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, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, makes it an "unlawful employment practice for an employer * * * to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of," *inter alia*, "such individual's * * * sex." 42 U.S.C. 2000e-2(a)(1). Petitioner operates private funeral homes that maintain a sex-specific dress code for employees who interact with the public. Petitioner terminated an employee, who was biologically male, after the employee informed petitioner that the employee intended to transition from male to female and to dress as a female. The court of appeals held that petitioner had thereby discriminated against the employee because of the employee's sex in violation of Title VII by applying its dress code based on the employee's biological sex rather than the employee's gender identity. The court additionally held that discrimination based on an individual's gender identity "is necessarily discrimination on the basis of sex" that always violates Title VII. Pet. App. 15a. The questions presented are as follows:

1. Whether the court of appeals erred in concluding that petitioner discriminated against the employee "because of" the employee's "sex" by applying its sex-specific dress code based on the employee's biological sex rather than the employee's gender identity.

2. Whether discrimination against an individual because of the individual's gender identity constitutes discrimination "because of such individual's * * * sex," 42 U.S.C. 2000e-2(a)(1), in violation of Title VII.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-81a) is reported at 884 F.3d 560. The opinion and order of the district court granting summary judgment to petitioner (Pet. App. 82a-161a) is reported at 201 F. Supp. 3d 837. The amended opinion and order of the district court denying petitioner's motion to dismiss (Pet. App. 162a-187a) is reported at 100 F. Supp. 3d 594.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2018. On May 16, 2018, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including August 3, 2018, and the petition was filed on July 20, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner is a family-owned, for-profit corporation that operates funeral homes at several locations in Michigan. Pet. App. 90a. The principal owner, Thomas Rost, is a Christian who believes "'that God has called him to serve grieving people' and 'that his purpose in life is to minister to the grieving.'" *Id.* at 6a (citation omitted). Petitioner's website includes a mission statement providing that its "highest priority is to honor God in all that we do as a company and as individuals," but petitioner, which is not affiliated with a specific church, hires employees and serves clients of all faiths. *Ibid.* (citation omitted); see *id.* at 6a-7a.

Petitioner has adopted a sex-specific dress code for its employees who interact with the public. Pet. App. 7a. The dress code requires male employees to wear suits and ties and female employees to wear skirts and business jackets. *Ibid.* In petitioner's view, "[m]aintaining a professional dress code that is not distracting to grieving families is an essential industry requirement that furthers their healing process." *Id.* at 198a; see *id.* at 91a, 140a, 196a; Pet. 3-4. Petitioner provides suits and ties for male employees and currently provides a clothing stipend to female employees. Pet. App. 7a-8a.[1]

Petitioner "administers its dress code based on [its] employees' biological sex, not based on their subjective gender identity." Pet. App. 198a. Rost, the principal owner, "'sincerely believes that the Bible teaches that a person's sex is an immutable God-given gift,' and that he would be 'violating God's commands if he were to

[1] At the time this suit was filed in September 2014, petitioner did not provide clothing or a clothing stipend to female employees. Pet. App. 7a. In October 2014, petitioner began providing female employees a clothing stipend. See *id.* at 7a-8a.

permit one of the Funeral Home's funeral directors to deny their sex while acting as a representative of the organization.'" *Id.* at 9a (brackets and citation omitted). In Rost's view, "authorizing or paying for a male funeral director to wear the uniform for female funeral directors would render him complicit 'in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift.'" *Ibid.* (citation omitted).

b. Respondent Stephens was employed by petitioner from 2007 to 2013, first as an apprentice and later as a funeral director and embalmer. Pet. App. 5a. Stephens "was born biologically male," with the name William Anthony Beasley Stephens, and Stephens presented as a male when Stephens began working at petitioner's funeral home and for more than five years thereafter. *Id.* at 3a; see *id.* at 5a-6a. Stephens now identifies as a transgender woman and uses the name Aimee Stephens. *Id.* at 3a, 5a, 8a.

