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,
Respondent,

and AIMEE STEPHENS,
Respondent-Intervenor.

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

BRIEF OF SCHOLARS OF PHILOSOPHY, THEOLOGY, LAW, POLITICS, HISTORY, LITERATURE, AND THE SCIENCES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DAVID R. LANGDON
Counsel of Record
LANGDON LAW LLC
8913 Cincinnati-Dayton Road
West Chester, Ohio 45069
(513) 577-7380
dlangdon@langdonlaw.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTERESTS OF *AMICI*[1]

Amici, whose names and affiliations are set forth in the attached Appendix, are distinguished professors of philosophy, theology, law, politics, history, literature, and the sciences who have studied, taught, and published variously on matters concerning anthropology, marriage and family, sexual difference, human action, political community, natural law, ethical theory, bioethics and sexual ethics, as well as the intersection of these with jurisprudence, science, technology, social science, psychology, language, and gender theory. Based on their expertise, they critically evaluate the constructs of "gender identity" and "transgender/transitioning status" that inform the Sixth Circuit's ruling against Petitioner, R.G. & G.R. Harris Funeral Homes, Inc. (Harris Homes).

Amici show that "gender identity" and "transgender/transitioning status" are metaphysical constructs of dubious ideological and political origin, enabled by the technological manipulation of human biology, and that they are destined to catalyze further and more radical biotechnical interventions whose safety and ultimate consequences cannot be known in advance. They show, moreover, the authoritarian nature of these constructs, how they impose a divisive

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[1] Pursuant to Rule 37.3(a), *amici* certify that this brief is filed with written consent of all parties. Pursuant to Rule 37.6, counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Law and Liberty Institute provided funding for the preparation or submission of this brief.

design on the whole of society, present and future, and undermine the basic liberties of all.

SUMMARY OF ARGUMENT

Harris Homes allegedly violated Title VII's prohibition against discrimination "because of sex" (1) based on "sex stereotypes," under case law interpreting Title VII and (2) based on "transgender/transitioning status," directly under Title VII, where "transgender/transitioning status" is interpreted as a "protected class" under the statute's use of the term "sex."

The issue comes down to whether "sex" in Title VII can be properly interpreted as "gender identity" or "transgender/transitioning status" and whether it is a prohibited "stereotype" to think that "sex" is a non-arbitrary and natural reality, and, while certainly a source of "identity," one that is properly and organically rooted in the body's sexual dimorphism.

When courts hold that "sex" in antidiscrimination legislation includes or means "gender identity," they also implicitly accept this latter category as real, which, in the present context, means that they agree that the relationship between the sexually dimorphic body and identity are in principle related accidentally, even arbitrarily. This means that the relationship is established according to one's feelings or choice, rather than organically or naturally.

The effect is to suggest that the organic ties that make the human person a whole and single being, an embodied person, are in fact accidental or arbitrary relations between a material, functionalistic, or plastic bodily substrate and a separate consciousness

or mind. The human person is thereby conceived in a fragmented or reductive, rather than a holistic, natural, or organic way. Accepting this view then draws into question the reality of men and women, suggesting that what makes them to be such is only their feeling about themselves, or the cultural construction of those feelings, and not their embodied presence to themselves and to others. Moreover, it suggests that the organic ties of vital human communities, such as the family, kinship group, and larger communities, which are very often mediated in subtle ways by sexual difference, are artificial and arbitrary, rather than natural.

Beneath its tortured arguments about "stereotypes," the Sixth Circuit does just this when it accepts the highly ideological and polemically freighted category of "gender identity," as a real and true replacement for "sex," effectively rejecting the natural meaning of the latter as understood throughout history and across civilizations. It entangles Title VII (and other nondiscrimination laws) in metaphysically saturated assumptions.

In fact, the relationship between the body and subjectivity, which is the question that is really at stake, is inherently philosophical, indeed metaphysical, in nature. It concerns truths about the very nature of things that precede human construction and transcend contingent historical circumstances. Thus, the Sixth Circuit not only takes sides in an extremely contentious philosophical debate, but imposes basic assumptions, which are highly problematic, of one side of that debate on society as a whole. This will have vast consequences for our understanding of basic natural human

communities. Were this Court to accept that "sex" can be replaced by or include "gender identity" and "transgender/transitioning status," it would essentially codify a certain metaphysics or philosophical anthropology, with vast implications for society, for communities, and for every man, woman, and child.

ARGUMENT

I. The Sixth Circuit redesigned the law in terms of novel normative and metaphysical assumptions.

A. The court posited a redefinition of human nature.

In replacing "sex" with "gender identity" in the law, the Sixth Circuit has put into place a principle with vast implications. Its entire decision appears to begin with the assumption that a transgender identity is a genuine way of being and thus a legitimate category. This is apparent throughout its decision in its introduction of the Respondent as "Aimee Stephens, a transgender woman," Pet. App. 5a, who was "transitioning from male to female," Pet. App. 36a, and in its consistent use of the feminine pronoun. As for Stephens's bodily "sex," the Sixth Circuit suggests or assumes a number of alternatives: that Stephens's true sex is irrelevant to his "identity" or absorbed by it; that it is undetermined, undeterminable, or fluid; or that it is simply subject to his decision, as they believe it was subject to the decision of his doctors and parents who "assigned" it, a highly loaded and tendentious term the Sixth Circuit takes for granted. Pet. App. 5a.

In accepting the category of "gender identity" as real, the Sixth Circuit also accepts a metaphysical category and the entire set of its anthropological implications as real, all without discussion or justification. What purports to be a decision about rights is, more fundamentally, a metaphysical decision about the very nature of things. After all, Stephens's claim is not that he has the right to dress as he pleases, *but rather that he in fact is a woman* and, on that basis, has a right to be treated as such. He has not challenged the sex-specified dress code. Stephens Br. 50-51; Pet. App. 18a; 21a, 66a-67a, 86a, 112a, 138a. Nor has he challenged the idea that expectations for men and women differ with regard to that dress code. Indeed, he eagerly accepted the sex-specific dress code and its associated expectations. His claim is rather that he is a woman and, on that basis, ought to be able to come to work dressed according to the women's dress code. The Sixth Circuit accepts this claim at every turn. Yet if Stephens is not a woman, his claim falters. He would have to make a different claim, viz., he would have to challenge the sex-specified dress code as such. The validity under Title VII and *Price Waterhouse* of sex-specified dress codes is an entirely different issue from the one presented to the Sixth Circuit and, now, to this Court.

