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.*,
Respondents.

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

BRIEF OF LAW & HISTORY PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT AIMEE STEPHENS

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INTEREST OF THE AMICI CURIAE[1]

Amici Curiae—38 scholars with expertise in LGBT rights and history[2]—respectfully submit this brief in support of Aimee Stephens. The two questions presented here concern whether Title VII's sex discrimination prohibition proscribes discrimination against individuals for being transgender. *Amici* have substantial knowledge of how transgender individuals were understood both in popular culture and in the halls of Congress when Title VII was passed and amended. In particular, as *amici* explain, discrimination against transgender individuals took the form of facial discrimination based on sex decades before the passage of Title VII.

SUMMARY OF ARGUMENT

In being fired from her job at Harris Funeral Homes for being transgender, Aimee Stephens suffered employment discrimination "because of … sex," under the plain terms of Title VII. 42 U.S.C. § 2000e–2(a) (2018). Stephens was fired "because of" the "sex" she was assigned at birth, and the "sex" assigned to her by Petitioner Harris Homes. Had Stephens been designated as female at birth, or if Harris Homes recognized her as a woman, she would not have been fired. Further, Stephens was fired for failing to conform to sex stereotypes regarding how men and women should

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[1] Pursuant to Rule 37, this brief is filed with the written consent of Respondent Stephens. Respondent Equal Employment Opportunity Commision & Petitioner have lodged blanket consents for the filing of amicus briefs with this Court. Counsel for a party did not author this brief in whole or in part and such counsel or a party did not make a monetary contribution intended to fund the preparation or submission of this brief.

[2] Amici professors are listed in Appendix.

behave according to Harris Homes. She failed to conform to Harris Homes' stereotypes of men because of her name and clothing. She also failed to conform to stereotypes Harris Homes required of women because of her appearance and the sex assigned to her at birth.

Because the plain text of Title VII unambiguously prohibits the employment discrimination Stephens suffered because of her sex, it is inapposite to speculate about the intent of enacting and amending Congresses with respect to whether transgender individuals are covered under the statute. However, even if this Court sought to divine unitary intent among the various members of Congress that enacted and amended Title VII, there is no indication that Congress sought to exclude transgender individuals.

By the time Title VII was enacted, the American popular press published frequent stories regarding individuals who presented in a manner that appeared inconsistent with their sex assigned at birth. These stories told of the so-called "sex change surgeries" that these individuals were newly able to obtain, and emphasized and interrogated the "sex" to which these individuals belonged. Indeed, even as medical technology and culture increasingly allowed transgender individuals to seek medical treatments and to live congruently with their gender identities, laws and regulations at the state and local level sought to police those boundaries, many explicitly requiring individuals to conform to the "sex" assigned to individuals at birth.

Given this history, in the years immediately leading up to the passage of Title VII, the public and—crucially—members of Congress, would have been well aware of transgender people and would have understood the term "sex" to include them.

Further, Congress frequently had—and, indeed, on several occasions, took—the opportunity to amend Title VII. Indeed, it specifically amended the definition of "sex" in Title VII on two of these occasions, in 1978 and 1991. Contemporary evidence at the time of these amendments shows that members of Congress were aware both of the existence of transgender individuals, and that transgender individuals' lives often called into question stereotypes about women and men, and how people should identify and present themselves. By 1978, many courts permitted name changes, and also required funding of Medicaid coverage for "sex change" operations. By 1991, plaintiffs had advanced arguments in both state and federal courts that anti-transgender discrimination constituted sex discrimination, and Congress had expressed concerns about transgender individuals obtaining protections in the context of other federal statutes and programs.

By 2009, when Congress passed its most recent set of amendments in response to this Court's ruling in a case alleging sex discrimination, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), anti-transgender discrimination was a recurrent topic of discussion in both chambers of Congress. That same year Congress included transgender individuals within the protections of a federal hate crimes bill, after hearing testimony regarding the pervasive violence and oppression they experience. And in both 2007 and 2009, Congress repeatedly received evidence of transgender individuals seeking—and frequently, obtaining—protection from employment discrimination under the sex discrimination prohibition of Title VII.

Through every step of this clear and well-documented history, Congress expressed no views on

whether transgender individuals should be excluded from the protections of Title VII—even though it had sought to limit transgender protections in other contexts. Even if the plain statutory language were in some way ambiguous—and it is not—this persistent silence regarding transgender rights in the context of Title VII renders any reliance on inchoate congressional intent a particularly treacherous exercise.

ARGUMENT

I. THIS CASE IS DETERMINED BY TITLE VII'S PLAIN PROHIBITION AGAINST DISCRIMINATION "BECAUSE OF SEX", NOT SPECULATION ABOUT CONGRESSIONAL INTENT

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., establishes that it is "an unlawful employment practice for an employer … to discriminate against any individual … *because of* such individual's race, color, religion, ***sex***, or national origin." 42 U.S.C. § 2000e–2(a) (2018) (emphases added).

This Court's approach in *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998), underscores the notion that analysis of Title VII's prohibition on discrimination "because of ... sex" must be based on the statutory text, and that seeking to divine further congressional intent is both unnecessary and improper. In *Oncale*, Justice Scalia explained on behalf of a unanimous Court that "sex discrimination" includes same-sex sexual harassment. Crucially, the Court emphasized that while same-sex sexual harassment in the workplace may not have been the "principal evil Congress was concerned with when it enacted Title VII," "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." *Id*. at 79 (emphasis added). Title VII's protections therefore "*must extend to sexual harassment* ***of any kind*** that meets the statutory requirements." *Id*. at 79-80 (emphasis added).

Here, Respondent Stephens suffered discrimination "because of" her "sex" on two grounds. First, Stephens was fired "because of" the "sex" she was assigned at birth, and the "sex" to which she belongs—at least according to Petitioner Harris Homes. Had Stephens been designated as female at birth, or if Harris Homes recognized her as a woman, she would not have been fired. *See* Brief for Respondent Aimee Stephens at 24-26, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC and Aimee Stephens*, No. 18-107 (June 26, 2019) ("Stephens Brief").

