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# Legal Protections for the 'Personal Best' of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of *Price Waterhouse v. Hopkins*, and the Prospect of ENDA

Mary Anne Case

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# LEGAL PROTECTIONS FOR THE “PERSONAL BEST” OF EACH EMPLOYEE: TITLE VII’S PROHIBITION ON SEX DISCRIMINATION, THE LEGACY OF *PRICE* *WATERHOUSE V. HOPKINS*, AND THE PROSPECT OF ENDA

Mary Anne Case\*

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### INTRODUCTION

This year, the fiftieth anniversary of the passage of Title VII of the Civil Rights Act of 1964, is also the twenty-fifth anniversary of the U.S. Supreme Court's decision in *Price Waterhouse v. Hopkins*.<sup>1</sup> *Hopkins* reaffirmed what the Equal Employment Opportunity Commission (EEOC), lower courts, and the Supreme Court itself had long observed about Title VII's prohibition on discrimination in employment on the grounds of sex:

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."<sup>2</sup>

In honoring both these anniversaries through this Essay, I will be reaffirming arguments I first made about the implications of the *Hopkins* decision in my 1995 *Yale Law Journal* article *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*.<sup>3</sup>

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1. 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* *Burrage v. United States*, 134 S. Ct. 881 (2014). Although the Civil Rights Act of 1991 overturned *Hopkins*'s treatment of mixed-motives claims, it did not affect the portion of that decision relevant to my discussion here.

2. *Id.* at 251 (plurality opinion) (alteration in original) (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)). Although this language comes from the plurality opinion, the disagreement of those concurring was neither on the sex-stereotyping theory of liability nor on the sufficiency of the evidence, but rather on the burden of proof. *See id.* at 260-61 (White, J., concurring in the judgment); *id.* at 261-62 (O'Connor, J., concurring in the judgment).

3. Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *YALE L.J.* 1 (1995). The issues and cases dealt with in that article, and especially in this Essay, have captured the im-

Some of these arguments have finally been accepted by both federal courts and the EEOC, but others, although once long ago accepted, have more recently, unfortunately, been called into question. My analysis of the implications of *Hopkins* focused on the appropriate legal treatment of the various forms of what I called gender discrimination, defined as “discrimination in favor of or against qualities coded masculine or feminine, sometimes irrespective of and sometimes inflected by whether the person exhibiting those qualities was male or female.”<sup>4</sup> Famously, the prevailing plaintiff in the case, Ann Hopkins, had been criticized by those considering her for partnership in an accounting firm for being “macho,” “overly aggressive,” and “tough-talking,” and had been advised that her chances for partnership would improve were she to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, . . . wear jewelry,” and go to “charm school.”<sup>5</sup> Because to ask these things of her when they were not required of a male candidate was held to be impermissible discrimination on the grounds of sex, I drew from the case a roadmap for protection against discrimination in employment for gender benders of all sorts, including those whom lower courts had earlier refused to protect, such as plaintiffs who were denied employment or suffered harassment on the job because they were perceived as effeminate, gay, or transgender, or in violation of sex-specific codes of dress, grooming, or behavior. I thought at the time that women who moved in a direction perceived as masculine were the most readily assured of legal protection—after all, Ann Hopkins had won her case, the Supreme Court was about to order women admitted to the hyper-masculine Virginia Military Institute (VMI),<sup>6</sup> and California had even passed legislation that made it a violation of state sex discrimination laws for an employer to prohibit female employees from wearing pants to work.<sup>7</sup> The more difficult task, to which I devoted the bulk of my article, would, I thought, be in persuading courts and other decisionmakers that the logic of *Hopkins* equally protected a male employee’s moves in the direction of a more feminine gender presentation.

For some time after *Hopkins*, and contrary to its clear holding, courts in Title VII cases continued to enforce sex-specific employment codes against and left vulnerable to firing and harassment both male-to-female (MTF) transsexu-

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agination of the legal academy and generated hundreds of articles by others. To cite and engage with even the most relevant among them would consume the space allotted to me here. With apologies to the authors of the many fine works that deserve mention, I shall therefore only cite to works when I am relying specifically on them for a proposition.

4. Mary Anne Case, *No Male or Female*, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* 83, 84 (Martha Albertson Fineman ed., 2011).

5. *Hopkins*, 490 U.S. at 235 (internal quotation marks omitted).

6. See *United States v. Virginia*, 518 U.S. 515 (1996).

7. Act of Sept. 12, 1994, ch. 535, § 2, 1994 Cal. Stat. 2760, 2761 (codified as amended at CAL. GOV’T CODE § 12947.5(a) (West 2014)).

als and male plaintiffs who did not claim to be transgender, but who nevertheless engaged in behavior seen as stereotypically feminine.<sup>8</sup> Since the turn of the millennium (and particularly in the last several years), however, transsexuals, effeminate men, and gay men have found increasing favor with the EEOC and with courts adjudicating Title VII anti-sex-stereotyping cases, as I shall discuss. On the other hand, in the infamous *Jespersen* case, the Ninth Circuit, en banc, enforced a sex-specific grooming code against a female plaintiff who did not identify as transgender, but simply claimed that her employer's requirement that she wear makeup "'prohibited [her] from doing [her] job' because '[i]t affected [her] self-dignity . . . [and] took away [her] credibility as an individual and as a person.'"<sup>9</sup> Jespersen's employer, Harrah's Casino, ironically gave the name "Personal Best" to the sex-specific grooming regime under which it required Jespersen and all other female bartenders to wear color-coordinated foundation, rouge, mascara, and lipstick while it forbade all male bartenders from wearing any makeup at all. For the violation of this "Personal Best" grooming code, Jespersen, who found wearing makeup was an obstacle to performing at her own personal best, was fired.<sup>10</sup>

One of my aims in this Essay is to examine ways in which employment discrimination law can best facilitate what would indeed be each employee's personal best, regardless of sex, gender, or orientation. Among the potential vehicles currently before Congress is the Employment Non-Discrimination Act (ENDA), which would explicitly offer employees some protection from discrimination on the basis of their actual or perceived sexual orientation (including homosexuality, heterosexuality, and bisexuality, but unfortunately not asexuality)<sup>11</sup> and gender identity.<sup>12</sup> I shall set out two sets of concerns about the current version of ENDA. The first includes normative concerns that a turn toward ENDA and away from Title VII could privilege those gender benders who can and do claim an identity as transgender or gay, but could increasingly leave out those who cannot or do not choose to claim such an identity, including those whose transgression of conventional gender norms is less extreme, consistent, or unidirectional. Such a result would be a step backward for the freedom of gender expression and from sex stereotyping for all individuals, betraying the promise of Title VII and making it harder for many employees to give their actual personal best. It is therefore imperative, I shall argue, that progress under Title VII and the increasingly robust line of sex-stereotyping cases

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8. Case, *supra* note 3, at 64-66.

9. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1107-08 (9th Cir. 2006) (en banc) (alterations in original).

10. *Id.*

11. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 3(a)(10) (2013) (as referred to the House of Representatives, Nov. 12, 2013).

12. *Id.* § 3(a)(7).

that are the progeny of *Hopkins* be vigorously pursued whatever the fate of ENDA in Congress.

I will also, however, argue as a descriptive and predictive matter that even those single-mindedly focused on protecting employment opportunities for lesbian, gay, bisexual, and transgender (LGBT) employees should have concerns about the limitations on LGBT rights that the provisions of the current version of ENDA might lock into law. Among these are an extremely broad religious exemption,<sup>13</sup> concession to sex-specific grooming standards,<sup>14</sup> the absence of a bona fide occupational qualification (BFOQ), preclusion of disparate impact claims<sup>15</sup> and affirmative action,<sup>16</sup> an extremely broad but potentially confusing definition of gender identity,<sup>17</sup> and an absence of explicit protections for many items of concern to the transgender community, including use of pronouns and bathrooms consistent with an individual's gender identity.

Given, on the one hand, the recent favorable progress in the direction of protection against employment discrimination on grounds of sexual orientation and gender identity in the courts and the EEOC under Title VII (as well as in states and localities under local antidiscrimination laws), and, on the other hand, the severe limitations imposed on such protections by the current text of ENDA, perhaps the most important provision in ENDA is section 15, which provides that ENDA shall not "invalidate or limit the rights, remedies, or procedures available to an individual claiming discrimination prohibited under any other Federal law or regulation or any law or regulation of a State or political subdivision of a State."<sup>18</sup>

Were the current version of ENDA to pass, I fervently hope both advocates and judges take seriously this provision, so that, while they pick up the new tools ENDA offers them, they do not let the recently sharpened tools of Title VII become dull or rusty. I am encouraged in this hope by the EEOC's inclusion as a "national priorit[y]" of its Strategic Enforcement Plan for 2013-2016 "the emerging and developing issue" of "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions."<sup>19</sup>

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13. *Id.* § 6.

14. *See id.* § 8(a).

15. *Id.* § 4(g).

16. *Id.* § 4(f).

17. *See id.* § 3(a)(7).

18. *Id.* § 15.

19. EEOC, STRATEGIC ENFORCEMENT PLAN FY 2013-2016, at 8-10 (2013) (capitalization altered), available at <http://www.eeoc.gov/eeoc/plan/upload/sep.pdf>.

I. TITLE VII AND THE LEGACY OF *HOPKINS*A. *The Text and Legislative History of Title VII Are Sharp Tools to Strike at the Entire Spectrum of Disparate Treatment of Men and Women Resulting from Sex Stereotypes*

Title VII of the Civil Rights Act of 1964 was initially intended principally to combat discrimination in employment on the grounds of race. The near last-minute addition of “sex” to the forbidden grounds of race, color, national origin, and religion in Title VII may, however, have had an even greater transformative effect on American law and life than anything else in the Act. Once an initially reluctant EEOC finally took seriously the complaints of sex discrimination with which it was inundated from the start and promulgated regulations prohibiting employers from relying on either stereotyped characterizations of the sexes, coworker or customer preferences, or restrictive state laws as excuses to deny women employment opportunities,<sup>20</sup> whole categories of work that had de jure been closed to women opened up. Men, too, were clearly benefited in multiple ways: they became newly eligible for job categories once categorically closed to them,<sup>21</sup> and the EEOC required that employers, who had hitherto provided benefits such as premium pay for overtime or special rest and meal breaks only to female employees in compliance with state law, extend such benefits to male workers unless demonstrably precluded by business necessity.<sup>22</sup>

Moreover, as I have previously demonstrated, the development of the law of sex discrimination under Title VII led in path-dependent ways to the current U.S. constitutional law of sex equality.<sup>23</sup> First, many of the important early Supreme Court cases, from negative precedents like *Bradwell v. State*<sup>24</sup> and *Goesaert v. Cleary*<sup>25</sup> to Ruth Bader Ginsburg victories like *Frontiero v. Richardson*,<sup>26</sup> involved the terms and conditions for women’s employment. Second, language that opposed limiting the opportunities of the sexes on the basis of stereotypes migrated from the EEOC guidelines, on the BFOQ<sup>27</sup> to state and

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20. See 29 C.F.R. § 1604.2 (2013).

21. See *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971) (striking down a per se exclusion of males from the job of flight attendant).

22. See 29 C.F.R. § 1604.2(b)(3).

23. See Mary Anne Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447 (2000).

24. 83 U.S. (1 Wall.) 130 (1872) (upholding the exclusion of women from the practice of law).

25. 335 U.S. 464, 466 (1948) (upholding the exclusion of women not supervised by male relatives from tending bar).

26. 411 U.S. 677, 686 (1973) (striking down the disparity in spousal benefits provided to males and females employed by the armed forces).

27. See 29 C.F.R. § 1604.2.

lower federal court cases on public employment that combined constitutional and statutory claims<sup>28</sup> and to the Supreme Court, first in the Title VII case of *Phillips v. Martin Marietta Corp.*<sup>29</sup> and then in the constitutional case of *Frontiero*.<sup>30</sup> Finally, it was in a case about access to vocational training for men seeking to be employed as nurses that Justice O'Connor made clear that our constitutional rule for equal protection on grounds of sex is that state action must be "free of fixed notions concerning the roles and abilities of males and females."<sup>31</sup>

Similar sentiments to Justice O'Connor's—it may surprise some readers to learn—were also central to those members of Congress who supported the addition of "sex" as a forbidden ground in Title VII. Courts and commentators from all sides of the political spectrum have resolutely insisted for fifty years that there is no useful legislative history attached to the introduction of sex as a forbidden ground in Title VII because, according to these commentators, sex was added at the last minute by the racist Southern chair of the House Rules Committee, Howard Smith of Virginia, in part as a joke and in part as a devious attempt to bring the whole Civil Rights Act down to defeat.<sup>32</sup> Anyone who continues to hold and promulgate this view has unaccountably not bothered to read even the *Congressional Record* of the proceedings in question, let alone the many works by scholars who have filled in the relevant background. As I and others have often written,<sup>33</sup> Representative Smith was indeed a racist and would have been happy to see the defeat of the Civil Rights Act, but he had also been a sponsor of the Equal Rights Amendment since 1943 and was a supporter of the National Woman's Party (NWP).<sup>34</sup> More importantly, the moderate Republican and Democratic women in the House who rose in support of his addition of the word "sex" were by no means joking or ambivalent in their support.

What both the racist Southern congressmen and the moderate Northern congresswomen who supported the inclusion of sex as a forbidden ground shared was an awareness of and a commitment to what we today call intersectionality. Representative Smith's racism interacted in important ways

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28. See, e.g., *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529, 540 (Cal. 1971) (en banc).

29. 400 U.S. 542, 545 (1971) (Marshall, J., concurring).

30. *Frontiero*, 411 U.S. at 686.

31. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982).

32. See, e.g., Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L.J.* 1281, 1283-84 (1991) ("[S]ex discrimination in private employment was forbidden under federal law only in a last minute joking 'us boys' attempt to defeat Title VII's prohibition on racial discrimination. Sex was added as a prohibited ground of discrimination when this attempted *reductio ad absurdum* failed and the law passed anyway.").

33. See, e.g., Mary Anne Case, *Reflections on Constitutionalizing Women's Equality*, 90 *CALIF. L. REV.* 765, 767-70 (2002).

34. See JO FREEMAN, *WE WILL BE HEARD: WOMEN'S STRUGGLES FOR POLITICAL POWER IN THE UNITED STATES* 171-90 (2008).



with his support for women's rights. He understood quite well that, as Michigan Democratic Representative Martha Griffiths—also connected to the NWP—put it in floor debate, “a vote against this amendment today by a white man is a vote against his wife, or his widow, or his daughter, or his sister.”<sup>35</sup> As Representative Smith and other conservative, white Southerners saw it, unless Congress included prohibitions on sex discrimination with those on grounds of race, color, religion, and national origin, “the white woman of mostly Anglo-Saxon or Christian heritage [would be deprived of] equal opportunity before the employer”<sup>36</sup> compared not only to Anglo-Saxon Christian men, but also to men and women of every other race, ethnicity, and religion. Representative Smith may have been a racist, but he did not want “his” women to take second place to men and women of other races. For Representative Griffiths, black women were also an important intersectional category; she stressed that black women needed a prohibition on sex discrimination were they to have any hope of equal employment opportunity and illustrated her point with examples from every class of employment—from a Negro female dishwasher seeking to move from “a ‘greasy spoon’” to a “very good restaurant which employed only . . . white men” to “a colored woman political scientist” seeking a job at a university where there “has never been a woman political scientist employed.”<sup>37</sup>

Thus, if one were to look to the legislative history of the inclusion of sex as a forbidden ground, one would find ample evidence of a legislative attempt to be comprehensive, to make sure that discrimination on the basis of one identity category could not be used by an employer to cover up or justify discrimination on the basis of another, and to ensure that no category of person who might face employment discrimination would be excluded from the protections of Title VII. As Representative Edna Kelly insisted:

My support and sponsorship of this amendment and of this bill is an endeavor to have all persons, men and women, possess the same rights and same opportunities. . . .

