

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION

4 EQUAL EMPLOYMENT OPPORTUNITY
5 COMMISSION,

6 Plaintiff,

7 -v-

8 Case No. 14-13710

9 R.G. & G.R. HARRIS FUNERAL
10 HOMES, INC.,

11 Defendant./

12 **MOTIONS FOR SUMMARY JUDGMENT**
13 **BEFORE HON. SEAN F. COX**

14 United States District Judge
15 257 U.S. Courthouse
16 231 West Lafayette Boulevard
17 Detroit, Michigan 48226

18 **(Thursday, August 11, 2016)**

19 APPEARANCES:

20 DALE R. PRICE, ESQUIRE
21 MILES SHULTZ, ESQUIRE
22 Appearing on behalf of the Plaintiff.

23 JAY KAPLAN, ESQUIRE
24 Appearing on behalf of ACLU.

25 DOUGLAS WARDLOW, ESQUIRE
CALEB DALTON, ESQUIRE
JOEL J. KIRKPATRICK, ESQUIRE
Appearing on behalf of the Defendant.

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EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.

1 Detroit, Michigan

2 Thursday, August 11, 2016

3 At 10:31 a.m.

4 * * *

5 COURT CLERK: All rise. The United States District
6 Court for the Eastern District of Michigan is now in session,
7 the Honorable Sean Cox, United States District Judge
8 presiding.

9 Please be seated.

10 The Court calls case number 14-13710.

11 THE COURT: Good morning. Could I have your
12 appearances, please?

13 MR. PRICE: Yes. Dale Price on behalf of the EEOC,
14 Your Honor.

15 MR. SHULTZ: Miles Shultz for the EEOC, Your Honor.

16 MR. WARDLOW: Your Honor, Doug Wardlow for Alliance
17 Defending Freedom and R.G. & G.R. Harris Funeral Homes.

18 MR. DALTON: Caleb Dalton, also on behalf of the
19 defendant.

20 MR. KIRKPATRICK: Joel Kirkpatrick, Your Honor, on
21 behalf of defendant.

22 THE COURT: Good morning.

23 And Mr. Kaplan is here?

24 MR. KAPLAN: Yes.

25 THE COURT: You can sit up at counsel table if you

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1 wish.

2 MR. KAPLAN: I'm fine here.

3 THE COURT: It's entirely up to you.

4 All right. Interesting case. The case has been
5 thoroughly briefed by all the parties, the ACLU.

6 I have granted the ACLU's request to file an amicus
7 brief. And, Mr. Kaplan, if you want to join in the
8 argument during the course of this morning's presentations,
9 you are free to join us. Just let us know.

10 I have granted all requests to exceed the normal
11 page limitations for briefs.

12 And before you start your arguments, I have a few
13 questions, if that's okay with everyone.

14 MR. PRICE: Sure.

15 MR. WARDLOW: Yes.

16 THE COURT: Who is going to be arguing on behalf of
17 the EEOC?

18 MR. PRICE: I am, Your Honor.

19 THE COURT: Okay. And on behalf of Harris Funeral
20 Homes?

21 MR. WARDLOW: I am, Your Honor.

22 THE COURT: All right.

23 Mr. Price, is it the EEOC's position that
24 transgender is a protected class under Title VII?

25 MR. PRICE: Your Honor, we have argued that

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1 previously and -- but that was dismissed, Your Honor. We're
2 left here with just the stereotyping claim and that's what
3 we're --

4 THE COURT: I understand that.

5 MR. PRICE: Okay.

6 THE COURT: And I think you wanted to preserve that
7 issue for an appeal, as well?

8 MR. PRICE: Yes. Yes, Your Honor.

9 THE COURT: So my question again to you, is it the
10 EEOC's position that transgender is a protected class under
11 Title VII?

12 MR. PRICE: Yes, Your Honor. We believe that they
13 are protected under Title VII, Your Honor.

14 THE COURT: Very good. Do you have any statutory
15 authority to support that position by the EEOC?

16 MR. PRICE: We do not, other than the language of
17 Title VII, which embraces not just sex, but also gender
18 according to the case law as that's been interpreted.

19 THE COURT: Any specific language in Title VII that
20 supports the EEOC's position that transgender is a protected
21 class under Title VII?

22 MR. PRICE: Apart from just the reference to sex,
23 Your Honor, no.

24 THE COURT: Do you have any Supreme Court authority
25 to support the EEOC position that transgender is a protected

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1 class under Title VII?

2 MR. PRICE: We do not, Your Honor, on that specific
3 point, no.

4 THE COURT: And do you have any Sixth Circuit
5 authority to support your position that transgender is a
6 protected class under Title VII?

7 MR. PRICE: Well, I believe we can at least say that
8 Title VII has been interpreted in the Sixth Circuit in *Smith*
9 and in *Myers* to protect a transsexual, and, to use the
10 old language, the right to be free from workplace
11 discrimination.

12 THE COURT: *Smith, Myers?*

13 MR. PRICE: *Smith and Myers and Barnes.*

14 THE COURT: And *Barnes*. Very good. Thank you.

15 My next question, Mr. Price, is this. Would you
16 agree that a funeral home director is the public face of a
17 funeral home?

18 MR. PRICE: A funeral home director can be, Your
19 Honor. I believe the record here is little different as to
20 the specific job duties of Ms. Stephens.

21 THE COURT: Stephens was a funeral home director, as
22 well as an embalmer?

23 MR. PRICE: Yes.

24 THE COURT: I'm not asking about embalmers. I'm
25 asking about the funeral home director, the one that greets

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1 the individuals as they come to the funeral home, that
2 interfaces with the family, that takes the body to the
3 church, synagogue, mosque, wherever, and then to burial or
4 cremation.

5 Would you agree that the funeral home director is a
6 public face of the funeral home?

7 MR. PRICE: They can act in a public face on behalf
8 of the funeral home, yes.

9 THE COURT: Okay.

10 Mr. Wardlow, can you direct this Court to any
11 post-*Price Waterhouse* decisions wherein the Sixth Circuit has
12 dealt with a sex-specific dress code?

