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Amicus Curiae Brief of Equality Ohio in Support of Intervenor Urging Reversal

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No. 16-2424

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY 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, Hon. Sean F. Cox, No. 14-13710

AMICUS CURIAE BRIEF OF EQUALITY OHIO IN SUPPORT OF INTERVENOR URGING REVERSAL

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Pursuant to Sixth Circuit Rule 26.1, Equality Ohio makes the following disclosure:

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   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:

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INTEREST OF *AMICUS CURIAE*[1]

Equality Ohio is a non-profit organization seeking to achieve fair treatment and equal opportunity for all Ohioans, regardless of their sexual orientation or gender identity or expression.

A proud member of the Equality Federation, which supports state members nation-wide (including Michigan), Equality Ohio works closely with legislators and local communities to ensure that policy and law in Ohio are fully inclusive of LGBTQ people. In particular, Equality Ohio seeks to guarantee the rights of transgender persons. For example, last year Equality Ohio worked closely with Cleveland City Council to pass Ordinance 1446, removing discriminatory language from Cleveland's code and allowing transgender Clevelanders and visitors to have the dignity of using the restroom matching their gender identity. In addition, the organization is currently working with a bi-partisan group of Ohio legislators to pass a bill ending discrimination in employment on the basis of gender identity.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), counsel for *amicus curiae* certifies that all parties have consented to the filing of this brief. Pursuant to Rule 29(a)(4)(E), counsel certifies that no party's counsel have authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and that no person — other than the *amicus curiae*, its members, or its counsel — has contributed money that was intended to fund preparing or submitting this brief.

Equality Ohio has a clear interest in this matter. Should the district court opinion stand, transgender persons in Ohio would be negatively affected in several ways. In particular, the legal assertion that an employer can fire a person based solely on their gender identity — and do so with impunity, despite the clear language of Title VII — is offensive and damaging to many a transgender Ohioans.

SUMMARY OF THE ARGUMENT

Title VII's plain language bars discharge of "*any* individual" — whether transgender or not — "because of such individual's . . . sex." It applies whenever employers take gender into account in making employment decisions. It is undisputed that the employer in this case based his decision to terminate Ms. Stephens *solely on* sex-based considerations. To be sure, he *could* have terminated Ms. Stephens for a wide array of reasons — tardiness, failure to perform, disciplinary issues — or for no reason at all. Under those circumstances, such termination — even of a transgender person — would not be "because of such individual's sex." But that is not the case here. Here, the only reasons provided by the employer were all related, directly and unequivocally, to Ms. Stephen's sex. Accordingly, Title VII applies, and the discharge should be held unlawful.

This argument proceeds in three parts. First, we assert that Title VII directly applies in this matter. More specifically, we explain why discrimination against Ms. Stephens, solely because of her transsexual identity, is discrimination "based on sex" and is therefore unlawful under Title VII.

Second, and consequently, we explain why the district court erred in its analysis of this issue. We review the assertions made by the district court, according to which transgender persons are not protected under Title VII, and show why they were made in error according to Sixth Circuit law.

Finally, we explain why the result we reached is desirable in terms of policy. We explain that recognizing "sex discrimination" in the transgender context is a natural, reasonable interpretation of Title VII. We review both the statute's legislative history and subsequent legal developments pertaining to sexual minorities and conclude that the result sought here — the protection of transgender persons at work — is both desired and inevitable.

Equality Ohio limits its argument here to the Title VII issues. It does not consider RFRA. With that, Equality Ohio is of the opinion that Title VII is a "super statute," as noted by Professor Eskridge.[2] Accordingly, no

[2] William N. Eskridge, Jr. and John Farejohn, *Super Statutes*, 50 Duke L.J. 1215, 1237 (2001) ("the Civil Rights Act is a proven super-statute because it embodies a great principle (antidiscrimination), was adopted after

employer — whether sued by the Federal Government or otherwise — should be able to overcome its formidable apparatus simply by invoking RFRA. Title VII, now over half a century in age, was not designed to be overturned each time an employer's religious beliefs (genuine or newly-found) are brought to the fore.

