

No. 18-107

IN THE
Supreme Court of the United States

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

—v.—

Petitioner,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
and AIMEE STEPHENS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR RESPONDENT AIMEE STEPHENS

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INTRODUCTION

Instead of addressing the question presented here—whether it is lawful under Title VII to fire someone for being transgender or for not complying with an employer’s sex stereotypes—Petitioner and the Government seek to reframe the case as about a sex-specific dress code. But as the court of appeals recognized and the record unequivocally demonstrates, Harris Homes fired Aimee Stephens, without ever discussing the dress code, because she is transgender and departed from its owner’s sex stereotypes about how men and women should appear, behave, and identify.

The hallmark of Title VII’s protections is that an individual employee should be judged on merit and not sex. But Petitioner and the Government argue that an employer may consider sex as part of a decision to fire a transgender person, so long as it discriminates against both transgender women and transgender men. A decision to fire someone because they are transgender, however, is necessarily based on sex, even if sex is defined only as sex assigned at birth. And firing a transgender man and a transgender woman because of their sex assigned at birth constitutes two separate acts of sex discrimination, not a defense.

Along the same lines, Petitioner and the Government argue that even though Harris Homes fired Ms. Stephens for failing to conform to sex-based stereotypes, her firing does not count as sex discrimination because Harris Homes would also fire employees assigned a female sex at birth for failing to conform to sex-based stereotypes. But as the Government concedes, firing a man for being too

feminine is no defense to firing a woman for being too masculine. Again, they are simply two acts of sex discrimination. And as both Petitioner and the Government concede, Title VII protects transgender employees, just as it protects all employees, from discrimination because of sex.

Finally, Petitioner’s warning that ruling for Ms. Stephens would render all sex-specific rules and spaces invalid is unfounded. The only question here is whether firing Ms. Stephens was “because of sex.” Employment rules that explicitly draw sex-based distinctions are on their face “because of sex.” Whether such sex-based rules impermissibly discriminate with respect to the terms and conditions of employment, or otherwise adversely affect individual workers, present different questions that are not at issue here.

I. HARRIS HOMES FIRED MS. STEPHENS BECAUSE SHE IS TRANSGENDER AND VIOLATED HARRIS HOMES’S SEX STEREOTYPES, NOT BECAUSE OF ITS SEX-SPECIFIC DRESS CODE.

Petitioner and the Government contend that the only reason Harris Homes fired Ms. Stephens was because she was going to adhere to the company dress code for women and not men. But the Sixth Circuit flatly rejected the argument that the dress code, rather than Mr. Rost’s sex stereotypes and Ms. Stephens’s transgender status, led to Ms. Stephens’s discharge, and the record fully supports that holding. Pet. App. 21a-22a.

The Sixth Circuit held that Harris Homes fired Ms. Stephens “for wishing to appear or behave in a manner that contradicts [her employer’s]

perception of how she should appear or behave based on her sex.” Pet. App. 22a. The court further held that “the record . . . contains uncontroverted evidence that Rost’s reasons for terminating Stephens extended . . . beyond Stephens’s attire and reached Stephens’s appearance and behavior more generally.” Pet. App. 65a. The facts unambiguously support that holding.

Mr. Rost fired Ms. Stephens without even mentioning the dress code. J.A. 51. He simply told her, “this is not going to work out” and “[d]id not talk” with her “about anything.” Pet. App. 96a; J.A. 51. The record shows that Mr. Rost objected broadly to the very idea of Ms. Stephens’s transgender status, rather than the type of clothes she would wear. Mr. Rost testified that he fired Ms. Stephens because Ms. Stephens “was no longer going to represent himself as a man,” and it “would be violating God’s commands if [Mr. Rost] were to permit one of [Harris Homes’s] funeral directors to deny their sex while acting as a representative of [the company].” Pet. App. 109a, 104a. Mr. Rost further testified that he was uncomfortable referring to Ms. Stephens by the name “Aimee” because, in his view, Ms. Stephens is “a man.” J.A. 72. Additionally, he indicated that “there is no way that” Ms. Stephens “would be able to present in such a way that it would not be obvious that it was [a man].” J.A. 31. He believed “a male should look like a . . . man, and a woman should look like a woman.” Resp. App. 62a-63a.¹