. . . .

I do not want anyone to be denied that which is his or her inherent rights as an individual.

Let us recognize that there are many minorities in this country in all groups and organizations. . . . For their opportunity, we seek to secure these rights under this bill . . . .<sup>38</sup>

While LGBT and other gender-nonconforming persons may not have been among the minorities within groups foremost on the Title VII legislators' minds, one can certainly find more evidence in the legislative history in support

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35. 110 CONG. REC. 2580 (1964) (statement of Rep. Martha Griffiths).

36. *Id.* at 2583 (statement of Rep. L. Mendel Rivers).

37. *See id.* at 2579 (statement of Rep. Martha Griffiths).

38. *Id.* at 2583 (statement of Rep. Edna Kelly).

of extending to these sexual minorities equal employment opportunity under the rubric of the prohibition on sex discrimination than evidence against so doing.<sup>39</sup>

According to Representative Katharine St. George, “[t]he addition of that little, terrifying word ‘s-e-x’ will not hurt this legislation in any way. In fact, it will improve it. It will make it comprehensive. It will make it logical. It will make it right.”<sup>40</sup> Representative St. George’s observation has import as more than legislative history, because for some powerful interpreters of statutory language, such as Justice Scalia, “the use of legislative history is illegitimate and ill advised in the interpretation of any statute—and especially a statute that is clear on its face.”<sup>41</sup> And a principal advantage of Title VII has been the clarity and simplicity of its legislative language. It took very little more than the addition of the single word “sex” to a statute already clear in its prohibition of discrimination to effect revolutionary change.

While early judicial interpreters used the alleged absence of legislative history to justify diverging from the clear text in ways harmful to the rights of gender benders, it is important to note that one of the Supreme Court decisions most important to this Essay’s claims, *Oncale v. Sundowner Offshore Services, Inc.*,<sup>42</sup> was decided unanimously in favor of the plaintiff, with Justice Scalia writing for the Court. To the charge that “male-on-male sexual harassment in the workplace was assuredly not the principal evil with which Congress was concerned when it enacted Title VII,”<sup>43</sup> Justice Scalia responded that

statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits “discriminat[ion] . . . because of . . . sex” in the “terms” or “conditions” of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.<sup>44</sup>

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39. Representative Emanuel Celler’s remarks during floor debate are suggestive. Representative Celler opposed both the inclusion of “sex” in Title VII and the passage of the Equal Rights Amendment because “[t]he list of foreseeable consequences . . . is unlimited.” *Id.* at 2578 (statement of Rep. Emanuel Celler). “Imagine the upheaval that would result from adoption of blanket language requiring total equality,” he warned the House. *Id.* at 2577. After listing what were for him a parade of horrors, including equal rights of men and women to child custody, alimony, and working conditions (each of which has indeed come to pass), he concluded, in a self-described moment of “levity,” by quoting two lines of verse: “Lives there a man with hide so tough/Who says, ‘Two sexes are not enough.’” *Id.* at 2578. On this score as well, he seems to have been prescient.

40. *Id.* at 2581 (statement of Rep. Katharine St. George).

41. *Zedner v. United States*, 547 U.S. 489, 511 (2006) (Scalia, J., concurring in part and concurring in the judgment).

42. 523 U.S. 75, 82 (1998).

43. *Id.* at 79.

44. *Id.* at 79-80 (alterations in original).

This demonstrated willingness on the part of conservative textualists like Justice Scalia to apply the plain, thin language of Title VII—rather than seek to restrict it by reference to legislative history—makes it likely that the Supreme Court would, if confronted with the issue, ratify the increasing trend of the lower courts to protect sexual minorities under the text of Title VII and the logic of *Hopkins*, even in the absence of ENDA. As I will suggest below, however, it may bode less well for the Supreme Court’s potential reception of the much wordier, convoluted, and confusing text of ENDA.

B. *The Path to Protection of Transgender, Gay, Lesbian, and Bisexual Employees Under Title VII*

Justice Scalia’s *Oncale* opinion may have been a catalyst in finally pushing courts to reexamine their precedent on the coverage under Title VII of sexual minorities and gender-nonconforming employees in light of *Hopkins*. In the early years after the passage of Title VII, a few decisions by influential courts considered and rejected the proposition that discrimination on the basis of homosexuality or against transsexual employees was discrimination on the basis of sex.<sup>45</sup> Other courts reflexively cited these precedents for decades without ever reexamining them. A hallmark of these decisions is that they claimed to be relying on the statutory text while they blatantly disregarded its actual language. In the leading case of *Ulane v. Eastern Airlines, Inc.*, for example, the Seventh Circuit justified its “den[ial of Title VII] protection for transsexuals” by reference to what it characterized as plain statutory text and a “dearth of legislative history”:

The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. . . . The dearth of legislative history . . . strongly reinforces the view that that section means nothing more than its plain language implies.<sup>46</sup>

Several things are of note about the court’s moves here. First, only the word “sex,” not any reference to either “men” or “women,” appears in the text of Title VII. In the European Union (EU), by contrast, the comparable statutory language speaks explicitly of having as its “purpose . . . to put into effect in the Member States the principle of equal treatment for men and women as regards

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45. See *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); see also, e.g., *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 332 (9th Cir. 1979); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977). As I shall discuss further below, it is noteworthy that the Ninth Circuit, allegedly left leaning and quite frequently reversed by the Supreme Court, has written so many of the central and influential bad precedents in the areas covered by this Essay.

46. 742 F.2d at 1085.

access to employment.”<sup>47</sup> Nevertheless, when first presented with the question in the mid-1990s, the European Court of Justice had no trouble holding that the statutory language “cannot be confined simply to discrimination based on the fact that a person is of one sex or the other sex” but also “appl[ies] to discrimination arising . . . from the gender reassignment of the person concerned” such that the law “precludes dismissal of a transsexual for a reason related to a gender reassignment.”<sup>48</sup>

Second, in insisting that the “the phrase in the Civil Rights Act prohibiting discrimination on the basis of sex should be given a narrow, traditional interpretation,” the appeals court in *Ulane* was responding to and rejecting efforts—including those of the district court which had ruled in *Ulane*’s favor—to read into the statutory language a “broad interpretation of the term” sex, encompassing “sexual identity.”<sup>49</sup> Instead of using the terms “broad” and “narrow” to describe the two competing visions of the meaning of the term “sex” in Title VII with which the *Ulane* courts were wrestling, I prefer to use the terms “thick” and “thin.” A thick definition of sex might include in the concept not only a legal designation as male or female, but also, for example, sexual identity, sexual orientation, gender expression, and gender identity. There have, over the years, been many who have advocated for such a thick definition,<sup>50</sup> precisely in hopes of thereby bringing under the protection of the prohibition against discrimination in employment a broader array of persons, including but not limited to the “homosexuals, transvestites, or transsexuals” discussed in *Ulane*,<sup>51</sup> as well as offering protection to a broader range of what the current draft of ENDA refers to as the “gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual.”<sup>52</sup>

My own longstanding and unshaken view, driven at least as much by practical lawyering considerations as by ideological commitments, is that a thin definition of sex in law is not only more normatively attractive but is, in general, a more effective way to achieve legal protection for the broadest possible range of sexual identities, gendered traits, and the individuals manifesting them. This thin view reduces legal sex—in the sense of legal designation as male or fe-

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47. Council Directive 76/207, art. 1, 1976 O.J. (L 39/40) 1 (EC). The Directive was promulgated to implement article 119 of the Treaty of Rome, in which each member state committed to “ensur[ing] and subsequently maintain[ing] the application of the principle that men and women should receive equal pay for equal work.” Treaty Establishing the European Economic Community art. 119, Mar. 25, 1957, 298 U.N.T.S. 11.

48. Case C-13/94, *P. v. S. & Cornwall Cnty. Council*, 1996 E.C.R. I-2159, I-2165 to -2166.

49. 742 F.2d at 1084, 1086.

50. See generally, e.g., Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995).

51. 742 F.2d at 1085.

52. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 3(a)(7) (2013) (as referred to the House of Representatives, Nov. 12, 2013).

male—to little more than the potential basis for a claim of discrimination, allowing a plaintiff, whether in a statutory or a constitutional case, to prevail by showing that the plaintiff’s legal sex is causally related to the treatment of which the plaintiff complains (i.e., that the detrimental treatment occurred, to use the words of Title VII, “because of such individual’s . . . sex”).<sup>53</sup> The designation of a plaintiff’s sex in a Title VII suit merely serves as the grounding for the plaintiff’s claims against the employer: “If my sex were other than the one you have attributed to me, I would not be in the position I’m in. You wouldn’t be refusing to hire me or promote me; you wouldn’t be harassing me; you wouldn’t be requiring me to dress this way.” This thin, stripped down view of legal sex may not feel true to an individual’s full and rich sense of sexual and gender identity. Indeed, validating the identity of LGBT employees seems to be one important reason many in the LGBT community and their allies support the passage of ENDA, quite apart from any concrete legal results it may achieve for them or any cases whose outcome it might change. But the thin view of sex under Title VII, like a thin view of sex in U.S. constitutional law,

opens the possibility of legal protection to gender benders of all stripes, regardless of their sex; regardless of whether they can or do make an identitarian claim as transgendered . . . or . . . gay; and regardless of how mild or how extreme, how occasional or how systematic, their transgression of conventional gender norms may be.<sup>54</sup>

This thin view of sex, interpreting the words of Title VII to mean that an employee’s sex “must be irrelevant to employment decisions,”<sup>55</sup> underlies the *Hopkins* decision, which therefore stands ready to be mobilized both by those who claim a particular sexual identity and those who do not, as well as by those who have one attributed to them by those who discriminate against them in employment and those who do not. Consider, for example, the principal plaintiff in *Doe v. City of Belleville*, among the earlier cases to use *Hopkins* on behalf of a victim of harassment on the job.<sup>56</sup> Apparently in large part because he wore an earring to his summer job, Doe, a heterosexual male high school student, was subject to harassment, including being called names (from “girl” and “bitch” to “queer” and “fag”) and having his testicles grabbed by a coworker in order to “finally find out if [he was] a girl or a guy.”<sup>57</sup> Judge Ilana Rovner saw the case as directly parallel to *Hopkins*, because in each case the negative treatment on the job was taken in “reliance upon stereotypical notions about

53. Civil Rights Act of 1964, tit. VII, § 703, 42 U.S.C. § 2000e-2 (2012).

54. Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199, 1205-06 (2010).

55. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1988) (plurality opinion), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* *Burrage v. United States*, 134 S. Ct. 881 (2014).

56. 119 F.3d 563 (7th Cir. 1997), *vacated on other grounds*, 523 U.S. 1001 (1998).

57. *Id.* at 567 (internal quotation marks omitted).

how men and women should appear,” and this “gender stereotyping establishes the link to the plaintiff’s sex that Title VII requires.”<sup>58</sup>

Some of the earliest cases to recognize the implications of *Hopkins* for claims of sex discrimination by transgender plaintiffs were not Title VII cases. At the turn of the millennium, in *Schwenk v. Hartford*, for example, the Ninth Circuit upheld a claim by a transgender prisoner under the Gender Motivated Violence Act, holding that “[t]he initial judicial approach taken in cases such as [*Ulane*] has been overruled by the logic and language of” *Hopkins*, in which the Supreme Court made clear that discrimination based on the failure “to conform to socially-constructed gender expectations” and “[d]iscrimination because one fails to act in the way expected of a man or woman [are] forbidden under Title VII.”<sup>59</sup>

Within five years of *Schwenk*, the Sixth Circuit relied on *Hopkins* in deciding a pair of cases brought by preoperative MTFs, each of whom was in the sort of conventionally masculine job that had typically been categorically off-limits to women as a matter of law in the days before Title VII. After having been diagnosed with Gender Identity Disorder (GID), Jimmie Smith, a firefighter, had begun “expressing a more feminine appearance” at work, leading coworkers to “comment[] that his appearance and mannerisms were not ‘masculine enough.’”<sup>60</sup> Upon being told of Smith’s diagnosis and “the likelihood that his treatment would eventually include complete physical transformation from male to female,”<sup>61</sup> Smith’s superiors conspired to use his “transsexualism and its manifestations as a basis for terminating his employment.”<sup>62</sup> Smith’s case for unlawful sex discrimination was simplified by his ability and willingness to plead “that he is a male with Gender Identity Disorder.”<sup>63</sup> The appeals court could therefore simply hold:

After [*Hopkins*], an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.<sup>64</sup>

The Sixth Circuit went on to fault the district court for failing to apply *Hopkins* because it had erroneously sought to “superimpose classifications such

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58. *Id.* at 581.

59. 204 F.3d 1187, 1201-02 (9th Cir. 2000).

60. *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir.) (internal quotation mark omitted), *superseding* 369 F.3d 912 (6th Cir. 2004).

61. *Id.*

62. *Id.*

63. *Id.* at 570.

64. *Id.* at 574.

as ‘transsexual’ on [the] plaintiff, and then legitimize discrimination based on the plaintiff’s gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification.”<sup>65</sup>

A year later, the Sixth Circuit reaffirmed its holding in *Smith* that “[s]ex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”<sup>66</sup> This time, the plaintiff was another preoperative MTF, but a police officer, who—after decades on the force, during which time he had developed “a reputation . . . as a homosexual, bisexual or cross-dresser”<sup>67</sup>—failed his probationary period for promotion to sergeant due to an alleged lack of “command presence” after having been warned “that he needed to stop wearing makeup and act more masculine.”<sup>68</sup>

Three other successful transsexual plaintiffs in subsequent years are worth mentioning here, because each of their cases added a further important element to the development of the law. The first, retired Special Forces Colonel Schroer, had been offered a job as a Specialist in Terrorism and International Crime with the Congressional Research Service, only to have the offer rescinded when the hiring supervisor learned the Colonel would be showing up for work not as David, but as Diane.<sup>69</sup> Although there was evidence that Schroer’s “especially masculine” Special Forces background “made it all the more difficult for [the hiring supervisor] to visualize Diane Schroer as anyone other than a man in a dress”<sup>70</sup> and also that the supervisor worried that Schroer would lose credibility in Congress (before whom she was hired to testify) because “people would perceive [Schroer] to be a woman, and would refuse to believe that she could possibly have the credentials that she had,”<sup>71</sup> Judge James Robertson initially rejected Schroer’s *Hopkins*-based sex-stereotyping claim, because he could not reconcile it with the Ninth Circuit’s holding in *Jespersen* that a generally applicable employer policy that “imposed equally burdensome, although gender-differentiated, standards on men and women” did not constitute disparate treatment on grounds of sex—and therefore did not violate Title VII.<sup>72</sup> Having been persuaded that the policy applied to Schroer was not in fact “a generally applicable, gender-specific policy, requiring proof that the policy itself

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65. *Id.*

66. *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (quoting *Smith*, 378 F.3d at 575).

