No. 16-2424

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

EQUAL OPPORTUNITY EMPLOYMENT COMMISSION,

Plaintiff-Appellant,

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
Civil Case No. 2:14-cv-13710 (Honorable Sean F. Cox)

RESPONSIVE BRIEF OF APPELLEE R.G. & G.R. HARRIS FUNERAL HOMES, INC.

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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: EEOC v RG & GR Harris Funeral Home

Name of counsel: Douglas G. Wardlow

Pursuant to 6th Cir. R. 26.1, R.G. & G.R. Harris Funeral Homes, Inc.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on May 17, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Douglas G. Wardlow
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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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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the enforcement of R.G. and G.R. Harris Funeral Home, Inc.'s ("R.G.") sex-specific dress code against Charging Party Stephens constitutes sex stereotyping in violation of Title VII when the dress code is evenly enforced and does not impose unequal burdens on the sexes.

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

3. Whether the Religious Freedom Restoration Act ("RFRA") entitles R.G. to an exemption from the enforcement of Title VII under the specific facts and circumstances of this case.

STATEMENT OF THE CASE

I. Summary of Facts

R.G. & G.R. Harris Funeral Homes, Inc. ("R.G.") is a closely held corporation owned and operated by Thomas Rost that has been in business since 1910. R.G. Statement of Facts ("R.G. Facts"), R.55, PageID#1683, ¶¶ 1-2.[1] Rost, the president and sole officer of R.G., owns 94.5% of the company.. *Id.*, PageID#1684, ¶¶ 8-9.

Rost has been a Christian for over sixty-five years. *Id.*, PageID#1685, ¶¶ 17-18. Rost operates R.G. according to his religious convictions; he "practice[s] [his] faith through [his] businesses." T. Rost 30(b)(6) Dep., R.54-5, PageID#1368, 86:20-22, 87:3-24; T. Rost Aff., R.54-2, PageID#1327-28, ¶¶ 7, 10. R.G.'s mission statement, published on its website, reads: "R.G. … recognize[s] that its highest priority is to honor God in all that we do as a company and as individuals. With respect, dignity, and personal attention, our team of caring professionals strive to exceed expectations, offering options and assistance designed to facilitate healing and wholeness in serving the personal needs of family and friends as they experience a loss of life." R.G. Facts, R.55, PageID#1686, ¶ 21. Throughout his funeral homes, Rost places Christian devotional booklets and "Jesus" cards featuring Bible verses. R.G. Facts, R.55, PageID#1686, ¶

[1] All facts that are supported herein by citations to R.G.'s Statement Facts, R.55, were undisputed by the EEOC. *See* EEOC Counter-Statement of Disputed Facts, R.64, Page ID#2066-2088.

23. Rost also leads prayer at R.G. business meetings. *Id.*, PageID#1686, ¶ 24. Employees acknowledge that R.G. is a Christian business. *Id.*, PageID#1687, ¶¶ 26-27.

Rost operates R.G. as a ministry to serve grieving families. T. Rost 30(b)(6) Dep., R.54-5, PageID#1368, 86:2-19; T. Rost Aff., R.54-2, PageID#1327, ¶ 7. Rost describes R.G.'s ministry as one of healing. T. Rost 30(b)(6) Dep., R.54-5, PageID#1368, 86:2-19. He sincerely believes that God has called him to minister to grieving people; his religious faith compels him to do that important work. R.G. Facts, R.55, PageID#1688, ¶ 31. Accordingly, R.G. strives to meet clients' needs by training staff in grief management and maintaining strict codes of conduct and decorum at all times so that family members and friends of the deceased may grieve in a place conducive to healing. T. Rost Aff., R.54-2, PageID#1327, ¶ 8.

Rost sincerely believes that the Bible teaches that a person's sex (male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex. T. Rost Aff., R.54-2, PageID#1334, ¶ 42. He also sincerely believes that he would be violating God's commands if he were to pay for or authorize one of R.G.'s funeral directors to wear the uniform for members of the opposite sex while on the job representing the company. T. Rost Aff., R.54-2, PageID#1334-35, ¶¶ 43-46.

Charging Party Stephens started at R.G. on October 1, 2007, as an apprentice and later moved to the position of funeral director and embalmer. R.G. Facts, R.55, PageID#1688, ¶¶ 35-36. As a funeral director, Stephens's duties included, among other things, body removal, helping set up funeral arrangements, and conducting visitations

and funerals, requiring Stephens to interact with grieving families and friends. *Id.*, PageID#1688-89, ¶¶ 37-38; Shaffer Dep., R.54-13, PageID#1435-37, 48:23-49:14, 53:4-54:16; T. Rost Aff., R.54-2, PageID#1328-32, ¶¶ 14-31; Cash Dep., R.54-9, PageID#1406, 27:13-28:22; EEOC T. Rost Aff., R.54-17, PageID#1467-68, ¶¶ 13-14; EEOC Kish Aff., R.54-18, PageID#1475, ¶ 15. Funeral directors are R.G.'s most prominent public representatives. EEOC T. Rost Aff., R.54-17, PageID#1467-68, ¶¶ 13-14; T. Rost Aff., R.54-2, PageID#1332, ¶ 32; EEOC Kish Aff., R.54-18, PageID#1475, ¶ 15.

To ensure that employees do not draw undue attention to themselves or cause grieving individuals unnecessary stress, R.G. maintains a conservative, industry-standard dress code. T. Rost 30(b)(6) Dep., R.54-5, PageID#1361-62, 57:20-58:6 and 59:13-60:5; T. Rost Dep., R.54-4, PageID#1351-52, 49:22-50:15; T. Rost Aff., R.54-2, PageID#1333, ¶ 34; Kish Dep., R.54-6, PageID#1387, 63:19-64:7. R.G.'s employee handbook outlines a general dress code for men requiring that they wear dark suits, white shirts, ties, and dark socks, shoes, and gloves. R.G. Facts, R.55, PageID#1691, ¶ 49. The handbook specifies that women must wear a "suit or plain conservative dress" in muted colors. *Id.*, PageID#1691, ¶ 50. R.G. employees understand that male employees who interact with the public must wear suits and ties, while female employees who interact with the public must wear a skirt suit. *Id.*, PageID#1691, ¶ 51. Funeral directors must wear company-provided suits. Kish Dep. R.54-6, PageID#1381, 17:8-22; Crawford Dep., R.54-7, PageID#1394, 18:3-11. Stephens agrees that R.G.'s

sex-specific dress code is industry standard. Stephens Dep., R.54-15, PageID# 1458-59, 1461, 90:7-25, 91:22-92:9, 102:19-103:14, 118:19-25. Employees have been disciplined for failing to abide by R.G.'s dress code. R.G. Facts, R.55, PageID#1693, ¶ 60. R.G. administers its sex-specific dress code based on its employees' biological sex. T. Rost Aff., R.54-2, PageID#1333, ¶ 35.

Stephens was born male, so all of R.G.'s employment records for Stephens identify Stephens as male. R.G. Facts, R.55, PageID#1693-94, ¶¶ 61 and 63. For the entire term of Stephens's employment, Stephens dressed in accordance with the dress code for male funeral directors, wearing uniform men's suits purchased by R.G. *Id.*, PageID#1694, ¶¶ 64 and 66.

On July 31, 2013, Stephens approached Rost and presented him with a letter that stated Stephens's intent to transition from presenting as a man to presenting as a woman, including Stephens's intent to wear female attire at work. *Id.*, PageID#1694-95, ¶ 67; Stephens Letter, R.54-21, PageID#1494-95. Rost understood from the letter and conversation that Stephens refused to comply with the dress code for male funeral directors. T. Rost 30(b)(6) Dep., R.54-5, PageID#1372, 136:14-23. Approximately two weeks later, on August 15, 2013, Rost informed Stephens that Stephens could not violate R.G.'s dress code for male funeral directors and offered Stephens a severance package. T. Rost 30(b)(6) Dep., R.54-5, PageID#1371, 126:1-25; Stephens Dep., R.54-15, PageID#1455-56, 74:13-75:24, 76:2-10, 79:22-80:10; Stephens subsequently filed a charge of discrimination with the EEOC alleging that Stephens was discharged because

of Stephens's "sex and gender identity, female." Charge of Discrimination, R.54-22, PageID#1497.

Rost would not have dismissed Stephens if Stephens had expressed an intent to dress as a woman only outside of work. T. Rost Aff., R.54-2, PageID#1336, ¶ 50; T. Rost 30(b)(6) Dep., R.54-5, PageID#1372, 137:11-15. Stephens's intent to violate the dress code while at work was the decisive consideration in the employment decision. T. Rost Aff., R.54-2, PageID#1336, ¶¶ 50-51.