¹ Petitioner asserts that Mr. Rost also “thought about” restroom usage, Pet. Br. 9, even though he testified that concerns about restroom usage were “hypothetical.” J.A. 36-37. While Petitioner claims that Mr. Rost “did consider the restroom issue

In short, Petitioner and the Government premise their arguments on a set of facts the record simply does not support. Moreover, in their briefing before this Court, Petitioner and the Government affirmatively concede that Harris Homes in fact fired Ms. Stephens because her gender identity does not match her assigned sex at birth, Pet. Br. 27, or because Harris Homes perceived her to “deny” her sex, U.S. Br. 4. Thus, Harris Homes fired Ms. Stephens because she is transgender and did not conform to Harris Homes’s other sex-based stereotypes—not because of the dress code.²

II. MS. STEPHENS’S SEX WAS A BUT-FOR CAUSE OF HER FIRING.

Petitioner and the Government contend that Ms. Stephens’s discharge was lawful because she was fired for being transgender and not because of her sex. But firing someone for being transgender is “because of such individual’s sex” even if the term sex is limited to sex assigned at birth (or what Petitioner and the Government refer to as “biological sex”). Had Ms. Stephens been assigned a female sex at birth, Harris Homes would not have fired her for living openly as a woman. Thus, she has met the “simple test” for sex discrimination set out in *Manhart*.

when processing his decision,” Pet. Br. 9 n.4, the pages cited say nothing about the reason for Ms. Stephens’s firing.

² If this Court concludes that there is a genuine dispute of fact about why Harris Homes fired Ms. Stephens, the Court should remand for trial.

A. An Employer Cannot Fire an Employee for Being Transgender Without the Person’s Sex Assigned at Birth Being a But-For Cause of the Discharge.

By definition, a transgender person is someone who lives and identifies with a sex different than the sex assigned to the person at birth. *Amici Br. Am. Med. Ass’n* 4-5. Thus, there is no way to fire someone for being transgender without doing so at least in part based on the person’s sex assigned at birth. *See Amici Br. Walter Dellinger et al.* 14-17. That makes sex a but-for cause of the firing. The fact that living openly as a woman was also a cause of Ms. Stephens’s discharge is no defense, as sex need not be the sole cause of a firing to trigger Title VII liability. *Stephens Br.* 21-23.

A slight change in the facts illustrates the point. Ms. Stephens could have transitioned at a younger age and applied for the job at Harris Homes while already living openly as a woman. If Harris Homes had perceived her as female when it hired her, and then fired her when it learned that she was assigned a male sex at birth, her sex would plainly have been a but-for cause of her discharge. The only difference here is that Harris Homes became aware of her sex assigned at birth first, and her intention to live openly as a woman second—but in both instances sex assigned at birth would be a but-for cause of discharge. *See, e.g., Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 656 (S.D. Tex. 2008) (explaining prospective employer rescinded transgender woman’s job offer because: “You presented yourself as a female and we later learned you are a male”).

Although Petitioner and the Government concede that in firing Ms. Stephens, they “noticed” her sex assigned at birth, they argue that Title VII permits employers to notice sex in the context of enforcing sex-specific rules like dress codes and restrooms. Pet. Br. 18; U.S. Br. 36. But here, Harris Homes did not simply notice that Ms. Stephens was assigned male at birth: it fired her because of her assigned sex. And while some sex-specific policies may not violate Title VII, that is not because they are not “because of sex”—they indisputably are—but because they may not discriminate with respect to the “terms [or] conditions” of an individual’s employment or “otherwise adversely affect [an individual’s] status as an employee.” 42 U.S.C. § 2000e-2(a)(1)-(2); *see* Point V *infra*. Thus, the fact that Title VII may permit employers to draw sex-based distinctions in some limited circumstances does not refute the point that when an employer fires an employee based in part on her sex assigned at birth, its actions are “because of sex.”³

