NO. _____

IN THE
Supreme Court of the United States

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

v.

EQUAL OPPORTUNITY EMPLOYMENT COMMISSION,
Respondent,

and

AIMEE STEPHENS,
Respondent-Intervenor.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the word "sex" in Title VII's prohibition on discrimination "because of . . . sex," 42 U.S.C. 2000e-2(a)(1), meant "gender identity" and included "transgender status" when Congress enacted Title VII in 1964.

2. Whether *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), prohibits employers from applying sex-specific policies according to their employees' sex rather than their gender identity.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is R.G. &. G.R. Harris Funeral Homes, Inc., a closely held, for-profit corporation. The respondents are the Equal Employment Opportunity Commission and Intervenor Aimee Stephens.

CORPORATE DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

***Cases*:**

***Statutes*:**

***Legislative Materials*:**

***Administrative Rulings*:**

***Miscellaneous*:**

OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2018. On May 16, this Court extended the time to file this petition until August 3. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in the appendix to this petition. App. 188a.

INTRODUCTION

The "proper role of the judiciary" is "to apply, not amend, the work of the People's representatives." *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017). The Sixth Circuit departed from that role by judicially amending the word "sex" in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), to mean "gender identity." In so doing, the Sixth Circuit usurped the role of Congress, which has repeatedly considered and rejected making such a change to Title VII.

Redefining "sex" to mean "gender identity" is no trivial matter. Doing so shifts what it means to be male or female from a biological reality based in anatomy and physiology to a subjective perception evidenced by what people profess they feel. Far-reaching consequences follow from that. For example, federal law in some parts of the country now mandates that employers, governments, and schools must administer dress codes and assign living facilities, locker rooms, and restrooms based on the "sex" that a person professes.

As for Petitioner R.G. &. G.R. Harris Funeral Homes, Inc. (Harris Homes), the Sixth Circuit ordered it to allow a male funeral director to dress and present as a woman at work. Harris Homes must do that even though its owner reasonably determined that the employee's actions would violate the company's sex-specific dress code and disrupt the healing process of grieving families. The language of Title VII does not mandate that result. This Court should grant review and reverse.

STATEMENT

A. Petitioner Harris Homes

Harris Homes is a small, family-owned funeral business that has helped its clients mourn the loss of loved ones since 1910. App. 90a. Thomas Rost is its current president and owner. *Ibid.*

As a devout Christian, Rost "sincerely believes that his 'purpose in life is to minister to the grieving, and his religious faith compels him to do that important work.'" App. 103a; accord *id.* at 6a. Harris Homes' mission statement, announced on its website, says that the company's "highest priority is to honor God in all that we do." *Id.* at 6a, 102a.

Funerals are somber and solemn events that address transcendent matters, hold deep spiritual significance, and mark some of the most difficult times in life. App. 196a–97a. They often are traumatic and painful experiences, and family and friends need to be able to focus on each other and their grief. *Id.* at 196a. Because of this, Rost requires his employees to conduct and present themselves in a professional manner and to avoid disrupting or distracting clients as they process their grief. *Id.* at 196a, 198a.

Harris Homes' dress code for employees who interact with clients is integral to ensuring that the company meets the high standards it sets. App. 91a–93a, 140a. It is a sex-specific dress code that prescribes certain requirements for male employees (e.g., they must wear suits) and others for female employees (e.g., they must wear dresses or skirts). *Id.* at 91a–93a. The protocol for funeral directors is

that men wear pant suits and women wear skirt suits. *Id.* at 106a. Respondents do not challenge the dress code as improper under Title VII. *Id.* at 112a; see also *id.* at 18a, 21a, 66a–67a, 86a, 111a, 138a.

Harris Homes' funeral directors are "prominent public representatives" of the company. App. 103a. They regularly interact with clients and guests while moving the deceased's body from the place of death "to the funeral home," helping "integrat[e] the clergy" into the funeral, "greeting the guests," and coordinating the family's "final farewell" to their loved one. *Id.* at 41a.

B. Respondent Stephens

Rost hired Respondent Stephens as a funeral director in 2007. App. 93a–94a. During Stephens's six years of employment, it is undisputed that Stephens "presented as a man." *Id.* at 6a. All relevant employment records—"including driver's license, tax records, and mortuary science license—identif[ied] Stephens as a male." *Id.* at 93a–94a. Nothing during Stephens's employment with Harris Homes, as Stephens testified, would have suggested to anyone at work that Stephens was "anything other than a man." *Id.* at 200a.

In a July 2013 letter, Stephens first told Rost that Stephens identifies as female. App. 8a, 94a–95a. "Stephens 'intend[ed] to have sex reassignment surgery,' and explained that '[t]he first step . . . is to live and work full-time as a woman for one year.'" *Id.* at 8a. Stephens's plan was to present as a woman and wear female attire at work. *Id.* at 95a.

A few weeks later, after seeking legal counsel, Rost told Stephens that the situation was "not going to work out." App. 9a, 96a. Because Rost wanted to reach "a fair agreement," he offered Stephens a severance package. *Id.* at 203a. Stephens declined it.

It is undisputed why Rost let Stephens go. He determined that acquiescing in Stephens's proposal would have violated Harris Homes' dress code, App. 9a, 100a–01a, and "disrupted the[] grieving and healing process" of "clients mourning the loss of their loved ones," *id.* at 198a. Rost was also concerned that female clients and staff would be forced to share restroom facilities with Stephens. *Id.* at 65a. Notably, Rost would *not* have reached the same decision had Stephens professed a female gender identity but "continued to conform to the dress code for male funeral directors while at work." *Id.* at 104a–05a; see also *id.* at 138a.

Also, because Rost interprets the Bible as teaching that sex is immutable, he believed that he "would be violating God's commands" if a male representative of Harris Homes presented himself as a woman while representing the company. App. 104a. Were he forced to violate his faith that way, Rost "would feel significant pressure to sell [the] business and give up [his] life's calling of ministering to grieving people as a funeral home director and owner." *Ibid.* The EEOC "does not contest [Rost's] religious sincerity." *Id.* at 124a.

