

A WIN FOR TRANSGENDER EMPLOYEES: *CHEVRON* DEFERENCE
FOR THE EEOC'S DECISION IN *MACY V. HOLDER*

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INTRODUCTION

A recent decision by the Equal Employment Opportunity Commission (EEOC) in an administrative adjudication has the potential to dramatically alter the legal landscape for transgender workers with employment discrimination claims. The historic decision is predicted to improve the availability and likelihood of success of judicial and administrative remedies for claims of discrimination based on transgender status.¹ In its ruling, the EEOC recognized that “claims of discrimination based on transgender status, also referred to as claims based on gender identity, are cognizable under Title VII’s sex discrimination prohibition . . .” and “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.”² This ruling reflects the changing attitudes toward transgender individuals in our society and signals a growing recognition that all individuals are entitled to basic civil rights that prevent discrimination on the basis of gender identity.

This Note argues that the federal courts should either give full deference to the EEOC’s recent decision under the deference principles laid out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*³ or should adopt the EEOC’s interpretation as persuasive under *Skidmore v. Swift & Co.*⁴ Part I provides an overview of what it means to be transgender, exploring definitions from both the medical and social science communities, and the prevalence of transgender individuals in our society. This Part also briefly introduces the history of the transgender rights movement—its triumphs and struggles to achieve legislative success and societal approval, and its relationship to the gay rights and disability rights movements. Part I also chronicles the progression of relevant federal court decisions in the areas of Title VII employment rights with a discussion of sex as a protected characteristic, the relationship of sex to gender identity, and legal theories such as “sex stereotyping.” Important cases not

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¹ Chris Geidner, *Transgender Breakthrough*, METROWEEKLY (Apr. 23, 2012, 10:38 PM), <http://www.metroweekly.com/news/?ak=7288>.

² *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at *5–6, 14 (E.E.O.C. Apr. 20, 2012).

³ 467 U.S. 837, 844–45 (1984).

⁴ 323 U.S. 134, 139–40 (1944).

involving transgender individuals provide context and create a framework for transgender plaintiffs to successfully bring employment discrimination claims against their employers. Part II summarizes the *Macy* decision, setting forth the factual circumstances and legal precedent that guided the EEOC's opinion. Part III considers Congress's intent in including "sex" as a protected characteristic under Title VII and also discusses other relevant proposed federal legislation affecting transgender individuals in the workplace. Finally, Part IV addresses the heart of the argument for *Chevron* deference by introducing the *Chevron* doctrine and noting the historical inconsistency of the Supreme Court's application of the doctrine to EEOC actions. Because the EEOC is the primary administrative and enforcement agency for Title VII and because the ruling was promulgated in a formal adjudication proceeding, federal courts should afford *Chevron* deference to the *Macy* decision. This Part also discusses an alternative argument for granting the decision deference, under *Skidmore*, and notes the procedural mechanisms such as en banc review that would allow a circuit court to bring its precedent into conformance with the EEOC's position in *Macy*. Finally, this Note concludes with a brief comment on some of the broader social and cultural implications of the *Macy* decision.

I. BACKGROUND

A. *The Meaning of "Transgender"*

The term "transgender"⁵ refers to an individual whose self-identified gender identity is not in conformance with his or her assigned birth gender, that is, an individual who either transiently or persistently identifies with a gender different from his or her birth gender.⁶ According to the fifth edition of the Diagnostic and Statistical Manual of the American Psychiatric Association (DSM-5), individuals who experience, for a period of 6 months or more, a "marked incongruence between the gender they have been assigned to . . . and their experienced/expressed gender," combined with "evidence of distress about this incongruence," may be

⁵ This Note will use the umbrella term "transgender," but courts have alternatively referred to such individuals as transgender or transsexual. *Compare* Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) (referring to individuals as transgender), *with* Etsitty v. Utah Transit Authority, 502 F.3d 1215, 1218 (10th Cir. 2007) (referring to individuals as transsexual). Courts have also referred to claims of discrimination based on transgender status as claims of discrimination based on gender identity. *Schroer v. Billington*, 577 F. Supp. 2d 293, 302 (D.D.C. 2008). Gender identity is an individual's psychologically self-identified gender, or "one's sense of oneself as male, female, or transgender," regardless of physical anatomy; transgender individuals have a gender identity incongruous with their biological or birth sex. *Practice Guidelines for LGB Clients*, AM. PSYCHOLOGICAL ASS'N, <http://www.apa.org/pi/lgbt/resources/guidelines.aspx?item=2> (last visited Aug. 3, 2013).

⁶ PAISLEY CURRAH ET AL., *TRANSGENDER RIGHTS* xiv (Paisley Currah et al. eds., 2006); AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, DSM-5* 451 (5th ed. 2013) [hereinafter DSM-5].

diagnosed with “gender dysphoria.”⁷ Many physicians recommend a course of treatment for individuals diagnosed with gender dysphoria that may include taking hormones, presenting as the self-identified gender at work or school, or surgical procedures to bring a person’s physical anatomy into conformance with his or her self-identified gender.⁸ For a variety of reasons—including the social stigma associated with transgender identity and mental illness, lack of access, or lack of funds for psychological or medical treatment—many transgender people will never be officially diagnosed with gender dysphoria.

Scholars, social scientists, and researchers of human sexuality have identified several layers of sex and gender that, in most people, align to create an external gender that matches one’s self-identified gender.⁹ At fertilization, an embryo has a chromosomal sex, either XX or XY.¹⁰ After a few weeks, the embryo develops gonadal sex with the initial development of either ovaries or testes.¹¹ The fetus acquires hormonal sex once the gonads begin producing hormones.¹² Around four months, the fetus’s genitals become developed enough for identification and establish the fetus’s genital sex.¹³ At birth, medical staff assigns the baby either male or female gender based on external sex organs.¹⁴ But this is only the beginning: Throughout development, social and cultural influences shape a person’s gender identity until, after puberty, an adult fully identifies (and is generally identifiable) as either male or female.¹⁵ The vast majority of people develop in this “normal” way, and their self-identification of gender matches every other layer: chromosomal, gonadal, genital, and so on. At each layer of sex, however, there are variations within individuals that may lead to gender identity dysphoria if the variations do not align with the other layers.¹⁶

Transgender individuals may be anatomically and physiologically indistinguishable from nontransgender individuals, while nonetheless identifying

⁷ DSM-5, *supra* note 6, at 452–53. The term “gender dysphoria” replaces the fourth edition’s diagnosis of “gender identity disorder.” AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, DSM-IV 532–33 (4th ed. 1994).

⁸ See, e.g., KENNETH J. ZUCKER & SUSAN J. BRADLEY, GENDER IDENTITY DISORDER AND PSYCHOSEXUAL PROBLEMS IN CHILDREN AND ADOLESCENTS 303–06 (1995).

⁹ See ANNE FAUSTO-STERLING, SEX/GENDER: BIOLOGY IN A SOCIAL WORLD 3–6 (2012); see also Julie A. Greenberg, *The Roads Less Traveled: The Problem with Binary Sex Categories*, in TRANSGENDER RIGHTS 51, 54–58 (Paisley Currah et al. eds., 2006) (discussing layers of sex and related disorders). For examples of how courts have recognized (or refused to recognize) the scientific community’s layers of sex theory, see *Schroer*, 577 F. Supp. 2d at 306; *Littleton v. Prange*, 9 S.W.3d 223, 227 (Tex. App. 1999).

¹⁰ FAUSTO-STERLING, *supra* note 9, at 4.

¹¹ *Id.*

¹² *Id.* at 4–5.

¹³ *Id.* at 5.

¹⁴ *Id.* at 6.

¹⁵ See *id.* at 6, 11.

