No. 16-2424

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff/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, Hon. Sean F. Cox, No. 14-13710

OPENING BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLANT

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The Equal Employment Opportunity Commission (EEOC) requests oral argument because this case raises an important and novel issue in this circuit: whether the court erred below in holding that the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq*., operates as a defense to the EEOC's enforcement action in this case seeking to vindicate the charging party's right to be free from sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. This case also raises the significant issue of whether Title VII's prohibition against sex discrimination, 42 U.S.C. § 2000e-2(a), encompasses discrimination based on transgender status and/or transitioning. Finally, this case raises an important issue regarding the permissible scope of an EEOC lawsuit following an investigation that reveals discrimination beyond that alleged in the charge. Oral argument would assist this Court in resolving these significant issues.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(1), (3). On April 23, 2015, the court ruled on the defendant's motion to dismiss. Opinion, R.13, PageID#182. On August 18, 2016, the court granted summary judgment and entered final judgment on all claims. Opinion, R.76, PageID#2179-2234; Judgment, R.77, PageID#2235. Pursuant to Fed. R. App. P. 4(a)(1)(B)(ii), on October 13, 2016, the EEOC timely filed its notice of appeal. Appeal Notice, R.78, PageID#2236. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Title VII's prohibition on discrimination "because of . . . sex," 42 U.S.C. § 2000e-2(a), encompasses discrimination based on transgender status and/or transitioning from male to female.

2. Whether the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1, provides a defense to the EEOC's enforcement action, allowing the defendant to rely on its sincerely held religious beliefs to justify its termination of Aimee Stephens because she is a transgender woman,

thereby depriving Stephens of her Title VII right to be free from sex discrimination.

3. Whether the EEOC may pursue its clothing benefit claim for a class of women where the EEOC discovered the alleged violation during a reasonable investigation of Aimee Stephens' charge alleging sex-based discriminatory termination.

STATEMENT OF THE CASE

A. Statement of the Facts

Charging party Aimee Stephens is a transgender woman. She was "assigned male at birth." Stephens Depo. p.49, R.51-18, PageID#817. Stephens began working for Defendant R.G. & G.R. Harris Funeral Homes Inc. ("Funeral Home") in October 2007, when her legal name was William Anthony Stephens and she presented as a male. Counter Facts, R.61, PageID#1825 (¶¶1,2); Stephens Depo. p.48-50, R.51-18, PageID#816-817. Stephens worked as a funeral director/embalmer. Counter Facts, R.61, PageID#1825 (¶2). The duties of funeral directors/embalmers include removing remains, embalming/cremation, planning services, completing

obituary notices, processing death certificates, filing for insurance/benefits, appearing at services, and accompanying families and friends to burials. Def.'s Answers to Discovery Requests, R.51-21, PageID#832-33. Stephens was a "very good embalmer"; it is undisputed that her termination was unrelated to her job performance. Kish Aff., R.54-18, PageID#1476; Counter Facts, R.61, PageID#1829 (¶16).

The Funeral Home is a closely-held, for-profit corporation with three Michigan locations. Def. Facts, R.55, PageID#1683-84 (¶1,4).[1] Thomas Rost owns 95.4% of the company; his children own the rest. Def. Facts, R.55, PageID#1684 (¶8). Rost is Christian. Def. Facts, R.55, PageID#1685 (¶17). The Funeral Home's website contains a mission statement providing that its "highest priority is to honor God in all we do as a company" and including a Scripture verse. Def. Facts, R.55, PageID#1686 (¶¶21,23). Placed in the funeral homes are Christian devotional booklets and small "Jesus Cards" with Bible verses. *Id*. at ¶23.

[1] Those facts taken from R.55 were undisputed by the EEOC. Counter-Statement of Disputed Facts, R.64, PageID#2066-2088.

The Funeral Home, however, is not affiliated with any church and its articles of incorporation do not avow any religious purpose. Counter Facts, R.61, PageID#1832-33 (¶¶25,26). The Funeral Home serves clients of every religion (including Hindu, Muslim, Jewish, native Chinese, and no religion), and employs individuals from different religions (or no religion). Counter Facts, R.61, PageID#1833-35 (¶¶30,37). Employees have worn Jewish head coverings during Jewish funeral services. *Id*. at PageID#1834 (¶31). The Funeral Home is not closed for any religious holiday; rather, it is open 365 days a year. *Id*. at PageID#1833 (¶29). Although rooms where funerals are held are called "chapels," they are decorated to look like living rooms and lack religious fixtures. PageID#1834 (¶33).

The Funeral Home has a sex-specific dress code. Dress Code, R.51-20, PageID#826-28. Men must wear dark suits, white shirts, a tie "selected by the company, or very similar," and dark socks and shoes for funerals, viewings, calls, or any other funeral work. *Id*. at PageID#827. Women must wear a conservative suit or dress. *Id*. at PageID#828.

The Funeral Home provided male employees who interacted with the public with free suits and ties. Counter Facts, R.61, PageID#1836 (¶42). Full-time male employees were provided upon hire with two suits (each worth $225) and two ties (each worth $10), while part-time males were provided one suit and tie upon hire. Counter Facts, R.61, PageID#1837-38 (¶¶47,52). The Funeral Home replaced the men's suits and ties "as needed," which ranged from every nine months to every few years. Counter Facts, R.61, PageID#1837 (¶49); Cash Depo. p.19, R.51-12, PageID#754 (new suit every nine months to a year). Male employees who received free suits were also able to have their company suits tailored, free of charge, during work hours. R.61, Counter Facts, PageID#1838 (¶¶50-51). The Funeral Home did not provide female employees who interacted with the public any clothes, or any clothing allowance, until October 2014 (after EEOC filed suit), when it began paying full-time female employees an annual stipend of $150/year and part-time employees a stipend of $75/year. Counter Facts, R.61, PageID#1839 (¶54).

On July 31, 2013, Stephens gave Rost a letter describing her struggle with "gender identity disorder" and relating her "diagnos[is] as a tran[s]sexual." Letter, R.54-21, PageID#1494. Stephens stated that she intended to have sex reassignment surgery, which required her to first live and work as a woman for one year. *Id*. Therefore, she explained, she would return from her vacation as her "true self, A[im]ee Australia Stephens, in appropriate business attire." *Id*.

When Stephens returned on August 15, 2013, Rost fired her. Counter Facts, R.61, PageID#1828 (¶10). Rost said, "this is not going to work," and offered Stephens a severance agreement if she "agreed not to say anything or do anything." Stephens Depo. pp.75-76, R.54-15, PageID#1455; Rost Depo. p.126, R.63-5, PageID#1974. Stephens refused. *Id*. Instead, she filed a charge of sex discrimination with the EEOC. Charge, R.54-22, PageID#1497. The charge states that after informing management of her "gender transitioning" plans, Stephens was told that "the public would [not] be accepting of [her] transition." The charge further states that Stephens believed that she was fired due to her "sex and gender identity, female." *Id*.

During the EEOC's investigation into these allegations, Rost never mentioned any religious objection to employing Stephens. Rather, the Funeral Home asserted in the position statement submitted to the EEOC that the charge should be dismissed because "Aimee" Stephens never worked there. Statement, R.54-23, PageID#1499. Rost felt uncomfortable with using the name "Aimee" for Stephens because "he's a man." Rost Depo. p.23, R.51-16, PageID#769. While the company admitted it fired "Anthony" Stephens, it said the termination was justified because Stephens said she would no longer abide by the male dress code. Statement, R.54-23, PageID#1500. Rost told an EEOC investigator that "dressing as [a] woman would have interrupted business[.]" Notes, R.54-24, PageID#1509.

During the investigation, another employee told the EEOC investigator that Stephens was terminated for refusing to wear the "company provided suit[], tie, and shirt." Notes, R.54-24, PageID#1513. The investigator then asked the employee whether women were provided suits or uniforms. *Id*. The witness said not in the last ten or fifteen years. *Id*.

The EEOC issued a letter of determination (Determination) finding cause to believe Stephens' termination violated Title VII. Determination, R.63-4, PageID#1968. The Determination added that "[l]ike and related and growing out of this investigation, the Commission found reasonable cause to believe that [the Funeral Home] discriminated" against female employees by providing only male employees with a clothing benefit. *Id*. The EEOC attempted to resolve these matters through informal conciliation, but the parties were unable to reach an agreement. *See generally* Exhibit, R.74, PageID#2165 (attaching (sealed) proposed conciliation agreement).

