WHY DO YOU CARE ABOUT MY HAIR?: A PROPOSAL FOR REMEDYING HAIR DISCRIMINATION IN THE WORKPLACE ON A FEDERAL LEVEL

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INTRODUCTION

Imagine this. You are a rising second-year law student preparing for on-campus interview season. You are ecstatic because you were able to secure an interview with your top choice law firm. You worked hard for this opportunity, and you know that you are qualified. You have the grades and ambition to succeed. Then, one of your classmates nonchalantly asks, "Are you going to straighten your hair for the interview?" It may seem like an uncomplicated question, yet, for many, this question presents a quandary. As an Afro-Latinx[1] woman with naturally curly hair, I know all too well the conundrum this question creates and have too many times found myself in an internalized struggle when it comes to my hair and professional settings. On the one hand, I have a deep love for my hair and have allowed it to become a defining personality trait of mine, often letting it guide me into conversations. On the other hand, I have felt the pressures to conform to society's Eurocentric standards, often finding myself using harsh chemicals and extreme heat to alter the texture of my natural hair.[2]

The Black community has often relied on their hair as a source of artistry and self-expression.[3] Nonetheless, European aesthetics continue to permeate the Black community in various ways, including "cultural

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1 *See Afro-Latinx*, DICTIONARY.COM, https://www.dictionary.com/e/pop-culture/afro-latinx/ [https://perma.cc/D7SX-SM22] ("*Afro-Latin*[x] refers to people from Latin American countries with African ancestry. In both Latin America and the United States, this population is usually coded as being Black.").

2 *See Eurocentric*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/Eurocentric [https://perma.cc/BSG4-9UET] (defining Eurocentric as "reflecting a tendency to interpret the world in terms of European or Anglo-American values and experiences"). Eurocentric beauty standards are those standards that focus on "European (or Caucasian) culture." *See* Gabriella Tranchina, *Eurocentric Beauty Standards: A Global Disease*, GERM MAG. (June 15, 2015), http://www.germmagazine.com/eurocentric-beauty-standards-a-global-disease [https://perma.cc/4NWR-PBAL]. Afrocentric standards are "centered on or derived from Africa or the Africans." *See Afrocentric*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/Afrocentric [https://perma.cc/2ZWU-D28P].

3 Robyn Spencer, *Hair and Beauty Culture in the United States*, ENCYCLOPEDIA.COM (2005), https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/hair-and-beauty-culture-united-states [https://perma.cc/T9AQ-D878].

expressions categorizing hair as 'good' or 'bad' based on its [natural] texture."[4] This undoubtably has shaped the way in which members of the Black community have made their hair and beauty choices.[5] Despite hair's cultural and historical significance, there is currently no federal remedy available to those who have faced discrimination in the workplace based on their natural hair.[6]

History shows that hair has been an important and defining characteristic of African culture since ancient times.[7] Hairdressers held a high status in traditional African cultures and African hairstyles were often used to signify a person's birthplace, tribal membership, marital status, age, occupation, and socioeconomic status.[8] In fact, men and women in traditional African cultures often used their hair as a means of raising awareness of specific social connotations, such as the women of Senegal's Wolof people who would shave their heads a certain way until they were of marrying age and Wolof men who would braid their hair a particular way to demonstrate their preparation for war.[9] Hairdressing was done daily and involved a process of cleansing, combing, and styling into braids, twists, wraps, curls, and other styles, often including decorative accessories.[10] It was expected that both men and women would groom their hair, as "unkempt hair was a sign of mourning, illness or antisocial behavior."[11] The ornamentation of both head and hair was crucial to African society, "especially in West Africa, where most [B]lacks in America have their origins."[12]

In the 1400s, Europeans arrived in Africa and began kidnapping Africans for their labor.[13] At first, the Westerners admired the elaborate hairstyles worn by African men and women.[14] But soon after, slaveholders began shaving the captured individuals' heads, in what

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4 *Id.*

5 *Id.*

6 *See* Renee Henson, *Are My Cornrows Unprofessional?: Title VII's Narrow Application of Grooming Policies, and Its Effect on Black Women's Natural Hair in the Workplace*, 1 BUS. ENTREPRENEURSHIP & TAX L. REV. 521, 522–23 (2017); D. Sharmin Arefin, *Is Hair Discrimination Race Discrimination?*, ABA (Apr. 17, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/05/hair-discrimination [https://perma.cc/S78R-9R9L].