C. Title VII

Congress enacted Title VII in 1964. The Act deems it "an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge

any individual, or otherwise to discriminate . . . , because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). When enacting Title VII, Congress's "major concern" was ending "race discrimination." *Holloway* v. *Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977).

The word "sex" "was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate." *Ulane* v. *E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); see also *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 243 n.9 (1989) (plurality) (sex "was included in an attempt to *defeat* the bill"). The problem Congress sought to address by adding "sex" was the lack of "equal opportunities for women" in employment. *Sommers* v. *Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam). So Congress chose language "ensur[ing] that men and women are treated equally." *Holloway*, 566 F.2d at 663.

Both at the time of Title VII's enactment and today, the word "sex" refers to a person's status as male or female as objectively determined by anatomical and physiological factors, particularly those involved in reproduction.[1] In contrast, gender identity is an altogether different construct. It refers

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[1] *E.g.*, The American College Dictionary 1109 (1970) (defining "sex" as "the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished"); The American Heritage Dictionary 1605 (5th ed. 2011) (classifying male and female "on the basis of their reproductive organs and functions"); American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 451 (5th ed. 2013) (DSM–5) ("'[S]ex' . . . refer[s] to the biological indicators of male and female").

to an "inner sense of being male or female," App. 204a, or "some category *other than* male or female," DSM–5 451 (emphasis added). The term first emerged in 1963 at a medical conference in Europe. David Haig, *The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001*, 33 Archives of Sexual Behavior 87, 93 (2004).

It was not until 1990 that the concept of gender identity appeared in federal law. That occurred with the passage of the Americans with Disabilities Act, which excluded protection for "gender identity disorders." 42 U.S.C. 12211(b)(1). A year later, when Congress reenacted Title VII, it did not amend the word "sex" to mean "gender identity." Civil Rights Act of 1991, Pub. Law 102–166.

Since then, dozens of state and local legislatures have added "gender identity" to nondiscrimination laws that already include "sex."[2] But Congress has considered and rejected at least a dozen proposals to similarly add "gender identity" to Title VII,[3] even

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[2] *E.g.*, Conn. Gen. Stat. § 46a-60(b)(1) (forbidding employment discrimination based on "sex" and "gender identity or expression"); Del. Code Ann. tit. 19, § 711(a)(1)–(2) (including "sex" and "gender identity"); D.C. Code § 2-1402.11(a) (including "sex" and "gender identity or expression").

[3] *E.g.*, Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007); To Prohibit Employment Discrimination Based on Gender Identity, H.R. 3686, 110th Cong. (2007); Employment Non-Discrimination Act of 2009, H.R. 2981, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009); Employment Non-Discrimination Act of 2011, H.R. 1397, 112th

while enacting other nondiscrimination provisions listing either "sex" or "gender" alongside "gender identity."[4]

D. District Court Proceedings

Stephens filed a charge of discrimination with the EEOC in September 2013, alleging an unlawful discharge based on "sex and gender identity" in violation of Title VII. App. 97a. After investigating, the EEOC filed suit against Harris Homes, claiming that the company violated Title VII by discharging Stephens allegedly (1) "because Stephens is transgender" and sought to "transition from male to female" and (2) "because Stephens did not conform to [Harris Homes'] sex- or gender-based preferences, expectations, or stereotypes." *Id.* at 166a. The EEOC sought to enjoin Harris Homes from "discriminat[ing] against an employee or applicant because of

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Cong. (2011); Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011); Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013); Equality Act, H.R. 3185, 114th Cong. (2015); Equality Act, S. 1858, 114th Cong. (2015); Equality Act, H.R. 2282, 115th Cong. (2017); Equality Act, S. 1006, 115th Cong. (2017).

[4] *E.g.*, 34 U.S.C. 12291(b)(13)(A) (prohibiting discrimination based on "sex" and "gender identity") (language added via the Violence Against Women Reauthorization Act of 2013, Pub. Law 113–4); 18 U.S.C. 249(a)(2) (prohibiting crimes committed because of "gender" or "gender identity") (language added via the National Defense Authorization Act for Fiscal Year 2010, Pub. Law 111–84); 34 U.S.C. 30503(a)(1)(C) (authorizing the Attorney General to assist in prosecuting crimes motivated by "gender" or "gender identity") (language added via the National Defense Authorization Act for Fiscal Year 2010).

their sex, including on the basis of gender identity." *Id.* at 168a.[5]

Harris Homes moved to dismiss. The district court agreed that "[t]here is no Sixth Circuit or Supreme Court authority to support the EEOC's position that transgender status is a protected class under Title VII." App. 173a. But the court found Sixth Circuit support for the EEOC's alternative theory—"a sex-stereotyping gender-discrimination claim" based on this Court's plurality opinion in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989). App. 183a. The court declined to dismiss that claim. *Id.* at 187a.

After discovery and cross-motions for summary judgment, the district court ruled for Harris Homes. The court reiterated that the EEOC could not prevail on its claim "that Stephens's termination was due to transgender status or gender identity—because those are not protected classes." App. 83a. But the EEOC raised a viable sex-stereotyping claim because the Sixth Circuit in *Smith* v. *City of Salem*, 378 F.3d 566 (6th Cir. 2004), had expanded those claims "further than other courts"—going so far as to create Title VII protection for "men who wear dresses." *Id.* at 108a, 117a–118a.