It is therefore important to try to understand what the Sixth Circuit thinks or assumes is true about Stephens. Logically, if he is a woman, then it seems that one of two things must be true. The first is perhaps more straightforward: he is a woman with a man's body. If so, then the anthropological or metaphysical assumption is Cartesian dualism,

famously derided by British philosopher Gilbert Ryle as "the dogma of the Ghost in the Machine."[2] This anthropology would tend to see the body as only a mechanical substrate, and the mind or consciousness as a separate substance having little to do with material reality. Here the purported illicit "stereotype" would be thinking that a woman cannot have a male body with male genitalia or, having "notions of how sexual organs and gender identity ought to align." Pet. App. 26a-27a. Anthropologically, this view presents us with a vision of the human person that is utterly fragmented, rather than natural and holistic. Like the ancient gnostic vision, it implies that the body is a kind of external housing, possessed by the subject, but less than fully personal. If the body is an external possession, the implication is that people ought to be able to treat it like they do any property. Clearly, such a view has vast implications for law and society, not only in the area of sex discrimination, but also, for example, in relation to rapidly deepening and problematic applications of biotechnology. Just as importantly, it treats the relationship between the inner "identity," a quality of mind, and the external "body," a biological substrate, as entirely arbitrary.

Another logical possibility is that Stephens is a woman with a woman's body. Here the sex of the body has been entirely assimilated into the "gendered" identity. Here, the allegedly illicit "stereotype" is what everyone has assumed throughout the history of civilization, namely, that a male body is in fact a male body. Or to put it differently, the "stereotype" is to

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[2] GILBERT RYLE, THE CONCEPT OF MIND 15-16 (2000).

think that penises and testes are male sex organs (and, by implication, that vaginas, ovaries, and uteruses are female sex organs). This result implies doing away with the concept of the sexes altogether. Indeed, it renders the idea that there even are male and female, men and women, entirely unintelligible. It envisions sexually dimorphic bodies as merely functional parts and pieces, and subjectivities as only feelings or choices. Like the first alternative, it views the relationships between these as entirely arbitrary, and, also like the first alternative, suggests that the body's very meaning is entirely dependent on the feelings or choices of the subject. It is tantamount to reducing sexual dimorphism to having an extra orifice or an extra appendage, which cannot have any sort of real or unchosen bearing on one's interior subjectivity any more than one's eye color. To think that these extra anatomical features bear any further human, cultural, or social meaning would be to indulge mere stereotypes.

This second more radical possibility underlies what appears to be a straightforward traditional "sex stereotype" claim based on *Price Waterhouse* and its progeny, where female or male employees are considered to be insufficiently feminine or masculine, respectively (in their manner or dress). Under that claim, the Respondent who, in this case *wants* to dress femininely, is alleged to have been dismissed for being "unacceptably masculine for a woman," Stephens BIO 23, in the same way that the female employee in *Price Waterhouse* "failed to be womanly enough." Pet. App. 15a. While this count attempts to skirt the transgender/transitioning question, it, of course, assumes it from the outset. It assumes the

assimilation of the body's sex by the "gendered" identity.

Either position entails a radical dissolution of the way we in fact experience being human. Either amounts to the forced acceptance of a very particular, indeed ideological, philosophical anthropology, with a very particular history and agenda behind it, without any justification, a justification that could only take the form of a philosophical argument beyond the competence of courts.

Of course, the Sixth Circuit has not explicitly committed to either of these possibilities. Rather, it implies that illegal stereotyping occurs anytime an employer makes an adverse employment decision based on the employer's "notions of how sexual organs and gender identity ought to align." Pet. App. 26a-27a. The Sixth Circuit thereby suggests that it is an illegal stereotype to assume an employee's "sexual organs" must place him or her within the "sex binary" at all and that a decision to live entirely outside it is protected behavior. A cause of action could arise, therefore, anytime an employment decision is made based on the perception that the employee is in any way "gender non-conforming." Evidence that this is in fact what the Sixth Circuit has in mind may be found, for example, in its footnote 4, which tells us:

> [D]iscrimination because of a person's transgender, intersex, *or sexually indeterminate status* is no less actionable than discrimination because of a person's identification with two religions, an unorthodox religion, *or no religion at all*. And "religious identity" can be *just as fluid,*

> *variable, and difficult to define* as "gender identity"; after all both have a "deeply personal, internal genesis *that lacks a fixed external referent*."[3]

On what basis, and with what evidence, can the Sixth Circuit make this metaphysical claim?

While the case seems to be based on Respondent's reported feeling that he is actually a woman, the Sixth Circuit's actual holding implies that Title VII (and by extension Title IX and many other nondiscrimination laws) protect a simple choice, whether permanent or temporary, static or fluid, to live anywhere within or indeed outside the sexual binary. Correlative with this conclusion, we now hear of individuals "microdosing," or using low doses of sex hormones, to make themselves "non-binary."[4] We also read about the endless multiplication of "identities," requiring the "LGBT" acronym to expand to "LGBTQ" and beyond. In this case, one's adaptation of the body becomes nothing more than a chosen self-expression, very much like a chosen lifestyle or manner of dress, and the body a kind of billboard or propaganda of the individual for the world. The nondiscrimination provisions of Titles VII and IX pertaining to sex then protect, not women or men, but lifestyle choices. This is not simply a kind of court-enabled mission creep,

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[3] Pet. App. 24a-25a, n.4 (citing and quoting Sue Landsittel, *Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII*, 104 NW. U. L. REV. 1147, 1172 (2010)) (emphasis added).

[4] *E.g.*, Julie Compton, *Neither Male nor Female: Why Some Non-Binary People Are "Microdosing" Hormones*, NBC News, Jul. 13, 2019: https://nbcnews.to/2xKcfb9 (last visited Aug. 19, 2019).

but rather a full-blown inversion of the very idea of these landmark antidiscrimination statutes.

Perhaps even more aggressively than these two alternatives, the Sixth Circuit's embrace of an entirely fluid and chosen sense of "identity" implies its entirely arbitrary relation to the body and the body's complete subjection in the manner of external property. It ultimately puts into question the fundamental anthropological fact, obvious to every civilization in history, that there really are men and women, that they are different in important ways, and that history and civilization depend on their complementary relationship.

B. The court's ruling foists an ideological innovation onto society.

While law in liberal societies often presents itself as only mediating between interest groups or between rights and state interests, the fact of the matter is that law by its nature guides human conduct, and in so doing it also forms minds. Not only is this an ancient insight,[5] but contemporary legal theorists and philosophical proponents of the Sixth Circuit's decision also recognize it in various forms.[6] When law

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[5] *See, e.g.*, THOMAS AQUINAS, SUMMA THEOLOGIAE I-II, Q. 90, a. 1; Q. 92, a. 1.

