No. 16-2424

In the 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 HOMES, INC.,
Defendant-Appellee.

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

Brief *Amicus Curiae* of Public Advocate of the United States, U.S. Justice Foundation, and Conservative Legal Defense and Education Fund in Support of Appellee and Affirmance

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-2424 Case Name: E.E.O.C. v. Harris Funeral Homes

Name of counsel: William J. Olson

Pursuant to 6th Cir. R. 26.1, Public Advocate of the United States, et al.
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF THE *AMICI CURIAE*[1]

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[1] *Amici* requested and received the consent of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1984 DOES NOT PROHIBIT THE FIRING OF COMPLAINANT STEPHENS.

From the filing of its complaint in district court onward, the Equal Employment Opportunity Commission ("EEOC") has taken the position that Mr. William Anthony Stephens, who has come to call himself Aimee Australia Stephens, was fired by the Harris Funeral Home in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. The EEOC alleges discrimination "because of ... sex" based on three alternative theories, that Stevens: (i) is transgender; (ii) is transitioning from male to female; and/or (iii) did not conform to the Funeral Home's sex-or gender-based preferences, expectations, or stereotypes. EEOC Br. at 9.

As to the first theory, the district court "held that discrimination based on transgender status is not cognizable under Title VII." EEOC Br. at 10. As to the second theory, the EEOC concedes that, despite the absence of an express ruling, the court's denial of that claim "seems implicit." *Id*. at 10, n.2. However, as to the third theory, the district court believed that "the complaint did state a claim for relief under the unlawful sex-stereotyping theory of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)." EEOC Br. at 11. Nevertheless, because, the district court

found that the Religious Freedom Restoration Act ("RFRA") provided a defense to this claim, it found for the Harris Funeral Homes. EEOC Br. at 12-14. These *amici* first address EEOC's statutory arguments, followed by the EEOC's argument based on a judicially created "sex-stereotyping" theory of Price Waterhouse.

A. The Text Does Not Support the EEOC's Claim that Title VII Prohibits Discrimination because of Transgender Status or Transitioning.

Title VII of the Civil Rights Act of 1964 prohibits an employer from "discharg[ing] any individual ... because of such individual's ... sex...." 42 U.S.C. § 2000e-2(a)(1). The EEOC asserts that "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 [judicial] decisions...." EEOC Br. at 16-17 (emphasis added). There is no textual support for this claim.

In 1964, Representative Howard W. Smith (D-VA) proposed to insert "sex" into the list of types of protected classes, explaining that the sole reason was to address the "indisputable fact that all throughout industry women are

discriminated against."[2] Beyond that, very little is known, as the Ninth Circuit has observed:

> There is a dearth of legislative history on Section 2000e-2(a)(1).... The major concern of Congress at the time the Act was promulgated was race discrimination. Sex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate. [Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977).][3]

Thus, in accordance with the plain text and other court precedents, the district court below properly rejected the EEOC's atextual attempt "to seek a more expansive [judicially fabricated] interpretation of sex under Title VII that would include transgender persons as a protected class." 100 F. Supp. 3d 594, 599 (E.D. Mich. 2015). In its order denying defendant's motion to dismiss, the district court correctly concluded that "[t]here is no Sixth Circuit or Supreme Court authority to support the EEOC's position that transgender status is a protected class under Title VII." *Id*. When ruling on cross motions for summary judgment, the district court affirmed this view when it held that "neither transgender status nor gender identity are protected classes under Title VII.... Congress can change that by amending

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[2] *See generally* C. Risen, "The Accidental Feminist," Slate (Feb. 7, 2014).

[3] The EEOC Brief never cited the Ninth Circuit Holloway decision which remains the controlling Title VII decision in that Circuit, but rather cited to *dicta* from an opinion by Judge Stephen Reinhardt in a case not involving Title VII. EEOC Br. at 26.

Title VII. It is not this Court's role to create new protected classes under Title VII." 201 F. Supp. 3d 837, 861 (E.D. Mich. 2016).

The district court's understanding of the Title VII text is fully consistent with decisions of other courts. The district court itself cited as support Vickers v. Fairfield Med. Ctr., 453 F.3d 757 (6th Cir. 2006) and Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007). In Dobre v. National R.R. Passenger Corp., 850 F. Supp. 284 (E.D. Penn. 1993), another district court cogently explained that:

> [t]he term "sex" as used in § 2000e-2(a) is not synonymous with the term "gender."... The term "sex" in Title VII refers to an individual's distinguishing biological or anatomical characteristics, whereas the term "gender" refers to an individual's sexual identity.... Simply stated, Congress did not intend Title VII to protect transsexuals from discrimination on the basis of their transsexualism. [*Id*. at 286-87.]