ARGUMENT

I. Title VII Applies in This Matter Since the Employer Discriminated Against Stephens "Because of . . . Sex."

A. Title VII Prohibits Employers from Relying on Sex-Based Considerations to Make Employment Decisions, Except Where Doing so Constitutes a Bona Fide Occupational Qualification.

Title VII provides that "it shall be an unlawful employment practice for an employer to . . . discharge [or otherwise discriminate against] *any* individual . . . because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1). The word *any* is important here because it means that Title VII's anti-discrimination mandate covers any individual, including a transgender person,

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an intense political struggle and normative debate and has over the years entrenched its norm into American public life, and has pervasively affected federal statutes and constitutional law. . . . Title VII's principle has been debated, honed, and strengthened through an ongoing give-and-take among the legislative, executive, and judicial branches. . . . [T]he Civil Rights Act's evolution has repeatedly been influenced by social movement ideas and popular pressure on the political process.").

as long that person has been the victim of discrimination because of his or her sex. *See Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) ("[A] label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.").[3]

This Court has long recognized that Title VII requires that sex must be an "irrelevant factor[] in employment opportunity." *Jacobs v. Martin Sweets*,

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[3] The terms "transgender" and "transsexual" are used interchangeably throughout this brief as the former term encompasses the latter. According to the American Psychological Association, the term transgender is an "umbrella term" and may include a variety of individuals whose gender identity or expression transgress binary conceptions of gender. *See "What Does Gender Mean?"* American Psychological Association, http://www.apa.org/topics/lgbt/transgender.aspx; *see also* Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What Is the "Plain Meaning" of "Sex" in Title VII of the Civil Rights Act of 1964?*, 18 Temp. Pol & Civ. Rts. L. Rev. 573, 589 (2009) (explaining that "transgender" may "denote transsexuals, transvestites, crossdressers, and anyone else whose gender identity or gender expression varies from the dimorphic norm").

The term "transsexual" refers specifically "to people whose gender identity is different from their assigned sex [and who] [o]ften . . . alter or wish to alter their bodies through hormones, surgery, and other means to make their bodies as congruent as possible with their gender identities." *"What Does Gender Mean?,"* American Psychological Association, http://www.apa.org/topics/lgbt/transgender.aspx.

Ms. Stephens was diagnosed with Gender Identity Disorder and "was diagnosed as a transsexual," Opinion & Order, R.76, PageID#2188-10, meaning, according to the authorities cited, that she is also considered to be transgender.

Co., 550 F.2d 364, 370 (6th Cir. 1977); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1987) ("In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees.").[4] Accordingly, Title VII prohibits employers from relying on sex-based considerations in making employment decisions. *See Price Water*house, 490 U.S. at 241 (explaining that by using the phrase "because of sex" in Title VII, "Congress meant [only] to obligate . . . [plaintiffs] to prove that the employer relied upon sex-based considerations in coming to its [employment-related] decision"). In this matter, the record is unmistakably clear that the employer's decision to fire Ms. Stephens because she is transgender included sex-based consideration and runs afoul of Title VII.

B. Discrimination Because of an Individual's Gender Identity Is Actionable Under Title VII Because It Is Motivated by Sex-Based Considerations.

1. The meaning of "because of sex" has evolved over time.

It is unclear exactly what Congress intended the term "sex" to mean under Title VII. Legislative history on the matter is sparse. *See Meritor Sav.*

[4] The Court recognized "the special context of affirmative action" and the statutory defense of bona fide occupational qualification as exceptions to the rule. *See Price Waterhouse*, 490 U.S. at 239 & n.3, 244.

