

No. 18-107

IN THE
SUPREME COURT OF THE UNITED STATES

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

v.

EQUAL OPPORTUNITY EMPLOYMENT COMMISSION,
Respondent,

and

AIMEE STEPHENS,
Respondent-Intervenor.

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

**BRIEF OF SCHOLARS OF
FAMILY AND SEXUALITY
AS *AMICI CURIAE* IN SUPPORT
OF PETITIONER**

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QUESTION PRESENTED

Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

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INTEREST OF AMICI CURIAE¹

Amici are social science scholars who have researched and written extensively about family and human sexuality.

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These social science scholars submit this brief to bring to the Court's attention important social science research issues and public policy concerns that bear on whether Title VII prohibits discrimination against transgender people based on transgender status or stereotyping.

¹ No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution to the preparation or submission of this brief. No person, other than amici curiae, its members, or its counsel made a monetary contribution to intended to fund the preparation or filing of this brief. Letters from all parties consenting to the filing of this brief have been submitted to the Clerk or provided to amici counsel.

SUMMARY OF ARGUMENT

To suggest that this case is a straightforward incident of discrimination motivated in part by the employee’s “sex” is to ignore the confusing morass that is the state of the empirical social science regarding gender identity and the transgender experience, and to privilege the “deeply felt, inherent sense” of Stephens over and above the same on the part of the Harris Funeral Homes.² Stephens seeks to overhaul the plain meaning of “sex” in Title VII to include “gender identity.” But sex has a specific meaning, a definition held, not just by Harris Funeral Homes, but in congruence with most of the globe’s population for nearly all of human history.

This is not a case, as the American Psychological Association’s (APA) brief maintains, about “the nonconformity of a person perceived to be of a given biological sex to society’s expectations of how people of that sex should look, behave, dress, speak, or otherwise express their gender identity.”³ This is, rather, a case about the demand that fellow citizens cooperate in a process—the transgender transition—whose hallmarks, definitions, measures, and consequences remain contested, even among

² Amici Br. The American Medical Association et al., 4. (hereinafter, “AMA Br.”)

³ Amici Br. The American Psychological Association et al., 7. (hereinafter, “APA Br.”)

experts and supporters. It seeks to overthrow how the longstanding material reality of biology orients the world's population toward each other—as male and female. That objective reality appears to be the conception that the respondents argue should, in the name of “progress,” be discarded in favor of a subjectively constructed world of gender fluidity between male and female. This profound and far-reaching clash over reality is outside the Court's purview or capacity to decide.

Amici do not aim to make light of a challenging situation or to underestimate the difficulties people who identify as transgender experience, including discrimination. Rather, this brief serves to shed light on the immense complications involved in studying the transgender population, including experiences of discrimination, concluding that the social science is still very young, limited, regularly contradictory, and prone to politicization, not just in the reporting of results, but in the collection of data as well.

The Sixth Circuit has usurped the U.S. Congress's jurisdiction by judicially amending the word “sex” in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-29(a)(1), to include “gender identity,” which has a wholly different meaning. In fact, amici agree with Stephens that this Court “need not decide whether ‘gender identity’ is part of ‘sex’ for purposes

of Title VII.”⁴ Not only is it unnecessary to decide that question, but this Court is ill-equipped to settle the complex conceptual, definitional, and measurement quandaries in the empirical study of gender identity and the transgender experience that sympathetic experts themselves disagree upon.

ARGUMENT

There is wide agreement that transgender populations have experienced prejudice.⁵ While we do not dispute the existence of such prejudice, the empirical social science documenting the scope and nature of discrimination here is hamstrung by the comparative novelty of its central subject matter—the transgender population. The longstanding distinction between sex and gender becomes problematic as both sex and gender are caught up in identity politics. Stephens and supporting amici wish to make this case not simply about age-old flexibility in normative

⁴ Brief of Respondent Aimee Stephens, 20 (hereinafter “Stephens Br.”).

⁵ Amanda Rodriguez et al., *Self-Reported Discrimination in Health-Care Settings Based on Recognizability as Transgender: A Cross-Sectional Study among Transgender U.S. Citizens*, 47 *Archives of Sexual Behavior* 973-985 (2018); Sandy E. James et al., Nat’l Ctr. for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* (2016) (hereinafter “USTS”); Jaime M. Grant et al., Nat’l Ctr. for Transgender Equality & Nat’l Gay & Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011) (hereinafter “NTDS”).

appearance and behavior—matters of expression—but about gender “identity” or “status” and accuse Harris Funeral Homes of discrimination based on rigid stereotyping.

Unlike with the study of gay and lesbian Americans, a population that has remained fairly stable in recent years, the population that self-identifies as transgender has exploded of late—especially, but not exclusively, among adolescents—which brings to the fore prudential concerns about the stability of valid measurement. This, together with the surge in popularity of research on gender identity, poses significant challenges for the empirical validity of studies in this domain.

The problem is compounded by the “flexibility in designs, definitions, outcomes, and analytical modes” that dog the study of the transgender population and their experiences.⁶ While these are common challenges that stalk the early years of any subject matter’s study, uncommon and significant political obstacles also threaten the ability to learn about the transgender population with minimal bias.

⁶ John P. A. Ioannidis, *Why Most Published Research Findings are False*, 2 PLoS Med 8 (2005) at e124; see also Joseph P. Simmons et al., *False-Positive Psychology: Undisclosed Flexibility in Data Collection and Analysis Allows Presenting Anything as Significant*, 22 Psychological Science 11, 1359-66 (2011).

Talented researchers have been subject to elevated scrutiny, suppression, and even censure when studying transgenderism. There is a policing of conclusions that is not commensurate with the free search for empirical truths. Together, these challenges suggest there is insufficient clarity to establish a protected class status for persons who identify as transgender.

I. INCONSISTENCIES AND INCOHERENCE SURROUNDING THE DEFINITIONS OF TRANSGENDERISM, INCLUDING WHETHER GENDER IS FLUID OR FIXED, SHOW “GENDER IDENTITY” IS NOT THE SAME AS “SEX” NOR SHOULD IT BE RECOGNIZED AS A PROTECTED CLASS.