[6] See, *e.g.*, Carl Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992); Clare Huntington, *Family Norms and Normality*, 59 EMORY L.J. 1103 (2010); Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589-651 (2013); Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307 (2009); Phil. Professors Amici Br. 27 (citing ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 8 (1996)).

legitimizes or delegitimizes conduct for public purposes, practices and beliefs of public life are widely influenced. Indeed, government and business bureaucracies, professional ethics codes, schools, and any number of other social and cultural institutions are deeply influenced by the legal conclusions of the courts. This is why litigants contend mightily over issues that in truth bear more symbolic meaning than they do substantive consequence.

Even when it claims only to be extending a right, law communicates and enforces tacit assumptions about the nature of the human person and his or her relation to natural human communities, such as marriage, the family, and society more generally. This fact was acknowledged, for example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), where this Court pointed out that the concept of liberty announced by *Roe v. Wade*, 410 U.S. 113 (1973), had profoundly and permanently changed the way "people have organized intimate relationships and made choices that define their views of themselves and their places in society." 505 U.S. at 856. These considerations are especially important when the issue strikes directly at the very core of human nature. It is difficult to think of any topic closer to the question of human nature than the division of humanity into men and women, the fact that the bodies of men and women correlate, that history, civilization, and indeed the future of the species depend on this correlation, and that these facts mean that our ties of kinship are literally inscribed in our bodies by nature.

If law forms and habituates people to certain actions and ideas—whether we like it or not—as a

pedagogue, then the question is whether the courts should use their powerful civil authority and moral suasion to impose a novel and deeply problematic metaphysical, normative, and indeed ideological position, with vast implications for human relationships and self-understanding, on the entire society.

What we have shown points to a paradox. Of course, Stephens ostensibly seeks only to live according to his claimed identity, by coming to work as a woman. But this narrow framing of the issue does not capture the full extent of the demand. Entailed in the demand is also the legally enforced affirmation of his claimed identity by all those around him at work, whether the employer, fellow employees, or clients and their families. Since Title VII jurisprudence will undoubtedly influence Title IX jurisprudence, the demand is also in effect that school administrators, teachers, students, parents, coaches, and others also acknowledge "gender identity" in lieu of natural sex. Of course, other nondiscrimination jurisprudence would also be affected. In truth, then, the Sixth Circuit's holding implies a requirement, by force of law, that *everyone* in society affirm Stephens's identity. But to affirm his identity means that all must act, speak, and ultimately think as though he really were a woman, even if their basic understanding of human nature and reality, not to mention their eyes and ears, tell them otherwise.

This implicit demand places this issue completely outside of earlier discrimination litigation, which was about the just relations of equality and mutual dignity between different groups or kinds of people. Here the disagreement is not most fundamentally

about the just interactions of different categories of persons in society, but about the truth and reality of one of those very categories itself.

The Sixth Circuit's decision implies that the relationship between identity and the body really is arbitrary, rather than organic and natural. Yet this arbitrariness is the mark of the purported *transgender* "identity." The demand is that, at least for nondiscrimination purposes, we understand human nature through that lens. Effectively, then, the Sixth Circuit imposed the crux of the gender identity movement (turning as it does on the idea that the relationship between identity and the body's sexual dimorphism is entirely arbitrary) onto the sexual status of every man, woman, and child in the country. All of them, even if their bodies and identity happen to "align," are understood according to the model of transgender arbitrariness.

Gender identity advocates often lament that "American society enforces a rigid, binary sex/gender system."[7] They urge a social revolution to eliminate what they consider a "simplistic understanding of sex, as two fixed binary categories."[8] They hope to reverse

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[7] S. Elizabeth Malloy, *What Best to Protect Transsexuals from Discrimination: Using Current Legislation or Adopting a New Judicial Framework*, Faculty Articles and Other Publications, Paper 302, at 283 (2010). https://bit.ly/2KPVth1.

[8] Malloy writes that equality for transgender individuals "would be difficult to achieve because it requires the reconstruction of American society's beliefs, assumptions, and norms associated with the binary sex/gender system." *Id.* at 285. *See also* M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 946 (2015).

what they call "the erasure"[9] of "transgender experience,"[10] and "to alter the norms by which sex is given social meaning."[11] Setting aside the fact that these claims assume that transgender identity is a natural or chosen variant of human sexuality, the project entails rebuilding society according to an idea advocates take to be universal: the transgender idea of an arbitrary relationship between the sexed body and the mind, all for the sake of the "erased" transgender experience.

But society is structured as it is, and across every civilization, because the "experience" of the vast majority of people is not that of transgenderism, hence also not that of arbitrariness. Assuming the argument to be true, that a society built on a metaphysics of sex different from one's own "experience" is a form of "erasure" and alienation, would it not follow that a society reshaped on the assumptions of the gender identity movement would effectively "erase" or nullify the experience of the vast majority? Would it not constitute a form of alienation for them—personally and certainly legally? Would it not, therefore, be better to find other ways to accommodate or help those few persons with gender dysphoria than transforming the whole society according to the dictates of the ideologically and agenda-driven gender identity movement?

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9 Malloy, *supra* note 7, at 285.

10 *Id.* at 287.

11 Phil. Professors Amici Br. 27, n.19 (citing Robert C. Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law,* 88 CALIF. L. REV. 1, 17, 20 (2000)).

C. The court imposed, not a liberal settlement, but a normative transformation.

The Sixth Circuit does make a vague attempt to claim neutrality with respect to the underlying metaphysical question, when it rejects the need to decide whether "biological sex" is mutable or immutable. Pet. App. 26a. It did so when responding to Harris Homes's affirmative defense, based on the substantial burden entailed in "put[ting] [Petitioner] to the choice of engag[ing] in conduct that seriously violates [his] religious beliefs [or] . . . facing serious consequences." Pet. App. 51a (internal quotation marks omitted). Here, the court makes use of free speech jurisprudence to argue that Harris Homes's continued employment of Stephens would not imply that it endorses the assumption that Stephens really is a woman or that sex really is mutable. Pet. App. 55a. In claiming to prescind from any judgment concerning these metaphysical matters, the Sixth Circuit suggests that only a *modus vivendi* or an "agreement to disagree" is required between Harris Homes and Stephens.

