No. 18-107

IN THE

Supreme Court of the United States

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

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AND AIMEE STEPHENS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF PROFESSORS SAMUEL R. BAGENSTOS, MICHAEL C. DORF, MARTIN S. LEDERMAN, LEAH M. LITMAN, AND MARGO SCHLANGER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT STEPHENS

Martin S. Lederman
600 New Jersey Ave., NW
Washington, DC 20001

Samuel R. Bagenstos
Leah M. Litman
Margo Schlanger
625 S. State St.
Ann Arbor, MI 48109

Michael C. Dorf
242 Myron Taylor Hall
Ithaca, NY 14853

Daniel Woofter
Counsel of Record
Kevin K. Russell
Eric F. Citron
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
dhwoofter@goldsteinrussell.com

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INTEREST OF AMICI CURIAE

Amici are legal scholars who teach and write on constitutional law and civil rights law. They submit this brief to call attention to one particular means of resolving this case that would not require the Court to determine whether Title VII prohibits discrimination against transgender individuals based upon their transgender status, as such. More broadly, amici seek to offer guidance on how to interpret Title VII in cases where employers require employees to comply with sex-specific dress, grooming, and presentation requirements in the workplace.[1]

Samuel Bagenstos is the Frank G. Millard Professor of Law at the University of Michigan Law School.

Michael C. Dorf is the Robert S. Stevens Professor of Law at Cornell Law School.

Martin S. Lederman is Professor from Practice at the Georgetown University Law Center.

Leah M. Litman is Assistant Professor of Law at the University of Michigan Law School.

Margo Schlanger is the Wade H. and Dores M. McCree Collegiate Professor of Law at the University of Michigan Law School.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici states that no counsel for any party authored this brief in whole or in part, and no such counsel or party, and no person other than amici and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In order to resolve this case, it is not necessary for the Court to decide whether Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), prohibits discrimination against transgender people based upon their transgender status, as such; nor need it decide, as Petitioner suggests, Pet. 2, whether the term "sex" in Title VII should be "[r]edefin[ed]" to include "transgender status."

A simpler and more familiar reading of the statute, one grounded in and informed by this Court's jurisprudence, demonstrates why Petitioner R.G. & G.R. Harris Funeral Homes, Inc. ("Harris Homes") violated Title VII: Harris Homes concededly discharged Respondent Aimee Stephens because she planned to disregard certain workplace norms that Harris Homes' owner and director imposed only upon funeral directors whom he considered to be "men." And Harris Homes insisted that Stephens comply with those norms for "male" funeral directors only because of the reproductive organs with which Stephens was born, a classification unambiguously made "because of [her] sex" according to a longstanding, familiar definition of that term that everyone accepts.[2]

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[2] Amici agree that Harris Homes' insistence that Stephens comply with certain workplace rules, and its firing of her because she planned not to do so, were actions taken "because of [Stephens'] sex" for a related reason as well—namely, that the rules themselves were premised upon sex stereotypes concerning proper workplace presentation by individuals born with certain physical characteristics. *See infra* at 10-11.

Moreover, application of those workplace rules to Stephens, a transgender employee, profoundly harmed her—indeed, they made it virtually impossible for her to continue working at the funeral home—and thus were a form of "discriminat[ion] against" Stephens "with respect to [her] . . . terms [and] conditions . . . of employment," in violation of Subsection 703(a)(1), 42 U.S.C. § 2000e-2(a)(1). Harris Homes also "classif[ied]" Stephens as a man because of her "sex," thus subjecting her to the norms that applied to men, in a "way which . . . deprive[d] [her] . . . of employment opportunities," in violation of Subsection 703(a)(2) of Title VII, 42 U.S.C. § 2000e-2(a)(2).

This does not mean that all sex-based dress, grooming, and presentation standards in the workplace are unlawful. Many such sex-specific standards have only an "innocuous" effect, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998), as applied to most, or sometimes all, employees. Those rules thus do not amount to "discriminat[ion] against" those employees in their terms and conditions of employment, nor do they "classify" such employees in a way that would deprive them of employment opportunities.