While sex and gender are often equated in legal parlance, there are many more relatively new terms that must be apprehended to understand this case—“gender identity,” “gender expression,” “heteronormativity,” “gender dysphoria,” and words like “cisgender” and “nonbinary,” as well as what it means to be “transgender” or “transitioning,” to say nothing of how each of these different phenomena are actually measured. Indeed, many of Stephens’ supporting amici briefs include a complex series of definitions and terms concerning gender identity and what it means to be transgender. This ought to be the first signal of difficulty in discerning how it is that “transgender” could be a discretely definable and

recognizable protected class.

A second signal of difficulty is found in the clear differences in those definitions and criteria among amici supporting Stephens. For example, the American Medical Association (and additional amici) maintains that to be transgender is to have transitioned, albeit in an unspecified manner:

A transgender man is someone who is assigned the sex of female at birth, but transitions to being male. A transgender woman is an individual who is assigned the sex of male at birth, but transitions to being female. A transgender man is a man. A transgender woman is a woman.⁷

This contrasts with the “Scholars Who Study the Transgender Population” brief, which notes that “a transgender identity is not dependent upon transitioning or on any specific medical treatment.”⁸ In other words, it is entirely up to the person, with no need to do anything (i.e. “transition” via clothing choice, hormone replacement, or sex reassignment surgery) apart from simply self-identifying as, for example, a member of the opposite sex. This example of definitional disagreement is not unusual and demonstrates insufficient clarity and an immaturity

⁷ AMA Br. 5.

⁸ Amici Br. Scholars Who Study the Transgender Population 7 (hereinafter “Scholars Br.”).

in the comparatively new scientific study of the transgender experience.

Furthermore, the American Academy of Pediatrics (AAP) policy statement on the care and support for transgender and gender diverse children and adolescents asserts that the self-recognition of gender identity “develops over time” and yet “[f]or some people, gender identity can be fluid, shifting in different contexts.”⁹ This perspective on gender fluidity stands in stark contrast to the testimony of Duke University Medical School pediatrician and recent expert witness Deanna Adkins that gender identity “cannot be voluntarily altered including for individuals whose gender identity does not align with their birth-assigned sex.” Adkins, who served as a contributor to the Human Rights Campaign’s joint publication (with the AAP) on transgender children, claims that “evidence strongly suggests that gender identity is innate or fixed at a young age and that gender identity has a strong biological basis.”¹⁰

⁹ Jason Rafferty & the Committee on Psychosocial Aspects of Child and Family Health. *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 142 *Pediatrics* 4 (2018).

¹⁰ Declaration of Deanna Adkins, M.D., U.S. District Court, Middle District of North Carolina, Case 1:16-cv-00236-TDS-JEP https://www.aclu.org/sites/default/files/field_document/AdkinsDecl.pdf; see also Gabe Murchison, *Supporting and Caring for Transgender Children*, Human Rights Campaign, American

Meanwhile, Columbia University sociologist Tey Meadow reports in her article on the production of legal gender classifications: “Many courts look to medical definitions of sex.... yet there is no consensus about when gender change actually happens.”¹¹ If professional associations and groups of scholars that claim expertise on this topic are not in agreement on significant aspects of the causes and definitions surrounding the transgender experience, how can anyone else, including this Court and workplace supervisors (or their customers), be expected to understand, let alone be expected to create “a supportive environment” for the subjective transitional efforts of an employee whose actions—like any other employee—affect the success of the organization?

II. THE LACK OF DEFINITIONAL CONSENSUS HAS MADE IT DIFFICULT TO EMPIRICALLY STUDY THE TRANSGENDER EXPERIENCE IN A COHERENT AND CONSISTENT MANNER.

Thus far, this brief has only addressed the definitions of terms and concepts. Moving now from

Academy of Pediatrics, and American College of Osteopathic Pediatricians (2016).

¹¹ Tey Meadow, “A Rose is a Rose”: *On Producing Legal Gender Classifications*, 24 *Gender & Society* 6 814–837 (2010) at 824.

definitions to sensible and realistic measures of gender identity and the transgender experience uncovers yet more scholarly disagreement. Protocols in social scientific measurement come about when, over time, scholars in different locales and working with different groups of people come to agree—within reasonable limits—that there are best-practice ways of asking questions. When the questions concern sensitive matters, as the transgender topic certainly does, it is easier to get it wrong. Patience is required. But in this domain, developments are moving quickly while protocols are being established hastily.

A simple example of the instability in understanding basic transgender matters comes from estimates of the overall transgender population. One recent assessment of five population-based surveys through 2015 estimated the adult transgender population in the United States at around four-tenths of one percent.¹² Another 2016 comparison study using CDC Behavioral Risk Factor Surveillance System (BRFSS) data put the estimate at six-tenths of one percent, a figure that is double the estimate using extrapolated data from California and Massachusetts as recently as 2011.¹³ Estimates of

¹² Esther Meerwijk & Jae Sevelius, *Transgender Population Size in the United States: A Meta-Regression of Population-Based Probability Samples*, 107 *American Journal of Public Health* e1-e8 (2017).

¹³ Andrew R. Flores et al., Williams Inst., *How Many Adults Identify as Transgender in the United States?* (2016).

transgender adolescents, on the other hand, are well above these rates. Estimates of the adolescent transgender or gender non-conforming (TGNC) populations range from 1.3 percent in San Francisco middle schools to 1.6 percent in Boston public high schools and 2.7 percent in Minnesota high schools.¹⁴ (This recent surge far exceeds any modest growth in self-identified gay or lesbian teens.) These figures are 2-4 times as high as estimates of the same in the adult population, prompting concern about the validity of some share of the cases.

In an attempt to understand this surge, public health scientist Lisa Littman explored possible “cluster outbreaks” of rapid onset gender dysphoria (ROGD) among adolescents and found plenty of peer influence.¹⁵ In 37 percent of the friendship networks

¹⁴ Joanna Almeida et al., *Emotional Distress among LGBT Youth: The Influence of Perceived Discrimination Based on Sexual Orientation*, 38 *Journal of Youth and Adolescence* 7 1001–14 (2009); Marla E. Eisenberg et al., *Risk and Protective Factors in the Lives of Transgender/Gender Nonconforming Adolescents*, 61 *Journal of Adolescent Health* 4 521–526 (2017); John P. Shields et al., *Estimating Population Size and Demographic Characteristics of Lesbian, Gay, Bisexual, and Transgender Youth in Middle School*, 52 *Journal of Adolescent Health* 2 248-250 (2013).