67. *Id.* at 733.

68. *Id.* at 735 (internal quotation marks omitted).

69. *Schroer v. Billington*, 577 F. Supp. 2d 293, 295-99 (D.D.C. 2008).

70. *Id.* at 305.

71. *Id.* (internal quotation mark omitted).

72. *Id.* at 304.

imposed unequal burdens on men and women,” but an application of stereotypes directly to Schroer as an individual, “render[ing] proof of disparate treatment unnecessary,”<sup>73</sup> Judge Robertson concluded:

Ultimately, I do not think that it matters for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual. . . . Schroer is entitled to judgment based on a [*Hopkins*]-type claim for sex stereotyping . . .<sup>74</sup>

Judge Robertson’s move here to distinguish the Ninth Circuit’s holding in *Jespersen* instead of, as I argue he should have done, simply rejecting it as incorrect because of its inconsistency with both the plain language of Title VII and the Supreme Court’s holding in *Hopkins*, works a noteworthy and troubling reversal in the path of the law. Schroer’s exceptional status as a transsexual, rather than excluding her from protection against sex discrimination—as it risked doing for prior transsexual plaintiffs—actually cut in her favor according to Judge Robertson, giving her a claim against sex-respecting appearance requirements not seen as available to the mine run of women such as *Jespersen*. As I shall discuss below, whichever way it cuts, a division drawn between the legal rights of plaintiffs challenging sex-respecting appearance standards—making losers of some on the basis of their gender identity—should be seen to violate existing antidiscrimination law and does tremendous damage, not only to the individuals involved, but also to the prospects for progress toward a society and a workforce enriched by the “personal best” of everyone.

In addition to finding in Schroer’s favor on a sex-stereotyping theory, Judge Robertson held that discrimination against her as a transsexual was itself sufficient to ground her claim because “the Library’s refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination ‘because of . . . sex.’”<sup>75</sup> Just as an employer who was willing to hire both Christians and Jews but refused to hire converts from one religion to the other would present “a clear case of discrimination ‘because of religion,’”<sup>76</sup> Judge Robertson held, “in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman,”<sup>77</sup> the discrimination is a clear violation of the plain language of Title VII.

In 2011, the Eleventh Circuit extended the holding that “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination” beyond Title VII to a constitutional case brought by a transsex-

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73. *Id.*

74. *Id.* at 305.

75. *Id.* at 308 (alteration in original).

76. *Id.* at 306.

77. *Id.* at 306-07.



ual employee of the Georgia General Assembly, Vandiver Elizabeth Glenn.<sup>78</sup> Finally, in 2012, the EEOC itself issued a decision in favor of Mia Macy, a transgender woman whose progress toward a government job abruptly ended when the hiring supervisor learned “that [Macy] was in the process of transitioning from male to female.”<sup>79</sup> After reviewing lower court precedents, as well as the *Hopkins* and *Oncale* decisions and the “plain language of the statute,” the EEOC “conclude[d] that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.”<sup>80</sup>

The defendant federal employer in *Macy* had one system for adjudicating claims of sex discrimination under Title VII and a separate system, offering different and lesser rights, for adjudicating complaints of sexual orientation and gender identity discrimination against its employees.<sup>81</sup> Macy had alleged “sex stereotyping, sex discrimination based gender transition/change of sex, and sex discrimination based gender identity” as the forbidden grounds on which her job offer had been rescinded, but the agency had divided her claim and stated that it would proceed under Title VII only with the sex/female claim and would proceed under its other process for the gender identity claim.<sup>82</sup> The EEOC held that this was error and that it had jurisdiction under Title VII over the entire claim because “[e]ach of the formulations of Complainant’s claims are simply different ways of stating the same claim of discrimination ‘based on . . . sex,’ a claim cognizable under Title VII”<sup>83</sup>:

Thus, a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations. These different formulations are not, however, different claims of discrimination that can be separated out and investigated within different systems. Rather, they are simply different ways of describing sex discrimination.

For example, Complainant could establish a case of sex discrimination under a theory of gender stereotyping by showing that she did not get the job . . . because the employer believed that biological men should consistently present as men and wear male clothing.

Alternatively, if Complainant can prove . . . that the Director was willing to hire her when he thought she was a man, but was not willing to hire her once

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78. *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011).

79. *Macy v. Holder*, EEOC Decision No. 0120120821, 2012 WL 1435995, at \*1 (Apr. 20, 2012).

80. *Id.* at \*11 (second alteration in original).

81. *Id.* at \*5.

82. *Id.* at \*3 (internal quotation marks omitted).

83. *Id.* at \*5 (second alteration in original); see *Mary Anne Case, All the World’s the Men’s Room*, 74 U. CHI. L. REV. 1655 (2007); cf. *DeClue v. Cent. Ill. Light Co.*, 223 F.3d 434, 440 (7th Cir. 2000) (Rovner, J., dissenting in part) (“[T]he lines with which we attempt to divide the various categories of discrimination cannot be rigid.”).

he found out that she was now a woman—she will have proven that the Director discriminated on the basis of sex. Under this theory, there would actually be no need . . . to compile any evidence that the Director was engaging in gender stereotyping.<sup>84</sup>

The EEOC endorsed and expanded on the *Schroer* court’s analogy to discrimination against religious converts, noting that in the case of discrimination against converts from one religion to another:

There would be no need for the employee who experienced the adverse employment action to demonstrate that the employer acted on the basis of some religious stereotype . . . . [T]he employee simply must demonstrate that the employer impermissibly used religion in making its employment decision.

. . . .

Applying Title VII in this manner does not create a new “class” of people covered under Title VII—for example, the “class” of [religious converts] . . . . Rather, it would simply be the result of applying the plain language of a statute prohibiting discrimination on the basis of religion to practical situations in which such characteristics are unlawfully taken into account.<sup>85</sup>

### C. *Sexual Orientation Discrimination Under Title VII: Moving from “Loopholes” and “Bootstraps” to Full Coverage*

I began *Disaggregating Gender* by observing that in the case law up to that point, “When individuals diverge from the gender expectations for their sex—when a woman displays masculine characteristics or a man feminine ones—discrimination against her is now treated as sex discrimination while his behavior is generally viewed as a marker for homosexual orientation and may not receive protection from discrimination.”<sup>86</sup>

Francisco Valdes, who, also in 1995, wrote a lengthy comprehensive article analyzing this problem, referred to it as “a sexual orientation loophole” which “enable[s] defendants and decisionmakers to (re)characterize, at will, a plaintiff’s sex and gender discrimination claim as involving only permissible sexual orientation discrimination,” thereby ratifying sex and gender discrimination.<sup>87</sup>

Courts were slow to close this loophole after the *Hopkins* decision.<sup>88</sup> In a number of cases around the turn of the millennium in which the plaintiff

84. *Macy*, 2012 WL 1435995, at \*10.

85. *Id.* at \*11.

86. Case, *supra* note 3, at 2.

87. Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 18 (1995).

88. For an early case denying the claim that *Hopkins* was relevant to a claim of hostile work environment sexual harassment by an effeminate gay man, see *Dillon v. Frank*, 952 F.2d 403 (6th Cir. 1992). See also Case, *supra* note 3, at 57-61 (discussing *Dillon*).

acknowledged that his homosexuality played some role in his adverse treatment but also raised a sex-stereotyping or other sex discrimination claim, appellate courts avoided the issue by finding that the claim of sex discrimination or the invocation of *Hopkins* and sex stereotyping was raised too late or was inadequately developed.<sup>89</sup> There were indications that at least some of these courts would be particularly receptive to future sex-stereotyping claims by effeminate men, gay or not, given that a claim based on this “failure to conform to gender norms . . . would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine.”<sup>90</sup> The good news here was that the language in these appellate decisions left open the possibility that a timelier or better-pleaded claim could fare better. Among the lower court judges taking up this possibility in subsequent better-pleaded cases was Judge Nancy Gertner in Massachusetts. Faced with postal worker Stephen Centola’s claim that “his co-workers continuously tormented him . . . mocking his masculinity, portraying him as effeminate, and implying that he was a homosexual,”<sup>91</sup> Judge Gertner noted:

[T]he line between discrimination because of sexual orientation and discrimination because of sex is hardly clear. Sex stereotyping is central to all discrimination: Discrimination involves generalizing from the characteristics of a group to those of an individual, making assumptions about an individual because of that person’s gender, assumptions that may or may not be true. . . . Stated in a gender neutral way, the rule is: If an employer acts upon stereotypes about sexual roles in making employment decisions . . . then the employer opens itself up to liability under Title VII’s prohibition of discrimination on the basis of sex.

. . . .

Centola does not need to allege that he suffered discrimination on the basis of his sex alone or that sexual orientation played no part in his treatment. . . .

. . . Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn . . . the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or [one] he perceives to be gay, whether effeminate or not, because he thinks, “real men don’t date men.” The gender stereotype at work here is that “real” men should date women . . . . Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action al-

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89. *See, e.g.,* *Simonton v. Runyon*, 232 F.3d 33, 37-38 (2d Cir.), *amending* 225 F.3d 122 (2d Cir. 2000).

90. *Id.* at 38.

91. *Centola v. Potter*, 183 F. Supp. 2d 403, 406 (D. Mass. 2002).

leging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what “real” men do or don’t do.<sup>92</sup>

Judge Gertner’s analysis here suggests one route—through sex stereotyping—by which all discrimination against an employee because of his homosexuality could receive Title VII protection as discrimination on the basis of sex. As with transsexuality, another route would be to proceed under the plain language of Title VII to the realization that, given that a homosexual person’s sex is necessarily taken into account rather than treated as irrelevant in reaching the determination to discriminate against him, such discrimination is necessarily “because of” sex. Still a third route, rejected in the 1970s by the Ninth Circuit in the leading case of *DeSantis*,<sup>93</sup> would be through analogy to established precedent holding that it is actionable discrimination under Title VII to discriminate against an employee because of the race of those with whom (s)he associated.<sup>94</sup> Because there was ample evidence before Judge Gertner that Centola’s perceived effeminacy was at the root of his discriminatory harassment, she did not have to “go so far”<sup>95</sup> as her analysis suggested that the logic of the law would lead in order to rule in Centola’s favor.

The Ninth Circuit, which had also ruled in *DeSantis* that discrimination on grounds of effeminacy was not protected under Title VII, was prepared to revisit at least that part of its holding in light of *Hopkins*. One of the component cases of *DeSantis*, *Strailey v. Happy Times Nursery School, Inc.*, involved a male nursery school teacher fired simply for his “effeminate appearance.”<sup>96</sup> Faced in 2001 with the claim of Antonio Sanchez, a gay male waiter who was “mocked . . . for walking and carrying his serving tray ‘like a woman,’ and taunted . . . as, among other things, a ‘faggot’ and a ‘fucking female whore,’” a panel of the Ninth Circuit agreed that “the holding in [*Hopkins*] applies with equal force to a man who is discriminated against for acting too feminine” and “to the extent it conflicts with [*Hopkins*] . . . *DeSantis* is no longer good law.”<sup>97</sup> Perhaps because *Strailey*’s alleged effeminacy was manifested simply by his wearing an earring, the panel opinion then dropped a footnote of gratuitous dicta: “We do not imply that all gender-based distinctions are actionable under Ti-

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92. *Id.* at 408-10 (footnote omitted). For a similar analysis involving a lesbian plaintiff, see *Heller v. Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002).

93. *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 331 (9th Cir. 1979).

94. *Id.*; see also Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J.L. & GENDER 209, 246-58 (2012).

95. *Centola*, 183 F. Supp. 2d at 410.

96. *DeSantis*, 608 F.2d at 328, 331-32. In *Disaggregating Gender*, I compared *Strailey* in detail with *Hopkins*, arguing it was clearly no longer good law and that this had implications for a wide variety of other cases. The fact that the Ninth Circuit on appeal lumped *Strailey*’s case, together with two other cases explicitly and exclusively raising claims of discrimination on the basis of sexual orientation, into a single opinion, *DeSantis*, was itself remarkable. See Case, *supra* note 3, at 54-57.

97. *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 870, 874-75 (9th Cir. 2001).

tle VII. For example, our decision does not imply that there is any violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards.”<sup>98</sup>

As subsequent Parts of this Essay will discuss, this footnote—from which there is a direct line to the Ninth Circuit’s en banc holding in *Jespersen*—can be seen as the thin end of the wedge through which, as courts relying on *Hopkins* became more receptive to claims by sexual minorities (including, especially, effeminate men, gay men, and transgender plaintiffs), they paradoxically became less receptive to plaintiffs who more closely resembled Ann Hopkins herself—women who asserted no identity as a sexual minority, but whose gender presentation veered slightly more in a masculine direction than suited their employers.

The Ninth Circuit itself demonstrates this incipient divide. Four years before it ruled en banc against *Jespersen*, it decided (also en banc) in favor of Medina Rene, “an openly gay man” who alleged that he was subject to harassment including not only verbal taunts but also “offensive physical conduct of a sexual nature.”<sup>99</sup> A plurality of the court, in an opinion by Judge William Fletcher—one of the *Jespersen* dissenters—held that the mere fact that Rene was singled out to be “grabbed in the crotch and poked in the anus” and that this “offensive conduct was sexual”<sup>100</sup> sufficed to ground a cause of action, and Rene’s “sexual orientation . . . was simply irrelevant.”<sup>101</sup> The plurality made no mention of sex stereotyping. A concurrence by Judge Harry Pregerson, who wrote a dissent in *Jespersen*, by contrast, stressed that the “repeated testimony that his co-workers treated Rene, in a variety of ways, ‘like a woman’ constitutes ample evidence of gender stereotyping.”<sup>102</sup> Chief Judge Mary Schroeder, author of the en banc majority opinion in *Jespersen*, joined a dissent which found that, unlike Sanchez, Rene had “made no claim of sexual stereotyping”<sup>103</sup> and shown no evidence of effeminacy, but was harassed simply “because of his sexual orientation, which is not actionable under Title VII.”<sup>104</sup>

There is some reason for optimism that Title VII protections against sex discrimination will increasingly be extended beyond effeminate gay men to those gay and lesbian plaintiffs whose only deviation from sex stereotypes is in their choice of a partner of the same sex. As with transgender plaintiffs, so with

98. *Id.* at 875 n.7.

99. *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1064 (9th Cir. 2002) (en banc) (plurality opinion).

100. *Id.* at 1067.

101. *Id.* at 1066. As the plurality observed: “We have surveyed the many cases finding a violation of Title VII based on the offensive touching of the genitalia, buttocks, or breasts of women. In none of those cases has a court denied relief because the victim was, or might have been, a lesbian.” *Id.*

102. *Id.* at 1068 (Pregerson, J., concurring in the judgment).

103. *Id.* at 1077 (Hug, J., dissenting).

