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 Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE STATES OF NEBRASKA, ALABAMA, ARKANSAS, KANSAS, LOUISIANA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WEST VIRGINIA, WYOMING, AND THE COMMONWEALTH OF KENTUCKY, BY AND THROUGH GOVERNOR MATTHEW G. BEVIN, PAUL L. LEPAGE, GOVERNOR OF MAINE, AND GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the word "sex" in Title VII's prohibition on discrimination "because of . . . sex," 42 U.S.C. § 2000e-2(a)(1) meant "gender identity" and included "transgender status" when Congress enacted Title VII in 1964.

2. Whether *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), prohibits employers from applying sex-specific policies according to their employees' sex rather than their gender identity.

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INTEREST OF *AMICI CURIAE*[1]

"It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). "[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

Amici States wish to safeguard the separation of powers undergirding our system of government, a system that encourages the States and the federal government to "control each other" through checks and balances. The Federalist No. 51 at 351 (James Madison) (J. Cooke ed. 1961). The States' purpose is to note that "sex" under the plain terms of Title VII does not mean anything other than biological status. Unless and until Congress affirmatively acts, our Constitution leaves to the States the authority to determine which protections, or not, should flow to individuals based on gender identity. The Sixth Circuit ignored this fact and essentially rewrote federal law, engaging in policy experimentation. The States urge the Court to grant certiorari to correct the Sixth Circuit's egregious error and restore the balance of power in our federal system,

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[1] The parties' counsel of record received notice of the intent to file this brief.

allowing States to legislate and experiment in this policy arena.

SUMMARY OF ARGUMENT

The Sixth Circuit's opinion below erases all common, ordinary understandings of the term "sex" in Title VII and expands it to include "gender identity" and "transgender" status. In doing so, the lower court rewrites Title VII in a way never intended or implemented by Congress in the Civil Rights Act of 1964. The Sixth Circuit error lies in its failure to apply basic canons of statutory interpretation, which guide courts to read the text of a statute, apply its ordinary meaning, and inform those meanings with the original public understanding of those words.

Two primary canons of statutory and constitutional interpretation include the ordinary-meaning canon and the fixed-meaning canon. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 69 & 78 (West 2012). The former canon instructs courts to give words their ordinary, everyday meaning, unless the context shows that they are to be used in a technical sense. See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. 304, 326 (1816) ("The words [of the Constitution] are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged."). The latter canon directs courts to give words the meaning they had at the time the document was adopted. See, e.g., *District of Columbia v. Heller*,

554 U.S. 570, 582–83 (2008) (assigning meaning to words in the Second Amendment based on their meaning at the founding). Thus, "[i]n the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940).

The Sixth Circuit erred by categorically declaring "[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex." *EEOC v. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018). The text, structure, and history of Title VII, however, demonstrate Congress's unambiguous intent to prohibit invidious discrimination on the basis of "sex," not "gender identity." The term "gender identity" does not appear in the text of Title VII or in the regulations accompanying Title VII. In fact, "gender identity" is a wholly different concept from "sex," and not a subset or reasonable interpretation of the term "sex" in Title VII. The meaning of the terms "sex," on the one hand, and "gender identity," on the other, both now and at the time Congress enacted Title VII, forecloses alternate constructions. See *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (explaining that an agency interpretation must be consistent with the given meaning of a term when official action was taken). For these reasons, the Court should grant the petition and hear this case of national importance.

ARGUMENT

I. The Text of Title VII Prohibits Discrimination on the Basis of "Sex," Not Transgender Status.

The text of Title VII prohibits invidious discrimination "on the basis of sex." 42 U.S.C. § 2000e-2(a). The statute does not define "sex"; thus, the ordinary meaning of the word "sex" prevails. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning."). When Congress enacted Title VII, virtually every dictionary definition of "sex" referred to physiological distinctions between females and males, particularly with respect to their reproductive functions. See, e.g., American Heritage Dictionary 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions."); Webster's Third New International Dictionary 2081 (1971) ("the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change. . . ."); 9 Oxford English Dictionary 578 (1961) ("The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these."). Even today, "sex" continues to refer to biological differences between females and males. See, e.g., Webster's New World College Dictionary 1331 (5th ed. 2014) ("either of the two divisions,

male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions"); Sari L. Reisner et al., "Counting" Transgender and Gender-Nonconforming Adults in Health Research, Transgender Studies Quarterly, Feb. 2015, at 37 ("Sex refers to biological differences among females and males, such as genetics, hormones, secondary sex characteristics, and anatomy.").