That is not the case, however, when an employer applies certain sex-specific dress and conduct rules to a transgender individual such as Aimee Stephens. A sex-based dress, grooming, or presentation rule that might cause little or no harm to most employees of the sex in question can profoundly harm a transgender person whom the employer deems to be of that sex by virtue of his or her (actual or presumed) reproductive physiology. If a transgender employee is compelled to comply with such a rule, he or she will experience continuing, profound distress and impairment in social,

occupational, and other important areas of functioning. Indeed, if such an employee is undergoing gender transition, the imposition of those sex-based rules would fundamentally undermine that process, thereby preventing the individual from taking the necessary steps to alleviate his her severe distress and impairment.

That is just what happened here. Harris Homes' insistence that Aimee Stephens comply with its dress, grooming, and presentation standards for men thus constituted discrimination against Stephens in violation of Subsection 703(a)(1) of Title VII. And Harris Homes' classification of Stephens as a "man" for the purpose of applying those workplace rules thus deprived her of employment opportunities and adversely affected her status as an employee of Harris Homes, in violation of Subsection 703(a)(2). *See* J.A. 15 (First Amended Complaint ¶ 16) (alleging that Harris Homes' practices "deprive[d] Stephens of equal employment opportunities and otherwise adversely affect[ed] her status as an employee because of her sex").

ARGUMENT

I. UNDER EVEN THE NARROWEST, UNIVERSALLY ACCEPTED DEFINITION OF THE TERM "SEX"—TO REFER TO REPRODUCTIVE PHYSIOLOGY—HARRIS HOMES CLASSIFIED AIMEE STEPHENS AS A MAN BECAUSE OF HER SEX, REQUIRED HER TO COMPLY WITH WORKPLACE CONDITIONS DESIGNED FOR MEN BECAUSE OF THAT CLASSIFICATION, AND DISCHARGED HER FOR REFUSING TO COMPLY WITH THOSE SEX-BASED CONDITIONS.

Aimee Stephens is transgender: Her gender identity, or inner sense of her gender, is that she is a woman, notwithstanding that she was treated as a male at birth (presumably because of her external sex characteristics). J.A. 180-81. In her first few years as a funeral director and embalmer at Harris Homes, Stephens identified herself as a man and presented herself in the office in a stereotypically masculine way. Yet she "felt imprisoned in a body that d[id] not match [her] mind." Resp. App. 1a. Stephens suffered from intense despair, loneliness, and shame due to the incongruity between the sex she understood herself to be and the sex she was assigned at birth and presented herself as being. *Id.*

Under current clinical standards, the most common treatment for the sort of gender dysphoria Stephens suffered is a process known as "gender transition," i.e., taking steps to align a transgender person's body and/or social behavior with the person's gender identity in order to alleviate the person's distress and impairment in social, occupational, or other important

areas of functioning.[3] This typically consists of some combination of "social transitioning," i.e., outwardly changing gender expression and role to live and work consistent with an individual's identified gender, along with "medical transitioning," which can involve hormone therapy and, in some cases, gender confirmation surgeries. *See* DSM-V at 451, WPATH *Standards of Care* at 170-71. Hormone therapy alters the body's secondary sex characteristics, aligning them with those of the individual's identified gender. Gender confirmation surgeries seek to align the person's primary or secondary sex characteristics (e.g., breast/chest, external and/or internal genitalia, facial features, body contouring) with those commonly associated with persons of the individual's gender identity. *See* WPATH *Standards of Care* at 171. Medical professionals generally recommend that transgender persons engage in at least one year of full-time social transition—continuously living openly in accordance with

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[3] The record does not contain specific evidence of a medical diagnosis of dysphoria—a "marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration," that results in "clinically significant distress or impairment in social, occupational, or other important areas of functioning," Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 452-53 (5th ed. 2013) (hereinafter DSM-V)—but the fact that Stephens was preparing for gender confirmation surgery indicates that she had probably received such a diagnosis, for such surgery typically requires a medical diagnosis of dysphoria. *See* Eli Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7*, 13 Int'l J. of Transgenderism 165, 182-83 (2011) (hereinafter WPATH *Standards of Care*). In any event, there is no question that Stephens suffered from intense despair, loneliness, and shame when she presented as a man.

one's gender identity—before undergoing at least certain forms of such surgery, such as genital reconstruction. *Id.* at 202-03.

In late July 2013, Stephens informed her supervisor and co-workers at Harris Homes that she was undergoing a gender transition from male to female so that she could live as the woman she knew herself to be. As part of that transition, she intended to dress at work from that point forward in business attire appropriate for women, in preparation for subsequent gender confirmation surgery. Pet. App. 94a-95a. Two weeks later, and expressly in response to Stephens' announcement about her intended presentation as a woman, Harris Homes fired her. J.A. 49-50.

