

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

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

and

AIMEE STEPHENS,
Intervenor,

v.

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

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

REPLY BRIEF OF INTERVENOR AIMEE STEPHENS

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INTRODUCTION

Discrimination against Aimee Stephens and other transgender persons is by its very nature sex discrimination, as more and more circuits have agreed. The Funeral Home's arguments that Title VII coverage is unavailable for Ms. Stephens involve challenging well-established precedent as well as the core identity and existence of Ms. Stephens and other transgender individuals. Even if discrimination against transgender persons is not inherently sex discrimination, the discrimination against Ms. Stephens because she intended to present and dress as a woman is an archetypal case of sex stereotyping. The Funeral Home's claim that it was firing Ms. Stephens for violating its gender-segregated dress code plainly does not exempt its sex stereotyping from the protections of Title VII, given that Ms. Stephens intended to comply with the dress code's requirements for women but the Funeral Home wanted her to dress as a man. Nor is Ms. Stephens required to prove that its decision to fire her because she intended to present and dress as a woman placed a greater burden on all women than men, as the Funeral Home contends. In any event, the evidence shows that Ms. Stephens was fired not only because of her intention to comply with the female dress code, but also because she intended to transition and present in all ways as a woman.

The Funeral Home's efforts to defend its firing of Ms. Stephens because of the religious beliefs of its owner should also be rejected. If accepted, the Funeral

Home's claim that the Religious Freedom Restoration Act ("RFRA") allows employers with religious objections to transgender persons to fire them would have tragic implications for transgender Americans, as well as religious minorities and women. Civil rights statutes such as Title VII further a compelling governmental interest in eliminating employment discrimination, and enforcing those statutes when such discrimination occurs is the least restrictive means of furthering that interest. Therefore, RFRA neither permits nor requires the government to offer exemptions to employers from compliance with Title VII where the employer asserts a religiously-motivated grounds for discriminating. The EEOC's action under Title VII to remedy the discrimination against Ms. Stephens is plainly supported by such government interests, while the alternatives suggested by the District Court and the Funeral Home would utterly fail to achieve those interests and would in fact undermine them. Moreover, RFRA is not even a defense to Ms. Stephens' Title VII claim of discrimination, so the Funeral Home should not be allowed to assert it as grounds for a ruling against her.

ARGUMENT

I. The Funeral Home violated Title VII by firing Ms. Stephens because she is transgender and intended to transition to presenting as a woman.

The Funeral Home's decision to fire Ms. Stephens because she is transgender and intended to transition to living as a woman is per se sex discrimination. This Court already recognized as much in *Smith v. City of Salem*

and *Dodds v. Department of Education*, as have other circuits in holding that discrimination against transgender individuals constitutes sex discrimination. See *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-03 (9th Cir. 2000); *Glenn v. Brumby*, 663 F.3d 1312, 1316-19 (11th Cir. 2011). It is simply impossible to discriminate against someone for being transgender without taking the impermissible “criterion” of “sex” into account. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 248 (1989) (plurality); *id.* at 262 (O’Connor, J., concurring); *id.* at 282 (Kennedy, J., dissenting).

Since the Funeral Home filed its brief, two other circuits have reached or suggested they would reach the same conclusion, in spite of earlier contrary rulings from those circuits. In *Whitaker By Whitaker v. Kenosha Unified School District No. 1 Board of Education*, ___F.3d___, No. 16-3522, 2017 WL 2331751 (7th Cir. May 30, 2017), the Seventh Circuit reasoned that under *Price Waterhouse* discrimination against transgender individuals is by its very nature sex discrimination, since “[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.” *Id.* at *9. In doing so, the court recognized that the reasoning of *Price Waterhouse* effectively overruled the conclusion of *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), that discrimination against transgender people was not sex

discrimination. *Id.* Similarly, in *Tovar v. Essentia Health*, ___F.3d___, No. 16-3186, 2017 WL 2259632 (8th Cir. May 24, 2017), the Eighth Circuit “assume[d] for purposes of this appeal that the prohibition on sex based discrimination under Title VII . . . encompass[e]d protection for transgender individuals, *id.* at *2 (citing *Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697, 702 (8th Cir. 2012)), notwithstanding the Eighth Circuit’s previous decision in *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) that transgender persons were not protected by Title VII.¹