7 *Black Hair, Media & America: A Twisted History*, NAT. HAIR PRODS. [hereinafter *A Twisted History*], https://www.naturalhair-products.com/black-hair-media.html [https://perma.cc/2T8T-CTYU].

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

would be the start of eradicating their self-identity and culture.[15] Indeed, many whites held the belief that Blacks' social, economic, and political inferiority as enslaved individuals was justified by their physical appearance.[16] During this era, cities like New Orleans enacted laws that required Black Creole women who displayed their hair in natural styles to wear a tignon scarf over their hair to signify that they were members of the slave class, regardless of whether they were free or enslaved.[17] These circumstances often resulted in enslaved individuals, especially those in close contact with whites, conforming to and adopting Eurocentric beauty standards.[18]

In the nineteenth century, the process of importing enslaved individuals came to an end in the United States, resulting in an increase in the market value of enslaved individuals.[19] As a financially influenced reprieve, enslaved individuals were no longer forced to labor on Sundays.[20] Hoping to capture the essence of their beloved historical African hairstyles, women took this opportunity to style their hair.[21] These women were able to leave their hair uncovered for church services on Sundays, but kept it wrapped Monday through Saturday.[22]

America's love affair with hair has been a tangled one. The concept of "good hair" arose in the years leading up to the abolition of slavery.[23] "'Good hair' is considered to be hair that is wavy or straight in texture [and] soft to the touch," requiring minimal use of products to be embraced.[24] Indeed, this notion of "good hair" creates a pervasive cultural message that idealizes a particular perception of hair that is perpetuated by the sale, distribution, and promotion of treatments and products that achieve what is considered to be "good hair."[25]

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15 *You Can't Take Our Crowns: The Impact of Slavery on Black Women's Hair*, BLACKTHEN (Sept. 8, 2019), https://blackthen.com/you-cant-take-our-crowns-the-impact-of-slavery-on-black-womens-hair (last visited Mar. 18, 2022).

16 Spencer, *supra* note 3.

17 Chanté Griffin, *How Natural Black Hair at Work Became a Civil Rights Issue*, JSTOR DAILY (July 3, 2019), https://daily.jstor.org/how-natural-black-hair-at-work-became-a-civil-rights-issue [https://perma.cc/NA3N-5Y9K].

18 Spencer, *supra* note 3 ("Evidence exists, for example, that urban male slaves in New York in the seventeenth century styled their hair to resemble the popular wigs worn at the time by white men.").

19 *A Twisted History*, *supra* note 7.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 *What Is "Good Hair"?*, PERCEPTION INST., https://perception.org/goodhair/whatisgoodhair [https://perma.cc/MX69-62ZJ].

25 *Id.*

Despite this "good hair" standard, the last decade has seen a rise in the "natural hair movement," where the Black community has chosen to consciously reject dominating Eurocentric beauty standards and celebrate their natural hair.[26] As such, the market value of relaxers—"products that chemically straighten textured hair"—have fallen thirty-four percent since 2009.[27] The choices that the Black community, and specifically Black women, are making to wear their hair naturally is challenging the "traditional norms" of what society considers to be "appropriate," "attractive," and—most importantly for purposes of this Note—"professional."[28] However, even with this rightful confidence, there is still evidence that society has not yet come to accept the rise of the natural hair movement.