104. *Id.* at 1078.

gay and lesbian plaintiffs, the EEOC is increasingly putting the weight of its powers to investigate and adjudicate claims behind the proposition that such plaintiffs have viable sex discrimination claims under Title VII. In two recent cases, for example, the EEOC reversed the dismissal of complaints brought by postal workers—one a gay man, the other a lesbian—holding that each had stated a potentially viable claim of impermissible sex stereotyping.

Jason Veretto alleged that a coworker threatened him when he learned of Veretto's impending wedding to another man and that supervisors had failed to take appropriate action.<sup>105</sup> Holding that these "allegations are sufficient to state a viable hostile work environment claim under Title VII,"<sup>106</sup> the EEOC noted that Veretto "has essentially argued that [the coworker] was motivated by the sexual stereotype that marrying a woman is an essential part of being a man, . . . [i]n other words . . . that [his] actions were motivated by his attitudes about stereotypical gender roles in marriage."<sup>107</sup>

Similarly, the EEOC held that lesbian Cecile Castello had made out "a plausible sex stereotyping case . . . under Title VII"<sup>108</sup> when she alleged her supervisor "made an offensive . . . comment about her having relationships with women. . . . motivated by the sexual stereotype that having relationships with men is an essential part of being a woman . . . ."<sup>109</sup>

Most recently, Peter Terveer alleged that his supervisor at the Library of Congress "intentionally discriminated against [him] because his identity as a homosexual male represents a departure from sex stereotypes recognized by [his supervisor]."<sup>110</sup> The district court held that Terveer had adequately pleaded a claim of sex discrimination under Title VII even though his complaint enumerated only his sexual orientation and no other aspects of his "behavior, demeanor or appearance" as the trigger for the discrimination against him.<sup>111</sup>

What sets these latter claims apart from earlier successful hostile work environment claims by gay plaintiffs relying on sex stereotyping, such as Sanchez and Centola, is that no mention is made of any effeminate traits on the part of Veretto or Terveer or of masculine traits on the part of Castello, nor was harassment directed in a sexualized way at their body parts, as it was against Rene. Only their choice of a same-sex partner (or their homosexual orientation more

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105. Veretto v. Donahoe, EEOC Appeal No. 0120110873, 2011 WL 2663401, at \*1 (July 1, 2011).

106. *Id.* at \*3.

107. *Id.*

108. Castello v. Donahoe, EEOC Appeal No. 0120111795, 2011 WL 6960810, at \*2 (Dec. 20, 2011).

109. *Id.* at \*2-3.

110. Terveer v. Billington, No. 12-1290 (CKK), 2014 WL 1280301, at \*4 (D.D.C. Mar. 31, 2014) (internal quotation marks omitted).

111. *Id.* at \*9. Terveer alleged that he is "a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles." *Id.* (internal quotation marks omitted).

generally) grounds their sex discrimination claims. The logical consequence of accepting such claims would be categorically to overturn the mistaken view that discrimination on the basis of sexual orientation is not sex discrimination and therefore not remediable under Title VII. It seems particularly fitting that the road to such a realization is coming through the consideration of the claims of public employees, since among the earliest cases protecting gay men and lesbians from losing their jobs because of their sexual orientation were cases relying on statutory protections for civil servants.<sup>112</sup>

D. *Enforcement of Sex-Specific Dress and Grooming Codes by Lower Courts Violates both the Plain Language of Title VII and the Clear Holding of Hopkins*

Although the progress of claims brought by transgender and gay plaintiffs under Title VII has shown a positive trend, moving from early disregard of the plain language of the statute to increasing willingness to take seriously both the statutory language and the lessons of *Hopkins*, a trend in the opposite direction has emerged in cases challenging sex-specific grooming codes brought by plaintiffs who did not identify as transgender. Early on, the EEOC was ready to hold unlawful an employer's imposition of disparate grooming standards on the sexes. In cases from 1972, for example, the EEOC ruled succinctly as follows:

Employer allows its female employees to wear their hair longer than male employees. To maintain one employment standard for females and another for males discriminates because of sex . . . and is unlawful unless the employer demonstrates the applicability of the narrow [BFOQ] exception . . . [which w]e hold, . . . as a matter of law, . . . is not applicable to . . . Employer's long hair policy.<sup>113</sup>

Some early court decisions were in line with this approach. Although he ultimately found that the plaintiffs before him were fired for reasons unrelated to their employer's grooming policy, Judge Warren Ferguson wrote eloquently of the connection between sex-neutral grooming policies and the deep purpose of Title VII:

An employer has every right to adopt dress codes suitable to various job categories. . . . A dress . . . code, however, must be applied equally to everyone. It may not establish different standards for males and females; it may not discriminate on the basis of sex.

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112. See *Norton v. Macy*, 417 F.2d 1161, 1163 (D.C. Cir. 1969) (holding that, because "the efficiency of the service" was not implicated, a civil servant could not be fired even though he conceded to having engaged in homosexual activity and had been accused of making a homosexual advance on an undercover Morals Squad officer (internal quotation mark omitted)).

113. EEOC Decision No. 72-1380, 4 Fair Empl. Prac. Cas. (BNA) 846 (1972) (citation omitted).

The issue of long hair on men tends to arouse the passions of many in our society today. In that regard the issue is no different from the issues of race, color, religion, national origin and equal employment rights for women, all of which are raised in Title VII. When this Nation was settled it was hoped that there be established a society where every individual would be judged according to his ability . . . . The Civil Rights Act of 1964 was born of that hope. Although the legal technicalities are many, the message of the Act is clear: every person is to be treated as an individual, with respect and dignity. Stereotypes based upon race, color, religion, sex or national origin are to be avoided.

. . . .

Males with long hair conjure up exactly the sort of stereotyped responses Congress intended to be discarded. . . . Title VII does not permit the employer to indulge in such generalizations. The Act requires that every individual be judged according to his own conduct and job performance.<sup>114</sup>

Unfortunately, in the period before *Hopkins*, courts moved away from the plain language of the statute and tended to endorse employer dress and grooming codes that differed by sex. Even the EEOC admitted defeat, declaring that, although it held to its longstanding view that “absent a showing of a business necessity, different grooming standards for men and women constitute sex discrimination under Title VII,”<sup>115</sup> because “the circuit courts of appeals have unanimously concluded that different appearance standards for male and female employees, particularly those involving hair length where women are allowed to wear long hair but men are not, do not constitute sex discrimination” it would “administratively close all sex discrimination charges which dealt with male hair length.”<sup>116</sup> The EEOC initially declared that this “policy applied only to male hair length cases and was not intended to apply to other dress or appearance related cases”<sup>117</sup> and continued to insist that, “where a dress policy reflects a stereotypical attitude toward one of the sexes, that policy will be found in violation of Title VII.”<sup>118</sup> Yet, unfortunately, by 1981, the EEOC *Compliance Manual* included among examples of dress codes that might be permissible under Title VII—“if suitable and . . . equally enforced and so long as the requirements are equivalent for men and women with respect to the standard or burden that they impose”—an employer’s “requir[ing] male employees to wear neckties at all times and female employees to wear skirts or dresses at all times.”<sup>119</sup>

Among the justifications commonly propounded by courts upholding sex-differentiated dress and grooming codes were that the elements of personal appearance involved in a typical grooming code were neither immutable nor fun-

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114. *Aros v. McDonnell Douglas Corp.*, 348 F. Supp. 661, 666 (C.D. Cal. 1972).

115. 2 EEOC Compl. Man. (CCH) § 619.1 (Oct. 1981).

116. *Id.*

117. *Id.*

118. *Id.* § 619.4(b).

119. *Id.* § 619.4(d).



damental rights; that complying with grooming codes would be a de minimis burden on an employee; and that policing grooming codes would be an unwarranted judicial intrusion into an employer's business decisions. But the trial court in the leading case of *Willingham v. Macon Telegraph Publishing Co.* was perfectly candid about what was at stake:

[I]f it be mandated that men must be allowed to wear shoulder length hair . . . because the employer allows women to wear hair that length, then it must logically follow that men, if they choose, could not be prevented by the employer from wearing dresses to work if the employer permitted women to wear dresses. . . . [I]t would not be at all illogical to include lipstick . . . and other items of typical female attire among the items which an employer would be powerless to restrict to female attire . . . . It would be patently ridiculous to presume that Congress ever intended such result . . . .<sup>120</sup>

As I observed in 1995, the specter of the man in a dress has haunted all discussion of the abolition of sex-specific grooming codes.<sup>121</sup> According to the EEOC, the "vast majority of cases treating employer grooming codes as an issue have involved appearance requirements for men."<sup>122</sup> But the clear holding of *Hopkins* should have ended any questioning of the EEOC's quite correct holding in 1972 that, unless it can be justified as a BFOQ, any dress or grooming code that sets different requirements for males than for females violates Title VII.<sup>123</sup> The Supreme Court did "not find as a matter of fact that [Hopkins's] appearance was appropriate for her sex; it [held] as a matter of law that it constitutes sex discrimination for her employer to require that it be so."<sup>124</sup>

Nevertheless, the Eleventh Circuit, one of the few appellate courts to revisit the question of an employer policy requiring short hair only from male employees after the *Hopkins* decision, declared in 1998 that "[n]o decision cited by the plaintiffs has supplanted the reasoning or called into question the conclusions set forth in" longstanding, binding precedent holding that "such a policy was not discriminatory."<sup>125</sup> Astonishingly, there is no mention whatsoever of *Hopkins* in the court's opinion, leaving the reader to wonder whether the plaintiffs' lawyer had committed malpractice or whether the court was being

120. *Willingham v. Macon Tel. Publ'g Co.*, 352 F. Supp. 1018, 1020 (M.D. Ga. 1972), *rev'd*, 482 F.2d 535 (5th Cir. 1973), *vacated*, 507 F.2d 1084 (5th Cir. 1975) (en banc).

121. *See Case, supra* note 3, at 7.

122. 2 EEOC Compl. Man. (CCH) § 619.1 (Oct. 1981).

123. *See* EEOC Decision No. 72-1380, 4 Fair Empl. Prac. Cas. (BNA) 846 (1972).

124. *Case, supra* note 3, at 61. The record before the Court gave no clue what Hopkins actually looked like or how she dressed.

125. *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1389 (11th Cir. 1998); *see also* *Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907, 908 (2d Cir. 1996) (holding, similarly without any mention of *Hopkins*, that recent Supreme Court cases had not undercut prior lower court precedents upholding differential hair length requirements for male and female employees).

disingenuous in distinguishing only a series of cases much less obviously relevant.

Thus, notwithstanding what I continue to view as a clear holding interpreting a clear statutory text prohibiting employer-mandated distinctions between the sexes, my expectation that *Hopkins* would spell the end of legally enforceable employer-mandated, sex-specific appearance codes was wildly overoptimistic. That the dress codes would have some staying power I was prepared for—after all, as Wendy Williams shrewdly observed with respect to the Supreme Court’s departures from a principled application of the anti-stereotyping requirement in constitutional sex equality cases, courts very rarely “come right out and say ‘We’ve reached our cultural limits,’” but when they do reach those limits they have a track record of “refus[ing to] proceed further with gender equality.”<sup>126</sup> What did surprise me was where the biggest sticking point came—not, as I would have predicted, with respect to a man who wished to dress more femininely, but rather with respect to a woman who was instructed by her employer to wear makeup, just like Ann Hopkins, and was fired for refusing.

If any case would seem to be on all fours with the case of Ann Hopkins, it is that of Darlene Jespersen. Both were women in traditionally male fields<sup>127</sup> with a track record of outstanding performance<sup>128</sup> and customer satisfaction.<sup>129</sup> Each was told that to satisfy the demands of higher management in her organization, she would have to acquire a more feminine appearance, including in each case to “wear make-up, [and] have her hair styled.”<sup>130</sup> Like Hopkins, Jespersen could claim that her employer’s demand put her in “an intolerable and impermissible catch 22,”<sup>131</sup> because a certain level of assertiveness incompatible with the feminized appearance her employer now required was necessary to do the job effectively. Jespersen testified that being forced to be feminine and “wear makeup” actually interfered with her ability to be an effective bartender (which sometimes required her to deal with unruly, intoxicated guests) because it “took away [her] credibility as an individual and as a per-

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126. See Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 14 *WOMEN’S RTS. L. REP.* 151, 158-59 (1992).

127. Jespersen was not a cocktail server or a “bevertainer,” service categories dominated by women and emphasizing sexiness, but one of very few women then tending bar in the casino. See generally Ann C. McGinley, *Masculinity, Labor, and Sexual Power*, 93 *B.U. L. REV.* 795, 805 (2013).

128. See, e.g., *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1106-07 (9th Cir. 2006) (en banc).

129. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 234 (1989) (plurality opinion), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* *Burrage v. United States*, 134 S. Ct. 881 (2014).

130. *Id.* at 235; see *Jespersen*, 444 F.3d at 1107.

131. *Hopkins*, 490 U.S. at 251.

son.”<sup>132</sup> But Jespersen lost at every level—on summary judgment before the district court, on appeal before a panel of the Ninth Circuit, and again before the Ninth Circuit en banc.<sup>133</sup>

The Ninth Circuit claimed it “took this sex discrimination case en banc in order to reaffirm our circuit law concerning appearance and grooming standards, and to clarify our evolving law of sex stereotyping claims.”<sup>134</sup> But, as I am far from the first academic commentator to observe, instead of “reaffirm[ing] [its] circuit law concerning appearance and grooming standards,”<sup>135</sup> the Ninth Circuit should have reevaluated its approach in light of *Hopkins* and concluded that its own “evolving law of sex stereotyping claims,” previously focused on coworker harassment of effeminate men like Sanchez, was even more clearly applicable to an employer’s direct discriminatory treatment of a woman like Jespersen.

As with Macy’s claim before the EEOC,<sup>136</sup> there were many potential routes to victory for Jespersen, but a majority of the Ninth Circuit rejected all of them. The Ninth Circuit could have, as Jespersen’s appellate attorney, Lambda Legal’s Jenny Pizer, called upon them to do, “enforce[d] the federal employment discrimination statute as written,” acknowledging that, “[i]f . . . Jespersen were male, she still would be working behind Harrah’s Sports Bar,”

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132. *Jespersen*, 444 F.3d at 1108 (alteration in original) (internal quotation marks omitted).

133. *Id.* at 1105-06.

134. *Id.* at 1105.

135. *Id.* Just as the Ninth Circuit had been an early leader in ruling against LGBT plaintiffs under Title VII, so it had been in the forefront of appellate courts rejecting the sex discrimination claims of employees challenging sex-specific dress and grooming codes. *See, e.g.,* *Fountain v. Safeway Stores Inc.*, 555 F.2d 753, 757 (9th Cir. 1977) (upholding a necktie requirement for males); *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 898 (9th Cir. 1974) (upholding a short hair requirement for males). In the years after *Hopkins*, the Ninth Circuit’s principal appearance case, *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000), involved weight requirements for flight attendants. In her *Jespersen* opinion, Chief Judge Schroeder described *Frank* as striking down “a weight policy that applied different standards to men and women in a facially unequal way. The women were forced to meet the requirements of a medium body frame standard while men were required to meet only the more generous requirements of a large body frame standard.” *Jespersen*, 444 F.3d at 1109. Chief Judge Schroeder had been the author of the majority opinion in *Frank*’s predecessor, the pre-*Hopkins*, en banc decision in *Gerdorn v. Continental Airlines*, 692 F.2d 602 (9th Cir. 1982) (en banc). Chief Judge Schroeder described *Gerdorn* in *Jespersen* as holding that it constituted a Title VII violation for the airline to have “imposed strict weight restrictions on female flight attendants . . . because the airline imposed no weight restriction whatsoever on a class of male employees who performed the same or similar functions as the flight attendants.” *Jespersen*, 444 F.3d at 1109. The experience of Chief Judge Schroeder and her colleagues with the much more dramatically unequal appearance burdens imposed by the airlines may have colored their approach to *Jespersen*’s claim.