On September 25, 2014, the EEOC filed a complaint in district court alleging that the Funeral Home fired Stephens "because Stephens is transgender, because of Stephens's transition from male to female, and/or because Stephens did not conform to [the Funeral Home's] sex-or gender-based preferences, expectations, or stereotypes." Complaint ¶15, R.1, PageID#4-5. The EEOC also alleged that the Funeral Home violated Title VII by providing a clothing benefit only to male employees. *Id*. at ¶17.

B. Motion to Dismiss

The Funeral Home filed a Rule 12(b)(6) motion to dismiss the termination claim for failure to state a claim. Motion, R.7, PageID#22-47. The district court agreed in part with the Funeral Home's arguments but denied the motion.

The court first held that discrimination based on transgender status is not cognizable under Title VII. Opinion, R.13, PageID#188-89.[2] The district court relied on *Vickers v. Fairfield Medical Center*, 453 F.3d 757, 762 (6th Cir. 2006), which held that "'sexual orientation is not a prohibited basis for discriminatory acts under Title VII[,]'" but the district court did not explain how *Vickers*' determination of a different issue—sexual orientation—was relevant to whether transgender discrimination is actionable under Title VII. Opinion, R.13, PageID#188. The district court also relied on an out-of-circuit decision, *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1222 (10th Cir. 2007), which held that "transsexuals are not a protected class under Title VII." Opinion, R.13, PageID#188. The district court held, however, that

[2] The court did not hold expressly that transitioning from male to female is not cognizable, but that holding seems implicit.

the complaint did state a claim for relief under the unlawful sex-stereotyping theory of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). R.13, opinion, PageID#189-195 (citing *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005)).

C. Amended Answer

On April 29, 2015, the Funeral Home filed an answer, which did not mention RFRA. R.14, Answer, PageID#199. On June 1, 2015, the EEOC amended its complaint to correct the spelling of Aimee Stephens' name. Amended Complaint, R.21, PageID#241-249. On June 4, 2015—eight and a half months after the EEOC filed its original complaint—the Funeral Home for the first time asserted RFRA as a defense. Answer, R.22, PageID#254.

The EEOC and the Funeral Home later filed summary judgment motions. EEOC motion, R.51, PageID#591-640; Funeral Home Motion, R.54, PageID#1285-1321. In his April 16, 2016, affidavit, submitted in support of the Funeral Home's motion, Rost stated that continuing to employ Stephens would have conflicted with his sincere religious beliefs. Affidavit, R.54-2, PageID#1326-1338. Rost "sincerely believes that the Bible teaches

that a person's sex is an immutable God-given gift and that people should not deny or attempt to change their sex." Rost Aff. ¶42, R.54-2, PageID#1334. He further believes that he "would be violating God's commands if [he] were to permit" employees to "deny their sex while acting as a representative of [his] organization." *Id*. ¶43. In Rost's view, it would "violate God's commands because" he "would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift." *Id*. Rost therefore believes it would "violat[e] God's commands" if he were to permit "male funeral directors to wear the uniform for female funeral directors while at work," or if he were to "pay for a male funeral director to wear the uniform for female funeral directors." *Id*. ¶¶45-46. If forced to pay an employee "to dress inconsistent with his or her biological sex, [Rost] would feel significant pressure to sell" his business and give up his life's calling of ministering to grieving people. *Id*. at ¶48.

Rost stated in his deposition that he fired Stephens because "he was no longer going to represent himself as a man. He wanted to dress as a woman." Rost Depo.136, R.63-5, PageID#1975.

D. Summary Judgment Order

The district court granted summary judgment for the Funeral Home. Opinion, R.13, PageID#2179-2234. The court acknowledged that Rost's testimony that he fired Stephens because she wanted to dress as a woman appeared to constitute "direct evidence" of sex discrimination. *Id*. at PageID#2198-99. The court also rejected the Funeral Home's argument that its sex-specific dress code constituted a defense. *Id*. at PageID#2199-2204.

But the court held that RFRA operated as a defense to any violation of Stephens' Title VII rights. *Id*. at PageID#2204-2223. The court noted that RFRA, 42 U.S.C. §§ 2000bb-1(a), (b), prohibits the government from substantially burdening a person's exercise of religion, even if the burden arises from a generally applicable rule, unless the government shows that application of the burden "to the person" is the least restrictive means of furthering a compelling governmental interest. *Id*. at PageID#2205. The

court held that the Funeral Home met its burden of showing that Title VII's enforcement "substantially burdened" its "exercise of religion." *Id*. at PageID#2206.

At the outset, the court ruled that *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), foreclosed the EEOC's argument that RFRA, by its plain terms, protects religious exercise, not beliefs. *Id*. at PageID#2207 (n.8). The court recounted Rost's religious beliefs and concluded that enforcing Title VII "by requiring the Funeral Home to provide a skirt to and/or allow an employee born a biological male to wear a skirt at work would impose a substantial burden on" Rost's ability to conduct his business in accordance with his sincerely held religious beliefs. *Id*. If the Funeral Home refused to comply with Title VII, the court said, it would face "severe" economic consequences, as it might have to pay back and front pay, and Rost would feel pressured to sell his business. *Id*. at PageID#2210. The court therefore concluded the Funeral Home showed substantial burden on religious exercise.

The court next considered whether the EEOC established compelling interest and least restrictive means. Although the court questioned whether the EEOC satisfied RFRA's "to-the-person" test, the court assumed that the EEOC established compelling interest. *Id*. at PageID#2211-2214. But the court held that the EEOC failed to show least restrictive means. The court stated that "the case concerned only "work place clothing," not "hair styles or makeup." *Id*. at PageID#2216 n.11. The court emphasized that the case had been limited to a "*Price Waterhouse* sex/gender stereotyping theory." *Id*. at PageID#2218. Had the EEOC been "truly interested in eliminating gender stereotypes as to clothing," the court said, the EEOC should have proposed a gender-neutral dress code (which no party had ever raised as an alternative). *Id*. at PageID#2218-19. The court acknowledged that applying RFRA here produced an "odd result," since RFRA does not apply in private actions and therefore would not have been a defense had Stephens sued. *Id*. at PageID#2223 n.23.

Finally, the court granted summary judgment on the clothing benefit claim. *Id*. at PageID#2223-2233. Citing *EEOC v. Bailey Co.*, 563 F.2d 439 (6th

Cir. 1977), the court held that the class claim was unrelated to Stephens' individual charge of discriminatory termination. The court reasoned that because the charge failed to mention "clothing, a clothing allowance, or a dress code," it could not have reasonably been expected to lead to an investigation of whether the Funeral Home violated Title VII by providing only male employees with a clothing allowance. *Id*. at PageID#2231. Upon uncovering this new violation, the court said, the EEOC ought to have filed a Commissioner's charge. *Id*. at PageID#2233.

STANDARD OF REVIEW

This Court reviews de novo a district court's dismissal of a complaint under Rule 12(b)(6). *Bridge v. Ocwen Fed. Bank, FSB*, 681 F.3d 355, 358 (6th Cir. 2012). The district court's grant of summary judgment is also reviewed de novo. *Griffin v. Finkbeiner*, 689 F.3d 584, 592 (6th Cir. 2012).

SUMMARY OF ARGUMENT

The district court erred in granting summary judgment on the EEOC's termination claim on behalf of Aimee Stephens, a transgender woman. Contrary to the court's ruling below, Title VII's prohibition on

discrimination "because of . . . sex" encompasses discrimination based on transgender status and/or transitioning. This conclusion is based on the text of Title VII, as well as decisions of the Supreme Court and this Court that have long recognized that Title VII forbids gender from playing a role in employment decisions. The district court therefore erred in ruling on the Funeral Home's motion to dismiss that the Commission's complaint failed to state a claim for relief as to Stephens' termination based on transgender status and/or transitioning, although the court held correctly that the complaint stated a claim of sex discrimination under *Price Waterhouse* based on sex stereotypes.

The court also erred in ruling that RFRA provides the Funeral Home a defense to the EEOC's enforcement action in this case. Congress and the courts have already spoken to the correct balance between Title VII and an employer's religious exercise; Title VII permits religious organizations to prefer coreligionists, and the judicially created "ministerial exception" prohibits application of federal anti-discrimination laws to the employment relationship between a religious institution and its ministers. Neither of

these exceptions applies here. And contrary to the court's conclusion below, RFRA does not provide what Title VII omits: a defense in this case that exempts the Funeral Home from complying with Title VII's prohibition on sex discrimination based on the sincere religious beliefs of its owner.