Second, claims alleging discrimination "because of ... sex" may be brought based on "disparate treatment ... resulting from sex stereotypes." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-55 (1989). Here, Harris Homes fired Stephens because she failed to conform to sex stereotypes regarding how men and women should behave. She failed to conform to the stereotypes Petitioner required of employees it perceived as male because of her name and clothing. Further, she failed to conform to stereotypes Petitioner required of employees it perceived as female because of her appearance and sex assigned at birth. *See* Stephens Brief at 30-31.

"[W]here, as here, the words of the statute are unambiguous, the 'judicial inquiry is complete.'" *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (citation omitted). Because the term "sex" is unambiguous on its face, Congressional intent beyond the statutory language alone is insufficient to overcome such plain meaning, and the Court must apply that language accordingly.

II. IT IS IMPOSSIBLE TO DIVINE ANY "INTENT" TO EXCLUDE TRANSGENDER INDIVIDUALS FROM TITLE VII'S BAN ON SEX DISCRIMINATION AMONG ITS ENACTING AND AMENDING CONGRESSES

Even if this Court sought to divine unitary intent among the various members of Congress that enacted and amended Title VII, there is no indication that Congress sought to exclude transgender individuals. Indeed, although Congress was presented evidence that discrimination against transgender individuals implicated sex discrimination, Congress expressed no views on transgender individuals—even though its members had done so in other contexts. Congress's persistent silence regarding transgender rights in the context of Title VII renders any reliance on inchoate congressional intent a particularly treacherous exercise.

A. Determinations Based on "Sex" Were Understood to Implicate Transgender Individuals Before the Passage of Title VII

1. Existing state and local laws targeted transgender individuals based on their "sex" before the passage of Title VII

For over a century before the passage of Title VII, the law explicitly used the assigned "sex" of individuals to determine the clothes they could and could not wear—which especially affected individuals who identified with a sex different from the one assigned to

them at birth.[3] Thus, an 1863 San Francisco ordinance criminalized "any person ... . appear[ing] in a public place ... in a dress not belonging to his or her sex."[4] Chicago similarly criminalized "appear[ing] in a public place ... in a dress not belonging to [an individual's] sex."[5] Toledo prohibited a "person" from appearing in clothing belonging to another sex.[6] Similar cross dressing prohibitions were adopted in Columbus, Houston, Kansas City, St. Louis, and dozens of other cities.[7] Such laws continued to be adopted from the 1950s through the 1970s.[8] For example, such laws were adopted in Detroit and Miami in the 1950s, a decade before the passage of Title VII.[9]

Even when such statutes did not explicitly mention the term "sex," they were used to prosecute individuals for crossdressing. Courts explicitly referred to defendants' failure to conform to their assigned sex as the basis of prosecution. In *People v. Gillespi*, for example, one defendant was convicted of vagrancy for wearing female clothes, shoes and underclothes, a female wig, painting his face, using rouge and lipstick, and wearing a pearl necklace. The other defendant in

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[3] Bennett Capers, *Cross Dressing and the Criminal*, 20 Yale J.L. & Human. 1, 8-9 (2008).

[4] Susan Stryker, *Transgender History: The Roots of Today's Revolution* 47 (Seal Press 2017).

[5] William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 3, 20 (1999).

[6] *Toledo's 'Pervert Drag' Law Voided*, The Advocate, Nov. 7, 1973, at 16. *See also* Capers, *supra* note 2, at 8-9.

[7] Eskridge, *supra* note 4, at 27.

[8] Stryker, *supra* note 3, at 47.

[9] *Id.*

the case was convicted for wearing female clothes and shoes, rouge, lipstick, and face powder, female underclothing, wearing her hair in a female fashion, and carrying a female pocketbook. 202 N.E.2d 529 (N.Y. 1964). Similarly, in *People v. Archibald*, the court noted that the defendant said that she was "a girl;" and that by "conceal[ing] her *true gender* ... the defendant was in violation of" the statute in question. 296 N.Y.S. 2d 834, 836 (N.Y. App. Div. 1968) (emphasis added).

In addition to the criminalization of crossdressing, laws targeted individuals for wearing clothes traditionally associated with other sexes in a myriad of ways. For example, *Etscheid v. Police Bd. of City of Chicago* addressed the discharge of a policeman from the Chicago Police Department for conduct unbecoming a police officer. The conduct for which the officer was discharged consisted of "wearing a woman's bra, slip, and panties." The court concluded that even though the officer had an exemplary record, it was a proper exercise of authority for the police board to conclude that "[b]ecause of his interest in wearing feminine clothing, ... he should be removed from the force." 197 N.E.2d 484, 487 (Ill. App. Ct. 1964). Also, courts at times treated evidence of a male dressed in female attire as creating an inference of solicitation in criminal prosecutions, even where additional evidence was limited. *Berneau v. United States*, 188 A.2d 301, 302 (D.C. 1963); *Alexander v. United States*, 187 A.2d 901, 902 (D.C. 1963).

Another legal mechanism used to control the manner in which individuals presented their "sex" to the world was through prosecutions for alleged "marriage fraud." While crossdressing was not universally illegal throughout the twentieth century, making putatively false statements about one's "identity" on a marriage

contract was proscribed.[10] These stories of invalidated marriages were covered widely in the popular press.[11] Thus, as early as 1927, Kenneth Lisonbee, who was designated as female at his birth, was prosecuted after he married Eileen Garnett for representing himself as male on the marriage contract.[12] His life story, arrest, prosecution, and freedom were widely covered by the popular press across the nation.[13]

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[10] Emily Skidmore, *True Sex* 140-141 (New York University Press 2017).

[11] *Id.* at 140.

[12] *Id.*

[13] *Woman-"Husband" in Jail*, Los Angeles Times, Jan. 11, 1929; *Arrest Bares Her Disguise*, Los Angeles Examiner, Jan. 11, 1929; *Girl-Man Free under Mann Act in Jail Again*, Fresno (CA) Bee, Jan. 11, 1929; *Ranch Tomboy in Legal Mess*, Los Angeles Times, Jan. 12, 1929; *Trousered Tomboy Bleats in Bastille*, Helena (MT) Daily Independent, Jan. 12, 1929; *Utah Woman Held in Jail*, Salt Lake (UT) Tribune, Jan. 12, 1929; *Katherine Wing Sent to Jail in Adventure Case*, Montana Standard (Butte), Jan. 12, 1929; *Girl, Posing as Husband, Goes to Jail*, Galveston (TX) Daily News, Jan. 12, 1929; *Suave, Trouser-Clad Barber Turns Out to Be Damsel*, Rocky Mountain News (Denver), Jan. 12, 1929; *Man Barber' a Girl; Also Acted Husband*, Daily News (New York), Jan. 13, 1929; *Sporty White-Aproned Barber Turns Out to Be Pretty Girl*, Simpson's Leader-Times (Kittanning, PA), Jan. 14, 1929; *Girl-'Husband' Gets Liberty*, Los Angeles Times, Jan. 15, 1929; *Woman Posing as "Husband" to Go Free*, Los Angeles Evening Herald, Jan. 15, 1929; *Posing as Man, Girl Weds Two*, Pointer (Riverdale, IL), Feb. 15, 1929; *Posing as Man, Girl Weds Two*, Dunkirk (NY) Observer, Feb. 25, 1929. *See also*, Skidmore, *supra* note 10, at 157-169.