In 2016, the Perception Institute conducted the "Good Hair" Study to examine explicit and implicit attitudes toward Black women's hair.[29] This study included 4,163 participants: a national sample of 3,475 men and women and a sample of 688 women from an online natural hair community.[30] The study included the "Good Hair" Survey and a Hair Implicit Association Test (IAT).[31] The "Good Hair" Survey evaluated women's explicit attitudes toward Black women's hair, hair anxiety, and experiences related to their own hair, and the IAT assessed implicit attitudes toward Black women's natural hair.[32] The objective of this study "was to determine the risk of discrimination against [B]lack women who wear their hair naturally."[33] This study found that, "[o]n average, white women show explicit bias toward [B]lack women's textured hair[,] . . . rat[ing] it as 'less beautiful, less sexy/attractive, and less professional than smooth hair.'"[34] Further, the study concluded that "Black women perceive a level of social stigma against textured hair," and this perception is often confirmed "by white women's devaluation of natural hairstyles."[35]

In the professional context, the "Good Hair" Study found that "[B]lack women show a preference for smooth hairstyles," suggesting

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26 *Id.*

27 *Id.*

28 *Id.*

29 ALEXIS MCGILL JOHNSON, RACHEL D. GODSIL, JESSICA MACFARLANE, LINDA R. TROPP & PHILLIP ATIBA GOFF, THE "GOOD HAIR" STUDY: EXPLICIT AND IMPLICIT ATTITUDES TOWARD BLACK WOMEN'S HAIR 1 (2017), https://perception.org/wp-content/uploads/2017/01/TheGood-HairStudyFindingsReport.pdf [https://perma.cc/7GR5-Y5PC].

30 *Id.* at 3–4.

31 *Id.* at 1, 4.

32 *Id.* at 4.

33 *Id.* at 1.

34 *Id.* at 6.

35 *Id.*

that these styles "are considered more acceptable than textured hairstyles in professional [environments]."[36]

Furthering the notion advanced in the "Good Hair" Study, it is evident that our predominantly Eurocentric society has not accepted many of the Afrocentric practices that mold Black culture, especially as they relate to professional environments. A 2019 study conducted by the American personal care company, Dove, found that Black women's hair is policed more in the workplace than their non-Black female counterparts' hair, thereby highlighting how workplace bias and corporate grooming policies unfairly impact Black women.[37] The study surveyed 2,000 women, approximately 1,000 of whom were Black and 1,000 of whom identified as non-Black.[38] The women, ages twenty-five to sixty-four, were all employed full-time throughout the United States and either worked in an office or field (sales) setting, or had worked in a corporate office in the past six months.[39] The study revealed that Black women are thirty percent more likely than their non-Black counterparts to be made aware of a formal workplace appearance policy, and that Black women are one and a half times more likely to be sent home from the workplace because of their hair.[40] Moreover, a Black woman's hair is roughly three and a half times more likely to be perceived as unprofessional, and a Black woman is eighty percent more likely than her non-Black counterparts to change her natural hair to meet social norms or expectations at work.[41]

Nevertheless, despite the evidence highlighting the limpid effects hair discrimination has on professional environments, there is currently no federal legal remedy available to individuals who have been subjected to employment discrimination based on their natural hair.[42] While some states and localities have enacted legislation to combat this, there are still many places where an employee can be disciplined, or even fired, if they refuse to conform to an employer's grooming policies.[43]

This Note examines hair discrimination in the workplace and how Title VII of the Civil Rights Act of 1964 (Title VII) does not protect

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36 *Id.* at 12.

37 DOVE, THE CROWN RESEARCH STUDY: CREATING A RESPECTFUL AND OPEN WORKPLACE FOR NATURAL HAIR 2 (2019), https://static1.squarespace.com/static/5edc69fd622c36173f56651f/t/5edeaa2fe5ddef345e087361/1591650865168/Dove_research_brochure2020_FINAL3.pdf [https://perma.cc/L27C-LSLF].

38 *Id.*

39 *Id.*

40 *Id.* at 4.

41 *Id.* at 4–5.

42 *See* sources cited *supra* note 6.