Another reason discrimination against transgender people is inherently sex discrimination is that it is discrimination against someone for undergoing a gender transition. *See Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008)

¹ The Funeral Home speculates that this Court implicitly rejected the argument that discrimination against transgender people is sex discrimination when it modified its opinion in *Smith* to remove the language stating that “to the extent that Smith also alleges discrimination based solely on his identification as a transsexual, he has alleged a claim of sex stereotyping pursuant to Title VII.” *Smith v. City of Salem*, 369 F.3d 912, 922 (6th Cir. 2004), *opinion amended and superseded*, 378 F.3d 566 (Oct. 18, 2004). Such logic is obviously flawed. This Court may have modified its decision for any number of reasons such as, for example, the determination that the language was not necessary to its ruling in that case. That position is supported by the final language of the decision, which states that an employer violates Title VII by discriminating against an employee “who is a transsexual—and therefore fails to act and/or identify with his or her gender.” *Smith*, 378 F.3d at 575. By definition, transgender persons are such persons. *See also Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (recognizing that “[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes”) (quoting *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011)).

(analogizing gender transition to religious conversion). The Funeral Home’s disagreement with the *Schroer* court’s conclusion depends on its unsupportable head-in-the-sand assertion that “a person’s religion can be changed, but a person’s sex cannot” and its tortured argument regarding Title VII protections for religious converts. *See* Funeral Home Brf. at 30-31. It defies logic to believe that discriminatory motivations can be parsed between aversion to the conversion (or transition) and disfavor regarding the religion (or gender presentation) itself, or that evidence of discrimination because someone converts would be insufficient to violate Title VII. “Applying Title VII” to protect converts “does not create a new ‘class’ of people covered under Title VII—for example, the ‘class’ of [religious converts] Rather, it would simply be the result of applying the plain language of a statute prohibiting discrimination on the basis of religion to practical situations in which such characteristics are unlawfully taken into account.” *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012); *cf. Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 144 (1987) (refusing to adopt interpretation of Free Exercise Clause that would “single out the religious convert for different, less favorable treatment”). Religious discrimination is not limited to “discrimination against members of particular religions,” *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016), with defined

“religious tenets” as the Funeral Home suggests, Funeral Home Brf. at 31,² but includes “discrimination against converts, or against those who practice either religion the ‘wrong’ way.” *Fabian*, 172 F. Supp. 3d at 527. Whether the Funeral Home was motivated to fire Aimee Stephens because she transitioned or intended to express herself as a woman, it was acting on the basis of sex in violation of Title VII.

II. Firing Ms. Stephens because she intended to present as a woman and because she intended to follow the female dress code is a classic form of sex stereotyping.

Even if discrimination against transgender individuals were not inherently based on sex, the discrimination experienced by Ms. Stephens was motivated by sex stereotyping in violation of Title VII. Such discrimination has been uniformly held to violate Title VII by this Court and others. *See Smith*, 378 F.3d at 574 (employers who discriminate against employees perceived as men “because they . . . wear dresses and makeup . . . are . . . engaging in sex discrimination”); *Glenn v. Brumby*, 663 F.3d 1312, 1320-21 (11th Cir. 2011) (Brumby “fired Glenn because he considered it ‘inappropriate’ for her to appear at work dressed as a woman and that he found it ‘unsettling’ and ‘unnatural’ that Glenn would appear wearing women’s clothing”; he fired her because of “the sheer fact of [her] transition”);

² Indeed, it is difficult to understand why the Funeral Home, which asserts religious liberty interests in this case, would advocate for limiting religious liberty protections in the context of converts from one religion to another.

Rosa, 214 F.3d at 214-16 (bank employee’s refusal to provide transgender individual a loan application “because she thought that Rosa’s attire did not accord with his male gender” was evidence of sex discrimination). Indeed, given that this Court has already held that “Title VII’s reference to ‘sex’ encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to *stereotypical* gender norms,” *Smith*, 378 F.3d at 573 (emphasis added), the Funeral Home’s discussion of dictionary definitions, Funeral Home Brf. at 25, is entirely beside the point.³

Although the Funeral Home asks this Court to follow the narrower approach to sex stereotyping advocated by Judge Pryor’s concurring opinion in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248, 1258 (11th Cir. 2017), *see* Funeral Home Brf. at 17, Ms. Stephens would prevail even under that narrower standard.