¹⁶ See *id.* at 11.

psychologically with a different gender. For example, an individual with external male anatomy may nonetheless identify as female, a gender incompatible with his anatomy.¹⁷ There is no scientific or medical consensus on the cause of this psychological disconnect.¹⁸

The number of people with transgender conditions is unknown; there is no far-reaching authority (such as the Census Bureau) that collects comprehensive information on gender identity.¹⁹ The National Center for Transgender Equality estimates the number of transgender people at 0.25% to 1% of the U.S. population, that is, approximately 750,000 to 3 million people.²⁰

People identifying as transgender or experiencing some form of gender identity dysphoria have a long history of discrimination and persecution in the United States. During the sexual revolution of the 1960s and 70s, around the time of the Stonewall riots that have come to represent the symbolic birth date of the gay rights movement, the transgender movement was generally excluded as distinctly separate.²¹ More recently, transgender individuals have been embraced into the broader lesbian, gay, bisexual, transgender (LGBT) community with organizations like the National Gay and Lesbian Law Association and the National Gay and Lesbian Task Force leading the way.²² Transgender individuals have also been excluded from relying on disability laws for legal protections, partly because of the pervasive social stigma associated with the term “disability,”²³ and partly because the Americans with Disabilities Act of 1990 explicitly excludes

¹⁷ A common misperception, however, is that anyone whose layers of sex do not align is transgender. See FAUSTO-STERLING, *supra* note 9, at 3–6. In fact, there can be variations that go unnoticed throughout a person’s lifetime; for example, an otherwise normal woman who self-identifies as female could be chromosomally XY. In the 1996 Atlanta Olympic Games, eight of the female athletes required to undergo chromosomal genetic testing had results positive for XY chromosomes. See Jennifer Finney Boylan, *The XY Games*, N.Y. TIMES (Aug. 3, 2008), <http://www.nytimes.com/2008/08/03/opinion/03boylan.html>. A condition called androgen insensitivity syndrome, which occurs in approximately 1 in 20,000 individuals, can cause an individual’s body to effectively ignore the Y chromosome and develop as female. See PubMed Health, *Androgen Insensitivity Syndrome*, NAT’L LIBR. OF MED., <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002163> (last visited August 3, 2013). Such individuals may not identify as transgender, especially as their incongruent chromosomal sex may have been previously undiagnosed.

¹⁸ UNDERSTANDING TRANSGENDER, NAT’L CTR. FOR TRANSGENDER EQUAL., 1 (2009), available at http://transequality.org/Resources/NCTE_UnderstandingTrans.pdf.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Shannon Price Minter, *Do Transsexuals Dream of Gay Rights?*, in TRANSGENDER RIGHTS 141, 144, 150–51 (Paisley Currah et al. eds., 2006).

²² *Id.* at 160.

²³ Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People Through Disability Laws*, in TRANSGENDER RIGHTS, *supra* note 21, at 74. Part of the transgender movement worries that claiming transgender identity as a disability will perpetuate social myths that transgender individuals are “sick, abnormal, or inferior”—unfortunate social stigmas still associated with the term “disability.” *Id.*

“transsexualism,” and “gender identity disorders not resulting from physical impairments” from its protection.²⁴

B. “Sex” Under Title VII

Title VII of the Civil Rights Act of 1964 states, “[A]ll personnel actions affecting [federal] employees or applicants for employment . . . shall be made free from any discrimination based on . . . sex.”²⁵ Likewise for covered private employers, Title VII states, “It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual’s race, color, religion, *sex*, or national origin”²⁶ The legislative history surrounding the inclusion of sex into the protected categories under Title VII tells us little about Congress’s intent. In fact, sex was added to the bill as a floor amendment the day before it came to vote in the House.²⁷ Virginia Congressman Howard W. Smith, an opponent of Title VII, proposed the addition, allegedly hoping to stymie the passage of the entire piece of legislation.²⁸ His plan backfired and Congress passed Title VII with sex as a protected characteristic.²⁹

Absent legislative guidance, the courts have been tasked with interpreting the word “sex” as used in Title VII. Courts have held that Title VII’s prohibition on sex discrimination protects both men and women,³⁰ and protects employees from sexual harassment constituting a hostile and abusive work environment whether

²⁴ 42 U.S.C. § 12211(b)(1) (2006).

²⁵ *Id.* § 2000e-16(a). Though state and municipal employers are not statutorily bound by Title VII, many state and local governments have enacted legislation that explicitly protects employees on the basis of sexual orientation or gender identity. As of January 20, 2012, the National Gay and Lesbian Task Force reported that sixteen states and the District of Columbia had laws protecting employees on the basis of gender identity or expression. *State Nondiscrimination Laws in the U.S.*, NAT’L GAY & LESBIAN TASK FORCE (Jan. 20, 2012), http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_1_12_color.pdf.

²⁶ 42 U.S.C. § 2000e-2(a) (emphasis added).

²⁷ *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977), *abrogated* by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). A more comprehensive discussion of Congress’s intent appears *infra* Part III.

²⁸ *See* 110 CONG. REC. 2577, 2581 (1964) (remarks of Congresswoman Green); *see also Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act*, 84 HARV. L. REV. 1109, 1167 (1971) (discussing the events surrounding the inclusion of “sex” in Title VII).

²⁹ Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e).

³⁰ *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983) (noting that withholding insurance coverage from dependents of male employees while providing coverage to a female employee’s dependents would violate Title VII).

the aggressor is of the opposite or the same sex.³¹ Courts have also held that as used in Title VII, the term “sex” as a basis of discrimination does not protect employees from discrimination on the basis of sexual orientation.³²

The Supreme Court has had several opportunities to interpret the breadth of Title VII’s protection for employees who experience discrimination based on sex. In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*,³³ an employer tried to deny pregnancy-related health insurance benefits to the spouses of male employees but provided complete health insurance coverage for spouses of female employees, resulting in an overall benefits package that was less comprehensive for male employees than for female employees.³⁴ The Court held that Title VII protection extends to men as well as women and struck down the policy as a violation of Title VII.³⁵

In *Oncale v. Sundowner Offshore Services*,³⁶ a male employee was “forcibly subjected to sex-related, humiliating actions against him” by other male employees.³⁷ The Court held that Title VII protects employees from discrimination even where the offender is of the same sex as the victim.³⁸ The definition of sexual harassment “must extend to sexual harassment of any kind that meets the statutory requirements,” regardless of the gender of the victim and the aggressor.³⁹

Eventually, the Court had the opportunity to address the breadth of Title VII as a protection not only from discrimination based on one’s biological sex, but also from discrimination based on one’s failure to conform to traditional social norms that define gender in *Price Waterhouse v. Hopkins*.⁴⁰ *Price Waterhouse* held that when an employee’s non-conformance with sex stereotypes plays a motivating

³¹ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986) (“[A] plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.”); *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81–82 (1998) (finding that “sex discrimination consisting of same-sex sexual harassment is actionable under Title VII”).

³² *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *accord* *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989).

³³ 462 U.S. 669.

³⁴ *Newport News*, 462 U.S. at 684.

³⁵ *Id.* at 685.

³⁶ 523 U.S. 75.

³⁷ *Id.* at 77.

³⁸ *Id.* at 82.

³⁹ *Id.* at 80. “A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.” *Id.*

⁴⁰ 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 107, *as recognized in* *Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994). *See also infra* note 52.

factor in an adverse employment action, the employee's claim is cognizable as sex discrimination under Title VII.⁴¹ This holding is an essential premise for most Title VII discrimination claims involving transgender plaintiffs.

C. Title VII Cases: Price Waterhouse and Transgender Plaintiffs

*I. Ulane v. Eastern Airlines, Inc.*⁴²

In 1985, in a case of first impression in the Seventh Circuit, plaintiff Karen Ulane sued her former employer Eastern Airlines for sex discrimination under Title VII when she was terminated after undergoing a male-to-female transition.⁴³ Ulane had worked for Eastern Airlines for nearly twenty years and was a distinguished pilot.⁴⁴ She was terminated when she returned to work after her sex reassignment surgery.⁴⁵ Ulane filed a timely EEOC complaint and received a right to sue letter, and then sued the airline in federal court.⁴⁶ The district court allowed Ulane's Title VII claim for discrimination based on her transgender status and presciently recognized that "sex is not a cut-and-dried matter of chromosomes" but rather a question of "self-perception" and social construct.⁴⁷ On appeal, however, the Seventh Circuit reversed the decision of the district court to hold that transgender individuals are not protected: "While we do not condone discrimination in any form, we are constrained to hold that Title VII does not protect transsexuals"⁴⁸ The court held that the plain language interpretation of "sex" in Title VII does not encompass sexual preference nor sexual identity, which was consistent with contemporaneous decisions declining to extend Title VII protection to homosexuals or transvestites.⁴⁹ Despite wide criticism and the apparent erosion of the *Ulane* holding by *Price Waterhouse*, discussed below, the Seventh Circuit Court of Appeals has not revisited the issue. The *Ulane* precedent, however, may be splintering. In 2009, a district court in the Seventh Circuit held that a transgender plaintiff had stated a claim under Title VII despite her transgender status.⁵⁰ The plaintiff, however, still failed to succeed on the merits of her claim.⁵¹

⁴¹ *Id.* at 251.

⁴² 742 F.2d 1081 (7th Cir. 1984).

⁴³ *Id.* at 1082–83.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 1082.

⁴⁷ *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 823, 825 (N.D. Ill. 1984), *rev'd*, 742 F.2d 1081 (7th Cir. 1984).

⁴⁸ *Ulane*, 742 F.2d at 1084.

⁴⁹ *Id.*

⁵⁰ *Creed v. Family Express Corp.*, No. 3:06-CV-465RM, 2009 WL 35237, at *1, *7 (N.D. Ind. Jan. 5, 2009).