Bank, FSB v. Vinson, 477 U.S. 57, 63-64 (1986) (noting that there is "little legislative history to guide us in interpreting the Act's prohibition against discrimination based on "sex"). The prohibition against sex discrimination was added one day before Congress voted on Title VII, and it is commonly understood that the amendment was a last-ditch effort to scuttle the bill. *See, e.g.*, *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 519 (D. Conn. 2016) (discussing the history of the "sex" amendment to Title VII as well as early judicial treatment of Title VII and transgender identity); *see also* Matthew W. Green, Jr., *Same-Sex and Immutable Traits: Why* Obergefell v. Hodges *Clears a Path to Protecting Gay and Lesbian Employees from Workplace Discrimination Under Title VII*, 20 J. Gender, Race & Justice 1, 19-20 (2017) (discussing legislative history of "sex" amendment).

Courts have long debated what Congress intended by including "sex" among Title VII's protected traits, particularly when addressing claims by transgender employees. For instance, as this Court explained in *Smith*, 378 F.3d 566, ostensibly relying on the plain language of the term "sex" and Congressional intent, some early courts rejected claims by transgender plaintiffs, contending that by including sex in Title VII Congress intended only to bar discrimination based on an individual's anatomical or biological sex. *See id.* at 573; *see also Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081,

1086 (7th Cir. 1984) (holding that "sex" as used in Title VII means "no more than biological male or biological female"). Some early courts considered transgender discrimination as relating more to an individual's gender than to his or her sex and thus outside of Title VII's protection. *See Smith*, 378 F.3d at 572-73.[5]

As this Court has recognized, the law in this area significantly shifted after *Price Waterhouse v. Hopkins*, which held that sex and gender must be treated the same for purposes of Title VII. *Smith*, 378 F.3d at 573. Thus, discrimination because of the failure to act consistent with certain gender norms associated with one's sex is actionable discrimination under the statute. Moreover, sex-stereotyping on the basis of an individual's gender non-conforming behavior is unlawful under Title VII, regardless of whether the basis for that behavior is the individual's transsexualism. *See id*. at 574-75.

[5] The American Psychological Association distinguishes sex from gender. *See "What Is the Difference Between Sex and Gender?,"* American Psychological Association, http://www.apa.org/topics/lgbt/transgender.aspx ("Sex is assigned at birth, refers to one's biological status as either male or female, and is associated primarily with physical attributes such as external and internal anatomy. Gender refers to the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for boys and men or girls and women.").

2. Discrimination against Ms. Stephens because of her transsexual identity is unlawful under Title VII.

Transsexual persons like Ms. Stephens are not limited to proving sex discrimination by way of gender nonconformity. Rather, sex stereotyping aside, discrimination because an individual is transsexual is necessarily discrimination because of that individual's sex because it is grounded in sex-based considerations.

As explained, an individual is considered transgender because of the mismatch between gender identity and anatomy. Accordingly, when discrimination occurs because an individual is transgender, that discrimination is not only grounded in the failure of the individual to conform to gender norms concerning how men and women should dress, behave or identify, but is motivated in part by the sex of the individual. The Ninth Circuit recognized the inextricable link between transsexualism and sex in *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000). In *Schwenk*, a transgender inmate alleged a violation of the Gender Motivated Violence Act (GMVA) after being sexually assaulted by a prison guard. *See id*. at 1193-95. The court was faced with the issue of whether gender was a motivating factor in the attack, and it looked to Title VII case law to define the term "gender." *See id*. at 1201. Consistent with the discussion set forth earlier in this brief, the court explained that early courts addressing the issue considered sex and

gender to be distinct concepts, with Title VII barring discrimination because of the former but not on the latter. *See id*.

Price Waterhouse, of course, collapsed these concepts for purposes of Title VII. The Ninth Circuit went on to explain that "[w]hat matters, for purposes of . . . *Price Waterhouse* analysis, is that in the mind of the perpetrator the discrimination *is related to the sex of the victim:* here for example, the perpetrator's [discriminatory] actions stem from [a belief] that . . . the [transsexual] victim was a man who 'failed to act like' one." *Id*. at 1202. Thus, discrimination against a transsexual individual is motivated by both sex and gender. Title VII requires only that sex be a motivating factor in an adverse employment action. 42 U.S.C. § 2000e-2(m). It does not have to be the sole or exclusive factor. Accordingly, there is no need to rely on gender discrimination or sex stereotyping where an individual shows that sex-based considerations underlay the adverse action. In the instant case, for instance, Aimee Stephens informed the employer that she had been diagnosed with Gender Identity Disorder and was transsexual. Opinion & Order, R.76, PageID#2188-10. Discrimination against her on that basis would be motivated at least in part because of her sex.