Despite this, the district court ruled for Harris Homes because the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb, prohibits the EEOC

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[5] The EEOC also claimed that Harris Homes violated Title VII by providing a more valuable "clothing allowance" to its male employees. App. 167a. Neither the district court nor the court of appeals has addressed the merits of that claim, and it is not the subject of this petition.

from applying "Title VII, and the body of sex-stereotyping case law that has developed under it, under the facts and circumstances of this unique case." App. 142a. Since Rost cannot in good conscience "support the idea that sex is a changeable social construct," forcing him to allow a male funeral director to present as a woman while representing Harris Homes "would impose a substantial burden" on Rost's ability "to conduct his business in accordance with his sincerely-held religious beliefs." *Id.* at 125a.

E. Sixth Circuit Ruling

The Sixth Circuit allowed Stephens to intervene on appeal because of a "concern that changes in policy priorities within the U.S. government might prevent the EEOC from fully representing Stephens's interests." App. 12a–13a. The court then reversed and ordered judgment for the EEOC. *Id.* at 81a.

The Sixth Circuit held that, under *Price Waterhouse*, employers engage in unlawful sex stereotyping when they administer sex-specific policies according to their employees' sex instead of their gender identity. App. 15a–18a. Because the EEOC did not challenge Harris Homes' dress code, the alleged stereotype was not "requiring men to wear pant suits and women to wear skirt suits," but declining to treat a male employee who professes a female gender identity as a woman. *Id.* at 18a. Although classifying all employees consistently with their sex does not disparately affect men or women, the court rejected *Price Waterhouse*'s requirement that a plaintiff prove "disparate treatment of men

and women," *id.* at 15a, because it could not "be squared with" the Sixth Circuit's prior decision in *Smith*, *id.* at 20a–21a.

The Sixth Circuit then judicially amended the word "sex" in Title VII to mean "gender identity" and held that "discrimination on the basis of transgender . . . status violates Title VII." App. 22a. As the court acknowledged, this went beyond what the Sixth Circuit previously held in *Smith*, *id.* at 27a, which did not "recognize Title VII protections for transgender persons based on identity," *id.* at 32a.

The court gave two reasons for rewriting Title VII. For one, employers that apply sex-specific policies based on their employees' sex instead of their gender identity "necessarily" rely on "stereotypical notions of how sexual organs and gender identity ought to align." App. 26a–27a. The Sixth Circuit thus treated the very idea of sex—which determines a person's status as male or female based on reproductive anatomy and physiology—as an illicit stereotype.

In addition, the court said that "it is analytically impossible" to apply sex-specific policies to an employee who asserts a gender identity that differs from his sex "without being motivated, at least in part, by the employee's sex." App. 23a. The mere fact that the employer "consider[s] that employee's biological sex . . . necessarily entails discrimination on the basis of sex." *Id.* at 30a.

The court also held that Title VII protects "transitioning status," App. 22a, and in so doing, left no doubt that it replaced "sex" with "gender identity," see *id.* at 24a–26a. Its opinion did not say

that "a person's sex can[] be changed"; in fact, it said that it "need not decide that issue." *Id.* at 26a. Rather, it emphasized that "gender identity" changes—it is "fluid, variable, and difficult to define"—because it has an "internal genesis that lacks a fixed external referent," and much like religion, should be "authenticat[ed]" through professions of identity rather than "medical diagnoses." *Id.* at 24a–25a n.4.

The Sixth Circuit then dismissed the statutory-construction principles on which Harris Homes relied. It said that the word "sex" includes "gender identity" because "statutory prohibitions often go beyond the principal evil" that Congress sought to remedy. App. 28a (quoting *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)). It also found nothing probative in other federal statutes, like the Violence Against Women Act, 34 U.S.C. 12291(b)(13)(A), that expressly "prohibit discrimination on the basis of [both] 'gender identity'" and "sex" because "Congress may certainly choose to use both a belt and suspender to achieve its objectives." App. 31a. Nor was there any "significance," the court said, in Congress's long-running rejection of bills seeking "to modify Title VII to include . . . gender identity." *Id.* at 31a–32a.

Finished judicially altering Title VII, the Sixth Circuit found that RFRA was not a defense. App. 41a–73a. Forcing Rost to violate his religious beliefs and pressuring him to give up his ministry to the grieving does not "substantially burden" his religious exercise. *Id.* at 46a–56a. Accordingly, the Sixth Circuit granted "summary judgment to the EEOC on its unlawful-termination claim." *Id.* at 81a.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for four reasons. First, the circuits are split into three camps on whether "sex" in Title VII means "gender identity" and includes "transgender status." One group says it does not. Another takes the same position, but subsequent case law casts doubt on that. And in the final category is the Sixth Circuit's decision judicially amending "sex" to mean "gender identity."

Second, the Sixth Circuit's opinion conflicts with—and substantially distorts—this Court's decision in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989). The *Price Waterhouse* plurality recognized that impermissible sex discrimination occurs when an employer treats one sex better than the other, and it identified an employer's reliance on sex stereotypes as one way of evidencing such discrimination. See *id.* at 250–51. But the Sixth Circuit departed from *Price Waterhouse*'s guidance by treating sex as if it were itself a stereotype and by rejecting the plurality's recognition that any action challenged on sex-stereotyping grounds must result in "disparate treatment" favoring one sex over the other. *Id.* at 251. That decision adds to an incomprehensible mishmash of circuit-court cases attempting to apply *Price Waterhouse*—a jumble that has been decades in the making. The need for clarity is long overdue.

Resolution of these circuit conflicts is urgently needed. The issues presented do not warrant further percolation because each new decision only breeds more division and confusion. Employers, employees,

governments, schools, lower courts, and attorneys need clarification now. It is untenable that courts are resolving claims differently depending entirely on the circuit where they arose. If Harris Homes' arguments are correct, courts are subjecting employers in some states to liability that federal law does not impose. And if the EEOC is right, courts in other states are rejecting claims that should be allowed to proceed. Either way, this Court's immediate intervention is required.