In relation to Harris Homes's customers, this non-endorsement view is manifestly false. And on closer inspection, the claimed neutrality concerning the underlying question of truth is clearly incorrect. For one thing, the Sixth Circuit's opinion is filled with normative language. Even if we grant the idea that the court has in mind a liberal settlement, a *modus vivendi*, between alternative but irreconcilable private doctrines, to suggest that Harris Homes, individuals, and communities can maintain private philosophical and ethically informed stances

(legitimate at the "private level") which are in absolute tension with a court-mandated *public* stance saturated with the aforementioned bias, is to suggest a sort of civic schizophrenia, one that can only resolve itself (for example, through the public education system) in a policy delegitimization of the now thoroughly "privatized" understanding of the vast majority of citizens. When a school requires a ten-year-old child to affirm in word and deed that a classmate whom he knows is a boy is now a "girl," this does not simply affirm the second child's right to self-expression. It radically calls into question the meaning of "boy" and "girl," not just for the classmate, but for everyone, including the first child himself, and in relation to everyone in his life, from his mother and father, to his brothers and sisters, and all of his friends and relatives. Insofar as "gender identity" is an ideological construct, this is of course the very intention of its advocates. It is simply impossible for it not to shape everyone's understanding of himself or herself, of others and of the world, without choice or even full awareness.

Moreover, the Sixth Circuit's assumption that Stephens really is a woman amounts to a prejudgment of the case's basic framework or context, both undercutting the court's claimed metaphysical neutrality and placing the legal issues to be decided in a certain light. It suggests that Harris Homes in fact did immorally or unjustly discriminate against Stephens. The question then becomes: Is there a remedy under law for this unjust discrimination? This already casts a very negative light on Harris Homes. The Sixth Circuit's assumption that what Stephens says is true about himself really is true frames the

entire legal analysis in a light favorable to Stephens and prejudicial to Harris Homes. In effect, then, the Sixth Circuit's metaphysical presuppositions constitute an unannounced but pervasive normative stance about who is fundamentally right and who is wrong in this litigation.

In sum, then, the Sixth Circuit's position is that Harris Homes not only must provide equal space for Stephens's self-expression, but that they (and, by implication, their customers and, indeed, the rest of society) accept that Stephens really is a woman. By implication, the circuit court also requires that all accept—by word, act, and finally thought—that it is possible for a man to "become a woman" or a woman to become a man, if they so decide; that any human with a male anatomy might very well "be a woman;" and that any human with female anatomy might "be a man." The Sixth Circuit furthermore implies acceptance of the idea that "fathers" might give birth or breastfeed, or, for that matter, that mothers might impregnate fathers. But these results drain man and woman, mother and father of any meaning at all, making them unintelligible, and therefore incapable of legal cognizance. By appropriating gender identity ideology, the circuit court demands, not tolerance of, but conformity to those different views and ways. The Sixth Circuit requires validation of what is, in effect, an archetypal redefinition of man and woman, indeed the abolition of man and woman as we have heretofore known them.

D. The court's ruling exceeded the scope of a *legal* decision.

The Sixth Circuit makes fundamental assumptions about reality and the nature of the human being, assumptions that legal analysis cannot justify. Indeed, the questions it takes up are not legal in nature but belong to the domain of philosophy. They involve such basic anthropological questions as how we should understand the relationship between the body and subjectivity. Even the sciences can only presume an answer to such questions and then proceed with their empirical analyses on that basis. These questions, which philosophers have debated since Plato, are irreducibly metaphysical. Consequently, whatever "science" or "medicine" there may be on this topic is itself highly contentious, novel, and extremely susceptible to ideological influence and error.

In *Roe v. Wade*, this Court ruled that the state could not impose one theory of life over others. 410 U.S. at 162. Here, the Sixth Circuit is attempting to impose its ideologically saturated concept of "gender identity" on the entire population, overruling their connatural, pre-ideological perception of reality. The question could be boiled down to this: Which is more grounded in reality, the actual bodily nature of the person as a sexual being or his or her feelings or choices about sexuality? If we answer in one way, one's physical appearance (through clothing or anatomy) might be altered to fit one's sense of identity. If the other, medicine should look to helping the person (often children or adolescents) with their feelings of alienation from themselves. This is not a question law can answer, and it is not a question to be decided willy-nilly by the courts.

Our point is not based on principles of federalism or any particular theory of judicial interpretation. Rather, it is simply based on the substance of legal rationality. While courts inescapably make decisions with philosophical import, law is not philosophy. This Court should be chary of providing legal answers to fundamental philosophical questions. Such questions should in fact be fought out in the academy and in the development of culture and society. The risk of codifying falsehood is high, especially when the matter at hand concerns such highly controversial and unproven notions about basic human categories, the undermining of which would lead to vast and unpredictable social conflict and accelerate social and cultural disintegration. What if future studies were to conclude definitively that an incongruence between an individual's "identity" and his or her body is in fact a mental illness and that gender ideology is harmful to the young? There would be a constitutional impediment to acting responsibly on this knowledge and maybe even an *a priori* obstacle to discovering it in the first place.

II. The Sixth Circuit's ruling enshrined an ideological construct of recent vintage.

A. "Gender identity" is not a natural category.

Until very recently, few had ever heard the term "gender identity." Apart from the rare exception of genital ambiguity, children knew themselves to be boys and girls and recognized their fathers and mothers as men and women. Nobody needed philosophy, advocates, or ideologues to know what sex he or she was, or a contrived, technical lexicon to

name this fundamental reality. In lived human experience, the knowledge of oneself and of one's parents as a boy or a girl, a man or a woman, was connatural—something one could not *not know* and the foundation of much of what one did know. It was knowledge given at birth, imbibed quite literally, as it were, with a mother's milk. It was among the first and most reliable of the things we know, an indispensable condition for the basic division of the world into kinds and for recognizing a given order that makes a common life, a common language, and a common culture possible in the first place. Even in those rare cases of sexual ambiguity, or cases such as the ancient Indonesian *bissu*, anachronistically invoked by activist scholars to establish a historical antecedent for the contemporary transgenderism phenomenon, the intelligibility of the deviations from the natural norm depended upon the more basic intelligibility of the norm itself.

The terms "sex" and "gender," far from calling this connatural knowledge into question, were used synonymously, each referring to that bodily distinction by which individuals of a species generate, as the *Oxford English Dictionary* attests, whether in reference to individuals, as is the case with both terms, or, grammatically, in the case of "gendered" nouns. Tellingly, the root of the latter term is found also in nouns such as "generation," "progeny," and the verb "engender."[12] Yet, if the initial reference in these terms is to the body, this bodily nature is in fact inextricably and necessarily woven together with social and cultural meaning. As biologist Adolf

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[12] *Cf.* THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY (Charles Talbut Onions, ed., 1966).