Based on Rost's long professional experience in the funeral industry and interactions with Stephens at work, Rost 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, thus disrupting R.G.'s ministry of healing. T. Rost Aff., R.54-2, PageID#1333-34, ¶¶ 39-40; T. Rost 30(b)(6) Dep., R.54-5, PageID#1361-62, #1373-74, 54:8-17, 59:13-60:9, 61:2-18, 139:5-23, 142:23-143:12; EEOC T. Rost Aff., R.54-17, PageID#1470, ¶ 21. Allowing Stephens to contravene the dress code and wear a female uniform in the public-facing role of funeral director would have caused R.G. to convey a message in direct conflict with Rost's religious belief that a person's sex is an immutable, God-given gift, thus violating Rost's religious convictions. T. Rost Aff., R.54-2, PageID#1334-35, ¶¶ 41-46; T. Rost 30(b)(6) Dep., R.54-5, PageID#1361, 54:8-17, 55:1-14. And because R.G. provides suits for all of its funeral directors regardless of their sex, if Rost would have agreed that Stephens could continue to work at R.G. while

dressing in the female uniform on the job, Rost would have been paying for a male to wear the female uniform, which would have violated his faith. T. Rost Aff., R.54-2, PageID#1335, ¶¶ 46-47.

If Rost were to be compelled to violate his sincerely held religious beliefs by paying for or authorizing one of his employees to dress inconsistently with his or her biological sex at work, he would feel significant pressure to sell the business and give up his life's religious calling of ministering to grieving people as a funeral home director and owner. T. Rost Aff., R.54-2, PageID#1335, ¶ 48.

II. Relevant Procedural History and Rulings Presented for Review

The EEOC conducted an investigation and subsequently issued a letter of determination finding cause to believe that Stephens's discharge violated Title VII. Determination, R.63-4, PageID#1968. On September 25, 2014, the EEOC filed a complaint in district court alleging that R.G.'s discharge of Stephens constituted unlawful discrimination because of Stephens's transgender status, because of Stephens's "transition from male to female," and because of sex stereotyping. Complaint, R.1, PageID#4-5, ¶ 15. The EEOC also alleged that R.G. violated Title VII by providing different clothing benefits to male and female employees, though that claim did not impact Stephens. *Id.*, PageID#5, ¶ 17.

R.G. filed a motion to dismiss the wrongful termination claim for failure to state a claim on which relief can be granted. Motion, R.7, PageID#22-47. The district court ruled that Title VII's prohibition of discrimination "because of . . . sex" does not include

discrimination based on transgender status. Amended Order, R.13, PageID#188-89. The district court's ruling also implicitly recognizes that discrimination based on a person's status as gender-transitioning is likewise not encompassed within Title VII's prohibition of discrimination because of sex. The district court further held that the EEOC's complaint stated a claim for relief for impermissible sex stereotyping in violation of Title VII. Amended Order, R.13, PageID#189-95.

The EEOC and R.G. filed cross-motions for summary judgment. EEOC Motion, R.51, PageID#591-640; R.G. Motion, R.54, PageID#1285-1321. The district court granted summary judgment for R.G. on the wrongful termination claim. Order, R.76, PageID#2233. The district court determined that the enforcement of R.G.'s sex-specific dress code was sex stereotyping in violation of Title VII. *Id.*, PageID#2199-2204. But the district court held that RFRA exempted R.G. from the enforcement of Title VII. *Id.*, PageID#2204-23. The court also granted summary judgment on the EEOC's clothing benefit claim, dismissing it without prejudice on the grounds that the court lacked jurisdiction over the claim because (1) the alleged discrimination did not impact Stephens, and (2) the charge of wrongful termination could not have been reasonably expected to lead to an investigation of R.G.'s clothing benefits for male and female employees. *Id.*, PageID#2223-33. The court concluded that proper procedure upon discovering evidence of purported clothing-benefit discrimination would have been to file a Commissioner's charge. *Id.*, PageID#2233.

After the EEOC commenced this appeal, charging party Stephens successfully moved to intervene as an appellant. Order, Doc.28-2, PageID#1-3.

SUMMARY OF THE ARGUMENT

This Court should reject the district court's determination that the enforcement of R.G.'s sex-specific dress code violated Title VII and affirm the district court's dismissal of the wrongful termination claim on the alternative ground that the enforcement of a sex-specific dress code does not violate Title VII when the dress code does not impose unequal burdens on men and women. No court has ever held that the enforcement of a sex-specific employee-appearance policy constitutes impermissible sex stereotyping in violation of Title VII simply because it imposes different requirements on men and women. The Court should not do so here. The even-handed enforcement of a sex-specific dress code that does not unequally burden the sexes does not constitute impermissible sex-stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), because the enforcement of such a policy does not demonstrate an intent to single out an employee for adverse treatment because of their sex.

Alternatively, the Court should affirm the district court's grant of summary judgment on the basis relied upon by the district court, namely, that RFRA entitles R.G. to an exemption from the enforcement of Title VII under the particular facts of this case. Contrary to the arguments of the EEOC and Stephens, R.G. has established that the enforcement of Title VII would substantially burden R.G.'s religious exercise. Compelling R.G. to allow a public-facing employee to wear the uniform for members

of the opposite sex while representing the company on the job would cause R.G.'s owner, Tom Rost, to violate his sincerely held religious belief that a person's sex is an immutable, God-given gift. By causing disruption to the grieving process of mourners, it would also interfere with Rost's religious calling and mission to serve those who grieve. Rost would be pressured to give up his business rather than violate his religious convictions. Consequently, Rost has established a substantial burden on his religious exercise. The burden thus shifts to the EEOC to establish that enforcing Title VII is the least restrictive means of furthering a compelling government interest. RFRA requires that the government show a compelling interest to enforce the statute with respect to the specific person asserting the religious objection. But the EEOC cannot demonstrate that it has a compelling interest to force Rost to allow an employee to wear the uniform for a member of the opposite sex while at work. Moreover, the EEOC has not demonstrated that other means exist to further its interest in opposing sex stereotypes. Indeed, the means advocated by the EEOC—compelling R.G. to allow an employee to dress and present according to female sex stereotypes in the workplace—undermines the goal of eliminating sex stereotypes from the workplace.

The Court should also affirm the district court's holding on R.G.'s Rule 12(b)(6) motion that Title VII's prohibition of discrimination "because of . . . sex" does not include discrimination based on transgender or gender-transitioning status. The common and ordinary meaning of "sex" in Title VII contemporaneous with the enactment of the statute does not include the concept of gender identity or transgender

status. The court should not use the sex stereotyping theory of *Price Waterhouse* to bootstrap protection for gender identity or transgender status into Title VII.

Finally, the Court should affirm the district court's dismissal without prejudice of the EEOC's clothing benefits claim. Under this Circuit's holding in *EEOC v. Bailey Co., Inc.*, 563 F.2d 439 (6th Cir. 1977), the district court lacked jurisdiction over the clothing benefits claim because Stephens's charge of discrimination, which alleged only wrongful termination on the basis of sex or gender identity, cannot be reasonably expected to lead to an investigation concerning whether R.G. provided clothing benefits to men and not women. *Bailey* remains good law and does not contradict the Supreme Court's narrow holding in *General Telephone Co. of the Northwest v. EEOC*, 446 U.S. 318 (1980).

ARGUMENT

I. The District Court's Grant of Summary Judgment on the Wrongful Termination Claim Should Be Upheld on the Basis That R.G. Did Not Engage in Impermissible Sex Stereotyping in Violation of Title VII.

The district court determined that R.G.'s sex-specific dress code was not a defense to the EEOC's Title VII sex-stereotyping claim., in essence holding that R.G.'s enforcement of its sex-specific dress code against Stephens constituted sex stereotyping in violation of Title VII. Order, R.76, PageID#2204. This is legal error: sex-specific dress codes that do not impose an unequal burden on one sex are permissible under Title VII. Because R.G. discharged Stephens for refusing to abide by R.G.'s sex-specific

dress code, and because R.G.'s dress code does not impose an unequal burden on one sex, R.G. did not engage in impermissible sex stereotyping under Title VII. This is an alternative basis for affirming the district court's grant of summary judgment in favor of R.G. on the EEOC's wrongful termination claim.

A. Because R.G.'s Sex-Specific Dress Code Imposes Equal Burdens on Men and Women, Its Enforcement Does Not Constitute Impermissible Sex Stereotyping in Violation of Title VII.

It has long been held that sex-specific dress codes and other employee-appearance policies that impose equal burdens on men and women do not violate Title VII.

In *Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 401 (6th Cir. 1977), this Circuit held that a male employee who was discharged for failing to keep his hair short as required by his employer's sex-specific grooming policy did not state a cause of action under Title VII for discrimination because of sex. The employer's grooming policy "limited the manner in which the hair of the men could be cut and limited the manner in which the hair of women could be styled." *Id.* In holding that the male plaintiff failed to make out a prima facie case of sex discrimination, the court observed that there was "no allegation that women employees who failed to comply with the code provisions relating to hair style were not discharged"; nor was there "any allegation that the employer refused to hire men who did not comply with the code, but did hire women who were not in compliance." *Id.* That is, the dress code did not disparately impact women versus men.