In 2013, Stephens submitted a letter to petitioner stating that Stephens had "struggled with 'a gender identity disorder' her 'entire life,'" "ha[d] 'decided to become the person that her mind already is,'" and "'intend[ed] to have sex reassignment surgery.'" Pet. App. 8a (brackets and citations omitted); see *id.* at 94a. Stephens further stated that "the first step [Stephens] must take [wa]s to live and work full-time as a woman for one year," and that, following a planned vacation, Stephens "w[ould] return to work as [Stephens's] true self, Amiee [sic] Australia Stephens, in appropriate business attire." *Id.* at 95a (citation and emphasis omitted). Stephens intended to comply with petitioner's dress code applicable to female employees, requiring a skirt and suit jacket. See *ibid.*

Several weeks later, before Stephens departed for the planned vacation, Rost terminated Stephens's employment. Pet. App. 9a; see *id.* at 95a-96a. Rost told Stephens that "this is not going to work out," *id.* at 9a (citation omitted), and "Stephens's understanding from" the conversation with Rost "was that 'coming to work dressed as a woman was not going to be acceptable,'" *id.* at 96a (citation omitted). According to petitioner, Rost was concerned that permitting Stephens to dress as a female in violation of petitioner's dress code would have "'disrupted the grieving and healing process' of 'clients mourning the loss of their loved ones,'" and also "that female clients and staff would be forced to share restroom facilities with Stephens." Pet. 5 (quoting Pet. App. 198a) (brackets omitted). Rost averred that he "would not have dismissed Stephens if Stephens had expressed to Rost a belief that [Stephens] is a woman and an intent to dress or otherwise present as a woman outside of work, so long as [Stephens] would have continued to conform to the dress code" at work, and that "[i]t was Stephens's refusal to wear the prescribed uniform and intent to violate the dress code while at work that was the decisive consideration in [Rost's] employment decision." Pet. App. 104a-105a (brackets and citations omitted). Petitioner offered Stephens a severance package, which Stephens declined. *Id.* at 9a.

2. a. Stephens filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC), stating that Stephens believed the firing was due to Stephens's "sex and gender identity, female." Pet. App. 97a (citation omitted). After investigating, the EEOC issued a letter of determination finding reasonable cause to believe that petitioner had discharged Stephens based on sex and gender identity in violation of

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* See Pet. App. 10a. As relevant here, Title VII makes it an "unlawful employment practice for an employer * * * to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex." 42 U.S.C. 2000e-2(a)(1); see Pet. App. 10a.[2]

After efforts to resolve the matter through informal conciliation proved unsuccessful, the EEOC brought this suit against petitioner, alleging (as relevant) that petitioner's termination of Stephens violated Title VII. Pet. App. 10a, 87a-88a, 162a-163a. The EEOC alleged that petitioner "fired Stephens because Stephens is transgender, because of Stephens's transition from male to female, and/or because Stephens did not conform to [petitioner's] sex- or gender-based preferences, expectations, or stereotypes." *Id.* at 87a-88a (quoting Am. Compl. ¶ 15).

b. Petitioner moved to dismiss the complaint for failure to state a claim under Title VII. Pet. App. 170a. The district court denied the motion, but it narrowed the scope of the claim on which the suit could proceed. See *id.* at 171a-184a. The court determined that the EEOC's Title VII claim could not proceed on a theory that petitioner had terminated Stephens "based solely upon Stephens's status as a transgender person." *Id.* at 172a.

[2] The EEOC's complaint also alleged that petitioner had discriminated against female employees by providing a clothing benefit to male but not female employees. Pet. App. 163a. That claim is not at issue in this Court.

The court reasoned that, "like sexual orientation, transgender or transsexual status is currently not a protected class under Title VII." *Ibid.*

The district court further determined, however, that the EEOC's suit could proceed on a theory that petitioner had engaged in improper sex stereotyping. See Pet. App. 172a-184a. The court reasoned that, under *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), and Sixth Circuit precedent, "a transgender person—just like anyone else—can bring a sex-stereotyping gender-discrimination claim under Title VII." Pet. App. 183a. The court concluded that, because the EEOC's complaint also "alleged that Stephens's failure to conform to sex stereotypes was the driving force behind [petitioner's] decision to fire Stephens, the EEOC ha[d] sufficiently pleaded a sex-stereotyping gender-discrimination claim under Title VII." *Id.* at 184a; see *id.* at 172a-173a, 183a-184a.

c. Following discovery, the parties filed cross-motions for summary judgment. Pet. App. 11a, 88a. The district court granted summary judgment for petitioner. *Id.* at 82a-161a. The court determined (as relevant) that the EEOC had presented "direct evidence to support a claim of employment discrimination," and the court rejected petitioner's contention "that its enforcement of its sex-specific dress code c[ould] not constitute impermissible sex stereotyping." *Id.* at 110a-111a; see *id.* at 107a-118a. The court concluded, however, that petitioner was entitled to an "exemption from Title VII" based on the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, "under the facts and circumstances of this unique case." Pet. App. 87a; see *id.* at 118a-144a.