RFRA is inapplicable here because the Funeral Home failed to meet its initial burden of showing that the EEOC's enforcement action imposed a "substantial burden" on the company's "exercise of religion." The Funeral Home fell short of establishing on this record that continuing to employ Stephens during, or after, her transition impinged on Rost's "exercise of religion," or that any burden imposed by her continued employment was "substantial."

Even if the Funeral Home met its initial burden, RFRA does not provide a defense in this case. The court assumed correctly that the eradication of sex-based employment discrimination is a compelling governmental interest (as evidenced by Congress' enactment of Title VII). But the court erred on the final prong of the test in holding that this

enforcement action was not the least restrictive means of achieving that interest. Although the Funeral Home never suggested it would be open to a gender-neutral dress code as a solution, the court faulted the EEOC for failing to propose it. Contrary to the court's conclusion, imposing a gender-neutral dress code is not the least restrictive means, as the government's interest is not in the elimination of sex-specific dress codes but in the eradication of sex discrimination, including protecting Stephens' right not to be fired because she is transgender, transitioning, and/or refuses to comply with traditional sex stereotypes. A gender-neutral dress code would not serve the government's interest "equally well," as the record shows that Rost would have objected to employing Stephens had she complied with a gender-neutral dress code, e.g., business attire, but otherwise dressed and acted as a woman.

Finally, the district court erred in granting summary judgment on the EEOC's clothing benefit claim as to a class of women. The court applied an erroneous legal standard when it ruled that the EEOC cannot seek relief for women denied a clothing benefit because that claim was not included in

Stephens' charge. The Supreme Court has held that the EEOC may seek relief as to any violation ascertained during the course of a reasonable investigation. Here, the EEOC's investigation revealed that the Funeral Home had for years provided male employees who work with the public with free suits, ties, and tailoring, while women who worked with the public were given nothing. The EEOC's Determination included the clothing allowance claim, and it is undisputed that the EEOC sought to conciliate with the Funeral Home as to this claim. After conciliation efforts failed, the agency was therefore entitled to seek relief in court for a class of women denied the clothing benefit accorded their male co-workers.

ARGUMENT

Summary judgment should be reversed on the EEOC's Title VII claims of sex discrimination as to the termination of Aimee Stephens and the denial of a clothing benefit as to a class of female employees.

A. The complaint stated a claim of sex discrimination based on transgender status and/or transitioning.

Title VII makes it unlawful for an employer to discharge an individual "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1).

The EEOC alleged that the Funeral Home's termination of Stephens violated this provision because it "was motivated by sex-based considerations," i.e., because "Stephens is transgender, because of Stephens's transition from male to female, and/or because Stephens did not conform to [the Funeral Home's] sex- or gender-based . . . stereotypes." Complaint, R.1, PageID#4-5 (¶15). [3] Ruling on the Funeral Home's motion to dismiss, however, the district court held that the EEOC's complaint stated a claim for relief under only a sex-stereotyping theory. While the district court properly recognized that Title VII's prohibition on sex discrimination makes it unlawful to discriminate against a transgender individual—like any other individual—based on sex-stereotyping, the court erred in concluding that discrimination based on transgender status and/or transitioning is not inherently sex discrimination. This error requires correction by this Court in order to clarify the meaning of "because of . . . sex" under Title VII, and because the district court's error

[3] The term "transgender" is defined as relating to "a person whose gender identity differs from the sex the person had or was identified as having at birth." Merriam Webster Online Dictionary, Transgender (January 23, 2017) http://www.merriam-webster.com/dictionary/transgender).

infected its RFRA analysis, as the court subsequently held that the only compelling interest in this case was the elimination of sex-stereotypes as to the dress code. *See* Opinion, R.76, PageID#2217-2218 (emphasizing the "narrow context" of the discrimination claim here).

The Supreme Court and this Court have long recognized that Title VII's prohibition on sex discrimination encompasses the full range of gender-based discrimination. The Supreme Court made this clear in *Price Waterhouse*, where the Court clarified that the phrase "because of . . . sex" means "that gender must be irrelevant to employment decisions." *Price Waterhouse*, 490 U.S. at 240. In *Price Waterhouse*, the plaintiff was denied partnership because she was "macho" and was told she would improve her promotion chances if she walked, talked, and dressed more femininely and wore make-up and jewelry. *Id*. at 235. The Court held that this amounted to prohibited sex stereotyping, explaining that "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Id.* at 251 (quoting *Los Angeles Dep't of*

Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)). The Court held that Title VII barred not just discrimination because plaintiff was a woman, but also discrimination based on the employer's belief that she was not acting like a woman. *Id*. at 250-51.

This Court has also recognized that "[b]y holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court [in *Price Waterhouse*] established that Title VII's reference to 'sex' encompasses . . . discrimination based on a failure to conform to stereotypical gender norms." *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004). In *Smith*, this Court held that the plaintiff stated a claim for relief under *Price Waterhouse* where he alleged discrimination based on "his gender non-conforming conduct and, more generally, because of his identification as a transsexual." *Id*. at 571. This Court explained that "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior[.]" *Id*. at 575; *see also Myers v. Cuyahoga Cnty.*, 182 F. App'x 510, 519 (6th Cir. 2006) ("Title VII

protects transsexual persons from discrimination for failing to act in accordance and/or identify with their perceived sex or gender."); *Barnes v. City of Cincinnati*, 401 F.3d 729, 733, 737 (6th Cir. 2005) (holding that a "pre-operative male-to-female transsexual" was protected under Title VII where he alleged discrimination for his failure to conform to sex stereotypes).

That Title VII forbids the full range of gender discrimination leads ineluctably to the conclusion that transgender and transitioning discrimination *is* discrimination "because of . . . sex." At its core, transgender discrimination is based on the non-conformance of an individual's gender identity and appearance with sex-based norms or expectations. In other words, discrimination because of an individual's transgender status is *always* based on gender-stereotypes: the stereotype that individuals will conform their appearance and behavior—whether their dress, the name they use, or other ways they present themselves—to the sex assigned them at birth. The Eleventh Circuit has recognized this, holding in *Glenn v. Brumby* that "discrimination against a transgender individual because of her gender-non-conformance is sex discrimination,

whether it's described as being on the basis of sex or gender." 663 F.3d 1312, 1317 (11th Cir. 2001). The *Glenn* court explained, "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." *Id.* at 1316 (internal quotation marks and citations omitted).

This Court essentially recognized in *Smith* that discrimination against an individual who is transgender *is* discrimination based on the failure to conform to a gender stereotype. This Court stated, "discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman." 378 F.3d at 575. *Smith* also recognizes that after *Price Waterhouse*, "employers who discriminate against men because they *do* wear dresses and make-up, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not

occur but for the victim's sex." *Id*. at 574. The logical extension of this Court's statement is that transgender discrimination is *per se* prohibited under *Price Waterhouse* because such discrimination is based on the individual's failure "to act and/or identify with his or her gender." *Smith*, 378 F.3d at 575; *see also Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (applying *Price Waterhouse* to hold that pre-operative male-to-female transgender plaintiff stated a claim for sex discrimination under the Gender Motivated Violence Act because "the perpetrator's actions stem from" his belief "the victim was a man who 'failed to act like one'"); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000) (applying *Price Waterhouse* to hold that bank's refusal to give a loan to the plaintiff because the plaintiff's traditionally feminine "attire did not accord with his male gender" stated a claim under the Equal Credit Opportunity Act).

The Commission's federal sector decisions underscore that discrimination based on transgender status and/or transitioning constitutes sex discrimination. *See, e.g.*, *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at *4-7 (EEOC Apr. 20, 2012) (clarifying that discrimination "based

on transgender status" is cognizable under Title VII and that discrimination because an individual "has transitioned or is in the process of transitioning" constitutes sex discrimination). *Macy* recognizes that "consideration of gender stereotypes will inherently be part of what drives discrimination against a transgendered individual." *Id*. at *8. Thus, discrimination "against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex,' and such discrimination therefore violates Title VII." *Id*. at *11. *See also Lusardi v. McHugh*, Appeal No. 0120133395, 2015 WL 1607756, at *11 n.6 (EEOC Apr. 1, 2015) (explaining that "*Macy* [] held that discrimination on the basis of transgender status is *per se* sex discrimination" and "that a plaintiff need not have specific evidence of gender stereotyping because 'consideration of gender stereotypes will inherently be part of what drives discrimination against a transgender individual'") (quoting *Macy*, 2012 WL 1435995, at *8).