⁵¹ *Id.* at *10–11.

2. Price Waterhouse v. Hopkins

The most relevant Supreme Court decision that can be applied to cases involving the rights of transgender people is *Price Waterhouse*, which held that “sex stereotyping” is an impermissible form of discrimination based on sex when it plays a part in an employment decision.⁵² Plaintiff Ann Hopkins was a senior manager at the accounting firm Price Waterhouse, and the partners in the firm proposed her for partnership in 1982.⁵³ Her candidacy was “held” for reconsideration the next year, when the nominating partners declined to re-propose her for the promotion.⁵⁴ Although Hopkins was an “outstanding professional” who had secured a \$25 million contract—a seemingly ideal candidate for partner—male partners in the firm had criticized her for being “macho” and suggested that she “overcompensated for being female.”⁵⁵ One partner even advised Hopkins that to improve her chances for partnership, she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁵⁶ Hopkins filed suit, alleging that Price Waterhouse impermissibly discriminated against her on the basis of sex when considering her candidacy for partnership.⁵⁷

The Supreme Court found that Price Waterhouse discriminated against Hopkins on the basis of sex in violation of Title VII of the Civil Rights Act because Price Waterhouse impermissibly used sex stereotyping—specifically, Hopkins’ failure to conform to traditional gender stereotypes of female behavior—as a motivating factor in an employment decision.⁵⁸ The Court recognized both the difficult position in which women are placed in particularly competitive fields and the corresponding protection provided by Title VII: “An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively

⁵² *Price Waterhouse*, 490 U.S. at 251, 258. *Price Waterhouse*’s holding that sex stereotyping and gender non-conforming behavior are bases for a sex discrimination claim under Title VII remains valid. However, the majority of the Court’s discussion focused on the burden-shifting involved in proving discrimination where the employment action had both legitimate and illegitimate motivating factors. *See id.* at 238–55. In response, Congress passed the Civil Rights Act of 1991, which established that use of any impermissible factor in an employment action, even if it is only one of many factors motivating the decision, is actionable under Title VII. 42 U.S.C. § 2000e-2(m) (2006). *See also* Jason Lee, *Lost in Transition: The Challenges of Remediating Transgender Employment Discrimination Under Title VII*, 35 HARV. J.L. & GENDER 423, 426 n.18 (2012) (offering an in-depth explanation of why *Price Waterhouse* is still valid in the sex stereotyping context).

⁵³ *Price Waterhouse*, 490 U.S. at 231.

⁵⁴ *Id.* at 233–34.

⁵⁵ *Id.* at 234–35.

⁵⁶ *Id.* at 235.

⁵⁷ *Id.* at 232.

⁵⁸ *Id.* at 256–58.

and out of a job if they do not. Title VII lifts women out of this bind.”⁵⁹ The Supreme Court’s holding firmly establishes the principle that employment discrimination on the basis of non-conformance with sex stereotypes violates Title VII: “[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group”⁶⁰ The holding is consistent with prior Supreme Court holdings and with Congress’s general intent in extending Title VII’s protections to “sex.” As the Court stated, “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”⁶¹

Some federal courts, however, have been hesitant to apply *Price Waterhouse* to claims by transgender plaintiffs.⁶² Those arguing on behalf of transgender individuals with employment discrimination claims argue that the transgender individual is being discriminated against on the basis of his or her non-conformance with gender stereotypes, in clear violation of the holding of *Price Waterhouse*.⁶³ Opponents argue that *Price Waterhouse* is inapplicable because it did not involve transgender issues, and that broadening the Court’s holding to protect transgender plaintiffs would misinterpret the holding and go too far.⁶⁴

Consequently, in the wake of *Price Waterhouse*, the federal circuit courts have disagreed about whether discrimination against transgender individuals, based either on their transgender status or on their non-conformance with sex stereotypes, is a form of prohibited sex discrimination. Specifically, the federal circuit courts have split on the issue of whether a plaintiff’s transgender status bars a claim of discriminatory sex stereotyping under *Price Waterhouse*.⁶⁵ The Seventh Circuit is still bound by its *Ulane* precedent, which has not been overruled, and the Tenth Circuit ultimately rejected a sex-stereotyping claim by a transgender

⁵⁹ *Id.* at 251.

⁶⁰ *Id.*

⁶¹ *Id.* (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

⁶² *See, e.g., Broadus v. State Farm Ins. Co.*, No. 98-4254CVCSOWECF, 2000 WL 1585257, at *4 (W.D. Mo. Oct. 11, 2000); *Sweet v. Mulberry Lutheran Home*, No. IP02-0320-C-H/K, 2003 WL 21525058, at *3 (S.D. Ind. June 17, 2003) (holding plaintiff’s intent to change his sex did not support a claim of sex discrimination under Title VII).

⁶³ Kylar W. Broadus, *The Evolution of Employment Discrimination Protections for Transgender People*, in *TRANSGENDER RIGHTS*, *supra* note 21, at 93, 96 (“Logically, if Title VII prohibits an employer from discriminating against an employee because of her allegedly ‘unfeminine’ personality or appearance, then must it not also prohibit an employer from discriminating against a transsexual person, either for retaining some characteristic of his or her birth sex or for assuming a masculine or feminine identity?”).

⁶⁴ *E.g., Broadus*, 2000 WL 1585257, at *4 (“In *Price Waterhouse*, the plaintiff was not a transsexual.”).

⁶⁵ *Compare Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007), with *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004).

plaintiff and adopted *Ulane*.⁶⁶ Meanwhile, the Sixth Circuit has allowed Title VII claims by transgender plaintiffs to proceed on a *Price Waterhouse* sex-stereotyping theory.⁶⁷ The Second Circuit has also allowed a *Price Waterhouse* sex-stereotyping theory by a transgender plaintiff in an equal protection employment case, stating that the theory would be equally applicable to a transgender plaintiff's Title VII claim.⁶⁸

3. *Smith v. City of Salem*⁶⁹

In *Salem*, the Sixth Circuit held that protection from discrimination based on non-conformance with gender stereotypes under *Price Waterhouse* includes protections for transgender people. That court has allowed Title VII claims by transgender individuals that are based on a theory of impermissible sex stereotyping as articulated in *Price Waterhouse*. According to the Sixth Circuit, there is not “any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual.”⁷⁰ The Sixth Circuit saw no difference between the impermissible sex stereotyping in *Price Waterhouse* and the discriminatory behavior that often affects transgender individuals:

After *Price Waterhouse*, 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.⁷¹

The *Salem* court went so far as to state that the narrow approach taken by the *Ulane* court had been “eviscerated” by the holding in *Price Waterhouse*.⁷²

⁶⁶ See *Etsitty*, 502 F.3d at 1221. The Tenth Circuit did not outright reject *Etsitty*'s sex-stereotyping claim, but it stated that “[u]se of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes,” effectively eclipsing the availability of a *Price Waterhouse* claim in many transgender employment discrimination cases. *Id.* at 1224.

⁶⁷ See, e.g., *Smith*, 378 F.3d at 572–73 (holding that the district court erred in relying on a series of cases because they were overruled by *Price Waterhouse*).

⁶⁸ *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011).

⁶⁹ 378 F.3d 566.

⁷⁰ *Id.* at 575. Plaintiff *Smith* was an employee of the City of Salem and a transgender individual diagnosed with gender identity disorder. When *Smith* began to “assume[] a more feminine appearance and manner” at work in order to initiate his transition from male to female, his co-workers began to question him about his appearance, and the city ultimately ordered him to undergo a series of psychological evaluations or face termination. *Id.* at 572.

⁷¹ *Id.* at 574.

⁷² *Id.* at 573; accord *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000).

4. Etsitty v. Utah Transit Authority⁷³

On the other hand, in a case of first impression in the Tenth Circuit, the court held that a claim for discrimination based on transgender status was insufficient to state a claim for discrimination based on “sex” under Title VII.⁷⁴ The court declined to decide whether claims based on a *Price Waterhouse* theory of sex stereotyping would be made available to transgender individuals.⁷⁵ Plaintiff Krystal Etsitty sued her former employer, the Utah Transit Authority (UTA), when she was fired after beginning to transition from male to female.⁷⁶ Though she had been taking female hormones for nearly four years, Etsitty was presenting as male when she was hired and completed her training with the UTA.⁷⁷ When she informed her supervisor she was going to begin presenting as female and would be undergoing sex reassignment surgery, he was supportive.⁷⁸ But Etsitty was ultimately terminated for using the women’s restroom because the UTA expressed concern over its liability for a person with male genitalia using the female restrooms.⁷⁹ Ignoring the merits of Etsitty’s claim, the Tenth Circuit’s holding foreclosed the possibility of claims by other transgender people by setting a precedent in the Tenth Circuit that Title VII does not protect transgender individuals from discrimination on the basis of their transgender status.