13 MR. WARDLOW: In the Sixth Circuit, I cannot direct
14 the Court to any such decision.

15 THE COURT: Okay.

16 So you cannot direct the Court to any post-*Price*
17 *Waterhouse* decisions, is that correct?

18 MR. WARDLOW: In the Sixth Circuit, dealing with
19 sex-specific dress codes?

20 THE COURT: Yeah.

21 MR. WARDLOW: Correct.

22 THE COURT: Okay.

23 Mr. Price, can you direct this Court to any
24 post-*Price Waterhouse* decisions wherein the Sixth Circuit has
25 dealt with a sex-specific dress code?

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1 MR. PRICE: No, Your Honor, I can not.

2 THE COURT: Okay.

3 Mr. Wardlow, are you aware of any decisions after
4 the Supreme Court issued *Hobby Lobby*, wherein an employer has
5 asserted a Religious Freedom Restoration Act defense to a
6 Title VII employment discrimination claim brought by the
7 EEOC?

8 MR. WARDLOW: No, Your Honor. I'm not aware.

9 THE COURT: Same question to you, Mr. Price.

10 MR. PRICE: No, Your Honor. I'm not aware of
11 any.

12 THE COURT: All right. Mr. Price, is it the EEOC's
13 position that Title VII cases are exempted from the
14 focused-to-the-person analysis set forth in the majority
15 opinion in *Hobby Lobby*?

16 MR. PRICE: No, Your Honor. I would not say that
17 that's our argument.

18 THE COURT: Is that your position?

19 MR. PRICE: No, that's not our position.

20 We would say that you have to look at that, but at
21 the bottom line is that it is precisely tailored to achieve
22 the ends. That's what you have to focus on.

23 THE COURT: All right. So the answer to that
24 question?

25 MR. PRICE: That is no.

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1 THE COURT: Okay. All right, Mr. Price, you may
2 proceed with your motion for summary judgment.

3 MR. PRICE: Thank you, your Honor.

4 THE COURT: Mr. Kaplan, do you disagree with any of
5 the positions taken by Mr. Price in the questions that I
6 asked him?

7 MR. KAPLAN: No, I do not.

8 MR. PRICE: Good morning, Your Honor.

9 Essentially, this is a Title VII case involving two
10 claims.

11 The first is a sex stereotyping claim involving the
12 discharge of the commission's charging party, Aimee Stephens,
13 for failure to conform to the employers' stereotypes.

14 For the purposes of that, it's important to note
15 that Title VII, quote, protects transsexual persons from
16 discrimination for failing to act in accordance with or to
17 identify with their perceived sex or gender.

18 That's the *Myers versus Cuyahoga County* case
19 cited by Your Honor back in the denial of the motion to
20 dismiss.

21 It is undisputed she was not fired for performance
22 issues. She had worked as a funeral home director/embalmer
23 for five years. And there were no such -- it's admitted. We
24 have that in the record.

25 Rather, she was fired because she did not conform to

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1 the stereotypes of Mr. Rost.

2 The second component is a claim that the defendant
3 denied any form of clothing allowance to female employees --

4 THE COURT: I apologize.

5 MR. PRICE: Sure.

6 THE COURT: As I understand, is that your client,
7 who was transitioning, starting the process --

8 MR. PRICE: I would say she was well along in the
9 process. She was making the next step in the process, Your
10 Honor. Yes.

11 THE COURT: As I understand -- is that as I recall
12 from what was submitted to me, part of the process is that
13 you live as a woman before you have medical intervention, is
14 that correct?

15 MR. PRICE: That is my understanding of the case.
16 In this particular case, yes, Your Honor.

17 THE COURT: And so your client wanted to transition
18 as a woman, to be a woman and dress as a woman, is that
19 correct?

20 MR. PRICE: Yeah, I would say that's mostly correct,
21 except I would say that her gender identity was female, and
22 that this -- that the presenting as female, and female
23 clothing is part of that process, yes.

24 I would say it's not like she had discovered that.
25 I think her letter sets it forth pretty well that she had

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1 been dealing with this for years.

2 THE COURT: I caught all that.

3 MR. PRICE: Okay.

4 THE COURT: But this was the first step in the
5 process, before medical intervention, that the individual
6 that is transitioning from in this case, male to female, male
7 to female, spent a year before any type of medical
8 intervention, living as the opposite sex?

9 MR. PRICE: I believe it is part of the process,
10 yes. I don't know about the precise time lines. I apologize
11 I can't speak to that. But this was part of her process of
12 her becoming that before medical intervention, correct.

13 THE COURT: So she was a woman who wanted to dress
14 as a woman?

15 MR. PRICE: She was -- I think you have to look at
16 it this way. She was -- the sex assigned at birth was male.

17 THE COURT: Right, absolutely.

18 MR. PRICE: And she was a part of -- the transition
19 was to become -- the gender identity was female from a very
20 early age.

21 THE COURT: No one disputes that.

22 MR. PRICE: Okay. And for the purposes of Title
23 VII, that's -- *Smith and Barnes and Cuyahoga County*, that's
24 all we need for a sex stereotyping claim.

25 THE COURT: I understand.

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1 Has Stephens transitioned from male to female, as
2 this case is being argued today?

3 MR. PRICE: As far as surgical intervention, Your
4 Honor?

5 THE COURT: Correct.

6 MR. PRICE: No, there's been no surgical
7 intervention as of yet.

8 THE COURT: Okay, that's good. I just want the
9 record complete. And I just want to make sure where things
10 are. Go ahead. I'm sorry for the interruption.

11 MR. PRICE: Sure. No problem, Your Honor.

12 The second component of the claim is the denial of a
13 clothing allowance or a clothing benefit to females.

14 I think it's undisputed that no such benefits were
15 provided to female employees until October of 2014, and that
16 since that date they have been provided with a benefit that
17 is monetarily and flexibility-wise inferior to that provided
18 to the male employees.