In ruling that Title VII does not prohibit discrimination based on transgender status, the district court relied on *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007). Opinion, R.13, PageID#188. *Etsitty*

is weak support for the district court's ruling. To be sure, in *Etsitty* the Tenth Circuit declined to adopt a rule that transgender discrimination necessarily constitutes sex discrimination, although the court assumed without deciding that Title VII protects "transsexuals who act and appear as a member of the opposite sex." 502 F.3d at 1221, 1224. But *Etsitty*'s rejection of a per se rule that Title VII protects against transgender discrimination was incorrect. First, *Etsitty* relied on decisions issued before *Price Waterhouse*. *Id*. at 1221. Second, the court's decision was based on its erroneous view that Title VII prohibits discrimination based only on "the traditional binary conception of sex," i.e., "the two starkly defined categories of male and female." *Id*. at 1222. As discussed, however, *Price Waterhouse* makes clear that the term "sex" under Title VII prohibits the full range of gender-based discrimination.

Schroer v. Billington illuminates the flaw in *Etsitty*'s "starkly defined" reasoning. 577 F. Supp. 2d 293 (D.D.C. 2008). In *Schroer*, the defendant revoked its hiring offer after the plaintiff disclosed that she was transgender, would be undergoing a male-to-female transition, and would

like to start working as "Diane." *Id*. at 296. The district court agreed with the plaintiff that this constituted sex discrimination under the *Price Waterhouse* sex-stereotyping theory. *Id*. at 302-305. But the court *also* held that the defendant had literally discriminated "because of . . . sex," based on the plain language of the statute. *Id*. at 306-308. The court explained its reasoning by analogizing to religious discrimination. The court postulated that if an employee were fired because she converted from Christianity to Judaism—not because of her employer's animosity towards either religion, simply out of bias against "converts"—that "would be a clear case of discrimination 'because of religion.' No court would take seriously the notion that 'converts' are not covered by the statute." *Id*. at 306. Likewise, the court reasoned, discrimination against an individual who converts from male to female should be considered discrimination because of sex. *See id*. at 307. Courts have only been able to avoid this conclusion by carving out an exception for transgender individuals that simply is not in the statute. *Id*. at 307.

The district court also relied on this Court's decision in *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2006), which addressed only whether Title VII forbids sexual orientation discrimination, not discrimination against a transgender individual. Amended Opinion, R.13, PageID#188. This reliance on a case raising a different question was misplaced. *Cf. Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1081 (9th Cir. 2015) (noting that gender identify and sexual orientation are "distinct").

The EEOC therefore urges this Court to clarify that a complaint alleging sex discrimination based on transgender status and/or transitioning has stated a claim for relief under Title VII, as such discrimination is inherently based on sex stereotypes. This conclusion is compelled by the statute's text, as interpreted by the Supreme Court in *Price Waterhouse*. This Court should also embrace this conclusion because of the practical difficulty that arises from artificially parsing out discrimination based on transgender status from discrimination based on gender non-conformance. They are difficult to parse out because, in a case involving a transgender individual, they are one and the same.

Such is the case here. The EEOC presented evidence that upon being informed of Stephens' transgender status and intention to transition, Rost fired her, saying "this is not going to work[.]" Depo. 75-76, R.54-15, PageID#1455. Rost added that "the public would [not] be accepting of [her] transition." Charge, R.54-22, PageID#1497. This evidence is difficult to compartmentalize into "sex-stereotyping" versus "transgender/ transitioning" boxes. Placed in either box, the evidence suggests Rost fired Stephens because she refused to continue conforming her behavior and appearance to the gender stereotypes associated with the male sex. This violates Title VII. *See Schroer*, 577 F. Supp. 2d at 305 (stating that "[u]ltimately," it should not "matter[] for purposes of Title VII liability whether" an employer fires an individual because it perceives her as being "an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual").

Finally, the complaint plausibly alleged that Stephens' termination was in fact based on transgender status and/or Stephens' intention to transition from male to female. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)

(complaint must contain sufficient facts to state a plausible claim for relief). The complaint alleged that Stephens performed adequately for six years; she informed Rost on July 31, 2013, that she was undergoing a male-to-female gender transition; and on August 15, 2013, Rost fired her, stating that what she was "'proposing to do' was unacceptable." Complaint, R.1, PageID#3-4 (¶¶8-11). The complaint therefore sufficed to overcome the motion to dismiss, not only under a sex-stereotyping theory but also as to transgender status and transitioning. *See Schroer*, 577 F. Supp. 2d at 308 (employer's refusal to hire the plaintiff after she disclosed her intent to undergo "sex reassignment surgery was *literally* discrimination 'because of . . . sex'").

B. The court erred in granting summary judgment on the termination claim as to Aimee Stephens.

Despite recognizing that this is one of the rare cases in which "there is direct evidence" of discrimination based on sex, the district court granted summary judgment in favor of the Funeral Home. Opinion, R.76, PageID#2198. The court erred. Nothing in Title VII provides an exception by which a for-profit employer may deprive an employee of her

statutorily-protected right to be free from sex discrimination because of her employer's religious beliefs. Nor does RFRA provide a defense in this case that permits Rost's sincerely held religious beliefs to override Aimee Stephens' Title VII right to be free of workplace discrimination. Summary judgment should therefore be reversed.

1. *Neither Title VII nor the "ministerial exception" permits the Funeral Home to discriminate based on its religious beliefs.*

When Congress enacted Title VII, it adopted a comprehensive statutory scheme to eradicate employment discrimination based on race, sex, religion, national origin, and color. Notably absent in this comprehensive scheme is any exception that would permit a for-profit company such as the Funeral Home to discriminate based on sex due to its owner's religious beliefs. It was not, however, that Congress failed to consider the potential conflict between an employer's religious beliefs and Title VII's prohibitions on discrimination. Rather, Congress considered these concerns and included in Title VII an exemption that permits religious organizations or educational institutions to prefer "coreligionists," i.e., individuals of the same religion. *See* 42 U.S.C. § 2000e-

1(a) (permitting "a religious corporation, association, educational institution or society" to prefer individuals of that religion), § 2000e-2(e)(2) (permitting a "school, college, university, or other educational institution" owned by a particular religion, or whose learning is directed towards propagation of a particular religion, to prefer its own religious members). An additional exception permits employers to make employment decisions "on the basis of religion" where religion is a "bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business enterprise." 42 U.S.C. § 2000e-2(e)(1). *See generally Pime v. Loyola Univ. of Chicago*, 803 F.2d 351, 353-54 (7th Cir. 1986) (BFOQ exception permitted Jesuit college to prefer Jesuit philosophy professor).

None of these Title VII exceptions apply here. The "religious organization" exception is inapplicable because the Funeral Home is not a religious organization: it is a for-profit corporation unaffiliated with any church, its articles of incorporation do not avow any religious purpose, it serves clients of every religion, and it employs individuals from different religions (or no religion). Def. Facts, R.55, PageID#1683(¶1); Counter Facts,

R.61, PageID#1832-35 (¶¶25,26,30,37). But even if the Funeral Home were a religious organization, the exception would permit the Funeral Home only to prefer co-religionists, not to discriminate against its employees based on sex. *See EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (holding that religious school violated Title VII and the Equal Pay Act by providing health insurance benefits to single persons and married men but not to married women); *see also DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 173 (2d Cir. 1993) (holding that the Age Discrimination in Employment Act, like Title VII, applies to religious institutions and therefore prohibits them from engaging in age discrimination). Nor would the BFOQ defense apply here, as that exception would permit the Funeral Home to discriminate based only on Stephens' *religion*, not her sex, and only if religion were a "bona fide occupational qualification reasonably necessary to the normal operation" of the Funeral Home, which it was not.

The "ministerial exception" is also inapplicable here. This judicially-created doctrine, which is rooted in the First Amendment's guarantee of religious freedom, precludes application of federal employment

discrimination laws to the employment relationship between a religious institution and its ministers. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (holding that ministerial exception barred retaliation claim under the Americans with Disabilities Act on behalf of a commissioned minister who taught at a religious school). In short, the ministerial exception recognizes that the government's interest in eliminating employment discrimination yields to a church's right under the First Amendment's Free Exercise Clause and Establishment Clause to choose its ministers. *See id*. at 188. This exception does not apply here because the Funeral Home is not a religious institution, and because Stephens is not a ministerial employee.

2. *RFRA does not provide a defense to Stephens' unlawful termination.*

The district court erred in holding that RFRA provides in this case what Title VII does not: a defense that permits the Funeral Home to deprive Aimee Stephens of her Title VII right to be free from sex discrimination based on Rost's sincerely held religious beliefs.