Barker remains binding law in this Circuit. *See*, *e.g.*, *U.S. v. Smith*, 73 F.3d 1414, 1418 (6th Cir. 1996) (quoting *Salmi v. Sec'y of Health and Human Servs.,* 774 F.2d 685, 689 (6th Cir. 1985) ("A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.")). And while *Barker* did not consider *Price Waterhouse*, the Ninth Circuit recently did so *en banc* and upheld a sex-specific dress and grooming code. In *Jespersen,* the court held that Harrah's Casino did not violate Title VII by requiring its female bartenders to wear makeup and nail polish and to tease, curl, or style their hair, while prohibiting male bartenders from wearing makeup or nail polish and requiring them to keep their hair cut above the collar. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1107 (9th Cir. 2006). The court noted that it has "long recognized that companies may differentiate between men and women in appearance and grooming policies." *Id.* at 1110. "The material issue under our settled law is not whether the policies [for men and women] are different, but whether the policy imposed on the plaintiff creates an unequal burden for the plaintiff's gender." *Id.* (citation and quotation marks omitted). Because the female plaintiff failed to show that requiring women to wear makeup (and prohibiting men from doing so) imposed an unequal burden on women, the Ninth Circuit held that she could not establish her claim of sex discrimination. *Id.* at 1112; s*ee also Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998) (upholding sex-specific grooming policy); *Fagan v. Nat'l Cash Register*

Co., 481 F.2d 1115, 1117 n.3 (D.C. Cir. 1973) (explaining that when employers adopt policies that take account of "common differences in customary dress of male and female employees, it is not usually thought that there is unlawful discrimination 'because of sex'").

R.G.'s basic dress code is outlined in the company's employee handbook. *See* R.G. Employee Manual, R.54-20, PageID#1485-87. It is a sex-specific dress code that R.G. applies based on the biological sex of its employees. R.G. Facts, R.55, PageID#1692, ¶ 51. The dress code requires men who interact with the public to wear dark suits with nothing in the jacket pockets, white shirts, ties, dark socks, dark polished shoes, dark gloves, and only small pins. R.G. Employee Manual, R.54-20, PageID#1485-87. Women who interact with the public are generally required to wear a conservative business suit that consists of a skirt and business jacket. R.G. Facts, R.55, PageID#1691, ¶ 51; M. Rost Dep., R.54-11, PageID#1423, 14:16-19.

With respect to Stephens's claim, the relevant requirements of the dress code are those that apply to Stephens's funeral director position. *See Jespersen*, 444 F.3d at 1106-07 (focusing only on the dress code for the plaintiff's position). The dress code requires funeral directors—whether male or female—to wear company-provided suits. *See* Kish Dep., R.54-6, PageID#1381, 17:8-22; Crawford Dep., R.54- 7, PageID#1394, 18:3-11.[2]

[2] Although R.G. has not had an opportunity to employ a female funeral director since Rost's grandmother stopped working for R.G. around 1950, *see* Stephens Dep., R.54-15, PageID#1459, 102:4-14; T. Rost Aff., R.54-2, PageID#1336, ¶¶ 52-53, R.G. would provide female funeral directors with skirt suits in the same manner that it

The burden of the dress code on male funeral directors and on female funeral directors is identical.

Moreover, R.G. does not discriminate in its enforcement of the dress code. R.G. has in fact disciplined employees for failing to comply with the dress code. R.G. Facts, R.55, PageID#1693, ¶ 60. If a female funeral director were to say that she planned to wear a men's suit at work, that employee would be discharged just like Stephens was. T. Rost Aff., R.54-2, PageID#1337, ¶ 55.

Because R.G.'s dress code imposes equivalent burdens on male and female funeral directors, *Barker* and similar authority in other circuits instruct that the enforcement of R.G.'s dress code does not constitute impermissible sex stereotyping in violation of Title VII.

B. Neither *Price Waterhouse* nor *Smith* Alter the Conclusion that the Enforcement of R.G.'s Sex-Specific Dress Code Against Stephens Did Not Violate Title VII.

The district court reasoned that in light of the Supreme Court's decision in *Price Waterhouse* and the Sixth Circuit's holding in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), it "appears unlikely" that this Circuit would find the enforcement of R.G.'s sex-specific dress code permissible under Title VII. Order, R.76, PageID#2204. But a straightforward analysis of *Price Waterhouse* and *Smith* reveals that those cases do not alter the widely accepted rule acknowledged in *Barker* and *Jespersen* that sex-specific dress

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provides pant suits to male funeral directors, and that those female employees would be required to wear those suits while on the job. R.54-2, PageID#1337, ¶ 54.

and grooming codes are lawful under Title VII when they impose equivalent burdens on men and women.

Indeed, these cases are absolutely consistent with the Supreme Court's statement that "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of *disparate treatment of men and women* resulting from sex stereotypes.'" *Price Waterhouse*, 490 U.S. at 251 (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n. 13 (1978); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)) (emphasis added). Stephens goes astray by focusing narrowly on "entire spectrum" without paying due regard to the necessary demonstration of "disparate treatment" between "men and women."

It is a helpful exercise to think about *Price Waterhouse* and imagine that there was a dress code imposed which obligated Ms. Hopkins to wear a skirt while her male colleagues were obliged to wear pants. Had she simply been fired for wearing pants rather than a skirt, the case would have ended there—both sexes would have been equally burdened by the requirement to comply with their respective sex-specific standard. But what the firm could not do was fire her for being aggressive or macho when it was tolerating or rewarding the behavior among men—and when it did, it relied on a stereotype to treat her disparately from the men in the firm.

At bottom, *Price Waterhouse* revolves around the employer targeting employee behavior—acting feminine; being macho; getting aggressive—and in so doing, it relies upon the fixed, binary classification of a person's sex as male or female as the referent

for determining whether discrimination occurred. It does not create any categorical protection for the fluid continuum of gender identity. As Judge Pryor recently put it, the "doctrine of gender nonconformity is not an independent vehicle for relief; it is instead a proxy a plaintiff uses to help support her argument that an employer discriminated on the basis of the enumerated sex category by holding males and females to different standards of behavior." *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1260 (11th Cir. 2017) (*Pryor, J.*, concurring) (rejecting expansion of "sex" in Title VII to include sexual orientation).

Thus, *Smith* and *Price Waterhouse* are two of a kind, both involving behavior which the employer saw as stereotypical and thought inconsistent with the complainant's sex. Ms. Hopkins was too masculine while Mr. Smith expressed himself with "less masculine, and more feminine mannerisms and appearance...." *Smith*, 378 F.3d at 572. In neither case did the plaintiffs refuse to comply with (or challenge) a sex-specific dress code or grooming policy that imposed equal burdens on the sexes.

Nor does *Smith* expand on *Price Waterhouse* to create a freestanding claim for discrimination grounded solely in transgender identity. Granted, the *Smith* panel *initially* opined that "[d]iscrimination based on transsexualism is rooted in the insistence that sex (organs) and gender (social classification of a person as belonging to one sex or the other) coincide," which is "the very essence of sex stereotyping." *Smith v. City of Salem*, 369 F.3d 912, 921-22 (6th Cir. 2004), *amended and superseded*, 378 F.3d 566, *rehearing en banc denied* (Oct. 18, 2004). Thus, the panel went on to state that "to the extent that

Smith . . . alleges discrimination based solely on his identification as a transsexual, he has alleged a claim of sex stereotyping. . . ." *Id.* at 922. But just two months after publishing the opinion, the panel *removed that passage* in an amended opinion. *See* 378 F.3d 566.

Having corrected its opinion to reject a categorical protection for transgender status, the panel opinion summed it up this way: *Price Waterhouse* did "not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual." *Id.* at 574-575. In other words, transsexuals are not denied the protections of sex discrimination law under Title VII, nor are they precluded from using the "proxy" of sex stereotyping to "support [an] argument that an employer discriminated on the basis of the enumerated sex category. . . ." *Evans,* 850 F.3d at 1260 (*Pryor, J.*, concurring). To establish discrimination "because of . . . sex," they still have to prove that the employer's sex stereotyping resulted in "disparate treatment of men and women." *Price Waterhouse*, 490 U.S. at 251.

Smith therefore does not support bootstrapping Stephens's claim into Title VII based on Stephens's transgender status or efforts to transition. Instead, Stephens has to show that discrimination occurred because of Stephens's sex (male), and more specifically, that a disparate burden fell upon Stephens based upon Stephens's sex. But that is not Stephens's case, and *Smith* and *Price Waterhouse* will not carry the day for Stephens.

Indeed, unlike the employers in *Price Waterhouse* or *Smith*, R.G. never indicated that Stephens's behavior was too feminine or not masculine enough—no sex stereotype factored into R.G.'s employment decision. To the contrary, R.G. consistently maintained that Stephens, like all other employees, male or female, must comply with the company's professional sex-specific dress code to ensure that the bereaved receive the care that Rost is compelled by his faith to provide. Thus, the Appellants cannot establish what the plaintiff in *Price Waterhouse* could (and what the plaintiff in *Smith* alleged)—that R.G. treated Stephens differently from other employees because of Stephens's sex.