Moreover, the employer also impermissibly relied on sex-based considerations when he terminated Ms. Stephens because she notified him that

as part of her transition from male to female, she would begin to dress for work consistent with the sex with which she identifies: female. The employer admitted as much when he argued before the district court that RFRA provides a defense to this lawsuit. Describing the employer's religious beliefs concerning sex, the district court explained that

> [the employer] believes "that the Bible teachers that God creates people male or female" . . . [and] . . . "that people should not deny or attempt to change their sex." [The employer] believes that he "would be violating God's commands if [he] were to permit one of the [Funeral Home's] funeral directors to deny their sex while acting as a representative of [the Funeral Home] . . . [and] "that it is wrong from a biological male to deny his sex by dressing as a woman."

Opinion & Order, R.76, PageID#2194-16 through 17 (citations omitted).

The aforementioned shows an inextricable link between Ms. Stephens's sex and the employer's decision to fire her. In the employer's own words, he believes that Aimee Stephens's sex is "immutable" and that because of that immutable sex (which the employer perceived to be male), she was supposed to dress, behave and identify consistent with the anatomy with which she was born. To permit Ms. Stephens to do otherwise, according to the employer, would signify that he agrees with the idea that Ms. Stephens's "sex is a changeable social construct rather than an immutable God-given gift." *Id*. at 17. To be sure, the employer's views implicate stereotypical notions of how "real men" should identify or present themselves in the workplace. However,

by the employer's admission, Ms. Stephens's sex necessarily factored into his decision to fire her.

The employer claims that he would not have terminated Ms. Stephens had she dressed in female attire only when not at work. This claim does not change the sex-based considerations underlying her discharge. The employer considered Ms. Stephens to be male, a factor he admits he took into account in terminating her employment. Accordingly, her sex motivated his adverse action. Title VII requires no more. *See Price Water*house, 490 U.S. at 240 (explaining that by using the phrase because of sex in Title VII, "Congress meant [only] to obligate . . . [plaintiffs] to prove that the employer relied upon sex-based considerations in coming to its [employment-related] decision); *Jacobs*, 550 F.2d at 370 (explaining that Title VII requires that sex be irrelevant with regard to "employment opportunity"). Whether because of her transsexual identity or the employer's views regarding how Ms. Stephens should dress because of her anatomy at birth, sex-considerations motivated her discharge.

II. The District Court Erred in Holding That Title VII Protection Does Not Apply when the Decision to Terminate Is Based on Transgender Status or Gender Identity.

A. The District Court Erred in Failing to Find That Ms. Stephens Was a Member of a Protected Class for Purposes of the Claim of Transgender Status Discrimination.

The EEOC's main argument in this matter was that the Funeral Home's decision to terminate Stephens "because Stephens is a transgender" was "motivated by sex-based considerations" and therefore "an unlawful employment practice" under Title VII. Compl. ¶ 15, R.1, PageID#4. The district court denied that argument:[6] "like sexual orientation, transgender or transsexual status is currently not a protected class under Title VII." Order Denying MTD, R.13, PageID#188; *see also* Opinion & Order, R.76, PageID#2180 ("This Court previously rejected the EEOC's position that it stated a Title VII claim by virtue of alleging that Stephens's termination was due to transgender status or gender identity — because those are not protected classes.").

But this assertion is in error. This Court has held, at least twice, that transgender persons are protected under Title VII.

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[6] The district court did accept, however, the EEOC's alternative claim regarding gender non-conforming behavior. We agree with this result, as well with other Briefs' analyses supporting it.