Thomas Rost, Harris Homes' owner and director, claimed that he did not discharge Stephens simply because she was transgender or because she was transitioning. J.A. 131-32.[4] Rost instead acknowledged that he discharged Stephens because she planned to dress in the Harris Homes workplace in appropriate business attire for a woman and because she would otherwise "represent" herself to clients as a woman, including by referring to herself as "Aimee." *Id*. at 54, 129-130; *see also id.* at 180 (noting that Stephens formally changed her legal name to Aimee Australia Stephens a few weeks after she was fired).

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[4] According to Stephens, Harris Homes did, indeed, discharge her "simply for being transgender," and not solely because Rost assumed she would violate express or implied Harris Homes workplace rules applicable to men. Stephens Br. 50. As we explain in this brief, even assuming Harris Homes discharged Stephens only for the latter reason, it nevertheless violated Title VII.

Rost's stated objections went far beyond the strict terms of his company's formal Dress Code, which prescribed nothing about men's use of names, hair styles, make-up, or modes of describing themselves.[5] But whether or not his objections had been limited to the written Dress Code or extended to a much more comprehensive, unwritten "code" of conduct that in Rost's view regulated virtually every aspect of an employee's self-presentation at Harris Homes, Harris Homes' actions against Stephens depended upon Rost's assessment that she was a man. And there is no dispute that Rost treated Stephens as a man because of her physiological characteristics—namely, her external reproductive organs (or what Rost assumed them to be, anyway). If Stephens had been born with female reproductive organs, Rost would have considered her proposed workplace conduct to be perfectly acceptable—indeed, in at least some respects (such as wearing a skirt suit) required by what Rost understood to be an unwritten standard for women, *see* J.A. 73, 75.

Classifying an employee, and imposing conditions upon that employee, on the basis of his or her reproductive organs—actions the employer would not have taken if the person's anatomy had been different—are indisputably actions taken "because of such individual's . . . sex" for purposes of Section 703(a). And that's

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[5] The record does not demonstrate that Stephens planned to disregard any of the express rules for men in the Dress Code, *see* J.A. 119-20. Rost also insisted, however, that an employee he deemed to be a man must not, for instance, wear skirt suits or present herself to clients as a woman (such as by using a traditionally female name or, presumably, wearing make-up), which is what he presumed Stephens would do as part of her transition.

so regardless of whether employment actions taken because of an employee's transgender status (e.g., discharging an employee because she identifies as transgender, because she has gender dysphoria, or because she is transitioning) would also be "because of such individual's . . . sex."

Not surprisingly, dictionaries confirm the widely shared understanding that "sex" is defined *at the very least* by reference to a person's reproductive organs and capacities. *See, e.g.*, XV *The Oxford English Dictionary* 107-08 (1989) (defining "sex" as, *inter alia*, "[t]he sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these"); Random House, *Webster's Unabridged Dictionary* 1754 (2d ed. 1998) (defining "sex" as, *inter alia*, "either the male or female division of a species, esp. as differentiated with reference to the reproductive functions").

Importantly, the parties do not dispute that Harris Homes' classification of Stephens, and the workplace conditions it insisted she comply with, were sex-based in at least this respect—that they were dependent upon her physiology. *See* Pet. 6 (asserting that "sex" should be defined solely as "a person's status as male or female as objectively determined by anatomical and physiological factors, particularly those involved in reproduction"); *see also* Equal Employment Opportunity Commission (EEOC) Br. in Opp. 17 ("When Title VII was enacted in 1964, 'sex' . . . 'refer[red] to [the] physiological distinction[]' between

'male and female.'") (quoting *Webster's New International Dictionary* 2296 (2d ed. 1958)).[6]

It follows that but for Stephens' "sex"—as defined in at least this one, commonly agreed upon respect—Rost would not have required her to meet the dress, grooming, and presentation standards he imposed upon men in the Harris Homes workplace. And Harris Homes' discharge of Stephens for noncompliance with those standards therefore "does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which, but for that person's sex, would be different.'" *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991) (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)). Accordingly, Harris Homes discharged Stephens for failing to comply with its standards for male employees "because of [Stephens'] sex."