19 We assert that the record is clear on both claims
20 and that there is no material issues of disputed fact.

21 THE COURT: But Stephens also received a clothing
22 allowance?

23 MR. PRICE: Stephens did receive a clothing
24 allowance prior to the transition, the declaration that she
25 was going to present as female.

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1 THE COURT: And it wasn't an issue afterwards
2 because Stephens was fired.

3 MR. PRICE: Correct. There was no -- there was no
4 question of that. I mean, she never got the chance to claim
5 any kind of female benefit because she was fired because of
6 the letter, yes.

7 THE COURT: Go ahead. I did not mean to interrupt
8 you.

9 MR. PRICE: No, Your Honor. That's fine.

10 THE COURT: Now, tell us why the Religious Freedom
11 Restoration Act is not a viable defense in this case.

12 I'm sorry. Well, we might as well just cut -- if
13 it's okay, we'll deal with pretty much both of the motions
14 for summary judgment --

15 MR. PRICE: Sure, Your Honor.

16 THE COURT: -- at the same time, because it
17 basically touches upon the same issues. Go ahead.

18 MR. PRICE: Okay. I would say first of all, that
19 RFRA does not apply here because -- it's been a bit of a
20 moving target on substantial burden.

21 They've gone from saying in the interrogatory
22 responses that Stephens offended Mr. Rost's beliefs, to now
23 it is -- or then it moved to, "Well, we'd have to pay
24 for a clothing allowance for her, have to pay her to dress as
25 a female funeral director, have to provide clothing, to

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1 really, essentially, it is the continued employment of Ms.
2 Stephens that is the substantial burden.

3 THE COURT: Well, isn't the focus -- does the --
4 whether the law issue, which is Title VII, in the body of
5 stereotyping law, does that impose a substantial burden on
6 the ability of the funeral home to conduct business in
7 accordance with its religious beliefs of, in this case, the
8 owner?

9 MR. PRICE: Okay. Well, first of all, the
10 compelling interest is for Aimee Stephens to continue to work
11 in an environment free of sexual stereotyping under Title
12 VII.

13 Against that, what you have to do is to
14 ascertain whether the defendant has been substantially
15 burdened by the possibility of continuing to employ Ms.
16 Stephens.

17 First of all, again, it's a moving target as to what
18 the burden is. If the burden is to continue to employ Ms.
19 Stephens, then I would say no.

20 THE COURT: And I apologize for interrupting you
21 again.

22 MR. PRICE: Sure, Your Honor.

23 THE COURT: Does the Religious Freedom Restoration
24 Act apply to Title VII?

25 MR. PRICE: It has never -- I mean, you can analyze

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1 it, but I do not believe -- no, we argue -- absolutely not.
2 It does not trump Title VII.

3 THE COURT: But doesn't the statute state, quote,
4 applies to all federal law and the implementation of that
5 law, whether statutory or otherwise and whether adopted
6 before or after November 16, 1993?

7 MR. PRICE: It does say that, Your Honor.

8 There has not been a case where a Title VII has been
9 trumped by RFRA. I mean, they cited a couple of cases that
10 are functionally ministerial exception cases.

11 But the bottom line is, if you're looking at *Hobby*
12 *Lobby*, the language in that, and the precise tailoring to
13 achieve the governmental -- government's compelling interest
14 in achieving a workplace free of sexual stereotyping, that
15 the final analysis is that even if you find a substantial
16 burden here, this is the least restrictive means to achieve
17 the government's interest. And there are no cases to the
18 contrary on that.

19 Again, they cited to a couple of religious
20 colleges, I believe, but those were essentially ministerial
21 exception cases where RFRA was more or less dicta, I would
22 say.

23 THE COURT: Now, of course, the defense, in order
24 for the Religious Freedom Restoration Act, it's going to have
25 to show that Title VII in the body of sex stereotyping law

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1 imposes a substantial burden.

2 And I will be asking you to tell me, Mr. Wardlow,
3 where the substantial burden is.

4 But give me EEOC's argument on the substantial
5 burden issue.

6 MR. PRICE: It is not -- we would say that they have
7 not been substantially burdened here.

8 Certainly, if the issue is providing a clothing
9 allowance to Ms. Stephens, she was prepared to work without
10 one. I mean, the letter says that. She indicated that.

11 So actually, in an odd way she was actually saving
12 them money.

13 Secondly, I don't think in employing anyone, an
14 employee has ever been found to be a substantial burden,
15 continued employment.

16 And -- you know, the defendant really does not get
17 to the fact of what is the means here? What are we trying to
18 achieve?

19 We're trying to achieve a workplace free of sex
20 stereotyping discrimination.

21 They don't offer any other means to achieve that.
22 What they do is, they say, "Well, the government can
23 institute it." We could hire them, the EEOC could hire
24 somebody.

25 But that's not a means of eradicating

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1 discrimination. That's essentially perpetuating it on the
2 taxpayers' dime. They really don't have any other means.
3 This is the only means to achieve that goal, is the
4 enforcement of Title VII.

5 THE COURT: And that goal being?

6 MR. PRICE: Keeping Ms. Stephens free from what
7 her -- vindicating her rights under Title VII.

8 THE COURT: Okay.

9 MR. PRICE: I think also that the -- we do have
10 substantial admitted evidence of sexual stereotyping by Mr.
11 Rost. I've cited the deposition testimony that, you know,
12 is --

13 THE COURT: In other words, direct evidence.

14 MR. PRICE: That's -- yeah, I'd say it's an
15 admission. Yeah, it's direct -- it's clearly direct
16 evidence, but I mean it's the sworn admission on the record,
17 "I fired Stephens because he," using their language, "was no
18 longer going to represent himself as a man. He wanted to
19 dress as a woman."

20 "Likewise, I believe that God created a man as a man
21 and a woman as a woman. And to not honor that would be a
22 violation of my faith."

23 It's direct evidence, plus. It's an admission by
24 the decision-maker, the 95 percent stockholder of the
25 company. So yes, it's -- at the very least, it's direct

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1 evidence.