136. *See supra* notes 79-85 and accompanying text.

but “[b]ecause of [her] sex,’ her employment ended.”<sup>137</sup> They could have held—as the EEOC had been insisting since the early 1970s and as the *Jespersen* dissenters would have held—that any sex distinctions in grooming or appearance needed to be justified as a BFOQ.<sup>138</sup> They could have, as the *Jespersen* dissenters also would have done, followed the lead of the Seventh Circuit in *Carroll v. Talman Federal Savings & Loan Ass’n*,<sup>139</sup> and found Harrah’s very specific makeup requirements for women to be a “facial uniform,” discriminatory given that men were left much more discretion as to their facial appearance.<sup>140</sup> Even if they were going to continue to insist, incorrectly, that “unequal burdens” remained the correct standard for grooming codes post-*Hopkins* (and even if they were to disregard the psychological burden on Jespersen as an individual), they could have agreed with dissenting Judge Alex Kozinski, who stated:

Every [Harrah’s] requirement that forces men to spend time or money on their appearance has a corresponding requirement that is as, or more, burdensome for women: short hair v. “teased, curled, or styled” hair; clean trimmed nails v. nail length and color requirements . . . . The requirement that women spend time and money applying full facial makeup has no corresponding requirement for men, making the “overall policy” more burdensome for the former than for the latter. . . .

It is true that Jespersen failed to present evidence about what it costs to buy makeup and how long it takes to apply it. But is there any doubt that putting on makeup costs money and takes time?<sup>141</sup>

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137. Jennifer C. Pizer, *Facial Discrimination: Darlene Jespersen’s Fight Against the Barbie-fication of Bartenders*, 14 DUKE J. GENDER L. & POL’Y 285, 290 (2007) (fourth alteration in original) (footnote omitted). As Pizer observed, unlike *Hopkins*, which was a mixed-motives case, necessitating evidence of discriminatory intent to determine whether “her job performance or her gender performance” was what cost Hopkins a partnership, for Jespersen the determinative role played by gender performance requirements, and hence by her sex, in her loss of her job was undisputed. *Id.* at 312.

138. See 444 F.3d at 1114 n.2 (Pregerson, J., dissenting) (“Harrah’s has not attempted to defend the ‘Personal Best’ makeup requirement as a BFOQ. In fact, . . . Harrah’s quietly disposed of this policy after Jespersen filed this suit.”); see also *supra* note 113 and accompanying text.

139. 604 F.2d 1028, 1029, 1033 (7th Cir. 1979) (holding that requiring women to wear a uniform while leaving male employees free to wear their choice of business attire violates Title VII). The *Jespersen* dissenters saw *Carroll* as “closely analogous.” See *Jespersen*, 444 F.3d at 1116 (Pregerson, J., dissenting).

140. Male bartenders at Harrah’s were “free to wear any style of facial hair, or none at all.” See Reply Brief in Support of Petition for Rehearing & Rehearing En Banc at 6, *Jespersen*, 444 F.3d 1104 (No. 03-15045), 2003 U.S. 9th Cir. Briefs LEXIS 15045. On the other hand, as Judge Pregerson’s dissent pointed out, “Harrah’s . . . imposed a facial uniform (full makeup) on only female bartenders. . . . Jespersen was required not simply to wear makeup; . . . consultants dictated . . . how the makeup had to be applied.” *Jespersen*, 444 F.3d at 1114 (Pregerson, J., dissenting).

141. *Id.* at 1117 (Kozinski, J., dissenting).

Finally, they could have seen what was clear to the dissenters, “that the ‘Personal Best’ program was part of a policy motivated by sex stereotyping.”<sup>142</sup> As Judge Kozinski put it most colorfully:

Imagine, for example, a rule that all judges wear face powder, blush, mascara and lipstick while on the bench. Like Jespersen, I would find such a regime burdensome and demeaning; it would interfere with my job performance. . . .

Everyone accepts this as a reasonable reaction from a man, but why should it be different for a woman? It is not because of anatomical differences . . . . Women’s faces, just like those of men, can be perfectly presentable without makeup . . . . I see no justification for forcing them to conform to Harrah’s quaint notion of what a “real woman” looks like.<sup>143</sup>

The Ninth Circuit majority did advance the law of the circuit to this extent—they held that “appearance standards, including makeup requirements, may well be the subject of a Title VII claim for sexual stereotyping.”<sup>144</sup> Yet they went on to find “that on this record Jespersen has failed to create any triable issue of fact that the challenged policy was part of a policy motivated by sex stereotyping.”<sup>145</sup> Judge Kozinski’s analysis exposes the unexplained premise in the majority’s observation that “[g]rooming standards that *appropriately differentiate* between the genders are not facially discriminatory.”<sup>146</sup> The *Jespersen* en banc majority treated the makeup requirement in the same way Justice Brennan described his colleagues as treating “the Christmas holiday” in an Establishment Clause case, as something “so familiar and agreeable” that they were blinded to its legally problematic character, and they therefore, like the Supreme Court confronted by a government-sponsored nativity display, unjustifiably “depart[ed] from controlling precedent.”<sup>147</sup>

142. *Id.* at 1114 (Pregerson, J., dissenting).

143. *Id.* at 1118 (Kozinski, J., dissenting).

144. *Id.* at 1106 (majority opinion). The trial court had thought “the Ninth Circuit had excluded grooming standards from the reach of [*Hopkins*].” *Id.* The Ninth Circuit panel, relying, like the trial court, on the dicta in footnote seven in *Nichols*, discussed in Subpart C, above, had “held that [*Hopkins*] could apply to . . . appearance standards only if the policy amounted to sexual harassment.” *Id.*

145. *Id.*

146. *Id.* at 1109-10 (emphasis added).

147. See *Lynch v. Donnelly*, 465 U.S. 668, 696-97 (1984) (Brennan, J., dissenting) (saying, of an Establishment Clause challenge to a government-funded Christmas display, “I am convinced that this case appears hard not because the principles of decision are obscure, but because the Christmas holiday seems so familiar and agreeable”). I have noted that blindness to the familiar aspects of sex discrimination is a common problem for courts. See Mary Anne Case, *Feminist Fundamentalism on the Frontier Between Government and Family Responsibility for Children*, 2009 UTAH L. REV. 381, 402 (describing courts’ reluctance to intervene in the face of the Fundamentalist Church of Jesus Christ of Latter Day Saints’s educating girls into an “umbrella of belief” that their duty was to marry and give birth at a very young age, being obedient to the husbands chosen for them (internal quotation marks omitted)).

Let me end this Part of my Essay where I began it, with the position of the EEOC. The Supreme Court's decision in *Hopkins* conclusively demonstrates that the EEOC was quite correct all along that disparate appearance standards for males and females violate Title VII unless they can be justified as a BFOQ and that, as a matter of law, most cannot be so justified. It is long past the time for the EEOC to revise and update both its *Compliance Manual* and its enforcement policies in line with *Hopkins*. It should remove the pre-*Hopkins* language endorsing equal burdens<sup>148</sup> and return unequivocally to its earlier position, since ratified by the Supreme Court in *Hopkins*. Rather than closing charges in which employees challenge sex-specific appearance standards, the EEOC should actively pursue them. Action by the EEOC in returning to its earlier position regarding appearance codes would have many benefits. Besides being true to the statutory text and the holding in *Hopkins* and assisting employees like Jespersen, it could advance the EEOC's stated Strategic Enforcement Plan priority regarding "coverage of [LGBT] individuals under Title VII's sex discrimination provisions"<sup>149</sup> given the crucial role sex-specific grooming codes have played in employment actions taken against LGBT employees.<sup>150</sup>

## II. THE UNEVEN PROGRESS OF OPPOSITION TO SEX STEREOTYPING, IN LAW AND IN LIFE

It is illuminating to put Jespersen's case, like *Hopkins*'s, in the climate of its times and to notice how the times have changed. At the time the Supreme Court decided *Hopkins*, legal as well as sociocultural opposition to sex stereotyping was still on the upswing. By the time of the VMI case, in the decade following *Hopkins*, only Chief Justice Rehnquist in his lone concurrence supported an approach under the Constitution akin to that endorsed by the Ninth Circuit majority in *Jespersen* for Title VII—that sex-differentiated regimes were impermissible if they imposed “a requirement that categorically ‘applie[d] less favorably to one gender,’” but not necessarily if they imposed “different but essentially equal burdens on men and women.”<sup>151</sup> Even then, Chief Justice

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148. As noted above, the EEOC adopted this language not because it had changed its own position, but because it felt it could no longer hold out against the contrary view uniformly adopted by the circuit courts of appeals. See *supra* notes 115-16 and accompanying text. The *Hopkins* decision gives the EEOC the legal justification, and indeed the responsibility, not to defer any longer to these erroneous lower court decisions.

149. See EEOC, *supra* note 19, at 9-10.

150. See, e.g., *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam) (rejecting a race discrimination claim by a black, gay man reprimanded for wearing makeup); *Creed v. Family Express Corp.*, No. 3:06-CV-465RM, 2009 WL 35237, at \*9 (N.D. Ind. Jan. 5, 2009) (describing a transitioning MTF who was fired for what the court granting summary judgment to the employer described as “a legitimate non-discriminatory purpose—breach of the [sex-specific] grooming policy”).

151. *Jespersen*, 444 F.3d at 1109 (alteration in original) (quoting *Frank v. United Airlines, Inc.*, 216 F.3d 845, 854 (9th Cir. 2000)); cf. *United States v. Virginia*, 518 U.S. 515,

Rehnquist was careful to insist that any differentiation must not rest on sex stereotyping.<sup>152</sup> His authorship of the majority opinion in *Nevada Department of Human Resources v. Hibbs* may, in retrospect, turn out to have been a high-water mark for the repudiation of sex stereotypes and resulting differentiated regimes for the sexes with respect to employment and constitutional rights.<sup>153</sup> *Hibbs* put the full force of Congress's powers under Section Five of the Fourteenth Amendment behind what Chief Justice Rehnquist acknowledged was a not yet fully successful effort to "protect the right to be free from gender-based discrimination in the workplace," taking aim at "mutually reinforcing stereotypes [which] created a self-fulfilling cycle of discrimination."<sup>154</sup>

Between the time *Hibbs* was decided and the time *Jespersen* reached the Ninth Circuit en banc, the tide may have shifted back toward increasing acceptance of differentiating in law (and in society) between males and females. At the time the Supreme Court mandated its integration, VMI was one of fewer than half a dozen sex-segregated public schools nationwide. By 2006, there were more than 200.<sup>155</sup> In that same year, the Bush Administration promulgated new guidelines under Title IX which had the potential to allow public schools to set up sex-segregated classrooms embodying the very sex stereotypes both the Constitution and Title VII had repudiated.<sup>156</sup>

Ironically, at the same time federal courts, following *Hopkins*, were beginning to take seriously claims that discrimination on the basis of sexual orientation was sex discrimination under Title VII, the Supreme Court of California, in direct reliance on prior bad interpretations of Title VII, denied that sexual orientation discrimination was sex discrimination. At the very moment of extend-

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565-56 (1996) (Rehnquist, C.J., concurring in the judgment) (arguing that although the "women's institution Virginia proposes, VMIL, fails as a remedy, because it is distinctly inferior to . . . VMI," "the remedy should not necessarily require either the admission of women to VMI or the creation of a VMI clone for women," and that a women's institution with a very different curriculum, faculty, and physical plant could be a sufficient remedy if it "were of the same overall caliber"). Justice Scalia dissented in *Virginia*, and Justice Thomas recused himself from the case. See *id.* at 518 (Scalia, J., dissenting).

For discussion of the analogies between *Jespersen* and Chief Justice Rehnquist's approach in *Virginia*, see Case, *supra* note 54, at 1221-23.

152. See *Virginia*, 518 U.S. at 565-66 (Rehnquist, C.J., concurring in the judgment) ("[T]he State should avoid assuming demand based on stereotypes; it must not assume *a priori*, without evidence, that there would be no interest in a women's school of civil engineering, or in a men's school of nursing.").

153. 538 U.S. 721 (2003).

154. *Id.* at 728, 736. *Hibbs*, which concerned the application of the Family and Medical Leave Act to the states, focused on "stereotype-based beliefs about the allocation of family duties." *Id.* at 730.

155. Diana Jean Schemo, *Federal Rules Back Single-Sex Public Education*, N.Y. TIMES (Oct. 25, 2006), <http://www.nytimes.com/2006/10/25/education/25gender.html>.

156. See, e.g., Joanna Grossman, *The Bush Administration's Push for Single-Sex Education: An Attempt to Erode Federal Gender Equality Guarantees?*, FINDLAW (June 11, 2002), <http://writ.news.findlaw.com/grossman/20020611.html>.

ing rights to same-sex couples, the Supreme Court of California endorsed the view that “statutes, policies, or public or private actions that treat the genders equally but that accord differential treatment . . . to a person based upon whether he or she generally is sexually attracted to persons of the same gender rather than the opposite gender, do not constitute instances of sex discrimination.”<sup>157</sup> Thus, instead of advancing synergistically,<sup>158</sup> claims to be free of discrimination and stereotyping on grounds of sex and of sexual orientation were placed in a potentially destructive new tension with one another.

A high-water mark for societal opposition to sex-stereotyped grooming and appearance standards may have come even earlier, with the trend, at least with respect to clothing for boys and girls, shifting in the very year *Hopkins* itself was decided.<sup>159</sup> An expert on historical trends in children’s clothing, Jo Paoletti, observed:

Between 1965 and 1985, boys sported long hair and wore boldly patterned shirts and pants; girls wore pants, even for school . . . For a while, it appeared that gendered clothing was a thing of the past and that children were, in the words of a popular song, “Free to Be You and Me.” But as swiftly as it had appeared, the unisex trend faded. Neutral styles for infants were reduced to a very small part of the market in the mid-1980s, and by the mid-1990s styles for toddlers and young children were more gender specific than they had been in the 1950s.<sup>160</sup>

Paoletti’s observation—that pendulum shifts in the gendering of children’s clothing over the past century can be accounted for by each generation of parents rebelling against the clothes their parents imposed on them and choosing otherwise for their children—may mean that when the generation that grew up in frilly pink princess dresses or rugged superhero gear begins dressing their own offspring, sex-stereotyped appearance standards will once again decline. But, in the meantime, a greater societal receptivity to sex stereotyping of children’s appearance combined with a greater legal receptivity to identitarian claims made on behalf of LGBT individuals has led to a worrying trend in cases involving school children’s dress and appearance norms which, by analogy,

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157. *In re Marriage Cases*, 183 P.3d 384, 438 (Cal. 2008) (“In reaching this conclusion, [in prior case law] we relied . . . on the circumstance that the identical statutory prohibition against sex discrimination in employment set forth in title VII of the 1964 federal Civil Rights Act uniformly had been interpreted as not encompassing discrimination on the basis of sexual orientation . . .”).