³ Petitioner relies on *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), to argue that, just as discrimination based on citizenship status does not create a claim of national origin discrimination under Title VII, so too discrimination based on transgender status does not create a claim of sex discrimination. But Petitioner’s argument relies on an understanding of national origin rejected by this Court. Pet. Br. 29. The dissent in *Espinoza* interpreted national origin discrimination to include discrimination against someone because of the fact that they were born outside the United States, which bears some relationship to citizenship. 414 U.S. at 96. But the majority concluded that national origin discrimination refers more narrowly to one’s particular ancestry, which has no necessary relationship to citizenship. *Id.* at 88. Someone of Mexican ancestry can be a citizen of Mexico, the United States, or another country altogether. And an

B. Comparing the Treatment of People Assigned Male and Female at Birth Confirms that Ms. Stephens Was Fired Because of Sex.

Ms. Stephens was fired for living openly as a woman. Harris Homes would not have fired her for the same conduct had she been assigned female at birth. Petitioner and the Government offer no persuasive reason for rejecting this “simple test” to identify discrimination because of an individual’s sex. *City of L.A., Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978).

All parties agree that the purpose of a comparator is to “scrupulous[ly] . . . hold[] *everything* constant except the plaintiff’s sex,” so that “the comparator analysis can ‘do its job of *ruling in* sex discrimination as the actual reason for the employer’s decision.” Pet. Br. 26 (quoting *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 366 (7th Cir. 2017) (Sykes, J., dissenting)). The comparator is designed to determine whether, but for an employee’s sex, the employer’s decision would have been different. Therefore, as Petitioner asserts, “[t]he proper comparator is not someone who exhibits a different gender identity, but someone of the opposite sex who has all other characteristics in common with Stephens.” Pet. Br. 26.

employer can discriminate against someone for being a non-citizen without knowing the person’s ancestry or acting because of it. Indeed, it was undisputed in *Espinoza* that the employee was denied a position because of her status as a non-citizen, not because of her Mexican national origin. In contrast, it is impossible to fire someone for being transgender without the employee’s assigned sex at birth being both known and essential to the decision.

That is precisely the comparison that Ms. Stephens has made. Holding scrupulously constant everything except sex assigned at birth, including gender identity, Ms. Stephens was fired because she intended to live openly as a woman, while employees assigned the female sex at birth were not fired for the same conduct. So, too, in *Price Waterhouse*, this Court compared Ms. Hopkins—a woman who displayed stereotypically masculine behavior (aggressiveness)—to a man who displayed the same behavior (aggressiveness), not to a man with different stereotypically feminine behavior. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).

Petitioner claims that “[t]he proper comparison puts Stephens, a man who identifies as the opposite sex [i.e., has a female gender identity], alongside a woman who identifies as the opposite sex [i.e., has a male gender identity].” Pet. Br. 27. But this comparison does not treat everything but sex assigned at birth constant: it compares Ms. Stephens to someone who is different in two ways—“exhibit[ing] a different gender identity” (that is, identifying as male rather than female) *and* having a different sex assigned at birth. Pet. Br. 26.

Petitioner’s alternative descriptions of the conduct to be held constant—being transgender or violating the dress code—do not help it. Both transgender status and sex-specific dress codes are inescapably “because of sex,” so they cannot serve as comparators if the aim is to rule in or out whether the disparate treatment was “because of sex.”