2 THE COURT: Okay.

3 MR. PRICE: In addition, I would say that there is
4 additional evidence of, you know, discomfort with the name
5 change on the letter.

6 And it is important to note that Ms. Stephens' name
7 is officially changed, that is, Aimee Stephens. It has been
8 since shortly after she was fired.

9 I think as Your Honor put in the opinion, "Stephens'
10 failure -- the question is, does Stephens' failure to conform
11 to sex stereotypes, was that the driving force behind the
12 funeral home's decision?"

13 And I think that's -- this is the case. I think
14 we've got the evidence for that.

15 Now, they will cite to their dress code, but I would
16 say, given what they've filed with the Court, they have
17 admitted that the dress code reflects and enforces his
18 beliefs regarding how men and women are supposed to act and
19 dress.

20 It is not a nondiscriminatory reason for firing.
21 It is itself evidence of stereotype.

22 THE COURT: Okay.

23 MR. PRICE: And she presented the letter, and in
24 response, Rost terminated her. That's where we are.

25 With respect to RFRA, they have to basically say

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1 that there is a religious exercise here.

2 And I think there's a problem with that too, because
3 when I asked him at the deposition, "What is your religious
4 exercise in the workplace?"

5 "Well, I place cards reflecting -- my faith of Jesus
6 cards. I also have daily bread devotionals that I place."

7 And he testified that continuing to employ Aimee
8 Stephens would not interfere with that exercise. I mean, to
9 the extent he exercises overtly his religion in the
10 workplace, it is not interfered with by Ms Stephens.

11 And again, I already mentioned --

12 THE COURT: That's all in your briefs. Right.

13 MR. PRICE: Well, it's all in the briefs. I'm not
14 going to beat to death the whole moving target thing.

15 THE COURT: Right, right.

16 MR. PRICE: And the bottom line is, even assuming it
17 is a substantial burden, an enforcement of Title VII here is
18 the least restrictive means to achieve the goal.

19 They haven't proffered any other option. Well,
20 don't sue on behalf -- don't sue people. Don't sue people --
21 you know, don't sue businesses serving distressed persons,
22 which I think is a staggering enlargement of the law.

23 I mean, if we're going to be catering to distressed
24 people, really there's -- every workplace might deal with
25 somebody who is distressed for some reason. I mean, you are

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1 really kind of catering to third-party prejudices, which is
2 clearly prohibited under Title VII.

3 And again, it's not that they have offered another
4 means. They basically say, "Well, you could secure the
5 benefits of employment by starting a governmental hiring
6 program for persons like Ms. Stephens."

7 That's not means of eradicating anything. It's a
8 means of perpetuating it, to be honest.

9 THE COURT: Okay. Anything else?

10 MR. PRICE: Going to the -- I don't believe we've
11 spent much time at all on the -- going back to the dress code
12 too, I think there's a problem with it too, because they cite
13 this kind of parade of horrors about, "Well, you could have
14 topless ditchdiggers, you could have men in beards basically
15 coming into the workplace dressing, you could have people
16 switching back and forth."

17 And I think the ACLU's brief is good on that point.
18 I wholeheartedly agree with it, that this is not the
19 situation here. This is not somebody -- Ms. Stephens does
20 not have a -- you know, a sort of caricature drag queen
21 situation here. And that's they were kind of -- excuse me.
22 My mouth is getting dry.

23 They're trying to portray her as some kind of
24 caricature or some kind of offensive thing, you know, the
25 parade of horrors. This is not something entered into

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1 lightly.

2 I think the letter sets forth pretty well, this
3 is a process. This is not something we're endorsing or
4 authorizing the people to come and switch willy-nilly
5 or to dress in some kind of, frankly, freakish fashion. I
6 mean, that is really kind of appealing to stereotypes
7 itself.

8 She was going to conform to the code. She was going
9 to dress appropriately in female garb. She wasn't asking for
10 any clothing to do so. And the response -- the defendant
11 assumed sight unseen that this would be harmful.

12 And I think -- talking about distressed people, and
13 they used that language too, harmful to grieving persons.
14 There's a whole lot of assumptions in that, especially when
15 you fire somebody sight unseen, without allowing them to do
16 that. It's an assumption that this is going to be some kind
17 of freakish thing.

18 This is a person with a lot of experience. Ms.
19 Stephens spent a lot of time working and very well, very
20 sensitive to the people she worked with. No complaints about
21 that. She is not going to do anything to try to disrupt the
22 workplace. And I think to assume that her very presentation
23 as female in the workplace is going to do so, is reflective
24 of stereotyping.

25 And I think it's the essence of it. And to say

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1 that, "Well, we might have people who are upset with it,"
2 also -- I mean, there are people upset with people of another
3 religion who are working with them or people who are upset
4 with another color.

5 Granted, yes, funeral home situations are sensitive,
6 but she was going to behave in a sensitive fashion as she
7 always had. And to assume that she was not going to be --
8 that her very presentation is insensitive, or harmful or
9 otherwise, is itself a reflection of stereotypes.

10 With respect to the clothing allowance claim, I
11 think the defendant's procedural interposition using the
12 general pre-*General Telephone* case, I think that's different
13 here.

14 What we had was, we had a sex discrimination charge
15 to which we found evidence, undisputed, all before the Court,
16 that females were not provided with any form of clothing
17 allowance and males were.

18 And it's substantial. And it was not remedied until
19 October of 2014. The case law states, "*General Telephone*,"
20 the Supreme Court says, "Any violations that we ascertain in
21 the course of a reasonable investigation are actionable."

22 And that case that they cite is pre-*General*
23 *Telephone*. I don't think it is at all unreasonable if we
24 have evidence of a violation that comes in our -- to our
25 attention, an undisputed violation, that we cannot -- the one

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1 that we attempted to remedy through our processes, we
2 brought to their attention and we discussed with them, that
3 is not unreasonable. It arose reasonably out of that
4 investigation.

