
**WHOSE BATHROOM IS IT, ANYWAY?:
THE LEGAL STATUS OF
TRANSGENDER BATHROOM ACCESS
UNDER FEDERAL EMPLOYMENT LAW**

ALLISON BADER*

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*. Executive Senior Editor, *Southern California Law Review*, Volume 91; J.D. 2018, University of Southern California Gould School of Law; B.A. Political Science 2014, University of California, Los Angeles. I would like to thank Professor Ronald Garet and Professor David B. Cruz for their assistance and valuable insights on this project. I would also like to thank Kathy Bader and Seth Jones for their support. Finally, I would like to thank the staff and editors of the *Southern California Law Review* for their excellent work.

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INTRODUCTION

In many ways, Michael C. Hughes is an average American family man. He is a middle-aged father of four from Rochester, Minnesota. He has been married to his wife for twelve years. He has a broad, muscular frame and is partial to cowboy hats and wide belt buckles. But Hughes is unlike the average American family man in one fundamental way: he was born biologically female.¹ Hughes is one of the more than 1.4 million transgender adults in the United States,² a small but increasingly visible group of people who are currently facing a unique legal battle to use restrooms and single-sex facilities that align with their gender identity.³

Hughes garnered publicity with a viral photo taken in a public restroom, in protest of “bathroom bills”—laws that require Hughes to use women’s

1. Michael Hughes, *Transgender Lives: Your Stories*, N.Y. TIMES, <https://nyti.ms/2FdI6DG> (last visited May 9, 2018).

2. FLORES ET AL., WILLIAMS INSTITUTE, HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 2–3 (2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

3. *Restroom Access for Transgender Employees*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/restroom-access-for-transgender-employees> (last visited May 9, 2018).

restrooms and facilities, despite his gender identity.⁴ “Bathroom bill” is the common name for legislation that prohibits individuals from using bathrooms (or other private, single-sex facilities like locker rooms) that do not match their biological sex or sex markers on their identification documents, depending on the bill.⁵ Posing in front of the bathroom mirror in a women’s restroom, as female patrons look on questioningly, Hughes “presents” as a male—making him appear out of place in the restroom that nonetheless matches his biological sex. Hughes’ photo and its accompanying hashtag, “#WeJustNeedtoPee,” went viral in 2016, reflecting Americans’ rapt attention on transgender issues.⁶

Hughes’ photo was a direct reaction to North Carolina’s Public Facilities Privacy & Security Act, or House Bill 2 (“H.B. 2”), which to date remains the only bathroom bill to successfully pass a state legislature.⁷ H.B. 2 was enacted shortly after the passage of Ordinance 7056 in Charlotte, North Carolina, which prohibited discrimination on the basis of gender identity in Charlotte’s public accommodations and, in doing so, permitted transgender people to use the restrooms of their choosing.⁸ H.B. 2 prohibited individuals from using bathrooms and changing facilities in government buildings—including schools, government agencies, and courthouses—that did not correspond with the sex listed on their birth certificates.⁹ The bill also overturned Charlotte Ordinance 7056 and prohibited municipalities from enacting their own anti-discrimination policies.¹⁰ Many transgender rights activists argued that H.B. 2 was the most anti-LGBT piece of legislation then

4. Mitch Kellaway, *Trans Folks Respond to 'Bathroom Bills' With #WeJustNeedtoPee Selfies*, ADVOCATE (Mar. 14, 2015), <https://www.advocate.com/politics/transgender/2015/03/14/trans-folks-respond-bathroom-bills-wejustneedtopee-selfies>.

5. German Lopez, *Tennessee’s Anti-Transgender Bathroom Bill, Explained*, VOX (Apr. 7, 2016, 9:10 AM), <https://www.vox.com/2016/4/7/11381400/tennessee-transgender-bathroom-bill>.

6. *Id.*

7. See Public Facilities Privacy & Security Act, ch. 3, 2016 N.C. Sess. Laws 12 (codified as amended at N.C. GEN STAT. § 143-760 (2016)), *repealed by* ch.4, 2017 N.C. Sess. Laws 1 [hereinafter H.B. 2]; Joellen Kralik, “Bathroom Bill” *Legislative Tracking*, NATIONAL CONFERENCE OF STATE LEGISLATORS (July 28, 2017), <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx>.

8. Jason Hanna, Madison Park & Elliot C. McLaughlin, *North Carolina Repeals “Bathroom Bill,”* CNN POLITICS, <https://www.cnn.com/2017/03/30/politics/north-carolina-hb2-agreement/index.html> (last updated Mar. 30, 2017, 9:36 PM).

9. Notably, in North Carolina, an individual may only change the sex marker on their birth certificate if they have undergone full sexual reassignment surgery. See *Changing Birth Certificate Sex Designations: State-By-State Guidelines*, LAMBDA LEGAL, <https://www.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations> (last visited May 9, 2018).

10. David A. Graham, *North Carolina Overturns LGBT-Discrimination Bans*, ATLANTIC (Mar. 24, 2016), <https://www.theatlantic.com/politics/archive/2016/03/north-carolina-lgbt-discrimination-transgender-bathrooms/475125>.

operating in the United States.¹¹ It launched a series of lawsuits, as proponents and opponents of the bill prepared to battle over the application and extent of transgender rights.¹² It also faced severe pushback and resulted in harm to North Carolina's economy and public image.¹³ On March 30, 2017, a year after H.B. 2's passage, both the state House and Senate partially overturned the bill, doing away with the prohibition on transgender bathroom access.¹⁴

Although there are currently no state laws prohibiting transgender individuals from using the bathroom of their choice, transgender bathroom access remains an important issue for two reasons. First, numerous bathroom bills are currently pending: in the 2017 legislative session alone, sixteen states¹⁵ considered legislation that would restrict transgender access to bathrooms, locker rooms, and other sex-segregated facilities that match their assigned sex at birth or "biological sex."¹⁶ Second, private employers may adopt policies or practices preventing their transgender employees from accessing bathrooms and other single-sex facilities corresponding to their gender identity. This Note will focus on this second issue, dealing

11. See, e.g., Michael Gordon et al., *Understanding HB2: North Carolina's Newest Law Solidifies State's Role in Defining Discrimination*, CHARLOTTE OBSERVER (March 26, 2016, 11:00AM), <http://www.charlotteobserver.com/news/politics-government/article68401147.html>; Avianne Tan, *North Carolina's Controversial "Anti-LGBT" Bill Explained*, ABC NEWS (Mar. 24, 2016, 6:51 PM), <http://abcnews.go.com/US/north-carolinas-controversial-anti-lgbt-bill-explained/story?id=37898153>; Judy Woodruff & John Yang, *How North Carolina Signed a Bill Dubbed the Most Anti-LGBT Law in the U.S.*, PBS (Mar. 24, 2016, 8:07 PM), <https://www.pbs.org/newshour/show/how-north-carolina-signed-a-bill-dubbed-most-anti-lgbt-law-in-the-u-s>.

12. Craig Jarvis et al., *McCrorry, NC Lawmakers Sue Justice Department Over HB2; Feds Counter With Lawsuit*, CHARLOTTE OBSERVER (May 9, 2016, 10:35 AM), <http://www.charlotteobserver.com/news/politics-government/article76502777.html>; *McCrorry Drops House Bill 2 Lawsuit, Cites Costs*, ASSOC. PRESS (Sept. 18, 2016), <http://abc11.com/politics/mccrorry-drops-house-bill-2-lawsuit-cites-costs/1516428>; Press Release, U.S. Dep't of Justice, Justice Department Files Complaint Against the State of North Carolina to Stop Discrimination Against Transgender Individuals (May 9, 2016), <https://www.justice.gov/opa/pr/justice-department-files-complaint-against-state-north-carolina-stop-discrimination-against>.

13. Tom Jensen, *HB 2 Deeply Unpopular in North Carolina; Voters Think It's Hurting State*, PUB. POL'Y POLLING (Apr. 25, 2016), <http://www.publicpolicypolling.com/main/2016/04/hb-2-deeply-unpopular-in-north-carolina-voters-think-its-hurting-state.html>.

14. See ch.4, 2017 N.C. Sess. Laws 1 (codified as amended at N.C. GEN STAT. § 143-760 (2017)); Allen Smith, *N.C. Repeals "Bathroom Bill," Pre-Empts Local Employment Laws*, SOC'Y FOR HUMAN RESOURCE MGMT. (Mar. 31, 2017), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/h.b.-2-repeal.aspx>.

15. These states are: Alabama, Arkansas, Illinois, Kansas, Kentucky, Minnesota, Missouri, Montana, New York, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, and Wyoming. Joellen Kralik, *"Bathroom Bill" Legislative Tracking*, NAT'L CONF. OF STATE LEGISLATORS (July 28, 2017), <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx>.

16. *Id.*

specifically with the legality of private employers' policies restricting transgender bathroom access.

While transgender people have become more prominent in mainstream America over the last ten years, their status under the law is still an open question in many areas. This includes whether transgender employees are legally entitled to access bathrooms and single-sex facilities matching their gender identity in the workplace. The answer to this question is far from clear: in the absence of explicit federal protections against transgender discrimination, advocates and supporters look to Title VII of the Civil Rights Act of 1964 ("Title VII"), the main source of federal employment anti-discrimination law. Title VII prohibits discrimination on the basis of "sex" in employment and thus potentially provides protection for transgender persons against discrimination in the workplace.¹⁷

Multiple federal agencies, including the Equal Employment Opportunity Commission ("EEOC"), an independent federal agency that oversees enforcement of Title VII, have issued guidances that affirm these federal laws protect transgender employees from discrimination.¹⁸ The Obama administration also embraced this view.¹⁹ And multiple federal courts have found federal laws prohibiting sex discrimination also cover discrimination on the basis of transgender status, including the Courts of Appeals for the First, Sixth, Ninth, and Eleventh Circuits and lower courts in the second and fifth circuits. However, some argue that these agencies, the Obama administration, and the courts overstepped their sphere of authority and argue that Title VII was never intended to (and thus should not) offer protection for transgender status.²⁰ This includes Attorney General Jeff Sessions, who has helped steer the Trump-era Department of Justice in the

17. *Laws, Regulations & Guidance: Title VII and the Civil Rights Act of 1964*, EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/statutes/titlevii.cfm> (last visited May 9, 2018) [hereinafter EEOC].

18. Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Transgender Students (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>; *Title VII and the Civil Rights Act*, *supra* note 17; *Bathroom/Facility Access and Transgender Employees*, EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm> (last visited May 15, 2018).

19. Chris Geidner, *Justice Department Will Now Support Transgender Discrimination Claims in Litigation*, BUZZFEED NEWS (Dec. 18, 2014, 11:06 AM), https://www.buzzfeed.com/chrisgeidner/justice-department-announces-reversal-on-litigating-transgen?utm_term=.vhkNLmjp3#.sjyP4705N.

20. William Duncan, *How the Feds Began Rewriting Title IX To Push Trans Policies*, FEDERALIST (May 25, 2016), <http://thefederalist.com/2016/05/25/how-the-feds-began-rewriting-title-ix-to-push-trans-policies/>; Eugene Volokh, *Successful Religious Freedom Defense in Title VII Case Brought by Transgender Employee*, WASH. POST: VOLOKH CONSPIRACY (Aug. 19, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/19/successful-religious-freedom-defense-in-title-vii-case-brought-by-transgender-employee>.

direction of rolling back administrative policies that offered transgender employees protections in the workplace.²¹

This question is hotly debated, and both sides of the aisle have made public policy arguments in support of their interpretation of the law. Proponents of these policies cite privacy concerns, employee comfort, and the protection of women and children as the motivation for these policies.²² On the other hand, opponents argue these concerns are at best a myth and at worst a thinly veiled pretext for denying transgender people equal rights.²³ Moreover, they claim that not allowing transgender employees to access bathrooms corresponding to their gender identity poses serious privacy and safety concerns for those employees.²⁴

This Note will critically analyze arguments on both sides. Ultimately, this Note argues that Title VII should be read to protect transgender status and gender identity from discrimination on the basis of sex. Thus, employer policies that prevent transgender employees from using bathrooms matching their gender identity violate the provisions of Title VII that protect individuals from discrimination on the basis of sex. When this issue eventually goes to the Supreme Court, the Court should affirm that transgender people are protected from discrimination and disparate treatment in their employment under federal law and that denying them access to bathrooms matching their gender identity in the workplace is a form of discrimination.

