

No. 18-107

IN THE
Supreme Court of the United States

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

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
and AIMEE STEPHENS,
Respondents.

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

**BRIEF FOR TRANSGENDER LEGAL DEFENSE &
EDUCATION FUND AND 33 ORGANIZATIONS
SERVING TRANSGENDER INDIVIDUALS AS
AMICI CURIAE IN SUPPORT OF
RESPONDENT AIMEE STEPHENS**

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INTEREST OF *AMICI*¹

Amici in this case are 34 non-profit organizations and law firms who advocate on behalf of transgender individuals across this country. These organizations are committed to ensuring that transgender individuals receive the same rights and protections under the law as cisgender individuals, including the right not to be discriminated against because of their sex under Title VII.² *Amici* wish to ensure that in making critical decisions affecting the lives of transgender people, this Court is provided with an accurate understanding of what it means to be transgender, which, *amici* submit, supports the conclusion that the term “sex” under Title VII includes a person’s immutable gender identity.

¹ Pursuant to Supreme Court Rule 37.3, *amici curiae* certify that counsel of record of all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amici* also certify that no counsel for either party authored this brief in whole or in part and that no person or entity, other than *amici* or their counsel, has made a monetary contribution to its preparation or submission. A complete list of *amici* is included in the Appendix.

² “The term ‘transgender’ refers to a person whose gender identity does not align with the sex that person was determined to have at birth.” *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018), *cert. denied*, No. 18-658, 2019 WL 2257330 (May 28, 2019). Cisgender is a term for people “who identify as being the same sex they were determined to have at birth.” *Id.* at 521.

SUMMARY OF ARGUMENT

This Court should decline Petitioner’s invitation to write language into Title VII that would arbitrarily carve out 1.55 million people from that statute’s protections against sex-based employment discrimination simply because they are transgender. Accordingly, *amici* respectfully submit that the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed for the reasons set forth in the Brief for Respondent Aimee Stephens. Petitioner R.G. & G.R. Harris Funeral Homes Inc. (“Petitioner” or “Harris Homes”) violated Title VII’s prohibition against sex discrimination when it fired Aimee Stephens for living openly as a woman.

Even were the Court to accept Harris Homes’ narrow definition of sex—which finds no support in Title VII—to mean only “anatomical and physiological factors, particularly those involved in reproduction,” Pet. 6, Harris Homes terminated Ms. Stephens’ employment “because of sex.”³ 42 U.S.C. § 2000e-2(a)(1). It is Harris Homes’ acknowledged discomfort with Ms. Stephens’ genitalia and physiology, and its resulting inability to accept her working openly as a woman, that led it to fire her. Plainly, but for Ms. Stephens’ sex, even under Harris Homes’ definition of “sex,” her employment would not have been terminated.

³ *Amici* use “because of sex” rather than “because of . . . sex” when quoting 42 U.S.C. § 2000e-2(a)(1).

While this Court need go no further to affirm the Sixth Circuit's decision, *amici* respectfully submit that the Court, if it chooses to define sex with greater precision, should be informed by the experiences of transgender individuals, the consensus of the medical community (including with regard to the "anatomical and physiological factors" that Harris Homes argues are controlling), and the growing consensus of lower courts regarding the meaning of the term "sex." Ms. Stephens' experience as a woman who is transgender, as with all transgender individuals, is a physical and anatomical reality. It is not a choice, it is not a fiction, and it has no bearing on her ability to work. Decades of scientific research confirm that all people have an internal understanding of their sex that is immutable, innate, and the only reliable indicator of that person's sex. Nothing in the text of Title VII or contemporaneous dictionaries limits the definition of "sex" solely to a person's sex assigned at birth or chromosomes and genitalia.

Ms. Stephens' skills and experience remained consistent during the six years she was employed by Harris Homes. The only thing that changed was that Ms. Stephens would work at Harris Homes openly as a woman. Harris Homes was uncomfortable with this because Ms. Stephens was labeled male at birth. Terminating her employment on this basis violates Title VII. Holding otherwise would deny 1.55 million transgender people in the United States statutorily-guaranteed protections against discrimination "because of sex."

ARGUMENT

This is a straightforward case of sex discrimination. Harris Homes was happy to employ Aimee Stephens as a man, but not as a woman. Title VII prohibits employers from taking any adverse employment actions against an individual “because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). The test for whether an employment decision was made “because of sex” is whether the employee would have been fired had sex not been a factor. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989). Stated differently, an employer violates Title VII if consideration of a person’s “sex” was a but-for cause of an adverse employment decision. *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978). An individual’s sex must be “irrelevant to employment decisions.” *Price Waterhouse*, 490 U.S. at 240.