Portmann notes, the human mammal is *most* in need of social life and education—even requiring an "extra uterine" year in the "social uterus" of the family to develop those quintessentially human features of speech and upright posture.[13] Similarly, this inextricable nexus accommodates a distinction between the whole reality of an individual man or woman and the "expression" of this reality under specific historical and cultural circumstances.

Each entails the possibility of injustice. But in neither case is this fundamentally a question of imposing upon a merely "biological" substrate a construct—a "stereotype" or "expectation"—that is *essentially* extrinsic and thus oppressive. The bifurcation of human beings into merely "biological" and "social" aspects is itself a construct, with its own traceable philosophical history, an abstraction imposed upon human nature that is otherwise undivided in the way we live and experience it. The role of educators and society, far from being essentially oppressive, is a necessary implication—however much it might in various historical contexts be flawed—of the very kind of sexually differentiated individual the human being is, namely, a deeply social and rational one. It is in the very nature of girls and boys as dependent rational animals to *need* the family, teachers, and society at large to become men and women. The same is true of motherhood and fatherhood, now similarly bifurcated into "biological" and "social" dimensions. Being rational, the individual man and woman live out these vocations,

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[13] ADOLF PORTMANN, A ZOOLOGIST LOOKS AT HUMANKIND 31-62 (Judith Schaeffer, trans. 1990).

not just instinctively, but *freely*, marking no division between the "biological" acts of begetting children and securing their bodily sustenance and culturally inscribed activities such as education. However much philosophers might bifurcate the human being in thought, it was not possible, in the lived reality of human sexual difference, to conceive of a living, acting "I" entirely separable from, and indeed overriding, his bodily existence as a man or woman. To "express" one's sex in particular cultural and social forms meant becoming "more" of what one already is, not something else.

In current parlance, "gender" is used in a sense opposite its original meaning, to designate something *other* than "sex," and only arbitrarily related to it (*i.e.*, either a "social construct" or an "inner feeling"). This remains the case even where "sex" and "gender" happen to align. The fashionable prefix "cis" is meant to suggest this. Understood in this sense, the current gender construct overrides the most basic fact of the sexually distinct human body, transparent in the root of the very word it takes for itself (*gener*), namely, that each sex has a power to generate that can only be actualized with the corresponding power belonging to the opposite sex, the very phenomenon by which we exist as sexual, and exist at all.

In rhetorical and legal contexts, the appeal to "gender" as an inner feeling oscillates as needed between a quasi-deterministic, "naturalistic" understanding and a radically libertarian, voluntarist understanding, with "gender non-conformity" expressing the fundamental liberty of self-definition. That the Respondent who has "known that she is female for most of her life," Stephens BIO 1, does not

preclude the possibility of going back to "present as a man," J.A. 112-13, suggests just this oscillation.[14] What, in the end, does it matter if one has a "deep-seated" feeling? Why not just a choice? Indeed, it is noteworthy that despite the many references to the Respondent's feelings, they are not used as an argument. It is enough that Stephens has declared himself to be a woman for him to "be a woman," and treated as such

In fact, in the most authoritative and contemporary sense of "gender," there is no need to refer to "normative identities" whatsoever. "Gender" functions precisely to release us from any prevenient order—by reducing it to nothing—a temporary "assignment," making clear the path for a groundless "deed."[15] This appears to be the Sixth Circuit's view when it speaks of "gender identity" as "fluid, variable, and difficult to define," and "lack[ing] a fixed external referent." Pet. App. 24a-25a n.4.

The historical process whereby "gender" came to acquire a sense opposite its original meaning is no more politically and ideologically innocent than it is metaphysically innocent. The "gender" of gender

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[14] For example, parties in the present case use the definition of an "inner sense of being male or female, " Pet. App. 204a, while the Sixth Circuit resorts to the definition of something "fluid, variable, and difficult to define," which much like religion, should be "authenticat[ed] by simple professions of belief." *Id.* at 24a-25a n.4, 30a.

[15] We note the use of the freighted term "assignment" by the Sixth Circuit, Pet. App. 5a, 23a, 28a, by the American Psychological Association, Am. Psychol. Ass'n Amici Br. at 9, 10, 11, 17, and by a group of Philosophers. Phil. Professors Amici Br. at 7, 8, 9.

theory is not a natural category recently discovered amidst the progressive increase of scientific knowledge and understanding, but an ideological and political construct of dubious origins. There is no philosophical or scientific consensus regarding its nature and status. The problematization of "gender identity" has only arisen because of a biopolitical ideology.

Indeed, the re-invention of gender looks forward to nothing less than a radical re-invention of kinship, based on the same artificial and arbitrary bonds the new "gendered" subject has with his or her own body.[16] The new "functional" and "intentional" definitions of motherhood and fatherhood entailed in this arbitrary relation presuppose and necessitate further biotechnical interventions not only with respect to so-called "sex assignment," but with respect to procreation and reproductive biology. The new transgendered regime demands the possibility of producing and acquiring children by "both sexes equally, or independently of either."[17] Were this Court to confirm the Sixth Court's decision, it would codify this wide-ranging brave new world for the whole of society.

B. Gendering human identity entails ironic consequences.

The negation of reality at the heart of gender theory results in some ironic consequences in the present instance. The first concerns the relation of

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16 *See* JUDITH BUTLER, UNDOING GENDER, 102-30 (2004).

17 SHULAMITH FIRESTONE, THE DIALECTIC OF SEX 11 ([1970] ed. 2003).

"gender," "gender identity," or "transgender/ transitioning status" to "sex." Whereas it is considered a forbidden "stereotype" to factor a person's sexual organs into his or her "gender identity," it is precisely the "reference" of "gender identity" to those same organs that grounds the argument for including "gender identity" under "sex" according to Title VII. This argument is made by a group of philosophers and gender theorists, among others, who hold that Stephens has a claim under Title VII and the anti-stereotyping principle of *Price Waterhouse* because "gender" bears an "inextricable tie," "reference to," or "intrinsic relation to" "sex" through "nonconformity" with it. Phil. Professors Amici Br. 1, 3, 7, 10-12; Am. Psychol. Ass'n Amici Br. 7, 11. Like the Sixth Circuit's decision, the argument about the "relation" is entirely question-begging. It does not justify, but rather presumes, its terms as if they were self-evident ontological categories.

While its definition of "gender non-conformity" presumes the underlying distinction ("relation") between "sex" and "gender," the argument appears carefully crafted so as to include in Stephens's "gender presentation," things like speech patterns, attire, and hairstyle. Phil. Professors Amici Br. 17 n.12, while excluding the underlying reality that would make a "presentation" conforming or non-conforming in the first place. Thus, immediately after framing the whole question according to transgender categories and asserting the Respondent's transgender status, the brief changes tack and insists that "this fact is not essential to the case." *Id.* at 7.