3. The EEOC appealed. Pet. App. 12a. On October 4, 2017, while the appeal was pending, the Attorney General issued a memorandum stating that "Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*," and "Title VII is not properly construed to proscribe employment practices (such as sex-specific bathrooms) that take account of the sex of employees but do not impose different burdens on similarly situated members of each sex." *Id.* at 193a; see *id.* at 191a-194a. The memorandum stated that "the Department of Justice will take that position in all pending and future matters." *Id.* at 193a.

4. The court of appeals reversed. Pet. App. 1a-81a.

a. The court of appeals held that "the district court correctly determined that Stephens was fired because of her failure to conform to sex stereotypes, in violation of Title VII." Pet. App. 14a; see *id.* at 15a-22a. The court of appeals explained that, under *Price Waterhouse* and circuit precedent, "sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination." *Id.* at 16a (quoting *Smith* v. *City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004)) (brackets omitted). The court determined that petitioner's "decision to fire Stephens because Stephens was 'no longer going to represent himself as a man' and 'wanted to dress as a woman' falls squarely within the ambit of sex-based discrimination that *Price Waterhouse* and *Smith* forbid." *Ibid.* (citation omitted).

The court of appeals rejected petitioner's contentions that "an employer does not engage in impermissible sex stereotyping when it requires its employees to conform to a sex-specific dress code" that "'imposes equal burdens on men and women,'" and that "sex stereotyping

violates Title VII *only* when 'the employer's sex stereotyping resulted in disparate treatment of men and women.'" Pet. App. 17a, 20a (brackets, citations, and internal quotation marks omitted). The court stated that "[i]t is apparent from both *Price Waterhouse* and *Smith* that an employer engages in unlawful discrimination even if it expects both biologically male and female employees to conform to certain notions of how each should behave." *Id.* at 21a. The court held that "[petitioner's] sex-specific dress code does not preclude liability under Title VII," because—"[e]ven if [petitioner's] dress code does not itself violate Title VII," a question that was "not before" the court—petitioner could "not rely on its policy to combat the charge that it engaged in improper sex stereotyping when it fired Stephens for wishing to appear or behave in a manner that contradicts [petitioner's] perception of how she should appear or behave based on her sex." *Id.* at 21a-22a.

The court distinguished the Ninth Circuit's decision in *Jespersen* v. *Harrah's Operating Co.*, 444 F.3d 1104 (2006) (en banc), which had rejected a Title VII claim challenging "a sex-specific grooming code that imposed different but equally burdensome requirements on male and female employees." Pet. App. 17a. Although the court of appeals expressed disagreement with *Jespersen*'s reasoning on that issue, see *id.* at 19a-20a, the court stated that "the central issue in *Jespersen* * * * —whether certain sex-specific appearance requirements violate Title VII—[wa]s not before th[e] court," and that it "[was] not considering, in this case, whether [petitioner] violated Title VII by requiring men to wear pant suits and women to wear skirt suits." *Id.* at 18a. The court stated that here it was deciding instead "whether

[petitioner] could legally terminate Stephens, notwithstanding that she fully intended to comply with the company's sex-specific dress code" corresponding to Stephens's gender identity, "simply because she refused to conform to [petitioner's] notion of her sex." *Ibid.*

b. The court of appeals additionally concluded that the district court had erred in precluding the EEOC from pursuing its alternative theory that petitioner violated Title VII by "discriminat[ing] against" Stephens "on the basis of her transgender and transitioning status." Pet. App. 14a; see *id.* at 22a-36a. The court of appeals stated that "[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex," and therefore "the EEOC should have had the opportunity to prove that [petitioner] violated Title VII by firing Stephens because she is transgender and transitioning from male to female." *Id.* at 14a-15a. The court stated that it reached this conclusion "[f]or two reasons." *Id.* at 23a.

First, the court of appeals stated that "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." Pet. App. 23a; see *id.* at 23a-26a. Citing the Seventh Circuit's decision in *Hively* v. *Ivy Tech Community College*, 853 F.3d 339 (2017) (en banc), the court explained that the relevant question is "whether Stephens would have been fired if Stephens had been a woman who sought to comply with the women's dress code." Pet. App. 24a. The court stated that "[t]he answer quite obviously is no," and that fact, "in and of itself, confirm[ed] that Stephens's sex impermissibly affected Rost's decision to fire Stephens." *Ibid.*

Second, the court of appeals stated that "discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping." Pet. App. 26a; see *id.* at 26a-31a. The court explained that "a transgender person is someone who 'fails to act and/or identify with his or her gender,'" and therefore "an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align." *Id.* at 26a-27a (citation omitted).