This brings the present case squarely into the *Jespersen* analysis, where Jespersen invoked *Price Waterhouse* to invalidate a sex-specific dress and grooming policy that imposed equal burdens on the sexes. But the Ninth Circuit rejected her argument, concluding that "Jespersen's claim . . . materially differs from [the plaintiff's] claim in *Price Waterhouse* because Harrah's grooming standards do not require Jespersen to conform to a stereotypical image that would objectively impede her ability to perform her job requirements as a bartender." 444 F.3d at 1113. This case tracks that scenario precisely: "[t]he record contains nothing to suggest [that R.G.'s dress] standards would objectively inhibit" one sex's "ability to do the job." *Id.* at 1112. R.G.'s dress code does not require Stephens to conform to a sex stereotype that would impede Stephens's ability to perform the duties of a funeral director. On the contrary, R.G. implemented its dress code to further its unique work as a funeral business catering to the needs of

its customers. Thus, far from impeding Stephens's ability to perform the requirements of the job, R.G.'s dress code would have *enabled* Stephens to perform the funeral director's duties in the manner that R.G.'s decades of experience established as the right way to serve the bereaved.

The district court rejected the appellate court's *Jespersen* analysis, concluding that it was not in line with this Circuit's admonition in *Smith* that "[a]fter Price Waterhouse, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex." *Smith*, 378 F.3d at 574. *See* Order, R.76, PageID#2204. But the district court's reasoning gave short shrift to the critical difference between *Smith* and the instant case: *Smith* alleged that his employer *singled him out* for adverse treatment because he "express[ed] less masculine, and more feminine mannerisms and appearance." 378 F.3d at 572. In contrast—dispositive contrast—R.G. did not target Stephens for disparate treatment, but rather sought compliance with a policy which obligated every employee to conform to the even-handed, sex-specific dress code. No burden fell uniquely on Stephens because Stephens was male, and that makes *Smith* inapposite to this case.

C. Title VII Does Not Prohibit All Customary Distinctions between Male and Female Dress and Appearance.

The district court reasoned from the premise that Title VII was violated because R.G. insisted that Stephens dress in accord with "gender-based stereotypes," which

"stereotypes" had been codified into a "formal policy." Order, R.76, PageID#2204. But that reasoning is in open conflict with the EEOC's own policies on dress codes, as set forth in its Compliance Manual:

> [A] dress code may require male employees to wear neckties at all times and female employees to wear skirts or dresses at all times. So long as these requirements are suitable and are equally enforced and so long as the requirements are equivalent for men and women with respect to the standard or burden that they impose, there is no violation of Title VII.

EEOC Compliance Manual § 619.4(d) (June 2006). The EEOC thus recognizes that not every mannerism or custom associated with being a man or a woman is an impermissible sex stereotype under Title VII.

And perhaps more importantly, the point of *Price Waterhouse* was to proscribe an employer from relying on his own stereotypes to effect sex discrimination—whereas Stephens would force Stephens's own stereotypes on the employer as a means of affirming Stephens's professed gender identity—thus in a sense establishing an employee-created dress code and insisting that Title VII obligates the employer to adopt it. This Court should not write such a standard into Title VII.

In any event, many courts post-*Price Waterhouse* have permitted employers to distinguish between the sexes in their dress and grooming policies, refusing to denounce the harmless sex-based generalizations that underlie all sex-specific employee-appearance polices. *See*, *e.g.*, *Jespersen*, 444 F.3d at 1110; *Frank v. United Airlines, Inc.*, 216 F.3d 845, 854 (9th Cir. 2000) ("An appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment"); *Harper*, 139

F.3d at 1387 (holding that an employee-appearance policy prohibiting men, but not women, from wearing long hair does not violate Title VII); *Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907 (2nd Cir. 1996) (upholding a sex-specific grooming policy).

At bottom, then, the central question in this case is not whether R.G.'s dress code relies on distinctions between male and female dress: all sex-specific employee-appearance policies do that, and appellate courts have upheld the practice. Rather, the "material issue under our settled law is not whether the policies [for men and women] are different, but whether the policy imposed on the plaintiff creates an 'unequal burden' for the plaintiff's gender." *Jespersen*, 444 F.3d at 1110; *see also Barker*, 549 F.2d at 401 (holding that a plaintiff who failed to allege that his employer's grooming policy imposed an unequal burden on one sex did not state a claim under Title VII); and EEOC Compliance Manual § 619.4(d) ("[S]o long as the [dress code] requirements are equivalent for men and women with respect to the standard or burden that they impose, there is no violation of Title VII.").

The district court observed that the Sixth Circuit has not yet addressed "how to reconcile th[e] previous line of authority" in this Circuit holding that even-handed sex-specific dress codes do not violate Title VII "with the more recent sex/gender-stereotyping theory of sex discrimination under Title VII." Order, R.76, PageID#2203. That is true as far as it goes—the Sixth Circuit has not clearly delineated that *Price Waterhouse* and *Smith* deal with different fact patterns and analysis than *Barker* and *Jespersen*. But the two lines of cases are on separate analytical tracks that do not conflict.

Price Waterhouse and *Smith* demonstrate how a case for discrimination because of sex may be supported by reference to employer decisions based on sex stereotypes that single out an employee for adverse treatment compared to members of the opposite sex. In contrast, *Barker* and *Jespersen* teach that a sex-specific employee-appearance policy, which may be enforced against an employee for reasons that have nothing to do with sex stereotypes (*e.g.*, a male funeral director might be discharged for refusing to wear a coat and tie, or for wearing a kilt on the job), will not violate Title VII unless its enforcement imposes an unequal burden on (thus disparately impacting) one of the two sexes. The present case fits with *Barker* and *Jespersen*, not with *Price Waterhouse* and *Smith*.[3] This two-track analysis is consistent with the fact that no federal court has held that an employer whose dress code is sex-specific violates Title VII simply because men are expected to wear different clothing than women. As longstanding precedent from many circuits attests, Title VII does not reach so far.

[3] The district court also observed that unlike *Barker* and *Jespersen*, the present case does not involve an employee challenging a sex-specific dress code. Order, R.76, PageID#2200. But that is a distinction without a difference. There is no dispute that Rost discharged Stephens because of Stephens's stated intention to violate the dress code for male funeral directors. T. Rost 30(b)(6) Dep., R.54-5, PageID#1372, 136:22-137:10; T. Rost Aff., R.54-2, PageID#1336, ¶ 50. Moreover, there is no dispute that Rost would not have discharged Stephens if Stephens had stated an intention to abide by the dress code at work and dress as a woman only outside of work, demonstrating that Rost's motivation concerned only the work-appearance policy and not Stephens's professed identity or appearance more generally. T. Rost 30(b)(6) Dep., R.54-5, PageID#1372, 137:11-15. Consequently, if the dress code is permissible under the standards enunciated in *Barker*, *Jespersen*, and similar cases (it is), then R.G. did not violate Title VII when R.G. enforced the dress code against Stephens.

This Court should therefore affirm the district court's grant of summary judgment in favor of R.G. on the EEOC's wrongful termination claim on the alternative ground that, contrary to the determination of the district court, R.G. did not engage in impermissible sex stereotyping when it enforced its dress code and discharged Stephens.

II. The District Court Correctly Held that "Sex" in Title VII Does Not Include Transgender or Transitioning Status.

Ruling on R.G.'s motion to dismiss, the district court held that Title VII does not prohibit employment discrimination based on transgender or transitioning status. Amended Order, R.13, PageID#188. The EEOC and Stephens argue that the district court erred because the language "because of . . . sex" forbids discrimination based on transgender or transitioning status. EEOC Br., Doc.22, PageID#21-22; Stephens Br., Doc.60, PageID#18-19. But the EEOC's and Stephens's argument does not remotely meet the long-established test for statutory interpretation of terms.

In relevant part, Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). An individual's transgender or transitioning status is not on the list of forbidden categories. To determine whether Title VII's prohibition of discrimination "because of . . . sex" also bans discrimination because of transgender or gender-transitioning status, the court must begin with the statutory text. Specifically, the court should look to the meaning of the words of the

statutory text at the time of its enactment. *See*, *e.g.*, *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) ("It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning;"; looking to dictionaries from era of enactment).

The common and ordinary meaning of "sex" was the same in 1964 as it is now: "sex" refers to a person's sex as determined according to physiology and reproductive role, either male or female. *See*, *e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2081 (1971) (defining "sex" as "the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change"); THE AMERICAN COLLEGE DICTIONARY 1109 (1970) (defining "sex" as "the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished"); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1969) (defining "sex" as "[t]he property or quality by which organisms are classified according to their reproductive functions[;] [e]ither of two divisions, designated *male* and *female*, of this classification"); *see also* NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010) (defining "sex" as "either of the two main categories (male and female) into which humans and many other living things are divided on the basis of their reproductive functions").