According to Judge Pryor:

Glenn’s claim was successful because Glenn was fired after choosing to “beg[i]n to take steps to transition.” Glenn “present[ed]” and “dressed as a woman” at work and notified the supervisor that Glenn intended to continue this behavior. Because Glenn “was born a

³ Even the dictionary definitions of sex quoted by the Funeral Home include the “behavioral” components of “sex.” *See Webster’s Third New International Dictionary* 2081 (1971) (defining “sex” to include the “behavioral peculiarities of living beings that subserves biparental reproduction . . . and that is typically manifested as maleness and femaleness”); *American College Dictionary* 1109 (1970) (defining sex to include “the character of being either male or female”); *see also OED Online*, Oxford University Press (defining sex as “a social or cultural phenomenon, and its manifestations” and collecting definitions from back to 1651).

biological male,” Glenn’s employer believed these choices were “unsettling,” “unnatural,” and “not appropriate.” . . . Title VII would have protected any [person whose sex assigned at birth is] male under those facts, not because of status, but because of behavior.

Evans, 850 F.3d at 1260 (11th Cir. 2017) (Pryor, J., concurring) (quoting *Glenn*, 663 F.3d at 1314, 1320-21). Exactly the same facts are presented here.

The Funeral Home’s assertion that it was firing Ms. Stephens because of her violation of its dress code does not immunize its conduct from challenge, as the Funeral Home contends. Funeral Home Brf. at 12-17. Ms. Stephens intended to *comply* with the dress code’s requirement for women, and therefore the EEOC never challenged the dress code itself, as the District Court noted. Summary Judgment Opinion, R.76, PageID#2220-21. Even if the Funeral Home fired Ms. Stephens because its owner believed she should follow the dress code *for men*, it clearly engaged in sex discrimination. Since *Price Waterhouse*, courts have regularly found that employers violated Title VII by firing an employee for dressing in clothing that defied the employer’s sex-based stereotypes. *See, e.g., Smith*, 378 F.3d at 574.

There was never an actual “biological” dress code, as the Funeral Home claims. Rather, the Funeral Home administered its dress code based on its perception of someone’s sex and rejected Ms. Stephens’ female identity and her decision to dress as a woman. EEOC’s Counter-Statement of Facts, R.64,

PageID#2076-77.⁴ The Funeral Home’s reliance on its so-called “biological” dress code is simply a pretext for its decision to fire Ms. Stephens for failing to comport with Mr. Rost’s sex stereotype that all individuals should dress consistently with their birth-assigned sex. *Cf. Whitaker*, ___F.3d at ___, 2017 WL 2331751, at *11, *12 (finding that school district policy requiring students to use the restroom based on the sex listed on their birth certificate punishes a transgender “individual for his or her gender non-conformance” and “is inherently based upon a sex-classification”).⁵ “[A]ssuming or insisting that Ms. Stephens match[] the stereotype associated with [her] group,” is sex discrimination. *Price Waterhouse*, 490 U.S. at 251. And a primary reason that sex discrimination is prohibited by Title VII is because “[p]ractices that classify employees in terms of . . . sex tend to preserve

⁴ The EEOC admitted that the Funeral Home administered its dress code based on “its perception of someone’s sex” but challenged the Funeral Home’s assertion that its dress code was administered based on an employees’ biological sex, since it was unclear what the Funeral Home meant by “biological sex” and it had no way of knowing employees’ “chromosomes, birth sex, or genitalia because [the Funeral Home] does not know any of these three” and “does not ask employees what their ‘biological sex’ is in order to administer its dress code.” EEOC’s Counter-Statement of Facts, R.64, PageID#2076-77.