Amici agree with the three reasons set forth in Respondent’s brief why Ms. Stephens’ sex was a but-for cause of her termination. Ms. Stephens would not have been fired but for the fact that (i) she was labeled male at birth; (ii) she experiences herself as a woman (because she is a woman) and Harris Homes believes she is a man; and (iii) in the view of Harris Homes, she “changed” her sex. Resp. Br. 24-26. Ruling on any of these bases does not require this Court to decide further the precise contours of what “sex” means under Title VII; each stands alone as a violation of Title VII even under the narrow interpretation of “sex” proposed by Harris Homes. However, if this Court does choose to define the term

“sex,” that term, properly defined, would further support the conclusion that Harris Homes’ firing of Ms. Stephens ran afoul of Title VII because a person’s sex encompasses more than anatomy and physiology related to reproduction.

I. EVEN ACCEPTING HARRIS HOMES’ VIEW OF SEX, HARRIS HOMES FIRED MS. STEPHENS BECAUSE OF SEX.

In its Petition, Harris Homes tries to draw a distinction between biological and non-biological sex characteristics, seeking to limit the meaning of “sex” to what it perceives are “biological” sex characteristics. *See* Pet. 2, 6 (defining “sex” as “a person’s status as male or female as objectively determined by anatomical and physiological factors, particularly those involved in reproduction”). As explained below, Harris Homes’ view of the biological characteristics of sex is contrary to the consensus of the medical community and thus should be rejected. But even under Harris Homes’ premise that the definition of “sex” under Title VII is limited to anatomy and physiology, adverse employment decisions made because of a person’s anatomy and physiology is discrimination because of sex. *See, e.g., Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1265-66 (11th Cir. 2017) (Pryor, J., concurring) (noting that “discrimination against a transsexual because she fails to conform to the employer’s view that a birth-assigned male should have male anatomy” constitutes sex discrimination), *cert. denied*, 138 S. Ct. 557 (2017). Accordingly, firing

Ms. Stephens in significant part because of her genitalia and physiology is sex discrimination.⁴

As the Second Circuit has noted, this Court’s decision in *Manhart*, 435 U.S. 702, makes clear that an employer cannot evade Title VII by purporting to rely on “a trait other than sex [that] is, in fact, a proxy for (or a function of) sex.” *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 116 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019). Clearly, under even the most narrow interpretation of “sex,” reproductive organs and sex-linked physical characteristics are a “function” of sex. Thus, it is no surprise that several courts have held that the decision to fire an employee in reaction to their genitalia or external physiology constitutes sex discrimination.

In *Glenn v. Brumby*, for example, the Eleventh Circuit concluded that an employer discriminated against a transgender employee because of its discomfort with the transgender employee’s genitalia. In *Glenn*, the plaintiff’s employer stated that it was “unsettling to think of someone dressed in women’s clothing with male sexual organs inside that clothing,” that a male in women’s clothing was “unnatural,” and that plaintiff was “a man dressed as a woman and made up as a woman.” 663 F.3d 1312, 1314 (11th Cir. 2011); *see also Roberts v. Clark*

⁴ Ms. Stephens is only required to show that her sex “was a factor in the employment decision *at the moment it was made.*” *Price Waterhouse*, 490 U.S. at 241 (emphasis in original). She is not required to show that it was the only factor. *See id.* (“[T]he words ‘because of’ do not mean ‘solely because of’”) (emphasis in original).

Cty. Sch. Dist., 215 F. Supp. 3d 1001, 1015 (D. Nev. 2016) (holding that discrimination based on a person's genitalia is sex discrimination). Similarly, in *Schroer v. Billington*, 577 F. Supp. 2d 293, 297 (D.D.C. 2008), the employer rescinded a job offer where a staff member believed that in photos, Schroer looked like "a man dressed in women's clothing;" that is, the employer was uncomfortable with Schroer having stereotypically male physiology.

Moreover, outside of the context of a bona fide occupational qualification, an employer cannot express a preference as to whether its employee is male or female. This not only includes a preference as to whether that employee has typically male genitalia or typically female genitalia, but also precludes an employer from expressing a preference as to whether an employee has other sex-linked characteristics, such as having breasts versus not having breasts, or having a high-pitched voice versus a low-pitched voice. Under Title VII, employers may not fire employees based on characteristics "linked" to sex. *Manhart*, 435 U.S. at 712-13.