The common and ordinary meaning of "sex" in 1964 did not refer to or include the concept of a person's status as "transgender." The term "transgender" refers to "a

person whose *gender identity* differs from the sex the person had or was identified as having at birth," something that is entirely different and distinct from a person's sex as that term was understood in 1964. *Transgender*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2014), available at https://www.merriam-webster.com/dictionary/transgender (last visited May 11, 2017) (emphasis added). Indeed, when Title VII was enacted, the term and concept "gender identity" was almost completely unknown. The very first use of the term occurred at a psychoanalytic conference in Stockholm in 1963 and was understood to refer to something different than "sex," namely, the "psychological phenomena related to the sexes but without direct biological connotations." Jennifer Germon, *Gender: A Genealogy of an Idea* 65 (2009) (quotation marks and citation omitted). It is therefore implausible that the common and ordinary meaning of "sex" at the time of Title VII's enactment included the concept of gender identity or transgender status.

Analyzing the contemporary definitions of "sex" reveals two important facts: in common and ordinary usage in both 1964 and today, "sex" (1) refers to a binary characteristic for which there are only two classifications, male and female, (2) which classification arises in a person based on their chromosomally driven physiology and reproductive function. As just explained, a person's status as "transgender," on the other hand, refers to a person's self-assigned "gender identity." *See Transgender*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra*. But gender identity is not a binary characteristic. Rather, it refers to a spectrum of possible classifications, including

male, female, asexual, non-binary, and others. *See* Am. Psychological Ass'n, *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* 2 (3d ed. 2014), available at http://bit.ly/1mZQCsH (last visited May 8, 2017) (explaining that some "[g]enderqueer" people "identify their gender as falling outside the binary constructs of 'male' and 'female,'" and indicating that other gender identities include "androgynous, multigendered, gender nonconforming, third gender, and two-spirit"). Moreover, gender identity has nothing to do with physiology or reproductive function. Indeed, Robert Stoller, the UCLA psychoanalyst who introduced the term "gender identity," wrote in 1968 that gender had "psychological or cultural rather than biological connotations." Robert J. Stoller, *Sex and Gender: On the Development of Masculinity and Femininity* 9 (1968).

Because gender identity is not a binary characteristic and has nothing to do with physiology or reproductive function, the common and ordinary meaning of "sex" in Title VII cannot possibly include the concept of gender identity. And it thus follows that "sex" in Title VII cannot include the concept of transgender status, either, because that term takes on meaning by relying on the concept of gender identity.

In short, discrimination because of sex cannot be reasonably understood to include discrimination based on transgender status, because transgender status is an entirely different and distinct trait. Consider it this way: one can imagine a class of persons who profess to be transgender. That class may include persons who are male as well as persons who are female per the common and ordinary meaning of sex.

Similarly, a class of persons who are female (again, according to the common and ordinary meaning of sex) may include persons who are transgender and persons who are not transgender. It follows that the trait of "sex" is distinct from the concept of "transgender status." Discrimination because of sex and discrimination based on transgender status are not synonymous; thus Title VII's prohibition of discrimination in employment "because of . . . sex" does not prohibit transgender-status discrimination. 42 U.S.C. § 2000e-2(a). To hold otherwise would be to amend the statutory text—a job reserved for Congress, not the courts.

This conclusion is buttressed by the words that Congress employs when it chooses to enact legislation that does, in fact, prohibit discrimination against persons for professing a gender identity that differs from their actual sex. In such cases, Congress uses the phrase "gender identity." For example, the Violence Against Women Act prohibits funded programs from discriminating on the basis of "race, color, religion, national origin, *sex*, *gender identity*, . . . or disability." 42 U.S.C. 13925(b)(13)(A) (emphasis added). There would be no reason to include "gender identity" if the Act's probation of discrimination on the basis of "sex" encompassed discrimination based on gender identity or transgender status. *See also* Hate Crimes Act, 18 U.S.C. § 249(a)(2)(A) (imposing a heightened penalty for causing or attempting to cause bodily injury "to any person, because of the actual or perceived religion, national origin, *gender*, sexual orientation, *gender identity*, or disability of any person.") (emphasis added). This confirms

that discrimination because of sex is distinct from discrimination based on the gender identity that a person professes.[4]

For the same reasons, discrimination based on sex is distinct from discrimination based on whether a person is "transitioning" from a gender identity that matches their actual sex to one that does not. Again, the common and ordinary meaning of "sex" contemporaneous to Title VII's enactment refers to a person's classification as either male or female based on physiology and reproductive role. Regardless what a person does to "transition" to or profess a different gender identity, their sex—according to the common and ordinary meaning of that term in 1964—does not change. Accordingly, a person's sex describes a trait that is separate and distinct from the person's status as transitioning from one gender identity to another.

The EEOC and Stephens point to the D.C. Circuit's decision in *Schroer v. Billington,* 577 F.Supp.2d 293 (D.C. Cir. 2008), arguing that it supports the view that discrimination based on transgender and gender-transitioning status constitutes discrimination because of sex prohibited by Title VII. EEOC Br., Doc.22, PageID#36-

[4] Appellants argue that the Supreme Court in *Price Waterhouse* made clear that Title VII's prohibition on discrimination in employment because of sex means that "gender must be irrelevant to employment decisions." *Price Waterhouse*, 490 U.S. at 240. *See* EEOC Br., Doc.22, PageID#30; Stephens Br., Doc.60, PageID#18. It is important to note that "sex" and "gender" are used interchangeably throughout the *Price Waterhouse* opinion. While Title VII means that gender (meaning sex) must not be taken (absent a BFOQ) into account in adverse employment decisions, it does not mean that *gender identity* must not be taken into account in adverse employment decisions. To do so would take what is a proxy for sex discrimination—a stereotype—and create by judicial order a wholly new protected class that is mutually exclusive from sex.

37; Stephens Br., Doc.60, PageID#21. Specifically, the EEOC highlights the *Schroer* court's analogy to religious converts, reasoning that if an employee who converted from Christianity to Judaism were fired not because of the employer's animosity toward the religion to which they adhere, but because of animosity toward changing religion, that would nonetheless constitute discrimination "because of religion." *Schroer*, 577 F.Supp.2d at 306-307. *See* EEOC Br., Doc.22, PageID#37. But this analogy is structurally flawed: a person's religion can be changed, but a person's sex cannot. That is because sex, as the term was understood at the time of Title VII's enactment, is immutable: a person has either "XX" or "XY" chromosomes, and that biological foundation determines whether the person will fall within the male or female classifications as defined according to reproductive function.[5] Thus, regardless of whether a person surgically alters their appearance, a "gender transition" does not alter

[5] The existence of "intersex" conditions or chromosomal aberrations do not alter this conclusion. Intersex conditions are rare. Two that are noted in the literature are 5 alpha reductase deficiency, which is so rare that its incidence level is unknown, and androgen insensitivity syndrome, which is known to affect 2-5 persons per 100,000 people. U.S. National Library of Medicine, https://ghr.nlm.nih.gov/condition/5-alpha-reductase-deficiency (last visited May 8, 2017); U.S. National Library of Medicine, https://ghr.nlm.nih.gov/condition/androgen-insensitivity-syndrome (last visited May 8, 2017). Both represent disorders of sexual development, not a different sex. And those who suffer from the most common but still very rare chromosomal disorder, Klinefelter's (XXY) syndrome, are treated as and considered to be male. U.S. National Library of Medicine, https://ghr.nlm.nih.gov/condition/klinefelter-syndrome (last visited May 8, 2017); U.S. National Library of Medicine, https://medlineplus.gov/ency/article/000382.htm (last visited May 8, 2017).

one's sex or make one the functional equivalent of the opposite sex. It merely alters some range of secondary characteristics associated with one's actual sex.

And it fails for another reason: for religious discrimination to be unlawful, it must burden a person's sincerely held religious belief. However, the act of converting is not itself a religion; it is rather a transition from one belief system to another. So while there are religious tenets to which one may adhere in the Catholic faith or Jewish faith, there are no tenets establishing a "conversion faith." If a new convert has occasion to claim religious discrimination for being of, for example, the Jewish faith, he must point to his Jewish faith, not to the transition between one faith (or no faith) and the new one.

The EEOC further argues that a complaint alleging transgender-status or gender-transitioning discrimination states a claim for relief under Title VII because "such discrimination is inherently based on sex stereotypes." EEOC Br., Doc.22, PageID#38. The EEOC is flatly wrong. As explained above, the fact that stereotypes may play into an employment situation does not create an independent claim for discrimination. Much to the contrary, the employer's reliance on stereotypes must result in disparate treatment of employees because they are either male or female. Again, recall that the *Smith* panel redacted the one paragraph which could have been read as establishing categorical protection for those who profess transgender status, *see* Section I.B, *supra*. The EEOC's proposition that Title VII prohibits transgender-status discrimination because such discrimination is inherently based on sex stereotypes has thus been directly rejected by a panel of this Court. And the holding of a panel of this Court may

not be overruled by another panel. *See*, *e.g.*, *U.S. v. Smith*, 73 F.3d 1414, 1418 (6th Cir. 1996) (quoting *Salmi v. Sec'y of Health and Human Servs.,* 774 F.2d 685, 689 (6th Cir. 1985) ("A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.")).