Third, the decision below defies this Court's principles of statutory construction. The court of appeals does not ground its analysis in the statutory term "sex" as understood in 1964, opting to read Title VII as if Congress used the term "gender identity" instead. Nor does the decision give sufficient weight to related federal statutes, Congress's repeated rejection of bills attempting to add "gender identity" to Title VII, or the judicial and administrative consensus that Congress ratified when it reenacted Title VII in 1991.

Finally, the Sixth Circuit's startling decision to change what it means to be male and female will have widespread consequences. It threatens to drive out sex-specific policies—ranging from living facilities and dress codes to locker rooms and restrooms—in employment and public education. It undermines critical efforts to advance women's employment and educational opportunities. And it imperils freedom of conscience. The sweeping implications of the Sixth Circuit's ruling counsel strongly in favor of this Court's granting review.

I. The circuits are irreconcilably split on whether "sex" in Title VII means "gender identity" and includes "transgender status."

Three undisputed facts in this case put squarely before this Court the question whether "sex" in Title VII means "gender identity." First, Stephens's sex while employed at Harris Homes was male. App. 6a, 93a-94a. Second, Rost let Stephens go because Stephens's plan to wear female clothing at work violated the company's sex-specific dress code. *Id.* at 9a, 100a–01a. Third, that "dress code policy *has not* been challenged by the EEOC in this action." *Id.* at 112a; see also *id.* at 18a ("We are not considering . . . whether the Funeral Home violated Title VII by requiring men to wear pant suits and women to wear skirt suits."); *id.* at 21a, 66a–67a, 86a, 111a, 138a. Title VII allows Harris Homes' straightforward enforcement of its unchallenged dress code *unless* the statute requires Rost to consider Stephens a woman. Such an obligation exists *only* if "sex" is rewritten to mean "gender identity" and include "transgender status." On that question, the circuits are hopelessly split among three camps.

1. The circuits in the first group—the Eighth and Tenth—have held that Title VII does not include "gender identity" or "transgender status." In 2007, the Tenth Circuit "agree[d] with . . . the vast majority of federal courts to have addressed this issue and conclude[d] [that] discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII." *Etsitty* v. *Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007). The "plain

meaning of 'sex'" refers to the "binary conception" of "male and female," and employers violate Title VII's ban on sex discrimination only when employees "are discriminated against because they are male or because they are female." *Id.* at 1222.

The Eighth Circuit has likewise concluded that "discrimination based on one's transsexualism does not fall within the protective purview of [Title VII]." *Sommers* v. *Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam). Expressing "agreement with the district court," *ibid.*, the Eighth Circuit quoted its rationale:

> [T]he Court does not believe that Congress intended by its laws prohibiting sex discrimination to require the courts to ignore anatomical classification and determine a person's sex according to the psychological makeup of that individual. The problems of such an approach are limitless. One example is the simple practical problem that arose here—which restroom should plaintiff use? [*Id.* at 749.]

2. The circuits in the second camp—the Seventh and Ninth—have previously determined that "sex" in Title VII does not include "gender identity" or "transgender status." But subsequent case law construing other nondiscrimination laws has essentially said otherwise. In *Ulane* v. *Eastern Airlines, Inc.*, the Seventh Circuit held that "Title VII is not so expansive in scope as to prohibit discrimination against transsexuals." 742 F.2d 1081, 1087 (7th Cir. 1984). That ruling overturned the district court's conclusion that the term "sex"

includes "sexual identity." *Id.* at 1084. Refusing to rewrite Title VII, the Seventh Circuit recognized its proper role when construing statutes:

> [T]o include transsexuals within the reach of Title VII far exceeds mere statutory interpretation. Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation. For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating. [*Id.* at 1086.]

Yet recently, the Seventh Circuit distinguished *Ulane* and reached the opposite conclusion when construing the word "sex" in Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a). *Whitaker By Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047 (7th Cir. 2017). The court announced that people who assert a gender identity in conflict with their sex now have categorical protection under *Price Waterhouse* because they, "[b]y definition," do not "conform to the sex-based stereotypes of the[ir] sex" *Id.* at 1047–48. From that premise, the Seventh Circuit told public schools that they must regulate access to sex-specific facilities like locker rooms and restrooms based on gender identity instead of sex. *Id.* at 1049–50. It is hard to say that *Ulane* remains good law after *Whitaker*.

The Ninth Circuit's story is similar. In *Holloway* v. *Arthur Andersen & Co.*, it interpreted "sex" in Title VII according to "its plain meaning" and held that the statute does not include "transsexuals as a class" or "decision[s] to undergo sex change surgery." 566 F.2d 659, 662, 664 (9th Cir. 1977). The court thus denied the claim of a plaintiff who alleged discriminatory treatment not "because she is male or female, but rather because she is a transsexual who chose to change her sex." *Id.* at 664.

Years later, though, when interpreting the word "gender" in the Gender Motivated Violence Act, 34 U.S.C. 12361, the Ninth Circuit said that it was overruling *Holloway*. See *Schwenk* v. *Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000). The late Judge Reinhardt wrote that "*Holloway* has been overruled by the logic and language of *Price Waterhouse*," and that "sex" under Title VII refers to more than "the biological differences between men and women." *Ibid.* That decision dramatically altered the Ninth Circuit's sex-discrimination jurisprudence.

3. In the third group is the Sixth Circuit, which has now definitively interpreted "sex" in Title VII to mean "gender identity" and include "transgender status." App. 14a–15a, 22a, 28a, 30a, 35a–36a. Other circuits have similarly redefined "sex" in related nondiscrimination contexts. The Eleventh Circuit, for instance, used *Price Waterhouse* to hold that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination" that violates the Equal Protection Clause of the Fourteenth Amendment. *Glenn* v. *Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011). In a Title IX case, the Third Circuit "concluded that discriminating

against transgender individuals constitutes sex discrimination." *Doe by & through Doe* v. *Boyertown Area Sch. Dist.*, 893 F.3d 179, 199 (3d Cir. 2018). And the Fourth Circuit, applying *Auer* deference principles, reached a similar conclusion in a now-vacated decision, see *G.G.* v. *Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 720–23 (4th Cir. 2016), *vacated by* 137 S. Ct. 1239 (2017), which lower courts in the circuit—including the district court in that very case—continue to treat as "binding law," *e.g.*, *Grimm* v. *Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 743 n.6 (E.D. Va. 2018); *M.A.B.* v. *Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 712 n.5 (D. Md. 2018).