The court of appeals rejected petitioner's argument that "the Congress enacting Title VII understood 'sex' to refer only to a person's 'physiology and reproductive role,' and not a person's 'self-assigned gender identity.'" Pet. App. 28a (citation and internal quotation marks omitted). The court stated that "the drafters' failure to anticipate that Title VII would cover transgender status is of little interpretive value, because 'statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.'" *Id.* at 28a-29a (quoting *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998), and citing *Zarda* v. *Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc), petition for cert. pending, No. 17-1623 (filed May 29, 2018)). The court further observed that *Price Waterhouse* "preclude[s] an interpretation of Title VII that reads 'sex' to mean only individuals' 'chromosomally driven physiology and reproductive function.'" *Id.* at 29a (citation omitted).

c. The court of appeals further concluded that the district court had erred in finding that petitioner was entitled to an exemption from Title VII's requirements in these circumstances under RFRA. Pet. App. 41a-73a. In this Court, petitioner has not sought review of that determination. See Pet. i, 13-35.

ARGUMENT

Petitioner contends (Pet. 21-25) that the court of appeals erred in concluding that petitioner discriminated against Stephens because of sex by applying its sex-specific dress code based on Stephens's biological sex, rather than Stephens's gender identity. Petitioner additionally contends (Pet. 15-21, 25-34) that the court erred in concluding that the EEOC should have been permitted to pursue its alternative theory that discrimination based on an individual's gender identity necessarily constitutes discrimination "because of such individual's * * * sex," 42 U.S.C. 2000e-2(a)(1), and that its conclusion conflicts with decisions of other circuits.

Two other petitions for writs of certiorari that are pending before the Court and that have been fully briefed present a related question on which a deep and entrenched circuit conflict exists: whether discrimination because of an individual's sexual orientation constitutes discrimination "because of such individual's * * * sex," 42 U.S.C. 2000e-2(a)(1), in violation of Title VII. See Pet. for Cert. at i, 9-31, *Altitude Express, Inc.* v. *Zarda*, No. 17-1623 (filed May 29, 2018); Pet. for Cert. at i, 12-32, *Bostock* v. *Clayton Cnty.*, No. 17-1618 (filed May 25, 2018). If the Court grants plenary review in *Zarda*, *Bostock*, or both to address that question, its decision on the merits may bear on the proper analysis of the issues petitioner raises. The court of appeals here relied on the reasoning of decisions (including *Zarda*) holding that Title VII's prohibition on sex discrimination extends to sexual-orientation discrimination. Accordingly, the Court should hold the petition in this case pending its disposition of the petitions in *Zarda* and *Bostock* and, if certiorari is granted in either or both of those cases, pending the Court's decision on the merits.

If the Court denies review in *Zarda* and *Bostock*, the petition in this case should also be denied. To be sure, the United States disagrees with the court of appeals' decision. As relevant here, the court's analysis of whether petitioner engaged in improper sex stereotyping reflects a misreading of *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989). The court's further conclusion that gender-identity discrimination necessarily constitutes discrimination because of sex in violation of Title VII—although it was unnecessary to the ultimate result the court reached in this case—is also inconsistent with the statute's text and this Court's precedent. Both of those questions are recurring and important.

If, however, the Court elects not to review the sexual-orientation question presented in *Zarda* and *Bostock*, the gender-identity questions presented here would not appear to warrant this Court's review at this time. The question presented in *Zarda* and *Bostock* implicates a much deeper and more entrenched circuit conflict on a similarly important and recurring question that nearly every circuit has addressed, and two courts of appeals sitting en banc have recently rejected the long-prevailing consensus view on that question. Fewer circuits have addressed the questions presented in this case, and the panel decision here appears to be the first court of appeals decision to conclude in a Title VII case that gender-identity discrimination categorically constitutes discrimination because of sex under that statute. If the Court determines that the question raised in *Zarda* and *Bostock* does not warrant plenary review at this time, the questions presented here would likewise not appear to warrant review at this juncture.

1. Both questions presented in the petition (Pet. i) concern the scope of Title VII's prohibition on discrimination against an individual "because of such individual's * * * sex." 42 U.S.C. 2000e-2(a)(1). In particular, both questions center on whether and to what extent that prohibition encompasses discrimination based on an attribute other than an individual's biological sex: the individual's gender identity. The petitions for writs of certiorari that are pending before the Court in *Zarda* and *Bostock*, which have been fully briefed, present a similar question on which courts of appeals are deeply divided: whether treating employees differently because of another non-biological-sex attribute—an individual's sexual orientation—constitutes sex discrimination in violation of Title VII. See Pet. for Cert. at i, 9-31, *Zarda*, *supra* (No. 17-1623); Pet. for Cert. at i, 12-32, *Bostock*, *supra* (No. 17-1618).

