although Rost stated he “will” provide female funeral directors with suits, RGGR has not had a female director since 1950. Counter-Facts ¶ 54, R.61, PageID#1838-39; Rost. Aff. ¶ 54, R.54-2, PageID#1337. The record thus shows at least a factual question as to whether RGGR would have purchased clothes for Stephens after her transition, undercutting its religious exercise argument.

Contrary to RGGR’s contention, being forced to *allow* Stephens to wear female clothes is not like forcing the employers in *Hobby Lobby* to pay for birth control they viewed as abortion. Resp. 39. As EEOC argued, this is because Rost identified no religious tenet forbidding him from simply *employing* a transgender worker. *See Barnes*, 2017 WL 375629, at *4 (no

religious exercise where religion did not require growing and donating marijuana); *Wilson v. James*, 139 F. Supp. 3d 410, 425 (D.D.C. 2015) (no religious exercise infringement where RFRA claimant conceded that no “LDS doctrine requires him to publicly voice his dissent about homosexuality or same-sex marriage”); *Mahoney v. U.S. Marshals Serv.*, 454 F. Supp. 2d 21, 38 (D.D.C. 2006) (no RFRA violation where claimants failed to “allege that their religion compels them to demonstrate in favor of the public display of the Ten Commandments at all time and in all places”). Try as it might, RGGR cannot turn this case into *Hobby Lobby*, which did not hold that RFRA permits employers to fire employees who used certain contraception.

RGGR’s argument boils down to this: an employer’s religious exercise is impinged if it is forced to employ workers whose public appearance is at odds with the owner’s religious beliefs. This is a deeply troubling proposition that opens the door to a broad spectrum of otherwise impermissible discrimination, such as against working women; unwed

pregnant employees; employees who wear, or refuse to wear, yarmulkes, cross jewelry or hijabs; and even biracial employees.

The reasoning underlying this troubling argument is also fallacious. The employment of individuals whose outward appearance or conduct conflicts with a business owner's religious views is not an endorsement of the employee's religious views or lifestyles, any more than a clerical worker's issuance of same-sex marriage licenses constitutes an endorsement of same-sex unions. *See Summers v. Whittis*, No. 15-0093, 2016 WL 7242483, at *5-6 (S.D. Ind. Dec. 15, 2016) (rejecting Christian plaintiff's claim that requiring her to issue same-sex marriage licenses violated Title VII). The hollowness of RGGR's argument is underscored by the fact that Rost employs non-Christians, serves non-Christians, performs cremations (contrary to his religious ideals), offers Catholic religious items to clients, and permits employees to wear Jewish head coverings for Jewish services. Counter-Facts ¶¶ 30, 31, 32, 37, 40, R.61, PageID#1833-36. Evidently, Rost himself understands these activities do not constitute an endorsement of other religions or non-Christian values; Rost even testified he is *not*

endorsing his employees' religious beliefs by employing them. Rost. Depo. 41-42, R.51-3, PageID#653. RGGR is therefore hard-pressed to argue that employment of a transgender funeral director "implicates [Rost's] religious convictions." Resp. 39.

RGGR's overlapping "substantial burden" argument fares no better. As this Court stated recently, "not just any imposition on religious exercise will constitute a violation"; rather, "a burden must have some degree of severity." *Livingston Christian Schs. v. Genoa Charter Twp.*, _ F.3d _, 2017 WL 2381336, at *5 (6th Cir. June 2, 2017) (RLUIPA case). Relying exclusively on Rost's testimony, RGGR argues that allowing a male funeral director to wear female clothes "would often create distractions" and hinder healing. Resp. 38. Rost's testimony is as speculative as it is offensive. It is based on a bias against transgender individuals and a view that Stephens is a "man" and would be perceived as such even after her gender transition. Rost then parlays his bias into an assumption that a transgender funeral director would so disturb clients as to "hinder healing." If accepted here, such an argument would invite any employer to assert a religious objection to

avoid employing Muslims, African-Americans, women, pregnant women, or anyone else whose workplace presence is viewed by the company as “distracting” customers. Courts have long rejected such purported customer preferences as an excuse to discriminate. *See, e.g., Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (rejecting customer preference for female flight attendants).