2. The public meaning of "sex" implicated transgender individuals in the decade before Title VII was passed

Throughout most of the twentieth century, the American public was increasingly made aware of individuals who presented in a manner that appeared inconsistent with their sex assigned at birth.[14] These stories would emphasize and interrogate the "sex" to which these individuals purportedly belonged. Given this history, in the years immediately leading up to the passage of Title VII, and long before, the public—to say nothing of Congress—would have understood the term "sex" to implicate transgender identity.

In 1897, for example, the Stockton Daily Record published a description of Jack Garland (Babe Beane), who was born Elvira Virginia Mugarrieta in 1869: "Babe Bean is the name the bright-faced girl-boy goes by, but what her real name is she alone knows, and is not liable to divulge it, as she claimed to come from one of the best families in the land."[15] In 1899, Garland, dressing as a man, went to the Philippines to fight in the Philippine-American War.[16] While it was ultimately discovered that Garland was dressed in a manner inconsistent with his sex assigned at birth, he remained in Manila during the conflict.[17] His story,

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[14] Skidmore, *supra* note 10, at 101-137.

[15] *Was Dressed as a Boy, Pretty Miss Bean Travels around the World*, Stockton (CA) Daily Record, Aug. 23, 1897.

[16] Skidmore, *supra* note 10, at Chapter 4.

[17] *Jack Goes to Japan*, Manila Freedom, June 13, 1900. For additional newspaper coverage of Garland's time in the Philippines, *see*, *e.g.*, *"Babe" Bean the Stowaway*, San Francisco Chronicle, Nov. 2, 1899; *Girl Stowaway Reaches Manila*, San Francisco Chronicle, Dec. 12, 1899; *"Babe" Bean Is in Manila*, Stockton (CA) Evening Mail, Dec. 13, 1899; *Serious Accident*, Manila Freedom,

describing his time in the Philippines, was later published in the Sunday magazine section of all of the Hearst newspapers.[18] In 1917, Garland again appeared in the popular press when he was arrested and accused of being a German spy disguised as a man.[19] Garland's arrest and ultimate release were reported by the popular press across America.[20] As reported by the Los Angeles Times, "[w]hen asked why she wore male attire, Beebe Bean said: 'I fought in the China Boxer war with Gen. Woolaston, and consequently I find [male clothing] more convenient.'"[21]

While Americans were reading stories about individuals like Jack Garland in the first half of the twentieth century, scientists in Europe had also begun to discuss and experiment with the idea of "sexual transformation."[22] From 1910 into the 1930s, Eugen Steinach in Austria and Magnus Hirschfeld in Germany

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Jan. 7, 1900; *Beebe Bean There*, Manila Freedom, Feb. 15, 1900; *Babe Bean Arrested in the City of Manila*, Stockton (CA) Evening Mail, April 4, 1900; *Exploits of an Extraordinary Woman*, Stockton (CA) Evening Mail, April 28, 1900; *Beebe Beam Back from the War*, San Francisco Examiner, Aug. 8, 1900.

[18] Beebe Beam, *My Life as a Solider*, Sunday Examiner Magazine, Oct. 21, 1900.

[19] *Woman in Man's Clothes Arrested as Spy Suspect*, Los Angeles Times, Dec. 29, 1917.

[20] *See, e.g.*, *Bare History of Freed Man-Woman*, Los Angeles Times, Jan. 1, 1918; *Suspected as "Mme. H.,"* Washington Post, Dec. 30, 1917; *Girl Dressed in Men's Togs Held in German Plot*, Chicago Daily Tribune, Dec. 30, 1917.

[21] *Woman in Man's Clothes Arrested as Spy Suspect*, Los Angeles Times, Dec. 29, 1917.

[22] Joanne J. Meyerowitz, *How Sex Changed: A History of Transsexuality in the United States* 15 (Harvard University Press 2002).

conducted research focused on the possibility of "sex-change."[23] Doctors at Hirschfeld's Institute for Sexual Science began to perform "sex-change" surgeries on humans.[24] Beginning in the 1930s, stories about these "sex-change" surgeries began to appear in the popular press in America.[25] These stories described a process whereby individuals' sexual identity was transformed, again demonstrating that the term "sex" would have been broadly understood to encompass this possibility.

Most prominent was the story of World War II veteran, Christine Jorgensen. After the War, Jorgensen returned to Europe in the 1950s to undergo so called "sex change" surgical procedures.

Jorgensen was not the first person to undergo what today is often referred to as gender confirmation surgery—but her story was front page news, even amidst reporting on the Korean War and the death of King George VII of England. On December 1, 1952, for example, the headline on the front page of the New York Daily News exclaimed "Ex-GI Becomes Blonde Beauty."[26] Similarly, when Jorgensen returned to the United States in 1953, she was met by reporters,