In addition, contrary to the EEOC's contention, *see* EEOC Br., Doc.22, PageID#38, the district court properly relied on *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2006) when it dismissed the EEOC's transgender-status discrimination claim. One year after the *Smith* decision, the *Vickers* court held that harassment based on an employee's "perceived homosexuality" does not state a sex-stereotyping claim despite the fact that ideas about sexual orientation can be described as stereotypes about the way that men and women should (or, typically do) behave. *See id.* at 763-64. The court reasoned that to accept the proposition that discrimination based on the perception of a person's sexual orientation constitutes impermissible sex stereotyping would improperly expand the scope of Title VII: "a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII." *Id.* at 764 (quoting *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005)); *accord Evans*, 850 F.3d 1248 (holding that sexual orientation is not a protected category under Title VII). Similarly here, this court should not use a sex stereotyping claim to bootstrap

transgender status or gender-transitioning status into Title VII's list of protected categories.

At a fundamental level, the *Vickers* decision and the amendment of the *Smith* decision stand for the same principle: *not all characteristics typically associated with the behavior or appearance of men or of women constitute impermissible sex stereotypes under Title VII*. It is only when the employer relies on a stereotype to disparately impact either men or women that the stereotype becomes relevant to Title VII discrimination. In *Vickers*, the court held that the set of sex stereotypes prohibited by Title VII does not include the idea that a male employee should have the sexual orientation toward women that is typical of men (in other words, the "stereotypical" sexual orientation of men). *See* 453 F.3d at 763-64. And the amendment of the initial opinion in *Smith* instructs that the set of sex stereotypes prohibited by Title VII does not include the idea that a biological male employee should profess a male gender identity (i.e., the "stereotypical" gender identity of men). *Compare* 369 F.3d at 921-22 and 378 F.3d at 574. If this were not so—if the EEOC's and Stephens' position were to be accepted—then Title VII would, in the realm of employment, abolish *every* difference between men and women of which society traditionally takes note. That is far beyond the plain-text meaning of Title VII's prohibition of employment discrimination because of sex, and it is a policy determination suitable to legislative—not judicial—decision. Accordingly, this Court should uphold the district court's ruling that transgender and gender-transitioning status are not protected classes under Title VII.

III. The District Court Correctly Held that RFRA Entitles R.G. to an Exemption from the Enforcement of Title VII.

A. RFRA May Provide an Exemption from the Enforcement of Title VII Based on the Facts of a Particular Case.

As an initial matter, Stephens contends that as a result of Stephens's successful intervention motion (which motion was filed after the commencement of this appeal by the EEOC), this matter should be remanded back to the district court, arguing that RFRA is not a defense to an action between private parties. Stephens Br., Doc.60, PageID#25. Stephens's argument must be rejected. This Court's order permitting Stephens's intervention permitted Stephens to intervene "for briefing purposes only" Order, Doc.28-2, PageID#3. This Court also limited Stephens to argue existing issues only, stating that R.G. would "not be prejudiced [by Stephens's intervention] given Stephens's concession in her reply that she does not intend to raise new issues." Order, Doc.28-2, PageID#2. The Court's order granting intervention was thus premised upon Stephens's assurance to this Court and the parties that Stephens would not raise new issues. Yet now Stephens is violating the Court's order and breaking Stephens's word by attempting to do just that. Whether RFRA is a defense to a Title VII action between private parties is a new and complicated issue that has never been a part of this case and has never been briefed by the parties. The district court's mention of the issue in its summary judgment opinion is *sua sponte* dicta that predates Stephens's motion to intervene. *See* Order, R.76, PageID#2222. To allow Stephens to raise the new issue now would immensely prejudice R.G. and undermine the Court's reasons for allowing

Stephens's intervention in the first place. *See Illinois Bell Tel. v. FCC,* 911 F.2d 776, 786 (D.C. Cir. 1990) (intervenors on appeal are limited to matters "brought before the court by another party").

Stephens also argues that "ample legal precedent" exists for the proposition that RFRA may not be applied to create an exception to the enforcement of Title VII. Stephens Br., Doc.60, PageID#26-30. Stephens is incorrect. Indeed, none of the cases that Stephens cites is factually similar to the present case, and only two of them involve RFRA at all—and those are both district court rulings from other circuits that are factually distinguishable.

Stephens's reliance on *Redhead v. Conference of Seventh-Day Adventists*, 440 F.Supp.2d 211 (E.D.N.Y 2006) is misplaced because in that case, the defendant's RFRA defense was rejected in favor of analyzing Title VII's burden on the defendant religious organization's hiring practices ground that the judicially created free-exercise doctrine of the "ministerial exception." *Id.* at 220. But as the EEOC points out, EEOC Br., Doc.22, PageID#42-43, R.G. is not a religious organization in the sense of a church or religious school, and thus the ministerial exception has no application—there is no need to safeguard "matters of church government [or] those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N.A.,* 344 U.S. 94, 116 (1952). Accordingly, the interplay between the ministerial exception and RFRA in *Redhead* is of no moment here.

Stephens's reliance on *EEOC v. Preferred Management Corp.*, 216 F.Supp.2d 763, 810-813 (S.D. Ind. 2002) is likewise misplaced. In *Preferred Management*, the EEOC brought a complaint alleging religious discrimination in violation of Title VII. Preferred brought objections, which the court treated as a motion to strike, arguing that certain of the EEOC's religious-discrimination allegations should be stricken because they were the product of the EEOC's "overly-aggressive and intrusive inquiry" into certain employees' religious beliefs in violation of RFRA. *Id.* at 806. The court rejected the employer's RFRA defense because there was no evidence that the EEOC's investigation of Preferred's alleged religious discrimination was a substantial burden on anyone's religious exercise. *Id.* at 810. In the present case, the EEOC did not investigate a claim of religious discrimination, and R.G. has never argued that the EEOC's *investigation* was a burden on the company's religious exercise. Rather, the burden on R.G.'s religious exercise arises from the Title VII penalties that the EEOC seeks to impose on Rost—reinstatement or back pay and front pay—for operating R.G. according to his religious convictions. Accordingly, *Preferred Management* provides no guidance here.

There is no support for Stephens's proposition that RFRA may not create an exception to Title VII's enforcement. Rather, whether RFRA creates an exception to the enforcement of a statute depends on the application of RFRA's substantial burden and compelling interest tests to the facts of the case at hand. Title VII actions are not exempted from RFRA's reach: RFRA "applies to all Federal law, and the

implementation of that law, whether statutory or otherwise, and whether adopted before or after" RFRA's enactment. 42 U.S.C. § 2000bb-3(a).

B. The Enforcement of Title VII Substantially Burdens R.G.'s Exercise of Religion.

The EEOC argues that R.G. failed to show that its "religious exercise" was "substantially burdened" as required by RFRA. EEOC Br., Doc.22, PageID#48. Specifically, the EEOC contends that R.G. failed to "identif[y] how continuing to employ Stephens after, or during, her transition would interfere with any religious 'action or practice.'" *Id.*, PageID#51.

Contrary to the EEOC's crabbed understanding, the Supreme Court in *Hobby Lobby* held that the "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. Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition." *Burwell v. Hobby Lobby Stores, Inc.,* 134 S. Ct. 2751, 2770 (2014) (quotation marks and citation omitted). Thus, as the district court correctly observed, the "question that RFRA presents" is whether the law at issue "imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs." *Id.* at 2778. And the relevant question in this case is "whether the law at issue here, Title VII and the body of sex-stereotyping case law that has developed under it, imposes a substantial burden on the ability of the

Funeral Home to conduct business in accordance with its religious beliefs." Order, R.76, PageID#2207.

The answer to that question is indisputably "yes." The record shows that Rost's "faith compels [him]" to "serve grieving people" as he does through R.G., *see* T. Rost Aff., R.54-2, PageID#1328, ¶ 10 ("I believe God has called me to serve grieving people . . . , and my faith compels me to do this important work."). Rost's life work of serving those who mourn the loss of their loved ones—that is, his very operation of R.G.—constitutes protected religious exercise. In other words, R.G. is the embodiment of Rost's religious exercise. Requiring R.G. to authorize a male funeral director to wear the uniform for female funeral directors would directly interfere with—and thus impose a substantial burden on—R.G.'s ability to carry out Rost's religious exercise of caring for the grieving. It would do this in two ways. First, allowing a funeral director to wear the uniform for members of the opposite sex would often create distractions for the deceased's loved ones and thereby hinder their healing process (and R.G.'s ministry). T. Rost 30(b)(6) Dep., R.54-5, PageID#1361-62, 54:8-17, 59:13-60:9; T. Rost Aff., R.54-2, PageID#1333, ¶¶ 36-38. Second, by forcing R.G. to violate Rost's faith, the application of Title VII would significantly pressure Rost to leave the funeral industry and end his ministry to grieving people. T. Rost Aff., R.54-2, PageID#1335, ¶ 48.