Until 2017, all eleven courts of appeals to consider the question had concluded that Title VII does not apply to sexual-orientation discrimination. *Higgins* v. *New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Simonton* v. *Runyon*, 232 F.3d 33, 36 (2d Cir. 2000); *Bibby* v. *Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001), cert. denied, 534 U.S. 1155 (2002); *Wrightson* v. *Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Blum* v. *Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (per curiam); *Vickers* v. *Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006), cert. denied, 551 U.S. 1104 (2007); *Hamm* v. *Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1062 (7th Cir. 2003); *Williamson* v. *A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam), cert. denied, 493 U.S. 1089 (1990); *DeSantis* v. *Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-330 (9th Cir. 1979), abrogated on other grounds,

Nichols v. *Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874-875 (9th Cir. 2001); *Medina* v. *Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Evans* v. *Georgia Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir.), cert. denied, 138 S. Ct. 557 (2017).

Since April 2017, however, two of those courts—the Second and Seventh Circuits, both sitting en banc—have overruled their prior decisions and held that discrimination on the basis of sexual orientation does constitute discrimination because of sex in violation of Title VII. See *Zarda* v. *Altitude Express, Inc.*, 883 F.3d 100, 112-115, 124-131 (2d Cir. 2018) (en banc), petition for cert. pending, No. 17-1623 (filed May 29, 2018); *id.* at 115-124 (plurality opinion); *Hively* v. *Ivy Tech Cmty. Coll.*, 853 F.3d 339, 343-352 (7th Cir. 2017) (en banc). On the other hand, the Eleventh Circuit denied rehearing en banc of the panel's decision in *Evans*, *supra*. This series of recent rulings makes it very unlikely that the circuit conflict will resolve itself, and the issue otherwise warrants this Court's review.

If the Court were to grant the petitions in *Zarda*, *Bostock*, or both to resolve that conflict, its decision may bear on the questions petitioner raises concerning gender-identity discrimination and thus may bear on the proper disposition of the petition in this case. The question presented in those cases is distinct from the issues petitioner raises here, but analysis of the issues may overlap. The court of appeals here relied on the reasoning of the en banc Second Circuit's decision in *Zarda* and the en banc Seventh Circuit's decision in *Hively* in addressing whether Title VII applies to gender-identity discrimination. See Pet. App. 21a, 23a-24a, 29a, 31a. And both reasons the court of appeals gave for concluding that "discrimination on the basis of transgender and

transitioning status violates Title VII," *id.* at 22a; see *id.* at 23a-28a, parallel rationales that were relied upon in *Zarda* and *Hively*. First, the court stated that "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." *Id.* at 23a. Second, the court stated that "an employer cannot discriminate on the basis of transgender status without" engaging in "sex stereotyping," by "imposing its stereotypical notions of how sexual organs and gender identity ought to align." *Id.* at 26a-27a. Both rationales or slight variants were adopted by the majority or plurality opinions in *Zarda* and *Hively*. See *Zarda*, 883 F.3d at 113-115; *id.* at 116-123 (plurality opinion); *Hively*, 853 F.3d at 345-346.

If this Court were to grant review in *Zarda* or *Bostock*, its decision on the merits thus might bear on the soundness of the court of appeals' decision here, and in turn on the appropriate disposition of the petition in this case. The Court accordingly should hold the petition in this case pending its disposition of the petitions in *Zarda* and *Bostock* and, if review is granted in either or both of those cases, pending its decision on the merits.

2. If the Court denies review in *Zarda* and *Bostock*, the petition for a writ of certiorari in this case should also be denied. To be sure, the court of appeals' decision is erroneous, and this is an important and recurring issue that may require this Court's review in an appropriate case. But if this Court denies certiorari in *Zarda* and *Bostock*—which implicate a more widespread and deeply entrenched circuit conflict—certiorari would likewise not appear to be appropriate in this case at this time.

a. Title VII makes it an "unlawful employment practice for an employer * * * to fail or refuse to hire or to

discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of," *inter alia*, "such individual's * * * sex." 42 U.S.C. 2000e-2(a)(1). The court of appeals concluded that petitioner violated that provision by applying a sex-specific dress code—which itself was not challenged in this case—to an employee, Stephens, based on Stephens's biological sex rather than Stephens's gender identity. Pet. App. 15a-22a. The court further concluded that the EEOC should have been allowed to pursue an alternative theory in support of the same wrongful-termination claim: that gender-identity discrimination necessarily constitutes sex discrimination and therefore always violates Title VII. *Id.* at 22a-36a.