Moreover, and as this Court explained in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the assumption that employees with one kind of reproductive anatomy must act and dress in a particular way is also a form of sex stereotyping. For that reason, to require an employee of one sex but not the other to conform to such stereotypes is to impose a rule "because of such individual's . . . sex." *See id.* at 235 (plurality

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[6] Reading "sex" to include, at a minimum, a person's anatomical and physiological characteristics related to reproduction not only reflects common definitions of the term, but also comports with a principal purpose of Title VII: Those reproduction-related characteristics, like the color of one's skin, are virtually never relevant to a person's capability of performing job functions.

opinion) ("[T]he man who . . . bore responsibility for explaining to Hopkins the reasons for the Policy Board's decision to place her candidacy on hold [advised her that] in order to improve her chances for partnership . . . Hopkins should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"); *accord id.* at 272 (O'Connor, J., concurring in the judgment).[7] That describes Aimee Stephens' case, just as it described Ann Hopkins': The conditions Harris Homes imposed upon Stephens—including to dress only in conventional male attire—were themselves the product of sex-specific stereotypes and would not have been applied to Stephens had her anatomy been different. *See* J.A. 15 (First Amended Complaint ¶ 15, alleging that Harris Homes' "decision to fire Stephens was motivated by sex-based considerations," including that "Stephens did not conform to the Defendant Employer's sex- or gender-based preferences, expectations, or stereotypes").

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[7] This principle applies to names, too. Were it otherwise, employers could prohibit even cisgender employees from using their given names in the workplace if those names were stereotypically associated with persons of the other sex. Consider, for example, Evelyn Waugh, Carol Reed, Lynn Swann, Glenn Close, and Stevie Nicks.

II. ALTHOUGH TITLE VII DOES NOT INVARIABLY PROHIBIT SEX-BASED WORKPLACE CONDUCT AND APPEARANCE RULES, HARRIS HOMES' INSISTENCE THAT AIMEE STEPHENS COMPLY WITH ITS WORKPLACE STANDARDS FOR MALE EMPLOYEES VIOLATED THE LAW BECAUSE OF THE SEVERE HARMS SUCH REQUIREMENTS IMPOSE ON A TRANSGENDER WOMAN SUCH AS STEPHENS.

That is not the end of the analysis, however, because Title VII does not prohibit all employer actions taken "because of [an employee's] sex"—a categorical result Congress could not have intended because it obviously did not mean to outlaw several common, innocuous workplace practices in which employers distinguish between male and female employees. *See Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992) ("[T]he venerable maxim *de minimis non curat lex* . . . is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept. . . . Whether a particular activity is a *de minimis* deviation from a prescribed standard must, of course, be determined with reference to the purpose of the standard.").

A. Subsection 703(a)(1) prohibits actions by a covered employer with respect to an employee's "compensation, terms, conditions, or privileges of employment" only if the action "discriminate[d] against" the employee, in addition to being taken "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). Similarly, the companion provision of Title VII, Subsection 703(a)(2), prohibits a covered employer from "segregat[ing] or classify[ing] his employees" on the basis of

their sex only when doing so would "in any way . . . deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee." *Id.* § 2000e-2(a)(2).[8]

This is a "disparate treatment" case involving sex-specific workplace rules and a sex-based classification of an employee for the purpose of determining which of those sex-based rules to apply. Just as Ann Hopkins would not have been expected to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" if she had been a man, *see Price Waterhouse*, 490 U.S. at 235 (plurality opinion) (internal quotation marks omitted), Harris Homes would not have classified Aimee Stephens as a man, and thus required her to present herself as a man in the workplace, if she had different reproductive organs. Such disparate treatment "because of" an employee's sex will often constitute "discrimination against" that employee "with respect to [her] terms [and] conditions" of employment, in violation of Subsection 703(a)(1), and in some cases deprive that individual of employment opportunities or otherwise adversely affect her status as an employee, in violation of Subsection 703(a)(2).

But not invariably.

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[8] Many small employers, including, perhaps, some closely held businesses that might wish to exclude transgender employees from their workplace because of religious or moral objections, are not bound by Title VII in the first place, because they do not meet the statute's fifteen-employee threshold, *see* 42 U.S.C. § 2000e(b). Harris Homes, however, is large enough to be covered by Title VII.

This Court's Title VII jurisprudence concerning sexual harassment offers guidance on how to identify cases in which employer actions taken "because of [an employee's] sex" might not violate Title VII.