43 *See infra* Section II.B (discussing state and local laws enacted).

plaintiffs alleging that they were subjected to employment discrimination because of their natural hair. Recognizing a need for clear remedies on a federal level, I propose not only that Title VII be amended to recognize a claim for hair discrimination, but further that such claims be extended beyond that of race, and opened to protected classes such as national origin and religion.[44] Various states have adopted legislation that goes beyond Title VII to forbid racial discrimination on race-based characteristics, explicitly including hair.[45] But it is essential that a clear, consistent, and enforceable legal standard be provided at the federal level because, as is made clear in the Civil Rights Act of 1964, the federal government must play a key role in enforcing federal civil rights laws in a way that ensures equal educational, employment, and other opportunities of all individuals, regardless of their race, national origin, or religion.[46]

Part I of this Note provides background regarding Title VII, the Equal Employment Opportunity Commission (EEOC), and discrimination in the workplace. Part II analyzes how courts address hair discrimination claims, and how hair discrimination intersects with protected characteristics beyond race. Part III looks toward the future of banning hair discrimination on the federal level and provides recommendations as to how a federal amendment to Title VII can cure the issues raised in previous Sections. Finally, Part III explains how courts and employers can contribute to fulfilling the intent of Title VII as it relates to hair discrimination in the workplace.

I. BACKGROUND

A. *Title VII, the EEOC, and Discrimination in the Workplace*

On July 2, 1964, before an audience of legislators and civil rights activists, President Lyndon B. Johnson signed the Civil Rights Act of

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44 *See Protected Group Member Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/p/protected-group-member [https://perma.cc/8QVQ-C6MC] ("A protected group member is an individual who falls within a group that is qualified for protection under equal employment laws. Federal law protects employees from discrimination or harassment based on sex, race, age, disability, color, creed, national origin, or religion. Employer policies may also protect employees from harassment or discrimination based on sexual orientation or marital status.").

45 *See infra* Section II.B (discussing state and local laws enacted).

46 *See* Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971) ("The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.").

1964 into law.[47] Considered to be the most sweeping civil rights legislation since Reconstruction,[48] President Johnson remarked that this Act would "eliminate the last vestiges of injustice in our beloved country."[49] Title VII prohibits employment discrimination based on "race, color, religion, sex, or national origin."[50] Title VII applies to private and public employers,[51] labor organizations,[52] and employment agencies.[53] The purpose of Title VII is nothing less than "the elimination of discrimination in the workplace."[54]

Congress drafted Title VII with the intention of allowing the broadest possible definition of discrimination.[55] Despite the many

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47 *LBJ Signs Civil Rights Act of 1964*, YOUTUBE (Feb. 1, 2010), https://www.youtube.com/watch?v=ZaRUca7FyAc [https://perma.cc/QS23-YRZ7].

48 Mae Bowen, *This Day in History: President Lyndon B. Johnson Signed the Civil Rights Act of 1964*, OBAMA WHITE HOUSE ARCHIVES (July 2, 2015, 3:29 PM), https://obamawhitehouse.archives.gov/blog/2015/07/02/day-history-president-lyndon-b-johnson-signed-civil-rights-act-1964 [https://perma.cc/X4GF-T4VS].

49 *LBJ Signs Civil Rights Act of 1964*, *supra* note 47.

50 42 U.S.C. § 2000e-2(a)(1).

51 *Id.* § 2000e(b) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.").

52 *Id.* § 2000e-2(c) ("It shall be an unlawful employment practice for a labor organization—(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin; (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.").

53 *Id.* § 2000e-2(b) ("It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.").

54 Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979); *see also* Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091 (5th Cir. 1975) ("[Title VII] should reach any device or policy of an employer which serves to deny acquisition and retention of a job or promotion in a job to an individual . . . ."); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 ("Congress enacted Title VII . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin.").