158. For an account of both the possibilities of synergy and the risks in rejecting it, see generally Case, *supra* note 54.

159. The pendulum for adult women’s dress and grooming standards swung in a somewhat different rhythm. As a litigation associate for Paul, Weiss in the years surrounding the *Hopkins* decision, I never once observed any female lawyer wear a pantsuit. Yet a senior female partner confessed to a closet full of pantsuits from the 1970s, when wearing them was considered more appropriate, as it is once again.

160. JO B. PAOLETTI, *PINK AND BLUE: TELLING THE BOYS FROM THE GIRLS IN AMERICA* 100 (2012).



may help illustrate both some of the problems with the evolving law of gender nonconformity under Title VII and some of the risks posed by a potential move from Title VII to ENDA in adjudicating claims of discrimination on the grounds of gender nonconformity.

The post-millennial trend in school dress code cases suggests that students objecting to sex-specific appearance rules seem to have a far clearer road to victory if they claim an identity as transgender, gay, or lesbian rather than simply raising an objection to being stereotyped on grounds of sex. Thus, although Constance McMillin testified that “she wants to wear a tuxedo to the prom so that she can express to her school community that ‘it’s perfectly okay for a woman to wear a tuxedo, and that the school shouldn’t be allowed to make girls wear a dress if that’s not what they are comfortable in,’” the district court seemed to find her sexual orientation relevant to a ruling in her favor, not only as to her choice of a prom date, but as to her choice of attire— “[t]he record shows Constance has been openly gay since eighth grade and she intended to communicate a message by wearing a tuxedo and to express her identity through attending prom with a same-sex date.”<sup>161</sup> And when Pat Doe, a “biologically male” fifteen-year-old, sought to wear “girls’ make-up, shirts, and fashion accessories to school,” the Massachusetts judge who ruled in Doe’s favor stressed that a diagnosis of gender identity disorder meant “that it was medically and clinically necessary for plaintiff to wear clothing consistent with the female gender,” and Doe was “expressing her gender identity and, thus, her quintessence, at school.”<sup>162</sup> Although the actual order issued by Judge Linda Giles “preliminarily enjoined [the school] from preventing plaintiff from wearing any clothing or accessories that any other *male or female* student could wear to school without being disciplined”<sup>163</sup>—and her opinion quoted *Brown v. Board of Education* to the effect that “in the field of public education the doctrine of ‘separate but equal’ has no place”—the judge distinguished, rather than rejected, earlier cases in which sex-specific dress codes were upheld against challenges by plaintiffs who made no identitarian claims.<sup>164</sup>

*Doe v. Yunits* is often paired in discussion with the nearly contemporaneous case of Nikki Youngblood, who is in some respects the high school equivalent of Darlene Jespersen. When having her yearbook photo taken, Youngblood objected to wearing the “velvet-like, ruffly, scoop neck drape” girls were required to wear and asked instead to pose in “a white shirt, tie, and dark jacket,”

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161. *McMillen v. Itawamba Cnty. Sch. Dist.*, 702 F. Supp. 2d 699, 702, 705 (N.D. Miss. 2010).

162. *Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at \*1, \*7 (Mass. Super. Ct. Oct. 11, 2000).

163. *Id.* at \*8 (emphasis added).

164. *Id.* at \*7 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954)) (internal quotation marks omitted); *see id.* at \*6.

as was required of boys.<sup>165</sup> Her request was refused, her photo excluded from the yearbook, and she brought suit on the claim that her school had “created a discriminatory dress code policy . . . based on stereotypes of how they believe males and females should dress.”<sup>166</sup> Youngblood’s complaint described her as someone who had long rejected “gender stereotypes,” had not worn skirts since second grade, and would find it “emotionally damaging” to be forced to wear “stereotypically feminine attire,” but the only identity she claimed was “female.”<sup>167</sup> After briefing heavily featuring Title VII cases<sup>168</sup> in which the school made an “equal burdens” defense, the district court dismissed Youngblood’s complaint.<sup>169</sup> In the course of an appeal to the Eleventh Circuit, the case settled, with an agreement providing that in the future “[s]tudents may request an exception to the dress code from the principal, who will grant the exception when good cause is shown.”<sup>170</sup> No specification, however, was made of what shall constitute “good cause.” It is unsurprising, therefore, that a subsequent challenge to identical yearbook photo requirements in another Florida school noted the plaintiff was a lesbian and included a sexual orientation nondiscrimination provision in the resulting settlement.

Several things are noteworthy about these yearbook settlements, especially when considered in light of *Jespersen*. First, the settlements did not categorically strike down sex-specific grooming rules, but only allowed specific exceptions for objecting individuals with good cause. This was a settlement Jespersen herself was offered but declined to take, in part because she did not see herself as exceptional in objecting to the makeup requirement, only in her willingness to sue, and she did not want to be “singled . . . out in a problematic way” from her female coworkers.<sup>171</sup> Second, Youngblood was prepared, indeed eager, to cross over entirely from the dress code for females to that for males. Jespersen seems never to have been offered this choice, but there is reason to think she might have accepted it, given that the only portion of Harrah’s dress code requirement for males she was not in compliance with at the time she lost her job was hair length, and her hair, once short, had likely been grown out precisely to

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165. Complaint for Damages & Demand for Jury Trial at 2, *Youngblood v. Hillsborough Cnty. Sch. Bd.*, No. 8:02-CV-1089-T-24MAP (M.D. Fla. June 19, 2002), ECF No. 1.

166. *Id.*

167. *Id.*

168. See Plaintiff’s Opposition to Defendants McCarthy & Fyfe’s Motion to Dismiss, Request for Oral Argument, & Memorandum of Law at 5-6, *Youngblood*, No. 8:02-CV-1089-T-24MAP (M.D. Fla. July 26, 2002), ECF No. 16. Youngblood’s attorneys also stressed the constitutional prohibition on sex stereotyping. See *id.*

169. See Defendants’ Motion to Dismiss & Memorandum of Law, *Youngblood*, No. 8:02-CV-1089-T-24MAP (M.D. Fla. July 9, 2002), ECF No. 13; Order, *Youngblood*, No. 8:02-CV-1089-T-24MAP (M.D. Fla. Sept. 25, 2002), ECF No. 23.

170. Settlement Agreement & General Release at 1, *Youngblood v. Hillsborough Cnty. Sch. Bd.*, No. 02-15924-CC (11th Cir. Apr. 26, 2004).

171. Pizer, *supra* note 137, at 312 n.113.

comply to the extent possible for her with Harrah's requirements for females. Third, the difference between the male and female yearbook garb was stark and categorical, whereas, as Chief Judge Schroeder stressed in her opinion, Harrah's "'Personal Best' . . . program contained certain appearance standards that applied equally to both sexes, including a standard uniform of black pants, white shirt, black vest, and black bow tie."<sup>172</sup>

### III. THE PROSPECT OF ENDA

#### A. *Would the Current Version of ENDA Help Darlene Jespersen?*

Hundreds of articles have examined the extent to which Title VII protects LGBT individuals and other gender benders from discrimination. Quite a few have proclaimed the need for a statute like ENDA to assure such protection. Very few, however, have analyzed in any degree of detail what effect the current version of ENDA might have on any common fact pattern or concrete case, including those already litigated and lost, to establish how, if at all, the result would be different and better under ENDA than under Title VII as its interpretation is currently evolving.<sup>173</sup> A full examination of the effects of ENDA if passed in its current form is far beyond the scope of this Essay as well, but I do want to consider ENDA's possible effects on one concrete case—that of *Jespersen*—because the result illustrates well some of the difficulties with both ENDA's current form and Title VII's current application by the lower courts.

The current version of ENDA defines "gender identity" as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."<sup>174</sup> This definition, in striving to be as broad as possible, also risks being obscure and subject to judicial manipulation or confusion. It is not, for example, clear from the text whether ENDA is to be read as prohibiting discrimination on the basis of individual gender-related characteristics or only those which can be seen as part of a recognizable, coherent "gender identity." Are gender-related characteristics intended to be viewed only as what, in earlier work, I referred to as "a package deal,"<sup>175</sup> or can they give rise to a viable

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172. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1107 (9th Cir. 2006) (en banc).

173. That little has been written about the potential application of ENDA is not surprising—ENDA has been hard to enact and has undergone many changes, such that any examination by either its supporters or its opponents may be premature or may have unintended adverse effects on both its text and its chances for passage.

174. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 3(a)(7) (2013) (as referred to the House of Representatives, Nov. 12, 2013) (internal quotation marks omitted).

175. Mary Anne Case, *Unpacking Package Deals: Separate Spheres Are Not the Answer*, 75 DENV. U. L. REV. 1305, 1311-13, 1320 (1998).

cause of action in isolation? Consider, for example, a job applicant discriminated against because of a high-pitched voice, which is certainly a gender-related characteristic.<sup>176</sup> Should it matter under ENDA whether this high-pitched voice is part of an otherwise feminine gender presentation?<sup>177</sup>

If the “appearance, or mannerisms or other gender-related characteristics” are to be taken as a whole, does it matter whether that whole is a combination of masculine and feminine gendered characteristics idiosyncratic to the individual in question? This question is placed in stark relief when considered in light of one of the most troubling provisions in the current version of ENDA:

Dress or Grooming Standards.—Nothing in this Act shall prohibit an employer from requiring an employee, during the employee’s hours at work, to adhere to reasonable dress or grooming standards not prohibited by other provisions of Federal, State, or local law, provided that the employer permits any employee who has undergone gender transition prior to the time of employment, and any employee who has notified the employer that the employee has undergone or is undergoing gender transition after the time of employment, to adhere to the same dress or grooming standards as apply for the gender to which the employee has transitioned or is transitioning.<sup>178</sup>

Although the first half of this provision is carefully framed to leave open the possibility that there are not (or at least that at some future time<sup>179</sup> there may not be) any sex-specific dress or grooming standards “not prohibited by other provisions of” law, the reference in the second half to such standards “as apply for the gender to which the employee has transitioned or is transitioning” mitigates against the possibility that what is meant by “reasonable dress or grooming standards” is simply and exclusively sex-neutral standards of business attire appropriate for the job in question.

Only a minority of state prohibitions on gender identity discrimination explicitly mention dress codes, and their language is much less inclined to reinforce a gender binary either on dress codes or the employees subject to them than is the current version of ENDA. California’s provision, typical of those of a number of states, allows “an employer to require an employee to adhere to reasonable workplace appearance, grooming, and dress standards not precluded by other provisions of state or federal law, provided that an employer shall allow an employee to appear or dress consistently with the employee’s gender identity or gender expression.”<sup>180</sup>

On its face, this provision seems to suggest that the “gender identity or gender expression” with which the employee’s dress and appearance is allowed

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176. See Case, *supra* note 3, at 28-30.

177. *Id.* at 23 n.66 (discussing Sears’s preference for applicants who had “a low-pitched voice” but also cursed and participated in masculine sports).

178. S. 815 § 8(a).

179. For example, at such time as lower courts correctly apply what I have argued is the clear holding of *Hopkins*.

180. CAL. GOV’T CODE § 12949 (West 2014).

to be consistent need not fall into a conventional gender binary. But, in contrast to a simple ban on sex-specific appearance codes—which would apply to all employees equally regardless of identity—this provision seems to function more like the accommodation under Title VII for religious garb and grooming,<sup>181</sup> in that it is offered because of and not in spite of the employee's identity, and, being conditioned on the establishment of an identity, raises the possibility that as between two employees of the same firm in the same job, one does and the other doesn't, for example, get to grow long hair or wear a skirt in contravention of the employer's rules. If the gender identity being accommodated is indeed, as suggested by the text of the California statute, nonbinary, this makes it even more like religion and disability, subject to an almost infinite range of possibly required accommodations.<sup>182</sup>

The current version of ENDA seems, however, decidedly binary in its approach to appearance, apparently premised on the traditional MTF-FTM model of transsexuality. Unfortunately, as I shall explain, as currently framed, it serves no constituency well,<sup>183</sup> neither those who fit this model nor those who diverge from it.

Consider first Jespersen herself. First, ENDA does her no favors by implicitly suggesting there could be some legal legitimacy to Harrah's sex-differentiated grooming codes. Second, assuming she were, as I have assumed above, willing to take on the full requirements of the grooming code for male bartenders at Harrah's, it is unlikely she would qualify under ENDA to do so, because she gave no indication that her gender identity is in transition. She may be butch, but she showed no signs of identifying as male. Her ability to choose the most appropriate dress code should not have to depend on such a transition.

Moreover, people far more distant from the masculine end of the appearance spectrum than Jespersen might strongly prefer a choice of dress codes

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181. See *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, EEOC, [http://www1.eeoc.gov/eeoc/publications/qa\\_religious\\_garb\\_grooming.cfm](http://www1.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm) (last visited June 8, 2014) ("In most instances, employers are required by federal law to make exceptions to their usual rules . . . to permit . . . employees to observe religious dress and grooming practices."). As I have previously discussed, using the example of Colonel Martha McSally, who objected as both a woman and a Christian to being forced by the U.S. military to wear an abaya while stationed in Saudi Arabia, objections to sex-specific dress codes have of late received a more favorable hearing when grounded in claims of free exercise rather than in claims of sex equality. See Mary Anne Case, *Feminist Fundamentalism as an Individual and Constitutional Commitment*, 19 AM. J. GENDER, SOC. POL'Y & L. 549, 574-76 (2011).

182. And it is less like race and sex, as to which Title VII demands only nondiscrimination, not accommodation.

183. Because they are not in transition, ENDA would not even help masculine men objecting to wearing the uniform in a pink-collar ghetto, such as the "first and only male nurse in a hospital were [he] required to wear exactly the same uniform as his female colleagues had been issued from time immemorial—white shirtdress, bonnet, pantyhose and pumps." Case, *supra* note 83, at 1656 (quoting E-mail from Mary Anne Case to Richard A. Posner (Nov. 13, 2000)).

ENDA as currently written would deny them. I can speak very personally about this—no item in my professional wardrobe comes from the menswear department, the current length of my hair is well below the collar, and, unlike Jespersen, I have no categorical aversion to makeup, but if forced to choose between any set of male and female dress and grooming standards I have ever seen, from those enforced by Harrah's to those endorsed by the EEOC *Compliance Manual* in 1981,<sup>184</sup> I would unhesitatingly choose the male, even at the cost of acquiring a whole new wardrobe and a haircut. My choice would stem as much from reasons of practicality as taste—men's clothing is, by and large, more comfortable and durable. Men's shoes are easier on the feet and more conducive to mobility than heels.<sup>185</sup> As between, to use the EEOC *Compliance Manual's* example, having always to wear a necktie and always to wear a skirt, I have a strong preference for the former. Neckties present no risk of upskirting on Boston trains or freezing legs in Chicago winters. I would not, however, qualify for an exemption under ENDA from an otherwise enforceable sex-specific dress code, because I am not “undergoing gender transition.”

