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 AMICUS CURIAE FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers.

The Foundation has an interest in this case because many Americans, like the funeral home owners in this case, have religious objections to affirming that a person can change his or her gender. The Foundation believes that interpreting "sex discrimination" under Title VII to cover "gender identity" will lead inevitably to the punishment of Americans who have such religious objections. The Foundation also believes that statutes must be interpreted as written and that the fixed meaning of "sex" in Title VII is "biological sex."

Amicus has another, more direct interest in this case. One of the Foundation's interns, who has contributed research for this brief, lives only fifteen minutes from Harris Funeral Home, which has conducted funerals for two of her aunts and may well conduct funerals for her family in the future. She

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[1] Pursuant to Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

confirms that she and her family would be upset and traumatized if a director at Harris Funeral Home wearing the clothing of the opposite biological sex were to conduct a funeral for one of her family members.

SUMMARY OF ARGUMENT

The courts must interpret the words in a statute according to their fixed meaning at the time the law was enacted. Title VII was born out of the civil rights movement, which was a continuation of the principles stated in our Declaration of Independence: that all people are equal under God and have been endowed by Him with certain unalienable rights. The Civil Rights Act must be viewed in that light. Consequently, Title VII's prohibition of "sex discrimination" cannot be applied to transgenderism, because in 1964 the belief was there were only two sexes. This is because our Creator made only two sexes: male and female. Rewriting Title VII (or extending this Court's plurality decision from *Price Waterhouse*) to protect transgenderism would result in rewriting the statute, which this Court is forbidden from doing.

Moreover, because so many Americans have religious objections to transgenderism, interpreting "sex" to mean "gender identity" will cause an inevitable conflict with religious liberty. Religious Americans, whose rights are actually protected by the text of Title VII, will be punished for declining to share bathrooms with people of the opposite biological sex or for refusing to use pronouns that

affirm the transgender ideology. Employers will suffer as well when they try to resolve these conflicts in the workplace: if they side with the religious employees, then they will be sued for sex discrimination; if they side with the transgender employees, then they will be sued for religious discrimination. State and local governments may also be sued for Free Exercise violations if they deny unemployment benefits to religious employees that were fired for standing by their convictions. All of this will result in the loss of a liberty that is given ultimately not by Title VII but by God. Religious liberty is our first freedom, and religious Americans should not have to face the possibility of losing it based on a misinterpretation of "sex" in Title VII.

All of this chaos can be avoided if the court does one simple thing: interpret "sex" according to its fixed meaning at the time it was adopted.

ARGUMENT

I. "Sex" in Title VII has a fixed meaning: male or female.

A. The ideas that drove the passage of the Civil Rights Act.

One of the cardinal rules of statutory interpretation is that "[w]ords must be given the meaning they had when the text was adopted." Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 78 (2012). Evidence from the time of its enactment demonstrates that the Civil

Rights Act of 1964 was born out of the fixed-meaning natural law tradition of the time. Title VII was the product of the civil rights movement, which was led by Dr. Martin Luther King, Jr. In his famous "I Have a Dream" speech, which he gave as the Civil Rights Act was pending before Congress, Dr. King said,

> "When the architects of our Republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men—yes, black men as well as white men—would be granted the unalienable rights of life, liberty, and the pursuit of happiness. It is obvious today that America has defaulted on that promissory note insofar as her citizens of color are concerned.
>
> ....
>
> I say to you today, my friends, though, even though we face the difficulties of today and tomorrow, I still have a dream. It is a dream deeply rooted in the American dream. I have a dream that one day this nation will rise up, live out the true meaning of its creed: "We hold these truths to be self-evident, that all men are created equal."[2]

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[2] Speech by the Rev. Martin Luther King at the "March on Washington," *I Have a Dream* (Aug. 28, 1963), *available at* https://www.archives.gov/files/press/exhibits/dream-speech.pdf (last visited Aug. 7, 2019).

Thus, Dr. King did not view his efforts or the civil rights movement as a radical, new departure from the ideals that our Founders pronounced in 1776, but rather the fulfillment of them. He viewed the civil rights movement, and the Civil Rights Act, as taking those principles to their logical conclusion.