First, in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), this Court reviewed the case of a male firefighter who worked for seven years for the City without an incident. Then, after being diagnosed with a Gender Identity Disorder (GID), he began "'expressing a more feminine appearance on a full-time basis.'" *Id*. at 568. He was fired and brought claim under Title VII. The district court dismissed his claim. This Court reversed, noting:

> Smith is a member of a protected class. His complaint asserts that *he is a male* with Gender Identity Disorder, and *Title VII prohibition of discrimination "because of . . . sex" protects men as well as women*. The complaint also alleges both that Smith was qualified for the position in question – he would have been a lieutenant in the Fire Department for seven years without any negative incidents – and that he would not have been treated differently, on account of his non-masculine behavior and GID, had he been a woman instead of a man.

Id. at 570 (emphasis added; citation omitted).

The resemblance to this case is striking. Here, too, Stephens worked for nearly six years, Opinion & Order, R.76, PageID#2187, without any negative incidents. Here, too, Stephens had a Gender Identity Disorder *Id.*, PageID# 2188. Here, too, she was treated differently solely on the account of her GID and her *intention* — expressed in a letter, never to be carried out — to express herself, by "liv[ing] and work[ing] full-time," as a woman. *Id*. Surely, Stephens — like Smith — is a member of a protected class.

A year following *Smith*, in *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005), this Court again confirmed that transgender persons are protected under Title VII. In *Barnes*, this Court examined the case of a police officer who "was living as a pre-operative male-to-female transsexual." *Id*. at 733. Hired in 1981 as a man, Barnes successfully passed a promotional test for sergeant seven years later. *Id*. Still, he was denied the promotion, among other things, "for lack of 'command presence.'" *Id*. at 734. Barnes filed a Title VII claim against the City, and the jury awarded him more than $800,000, including compensatory damages, front pay, back pay, and attorneys fees. The City appealed to this Court. This Court affirmed.

Much like the district court here, the City in that case claimed that Barnes "was not a member of protected class." *Id*. at 736. This Court denied that claim:

> *Smith* . . . instructs that the City's claim that Barnes was not a member of a protected class lacks merit. In *Smith*, this court held that the district court erred in granting a motion to dismiss by holding that transsexuals, as a class, are not entitled to Title VII protection, stating: . . . "a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."

Id. at 737 (citation omitted).

Again, the resemblance to this case is uncanny. Here, it is clear that the district court — relying on a gender-orientation case rather than a transgender case[7] — erred in his analysis.

B. The District Court Erred by Posing the Wrong Question.

In addition to being wrong on the protection granted to transgender persons in this Circuit, the district court was also wrong in the question it posed for review.

The district court dismissed the EEOC's claim that the termination of Ms. Stephens's employment was motivated by sex-based characteristics. Relying on questionable precedent,[8] the lower court held that "transgender or

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[7] The district court relied on *Vickers v. Fairfield Med. Cir.*, 453 F.3d 757 (6th Cir. 2006) ("sexual orientation is not a prohibited basis for discrimination acts under Title VII"). First, *Vickers* is *not* a transgender case, and this Court has direct law on the issue. There was, therefore, no need to invoke *Vickers* in the first place. Second, *Vickers* is more than a decade old, and perhaps should be re-evaluated in light of recent cases. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (same-sex couples have a constitutional right to marry); and *Hively v. Ivy Tech Cmty College of Indiana*, No. 115-1720, 2017 U.S. App. LEXIS 5839 (7th Cir. Apr. 4, 2017) (en banc) (Title VII applies to sexual orientation).

[8] The district court cited a case from this Court involving a claim of sexual orientation discrimination, *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006), and a transsexual discrimination case from the Tenth Circuit, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007). Obviously, *Vickers* dealt with a different issue. *Etsitty* relies on a line of cases including *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984), which have been undercut by *Price Waterhouse*. *See Schwenk v. Hartford*, 204 F.3d 1187,

transsexual status is currently not a protected class under Title VII." Opinion, R.13, PageID#188-89. In framing the issue that way, the district court effectively carved transgender persons out from the protections of Title VII, something that this Court has already criticized in both *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), and *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005). As those cases clearly state, transgender individuals are entitled to Title VII's protection against sex discrimination.