Even the Ninth Circuit, in Holloway v. Arthur Andersen & Co., held that "[t]he cases interpreting Title VII sex discrimination provisions agree that they were intended to place **women** on an equal footing with **men**.... Giving the statute its plain meaning, this court concludes that Congress had only the **traditional notions of 'sex'** in mind." Holloway at 662 (emphasis added). Like the district court in this case, Holloway decided to leave legislating to the legislature: "this court will not expand Title VII's application in the absence of Congressional mandate." *Id*. at 663.

Thus, for decades, it has been understood that the provision on sex discrimination related primarily to discrimination against women, and certainly had no application to discrimination based on personal "sexual preference" or so-called "gender identity." That understanding is confirmed by the several attempts to amend the Act to broaden its coverage to cover "sexual preference" and "gender identity." In Holloway, *supra,* the Ninth Circuit referred to three bills introduced in the 94th Congress (1975-1976), and seven bills introduced in the 95th Congress (1977-1978). *Id*. at 662 n.6. Up to and including the current Congress,[4] all such efforts to broaden the scope of Title VII have failed.

B. The "Sex-Stereotyping" Theory of Price Waterhouse v. Hopkins Does Not Bar the Firing of Complainant Stephens.

1. EEOC's Confusion of Sex and Gender.

The EEOC's allegations and the district court's finding based on Price Waterhouse are erroneous. Specifically, the EEOC alleges that, in Price Waterhouse, "the Court clarified that the phrase 'because of ... sex' means 'that gender must be irrelevant to employment decisions' [and] 'Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" EEOC Br. at 22.

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[4] *See, e.g.,* in the 115th Congress, H.R. 2282, Sec. 2(a)(9) and (10) (with 194 co-sponsors) and S. 1006 (with 45 co-sponsors).

To the contrary, Justice Brennan's theory of sex discrimination based on sex stereotypes was as follows:

> In saying that **gender** played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a **woman**. In the specific context of **sex stereotyping**, an employer who acts on the basis of a belief that a **woman** cannot be aggressive, or that she must not be, has acted on the basis of **gender**.... Congress intended to strike at the entire spectrum of **disparate treatment of men and women** resulting from **sex stereotypes**. [Price Waterhouse at 250-51 (emphasis added).]

From this explanation, one can see that Justice Brennan employs the word "gender" as a synonym to the statutory term "sex," as would be expected nearly three decades ago. Therefore, there is no warrant from his opinion to now impute a new modern meaning to "gender" to fraudulently apply these decisions to transitioning transvestites. Indeed, the theory of transitioning between sexes is bogus, as shown again by a recent study that one's male or female nature is reflected in every cell of the body and is immutable.[5]

Second, in explaining "gender" to mean "sex" (*i.e.*, male or female), the narrow scope of Price Waterhouse is defined. Based on the statute and Justice

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[5] *See, e.g.*, Weizmann Institute of Science, "Researchers Identify 6,500 Genes That Are Expressed Differently in Men and Women" (May 3, 2017); *see also* L.S. Mayer, Ph.D. and P.R. McHugh, M.D., "Sexuality and Gender," The New Atlantis (Fall 2016).

Brennan's opinion, the rule of that case must be that unlawful discrimination must be based only on (i) sex or (ii) "sex stereotyping," where that term is understood to reveal a concealed bias against a woman because of her nature and characteristics. There is no evidence that the Funeral Home here would have treated a transvestite woman supposedly "transitioning" to being a man any differently from a man supposedly "transitioning" to being a woman. The Funeral Home's policy reflects equal treatment of the sexes, not "disparate treatment of men and women."

In sum, the Price Waterhouse decision simply clarified that Title VII barred not only opposition to women as such, but opposition to women for how they may act as women — a slightly veiled version of opposition because a person is a woman. However, in no way does this establish a free-floating cause of action based on a right to be free of sex-stereotyping that does not reveal categorical discrimination against a real biological woman.