RFRA was passed in 1993 against the backdrop of a series of Supreme Court decisions concerning the Free Exercise Clause of the First Amendment, which states that "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof* . . . ." U.S. Const., Amdt. 1 (emphasis added). In *Sherbert v. Verner*, 374 U.S. 398, 403-06 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972), the Supreme Court used a balancing test to evaluate claims that government action violated the Free Exercise Clause: the test looked at whether the challenged government action imposed a substantial burden on the claimant's religious practice and, if so, whether the burden was needed to serve a compelling government interest. Applying this balancing test, the Supreme Court held in *Sherbert* that denying an employee unemployment benefits because she refused to work on her Sabbath violated the First Amendment. 374 U.S. at 403-10. The Supreme Court likewise held in *Yoder* that the First Amendment was violated by forcing Amish children to attend school until age sixteen where the Amish religion required them to focus on Amish values and beliefs during adolescence. 406 U.S. at 214-36.

The Supreme Court, however, rejected "the balancing test set forth in *Sherbert*" when it decided *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 883 (1990). Repudiating the strict scrutiny standard for Free Exercise claims, the Court held in *Smith* that neutral, generally applicable laws may be applied even without showing compelling government interest. *Id*. at 885-90. Applying its holding, the Court ruled there was no First Amendment violation when the state denied unemployment benefits to members of the Native American Church who were fired for ingesting peyote during a sacramental service. *Id*. at 890.

Three years after *Smith* rejected the compelling interest standard, Congress restored it by enacting RFRA. The stated purpose of RFRA was "to restore the compelling interest test" of *Sherbert* and *Yoder* and to "guarantee its application in all cases where free exercise of religion is substantially burdened by government." 42 U.S.C. § 2000bb(b)(1). Accordingly, RFRA forbids the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability, except" where the government "demonstrates

that application of the burden to the person" furthers "a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb-1(a),(b).

RFRA applies not only to individuals but also to "for-profit closely held corporation[s]." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767-75 (2014). Although "exercise of religion" was originally defined in reference to "the exercise of religion under the First Amendment," 42 U.S.C. § 2000bb-2(4) (1994 ed.), Congress amended that definition when it enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which imposes RFRA's test to a limited category of government actions. Accordingly, "exercise of religion" under RFRA means "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (as incorporated by 42 U.S.C. § 2000bb-2(4)).

RFRA claims are analyzed under a two-step process. First, the party asserting the exemption must show that the law "would (1) substantially burden (2) a sincere (3) religious exercise." *Michigan Catholic Conf. &*

Catholic Family Servs. v. Burwell, 755 F.3d 372, 384 (6th Cir. 2014) (internal quotation marks and citation omitted), *vacated and remanded on other grounds*, 135 S. Ct. 1914 (2015). If a prima facie case is shown, then the government bears the burden of production and persuasion as to whether "application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means" of furthering that interest. *Id*. (internal quotation marks and citation omitted).

The RFRA defense is inapplicable here. Although the EEOC does not challenge the sincerity of Rost's religious beliefs, the Funeral Home failed to show that its "religious exercise" was "substantially burdened." Even if the Funeral Home established this, the EEOC established that application of the burden to the Funeral Home furthered a compelling governmental interest and that no less restrictive means is available to achieve the government's compelling interest in eradicating sex-based discrimination in the workplace, including as to Aimee Stephens.

a. RGGR failed to show that its religious exercise was substantially burdened.

By its terms, RFRA protects religious exercise, not religious beliefs. *See* 42 U.S.C. § 2000bb-1(a) (government may not substantially burden "a person's *exercise of religion*") (emphasis added); *Wilson v. James*, 139 F. Supp. 3d 410, 424 (D.D.C. 2015) ("A substantial burden on one's religious beliefs—as distinct from such a burden on one's *exercise* of religious beliefs—does not violate RFRA."). The exercise of religion "necessarily involves an action or practice." *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) (holding that collection of DNA evidence from inmate did not burden his religious exercise). Government action that compels a person to modify his behavior in a way that violates his religious beliefs, prevents him from engaging in conduct required by his religion or forces him to engage in conduct forbidden by his religion, or conditions receipt of important benefits upon conduct proscribed by his religion burdens religious exercise. *Wilson*, 139 F. Supp. 3d at 425.

In *Hobby Lobby*, for instance, the Court held that forcing employers to choose between "providing" insurance coverage with contraceptive

options they found immoral and incurring a severe economic penalty substantially burdened their religious exercise. *Hobby Lobby*, 134 S. Ct. at 2778. Likewise, religious exercise is burdened (or is at least arguably burdened) when an employee is forced to make turrets for tanks despite his religious objection to manufacturing weapons (*Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981)); when a prisoner whose religion requires him to grow a beard is forced to choose between shaving his beard or being disciplined (*Holt v. Hobbs*, 135 S. Ct. 853 (2015)); or when a prisoner is denied the chance to play piano for religious services (*Wagner v. Campuzano*, 562 F. App'x 255 (5th Cir. 2014) (per curiam)). Religious exercise is not implicated, however, when a claimant is disciplined for publicly criticizing same-sex marriages but fails to assert that his religion requires him to publicly voice his dissent, although he believes it immoral (*Wilson*, 139 F. Supp. 3d at 424-25), or when a prisoner who believes homosexuality is a sin is housed with a homosexual cellmate, since sharing a cell does not "put any pressure on him to change his religious

conduct" (*McKnight v. MTC*, 2015 WL 7730995, at *4 (N.D. Tex. Nov. 9, 2015)).

Here, the Funeral Home asserted that the EEOC's enforcement of Stephens' Title VII right to work free from sex discrimination would "burden [RGGR's] free exercise of religion by compelling Rost to engage in conduct that seriously violates his religious beliefs," i.e., his belief that a person's sex is an immutable, God-given gift that cannot be denied. Def. Memo., R.54, PageID#1314. But the Funeral Home has not identified how continuing to employ Stephens after, or during, her transition would interfere with any religious "action or practice." *Kaemmerling*, 553 F.3d at 679 (holding that collection of inmate's DNA did not burden his religious exercise and stating that "[t]he government's extraction, analysis, and storage of Kaemmerling's DNA information does not call for Kaemmerling to modify his religious behavior in any way—it involves no action or forbearance on his part, nor does it otherwise interfere with any religious act in which he engages"). Rost would still be able to attend church and would be free to continue placing devotionals and cards for the public in

his funeral homes. Rost did not point to a Bible passage or religious doctrine that precludes him from employing an individual who is transgender, is transitioning, or who was born male but who presents as a woman and wears traditionally female clothes.

In essence, Rost objected to having Stephens continue to work for him because being transgender offends his religious beliefs. But RFRA is about protecting the exercise of religion, not about ensuring that an individual's religious beliefs are not offended. *See McKnight*, 2015 WL 7730995, at *4 (rejecting RFRA claim and stating, "Plaintiff's allegations suggest that he takes issue only with the *exposure* to a homosexual cellmate, and not with any *effect* it has on his religious activities"). Here, Rost simply did not identify any government action that coerced him into conduct prohibited by his religious beliefs, or forced him to refrain from conduct required by his religion.

Contrary to the district court's conclusion, *Hobby Lobby* does not compel a different result. To be sure, *Hobby Lobby* states "that the question that RFRA presents" is whether the law at issue "imposes a substantial

burden on the ability of the objecting parties to conduct business in accordance *with their religious beliefs*." 134 S. Ct. at 2778. The *Hobby Lobby* Court answered that question affirmatively, holding that the plaintiffs met this burden because they had a sincere religious belief that life begins at conception and they were forced to choose between providing health insurance that covers birth control methods that could result in the destruction of an embryo and incurring severe economic consequences (as much as $475 million/year). *Id*. at 2778-79. Thus, the Court held that the government was coercing the plaintiffs into taking an action—providing contraception they found immoral—that violated their religious beliefs. *See id*. at 2779.