4. Even the federal government is divided. On the one hand is the Department of Justice. In an October 4, 2017 Memorandum, the Attorney General announced that "Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*, including transgender status." App. 193a. "'Sex' is ordinarily defined to mean biologically male or female," the Attorney General explained, and "Congress has confirmed this ordinary meaning by expressly prohibiting, in several other statutes, 'gender identity' discrimination, which Congress lists in addition to, rather than within, prohibitions on discrimination based on 'sex' or 'gender.'" *Id.* at 192a–93a. The Attorney General also declared that Title VII does not "proscribe[] employment practices (such as sex-specific bathrooms) that take account of the sex of employees but do not impose different burdens on similarly situated members of each sex." *Id.* at 193a.

On the other hand is the EEOC. In 2012, it said that a "complaint of discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII." *Macy* v. *Holder*, EEOC DOC 0120120821 (Apr. 20, 2012), 2012 WL 1435995, at *1. That decision "expressly overturn[ed]" the EEOC's prior position, in place since at least 1984. *Id.* at *11 n.16; see, *e.g.*, *Casoni* v. *U.S. Postal Serv.*, EEOC DOC 01840104 (Sept. 28, 1984), 1984 WL 485399, at *3 ("allegation of sex discrimination on account of being a male to female preoperative transsexual" was not a "cognizable claim[] under the provisions of Title VII"). This lawsuit is an effort to write the EEOC's new view into law.

This split of authority has had more than enough time to percolate. Federal courts have been addressing these questions since the late 1970s. See *Holloway*, 566 F.2d at 662–64. The circuit-court confusion emerged decades ago when courts began to misread *Price Waterhouse*. See *Schwenk*, 204 F.3d at 1201–02. And at least five circuits have decided the Title VII issue directly, while many others have addressed similar issues in related contexts. No more development in the lower courts is necessary.

Awaiting additional cases is particularly ill advised because the status quo forces employers, governments, and schools to apply core policies—such as access to living facilities, locker rooms, and restrooms, not to mention compliance with dress codes—differently based on where they find themselves. It is unsustainable that employers' responsibilities under Title VII, governments' obligations under the Equal Protection Clause, and schools' duties under Title IX shift so dramatically

depending on the circuit in which they are located. Only this Court can resolve the cacophony of inconsistent pronouncements on the meaning of sex discrimination in federal law. It should do so now.

II. The Sixth Circuit's decision misreads *Price Waterhouse* and adds to a confusing and inconsistent body of lower-court case law.

Price Waterhouse resolved a circuit split over—and the plurality's holding addressed only—the burden that each party bears in Title VII mixed-motives cases. 490 U.S. at 232, 258. In its opinion, the plurality observed that the plaintiff there—a female employee seeking a promotion—proved sex discrimination through evidence that her employer made employment decisions based on stereotypes about women. *Id.* at 250–52, 255–58. Foremost among those stereotypes was "insisting" that women "must not be" "aggressive" in the workplace. *Id.* at 250–51; see also *id.* at 234–35, 256.

Title VII, the plurality said, forbids "*disparate treatment of men and women* resulting from sex stereotypes." 490 U.S. at 251 (quoting *L.A. Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 707 n.13 (1978)) (emphasis added). Disparate treatment was obvious there because aggressive men were promoted and praised, while aggressive women were passed over and pushed down. *Ibid.* Such stereotyping placed female employees in an "impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not." *Ibid.*

The dissenting opinion "stress[ed] that Title VII creates no independent cause of action for sex stereotyping." 490 U.S. at 294 (Kennedy, J.,

dissenting). Instead, "[e]vidence of use by decision-makers of sex stereotypes is" a *means* of demonstrating "discriminatory intent" and disparate treatment. *Ibid.* Also, the two Justices who "concurred in the judgment only . . . said nothing about sex stereotyping as a 'theory' of sex discrimination." *Hively* v. *Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 369 (7th Cir. 2017) (en banc) (Sykes, J., dissenting).

1. The Sixth Circuit's application of *Price Waterhouse* conflicts with and distorts that case in two fundamental ways.

a. First, the Sixth Circuit rejected what the *Price Waterhouse* plurality said about disparate treatment favoring one sex over the other. The plurality condemned not all sex stereotypes in the workplace, but only the "disparate treatment of men and women resulting from sex stereotypes." 490 U.S. at 251 (quoting *Manhart*, 435 U.S. at 707 n.13). Yet the Sixth Circuit rejected the requirement that plaintiffs prove "disparate treatment" advantaging one sex because it could not "be squared with" that court's own precedent. App. 20a–21a.

By erasing that requirement, the Sixth Circuit unmoored *Price Waterhouse* from Title VII's text, which prohibits "discriminat[ion] . . . because of . . . sex," and it perpetuated the notion that sex stereotyping is an independent cause of action. Cf. *Price Waterhouse*, 490 U.S. at 294 (Kennedy, J., dissenting) ("Title VII creates no independent cause of action for sex stereotyping."); *Hively*, 853 F.3d at 369 (Sykes, J., dissenting) (same). That, in turn, led the court of appeals to announce a federal right for

men to "wear dresses" at work. App. 16a; cf. *Hamm* v. *Weyauwega Milk Prod., Inc.*, 332 F.3d 1058, 1067 (7th Cir. 2003) (Posner, J., concurring) (rejecting "a subtype of sexual discrimination called 'sex stereotyping'" that creates a "federally protected right for male workers to wear nail polish and dresses"). This Court should grant review and clarify that *Price Waterhouse* did not establish a free-standing claim of sex stereotyping that treats as irrelevant whether one sex is favored over the other.

b. Second, the Sixth Circuit's decision adopted a bewildering view of sex stereotyping. It denounced as stereotyping *all* sex-specific policies administered according to sex instead of gender identity. See App. 26a–27a (decrying "stereotypical notions of how sexual organs and gender identity ought to align"). The court thus deemed the very idea of sex—which determines a person's status as male or female based on reproductive anatomy and physiology—as itself a stereotype.