¹⁵ Lisa Littman, *Rapid-Onset Gender Dysphoria in Adolescents and Young Adults: A Study of Parental Reports*, 13 *PLoS One* e0202330 (2018). Littman describes “Rapid Onset Gender Dysphoria” as the recent phenomenon of adolescents, predominantly female, suddenly presenting with a transgender identity with no prior history of gender dysphoria, the onset of

respondents mentioned, a majority of the friends had begun identifying as transgender. In over six of 10 cases in the Littman study, parents identified a surge in social media use among their teenage children just prior to the child’s announcement that they identified as transgender. Only 13 percent of parents noted no evidence of a “social influence” on their child’s ROGD. Despite an uproar over the notion of a possible “contagion” effect on transgender teens—and an unprecedented “re-review” of the peer-reviewed study—the methods and results remained the same, suggesting a challenging atmosphere both for understanding what is going on as well as reporting it. Littman’s is not the only study documenting peer influence on the alteration of adolescents’ gender identity; it’s just the one that attracted the most attention.¹⁶

As with the present case, these studies remind us of the social side of “transitioning,” namely that it involves other persons—parents or children, friends, employers, and even strangers—agreeing to collaborate with and validate the transition. The key

which is often marked by social media exposure and peer influence.

¹⁶ Dawn DeLay et al., *The Influence of Peers during Adolescence: Does Homophobic Name Calling by Peers Change Gender Identity?* 47 *Journal of Youth Adolescence* 3 636-649 (2018); Lisa Marchiano, *Outbreak: on Transgender Teens and Psychic Epidemics*, 60 *Psychological Perspectives* 3 345-366 (2017).

for all successful human interaction, however, is having an agreed-upon definition of the situation, which makes such interactions coherent and understandable.¹⁷ For the person who identifies as transgender, this challenge continues daily—not just at transition—because the material reality of biology (i.e., sexual dimorphism, or how the sexes exhibit different characteristics beyond the basic distinctions in sexual organs) has and will continue to orient the people of the world toward each other. In other words, there is a pervasive social component to transitioning that will arguably never be finished until the person identifying as transgender no longer feels any need to manage others’ impressions of them and of their interactions.

Nevertheless, a mere two years after scholars labeled the state of the science as at a starting point in 2012,¹⁸ the Williams Institute in 2014 issued a “best practices” report at a time when no large federally-funded survey project had yet elected to include a measure of transgender identity and before the surge in rates of the same in surveys of adults and

¹⁷ Erving Goffman, *The Presentation of Self in Everyday Life* (1959).

¹⁸ Eli Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7*, 13 *International Journal of Transgenderism* 165-232 (2012).

adolescents.¹⁹ Among many suggestions, the Williams Institute report recommended survey instruments begin with a question about “what sex were you assigned at birth,”²⁰ a move which suggests a more active (assignment) than passive (observation) process of determining a newborn’s sex. “Assigned” also conveys an impression of randomness and an external authority. In reality, biological sex has long been objectively observed, that is, recognized clearly.

Intersex cases occur in roughly one in every 5,000 births, an estimate consonant across three continents.²¹ However, they are considered a type of

¹⁹ Gender Identity in U.S. Surveillance Group, Williams Inst., *Best Practices for Asking Questions to Identify Transgender and Other Gender Minority Respondents on Population-Based Surveys* (Sep. 2014) <http://williamsinstitute.law.ucla.edu/wp-content/uploads/geniuss-report-sep-2014.pdf> (hereinafter “*Best Practices*”).

²⁰ The term “sex assigned at birth” is a recent phrase recommended by individuals and groups promoting transgenderism and the gender spectrum. Sex assigned at birth suggests that biology and genetics may have little to do with the objective biological sex recognized by one’s parents and doctor at birth, but that one’s sex is primarily a subjective choice of the fully autonomous will which a person decides at some point in their life, and which, according to some, is fluid and can change. However, “sex” is not a mere social construct; it is an objective biological reality.

²¹ Kun S. Kim & Jongwon Kim, *Disorders of Sex Development*, 53 *Korean Journal of Urology* 1, 1-8 (2012); Ute Thyen et al., *Epidemiology and Initial Management of Ambiguous Genitalia at Birth in Germany*, 66 *Hormone Research in Pediatrics* 195-203 (2006); Leonard Sax, *How*

disorder of sex development (DSD), not evidence—as InterACT amici claim—of a “spectrum” of biological sex.²² InterACT amici make a common error here by inflating the incidence rate of actual intersex cases by including disorders of sexual development (DSD) that are not true intersex conditions.²³ To their credit, the Williams Institute’s best-practices report notes that intersex “is not, by definition, a gender identity, but a difference in congenital sex.”²⁴ (“Difference,” however, is not the same as DSD.)²⁵

Yet InterACT amici claim that a spectrum between male and female exists even on the biological level.²⁶ However, the male-female binary is unquestionable in terms of human reproduction: there are only two types of gametes from which new life springs and one of each is required, a sperm and an egg. That anomalies in fertilization or other DSDs can occur does not change the material reality of the binary (male and female) elements involved. While InterACT amici do not disprove the sexual binary,

Common is Intersex? A Response to Anne Fausto-Sterling, 39 *Journal of Sex Research* 3 174-178 (2002).

²² Amici Br. InterACT: Advocates for Intersex Youth, et al. (hereinafter “InterACT Br.”).

²³ Sax, *supra* note 21.

²⁴ *Best Practices* 42.

²⁵ *Id.* However, the 2008 National Transgender Discrimination Survey (*NTDS*), which was the first iteration of the *USTS*, included “intersex” in its list of gender identity terms, an approach the Williams Institute guidelines suggest is a mistake.

²⁶ InterACT Br.

they do affirm that bodily, material reality matters. Intersex individuals are grappling with their identities in connection with the discordant male and female aspects of their material bodies. This is quite distinct from transgender cases where a gender identity is constructed in opposition to or in contradiction to the healthy and unambiguous physical bodies of (non-intersex) persons identifying as transgender.