Echoing its religious exercise argument, RGGR posits that permitting Stephens to dress (and present) as a female “*while representing R.G.*” imposes a substantial burden because it contravenes Rost’s religious convictions, of which the dress code is an extension. Resp. 39. This argument fails because, as discussed, Rost cannot identify any religious tenet forbidding the employment of transgender workers; he is not being forced to facilitate Stephens’s transition and remains free to believe sex is immutable. *See generally United States v. Sterling*, 75 M.J. 407, 418 (C.A.A.F. 2016) (no substantial burden where claimant failed to offer evidence that removing religious signs from her computer would prevent her from

engaging in required religious conduct, or force abandonment of religious precept), *cert. denied*, 2017 WL 2407485 (June 5, 2017) (No. 16-814).

3. EEOC established a compelling interest in Title VII's enforcement as to RGGR.

RGGR contends that eradicating employment discrimination is “too broadly formulated [an] interest” to be compelling. Resp. 41. But that was not EEOC’s argument. EEOC discussed precedent (including *Hobby Lobby*) recognizing that the government has a compelling interest in eliminating discrimination, but EEOC then contended it satisfied *O Centro*’s “to-the-person test” as to this enforcement action against RGGR. EEOC-Br. 51-54 (citing *Gonzales v. O Centro Espirita Beneficente Uniano Do Vegetal*, 546 U.S. 418 (2006)). Thus, this Court need not decide whether the government always has a compelling interest in enforcing Title VII, although *Hobby Lobby* and a long line of Supreme Court cases suggest that it does.

RGGR disregards *Hobby Lobby*’s compelling-interest analysis. As EEOC argued, *Hobby Lobby* states that “[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race[.]” 134 S. Ct. at 2783. The government’s interest as to

sex is equally compelling. *See, e.g., United States v. Burke*, 504 U.S. 229, 238 (1992) (“[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.”); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (stating that discrimination’s stigmatizing injury and denial of equal opportunities “is surely felt as strongly by persons suffering discrimination on the basis of” sex as those discriminated against based on race).

EEOC further argued that exempting RGGR from Title VII would cause severe harm, as it would deprive Stephens of her Title VII right to work free of sex discrimination. EEOC-Br. 54. RGGR responds that Stephens has no right to be free from transgender/transitioning discrimination. Resp. 42. For reasons already discussed, the government disagrees. Furthermore, *Price Waterhouse* and *Smith* make clear that Title VII prohibits sex-stereotyping discrimination against transgender individuals. Unable to deny this, RGGR instead denies that any “impermissible sex stereotyping . . . occurred.” Resp. 42. But even the

district court observed that Rost's testimony appeared to constitute "direct evidence" of sex-stereotyping discrimination. Opinion, R.76, PageID#2199.

Unable to refute EEOC's arguments, RGGR asserts that "the constitutional guarantee of free exercise" — and, therefore, religious liberty — "supersedes a conflicting statutory right," rendering the government's interest non-compelling. Resp. 42. This assertion lacks any authority and contravenes RFRA, which employs a two-step burden-shifting process designed to *balance* religious liberties against the government's compelling interests. Even the district court recognized the government's compelling interest in enforcing Stephens' Title VII rights, refuting RGGR's contention that religious liberties negate the government's compelling interest in enforcing statutory rights.

The underlying premise of RGGR's assertion that RFRA protects religious liberties, no matter the cost to anyone else, is wrong. *Hobby Lobby* makes this clear. Writing for the majority, Justice Alito stated forcefully that "[o]ur decision . . . provides no . . . shield" to "discrimination in hiring, for example on the basis of race" that "might be cloaked as religious

practice.” 134 S. Ct. at 2783. Justice Kennedy likewise stated that although government may not restrict religious exercise, “neither may that same exercise unduly restrict *other persons, such as employees*, in protecting their own interests, interests the law deems compelling.” 134 S. Ct. at 2786-87 (Kennedy, J., concurring) (emphasis added). Rost’s religious liberties thus do not negate the government’s compelling interest in enforcing Stephens’ right to be free of sex discrimination.

4. EEOC satisfied the least-restrictive-means test.

Relying on *Hobby Lobby*, Supreme Court precedent, and the record, EEOC argued this enforcement action is the least-restrictive means of protecting Stephens’ Title VII right to work. EEOC further argued that the court erred in holding *sua sponte* that a gender-neutral dress code “could” constitute a less-restrictive alternative, dooming EEOC’s case. EEOC-Br. 59-61. RGGR implicitly concedes almost every point EEOC made, including that the district court’s least-restrictive alternative is no alternative here.