It is apparent from the record that the owner of Harris Homes fired Ms. Stephens, at least in significant part, due to his discomfort with Ms. Stephens' genitalia and external physiological characteristics. Mr. Rost described Ms. Stephens as a "biological male," J.A. 131, and indicated that there was "no way that . . . the person [I] knew . . . would be able to present in such a way that it would

not be obvious that it was [a man].”⁵ J.A. 31. Mr. Rost was uncomfortable with Ms. Stephens using the name Aimee—“because he’s a man.” J.A. 72. According to Mr. Rost, he has “yet to see a man dressed up as a woman that [he] didn’t know was not a man dressed up as a woman.” J.A. 31.

It was only after Ms. Stephens wrote a letter to Mr. Rost indicating that she intended to undergo surgery and would begin to live and work openly as a woman, Resp. App. 1a, that, in direct response to that letter, Harris Homes terminated Ms. Stephens. The only explanation given to Ms. Stephens was that “management did not believe the public would be accepting of [her] transition.” Resp. App. 5a. In his deposition, Mr. Rost reaffirmed that he fired Ms. Stephens because she “was no longer going to represent himself as a man” and “he wanted to dress as a woman.” J.A. 54. Like the employer in *Glenn*, Mr. Rost did not want to “think of someone dressed in women’s clothing with male sexual organs”—or what should be male sexual organs based on the sex assigned at birth—“inside that clothing.” *Glenn*, 663 F.3d at 1314.

Mr. Rost additionally took issue with Ms. Stephens’ physical appearance. While men and women may typically have distinct secondary sex characteristics (i.e., they generally have distinct

⁵ Mr. Rost was likely not aware of the effects of medical transition that do change physical secondary sex characteristics, but even if Ms. Stephens never undertook medical transition and remained visibly transgender, firing someone due to their sex-specific physical features is barred by Title VII.

external physiology),⁶ firing a transgender woman because her jawline is deemed “too square” or her hips “too narrow” is equally prohibited under Title VII as would firing a cisgender woman because she has too much hair on her upper lip. Title VII prohibits discrimination because of an individual’s sex, which includes sex-linked traits that may be atypical for their sex. Transgender people may not be carved out of this basic protection simply because the divergence of their sex-linked traits occurs with more frequency than is typical for cisgender people.

Ms. Stephens was the same person the day before she informed Harris Homes that she was a woman as she was the day after. Even if Harris Homes could somehow prove that Ms. Stephens really were a man, that would not make its actions legal. To the contrary, it would only serve to highlight that Harris Homes terminated her based on how it perceived her sex. Harris Homes knew that Ms. Stephens was going to take concrete steps to express herself as a woman, including using a typically female name, using typically female pronouns, and wearing typically female clothing. It knew that she had

⁶ See, e.g., L.J. Gooren & E.J. Giltay, *Men and Women, So Different, So Similar: Observations From Cross-Sex Hormone Treatment of Transsexual Subjects*, 46 *Andrologia* 570, 571 (2013). These differences can be seen in, for example, breasts, size of bone structures of hands and feet, facial hair, fat distribution, muscle mass, height, body hair, voice, and facial shape. See *id.*; see also Masami K. Yamaguchi et al., *Judgment of Gender Through Facial Parts*, 24 *Perception* 563, 563 (1994); Heather A. Wild et al., *Recognition and Sex Categorization of Adults’ and Children’s Faces: Examining Performance in the Absence of Sex-Stereotyped Cues*, 77 *J. Experimental Child Psychol.* 269, 270-71 (2000).

already begun female hormone therapy and would soon undergo surgery on her reproductive organs. And this, coupled with the fact that she was labeled male at birth, is why Harris Homes fired Ms. Stephens, which is unquestionably discrimination because of sex.

Finally, Harris Homes cannot escape liability even under its own misconception of sex by reference to its dress code policy. Ms. Stephens was willing to comply with the women's dress code; this, however, would not satisfy Harris Homes because she was born with male genitalia. And it is clear from the record that no matter what Ms. Stephens had worn, Mr. Rost would have fired her. Had she complied by wearing a suit, but also wore jewelry, Harris Homes would have fired her. *See* J.A. 31. Had she worn entirely masculine attire, but changed her name to Aimee, Harris Homes would have fired her. *See* J.A. 72. Harris Homes fired Ms. Stephens not because of the dress code (or, at least not solely because of the dress code). Rather, it fired her because Ms. Stephens says she is a woman but was born with typically male genitalia and, at least in Mr. Rost's view, had typically male physiology. As in all cases of sex discrimination, Ms. Stephens was fired because of the body with which she was born.