Increasing interest has turned away from the body toward “nonbinary” gender identities. From a measurement perspective, this is a very important development. If a person who identifies as transgender was “assigned” female but wishes to take hormonal and surgical steps in consonance with their “deeply felt, inherent sense” of being a male, scholars can still function in the realm of a binary distinction (i.e., male and female) that is straightforward to ask about on surveys. While self-identification as transgender (or not) on a survey would seem to be straightforward, the 2015 United States Transgender Survey (USTS) elected to offer its respondents 25 different options in their question on gender identity, with an additional possibility to write in something other than what appeared there (an option which 12 percent of respondents chose).²⁷ The answers

²⁷USTS, *supra* note 5. See Question 2.2 at 254. Namely, the options listed were: “A.G. or aggressive; Agender; Androgynous;

“transgender” (65 percent) and “trans” (56 percent) were the top selections, but “trans woman,” “trans man,” “non-binary,” “genderqueer,” “gender non-conforming,” and “gender fluid” or “fluid” were all answers chosen by at least one of every four or five respondents. Ironically, only 44 percent of respondents said they were “very comfortable” with the term transgender being used to describe them.²⁸ The USTS, an opt-in survey which actively sought transgender participation, is a helpful tool to understand a complex population. Yet it simultaneously illuminates the very real challenges to reaching a point of clarity and precision in understanding this diverse population.

Additionally, a 2014 survey of youth conducted by the Human Rights Campaign asked respondents “if they considered themselves ‘male, female, transgender or other gender.’”²⁹ Two out of every

Bi-gender; Butch; Bulldagger; Cross dresser; Drag performer (king/queen); Fa’afafine; Gender non-conforming or gender variant; Genderqueer; Gender fluid/fluid; Intersex; Mahu; Multi-gender; Non-binary; Third gender; Stud; Transgender; Trans; Trans man (FTM, female to male); Transsexual; Trans woman (MTF, male to female); Travesti; Two-spirit; A gender not listed above (please specify).”

²⁸ *Id.*

²⁹ Joel Baum et al., *Supporting and Caring for Our Gender Expansive Youth: Lessons from the Human Rights Campaign’s Youth Survey* (2012) https://www.genderspectrum.org/staging/wp-content/uploads/2014/12/HRC_report.pdf.

three respondents who picked “transgender” or “other gender” selected the latter option, signaling further difficulty in classification here. The summary report’s authors conclude with a social scientist’s nightmare, declaring that “these youth represent 925 distinct gender identities and expressions.”³⁰ In the 2013 and 2015 Minnesota College Student Health Survey, twice as many respondents endorsed “genderqueer” or “another gender” as selected “transgender.”³¹ Even some social scientists are calling for open-ended responses for gender questions on surveys as a way to better reflect identities and lived experiences, signaling profound challenges in figuring out how to assess the transgender population.³² Classification, it seems for this complex group, is increasingly difficult.

³⁰ *Id.* at 2.

³¹ Katherine Lust et al., *College Student Health Survey Report: Health and Health-Related Behaviors-Minnesota Postsecondary Students*, Boynton Health Service: Univ. of MN (2015)

https://boynton.umn.edu/sites/boynton.umn.edu/files/2018-02/MNPostsecondaryStudents_CSHSReport_2015.pdf.

Katherine Lust et al., *College Student Health Survey Report: Health and Health-Related Behaviors-Minnesota Postsecondary Students*, Boynton Health Service: Univ. of MN (2013) https://boynton.umn.edu/sites/boynton.umn.edu/files/2017-09/MNPostsecondary_CSHSReport_2013.pdf.

³² Laurel Westbrook & Aliya Saperstein, *New Categories Are Not Enough: Rethinking the Measurement of Sex and Gender in Social Surveys*, 29 *Gender & Society* 4 534–560 (2015); see also Jack Harrison et al., *A Gender Not Listed Here: Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey*, 2 *LGBTQ Policy Journal at the Harvard*

The empirical evidence suggests that social and health scientists are still early in the process of gathering and analyzing data on gender identity and the transgender phenomenon. There is not yet wide agreement about how to ask about transgender self-identity, behavior, or status, like there is for questions of sexual orientation.³³ Efforts to improve measurement are laudable, but suggestions of a protocol are premature. That the study of transgender matters is politicized means the scientific community is in an even more precarious position. Legal and legislative bodies are asking for reliable information that simply does not yet exist. Reliability, after all, emerges over time as survey instruments are fine-tuned, measures agreed upon, and populations stabilize. We are not there yet. The legal conclusion here seems obvious. How can the Court or the U.S. Congress discern a protected class if there is no consistent or intelligible way to classify this population?

Kennedy School (2011-2012)
<http://williamsinstitute.law.ucla.edu/wp-content/uploads/Harrison-Herman-Grant-AGender-Apr-2012.pdf>.

³³ *Id.*

III. WHILE REGRETTABLE, THE INCIDENCE, RATES, AND CAUSAL PROCESSES OF TRANSGENDER DISCRIMINATION ARE UNCLEAR.

It is not our intention to dispute the existence of prejudice and discrimination exhibited toward self-identified transgender persons. Such treatment is regrettable and ought to be discouraged.³⁴ Nevertheless, much remains unclear—in part a product of the comparatively recent study of this population. The USTS (and its predecessor the National Transgender Discrimination Survey, or NTDS) remains the primary vehicle for seeking to clearly understand the extent of discrimination among the transgender population. This fact poses several problems, not the least of which is near-universal sole reliance on these data to date. First, each survey’s self-selected, opt-in sampling strategy only offers the reports of those persons who sought to fill out the survey, creating sampling bias. Second, the USTS survey construction raises risk of “response set” bias, or the tendency for a person to exhibit a particular pattern of responses; this is especially so in the USTS because numerous consecutive questions

³⁴ *USTS*, *supra* note 5; *NTDS*, *supra* note 5; Rodriguez et al.; Jennifer L. Glick et al., *The Role of Discrimination in Care Postponement among Trans-Feminine Individuals in the US National Transgender Discrimination Survey*, 5 *LGBT Health* 3 171-179 (2018).

solicited respondents' experience of discrimination. Even the introduction to the survey (and the title of the NTDS) highlights the purpose of documenting discrimination, an approach that prudent social scientists tend to avoid, if possible, in order to avoid the risk of erroneously elevated estimates of what they are intending to study.

Another limitation is that the USTS relies entirely on the subjective impressions of its respondents. Respondents were asked, "Do you believe that any of the times that you were (insert form of discrimination) in the past year were because of your... (eight identification options)?"³⁵ Their subjective impressions may be accurate. They may be inaccurate. However, there is no objective standpoint. While the APA brief notes that "discrimination can also occur without an individual's knowledge, such as during the hiring process," subsequent analyses of USTS data admit that discrimination may also be misperceived by respondents as having been because of gender identity or expression rather than, say, disability, sexual orientation, or race.³⁶ Given these challenges, we believe that these two surveys struggle to convey valid portraits of average discrimination levels. A simple acknowledgement of the sampling strategy and potential bias in respondents, however,

³⁵ *USTS*, *supra* note 5.