President Kennedy, who sent the Civil Rights Act to Congress, also believed that the views held in the Declaration of Independence dictated the need for Congress to act. In an address to Vanderbilt University in May 1963, President Kennedy referred to the ongoing struggle for civil rights for African-Americans, saying, "This Nation is now engaged in a continuing debate about the rights of a portion of its citizens. That will go on, and those rights will expand *until the standard first forged by the Nation's founders has been reached*, and all Americans enjoy equal opportunity and liberty under law."[3] About one month later, Alabama Governor George Wallace stood in front of the University of Alabama, attempting to block the admission of two African-American students. That evening, President Kennedy addressed the nation and called on Congress to act, noting that this country "was founded on the principle that all men are created equal," a clear

[3] President John F. Kennedy, Speech at 90th Anniversary of Vanderbilt University (May 18, 1963) (emphasis added), *available at* The University of Virginia Miller Center, https://millercenter.org/the-presidency/presidential-speeches/may-18-1963-90th-anniversary-vanderbilt-university (last visited Aug. 7, 2019).

reference to the Declaration of Independence.[4] On June 19, 1963, President Kennedy sent a civil rights bill to Congress, which after some amendments would eventually turn into the Civil Rights Act that Congress passed and President Johnson signed.[5]

As this Court noted, "[t]he prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 63 (1986) (citing 110 Cong. Rec. 2577-2584 (1964)). Because it received little debate, this Court has held that "we are left little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'" 477 U.S. at 64. Evidence shows that the National Women's Party had been pushing for legislation like this ever since the ratification of the Nineteenth Amendment. Jo Freeman, Ph.D., *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, JoFreeman.com, https://www.jofreeman.com/lawandpolicy/titlevii.htm (last visited Aug. 7, 2019). While we have evidence suggesting that the primary object of Congress's

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[4] President John F. Kennedy, Address on Civil Rights (June 11, 1963), *available at* The University of Virginia Miller Center, https://millercenter.org/the-presidency/presidential-speeches/june-11-1963-address-civil-rights (last visited Aug. 7, 2019).

[5] *The Civil Rights Era*, Library of Congress, https://www.loc.gov/exhibits/civil-rights-act/civil-rights-era.html (last visited Aug. 7, 2019); *The Civil Rights Act of 1964: A Long Struggle for Freedom*, Library of Congress, https://www.loc.gov/exhibits/civil-rights-act/civil-rights-act-of-1964.html (last visited Aug. 7, 2019).

prohibition of sex discrimination was to protect women, no such evidence exists that Congress intended to protect gender nonconformity or transgenderism.

In attempting to discern Congress's intent regarding what Congress meant by "sex," the Court should not ignore the driving force behind the passage of the Civil Rights Act as a whole: the belief that all people are entitled to equality *under the principles espoused in the Declaration of Independence*. It is therefore necessary to examine those principles in order to determine what the Civil Rights Act was meant to protect.

B. Equality and the principles of the Declaration of Independence

The Declaration of Independence says that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." *The Declaration of Independence* para. 2 (U.S. 1776). The laws of the Creator, which grants these rights to all people, are called "the laws of nature and of nature's God." *Id.* at para. 1.

Blackstone described the "laws of nature" this way: "[W]hen the supreme being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be." 1 Blackstone, *Commentaries* *38. Because man is a created being, he is also subject to the laws of His

creator. As Blackstone said, "Man, considered as a creature, must necessarily be subject to the laws of his creator, for he is entirely a dependent being.... This will of his maker is called the law of nature." *Id.* at *39-40.

Although the law of nature is discoverable by human reason, the reality of living in a world marred by sin means that man's "reason is corrupt, and his understanding full of ignorance and error." *Id.* at *41. Because of this, God revealed the law of nature through "an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures." *Id.* The law of nature and the law of God are really one and the same, but we can be more certain of these laws through revelation than through reason, "[b]ecause one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law." *Id.* at *42. "Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these." *Id.*

If the passage from *I Have a Dream* is not clear enough as to Dr. King's views on this matter, he also wrote in his famous Letter from a Birmingham Jail,

> "A just law is a man made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in

> terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law or natural law."

Martin Luther King Jr., *Letter from a Birmingham Jail* (Apr. 16, 1963), *available at* https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

Thus, Dr. King and the leaders of the civil rights movement were not advocating for a radical paradigm shift in American law. Instead, they were applying the same principles that the Founders did and fulfilling what they started in 1776.

It is therefore impossible to understand the fixed meaning of the words "sex" and "religion" without this background. *Amicus* fully agrees with the arguments raised by Petitioner concerning the dictionary definitions of "sex" at the time Title VII was enacted. Petition for Writ of Certiorari at 6 n.1, 26. In order to complement Petitioner's arguments, *Amicus* will apply the foregoing principles to Congress's prohibition on sex discrimination in the Civil Right Act.