5. Other Relevant Cases

In an unpublished opinion, *Kastl v. Maricopa County Community College District*,⁸⁰ the Ninth Circuit recognized a transgender plaintiff’s ability to state a claim for sex discrimination under Title VII.⁸¹ The transgender plaintiff claimed that her employer had taken an adverse employment action based on her failure to behave in accordance with the employer’s expectations for her gender.⁸² Despite recognizing the availability of relief under Title VII, the court affirmed the dismissal of her claim because the plaintiff failed to show that her employer denied her access to the women’s restroom because of her gender.⁸³

⁷³ 502 F.3d 1215 (10th Cir. 2007).

⁷⁴ *Id.* at 1221.

⁷⁵ *Id.* at 1224 (“This court need not decide whether discrimination based on an employee’s failure to conform to sex stereotypes always constitutes discrimination ‘because of sex’ and we need not decide whether such a claim may extend Title VII protection to transsexuals . . .”).

⁷⁶ *Id.* at 1219.

⁷⁷ *Id.* at 1218–19.

⁷⁸ *Id.* at 1219.

⁷⁹ *Id.*

⁸⁰ 325 F. App’x. 492 (9th Cir. 2009).

⁸¹ *Id.* at 493.

⁸² *Id.*

⁸³ *Id.* at 494.

Other district courts have allowed transgender plaintiffs to assert traditional sex discrimination claims, holding that transgender status is not a bar to such claims. *Schroer v. Billington*,⁸⁴ a D.C. District Court case, is unusual because it recognizes a cause of action for a transgender plaintiff not only on the basis of a *Price Waterhouse*-type sex stereotyping claim, but also “based on the language of the statute itself.”⁸⁵ With this holding, *Schroer* affirmed a minority view, which had previously only been recognized in a dissenting opinion from the Ninth Circuit, that discrimination based on transgender status is a form of *per se* sex discrimination.⁸⁶ In *Tronetti v. TLC Healthnet Lakeshore Hospital*,⁸⁷ the Western District of New York explicitly rejected *Ulane* and recognized the permissibility of Title VII claims for transgender plaintiffs.⁸⁸ And in *Lopez v. River Oaks Imaging & Diagnostic Group*,⁸⁹ the Southern District of Texas allowed a transgender plaintiff to state a claim for sex discrimination under Title VII using a *Price Waterhouse* sex stereotyping theory.⁹⁰

Despite the negative treatment of transgender sex discrimination claims by the *Ulane* court, the general trend is toward the recognition of some Title VII protection for transgender plaintiffs.⁹¹ Most courts recognizing such claims do so under a gender non-conformity or sex-stereotyping theory as seen in *Price Waterhouse*, but occasionally, as in *Schroer*, courts have recognized a cause of action under Title VII for claims of *per se* sex discrimination against a transgender plaintiff.

D. Cases Outside of Title VII

The Eleventh Circuit recently held not only that transgender discrimination is a form of sex discrimination, but also that such claims should be given intermediate scrutiny under the Equal Protection Clause.⁹² Plaintiff Glenn

⁸⁴ 577 F. Supp. 2d 293 (D.D.C. 2008).

⁸⁵ *Id.* at 303, 306.

⁸⁶ See *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977) (Goodwin, J., dissenting) (recognizing a transgender plaintiff’s ability to state a claim for discrimination under Title VII based on the “language of the statute itself”). See generally Lee, *supra* note 52, at 447–455 (discussing the merits and difficulties of the *per se* approach to transgender sex discrimination claims under Title VII).

⁸⁷ No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003).

⁸⁸ *Id.* at *4 (“This Court will not follow *Ulane*. Transsexuals are not gender-less, they are . . . protected under Title VII to the extent that they are discriminated against because of sex.”).

⁸⁹ 542 F. Supp. 2d 653 (S.D. Tex. 2008).

⁹⁰ *Id.* at 660. *But see* *Oiler v. Winn-Dixie La., Inc.*, No. 00–3114, 2002 WL 31098541, at *4–6 (E.D. La. Sept. 16, 2002) (finding that Title VII prohibits discrimination based on sex, but does not provide protection from discrimination on the basis of a gender identity).

⁹¹ Broadus, *supra* note 63, at 98 (“These recent positive decisions may be the harbinger of a new trend.”).

⁹² *Glenn v. Brumby*, 663 F.3d 1312, 1319–21 (11th Cir. 2011).

Morrison, a transgender individual known as Elizabeth Glenn, transitioned from male to female while working as a state employee in Georgia.⁹³ Her employer, the Georgia General Assembly's Office of the Legislative Council, terminated her after she began to present as a female at work.⁹⁴ Her supervisor "admitted that his decision to fire Glenn was based on the 'sheer fact of [her] transition.'"⁹⁵ On appeal, the Eleventh Circuit followed the *Price Waterhouse* reasoning to conclude that discrimination based on non-conformance with gender stereotypes is a form of sex discrimination in any context, including under the Equal Protection Clause.⁹⁶ Though Glenn did not raise a Title VII claim, the court recognized that if she had, the Title VII violation would be clear.⁹⁷

Likewise in the First and Ninth Circuits, courts have held that discrimination against transgender individuals based on their gender non-conformity is sex discrimination in contexts outside of Title VII. In *Rosa v. Park West Bank & Trust Co.*,⁹⁸ the First Circuit held that when a bank denied a loan application to a man because he was wearing a dress and make-up, the denial constituted sex discrimination in violation of the Equal Opportunity Credit Act.⁹⁹ In *Schwenk v. Hartford*,¹⁰⁰ the Ninth Circuit relied on Title VII sex discrimination jurisprudence to find that discrimination against a transgender plaintiff on the basis of her transgender status constituted a violation of the Gender Motivated Violence Act.¹⁰¹

II. THE MACY DECISION¹⁰²

On April 20, 2012, the EEOC issued an appellate decision in an administrative adjudication to clarify that "claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender

⁹³ *Id.* at 1314.

⁹⁴ *Id.*

⁹⁵ *Id.* at 1320–21.

⁹⁶ *Id.* at 1320.

⁹⁷ *Id.* at 1321 (determining that, based on Brumby's admission that Glenn was fired solely because of her transition, "[i]f this were a Title VII case, the analysis would end here") (citing *Lewis v. Smith*, 731 F.2d 1535, 1537–38 (11th Cir. 1984) ("If the evidence consists of direct testimony that the defendant acted with a discriminatory motive . . . the ultimate issue of discrimination is proved.")).

⁹⁸ 214 F.3d 213 (1st Cir. 2000).

⁹⁹ *Id.* at 215 ("Rosa did not receive the loan application because he was a man, whereas a similarly situated woman [that is, one wearing a dress,] would have received the loan application.").

¹⁰⁰ 204 F.3d 1187 (9th Cir. 2000).

¹⁰¹ *Id.* at 1202 ("Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.").

¹⁰² The facts in this section are taken solely from the Background section of the EEOC decision. *See* *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

identity, are cognizable under Title VII's sex discrimination prohibition"¹⁰³ The EEOC intended to address a jurisdictional issue whereby complaints based on sex discrimination are heard in a separate process than are claims based on sexual orientation or gender identity discrimination.¹⁰⁴ The implications of the decision, however, are not merely jurisdictional and procedural.

The complainant, Mia Macy, was a police detective in Phoenix, Arizona.¹⁰⁵ When she decided to relocate to San Francisco, she was offered a position (for which she was qualified) with a crime laboratory of the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (Bureau), a division of the Department of Justice (DOJ).¹⁰⁶ Macy asserts that the director of the crime lab told her during a phone interview that she would be able to have the job assuming no problems arose during her background check.¹⁰⁷ At the time of her relocation and transfer offer, Macy was still presenting as male and had not yet made the transition to female.¹⁰⁸

When Macy began to transition, she informed the contractor responsible for filling the position—also the entity responsible for conducting the background checks—that she was in the process of transitioning from male to female.¹⁰⁹ She requested that the contractor inform the director of the crime lab, and the contractor informed the Bureau.¹¹⁰ Several days later, she received an email from the contractor stating that due to budget cuts, the position had been eliminated.¹¹¹ Concerned about the abrupt change, Macy contacted an EEOC counselor, who informed her that someone else, who was “farther along” in the background check process, had filled the position.¹¹² Macy began to suspect the job offer had been rescinded because of her transgender status.¹¹³

To assert a claim of discrimination under Title VII, an employee must exhaust her administrative remedies with the EEOC before pursuing the claim in federal court.¹¹⁴ Macy consequently filed her EEOC discrimination complaint with the

¹⁰³ *Id.* at *4.