As the Attorney General's October 4, 2017, memorandum explained, the Department of Justice "must and will continue to affirm the dignity of all people, including transgender individuals," and the Department does not "condone mistreatment on the basis of gender identity." Pet. App. 194a. The Department also "has vigorously enforced," and "will continue to" enforce, Title VII and other laws that "protect[] against discrimination on the basis of sex that Congress has provided all individuals, including transgender individuals," as well as laws that specifically prohibit gender-identity discrimination. *Ibid.* But "the Department of Justice must interpret Title VII as written by Congress," *id.* at 192a, and the court of appeals misread the statute and this Court's decisions in concluding that Title VII encompasses discrimination on the basis of gender identity.

i. Title VII does not define the term "sex," see generally 42 U.S.C. 2000e, so the term should "be interpreted

as taking [its] ordinary, contemporary, common meaning." *Sandifer* v. *United States Steel Corp.*, 571 U.S. 220, 227 (2014) (citation omitted). When Title VII was enacted in 1964, "sex" meant biological sex; it "refer[red] to [the] physiological distinction[]" between "male and female." *Webster's New International Dictionary* 2296 (2d ed. 1958); see *ibid.* ("One of the two divisions of organisms formed on the distinction of male and female; males or females collectively"; "The sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female, or of pertaining to the distinctive function of the male or female in reproduction"; "SEX refers to physiological distinctions; GENDER, to distinctions in grammar."); see also, *e.g.*, *Hively*, 853 F.3d at 362-363 (Sykes, J., dissenting) (collecting dictionaries); *Zarda*, 883 F.3d at 145 (Lynch, J., dissenting).

Title VII thus does not apply to discrimination against an individual based on his or her gender identity. Notably, Congress has specifically prohibited discrimination based on "gender identity" in other statutes, as a separate protected category in addition to "sex" or "gender." See, *e.g.*, 18 U.S.C. 249(a)(2)(A) and (c)(4) (prohibiting acts or attempts to cause bodily injury to any person "because of the actual or perceived religion, national origin, *gender, sexual orientation, gender identity*, or disability of any person," and defining "gender identity" as "actual or perceived gender-related characteristics" (emphasis added)); 34 U.S.C. 12291(b)(13)(A) (Supp. V 2017) (prohibiting discrimination in certain federally funded programs "on the basis of actual or perceived race, color, religion, national origin, *sex, gender identity* (as defined in paragraph 249(c)(4) of Title 18), *sexual orientation*, or disability" (emphases added)). It has not

included similar language in Title VII as originally enacted in 1964 or in any amendment in the 54 years since.

In addition, as this Court has explained, by its terms "Title VII * * * is directed only at '*discrimination* . . . because of . . . sex.'" *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (brackets omitted). "The critical issue" in determining whether an employer has engaged in discrimination, as "Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Ibid.* (citation omitted). To be sure, the plurality in *Price Waterhouse* concluded that, "in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Price Waterhouse*, 490 U.S. at 251 (plurality opinion) (quoting *City of L.A. Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 707 n.13 (1978)) (brackets omitted). Thus, under that principle, an employer that treats a male or female employee disadvantageously based on a "sex stereotype[ ]" may violate Title VII, and evidence that an employer engaged in "sex stereotyping" may indicate that sex "played a motivating part in an employment decision." *Id.* at 250-251. But the statute is not properly construed to proscribe employment practices that take account of the sex of employees but do not impose different burdens on similarly situated members of each sex—such as the sex-specific dress code at issue in this case, cf., *e.g.*, *Jespersen* v. *Harrah's Operating Co.*, 444 F.3d 1104, 1109-1110 (9th Cir. 2006) (en banc), or sex-specific restrooms.

ii. The court of appeals erred in concluding that petitioner violated Title VII's prohibition on "discriminat[ing]" against an individual "because of such individual's * * * sex," 42 U.S.C. 2000e-2(a)(1), by terminating Stephens after learning that Stephens would no longer comply with petitioner's dress code corresponding to Stephens's biological sex. See Pet. App. 15a-22a. If petitioner's sex-specific dress code resulted in disparate, disadvantageous treatment of male or female employees, petitioner's termination of Stephens for not complying with the dress code applicable to Stephens's biological sex could arguably violate Title VII, regardless of Stephens's gender identity. But petitioner's dress code itself was not challenged in this case, see *id.* at 112a, and the court of appeals stated expressly that it was not adjudicating whether the dress code complies with Title VII, see *id.* at 18a ("[W]hether certain sex-specific appearance requirements violate Title VII * * * is not before this court. We are not considering, in this case, whether [petitioner] violated Title VII by requiring men to wear pant suits and women to wear skirt suits."); *id.* at 21a (stating that whether petitioner's dress code violates Title VII is "an issue that is not before this court").