In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Court explained that certain discriminatory acts directed at an employee, such as the "mere utterance of an . . . epithet which engenders offensive feelings in an employee," *id.* at 67, might not sufficiently affect the person's conditions of employment to implicate Subsection 703(a)(1) of Title VII, even where such a remark is made "because of" the employee's race or sex. And in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), the Court noted that "if the victim does not subjectively perceive the environment to be abusive," even though she may have been subject to hostile comments because of her sex, "the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." *Id.* at 21-22.

In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the Court reiterated and summarized the lessons of *Meritor* and *Harris* that Subsection 703(a)(1) of Title VII does not prohibit sex-based differences in treatment that have merely an "innocuous" impact on the plaintiff employee. *Id.* at 81. In the context of sex-based harassment, the Court explained, this means that Title VII does not reach "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive." *Id.*; *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) ("A recurring point in these opinions is that 'simple teasing,' offhand com-

ments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'") (quoting *Oncale*, 523 U.S. at 82) (internal citations omitted).

As *Oncale* indicates, the pertinent inquiry, which asks about the *degree* of harm to the employee, is an "objective[]" test that depends upon what a "reasonable person" would conclude about the impact of the sex-based conduct. Importantly, however, the Court specified that this "objective" test is sensitive to the particular plaintiff's personal circumstances: "[T]he objective severity of harassment should be judged from the perspective of a reasonable person *in the plaintiff's position, considering 'all the circumstances*,'" 523 U.S. at 81 (emphasis added) (quoting *Harris*, 510 U.S. at 23). The inquiry therefore "requires careful consideration of the social context in which particular behavior occurs *and is experienced by its target*." *Id.* (emphasis added). As the Court explained, "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Id.* at 81-82. For example, even in a workplace where a supervisor's provocative sexual remarks directed to women because of their sex might not cause sufficient harm to be a Title VII violation with respect to certain employees, it could be actionable discrimination against another employee if the supervisor directs such comments at her knowing that she had been traumatized by sexual assault or if she has otherwise made clear that such remarks appreciably injure her.

B. The same sort of analysis is appropriate in the context of sex-based rules governing workplace dress,

grooming, and presentation. Where those rules impose little burden on employees, they will not constitute forbidden discrimination even though they are plainly based upon—imposed "because of"—the sex of the employees in question. The Federal Government is therefore incorrect to suggest (EEOC Br. in Opp. 22) that a ruling for Stephens would lead to the wholesale invalidation of reasonable, sex-based workplace standards.

For example, the Harris Homes Dress Code's formal requirements that male employees wear ties and socks, button their coats, and not wear gloves of colors other than black, gray, and dark blue, *see* J.A. 119-20, are "innocuous," *Oncale*, 523 U.S. at 81, in all or almost all applications. It's hard to imagine funeral home directors, for instance, for whom the requirement of buttoning a coat, or not wearing gloves of certain colors, could have any but (at most) a minuscule "real social impact," *id.* at 82. And the same is true of at least the vast majority of such employees with respect to the requirements to wear ties and socks. That explains why there are so few cases involving Title VII challenges to those sorts of workplace rules.[9]

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[9] It is true, of course, that even in a case in which a dress, grooming, or presentation rule does not itself cause more than innocuous harm to an employee, an employer might fire an employee who violates it. And discharge itself is obviously a harsh sanction. *See Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 337 (5th Cir. 2019) (Ho, J., concurring). That does not affect the analysis, however. The employer would typically impose that or another serious sanction pursuant to a sex-neutral rule that generally, and reasonably, requires employees to comply with *all* workplace requirements or that forbids insubordination across-the-board.

Other dress or grooming requirements, by contrast, could raise more serious concerns, at least as applied to some employees. Some such rules, for example, might reflect "overbroad generalizations about the different talents [and] capacities" in the workplace "of males and females." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Furthermore, requiring only women to wear make-up and have their hair elaborately styled, *see Price Waterhouse*, 490 U.S. at 235 (plurality opinion), or to wear high heels that restrict mobility, can serve to perpetuate outmoded stereotypes of women as demure or docile, or as alluring objects of men's desires.[10] Although many women in a workplace might not consider such standards burdensome, or might even welcome them and choose to conform to such standards even if they were not required,

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In a case where an employee refused to abide by a work rule that did not harm her in any appreciable way, there should be no basis for using the harshness of the neutral sanction as a "bootstrap" to trigger liability. Of course, Title VII would require the employer to apply that insubordination rule neutrally, without regard to employees' sex and without using it as a pretext for sex discrimination.