Building sex into the comparison defeats the purpose of the exercise.⁴

C. Firing an Employee for Changing Sex Is Because of Sex.

Petitioner also asserts that it fired Ms. Stephens not for her sex assigned at birth, but for “attempt[ing] to change . . . sex.” J.A. 131, 133. But firing someone for “changing sex” is still “because of sex” in violation of Title VII, just as firing an employee for changing religion would be “because of religion.” *See* Stephens Br. 26-27; Amici Br. Walter Dellinger et al. 17-19.

The fact that Title VII defines “religion” to include “religious observance and practice” does not, as the United States argues, justify different legal treatment. *See* U.S. Br. 44. Title VII “on its face treats each of the enumerated categories exactly the same.” *Price Waterhouse*, 490 U.S. at 243 n.9 (plurality opinion). Just as Title VII protects “all aspects of religious observance,” 42 U.S.C. § 2000e(j), so too does it “strike at the entire spectrum” of sex

⁴ Petitioner and the Government devote many pages to rebutting an argument that Ms. Stephens has not made—that the term “sex” in Title VII means gender identity or transgender status. Pet. Br. 19-24; U.S. Br. 16-21. As her opening brief made clear, Ms. Stephens’s argument is that, assuming arguendo that “sex” in Title VII means only assigned sex at birth, Ms. Stephens still prevails. *See* Stephens Br. 24-25; Amici Br. Walter Dellinger et al. 13 (“Under any interpretation of ‘sex,’ discriminating based on a person’s transgender status (or transition) . . . necessarily qualifies as discrimination ‘because of such individual’s . . . sex.’”). It bears noting, though, that their rebuttal hinges on adding a word to the statute that does not appear there (“biological”), and that “biological sex” is not a binary, simple, and unchanging fact in the way they assume. *See* Amici Br. InterACT 6.

discrimination. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (quoting *Manhart*, 435 U.S. at 707 n.13). Discriminating against people for changing religions is religious discrimination because religion, however defined, is inescapably a but-for cause of the discrimination. The same is true for changing sex.

III. HARRIS HOMES VIOLATED TITLE VII BY FIRING MS. STEPHENS BECAUSE SHE DID NOT CONFORM TO ITS SEX STEREOTYPES.

Harris Homes fired Ms. Stephens because, by living openly as a woman, she did not conform to its stereotype that “a male should look like a . . . man.” Stephens Br. 28-34. Unable to deny that Harris Homes fired Ms. Stephens for failing to conform to Mr. Rost’s explicit sex-based stereotypes, Petitioner and the Government contend that “it is not enough to prove sex stereotyping; an employee must prove disparate treatment favoring one sex over the other.” Pet. Br. 33. They also maintain that Ms. Stephens’s argument treats sex itself as a stereotype. Pet. Br. 35; *see also* U.S. Br. 48-49. But Ms. Stephens has proven sex-based favoritism. And Mr. Rost’s notions about how men and women should identify, look, and act are not sex itself, but sex-specific generalizations.

An employee who shows that she was fired because she failed to conform to her employer’s sex-based stereotypes *has* shown sex-based favoritism. Ms. Stephens would not have been fired for failing to conform to Harris Homes’s expectations about how people assigned male at birth should identify, look, and act had she been assigned female at birth. Mr. Rost fired Ms. Stephens because she did not conform

to his view that “a male should look like a . . . man.” Resp. App. 62a-63a; *see also* Pet. 5 (objecting to having “a male representative of Harris Homes present[ing] himself as a woman while representing the company”). The fact that Harris Homes would also fire an employee assigned female at birth for failing to live up to the reciprocal (but different) stereotype that “a woman should look like a woman,” Resp. App. 63a, does not make its discrimination permissible. *Cf. Dothard v. Rawlinson*, 433 U.S. 321, 325 n.6, 332-33 (1977) (policy that barred both men and women from guarding the “opposite sex” discriminated because of sex); *see also* Reply Br. for Resp’ts 3-5, *Altitude Express, Inc. v. Zarda*, No. 17-1623.⁵

By enforcing the reciprocal stereotypes that “a male should look like a . . . man” and a “woman should look like a woman,” Petitioner does not escape Title VII liability—it doubles it. Indeed, the Government agrees:

[T]he employer violates Title VII because it would be treating a subset of women (macho women) worse than a

⁵ Transgender people often face discrimination for failing to meet employer stereotypes of both men and women. Harris Homes also fired Ms. Stephens because Mr. Rost believed she could never look how he thought a woman should look. J.A. 31 (“[T]here is no way that” Ms. Stephens “would be able to present in such a way that it would not be obvious that it was [a man].”). Ultimately, whether Mr. Rost saw Ms. Stephens as “an insufficiently masculine man” or “an insufficiently feminine woman,” it fired her for failing to conform to sex-specific stereotypes about how men and women should look, behave, and identify. *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008).

similarly situated subset of men (macho men) *and*—in a separate act of discrimination—treating a subset of men (effeminate men) worse than a similarly situated subset of women (effeminate women). Each practice separately violates Title VII because each results in disparate treatment of men and women.

Br. for United States as Amicus Curiae Supporting Affirmance in No. 17-1618 and Reversal in No. 17-1623 at 25-26, *Bostock v. Clayton Cty., Ga.*, No. 17-1618 (quotation marks omitted). The same logic applies here. Firing Ms. Stephens for acting insufficiently masculine is not cured by firing an employee assigned female at birth for acting insufficiently feminine.

Both Ms. Hopkins and Ms. Stephens faced discrimination because they did not match the sex-specific stereotypes their employers had for people with their sex assigned at birth. The only difference is that Ms. Stephens is transgender. But Petitioner and the Government agree that transgender employees enjoy the same protections against sex discrimination as all other employees. *See* U.S. Br. 52 (“Title VII’s protections apply fully to transgender individuals.”); Pet. Br. 43 (“[I]t is still unlawful for any employer to discriminate against a transgender employee because of the employee’s sex.”); *see also Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (“[A] label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”).

As this Court has recognized, sex discrimination often takes the form of confining *both* men and women to particular stereotypes. “These mutually reinforcing stereotypes create[] a self-fulfilling cycle of discrimination” where stereotypes about women “are reinforced by parallel stereotypes” about men. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003). Firing any individual for failing to meet a generalization about how men or women should look or behave is sex discrimination. *See Manhart*, 435 U.S. at 709 (“Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals.”).

So-called “equal application” would not defeat a Title VII claim based on other protected characteristics. “It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.” *Flowers v. Mississippi*, 139 S. Ct. 2228, 2242 (2019) (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). Nor does it here. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (prohibiting sex-based peremptory challenges even if they are equally applied against men and women).

The judgment below can be affirmed based solely on the fact that Harris Homes fired Ms. Stephens for failing to conform to its owner’s particular sex-specific stereotypes about how men and women should look, behave, and identify. But such explicit evidence of stereotypes is not in fact necessary, because firing an employee because she is transgender is inherently predicated on sex stereotypes about how people assigned a particular sex at birth should live, appear, and identify. *See*

Stephens Br. 32-34. Petitioner maintains that this argument treats sex itself as a stereotype. *See* Pet. Br. 35. Not so. The idea that a person should identify with and live in ways typical of their sex assigned at birth is a stereotype about sex, not sex itself. Under Title VII, generalizations about women or men as a class—even those that are “unquestionably true”—are “an insufficient reason for disqualifying an individual to whom the generalization does not apply.” *Manhart*, 435 U.S. at 707-08. Harris Homes fired Ms. Stephens because, as a transgender woman, she did not meet its stereotype that someone assigned male at birth should live and identify as male. That is impermissible sex discrimination even if most people assigned male at birth live openly in ways typical of men and identify as male.