¹⁰⁴ *Id.* at *3.

¹⁰⁵ *Id.* at *1.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at *2.

¹¹³ *Id.*

¹¹⁴ The administrative exhaustion doctrine, which applies to many federal statutes, likewise applies in the context of Title VII claims:

In Title VII, Congress set up an elaborate administrative procedure, implemented through the EEOC, that is designed to assist in the investigation of claims of . . . discrimination in the workplace and to work towards the resolution of these claims through conciliation rather than litigation. Only after these

Bureau.¹¹⁵ Macy's initial formal complaint listed her gender as female and alleged discrimination based on "gender identity" and "sex stereotyping."¹¹⁶ The Bureau separated Macy's claim into two claims: the first for sex discrimination based on her self-identified female gender, and the second for discrimination based on gender identity.¹¹⁷ The first claim was accepted for processing under Title VII and the EEOC's procedures while the second was denied from the EEOC process.¹¹⁸ The Bureau informed her that under current policies, claims of discrimination based on gender identity could not be heard before the EEOC, and that the claim would be processed within the DOJ.¹¹⁹ The DOJ's separate process for adjudicating claims based on gender identity and sexual orientation does not follow the same procedures, "include the same rights," nor offer the same remedies as EEOC Title VII proceedings; importantly, the DOJ adjudication does not include the right to appeal its final decision to the EEOC.¹²⁰

Macy then filed a notice of appeal with the EEOC, asserting that the Bureau's denial of her gender identity claim constituted a "de facto dismissal" of that claim under Title VII and that the EEOC had jurisdiction over her entire claim.¹²¹ Macy therefore requested that the EEOC accept her entire claim for adjudication.¹²² The EEOC accepted the appeal "in the interest of resolving the confusion regarding [this] recurring legal issue"¹²³

The analysis outlined in the EEOC decision tracks many of the federal court decisions laid out above in Part I. The EEOC recognizes that, as used in Title VII, the word sex "encompasses both sex . . . and gender."¹²⁴ Gender, in turn, "encompasses not only a person's biological sex but also the cultural and social aspects"¹²⁵ associated with gender—in other words, sex stereotypes. According to the EEOC, a plaintiff's transgender status does not preclude a Title VII claim of discrimination based on gender non-conformance.¹²⁶ Furthermore, "consideration

procedures have been exhausted, and the plaintiff has obtained a "right to sue" letter from the EEOC, may he or she bring a Title VII action in court.

Patterson v. McLean Credit Union, 491 U.S. 164, 180–181 (1989) (citations omitted).

¹¹⁵ Macy, No. 0120120821, 2012 WL 1435995, at *2.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at *3.

¹²² *Id.* at *4.

¹²³ *Id.*

¹²⁴ *Id.* at *5; accord Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004).

¹²⁵ Macy, No. 0120120821, 2012 WL 1435995, at *6.

¹²⁶ See *id.* at *9 ("[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender.").

of gender stereotypes will inherently be a part of what drives discrimination against a transgendered individual.”¹²⁷ For example, an employer might discriminate against a transgender individual because the employee does not exhibit the traditional gender-normative behavior that an employer might expect of a biologically male employee. In this situation, the employer is discriminating based on gender stereotypes.

The EEOC also recognized the potential limitations of Title VII—Congress almost certainly did not have transgender individuals in mind when it enacted Title VII.¹²⁸ But Title VII reaches “comparable evils” that were not contemplated when it was enacted.¹²⁹ In *Macy*, the EEOC outlined the convincing analogy first set out by the district court in *Schroer*: if a plaintiff who initially tells her employer she is Christian converts to Judaism, and is subsequently fired for changing her religion, the employer’s actions would almost certainly constitute impermissible discrimination on the basis of religion under Title VII.¹³⁰ Similarly, an employment decision based on a change in an employee’s sex is impermissible discrimination “because of sex” under Title VII.¹³¹

III. CONGRESSIONAL INTENT

A. *Congressional Intent: Title VII*

The predominant view in employment discrimination law is that the complete lack of legislative history surrounding Congress’s inclusion of “sex” in Title VII makes it difficult to determine the scope of sex discrimination that Congress intended to prohibit.¹³² But the notion that there are no clues about Congress’s intent largely glosses over the robust debate about gender roles and the meaning of “sex”—especially in the employment context—that was occurring at the time of Title VII’s passage, partly as a result of the women’s movement.¹³³ Some of the strongest opponents of the inclusion of sex as a protected characteristic recognized that the term could be interpreted very broadly, threatening regulations put in place

¹²⁷ *Id.* at *8 (citing *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011)).

¹²⁸ *Id.* at *9 (“To be sure, the members of Congress that enacted Title VII in 1964 and amended it in 1972 were likely not considering the problems of discrimination that were faced by transgender individuals.”).

¹²⁹ *Id.* at *10; *see also* *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79–80 (1998); *accord* *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 679–81 (1983).

¹³⁰ *Macy*, No. 0120120821, 2012 WL 1435995, at *11 (citing *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008)).

¹³¹ *Id.* at *10 (citation omitted).

¹³² *See* Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1317 (2012) (“It is a [sic] commonplace in employment discrimination law that Title VII’s prohibition of sex discrimination has no legislative history.”).

¹³³ *Id.* at 1320–29.

to preserve the “special role”¹³⁴ of women in home and family life.¹³⁵ Proponents supported its inclusion for precisely that reason: a broad prohibition on sex discrimination in the workplace would disrupt the “traditional sex-role structure” of employment law and promote sexual equality.¹³⁶ Many, including the then-current EEOC Chairman Franklin D. Roosevelt, recognized the potentially “unlimited”¹³⁷ scope of the provision’s protections.

Courts struggled to interpret Title VII’s “sex” provision for more than a decade following its passage, culminating in the Supreme Court’s decision in *General Electric Co. v. Gilbert*¹³⁸ that established the narrow “traditional concept”¹³⁹ of sex discrimination. The Supreme Court held that an employment policy that denied pregnancy-related medical benefits to female employees was not a violation of Title VII.¹⁴⁰ The Court stated that the policy did not differentiate between men and women, but between pregnant persons and non-pregnant persons, suggesting that only actions that perfectly differentiated employees along biological sex lines—male versus female—would violate Title VII’s prohibition on sex discrimination.¹⁴¹

Many courts continue to follow this narrow “traditional concept” interpretation despite the enactment of the Pregnancy Discrimination Act (PDA) in 1978,¹⁴² which emphatically demonstrated Congress’s intent to reject the Court’s narrow construction of the term “sex.”¹⁴³ The PDA, passed directly in response to *Gilbert*, amended the definitions in Title VII to clarify that “the terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.”¹⁴⁴ The PDA addressed the rather absurd result in *Gilbert* that discrimination based on pregnant status was somehow not “because of sex.”¹⁴⁵

¹³⁴ *Id.* at 1320.

¹³⁵ *Id.* at 1320–26.

¹³⁶ *Id.* at 1326–27.

¹³⁷ *See id.* at 1329.

¹³⁸ 429 U.S. 125, 145–46 (1976).

¹³⁹ The traditional concept of sex discrimination is defined by the idea that “an employment practice would not have qualified as discrimination ‘because of sex’ unless it divided men and women into two groups, perfectly differentiated along biological sex lines.” Franklin, *supra* note 132, at 1309. Franklin argues that this concept is an “invented tradition.” *Id.* at 1312.

¹⁴⁰ *Gilbert*, 429 U.S. at 139–40.

¹⁴¹ *Id.* at 135.

¹⁴² Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2006)).

¹⁴³ *See, e.g., Oiler v. Winn-Dixie La., Inc.*, No. Civ.A 00-3114, 2002 WL 31098541, at *4 n.52 (E.D. La. Sept. 16, 2002).

¹⁴⁴ 42 U.S.C. § 2000e(k).

¹⁴⁵ Franklin, *supra* note 132, at 1311 n.16.