This Note will proceed in six parts. Part I defines terms and describes the history of transgender status and bathroom access under the law. Part II provides background information on Title VII and discusses how other federal laws protecting against discrimination on the basis of sex, like Title IX, have been interpreted with regard to transgender status and bathroom access. Part III discusses the disjointed stance taken by the executive branch,

21. Kevin Johnson, *Jeff Sessions: Transgender People Not Protected from Workplace Discrimination*, USA TODAY (Oct. 5, 2017, 4:45 PM), <https://www.usatoday.com/story/news/politics/2017/10/05/jeff-sessions-transgender-people-not-protected-workplace-discrimination/735709001>.

22. Compare Jae Alexis Lee, *What if a Pervert Pretending to be Transgender Entered the Opposite Sex's Bathroom?*, HUFFINGTON POST (Oct. 28, 2017), http://www.huffingtonpost.com/quora/what-if-a-pervert-pretend_b_12677938.html, with Nicole Russell, *Don't Put My Five-Year-Old Girl in a Bathroom with a Transgender Boy*, FEDERALIST (July 24, 2015), <http://thefederalist.com/2015/07/24/transgender-bathroom-my-daughter>.

23. Katy Steinmetz, *Why LGBT Advocates Say Bathroom "Predators" Argument Is a Red Herring*, TIME (May 2, 2016), <http://time.com/4314896/transgender-bathroom-bill-male-predators-argument>.

24. See, e.g., Jeff Brady, *When a Transgender Person Uses a Public Bathroom, Who Is at Risk?*, NPR (May 15, 2016, 7:48 AM), <http://www.npr.org/2016/05/15/477954537/when-a-transgender-person-uses-a-public-bathroom-who-is-at-risk>.

including the postures of the Trump administration and administrative agencies. Part IV outlines various federal courts' approaches to transgender rights under Title VII, including bathroom access. Part V introduces the various arguments for and against reading Title VII as prohibiting discrimination on the basis of transgender status. Finally, Part VI argues that federal law protects transgender people from discrimination on the basis of their gender identity in employment and prohibits private employer policies that restrict transgender bathroom access.

I. BACKGROUND

A. DEFINING TRANSGENDER

Before diving into the substance of the debate over transgender discrimination's legal protections, it is helpful to define the terms that will be used throughout this Note and provide brief information on transgender individuals. Transgender people (or "transpersons") identify with a gender that does not correspond to their biological sex as assigned at birth.²⁵ Most commonly, transgender people identify with the opposite sex from what they were assigned at birth.²⁶ For example, a person who was born biologically male but identifies as a female is referred to as a trans-woman, and a person who was born biologically female but identifies as a male is called a trans-man. However, the term transgender may also apply to people who do not exclusively identify as either male or female—for example, genderfluid, genderqueer, and agender people, and those who identify with a third gender outside of the male-female binary.²⁷ The term transgender does not conventionally apply to cross-dressers—individuals who derive pleasure or satisfaction from dressing as the opposite sex—unless those individuals have gender identities that do not match their sex at birth.²⁸ Finally, it is a common misconception that being transgender relates in some way to sexual orientation. However, transgender status is completely separate from sexual orientation, and transgender individuals can be straight, gay, lesbian, bisexual, and so on.²⁹

A "gender transition" is the process by which transgender people begin "presenting" as their gender identity (that is, taking steps to outwardly appear as the sex matching their gender identity and identifying themselves as such).

25. See *Transgender FAQ*, GLAAD, <http://www.glaad.org/transgender/transfaq> (last visited May 15, 2018).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

This process is sometimes coupled with undergoing medical treatments or procedures to change their biological sex.³⁰ These medical treatments may include the following: hormone replacement treatment; breast reduction or augmentation; and sexual reassignment surgery, which involves reconstructing the genitals to match those of the biological sex that corresponds with the individual's gender identity.³¹ Not all transgender people undergo procedures or medical treatment in their transitions, and the desire or intent to have medical procedures is not a requirement for being transgender. When a transgender person physically appears as the sex corresponding with their gender identity to the public at large, this is called "passing."³²

Transgender status is no longer considered a mental health disorder by the American Diagnostic and Statistical Manual of Mental Disorders ("DSM"), though it once was.³³ However, the DSM and many mental health professionals recognize "gender dysphoria"—the discomfort and distress associated with one's assigned gender role—as a mental health disorder in need of treatment.³⁴ Indeed, treatment plans can include "counseling, cross-sex hormones, puberty suppression and gender reassignment surgery."³⁵

It is important to note that the word "transsexual," which was previously used to describe transpeople, is disfavored by the transgender community³⁶ and will not be used in this Note.

B. HISTORY OF TRANSGENDER STATUS & RIGHTS IN THE UNITED STATES

Transgender status and the concept of gender identity is not a recent phenomenon. Individuals from many cultures over time have identified with genders that do not match their biological sex.³⁷ For example, many Native

30. *Id.*

31. *Id.*

32. *Id.*

33. See AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013). See also Wynne Parry, *Gender Dysphoria: DSM-5 Reflects Shift in Perspective on Gender Identity*, HUFFINGTON POST, http://www.huffingtonpost.com/2013/06/04/gender-dysphoria-dsm-5_n_3385287.html (last updated Aug. 4, 2013).

34. Ranna Parekh, *What is Gender Dysphoria?: Treatment*, AM. PSYCHIATRIC ASS'N, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (last updated Feb. 2016).

35. *Id.*

36. FENWAY HEALTH, GLOSSARY OF GENDER & TRANSGENDER TERMS 15 (2010), http://fenwayhealth.org/documents/the-fenway-institute/handouts/Handout_7-C_Glossary_of_Gender_and_Transgender_Terms__fi.pdf.

37. See Avery Martens, Commentary, *Transgender People Have Always Existed*, ACLU OHIO (June 10, 2016), <http://www.acluohio.org/archives/blog-posts/transgender-people-have-always-existed>; *A Map of Gender-Diverse Cultures*, PBS (Aug. 11, 2015), <http://www.pbs.org/independentlens>

American tribes recognized a third gender, which embraced biological males who identified with a gender separate from male and female.³⁸ These individuals were sometimes referred to as “two-spirit” people.³⁹ According to some scholars, at least 155 Native American tribes historically accepted these two-spirit people who existed outside of the gender binary.⁴⁰ In addition, during the American Civil War, many biological women disguised their sex to fight as soldiers; although most who survived presumably lived as women after the war, some lived out the rest of their lives as men.⁴¹ The most famous example, Albert Cashier, “served in the army as a man, lived his life as [a] man and was buried at 71 with full military honors in 1915, as a man,” despite being biologically female.⁴² Almost a century after the Civil War, in 1951, Christine Jorgensen became famous for undergoing the first sex reassignment surgery that was widely publicized in the United States, bringing an early transition to light.⁴³

But while people have long identified as transgender, at least in effect if not in name, there is no question that transgender people and the legal questions surrounding their rights have become much more visible in the last decade. Transgender celebrities like Chaz Bono (formerly Chastity Bono), the son of musicians Cher and Sonny Bono, and Matrix directors Lana and Lilly Wachowski (formerly Larry and Andrew Wachowski) brought media attention to transgender people by publicly coming out in 2009, 2010, and 2016, respectively.⁴⁴ In 2014, Laverne Cox, a transgender woman and star of the Netflix hit show “Orange is the New Black,” became the first openly transgender person to be nominated for an Emmy in an acting category for

/content/two-spirits_map.html.

38. John Leland, *A Spirit of Belonging, Inside and Out*, N.Y. TIMES (Oct. 8, 2006), <http://www.nytimes.com/2006/10/08/fashion/08SPIRIT.html>.

39. See generally HARLAN PRUDEN & SE-AH-DOM EDMO, TWO-SPIRIT PEOPLE: SEX, GENDER & SEXUALITY IN HISTORIC AND CONTEMPORARY NATIVE AMERICA (2014), http://www.ncai.org/policy-research-center/initiatives/Pruden-Edmo_TwoSpiritPeople.pdf.

40. Trista Wilson, Comment, *Changed Embraces, Changes Embraced? Renouncing the Heterosexist Majority in Favor of a Return to Traditional Two-Spirit Culture*, 36 AM. INDIAN L. REV. 161, 169 (2011).

41. Steve Hendrix, *A History Lesson for Trump: Transgender Soldiers Served in the Civil War*, WASH. POST (Aug. 25, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/07/26/a-history-lesson-for-trump-transgender-soldiers-served-in-the-civil-war/?utm_term=.79df6a8d4c44.

42. *Id.*

43. John T. McQuiston, *Christine Jorgensen, 62, Is Dead; Was First to Have a Sex Change*, N.Y. TIMES (May 4, 1989), <http://www.nytimes.com/1989/05/04/obituaries/christine-jorgensen-62-is-dead-was-first-to-have-a-sex-change.html>.

44. See, e.g., Erica Keppler, *Chaz Bono's Place in History*, HUFFINGTON POST, http://www.huffingtonpost.com/erica-keppler/chaz-bonos-place-in-histo_b_981508.html (last updated Feb. 2, 2016); *Lana Wachowski Received the HRC Visibility Award*, HUMAN RIGHTS CAMPAIGN (Oct. 25, 2012), <https://www.hrc.org/videos/videos-lana-wachowski-receives-the-hrc-visibility-award>.

her portrayal of the transgender inmate Sophia Buset.⁴⁵ In the same year, Ms. Cox was on the cover of *Time*, stirring up conversations about transgender people and gender identity at dinner tables across the country.⁴⁶

Finally came a tipping point for transgender visibility: Olympic gold medal-winning decathlete Caitlyn Jenner (formerly Bruce Jenner) publicly came out as a trans-woman in April 2015.⁴⁷ Ms. Jenner's coming out was, in many ways, the perfect vehicle for bringing transgender issues to light. To older generations, the 67-year-old was an American hero and phenom who brought home gold in the 1974 Olympics.⁴⁸ To younger generations, Jenner was the stepfather of Kim Kardashian and member of the Kardashian clan, one of America's most famous families. As arguably the most famous openly transgender person in the world, Ms. Jenner's public coming-out and televised transition firmly solidified transgender people as prominent players in media and entertainment.

Most recently, in a historic moment for transgender representation in government, Virginia House of Delegates candidate Danica Roem became the first openly transgender woman to win a seat in a state legislature in November 2017.⁴⁹ Roem's win was particularly notable because she unseated incumbent Republican candidate Robert G. Marshall, the author of Virginia's ultimately unsuccessful bathroom bill.

Yet despite these changes, the legal status of transgender people and the rights they are afforded vary widely across the country and depend on the laws enacted within each state. Though the 14th Amendment includes a general guarantee of equal protection,⁵⁰ transgender people are not explicitly a protected class under federal law.⁵¹ Congress has repeatedly tried, and

45. Aleksandra Gjorgievska & Lily Rothman, *Laverne Cox Is the First Transgender Person Nominated for an Emmy—She Explains Why That Matters*, TIME (July 10, 2014, 4:00 PM), <http://time.com/2973497/laverne-cox-emma>.

46. Katy Steinmetz, *Laverne Cox Talks to TIME About the Transgender Movement*, TIME (May 29, 2014), <http://time.com/132769/transgender-orange-is-the-new-black-laverne-cox-interview>.

47. Daniel D'Addario, *Bruce Jenner Comes Out as Transgender: "For All Intents and Purposes, I Am a Woman"*, TIME (Apr. 24, 2015, 10:53 PM), <http://time.com/3835205/bruce-jenner-diane-sawyer-transgender>.

48. Arash Markazi, *How Bruce Jenner Became an Olympic Icon Exactly 39 Years Ago*, ESPN (July 30, 2015), http://www.espn.com/olympics/story/_/id/13346959/bruce-jenner-became-olympic-icon-exactly-39-years-ago.

49. Susan Milligan, *Danica Roem Becomes First Transgender Woman to Win State Seat*, U.S. NEWS (Nov. 7, 2017, 9:53 PM), <https://www.usnews.com/news/politics/articles/2017-11-07/danica-roem-becomes-first-transgender-woman-to-win-state-seat-in-virginia>.