³⁶ APA Br. 20; Rodriguez et al.

is a small consolation given the wide media coverage and attention they received.

The self-selected nature of the survey creates additional problems with understanding chronology and (inferred) causation. While the USTS estimates transgender unemployment at 20 percent, a rate four times that above the population estimate, it is not readily discernible how much of this is due to employment discrimination per se. Elevated rates of mental health impairment within the transgender population make it difficult to discern the causal order in accounting for employment difficulties. For example, 31 percent of respondents indicated that “because of a physical, mental, or emotional condition,” they have “serious difficulty concentrating, remembering, or making decisions.”³⁷ For identical reasons, 23 percent said they “have difficulty doing errands alone, such as visiting a doctor’s office or shopping.”³⁸ The “Scholars Who Study the Transgender Population” brief hints at the complications surrounding decisions to leave places of employment: “All too often, they (transgender people) are forced to leave jobs for which they are qualified, simply to avoid harassment or the need to repress who they are.”³⁹ While concern with discrimination against the transgender population is not unmerited,

³⁷ *USTS* 247.

³⁸ *Id.* 247.

³⁹ Scholars Br. 3.

its sources and etiology are difficult to discern. This poses challenges for legislative or judicial bodies seeking to shape discrimination law around gender identity.

Curiously, social scientists have even documented that persons identifying as transgender are discriminated against in the world of dating.⁴⁰ In an assessment of just under 1,000 participants in a study of relationship decision-making processes, over 97 percent of heterosexual men and women said they would not consider dating a person who identifies as transgender. The same was true of 89 percent of gay men and 71 percent of lesbian women. While this form of discrimination is commonly considered less significant than other forms, like employment or housing, it is illustrative in that it documents how the vast majority of Americans orient themselves in relation to others by biological sex, rather than gender identity. They do so not only in a romantic sense but in a mundane, everyday social sense. The social world, including the lives of the vast majority of gay and lesbian citizens, is oriented toward understanding “cisgender” men and women as natural and normal, rooted in a biological, material

⁴⁰ Karen L. Blair & Rhea Ashley Hoskin, *Transgender Exclusion from the World of Dating: Patterns of Acceptance and Rejection of Hypothetical Trans Dating Partners as a Function of Sexual and Gender Identity*, 36 *Journal of Social and Personal Relationships* 7 2074-2095 (2019).

reality which is the way the world has for millennia normatively navigated sex. This reality appears to be the conception that Stephens and supporting amici maintain must somehow be done away with in favor of a forcibly reconstructed world of gender fluidity.

Even public opinion is courted as “evidence.” The “Scholars who Study the Transgender Population” brief includes a section entitled, “Public Opinion Confirms that Title VII Should be Understood to Prohibit Discrimination Against Transgender People.”⁴¹ Public opinion by itself, however, is not a prudent basis for assessing legal rights or for discerning social scientific conclusions about persons who identify as transgender.

Finally, the APA brief maintains that the discrimination gender minorities experience is analogous to discrimination against women more generally. This is based on the logic that each faces stigma stemming from “the employees’ nonconformity with their employers’ perceptions about how a person of a given biological sex should appear and behave,” based on sex-role stereotypes.⁴² The analogy is limited, however: women have often been discriminated against due to their unique biological (and material) reality—reproduction. Indeed, the

⁴¹ Scholars Br. 31.

⁴² *Id.* 7.

material reality and importance of the male and female sexed body cannot be denied if scientific accuracy is to be preferred over ideological commitments, since “(s)ex differences occur at the molecular, cellular, physiological, and behavioral level, and are pervasive across the brain, lifespan, and context.”⁴³ Recognizing the obligation to study sex influences in all domains, in 2016 the National Institutes of Health (NIH) adopted a policy called “Sex as a Biological Variable” (SABV), which requires the incorporation of understanding differences between male and female in funded research projects.⁴⁴ It was because of longstanding discrimination in medical study and treatments—designed more for men than women—that the NIH pressed for this change.

While discrimination based on sex is regrettable and unlawful, discrimination or stigma based on “nonconformity of a person perceived to be of a given biological sex to society’s expectations of how people of that sex should look, behave, dress, speak, or otherwise express their gender

⁴³ Daphna Joel & Margaret M. McCarthy, *Incorporating Sex as a Biological Variable in Neuropsychiatric Research: Where Are We Now and Where Should We Be?*, 42 *Neuropsychopharmacology* 379-385 (2017) at 384.

⁴⁴ Janine A. Clayton, *Studying Both Sexes: A Guiding Principle for Biomedicine*, 30 *The FASEB Journal* 2, 519-524 (2015).

identity” is a far more complicated conceptual and analytic problem than Stephens’ supporting amici present it.⁴⁵ This case is not, as the Sixth Circuit asserted, about the termination of Stephens “because she refused to conform to the Funeral Home’s notion of her sex.”⁴⁶ Rather, this case is about Stephens’ novel definition of sex—not the Funeral Home’s. Stephens is seeking to fundamentally overhaul the definition and meaning of sex, held not just by Harris Funeral Homes, but in congruence with most of the globe’s population. This case is not about stereotypes, but is about how the longstanding, material reality of biology orients the world’s population toward each other—a far more entrenched reality which, as is discussed further below, is beyond the Court’s purview to address or alter.

IV. THE IDEOLOGICAL POLITICIZATION OF THE TRANSGENDER EXPERIENCE BIASES RESEARCH, UNDERMINING CONFIDENCE IN SOCIAL SCIENCE.

In 2000, University of North Carolina demographer J. Richard Udry created a firestorm among sociologists of gender when he documented how prenatal hormone levels in mothers subsequently predicted the “gendered” (in this case, traditionally feminine) behavior of their adult female

⁴⁵ APA Br. 17.