5 And essentially, what they're asking the Court to do
6 is, "Well, let's play -- let's pretend that the EEOC never
7 discovered this."

8 And that's not what the case law requires. I mean,
9 *Kronos* says we're not required to ignore facts that support
10 additional claims of discrimination.

11 We did not do a fishing expedition. We just
12 discovered this and investigated accordingly. And I don't
13 think that there's a procedural basis for denying that.

14 Even *Cambridge Tile* says prior to *General Telephone*
15 that we can investigate, we can subpoena it. We can't do
16 fishing expeditions. So, yeah, granted, it was subpoena
17 enforcement, but we are allowed to if we can investigate and
18 subpoena it legitimately, then we should be able to litigate
19 it as well. I don't think that's -- otherwise, it would be a
20 fishing expedition.

21 THE COURT: I understand your argument and I
22 understand their argument on the clothing issue.

23 MR. PRICE: Okay. And I would say that the facts
24 with respect to that are undisputed. We provided the
25 receipts, we provided the time frame, provided the checks.

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1 You know, the lack of flexibility -- you know, men can
2 repair -- have their clothes repaired and replaced as
3 necessary. And they really have not adequately addressed
4 that.

5 And with that, I'll reserve any other time.

6 THE COURT: But that issue, that concern, was
7 resolved in October 2014, as I understand.

8 MR. PRICE: No, Your Honor. They started providing
9 a \$150 stipend to women once a year if they were full-time.
10 And that \$75 stipend to females who were part-time.

11 Whereas, men get -- part-time men get a \$235 suit
12 and tie, repaired and replaced as needed throughout the year.
13 And full-time men get two suits, repaired and --

14 THE COURT: I apologize. I kind of -- it seemed to
15 me from the briefs that that issue of disparity in clothing
16 allowance had been resolved.

17 MR. PRICE: No, Your Honor. It's not. I'm sorry.

18 THE COURT: Okay. I apologize.

19 MR. PRICE: No, no. That's fine. It continues.
20 Since October of 2014, it has been partially remedied.

21 THE COURT: Okay. All right.

22 MR. PRICE: But it has not been fully. Thank you,
23 Your Honor.

24 THE COURT: Okay. Thank you.

25 Mr. Wardlow?

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1 MR. WARDLOW: Thank you, Your Honor, may it please
2 the Court.

3 So this case is about the right of an employer to
4 control the public face of his business. And here that
5 business is a business and a ministry that Mr. Rost believes
6 he is religiously called to do, that serves grieving people
7 who are mourning the loss of loved ones.

8 THE COURT: Is your client engaged in sex
9 stereotyping?

10 MR. WARDLOW: My client did not engage in sex
11 stereotyping. What my client did was, he put into place as a
12 longstanding and industry-standard sex-specific dress code.
13 So he engaged in permissible sex specificity under a
14 sex-specific dress code, not impermissible sex stereotyping.
15 And there's a significant difference between those two.

16 We know that after *Price Waterhouse*, courts around
17 the country have upheld sex-specific dress codes as not
18 constituting sex stereotyping.

19 THE COURT: In the Sixth Circuit?

20 MR. WARDLOW: In the Sixth Circuit, the question
21 hasn't come -- I am not aware of a case in the Sixth Circuit,
22 but there are pre *Price Waterhouse* cases on this point.

23 And there are cases from around the country on this
24 point as well. So the wide body of case law indicates that
25 *Price Waterhouse* does not mean that sex-specific dress codes

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1 constitute impermissible sex stereotyping.

2 So you have a spectrum, right? You have
3 impermissible sex stereotyping on the one hand, *Price*
4 *Waterhouse*, and *Hopkins*.

5 And she was told basically that she had to be more
6 aggressive to be a partner.

7 But she was also told that she -- well, that was the
8 implication.

9 THE COURT: That she needed to dress more feminine?

10 MR. WARDLOW: Right, exactly, but she had -- so she
11 was in a catch 22 as the Court said.

12 Then on the other end of the spectrum, we have
13 actually what the EEOC's compliance manual itself sets out
14 with respect to sex-specific dress codes. And that is, that
15 if a sex-specific dress code does not impose an unequal
16 burden on the sexes, then it complies with Title VII. And
17 that's from the EEOC's own compliance manual. And that's
18 what we have here.

19 A couple of points about the *Smith* case and the
20 *Myers* case, but mainly the *Smith* case.

21 The *Smith* case is important in the Sixth Circuit
22 because it actually stands for the proposition, first
23 of all, that a transgender person cannot be denied a sex
24 stereotyping claim simply because they are transgender.

25 But it does not stand for the proposition

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1 rather than transgender status is a sufficient basis for a
2 sex stereotyping claim or a sex discrimination claim. That
3 is, there is a paragraph, as you know, Your Honor, that was
4 deleted from the Sixth Circuit's opinion in *Smith*.

5 And that paragraph that was deleted in amended
6 opinion actually stated that transgender status would be a
7 protected status under Title VII, but that was deleted. The
8 Sixth Circuit decided not to go that far.

9 I think that strongly implies that in the Sixth
10 Circuit -- and is the law of this case, actually, a
11 transgender status is not a protected status under Title VII.

12 Now, if transgender status is not a protected class
13 under Title VII and if the sex -- same sex -- I'm sorry, a
14 sex-specific dress code is -- complies with Title VII,
15 post-Price Waterhouse, it doesn't make any sense that you can
16 sort of add those two together and then come up with an
17 actual claim.

18 That is, a sex-specific dress code and the
19 enforcement thereof cannot become an actionable example of
20 sex stereotyping simply because the person that violates the
21 sex-specific dress code is transgender.

22 So essentially, what the EEOC is asking for, one of
23 two things. They want this Court to either rule essentially
24 that all sex-specific dress codes are impermissible under
25 Title VII because sex-specific dress codes are sex-specific,

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1 and that in itself, is sex stereotyping, but that is not what
2 the case law shows.