Instead, my gender expression is a more or less stable, potentially varying mix of masculine and feminine elements, something quite common in the population at large, but particularly among the sexual minorities and gender nonconforming individuals ENDA was designed to protect.<sup>186</sup> Many of these individuals frame it in identitarian terms, from genderqueer to any one of the more than fifty gender identity options now offered by Facebook<sup>187</sup> or the even larger number previously offered by Yay Genderform!<sup>188</sup>

Representative Barney Frank, a principal sponsor of the direct predecessor to the current version of ENDA, infamously said of potential plaintiffs under ENDA that they “would have to have a ‘consistent gender presentation’ in order to be able to sue for discrimination. ‘They can’t sit there with a full beard

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184. See 2 EEOC Compl. Man. (CCH) § 619.1 (Oct. 1981).

185. I was foolish enough to think one of the very few upsides of 9/11 might be the abandonment of high heels as business attire for women, given the blood-soaked pairs fleeing businesswomen left behind, as, unlike their male coworkers, they were forced to try to flee the collapsing World Trade Center barefoot. See, e.g., *9/11 Museum: A Survivor's Blood-Soaked High Heels*, TORONTO STAR (Sept. 10, 2011), [http://www.thestar.com/news/world/2011/09/10/911\\_museum\\_a\\_survivors\\_bloodsoaked\\_high\\_heels.html](http://www.thestar.com/news/world/2011/09/10/911_museum_a_survivors_bloodsoaked_high_heels.html).

186. When speaking about ENDA, I often illustrate this point by holding up a Swatch with the question “What am I today?” written on its face, beneath the image of a Filipino transgender celebrity, half of whose face is made up and bejeweled, the word UNISEX running along a band displaying days of the week and male and female symbols.

187. Martha Mendoza, *Facebook Offers New Gender Options for Users*, ASSOCIATED PRESS: THE BIG STORY (Feb. 13, 2014, 6:35 PM EST), <http://bigstory.ap.org/article/apnewsbreak-new-gender-options-facebook-users>.

188. YAY GENDERFORM!, <http://www.yaygender.net/pages/gender.pl> (last visited June 8, 2014).

and a dress.”<sup>189</sup> There are two major problems with this statement of legislative intent. First, it incorrectly presumes that no one who combines a full beard and a dress can have a “consistent gender presentation.”<sup>190</sup> Second, even Representative Frank himself was known to mix and match, albeit less dramatically. In introducing ENDA in 2007, Representative Frank announced he had

just left the hearing of the Financial Services Committee . . . . And . . . I didn’t want to . . . play favorites in my responsibilities. So that is why I appear before you today in a pinstripe suit and a lavender tie. I figured that would be kind of a sartorial compromise that could reach everything.<sup>191</sup>

If, as some law firms did in the 1980s, Representative Frank’s employer had imposed color and not just style restrictions as part of its male dress code, he would be precluded from objecting under ENDA.

Less hypothetically, consider one potential and one actual plaintiff who should clearly be among the intended beneficiaries of ENDA, but who would be out of luck under its current dress code provisions. Gay figure skater Johnny Weir, a commentator at the Sochi Olympics, received international attention for his flamboyant sartorial choices, which regularly combined items from male and female wardrobes. Fortunately, for Weir, the attention was overwhelmingly favorable.<sup>192</sup>

Another television commentator, B. Scott, was less fortunate. Scott, a gay media personality who regularly dresses in a mixture of masculine and feminine attire and grooms his long hair in a feminine style, had been hired by BET as a red carpet correspondent, but was pulled off air allegedly because his clothing choices for the evening were too feminine. He subsequently filed an antidiscrimination lawsuit<sup>193</sup> under the California equivalent of ENDA, cited

189. Steven T. Dennis & Tory Newmyer, *Backers Say Gay Rights Bills Will Win in House: Moderates Are Uneasy, but Nondiscrimination Bill and DADT Repeal May Reach House Floor This Month*, ROLL CALL (May 10, 2010, 12:00 AM), [http://www.rollcall.com/issues/55\\_129/-46002-1.html](http://www.rollcall.com/issues/55_129/-46002-1.html) (internal quotation marks omitted) (quoting Representative Frank).

190. See, e.g., Sally McGrane, *An Austrian Drag Queen Wins Eurovision*, NEW YORKER (May 12, 2014), <http://www.newyorker.com/online/blogs/culture/2014/05/conchita-wurst-wins-eurovision-2014.html> (describing victory in a Europe-wide song competition of Conchita Wurst, a bearded man in an evening gown).

191. *The Employment Non-Discrimination Act of 2007 (H.R. 2015): Hearing Before the Subcomm. on Health, Emp’t, Labor & Pensions of the H. Comm. on Educ. & Labor*, 110th Cong. 10-11 (2007) (statement of Rep. Barney Frank).

192. See, e.g., Jordan Sargent, *Ex-Skater Johnny Weir’s Fashion Is About to Take Over the Olympics*, GAWKER (Feb. 9, 2014, 12:45 PM), <http://gawker.com/ex-skater-johnny-weirs-fashion-is-sochis-greatest-sub-1519357192> (describing Weir wearing “a white blazer over a white sheer v-neck shirt with a dramatic gold necklace pulled straight from your grandmother’s closet”).

193. Complaint at 1, *Sessoms v. BET Networks, Inc.*, No. BC517318 (Cal. Super. Ct. Aug. 6, 2013), available at <http://cdn.madamenoire.com/wp-content/uploads/2013/08/B-SCOTT-BET-VIACOM-COMPLAINT-Blank.pdf>. Scott’s lawsuit was subsequently dis-

above, describing himself for the first time as transgender, to the consternation of many:

[F]ans seemed . . . confused by the idea that a previously gay-identified feminine person was now identifying as transgender yet wasn't seeking to become a woman; and many trans women knew B.'s announcement would further muddy the waters for transsexual women who often combat widely popular images of drag queens, cross-dressers and other male-bodied folks who express femininity.<sup>194</sup>

As Scott explained to supportive transgender activist Janet Mock, “[i]t was hard to pin down, label and classify myself. I had a lot to learn but when I finally read that transgender also meant ‘neither or both,’ I was like, ‘Wow, that’s me!’ For the first time, I found something I was included in.”<sup>195</sup>

As discussed above, Scott may have some prospect of winning under the California prohibition on gender identity discrimination which formed the basis for his lawsuit, but, as someone not in transition, he would have little chance of defending his dress and grooming choices under the proposed federal ENDA.

It’s bad enough that the “Dress or Grooming Standards” provision currently in ENDA lends some legislative credibility to clearly erroneous holdings like *Jespersen* and would leave Scott without a remedy. What’s worse is that it may serve those who are actually transitioning no better. Although the current version of ENDA is touted as “trans-inclusive,” except for the mention of employees “undergoing gender transition” in the section on dress or grooming standards, no version of the word “trans” appears anywhere in it. If one were to ask what issues of importance to transgender employees are least apt to be successfully addressed by a continuing development of the law of sex discrimination under Title VII along the lines now so well begun, the most likely answer would be those pertaining to legally guaranteed access to sex-segregated spaces like bathrooms and to forms of address “for the gender to which the employee . . . is transitioning,” which are nowhere mentioned in ENDA.<sup>196</sup> Following the *Hopkins* line works well when the objective is to dismantle sex distinctions, but it works less well when sex distinctions are likely to remain, as with bath-

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missed on First Amendment grounds. Sunnive Brydum, *B. Scott to Appeal Ruling Finding BET Didn't Discriminate*, ADVOCATE.COM (Apr. 18, 2014), <http://www.advocate.com/transgender/2014/04/18/b-scott-appeal-ruling-finding-bet-didnt-discriminate>.

194. Janet Mock, *A Conversation with B. Scott on the Power of Defining Yourself*, JANET MOCK (Aug. 9, 2013), <http://janetmock.com/2013/08/09/b-scott-transgender-identity-label>.

195. *Id.*; cf. Mary Anne Case, *Why Not Abolish Laws of Urinary Segregation?*, in TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 211 (Harvey Molotch & Laura Norén eds., 2010) (arguing against segregation of restroom facilities).

196. See Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 8(a) (2013) (as referred to the House of Representatives, Nov. 12, 2013). Indeed, the only mention of bathrooms in ENDA is an oblique and negative one, which can hurt transitioning employees. See *id.* § 8(b) (stating that “[n]othing in this Act shall be construed to require the construction of new or additional facilities”).



rooms—although there is reason for transgender employees to be hopeful even with respect to bathroom access as sex discrimination law evolves.<sup>197</sup>

The *only* statutory guarantee in ENDA that an employer must respect a transitioning employee's access to aspects of the job lawfully sex segregated on the same terms as the employer makes them available to members of the sex to which the employee is transitioning pertains to dress and grooming standards, as to which Title VII case law is to date far clearer and more favorable to those transitioning than it is on, for example, bathrooms. There is a real risk that application of the maxim *expressio unius est exclusio alterius* will lead even a well-intentioned, scrupulous judge, and certainly one inclined to be hostile or skeptical of expanding employment rights on the basis of gender identity, to claim that since access to grooming standards is mentioned and access to bathrooms is not, ENDA must not have intended to expand bathroom access for those transitioning. This actually risks leaving transsexuals worse off than they are under the developing law of sex discrimination under Title VII.

B. *The Americans with Disabilities Act Experience as a Cautionary Tale for ENDA Proponents*

Advocates for the LGBT[QI . . .] community often have legitimate concerns that a particular legal strategy will leave behind those parts of the community deemed farthest beyond the pale by the broader society. It should also cause concern when it's the less extreme and those who, without repudiating the community, reject an identitarian label for themselves who get left behind.<sup>198</sup>

Let me tell this cautionary tale in two ways. The first is with reference to the dilemma of exit, voice, and loyalty.<sup>199</sup> If ENDA remains a central focus of energy before it passes, and then, after its passage, litigation energy were to move toward ENDA and away from Title VII, synergistic forward progress in the law could wither. More is at stake than merely employment discrimination, important though that is. Just as good law tended to migrate from Title VII sex discrimination cases to constitutional equal protection cases in the 1970s, so more recent Title VII law, good and bad, is migrating, not only to the constitutional but to other statutory contexts, such as Title IX. That migration has pro-

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197. See U.S. DEP'T OF JUSTICE, NO. 169-12C-70, RESOLUTION AGREEMENT: BETWEEN ARCADIA SCHOOL DISTRICT, THE U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, AND THE U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION 2 (2013), for evidence that even access to bathrooms in a transitioning person's destination sex can successfully be obtained under a simple prohibition on sex discrimination.

198. I have previously argued that the LGBT community made both a strategic and a moral error in leaving behind straight marriage resisters in their quest for relationship recognition. See generally Case, *supra* note 54, at 1228, 1232.

199. See generally ALBERT HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 37 (1970).

duced constitutional protections for transgender government employees and increased statutory protections for transgender students such as those covered by the Title IX settlement recently reached by the U.S. Department of Justice's Civil Rights Division and the Department of Education with the Arcadia Unified School District in California. This settlement, responding to a complaint filed by an FTM transgender student, required the school district to treat the student as male for all purposes and more generally to revise its policies to state that transgender and gender-nonconforming students are entitled to equal access to all of the school's programs, facilities, and activities.<sup>200</sup> It could be the thin end of the wedge which would open up sex-segregated spaces to transgender individuals of all ages and stations in life. ENDA, however, covers only employment, and any good law generated under it would have more difficulty migrating to fields such as education to protect individuals such as students under federal law.

An analysis of the experience of seeing the courts diverge from the hopes of the drafters of the Americans with Disabilities Act (ADA) also should serve as a warning to those invested in ENDA's success. The ADA and ENDA have much in common, not the least of which is that Chai Feldblum, now an EEOC Commissioner, was a central player in the early drafting history of both statutes. The story Feldblum tells, first in an op-ed she was instrumental in crafting for Representative Steny Hoyer,<sup>201</sup> and then, after the op-ed had done its work in amending the law, in a law review article on the ADA Amendments Act of 2008,<sup>202</sup> is one I have long thought held lessons for ENDA. The ADA too, was a statute that became extremely complex, with even more complex regulations,<sup>203</sup> at the polar opposite of the addition of the single word "sex" into Title VII. It, too, had to resolve the issues raised by a wide variety of legislators and constituencies. The "business community . . . had concerns and reservations about the bill,"<sup>204</sup> and the disability community, like the LGBT community, was quite diverse in its needs. As with ENDA, the ADA's supporters wanted its coverage to be as broad as possible and did their best to choose statutory language and provide legislative history they thought would give "clear instruc-

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200. See U.S. DEP'T OF JUSTICE, *supra* note 197, at 2. "Gender identity," the settlement specified, means "one's internal sense of gender . . . which is consistently and uniformly asserted, or for which there is other evidence that the gender identity is sincerely held as part of the student's core identity." *Id.* (internal quotation marks omitted).

201. Steny H. Hoyer, Op-Ed., *Not Exactly What We Intended*, *Justice O'Connor*, WASH. POST, Jan. 20, 2002, at B01.

202. Chai R. Feldblum et al., *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187 (2008).

203. See *id.* at 192 ("Disability rights advocates were uncomfortable with the extreme degree of complexity introduced by the EEOC's regulations into the disability coverage analysis. At bottom, however, most advocates believed that the EEOC regulations could not cause much harm in the long run for coverage of people with a range of physical and mental impairments . . . . How wrong we were.").

204. *Id.* at 190.

tions to the courts that the [statute] was intended to provide broad coverage prohibiting discrimination against people with a wide range” of conditions.<sup>205</sup> But, in a series of cases, the Supreme Court radically narrowed the scope of coverage under the ADA, restricting claims only to the more severely disabled, and not to those whose milder disabilities could be mitigated.<sup>206</sup>

I have previously referred to this lesson as that of a Trans-Inclusive ENDA in a Rose-Colored Eyeglass Case, referring first to the rose-colored glasses with which ENDA supporters, like supporters of the ADA before them, approached the prospects for their statute in the courts and second, to the likelihood that ENDA, like the ADA before it, could find its scope limited by the courts, in a case analogous to *Sutton v. United Air Lines, Inc.* In *Sutton*, the Supreme Court held that wearers of eyeglasses, because they were insufficiently disabled and too numerous, were not intended to be covered by the ADA.<sup>207</sup> The disability community was eventually able to convince Congress to amend the law to overcome these limitations, but it took them years; and initially their prospects looked so dim, they “agreed that any effort to change the law at that time might result in adverse consequences for the law.”<sup>208</sup>

If the courts were to impose similar limitations in their interpretation of ENDA, there is a far lower probability that the LGBT community could effect the sort of statutory amendment that the disability community eventually managed for a number of reasons, including that the foreseeable opponents of such an amendment include the religious right and that Congress generally has become less functional in the years since 2008.

C. *In Addition to Its Many Dangerous Ambiguities, the Current Version of ENDA Has Many Severe Limitations*

Even most advocates of ENDA acknowledge, at least privately, that it has many problems. Let me, in the Subparts following, briefly touch on three of them, in addition to those already discussed above, in furtherance of my argument that whatever the limitations of Title VII, it is a better vehicle for combating discrimination on the basis of sexual orientation and gender identity than the current version of ENDA. The first, ENDA’s already very broad and broadening religious exemption is generally acknowledged to be a serious limitation, but only those who follow both the recent changes in the text of ENDA and the even more recent (and still ongoing) rapid legal change in the field of religious accommodation will have yet realized exactly how serious it is likely to become. The second, the absence of a BFOQ, may be seen by some as a feature and not a bug, but I want to raise some doubts about this conclusion. The third,

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205. *Id.* at 188.