II. THE TERM "SEX" EMBRACES MORE THAN JUST ANATOMY AND PHYSIOLOGY RELATED TO REPRODUCTION

As shown above, even under Harris Homes' narrow definition of "sex," it engaged in sex

discrimination. Although the Court need go no further, in fact, Harris Homes' definition of sex is inconsistent with the reality of what it means to be transgender, as long recognized and accepted by the medical community and numerous courts.

There is a scientific consensus that sex is not solely determined by chromosomes and reproductive organs. Numerous anatomical features—including aspects of the brain—also determine a person's sex. The attributes that make up a person's sex include:

1. Genetic or chromosomal sex (i.e., the presence of an XX or XY genotype);
2. Gonadal sex (i.e., the presence of ovarian or testicular tissue);
3. Internal morphologic sex (i.e., the presence of seminal vesicles, a prostate, a vagina, a uterus, or fallopian tubes);
4. External morphologic sex (i.e., genitalia);
5. Hormonal sex (i.e., levels of testosterone, estrogens, and progesterone);
6. Phenotypic sex (i.e., secondary sexual features such as facial hair or breasts);
7. Assigned sex and gender of rearing; and

8. Psychosexual identity, sexual identity, or gender identity (i.e., brain gender).⁷

Harris Homes bases its view of sex on some of these factors—chromosomes⁸ and reproductive organs at birth—but arbitrarily excludes others, including, most importantly, a person’s gender identity. In doing so, Harris Homes advances a misconception of sex that is contrary to the scientific consensus, as recognized by numerous lower courts.⁹

⁷ See, e.g., Julie A. Greenberg & Marybeth Herald, *You Can’t Take it With You: Constitutional Consequences of Interstate Gender Identity Rulings*, 80 Wash. L. Rev. 819, 825-26 (2005) (discussing eight factors that contribute to a person’s sex, including gender identity); Dru M. Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights*, 39 Vt. L. Rev. 943, 951, 951 n.36 (2015). Harris Homes’ contrary definition of “sex” does not rely on any medical, academic, or scientific literature or studies.

⁸ Chromosomes are not a reliable basis for determining a person’s sex. Some people are born with XXX, XYY, or XXY pairing, rather than the typical XX and XY pairings. *Gender and Genetics*, World Health Org., <https://www.who.int/genomics/gender/en/index1.html> (last visited July 2, 2019). Additionally, some men are born with XX pairings, and some women are born with XY pairings. *Id.* “Clearly, there are not only females who are XX and males who are XY, but rather, there is a range of chromosome complements, hormone balances, and phenotypic variations that determine sex.” *Id.*

⁹ See, e.g., *Schroer v. Billington*, 424 F. Supp. 2d 203, 211-13 (D.D.C. 2006) (scientific observation confirms “sex is not a cut-and-dried matter of chromosomes” but rather consists of “different components of biological sexuality”) (citation omitted); *In re Heilig*, 816 A.2d 68, 73 (Md. 2003) (gender is determined by seven factors, including “personal sexual

Transgender persons know themselves to be a sex different from that which they were labeled at birth. That intuitive self-knowledge, or gender identity, is best understood as a biologically-determined roadmap of the body—a “hard-wired, neural basis for an individual’s gender-specific body image down to the precise details of external sexual anatomy.”¹⁰ Everyone—transgender or not—is born with an internal sense of their sex, but in most cases that internal sense matches up with other parts of their anatomy.¹¹ A thought experiment helps to

identity”); *Maffei v. Kolaeton Indus., Inc.*, 164 Misc. 2d 547, 551-52 (Sup. Ct. N.Y. Cty. 1995) (explaining that at least seven variables . . . interact to determine the ultimate sex of an individual,” including gender identity); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1136 (D. Idaho 2018) (“There is scientific consensus that biological sex is determined by numerous elements”).

¹⁰ See V.S. Ramachandran & Paul D. McGeoch, *Phantom Penises in Transsexuals: Evidence of an Innate Gender-Specific Body Image in the Brain*, 15 J. Consciousness Stud. 5, 10 (2008); Murat Altinay & Amit Anand, *Neuroimaging Gender Dysphoria: A Novel Psychobiological Model*, *Brain Imaging & Behav.*, May, 2019, at 12 (connecting the “body image network” of the brain to “brain gender”). In light of this, in 2018, the WHO removed “gender incongruence” from the mental disorder chapter and described it in the sexual health chapter as a “marked and persistent incongruence between an individual’s experienced gender and the assigned sex.” *Gender Incongruence of Adolescence or Adulthood*, ICD-11 for Mortality and Morbidity Statistics, World Health Org., <https://icd.who.int/browse11/l-m/en#/http://id.who.int/icd/entity/90875286> (last visited July 2, 2019).