C. Application to sex discrimination

The creation account tells us, "God created man in His own image, in the image of God He created him; male and female He created them." *Genesis* 1:27.[6] The Creator never gave mankind the power to change

[6] All Bible quotations in this brief come from the New American Standard Bible unless otherwise noted.

their sex. On the contrary, He prohibited it. *See Deuteronomy* 22:5 ("A woman shall not wear man's clothing, nor shall a man put on a woman's clothing; for whoever does these things is an abomination to the LORD your God."); *see also I Corinthians* 6:9-10 ("Or do you not know that the unrighteous will not inherit the kingdom of God? Do not be deceived; neither fornicators, nor idolaters, nor adulterers, *nor effeminate*, nor homosexuals, nor thieves, nor the covetous, nor drunkards, nor revilers, nor swindlers, will inherit the kingdom of God.") (emphasis added).[7]

In conclusion then, President Kennedy, Dr. King, and the leaders of the civil rights movement were attempting to fulfill what the Founders started in 1776: taking the principle of God-given rights to their logical conclusion. However, God Himself made only two sexes: male and female. If Congress was intending to secure God-given rights, and if God never gave people the right to change their sex, then "sex" in Title VII could never apply to transgenderism.

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[7] The next verse says, "Such were some of you; but you were washed, but you were sanctified, but you were justified in the name of the Lord Jesus Christ and in the Spirit of our God." *I Corinthians* 6:11. Although God's justice demands that those who practice such things be judged, "God so loved the world, that He gave His only begotten Son, that whoever believes in Him shall not perish, but have eternal life." *John* 3:16.

II. This Court's decision in *Price Waterhouse v. Hopkins* cannot be extended to cover "gender identity."

This Court granted certiorari to address "[w]hether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)." *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S.Ct. 1599 (2019). *Price Waterhouse* arose from a sex-discrimination case under Title VII, in which a female employee was refused a partnership in her company in part because her supervisors believed she was too aggressive for a female. A plurality of this Court held that "[i]n 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," and is therefore liable for sex-discrimination. *Id.* at 250. Lower courts have extended *Price Waterhouse* to cover transgenderism, reasoning that transgender people by definition do not conform to traditional gender norms and expecting them to do so is sex-stereotyping. *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

As discussed in the preceding section, "sex" in Title VII refers to only one of two sexes: male and female. With this background in mind, the courts cannot amend Title VII under the guise of interpreting it[8] to permit something that *Price*

[8] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 404 (1937) (Sutherland, J., dissenting) ("The judicial function is that of

Waterhouse did not address at all: a person holding themselves out as the other sex, instead of having one or two characteristics that might not comport with sex stereotypes. The Foundation even questions whether *Price Waterhouse* was correctly decided at all and would invite the Court to reconsider it altogether. But if the Court is not willing to do so in this case, it should not repeat the lower courts' errors by extending it to mean something that Congress did not intend.

III. The collision course with religious liberty

A. Interpreting "sex" to mean "gender identity" will lead to an inevitable clash with religious values in the workplace.

Title VII makes it unlawful for an employer "to fail to 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 race, color, *religion*, *sex*, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). The term "religion" in Title VII "includes *all aspects of religious observance and practice*, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j)

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interpretation; it does not include the power of amendment under the guise of interpretation.").

(emphasis added). For this reason, the EEOC acknowledges that "religious practices" under Title VII "include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. § 1605.1.

Many Americans are religious. According to a 2017 Gallup poll:

- 48.5 % of Americans identify as Protestant;
- 22.7% of Americans identify as Catholic;
- 2.1% of Americans identify as Jewish;
- 1.8% of Americans identify as Mormon; and
- 0.8% of Americans identify as Muslims.

Frank Newport, *2017 Update on Americans and Religion*, Gallup (Dec. 22, 2017).[9] All of these religions look to the Hebrew Scriptures for religious instruction, at least in some capacity. Thus, 75.9% of Americans have religious views that are influenced by the book of *Genesis*, which teaches that God created two sexes. *Genesis* 1:27.[10]

Under Title VII, these Americans are not required to shed their religious views when they enter the workplace. And because a supermajority of Americans identify with a religion that affirms the gender binary—that the only two genders are male

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[9] *Available at* https://news.gallup.com/poll/224642/2017-update-americans-religion.aspx.