Yet this "inessential" fact is essential to the philosophers' argument. For it is only by declaring

this fact "inessential" and ruling out any "reference" back to the Respondent's "former" "sex" that they can establish a parallel with the example of a woman who was "assigned 'female'" at birth and identifies as a woman. She "should have no less recourse to a claim of discrimination if she is terminated for not wearing makeup, having short hair, or otherwise not conforming to traditional gender stereotypes." *Id.* This is just a sleight of hand and not only because accepting this argument means accepting the loaded, question-begging categories in which the question is framed and the argument tendered. It also conceals the question that the Court is really being asked to decide—whether Stephens is a woman—the question that has been decided *a priori*.

Further obfuscation comes with the addition of the loaded term "identification" to "behavior" and "appearance," *id.* at 5, together with the qualifier "presumed" to "sex." *Id.* at 6. "Identifying," "behaving," and "appearing" are three very different kinds of activity, three ways of "referring" or "being related" to sex. The first involves a truth claim while the others do not. Only by blending these terms and obscuring this distinction could this case plausibly be conceived as a case of "gender non-conformity" to begin with.

But the Respondent's case is *not* parallel to a woman who is "terminated for not wearing makeup, having short hair, or otherwise not conforming to traditional gender stereotypes." *Id.* at 7. It is not an ordinary case of "gender non-conformity" at all. Stephens does not hold that men should be able to defy stereotypes by dressing as women nor that dress codes unjustly "stereotype" women. Rather Stephens

wishes to adhere to this "stereotypical" dress code *as a woman*. The appeal to the anti-stereotyping principle of *Price Waterhouse* presumes that the respondent really is a woman and that acknowledgment of embodied reality is itself a stereotype. It is Stephens's claim *to be* a woman that the Court is being asked to affirm for all practical and public purposes. The philosophers' brief conceals this by obscuring rather than clarifying important distinctions that differentiate Stephens' claims from ordinary discrimination claims under Title VII.

As for the actual "reference" in question here, the relation by which "gender identity" "refers to" sex is a negative one, canceling out or reducing to nothing the very reality on which its intelligibility depends.[18] To say, then, that "discrimination" on the basis of "gender non-conformity" is discrimination "because of" sex, when it is the very function of "gender" and "gender non-conformity" to negate sex is tantamount to saying that it is discrimination because of nothing.

The second irony is already indicated in the first. By insisting on this negative "reference," the concepts of "gender identity" and "gender non-conformity" negate the very grounds for distinguishing reality *from* a stereotype.[19] Thus, "gender identity"

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[18] This is clear in the terms "non-conformity," Pet. App. 22a, 27a, "change in," Pet. App. 24a, and "disjunction." Pet. App. 26a. In gender theory, there is a clear bias in favor of the negative relation. *See* Butler, *supra* n. 16, at 8, 217, 222.

[19] Commonly understood, "stereotypes" are identified as such precisely on the grounds of knowing what is essential to be being a girl (or woman) or boy (or man). A girl who likes to climb trees, for example, does not cease to be a girl because she likes to do

effectively becomes a bundle of stereotypes of the most frivolous sort, elements in the "part [an employee] profess[es] to play," Pet. App. 202a, which are *in*essential to sexual difference, such as a preference for lipstick, skirts, and feminine hairstyles. Now a man declares himself to be a "woman" precisely *on account of* such things. For without a prevenient order of nature, such stereotypes are all that is left for determining what feeling like a member of the opposite sex must be like. The offense to women, especially, has not been lost on many feminists, who are rightly concerned about stereotypes in the ordinary sense of the term, which could only be recognized as such by knowing what a woman or a man is in the first place.

The gender identity ideology is not metaphysically neutral. It is not the product of a progressive increase in our scientific understanding of the natural order, but of a series of politically motivated and technologically enabled decisions to negate that order and codify in its place a new biopolitical regime as a matter of constitutional principle.

Since the question at issue concerns the fundamental realities of human nature—man, woman, mother, father, and child—redefining these realities for all practical and public purposes would place a substantial burden on everyone; for one cannot alter these fundamental realities without

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something boys tend to like more, since the predilection for climbing trees is not what makes a boy a boy. But now the Sixth Circuit would dismiss the very criteria by which a stereotype can be known to be such either by simply ignoring the criteria or by considering a positive reference to *it* a "stereotype."

thereby altering everything else. The consequences of such a decision would be vast, far exceeding the narrow question of rights in which this ideology here presents itself.

III. The Sixth Circuit's ruling portends social disruption.

A. The court's ruling negates the bases for common life.

By asserting the right to be treated as a woman, Respondent is effectively seeking the legal redefinition of human nature and requesting the law to usurp philosophy and science as the definer of truth, a function heretofore characteristic of totalitarian political systems. If there is anything naturally held in common among human beings, a necessary supposition for human society and a condition of possibility for any conception of a *common* good beyond that of a mere order among otherwise warring factions, it must be our common nature, even if the meaning of nature is not entirely self-evident or is contested.

It is thus impossible to redefine human nature for just one person. Since "nature" is common, by definition, its *re*-definition necessarily applies to everyone. If, therefore, "gender" is merely a self-appropriated identity distinct from and arbitrarily related to one's sexually differentiated body, now conceived as a meaningless "biological" substrate, then there is no longer any such thing as man or woman as heretofore understood. From the vantage-point of the new anthropology, the "alignment" of one's "gender identity" and the sex "assigned" to one's body at birth can be *no more due to* our *being* male or

female, or any *less* arbitrary, than with those who are misaligned. We are all transgender under this thought regime, even if "gender" and sexual "identity" happen to coincide for the vast majority of people.

Nothing could be nearer to us than the nature we have in common. It must first be regarded less as an object of reflection numbered *among* our experiences (though of course it is that as well) than the foundational condition of possibility *for* experiences of every kind.[20] Realities as fundamental as man and woman, mother, father, and child, cannot therefore be overturned and redefined without thereby affecting everything else, as a stone dropped into a pond sends out ripples in every direction. For those who "seek[] to reconstruct social reality" through the imposition of law, this is precisely the point.[21] But social reality cannot be reconstructed in this fundamental way without imposing a tremendous burden on everyone, without denying their basic constitutional liberties, and without great harm to society as a whole, its most vulnerable members, in particular.