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

Nothing in *Price Waterhouse* suggests that sex itself is a stereotype. To the contrary, this Court's cases firmly reject that it is. Sex-based "stereotype[s]" consist of "fictional difference[s] between men and women," such as the "assumption[]" that women cannot "perform certain kinds of work."

Manhart, 435 U.S. at 707. In contrast, this Court has squarely held that "[p]hysical differences between men and women" relating to reproduction—the very features that determine sex—are not "gender-based stereotype[s]." *Nguyen* v. *INS*, 533 U.S. 53, 68 (2001).

Nor does *Price Waterhouse* insinuate that Title VII requires employers to treat their employees according to their professed gender identity rather than their biological sex. The plurality said that its "specific references to gender throughout th[e] opinion, and the principles [it] announce[d], apply with equal force to discrimination based on race." 490 U.S. at 243 n.9. No one would suppose that the plurality ordered employers to agree that a white employee who identifies as black is actually African American. Insisting on the equivalent in the sex context shows how far the Sixth Circuit departed from what the *Price Waterhouse* plurality actually said.

2. The Sixth Circuit's opinion adds to "a confusing hodgepodge" of *Price Waterhouse* decisions that have resulted from "an unfortunate tendency to read [the plurality's opinion] for more than it's worth." *Hively*, 853 F.3d at 371 (Sykes, J., dissenting); see, *e.g.*, *Evans* v. *Ga. Reg'l Hosp.*, 850 F.3d 1248, 1262 (11th Cir. 2017) (Rosenbaum, J., dissenting) ("*Price Waterhouse* rocked the world of Title VII litigation."). Some circuits have used *Price Waterhouse* the same way that the Sixth Circuit did. The Third and Seventh Circuits, for example, recently interpreted *Price Waterhouse* to compel schools to administer sex-specific locker-room and restroom policies according to gender identity

instead of sex. *Whitaker*, 858 F.3d at 1047–50; *Boyertown Area Sch. Dist.*, 893 F.3d at 198–99. And district courts in the Fourth Circuit have done likewise. *Grimm*, 302 F. Supp. 3d at 744–47; *M.A.B.*, 286 F. Supp. 3d at 715–17.

Other circuits have properly recognized *Price Waterhouse*'s limits. "However far *Price Waterhouse* reaches," the Tenth Circuit concluded, it does not "require[] employers to allow biological males to use women's restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." *Etsitty*, 502 F.3d at 1224. The Tenth Circuit thus affirmed that employers may administer sex-specific policies according to their employees' sex rather than their gender identity. And the Ninth Circuit—in a decision that the Sixth Circuit labeled "irreconcilable" with its own cases, App. 19a–20a—held that sex-specific dress and grooming policies that impose equal burdens on the sexes do not violate *Price Waterhouse*. *Jespersen* v. *Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1111–13 (9th Cir. 2006) (en banc).

This Court's review is needed to address these conflicting circuit decisions and bring clarity to the muddled mess that has become *Price Waterhouse*'s legacy.

III. The Sixth Circuit's decision conflicts with this Court's directives on statutory construction.

When construing Title VII, as with all statutes, "the starting point" for interpretation "is the statutory text." *Desert Palace, Inc.* v. *Costa*, 539 U.S.

90, 98 (2003). "It is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning'" when they were enacted. *Sandifer* v. *U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (quoting *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)). To illustrate, the fact that the word "blockbuster" meant a large bomb in the early 20th century and refers to a hit movie today, see *Viacom Inc.* v. *Ingram Enters., Inc.*, 141 F.3d 886, 891–92 (8th Cir. 1998), does not mean that a 1930s ban on citizen possession of "blockbusters" now prohibits possession of DVDs.

1. Title VII forbids discrimination "because of . . . sex." 42 U.S.C. 2000e-2(a)(1). "In common, ordinary usage in 1964—and now, for that matter—the word 'sex' means biologically *male* or *female*," *Hively*, 853 F.3d at 362 (Sykes, J., dissenting), as objectively determined by anatomical and physiological factors, particularly those involved in "reproductive functions," *G.G.*, 822 F.3d at 736 (Niemeyer, J., dissenting) (collecting dictionaries); see also note 1, *supra* (collecting sources).

The Sixth Circuit ignored this undisputed definition. Instead, it assumed that "sex," as understood in 1964, meant "gender identity." That is impossible. Not only is gender identity—defined by the EEOC as the "inner sense of being male or female," App. 204a—very different from sex, see p. 30, *infra*, it was a nascent concept when Congress enacted Title VII, see Haig, *supra*, at 93 ("gender identity" was first introduced at a European medical conference in 1963). It is only through "judicial interpretive updating," *Hively*, 853 F.3d at 353

(Posner, J., concurring)—not faithful statutory construction—that courts have begun recasting "sex" to mean "gender identity."

The Sixth Circuit rejected this Court's text-based method of statutory construction because "statutory prohibitions often go beyond the principal evil" that Congress sought to address. App. 28a (quoting *Oncale*, 523 U.S. at 79). True enough. But that is no excuse for ignoring the text. As this Court explained in *Oncale*, Title VII's language is the ultimate guide when construing that statute. 523 U.S. at 79.