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[23] *Id.*

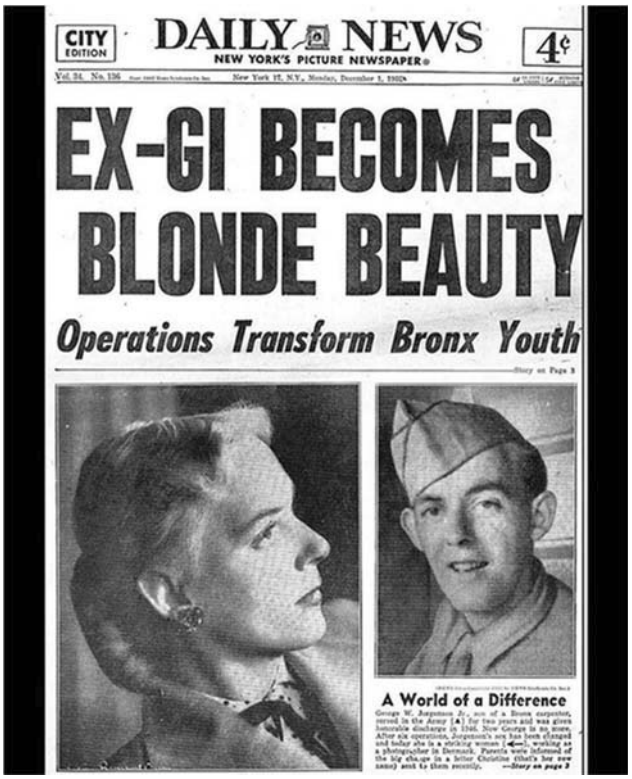
[24] *Id.*

[25] *Id.* at 29-36. *See, e.g.*, *Astounding Case of the Man Who Was Changed Into a Woman*, Omaha World Herald, 22 Oct. 1933; *Man in Woman's Body*, Your Body 4:l (Sept. 1937); J. P. Harbuck, *Sex Repeal! Science Solves the Riddle of Man-Women Wonders*, True, Sept. 1939, at 50–55, 119–120; *["Bad-Old"] Days of Newly-Made Man"* n.p., n.d.*; "Boy Ex-Girl "Corsetiere"*, New York Daily Mirror, n.d. [c. 1936]; *Former Girl Athlete Arrives, Now a Man*, n.p., n.d. [c. 1936]; *Women into Men by Surgery?*, Sexology 3:12 (Aug. 1936), at 775; Jacob Hubler, *Science Turns Girl into Boy*, Sexology 2:3 (Nov. 1934), at 158.

[26] Meyerowitz, *supra* note 21, at 62.

photographers, and around 350 spectators.[27] In the following two weeks, Newsweek reports that the three major wire services sent out 50,000 words on the Christine Jorgensen story.[28]

The news stories focused squarely on the question of the "sex" to which Jorgensen belonged. As noted, the Daily News described Jorgensen as a "blond beauty."[29]



CITY EDITION

DAILY NEWS

NEW YORK'S PICTURE NEWSPAPER

4¢

Vol. 34. No. 336 New York 17, N.Y., Monday, December 1, 1952

EX-GI BECOMES BLONDE BEAUTY

Operations Transform Bronx Youth

Story on Page 3

A World of a Difference

George W. Jorgensen Jr., son of a Bronx carpenter, served in the Army [▲] for two years and was given honorable discharge in 1946. Now George is no more. After six operations, Jorgensen's son has been changed and today she is a striking woman [◀—], working as a photographer in Denmark. Parents were informed of the big change in a letter Christine titled "her new name] sent to them recently. —Story on page 3

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[27] *Id.* at 65.

[28] *Christine and the News*, Newsweek, Dec. 15 1952, at 64.

[29] Theo Wilson, *Folks Proud of GI Who Became Blonde Beauty*, Daily News, Dec. 1, 1952.

The San Francisco Examiner described Jorgensen as "not only female; she's a darn good looking female. She's tall, very blonde and chic."[30] The Los Angeles Times described Jorgensen in the following manner: "pretty, personable, and pleasant—by any standard. She's courteous and intelligent, too. Over lunch in a suite at the Statler yesterday, this reporter forgot to remember her past maleness and saw only the present femininity and charm."[31]

In addition to Jorgensen, during the 1950s and 1960s, a variety of popular press outlets identified and discussed a number of other transgender persons, including Charlotte McLeod, Delisa Newton, Laverne Peterson, Marta Olmos Ramiro, and Tamara Rees. These mainstream outlets included Time and Newsweek, popular daily newspapers such as The New York Daily News, African American publications such as Sepia and Ebony, and cult tabloid magazines such as Mr. and Whisper.[32]

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[30] *Former Boy Real Girl, Writer Says*, San Francisco Examiner, Feb. 13, 1953.

[31] Fay Hammond, *Christine's Femininity Charms Interviewer*, Los Angeles Times, May 9, 1953.

[32] *See, e.g., In Christine's Footsteps*, Time, Mar. 8, 1954, at 63; *Charlotte Home, Battles Photog Like the Charles She Used to Be*, Daily News, Apr. 14, 1954; *Ex-GI Changes Sex after Surgery*, Chicago Daily Tribune, Feb. 25, 1954, at B2; *Charlotte Would Wed*, San Francisco Examiner, June 25, 1954; *Sex Change, Ex-GI Now Is a Bride*, New York Herald Tribune, Nov. 14, 1959; Tamara Adel Rees and Henry Lee, *Tamara Tells Her Story: A Boy Wanted to Grow Up as a Girl*, New York Daily News, Nov. 11, 1954, at 12; *Tamara Joined Paratroopers as Test of Manhood*, New York Daily News, Nov. 12, 1954, at 3, 24; *Male Clerk Now Wants to Be a Mother*, San Francisco Chronicle, May 7, 1954; Delisa Newton, *From Man to Woman*, Sepia, April 1966, at 9; *My Mother Was a Man*, Ebony, June 1953, at 75; *Male Dancer Becomes Danish*

Sacramento, California

Danish Doctors Again Change Sex Of American

By Eigil Andersen

COPENHAGEN —AP— Dan ish doctors again have len nature a helping hand and young American who came her last winter as Charlie McLeo is almost ready to return t New Orleans as Charlotte Mc Leod.

After a series of hormon injections and operations in th Copenhagen Hospital throug the last year Charlotte ha reached her goal after over coming troubles she called "jus one year of hell."

The reason of all this trouble 28 year old Charlotte said, wa "the bad publicity of a recen similar case," that of Christin Jorgensen.

Leaning heavily on a walkin

At the left is Charlie McLeod of New Orleans, in a picture taken two years ago. At the right is the same person today, now known as Charlotte McLeod, after a series of operations in Copenhagen, Denmark. AP Wirephoto

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Citizen to Change His Sex, Jet, June 25, 1953, at 26; *Male Shake Dancer Plans to Change Sex, Wed GI in Europe*, Jet, June 18, 1953, at 24-25; Juan Morales, *Mexico's Hush-Hush Secret: Sex Surgery While You Wait!*, Whisper, April 1955, at 24-26, 43. *See also* Emily Skidmore, *Construction the "Good Transsexual": Christine Jorgensen, Whiteness, and* Heteronormativity, 37 Feminist Studies 270, 272-278 (2011).