RGGR does not refute that *Hobby Lobby* states that “prohibitions on racial discrimination are *precisely tailored to achieve th[e] critical goal*” of

ridding the workplace of race discrimination, supporting EEOC's argument that Title VII's framework is itself the least-restrictive means of achieving the government's compelling interest in most cases, as it is here. 134 S. Ct. at 2783 (emphasis added); see *Redhead v. Conf. of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 222 (E.D.N.Y. 2006) (Title VII's framework is "least restrictive means of furthering" compelling interest in enforcing Title VII). Nor does RGGR dispute that less-restrictive alternatives must "equally further[]" the government's interest, and that courts must assess the burdens that proposed alternatives impose on others. See EEOC-Br. 55-56.

Significantly, RGGR *does not defend the district court's holding* that a gender-neutral dress uniform—like those the district judge saw court security officers wearing—"could be a less restrictive alternative," which was the basis for the court's grant of summary judgment. Opinion, R.76, PageID#2219; see Resp. 43-45. It is no wonder RGGR refrains from defending the court's ruling; the record shows Rost would have fired Stephens *even if she wore a gender-neutral uniform* because Rost objected to

her presenting as a woman *at all*, and dress is just one facet of that. EEOC-Br. 60. RGGR does not dispute that had Stephens worn a gender-neutral outfit but gone by “Aimee,” used the female pronoun, and worn make-up and a feminine hairstyle, Rost *still* would have a religious objection to her employment.

RGGR instead contends EEOC employs circular reasoning by asserting that only the enforcement of Stephens’ Title VII rights would equally further the government’s compelling interest in vindicating her right to be free from sex discrimination. Resp. 44. However, it is the operation of the statute and precedent, including *Hobby Lobby*, that compels the conclusion that enforcement of anti-discrimination laws is usually (and is here) the least-restrictive means of enforcing an individual’s civil rights.

RGGR asserts that EEOC did not even “attempt to demonstrate that there is no other way to achieve its desired goal.” Resp. 44. But EEOC’s opening brief addressed *each* purported less-restrictive alternative RGGR offered during litigation, as well as the district court’s self-created gender-neutral dress code, and explained why each failed. EEOC-Br. 56-60. And

RGGR does not deny that asking the government to pay Stephens' salary (directly, or indirectly by paying another funeral home to employ her) is *not* a less-restrictive alternative, EEOC-Br. 57, seemingly abandoning this argument.

The only alternative RGGR offers is that EEOC permit businesses to enforce sex-specific dress codes for "public-facing" employees. Resp. 44-45. This is no alternative here, as it would not in any way achieve the government's compelling interest in protecting *Stephens'* right to work free of sex discrimination (whether viewed as transgender/transitioning discrimination, or sex-stereotyping discrimination). As RGGR just argued as to compelling interest, the government's interest is specific to *Stephens*. Permitting RGGR, and selected other employers, to impose sex-specific dress codes on transgender employees would not ensure Stephens' right to work free from sex stereotypes. Because this alternative does not at all accomplish, much less "equally further[]," the government's interest, it fails. *Hobby Lobby*, 134 S. Ct. at 2786 (J.Kennedy, concurring) (government failed least-restrictive-means test where pre-existing HHS accommodation

“equally furthers” government’s “compelling interest in the health of female employees”).

RGGR’s contention that allowing its sex-specific dress code would resolve Rost’s religious objections is also disingenuous. RGGR has never said that it would re-employ Stephens if she agreed to wear the male uniform but otherwise acted and presented as a woman. And that is because the record establishes that Rost *would have fired her anyway, no matter what uniform she wore*. Stephens’ letter to Rost did not focus narrowly on clothing. Rather, she explained she had “a gender identity disorder,” had been “diagnosed as a transsexual,” “intend[ed] to have sex reassignment surgery” and would “live and work full-time as a woman for one year,” and would return from vacation as “A[i]mee . . . in appropriate business attire.” Letter, R.54-21, PageID#1494. Rost’s response likewise focused on Stephens’ transition, not her clothing. He fired her, stating that “the public would [not] be accepting of [her] transition.” Charge, R.54-22, PageID#1497. During EEOC’s investigation, RGGR refused to use Aimee’s name, insisting “[s]he is a man.” Letter, R.54-23, PageID#1499-1504. Even

after RGGR belatedly raised its religious objection to employing Stephens, Rost testified that he fired Stephens, inter alia, because “[s]he was no longer going to represent h[er]self as a man.” Rost Depo. 136, R.63-5 PageID#1975.