⁴⁶ Pet. App. 18a.

children, even after controlling for “socialization.” Biology, he concluded, “sets limits” on the social construction of gender as well as the possible effects of gender socialization.⁴⁷ While many of his colleagues in sociology were not amused, his experience offers some wisdom here, with a warning to those who would ignore biology:

Humans form their social structures around gender because males and females have different and biologically influenced behavioral predispositions. Gendered social structure is a universal accommodation to this biological fact. Societies demonstrate wide latitude in this accommodation—they can accentuate gender, minimize it, or leave it alone. If they ignore it, it doesn’t go away. If they depart too far from the underlying sex-dimorphism of biological predispositions, they will generate social malaise and social pressures to drift back toward closer alignment with biology. A social engineering program to de-gender society would require a Maoist approach: continuous renewal of

⁴⁷ J. Richard Udry, *Biological Limits of Gender Construction*, 65 *American Sociological Review* 443-457 (2000) 454.

revolutionary resolve and a tolerance for conflict.⁴⁸

Udry was prescient. Widespread and increasing social conflict surrounding biological sex and gender identity is exactly what we now have. A cultural revolution of sorts seems upon us. For example, schools in many states have increasingly become enlisted as part of the growing social engineering program to de-gender society, taking advantage of a built-in captive audience. However, the content is neither unbiased nor is it balanced. Biological facts, longstanding terminology, and historical realities are questioned, subverted, and attacked, undermining dissenting viewpoints of families and children by inculcating complex, confusing, and incoherent classroom instruction about sex and gender identity,⁴⁹ including “The Genderbread Person” and “The Gender Unicorn.”⁵⁰ Simultaneously, rather than improving over time, the social environment for the study of gender identity and the transgender experience has instead eroded as

⁴⁸ *Id.* 454.

⁴⁹ Deepa Bharath, *Parents Opposed to Comprehensive Sex Education Pull Children from Schools, Stage Rallies Across Southern California*, O.C. Register (May 17, 2019), <https://www.oregister.com/2019/05/17/parents-opposed-to-comprehensive-sex-education-pull-children-out-of-schools-stage-rallies-across-southern-california/>.

⁵⁰ <https://www.genderbread.org/resource/genderbread-person-v4-0> (Genderbread Person); <http://www.transstudent.org/gender/> (The Gender Unicorn).

it has found itself near the epicenter of a wider crisis in scientific confidence. The result is the politicization of research. What was meant to map and understand has turned instead to name (new terms and protocols) and shame (the cautious scholar). Ideology is undermining objectivity and unfettered research.

For instance, the World Professional Association for Transgender Health (WPATH), formed in 1979, has evolved from its beginnings as a group of professionals seeking to understand and assist those with gender dysphoria to acting as a professional organization that purports to offer “consensus” clinical guidelines while engaging in advocacy.⁵¹ WPATH’s treatment recommendations powerfully shape the recommendations of other professional organizations. The APA’s Guidelines, for example, complement WPATH’s recommendations and label any approach other than “affirming” to gender dysphoric youth as unethical.⁵²

⁵¹ Stephen B. Levine, *Ethical Concerns About Emerging Treatment Paradigms for Gender Dysphoria*, 44 *Journal of Sex & Marital Therapy* 1 29-44 (2018); Lieke J. J. Vrouenraets et al., *Early Medical Treatment of Children and Adolescents with Gender Dysphoria: An Empirical Ethical Study*, 57 *Journal of Adolescent Health* 4 367-373 (2015).

⁵² American Psychological Association, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 *American Psychologist* 9 832-864 (2015).

The American Medical Association is so confident of wide professional agreement that their brief was submitted “to inform the Court of the consensus among health care professionals regarding what it means to be transgender...”⁵³ But there is no consensus, as psychiatrist and longtime gender identity expert Stephen Levine explains:

(C)linical work in the gender identity arena, which used to be based on symptoms and social, vocational, and educational dysfunction, is now based on sociopolitical concepts. Cultural forces have provided a new narrative about the vital importance of having strict consonance between one’s sexed body and gender identity. A previous narrative recognized that all human beings were a subtle mosaic of masculine and feminine identifications.... Within about thirty years, body/gender incongruence has gone from being viewed as a rare psychiatric disorder, to a serious medical condition...to an increasingly common normal variation of gender identity development.... At the same time, the wish to change one’s “sex” (a reflection of the binary view of gender) is increasingly being replaced by

⁵³ AMA Br. 2.

the wish to personally define gender as one sees fit (the nonbinary view of gender).⁵⁴

A mere 10 years ago, scholars were being told by those who suffer from gender dysphoria and were seeking surgical solutions that they wanted more information.⁵⁵ But now, when the “consensus” answers are contested, the research can be suppressed, often via social media-fed antagonism. Scholars who question the new gender ideology “consensus” are targeted and marginalized, their reputations are impugned, and their academic positions are imperiled.⁵⁶

⁵⁴ Stephen B. Levine, *Informed Consent for Transgendered Patients*, 45 *Journal of Sex & Marital Therapy* 3 218-229 (2019) 219.

⁵⁵ Greta R. Bauer et al., “*I Don't Think This is Theoretical; This is Our Lives*”: *How Erasure Impacts Health Care for Transgender People*, 20 *Journal of the Association of Nurses in AIDS Care* 5 348-361 (2009).

⁵⁶ Consider the following account from the UK: "It seems important at this juncture to describe the process by which concerns about the growing uncritical acceptance of transgender theory and practice of transgenering children evolved. In early 2014, we began researching transgenderism. [...] To our surprise, our tentative steps towards progressive transcritical thought were responded to as injurious. Heather wrote a post for her University's blog Think Leicester on the social construction of gender and critiquing the celebration by Vanity Fair of the transitioning of Bruce Jenner to Caitlin Jenner as an act of Jenner's bravery in which 'she' had become a 'true' woman. (citation omitted) Formal complaints were made to the

The sensible approach as a social scientist is to listen to accounts, watch actions, ask questions, and write down what you see and hear. But this is precisely how Brown University's Lisa Littman found herself on the wrong end of a scholarly mob for her study on Rapid Onset Gender Dysphoria. The "re-review" of Littman's study, prompted by activists, changed