The analysis should begin with the language of the statute itself. *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008). Here, the plain language of the statute does not permit the interpretation given it by the *Etsitty* line of cases. Section 703 of Title VII prohibits an employer from discriminating against "any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). There is no exemption or exception anywhere in the statute for transgender individuals. Like all other individuals, they are protected from discrimination

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1201 (9th Cir. 2000); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 526 (D. Conn. 2016).

because of the listed base, including sex — whether male or female. It is hard to imagine a court holding that a transgender person is not protected from discrimination because of race or religion, yet ironically some courts deny such individuals protection from the type of discrimination of which they are most likely to be victims.

Those courts that have focused on whether transsexuals are a protected class "have allowed their focus on the label 'transsexual' to blind them to the statutory language itself." *Bd. of Educ. v. U.S. Dep't of Educ.*, No. 2:16-CV-524, 2016 U.S. Dist. LEXIS 131474, *45 (S.D. Ohio Sept. 26, 2016) (quoting *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008)). While criticizing transgender plaintiffs seeking relief for allegedly trying to create a new class of protected individuals, they have actually gone out of their way to create a new class of unprotected individuals: "the exclusion of discrimination on the basis of transgender identity from the protective scope of Title VII would be to take a certain class of gender nonconformity and reclassify it as a nonprotected status solely in order to exclude it . . . ." *Fabian*, 172 F. Supp. 3d at 523, relying on this Court's decision in *Smith*. This carve-out of transgender persons from the protections of Title VII "is no longer a tenable approach to statutory construction in general," *Schroer*, 577 F. Supp. 2d at

307, nor can it be reconciled with Price Waterhouse, *Schwenk*, 204 F.3d at 1201.

The question that should be asked in such cases is not whether transsexuals persons are covered by Title VII, but — as in every other Title VII case — whether the employer has taken "gender into account." *Price Waterhouse v. Hopkins*, 490 U.S. at 239 ("Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.") (plurality opinion). If so, the adverse employment action of the employer was "because of sex" and violated Title VII.

III. As a Matter of Public Policy and the Logical Continuation of Developing Case Law, This Court Should Hold That Discrimination Because an Individual Is Transsexual Is Discrimination Because of Sex.

The result we advocate for here — a holding that when a transgender person is terminated "because of [her] . . . sex" she is protected under Title VII — is correct as a matter of positive law; it is correct because the district court erred in its analysis; it is also correct as a matter of policy. To that we arrive now.

A. While Discrimination Against Transgender Persons Is Not the Primary Evil Congress Meant to Address in Title VII, Its Language Clearly Includes It.

We begin by conceding that discrimination against transgender persons may not have been the primary evil Congress intended to eradicate in 1964, when it enacted Title VII. That, however, should not deter this Court from arriving at the desired result. The law itself should provide protection against such discrimination so long as it is covered by its text. As the Supreme Court has noted, regarding another evil now protected by Title VII:

> As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. *But statutory prohibitions often go beyond the principled evil to cover reasonably comparable evils, and it ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed*. Title VII prohibits "discriminat[ion] . . . because of . . . sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirement.

Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 79-80 (1998) (emphasis added).

The same is true in the case at bar. There is no doubt that when an employer decides to terminate a person solely "because of" the gender that person chose to adopt, the employer's decision is "because

of . . . sex." In fact, it would be very hard to explain the decision in any other terms: what was it based on, other than "sex" considerations?

Throughout his testimony, the employer in this case referred to Ms. Stephens's sex. He has done so while referring to Ms. Stephens's alleged violation of the dress code, because of her sex. Opinion & Order, R.76, PageID#2192-14. He has done so when asserting that "the Bible teaches that a person's sex is an immutable God-given gift." *Id*., PageID#2194 (citing employer's affidavit). Either way, the reasons that led the employer in this matter to terminate Ms. Stephens were directly, and inexorably, linked to her sex. And this is a quintessential example of sex-based discrimination.