50. See U.S. CONST. amend. XIV.

51. *Compare* Adkins v. City of New York, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015), *with* Glenn v. Brumby, 663 F.3d 1312, 1319 (11th Cir. 2011).

failed, to pass the Employment Non-Discrimination Act (“ENDA”), a law that would include explicit protections against both sexual orientation and gender identity discrimination in the workplace.⁵² Given the current makeup of the Republican-controlled Congress, it seems unlikely the ENDA or a similar law will pass anytime soon.⁵³ Thus, there are no over-arching federal laws offering employees protection from discrimination on the basis of transgender status. As of January 2017, twenty-one states and at least 225 local jurisdictions had adopted legislation specifically prohibiting discrimination based on gender identity or transgender status.⁵⁴ These protections variably include prohibitions on discrimination in housing, employment, and public accommodations.⁵⁵

Nevertheless, many questions remain for transgender people in the remaining states, who face potential discrimination from employers, schools, and the state itself without recourse. This is especially true since the Supreme Court has not addressed whether existing federal laws, like Title VII, apply to transgender status or prevent discrimination on the basis of gender identity.⁵⁶ Throughout history, transgender people have faced, and continue to face, discrimination in a variety of areas including: employment, housing, public accommodations, education, health, marriage, parenting, and adoption.⁵⁷ Transgender people are also predisposed to higher levels of depression and suicide, face substantially higher homelessness rates, and are more often victims of violent crimes than their non-transgender peers.⁵⁸ Unfortunately, transgender people do not fare any better in the workplace; 47% of those surveyed by the National Transgender Discrimination Survey

52. *About ENDA*, AMERICANS FOR WORKPLACE OPPORTUNITY, <http://web.archive.org/web/20160318164443/http://workplaceopportunity.org/about-enda> (last visited May 15, 2018).

53. See Shaan Rizvi, *The Latest LGBT Legal Updates for the Workplace*, EMPLOYMENT PRACTICES SOLUTIONS (Feb. 28, 2017), <http://www.epspros.com/news-resources/whitepapers/2017/the-latest-lgbt-legal-update-for-the-workplace%20.html>.

54. *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender> (last visited May 15, 2018).

55. *Id.*

56. Aaron Lacey & Jesse Doggendorf, *A Look at the Legal Issues in the Transgender Bathrooms Debate*, THOMPSON COBURN LLP (Aug. 5, 2016), <http://www.thompsoncoburn.com/insights/blogs/regulation/post/2016-08-05/a-look-at-the-legal-issues-in-the-transgender-bathrooms-debate>.

57. See Angela Dallara, *Groundbreaking Report Reflects Persistent Discrimination Against Transgender Community*, GLAAD (Feb. 4, 2011), <https://www.glaad.org/2011/02/04/groundbreaking-report-reflects-persistent-discrimination-against-transgender-community>. See generally JAIME M. GRANT ET AL., *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY* (2011), https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf.

58. Katy Steinmetz, *Why Transgender People Are Being Murdered at a Historic Rate*, TIME (Aug. 17, 2015), <http://time.com/3999348/transgender-murders-2015>.

reported experiencing adverse job outcomes as a result of their transgender status and 90% reported experiencing harassment, mistreatment, or discrimination on the job.⁵⁹

C. TRANSGENDER BATHROOM ACCESS IN THE UNITED STATES

The laws surrounding transgender peoples' access to restrooms and other single-sex facilities matching their gender identity is equally muddy. In some states, using a restroom that does not match an individual's biological sex or "official" state-recognized sex found on identification documents is not a criminal act.⁶⁰ Other states have gone further and passed non-discrimination laws that specifically give individuals the right to use single-sex restrooms and other gendered public accommodations that conform with their gender identity.⁶¹ In these states, there are no legal repercussions for transgender people who use restrooms or facilities that do not match their biological sex or identification markers.

In other states, using a public restroom that does not correspond with an individual's biological or state-recognized sex is quasi-illegal.⁶² This means that if an individual is told to leave a restroom by a security guard or police officer and refuses, they may be cited or arrested for disturbing the peace.

At the other end of the spectrum, some states have passed or considered bathroom bills that specifically require individuals to use restrooms and other single-sex facilities that match the sex listed on their birth certificates.⁶³ In these jurisdictions, transgender people must use facilities corresponding to the sex that is listed on their IDs, use gender neutral or "family" restrooms, or use restrooms specifically designated for transgender people.⁶⁴ While North Carolina remains the only state to pass a bathroom bill, Florida, Arizona, Texas, and Kentucky are among states that have considered such laws.⁶⁵

Finally, some jurisdictions have taken a different approach to resolve this problem, addressing the facilities themselves. For example, California passed a law in September 2016 that required all single-occupancy restrooms

59. GRANT ET AL., *supra* note 57.

60. *National Equality Map*, TRANSGENDER L. CTR., <https://transgenderlawcenter.org/equalitymap> (last updated Feb. 7, 2018).

61. *Id.*

62. *Id.*

63. *Id.*

64. "*Bathroom Bill*" *Legislative Tracking*, *supra* note 7.

65. *Id.*

to be gender-neutral.⁶⁶ Although this law is limited to single-occupancy restrooms and does not apply to many restrooms in the state, it is one of the more progressive approaches taken by a state. Vermont passed a similar law on May 11, 2018.⁶⁷ As of May 2018, no other states had passed similar legislation.

D. TRANSGENDER BATHROOM ACCESS IN THE WORKPLACE

Additional legal questions are implicated when examining transgender bathroom access in the employment sphere. Without the passage of an amendment to Title VII or clarification from the Supreme Court, it is unclear whether the prohibition on “sex” discrimination in the workplace applies to discrimination on the basis of transgender status or gender identity. If it does apply to such discrimination, bathroom bills restricting transgender access to gender identity-affirming facilities would violate federal law. Moreover, this could make private employers liable for discrimination under Title VII if they refuse to allow their transgender employees to access facilities matching their gender identities.

However, even if transgender status was covered by the word “sex” in Title VII, it is unclear whether prohibiting employees from using restrooms or other single-sex facilities that do not correspond with their biological sex is discriminatory. The argument has been made that employers enforcing such rules would not be discriminating on the basis of sex because they would be allowing all employees to have equal access to the restroom or single-sex facility that matches that individual’s biological sex.⁶⁸ Of course, opponents of bathroom bills and other restrictions on transgender bathroom access argue that such actions are discriminatory because they allow cisgender employees to access bathrooms matching their gender identities, but not transgender employees, resulting in disparate treatment.⁶⁹

There is an additional wrinkle: the Occupational Safety and Health Administration (“OSHA”), an agency of the United States Department of Labor, views bathroom access as a basic condition of employment and

66. Jeremy B. White, *All-Gender Bathroom Bill Passes California Assembly*, SAC. BEE (May 9, 2016, 2:25 PM), <http://www.sacbee.com/news/politics-government/capitol-alert/article76595197.html>.

67. Kwegyirba Croffie, *Vermont Passes Gender-Neutral Bathroom Bill*, CNN (May 13, 2018, 8:50 PM), <https://www.cnn.com/2018/05/13/us/vermont-gender-neutral-restroom-bill/index.html>.

68. See, e.g., *NC Gov Defends “Bathroom Bill,” Says Law Is About Privacy, Not Discrimination*, FOX NEWS (Apr. 29, 2016), <http://www.foxnews.com/politics/2016/04/29/nc-gov-defends-bathroom-bill-says-law-is-about-privacy-not-discrimination.html>.

69. Alia E. Dastagir, *The Imaginary Predator in America’s Transgender Bathroom War*, USA TODAY (Apr. 29, 2016, 5:32 PM), <http://www.usatoday.com/story/news/nation/2016/04/28/transgenderbathroom-bills-discrimination/32594395>.

“requires employers to provide their employees with toilet facilities.”⁷⁰ For this reason, OSHA prohibits employers from putting “unreasonable restrictions” on employees’ restroom access.⁷¹ To the extent that requiring a transgender employee to use the bathroom that corresponds with their biological sex may be interpreted to “unreasonably restrict” that individual’s access to employer restrooms, employers may be legally required to offer transgender employees an alternative.⁷² This may feasibly include access to either a private or gender-neutral bathroom or to a bathroom matching that individual’s gender identity.

II. FEDERAL ANTI-DISCRIMINATION LAWS AND TRANSGENDER RIGHTS

A. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964 is the fundamental federal employment discrimination law in the United States. Title VII states that an employer covered under the act may not discriminate against employees on the basis of their race, color, religion, sex, or national origin.⁷³ Specifically, Title VII prohibits discrimination on the basis of these protected categories in the terms, conditions, and privileges of employment. Thus, employees do not have a claim for disparate treatment under Title VII, unless their employer took an adverse employment action against them because of their race, color, religion, sex, or national origin. Although Title VII breaks up employers into two categories, federal employers and private sector employers, and addresses them separately, the laws are analogous in their prohibition of discrimination on the basis of the defined protected characteristics.⁷⁴ The Equal Employment Opportunity Commission (“EEOC”) is tasked with interpreting and enforcing Title VII.

What is covered under “sex” discrimination has long been a subject for debate and has been interpreted to cover an expanding set of actions over time.⁷⁵ When the Civil Rights Act of 1964 was originally proposed, it did

70. See, e.g., *Interpretation of 20 C.F.R. 1910.141(c)(1)(i): Toilet Facilities*, Occupational Safety and Health Admin. (Apr. 4, 1998), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22932; OCCUPATIONAL SAFETY AND HEALTH ADMIN., BEST PRACTICES: A GUIDE TO RESTROOM ACCESS FOR TRANSGENDER WORKERS (2015) <https://www.osha.gov/Publications/OSHA3795.pdf>.

71. BEST PRACTICES, *supra* note 70.

72. *Id.*

73. EEOC, *supra* note 17.

74. *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756, at *6 (Apr. 1, 2015).

75. See generally *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Ulane v. E. Airlines Inc.*,

not include sex as one of the characteristics it would protect from employment discrimination.⁷⁶ At the time, the concept of prohibiting employers from discriminating against female employees (who were deemed to be covered by this protection) was so radical that it almost prevented the Civil Rights Act from being passed.⁷⁷ In fact, some argue that staunch civil rights opponent, Representative Howard W. Smith (Virginia), proposed that the bill include sex “to prevent discrimination against another minority group, the women,” in an effort to kill the bill.⁷⁸ Nonetheless, the Civil Rights Act, with Title VII, was passed.⁷⁹ In its early days, the EEOC largely ignored sex as a discrimination category under Title VII and viewed it as a “fluke” that was not intended by the passage of the bill.⁸⁰ As protection against sex discrimination has grown to be a critical element of Title VII, however, the slapdash birth of sex as a protected category has made questions of what Congress intended to protect somewhat unclear.

Because Title VII does not define “sex” or make explicit reference to protection for transgender status, it is unclear if discrimination against transgender employees is protected under the law. One of the earliest legal challenges to whether transgender status was a protected characteristic came in 1984, in *Ulane v. Eastern Airlines, Inc.*⁸¹ In *Ulane*, a pilot who was born biologically male underwent sex reassignment surgery and began publicly identifying as a woman. She was terminated because of her transition, as the airline argued she would distract her flight crew and prevent them from working in a manner conducive to safety. *Ulane* subsequently filed a claim with the EEOC for sex discrimination in violation of Title VII. At the trial court level, District Court Judge Grady held for *Ulane*, finding that Eastern Airlines had discriminated against *Ulane* on the basis of her transgender status, which was covered as a form of sex discrimination under Title VII.⁸² Judge Grady also found that *Ulane* was discriminated against for being a

742 F.2d 1081 (7th Cir. 1984); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (collecting cases).

76. See, e.g., GILLIAN THOMAS, *BECAUSE OF SEX* 1–7 (2016); Scott Highhouse, *The History Corner: Was the Addition of Sex to Title VII a Joke? Two Viewpoints*, SOC’Y FOR INDUST. & ORG. PSYCH., <http://www.siop.org/tip/jan11/12highhouse.aspx> (last visited May 15, 2018); Mark Joseph Stern, *How a 1964 Civil Rights Law Makes North Carolina’s Bathroom Bill Illegal*, SLATE (May 18, 2016, 10:14 AM), http://www.slate.com/blogs/outward/2016/05/18/sex_discrimination_is_trans_discrimination_gilliam_thomas_explains.html.

77. See THOMAS, *supra* note 76, at 3.

78. See Jo Freeman, *How “Sex” Got into Title VII: Persistent Opportunism As a Maker of Public Policy*, 9 LAW & INEQ. 163, 163–75 (1991).

79. *Id.*

80. *Id.*

81. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1082 (7th Cir. 1984).