University of Leicester including the accusations that Heather was firstly, being hurtful to possible transgender students and staff and secondly, breaching the 2010 Equality Act. Although these were not upheld we learned a painful lesson that while in most other areas academic research and writing offers a space in which critical thinking can take place, and conflicting theories and opinions can be expressed and debated, on the topic of transgenderism debate is suppressed. We found on this occasion and many since, there is an incredibly high demand for vigilance, policing of speech, and a real risk of being silenced. In our experience, transgender activists and their supporters can very quickly falsely accuse transcritical commentators of being oppressive to transgender individuals and of not aspiring to equality." Heather Brunskell-Evans & Michele Moore, *The Fabrication of the 'Transgender Child,' in Transgender Children and Young People: Born in Your Own Body* 1-15 (Brunskell-Evans & Moore eds. 2018) at 3-4. Predictably, both Brunskell-Evans and Moore have faced further censure; both were accused of being 'transphobic.' Brunskell-Evans lost her position as a spokeswoman for the Women's Equality Party, and there have been calls for Moore to resign as editor-in-chief of the journal *Disability & Society*. See: Josiah Mortimer, *The Women's Equality Party Have Sacked a Feminist Academic over This Transgender Debate* (Feb. 21, 2018) <https://leftfootforward.org/2018/02/the-womens-equality-party-have-sacked-a-feminist-academic-over-this-transgender-debate/>; Heather Brunskell-Evans, *The Purge of Trans-Sceptical Academics* (June 26, 2019) <https://www.spiked-online.com/2019/06/26/the-purge-of-trans-sceptical-academics/>.

nothing, but contributed to a wide perception that her study was so deeply flawed as to merit additional scrutiny. Yet it is telling that studies conducted with identical methods are praised as unquestionable science by transactivists if the conclusions seem to support the desired transgender identity narrative.⁵⁷ Longtime sexuality and gender scholars such as Northwestern University's J. Michael Bailey and the *Archives of Sexual Behavior's* editor Kenneth Zucker have likewise endured extensive professional and personal attacks for their work on the transgender experience. Due to protests and petitions, Bailey's 2003 book *The Man Who Would Be Queen* went from being a Lambda Literary Foundation award finalist to being withdrawn from the competition in a matter of days. The harassment of Bailey did not stop there and extended to false accusations of impropriety and personal vilifications regarding his family life, including publicly naming and involving his children. Harvard's Steven Pinker, a well-known intellectual in psychology, clarified over a decade ago what is at stake here:

The intimidation directed at (Michael) Bailey will ensure that graduate students, post-docs, and other young researchers will not touch this

⁵⁷ For example: Kristina R. Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, 137 *Pediatrics* 3 e20153223 (2016).

topic with a ten-foot pole, starving the field of new talent. Only tenured professors who have decided to change fields—a tiny number—would take it on.⁵⁸

Zucker was head of a Toronto addiction and mental health clinic’s “Gender Identity Service” until he was fired in 2015 after an external review by two adolescent psychiatrists found his method out of step with current best practices—that is, the latest thinking—for transgender youth.⁵⁹ His crime? Too much caution, patience in treatment, and displaying concern for parents and family dynamics. (Zucker remains the editor-in-chief of the top sexology journal in the field.) Intimidation and intolerance of this nature discourages wider interest in this field, narrowing the pool of interested researchers to those who don’t rock the boat or who openly agree to politically weaponize their studies. Persons

⁵⁸ Alice D. Dreger, *The Controversy Surrounding the Man Who Would Be Queen: A Case History of the Politics of Science, Identity, and Sex in the Internet Age*, 37 *Archives of Sexual Behavior* 3 366-421 (2008) 413.

⁵⁹ Jesse Singal, *How the Fight Over Transgender Kids Got a Leading Sex Researcher Fired* (Feb. 7, 2016) <https://www.thecut.com/2016/02/fight-over-trans-kids-got-a-researcher-fired.html>. Regarding Zucker’s vindication, see: The Canadian Press, *CAMH Reaches Settlement with Former Head of Gender Identity Clinic* (October 7, 2018) <https://www.cbc.ca/news/canada/toronto/camh-settlement-former-head-gender-identity-clinic-1.4854015>.

struggling with gender dysphoria will be poorly served by this phenomenon.

Meanwhile, an entirely different set of scholars is seeking to create confusion rather than clarity on matters of sexuality and gender—and it is intentional. Resisting “heteronormativity,” or the assumption that heterosexuality and monogamous coupling remain predictable traits of human societies, is a new standard in the sociology of sexuality and gender, and it is now undermining the scientific method, long presumed to be immune from social trends. Sometimes these critiques complain that otherwise respected scholars, for example Littman, used “flawed methodologies,” a knee-jerk refrain employed to undermine legitimate studies in the absence of solid evidence of problems.⁶⁰ Others hold that “rigorous empirical data could inform the tactics of progressive social movements and change public and scholarly opinions.”⁶¹ Still others aim to “queer” social research methods based on the charge that longstanding ways of generating social science knowledge are “exclusionary” and that quantitative

⁶⁰ Arjee J. Restar, *Methodological Critique of Littman’s (2018) Parental-Respondents Accounts of “Rapid-Onset Gender Dysphoria,”* Archives of Sexual Behavior 1-6 (2019).

⁶¹ Kristen Schilt et al., *Introduction: Queer Work in a Straight Discipline, in Other, Please Specify: Queer Methods in Sociology* 1-34 (D’Lane R. Compton et al. eds., 2018) 2.

research rests on “heteronormative assumptions.”⁶² Classification and understanding are contrary to the goals of queer theory, in which “it is illogical to ‘count’ subjects once one has argued that a ‘countable subject’ does not exist.”⁶³ Each of these approaches is in service to the goal of ideological social change, not of finding truth.

One of the reasons why many of Stephens’ supporting amici included sections defining terms is because new words and a new vocabulary are often the building blocks of social change and cultural revolutions. Words are not simply illuminating but they are also empowering. Social scientists understand the challenges of measurement and data collection and can appreciate clarification of terms. However, we also readily discern how they can become vehicles of cultural change themselves by endorsing new and novel ways of speaking and thinking about matters of sex and gender identity, which are themselves subject to an ongoing struggle. Surveys, the root source of so much social science raw data, are not exempt from politicization and bias but are now a medium of the same. For example, the United States Transgender Survey’s instrument instructs its participants

⁶² *Id.* 5, 16; Jessica N. Fish & Stephen T. Russell, *Queering Methodologies to Understand Queer Families*, 67 *Family Relations* 12-25 (2018).