2. The Court's Misplaced Reliance on the Curious Testimony of Psychologist Susan Fiske.

Before applying the amorphous term "sex stereotyping," it is first necessary to examine the exact use of that term in Price Waterhouse. There, the term was attributed to Dr. Susan Fiske, a psychologist[6] who testified at trial for plaintiff

[6] Courts must be very wary of grounding legal decisions on the social sciences, especially when it relates to sex. Recently, two social scientists

Hopkins regarding statements made about the plaintiff by others at Price Waterhouse. Importantly, her testimony was designed to establish unlawful discrimination and was not limited to "the overtly sex-based comments of partners but also on gender-neutral remarks...." Price Waterhouse at 235. Justice Brennan summarized her testimony as follows:

> According to Fiske, Hopkins' uniqueness (as the only woman in the pool of candidates) and the **subjectivity** of the evaluations made it **likely** that sharply critical remarks ... were the product of **sex stereotyping**. [*Id*. at 235-36 (emphasis added).]

Justice Brennan lamely attempted to demonstrate the reliability of Dr. Fiske's imputation of discriminatory motives to Price Waterhouse personnel — despite the fact that she never "met any of the people involved in the decisionmaking process," by pointing out that "it was commonly accepted practice

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demonstrated the openness of psychologists and other social scientists to the most irrational and foolish notions that fit their personal sexual and political views. *See* P. Boghossian & J. Lindsay, "The Conceptual Penis as a Social Construct: A Sokal-Style Hoax on Gender Studies," http://www.skeptic.com/reading_room/conceptual-penis-social-contruct-sokal-style-hoax-on-gender-studies/. The two authors created a "paper" entitled "The Conceptual Penis as a Social Construct," consisting of 3,000 words of utter nonsense posing as academic scholarship. Then a peer-reviewed academic journal in the social sciences accepted and published it. As the two scholars who perpetuated this hoax asserted "that the *conceptual penis* is better understood not as an anatomical organ but as a gender-performative, highly fluid social construct." The authors stated, "[w]e assumed that if we were merely clear in our moral implications that maleness is intrinsically bad and that the penis is somehow at the root of it, we could get the paper published in a respectable journal." *Id*.

for social psychologists to reach this kind of conclusion" without any personal contact with the persons being demeaned. Price Waterhouse at 236. Justice Brennan thereby implicitly adopted for the Court an unreliable standard of proof just because Dr. Fiske said it was "commonly" used in the world of social psychology. In dissent, Justice Kennedy, Chief Justice Rehnquist, and Justice Scalia revealed that Dr. Fiske's testimony was grounded in sand:

> The plaintiff who engages the services of Dr. Susan Fiske should have no trouble showing that sex discrimination played a part in any decision. Price Waterhouse chose not to object to Fiske's testimony, and at this late stage, we are constrained to accept it, but I think the plurality's enthusiasm for Fiske's conclusions unwarranted. Fiske purported to discern stereotyping in comments that were gender neutral — e.g., "overbearing and abrasive" — without any knowledge of the comments' basis in reality and without having met the speaker or subject. "To an expert of Dr. Fiske's qualifications, it seems plain that no woman could *be* overbearing, arrogant, or abrasive: any observations to that effect would necessarily be discounted as the product of stereotyping. If analysis like this is to prevail in federal courts, no employer can base any adverse action as to a woman on such attributes." [*Id*. at 293, n.5 (citations omitted).]

C. Hively v. Ivy Tech Community College of Indiana.

Two months after the EEOC filed its brief on February 10, 2017, the Seventh Circuit issued an *en banc* decision in Hively v. Ivy Tech Cmty. College of Ind., 2017 U.S. App. LEXIS 5839 (7th Cir. Apr. 4, 2017), ruling that Title VII protection based on "sex" should now be reinterpreted to include "sexual

orientation." Certainly, there will be pressure on the Sixth Circuit to follow the lead of the Seventh Circuit in this area, and even take a step ahead of it in applying Title VII to protect transvestites supposedly transitioning. In the slippery world of judicial improvisation, we move seamlessly away from the statutory text to implementing whatever the policy preferences of the judges may be — lesbians today, transvestites tomorrow.[7] When courts express such contempt for statutory language, they sit as a super-legislature, accountable only to themselves.