82. *Id.*

woman, which was also prohibited by Title VII.⁸³ In his opinion, Judge Grady relied on scientific information to examine how “sex” could mean more than male or female, including other nuances of sexual identity, such as gender identity.⁸⁴ He also rejected the argument that Title VII was not intended to apply to transgender status because “Congress never intended anything one way or the other on the question of whether the term, ‘sex,’ would include transsexuals.”⁸⁵ This, in his view, justified a broad understanding of “sex” that included psychological and social understandings.⁸⁶ However, Judge Grady’s ruling was reversed on appeal when the Seventh Circuit refused to apply Title VII sex discrimination to Ulane’s case, holding explicitly that: (1) Title VII does not prohibit discrimination against transgender status and (2) Ulane was not a woman under the law.⁸⁷

Although the Supreme Court has never explicitly found that Title VII prohibits transgender discrimination, the Court has held that sex discrimination includes discrimination against gender expression in the form of gender stereotyping.⁸⁸ In *Price Waterhouse v. Hopkins*, the Court used a broad definition of “sex” when it extended Title VII sex discrimination to prohibit the actions of an employer who discriminated against its female employee for dressing and acting overly “masculine.”⁸⁹ In that case, Ann Hopkins sued her former employer, the accounting firm Price Waterhouse, after she was denied partnership. Hopkins argued that she faced this adverse employment action because she didn’t match the other partners’ ideas of how a woman should act, speak, and dress.⁹⁰ Indeed, representatives of the firm instructed her to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁹¹ The Supreme Court held that the firm discriminated against Hopkins on the basis of her sex when it didn’t offer her partnership because she did not conform to stereotypical ideals of femininity.

Importantly, post-*Price Waterhouse*, it is unclear whether a sex-

83. *Id.*

84. *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 823, 825 (N.D. Ill. 1983), *rev’d*, 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985) (“After listening to the evidence in this case, it is clear to me that there is no settled definition in the medical community as to what we mean by sex.”).

85. *Id.* at 823–25.

86. *See id.*

87. *See Ulane*, 742 F.2d at 1084–87.

88. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

89. *Id.* at 228–36.

90. *Id.* at 235.

91. *Id.*

stereotyping claim would be successful if an employer could show it took an adverse action against a transgender woman employee, not because she did not dress as a stereotypical man, but because she was transgender. Out of this confusion, some believe *Price Waterhouse* represents a victory for transgender people, while others believe the holding of the case does not go far enough to protect transgender people from discrimination on the basis of their gender identity as it requires the logical leap that discrimination against transgender individuals is inherently a form of gender stereotyping.⁹²

B. COMPARISON TO TRANSGENDER STATUS PROTECTIONS UNDER OTHER FEDERAL LAWS

Title VII's anti-discrimination language is most analogous to Title IX of the Education Amendments of 1972, which similarly prohibits discrimination on the basis of "sex," though in schools as opposed to the workplace.⁹³ The laws not only share similar language, but also similar controversy regarding the breadth of their anti-discrimination coverage. Indeed, a debate currently rages regarding whether transgender students' bathroom access is protected under Title IX's sex discrimination prohibition. This question "has roiled the nation, pitting LGBT activists and transgender youth and their parents against those who say privacy and safety are compromised by accommodating transgender youth in school restrooms and locker rooms."⁹⁴

Taking a side in this debate, numerous state courts have ruled that transgender students have the right to use bathrooms and facilities that match their gender identity. For example, in *Doe v. Regional School Unit 26*, the Maine Supreme Court ruled that a school discriminated against a female transgender student by denying her access to the women's restroom because it had effectively treated her differently from other students on the basis of her transgender status.⁹⁵ The Colorado Division of Civil Rights came to a similar conclusion in *Mathis v. Fountain-Fort Carson School District 8*, in which the court ruled that "[b]y not permitting [a student] to use the restroom with which she identifies, as non-transgender students are permitted to do, the [school] treated the [student] less favorably than other students seeking

92. Thomas Bourgeois, *Title VII Protections for Transgender and Transsexual Employees*, LA. L. REV. (Oct. 28, 2015), <https://lawreview.law.lsu.edu/2015/10/28/title-vii-protections-for-transgender-and-transsexual-employees>.

93. *Title IX and Sex Discrimination*, OFFICE FOR CIVIL RIGHTS, https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last updated Apr. 2015).

94. Robert Barnes, *Supreme Court Sends Virginia Transgender Case Back to Lower Court*, WASH. POST (Mar. 6, 2017), http://wapo.st/2mvVo80?tid=ss_mail&utm_term=.38cd70402500.

95. See *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 607 (2014).

the same service.”⁹⁶

Federal courts have also grappled with whether Title IX gives transgender students the right to access restrooms and locker rooms that correspond with their gender identity. In 2015, the Fourth Circuit became the first federal Court of Appeals to determine whether Title IX’s prohibition on sex discrimination applies to transgender status in *G.G. ex rel. Grimm v. Gloucester County School Board*.⁹⁷ In *G.G.*, a transgender high school student named Gavin Grimm challenged his school board’s policy that prohibited him from using the boys’ restroom on campus. When Grimm refused to use the girls’ restroom, he was told he could use a unisex restroom that he believed singled him out and humiliated him. Grimm’s case was dismissed at the district court level, but on appeal, the Court of Appeals decided in Grimm’s favor with a tie vote.⁹⁸ The school board appealed the decision, and in October of 2016, the Supreme Court granted certiorari, agreeing for the first time to take up the question of Title IX’s application to transgender status and discrimination.⁹⁹

But the Supreme Court withdrew cert in March of 2017, after the Trump administration rescinded guidance from the Obama Administration’s Department of Justice that had advised schools that denying transgender students access to the bathroom of their choice violated Title IX.¹⁰⁰ Because the Fourth Circuit had initially deferred to this guidance in deciding for Grimm, this change in policy sharply changed the question before the Court.¹⁰¹ In light of this, the Court vacated the Fourth Circuit’s decision and sent it back for reconsideration, where it remains as of May 2018. Had the Supreme Court decided this case, it may have shed some light on the proper interpretation of sex discrimination in Title VII. Unfortunately, without the Supreme Court’s final word, the Title IX question remains muddy.

96. See *Mathis v. Fountain-Fort Carson Sch. Dist. No. 8*, Charge No. P20130034X, (Colo. Civ. Rights Div. 2013), https://archive.org/stream/716966-pdf-of-coy-mathis-ruling/716966-pdf-of-coy-mathis-ruling_djvu.txt.

97. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 718 (4th Cir. 2016).

98. *G.G. v. Gloucester County School Board*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/cases/gg-v-gloucester-county-school-board> (last updated Mar. 6, 2017) [hereinafter ACLU].

99. See *Gloucester County School Board v. G.G.*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/gloucester-county-school-board-v-g-g> (last updated Apr. 7, 2017).

100. ACLU, *supra* note 98.

101. Barnes, *supra* note 94.

III. EXECUTIVE BRANCH INCOHERENCE ON TRANSGENDER PROTECTIONS

A. TRUMP ADMINISTRATION CHANGES DIRECTION

Since taking office in January 2017, President Trump's administration has clearly departed from the pro-LGBT statements he made during his candidacy. This has caused uncertainty over the administration's future stance on transgender issues. On the campaign trail, Trump made multiple statements that seemed to evince his commitment to LGBT causes. At a 2016 campaign rally, following the tragic mass shooting at the Pulse nightclub in Orlando, Florida, Trump said "[a]s your president, I will do everything in my power to protect our LGBTQ citizens" ¹⁰² At a different event, he held a large pride flag onstage with the words "LGBTs for Trump" written on it. ¹⁰³

In April 2017, amidst controversy over North Carolina's bathroom bill, H.B. 2, then-candidate Trump said in an interview that transgender North Carolinians should be allowed to "use the bathroom they feel is appropriate." ¹⁰⁴ He later doubled down, agreeing that Caitlyn Jenner would be welcome to use any bathroom at Trump Tower if she were to visit. ¹⁰⁵ This was in clear contrast to the other Republican presidential candidate front-runner, Ted Cruz, who voiced support for H.B. 2 and bathroom bills in general. ¹⁰⁶

Yet the first year of Trump's presidency was marked by anti-LGBT policies and stances. As discussed above, in February 2017, the Trump administration rescinded an Obama-era Department of Education guidance that instructed schools to allow transgender students to use bathrooms and locker rooms that match their gender identities. ¹⁰⁷ Though some praised the

102. German Lopez, *Watch Donald Trump Reach Out to "L, G, B, T . . . Q" Americans*, VOX (July 21, 2016, 11:34 PM), <https://www.vox.com/2016/7/21/12254616/trump-acceptance-speech-lgbtq-rnc>.

103. Michelangelo Signorile, *Why Donald Trump Unfurled an Upside Down Rainbow Flag Onstage*, HUFFINGTON POST (November 1, 2016, 11:19 AM), https://www.huffingtonpost.com/entry/why-donald-trump-unfurled-an-upside-down-rainbow-flag-onstage_us_58189a60e4b0990edc336c51.

104. Karma Allen, *Trump's Reversal of Transgender Bathroom Guidance Contradicts His Past Claims of Support*, ABC NEWS (Feb. 23, 2017, 2:16 AM), <http://abcnews.go.com/Politics/trumps-reversal-transgender-bathroom-guidance-contradicts-past-claims/story?id=45678113>.

105. *Id.*

106. Deena Zaru, *Caitlyn Jenner Takes Trump Up on the Offer*, CNN POL. (Aug. 16, 2017, 8:59 PM), <http://www.cnn.com/2016/04/28/politics/caitlyn-jenner-bathroom-trump-tower-donald-trump/index.html>.

107. *Trump Rolls Back Transgender Bathroom Guidelines for Schools*, FORTUNE (Feb. 23, 2017), <http://fortune.com/2017/02/22/trump-lgbt-transgender-bathroom-guidelines>.

administration for leaving the issue to the states,¹⁰⁸ others argued this move showed “the president’s promise to protect LGBT rights was just empty rhetoric.”¹⁰⁹ Then in July 2017, Trump announced he would reinstate a ban on transgender individuals serving in the military, tweeting that the “military must be focused on decisive and overwhelming . . . victory and cannot be burdened with the tremendous medical costs and disruption that transgender [sic] in the military would entail.”¹¹⁰ Most recently, in October 2017, Trump’s Justice Department reversed an Obama-era memo that interpreted Title VII to protect transgender employees from discrimination on the basis of their gender identity.¹¹¹ In a memo announcing this decision, Attorney General Jeff Sessions argued “Title VII’s prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*, including transgender status.”¹¹² This was not surprising considering Trump’s Justice Department had previously filed an amicus brief in the Second Circuit Court of Appeals, arguing that Title VII should not be interpreted to prohibit discrimination on the basis of sexual orientation.¹¹³

Curiously, the Trump administration has continued to support one Obama-era protection against transgender discrimination—Executive Order 13672, which forbids federal government contractors from discrimination against employees on the basis of sexual orientation *or gender identity*.¹¹⁴ In a briefing issued in January of 2017, the White House affirmed that the

108. *Id.*

109. *How Liberals and Conservatives Are Reacting to Trump's Transgender Bathroom Decision*, FORTUNE (Feb. 23, 2017), <http://fortune.com/2017/02/22/trump-transgender-school-bathroom-reaction>.

110. Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55 AM), https://twitter.com/realDonaldTrump/status/890193981585444864?ref_src=twsrc%5Etfw; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), https://twitter.com/realDonaldTrump/status/890196164313833472?ref_src=twsrc%5Etfw; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:08 AM), https://twitter.com/realDonaldTrump/status/890197095151546369?ref_src=twsrc%5Etfw. See also Zeke J. Miller, *President Trump Has Taken a Key Step to Implement His Transgender Military Ban*, TIME (Aug. 25, 2017), <http://time.com/4916871/donald-trump-transgender-military-ban>.

111. German Lopez, *Trump's Justice Department Just Rescinded a Memo Protecting Transgender Workers*, VOX (Oct. 5, 2017, 11:08 AM), <https://www.vox.com/identities/2017/10/5/16429800/trump-sessions-transgender-workers>.

112. *Id.*

113. German Lopez, *It's Not Only the Military. Trump's Administration Just Took Another Big Anti-LGBTQ Step*, VOX (July 27, 2017, 9:50 AM), <https://www.vox.com/identities/2017/7/27/16049306/trump-sessions-justice-department-lgbtq>.