¹¹ *Boydén v. Conlin*, 341 F. Supp. 3d 979, 996-97 (W.D. Wis. 2018) (“[A]ll individuals, whether transgender or cisgender, have their own understanding of what it means to be a woman or a man, and the degree to which one’s physical, sexual

illustrate this point: Suppose you were asked how much money someone would have to pay you to socially, legally, and medically transition—including genital reassignment surgery—and live as the other sex? For most people, there is no amount of money that one could pay them to do so, and if asked why, people would respond simply that it would just “feel” wrong. If they were pressed to elaborate further, most people would say they just “know” what sex they are. That “feeling” and that “knowing” is the internal sense of one’s sex that resides in the brain.

Since the 1950s, the medical community has recognized gender identity—one’s internal sense of sex—as one of the many biological components of sex.¹² Legal scholars writing at the time of Title VII’s enactment brought attention to this medical understanding.¹³ Medical science, moreover, has

characteristics need to align with their identity.”); *see also* Dru M. Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights*, 39 Vt. L. Rev. 943, 951-52 (2015).

¹² *See, e.g.*, Ira B. Pauly, *Male Psychosexual Inversion: Transsexualism*, 13 Archives Gen. Psychiatry 172, 179 (1965) (citing medical studies and literature from the 1950s and 60s) (“[T]here is some evidence to suggest that biological factors, unproven in man, are prerequisite in setting the stage for the operation of early psychosocial determinants in the establishment of gender role.”).

¹³ Karl M. Bowman & Bernice Engle, *Sex Offenses: The Medical and Legal Implications of Sex Variations*, 25 L. & Contemp. Probs. 292, 303 (1960) (noting that among the many variables that affect sex determination, the “essential criterion” is not the somatic sex but “the strength of [the individual’s] identification with one sex or the other”) (citation

long recognized that an individual’s gender identity is fixed at a young age and is immutable,¹⁴ something also recognized by lower courts.¹⁵

omitted); John P. Holloway, *Transsexuals—Their Legal Sex*, 40 U. Colo. L. Rev. 282, 282 (1968) (citing contemporary medical literature to include among the “six recognized ways to medically identify a person’s sex . . . gender identity or psychosexual identity” and recognizing “gender identity[] has been described . . . as probably existing in the brain.”); David William Meyers, *Problems of Sex Determination and Alteration*, 36 *Medico-Legal J.* 174, 176 (1968) (listing “sex role” as among the eight “recognized criteria of sex”).

¹⁴ See, e.g., Christian Hamburger et al., *Transvestism: Hormonal, Psychiatric, and Surgical Treatment*, 152 *JAMA* 391, 392-93 (1953) (noting that transgender feelings, referred to then as “transvestism,” generally arise in early childhood and attempts to change a transgender person’s gender identity are futile); Harry Benjamin, *Transsexualism and Transvestism as Psycho-Somatic and Somato-Psychic Syndromes*, 8 *Am. J. Psychotherapy* 219, 228 (1954) (“[P]sychotherapy for the purpose of curing the condition is a waste of time.”); Harry Benjamin, *Clinical Aspects of Transsexualism in the Male and Female*, 18 *Am. J. Psychotherapy* 458, 458 (1964) (characterizing variations in sex experienced by transgender people as “an intrinsic part of nature”); Ira B. Pauly, *Male Psychosexual Inversion: Transsexualism*, 13 *Archives Gen. Psychiatry* 172, 179 (1965) (“Core gender identity is established early and is difficult, if not impossible, to reverse.”).

¹⁵ See, e.g., *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (being transgender is “immutable”); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139-140 (S.D.N.Y. 2015) (same); *Flack v. Wis. Dep’t of Health Servs.*, 328 F. Supp. 3d 931, 947 n.20, 953, 953 n.29 (W.D. Wis. 2018) (“Gender identity is innate and generally considered an immutable characteristic.”); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 277 n.12 (W.D. Pa. 2017) (“[E]xternal sex organs are one (but by no means the only

Harris Homes erroneously and artificially tries to distinguish gender identity from sex, asserting that the exact term “gender identity” came into use in 1963. Pet. 6-7. In reality, researchers were simply adopting “gender identity” as a uniform term for the well-known concept that had previously gone by several names.