Writing for an eight-judge majority, Chief Judge Diane P. Wood attempted to explain the break from precedent as though her ruling were a natural, perhaps inevitable, next step. First, she conceded that "[f]or many years, the courts of appeals ... understood the prohibition against sex discrimination to exclude discrimination on the basis of a person's sexual orientation." Hively at *1. Moreover, "[a]lmost all of our sister circuits have understood the law in the same way." *Id*. at *4. Nevertheless, "we conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination." *Id*. at *2.

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[7] As lesbian feminist Camille Paglia has explained, androgyny becomes prevalent "as a civilization is starting to unravel. You find it again and again and again in history." R. Dreher, "Paglia: Transgender & Civilization's Decline," The American Conservative (Mar. 8, 2017), http://www.theamericanconservative.com/dreher/paglia-transgender-civilizations-decline/. If she is correct, when the history of this devolution of our civilization is written, the courts will deserve much of the responsibility for pushing the society toward lawlessness and chaos.

In an effort to deflect anticipated criticism that this enormous change is nothing but judicial legislating, Judge Wood opined "[t]he question before us is not whether this court can, or should, 'amend' Title VII to add a new protected category.... Obviously that lies beyond our power." *Id*. at *7. Then she purported to explain the basis for her decision: "[w]e must decide instead what it means to discriminate on the basis of sex ... a pure question of statutory interpretation and thus well within the judiciary's competence." *Id.* Yet, Judge Wood concluded that it did not matter to her whether Congress intended the result she preferred — "the fact that the enacting Congress may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books." *Id*. at *12. She explained away the fact that Congress has considered and refused to add "sexual orientation" to the list of prohibited actions — "it is simply too difficult to draw a reliable inference from these truncated legislative initiatives to rest our opinion on them." *Id*. But that did not deter Judge Wood from speculating that Congress may have not acted because the EEOC has taken the position that sexual orientation was banned by the statute. *Id*. at *10-*11. Either way, what Congress intended was of no consequence, and Congress' refusal to amend the statute was of no consequence, because she was

following Supreme Court trends, noting "[t]he goalposts have been moving." *Id*. at *9.

In a startling concurring opinion, Judge Richard Posner offered "an alternative approach that may be more straightforward." *Id*. at *27. He conceded that:

> the term "sex" in the statute, when enacted in 1964, undoubtedly meant "man or woman".... Title VII does not mention discrimination on the basis of sexual orientation, and so **an explanation is needed** for how 53 years later the meaning of the statute has changed and the word "sex" in it now connotes both gender *and* sexual orientation. [*Id*. at *31 (emphasis added).]

In justification of the court's decision to impose a new meaning on a statutory word with a previously established meaning, Judge Posner explained that:

> This is something courts do fairly frequently to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch. **We should not leave the impression that we are merely the obedient servants of the 88th Congress** (1963-1965), carrying out their wishes. **We are not. We are taking advantage** of what the last half century has taught." [*Id.* at *42-43 (emphasis added).]

Remarkably candid, Judge Posner not only does not care that "sexual orientation" was not envisioned by Congress to be part of "sex" in Title VII, but he goes further, and admits that the framers of that statute would never have accepted the result he imposes. He candidly admits that the court is "taking advantage" — not

just of what he claims to have learned over the last half century, but, more honestly, "taking advantage" of being a federal judge. This explanation reflects contempt for the notion that judges are under law, but rather adopts the position of the fictional Judge Dredd[8] that some judges are the law. It reflects contempt for the notion of a written constitution, Congressional legislation, and the notion that it is the People who have a right to decide for themselves under which system they are to live. There could be no more clear violation of the constitutional standard of "good behavior" by federal judges under Article III than Judge Posner's opinion.

Lastly, Judge Posner explains that the decision is no longer based at all on the statute, because it cannot be "an interpretation that cannot be imputed to the framers of the statute but that **we are entitled** to adopt in light of (to quote Holmes[9]) '*what this country has become*'...." *Id*. at *38 (emphasis added). In

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[8] https://www.youtube.com/watch?v=wvJiYrRcfQo.