114. Press Release, U.S. White House, President Donald J. Trump Will Continue to Enforce Executive Order Protecting the Rights of the LGBTQ Community in the Workplace (Jan. 31, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-will-continue-enforce-executive-order-protecting-rights-lgbtq-community-workplace>.

president intended to continue enforcing this executive order, stating “President Trump continues to be respectful and supportive of LGBTQ rights, just as he was throughout the election.”¹¹⁵

Considering these discrepancies, it is unclear what side the Trump administration will take on transgender rights and issues as they emerge, including the issue of transgender bathroom access. However, the decision to walk back from the Obama administration’s interpretation of Title VII strikes a blow to transgender employees who can no longer rely on the guidance as legal support for their right to use gender-affirming bathrooms at work.

B. FEDERAL AGENCIES IN CONFLICT

While the position of the Trump administration seems disjointed, the broader stance of the executive branch and the federal agencies within it is a true quagmire. As discussed above, the Department of Justice has interpreted sex discrimination as *not* encompassing discrimination on the basis of transgender status.¹¹⁶ In doing so, it has implicitly rejected arguments from transgender employees that being denied access to gender-affirming facilities is unlawful discrimination. But, a separate group of federal agencies has weighed in on the issue in favor of broader transgender rights.¹¹⁷ These agencies include the EEOC, OSHA, and the Department of Labor’s Office of Federal Contract Compliance Programs (“OFCCP”).¹¹⁸

The EEOC is the federal agency tasked with enforcing anti-discrimination law in employment,¹¹⁹ as such, its position on Title VII is persuasive. Though Title VII does not explicitly mention transgender status or gender identity as a basis for discrimination, the EEOC takes the position that such discrimination is covered by the prohibition on *sex discrimination*.¹²⁰ This, the EEOC argues, is because discriminating against employees for being transgender and thus not conforming to the

115. *Id.*

116. *See* Lopez, *supra* note 1111.

117. *See* Michelle E. Phillips, *EEOC Stresses Title VII Bars Discrimination Against Transgender Workers, Including Regarding Bathroom Access*, JACKSON LEWIS (May 4, 2016), <https://www.jacksonlewis.com/publication/eec-stresses-title-vii-bars-discrimination-against-transgender-workers-including-regarding-bathroom-access>.

118. *Id.*

119. *About EEOC*, EQUAL EMPLOYMENT OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc> (last visited May 15, 2018).

120. *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, EQUAL EMPLOYMENT OPPORTUNITY COMM’N, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last visited May 15, 2018).

stereotypical behaviors of their biological sex is a form of gender stereotyping, which the Supreme Court held is unlawful sex discrimination.¹²¹ Applying this position, the EEOC has issued numerous opinions in recent years that protect transgender employees from discrimination on the basis of gender identity or transgender status.¹²² For example, the EEOC has found the following can constitute a claim for sex discrimination: 1) failing to hire an employee because she is a transgender woman;¹²³ 2) firing an employee because he is transitioning or plans to transition;¹²⁴ and 3) an employer's intentional misuse of a transgender employee's preferred name and pronouns.¹²⁵ Numerous federal courts have cited the most prominent of these cases, *Macy v. Holder*.¹²⁶ *Macy*, decided in 2012, was a landmark decision for the EEOC, wherein the agency held that a transgender plaintiff could pursue a Title VII claim against an employer for sex discrimination.¹²⁷

The EEOC has also addressed the issue of bathroom access. In a Fact Sheet titled "Bathroom/Facility Access and Transgender Employees," the agency advises that denying employees equal access to bathrooms and other facilities that correspond to their gender identity is a form of sex discrimination in violation of Title VII.¹²⁸ The Fact Sheet cites to the 2015 EEOC case *Lusardi v. McHugh*, in which the EEOC ruled as follows:

1. a federal agency that denied an employee equal access to a common bathroom/facility corresponding to the employee's gender identity discriminated on the basis of sex;
2. the agency could not condition this right on the employee undergoing or providing proof of surgery or any other medical procedure; and

121. *Id.*

122. *Id.*

123. *Id.* See generally *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012) (discussing an EEOC decision that held that failing to hire a transgender woman can be sex discrimination).

124. See Press Release, EEOC, Deluxe Financial to Settle Sex Discrimination Suit on Behalf of Transgender Employee (Jan. 21, 2016), <https://www.eeoc.gov/decisions/0120133395.txt>.

125. *Lusardi v. McHugh*, EEOC Appeal No. 0120133395, 2015 WL 1607756, at *1 (Apr. 1, 2015).

126. See, e.g., *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 386 (2d Cir. 2015); *Brown v. Subway Sandwich Shop of Laurel, Inc.*, No. 2:15-CV-77-KS-MTP, 2016 U.S. Dist. LEXIS 76526, at *5–6 (S.D. Miss. 2016); *Doe v. Arizona*, No. CV-15-02399-PHX-DGC, 2016 WL 1089743, at *2 (D. Ariz. 2016); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1014 n.104 (D. Nev. 2016); *Martin v. EEOC*, 19 F. Supp. 3d 291, 297 (D.D.C. 2014).

127. *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *1 (Apr. 20, 2012).

128. *Fact Sheet: Bathroom/Facility Access and Transgender Employees*, EQUAL EMPLOYMENT OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm> (last viewed May 15, 2018).

3. the agency could not avoid the requirement to provide equal access to a common bathroom/facility by restricting a transgender employee to a single-user restroom instead (though the employer can make a single-user restroom available to all employees who might choose to use it).¹²⁹

In *Lusardi*, a transgender woman named Tamara Lusardi brought a claim against her employer, a department of the U.S. Army, for disparate treatment.¹³⁰ Lusardi had been instructed to use a single-user restroom called the “executive restroom” instead of the common women’s restroom on the premises, until such a time as she had undergone “surgery,” the extent of which was unspecified.¹³¹ Lusardi used the common women’s restroom on three occasions, when the executive restroom was unavailable; each time, her superior confronted her and told her she must use the executive restroom until she could provide “proof” that she had undergone surgery.¹³² The EEOC held that Lusardi was discriminated against because of her transgender status, which was a violation of Title VII.¹³³ Thus, if the EEOC’s interpretation of Title VII is to be followed, employer restrictions on transgender employees’ access to facilities matching their gender identity constitute unlawful discrimination in violation of federal law.

Although EEOC decisions are not binding on the courts, the agency’s position is persuasive, so courts often give the EEOC some level of deference on issues of employment law.¹³⁴ Therefore, courts may adopt the EEOC in their rulings in cases of gender identity discrimination.¹³⁵

Similarly, OSHA has taken the position that employees should be permitted to use the bathroom that corresponds to their gender identities in the workplace.¹³⁶ Under OSHA’s Sanitation standard (1910.141), employers are required to provide bathroom facilities to employees to prevent the “adverse health effects that can result if toilets are not available when employees need them.”¹³⁷ These health effects can include urinary tract infections, bladder problems, and bowel problems. To this end, OSHA identifies as a “Core Principle” that “[a]ll employees, including transgender

129. *Id.* See also *Lusardi v. McHugh*, EEOC Appeal No. 0120133395, 2015 WL 1607756 at *8 (Apr. 1, 2015).

130. *Lusardi*, 2015 WL 1607756, at *1.

131. *Id.* at *2.

132. *Id.*

133. *Id.* at *10.

134. See, e.g., *Ryan v. Grae & Rybicki P.C.*, 135 F.3d 867, 870 (2d Cir. 1998).

135. See Rizvi, *supra* note 533; Patrick Dorrian, *EEO Roundup: What Deference Do Courts Give to the EEOC’s Views?*, BLOOMBERG BNA (June 8, 2016), <https://www.bna.com/eo-roundup-deference-b57982073811> (discussing the deference given to the EEOC).

136. BEST PRACTICES, *supra* note 70, at 1.

137. *Id.*

employees, should have access to restrooms *that correspond to their gender identity*.”¹³⁸ OSHA also advises that transgender employees should not be required to use a “segregated facility,” though they may elect to use one provided for them.¹³⁹ Although not interpreting Title VII, OSHA’s position exemplifies the public policy reasons for prohibiting employer policies that restrict access to gender-affirming bathrooms—namely, the health and safety of transgender employees.

Finally, the Department of Labor (“DOL”) has adopted prohibitions on employer policies that restrict access to gender-affirming bathrooms.¹⁴⁰ Per the DOL’s OFCCP, government contractors subject to Executive Order 11246 must allow transgender employees to use bathrooms and other facilities that correspond to their gender identities.¹⁴¹ Like the OSHA regulations, this prohibition does not interpret Title VII; however, it reflects policy considerations in favor of protecting transgender employees from discrimination.

In sum, there are two clear sides to the executive branch when it comes to interpretations of Title VII. Though the Trump Department of Justice recently rejected its predecessor’s expansive reading of the law as it applies to transgender employees, there is growing momentum toward the EEOC’s position. Time will tell if the Trump administration influences the other agencies to its adopt its position, if the opposite will occur, or if the executive branch schism will simply remain.

IV. FEDERAL COURTS’ APPROACHES TO GENDER IDENTITY DISCRIMINATION AND TRANSGENDER BATHROOM ACCESS

A. CIRCUIT SPLIT IN TITLE VII INTERPRETATION

In the absence of clear federal law prohibiting discrimination on the basis of transgender status, federal courts have grappled with whether Title VII’s prohibition on sex discrimination covers these actions. U.S. appellate courts are currently split on this issue.¹⁴² Two Circuit Courts of Appeals—

138. *Id.* (emphasis added).

139. *Id.* at 2.

140. Office of Fed. Contract Compliance Programs, Dep’t of Labor, *Frequently Asked Questions: Sexual Orientation and Gender Identity*, https://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html#Q24 (last visited May 15, 2018).

141. *Id.*

142. *See, e.g., Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII*, EQUAL EMPLOYMENT OPPORTUNITY COMM’N, https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm (last visited May 15, 2018); Scott Rabe, Sam Schwartz-Fenwick & Marlin Duro, *TITLE VII: Court Breaks from Department of Justice on Transgender*

the Seventh and Tenth Circuits—have issued decisions holding that sex discrimination under Title VII does not include discrimination on the basis of gender identity or transgender status.¹⁴³ Four Circuit Courts of Appeals—the First, Sixth, Ninth, and Eleventh Circuits—have held that Title VII sex discrimination does include discrimination on the basis of gender identity.¹⁴⁴ Finally, the remaining five Circuit Courts of Appeals—the Second, Third, Fourth, Fifth, and Eighth Circuits—have not addressed this issue, though lower district courts in these circuits have.¹⁴⁵

B. CASES INTERPRETING TITLE VII TO PROTECT TRANSGENDER STATUS

Representing one side of the Circuit Split, the First, Sixth, Ninth, and Eleventh Circuits have held that discrimination on the basis transgender status or gender identity is a form of sex discrimination under Title VII.¹⁴⁶ In general, these cases find that discrimination on the basis of transgender status is a form of sex stereotyping discrimination because discriminating employers are mistreating transgender employees for not conforming to established gender norms.¹⁴⁷

Examples of this line of reasoning can be found in Sixth Circuit precedents. Following *Price Waterhouse*, two Sixth Circuit cases, *Smith v. City of Salem* and *Barnes v. City of Cincinnati*, used the gender stereotyping doctrine to hold that sex discrimination under Title VII includes discrimination based on gender identity.¹⁴⁸ In *Smith*, the Sixth Circuit applied *Price Waterhouse*'s prohibition of sex stereotyping discrimination to a transgender plaintiff for the first time.¹⁴⁹ There, a transgender fire

Rights, SEYFARTH SHAW: EMPLOYMENT LAW OUTLOOK (Nov. 2, 2017), <https://www.laborandemploymentlawcounsel.com/2017/11/title-vii-court-breaks-from-department-of-justice-on-transgender-rights>.

143. *Equality Maps: Federal Courts Decisions Title VII: Gender Identity*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/federal_court_decisions (last updated May 15, 2018).

144. *Id.*

145. *Id.*

146. *See generally* *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Glenn v. Brumby*, 72 4 F. Supp. 2d 1284 (N.D. Ga. 2010), *aff'd*, 663 F.3d 1312 (11th Cir. 2011).

147. *See* cases cited *supra* note 146.

148. *Barnes v. City of Cincinnati*, 401 F.3d 729, 741 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004). *See also* *Sexual Orientation and Transgender Discrimination*, KATZ, MARSHALL & BANKS, LLP <http://www.kmblegal.com/practice-areas/discrimination-retaliation/sexual-orientation-transgender-discrimination> (last visited May 15, 2018).