SEX-CHANGED BRIDE AWAITS CURTAIN CALL . . Tamara Adel Rees, ex-paratrooper and reputed father of two children who changed sex last year in Holland surgery, waits off-stage in a Sacramento, Cal., burlesque theater with her bridegroom of six days, James E. Courtland, 3d, for cue to begin her performance. Tamara is lecturing to burlesque audiences on how to change sex.

AP Wirephoto

B. Amending Congresses Were Aware that the Word "Sex" Implicated Transgender Individuals

Title VII has been substantially amended four times since its passage. *See* Lily Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009) ("Ledbetter Amendments"); Civil Rights Act of 1991, Pub. L. 102-166 ("1991 Amendments"); Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k)) ("PDA Amendments"); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. At the time of each amendment, there was expanding consciousness of the link between discrimination based on sex and transgender status discrimination—and indeed, of cases in which plaintiffs argued, sometimes successfully, that transgender status discrimination constituted sex discrimination. Yet, even as Congress defined and re-defined sex discrimination and remedies therefor in several of its Amendments, members of Congress never suggested that transgender individuals should be excluded from Title VII's sex discrimination protections. *See* 1991 Amendments (defining sex stereotyping as a form of sex discrimination); PDA Amendments (clarifying that pregnancy discrimination is a form of sex discrimination).

1. PDA Amendments

By the time Congress revisited the definition of "sex" in Title VII for the first time in 1978, social developments linked transgender individuals deeply to the concept of sex, and indeed, to the concept of sex discrimination. As early as 1969, a study on medical practices submitted to a Senate Committee reported how a transgender individual was permitted to change her name after undergoing gender reassignment

surgery. *See Medical Malpractice: The Patient Versus the Physician* 744-45 (Washington, U.S. Gvt. Printing Office 1969) (citing *In re Anonymous*, 293 N.Y.S. 2d 834 (N.Y. 1968)) ("The question raised by this situation was whether a given person's gender is what society says it is or whether it is what the person says it is."). Similarly, in 1978, early in the same year the PDA was passed, a House Committee received written testimony about transgender identity, and its relationship with sexuality. As the testimony noted, "gender role exist[s] on a continuum." Research Into Violent Behavior: Overview and Sexual Assaults: Hearings Before the Subcomm. on Domestic and International Scientific Planning, Analysis, and Cooperation of the Committee on Science and Technology, 95th Cong 924 (1978).

Broader law and culture similarly recognized the existence of transgender individuals. Indeed, the law sometimes assisted transgender individuals with seeking medical treatments to live congruently with their gender identities. The Supreme Court of Minnesota, for example, mandated that state Medicaid cover "sex conversion" for a beneficiary, who was "one of 25 candidates selected from a large number of applicants to undergo sex conversion surgery at the university hospital." *Doe v. State, Dep't of Public Welfare*, 257 N.W.2d 816, 817 (Minn. 1977). In so concluding, the court explained its understanding that, for transgender individuals, "[s]ex [which] connotes the anatomical qualities that determine whether one is male or female" does not match their experienced sex, creating the need for surgery. *Id.* at 818. *See also City of Chicago v. Wilson*, 389 N.E.2d 522 (Il. 1978) (invalidating state law prohibiting public dress "not belonging to his or her sex"); *G. B. v. Lackner*, 80 Cal. App. 3d 64 (Cal. Ct. App. 1978) (ordering state Medicaid program

to cover gender transition surgery because it is medically necessary); *Rush v. Parham*, 440 F. Supp. 383 (N.D. Ga. 1977) (same), *rev'd*, 625 F.2d 1150 (5th Cir. 1980); *M. T. v. J. T.*, 355 A.2d 204 (N.J. App. Div. 1976) (upholding a marriage between a man and a transgender woman, and holding that "there are several criteria or standards which may be relevant in determining the sex of an individual"); *Darnell v. Lloyd*, 395 F. Supp. 1210, 1214 (D. Conn. 1975) (denying summary judgment to government in face of plaintiff's claim that its refusal to change her birth certificate violated her constitutional equal protection rights); *Christian v. Randall*, 516 P.2d 132, 134 (Colo. Ct. App. 1973) (declining party's invitation to change child custody status based on transgender parent's transition); *In re Anonymous*, 314 N.Y.S.2d 668, 670 (N.Y. Civ. Ct. 1970) (approving name change for trangender applicant).

Popular media provided exhaustive coverage about how transgender individuals often did not conform to traditional sex roles. In addition to films and books that portrayed transgender characters,[33] newspapers described studies on transgender individuals, and covered cases in which transgender individuals sought changes to the sex designation on their birth certificates.[34] Similarly, numerous prominent clinics around

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[33] *See*, *e.g.*, Howard Thompson, *Myra Breckinridge Revealed Onscreen*, New York Times, June 25, 1970, at 54 (discussing film which portrayed a transgender woman); Christopher Lehman Haupt, *Books of the Times*, New York Times, Apr. 13, 1978, at 71 (discussing John Irving's best-seller novel, *The World According to Garp*, which had a transgender character).

[34] *See, e.g.*, Gobind Behari Lal, *Sex Change Study Begun*, San Francisco Chronicle, June 30, 1965, at 32 (describing Dr. Harry Benjamin's study of "transsexual" individuals, the first-known study if its kind); Richard Lyons, *Sex Changes Vex Health Dept.*, New York Daily News, Feb. 6, 1966, at 4c (describing the request

the nation began to provide what then were sometimes referred to as "sex change" or "sex reassignment" services, which were discussed in some detail in the press throughout the nation and in court decisions like the Supreme Court of Minnesota's *Doe* case. For example, Johns Hopkins Hospital, the first U.S. hospital to establish a gender identity clinic and provide gender confirmation surgery (referred to as "sex-change operations" at the time), received coverage in 1966 New York Times and Associated Press articles,[35] which were reprinted across the country.[36] As more hospitals in the United States—including hospitals associated with the Universities of Minnesota, Washington, and Virginia—began to provide gender confirmation

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of transgender New Yorker's to change the sex designation on their birth certificates); Robert Gillette, *Surgeon Tells of Transsexuals—and Search for Help*, San Francisco Examiner, May 2, 1969, at 54 (describing the 3000 transgender individuals then estimated to live in the United States, the eight existing gender identity clinics, and the "constant fear" of transgender people about being arrested for cross-dressing).