[9] Posner's invocation of Justice Oliver Wendell Holmes, Jr., is no accident, as Posner has previously described him as "the most illustrious figure in the history of American law." R.A. Posner, edt., The Essential Holmes (Univ. of Chicago Press 1992). ("Among the fundamental questions that philosophy worries are questions about the meaning and purpose of human life, including **the meaning and purpose of human life in a cosmos from which God has departed**. Nietzsche, a contemporary of Holmes, said that God is dead. (Dead *for us*: Nietzsche was making a sociological rather than a metaphysical observation.) **God had been killed among the thinking class** by physics, geology, the "higher

truth, Judge Posner believes that he, as a federal judge, is "entitled" to make words mean what he wants them to mean.[10] In this decision, he claims not only the right to make law, but to exercise a lawmaking power superior to the one vested in Congress by the nation's written Constitution, Article I, Section 1.[11]

In dissent, Judge Diane Sykes, joined by Judges Bauer and Kanne, correctly viewed the Seventh Circuit decision as "momentous." She explains that neither the majority opinion, nor Judge Posner, are "faithful to the statutory text, read fairly, as a reasonable person would have understood it when it was adopted. The result is a statutory amendment courtesy of unelected judges." *Id.* at *49-50.

The question now for the Sixth Circuit is which of the paths laid out by the Judges of the Seventh Circuit will be followed: Judge Wood's politicized legerdemain as she pretends to be engaged in a conventional exercise of statutory

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criticism" of the Bible, and the theory of evolution — systems of thought that had undermined Christianity's appeal to the rational intellect — and had been **badly wounded among the common people** by the growth of security and prosperity, which had shifted people's attention from the next world to this one. **Christianity had been the foundation of Western civilization. Its disappearance as a living source of metaphysical certitude and ethical foundations was the crisis of modernity.**")

[10] *See* L. Carroll, Through the Looking Glass, chapt. 6 (1871).

[11] *See* H.W. Titus, Judge Posner's Emporium, Judicial Action Group (Apr. 18, 2017), http://judicialactiongroup.org/content/article/37800.

construction; Judge Posner's lawless assertion of judicial law-making power superior to that of Congress; or Judge Sykes' faithfulness to the judicial role in interpreting a statute according to the plain text and authorial intent.[12]

II. THIS IS A CASE OF EMPLOYEE BETRAYAL OF AN EMPLOYER, NOT EMPLOYER DISCRIMINATION AGAINST AN EMPLOYEE, AND IS OUTSIDE EEOC JURISDICTION.

A. Stephens Seeks to Undermine the Harris Funeral Homes' Mission.

Since 1910, the R.G. & G.R. Harris Funeral Homes has been serving God by attending to the burial of deceased members of "grieving families." *See* Appellee Brief ("Home Br.") at 2-3 and EEOC v. Harris, 201 F. Supp. 3d 837, 843 (E.D. Mich. 2016). R.G. Rost, the current president and owner, is a Christian man who, for over 65 years, has not hidden his "light ... under a bushel."[13] Rather, by an openly published mission statement, and through a "team of caring professionals," Mr. Rost has "honor[ed] God in all that we do as a company and as individuals ... to facilitate healing and wholeness in serving the personal needs of family and friends as they experience a loss of life." Home Br. at 2. Although Mr.

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[12] *See* E.D. Hirsch, Jr., Validity in Interpretation at viii, 5, 202-04, and 212-13 (Yale Univ. Press, 1967).

[13] *See* Matthew 5:14-16 (KJV) ("Let you light so shine before men, that they may see your good works, and glorify your Father which is in heaven.").

Rost places "[t]hroughout his funeral homes ... Christian devotional booklets and 'Jesus' cards featuring Bible verses," *id*., the funeral home's religious mission is an ecumenical one, ministering to grieving families "of every religion (various Christian denominations, Hindu, Muslim, Jewish, native Chinese religions) or none at all." EEOC at 843. To meet the needs of this wide-ranging clientele, Rost has a strict "conservative, industry-standard dress code," based upon its employees' biological sex, designed "[t]o ensure that employees do not draw undue attention to themselves or cause grieving individuals unnecessary stress," in keeping with the solemnity of the mortuary ministry. Home Br. at 4.

From the date he was first employed, Anthony Stephens not only embraced Rost's mission, but thrived, serving initially as an "apprentice," and quickly rising "to the position of funeral director and embalmer[,] requiring Stephens to interact with grieving families and friends." *Id.* at 3-4. Throughout his employment Stephens presented himself as a male, according to his biological sex. EEOC at 844. Then, in a letter dated July 31, 2013, after faithfully serving in the director role for six years, *id.*, Stephens abruptly informed Rost that for four years he, Stephens, had been secretly undergoing "therapy" to address a "gender identity disorder" – "a birth defect that needs to be fixed." *Id.* For the first time, Stephens explained that:

> I have felt imprisoned in my body that does not match my mind, and this has caused me great despair and loneliness. With the support of my loving wife, I have decided to become the person that my mind already is. I cannot begin to describe the shame and suffering that I have lived with. [EEOC at 844.]