Unlike the *Hobby Lobby* plaintiffs, who were forced to choose between facilitating conduct that violated their religious beliefs and incurring crippling economic consequences, Rost was not forced to choose between facilitating conduct that violated his religious beliefs and incurring severe economic hardship. That is because the EEOC's suit does not coerce the Funeral Home into *providing* or *facilitating* Stephens' transition from male to

female. *Cf. Hobby Lobby*, 134 S. Ct. at 2778 (noting that the plaintiffs "believe that *providing the coverage demanded* by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the [birth control] coverage") (emphasis added). Enforcement of Title VII in this case does not compel Rost to pay for Stephens' transition (i.e., he is not being asked to pay for Stephens' medications or surgery). Rather, in contrast to *Hobby Lobby*, enforcement of Title VII would require Rost only to continue employing Stephens, as he had for six years, after she began her gender transition and began presenting at work as a female. Unlike the *Hobby Lobby* plaintiffs, then, Rost would not be forced to "enabl[e] or facilitat[e] the commission of an immoral act": he would merely be keeping an employee on the payroll. 134 S. Ct. at 2778. *Hobby Lobby* is therefore inapposite. It would control this case only if it had held that RFRA allowed the plaintiffs to fire female employees who used contraceptives that resulted in the destruction of embryos. *Hobby Lobby* did not reach so far.

Even if the Funeral Home's religious exercise were burdened, the Funeral Home failed to show a "*substantial* burden." The word "substantial" was added to the original draft of RFRA, signaling that the modifier carries meaning. 139 Cong. Rec. 26180 (Oct. 26, 1993). As Senator Hatch stated in discussing the proposed amendment, the law "does not require the Government to justify every action that has some effect on religious exercise." *Id*. A burden is "substantial" only if it "places significant pressure on an adherent to act contrary to her religious beliefs[.]" *Eternal World Tele. Network, Inc. v. Sec'y of the Dep't of Health & Human Servs.*, 818 F.3d 1122, 1148-1151 (11th Cir. 2016).

Here, the Funeral Home did not establish on this record that the EEOC's enforcement action "substantially" burdened the Funeral Home's exercise of religion. The Funeral Home contends that employing a transgender woman imposes a "substantial" burden, but how? Rost sincerely believes that sex is an immutable God-given gift, but he was not asked to fund Stephens' transition, and he has not explained how the continued employment of a transgender woman (who worked for him for

six years) would *substantially* burden his ability to run his business in accordance with his religious beliefs. Certainly, many employees engage in conduct their employers find religiously objectionable—such as having children out of wedlock, eating pork, or engaging in premarital sex—but merely employing these individuals does not impose a "substantial burden" on religious exercise. *See EEOC v Tree of Life Christian Schs.*, 751 F. Supp. 700, 711 (S.D. Ohio 1990) (holding that "application of the Equal Pay Act" to employer to prohibit it from paying men greater benefits as "head of household" would impose only a "minimal" burden on employer's religious exercise); *Dole & EEOC v. Shenandoah Baptist Church*, 899 F.2d 1389, 1397 (4th Cir. 1990) (holding that "any burden" imposed on employer's free exercise of its religious beliefs by application of Fair Labor Standards Act "would be limited," and stating that "the Bible does not mandate a pay differential based on sex").

The district court erred in reaching a contrary conclusion. Opinion, R.76, PageID#2209. The court accepted the Funeral Home's assertion that permitting Stephens to dress in traditionally feminine attire would make

Rost complicit in supporting the idea that "sex is a changeable social construct rather than an immutable God-given gift." *Id*. The court never explained, however, how permitting Stephens to dress in female attire would "substantially" impact Rost's religious exercise. The court also stated that being forced to "provide a skirt" would be a substantial burden, *id*., but the undisputed record shows that in August 2013, the Funeral Home provided its female employees with *no* clothes, and *no* clothing stipend whatsoever. Thus, Rost would not have provided Stephens with a skirt after her transition, undercutting Rost's assertion of a "substantial" burden. In any event, the EEOC's enforcement action, even if successful as to the clothing benefit claim, also would not necessarily require Rost to provide Stephens with a skirt. Rather, the EEOC's suit would require only that *if* Rost provides a clothing benefit to his male employees, he provide a comparable benefit (which could be in-kind, or in cash) to his female employees. Alternatively, Rost could discontinue the clothing benefit altogether.

The court also stated that the burden was "substantial" because if Rost refused to employ Stephens, he might have to pay some undefined amount of "back and front pay" to her, and if he permitted her to work dressed as a female, he would feel pressured to sell his business. Opinion, R.76, PageID#2210. But the underpinning of the court's conclusion is its assumption that being forced to continue to employ Stephens, dressed as a woman, imposes a substantial burden on Rost's religious exercise. It does not.

b. The EEOC established compelling interest and least restrictive means.

Even assuming, *arguendo*, that the Funeral Home satisfied its burden, RFRA does not permit the Funeral Home to violate Stephens' Title VII rights because the EEOC established that it has a compelling interest in eradicating workplace discrimination and that it used the least restrictive means to achieve that interest.

The district court assumed without deciding that the EEOC has a compelling interest in the eradication of sex-based employment discrimination. Opinion, R.76, PageID#2211-2214. That assumption was

correct. Congress' enactment of Title VII itself establishes that the elimination of workplace discrimination, including sex discrimination, is of paramount importance. *See EEOC v. Miss. Coll.*, 626 F.2d 477, 488 (5th Cir. 1980) (stating that Title VII "manifested" the government's compelling interest in eliminating discrimination). The Supreme Court has repeatedly recognized the government's compelling interest in eliminating discrimination and has also recognized that anti-discrimination laws are narrowly tailored to meet that goal. In *Hobby Lobby*, the majority stressed that its decision "provides . . . no shield" to racially discriminatory hiring "cloaked as religious practice," stating that "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." 134 S. Ct. at 2783 (responding to the dissent's concern that racially discriminatory hiring "might be cloaked as religious practice to escape legal sanction"); *see also Hosanna-Tabor*, 565 U.S. at 196 ("The interest of society in the enforcement of employment discrimination statutes is undoubtedly important."); *Bob*

Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (holding that the government "has a fundamental, overriding interest in eradicating racial discrimination in education") (footnote omitted).

Lower courts have uniformly agreed that the government's interest in eradicating employment discrimination is compelling. *See, e.g.*, *Fremont Christian Sch.*, 781 F.2d at 1368-69 ("'By enacting Title VII, Congress clearly targeted the elimination of all forms of discrimination as a 'highest priority' . . . . Congress' purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions.'") (quoting *EEOC v. Pacific Press Publ'g Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982)); *Miss. Coll.*, 626 F.2d at 488 (in Title VII subpoena enforcement action as to race and sex discrimination, holding that "the government has a compelling interest in eradicating discrimination in all forms"); *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 220 (E.D.N.Y. 2006) (rejecting RFRA defense in Title VII case and stating, "generally, Title VII's purpose of eradicating employment discrimination is a 'compelling government

interest'"); *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 810 (S.D. Ind. 2002) (holding that "the eradication of employment discrimination based on the criteria identified in Title VII" constitutes a compelling interest under RFRA).

Contrary to the court's musings below, the EEOC established that compelling interest as to the Funeral Home. Opinion, R.76, PageID#2213-2214; *see* 42 U.S.C. § 2000bb-1(b) (government must show that "application of the burden to the person" furthers the government's compelling interest); *Hobby Lobby*, 134 S. Ct. at 2779 (stating that RFRA requires a focused inquiry; courts must look "'beyond broadly formulated interests' . . . to 'scrutinize the asserted harm of granting specific exemptions to particular religious claimants'—in other words, to look at the marginal interest in enforcing" the law in this case) (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (brackets omitted)).

EEOC satisfied this to-the-person test. This is not a case in which granting an exemption to a religious claimant would have little, or

minimal, impact on the government's compelling interest in the uniform application of a law, such as the exemption of the Amish from compulsory school attendance (*Yoder*) or the exemption from the Controlled Substances Act of church members whose faith requires receiving communion through hoasca (*O Centro*). Rather, in this case, the "asserted harm" of granting a "specific exemption" to the Funeral Home is severe: it means the deprivation of Stephens' statutory right to be free from discrimination which, in this case, meant the deprivation of her livelihood. Stephens' termination also inflicted emotional pain and suffering, as it sent her the message that as a transgender woman she is not valued or able to make workplace contributions. *See, e.g.*, *Lusardi*, 2015 WL 1607756, at *10 (discrimination against transgender employee "isolated and segregated her from other persons of her gender [and] . . . perpetuated the sense that she was not worthy of equal treatment and respect").