Attempting a textual argument, the Sixth Circuit insisted that Harris Homes "discriminate[d] . . . because of . . . sex," 42 U.S.C. 2000e-2(a)(1), since it had to "consider[] [Stephens's] biological sex" when applying its dress code. App. 30a; accord *id.* at 23a–24a. But "it is not the case that any employment practice that can only be applied by identifying an employee's sex is prohibited." *Zarda* v. *Altitude Express, Inc.*, 883 F.3d 100, 151 (2d Cir. 2018) (en banc) (Lynch, J., dissenting). That would carry in "ramifications that are sweeping and unpredictable," including the effective invalidation of sex-specific living facilities, locker rooms, and restrooms. *Id.* at 134 (Jacobs, J., concurring). The proper application of Title VII, instead, is that employers only "discriminate . . . because of . . . sex" when they treat one sex better than the other. *Manhart*, 435 U.S. at 707 n.13 (requiring "disparate treatment [between] men and women"); *Price Waterhouse*, 490 U.S. at 251 (plurality) (same); *Oncale*, 523 U.S. at 78 (same).

2. "When interpreting a statute, [this Court] examine[s] related provisions in other parts of the U.S. Code." *Boumediene* v. *Bush*, 553 U.S. 723, 776 (2008). For statutes that address discrimination, the analysis often considers other nondiscrimination provisions. *E.g.*, *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 174–75 (2009) (considering Title VII when interpreting the Age Discrimination in Employment Act); *Desert Palace*, 539 U.S. at 99 (considering other provisions in Title 42 when construing Title VII).

Congress has enacted multiple nondiscrimination laws listing either "sex" or "gender" alongside "gender identity." *E.g.*, 34 U.S.C. 12291(b)(13)(A); 18 U.S.C. 249(a)(2); 34 U.S.C. 30503(a)(1)(C). When Congress wants to prohibit discrimination based on gender identity, "it knows exactly how to do so." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1626 (2018). And when Congress uses the term "sex," it does not mean "gender identity," lest federal nondiscrimination law be imbued with "surplusage," *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001), and "redundan[cy]," *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 574 (1995). The Sixth Circuit ignored the established rule against reading redundancy into statutes, choosing instead to adopt the contradictory and heretofore unknown interpretive canon of "belt-and-suspenders [legislative] caution." App. 31a.

3. This Court has recognized that Congress's uniform rejection of "numerous and persistent" legislative proposals sheds some light on the meaning of existing statutes. *E.g.*, *Flood* v. *Kuhn*, 407 U.S. 258, 281–84 (1972) ("Congress, by its positive inaction, . . . clearly evinced a desire" not to change the law). Even the *Price Waterhouse* plurality

cited, as support for its statutory interpretation, Congress's decision not to adopt "an amendment" to Title VII. 490 U.S. at 241 n.7. But the Sixth Circuit found no "significance" in Congress's repeated rejection of bills seeking to add "gender identity" to Title VII. App. 31a–32a; see note 3, *supra* (collecting bills). Though the failure to enact those proposals is not dispositive, it surely "means something," *Zarda*, 883 F.3d at 155 (Lynch, J., dissenting), and bolsters the case against interpreting the word "sex" to mean "gender identity."

4. Finally, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 382 n.66 (1982); accord *Texas Dep't of Hous. and Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) ("If a word or phrase has been given a uniform interpretation by inferior courts, a later version of that act perpetuating the wording is presumed to carry forward that interpretation.") (cleaned up).

Congress reenacted Title VII in 1991. Civil Rights Act of 1991, Pub. Law 102–166. At that time, the unbroken consensus of the circuits—as well as the EEOC—was that "sex" in Title VII did *not* include gender-identity-based classifications like "transgender status." *Holloway*, 566 F.2d at 662–64; *Sommers*, 667 F.2d at 749–50; *Ulane*, 742 F.2d at 1086–87; *Casoni*, 1984 WL 485399 at *3. While the 1991 amendment altered Title VII in myriad ways, it did not amend "sex" to mean "gender identity" or include "transgender status." Congress is thus

presumed to have adopted the uniform judicial and administrative interpretation prevailing at the time. The Sixth Circuit erred in construing "sex" as though Congress had instead amended the statute.

IV. Interpreting "sex" to mean "gender identity"—as the Sixth Circuit did—will have far-reaching consequences.

By replacing "sex" with "gender identity" and denouncing sex as a stereotype, the Sixth Circuit brought about a seismic shift in the law. While "sex" views the status of male and female as an objective fact based in reproductive anatomy and physiology, "gender identity" treats it as a subjective belief determined by internal perceptions without "a fixed external referent." App. 24a–25a n.4. Gender identity is, as the Sixth Circuit acknowledged, "fluid, variable," "difficult to define," and "authenticat[ed]" by simple professions of belief instead of "medical diagnoses." *Ibid.*; cf. *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (sex "is an immutable characteristic determined solely by the accident of birth"). It is not limited to the binary choice between male and female, but includes other categories like gender-fluid, genderless, and many others. DSM–5 451. Trading "gender identity" for "sex" is a sea change in the law.

1. One immediate impact of that change is that federal law now forbids employers and public schools from administering sex-specific policies like dress codes, living facilities, locker rooms, and restrooms

based on sex.[6] Just two years ago, this Court granted review in a similar case where the Fourth Circuit prohibited a school board from regulating access to restrooms based on sex. *Gloucester Cty. Sch. Bd.* v. *G.G.*, 137 S. Ct. 369 (2016). While changed circumstances there prompted a remand before this Court reached the merits, see 137 S. Ct. 1239 (2017), granting review here would raise similar issues about the meaning of "sex" in federal nondiscrimination law.

The Sixth Circuit's mandate that organizations enforce their sex-specific policies based on gender identity raises a host of problems. For one, it fosters inconsistency and opens the door to manipulation. Anyone—not just those with "medical diagnoses"—can profess a gender identity that conflicts with their sex. App. 24a–25a n.4. And as Stephens admitted during deposition, if an employer allows a male employee "to present as a woman," it must permit him to "go[] back to present[ing] as a man later on." *Id.* at 200a.