⁵ The Funeral Home’s effort to limit *Price Waterhouse* and *Smith* to sex stereotyping regarding behavior other than a person’s dress, Funeral Home Brf. at 16-17, is unsupportable. In *Price Waterhouse*, the unlawful sex stereotyping Ann Hopkins experienced was not limited to telling her how to walk and talk, but also involved telling her that she should “dress more femininely, wear make-up, have her hair styled, and wear jewelry.” 490 U.S. at 235. Similarly in *Smith*, this Court included dress in its description of the sex stereotyping that violated Title VII. 378 F.3d at 574.

traditional assumptions about groups rather than thoughtful scrutiny of individuals.” *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978). It is “unquestionably true,” *id.* at 707, that most female employees were assigned the female sex at birth, but “[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.” *Id.* at 708.

The appearance code cases cited by the Funeral Home fail to support its position, because all of them fail to consider its application of an appearance code to a transgender person. This case is simply not a challenge to a dress code. But even “appearance standards, including makeup requirements, may well be the subject of a Title VII claim for sexual stereotyping,” where “the challenged policy was part of a policy motivated by sex stereotyping.” *Jespersion v. Harrah's Operating Co.*, 444 F.3d 1104, 1106 (9th Cir. 2006) (en banc). In contrast to *Jespersion*, the Funeral Home’s application of its dress code policy to Ms. Stephens was based on Mr. Rost’s sex stereotypical assumptions that all women were identified as female at birth and his resulting insistence that Ms. Stephens dress as a man. *See, e.g.*, Rost Aff., R.54-2, PageID#1333-35 (¶¶ 39-46) (Rost believed that Stephens is male and that allowing her to dress as a woman would offend customers, hurt business, and violate his religious beliefs). Moreover, in contrast to *Jespersion*, where there was “nothing to suggest the grooming standards would

objectively inhibit a woman's ability to do the job," *id.*, requiring Ms. Stephens to dress according to the male dress code would have been deeply harmful to her. *See* Letter, R.54-21, PageID#1494 (living her life as a man when she knew she was a woman was something "[she has] struggled with [her] entire life" and "caused [her] great despair and loneliness" which she was addressing by "liv[ing] and work[ing] . . . as a woman"). The Funeral Home could not, of course, rely on speculation regarding customer preferences to justify its firing of Ms. Stephens. *See, e.g., Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981) (female employee could not lawfully be fired because employer's foreign clients would only work with males).

This Court should also reject the Funeral Home's theory that sex stereotyping violates Title VII only if it treats all women worse than all men or all men worse than all women. Funeral Home Brf. at 16, 18. The law is clear that Title VII focuses on discrimination against individuals, not fairness to classes. Title VII "makes it unlawful 'to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin.'" *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978) (quoting 42 U.S.C. § 2000e-2(a)(1) (emphasis added by the court)). "The statute's focus on the individual is unambiguous. Even a true generalization about the class is an

insufficient reason for disqualifying an individual to whom the generalization does not apply.” *Id.* “Title VII eliminates” sex as a basis “for distinguishing among employees,” *Price Waterhouse*, 490 U.S. at 239, including discrimination against *one* individual who fails to comport with her employer’s gender-based stereotypes, because it prohibits an employer from “evaluat[ing] employees by assuming or insisting that they matched the stereotype associated with their group.” *Id.* at 251; *see also Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam) (discrimination against subclass of women with children is sex discrimination); *Sprogis v. United Air Lines, Inc.*, 517 F.2d 387 (7th Cir. 1975) (airline’s policy of employing only subclass of unmarried female flight attendants violated Title VII).

The Funeral Home fails to appreciate and belittles what it means to be transgender when it suggests that forcing Ms. Stephens to dress as male “would have *enabled* Stephens to perform the funeral director’s duties,” Funeral Home Brf. at 20, and argues that Ms. Stephens is trying to impose her own “stereotypes” on her employer and establish her own dress code. *Id.* at 21. Nothing could be further from the truth. As Aimee Stephens made very clear in the letter she gave to Mr. Rost regarding her decision to transition, she had struggled with her “gender identity disorder” her “entire life” so that living and presenting as a woman was something she desperately needed to do for her “peace of mind” and to end the “agony in [her] soul.” Letter, R.54-21, PageID#1494-95. Her intention was never

to challenge the dress code, but to comply with it. Firing Ms. Stephens because she “wanted to dress as a woman” reflects sex stereotyping by the Funeral Home, not by Ms. Stephens.