The court of appeals nevertheless concluded that petitioner violated Title VII by requiring Stephens to comply with the provisions of the dress code applicable to Stephens's biological sex (male) rather than the provisions corresponding to Stephens's gender identity (female). See Pet. App. 16a-22a. But the court did not identify any way in which applying the dress code—to Stephens or to any other employee—based on an employee's biological sex results in disparate treatment of similarly situated male or female employees. Instead, it concluded that no

such disparate treatment based on biological sex was necessary, stating that "[i]t is apparent from * * * *Price Waterhouse* * * * that an employer engages in unlawful discrimination even if it expects both biologically male and female employees to conform to certain notions of how each should behave." *Id.* at 21a. That is incorrect.

Neither the plurality nor concurring opinions in *Price Waterhouse* adopted such a rule. The question presented in that case concerned the burden and standard of proving that an employment decision was (or was not) motivated by an employee's sex. 490 U.S. at 232 (plurality opinion); see *id.* at 237-258; *id.* at 258-261 (White, J., concurring in the judgment); *id.* at 261-279 (O'Connor, J., concurring in the judgment). The portion of the plurality opinion that addressed sex stereotyping did not call into question that a Title VII plaintiff must show that the employer treated employees disparately because of sex. See *id.* at 250-252 (plurality opinion); *id.* at 251 ("[I]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." (citation omitted)). Indeed, that discussion addressed how sex-based stereotyping can constitute evidence that disparate treatment of an employee was motivated by sex. See *id.* at 250 ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.").

In any event, the Court's subsequent decision in *Oncale* erases any doubt that "[t]he critical issue" in determining whether an employer has engaged in sex-based "*discrimination*" is "'whether members of one sex are exposed to disadvantageous terms or conditions of

employment to which members of the other sex are not exposed.'" 523 U.S. at 80 (brackets and citation omitted). The court of appeals' contrary view "that an employer engages in unlawful discrimination [where] it expects both biologically male and female employees to conform to certain notions of how each should behave," even in the absence of terms or conditions that disadvantage members of one sex, Pet. App. 21a; see *id.* at 20a-21a, cannot be squared with *Oncale*.

iii. The court of appeals also erred in holding that the EEOC should have been able to pursue the alternative theory that discrimination based on gender identity "is necessarily discrimination on the basis of sex," Pet. App. 15a, and therefore "discrimination on the basis of transgender and transitioning status violates Title VII," *id.* at 22a; see *id.* at 22a-36a. As an initial matter, having concluded (albeit erroneously) that the EEOC was entitled to summary judgment on its case-specific theory of sexual stereotyping in support of its claim that petitioner's termination of Stephens violated Title VII, the court had no apparent reason to go further and conclude that the EEOC should have been permitted to advance a different, much broader theory in support of that same claim of wrongful termination.

In any event, the court of appeals' conclusion that gender-identity discrimination categorically constitutes sex discrimination under Title VII is incorrect. As discussed above, the ordinary meaning of "sex" does not refer to gender identity. See pp. 16-18, *supra*. The court's position effectively broadens the scope of that term beyond its ordinary meaning. Its conclusion should be rejected for that reason alone. Moreover, each reason the court gave for its conclusion fails on its own terms.

First, the court of appeals stated that "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." Pet. App. 23a; see *id.* at 23a-26a. In the court's view, the fact that applying the dress code depended in part on Stephens's sex proved that petitioner had discriminated based on sex. See *id.* at 23a-24a. The court reasoned that "Stephens's sex impermissibly affected Rost's decision to fire Stephens" because Stephens "obviously" would not "have been fired if Stephens had been a woman who sought to comply with the women's dress code." *Id.* at 24a. That is incorrect. The application of any sex-specific policy, by definition, turns in part on the employee's sex. But that does not constitute "*discrimination*" unless, as a result of the policy's application, "'members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" *Oncale*, 523 U.S. at 80 (brackets and citation omitted). Otherwise, every sex-specific policy—from dress codes for certain occupations to sex-specific employee restrooms—would automatically violate Title VII.