3 Or they want this whole Court to hold that there
4 should be a transgender exception to the rule of law that
5 sex-specific dress codes may be enforced and do not violate
6 Title VII as long as they impose equal burdens on the sexes.

7 Neither of those two positions are tenable. And for
8 those reasons alone, I think that Rost is entitled to summary
9 judgment in this case on the unlawful discharge claim.

10 Now with respect to RFRA, there clearly is a
11 substantial burden here under RFRA. The burden is this:
12 there are basically two words.

13 The burden first is that the U.S.A. is attempting to
14 compel Rost to allow Stephens to dress and present as a woman
15 while on the job. And that's critical, while on the job and
16 representing the company as the public face of the business,
17 as a funeral director.

18 That burdens Mr. Rost's religious beliefs regarding
19 human sexuality. And it actually forces Mr. Rost to
20 basically portray to the world a belief that is contrary to
21 his own. So that is a substantial burden on his religious
22 faith right there.

23 Also is Mr. Rost's opinion, given his 35 years as
24 president of R.G. and his 50 years of experience in the
25 funeral home industry, and his knowledge of Stephens for the

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1 last six years, that if Stephens returned to work after a
2 short vacation, presenting as a female, he would be
3 presenting in a way that would cause distractions at the
4 funeral home, interrupt the grieving process. And that is
5 Mr. Rost's opinion, based on all of his experience, and his
6 knowledge about what Stephens looks like.

7 And so that would interfere with the mission and the
8 ministry and the business of R.G. And he, Mr. Rost,
9 believes he is called to that business by his faith,
10 therefore, that is a second substantial burden on his
11 religious exercise.

12 So then the burden shifts to the government under
13 RFRA. And the government has the burden of showing that
14 there's a specific compelling interest that is the least
15 restrictive means, and that applying Title VII in this case
16 is the least restrictive means of furthering that compelling
17 interest.

18 The EEOC has made no showing of that in this case.
19 In fact, the EEOC just stands on, sort of a general -- a
20 general interest, and states that it's compelling, but is
21 not, in eradicating discrimination.

22 Now, as a general matter, perhaps that would be
23 or could be a compelling interest, but under RFRA, as Your
24 Honor noted, you need to look at the specific case in front
25 of you, and you need to look particularly at, does the EEOC

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1 have a specific compelling interest in forcing Rost to retain
2 Stephens in this case and allow him to present as a female
3 while on the job representing R.G. Harris Funeral Homes here?

4 And the EEOC has made no argument whatsoever that
5 that is the case. So they have completely failed to meet
6 their burden of demonstrating a specific, compelling
7 interest.

8 And so you don't even need to get to the second
9 point of the government's burden of least restrictive means,
10 but they haven't made any showing on least restrictive means
11 either. So they completely fail. That means RFRA does
12 apply.

13 Now, to address Your Honor's questions and counsel's
14 points with regard to RFRA and Title VII, RFRA, as Your Honor
15 read the language from RFRA, does specifically apply to all
16 federal statutes and their applications. And so here, this
17 particular -- it doesn't override Title VII.

18 Generally, what RFRA does is, it says, "Okay, you
19 can not apply any federal statute in a way that would
20 substantially burden someone's religious exercise unless the
21 government meets its burden of showing a compelling interest
22 that is specific and that that application is required and is
23 the least restrictive means of furthering that interest.

24 So it intervenes and bars the application of Title
25 VII in this case. And that's how it works.

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1 So there's no conflict between Title VII generally
2 and RFRA. Rather, in this case, you need to go through that
3 RFRA analysis, look at the clear language of the RFRA
4 statute, and you see that there is a substantial burden and
5 the government has not met its burden of showing a compelling
6 interest or least restrictive means, and therefore it cannot
7 apply Title VII in this case at all.

8 And that is an independently sufficient reason
9 that Rost is entitled to summary judgment in this case as
10 well.

11 Now, with respect to the clothing allowance claim,
12 it is defendant's position that Stephens -- well, first of
13 all, the claim is being brought on behalf of a class of
14 female plaintiffs, but all relevant times in this complaint,
15 Stephens has been and was a male person.

16 So Stephens can't even be a member of the class of
17 persons that the EEOC is claiming to bring this claim on
18 behalf of, and therefore Stephens was not an aggrieved person
19 because Stephens never claimed to receive a clothing
20 allowance.

21 You remember that the clothing allowances are only
22 given since October 2014 to female employees and not to male
23 employees, because male employees received their suits.
24 But there is no disparity, so therefore Stephens could have
25 no claim for a clothing allowance at all, because he was a

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1 male, right?

2 Now, there is no disparity if you get past the point
3 that there's no authority for the EEOC to bring the claim in
4 the first place.

5 Secondly, the situation has been remedied
6 since October 2014, and there is no disparity truly between
7 the male and female clothing allowances or clothing
8 provisions because what you have for males is, you have
9 to -- you have to look at the specific positions at
10 issue.

11 Now, for funeral directors, if there's a female
12 funeral director, the record is clear that a female funeral
13 director would receive a suit issued by the company, just
14 like male funeral directors do.

15 Now, going down from that position or looking at
16 others positions, all other positions where somebody
17 interacts with the public, the male employees receive a suit
18 from the company; whether if they're part-time, one suit, if
19 they're full-time, then two suits.

20 For the females, they receive \$75 or 150 per year as
21 a stipend. And the record in this case is clear, that that
22 is enough money to replace female clothing that conforms to
23 the female dress code, sex-specific dress code in this case,
24 when those clothes wear out. And that's exactly what the
25 males get. They get a new suit whenever their clothes wear

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1 out.

2 So the value of the clothing isn't really at issue.
3 What's at issue, what we have to look it is, do they receive
4 -- are there equivalent burdens here? And the answer to that
5 question is yes, because the females are able to replace
6 their clothing as it wears out, and the males' clothing is
7 replaced as it wears out.

8 And so the burden is identical and there is no
9 violation. And that situation has been remedied since
10 October of 2014.