149. *Smith*, 378 F.3d at 572. *See also* ERIC S. DREIBAND & BRETT SWEARINGEN, *THE EVOLUTION OF TITLE VII—SEXUAL ORIENTATION, GENDER IDENTITY, AND THE CIVIL RIGHTS ACT OF 1964* 7–8 (2015).

department lieutenant who began expressing himself in a more traditionally feminine way was fired for not conforming to sex stereotypes. The court argued there was no reason why a transgender plaintiff could not be protected from discrimination on the basis of sex stereotyping by Title VII, holding “discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman.”¹⁵⁰

Similarly, in *Barnes*, a transgender police officer argued he was demoted for his gender non-conformity, as he presented and lived as a woman while off-duty.¹⁵¹ Relying on *Smith*, the court found that (1) Title VII protected Barnes as someone who did not conform to sex stereotypes and (2) he had been demoted for this non-conformity, in violation of federal law.¹⁵²

The Eleventh Circuit also embraced this reasoning in *Glenn v. Brumby*. In *Glenn*, a transgender woman brought a claim for unlawful discrimination on the basis of sex in violation of the Equal Protection Clause after she was terminated from her employment with the Georgia General Assembly.¹⁵³ Although the claim was brought under 42 U.S.C. § 1983, the court analyzed Title VII precedent, including *Price Waterhouse*.¹⁵⁴ In doing so, the court concluded that the defendant discriminated against the employee on the basis of her sex by firing her due to her gender transition and concerns that other women would object to her use of the women’s bathroom.¹⁵⁵ The court found there is “congruence” between transgender-based discrimination and sex-stereotyping discrimination because an individual is regarded as transgender “precisely because of the perception that his or her behavior transgresses gender stereotypes.”¹⁵⁶ And because all employees are protected from discrimination based on sex stereotypes, the court held these protections must be available to transgender employees.¹⁵⁷

It is important to note other courts have approached this question from a textualist perspective, finding that discrimination on the basis of gender identity is sex discrimination precisely because it is related to the “sex” of

150. *Smith*, 378 F.3d at 575.

151. *Barnes*, 401 F.3d at 733. See also DREIBAND & SWEARINGEN, *supra* note 14949, at 8.

152. *Barnes*, 401 F.3d at 737–38.

153. *Glenn v. Brumby*, 663 F.3d 1312, 1313–14 (11th Cir. 2011).

154. *Id.* at 1316.

155. *Id.* at 1320–21.

156. *Id.* 1316–17.

157. *Id.* at 1318–19.

the targeted employees. The strongest example of this is the EEOC case *Macy v. Holder*, in which the Commission held that anti-transgender discrimination is *per se* sex discrimination and does not require evidence of gender stereotyping, which is “simply one means of proving sex discrimination.”¹⁵⁸ Under this line of reasoning, transgender employees can establish they were discriminated against because of sex if, for example, they have evidence that their employer has animus against transgender individuals or is uncomfortable with the employee’s transition.¹⁵⁹ A similar approach was articulated in a District Court for the District of Columbia case, *Schroer v. Billington*, with an opinion by Judge Robertson, who argued that it ultimately does not “matter[] for purposes of Title VII liability whether the [defendant] withdrew its offer of employment because it perceived [the employee] to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual.”¹⁶⁰ Judge Robertson reasoned that since the employer refused to hire the plaintiff because she planned to change her anatomical sex through sex reassignment surgery as part of her transition to female, the adverse employment action was quite literally “because of sex.”¹⁶¹ The opinion also analogized to discrimination against religious converts, which is clearly encompassed by religious discrimination, arguing that similar discrimination against those who seek to change their sex must constitute sex discrimination.¹⁶²

C. FEDERAL CASES INTERPRETING TITLE VII TO NOT ENCOMPASS GENDER IDENTITY DISCRIMINATION

On the other side of the Circuit Split, the Seventh and Tenth Circuit Courts of Appeals have explicitly held that Title VII does not protect transgender employees from discrimination on the basis of their gender identity. Both circuits primarily argue that Congress never intended Title VII to protect transgender status, so broadening Title VII to cover gender identity would be an impermissible overreach of the court’s adjudicatory role.¹⁶³

In the Tenth Circuit, *Etsitty v. Utah Transit Authority* established the

158. See *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *7–10 (Apr. 20, 2012) (“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.”).

159. *Id.* at *7–8.

160. *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008).

161. *Id.* at 307–08.

162. *Id.* at 306–07.

163. See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007); *Ulane v. E. Airlines Inc.*, 742 F.2d 1081 (7th Cir. 1984).

prevailing approach to gender identity discrimination claims under Title VII. In *Etsitty*, a bus driver was fired from the Utah Transit Authority shortly after she revealed that she was transgender to her employers.¹⁶⁴ Far from denying that she was fired due to being transgender, her employer's proffered reason for terminating her was that she intended to use women's public restrooms while wearing her employee uniform, despite still having male genitalia.¹⁶⁵ The court held that "discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII," as "sex" must be taken to mean the "traditional binary conception of sex."¹⁶⁶ Notably, the court acknowledged that the plain language of the statute, not the legislative intent, should guide its interpretation of Title VII; indeed, it expressed willingness to change its interpretation should "scientific research . . . someday cause a shift in the plain meaning of the term 'sex' so that it extends beyond the two starkly defined categories of male and female."¹⁶⁷

In the Seventh Circuit, *Ulane* remains the applicable interpretation of Title VII's sex discrimination provision. However, the precedential value of *Ulane* has been questioned for two reasons: First, *Ulane* predates *Price Waterhouse*, which not only fundamentally changed the meaning of sex discrimination in Title VII, but also provided a new potential protection to employees discriminated against because of their transgender status.¹⁶⁸ Second, a Seventh Circuit case, *Hively v. Ivy Tech Community College of Indiana*, called into question the logic of *Ulane* as it relates to the proper interpretation of sex discrimination and, some have argued, may actually overrule *Ulane*.¹⁶⁹ In *Hively*, the court held that discrimination on the basis of sexual orientation is cognizable as sex discrimination under Title VII because the plaintiff, a lesbian woman, would not have been discriminated against for marrying a woman if she were a man, thus, the discrimination occurred "because she is a woman."¹⁷⁰ The court also stated it was time to

164. *Etsitty*, 502 F.3d at 1218.

165. *Id.* at 1224–25.

166. *Id.* at 1221–22.

167. *Id.* at 1222.

168. See, e.g., Glenn v. Brumby, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011) (discussing the impact of *Price Waterhouse* on the *Ulane* decision); Chavez v. Credit Nation Auto Sales, 49 F. Supp. 3d 1163, 1189–90 (N.D. Ga. 2014) (same).

169. See *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 345–46 (7th Cir. 2017). For an argument that *Hively* overruled *Ulane*, see Mark Joseph Stern, *The 7th Circuit's Landmark Anti-Gay Discrimination Ruling is also Great News for Trans Rights*, SLATE (Apr. 5, 2017, 2:16 PM), http://www.slate.com/blogs/outward/2017/04/05/_7th_circuit_decision_in_hively_is_great_news_for_trans_rights.html ("*Hively* therefore overturned *Ulane*.").

170. *Id.*

“overrule [its] previous cases that have endeavored to find and observe [the] line” between sexual orientation discrimination and sex discrimination.¹⁷¹ This language could theoretically include *Ulane*, but the court clearly limited its decision to “the issue put before [it]”—namely sexual orientation—leaving “[a]dditional complications . . . for another day.”¹⁷² Thus, it seems the famous *Ulane* precedent remains alive and well in the Seventh Circuit. Nevertheless, the Seventh Circuit’s reasoning in *Hively* should encourage transgender rights activists as it seems to fly directly in the face of *Ulane* and may generate pro-transgender case law in the near future.

D. FEDERAL CASES ADDRESSING BATHROOM ACCESS

In addition to the overarching Title VII case law on transgender discrimination, some federal courts have explicitly addressed transgender bathroom access. Perhaps the best known of these cases is *Roberts v. Clark County School District*, in which a Nevada district court explicitly adopted the holdings of the EEOC cases, *Macy* and *Lusardi*.¹⁷³ In *Roberts*, the plaintiff informed his employer that he was transgender and would be transitioning from female to male; shortly after, he began using the men’s restroom at his workplace.¹⁷⁴ In response, the school district instructed him to only use the gender neutral restrooms “to avoid any future complaints” and officially banned him from using the men’s *or* women’s restrooms until he could present documentation of a sex change.¹⁷⁵

The Nevada District Court granted the plaintiff summary judgment on his sex discrimination claim, finding that the school district “banned Roberts from the women’s bathroom because he no longer behaved like a woman, [which] . . . alone shows that the school district discriminated against Roberts based on his gender and sex stereotypes.”¹⁷⁶ The court also addressed the school district’s claim that even if discrimination on the basis of Robert’s transgender status was prohibited by Title VII, it did not discriminate against him by prohibiting his use of the men’s room because he was biologically female and other similarly-situated females were also prohibited from using the men’s room.¹⁷⁷ The court summarily dismissed this argument because Roberts, unlike other biological females, was not

171. *Id.* at 350–51.

172. *Id.* at 351–52.

173. *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1014–15 (D. Nev. 2016).

174. *Id.* at 1005–06.

175. *Id.*

176. *Id.* at 1015.

177. *Id.* at 1016.

allowed to use the women's restroom and so was treated differently.¹⁷⁸

Similarly, in *Mickens v. General Electric Co.*, the Western District of Kentucky denied an employer's motion to dismiss a transgender employee's Title VII sex discrimination claim based on allegations that the employee was denied access to a gender-affirming bathroom and was terminated for attendance issues stemming from that denial.¹⁷⁹ In *Mickens*, the employee alleged that his employer, General Electric ("GE"), instructed him to not use the men's restroom at the workplace and that he was required to use a restroom further away from his workstation, causing him to return late from breaks, which he was reprimanded for.¹⁸⁰ The court rejected the employer's argument that discrimination on the basis of transgender status is not actionable under Title VII, citing *Price Waterhouse* and the prohibition against discrimination due to sex stereotyping.¹⁸¹ On this basis, it found that the plaintiff met his burden of pleading a sex discrimination claim as he had alleged "continued discrimination and harassment against him . . . because he did not conform to the gender stereotype of what someone who was born female should look and act like."¹⁸²

The issue has also been addressed from the other side, where a non-transgender employee alleged she had been discriminated against on the basis of sex and religion because her employer permitted a transgender coworker to use the women's restroom.¹⁸³ In *Cruzan v. Special School District No. 1*, a female teacher filed a suit against her school district for discrimination after the school permitted a transgender employee, Davis, to use the women's bathroom and she encountered Davis in said bathroom.¹⁸⁴ The court rejected Cruzan's argument that requiring her to share the women's restroom with someone who was biologically male constituted sexual harassment.¹⁸⁵ It further held that in order establish a case of discrimination on these grounds, a plaintiff must show that the school enacted a policy directed at the plaintiff and that the plaintiff suffered adverse employment action as a result.¹⁸⁶ Because the school's policy was not directed at the plaintiff and the plaintiff had "convenient access to numerous

178. *Id.*

179. *Mickens v. GE Co.*, No. 3:16CV-00603-JHM, 2016 U.S. Dist. LEXIS 163961, at *10 (W.D. Ky. 2016).

180. *Id.* at *2-3.

181. *Id.* at *8-9.

182. *Id.* at *9.

183. *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 982-83 (8th Cir. 2002).

184. *Id.*

185. *Id.* at 984.

186. *Id.* at 982, 984.

restrooms,” including single-stall bathrooms, summary judgment for the defendant was appropriate.¹⁸⁷

Taken together, this recent case law demonstrates momentum toward broader interpretations of Title VII that protects employees from both discrimination on the basis of transgender status broadly and specific policies preventing transgender employees from using gender-affirming bathrooms and facilities.

V. ARGUMENTS FOR COMPETING INTERPRETATIONS OF TITLE VII AS PERTAINING TO TRANSGENDER BATHROOM ACCESS

A war currently rages between those who believe Title VII protects transgender employees from restrictive bathroom policies and those who disagree. Both the circuit split that has developed in the courts and the divide in the executive branch exemplify this divide.¹⁸⁸ This Part will canvass the major legal arguments made by both sides of this debate. These arguments run the gambit from the proper interpretation of Title VII, to what constitutes discrimination in the workplace, to policy arguments regarding employee health, comfort, and safety. For clarity, this Note will refer to those who believe Title VII does *not* provide protection against transgender bathroom restrictions as supporters of the DOJ’s position. It will refer to those who believe Title VII *does* offer this protection to transgender employees as supporters of the EEOC’s position.