B. Coercive speech and thought regulations will attend.

Such a comprehensive re-definition of human nature would necessarily require the forced

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[20] Whether one regards human "nature" as a historical accident, or as so thoroughly mediated by cultural forms as to be inaccessible to thought apart from those forms, it remains the case that human self-creativity proceeds from *something given* that we do not create. This follows from the simple and universal fact that we are all *born*.

[21] Phil. Professors Amici Br. 27 n.19; KOPPELMAN, *supra* n. 6, at 8.

imposition of a new language—already evident in the media and in schools, universities, and workplaces throughout the country—and the re-education of everyone's understanding of self, of others, and of the whole visible world. It would require everyone to live for all public and practical purposes (and in spite of all contrary evidence) as if their pre-ideological experience of reality—beginning with themselves, their mothers, and their fathers—were officially false, a mere "stereotype." The burdens upon free speech, free exercise, and perhaps most fundamentally, free *thought,* are obvious. The resultant regime would require everyone to live for all public and practical purposes as though what is patently false were officially true, requiring them to think and say, for example, that a certain man "is a woman," or might be one were he to feel like or choose to be one. To repeat, by confirming the gender construct, the law would foist a "trans-world" on everyone, forcing them to deny their most basic apprehension of reality and the speech that signifies it, the very conditions for a shared life.

C. Practical harms are certain to follow.

Harmful practical consequences follow as a matter of logical necessity. Imposing new "natural norms" and a correlative set of rights would accelerate social division by triggering a tidal wave of litigation—in schools, workplaces, even in churches and families—wherever someone does not adhere to the new thought and speech norms. Recently a British Columbia court authorized a 14-year-old girl who "gender identified" as male to undergo hormone therapy at a doctor's suggestion and against her father's wishes and forbade him from referring to the child by feminine

pronouns. This is not unrealistic as a harbinger of the future.[22]

The British Columbia example is a reminder that gender identity theory is not simply a political ideology, but a *biopolitical* one, occasioned by and inseparable from biotechnical intervention in and manipulation of these basic human realities. Were this Court to confirm the gender construct, it would give legal impetus to what can only be described as a vast science experiment performed on the nation's children, since it is impossible to know with certainty the effects of gender reassignment surgery, puberty blocking hormones, and medically induced infertility before a generation of young people has undergone them. This violates the most basic tenets of sound medical ethics, the restriction of human experimentation, creates crises of professional and religious conscience for myriad medical professionals, and is a potential catalyst for a number of *medical* dilemmas and incongruencies.

Doctors, who would be subject to discrimination laws based on the newly codified "gender identity," could be compelled to provide services catering to the whole variety of bodily "adjustments" desired to match the felt or chosen "identities" of their patients, as though all of their scientific knowledge of the human organism no longer mattered. And, in a sort of tragic irony, just as the growing field of sex-specific epigenetics shows that medicine must make its judgments and tailor its therapies in part on the actual bodily sex of the patient, that same body will have been declared by law and society—perhaps even

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[22] *A.B. v. C.D. and E.F.*, 2019 BCSC 254 (Can.).

the patient—irrelevant. The burden would be worse for the patients themselves who, in addition to suffering the objective violence and mutilation done to them in their "sex-changes," would now, as heart transplant patients, for example, depend upon the sex they have "ceased" to be, for their very lives.[23] This schizophrenia concerning the human body would become all the more absurd, and all the more deleterious to the body politic, the more we follow this ideology to its logical conclusion.[24]

Short-sighted affirmation of gender identity theory would create a legal disincentive to any objective, scientific inquiry into the deleterious effects of therapies and procedures necessary to actualize the officially authorized ideology. We are already seeing evidence of this as the guild of "credentialed experts" shouts down any research that possibly contradicts the new sexual orthodoxy. History has not looked with

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[23] M. J. Legato & J.K. Leghe, *Gender and the Heart: Sex-Specific Differences in the Normal Myocardial Anatomy and Physiology*, in M. J. LEGATO, ED., PRINCIPLES OF GENDER-SPECIFIC MEDICINE 151-61 (2d ed. 2009).

[24] Little serious thought has been given to the destabilizing consequences of introducing the sexually dis-embodied "fluid" personal subject into the body politic. *Who,* after all, *is* the Respondent? What about other aspects of human embodiment—age, race, disability—from which "identities" could also be severed, so that subjects could "cease to be" what they were and "become" whatever their minds wish. One could no longer trust in a person's continuity of identity from year to year, or moment to moment. Introducing such fluid personal subjects into the body politic would completely undermine the basis for a common political life, even for attributing human agency and responsibility to people for their deeds.

favor on prior instances when the Court has aligned itself and the nation with ideologized science.[25]

Were this Court to impose the gender construct, it would also burden any institution employing persons of one or the other sex exclusively (*e.g.*, the WNBA). Moreover, it would invalidate sex-specific privacy facilities, since these are based, not on self-professed "identities," but on hard and fast embodied ones.[26]

Finally, imposing the gender construct would *mandate* stereotyping of the worst sort. Now society would have to accept someone who claims to be a woman or a man, based precisely on those things which are not constitutive of being a woman or a man. "Sex" for women, would be reduced to mere appearance without the underlying substance, the naturally dimorphic body. If the Court wishes to prevent discrimination based on stereotypes, it should not inscribe into law this gnostic vision of a disembodied self and its dream of conquering or escaping nature and the body.

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[25] *See Buck v. Bell*, 274 U.S. 200 (1927).

[26] *See, e.g.*, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 720-31 (4th Cir. 2016) (Niemeyer, J., concurring in part, dissenting in part), vacated by 137 S.Ct. 1239 (2017).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

David R. Langdon
Counsel of Record
Langdon Law LLC
8913 Cincinnati-Dayton Road
West Chester, Ohio 45069
(513) 577-7380
dlangdon@langdonlaw.com

Counsel for Amici Curiae

APPENDIX

APPENDIX

LIST OF AMICI CURIAE

1. **Hadley P. Arkes**, Ph.D.
Edward N. Ney Professor of Jurisprudence and American Institutions emeritus, Amherst College; *Founder and Director*, James Wilson Institute on Natural Rights & the American Founding

2. **Helen Alvare**, J.D.
Professor of Law, Antonin Scalia Law School, George Mason University

3. **Erika Bachiohi,** J.D.
Fellow, Ethics & Public Policy Center; *Research Scholar*, Abigail Adams Institute; *2018 Visiting Scholar*, Harvard Law School

4. **Francis J. Beckwith**, J.D., Ph.D.
Professor of Philosophy & Church-State Studies, Associate Director of the Graduate Program in Philosophy, Baylor University

5. **Philip Blosser**, Ph.D.
Professor of Philosophy, Sacred Heart Major Seminary, Detroit

6. **Gerard V. Bradley**, J.D.
Professor of Law, the University of Notre Dame School of Law, and Director, Natural Law Institute

7. **J. Budziszewski**, Ph.D.
Professor of Government and Philosophy, University of Texas, Austin

8. **David S. Crawford**, J.D., M.T.S., S.T.L., S.T.D.
Associate Professor of Moral Theology and Family Law, Pontifical John Paul II Institute for Studies on Marriage and Family, Washington, D.C.