B. The Understanding of the Term "Sex" in Title VII Has Evolved Considerably Since 1964.

The Seventh Circuit, sitting en-banc, has recently authored a comprehensive opinion regarding Title VII and sexual orientation. *See Hively v. Ivy Tech Cmty College of Indiana*, No. 115-1720, 2017 U.S. App. LEXIS 5839 (7th Cir. Apr. 4, 2017).

In *Hively*, the court held — in a decision described by its own members as "momentous," *Id*. at *50 (Sykes, J., dissenting) — that "discrimination on the basis of sexual orientation is a form of sex discrimination" and therefore covered by Title VII. *Id*. at *2.

Hively discussed in length the evolving understanding of the term "sex" in Title VII. Although the case involved sexual orientation discrimination, Judge Posner noted that such evolution applies to transgender persons as well:

> discrimination on grounds of "sex" in Title VII received today a new, a broader, meaning. Nothing has changed more in the decades since the enactment of the statutes than attitude towards sex. 1964 was more than a decade before Richard Raskind underwent male-to-female reassignment surgery and took the name Renée Richards, becoming the first transgender celebrity; now of course transgender persons are common.

Id. at *34-35 (Posner, J., concurring).

Moreover, the *Hively* court observed that "it would require considerable calisthenics to remove the 'sex' from 'sexual orientation.'" *Id*. at *24. We agree, and observe that it would take a Herculean effort to remove "sex" from "sexual identity." Thus, to say that to discriminate based on someone's sexual identity is *not* to discriminate based on sex truly makes no sense.

C. The Employer Cannot Deny Ms. Stephens Her Identity as a Woman.

A third, and perhaps most important, policy consideration in this case relates to the treatment (or mistreatment) of Ms. Stephens by her employer. The essence of the argument is this: at no point in this case did the employer bother to *recognize* the fact that his employee — here, Ms. Stephens — was undergoing a sex transition. He simply ignored the fact that she advised him of that change and continued to treat her as a male. For him, Ms. Stephens was

simply a man who wished to violate the workplace dress code by dressing like a woman. *See* Opinion & Order, R.76, PageID#2192 (citing deposition) ("Q: "What was the specific reason that you terminated Stephens? A: *Well because he – he was no longer going to represent himself as a man. He wanted to dress as a woman . . . we have a dress code that is very specific that men will dress as men* . . . and that women will conform to their dress code that we specify.") (emphasis in the original). He denied Ms. Stephens the recognition she deserves, as a human being and as a woman.

Indeed, Ms. Stephens no longer considered herself to be a man. If the employer would have bothered to ask which "sex" she identified with, the answer would have been clear: female. *See id.*, PageID#2188 (citing Stephens's letter) ("I have felt imprisoned in my body that does not match my mind . . . . *The first step I must take is to live and work full-time as a woman for one year.*") (emphasis in the original). Ms. Stephens's sexual identity is at the core of who she is; simply calling her a "man," besides completely ignoring reality, also denies her the ability to choose her sex. Under Title VII, *terminating* her for these precise reasons constitutes illegal employment discrimination.

CONCLUSION

This case is not difficult. We respectfully ask this Court to do no more than recognize that discrimination against an individual because that person is transsexual is by definition discrimination because of sex and is, therefore, prohibited by Title VII.

Respectfully Submitted,

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*Professor Matthew W. Green, an expert on employment discrimination, as well as Ms. Lorraine Catalusci and Mr. Russell Gates, students with the Clinic, contributed to the preparation of this Amicus Brief.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,387 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2017, I electronically filed the forgoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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DESIGNATION OF RELEVANT DISTRICT COURTT DOCUMENTS

E.D. Mich. Case No. 14-13710

Record.	Description	Page ID# Range
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13	Amended Order Denying Motion to Dismiss	188-89
76	Order & Opinion Re: Summary Judgment Motions	2180, 2187-88, 2192, 2194.