Second, the court of appeals stated that "discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping." Pet. App. 26a; see *id.* at 26a-31a. The court explained that "a transgender person is someone who 'fails to act and/or identify with his or her gender,'" and therefore "an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align." *Id.* at 26a-27a (citation omitted). It is highly doubtful that enforcement of a sex-specific dress code

by itself constitutes discrimination on the basis of gender identity, given that the code applies equally to employees based on their sex regardless of their gender identity. See *id.* at 91a-93a; see also *id.* at 104a-105a. But even assuming arguendo that it does, and even further assuming that the court of appeals' definition of "transgender" is correct, that rationale merely repeats in more generalized terms the court of appeals' reasoning that applying a sex-specific dress code to Stephens based on Stephens's biological sex inherently constituted improper sex stereotyping under *Price Waterhouse*. As explained above, that reasoning is mistaken. See pp. 19-21, *supra*.

b. The questions presented in the petition are important and recurring, and they implicate tension among the circuits. In addressing the sex-stereotyping claim against petitioner, the Sixth Circuit panel observed that its existing precedent (on which it relied here) is inconsistent with the Ninth Circuit's decision in *Jespersen*, *supra*. See Pet. App. 19a-20a. The court of appeals' broader conclusion that gender-identity discrimination categorically constitutes sex discrimination is inconsistent with decisions of other circuits that have rejected that view. See *Etsitty* v. *Utah Transit Auth.*, 502 F.3d 1215, 1220-1221 (10th Cir. 2007); *Ulane* v. *Eastern Airlines, Inc.*, 742 F.2d 1081, 1084-1087 (7th Cir. 1984), cert. denied, 471 U.S. 1017 (1985); *Sommers* v. *Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam); see also *Holloway* v. *Arthur Andersen & Co.*, 566 F.2d 659, 661-663 (9th Cir. 1977), abrogation recognized by

Schwenk v. *Hartford*, 204 F.3d 1187, 1201-1202 (9th Cir. 2000).[3]

Nevertheless, if the Court denies review of the question presented in *Zarda* and *Bostock*, review would appear to be unwarranted in this case as well. The question in *Zarda* and *Bostock* implicates a much deeper and more widespread circuit conflict on a similarly important and recurring question that nearly every court of appeals has addressed. That conflict is now entrenched by en banc decisions of both of the courts of appeals that have recently adopted the minority position, and a third court

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[3] Petitioner cites (Pet. 17-19) several additional decisions, but none arose in a case under Title VII. Those cases concerned gender-identity discrimination under other statutes or constitutional provisions—such as Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, or the Equal Protection Clause of the Fourteenth Amendment—and discussed Title VII only in the context of addressing those other laws. See *Doe ex rel. Doe* v. *Boyertown Area Sch. Dist.*, 893 F.3d 179 (3d Cir.), slip op. 23-31 (Title IX), vacated on reh'g, 897 F.3d 515 (3d Cir.), and superseded by 897 F.3d 518 (3d Cir. 2018); *Whitaker ex rel. Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046-1054 (7th Cir. 2017) (Title IX and Equal Protection Clause), cert. dismissed, 138 S. Ct. 1260 (2018); *G.G. ex rel. Grimm* v. *Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 720-723 (4th Cir. 2016) (Title IX and implementing regulations), vacated and remanded, 137 S. Ct. 1239 (2017); *Glenn* v. *Brumby*, 663 F.3d 1312, 1315-1321 (11th Cir. 2011) (Equal Protection Clause); *Schwenk*, 204 F.3d at 1198-1203 (Civil Rights Remedies for Gender-Motivated Violence Act, 34 U.S.C. 12361 (Supp. V 2017) (formerly 42 U.S.C. 13981)). In addition, two of those decisions have been vacated in relevant part. See *Gloucester Cnty. Sch. Bd.* v. *G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (vacating court of appeals' decision in light of agency guidance); *Doe ex rel. Doe* v. *Boyertown Area Sch. Dist.*, 897 F.3d 518, 533-536 (3d Cir. 2018) (superseding opinion omitting portion of original opinion discussed in the petition, which was vacated on rehearing); cf. *Doe*, 893 F.3d 179, slip op. 23-31 (vacated opinion); Pet. 18-19.

of appeals has declined to address the issue en banc. See pp. 13-14, *supra*. Fewer courts have addressed the issues presented here. To date, it appears that only the panel in this case has concluded in a Title VII case that gender-identity discrimination categorically constitutes discrimination because of sex. And the Sixth Circuit has not yet considered that question en banc (which petitioner did not seek here). If the Court determines that the question presented in *Zarda* and *Bostock* does not warrant plenary review at this time, it thus would be appropriate to deny review of the questions presented in this case at this juncture.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of the petitions in *Zarda* and *Bostock*. If the Court grants plenary review in *Zarda*, *Bostock*, or both, the petition for a writ of certiorari in this case should be held pending the Court's decision on the merits, and then disposed of as appropriate in light of that decision. If the Court denies review in *Zarda* and *Bostock*, the petition for a writ of certiorari in this case should be denied.

Respectfully submitted.

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OCTOBER 2018