Additionally, Stephens advised Rost that in order for him to achieve his goal of "becom[ing] the person that [he] already is" he intended to "have sex reassignment surgery," but that "the first step I must take is to live and work full-time as a woman for one year." *Id.* at 845. To that end, and with a heavy dose of chutzpah, Stephens announced that:

> At the end of my vacation on August 26, 2013, I will return to work as my true self, Aimee Australia Stephens, in appropriate business attire. [*Id*. at 845.]

Before closing the letter on this presumptuous note, Stephens backtracked a bit. Expressing realization that "some of you may have trouble understanding this," Stephens tempered the letter stating that "[i]t is my wish [to] continue my work at R.G. & G.R. Harris Funeral Homes," presumably dressed as a female. *Id.*

Two weeks later, on August 15, 2013, Rost met privately with Stephens, and after verifying that Stephens intended to report back to work in the standard female skirt attire, Rost advised Stephens that "this is not going to work out," *id*., offering instead a "severance package." Home Br. at 5. Instead of accepting the terms offered, and looking elsewhere to work "as a woman," Stephens hired a

lawyer and filed a complaint with the EEOC, claiming a violation of Title VII's ban on discrimination because of sex. EEOC at 845. In his charge filed with the Commission, Stephens alleged that the only "explanation" that he had been given for his termination was "that management did not believe the public would be accepting of my [gender] transition." *Id.* at 845.

However, before the EEOC and district court below, Rost maintained that:

> Based on [his] long professional experience in the funeral industry and interactions with Stephens at work, [he] believed that if Stephens violated the dress code by wearing a female uniform in the role of funeral director, it would have harmed R.G. clients by causing distraction and interfering with the grieving process. [Home Br. at 6.]

Additionally, the evidence established that to allow Stephens to come back to work as a female would compromise the Harris Funeral Homes' Mission Statement to "honor God," forcing Rost hypocritically to convey a message in direct conflict with Rost's belief "that a person's sex is an immutable God-given gift...." EEOC at 847-48.

Instead of approaching Rost privately, Stephens put Rost on the spot with his open July letter, elevating his individual therapeutic need above the welfare of Rost, his fellow workers, and their clientele. When that failed, Stephens turned to the EEOC. What had begun as a "wish" morphed into a civil command, as if the EEOC has jurisdiction to impose upon a privately owned, finely tuned ministry to

conform to an evolving transgender mandate, or to get out of the mortuary ministry entirely. *See* Home Br. at 7. The EEOC has no such authority.

B. The "Ministerial Exception" to EEOC Jurisdiction Applies to this Case.

In its opening brief, the EEOC has addressed several possible "religious" exceptions to the exercise of its authority to enforce Title VII. *See* EEOC Br. at 31-36. Among the exceptions discussed and dismissed is the "ministerial exception" applied in Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012). *See id.* at 35-36.[14] In support of its claim that the ministerial exception does not apply here, the EEOC makes a twofold argument: (1) "the Funeral Home is not a religious institution"; and (2) "Stephens is not a ministerial employee." EEOC Br. at 36. The EEOC is mistaken on both counts.

1. The "Ministerial Exception" Applies to both Religious and NonReligious Entities.

First, the ministerial exception is based on both the No Establishment and the Free Exercise Clauses of the First Amendment. *Id.* Like all First Amendment freedoms, the bans on "law[s] respecting an establishment of religion, or

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[14] Although the Funeral Home's Brief appears to have waived the ministerial exception (*see* Home Br. at 35), "the ministerial exception is a structural limitation imposed on the government by the Religion Clauses, a limitation that can never be waived." *See* Conlon v. InterVarsity Christian Fellowship, 777 F.3d 829, 836 (6th Cir. 2015).

prohibiting the free exercise thereof" secure rights of the people, not "religious institutions." While churches and other religious societies and organizations are certainly beneficiaries of the No Establishment and Free Exercise guaranties, the protections are not, as the EEOC appears to have assumed, limited to such institutions. *See* Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 316 (4th Cir. 2004). Just like the freedom of the press does not extend only to the New York Times or Fox News,[15] the freedom from an establishment of religion, or the free exercise of religion, is not limited to the Catholic Church or the Billy Graham Evangelistic Association. As the Supreme Court recently observed in Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014), the free exercise guarantee runs to individuals whether they be acting for a church or other religious organization, engaged in for-profit or nonprofit activities, or acting as a sole proprietor, business partner, or corporate officer. *Id.* at 2769-2773. Indeed, in Hobby Lobby, the Court acknowledged that the free "exercise of religion" "involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'" *Id.* at 2770.