Stephens's testimony also demonstrates that where gender identity is the prevailing construct, "sex" becomes a mere collection of stereotypes, and employers *are forced to engage in stereotyping*. Stephens testified that while Harris Homes ordinarily must permit "a male funeral director . . .

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[6] The decision here, resolved under Title VII, affects public schools under Title IX because the lower courts regularly consult Title VII case law when applying Title IX. *E.g.*, *Dodds* v. *U.S. Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (per curiam) (citing Title VII cases in the Title IX context); *G.G.*, 822 F.3d at 718 ("We look to case law interpreting Title VII . . . for guidance in evaluating a claim brought under Title IX.").

to present as [a] woman at work," it need not allow that if he is "bald" with a "neatly trimmed beard and mustache." App. 200a–01a. Stephens justified this disparity because that employee's appearance "doesn't meet the expectations" of what a female "[t]ypically" looks like. *Id.* at 201a. When asked "[w]hat meets th[ose] expectations," Stephens replied: "Your guess is as good as mine." *Ibid.*

According to Stephens, then, if employees fail to "adhere to the part [they are] professing to play," their employer may decline to recognize their gender identity. App. 202a. In other words, employers like Harris Homes must consider Stephens a woman because Stephens planned to conform to enough female stereotypes, but they could treat differently another employee who did not. Administering policies under that regime requires decisionmaking based on sex stereotypes. It will entrench rather than eradicate them.

The specific implications of the Sixth Circuit's ruling for sex-specific living facilities, locker rooms, and restrooms raise fundamental privacy concerns. See *United States* v. *Virginia*, 518 U.S. 515, 550 n.19 (1996) (discussing "alterations necessary" in living facilities "to afford members of each sex privacy from the other sex"). For employers and public-school officials that want to protect privacy interests, the decision "will require novel changes to . . . restrooms and locker rooms." *Dodds*, 845 F.3d at 224 (Sutton, J., dissenting). By short-circuiting the legislative process, the court of appeals kept Congress from addressing those sensitive issues before they arose. See, *e.g.*, N.M. Stat. Ann. § 28-1-9(E) (exempting sex-specific "sleeping quarters," "showers," and

"restrooms" from the state's nondiscrimination law); Wis. Stat. § 106.52(3)(b)–(c) (same); 775 Ill. Comp. Stat. 5/5-103(B) (similar).

2. Equally important, the Sixth Circuit's decision undermines the primary purpose for banning discrimination based on sex—to ensure "equal opportunities" for women, *Sommers*, 667 F.2d at 750, and "eliminate workplace inequalities that [have] held women back from advancing," *Zarda*, 883 F.3d at 145 (Lynch, J., dissenting); see also *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429 (1971) ("The objective of Congress . . . was to achieve equality of employment opportunities"). Employment reserved for women—like playing in the WNBA or working at a shelter for battered women, see 42 U.S.C. 2000e-2(e)(1) (authorizing sex as a bona fide occupational qualification)—now must be opened to males who identify as women. The same is true of sports and educational opportunities under Title IX. The Sixth Circuit's ruling impedes women's advancement.

3. Substituting "gender identity" for "sex" in nondiscrimination laws also threatens freedom of conscience. Statutes interpreted that way have the effect, for instance, of forcing doctors to participate in—or employers to pay for—surgical efforts to alter sex in violation of their deeply held beliefs. See *Franciscan All., Inc.* v. *Burwell*, 227 F. Supp. 3d 660, 691–93 (N.D. Tex. 2016) (concluding that a regulation likely violated RFRA by announcing that "sex" in the Patient Protection and Affordable Care Act's nondiscrimination provision, 42 U.S.C. 18116(a), means "gender identity").

And some governments have used those laws to mandate that employers, teachers, students, and others speak pronouns and similar sex-identifying terminology that conflicts with their conscience. *E.g.*, N.Y.C. Comm'n on Human Rights, *Legal Enf't Guidance on Discrimination on the Basis of Gender Identity or Expression* (June 28, 2016), *available at* https://on.nyc.gov/2KRC7e8 (requiring "employers and covered entities to use an individual's preferred name, pronoun and title (*e.g.*, Ms./Mrs.) regardless of the individual's sex assigned at birth, anatomy, . . . or the sex indicated on the individual's identification").

This very case involves freedom-of-conscience concerns. As the district court explained, accepting the EEOC's claim compels Rost—a devout man of faith—to violate his sincere religious beliefs about the immutability of sex. App. 121a–26a.

In sum, the Sixth Circuit ushered in a profound change in federal law accompanied by widespread legal and social ramifications. The stakes are too great—and the impacts on third parties too substantial—for this Court to let that decision go unreviewed.

V. This case is an ideal vehicle for addressing the important questions presented.

This case raises pure questions of law, and no material facts are disputed, not even the reason why Rost parted ways with Stephens. The Court should use this case as the vehicle for bringing clarity to sex-discrimination jurisprudence.

Two petitions for a writ of certiorari pending before this Court raise a similar (but different) question: whether "sex" in Title VII encompasses "sexual orientation." See *Altitude Express, Inc.* v. *Zarda*, Pet. for a Writ of Cert. at i (No. 17–1623) (May 29, 2018), and *Bostock* v. *Clayton Cty.*, Pet. for a Writ of Cert. at i (No. 17–1618) (May 25, 2018). While the questions presented in all three of these cases are important, the issues raised in this one are particularly pressing. The sexual-orientation cases seek to *expand* what is included in the term "sex," whereas this case attempts to *transform* what "sex" means by replacing it with "gender identity." The fallout of that redefinition threatens far-reaching consequences, which should not be imposed without this Court's approval. See section IV, *supra*. Accordingly, the Court should grant review here even if it takes up one of the sexual-orientation cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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