Moreover, the record shows that the discrimination in this case was based on more than just the dress code. Two weeks after Ms. Stephens explained to Mr. Rost that she is transgender and intended to transition to living as a woman, Mr. Rost fired her. He told Ms. Stephens that “this is not going to work out [] [a]nd that your services would no longer be needed here.” Rost 30(b)(6) Depo. 126-27, R.54-5, PageID#1371; Stephens Depo. 75-76, R.54-15, PageID#1455. Rost explained that he fired Ms. Stephens because she “was no longer going to represent [her]self as a man” and “wanted to dress as a woman.” Rost 30(b)(6) Depo. 135-36, R.54-5, PageID#1372.⁶

Rost also defended his firing of Ms. Stephens on the grounds that her presence as a woman violated his religious beliefs that “a person’s sex is an immutable God-given gift and that people should not deny or attempt to change

⁶ The EEOC disputed the Funeral Home’s claim that it was firing Ms. Stephens only because she intended to dress as a woman. *See* EEOC Counter-Statement of Facts, R.64, PageID#2081-82 (denying Funeral Home’s assertion that it fired Ms. Stephens because she refused to comply with the dress code and because her dressing as a woman would violate Rost’s religious beliefs because Rost never told Stephens he was going to fire her for violating the dress code and the religious defense was raised much later during the litigation); Rost 30(b)(6) Depo. 126-27, R.54-5, PageID#1371 (Rost failed to mention dress code or religious beliefs when firing Stephens).

their sex,” Rost Aff., R.54-2, PageID#1334 (¶42), as Stephens would be doing “while acting as a representative of [the Funeral Home].” *Id.* at PageID#1334 (¶43). Thus, it was her presentation as a woman, not merely her so-called violation of the dress code, that motivated Rost to fire her. The adverse action against her was sex-based, and therefore violated Title VII.

III. RFRA does not exempt the Funeral Home from Title VII’s prohibition on sex discrimination.

This Court should refuse the Funeral Home’s request that it be allowed to discriminate against Aimee Stephens because of its owner’s religious beliefs based on the longstanding precedent rejecting such exemptions to civil rights claims. This is true both because enforcing Title VII and other civil rights statutes serves a compelling governmental interest in eliminating discrimination and because enforcing those statutes when such discrimination occurs is the least restrictive means of advancing that interest.

In her opening brief, Ms. Stephens pointed out that RFRA is not a defense to the actions of private parties, such as Ms. Stephens, against private employers. Stephens Brf. at 15. Although the Funeral Home objects that intervenors are limited to issues that principal parties raised and cannot expand the scope of the litigation, in fact intervenors such as Ms. Stephens are permitted to present different arguments related to the principal parties’ claims, *Grutter v. Bollinger*, 188 F.3d 394, 400-01 (6th Cir. 1999), as Ms. Stephens has done here. The issue

whether the Funeral Home may claim a defense under RFRA and the specific question whether RFRA may be asserted against a private party were duly considered by the district court. Summary Judgment Opinion, R.76, PageID#2222. In *General Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 412 (6th Cir. 2010), this Court concluded that RFRA has no application to suits between private parties. Accordingly, this Court should reject the Funeral Home's argument that RFRA applies to Ms. Stephens' rights under Title VII for the additional reason that it may not be asserted against her.

A. Ample precedent supports the rejection of the Funeral Home's claim of an exemption to Title VII.

Numerous cases have rejected efforts by employers, school and businesses to assert that their religious beliefs or practices allow them to discriminate. *See* Stephens Brf. at 16-20. The Funeral Home's attempts to distinguish those cases from this one based on factual differences are unpersuasive. The court in *Redhead v. Conference of Seventh-Day Adventists*, for example, correctly concluded *both* that the "ministerial exception is inapplicable to plaintiff" *and* that "there is a compelling interest in ensuring that Title VII remains enforceable as to employment relationships that do not implicate concerns under the Free Exercise and Establishment Clauses of the First Amendment." 440 F. Supp. 2d 211, 221 (E.D.N.Y. 2006). It concluded that "Title VII's purpose of eradicating employment discrimination is a 'compelling government interest,'" *id.* at 220 (citing *Werft v.*

Desert Sw. Annual Conference of United Methodist Church, 377 F.3d 1099, 1102 (9th Cir. 2004); *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 810 (S.D. Ind. 2002)), and that “Title VII provides a uniform approach to eradicating employment discrimination in its various manifestations,” *id.* (citing *Preferred Mgmt. Corp.*, 216 F. Supp. 2d at 811). The *Redhead* court’s reasoning counsels a similar result in the present case.