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[15] Like the freedom of the press, which belongs to the People, not just to the institutional press, the freedom of religion belongs not just to the institutional church, but also to the People. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 795, *et seq*. (1978) (Burger, C.J., concurring).

Hence, the Hobby Lobby Court concluded that "[b]usiness practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition." *Id.*

Like the Hobby Lobby enterprise, Rost does business as a closely held/for-profit corporation. And as the owners of Hobby Lobby were compelled by their Christian faith to refuse to act in any way to aid and abet abortion, Rost was compelled by his Christian faith to disallow Stephens' effort to "contravene the [company's] dress code and wear a female uniform ... convey[ing] a message in direct conflict with [its] religious belief that a person's sex is an immutable, God-given gift, thus violating Rost's religious convictions." Home Br. at 6. [16]

2. Stephens Is a Ministerial Employee.

The EEOC brief also contends that the ministerial exception does not apply to the dismissal of Stephens because Stephens is not a "ministerial" employee. *See* EEOC Br. at 35-36. Apparently, the EEOC would limit the Hosanna-Tabor ruling to the narrow proposition that the ministerial exception applies only to

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[16] The EEOC contends that Hobby Lobby is inapposite because Rost would not by the EEOC action be forced to "'enabl[e] or facilitat[e] the commission of an immoral act': he would merely be keeping an employee on the payroll." *See* EEOC Br. at 46. To the contrary, as Rost testified, if he kept Stephens on the payroll after discovering Stephens' rejection of his God-given immutable male sex identity, Rost would be guilty of the sin of hypocrisy. *See* Matthew 23.

"commissioned minister[s]" who serve in a teaching or other doctrinal position. This ignores the warning in Justice Thomas's concurring opinion in Hosanna-Tabor that "secular courts could second-guess the organization's sincere determination that a given employee is a 'minister' under the organization's theological tenets." *Id.* at 197 (Thomas, J., concurring).

As a proselytizing Christian, Rost's funeral home mission is foremost to help heal persons who are grieving the loss of a loved one. While Rost himself places Christian devotional booklets and Jesus cards with Bible verses throughout his funeral homes, his staff is not required to profess any religious faith, in that the Harris Funeral Home "serves clients of every religion ... and of no religious beliefs at all." Consistent with this indiscriminate outreach, "the articles of incorporation do not avow any religious purpose [and] [i]ts employees are not required to hold any religious views." EEOC at 843. Neither of these facts means that the company is not staffed by "ministers." Rather, theirs is a "ministry to serve grieving families" — "one of healing," and thus trained in "grief management" — adhering to a strict code of "conduct and decorum" as is fit given the solemnity of the occasion.

In his position as funeral director, Stephens was primarily responsible for adherence to the company's "code[] of conduct and decorum" suitable for the

burial service. Largely self-enforced, and "more than a mere employment decision," the EEOC would interfere with the "internal governance" of the administration of the funeral conducted, "depriving the [funeral home] of control over the selection of those who personify its beliefs." *See* Hosanna-Tabor at 188. *See also* Rogers v. Salvation Army, 2015 U.S. Dist. LEXIS 61112 at *15-16 (E.D. Mich. 2015).

C. The EEOC Has No Jurisdiction over Funeral Services.

In his "Letter Concerning Toleration" published in 1689, John Locke observed that the "whole jurisdiction of the magistrate reaches only ... civil concernments, and that all civil power, right, and dominion, is bounded and confined to the only care of promoting these things." *See* "A Letter Concerning Toleration," reprinted in 5 The Founder's Constitution, at 52, Item # 10 (Kurland, P. & Lerner, R., eds., Univ. Chi.: 1987). Chief among the cares that lay outside the civil magistrates power, Locke wrote, is "the care of souls." *Id.* Such matters, Locke was convinced, fell outside the civil magistrate's authority because "true religion consist in the inward and full persuasion of the mind," unreachable by the power of the sword. *Id.* at 53. As Christ Himself taught,[17] Locke was persuaded

[17] *See* Luke 20:25.

that men were duty bound to obey Caesar only as to those things that belonged to Caesar, but not as to those things that belonged to God. *See id.* at 54-55.