⁶³ Kath Browne & Catherine J. Nash, *Queer Methods and Methodologies: Intersecting Queer Theories and Social Science Research* (2010) 11.

that not everyone is comfortable with the word “transgender,” but for this survey, we must use one word to refer to all trans and non-binary identities. Because of this, we will use the word “trans” in this survey to refer to all trans and non-binary identities.⁶⁴

University of Virginia sociologist James Davison Hunter asserts that to classify something in the social world is to penetrate the imagination, to alter our frameworks of knowledge and discussion, and to shift the perception of everyday reality. It is why Hunter understands culture as the power of “legitimate naming.”⁶⁵ In the domains of gender and sexuality—fraught as they are with great moral valence—there is poignant and bitter struggle over words and terms and the politics of using them or avoiding them. This suggests we are not witnessing a simple quest for a better understanding of an emergent population. We are also seeing social drama and cultural change ideologically enabled via social science wed to activism.

Stephens’ supporting amici desire the creation of a “brave new world,” one which demands a new vocabulary and the complete overhaul of the old.

⁶⁴ *USTS*, *supra* note 5, at 35.

⁶⁵ James Davison Hunter, *To Change the World: The Irony, Tragedy, and Possibility of Christianity in the Late Modern World* (2010).

Words alone will not be enough to complete the degendering of American society. Professor Udry, who warned against underestimating the biological roots of sex differences, was agnostic about manipulating biological sex differences. “I am certainly willing to mess with Mother Nature,” he admitted.⁶⁶ But the professor’s warning of a “Maoist approach” suggests the process will not be without great struggle and conflict.

V. TITLE VII PROHIBITS “SEX” DISCRIMINATION WHICH MAY BE EVIDENCED BY SEX STEREOTYPING, NOT “GENDER IDENTITY” DISCRIMINATION EVIDENCED BY GENDER-IDENTITY STEREOTYPING.

“Sex” has historically been defined and continues to be scientifically defined as an objective biological reality identified based on an organism’s organization and function with respect to sexual reproduction.⁶⁷ As there are two human reproductive systems, there are two sexes—male and female. The recent development and history of the newer words and phrases, including “gender identity,” “gender expression,” and “transgender” evidences that they do

⁶⁶ Udry, *supra* note 46, at 453.

⁶⁷ Sex is “[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female.” BLACK’S LAW DICTIONARY 1375 (6th ed. 1990).

not culturally or socially have the same meaning as “sex.” Indeed, each of these terms were formulated to contrast a person’s subjective sexual identity in comparison to one’s actual biological makeup or “sex.”

Title VII prohibits employers from “discriminat[ing] against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). Congress’s intent was clear: “Any other criterion or qualification for employment [beyond race, color, religion, sex and national origin] is not affected by this title.” 110 Cong.Rec. 7213 (1964). As this Court acknowledged, Title VII “does not purport to limit other characteristics that employers *may* take into account in making employment decisions.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 237 (1989).

The “proper role of the judiciary” is “to apply, not amend, the work of the People’s representatives.” *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017). Yet, the Sixth Circuit has here usurped the U.S. Congress’s jurisdiction by judicially amending the word “sex” in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), to include “gender identity,” which has a wholly different meaning. Certainly, Congress could have acted to amend Title VII to expressly include “gender identity” as a protected category or class for purposes of protecting individuals from actual or perceived

workplace discrimination, but it has not done so. In fact, whenever Congress has recently attempted to enact or amend legislation regarding people identifying as transgender, it has included “gender identity” as a separate and distinct category from “sex,” listing it alongside “sex” in at least two bills.⁶⁸ This same pattern of clear and precise differentiation has also been followed by state legislatures, as Petitioner points out.⁶⁹ Furthermore, because of the principle of the separation of powers so deeply embedded in the U.S. Constitution⁷⁰, neither the U.S. Court of Appeals for the Sixth Circuit nor this Court have the authority to judicially amend Title VII to include “gender identity,” even if individual justices strongly believe that people identifying as transgender need and deserve such protection. That is the sole authority of the U.S. Congress.

In *Price Waterhouse*, this Court did not read “gender identity” or transgender status into the definition of “sex.” Indeed, Title VII only protects the few above listed characteristics from employment discrimination. Whereas “sex” is expressly protected, transgender status or “gender identity” is not. The U.S. Court of Appeals for the Sixth Circuit greatly exceeded its jurisdiction by announcing, without citing any persuasive authority or precedent, except

⁶⁸ See 34 U.S.C. 12291(b)(13)(A) (Violence Against Women Reauthorization Act 2013); 18 U.S.C. § 249 (a)(2) (Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act 2009)

⁶⁹ Petitioner’s Br., fn. 10.

⁷⁰ U.S. Const. art. I, § 1

its own, that “Discrimination on the basis of transgender status and transitioning status is necessarily discrimination based on sex...” Pet. App. 14a-15a. If Congress had intended to include gender identity protections within the scope of Title VII, it could have specifically included it, but Congress did no such thing.

The Sixth Circuit further compounded its error by finding that “Stephens was fired because of her failure to conform to sex stereotypes.” Pet. App. 14a. But the plurality in *Price Waterhouse* did not condemn all possible sex or gender stereotypes, but only the “disparate treatment of men and women resulting from sex-stereotypes.” 490 U.S. at 251. In its effort to, in essence, retroactively read “gender identity” stereotypes into Title VII’s protection of “sex,” the Sixth Circuit clearly misinterpreted *Price Waterhouse*, employing clever verbal gymnastics and creative legal reasoning. Such a transparent misreading of the statute and legal precedent is deeply flawed, fundamentally dishonest, and improperly unmoors Title VII from its more limited protective purposes, restricted in this context to “sex” discrimination.

CONCLUSION

There is no empirical basis for declaring “gender identity” or transgender status as a protected class. Indeed, the social science is so new and so politicized that even understanding the meaning and scope of gender identity and the transgender

experience is still in progress. This body of research is profoundly inconclusive in spite of premature claims of consensus.

Contemporary gender scholars are moving away from claiming that gender identity is immutable and toward the assertion that it is fluid. And yet somehow an immaterial, subjective “gender identity” has been made—by force of effort and the tight policing of scholarly dissent—more “real” than the material, sexed body. If this Court rules for Stephens, “gender identity,” a new notion to many, will be legally poised to override the rights of others who would be forced to cooperate or face discrimination lawsuits. Therefore, the Court should reverse the Sixth Circuit’s ruling that improperly reads “gender identity” into Title VII protections of “sex.”

Respectfully submitted,

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