[35] Thomas Buckley, *A Change of Sex by Surgery Begun at John Hopkins*, New York Times, Nov. 21, 1966, at 1.

[36] *See, e.g.*, *Johns Hopkins Performing Operations to Change Sex*, Pittsburgh Post-Gazette, Nov. 21, 1966, at 1; *Transsexual Surgery Started in New York*, Arizona Daily Star, Nov. 21, 1966, at 2A; *Johns Hopkins Surgery Changes Sex*, Minneapolis Tribune, Nov. 21, 1966, at 9; *First Sex-Change Surgery in U.S. at Johns Hopkins*, Des Moines Register, Nov. 21, 1966, at 6; *Johns Hopkins Starts Sex Change Operations*, Dayton Daily News, Nov. 21, 1966, at 6; *Sex Change Done at Johns Hopkins*, Abilene Reporter-News (TX), Nov. 21, 1966, at 2B; *U.S. Hospital to Begin Sex Change Surgery*, Journal Times (Racine, WI), Nov. 22, 1966, at 7A; *Science to Help Sex Switchers Become Parents*, Detroit Free Press, Nov. 23, 1966, at 1; *Surgical Techniques Used to Change Sex*, Hartford Courant, Nov. 24, 1966, at 55.

surgery, news coverage proliferated.[37] By 1973, the Los Angeles Times confidently proclaimed that "Sex Change Surgery Spreads Through U.S."[38]

This trend culminated in the year before the passage of the PDA Amendments. Transgender tennis player Renée Richards argued in a high profile case that the United States Tennis Association's refusal to let her play as a woman "exclude[ed] [her] from sports events on the basis of gender," thus violating New York and federal law. *Richards v. U.S. Tennis Ass'n*, 93 Misc. 2d 713 (N.Y.S. 1977). Richards argued that the Tennis Association adopted a "sex determination test" in 1976 for the first time in its nearly-century long history—a test designed to exclude her from playing. The Association adopted a chromosome-based test to prevent the "10,000 transsexuals" they believed existed in the United States from playing as the "wrong sex."

Richards's experts countered with factual testimony showing the Tennis Association's binary concept of sex to be overly simplistic and at odds with scientific understanding. The evidence showed that Richards had the "external genital appearance, the internal organ appearance, gonadal identity, endocrinological makeup and psychological and social development of a female," and that the chromosome-based test was "inadequate to determine sex." Citing state law which

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[37] Jane E. Brody, *500 in the U.S. Change Sex in Six Years with Surgery*, New York Times, Nov. 20, 1972, at 1 (noting that the hospitals at the University of Minnesota, the University of Michigan, the University of Washington, and the University of Virginia established gender-confirmation surgical clinics between 1966 and 1972). *Sex Change Surgery Spreads—Even to Phila.*, Philadelphia Inquirer Oct. 21, 1973, at 2-A.

[38] *Sex Change Surgery Spreads Through U.S.*, Los Angeles Times, Dec. 7, 1973, at 14.

prohibited, inter alia, "discriminatory practice for an employer, because of age, race, creed, color, national origin, *sex* or disability," the court held for Richards. *Id.* at 722 (emphasis added).

Richards was not alone. In the years leading up to the PDA Amendments, a number of transgender individuals brought suit in federal court claiming employment discrimination "because of the individual's sex" under Title VII—though they were not as successful as Richards.[39]

By the time Congress turned to the PDA Amendments, then, it had evidence regarding the implications of "sex" in the lives of transgender individuals. The Richards case—which was the subject of numerous articles in the New York Times alone[40]—had held, among other things, that exclusion of a transgender

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[39] *Holloway v. Arthur Andersen & Co*., 566 F.2d 659 (9th Cir. 1977); *Powell v. Read's, Inc.,* 436 F. Supp. 369, 370 (D. Md. 1977); *Voyles v. Ralph K. Davies Medical Center,* 403 F. Supp. 456 (N.D. Cal. 1975); *Grossman v. Bernards Township Board of Education*, Civ. No. 74-1904 (D.N.J. Sept. 10, 1975); *Smith v. Liberty Mutual Insurance Company*, 395 F. Supp. 1098 (N.D. Georgia 1975). Although these cases found that discrimination against individuals because they are transgender is not covered by the pre-1991 version of Title VII, they demonstrate a rising awareness of transgender individuals as a discrete minority subject to discrimination.

[40] *See, e.g.*, Robin Herman, *A Former Male Tennis Player Seeks to Join Women's Tour*, New York Times, July 24, 1976, at 16; Neil Amdur, *Vexed U.S.T.A. Orders Sex Test For Women*, New York Times, Aug. 15, 1976, at 147; Neil Amdur, *Renee Richards Will Refuse To Take Sex Test For Tennis*, New York Times, Aug. 18, 1976, at 61, 63; *Renee Richards Pursuing Tennis Career For A Cause*, New York Times, Aug. 19, 1976, at 45; *Dr. Richards, Now Broke, Planning To Play New Circuit For Women*, New York Times, Mar. 10, 1977, at 40.

individual constituted sex discrimination in 1977. Yet, even as it amended Title VII's definition of sex in 1978, Congress took no steps to exclude transgender individuals from Title VII's protections.