Furthermore, R.G. operates consistently with Rost's sincerely held religious beliefs that a person's sex (whether male or female) is an immutable God-given gift and that people should not deny or attempt to change their sex. *Id.*, PageID#1334, ¶ 42.

Because of these convictions, R.G. will not purchase female attire for a male funeral director (or male attire for a female funeral director) or authorize funeral directors—the public face of R.G.—to wear the uniform for members of the opposite sex. *See id.*, PageID#1334-35, ¶¶ 43-46. Supreme Court precedent confirms that this qualifies as religious exercise protected under RFRA. Just as Hobby Lobby's religiously motivated practice of declining to pay for its employees' abortion-inducing drugs is protected religious exercise under RFRA, *see Hobby Lobby*, 134 S. Ct. at 2766, 2775, so too is R.G.'s religiously motivated decision declining to apply a female dress code to male employees. Forcing R.G. to allow Stephens to wear the uniform for female funeral directors while representing the Company as a funeral director would require Rost "to engage in conduct that seriously violates [his] religious beliefs," *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015), imposing a substantial burden on R.G.'s exercise of religion.

Thus, the EEOC is wrong to say that "merely employing" individuals who "engage in conduct their employers find religiously objectionable" is not a substantial burden. EEOC Br., Doc.22, PageID#56. To the contrary, the decisive factor in R.G.'s employment decision was Stephens' intent to dress in female attire *while representing R.G.* and serving the bereaved. Rost made clear that what his funeral directors wear at work while interacting with funeral-home clients implicates his religious convictions and R.G.'s dress code is an extension of those convictions. T. Rost Aff., R.54-2, PageID#1336, ¶ 50. In contrast, the uncontested evidence establishes that Rost would not have discharged Stephens if Stephens had only presented as a woman on Stephens'

own time while complying with R.G.'s dress code at work. Rost 30(b)(6) Dep., R.54-5, PageID#1372, 137:11-15; T. Rost Aff., R.54-2, PageID#1336, ¶¶ 50-51. Compelling R.G. to authorize Stephens to dress as a female while representing the Company on the job would pressure Rost to sell his business to avoid violating his religious convictions; if Rost refused to reemploy Stephens, ordering Rost to pay back and front pay to Stephens would amount to a monetary penalty for operating R.G. according to Rost's religious convictions. As the district court properly determined, in either scenario, there is a substantial burden on Rost's religious exercise. Order, R.76, PageID#2210. *See Holt*, 135 S. Ct. at 862 (substantial burden exists where the government requires a person "to engage in conduct that seriously violates [his] religious beliefs"); *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981) (substantial burden exists when the government "put[s] substantial pressure on an adherent . . . to violate his beliefs").

C. The EEOC Failed to Meet Its Burden to Demonstrate that the Enforcement of Title VII Against R.G. Furthers a Compelling Government Interest.

Having established a substantial burden on religious exercise, the burden shifts to the government to satisfy strict scrutiny. 42 U.S.C. § 2000bb-1(b). RFRA requires that the government "demonstrat[e] that application of [a substantial] burden to the person . . . is the least restrictive means of furthering" a compelling government interest. *Id.* This is an "exceptionally demanding" standard, requiring the government to "show[] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties." *Hobby Lobby*, 134 S. Ct. at

2780. The district court assumed without deciding that the EEOC's application of Title VII in this case furthers a compelling interest. But in fact the EEOC cannot demonstrate a compelling interest.

Appellants argue that the government has a compelling interest in the "elimination of workplace discrimination, including sex discrimination" that is of "paramount importance." EEOC Br., Doc.22, PageID#59; *see also* Stephens Br., Doc.60, PageID#30-36. But it is not enough to cite a general, broadly formulated interest. Rather, RFRA's strict-scrutiny test "look[s] beyond broadly formulated interests justifying the general applicability of government mandates." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006). The government must "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 420 (citing 42 U.S.C. § 2000bb–1(b)). Thus, the relevant government interest is not a generic interest in opposing discrimination (or even sex discrimination), but the specific interest in forcing R.G. to allow its male funeral directors to wear the uniform for female funeral directors while on the job. The EEOC has no compelling interest in mandating that—especially when its own compliance manual affirms the legitimacy of sex-specific dress codes.

The EEOC further argues that it has a compelling interest to apply Title VII to R.G. because the harm to Stephens of granting an exemption to R.G. is purportedly severe. EEOC Br., Doc.22, PageID#62. Specifically, the EEOC contends that applying

RFRA in this case means denying "Stephens' statutory right to be free from discrimination." *Id.* at 62. As established above, Stephens has no statutory right to be free from discrimination on the basis of transgender or transitioning status, and no impermissible sex stereotyping has occurred. In addition, the constitutional guarantee of free exercise—effectuated here via RFRA's rejection of *Smith*—is a higher-order right that necessarily supersedes a conflicting statutory right. Indeed, the legislative history makes clear that RFRA effectuates and enforces the First Amendment's guarantee of free exercise. The Senate Judiciary Committee described the need for the legislation this way:

> To assure that all Americans are free to follow their faiths free from governmental interference, the committee finds that legislation is needed to restore the compelling interest test. As Justice O'Connor stated in *Smith*, "[t]he compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in pluralistic society. For the Court to deem this comment a 'luxury,' is to denigrate '[t]he very purpose of a Bill of Rights.'"

Religious Freedom Restoration Act of 1993, S. Rep. 103-111, 8, 1993 U.S.C.C.A.N. 1892 (quoting *Smith*, 494 U.S. at 903 (O'Connor, J. concurring) (citation omitted)). Because RFRA effectuates Rost's free-exercise rights by restoring the compelling interest test, its application creates an as-applied exemption to Title VII. This result is also contemplated by RFRA's plain language, which provides that the statute "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3(a).

Stephens attempts to bolster the EEOC's compelling-interest argument by citing

statistics about harassment, violence, and other difficulties faced by persons who profess a gender identity that differs from their biological sex. *See* Stephens Br., Doc.60, PageID#33-35. But these statistics do not speak to the specific interest in applying Title VII to force R.G. to allow a funeral director to wear the uniform for the opposite sex. Moreover, the present case does not involve discriminatory animus against any person or class of persons. R.G. dismissed Stephens because Stephens would no longer comply with the dress code. R.G. was not motivated by animus against people who profess to be transgender or people who dress as members of the opposite sex. Indeed, it is undisputed that R.G. would not discharge or otherwise discipline employees who dress as members of the opposite sex on their own time but comply with the dress code while on the job. T. Rost Aff., R.54-2, PageID#1336, ¶¶ 50-51; T. Rost 30(b)(6) Dep., R.54-5, PageID#1372, 137:11-15. R.G.'s dress code and its enforcement of its dress code against Stephens are based on R.G.'s legitimate interest and religious calling to ensure that mourners have a space free of disruptions to begin the healing process after the loss of a loved one. T. Rost 30(b)(6) Dep., R.54-5, PageID#1372, 139:5-23; T. Rost Aff., R.54-2, PageID#1333, ¶¶ 36-39. For all of these reasons, applying Title VII in this case does not further a compelling government interest.

D. The EEOC Failed to Establish that Enforcing Title VII Against R.G. is the Least Restrictive Means of Achieving a Compelling Government Interest.

As the district court correctly held, the EEOC failed to meet its "exceptionally demanding" burden to "sho[w] that it lacks other means of achieving" its compelling

interest "without imposing a substantial burden on the exercise of religion by the objecting part[y]." *Hobby Lobby*, 134 S. Ct. at 2780. *See* Order, R.76, PageID#2215. But rather than attempt to demonstrate that there is no other way to achieve its desired goal, the EEOC asserts without support that "[n]o alternative short of this enforcement action—seeking Stephens'[s] reinstatement, back pay, and compensatory and punitive damages—would serve 'equally well' the government's interest in this case *in vindicating Stephens'[s] Title VII rights*." EEOC Br., Doc.22, PageID#64 (emphasis added). But that reasoning is circular. In any case where the question arises whether RFRA applies to carve out an exemption from the enforcement of a statute, if the government defines its interest as vindicating the full and regular enforcement of the statute in question, then it will always be true that no alternative short of the full and regular enforcement of the statute serves 'equally well' the government's interest. In short, *of course* the only way to vindicate Stephens's Title VII rights is to enforce Title VII. But that tells the court nothing at all, let alone anything about the relevant question here, which is whether alternatives exist that may achieve the government's compelling interest equally well—here, the purported interest in eradicating harmful sex stereotypes from the workplace.