Clearly, a biologically-grounded meaning of "sex" is what Congress had in mind when it enacted Title VII, and that is what the public at the time undeniably would have understood from its plain language. In fact, eight years after enacting Title VII, Congress passed Title IX, proscribing invidious discrimination on the basis of "sex" in federally funded education programs. 20 U.S.C. § 1681(a). When Title IX passed, "sex" and "gender identity" remained distinct. "Sex" described physiological differences between the sexes, while "gender identity" referred more to social and cultural roles. The debate over Title IX concerned invidious "sex" discrimination and guaranteeing women equal access to education, not "gender identity" discrimination. Lawmakers used the term "sex" repeatedly, referring to the biological distinction between women and men. 117 Cong. Rec. 30407 (1971); 118 Cong. Rec. 5807 (1972). "Gender identity" appears in neither the statute's text nor legislative history.

One need look no further than how Congress used the term "sex" in Title IX. Congress would not have enacted 20 U.S.C. § 1686 in Title IX if "sex" possessed a definition that encompassed anything other than

biological status. Section 1686 provides: "Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, *from maintaining separate living facilities for the different sexes*." 20 U.S.C. § 1686 (emphasis added). The qualifier "different" before "sexes" signals that Congress was referring to the two biological sexes, and "identical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (internal quotation marks and citations omitted). Thus, Title IX's admonitions "on the *basis of sex*" (emphasis added) refer to biological sex, just as Title VII's prohibition on discrimination "on the basis of sex" refers to biological sex and nothing more. When Congress enacted Title VII and Title IX, the understanding of the word "sex" did not include the expansion of that word to include "gender identity." The term "gender identity," or as the Sixth Circuit labels it, "transgender" and "transitioning status," are not found in the text or legislative history of Title VII.

II. The Meaning of "Sex" at the Time Congress Enacted Title VII Was a Person's Biological Status.

The Sixth Circuit intermingles the terms "gender identity," "transgender," and "transitioning status," with "sex," but none of these terms are ascribed to be synonymous with "sex" within the meaning of Title VII.

In the 1950s, John Money, a psychologist at Johns Hopkins University, introduced "gender"—previously a grammatical term only—into scientific discourse. Joanne Meyerowitz, A History of "Gender," 113 The American Historical Review 1346, 1353 (2008). Money believed that an individual's "gender role" was not determined at birth but was acquired early in a child's development much in the same fashion that a child learns a language. John Money et al., Imprinting and the Establishment of Gender Role, 77 A.M.A. Archives of Neurology and Psychiatry 333–36 (1957).

Robert Stoller, the UCLA psychoanalyst who first used the term "gender identity," was another early adopter of the terminology of "gender." He wrote in 1968 that gender had "psychological or cultural rather than biological connotations." Robert J. Stoller, Sex and Gender: On the Development of Masculinity and Femininity 9 (1968). To him, "sex was biological but gender was social." David Haig, The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001, Archives of Sexual Behavior, Apr. 2004, at 93.

Early users of "gender identity"—a term first introduced around 1963—distinguished it from "sex" on the ground that "gender" has "psychological or cultural rather than biological connotations." Haig, supra, at 93. "Biological sex," they contended, is not the same as "socially assigned gender." Id. (quoting Ethel Tobach, 41 Some Evolutionary Aspects of Human Gender, Am. J. of Orthopsychiatry 710 (1971)). While "sex" cannot be changed, "gender" (per this view) is more fluid. The

Federal Government on Autopilot: Delegation of Regulatory Authority to an Unaccountable Bureaucracy: Hearing Before the H. Comm. on the Judiciary, 114th Cong. 13 (2016) (stmt. of Gail Heriot, Member, U.S. Comm'n on Civil Rights) (quoting Virginia Prince, Change of Sex or Gender, 10 Transvestia 53, 60 (1969)).

In 1969, Virginia Prince, who is credited with coining the term "transgender," echoed the view that "sex" and "gender" are distinct: "I, at least, know the difference between sex and gender and have simply elected to change the latter and not the former. . . . I should be termed 'transgenderal.' " Id. And in the 1970s, feminist scholars joined the chorus attempting to differentiate "biological sex" from "socially assigned gender." Haig, supra, at 93 (quoting Ethel Tobach, 41 Some Evolutionary Aspects of Human Gender, Am. J. of Orthopsychiatry 710 (1971)). Thus, at the time Congress enacted Title VII, "sex," "gender identity," and "transgender" had different meanings. Given all of the above, the use of the term "sex" in Title VII cannot be fairly construed to mean or include "gender identity." The Sixth Circuit erroneously conflated these terms to redefine and broaden Title VII beyond its congressionally intended scope.