[10] *See, e.g.*, *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 607-08 (S.D.N.Y. 1981) (company violated Title VII by requiring its female lobby attendants to sport a short, revealing costume of stars and stripes designed to mark the Nation's bicentennial); *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981) (employer violated Title VII when, in order to "break away from the conservative image of other airlines and project to the traveling public an airline personification of feminine youth and vitality," *id.* at 294-95, it employed only females as ticket agents and flight attendants); *see also id.* at 304 (noting that the employer required those female employees to dress in high boots and hot-pants, thereby using "[t]heir sex appeal . . . to attract male customers to the airline").

an employer's insistence on compliance with such a sex-based rule would "discriminate against" a woman who is conscientiously opposed to being required to perpetuate or reflect such a stereotype, or who would suffer considerable discomfort if she were to abide by the rule.

C. Even where a particular sex-specific dress, grooming, or presentation rule does not materially harm the mine run of employees to whom the employer applies it, some such rules might reasonably be "experienced by" transgender employees, *Oncale*, 523 U.S. at 81, very differently, in a way sufficiently harmful to constitute the sort of discrimination that Subsection 703(a)(1) forbids. *See also id.* (requiring consideration of "the perspective of a reasonable person *in the plaintiff's position*, considering 'all the circumstances'") (emphasis added) (quoting *Harris*, 510 U.S. at 23).

That is what happened here. As applied to Aimee Stephens, the sex-based dress, grooming, and presentation requirements that Rost prescribed for male funeral directors imposed a sufficiently heavy burden to count as discrimination against Stephens with respect to the terms and conditions of her employment. As this Court explained in *Harris*, although Title VII does not *require* a showing that the conduct in question "seriously affect[ed the] plaintiff's psychological well-being," "[c]ertainly Title VII bars conduct" that has such a severe impact on the individual, at least assuming she is "a reasonable person." 510 U.S. at 22. And that was precisely the effect on Stephens when Harris Homes insisted that she comply with the standards that Rost prescribed for employees he deemed to be "men."

The language of Subsection 703(a)(2) suggests that a very similar, impact-sensitive inquiry is appropriate for purposes of that companion Title VII prohibition, as well. Application of a particular sex-based workplace conduct rule requires "classifying" employees by sex.[11] Most of the time, such a classification will be fairly benign, and therefore will not "deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee." 42 U.S.C. § 2000e-2(a)(2). Classifying a transgender woman as a "man," however, almost invariably will deprive her of opportunities and otherwise adversely affect her status as an employee if that classification requires her to conform her behavior and presentation so that she would have to effectively act in contravention of her gender identity. For many or most transgender individuals, this will cause the sort of intense despair, loneliness, and shame that Stephens experienced when she presented as a man and acted in traditionally masculine ways in the funeral home, thereby tending to deprive her of employment opportunities (especially if she can no longer abide by such rules), or otherwise adversely affect her status as an employee, in violation of Subsection 703(a)(2). *See* J.A. 15 (First Amended Complaint ¶ 16).

D. In contrast to the "individualized burden" inquiry this Court has applied in its sexual harassment cases to identify when an employer has materially "discriminate[d] against" an employee on the basis of

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[11] The Court has not addressed Subsection 703(a)(2) in its decisions involving sexual harassment because such cases typically do not involve an employer's sex-based segregation or classification of employees.

sex, the United States and Harris Homes suggest that in the context of sex-based dress and grooming standards the Court should adopt the analysis of the court of appeals in *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc). *See* EEOC Br. in Opp. 18, 22; Pet. 25. There, the Court of Appeals for the Ninth Circuit reasoned that application of dress or grooming rules to a particular female employee by virtue of her sex does not "discriminate against" that employee as long as the employer's rules *taken as a whole* would impose equal or greater burdens on similarly situated male employees. 444 F.3d at 1109-10. On this view, for example, requiring a woman to adopt a burdensome regime of prescribed make-up or stockings and high heels in the workplace would not be discriminatory unless the employee could demonstrate that the employer's other, *male*-specific dress or grooming requirements would be less onerous as applied to male counterparts.