Thus, the court assumed correctly that the EEOC showed a compelling interest. But the court erred in concluding that the EEOC did not satisfy the least-restrictive-means test. While this test is "exceptionally

demanding," the government satisfies it upon showing "that it lacks other means of achieving its desired goal." *Hobby Lobby*, 134 S. Ct. 2780. Only when a less restrictive alternative "equally furthers" the government's compelling interest must the government use it. *Id*. at 2786 (Kennedy, J. concurring). In assessing whether a less restrictive alternative exists, courts "must consider both the cost to the government and the burden the alternatives impose on the affected [individuals]." *Eternal World Television*, 818 F.3d at 1158; *see Hobby Lobby*, 134 S. Ct. at 2760 (denying that "RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on . . . thousands of women employed by Hobby Lobby") (citation and internal quotation marks omitted); *United States v. Lee*, 455 U.S 252, 261 (1982) (rejecting Free Exercise claim and stating, "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith *on the employees*") (emphasis added).

Here, the EEOC's Title VII enforcement action is not merely the least restrictive means of furthering the government's compelling interest in

eradicating sex-based employment discrimination as to Stephens, it is the *only* means. No alternative short of this enforcement action—seeking Stephens' reinstatement, back pay, and compensatory and punitive damages—would serve "equally well" the government's interest in this case in vindicating Stephens' Title VII rights.

The Funeral Home proposed below that the "government could continue to enforce Title VII in most situations, but permit businesses in industries that serve distressed people in emotionally difficult situations to require that its public representatives comply with the dress code at work." Memo., R.54, PageID#1317. This bizarrely selective enforcement of Title VII (which would impermissibly endorse discriminatory customer preferences against transgender workers) would not achieve "equally well" the government's compelling interest in eradicating sex-based employment to all those protected by Title VII, and it would not achieve it *at all* as to Stephens. The Funeral Home would elevate its owner's religious beliefs above Stephens' Title VII rights, ignoring them altogether. But this runs afoul of the Supreme Court's repeated admonition that courts must

consider burdens imposed on others when evaluating least restrictive alternatives. *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) ("courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries"); *Hobby Lobby*, 134 S. Ct. at 2760 (stating that "corporations [do not] have free rein to take steps that impose disadvantages . . . on others") (internal quotation marks and citation omitted).

The Funeral Home also posited below that the government could hire Stephens, provide her a salary while unemployed, and/or pay another funeral home to employ her. Reply, R.67, PageID#2118-19. For the reasons discussed above, these alternatives fail because they would not serve "equally well" the government's interest in enforcing Stephens' Title VII rights; they would not achieve, at all, Stephens' right to work for the Funeral Home without being subject to discrimination. Additionally, these proposals ignore that courts must consider "the cost to the government" when considering alternatives. *Eternal World Television*, 818 F.3d at 1158; *see Hobby Lobby*, 134 S. Ct. at 2760 (stating that corporations do not have "free

rein" to require "the general public [to] pick up the tab") (internal quotation marks and citation omitted). RFRA does not compel the government to "pick up the tab" here for a lifetime of employment for Stephens in order to accommodate Rost's view, although sincerely held, that sex is God-given and immutable.

The district court, seeming to recognize the shortcomings of the Funeral Home's argument, came up with its own alternative. After stressing the "narrow context" of the EEOC's claim—limited, by the court, to a *Price Waterhouse*/sex-stereotyping theory—the court stated that the compelling interest was "in ensuring that Stephens is not subject to gender stereotypes in the workplace *in terms of required clothing*." Opinion, R.76, PageID#2219 (emphasis added). Given this limited interest, the court said, the EEOC should have proposed a "gender-neutral dress code" to achieve that interest. *Id*. There are many problems with the court's analysis.

First, as discussed above, discrimination based on transgender status and/or transitioning constitutes discrimination "because of . . . sex." To the extent the court's least-restrictive-means analysis turned on its view that

the EEOC's sole interest here is in eliminating narrowly-defined sex stereotypes, and not transgender/transitioning discrimination, the court therefore erred. Second, even if the EEOC's sex discrimination claim is limited to a sex-stereotyping theory, the compelling interest is not eliminating the Funeral Home's sex-specific dress code. It is ensuring that Stephens is free from any discrimination based on sex-stereotyping, which includes not being fired because she no longer intends to conform to the stereotype of how an individual "assigned male at birth" should dress and act. Terminating Stephens because she intended to present as a female, and dress in a feminine manner, constitutes impermissible sex-stereotyping discrimination, just as it did when Ann Hopkins was not promoted because she did not wear make-up or jewelry and did not dress, talk, or walk in a stereotypically feminine manner.

Third, the record does not support the court's assumption that a gender-neutral dress code would have resolved Rost's religious objections to Stephens' continued employment. At the time he fired her, Rost never mentioned that a gender-neutral dress code would resolve his concerns.

Rather, when Rost fired Stephens, he told her "this is not going to work out"(not limiting his comment to the dress code) and that "the public would [not] be accepting of [your] transition." Charge, R.54-22, PageID#1497. Rost also testified that he fired Stephens, *inter alia*, because she "was no longer going to represent himself as a man," and he objected to Stephens' use of the name "Aimee" in her charge because, Rost said, she is "a man." Rost Depo.23, R.51-16, PageID#769, Rost Depo.136, R.63-5, PageID#1975. Simply put, Rost did not want Stephens working for him, no matter how she dressed, because he believes it is immoral to be transgender. It thus strains credulity to think that a gender-neutral dress code would have resolved this case; had Stephens dressed in a gender-neutral uniform but worn make-up, asked to be called "Aimee" and otherwise identified as a woman, Rost still would have objected to employing her because, he has stated repeatedly, his religious views dictate that individuals should adhere to their "immutable" sex. The district court even equivocated about the viability of the gender-neutral option, stating that it "*could* be a less restrictive means." Opinion, R.76, PageID#2219

(emphasis added). But a less restrictive alternative must *actually*—not maybe—achieve the government's compelling interest "equally well."

In short, the least restrictive means of ending sex-based employment discrimination in this case is to end sex-based employment discrimination, using the tool Congress adopted to do so: Title VII. *See Preferred Mgmt. Corp.*, 216 F. Supp. 2d at 811 (holding that EEOC's investigation constituted the "least restrictive means that Congress could have used to effectuate its" compelling interest in eradicating discrimination); *Redhead*, 440 F. Supp. 2d at 222 (ruling that Title VII's framework "is the least restrictive means of furthering" the government's compelling interest in enforcing Title VII and rejecting RFRA defense where teacher was fired for being unmarried and pregnant).

C. The district court erred in granting summary judgment on the clothing benefit claim.

The district court applied an erroneous legal standard in concluding that the EEOC could not pursue the clothing benefit claim as to a class of women because it did not fall within an investigation reasonably expected to grow out of Stephens' charge. Opinion, R.76, PageID#2223-34. In

reaching this conclusion, the court relied on *EEOC v. Bailey Co.*, 563 F.2d 439 (6th Cir. 1977). *Bailey*, however, is in tension with subsequent rulings of the Supreme Court and this Court. Even if *Bailey* remains good law, it is not controlling here because it is factually distinguishable.

In *Bailey*, the plaintiff, who was Caucasian, filed a charge of sex discrimination as to pay and promotion. *Id*. at 442. She later amended the charge to include discriminatory hiring against African-Americans. *Id*. During the EEOC's investigation, a company employee admitted it failed to hire an applicant because of religion. *Id*. at 442, 444. The EEOC issued a determination finding cause as to racial and religious discrimination in hiring. *Id*. at 442. On appeal, this Court held that the "allegations of religious discrimination exceeded the scope of the EEOC investigation . . . reasonably expected to grow out of [the] charge of sex and race discrimination." *Id*. 446. Therefore, this Court said, the EEOC could not pursue the religious discrimination claim. *Id*. This Court was unswayed by the EEOC's argument that because the facts relating to the religious discrimination claim "emerged during a legitimate investigation of [the]

sex discrimination," the EEOC had authority to pursue the claim. *Id*. at 448. Rather, this Court held, "when discrimination[] of a kind other than that raised by a charge filed by an individual party and unrelated to the individual party, come[s] to the EEOC's attention during the course of an investigation," the EEOC must file a Commissioner's charge. *Id*.

Bailey is difficult, if not impossible, to reconcile with *General Telephone Co. of the NW, Inc. v. EEOC*, 446 U.S. 318 (1980), which the district court failed to consider. In *General Telephone*, issued three years after *Bailey*, the Supreme Court clarified that "EEOC enforcement actions are not limited to the claims presented by the charging parties. Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable. See, *e. g., EEOC v. General Electric Co.*, 532 F.2d 359, 366 (CA4 1976); *EEOC v. McLean Trucking Co.*, 525 F.2d 1007, 1010 (CA6 1975)." 446 U.S. at 331 (holding that EEOC need not comply with Rule 23 when pursuing relief on behalf of a class of victims). *General Telephone* therefore stands for the proposition that the EEOC may pursue claims beyond those in the charge, so long as the investigation was

reasonable (and the claims are included in the determination and subject to conciliation). This is different than stating, as this Court held in *Bailey*, that no matter the reasonableness of the EEOC's actual investigation and what the agency learned during it, newly-discovered violations may be pursued only if they reasonably could have been *expected* to have grown out of the charge.