206. *See id.* at 193.

207. 527 U.S. 471, 482, 484 (1999).

208. Feldblum et al., *supra* note 202, at 193.

the absence of a disparate impact claim, may promote evasion and prevent workplace improvements that could benefit employers and employees alike.

1. *The current version of ENDA has a religious exemption that started out broad and is getting broader*

Unlike any other federally forbidden ground for discrimination in employment except religion itself, ENDA has a built-in exemption for religious organizations, which provides that it “shall not apply to a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964 . . . (referred to in this section as a ‘religious employer’).”<sup>209</sup>

The direct effect of this in itself would greatly diminish the number of employees who could benefit from the protections of ENDA, given that many LGBT individuals are employed by religious organizations. But the indirect signaling effects could be far worse, enshrining in law and in the understanding of legislators and citizens the notion that discrimination on the grounds of sexual orientation or gender identity (SOGI) is somehow more to be tolerated and accommodated than discrimination on other forbidden grounds. This is likely to strengthen the already vociferous demands of religious objectors around the country for legislative exemptions or accommodation for SOGI discrimination in other state and federal laws, such as those in laws that a multitude of states in the very recent past considered enacting.<sup>210</sup>

Were this religious exemption not already enough to give ENDA supporters pause, a last-minute expansion, introduced after ENDA had already passed the Senate and was being referred to the House, radically expanded it by providing that:

A religious employer’s exemption under this section shall not result in any action by a Federal agency, or any State or local agency that receives Federal funding or financial assistance, to penalize or withhold licenses, permits, certifications, accreditation, contracts, grants, guarantees, tax-exempt status, or any benefits or exemptions from that employer, or to prohibit the employer’s participation in programs or activities sponsored by that Federal, State, or local agency. Nothing in this subsection shall be construed to invalidate any other Federal, State, or local law (including a regulation) that otherwise applies to a religious employer exempt under this section.<sup>211</sup>

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209. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 6(a) (2013) (as referred to the House of Representatives, Nov. 12, 2013).

210. For an overview of these efforts, see generally Dana Liebelson, *Inside the Conservative Campaign to Launch “Jim Crow-Style” Bills Against Gay Americans*, MOTHER JONES (Feb. 20, 2014, 4:00 AM), <http://www.motherjones.com/politics/2014/02/gay-discrimination-bills-religious-freedom-jim-crow>.

211. S. 815 § 6(b).

While the language of this provision is difficult to parse, its intent is clear: it aims to shield discriminating religious employers, at least to some extent, from the possible cost in government benefits and funding potentially withdrawn from them by units of government unwilling to subsidize SOGI discrimination or grant privileges to those who engage in it.

Were this still not enough to give the supporters of ENDA pause, there is the possibility of much worse to come. This Essay goes to press at a time when *Sebelius v. Hobby Lobby Stores, Inc.* is sub judice. *Hobby Lobby* is representative of a host of cases in which for-profit corporations and their owners are raising religious objections to complying with some aspect of the contraception mandate of the Affordable Care Act.<sup>212</sup> Among the claims raised by a number of these corporations and individuals is that the government cannot show that the mandate is narrowly tailored to meet a compelling governmental interest, as the Religious Freedom Restoration Act (RFRA) demands,<sup>213</sup> because the government has already exempted nonprofit religious corporations (among others) from the mandate, leaving it more difficult to argue that for-profit religious employers cannot be exempt.<sup>214</sup> Were the Supreme Court to hold that for-profit corporations or their owners have a cognizable claim under RFRA—and further to hold that the religious exemptions and accommodations that the Obama Administration already allows to the contraceptive mandate either undercut the compelling governmental interest or reveal the presence and practicality of less restrictive means to further that interest—the results have the potential to be catastrophic for ENDA. First, another somewhat open question would have to be resolved: is the federal RFRA applicable to lawsuits between private parties? Some courts have held that it is, at least when a statute “is enforceable by the EEOC as well as private plaintiffs,” as ENDA would be.<sup>215</sup> The catastrophic scenario would then be this: for-profit employers who claim a religious opposition to LGBT rights could then use RFRA to demand that a religious exemption be extended to them. Not only would the existence of the statutory religious exemption undercut the government’s claim of a compelling interest in applying ENDA to the objecting for-profit employers, but also those objecting employers might prevail on the claim that, in general, prevention of SOGI dis-

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212. See 134 S. Ct. 678 (2013) (granting petition for a writ of certiorari on the question of whether a for-profit corporation may deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation’s owners).

213. 42 U.S.C. § 2000bb-1(b) (2012).

214. For an overview of this claim from a position sympathetic to the religious claimants, see John Bursch, *Symposium: Hobby Lobby and Conestoga; The Most Difficult-to-Answer Question*, SCOTUSBLOG (Feb. 21, 2014, 10:54 AM), <http://www.scotusblog.com/2014/02/symposium-hobby-lobby-and-conestoga-the-most-difficult-to-answer-question>.

215. See *Hankins v. Lyghte*, 441 F.3d 96, 103 (2d Cir. 2006) (holding, over a dissent by then-Circuit Judge Sotomayor, that RFRA was applicable in a suit between private parties under the Age Discrimination in Employment Act).

crimination is not a compelling governmental interest in the same way that prevention of race and sex discrimination have been held to be. The result could be to exempt from ENDA virtually any employer who could claim a religious objection to complying with it.<sup>216</sup>

Those who are, however reluctantly, prepared to tolerate a religious exemption may hope that in time it can be repealed or that the religious organizations (and other employers) who wish to avail themselves of it will dwindle. But there is little precedent for the repeal of religious exemptions once they are enshrined in law,<sup>217</sup> and there is more reason to suspect that once enacted they risk becoming entrenched, not only in the law, but also in the minds of believers.

2. *The current version of ENDA has no BFOQ exception and prohibits “preferential treatment or quotas”*

With the exception of race and color, all of the forbidden grounds for employment discrimination under Title VII have BFOQ provisions.<sup>218</sup> Even in the absence of a BFOQ for race, federal judges like my colleague Judge Richard Posner have allowed race to be used as a factor in employment, for example, in hiring a correctional officer in a prison boot camp where more than two-thirds of the inmates are black.<sup>219</sup> This makes the absence of a BFOQ in ENDA particularly remarkable. Consider a comparison with the use of the BFOQ for sex. The EEOC regulations allow for the possibility of sex being a BFOQ “[w]here it is necessary for the purpose of authenticity or genuineness . . . e.g., [as] an actor or actress.”<sup>220</sup> I have previously noted how bizarre this regulation is, given that “the very essence of [an actor’s] job is to pretend to be something one is not.”<sup>221</sup> But there certainly are advocates for lesbian, gay, and particularly of late transgender actors who would maintain that, for the “purpose of authenticity or genuineness,” such actors should have priority for certain roles,<sup>222</sup> and

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216. I am grateful to Chip Lupu for confirming my intuition on this score, albeit sorry to see it confirmed.

217. See Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 493 (2010) (documenting that states rarely later narrow the scope of their state RFRAs, and do not repeal the statutes across the board, but only amend them to deal with particularized needs). It is even conceivable that those from whom an exemption is withdrawn could raise a constitutional objection. See *id.* at 494-95.

218. See 42 U.S.C. § 2000e-2(a)(2), (e).

219. *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996) (holding that preferring a lower-scoring black applicant for the position was constitutionally permissible).

220. 29 C.F.R. § 1604.2(a)(2) (2013).

221. Case, *supra* note 3, at 12 n.23.

222. For example, transgender activist Laverne Cox has said, “What a difference it makes when an actual trans person plays the role.” Erik Piepenburg, *When They Play Women, It’s Not Just an Act*, N.Y. TIMES (July 28, 2011), <http://www.nytimes.com/2011/07/31/movies/new-roles-for-transgender-performers.html> (internal quotation marks omitted).

that a production which considers an actor's identity in making a casting decision should not be at risk of a lawsuit under ENDA. There are a multiplicity of other potential LGBT-focused employers, from the North American Gay Amateur Athletic Alliance (NAGAAA)<sup>223</sup> to certain advocacy, support, or counseling centers for the LGBT community, who might also wish to consider sexual orientation or gender identity in hiring decisions and for whom the absence of a BFOQ exception, especially combined with ENDA's prohibition on "preferential treatment or quotas"<sup>224</sup> could pose problems.

Another set of circumstances in which a BFOQ for sex has been upheld is for jobs requiring viewing or touching of another person's naked body.<sup>225</sup> There are some men who would have as strong or stronger objections to having their naked body viewed on a screen or their body cavities searched by a gay man than by a woman, and some women who might prefer a gay man, even if not a straight man, to a lesbian as their nurse's aide. While I take no normative position on the availability of a BFOQ exception in the interests of sexual privacy,<sup>226</sup> I do note that to allow a BFOQ for sex in such circumstances and categorically to foreclose one for orientation seems puzzlingly inconsistent.<sup>227</sup> And the fact that both proponents and opponents of LGBT rights might each, in some circumstances, favor the availability of a BFOQ makes its complete absence in ENDA also puzzling.

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223. *See, e.g.*, *Apilado v. N. Am. Gay Amateur Athletic Alliance*, No. C10-0682-JCC, 2011 WL 5563206, at \*1, \*3 (W.D. Wash. Nov. 10, 2011) (holding that, as an expressive association, the NAGAAA could limit participation to "openly gay, lesbian, and bisexual individuals," notwithstanding the prohibition on sexual orientation discrimination in Washington's Law Against Discrimination (emphasis omitted) (internal quotation mark omitted)).

224. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 4(f) (2013) (as referred to the House of Representatives, Nov. 12, 2013) (capitalization altered).

225. *See, e.g.*, *Everson v. Mich. Dep't of Corr.*, 391 F.3d 737, 740 (6th Cir. 2004) (upholding a women's prison's decision not to hire male guards in the interest of protecting the prisoners' privacy and preventing sexual assaults); *Fesel v. Masonic Home of Del., Inc.*, 447 F. Supp. 1346, 1354 (D. Del. 1978) (upholding a retirement home's refusal to hire a male nurse's aide when the majority of its residents were female), *aff'd*, 591 F.2d 1334 (3d Cir. 1979).

226. Indeed, precisely the complications raised by concerns around sexual orientation have caused some to question the BFOQ for sex when applied to positions such as prison guard. As my colleague Judge Frank Easterbrook observed in rejecting a male prisoner's Eighth Amendment claim against being guarded by a female who might see him naked in the shower, "There are too many permutations to place guards and prisoners into multiple classes by sex, sexual orientation, and perhaps other criteria, allowing each group to be observed only by the corresponding groups that occasion the least unhappiness." *Johnson v. Phelan*, 69 F.3d 144, 147 (7th Cir. 1995).

227. Advocates for ENDA may have thought a BFOQ exception would do more harm than good, given the frequency with which the objection to potentially being exposed to a gay male gaze has in the past been used to justify the exclusion of gay men from, for example, the military. Precisely this frequently voiced objection, however, makes it all the more surprising that those lobbying against ENDA or not yet committed to supporting it have not insisted on a BFOQ.

3. *The current version of ENDA does not allow for disparate impact claims*

According to Representative Frank, who introduced the predecessor to the current version of ENDA in Congress in 2007, the same reason explains the exclusion of both the possibility of affirmative action and the possibility of bringing disparate impact claims under ENDA: a respect for the right of privacy of employees and job applicants and an unwillingness to force them to disclose their sexual orientation.<sup>228</sup> But, as I discussed at length in *Disaggregating Gender*, the ability to bring disparate impact claims on the grounds of sex has enormous upsides, not only for employees, but also for employers, their customers, and society generally.<sup>229</sup> Of course, the most important upside for the protected group is the ability that disparate impact claims offer to combat deliberate attempts at evasion of the statute's provisions through establishment of job requirements designed not to improve job performance, but precisely to exclude members of the protected group. Thus, just as employers instituted new educational requirements in an effort to exclude blacks and new height and weight requirements in an effort to exclude women at the very instant Title VII went into effect,<sup>230</sup> so too employers who would otherwise have openly discriminated on the basis of sexual orientation might well seek to find proxies such as marital status or to revive morals clauses in employment contracts. Disparate impact claims can also serve as a remedy for the unconscious bias sometimes present in an employer's subjective evaluation of employees or of job requirements.

CONCLUSION: SOUR GRAPES AND SWEETER, LOWER-HANGING FRUIT

Compared to the inclusion of the prohibition on sex discrimination in the text of Title VII, the effort at the federal level to pass a statute clearly banning discrimination in employment on the basis of sexual orientation and gender identity has been extraordinarily long, difficult, and tortuous. From the moment in 1975 when Representative Bella Abzug first introduced a bill proposing that Title VII be "amended by adding after the word 'sex' each time it appears the words 'affectional or sexual preference,'" defined as "having or manifesting an emotional or physical attachment to another consenting person or persons of either gender, or having or manifesting a preference for such attachment";<sup>231</sup>

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228. See *The Employment Non-Discrimination Act of 2007 (H.R. 2015): Hearing Before the Subcomm. on Health, Emp't, Labor & Pensions of the H. Comm. on Educ. & Labor*, *supra* note 191, at 11-13 (statement of Rep. Barney Frank).

229. See Case, *supra* note 3, at 91.

230. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that tests and measuring procedures for employment must reasonably measure job performance and must not operate to discriminate on the basis of race, even without discriminatory intent).

231. H.R. 166, 94th Cong. §§ 6, 11 (1975).



through the single day in 1996 when the Senate held up-or-down votes on both the Defense of Marriage Act, which passed, and ENDA, which failed by one vote;<sup>232</sup> to 2007 when the first trans-inclusive version of ENDA was introduced and then withdrawn;<sup>233</sup> to the present, when a version of ENDA has passed the Senate but will almost certainly not be presented to the House before the end of this congressional term, ENDA has become increasingly complicated both textually and conceptually, but has not come appreciably closer to being enacted into law.

Given the current state of ENDA, with its massive limitations and ambiguities, ENDA should perhaps be seen by LGBT rights advocates as genuinely sour grapes, not only hard to reach, but neither tasty nor nourishing if finally grasped. In the meantime, the EEOC, LGBT public interest lawyers, individual employees, and employees' private counsel can continue gradually to pluck the lower-hanging, sweeter fruit of sex discrimination under Title VII, as fruit on the higher branches of Title VII law gradually ripens, causing the boughs to bend and bring it within reach, so that in the not-too-distant future the harvest may be complete, and the individuals ENDA was designed to protect may be sated with sweet, legally guaranteed freedom from discrimination in employment.<sup>234</sup>

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232. Suzanne B. Goldberg et al., *The Employment Non-Discrimination Act: Its Scope, History, and Prospects*, in *GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE* (Christine Michelle Duffy ed., forthcoming 2015).

233. *Id.*

234. There is precedent for such a result in the history of the Equal Rights Amendment. Although even the efforts of Howard Smith and the National Women's Party were not enough to pass a constitutional amendment, the results promised by the Equal Rights Amendment were achieved by the litigation strategy of Ruth Bader Ginsburg and a receptive Supreme Court. *See Case, supra* note 23, at 1450.