A. SUPPORTERS OF THE DOJ’S POSITION ON TRANSGENDER BATHROOM ACCESS

First, the Trump DOJ and supporters of its position argue that Title VII’s prohibition on sex discrimination does not include transgender status; thus, it is inappropriate to read Title VII as offering protection against transgender status discrimination in the terms, conditions, and privileges of employment.¹⁸⁹ This, they argue, is because a plain language reading of the word “sex” does not include notions of gender identity, but refers only to the two traditionally recognized sexes—male and female.¹⁹⁰ Thus, gender identity is a completely separate concept from sex. This side also argues that

187. *Id.*

188. *See supra* Parts III, IV.

189. *See* Emily McCord, *North Carolinians Who Support “Bathroom Law” Say They’re Being Drowned Out*, NPR (May 15, 2016, 5:14 PM), <http://www.npr.org/2016/05/15/477946675/north-carolinians-who-support-bathroom-law-say-theyre-being-drowned-out>.

190. Complaint for Declaratory Judgement at 6, *McCrory v. United States*, No 5:16-cv-00238-BO (E.D. N.C. May 9, 2016).

Title VII's legislative history shows that when the law was passed, Congress intended to protect women from discrimination in employment and did not intend (let alone envision) the law to apply to transgender status.¹⁹¹ Proponents of this argument may point to federal laws that explicitly protect both "sex" and "gender identity" discrimination, like the Violence Against Women Act, to argue that if Congress had intended to protect gender identity discrimination, it would have explicitly provided for that protection.¹⁹²

The Seventh Circuit made these arguments in *Ulane* to hold that Title VII does not protect against employment discrimination on the basis of transgender status. First, majority opinion author Judge Wood argued that although "some may define 'sex' . . . to mean an individual's 'sexual identity,' [the court's] responsibility is to . . . determine what Congress intended when it decided to outlaw discrimination based on sex."¹⁹³ Finding no evidence Congress intended to protect "sexual identity" discrimination, Judge Wood dismissed that broader interpretation.¹⁹⁴ Second, Judge Wood referenced a "maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning;" in his view, the ordinary, common meaning of sex discrimination is discriminating against women because they are women and vice versa—nothing more.¹⁹⁵

Notably, this argument faced pushback from opponents who argue cases like *Price Waterhouse* broadened the meaning of sex discrimination since *Ulane*.¹⁹⁶ In response, supporters of the DOJ position argue that *Price Waterhouse* and subsequent Sixth Circuit cases, *Smith* and *Barnes*, are limited to discrimination for non-conformance with gender stereotypes as opposed to transgender status itself.¹⁹⁷ Thus, proponents of this limited view of Title VII discrimination would argue that an employer who fires a transgender employee because of personal distaste for transgender individuals (absent evidence of sex stereotyping) does not violate Title VII.

Second, supporters of the DOJ position argue that even if Title VII protects against transgender discrimination, policies requiring employees to use bathrooms matching their biological sex are not discriminatory because

191. See Jim S. McNeill & Peter Stockburger, *Transgender Bathroom Debate: What's the Deference?*, LAW360 (May 18, 2016, 1:07 PM), <https://www.law360.com/articles/796989>.

192. *Id.*

193. *Ulane v. E. Airlines Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984).

194. *Id.* at 1084–85.

195. *Id.* at 1085.

196. See, e.g., DANA BEYER, JILLIAN T. WEISS & RIKI WILCHINS, NEW TITLE VII AND EEOC RULINGS PROTECT TRANSGENDER EMPLOYEES 3 (2014), <http://transgenderlawcenter.org/wp-content/uploads/2014/01/TitleVII-Report-Final012414.pdf>.

197. See *Eisity*, 502 F.3d at 1223–24; DREIBAND & SWEARINGEN, *supra* note 1499.

they affect all employees equally and, as such, are facially neutral.¹⁹⁸ Under this argument, policies requiring that employees use the bathroom matching their biological sex do not unfairly single out transgender employees or create disparate treatment in the terms, conditions, and privileges of employment.¹⁹⁹ While the right to a bathroom in the workplace is required, this side views employees' ability to use the bathroom of their choice as a mere privilege.²⁰⁰ When the privilege to use the bathroom of the employee's choosing is withheld from all employees, employers argue these policies are evenly applied and non-discriminatory.²⁰¹

In addition, supporters of the DOJ position argue that employer policies restricting transgender bathroom access serve public policy goals because they protect the majority of employees from feeling uncomfortable and unsafe in workplace bathrooms.²⁰² They buttress their position by arguing that because transgender people are a very small minority in America,²⁰³ it is unreasonable to subject the interests of the many to the preferences of the very few.²⁰⁴ They claim that requiring employers to permit transgender employees to use the bathrooms of their choice unfairly burdens the privacy and comfort of the vast majority of employees who are cisgender.²⁰⁵ This view seeks to protect individuals like the plaintiff in *Cruzan*, who brought suit against her employer because she felt uncomfortable sharing a restroom with a transgender coworker and believed she had a "right to privacy and modesty which the school district must respect."²⁰⁶ Indeed, employers may feel that by allowing transgender employees to use the restroom of their choice, they are appeasing one or a few employees, while upsetting the rest and essentially giving "special treatment" to their transgender employees.²⁰⁷

Finally, supporters of the DOJ position may point to safety concerns, arguing permissive bathroom policies are rife for abuse and could allow

198. See McNeill & Stockburger, *supra* note 191.

199. *Id.*

200. Nicole Russell, *The Transgender Lobby's Demands Are Not Civil Rights*, FEDERALIST (Nov. 22, 2016), <http://thefederalist.com/2016/11/22/transgender-lobbys-demands-not-civil-rights>.

201. *Id.*

202. *Id.*

203. Transgender people are estimated to represent about 0.5% of the United States population. FLORES ET AL., *supra* note 2, at 5.

204. *Business Leaders Support HB2 & Governor McCrory, KEEP NC SAFE*, <http://keepmncsafe.com/hundreds-business-leaders-show-support-hb2-governor-mccrory> (last updated Apr. 29, 2016).

205. *Id.*; Complaint for Declaratory Judgement, *supra* note 190, at 2.

206. *Legal Battle is Building Over Transgender Librarian*, TUSCALOOSA NEWS (Aug. 25, 1999), <https://genderidentitywatch.com/2015/01/07/cruzan-v-special-school-dist-1-usa>.

207. *Id.*; *Business Leaders Support HB2*, *supra* note 204.

predators unfettered access to female employees in the women's bathroom. This argument has primarily come about in the context of bathroom bills like H.B. 2, but it could easily be extended to the workplace. For example, lawmakers who supported North Carolina's H.B. 2 argued that it ensured women and children were not placed in a "vulnerable situation[] in . . . bathrooms and changing areas," citing concerns that men might fraudulently pretend to be transgender to commit sexual assaults.²⁰⁸ Opponents of this view argue these concerns are unfounded and unsupported by statistics.²⁰⁹ Nonetheless, proponents of these restrictive policies may argue such policies offer protection to female employees and thus should be allowed for policy reasons.

208. Stevie Borrello, *Sexual Assault and Domestic Violence Organizations Debunk "Bathroom Predator Myth"*, ABC NEWS (Apr. 22, 2016, 7:15 PM), <http://abcnews.go.com/US/sexual-assault-domestic-violence-organizations-debunk-bathroom-predator/story?id=38604019>.

209. *Id.*

B. SUPPORTERS OF THE EEOC'S POSITION ON TRANSGENDER BATHROOM ACCESS

Primarily, supporters of the EEOC's position argue that Title VII's use of "sex" should be interpreted to include gender identity for one of two reasons: 1) because Supreme Court precedent broadened the initial meaning of "sex"²¹⁰ or 2) because the plain language of "sex" naturally includes gender identity.²¹¹ According to the first argument, *Price Waterhouse* broadened the meaning of sex discrimination by recognizing discrimination due to gender stereotyping; thus, regardless of the basic meaning of "sex," sex discrimination under Title VII now necessarily encompasses notions of gender non-conformity.²¹² Federal courts, including the Sixth Circuit, have embraced this view as a basis for transgender employees to seek relief from discrimination.²¹³ And some have pointed to the landmark Supreme Court case, *Oncale v. Sundowner Offshore Services*, as also broadening the scope of sex discrimination.²¹⁴

In *Oncale*, the Supreme Court held for the first time that a man who was subjected to same-sex workplace harassment could bring a hostile work environment sex discrimination claim under Title VII.²¹⁵ This transgressed the traditional understanding of sex discrimination as discrimination against a woman because she is a woman and vice-versa. Writing for the majority, Justice Scalia argued that the interpretation of Title VII was not restricted to the intentions of Congress in 1964. So, despite conceding that Congress had not intended to attack same-sex harassment, he argued "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."²¹⁶ Thus, supporters of the EEOC position argue that taken together, *Price Waterhouse* and *Oncale* create an expanded base of coverage for transgender employees under Title VII's sex discrimination prohibition.²¹⁷

210. See, e.g., Arthur S. Leonard, *A Battle Over Statutory Interpretation: Title VII and Claims of Sexual Orientation and Gender Identity Discrimination*, OTHER PUBLICATIONS, 2017, at 3.

211. See, e.g., Complaint at 7, *United States v. North Carolina*, No. 1:16-cv-00425 (M.D. N.C. May 19, 2016).

212. See LEONARD, *supra* note 210, at 4.

213. See, e.g., *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 571–73 (6th Cir. 2004).

214. See LEONARD, *supra* note 210, at 4–5.

215. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81–82 (1997). See also LEONARD, *supra* note 210, at 4–5.

216. *Oncale*, 523 U.S. at 79–80.

217. See LEONARD, *supra* note 210, at 4–5.

Second, some argue that a plain language interpretation of “sex” simply includes more than just genitalia. The Obama-era Justice Department made this argument in its Complaint against North Carolina in opposition to H.B. 2, arguing that an individual’s “sex” includes “multiple factors, which may not always be in alignment.”²¹⁸ These factors include “hormones, external genitalia, internal reproductive organs, chromosomes, and gender identity, which is an individual’s internal sense of being male or female.”²¹⁹ Thus, this argument suggests that limiting the interpretation of sex to sexual assignment at birth is overly restrictive and fails to capture the full picture of a person’s sex.²²⁰

Supporters of the EEOC’s position further argue that policies preventing transgender employers from using restrooms that match their gender identity are discriminatory because they disproportionately burden the transgender population.²²¹ According to this argument, these policies create an unequal situation in which “employees . . . may access bathrooms and changing facilities that are consistent with their gender identity in their places of work, while transgender employees may not access bathrooms and changing facilities that are consistent with their gender identity . . .”²²² In this way, they argue, transgender people are unfairly singled out by restrictive bathroom policies and therefore face disparate treatment. Supporters also argue that these policies contribute to the stigmatization of transgender status and unfairly alienate transgender people from their fellow employees in the workplace.²²³ Thus, these restrictive employer policies are discriminatory, in violation of Title VII.

Lastly, supporters of the EEOC position argue that policies restricting transgender bathroom access should be unlawful for policy reasons because they can cause serious harm to transgender employees.²²⁴ According to transgender rights advocates, prohibiting transgender people from using restrooms corresponding with their gender identity may expose them to higher levels of violence.²²⁵ As it is, transgender people are subject to very high levels of violent crime. For example, approximately half of the

218. Complaint, *supra* note 211, at 7.

219. *Id.*

220. *Id.* at 7–9.

221. *Id.* at 4, 6.

222. *Id.* at 9.

223. *See id.*

224. *See, e.g.,* Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People’s Lives*, 19 J. PUB. MGMT. & SOC. POL’Y 65, 71–78 (2013).