Furthermore, as a matter of legislative interpretation, some scholars have argued that statutes with “meager”¹⁴⁶ legislative history that lack definitions of key terms are “particularly suited to a dynamic form of interpretation.”¹⁴⁷ Engaging in this kind of statutory construction ensures that a statute best serves “the needs and goals of our present day society.”¹⁴⁸ According to the Supreme Court, Title VII “evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment,”¹⁴⁹ and courts may fulfill this intent by interpreting the term to reach a broader range of disparate treatment. Indeed, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils,” and courts may reach reasonably comparable evils by interpreting statutory terms broadly.¹⁵⁰ Title VII could plausibly be interpreted to cover the reasonably comparable evil of discrimination against individuals based on any non-conformance with sex and gender stereotypes, regardless of the gender identity of the plaintiff bringing the claim. While it may be unclear what Congress intended by the inclusion of the term sex in Title VII, the debates about the meaning of the term and Congress’s later amendments to Title VII suggest that Congress likely did not intend the narrow “traditional concept” as “invented” by the courts.¹⁵¹

B. Congressional Intent: ENDA

Because of the difficulty of obtaining protection under Title VII in the federal courts, LGBT advocates have attempted to pass separate legislation to ensure employment protections for LGBT individuals. The Employment Non-Discrimination Act (ENDA) is a proposed piece of federal legislation that would expressly prohibit employment discrimination on the basis of sexual orientation and gender identity. ENDA would create legal protections similar in scope to, but entirely separate from, Title VII’s provisions.¹⁵² ENDA was proposed in Congress for the first time in 1994,¹⁵³ but similar legislation aimed at protecting employees from discrimination based on sexual orientation was introduced much earlier.¹⁵⁴

¹⁴⁶ *Id.* at 1318.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1318–19 (quoting Arthur W. Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 VAND. L. REV. 456, 469 (1950)).

¹⁴⁹ *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78 (1998) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986)).

¹⁵⁰ *Id.* at 79.

¹⁵¹ Franklin, *supra* note 132, at 1312, 1319 (discussing why courts should reject the narrow “traditional concept” of sex).

¹⁵² See *Employment Non-Discrimination Act (ENDA)*, NAT’L GAY & LESBIAN TASK FORCE, http://www.thetaskforce.org/issues/nondiscrimination/ENDA_main_page (last visited Feb. 14, 2013).

¹⁵³ *Id.*

¹⁵⁴ The Equality Act, introduced in 1974, would have protected employees from discrimination on the basis of sexual orientation, but did not include gender identity.

The National Gay and Lesbian Task Force recently testified in a Congressional hearing on the most recent version of the ENDA, arguing that the bill was necessary to combat the employment discrimination faced by up to 68% of LGBT individuals because of their sexual orientation or identity.¹⁵⁵ Despite this testimony, Congress has not yet passed federal employment legislation that explicitly protects LGBT individuals.¹⁵⁶

Opponents of ENDA could argue that Congress's repeated rejection of the bill over the past twenty-five years indicates that Congress intended to exclude discrimination based on transgender status from the scope of sex discrimination under Title VII. But a legislature's failure to enact legislation is one of the weakest indicators of intent.¹⁵⁷ A legislature may have many reasons, invidious or innocent, for declining to adopt a particular piece of legislation. Interpreting Congress's failure to act in this case as dictating its intent regarding transgender employment rights presumptively oversimplifies the issue.

IV. DEFERENCE

A. Chevron Deference

The EEOC's decision in *Macy* is entitled to *Chevron* deference. In *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, the Supreme Court held that federal courts are bound by an administrative agency's interpretation of a statute it administers unless the interpretation is "arbitrary, capricious, or manifestly contrary to statute."¹⁵⁸ First, the initial inquiry for *Chevron* deference is whether the particular provision of the statute in question is unclear, silent on the point at issue, or ambiguous.¹⁵⁹ When either the plain language of the statute is ambiguous or Congress's intent is not explicitly clear (for example, if there is a "gap for the agency to fill" in interpreting a particular statutory provision), "there is an express delegation of authority to the agency to elucidate a specific provision

Nondiscrimination Legislation Historical Narrative, NAT'L GAY & LESBIAN TASK FORCE, <http://www.thetaskforce.org/issues/nondiscrimination/narrative> (last visited Feb. 14, 2013).

¹⁵⁵ *Testimony of the National Gay and Lesbian Task Force Action Fund: Hearing on S. 811 Before the S. Comm. on Health, Educ., Labor, and Pensions*, 112th Cong. (2012) (statement of Rea Carey, Executive Director, Nat'l Gay & Lesbian Task Force Action Fund), available at http://www.thetaskforce.org/downloads/release_materials/TF_enda_testimony_061112.pdf.

¹⁵⁶ *Id.*

¹⁵⁷ *Transamerica Mortg. Advisors v. Lewis*, 444 U.S. 11, 33–34 n.9 (1979) ("The failure of Congress to enact legislation is not always a reliable guide to legislative intent."); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381–82 n.11 (1969) ("[U]nsuccessful attempts at legislation are not the best of guides to legislative intent.").

¹⁵⁸ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

¹⁵⁹ *Id.* at 842 ("First, always, is the question whether Congress has directly spoken to the precise question at issue.").

of the statute.”¹⁶⁰ Second, once it is established that *Chevron* deference is due, an agency’s interpretation is binding if Congress intended to delegate such interpretive authority. Courts “may not substitute [their] own construction of a statutory provision”¹⁶¹ and “should not disturb”¹⁶² an agency’s interpretation unless it clearly contradicts Congress’s intent. *Chevron* involved formal notice-and-comment agency rulemaking by the Environmental Protection Agency (EPA), but *Chevron* deference has also been extended to other formal agency actions, including adjudications and enforcement actions.¹⁶³

The Supreme Court has suggested that the scope of *Chevron* deference may extend to other agency actions as well, but the parameters remain unclear.¹⁶⁴ For example, the Court has held that an administrative interpretation of a particular statutory provision should be afforded *Chevron* deference even where the delegation of authority is implicit rather than explicit, if “Congress would expect the agency to be able to speak with the force of law.”¹⁶⁵ The Supreme Court has attempted to clarify—though perhaps only muddied further—the scope of *Chevron* deference regarding informal agency actions such as opinion letters, policy manuals, and guidelines. For example, in *Christensen v. Harris County*,¹⁶⁶ the Court recognized the distinction between informal actions and formal ones, and declined to extend *Chevron* deference to an opinion letter.¹⁶⁷ Further, in *United States v. Mead Corp.*,¹⁶⁸ the Court declined to extend *Chevron* deference to an informal ruling letter.¹⁶⁹ On the other hand, the Court has also stated that *Chevron* deference might sometimes be justified “even when no . . . administrative formality was required and none was afforded,” suggesting that lack of formality does not preclude *Chevron* deference in all cases.¹⁷⁰

The meaning of the word sex as used in Title VII is ambiguous. When courts interpreted the term sex narrowly in early sex discrimination cases, Congress responded by amending the Act to clarify its meaning.¹⁷¹ Under the first step of the

¹⁶⁰ *Id.* at 843–44.

¹⁶¹ *Id.* at 844.

¹⁶² *Id.* at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)).

¹⁶³ Steven Croley, *The Scope of Chevron* 3 (July 2001) (unpublished manuscript), available at http://www.americanbar.org/content/dam/aba/migrated/adminlaw/apa/chevron_scopejuly.doc; see, e.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (extending *Chevron* deference to an INS enforcement action).

¹⁶⁴ Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *FORDHAM L. REV.* 1937, 1940 (2006).

¹⁶⁵ *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

¹⁶⁶ 529 U.S. 576 (2000).

¹⁶⁷ See *id.* at 587.

¹⁶⁸ 533 U.S. 218.

¹⁶⁹ *Id.* at 231.

¹⁷⁰ *Id.*

¹⁷¹ See, e.g., *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), *superseded by statute*, *Pregnancy Discrimination Act of 1978*, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42

Chevron analysis, the plain text of the statute leaves its meaning open for interpretation. It reads, “The terms ‘because of sex’ or ‘on the basis of sex’ include, *but are not limited to*, because of or on the basis of pregnancy, childbirth, or related medical conditions”¹⁷² This open-ended definition invites further interpretation by the courts, and the courts have responded by expanding the meaning of the term; for example, the Supreme Court extended the meaning of sex in Title VII to include “sex stereotyping.”¹⁷³ There is little to no legislative guidance regarding the meaning of the term in the act because it was added so abruptly, giving Congress little chance even to discuss what its intended meaning would be.¹⁷⁴ The meaning of the term has changed many times; courts, scientists, and scholars have long debated its scope¹⁷⁵ and it was debated even at the time of Title VII’s passage.¹⁷⁶

Under the second step of the *Chevron* analysis, the EEOC is the primary administrator and enforcement agency of Title VII. Notably, the Supreme Court itself has given full deference to the EEOC’s interpretations of particular statutory terms.¹⁷⁷ The Court has stated that “the EEOC’s interpretation of Title VII, for which it has primary enforcement responsibility . . . need only be reasonable to be entitled to deference.”¹⁷⁸ The *Macy* decision was made in the context of a formal adjudication proceeding, one of the hallmark situations entitled to *Chevron* deference.¹⁷⁹ The decision comes from an enforcement action explicitly authorized

U.S.C. § 2000e(k) (2006)), *as recognized in* *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 89 (1983).

¹⁷² 42 U.S.C. § 2000e(k) (emphasis added).