In 1963, Robert Stoller and Ralph Greenson, clinical professors of psychiatry at UCLA Medical School, introduced the term “gender identity” at an international psychiatry conference in Europe. Greenson described it as “one’s sense of being a member of a particular sex; it is expressed clinically in the awareness of being a man or a male in distinction to being a woman or a female.” Ralph R. Greenson, *On Homosexuality and Gender Identity*, 45 Int’l J. Psychoanalysis, 217, 217 (1964). Stoller noted that they were not defining a new concept, but instead adopting a single phrase rather than “various other terms which have been employed in this regard, such as the term ‘sexual identity,’” noting the “advantage of the phrase ‘gender identity’ lies in the fact that it clearly refers to one’s self-images as regards belonging to a specific sex.” Robert J. Stoller, *A Contribution to the Study of Gender Identity*, 45 Int’l J. Psychoanalysis 220, 220 (1964). Stoller explained that this internal sense of sex was produced from “a biological force, which, though hidden from conscious and preconscious

or most accurate) indicia of a person’s sex and gender. . . . [B]eing transgender is not a ‘preference.’ . . . [B]eing transgender has a medically-recognized biological basis . . . it is an innate and non-alterable status.”).

awareness, nonetheless seems to provide some of the drive energy for gender identity.” *Id.*

With advances in brain imaging, today’s researchers have further substantiated initial medical findings of an anatomical basis for gender identity, and have confirmed that it resides in the brain.¹⁶ MRI scans of the brains of transgender people depict patterns associated with their affirmed sex rather than sex assigned at birth, even before any hormonal treatment.¹⁷ Researchers explain the phenomenon by noting that “[b]rain development can be separate from the genitalia, leading to the development of brain gender—[the] brain’s gender identity-specific architecture/organization.”¹⁸ Given this clear medical evidence and consensus, lower

¹⁶ See Aruna Saraswat et al., *Evidence Supporting the Biologic Nature of Gender Identity*, 21 *Endocrine Prac.* 199, 199-202 (2015) (surveying data in support of a “fixed, biologic basis for gender identity”); Altinay & Anand *supra* note 10 (reviewing structural and functional neuroimaging studies as well as the effects of sex hormones on the brain).

¹⁷ See Elyse Pine-Twaddle, *Medical Management Updates for Gender Minority Youth and Difficult Cases*, 29 *Adolescent Med.* 97, 98 (2018) (compiling relevant literature on a biological basis for gender identity); see also Aruna Saraswat et al., *Evidence Supporting the Biologic Nature of Gender Identity*, 21 *Endocrine Prac.* 199, 199-202 (2015) (surveying data in support of a “fixed, biologic basis for gender identity”).

¹⁸ Murat Altinay & Amit Anand, *Neuroimaging Gender Dysphoria: A Novel Psychobiological Model*, *Brain Imaging & Behav.*, May, 2019, at 12.

courts have recognized that sex is not limited to genitalia at birth.¹⁹

It is also largely because of this medical consensus that most states have adopted policies allowing people to update the sex designation on driver licenses and birth certificates based on a medical or mental health provider's attestation of that individual's sex.²⁰ Neither hormone therapy nor surgery are required. At the federal level, people can correct the sex on their passports, immigration documents, Social Security cards, and federal employee records based on the same standard.²¹

Indeed, the American Medical Association ("AMA") supports the elimination of any government requirement that a transgender individual undergo

¹⁹ See, e.g., *Schroer v. Billington*, 424 F. Supp. 2d 203, 212-213 (D.D.C. 2006) (recognizing "real variations in how the different components of biological sexuality – chromosomal, gonadal, hormonal, and neurological – interact with each other, and in turn, with social, psychological, and legal conceptions of gender"); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No.1 Bd. of Educ.*, 858 F.3d 1034, 1053 (7th Cir. 2017) (acknowledging that in some cases, "it is clear that the marker on the birth certificate would not adequately account for or reflect one's biological sex, which would have to be determined by considering more than what was listed on the paper").

²⁰ See *ID Please!: Quick Guide for Changing Federal Identity Documents to Match Your Gender Identity*, Transgender Law Center, <https://transgenderlawcenter.org/wp-content/uploads/2016/11/id-please-quick-guide-to-changing-federal-documents.pdf> (last updated Nov. 2016).

²¹ See *FAQ About Identity Documents*, Lambda Legal, <https://www.lambdalegal.org/know-your-rights/article/trans-identity-document-faq> (last visited July 2, 2019).

surgery in order to amend their birth certificate,²² and the World Professional Association for Transgender Health (“WPATH”) similarly rejects requirements for surgery or other medical treatments in order to obtain accurate identity documents.²³

Given this medically accepted scientific definition of “sex,” it is even clearer that Harris Homes violated Title VII. Harris Homes insists that a person cannot change their sex. *Amici* agree. Aimee Stephens has always been a woman. She did not “choose” to become a different sex; she only sought to live openly as the sex she knows herself to be.