55 *See* Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 780 (1987).

instances where Title VII has been used to cure unlawful discrimination, "courts have yet to fulfill the statute's mandate."[56] Despite the Supreme Court holding that Title VII must be interpreted as broadly as possible to give effect to its remedial purposes, courts have regularly contradicted the plain language of Title VII.[57] This contradiction is established by courts declaring certain employer policies nondiscriminatory, notwithstanding the fact that these policies incite glaring implications as they relate to race, sex, and national origin.[58] The legislative history of Title VII "encourages the courts to evolve their own broad definition proscribing all employment conditions based upon the statute's" protected classes.[59]

In addition to barring discrimination, Title VII created the EEOC, a federal agency tasked with enforcing the majority of federal laws that make it illegal to discriminate against a job applicant or employee.[60] Congress tasked the EEOC with the duties of investigating any claims of discrimination against employers and bringing suits against employers when necessary.[61] Further, the EEOC regularly issues guidance on all issues of discrimination in the workplace.[62] Although EEOC guidance is not legally binding, courts have regularly instructed employers to look at such guidance to ensure compliance with Title VII.[63] The EEOC's interpretation of Title VII is entitled to great deference by the courts.[64]

In 1989, the EEOC issued a document that included guidance on grooming standards in the workplace.[65] Seeking to clarify its policy and position on cases that raise a grooming- or appearance-related issue as a basis for discrimination under Title VII, the guidance states that appearance claims may raise viable race or national origin disparate

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56 *Id.* at 771.

57 *Id.* at 770–71.

58 *Id.* at 771.

59 *Id.* at 780.

60 42 U.S.C. § 2000e-4.

61 *Id.* § 2000e-6(e) ("[T]he Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission."); *see id.* § 2000e-5(f).

62 *Id.* § 2000e-12; Martin Childs IV, *Who Told You Your Hair Was Nappy?: A Proposal for Replacing an Ineffective Standard for Determining Racially Discriminatory Employment Practices*, 2019 MICH. ST. L. REV. 287, 312.

63 Childs, *supra* note 62, at 312–13; *see also* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("[Administrative agency decisions] while not controlling upon the courts . . . do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.").

64 Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971).

65 *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1989-10, CM-619 GROOMING STANDARDS (1989).

treatment claims.[66] Although this guidance was issued primarily in response to differential grooming standards applied between genders, the EEOC made clear that it relates to race or national origin.

In 2006, the EEOC issued an updated compliance manual that included revised guidance for race and color discrimination in the workplace.[67] When discussing hair, the manual stated that employers should maintain neutral rules.[68] The EEOC particularly stated that these rules must be applied evenhandedly, and that employers must respect racial differences in hair textures.[69] The guidance explicitly stated that employers may not prevent Black women "from wearing their hair in a natural, unpermed '[A]fro' style."[70]

Courts have frequently refused to provide the EEOC guidance the deference required to afford relief for plaintiffs asserting hair discrimination claims.[71] Courts have refused to rely significantly on the EEOC's compliance manual, citing that it is either contrary to case law or inconsistent in stating the EEOC's positions.[72] This refusal by courts proves to be problematic because it offers little remedy for plaintiffs who assert claims of hair discrimination. Furthermore, as a practical matter, this refusal neglects how stereotypes rooted in race can have a disparate impact on Black employees.[73]

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66 *Id.* at § 619.5.

67 *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2006-1, SECTION 15 RACE AND COLOR DISCRIMINATION (2006).

68 *Id.* at § 15-VII(B)(5) ("Employers can impose neutral hairstyle rules—e.g., that hair be neat, clean, and well-groomed—as long as the rules respect racial differences in hair textures and are applied evenhandedly. For example, Title VII prohibits employers from preventing African American women from wearing their hair in a natural, unpermed 'afro' style that complies with the neutral hairstyle rule. Title VII also prohibits employers from applying neutral hairstyle rules more restrictively to hairstyles worn by African Americans.").

69 *Id.*

70 *Id.*; *see also* Childs, *supra* note 62, at 313.