RGGR asserts EEOC has no compelling interest in eradicating “benign sex stereotypes,” like sex-specific dress codes. Resp. 45. At best, this statement fundamentally misunderstands gender dysphoria; at worst, it intentionally offends. Stephens did not whimsically awaken one day wanting to wear a skirt to work. Rather, as her letter to Rost explained, she has a medically diagnosed condition—gender identity disorder—and living her life inconsistently with her gender identity “caused [her] great despair and loneliness” for which she spent years in therapy. Letter, R.54-21, PageID#1494. Thus, contrary to RGGR’s trivializing assertion, there is nothing “benign” about forcing transgender individuals to dress inconsistently with their gender identity.

Finally, RGGR tries to turn the tables by arguing *EEOC* is perpetuating gender stereotypes by insisting Stephens be permitted to

express her “female gender identity through dress and appearance.”

Resp. 45. EEOC is not forcing gender stereotypes onto anyone. Rather, EEOC is arguing—consistent with Title VII’s text and Supreme Court and Sixth Circuit jurisprudence on impermissible sex stereotyping—that it is unlawful to fire an employee whose feminine “dress and appearance” fails to conform to an employer’s stereotype of how a birth-assigned male should look and act. Just as *Price Waterhouse* held that a (birth-assigned) woman cannot be fired for her insufficiently feminine appearance and mannerisms, a birth-assigned male cannot be fired for an insufficiently masculine appearance.

5. RFRA is not a defense to Stephens’ claim, underscoring that RFRA should not bar EEOC’s claim.

Stephens argued that RFRA is not a defense to a private party suit, requiring her Title VII claim to be remanded and decided on the merits.

Stephens-Br. 25. EEOC agrees.

Seeking to avoid the issue, RGGR insists that Stephens, as appellate intervenor, cannot address the “new and complicated issue” of RFRA’s applicability to private actions. Resp. 34. But the district court addressed it,

making it fair to consider it on appeal. Order, R.76, PageID#2222-23. RGGR also glosses over the fact that, as the district court noted, this Court stated in *General Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 411 (6th Cir. 2010), that RFRA is not a defense in a suit between private parties. As the district court noted, it is “odd” to hold that RFRA blocks EEOC’s suit (seeking relief for Stephens), but not Stephens’ suit (seeking the same relief). Order, R.76, PageID#2223 n. 23. The oddness of this result underscores that RFRA was never intended to operate as a defense to a Title VII suit seeking enforcement of individual statutory rights, whether brought by the government or an individual.

6. RGGR’s sex-specific dress code is not a defense.

RGGR urges affirmance on a ground rejected by the district court: that Title VII permits sex-specific dress codes imposing equal burdens. The district court correctly rejected this argument. This case has never been about whether RGGR’s sex-specific dress code imposes unequal burdens. *See* Opinion, R.13, PageID#197 (noting EEOC did not allege the dress code violated Title VII); Opinion, R.76, PageID#2200 (same). Rather, this case is

about whether *firing* Stephens for being transgender violates Title VII. RGGR thus answers the wrong question when it asserts its dress code imposes equal burdens and therefore complies with Title VII. Accordingly, RGGR's discussion of *Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 459 (6th Cir. 1977), and other cases upholding sex-specific grooming polices that impose equal burdens miss the mark because they do not address whether Title VII permits an employer to fire a transgender woman who wants to comply with the female dress code and otherwise present as a woman. Resp. 12-14. This Court therefore need not address the continuing validity of *Barker* after *Price Waterhouse*.

RGGR's dress code argument also fails because it is based on a mischaracterization of the record. Viewed in the light most favorable to EEOC, the record does not show that Rost fired Stephens merely because she refused to dress like a birth-assigned man. Rather, Rost fired Stephens because she intended to undergo a gender transition and present as a woman, and Rost feared the public would not accept a transgender funeral director (no matter what she wore). At a minimum, the record establishes a

jury question as to whether Stephens' refusal to comply with the dress code was the real reason, one of several reasons, *or not even a reason*, for Stephens' termination, making summary judgment inappropriate. 42 U.S.C. § 2000e-2(m) (motivating factor standard).

