



October 16, 2017

**Via ECF**

Office of the Clerk  
U.S. Court of Appeals for 6th Circuit  
Deborah S. Hunt, Clerk  
100 East Fifth Street  
Cincinnati, OH 45202

**Re: *EEOC v. R.G. & G.R. Harris Funeral Homes*, No. 16-2424**

Dear Ms. Hunt:

Intervenor responds pursuant to Fed. R. App. P. 28(j) to the submission of Defendant-Appellee dated October 6, 2017. Respectfully, the Attorney General memorandum misstates the law of the U.S. Supreme Court and the Sixth Circuit in several ways. First, the argument that sex is narrowly defined based on biology was rejected in *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality op.)).

Second, Congress's use of "gender identity" and "sex" in statutes enacted many years after Title VII does not evidence congressional intent to exclude treatment of "gender identity" discrimination as a form of "sex" discrimination prohibited by Title VII. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation"); *Bilski v. Kappos*, 561 U.S. 593, 645 (2010) (Stevens, J., concurring) ("When a later statute is offered as an expression of how the Congress interpreted a statute passed by another Congress a half century before, such interpretation has very little, if any, significance." (internal quotation marks and ellipses omitted)).

Third, the argument that *Price Waterhouse* is limited only to "sex stereotypes" that result in disparate treatment of men as compared to women, or vice versa, was rejected in *Price Waterhouse* itself, *Price Waterhouse*, 490 U.S. at 240 ("gender must be irrelevant to employment decisions"); *id.* at 251 (Title VII prohibits an employer from "evaluat[ing] employees by assuming or insisting that they matched the stereotype associated with their group," since "Congress intended to strike at the entire spectrum of disparate treatment of men *and* women resulting from sex stereotypes" (emphasis added)); *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80-81 (1998) (outlining different "evidentiary route[s]" to prove sex discrimination, only one of which is evidence of differential treatment of one sex compared to the other). In contrast, under the Attorney General's interpretation of *Price Waterhouse*, an employer could

require women to comply with stereotypical standards for feminine behavior and appearance, so long as it also enforced masculinity standards for men.

Respectfully,

/s/ John A. Knight

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 16, 2017, I filed the foregoing Rule 28(j) Letter, through the Court's ECF system, which will effectuate service on all parties.

/s/ John A. Knight  
John A. Knight

*Attorney for Intevenor Aimee Stephens*