The conflict between *Bailey* and *General Telephone* is evident when considering the Fourth Circuit's ruling in *EEOC v. General Electric Co.*, 532 F.2d 359 (4th Cir. 1976). While *Bailey* seemed to disagree with *General Electric*, the Supreme Court in *General Telephone* cited *General Electric* with approval. *Compare Bailey*, 563 F.2d at 448 (citing to the dissent in *General Electric*), *with General Telephone*, 446 U.S. at 331 (citing *General Electric* with approval). In *General Electric*, the Fourth Circuit held that the EEOC could pursue claims for sex discrimination that arose during the agency's investigation of charges alleging race discrimination. The court explained that a charge provides a "jurisdictional springboard to investigate whether the employer is engaged in any discriminatory practices" and that the

investigation might reveal additional violations. *Id*. at 364 (internal quotation marks and citation omitted). The EEOC may pursue in court any violations it uncovers during a reasonable investigation, the court held, so long as the uncovered discrimination was included in the cause determination and conciliated. *Id*. at 366.

Significantly, the Fourth Circuit explicitly rejected the notion—which *Bailey* endorsed—that the EEOC is obligated to pursue a Commissioner's charge for any violations unearthed during an investigation that are unrelated to the charge. The Fourth Circuit stated that:

> If the EEOC uncovers during that investigation facts which support a charge of another discrimination than that in the filed charge, it is neither obliged to cast a blind eye over such discrimination nor to sever those facts and the discrimination so shown from the investigation in process and file a Commissioner's charge thereon, thereby beginning again a repetitive investigation of the same facts already developed in the ongoing investigation. To cast a blanket over such facts in the ongoing proceedings would be a violation of the EEOC's statutory obligation in the area of employment discrimination.

Id. at 365. The Fourth Circuit held that the EEOC could pursue a claim of sex discrimination in hiring that was uncovered during "the course of a

reasonable investigation of the charges" alleging race discrimination in hiring, as both were based on certain tests required of applicants. *Id*. at 368.

Bailey also appears to be in tension with other decisions of this Court issued after *General Telephone*. For instance, in *EEOC v. Shoney's, Inc.*, the charging party alleged sex and national origin discrimination as to his suspension and termination. No. 93-5583, 28 F.3d 1213, at *1 (6th Cir. Aug. 18, 1994) (per curiam) (unpublished). The EEOC later sued for national origin and race discrimination, which it discovered during the investigation of the charge. *Id*. On appeal, this Court held that "the EEOC's complaint [of race discrimination] did *not* go beyond the scope of the EEOC investigation reasonably expected to grow out of the charge." *Id*. at *4 (reversing attorneys' fees award) (emphasis added). While the *Shoney* panel purported to apply *Bailey*, *id*., the dissent stated that the charge contained "no hint of race discrimination" and appeared to question whether *Bailey* therefore required a different result. *Id*. at *6 (Nelson, J., dissenting).

Bailey was also based on misconceptions concerning the EEOC's administrative process. This Court expressed concern that in the absence of

a Commissioner's charge, an employer will be deprived of notice of the newly-discovered violation and, therefore, deprived of a meaningful chance to participate in the investigation and conciliation. 563 F.2d at 448. This is incorrect. "The purpose of the EEOC's investigation . . . is to determine if there is a basis for that charge. The reasonable cause [] determination . . . is designed to notify the employer of the EEOC's findings and to provide a basis for later conciliation proceedings." *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1100 (6th Cir. 1984). This process allows room for the EEOC to investigate any additional violations ascertained during the investigation and to notify the employer of them in the reasonable cause determination, which then provides the framework for meaningful conciliation. This is, in fact, what happened in *Keco*, where this Court held that EEOC could pursue relief as to a class of victims—even though the charge alleged only individual discrimination—following the EEOC's inclusion of the class claim in the reasonable cause determination and the agency's effort to conciliate the class claim. *Id*. at 1100-1102. *See also Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1655-56 (2015) (where EEOC

received individual charge but sued as to a class, ruling that EEOC satisfies its conciliation obligation by "inform[ing] the employer about the specific allegation, as the Commission typically does in a letter announcing its determination of 'reasonable cause[,]'" and providing the employer with the opportunity to resolve the case).

The Commission therefore urges this Court to clarify, consistent with *General Telephone*, that the EEOC is entitled to pursue relief for any violations ascertained during the course of a reasonable investigation, where those violations are included in the reasonable cause determination and are subject to conciliation. Under the *General Telephone* standard, EEOC was clearly entitled to pursue the clothing allowance claim because it was "ascertain[ed] in the course of a reasonable investigation of the charging party's complaint." *General Telephone*, 446 U.S. at 331. Stephens' charge alleged the Funeral Home fired her when she announced her intention to undergo gender transitioning. During the investigation, an employee told the EEOC's investigator that Stephens was fired because she refused to continue wearing the "company provided" suit, shirt, and tie. At that

point, the investigator asked whether women were provided suits or uniforms, and the witness responded no, not in the last ten or fifteen years. *Id*. Notes, R.54-24, PageID#1513. Thus, this claim was discovered during the EEOC's reasonable investigation of Stephens' charge.

It is also undisputed that the reasonable cause determination notified the Funeral Home of the clothing benefit claim. Determination, R.63-4, PageID#1968 (finding "reasonable cause to believe that the Respondent discriminated against its female employees by providing male employees with a clothing benefit which was denied to females, in violation of Title VII"). Likewise, it is undisputed that the EEOC provided the Funeral Home with an opportunity to informally resolve the clothing benefit claim. *See* R.74, Exhibit, PageID#2165 (filing sealed proposed conciliation agreement); Opinion, R.76, PageID#2221 n.20 (quoting from proposed conciliation agreement). The EEOC thus satisfied its administrative prerequisites to suit as to the clothing benefit claim, entitling the agency to include the claim in its complaint. *See Mach Mining*, 135 S. Ct. at 1655-56; *Keco*, 748 F.2d at 1100.

The agency had no obligation to pursue a Commissioner's charge in order to pursue the clothing allowance claim; to the contrary, the agency would have disregarded its statutory obligations had it "cast a blind eye" over the uncovered violation. *General Electric*, 532 F.2d at 365. Requiring the EEOC to go back to the drawing board and start over with a new charge "would result in an inexcusable waste of valuable administrative resources and an intolerable delay in the enforcement of rights which require a timely and effective remedy." *Id*. (internal quotation marks omitted).

Even if *Bailey* remains good law, the district court's ruling was erroneous. Unlike *Bailey*, where the EEOC's complaint added a claim of discrimination (religion) not encompassed in the original charge (alleging race and sex discrimination), in this case the EEOC's clothing allowance claim, like the termination claim, alleged sex discrimination. Therefore, this case does not raise the question of whether the EEOC may seek relief for a different kind of discrimination than that alleged in the charge.

In further contrast to *Bailey*, where it was unreasonable to expect the religious claim to surface during the charge's investigation, here it was

reasonable to expect that the investigation of Stephens' charge of transgender discrimination would touch upon the Funeral Home's sex-specific dress code and would therefore also bring up that the company supplied the male employees with suits and ties. This case is also distinguishable from *Bailey* because unlike that case, in which the religion claim was unrelated to the charging party, in this case the clothing allowance claim related to Stephens; had Stephens been permitted to continuing working during her transition to a female, she, too, would have been a victim of the Funeral Home's discriminatory clothing allowance discrimination (since women did not receive a stipend until after EEOC filed suit). Accordingly, even under *Bailey*, the EEOC's clothing allowance claim was within the agency's authority to pursue. Summary judgment should therefore be reversed on the EEOC's clothing benefit claim.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,780 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 14 point.

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Dated: February 10, 2017

CERTIFICATE OF SERVICE

I, Anne Noel Occhialino, hereby certify that I electronically filed the foregoing brief with the Court via the appellate CM/ECF system on February 10, 2017, and that counsel of record for the Funeral Home has consented to electronic service and will be served the foregoing brief via the appellate CM/ECF system.

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