To be sure, many transgender people who, like Ms. Stephens, experience gender dysphoria—the feeling of disconnect or discomfort between the body they were born with and the body they expect to see—seek to socially transition (by changing their name, dress, and pronouns) and to physically transition (by changing their reproductive organs,

²² *Conforming Birth Certificate Policies to Current Medical Standards for Transgender Patients H-65.967*, AMA, <https://policysearch.ama-assn.org/policyfinder/detail/transgender?uri=%2FAMADoc%2FHOD.xml-0-5096.xml> (last updated 2014); *Changing Birth Certificate Sex Designations: State-by-State Guidelines*, Lambda Legal, <https://www.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations> (last updated Sept. 17, 2018).

²³ WPATH, *Identity Recognition Statement* (Nov. 15, 2017), <https://www.wpath.org/media/cms/Documents/Web%20Transfer/Policies/WPATH%20Identity%20Recognition%20Statement%2011.15.17.pdf>.

chest, and facial hair) to alleviate that disconnect or discomfort. But by undergoing surgery or hormone treatment, transgender people do not change their sex. Physical transitioning is therapeutic; however, throughout the process, the transgender person maintains the same gender identity. That is, they maintain the same “sex,” which is innate and immutable based on the factors described above.

In an effort to avoid the accepted medical understanding of “sex” based on extensive scientific study, Harris Homes instead relies on cherry-picked dictionary definitions for its claim that the ordinary meaning of “sex” at the time of Title VII’s enactment was limited only to a person’s status as male or female as determined solely by reproductive organs and chromosomes at birth. The dictionary definitions cited by Harris Homes further underscore that the common understanding of “sex” was not as limited as Harris Homes suggests. As an initial matter, in its Petition, Harris Homes cites only two dictionary definitions of sex, one of which is from 2011. *See* Pet. 6 n.1 (quoting *The American Heritage Dictionary 1605* (5th ed. 2011)). Thus, Harris Homes effectively concedes that a contemporary understanding of sex is relevant to this Court’s interpretation of the term.

More importantly, Harris Homes’ recent definition does not even support the conclusion it advocates. Harris Homes ignores that one of the definitions set forth in the 2011 edition of the *American Heritage Dictionary* upon which it relies defines “sex” as “[o]ne’s identity as either female or male,” *i.e.*, a person’s gender identity. *See Sex*, *The*

American Heritage Dictionary 1605 (5th ed. 2011). The American Heritage Dictionary also explicitly *rejects* Harris Homes’ narrow definition of “sex” in a usage note. *See Sex*, The American Heritage Dictionary, <https://ahdictionary.com/word/search.html?q=sex> (last visited July 2, 2019) (referring readers to a usage note at “gender”). The dictionary states:

Some people maintain that the word *sex* should be reserved for reference to the biological aspects of being male or female or to sexual activity, and that the word *gender* should be used only to refer to sociocultural roles. . . . In some situations this distinction avoids ambiguity, as in *gender research*, which is clear in a way that *sex research* is not. The distinction can be problematic, however. Linguistically, there isn’t any real difference between *gender bias* and *sex bias*, and it may seem contrived to insist that *sex* is incorrect in this instance.

Gender, The American Heritage Dictionary, <https://ahdictionary.com/word/search.html?id=G5077400> (last visited July 2, 2019) (emphasis in original).

In addition, as Harris Homes ignores, definitions of “sex” at the time of Title VII’s enactment explicitly recognize a psychological component to sex. For instance, Webster’s New International Dictionary, from 1958, explains that “[s]ex is manifested . . . in

the adult organisms often by many structural, physiological, and (in higher forms) *psychological* characters, *aside from the necessary modification of the reproductive apparatus.*” *Sex*, Webster’s New International Dictionary of the English Language 2296 (William A. Neilson et al. eds., 2nd ed. 1958) (emphasis added). The American Heritage Dictionary, from 1971, similarly includes in its definition of “sex” the “physiological, functional, and *psychological* differences that distinguish the male and the female.” *Sex*, The American Heritage Dictionary of the English Language 1187 (William Morris ed., 1971) (emphasis added).