7. The ministerial exception is inapplicable.

Amici contend the ministerial exception bars EEOC's claim. R. 70, pp. 20-27. It does not. Although not dispositive, we note RGGR never raised this defense below. Answer, R.22, PageID#253-54; *see Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829, 836 (6th Cir. 2015) (defense not waivable). RGGR also admits the ministerial exception "has no application" because RGGR "is not a religious organization." Resp. 35. RGGR is correct. The exception applies only to religiously affiliated entities, i.e., those "whose mission[s] are marked by clear or obvious religious characteristics." *Id.* at 834 (quotation marks and citation omitted). RGGR is not a religiously affiliated entity. It undisputed that RGGR is not affiliated with any church; its articles of incorporation do not avow any religious purpose; its employees are not required to hold any particular

religious views; and it employs and serves individuals of all religions.

Counter-Statement of Facts ¶¶ 25, 26, 27, 30, 37, R.61, PageID#1833-35.

Further, nothing about Rost's formal title or religious functions qualify him as a "ministerial employee." *Cf. Conlon*, 777 F.3d at 834-36 (holding that "spiritual formation specialist" who assisted others' "intimacy with God and growth in Christ-like character" was ministerial employee).

8. EEOC had authority to pursue the clothing benefit claim.

Relying on *General Telephone Co. of the NW, Inc. v. EEOC*, 446 U.S. 318 (1980), EEOC argued it had the authority—indeed, the obligation—to pursue the clothing benefit claim after RGGR's own employee informed EEOC's investigator that only men received suits/uniforms. EEOC-Br. 61-71; Notes, R.54-24, PageID#1513. RGGR argues *General Telephone* should be disregarded as dicta and that *EEOC v. Bailey Co.*, 563 F.2d 439 (6th Cir. 1977), remains good law and controls here. RGGR is wrong.

At the outset, RGGR errs in asserting the court "lack[ed] jurisdiction" over the claim; EEOC's pre-suit requirements are conditions precedent, not jurisdictional requirements. *See, e.g., Arbaugh v. Y & H Corp.*, 546 U.S. 500,

515-16 (2006) (statutory requirements are jurisdictional only if Congress clearly states so; holding that Title VII's numerosity provision is not jurisdictional).

As to *General Telephone*, RGGR does not dispute it states that “[a]ny violations that the EEOC ascertains in the course of a reasonable investigation of the charging party’s complaint are actionable.” 446 U.S. at 331 (emphasis added). RGGR shrugs this off as dicta, but the circuits have uniformly relied upon it to hold that “if the investigation turns up additional violations [beyond those in the charge], the Commission can add them to its suit.” *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005). The reason RGGR seeks to dismiss *General Telephone*’s statement as dicta is clear: *Bailey*’s holding (limiting EEOC’s claims to those “reasonably expected to grow” from the charge) cannot be reconciled with *General Telephone*’s subsequent statement that EEOC may pursue “any” claims it discovers during a reasonable investigation. *See* EEOC-Br. 63-66.

RGGR next tries to refute EEOC’s argument that even if *Bailey* remains good law, it does not apply here. EEOC explained that in contrast

to *Bailey*, both the termination and clothing benefit claims concern sex discrimination. RGGR does not dispute this distinction. Resp. 49. Instead, in a non sequitur, RGGR contends it was “unreasonable” to expect the charge investigation to reveal whether women received a clothing benefit. But RGGR’s assertion of its sex-specific *dress code* as an “affirmative defense,” Answer, R.22, PageID#253, shows the reasonableness of expecting the charge’s investigation to reveal that RGGR supplied only men with clothes complying with the dress code.

EEOC argued that *Bailey* is distinguishable because here the clothing benefit claim relates to Stephens. RGGR disputes this, saying it fired Stephens before she transitioned to female. In other words, RGGR fired Stephens before she, too, had the chance to become a victim of RGGR’s discriminatory clothing benefit policy. But if EEOC prevails and Stephens is reinstated, she would be injured by such a discriminatory policy. Thus, *Bailey* is not controlling, even if good law.

CONCLUSION

The district court’s judgment should be reversed.

Respectfully submitted,

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June 9, 2017

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 6,335 words.

I certify that 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Palatino Linotype 14 point.

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CERTIFICATE OF SERVICE

I, Anne Noel Occhialino, hereby certify that I electronically filed the foregoing brief with the Court on June 9, 2017, via the appellate CM/ECF system and that counsel for RGGR and Ms. Stephens have consented to electronic service and will be served the foregoing brief via the appellate CM/ECF system.

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ADDENDUM

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