Because the burden to demonstrate that the lack of any alternative means falls on the government, the existence of a single alternative method compels the conclusion that RFRA applies. Here, the government could permit businesses to allow the enforcement of sex-specific dress codes for employees who are public-facing

representatives of their employer, so long as the dress code imposes equal burdens on the sexes and does not affect employee dress outside of work. Contrary to the EEOC's contentions, this would achieve the purported compelling government interest in preventing adverse employment actions based on sex stereotypes equally well: as discussed above, *see* Section I.C, *supra*, the government has no interest in eliminating benign sex stereotypes such as traditional differences between male and female dress.

Finally, it is important to note that throughout this litigation, the EEOC has taken the position that Stephens must be allowed to wear a skirt-suit and otherwise express Stephens's female gender identity through dress and appearance. But, as the district court points out, this amounts to forcing R.G. to authorize Stephens to *insist upon sex stereotypes concerning female dress and appearance* in the workplace. And that would certainly not serve the government's interest in opposing sex stereotypes. In short, not only has the government failed to show that it lacks other means to achieve its purported interest; the means for which the EEOC argues here *undermines* the government's purported interest in eliminating sex stereotypes from the workplace.

Because the EEOC has failed to demonstrate a specific compelling interest, and because the EEOC has failed to meet its burden to demonstrate that enforcing Title VII against R.G. is the least restrictive means of achieving its purported compelling interest, the Court should affirm the district court's grant of summary judgment in favor of R.G. on the basis that RFRA provides R.G. an exemption from the enforcement of Title VII under the specific facts and circumstances of this case.

IV. The District Court's Grant of Summary Judgment in Favor of R.G. on the Clothing Benefit Claim Should Be Affirmed.

Relying on this court's decision in *Bailey,* 563 F.2d 439, the district court held that the EEOC could not pursue the clothing benefit claim because (1) the alleged clothing-benefit discrimination is of a kind not raised by the charging party, and (2) the alleged clothing-benefit discrimination does not affect Stephens. Order, R.76, PageID#2223-34. The EEOC asserts that the district court erred, arguing that *Bailey* is no longer good law, and that *Bailey* is in any event factually distinguishable. EEOC Br., Doc.22, PageID#70. The EEOC is incorrect.

First, *Bailey* remains good law. Contrary to the EEOC's contention, *Bailey* does not conflict with the Supreme Court's holding in *General Telephone*, 446 U.S. 318. In *Bailey*, the court held that a Caucasian female employee filed a charge of discrimination with the EEOC alleging sex discrimination against women and race discrimination against black women. 563 F.2d at 441, 445. After conducting an investigation, the EEOC issued a reasonable cause determination finding cause as to racial discrimination in addition to religious discrimination—a kind of discrimination not alleged in the initial charge—and subsequently initiated a lawsuit. *Id.* at 442. This Circuit held that the court lacked jurisdiction over the claim of religious discrimination because "[t]he portion of the EEOC's complaint incorporating allegations of religious discrimination exceeded the scope of the EEOC investigation of [the employer] reasonably expected to grow out of [the employee's] charge of discrimination," thus affirming the "clearly stated rule

in this Circuit . . . that the EEOC's complaint is limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination." *Id.* at 446 (citing *Tipler v. E. I. duPont deNemours & Co.*, 443 F.2d 125, 131 (6th Cir. 1971); *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1363 (6th Cir. 1975), cert. denied, 423 U.S. 994, 96 S. Ct. 420 (1976); *McBride v. Delta Air Lines, Inc.*, 551 F.2d 113, 115 (6th Cir. 1977)).

The rule affirmed in *Bailey* does not conflict with the holding in *General Telephone*, 446 U.S. 318. In *General Telephone*, four employees filed charges with the EEOC alleging sex discrimination. *Id.* at 320. After conducting an investigation, the EEOC commenced litigation against General Telephone and its subsidiary alleging sex discrimination against female employees, seeking relief including injunctive relief and backpay for the women affected by the discriminatory practices alleged. *Id.* Defendants moved to dismiss the class action aspects of the case, arguing that the EEOC had failed to comply with the requirements of Federal Rule of Civil Procedure 23. *Id.* at 322-23. Defendants' motion was denied, the denial was certified for interlocutory appeal, and the Ninth Circuit affirmed the district court's ruling. *Id.* at 323. The Supreme Court held that "the EEOC may maintain . . . civil actions for the enforcement of Title VII and may seek specific relief for a group of aggrieved individuals without first obtaining class certification pursuant to Federal Rule of Civil Procedure 23." *Id.* at 333-34.

In the course of reaching that conclusion, the Supreme Court reasoned that a consideration of the Rule 23 requirements of numerosity, commonality, typicality, and

adequacy of representation indicates that the Rule was not designed to apply to civil suits brought by the EEOC in its own name. *Id.* at 330. The court observed that the typicality requirement, which "limit[s] the class claims to those fairly encompassed by the named plaintiff's claims," seems inconsistent with the holdings of "the Courts of Appeals . . . that EEOC enforcement actions are not limited to the claims presented by the charging parties." *Id.* at 330-31. The court then added that "[a]ny violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable." *Id.* But these two sentences describing the holdings in two cases from the Courts of Appeals are mere dicta—the question at issue in *General Telephone* had nothing to do with whether the discriminatory acts alleged in the EEOC's complaint were "ascertain[ed] in the course of a reasonable investigation of the charging party's complaint." *Id.* Indeed, the Supreme Court emphasized the narrow scope of its ruling: "We hold only that the nature of the EEOC's enforcement action is such that it is not properly characterized as a 'class action' subject to the procedural requirements of Rule 23." *Id.* at 334 n. 16. *Bailey's* holding—that the EEOC's complaint must only include allegations that fall within the scope of the investigation reasonably expected to grow out of the charge of discrimination—does not conflict with the narrow holding in *General Telephone* and remains good law.

The EEOC further argues that *Bailey* is distinguishable from the present case, observing that the EEOC's complaint in *Bailey* added a claim for a type of discrimination (sex discrimination) not encompassed in the original charge, whereas

here "the EEOC's clothing allowance claim, like the termination claim, alleged sex discrimination." EEOC Br., Doc.22, PageID#78. This argument also fails. The EEOC's clothing-allowance claim alleges that R.G. discriminated against unidentified female employees by providing male employees but not female employees work clothing. This differs significantly from the discrimination charged by Stephens, who alleged in the charge of discrimination only wrongful termination on account of Stephens's sex and gender identity. *See* Charge of Discrimination, R.54-22, PageID#1497. In *Bailey,* this Circuit held that it was unreasonable to expect that a charge of sex and race discrimination would reasonably lead to an investigation of religious discrimination. *See Bailey*, 563 F.2d at 446. Similarly here, it is unreasonable to expect that the charge filed by Stephens—a biological male—alleging wrongful termination on account of sex or gender identity (which charge did not even mention R.G.'s dress code) would lead to an investigation of whether R.G. failed to provide its male and female employees with equivalent clothing benefits.

Finally, the EEOC contends that the present case is distinguishable from *Bailey* because here, the EEOC argues, the clothing allowance claim is related to the charging party. EEOC Br., Doc.22, PageID#79. The EEOC is again incorrect. In *Bailey*, the religious discrimination alleged by the EEOC did not affect the charging party. 563 F.2d at 447 ("[I]n the present case, the EEOC investigation into [the charging party's] charge revealed that . . . there was no unlawful discrimination of any kind against [her]. . . . The EEOC's reasonable cause determination, conciliation efforts, and lawsuit made

allegations of religious discrimination based on evidence wholly apart from [the charging party's] experience.") Similarly here, the purported denial of clothing benefits to female employees did not in any way impact Stephens. Stephens was provided with company suits at all relevant times and was discharged before attempting to dress as a woman on the job. Accordingly, Stephens is not a member of the class of female employees against whom R.G. allegedly engaged in clothing-benefit discrimination.

In sum, *Bailey* remains good law and is squarely on point. The district court's ruling that it lacked jurisdiction over the clothing benefits claim should be affirmed.

CONCLUSION

For all of the foregoing reasons, R.G. respectfully urges the Court to affirm the judgment of the district court dismissing all claims against R.G.

Dated this 17th day of May, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,964 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Garamond 14 point.

s/ Douglas G. Wardlow
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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2017, I filed the foregoing document, entitled Responsive Brief of Appellee R.G. & G.R. Harris Funeral Homes, Inc., through the Court's ECF system, which will effectuate service on all parties.

s/ Douglas G. Wardlow
Douglas G. Wardlow
Counsel for Defendant-Appellee

ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

E.D. Mich. Case No. 2:14-cv-13710

Record	Description	Page ID Range
7	Motion to Dismiss	21-47
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54-5	Thomas Rost 30(b)(6) Deposition (excerpts)	1354-1378
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54-17	EEOC Thomas Rost Affidavit	1465-1471
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55	R.G. Statement of Material Facts	1683-1702
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76	Summary Judgment Opinion and Order	2179-2234