Similarly, in *Preferred Management*, the court found *both* that the EEOC’s investigation and opposition to the employer’s summary judgment motion failed to substantially burden the employer’s religious beliefs or practices *and* that even had the EEOC’s conduct substantially burdened the employer’s religious beliefs or practices the eradication of employment discrimination is a compelling governmental interest and the EEOC’s conduct in investigating and enforcing Title VII is the least restrictive means to serve that interest. 216 F. Supp. 2d at 810-12. The factual differences between *Redhead* and *Preferred Management* and the current case fail to justify a different result here.

In addition, the Funeral Home fails to address the pre-*Employment Division v. Smith*, 494 U.S. 872 (1990), cases cited by Ms. Stephens in which courts rejected claims by employers, schools, and businesses serving the public for exemptions to Title VII and other civil rights laws based on religious beliefs and practices. These pre-*Smith* cases, which follow the analytical framework that

RFRA was enacted to restore, provide additional authority for the basic principle that enforcement of the civil rights statutes in cases where discrimination occurs is the least restrictive means for furthering the government's compelling interest in fighting discrimination. *See* Stephens Brf. at 16-19.

B. A compelling governmental interest supports the enforcement of Title VII to remedy the discrimination against Ms. Stephens.

The EEOC and Ms. Stephens have shown that enforcement of Title VII serves the government's compelling interest in putting an end to employment discrimination. *See* EEOC Brf. at 50-54; Stephens Brf. at 20-26. The Funeral Home argues that the "to the person" standard from RFRA, 42 U.S.C. § 2000bb-1(b), requires showing some specific interest here that sets the discrimination against Ms. Stephens apart from the discrimination experienced by other employees whose rights under Title VII have been violated. Funeral Home Brf. at 41. The problem with that argument is that every single instance of sex discrimination "causes grave harm to its victims," *United States v. Burke*, 504 U.S. 229, 238 (1992), such that the government's compelling interest in stopping such discrimination is implicated whenever such discrimination occurs. The Funeral Home also misrepresents the interest furthered here by persisting in arguing that the EEOC has challenged its gendered dress code and therefore must show a compelling interest in "forcing [the Funeral Home] to allow its male funeral directors to wear the uniform for female funeral directors," Funeral Home Brf. at

41, when the government's interest here is in stopping and remedying the discrimination imposed on Ms. Stephens by firing her because she intends to present as female generally, including in the way she dresses. The EEOC's and Ms. Stephens' challenge is to the Funeral Home's insistence that she follow the male dress code, despite the fact that she is a woman.

The Funeral Home also insists that because RFRA was intended to restore the pre-*Smith* "constitutional guarantee of free exercise," it is a "higher-order right that necessarily supersedes a conflicting statutory right," Funeral Home Brf. at 42, such that it creates an exemption to Title VII for the Funeral Home. But of course Congress cannot create a constitutional right without a supermajority vote and ratification by the states. U.S. Const. art. V, which is part of why the Supreme Court held that RFRA's application to the states cannot be justified as a congressional enforcement of the Fourteenth Amendment. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). In addition, both RFRA itself and pre-*Smith* free exercise case law make it clear that employers may not claim religiously-based exemptions to uniformly applicable laws where there is a compelling interest served by the law's enforcement and no lesser restrictive alternative to further the compelling interest. *See* 42 U.S.C. § 2000bb-1(b); *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406-09 (1963).