¹⁷³ *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

¹⁷⁴ Franklin, *supra* note 132, at 1318.

¹⁷⁵ *See generally* Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What is the “Plain Meaning” of “Sex” in Title VII of the Civil Rights Act of 1964?*, 18 TEMP. POL. & CIV. RTS. L. REV. 573, 597–616 (2009) (discussing at length the historical development and judicial interpretations of the meaning of the word “sex”).

¹⁷⁶ *See supra* Part III.A.

¹⁷⁷ *See, e.g., EEOC v. Comm. Office Prods. Co.*, 486 U.S. 107, 115 (1988) (recognizing the ambiguity of the term “terminate” and deferring to EEOC’s interpretation); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 112–14 (2002) (adopting EEOC’s interpretation of the term “charge” as defined in an EEOC regulation). Note that these holdings are both post-*Chevron*, and the Court afforded full deference to the EEOC actions, although without explicitly granting *Chevron* deference. In *Edelman*, Justice Thomas suggested in his concurring opinion that the EEOC interpretation should have received *Chevron* deference because it was “promulgated pursuant to sufficiently formal procedures.” *Edelman*, 535 U.S. at 123 (Thomas, J., concurring).

¹⁷⁸ *Comm. Office Prods. Co.*, 486 U.S. at 115.

¹⁷⁹ Though the Court did not explicitly state that formal adjudication and notice-and-comment rulemaking require *Chevron* deference, it did highlight the dichotomy between those situations and more informal interpretations. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (stating that interpretations in “opinion letters, . . . policy statements, agency manuals, and enforcement guidelines . . . do not warrant *Chevron*-style deference” in contrast to “formal adjudication or notice-and-comment rulemaking”).

by Congress,¹⁸⁰ the type of action also traditionally entitled to *Chevron* deference.¹⁸¹

Some administrative jurisprudence has held that the EEOC, as a primarily investigative and adjudicative body, does not have the kind of rulemaking authority that requires judicial deference as set out in *Chevron*. In *EEOC v. Arabian American Oil*,¹⁸² the Supreme Court declined to defer to the EEOC's interpretation of Title VII's extraterritorial reach as expressed in a series of documents including a letter from its General Counsel, testimony from its Chairman, and a policy statement issued in connection with the litigation.¹⁸³ And in *General Electric*, the Court likewise refused to adopt the EEOC's interpretation of Title VII in an opinion letter.¹⁸⁴ Those cases are distinguishable, however, because they both dealt with situations in which the EEOC was promulgating informal guidelines. *Arabian American Oil* is also distinguishable because the overriding concern in that case was extraterritorial foreign policy, an issue well outside the scope of the EEOC's authority.¹⁸⁵ But in a more recent case, the Supreme Court, after considering both *Chevron* and *Skidmore* deference, ultimately deferred to an interpretation by the EEOC contained in a formal regulation because it was "reasonable."¹⁸⁶

Justice Scalia has argued that all authoritative agency actions, even informal guidelines and including actions by the EEOC, should be afforded *Chevron* deference.¹⁸⁷ According to Scalia, in *Arabian American Oil*, the Court declined to defer to the EEOC's position only because the Court thought itself bound by its pre-*Chevron* decision in *General Electric*.¹⁸⁸ Justice Scalia also pointed out the inconsistency in the Court's application of *Chevron* with respect to the EEOC, noting that the state of the law regarding such deference is unsettled, and that it is an incorrect reading of *General Electric* "to say that the EEOC . . . is not entitled to deference."¹⁸⁹ Despite the Court's inconsistent and unclear application of *Chevron*

¹⁸⁰ 42 U.S.C. § 2000e-5 (2006).

¹⁸¹ See, e.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999).

¹⁸² 499 U.S. 244 (1991).

¹⁸³ *Id.* at 257–58.

¹⁸⁴ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 140–41, 143 (1976).

¹⁸⁵ *Arabian Am. Oil Co.*, 499 U.S. at 257 ("In *General Electric Co. v. Gilbert*, . . . we addressed the proper deference to be afforded the EEOC's *guidelines*." (emphasis added)).

¹⁸⁶ *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 395, 399 (2008).

¹⁸⁷ *Christensen v. Harris Cnty.*, 529 U.S. 576, 590 (2000) (Scalia, J., concurring) ("Quite appropriately, . . . we have accorded *Chevron* deference not only to agency regulations, but to authoritative agency positions set forth in a variety of other formats.").

¹⁸⁸ *United States v. Mead Corp.*, 533 U.S. 218, 255 (2001) (Scalia, J., dissenting).

¹⁸⁹ *Arabian Am. Oil Co.*, 499 U.S. at 260 (Scalia, J., concurring). At least one commentator has argued that denying *Chevron* deference to an EEOC interpretation is an abuse of discretion. Mary Ann MacLaughlan Weicher, Comment, *No Chevron Deference for EEOC's Interpretation of "Disability" in Family and Medical Leave Act—Navarro v. Pfizer Corp.*, 261 *F.3d* 90 (1st Cir. 2001), 36 *SUFFOLK U. L. REV.* 915, 916 (2003). In *Navarro v. Pfizer Corp.*, the First Circuit reversed a district court decision that had granted

deference, particularly in relation to the EEOC,¹⁹⁰ it is nevertheless true that a formal adjudication proceeding where Congress has expressly authorized the EEOC's enforcement of a statute will likely require *Chevron* deference.¹⁹¹ If *Chevron* deference applies in this case, federal district and circuit courts are bound by EEOC's interpretation of the scope of Title VII as articulated in the *Macy* decision.¹⁹² Should the Supreme Court decide that *Chevron* deference is warranted for the *Macy* ruling, then the Court itself would be bound by the EEOC's interpretation of "sex" under Title VII, because the Court has never ruled on the issue of whether the term sex includes transgender status in Title VII or any other statute.¹⁹³

B. Skidmore Deference

Even if an agency's decision is not afforded *Chevron* deference, it can still have persuasive value if several factors weigh in favor of deference.¹⁹⁴ In *Skidmore v. Swift* the Supreme Court recognized that when an administrative agency is not acting under an explicit delegation of power from Congress, its rulings nevertheless "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."¹⁹⁵ The weight of a particular judgment "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . ." ¹⁹⁶ Weighing an agency's interpretation under these factors is generally regarded as *Skidmore* deference, a lower form of deference than *Chevron* deference. The EEOC's guidelines, unlike

Chevron deference to an EEOC interpretation and applied a lower form of deference. *Navarro v. Pfizer Corp.*, 261 F.3d 90, 98 (1st Cir. 2001). This "lower" level of deference, known as *Skidmore* deference, because it was set forth in the Supreme Court decision *Skidmore v. Swift*, 323 U.S. 134 (1944), is discussed below. *See infra* Part IV.B.

¹⁹⁰ "[T]he Court has consistently refused to define what level of deference the [EEOC's] regulations are owed . . ." Hart, *supra* note 164, at 1938.

¹⁹¹ *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (affording *Chevron* deference where the statute states that "[t]he Attorney General shall be charged with the administration and enforcement of the statute" (internal quotation marks omitted)).

¹⁹² *See Schisler v. Sullivan*, 3 F.3d 563, 568 (2d Cir. 1993) (overruling four circuit court precedents because of *Chevron* deference to agency constructions adopted in a legislative rule); *Chemical Waste Mgmt. v. EPA*, 873 F.2d 1477, 1482 (D.C. Cir. 1989) (concluding it necessary under *Chevron* to overrule circuit precedent inconsistent with a newly-issued agency rule); 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 186–88 (4th ed. 2002).

¹⁹³ *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536–37 (1992) (noting that although an agency's regulations are generally due judicial deference, that deference will be withheld where the Supreme Court has previously interpreted a statute).

¹⁹⁴ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

its more formal proceedings, have routinely been given *Skidmore* deference.¹⁹⁷ Even if an administrative adjudicative decision is not accorded heightened deference by federal courts under *Chevron*, a court can and should adopt the agency's position if it is highly persuasive under the *Skidmore* factors.¹⁹⁸

Under the *Skidmore* framework there is also a strong argument that federal courts should adopt the EEOC's position in *Macy* as authoritative. First, under *Skidmore*, an administrative interpretation is particularly persuasive when the administrative agency has demonstrated "thoroughness evident in its consideration" of the issue.¹⁹⁹ In the *Macy* decision, the EEOC set out a comprehensive review of existing legal precedent related to the protection of transgender employees under Title VII, examining cases on both sides of the issue. The EEOC considered factors such as federal courts' various interpretations of the term sex in Title VII and the different theories of protection, and noted the apparent trend toward recognition of transgender employees' Title VII claims.