2. The 1991 Amendments

National awareness of transgender people continued to grow in the 1980s. In 1983, for example, a transgender pilot brought a lawsuit in federal court alleging that her employer discriminated against her based on "sex" within the meaning of Title VII. *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821, 823 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (7th Cir. 1984). Much like the court in the *Richards* case, the district court held that "sex is not a cut-and-dried matter of chromosomes ... . '[S]ex,' as used in any scientific sense and as used in the statute can be and should be reasonably interpreted to include among its denotations the question of sexual identity and that, therefore, transsexuals are protected by Title VII." *Id.* at 825. Accordingly, "the term, 'sex,' literally applies to transsexuals and … it applies scientifically to transsexuals." *Id.*

Although the Seventh Circuit Court of Appeals reversed *Ulane* the following year, 742 F.2d 1081, Congress was already aware of the lower court's holding. In arguing against expanding the reach of Title IX prohibitions on sex discrimination, a congressional witness explained his concern that the statute "does not say no discrimination against women. It says no discrimination on the basis of sex." Civil Rights Act of 1984: Hearings Before the Subcomm. on the Constitution of the Committee on the Judiciary, United States Senate, 98 Cong. 348 (1984) (Statement of Jack Clayton, Washington Representative, American Association of Christian Schools). Thus, he pointed

out that Title VII's analogous sex discrimination bar resulted in "Eastern Airlines, last year, los[ing] a case to a transvestite [sic] that had a sex change operation." *Id.* The district court opinion in *Ulane* also received extensive press coverage,[41] as did numerous other cases involving transgender discrimination claims. Cases ranged from those involving transgender women who sought hormone therapy and placement in a women's prison, to others, besides *Ulane*, in which employees claimed discrimination based on sex.[42] Many narratives—such as that of Renée Richards—also appeared in the popular press during this period.[43]

Many of these narratives reached Congress as well—and Congress took action in response to a number of them. In 1985, a Senator opposing additional funding to the Legal Services Corporation pointed to its support of litigation seeking "sex change operations" for transgender Medicaid beneficiaries 131 Cong. Rec. 10407, 10486 (1985). In 1988, one of those Senators, Jesse Helms, requested and obtained an amendment to the Federal Housing Act Amendments of 1988, which excluded "transvestites" from its protections based on disability. 134 Cong. Rec. 19697,

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[41] *See, e.g.*, *Dismissed Transsexual Pilot Wins $158,590 In Back Pay*, New York Times, Feb. 14, 1984, at 18.

[42] *See, e.g.*, *Transsexual Says He's in the Wrong Prison*, San Francisco Examiner, Jan. 11, 1986, at 6 (reporting on the lawsuit by Lavarita Merriweather, a transgender federal prison inmate, to compel the prison to provide estrogen hormone therapy and place her in a women's prison); *Transsexual Inmate Won't Get Hormones*, Indianapolis Star, Jan. 11, 1986, at 33 (same); *see also Transsexual officer Seeks Return to Job at Prison*, Tampa Tribune, Feb. 22, 1991, at 149.

[43] *See, e.g.*, *CBS'S 'SECOND SERVE'*, New York Times, May 13, 1986, at 18 (reviewing the CBS movie).

19727-729 (1988); S. Amdt. 2779 to H.R.1158, 100th Congress (1988). Finally, in September 1989, Senators Armstrong and Hatch also sought an exemption from the Americans with Disabilities Act that excluded, "transvestism [and] transsexualism." 135 Cong. Rec. S10765 - S10803, 1989 WL 183216 (daily ed. Sept. 7, 1989), codified as amended in 42 U.S.C. § 12211 (2018).

At the same time, in the summer and fall of 1989, Congress—indeed, similar committees of Congress—began the task of amending Title VII, which culminated in the 1991 Amendments.[44] On one hand, those amendments responded to the Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). On the other, relying on this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Congress broadened our understanding of sex discrimination. The 1991 Amendments also addressed matters not driven by this Court's decisions.[45] What is clear,

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[44] Both the ADA and a precursor of the 1991 Amendments, the Fair Employment Reinstatement Act, S. 1261, remained pending before the Senate Labor & HR Committee through the summer and fall of 1989.

[45] For example, the 1991 Amendments added a right to a jury trial (§ 102(c)), caps on certain types of damages based on size of the employer, the right to recover compensatory and punitive damages for intentional discrimination (§ 102(b)(1)-(3)), detailed the rules for consent judgments and whether interests of the client were adequately represented and modified (§ 108). *See generally* EEOC, *The Civil Rights Act of 1991*, *available at* https://www.eeoc.gov/eeoc/history/35th/1990s/civilrights.html (last visited July 1, 2019). Substantively, the 1991 Act codified the disparate impact theory of discrimination (§ 105(k)) and created employer liability when a plaintiff shows discrimination was even simply a motivating factor for an employment decision, though plaintiff's recovery is limited to injunctive relief, attorney's fees, and costs (§ 107) if an employer shows that it would have taken the same

however, is that even as Congress attempted to limit transgender rights in other contexts, it did *not* do so in Title VII—even as it simultaneously revised the statute's definition of sex discrimination. *Cf. Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 174 (2009) ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.").

Indeed, in expanding the basis of sex discrimination, Congress set the stage for transgender individuals to seek protections under Title VII. In the years following *Price Waterhouse*, civil rights claims brought by transgender and gender non-conforming plaintiffs coalesced around two distinct theories. First, courts understood this Court's recognition of the sex stereotyping claim in *Price Waterhouse* to afford such plaintiffs valid ground on which to assert Title VII claims.[46] Second, the conception of sex discrimination

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action if a prohibited characteristic had not been a motivating factor of its decisionmaking. *Id.*

[46] *See Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004) (finding allegations of sex stereotyping made by transgender woman who suffered retaliation and termination sufficient to constitute sex discrimination under Title VII and Equal Protection clause); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (citing *Price Waterhouse* to interpret Title VII as encompassing both "sex" and "gender" in case of "pre-operative male-to-female transsexual" prisoner bringing a claim under the Eighth Amendment and the Gender Motivated Violence Act); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213 (1st Cir. 2000) (anti-trans discrimination constitutes illegal sex stereotyping); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc*., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (sex stereotyping approach "make[s] [no] distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and an "effeminate" male or "macho" female"); *Tronetti v. TLC HealthNet Lakeshore Hosp*., No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003) (transgender plaintiffs can allege sex stereotyping); *Doe v. United Consumer Fin. Servs*.,

identified by the *Ulane* district court in 1983 proliferated. Such courts recognized that under any reasonable understanding of the word "sex," discriminatory acts targeting an individual's transgender or gender nonconforming status is *necessarily* discrimination on the basis of sex.[47] This changing awareness would have been evident to Congress when it again turned to amend Title VII again in 2009.

3. 2009 Amendments

In 2009, Congress passed the Ledbetter Amendments to overturn *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), regarding Title VII's statute of limitations in a sex discrimination case. By 2009, there was unmistakable awareness of transgender issues in Congress. For example, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 expressly included anti-transgender animus as a grounds for a hate crime. Pub. L. 111–84, 123 Stat. 2835. In the years preceding passage of the Act, the social oppression and violence that transgender indi-

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No. 1:01 CV 1112, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001) (same).