[10] This percentage would have been even higher when the Civil Rights Act was passed.

and female—the question is not *whether* their religious views will clash with the Sixth Circuit's interpretation of "sex," but *when*.

If "sex" is interpreted as "gender identity" or "gender nonconformity," then employers will be forced to call transgender individuals by their preferred names and pronouns. It will also require employers to let them use the bathrooms corresponding to their gender identity. Finally, as this case demonstrates, it will require them to let such employees dress in accordance with their gender identity.

But in addition, they also will *force their employees* to do the same. Religious employees will object that they consider it is sinful to affirm a theory of gender contrary to what their religion teaches. This will place religious employees in a scenario where they have to choose between their jobs and their faith.

Congress designed Title VII to avoid such a scenario. As this Court has noted, the intent of Senator Randolph, who introduced the 1972 Amendment to Title VII, was "'to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law.'" *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977) (quoting 118 Cong. Rec. 705 (1972)). As recently as 2015, this Court reiterated that not only religious *belief*, but religious *practice*, "is one of the protected characteristics that cannot be afforded disparate treatment and *must be accommodated*."

EEOC v. Abercrombie & Fitch Stores, Inc., 135 S.Ct. 2028, 2033-34 (2015) (emphasis added). Congress enacted Title VII to ensure that religious liberty is protected in the workplace, but if the Sixth Circuit's decision is allowed to stand, then employers are more likely to believe—incorrectly—that they may not accommodate religious employees' objections to transgender employees' name, pronoun, and bathroom preferences.[11]

Failing to correct the Sixth Circuit's decision will lead to the real Title VII violation: discrimination against religious employees whose rights to object to transgenderism are actually protected by statute instead of judicial fiat. If this Court does not correct the Sixth Circuit's error, then Justice Alito's warning from *Obergefell v. Hodges* will prove true here as well: "I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools." 135 S.Ct. 2584, 2642-43 (2015) (Alito, J., dissenting).

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[11] For an extensive discussion of how this is already happening, *see* Rena M. Lindevaldsen, *An Ethically Appropriate Response to Individuals with Gender Dysphoria*, 13 Liberty U. L. Rev. 295, 324-32 (2019) (documenting cases in which forcing other people to accept a person's gender identity violates their legal rights).

B. Interpreting "sex discrimination" to cover "gender identity" will subject employers to lawsuits from both transgender employees and religious employees.

The Sixth Circuit's interpretation of "sex discrimination" will place not only employees but also *employers* in a no-win scenario. Under the panel's interpretation of "sex discrimination," employers must make a choice when confronted with the clash between transgenderism and religion: they must either tell the transgender employees that the religious employees do not have to recognize their gender identity (in which case they will be sued for sex discrimination), or they must tell their religious employees that they have to put their objections aside (in which case they will be sued for religious discrimination).[12]

An employer's only hope of avoiding a lawsuit would be attempting to offer a "reasonable accommodation" to the religious employees. 42 U.S.C. § 2000e(j) But because so many of their employees are religious, employers will have their hands full trying to accommodate so many of their employees.

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[12] Reading Title VII in this way would also violate other canons of statutory interpretation. The harmonious-reading canon requires that "[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory." Scalia, *supra*, at 180. The absurdity doctrine would also be applicable here, because the scenario described above "would result in a disposition that no reasonable person could approve." *Id.* at 234.

Under such chaotic circumstances, employers will not be able to walk the tightrope forever. They will fall on one side or the other—likely on the side of violating their religious employees' rights.[13]

Finally, it should be noted that this scenario would cause severe economic hardship on employers. When placed in this no-win scenario, the cost of business will go up as employers have to find ways to protect themselves from liability and pay out damages from drastic increases in Title VII actions. This will lead to layoffs as employers will no longer be able to pay as many employees. Between the loss of jobs and the disruption in commerce, misinterpreting Title VII to cover gender identity is bad not only for religious employees, but also for employers and the economy. While the Constitution obviously does not give this Court the power to resolve cases based on economic calculus, the Court should realize that failing to correct the Sixth

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[13] In *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977), the Court held that it would requiring an employer to bear more than a *de minimis* cost in accommodating the employee would constitute a "substantial hardship," which allows the employer to avoid Title VII's accommodation requirement. This is why employers would likely violate the religious rights of their employees if they had to choose between the two. However, four justices of this Court have hinted that they would be willing to reconsider *Hardison*. *Kennedy v. Bremerton Sch. Dist.*, 139 S.Ct. 634, 637 (2019) (statement of Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ.). The Court has also invited the Solicitor General to share the views of the United States in a pending case concerning whether *Hardison* should be overruled. *Patterson v. Walgreen Co.*, 139 S.Ct. 1368 (2019).