IV. CONGRESS DID NOT SILENTLY RATIFY AN INTERPRETATION OF TITLE VII THAT EXCLUDES TRANSGENDER PEOPLE FROM COVERAGE.

Petitioner and the Government claim that firing someone for being transgender does not violate Title VII because in 1991 Congress implicitly ratified lower court cases that had reached that conclusion. Pet. Br. 22-23; U.S. Br. 24-27. But there is no support for this position. In passing the 1991 Civil Rights Act, Congress did not silently ratify an interpretation of Title VII that precludes coverage of transgender employees. *See* Opening Br. for Resp’ts 48-49, *Altitude Express, Inc. v. Zarda*, No. 17-1623.

Petitioner’s reliance on *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), is misplaced. Unlike in *Inclusive Communities*, where

the relevant legislative history explicitly discussed uniform decisions of nine courts of appeals, the history of the 1991 Title VII amendments makes no mention whatsoever of lower court opinions about Title VII and transgender people. And in 1991 only three courts of appeals had even addressed whether Title VII protected transgender employees. All of those decisions pre-dated *Price Waterhouse*, and therefore did not address whether discrimination against transgender people for violating sex stereotypes violated the statute. See *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977).

Finally, in *Inclusive Communities*, Congress added three exemptions to the statute that only made sense if Congress expected the holdings of the lower courts to remain in effect. 135 S. Ct. at 2520. Here, Congress made no changes to Title VII that depend on the interpretation Petitioner and the Government endorse. *Cf. id.*

As this Court has shown repeatedly before, whether a given course of conduct constitutes sex discrimination under Title VII is not determined by what members of Congress envisioned in 1964, 1978, or 1991, but on the text of the statute. This Court has recognized that discrimination “because of sex” encompasses different-sex sexual harassment, same-sex sexual harassment, and partial reliance on sex stereotypes in promotion. *Meritor*, 477 U.S. 57; *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75 (1998); *Price Waterhouse*, 490 U.S. 228. Like Petitioner here, the employers in most of those cases argued that Congress did not intend those results.

See, e.g., Br. for Resp'ts, *Oncale*, 523 U.S. 75 (No. 96-568), 1997 WL 634147, at *6; Br. of Pet'r, *Meritor*, 477 U.S. 57 (No. 84-1979), 1985 WL 669769, at *14. But the cases were governed not by an assessment of Congress's imagination, but by the text it enacted.

V. HOLDING THAT MS. STEPHENS'S FIRING VIOLATED TITLE VII WOULD NOT RENDER UNLAWFUL ALL SEX-BASED DISTINCTIONS IN THE WORKPLACE.

Resolving this case in favor of Ms. Stephens would not, as Petitioner and the Government suggest, make all sex-specific restrooms, dress codes, and other sex-specific rules unlawful. The question here is whether firing someone for being transgender or for failing to conform to sex-based stereotypes is “because of sex.” That is not a question with respect to sex-specific rules, such as dress codes and restrooms, which on their face treat men and women differently. The lawfulness of these rules therefore turns not on whether they are “because of sex,” but on the different question of whether they “discriminate against any individual with respect to . . . terms, conditions, or privileges of employment,” or “classify . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee.” 42 U.S.C. § 2000e-2(a)(1)-(2). Holding that Harris Homes fired Ms. Stephens “because of sex” will therefore not affect the legality of rules that are sex-specific on their face.

When an employer has facially different rules for the *hiring*, *firing*, or *compensation* of men and women, those rules are self-evidently “because of sex”

and nearly always prohibited by Title VII; the only exceptions are where the differential treatment remedies past discrimination or constitutes a bona fide occupational qualification (“BFOQ”). *See, e.g., Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (finding differential hiring of men and women violates Title VII); *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 685 (1983) (finding differential compensation for men and women violates Title VII); *Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. 616, 641-42 (1987) (finding differential treatment of men and women permissible to remedy past discrimination); *Dothard*, 433 U.S. at 334 (finding differential hiring of men and women permissible as a BFOQ). None of these established legal principles would change if this Court rules that Ms. Stephens’s discharge was because of her sex.