The Funeral Home also suggests that a showing of animus is necessary in order to find that a compelling interest is served by enforcement of Title VII. Funeral Home Brf. at 43. There is simply no such requirement and the Funeral Home fails to provide any legal support for its assertion. Title VII prohibits discrimination based on sex whether motivated by animus or other reasons, such as the desire to accommodate other people's prejudices or discomfort. *See, e.g., Fernandez*, 653 F.2d at 1276-77 (female employee could not lawfully be fired because employer's foreign clients would only work with males); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (rejecting customer preference for female flight attendants as justification for discrimination against male applicants).

C. The EEOC met its burden of showing that enforcing Title VII to remedy the discrimination against Stephens was the least restrictive means of furthering its compelling interests.

There is no alternative to enforcement of Ms. Stephens' rights under Title VII to reinstatement and damages that would serve "equally well," *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2782 (2014), the government's interests in eradicating sex discrimination. *See* EEOC Brf. at 55-61. Putting an end to the discrimination suffered individually by Ms. Stephens furthers the government's compelling interest in ending the "stigmatizing injury" of discrimination as well as "the denial of equal opportunities that accompanies it" in order to ensure that

individuals subject to discrimination are able to “participat[e] in political, economic, and cultural life” of this country. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984).

Contrary to the Funeral Home’s argument, there is nothing circular about arguing that the enforcement of Title VII and other civil rights statutes is the least restrictive means of furthering the government’s compelling interest in putting an end to discrimination each time those statutes are violated. The Supreme Court recognized this basic principle in *Hobby Lobby*, 134 S. Ct. at 2783, when it concluded 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.” The same is true with regard to employment discrimination based on sex.

The Funeral Home’s argument for a religious exemption to Title VII misconceives RFRA’s scope. While the Supreme Court has concluded that certain laws, such as the contraceptive mandate of the Affordable Care Act, allow for accommodations of religious beliefs and practices, *see id.* at 2782 (finding that already-existing alternative to requiring employers with religious objections to provide insurance coverage would protect the health of women as effectively as the contraceptive mandate); *see also id.* at 2786 (Kennedy, J., concurring) (same), no similar accommodation can be made with respect to Title VII that would “equally

well,” *id.* at 2782, serve the government’s compelling interests in ending such discrimination. In this case, requiring the Funeral Home to comply with Title VII vindicates the rights of someone who was discriminated against because of sex—the very discrimination that the government has a compelling interest in preventing—and there is no alternative that would both achieve that goal and not impose the burden on religious exercise that is claimed here.

Finally, even if an alternative to enforcement of Title VII might exist in other circumstances that at this point are difficult to imagine, the Funeral Home’s suggested alternatives are plainly unacceptable. Permitting the Funeral Home to fire Ms. Stephens and other transgender employees who are “public facing representatives of their employer,” Funeral Home Brf. at 44-45, conflicts directly with the government’s interest in putting an end to employment discrimination and would in fact license discrimination against transgender employees (as well as women and religious minorities) by any number of employers who object to employing persons whose appearance conflicts with the employers’ religious beliefs. *See* EEOC Reply Brf. at 17-18. Contrary to the Funeral Home’s assertion, there is nothing “benign” about either firing Ms. Stephens or the Funeral Home’s refusal to accept her as a woman that motivated its firing of her. Moreover, the Funeral Home’s surprising assertion that it was Ms. Stephens who insisted upon the Funeral Home’s gendered dress code has no basis in reality. Ms. Stephens

simply stated her intention to present and dress consistently with the Funeral Home's existing gendered dress code, which the Funeral Home has never suggested it was willing to discard. In fact, the Funeral Home argues repeatedly that having a gendered dress code was essential to its business. Funeral Home Brf. at 6-7, and even its owner's religious beliefs. *Id.* at 38-40. Therefore, enforcing Title VII here is the least restrictive means of furthering the government's compelling interests, and the Funeral Home's RFRA defense must be rejected.

CONCLUSION

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

Dated: June 12, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the word counting feature of counsel's word processing programs shows that this brief contains 5,474 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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

/s/ John A. Knight_____

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2017, I electronically filed the foregoing document through the court's electronic filing system, and that it has been served on all counsel of record through the court's electronic filing system.

/s/ John A. Knight_____

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

Record	Description	Page ID Range
54-2	Rost Affidavit	1325-1338
54-5	Rost 30(b)(6) Deposition (excerpts)	1354-1378
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