III. Congress's Legislative Actions Since 1964 Confirm that the Meaning of "Sex" in Title VII Refers to Biological Status.

Beginning in the 1970s, Congress reaffirmed on numerous occasions that the statutory term "sex" in

Title VII refers to the physiological characteristics of females and males. Lawmakers debated proposals to add the new category of "gender identity" to Title VII. In 1974, Representatives Bella Abzug and Edward Koch proposed to amend the Civil Rights Act to add the new category of "sexual orientation." H.R. 14752, 93rd Cong. (1974). Congress considered other similar bills during the 1970s. See H.R. 166, 94th Cong. (1975); H.R. 2074, 96th Cong. (1979); S. 2081, 96th Cong. (1979).

In 1994, lawmakers introduced the Employment Non-Discrimination Act ("ENDA") which, like Rep. Abzug and Koch's earlier effort, was premised on the understanding that Title VII's protections against invidious "sex" discrimination related only to one's biological sex as male or female. H.R. 4636, 103rd Cong. (1994). In 2007, 2009, and 2011, lawmakers proposed a broader version of ENDA to codify protections for "gender identity" in the employment context. See H.R. 2015, 110th Cong. (2007); H.R. 2981, 111th Cong. (2009); S. 811, 112th Cong. (2011). Each of these attempts failed. But regardless of their failures, they all affirmed Congress's enduring understanding that "sex," as a protected class, refers only to one's biological sex, as male or female, and not the Sixth Circuit's radical reauthoring of the term. ENDA would be superfluous if "gender identity" was already covered by Title VII.

In the one instance when Congress actually amended "sex" in Title VII to cover discrimination "on the basis of pregnancy, childbirth, or related conditions," it did so to ensure that pregnant and post-partum women

face the same opportunities for advancement as men. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § (k), 92 Stat. 2076, 2076 (1978). In amending the law in this way, Congress indicated that invidious "sex" discrimination occurs when females and males are not afforded the same avenues for advancement, i.e., when pregnant women may be legally fired or not hired. Thus, this amendment affirmed Congress's long-held view that "sex" refers to biological sex, and not to an individual's self-perception of his or her "gender identity."

Other federal statutes acknowledge the emergence of "gender" and "gender identity" as concepts distinct from "sex." The 2013 reauthorization of the Violence Against Women Act ("VAWA") prohibits recipients of certain federal grants from invidiously discriminating on the basis of both "sex" and "gender identity." 42 U.S.C. § 13925(b)(13)(A). In 2010, the President signed hate crimes legislation, 18 U.S.C. § 249, which applies to, inter alia, "gender identity." Id. § 249(a)(2). While Congress has expressly added "gender identity" in other civil rights statutes, it has not changed the terms of Title VII. Put differently, Congress clearly knows there is a distinction between sex and gender identity. It has used both terms at the same time (indicating they are not interchangeable), and it has thus far declined to add gender identity to Title VII. That should be the end of the inquiry into whether Title VII protects gender identity.

IV. The Decision Below—Expanding the Definition of "Sex" in Title VII—Is One of National Importance for this Court to Correct.

The Sixth Circuit brushes aside the plain and fixed meaning of the term "sex" in Title VII. It also ignores the statute's legislative history. Instead, the lower court found that "the drafters' failure to anticipate that Title VII would cover transgender status is of little interpretive value." *Harris Funeral Homes*, 884 F.3d at 577. It also posits that Title VII "already incorporate[s] the offered change" to include "gender identity" and "transgender" status. Id. at 579.

The Sixth Circuit's reasoning, however, utterly fails simple canons of statutory interpretation. Under the ordinary meaning canon, by all measures available, "sex" refers to one's biological status as male or female, not to a changeable psychological view of one's gender. The Sixth Circuit's holding also fails to overcome the fixed-meaning canon. At the time Congress enacted Title VII, both the common and academic definitions of "sex" did not include "gender identity" or "transgender." The Sixth Circuit's reasoning also fails to answer why members of Congress would need to attempt repeatedly to expand Title VII's coverage to "sexual orientation" and "gender identity." If the law already encompassed those terms, then amendment was unnecessary.

In rewriting Title VII to its own liking, rather than interpreting the statute based on its text, history, and

purpose, the Sixth Circuit not only ignored the will of Congress, but bestowed upon itself (an unelected legislature of three) the power to rewrite congressional enactments in violation of the separation of powers. The role of the courts is to interpret the law, not to rewrite the law by adding a new, unintended meaning. See *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("where, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms").

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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