11 And so just back to the dress code, I just want to
12 emphasize that it's no answer, as the EEOC suggests, to say
13 that the dress code must be applied based on gender identity
14 and not based on biological sex.

15 Because if that were the case, well, first of all
16 sex-specific dress codes would have no meaning in terms of
17 the ability of a company to control its public face, because
18 the employee could just declare themselves to be one
19 particular gender identity, and they could choose which part
20 of the dress code to comply with.

21 Secondly, it actually -- if that is the case, if the
22 rule of law were that dress code, that sex-specific must be
23 applied based on gender identity, then that would create
24 protected class status for transgender persons.

25 And here's why. Consider that you had a dress code

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1 that was sex-specific and it did not -- it required -- I'm
2 sorry. It allowed females but not males to wear skirts.

3 Under that scenario, under the EEOC's logic, if you
4 had a man who was not transgender, who wanted to wear a skirt
5 to work, then that man would not be able to do so. If he
6 did, he could be discharged because of the sex-specific dress
7 code, and he would not have a Title VII claim.

8 But if you had a biological man who claimed that he
9 was a woman and wanted to wear a skirt at work, under that
10 dress code, if he was discharged because of the dress code,
11 under the EEOC's position he would have a claim under Title
12 VII.

13 And therefore, if you apply a sex-specific dress
14 code based only on gender identity, you create a protected
15 class status under Title VII for transgender individuals.
16 And that is something that the Sixth Circuit has strongly
17 implied in *Smith*, as basically as held and this Court has
18 held Title VII does not cover transgender status as a
19 protected class.

20 So for that reason, I think that R.G. is entitled to
21 summary judgment.

22 THE COURT: Okay. Thank you.

23 Mr. Price, anything further?

24 MR. PRICE: I've got a few things, Your Honor, to
25 respond.

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1 It was only on summary judgment that we got this
2 whole public face of the ministry discussion. It's important
3 to point out that during the investigation we were never told
4 that there was any kind of religious objection to Ms.
5 Stephens.

6 THE COURT: It wasn't until you got the amended
7 answer, I think, right?

8 MR. PRICE: Right, it was not until the amended
9 answer several months into this litigation that finally we
10 have this RFRA claim.

11 And I think it's overly expansive to be talking
12 about this as a ministry in light of these facts. I mean, he
13 talks about how very limited -- I think our record is clear
14 about how limited the practice is. I mean -- and they
15 will -- they serve people of all religions or none. And to
16 describe this as a ministry, I think, is really trying
17 to be almost back-dooring their way into some sort of
18 religious establishment status. And that's not the case
19 here.

20 This is a private, for-profit, closely-held
21 corporation that stated no religious purpose until, you know,
22 this litigation. So I don't think that's a particularly -- I
23 think defendant is going too far, and I think that's the
24 logical unfortunate conclusion, you can come to, is they
25 really are trying to back door their way into an

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1 establishment.

2 I would say that with respect to the dress code,
3 we're not trying to eliminate every sex-specific dress code.
4 And I think here, really their dress code already is
5 functionally one of identification.

6 They are not verifying biology, genetically or
7 through some kind of crude medical examination or anything
8 like that. They are going on the say-so of the person who
9 comes in. So in that case -- I mean, to say that this -- by
10 stating --

11 THE COURT: I apologize. I did not understand on
12 the say-so of --

13 MR. PRICE: The employee. The employee is coming in
14 identifying as male or female and get their clothes
15 accordingly.

16 For all we know, they may have employed somebody who
17 was transgender. I mean, it's not like -- like I said, it's
18 not like they have ever tested for it. Nor should they, let
19 me be quick to say that.

20 You know, they said basically there's kind of a
21 burden is that they have to -- Ms. Stephens would not be
22 portraying the public face of the company or be portraying it
23 contrary to his beliefs.

24 That is not exercise. The very fact that someone
25 may not behave in a way that comports with your beliefs is

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1 not sufficient to elevate it into a question of religious
2 exercise which is what RFRA requires. And in a way, they are
3 almost trying to, with this dress code, find a way to get a
4 transgender exception to Title VII, not just with the dress
5 code, but also with the claim.

6 Basically, no, you really can't sue on behalf of
7 transgender people, people who are identifying as female or
8 according to your stereotypes, if the dress code -- the dress
9 code could trump it.

10 And really, they're asking for something that is
11 quite broad. It's not just to -- with respect to this
12 company. They're basically asking us to either not sue or to
13 hire people in a wide range of cases. And that precedent
14 would be wide. It would be used in any number of cases. It
15 wouldn't be just limited to transgender persons either. It
16 would be setting quite a large precedent.

17 And again, I would have to dispute that the idea
18 that this is -- you know, they would have bought female
19 funeral directors' clothing.

20 During the whole length of this policy and up to the
21 present day, they have never had a female funeral director,
22 nor have they ever bought clothes for one. So basically it's
23 speculative. I mean, they get their clothing from a men's
24 clothing store, Sam Michael's.

25 So again, this is kind of speculative. It's a

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1 statement, you know, I don't think has to be taken at face
2 value, given that there's no practice of it.

3 And again, the idea that this would create a
4 back-door gender status, I don't see that at all. I mean,
5 this is essentially, you know -- has there ever been a case
6 where a man has worn female clothing to work? They haven't
7 pointed to one where a non-transgender man is wearing female
8 clothing to work or anything like that.

9 It's entirely speculative. It's beyond
10 hypothetical. I mean, they're really trying to spin out some
11 kind of parade of horrors here that just doesn't exist.

12 That's all.

13 THE COURT: Okay. Anything else?

14 MR. WARDLOW: Very briefly, Your Honor?

15 THE COURT: Sure.

16 MR. WARDLOW: Just a few points, Your Honor.

17 First, I'd point out that the mission statement of
18 R.G. does actually talk about Rost religious faith and states
19 that the mission of the funeral home is to, above all other
20 things, serve God. So it's right there in the mission
21 statement.

22 So there is a basis for the religious exercise that
23 goes all the way back to whenever the mission statement was
24 put into place, which was quite some time ago.