[47] *See, e.g., Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) ("Even if the decisions that define the word "sex" in Title VII as referring only to anatomical or chromosomal sex are still good law—[]—the [Defendant]'s refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was literally discrimination 'because of ... sex.'"). Other cases recognized similar realities under parallel civil rights statutes. *See Miles v. New York Univ.*, 979 F. Supp. 248 (S.D.N.Y. 1997) (recognizing claim of sexual harassment made by transgender woman as constituting discrimination "on the basis of sex" in violation of Title IX).

viduals frequently experienced was a topic of recurrent discussion on the floors of the chambers of Congress.[48]

More importantly, by this time, it is clear that there was a growing understanding in Congress that unequal treatment of transgender individuals involves sex discrimination. For example, in 1995, while discussing sex discrimination issues in the international law context, Senator Daniel Coats noted that "the meaning of gender has been expanded to include not just male and female but transsexual ... ."[49] In 1996, as part of written testimony offered on H.R. 1863, a bill drafted to prohibit discrimination based on sexual orientation, Congress was told that discrimination towards transgender individuals "arises from the application of stereotypical notions of what having a particular chromosomal or birth sex entails. This is arguably … nothing but sex discrimination in another guise."[50]

Finally, in the years leading up to the passage of the Ledbetter Amendments, this idea that transgender discrimination implicated sex discrimination was regularly discussed in Congress. In 2007 several legislators discussed the link between "gender identity" and "discrimination based on gender stereotypes" prohibited by the 1991 Amendments, in debates on a bill that would prohibit discrimination based on sexual

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[48] 151 Cong. Rec. S1602 (2005); 151 Cong. Rec. 20228 (2005); 152 Cong. Rec. 115 (2006). 153 Cong. Rec. S2481 (2007); 154 Cong. Rec. 4982 (2008).

[49] 141 Cong. Rec. 21074 (1995).

[50] H.R. 1863—The Employment Non-Discrimination Act: Hearing Before the Subcomm. on Government Programs of the Committee on Small Business, House of Representatives, 114 Cong. 179 (1996).

orientation and gender identity in employment. 153 Cong. Rec. H13220 (2007); 153 Cong. Rec. E2399 (2007). As a witness noted in the hearings, "in 1989 the Supreme Court, in the *Price Waterhouse v. Hopkins* decision, held ... that sexual stereotyping ... would form a basis for a Title VII violation ... . [W]e have a protection already."[51] He concluded that express gender identity protections would be superfluous: it was "simply unclear" what such protections would achieve.[52] Legislative analysis that same year also came to the conclusion that "the sex stereotype theory might ... be viable in cases involving transgender individuals." Edward C. Liu, *Gender Identity Discrimination in Employment: Analysis of H.R. 3686 in the 110th Congress* (Congressional Research Service Nov. 6, 2007).

Sex stereotyping was not the only basis on which transgender individuals made sex discrimination claims. In 2007, a member of Congress raised the claim of Diane Schroer, a transgender Marine veteran, who had been denied a job with the Library of Congress for being transgender.[53] Schroer filed suit. As subsequent legislative analysis explained, Schroer's Title VII claim had moved forward, not on a sex stereotyping theory, but rather because "the scientific basis of sexual identity" might render gender identity

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[51] Employment Non-Discrimination Act of 2007 (H.R. 2015): Hearing Before the Subcomm. on Health, Employment, Labor and Pensions, Committee on Education and Labor, U.S. House of Representatives, 110th Cong. 34 (2007).

[52] *Id.*

[53] 153 Cong. Rec. 28026 (2007) (Gender-Identity Inclusivenes in ENDA) (quoting *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006)).

discrimination sex discrimination.[54] In 2008, while accepting the sex sterotyping theory, the court also concluded that "the Library's refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination 'because of sex.'" *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008).

As the 2007 legislative analysis noted, however, the sex stereotyping approach was far more prevalent in the courts. The analysis cited *Smith v. Salem*, 378 F.3d 566 (6th Cir. 2004), which held that, "to the extent that [a transgender] firefighter asserted that she experienced discriminatory treatment [because] ... she did not conform to what her employer believed males should look and act like, she had [made] a prima facie case of sex discrimination."[55] Similarly, in *Barnes v. Cincinnati*, 401 F.3d 729 (6th Cir. 2005), a "police officer undergoing gender transition to female" successfully argued that she "was denied a promotion because she acted too femininely in her supervisors' opinions."[56] *Smith* and *Barnes* were not isolated cases.[57]

To be sure, the claim that gender identity discrimination constituted a form of sex discrimination under Title VII was not without controversy. As one witness before Congress suggested, some government officials did not believe Title VII provided such protections, and

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[54] Edward C. Liu, *Gender Identity Discrimination in Employment: Analysis of H.R. 3686 in the 110th Congress* (Congressional Research Service Nov. 6, 2007).

[55] *Id.*

[56] *Id.*

[57] *See supra* notes 46-47.

therefore, additional laws were required.[58] But by the time Congress passed the Ledbetter Amendments, many transgender individuals were nevertheless successfully claiming protection under Title VII. It would therefore be peculiar to conclude that Congress sought to exclude transgender individuals from Title VII's protections.

* * *

This Court should rely on the plain text of Title VII to hold that transgender discrimination constitutes discrimination based on sex. Relying on congressional silence to conclude that Congress was hostile to transgender rights claims is particularly problematic given the evidence that Congress was quite aware of the potential—and ultimately the success—of transgender rights claims under Title VII, and still did nothing. Its failure to act is notable given the steps it took to clarify and amend *other* aspects of Title VII, including clarifying the broad scope of the statutory definition and understanding of "sex." Rather than dive into the murky waters of congressional intent, this Court should rely on the plain text of Title VII, to conclude that discrimination because a person is transgender constitutes a form of discrimination "because of sex."

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[58] H.R. 3017: Employment Non-Discrimination Act of 2009: Hearing before the Committee on Education and Labor, U.S. House of Representatives, 111th Cong. 13 (2009).

CONCLUSION

The judgment of the Sixth Circuit Court of Appeals should be affirmed.

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