225. Brady, *supra* note 24.

transgender population will be sexually assaulted in their lifetime, as opposed to one-third of women and one-sixth of men.²²⁶ Bathroom access implicates this issue because transgender people may be exposed to even greater risk of harassment or harm if they are forced to use restrooms not matching their gender identity, particularly if they are in the process of outwardly transitioning.²²⁷ In fact, a survey conducted by UCLA's Williams Institute found that almost 70% of transgender people have experienced a negative interaction in restrooms and that transgender people "who experienced issues [using the restroom] in the workplace felt it contributed to poor job performance, and some even changed jobs or simply quit their jobs to avoid the confrontations."²²⁸ In response to arguments from the other side, namely that allowing transgender individuals to use the bathroom of their choice threatens women, transgender rights advocates argue that these allegations are not supported by statistical evidence and present less severe threats of harm to cisgender people than to transgender people.²²⁹

Supporters of the EEOC's position also argue that forcing transgender employees to use restrooms matching their biological sex can cause serious mental distress and physical health problems.²³⁰ For instance, in its Complaint against North Carolina, the United States argued that H.B. 2's prohibition on transgender people's use of gender-corresponding restrooms caused them to suffer, "emotional harm, mental anguish, distress, humiliation, and indignity . . ."²³¹ This is in part because transgender people do not identify with the gender they were assigned at birth and may therefore be disaffirmed in their identity when their workplaces and coworkers categorize them as their biological sex.²³² In addition, policies restricting transgender bathroom access can cause physical health issues for transgender people, who may avoid workplace restrooms based upon fear of outing themselves as transgender, being confronted, or being harassed. One study found that 54% of transgender people had suffered "physical complications

226. *Sexual Assault and the LGBTQ Community*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/sexual-assault-and-the-lgbt-community> (last visited May 15, 2018).

227. Jennifer Litton Tidd, *Segregated Bathrooms Will Increase Violence Against Women*, LGBTQ NATION (May 14, 2016), <http://www.lgbtqnation.com/2016/05/segregated-bathroom-laws-will-increase-violence-trans-people>.

228. Zach Ford, *STUDY: Transgender People Experience Discrimination Trying to Use Bathrooms*, THINK PROGRESS (June 26, 2013, 1:06 PM), <https://thinkprogress.org/study-transgender-people-experience-discrimination-trying-to-use-bathrooms-34232263e6b3>.

229. See generally Herman, *supra* note 224; Ford, *supra* note 228.

230. Shoshana Goldberg & Andrew Reynolds, *The North Carolina Bathroom Bill Could Trigger a Health Crisis Among Transgender Youth, Research Shows*, WASH. POST: MONKEY CAGE (Apr. 18, 2016), https://wapo.st/1S5q0px?tid=ss_tw-bottom&utm_term=.66bad834133f.

231. Complaint, *supra* note 211, at 9–10.

232. Goldberg & Reynolds, *supra* note 230.

like dehydration, urinary tract infections, kidney infections, and other kidney problems simply because of the tactics they used to avoid going to the restroom during the day.”²³³ Thus, supporters argue these mental and physical health issues unfairly burden transgender employees, and Title VII should be interpreted to protect against this form of discrimination.

VI. ANALYSIS

Accounting for the EEOC’s and DOJ’s competing interpretations of “sex,” the possible disparate treatment of transgender people in the workplace due to restrictive bathroom policies, and policy concerns, Title VII should be interpreted to protect against discrimination on the basis of transgender status. Moreover, denying transgender employees access to gender-affirming restrooms and other single-sex facilities should be regarded as a form of sex discrimination in violation of Title VII.

A. INTERPRETATION OF “SEX” IN TITLE VII

Title VII’s prohibition of sex discrimination should be interpreted to include gender identity discrimination for three reasons. First, Supreme Court precedents support a broad reading of “sex” discrimination. Second, an originalist approach to statutory interpretation is probably inappropriate in this case and thus does not preclude defining “sex” as encompassing gender identity. Third, “sex” is best understood as including transgender status given the spirit and purpose of Title VII.

First, the Supreme Court precedents, *Price Waterhouse* and *Oncale*, support an expansive interpretation of sex discrimination that encompasses notions of gender identity and expression, under which transgender individuals are protected. The Seventh Circuit’s argument in *Ulane*, that sex discrimination includes only discrimination against women for being women and men for being men, can no longer be the prevailing interpretation since the Court decided *Price Waterhouse* and *Oncale*. Given that discrimination against transgender individuals is typically based on the idea these individuals do not think or act like members of their biological sex should, transgender discrimination clearly finds a home under the *Price Waterhouse* sex-stereotyping doctrine. Indeed, discrimination against individuals who are gender non-conforming is precisely the type of “reasonably comparable evil” Title VII prohibits, according to Justice Scalia’s *Oncale* opinion.

Second, the EEOC’s interpretation is persuasive because it is not contrary to lawmakers’ express intent. The intent of the original legislators

233. Ford, *supra* note 228.

who added sex discrimination to Title VII in 1964 is muddy; some argue the provision was only added as a last-minute poison pill to prevent the law's passage,²³⁴ while others dispute this claim, arguing the senator that originated the sex discrimination provision was sympathetic to feminist activists and wanted to ensure black women did not "enjoy more protection in the workplace—by virtue of their race—than white woman."²³⁵ Regardless, the interpretation of sex discrimination was unclear from its inception and has been a moving target ever since.²³⁶ Legal scholars have long-criticized intentionalism because it can be difficult to discern the legislator's intent and thus is a poor tool for interpreting law. As for Title VII, legislative intent may be even harder to pinpoint because it is not clear why sex discrimination was included. For these reasons, the interpretation of Title VII's sex discrimination provision should not turn on legislative intent.

Third, Title VII should be read to protect employees from gender identity discrimination because this interpretation best reflects the broad goals of the remedial law. Title VII was designed to prevent employers from treating prospective or current employees unequally based on non-qualitative features like race, religion, national origin, or sex. Just as the law would protect a female employee who is not promoted because she is a woman (without regard for her skills or job performance), it should similarly protect transgender employees who are not given the same privileges and rights in employment as their cisgender peers merely because of their gender identity. By adopting a broad interpretation of "sex" to include more than the male-female gender binary, Title VII can better protect vulnerable populations from unfair employment actions, which is within the spirit, if not the letter, of Title VII. After all, even the Seventh Circuit, in issuing perhaps the strongest rejection of transgender rights under Title VII that remains in effect, acknowledged the well-recognized "maxim that remedial statutes [like Title VII] should be liberally construed."²³⁷ For these reasons, Title VII should be interpreted to prohibit discrimination on the basis of gender identity.

234. *How A Poison Pill Worded As "Sex" Gave Birth to Transgender Rights*, NPR: POLITICS (May 15, 2016, 7:36 AM), <https://www.npr.org/2016/05/15/478075804/how-a-poison-pill-worded-as-sex-gave-birth-to-transgender-rights>.

235. Mark Joseph Stern, *How a 1964 Civil Rights Law Makes North Carolina's Bathroom Bill Illegal*, SLATE: OUTWARD (May 18, 2016, 10:14 AM), http://www.slate.com/blogs/outward/2016/05/18/sex_discrimination_is_trans_discrimination_gillian_thomas_explains.html. See generally GILLIAN THOMAS, *BECAUSE OF SEX* (2016) (discussing the inception of protection against sex discrimination in Title VII).

236. See generally THOMAS, *supra* note 235.

237. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084, 1086 (7th Cir. 1984).

B. EQUAL BATHROOM ACCESS AND DISCRIMINATION

In addition, restricting bathroom access for transgender employees should be regarded as facial discrimination in violation of Title VII, even where alternatives like gender-neutral or private bathrooms are provided. Although employer policies requiring all employees to use bathrooms corresponding to their biological sex are facially neutral, this alone does not end the inquiry with respect to underlying discrimination. Upon a closer look, such policies are unquestionably discriminatory because they disproportionately impact transgender employees. While being legally required to use the bathroom matching one's "official" sex is unlikely to ever inconvenience a cisgender person, such policies substantially impact the day-to-day life and working conditions of a transgender person.²³⁸ Moreover, the employer's intent in adopting these policies is to prevent transgender employees from using restrooms matching their gender identity, not cisgender employees. This alone should expose the discriminatory nature of facially neutral policies restricting bathroom access as they are designed to single out transgender employees and have clear discriminatory intent.²³⁹

It is important to note that policies requiring transgender employees to use private or gender-neutral facilities are often an improvement on policies requiring transgender employees to use gender-disaffirming bathrooms. But such policies are actually more discriminatory on their face because they clearly segregate the workplace by providing transgender individuals with different employment privileges than their peers. Even assuming the bathrooms provided are identical, this implicates the issue of "separate but equal," and, as *Brown v. Board of Education* made clear, such separate facilities are *not* equal.²⁴⁰ For these reasons, policies restricting transgender bathroom access on the basis of gender identity are probably discriminatory under Title VII.

C. POLICY IMPLICATIONS OF BATHROOM ACCESS

Finally, policy reasons, including the safety and health of transgender individuals, weigh in favor of finding bathroom bills and similar policies impermissible under Title VII. Transgender individuals are disproportionately vulnerable to sexual and physical violence. Requiring

238. See, e.g., Ford, *supra* note 229.

239. See Elizabeth Barholet, *Proof of Discriminatory Intent Under Title VII: United States Postal Service Board of Governors v. Aikens*, 70 CALIF. L. REV. 1201, 1202-03 (1982).

240. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); Brief for NAACP Legal Defense and Educational Fund, Inc. and the Asian American Legal Defense and Education Fund as Amici Curiae in Support of Respondent, *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017) (No. 16-273).

them to use restrooms not matching their gender identity may expose them to even greater levels of assault and violence by outing them as “other” in facilities meant to ensure privacy. Although there are concerns about the health and safety of employees if violent predators manage to abuse permissive bathroom access policies, these concerns are not based on evidence. This is in sharp contrast to the abundance of evidence showing that transgender individuals are a particularly vulnerable minority group. For these reasons, public policy warrants protecting transgender individuals’ access to gender-affirming workplace bathrooms.

Public policy also supports greater transgender bathroom access for health reasons. Many transgender individuals report experiencing serious health issues, including kidney stones and bladder infections, as a result of avoiding public bathrooms and the conflicts that arise in them. Moreover, forcing transgender individuals to use restrooms that do not match their gender identity can be emotionally damaging, psychologically disaffirming, and otherwise harmful to a group already subject to higher than average levels of depression and suicide.²⁴¹

This Note does not ignore the concerns of some individuals who are made uncomfortable by the notion of sharing single-sex facilities with transgender coworkers, whom they perceive to be from the opposite sex. However, the discomfort of these employees does not justify imposing serious and life-threatening harms on transgender employees through restrictive bathroom policies. It also does not justify the exclusion of transgender individuals as “other” that results when transgender employees are forced to use gender-neutral bathrooms. This is especially true given that people share bathrooms with transgender people every day without ever knowing it.²⁴² Notably, individuals who did not want to share spaces with members of a different race during the Civil Rights movement made similar arguments.²⁴³ As the argument failed then, so too should it fail today.

Ultimately, the greater severity of physical and mental harm to transgender employees outweighs the potential for harm to their coworkers. For these policy reasons, Title VII should be read to protect transgender

241. See generally ANN P. HAAS, PHILIP L. RODGERS & JODY L. HERMAN, WILLIAMS INST., SUICIDE ATTEMPTS AMONG TRANSGENDER AND GENDER NON-CONFORMING ADULTS (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf>.

242. See *Questionable Questions About Transgender Identity*, NAT’L CTR. FOR TRANSGENDER EQUALITY (Sept. 2, 2016), <https://transequality.org/issues/resources/questionable-questions-about-transgender-identity>.

243. See Vincent J. Samar, *The Right to Privacy and the Right to Use the Bathroom Consistent with One’s Gender Identity*, 24 DUKE J. GENDER L. & POL’Y 33, 55 (2016).

employees from discrimination.

CONCLUSION

Transgender bathroom access is a morass. With sharp divisions among the courts, the states, and even the executive branch of the federal government, it is unclear when and how this issue will be resolved. This is punctuated by the fact that the Supreme Court will not hear a single case involving transgender rights this term. Yet there is a path forward, and it may exist in the building momentum toward recognizing a protection for transgender employees under Title VII's sex discrimination prohibition. Supreme Court precedent that takes an expansive view of sex discrimination and society's growing understanding of gender identity and expression provides good reason to read Title VII to protect transgender employees. Such a reading of Title VII is also compelling because it protects one of the United States' most vulnerable populations from further harm. It is this approach that best meets the remedial goals of Title VII, providing the most equality, justice, liberty, and protection for minorities. As such, it is the approach the Supreme Court should take when it hears this issue in the future.