This Court has never considered the lawfulness of sex-specific dress or appearance codes. As discussed above, *see* Point I, *supra*, this case presents no occasion to resolve the propriety of sex-specific dress codes generally, or of Petitioner’s dress code in particular, either on its face or as applied to Ms. Stephens.⁶ To do so here, without the benefit of a factual record or litigation of the question below, would effectively render an advisory opinion.

Over the past several decades, the lower courts have used a range of different legal tests to

⁶ In its petition for certiorari, Petitioner asked this Court to rule on the applicability of sex-specific policies (such as dress codes) to transgender people, but the Court declined review on that question. It would therefore be inappropriate to take up the issue now. *See Lucia v. S.E.C.*, 138 S. Ct. 2044, 2050 n.1 (2018).

determine whether sex-specific codes of dress and appearance violate Title VII.⁷ As the Government concedes, some sex-specific dress codes discriminate and violate Title VII, even if others may not. *See, e.g.*, U.S. Br. 52 (discussing judicial recognition that Title VII prohibits sex-specific dress codes that stereotype women as sex objects). While some sex-specific dress and appearance codes have been upheld, no court has concluded that they were not “because of sex.” Rather, courts have upheld them by ruling that they did not sufficiently affect the terms or conditions of an individual’s employment to violate Title VII. In the many years during which federal courts have ruled that discrimination against transgender people is a form of sex discrimination, *see, e.g., Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000), and during which many states and municipalities have extended comparable protections, sex-specific policies, including dress codes and restrooms, have not fallen as impermissible discrimination. Ruling

⁷ *See, e.g., Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1111-13 (9th Cir. 2006) (evaluating whether the dress and grooming codes imposed unequal burdens on the sexes, tended to stereotype women, or would objectively inhibit the employee’s ability to do the job); *Carroll v. Talman Fed. Sav. & Loan Ass’n of Chi.*, 604 F.2d 1028, 1030 (7th Cir. 1979) (rejecting burden analysis and considering whether different terms and conditions of employment were imposed on individuals); *Kleinsorge v. Eyeland Corp.*, No. CIV. A. 99-5025, 2000 WL 124559, at *2 (E.D. Pa. Jan. 31, 2000), *aff’d*, 251 F.3d 153 (3d Cir. 2000) (considering whether sex-based differences in grooming code were “minor” and evenly enforced); *E.E.O.C. v. Sage Realty Corp.*, 507 F. Supp. 599, 608 (S.D.N.Y.), *decision supplemented*, 521 F. Supp. 263 (S.D.N.Y. 1981) (considering whether dress code had more than negligible effect on employment opportunities or created distinct employment disadvantages for individual employee).

that Ms. Stephens was fired “because of sex” would therefore not resolve the lawfulness of any of the sex-specific policies that Petitioner and the Government conjure.

The plain text of Title VII requires any inquiry into the impact of a sex-specific rule to focus on the individual, rather than on the protected group as a whole. *See Manhart*, 435 U.S. at 708. And as in other Title VII contexts, such an inquiry would be based “upon the circumstances of the particular case” and take into account the “perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’” *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 71 (2006) (quoting *Oncale*, 523 U.S. at 81). Under these standards, ruling that a transgender woman such as Ms. Stephens could not be forced to comply with dress codes for men would not necessarily affect the applicability of sex-specific dress codes to other employees.

When forced to comply with rules for men, transgender women suffer serious harms that objectively differ in kind and degree from those suffered by most non-transgender employees. *See* Resp. App. 1a (describing harms Ms. Stephens experienced while trying to live her life as a man); Amici Br. Transgender Law Center et al. 23 (transgender woman told by her employer that she had to dress as a man felt forced to “choose between my livelihood and my life”); Amici Br. Am. Med. Ass’n et al. 12-13 (efforts to compel a transgender person’s identity to match their assigned sex at birth fail and inflict significant harms). Gender identity is not a whim, but a fundamental sense of self that cannot be voluntarily altered. Amici Br. Am. Med. Ass’n et al. at 7-8. If forced to live as their sex