The approach in *Jespersen* is inconsistent with this Court's Title VII jurisprudence, however. Where an employer applies rules to a worker based upon that employee's sex, and those conditions impose a burden sufficiently severe to constitute discrimination against that employee, those conditions violate Subsection 703(a)(1) of Title VII and may also adversely affect the person's status as an employee, thus implicating Subsection 703(a)(2), as well. That is true even if the employer imposes parallel sex-based rules to workers of the other sex—including even where those other rules are equally or more burdensome with respect to some such employees. Indeed, the imposition of such parallel sex-based conditions might mean that the employer has violated Title VII with respect to *both* some men

and some women. That is particularly true where, as here, both sets of conditions reflect distinct stereotypes of how employees with *each* set of biological characteristics ought to act.

Take, for instance, *Price Waterhouse*. The accounting firm in that case violated Title VII when it effectively required Ann Hopkins to comport herself in a traditionally feminine manner—to stop swearing, stop being "overly aggressive," "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry"—in order to become a partner. 490 U.S. at 235 (plurality opinion). Price Waterhouse did not, of course, impose those particular requirements on its similarly situated male candidates for partnership. And that distinction—that disparate treatment—was sufficient to establish that Price Waterhouse had "discriminated against" Hopkins because of her sex in her terms and conditions of employment. Surely the result would not have been different had there been evidence that Price Waterhouse imposed a parallel but different set of requirements on male managers, corresponding to a converse set of sex stereotypes—e.g., that such men must not be too "nurturing" or "passive" or act too "effeminately." (And certainly the Court did not suggest it was Hopkins' burden to demonstrate the *absence* of any such equally burdensome conditions or stereotypes as applied to male managers.) If Price Waterhouse *had* imposed such "complementary" sex-stereotype-based conditions on male managers, that would not have cured or eliminated its Title VII discrimination against Hopkins—rather, it would have exacerbated the employer's Title VII violations and exposed

Price Waterhouse to possible liability with respect to certain male employees, as well.

As the example of that case demonstrates, and in keeping with "[t]he statute's focus on the individual," *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708-09 (1978), the pertinent question in a disparate treatment case under Title VII involving sex-based terms or conditions is not whether some hypothetical, "average" employees of the other sex would have been harmed by conditions distinct from those imposed upon the plaintiff. It is, rather, whether the *plaintiff herself* would have been equally harmed if she were the opposite sex—or, put another way, whether a similarly situated employee of the other sex would have been equally harmed *by the requirement or prohibition in question*. "The fact that a policy contains sex-differentiated requirements that affect people of both genders cannot excuse a particular requirement from scrutiny." *Jespersen*, 444 F.3d at 1116 (dissenting opinion of four judges).

Thus, even if Harris Homes would have imposed *other* dress and conduct rules upon employees with female reproductive organs (e.g., that they must wear skirt suits),[12] the rules Harris Homes required Ste-

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[12] As it happens, Harris Homes' formal Dress Code did not impose any material conditions on women that it didn't impose on men: The principal injunction as to women was to "please dress conservatively," a rule that in effect applied to male funeral directors, as well. J.A. 119-21. And Harris Homes has not employed any female funeral directors in about 70 years, since Rost's grandmother left the business. *Id.* at 133. Rost testified, however, that if he ever did hire a female funeral director, he would

phens to meet because of *her* anatomy nonetheless impermissibly discriminated against her on the basis of her sex. If Stephens (or a similarly situated employee) had female reproductive organs she (or that similarly situated employee) would not have been subject to those rules. And crucially, as we explained above, adherence to those rules caused Stephens profound harm—even if the same rules might have been innocuous as applied to other funeral directors with male reproductive organs. It is the combination of the concededly sex-based standards and the significant burdens they imposed on Stephens that rendered Harris Homes' treatment of her impermissible discrimination. Such discrimination would not be "neutralized by the presence of a stereotype or burden that affects people of the opposite gender." *Jespersen*, 444 F.3d at 1116 (dissenting opinion of four judges).