Circuit's error will have severe negative economic consequences as well.

C. If religious employees are fired because of their convictions about gender, then the States will violate their free exercise rights if they deny them unemployment benefits.

This Court has held repeatedly that if a person is fired for his religious beliefs and the State denies him unemployment benefits, then a Free Exercise violation may be present. *See, e.g., Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). The Sixth Circuit's decision is likely to cause confusion not only for employees, but also for state governments as they attempt to discern whether an employee who was fired for his religious beliefs is entitled to unemployment benefits. If state officials conclude that those employees are not entitled to unemployment compensation, then they may be subject to lawsuits under 42 U.S.C. § 1983.

D. "Religion" is an unalienable right granted by God.

Title VII's prohibition of religious discrimination reflects one of America's most fundamental values: religious liberty is an unalienable right granted to us not by the State, but by our Creator. *See The Declaration of Independence* para. 2 (U.S. 1776).

Among the unalienable rights given to us by God, the most important is religious liberty.

James Madison, sometimes called the "Father of the Constitution," explained how religious liberty is given by God and cannot be taken away by man:

> [W]e hold it for a fundamental and undeniable truth, 'that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.' The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a

> member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.

James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785).[14]

For Madison, and the other Founders, the belief in the sovereignty of God was not merely an individual's subjective way of attempting to "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992). On the contrary, it was an objective truth: the Creator who gave us rights reserved the right to be first in all things. If God gave authority to man, then how could man ever have the authority to take away a person's allegiance to God? A person cannot give away what he does not have in the first place. Because God never gave man the authority to take away religious liberty, man

[14] *Reprinted in The Founders' Constitution* (Univ. of Chicago Press 1987), *available at* https://bit.ly/1MHiLmr (last visited Aug. 16, 2018)

cannot give the civil government the right to take it away either.[15]

Notice that in *Memorial and Remonstrance*, Madison did not merely say that the *State* was powerless to take away religious liberty; he also said that "[t]his duty is precedent, both in order of time and in degree of obligation, *to the claims of Civil Society*." *Memorial and Remonstrance*, *supra* (emphasis added). Thus, not only is the State prohibited from abridging religious liberty, but so is mankind in general.

It therefore follows that neither the State *nor an employer* may take away a person's religious liberty. Thus, Congress's prohibition on religious discrimination was not merely a congressional policy preference, but rather recognition that a person's religious liberty may not be deprived by any man, whether in the form of the State or an employer.

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[15] As this Court has held, "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson,* 343 U.S. 306, 313 (1952). A decade later, the author of *Zorach* again acknowledged the Divine Source of human rights:

> "The institutions of our society are founded on a belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter, and that the individual possesses rights conferred by the Creator, which government must respect."

McGowan v. Maryland, 366 U.S. 420, 562 (1961) (Douglas, J., dissenting).

Because Title VII protects not a mere *positive* right but rather a *God-given* right, this Court should recognize the importance of the liberty that the Sixth Circuit's decision has imperiled. If there were any conflict between protecting "gender identity" and religious liberty, then religious liberty should win decisively. It is the first freedom granted to us by our Creator, and it cannot be taken away. But affirming the Sixth Circuit's decision would put this most fundamental liberty in jeopardy.

CONCLUSION

The passage of Title VII was a fulfillment of the principles stated in our Declaration of Independence—that all people are equal *under God*. Congress drew on this idea in passing Title VII, but this background is key to understanding Title VII's provisions—including the prohibition on sex-discrimination. With the background properly understood, there is no way "sex discrimination" in Title VII could apply to transgenderism, because God created only two sexes.

Perpetuating the Sixth Circuit's error would not only rewrite Title VII, but it would also severely place religious liberty in jeopardy, resulting in harm to employees, employers, and state and local governments. All of this can be avoided if the Court simply interprets "sex" according to what the term actually means: biological sex.

For all of those reasons, the Foundation for Moral Law respectfully requests this Court to reverse the judgment of the Sixth Circuit.

Respectfully submitted,

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