The only contemporaneous definition of sex cited by Harris Homes, from 1970, which describes sex as “the *sum of* the anatomical and physiological differences with reference to which the male and the female are distinguished,” does not support its narrow characterization of sex.²⁴ *See* Pet. 6 n.1 (quoting The American College Dictionary 1109 (Clarence Lewis Barnhart et al. eds., 1970)) (emphasis added). As noted above, gender identity

²⁴ Harris Homes also cites an outdated view of transgender status from the Diagnostic and Statistical Manual of Mental Disorders (DSM) in support of its definition of “sex.” Like homosexuality, transgenderism was historically viewed by the psychiatric community as a mental disease. *See* Francine Russo, *Where Transgender Is No Longer a Diagnosis*, *Sci. Am.* (Feb. 6, 2017), <https://www.scientificamerican.com/article/where-transgender-is-no-longer-a-diagnosis/>. However, Harris Homes fails to mention that, in 2013, the DSM declassified transgender status as a mental illness. *Am. Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013).

is an anatomical reality that creates differences between sexes.

In short, the ordinary meaning of the term “sex” when Title VII was enacted easily encompasses gender identity, even if discrimination “because of” gender identity was “not the principal evil Congress was concerned with when it enacted Title VII.” *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-80 (1998); *see also id.* (noting “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed”).

Title VII “committed the nation to a meritocratic norm of employment evaluation that disfavors the listed personal characteristics, because they are unrelated to merit, and favors the integration, under conditions of equality, of women, racial minorities, religious minorities, and sexual and gender minorities long excluded from and harassed within the workplace.” William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 *Yale L.J.* 322, 393 (2017). As this Court has made clear, Title VII is a remedial statute, designed “to protect *all* individuals from sex discrimination in employment.” *Newport News Shipbuilding & Dry Dock Co. v. Equal Emp't Opportunity Comm'n*, 462 U.S. 669, 681 (1983) (emphasis in original); *see also Slagle v. Cty. of Clarion*, 435 F.3d 262, 267 (3d Cir. 2006) (Title VII “must be interpreted liberally”); *Equal Emp't Opportunity Comm'n v. Total Sys.*

Servs., Inc., 240 F. 3d 899, 900 (11th Cir. 2001) (“[S]everal circuits . . . have explicitly recognized the principle that interpreting Title VII requires courts to attend to the broader purposes behind the statute.”). Harris Homes’ narrow reading of the phrase “because of sex” should therefore be rejected.

III. HARRIS HOMES ALSO ENGAGED IN PROHIBITED SEX STEREOTYPING IN VIOLATION OF TITLE VII

Amici agree with Respondent that Harris Homes also violated Title VII by engaging in prohibited sex stereotyping. Resp. Br. 28-36. Sex discrimination against a transgender person is always premised on the core stereotype—long refuted by medical science—that a person’s reproductive organs and external physiology are all that defines that person’s sex. In the case of Ms. Stephens, Harris Homes fired her because of the impermissible sex stereotype that she must identify and act as a man—including wearing men’s clothes and having a man’s first name—simply because she was born with typically male genitalia and was labeled a male at birth.²⁵ *See Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1265-66 (11th Cir.) (Pryor, J., concurring), *cert. denied*, 138 S. Ct. 557 (2017); *see also Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011). When the stereotype that genitalia defines sex motivates an

²⁵ *See also* Sunish Gulati, *The Use of Gender-Loaded Identities in Sex-Stereotyping Jurisprudence*, 78 N.Y.U. L. Rev. 2177, 2186 (2003); Dru M. Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights*, 39 Vt. L. Rev. 943, 1003 (2015).

adverse employment decision, it is sex
discrimination prohibited by Title VII.

CONCLUSION

For the foregoing reasons and those set forth in Respondent's brief, the decision below should be affirmed.

Respectfully submitted,

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July 2, 2019

APPENDIX: LIST OF *AMICI*

API Equality – Northern California (APIENC)

Bradbury-Sullivan LGBT Community Center

Brave Space Alliance

Callen-Lorde Community Health Center

Compass LGBTQ Community Center

Fairness Campaign

FORGE, Inc.

Gender Justice League

Gay Men’s Health Crisis (GMHC)

Hudson Pride Center

Indiana Legal Services, Inc.

Joan Watke Stacy, P.C., L.L.O.

Lavender Rights Project

Los Angeles LGBT Center

LGBT Community Center of Greater Cleveland

Ministries Beyond Welcome

OutCenter of Southwest Michigan

San Diego Pride

Stowell & Friedman, Ltd.

The LOFT LGBT Community Center

The TransLatin@ Coalition

Trans Advocacy in Rural Places

Trans Pride Initiative

Transcend Legal

Transcend the Binary

TransFamily Support Services

Transgender Children's Legal Defense Fund

Transgender Education Network of Texas

Transgender Legal Defense and Education Fund

TransOhio

TransVisible Montana

Tranzmission

True Colors, Inc.

U.T.O.P.I.A. Seattle