25 Now, with respect to the dress code being applied

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1 based on biological sex, of course the dress code is applied
2 based on the employer's determination of an employee's
3 biological sex based on what those employees say about their
4 biological sex in documents that confirm their biological
5 sex, like a driver's license, insurance forms, things like
6 that.

7 Now, of course, if a person has undergone a
8 transition that is so extensive that for all intents and
9 purposes they appear to be a member of the opposite sex, then
10 no issue would ever arise. Right? So it would never become
11 an issue and the Court need not concern itself with that kind
12 of situation. But it's perfectly legitimate to defer to the
13 employer when the employer recognizes that a person coming in
14 --

15 THE COURT: Just a question. I don't know if you
16 have the answer. Is there an employment application? I
17 mean, does Harris Funeral Home have an employment
18 application?

19 MR. WARDLOW: I don't believe there is in the
20 record, no.

21 THE COURT: Mr. Price, do you know whether they have
22 an employment application where somebody comes in to apply
23 for a job, fill out an application?

24 MR. PRICE: No, I do not believe so, Your Honor. In
25 this case -- I can speak to this. This case --

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1 THE COURT: No big deal. I mean, I'm just kind of
2 curious.

3 MR. PRICE: He was basically hired by the -- she was
4 hired by the charging -- where the respondent, having, you
5 know, just come in off of, you know, some personal contact.
6 There was no application filled out.

7 MR. WARDLOW: There were never documents in the
8 record that show that Stephens was a biologic male, including
9 unemployment documents, and his driver's license and things
10 like that.

11 Now, with respect to exercise -- a company acts
12 through its employees, so in order for a closely-held
13 business, under *Hobby Lobby*, to actually have religious
14 exercise, that has to take some kind of action.

15 And in this case, and in all cases, a company acts
16 through its employees. So if the company is acting through
17 Stephens and Stephens is portraying himself as a woman, but
18 he is not a woman and that is obvious from his
19 presentation of himself, then that is an action and
20 contravenes Rost's sincerely-held religious beliefs right
21 there.

22 Now, with respect to just these -- the precedent
23 that this would be setting if the Court were to hold that
24 RFRA applies in this case, all religious accommodations, all
25 religious accommodations affect and impact adversely

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1 whatever interest the government is putting forward in every
2 instance. That's just the nature of RFRA. It carves out
3 exceptions. It carves out accommodations and requires them
4 to be made. So that's just the nature of the law itself.

5 The Court wouldn't be creating a precedent that
6 would change anything. It's just the nature of RFRA and
7 that's already in place.

8 So -- and the United States, of course, has a very
9 long tradition of requiring religious accommodations to be
10 made in many instances under RFRA, and under the First
11 Amendment and under state constitutional provisions as well.

12 THE COURT: How about the thought that you somehow
13 back-doored the Religious Freedom Restoration Act defense?

14 MR. WARDLOW: Back-doored religious -- I don't
15 believe that there is any back-dooring of the Religious
16 Freedom Restoration defense here.

17 What we have here is -- the facts that support the
18 Religious Freedom Restoration Act defense have been in place
19 all along, and then at a certain point in the litigation, we
20 made the argument. And it was not unduly late in litigation,
21 and it was promptly upon discovering those facts and
22 analyzing it, we said, you know, this is the basis for the
23 Freedom Religious Restoration Act claim.

24 And the fact that it was raised a little bit later
25 in the litigation or raised in the amended complaint as

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1 opposed to something that Rost didn't say to Stephens at the
2 time of discharge, well, you know, we have this Religious
3 Restoration Act thing?

4 No, it doesn't make any sense. The facts were
5 there. They support the Religious Freedom Restoration Act
6 defense and it's perfectly legitimate. And there's nothing
7 back-door about recognizing those and then making the
8 argument to this Court.

9 And then finally, with response -- with regard to
10 the point that nothing shows that -- clothes for female
11 funeral directors, there is no record in evidence that would
12 indicate whatsoever that Harris Funeral Homes would not
13 purchase suits for a female funeral director, and there is
14 record evidence that it is the intention of Rost, the 94.5
15 percent owner and sole officer of Harris Funeral Homes, that
16 he would, in fact, purchase suits for a female funeral
17 director if they had the opportunity to hire one.

18 THE COURT: Okay.

19 MR. WARDLOW: Thank you, Your Honor.

20 THE COURT: Anything else, Mr. Price?

21 MR. PRICE: Not to belabor it, I just -- I think one
22 thing to point out is that the dress code could be used here
23 --

24 THE COURT: You can sit in the chair, wherever you
25 are comfortable. I don't care.

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1 MR. PRICE: The dress code here, it could be used --
2 I mean, if you're talking about -- again, we're not
3 assaulting all sex-specific dress codes. But what it could
4 do, is if you're basically requiring a biological dress code
5 as opposed to just merely sex-specific, you're really going
6 to basically eliminate any kind of person like Ms. Stephens
7 from employment.

8 THE COURT: Seriously, on the dress code issue, both
9 of you -- I mean, that was covered in your briefs. And I
10 don't think I need to review it or hear anything more about
11 that.

12 MR. PRICE: All right. Then I have nothing else.

13 THE COURT: Anything else?

14 MR. WARDLOW: No, Your Honor. Thank you.

15 THE COURT: Okay. Thank you very much. I hope to
16 have the opinion out to you probably in seven to fourteen
17 days. Okay?

18 MR. WARDLOW: Thank you.

19 MR. PRICE: Thank you.

20 THE COURT: Very good arguments, very good briefs.

21 MR. PRICE: Thank you.

22 THE COURT: Mr. Kaplan, did you have anything to
23 add on behalf of the ACLU?

24 MR. KAPLAN: No.

25 THE COURT: Okay.

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(Court in recess)

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C E R T I F I C A T I O N

I, Marie J. Metcalf, Official Court Reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript has been prepared by me or under my direction.

s\Marie J. Metcalf 10-23-16
Marie J. Metcalf, CVR, CM (Date)