Nearly 100 years after Locke wrote his letter demarcating the two jurisdictions, the people of Virginia adopted Locke's view in Section 16 of the 1776 Virginia Declaration of Rights, which states, in pertinent part: "[R]eligion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience...." Constitution of Virginia, Section 16, reprinted in Sources of Our Liberties at 312 (R. Perry & J. Cooper, eds., ABA Foundation, Rev. Ed.:1978). Three years later, Virginia's constitutional commitment to the free exercise of religion would be put to the test by Thomas Jefferson's bill denying to the Commonwealth's civil authorities any power "to compel[] [any man] to ... support any religious ... Ministry whatsoever...." *See* Jefferson's Bill for Establishing Religious Freedom (12 June 1779) reprinted in 5 The Founders' Constitution at 77, Item # 37. In the words of James Madison, in his inestimable Memorial and Remonstrance, it is not for the Civil Magistrate to "employ Religion as an engine of Civil policy," which would be "an unhallowed perversion of the means of salvation." James Madison, "Memorial and Remonstrance Against

Religious Assessments" (20 June 1785), reprinted in 5 The Founders' Constitution at 82-83, Item # 43. "If this freedom be abused," Madison asserted, "it is an offence against God, not against man: To God, therefore, not to man, must an account of it be rendered." *Id.* at 82.

The EEOC's action against Rost's ministry violates this principle. As it did in Hosanna-Tabor, the EEOC claims total jurisdiction over the employment practices of the Harris Funeral Homes. However, at the heart of the undertaking profession is the planning for and execution of a funeral service, a "rite ... as old as the human race itself."[18] Inherently religious, "[e]very human culture ever studied has three common threads for death and the disposition of their dead: [i] Some type of ceremony, funeral rite, or ritual; [ii] A sacred place for the dead; and [iii] Memorials for the dead." *Id.* Whether moved by fear[19] or faith,[20] the funeral service — along with a wake before the memorial service and the burial afterwards — is a quintessential religious event marked by prayers, sermons or homilies, readings from the Bible or other sacred texts, spiritual songs and sacred

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[18] "The History of Funerals," http://thefuneralsource.org/history.html.

[19] *See* https://bartonfuneral.com/funeral-basics/history-of-funerals/.

[20] H.D. Livingston, "When Did Funerals Start Being in Churches?" http://peopleof.oureverydaylife.com/did-funerals-start-being-churches-9199.html.

music, blessings and other words of comfort, eulogies, and memories, and even appeals directed to the attendants for the salvation of their souls. No wonder Rost's ministry extends not only to services for families who share Rost's personal Christian faith, but also to Hindu, Moslem, Jewish, and native Chinese religions. EEOC at 843. Such a variety of faiths can be accommodated because of Rost's strict policy of decorum and dress, conducive to the funeral atmosphere that prevails in funeral home chapels, limiting conversations to quiet whispering or mourning, loud talk being disrespectful to the family and friends of the deceased. *See* Home Br. at 2-5.

In disregard of Harris Funeral Homes' inherent religious mission, the EEOC has improperly exercised jurisdiction over Rost's employee ministers in violation of both the Establishment Clause and the Free Exercise Clause, which bar the Government from interfering with Rost's decision to fire one of its ministers who sought to change the Harris Funeral Homes' ministry to fit the employee's need, and which was incompatible with its religious mission. *See* Shaliehsabou, 363 F.3d at 316 (applying ministerial exception to Jewish home providing elder care).

CONCLUSION

For the reasons stated herein, the decision of the district court below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of Public Advocate of the United States, *et al*. in Support of Appellee and Affirmance, complies with the type-volume limitation of Rule 29(a)(5), Federal Rules of Appellate Procedure, because this brief contains 6,483 words, excluding the parts of the brief exempted by Rule 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 W ordPerfect version 18.0.0.200 in 14-point Times New Roman.

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Dated: May 24, 2017

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, in Support of Appellee and Affirmance, was made, this 24th day of May 2017, by the Court's Case Management/Electronic Case Files system upon the all parties or their counsel of record.

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