Contrary to the Solicitor General's alarm, *see* EEOC Br. in Opp. 22, this does not mean that "every sex-specific" dress or grooming rule in every workplace violates Title VII. As we showed in Part II-B, *supra*, the conclusion that a dress or grooming requirement is sex-based is not sufficient for Title VII liability. Many such requirements will not impose more than an innocuous burden on most or all employees—akin to the forms of common "horseplay or intersexual flirtation" the Court mentioned in *Oncale*, 523 U.S. at 81—and therefore in the mine run of cases would not rise to the level of "discriminat[ion] against [the] individual with respect to his terms [or] conditions . . . of employment" that Subsection 703(a)(1) prohibits. Applying some

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require her to wear a dark skirt, *id.* at 75, whereas he forbade directors he considered to be men from doing likewise.

such requirements to a transgender employee, however, particularly one suffering from gender dysphoria, imposes a severe burden, and therefore discriminates against such an employee. Title VII might thus require an employer to refrain from imposing such rules upon such a transgender employee, even though the rules would remain permissible as applied to most or all other employees in the same workplace.[13]

E. The Government also warns that the Court should not construe Title VII in a way that would prohibit employers from using "sex-specific employee restrooms." EEOC Br. in Opp. 22; *see also, e.g.*, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 150 (2d Cir. 2018) (en banc) (Lynch, J., dissenting) ("Title VII . . . does not prohibit an employer from having separate men's and women's toilet facilities.").

But application of the reasoning amici have proposed, derived from this Court's Title VII harassment cases, would not lead to any such ramifications. Providing equal but sex-segregated restrooms in the workplace would not materially reinforce invidious

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[13] To the extent Harris Homes asserts that permitting Stephens to present herself as a woman in the workplace would have created a "distraction that is not appropriate" to grieving families because Rost believed there was "no way that" Stephens "would be able to present in such a way that it would not be obvious that it was [a man]," J.A. 30-31—an assumption about Stephens that, at least on this record, was pure speculation—Title VII would permit Harris Homes to address such concerns through sex-neutral conduct rules that require workers not to draw undue attention to themselves while dealing with grieving clients, at least so long as Harris Homes applied that rule in a sex-neutral manner and without crediting customers' own stereotypes about proper roles, conduct and presentation of persons with certain male physiological traits.

sex-based stereotypes nor otherwise appreciably harm the vast majority of male or female employees, many of whom would, in fact, prefer not to use restrooms together with persons of the opposite sex—and therefore it would not "discriminate against" such employees for purposes of Subsection 703(a)(1). Nor would it violate the companion Title VII prohibition, Subsection 703(a)(2), which specifically addresses "segregat[ing]" employees on the basis of their protected characteristics, including sex, because it would not "deprive or tend to deprive" the mine run of employees "of employment opportunities or otherwise adversely affect [their] status as an employee." 42 U.S.C. § 2000e-2(a)(2).[14]

The Government's and Harris Homes' concerns about a possible sudden purge of sex-segregated restrooms across the nation are therefore decidedly exaggerated.[15]

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[14] Segregating bathrooms on the basis of race, by contrast, would obviously impose significant harm on many workers and adversely affect their status as employees. *Cf.* EEOC Decision No. 71-32, 2 Fair Empl. Prac. Cas. (BNA) 866 (1970), 1970 WL 3532, at *2 (finding that an employer's action of holding racially separate Christmas parties "discriminates against its Negro employees on the basis of race with respect [to] a condition or privilege of employment, because of their race, and segregates said employees in a way which adversely affects their status as employees, because of their race").

[15] To be sure, a discrete and narrow question would be raised if an employer consigned a *transgender* employee to restrooms designated for individuals of the sex that does not correspond to the individual's gender identity. To do so on the basis of such employee's (presumed) external reproductive organs could inflict grievous emotional and stigmatic harms upon her, and tend to

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Daniel Woofter
Counsel of Record
Kevin K. Russell
Eric F. Citron
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
dhwoofter@goldsteinrussell.com

Martin S. Lederman
600 New Jersey Ave., NW
Washington, DC 20001

Samuel R. Bagenstos
Leah M. Litman
Margo Schlanger
625 S. State St.
Ann Arbor, MI 48109

Michael C. Dorf
242 Myron Taylor Hall
Ithaca, NY 14853

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deprive her of employment opportunities and otherwise adversely affect her status as an employee, thereby raising a serious Title VII question. Even if Title VII would prohibit such a restroom assignment of a transgender employee in a particular workplace, it would not require the employer to eliminate its single-sex restrooms. For a fuller explication of this point in the context of another statute prohibiting "discrimination" on the basis of an individual's "sex," see Brief for Professors Samuel Bagenstos, Michael C. Dorf, Martin S. Lederman and Leah M. Litman as *Amici Curiae* in Support of Respondent, *Gloucester County School Board v. G.G. ex rel. Grimm*, No. 16-273.