assigned at birth, transgender people experience gender dysphoria, which if untreated can cause depression, self-injury, and suicide. *Id.* at 12. Social transition, including changes to one’s name, pronouns, appearance, and dress, is a critically important form of medical treatment for many that would be wholly undermined by being forced to follow sex-specific rules inconsistent with gender identity. *Id.* at 15. In an appropriate case addressing the application of sex-specific policies to transgender workers, these particular needs would be taken into account. Thus, a transgender employee forced to adhere to a sex-specific rule that contravenes their gender identity will often be able to demonstrate distinct, objective harms that other employees may not suffer.⁸

⁸ Nor would accounting for the unique needs of transgender people harm non-transgender women in the workplace or anywhere else. *See* Amici Br. Nat’l Women’s Law Ctr. & Other Women’s Rights Groups 28 n.10; Amici Br. Anti-Sexual Assault, Domestic Violence, & Gender-Based Violence Orgs. 2; Statement of Women’s Rights and Gender Justice Organizations in Support of Trans Inclusion in Athletics (2019), <https://nwlc.org/wp-content/uploads/2019/04/Womens-Groups-Sign-on-Letter-Trans-Sports-4.9.19.pdf> (“As organizations that fight every day for equal opportunities for all women and girls, we speak from experience and expertise when we say that nondiscrimination protections for transgender people—including women and girls who are transgender—are not at odds with women’s equality or well-being, but advance them.”). In fact, it is Petitioner’s proposed interpretation of Title VII that would harm non-transgender women by undermining *Price Waterhouse* and permitting discrimination against a woman because of her sex so long as an employer claimed it would also discriminate against a man because of his sex. *See* Amicae Br. Women CEOs & Other C-Suite Execs. 8; Amici Br. Nat’l Women’s Law Ctr. & Other Women’s Rights Groups 22.

In short, this case does not require the Court to “redefine” sex or to declare invalid all sex distinctions in the workplace, much less in the wide range of completely different contexts Petitioner invokes. A ruling for Ms. Stephens would have no necessary implications for how schools, athletic associations, and family law integrate transgender people. This Court is charged with applying the text of Title VII to the facts before it, not rewriting the text to resolve speculative concerns about areas of life not governed by Title VII. *See Brogan v. United States*, 522 U.S. 398, 408 (1998) (noting that “[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so”).⁹

Should a case arise that squarely challenges the application of a sex-specific dress code or other rule to an individual employee—transgender or not—this Court may have to decide the correct standard for assessing the lawfulness of such workplace rules. But this is not such a case. All the Court is asked to decide here is whether Ms. Stephens was fired because of her sex. She was.

* * *

⁹ This case involves no free speech or free exercise claim or defense, and Petitioner has not sought review of its Religious Freedom Restoration Act defense, which was rejected below. Regardless, as this Court has long held, “[t]here is no constitutional right . . . to discriminate.” *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); *see Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (“The right to associate . . . is not, however, absolute.”). Neutral, generally-applicable laws with an incidental effect on religious exercise are valid. *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 878 (1990).

In enacting Title VII, Congress prohibited employers from making sex relevant to employment decisions. *Price Waterhouse*, 490 U.S. at 240. Harris Homes fired Ms. Stephens not for anything to do with her performance, but solely because, as a transgender woman, she was assigned the male sex at birth and sought to live openly as a woman. In so doing, it made sex not just relevant, but a but-for cause of her discharge. Moreover, its reasons all sound in her failure to conform to specific sex stereotypes, the very stereotypes that have been central to sex discrimination jurisprudence from the outset. Ms. Stephens does not ask this Court to give “sex” an updated meaning, but simply to recognize that when Harris Homes fired her for being transgender and for failing, in its view, to “look”—or act—“like a . . . man,” it fired her “because of sex.”

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

Respectfully Submitted,

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