9. **Patrick J. Deneen**, Ph.D.
Professor of Political Science, David A. Potenziani Memorial College Chair, University of Notre Dame

10. **George W. Dent, Jr.**, J.D.
Schott - van den Eynden Professor of Law Emeritus, Case Western Reserve University School of Law

11. **G. Kevin Donovan**, M.D., M.A.
Director, Pellegrino Center for Clinical Bioethics, Professor of Pediatrics, Georgetown University Medical Center

12. **Justin B. Dyer**, Ph.D.
Professor of Political Science, University of Missouri, Director of Kinder Institute on Constitutional Democracy

13. **Anthony Esolen**, Ph.D.
Writer-in-Residence at Magdalen College of the Liberal Arts

14. **David F. Forte**, J.D.
Professor of Law, Cleveland State University, Cleveland Marshall College of Law

15. **Angela Franks,** Ph.D.
Professor of Theology, St. John's Seminary.

16. **John S. Grabowski**, Ph.D.
Associate Professor of Moral Theology/Ethics, The Catholic University of America

17. **Michael Hanby**, Ph.D.
Associate Professor of Religion and Philosophy of Science, Pontifical John Paul II Institute for Studies on Marriage and Family, Washington, D.C.

18. **Richard F. Hassing,** Ph.D.
Research Associate Professor of Philosophy, School of Philosophy, The Catholic University of America

19. **Elizabeth R. Kirk,** J.D.
Director, Institute for Faith & Culture, St. Lawrence Catholic Campus Center, University of Kansas

20. **Lynne Marie Kohm**, J.D.
John Brown McCarty Professor of Family Law, Regent University School of Law

21. **V. Bradley Lewis**, Ph.D.
Associate Professor, School of Philosophy, The Catholic University of America

22. **Guy Mansini**, S.T.D.
Max Seckler Chair of Theology, Ave Maria University

23. **John C. McCarthy,** Ph.D.
Associate Professor, School of Philosophy, The Catholic University of America

24. **Margaret Harper McCarthy,** S.T.L, S.T.D.
Associate Professor of Theological Anthropology, the Pontifical John Paul II Institute for Studies on Marriage and Family, Washington, D.C.

25. **Mellissa Moschella,** Ph.D.
Assistant Professor, School of Philosophy, The Catholic University of America

26. **Jessica Murdoch,** Ph.D.
Associate Professor of Theology, Villanova University

27. **Anca M. Nemoianu**, Ph.D.
Lecturer in Linguistics, The Catholic University of America

28. **Walter Nicgorski**, Ph.D.
Professor Emeritus of Political Theory, University of Notre Dame

29. **Michael Pakaluk,** Ph.D.
Ordinary Professor of Ethics and Social Philosophy, The Catholic University of America

30. **C.C. Pecknold**, Ph.D.
Associate Professor of Theology, The Catholic University of America; *Fellow*, Institute for Human Ecology; *Chairman*, Academy of Catholic Theology

31. **Daniel Philpott,** Ph.D.
Professor of Political Science, University of Notre Dame

32. **Christian Raab,** S.T.D.
Assistant Professor of Systematic Theology, Saint Meinrad Seminary and School of Theology

33. **Peter A. Redpath**, Ph.D.
Rector and Senior Fellow, Adler-Aquinas Institute; *Chair of the Graduate Concentration in Thomistic Studies*, Holy Apostles College; *Senior Fellow*, Center for the Study of The Great Ideas; *contributing scholar*, University Abat Oliba Doctoral Philosophy program, Barcelona, Spain

34. **Eugene F. Rivers, III**
Director, Seymour Institute for Black Church and Policy Studies

35. **Jacqueline C. Rivers**, Ph.D.
Lecturer in Sociology and African American Studies, Harvard University

36. **Deborah Savage**, Ph.D.
Clinical Professor of Philosophy and Theology, St. Paul Seminary School of Divinity, University of St. Thomas

37. **Nathan Schlueter**, Ph.D.
Professor of Philosophy and Religion, Hillsdale College

38. **Susan Selner-Wright,** PhD.
Associate Professor of Philosophy, St. John Vianney Theological Seminary

39. **Janet E. Smith**, Ph.D.
Professor of Moral Theology, Ret., and Chairholder of the Fr. Michael J. McGivney Chair of Life Ethics, Sacred Heart Major Seminary

40. **R.J. Snell**, Ph.D.
Director of Academic Programs, The Witherspoon Institute

41. **William Stigall,** M.D., M.A.
Assistant Professor of Philosophy, University of Dallas; Pediatric Intensive Care Physician

42. **Dennis M. Sullivan**, M.D., M.A. (Ethics)
Professor Emeritus of Pharmacy Practice, Cedarville University; *Director*, American Academy of Medical Ethics

43. **Michael M. Uhlmann**, Ph.D.
Clinical Professor of American Politics and Government, Claremont Graduate University

44. **Adrian Vermeule,** J.D.
Ralph S. Tyler Professor of Constitutional Law, Harvard Law School

45. **Arthur Waldron**, Ph.D.
Lauder Professor of International Relations, University of Pennsylvania

46. **Bruce Howard Weber**, Ph.D.
Professor of Biochemistry Emeritus, California State University Fullerton; *Robert H. Woodworth Chair in Sciences and Natural Philosophy Emeritus*, Bennington College

47. **James Matthew Wilson**, Ph.D.
Associate Professor of Humanities and Augustinian Traditions, Villanova University

48. **Bradley C. S. Watson**, Ph.D.
Professor of Politics and Philip M. McKenna Chair in American and Western Political Thought, *Co-Director, Center for Political and Economic Thought*, Saint Vincent College

49. **Bradford P. Wilson,** Ph.D.
Executive Director of the James Madison Program in American Ideals and Institutions, Lecturer in Politics, Princeton University

50. **Ferdinand D. Yates,** M.D., M.A. (Ethics)
Adjunct Lecturer, Trinity International University, Center for Bioethics & Human Dignity, Woodstock Pediatric Medicine, Woodstock, GA