Second, the "validity of [an agency's] reasoning" can make its interpretation more persuasive.²⁰⁰ The EEOC restated one of the most compelling arguments made by the federal courts—namely, the religious convert analogy—which asserts that discrimination based on a transition from one sex to another is just as impermissible as discrimination based on conversion from one religion to another.

Third, an agency's internal consistency with its own "earlier and later pronouncements" can weigh in favor of deference.²⁰¹ Though the EEOC previously stated that "transsexual[ity] is not a protected basis under Title VII"²⁰²—ostensibly because it is not literally included in the text of the statute—it has never held that transgender status is a complete bar to relief under a sex discrimination Title VII claim. In an informal discussion letter sent by the EEOC Associate General Counsel Dianna Johnston on May 25, 2007, Ms. Johnston stated, "Whether discrimination against a transgendered individual may constitute discrimination based on sex in violation of Title VII is a factual question that cannot be determined outside the context of specific charges of discrimination"²⁰³ The EEOC finally had the opportunity to address exactly

¹⁹⁷ *E.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257 (1991) (quoting *Skidmore*, 323 U.S. at 140) ("Recognizing that 'Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations,' [the Supreme Court] held that the level of deference afforded [to the EEOC's guidelines] 'will depend upon' the factors laid out in *Skidmore*.").

¹⁹⁸ *Skidmore*, 323 U.S. at 140.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Balmes v. Daley*, EEOC Decision No. 01A05006, 2000 WL 34329672, at *2 (Aug. 25, 2000) (citation omitted).

²⁰³ Dianna B. Johnston, *Title VII: Sex Discrimination/Coverage of Transgendered*, EEOC.GOV (May 25, 2007), http://www.eeoc.gov/eeoc/foia/letters/2007/titlevii_sex_coverage_trans.html.

this issue in *Macy*, and it resolved the issue in favor of allowing claims for discrimination based on transgender status under the sex provision of Title VII.

Fourth, the catchall phrase in the *Skidmore* factors—“and all those factors which give it power to persuade”²⁰⁴—suggests that additional circumstances might make an agency’s interpretation more persuasive. In the case of the *Macy* decision, it is notable that the full five-member bipartisan Commission convened to participate in the adjudication, which occurs only rarely.²⁰⁵ This full commission might be convened, for example, if the Commission sees an important legal issue in need of clarification, such as an employment law issue about which the federal circuit courts currently disagree.²⁰⁶ Despite the EEOC’s varying positions regarding claims by transgender employees, the “thoroughness evident in [the EEOC’s] consideration, the validity of its reasoning,”²⁰⁷ and the special circumstance of the fully convened commission are likely to persuade a federal court to adopt the EEOC’s interpretation in the *Macy* decision.²⁰⁸

C. *En Banc* Review

Under the Federal Rules of Appellate Procedure, a circuit court of appeals may sit en banc to hear or rehear a case when it is necessary to ensure the uniformity of panel decisions within its circuit²⁰⁹ or when there is a question of exceptional importance before the court.²¹⁰ One example of an issue of exceptional importance is when a panel decision of a circuit conflicts with an authoritative decision by another circuit on the same issue.²¹¹ A petition for hearing or rehearing en banc may be filed within 14 days of the entry of judgment and must identify the reason for the petition as one of the two potential prerequisites for an en banc hearing.²¹² As discussed in Part I above, the Sixth, Ninth, and Eleventh Circuits have allowed Title VII sex discrimination claims by transgender individuals, whereas the Seventh and Tenth Circuits have declined to recognize the availability

²⁰⁴ *Skidmore*, 323 U.S. at 140.

²⁰⁵ See LISA MOTTET, NAT’L GAY & LESBIAN TASK FORCE, MOVEMENT ANALYSIS: THE FULL IMPACT OF THE EEOC RULING ON THE LGBT MOVEMENT’S AGENDA 3 n.5 (2012), available at http://www.thetaskforce.org/downloads/reports/reports/eeoc_movement_analysis.pdf.

²⁰⁶ *Id.*

²⁰⁷ *Skidmore*, 323 U.S. at 140.

²⁰⁸ While a change in an agency’s interpretation of a statutory provision suggests that the interpretation is “entitled to considerably less deference,” inconsistency alone does not preclude the adoption of an administrative agency interpretation when the other factors weigh in favor of deference. *Watt v. Alaska*, 451 U.S. 259, 273 (1981); see, e.g., *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 400 (2008) (giving deference to the EEOC’s interpretation of a statutory term despite “[s]ome degree of inconsistent treatment”).

²⁰⁹ FED. R. APP. P. 35(a)(1).

²¹⁰ *Id.* 35(a)(2).

²¹¹ *Id.* 35(b)(1)(B).

²¹² *Id.* 35(b)(1), (c), 40(a)(1).

of protection under Title VII for transgender plaintiffs.²¹³ This divergence means that a circuit court would have grounds to grant a rehearing en banc. Once en banc, a circuit court could reverse a prior decision to bring its position into accord with the EEOC's ruling.

When a plaintiff files a Title VII discrimination claim based on his or her transgender status in any circuit with a precedential holding contrary to the EEOC decision—for example, in the Tenth Circuit—it is likely that the court would dismiss the claim on the basis that transgender individuals are not a protected class under Title VII. Upon dismissal, the plaintiff can appeal to the circuit court of appeals, which would then likely affirm the dismissal of the claim.²¹⁴ The plaintiff can then file a petition for rehearing en banc. If the circuit court grants the motion for rehearing en banc, the plaintiff can make the argument, outlined above,²¹⁵ that the circuit court should grant deference to the EEOC's decision in order to bring the circuit court's precedent into alignment with the EEOC's interpretation of the scope of sex discrimination under Title VII. While far from ensuring protection for transgender plaintiffs in circuits with adverse precedent, this procedural availability provides an additional avenue to ensure a transgender plaintiff's case is heard.

Whether federal courts afford the *Macy* decision full deference under *Chevron* or merely find its reasoning persuasive under *Skidmore*, the result would be the same: Title VII protects transgender employees who experience discrimination based on their transgender status or gender identity.²¹⁶

CONCLUSION

Even if the federal courts are not bound by, or decline to adopt, the EEOC's decision in *Macy* regarding the scope of Title VII discrimination, the decision is nevertheless likely to influence employment practices by public and private employers throughout the country. The EEOC decision is binding on all federal government agencies as employers, which affects millions of federal employees.²¹⁷ The decision also gives transgender employees in both the private and public sectors the ability to state a claim for relief in administrative proceedings through the EEOC, which is a prerequisite to file a federal action in any employment discrimination case.²¹⁸

Additionally, as a practical matter, many private corporations implement and encourage employment practices that are on the safe side of Title VII in order to avoid costly litigation and negative publicity. The Human Rights Campaign reports

²¹³ See *supra* Part I.

²¹⁴ See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1228 (10th Cir. 2007).

²¹⁵ See *supra* Parts IV.A–B.

²¹⁶ *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at *6–7 (E.E.O.C. Apr. 20, 2012).

²¹⁷ MOTTET, *supra* note 205, at 5.

²¹⁸ See *supra* note 103 and accompanying text.

that in 2012, 46% percent of Fortune 500 companies had voluntarily enacted policies to prohibit discriminatory employment practices based on transgender status, compared to only 3 companies in 2000.²¹⁹ Furthermore, the EEOC and labor employment agencies throughout the country are being trained and educated on transgender issues in order to effectively investigate transgender employment discrimination complaints and develop the law in this area.²²⁰ Out of the millions of complaints each agency receives annually, organizations such as the National Gay and Lesbian Task Force are tracking the incidence of transgender discrimination cases for aggressive investigation.²²¹ The *Macy* decision, in combination with these efforts by LGBT advocates, puts employers on notice that discriminatory treatment of transgender individuals is actionable via the EEOC, and presumably, many employers will take heed.

Despite the apparent trend toward more comprehensive protections for transgender employees in the workplace, advocates remain only cautiously hopeful because an adverse holding by the Supreme Court could abruptly establish that transgender status is not protected under Title VII. But even if the Supreme Court rules against Title VII protection for transgender employees, the trend toward broader protections may continue. Advocates are steadily gaining ground in favor of the Employment Non-Discrimination Act and private, state, and municipal policies and ordinances protecting transgender individuals. Regardless of how protection is achieved, all individuals deserve an employment system in which they are protected from discrimination on the basis of characteristics that define their very identities. Gender identity is just as intrinsic as race or religious identity and should be protected just as vigorously.

²¹⁹ *LGBT Equality at the Fortune 500*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/lgbt-equality-at-the-fortune-500> (last visited Oct. 22, 2012).

²²⁰ MOTTET, *supra* note 205, at 4–5 & 4 n.10.

²²¹ *Id.* at 9.