71 EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1032 (11th Cir. 2016) ("[W]e choose to not give [the EEOC's] guidance much deference or weight in determining the scope of Title VII's prohibition of racial discrimination."); *see also* Childs *supra* note 62, at 313.

72 *See, e.g.*, *Catastrophe Mgmt. Sols.*, 852 F.3d at 1031–32 (finding that "[t]he Compliance Manual contravenes the position the EEOC took in an administrative appeal less than a decade ago" and "runs headlong into a wall of contrary caselaw").

73 Dawn D. Bennett-Alexander & linda f. harrison, *My Hair Is Not like Yours: Workplace Hair Grooming Policies for African American Women as Racial Stereotyping in Violation of Title VII*, 22 CARDOZO J.L. & GENDER 437, 439 (2016) (lowercase preferred by source's author).

B. *Disparate Treatment v. Disparate Impact*

Title VII prohibits both "disparate treatment" and "disparate impact" discrimination.[74] Disparate treatment is intentional discrimination based on race, color, religion, sex, or national origin.[75] An example of disparate treatment would be requiring reading ability tests for Black employees, but not requiring the same test for their white counterparts.[76] For disparate treatment claims, the key question for courts to consider is whether a person was treated differently because of their race, color, religion, sex, or national origin.[77] On its face, the plain language of Title VII prohibits employers from engaging in the disparate treatment of their employees.[78]

The Supreme Court was faced with the question of whether Title VII prohibits facially neutral policies and practices that, regardless of intent, have an adverse impact on the basis of a protected trait.[79] In *Griggs v. Duke Power Co.*, the Court ruled in the affirmative and found that requirements or policies may violate the law if they have a disparate impact on a protected class of individuals covered under Title VII.[80] Disparate impact discrimination "prohibits employers from using neutral tests or selection procedures that have the effect of disproportionately excluding persons based on race, color, religion, sex, or national origin, where the tests or selection procedures are not 'job related and consistent with business necessity.'"[81] Disparate impact claims on the basis of race do not require the plaintiff to demonstrate an intentional action, but rather require the plaintiff to prove that the alleged discriminatory policy or practice has a statistically significant impact on a protected class.[82] "[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."[83]

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74 *See generally* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

75 *See* 42 U.S.C. § 2000e-2; U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2007-2, EMPLOYMENT TESTS AND SELECTION PROCEDURES (2007).

76 EMPLOYMENT TESTS AND SELECTION PROCEDURES, *supra* note 75.

77 *Id.*

78 42 U.S.C. § 2000e-2(a)(1).

79 *Griggs*, 401 U.S. 424.

80 *Id.*

81 EMPLOYMENT TESTS AND SELECTION PROCEDURES, *supra* note 75.

82 Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 987 (1988) ("The evidence in these 'disparate impact' cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities.").

83 *Id.*

II. ANALYSIS

A. *How Courts Have Addressed Hair Discrimination in the Workplace*

Perhaps the most renowned case involving hair discrimination is *Rogers v. American Airlines, Inc.* in 1981.[84] Rogers, a Black woman, was employed by American Airlines (American) as an airport operations agent.[85] In her role, she had extensive passenger contact, which included "greeting passengers, issuing boarding passes, and checking luggage."[86] Rogers claimed that American's grooming policy, which prohibited her from wearing her hair in a cornrow style, intruded on her rights and discriminated against her on the basis of race, in violation of Title VII.[87] Rogers asserted that the cornrow style of hair was one that was especially significant to Black women.[88]

The court acknowledged that the hair style is one that "has been and continues to be part of the cultural and historical essence of Black American women."[89] Nonetheless, the court found in favor of American, stating that the grooming policy was not discriminatory because the policy applied equally to members of all races and because Rogers did not allege that the cornrow hair style is worn exclusively or predominantly by Black people.[90] In fact, the court seemingly accepted American's contention that Rogers first appeared at work with the hairstyle "after the style had been popularized by a white actress in the film '10.'"[91] The court indicated that an employer's ban on hair styled as an "Afro/bush" would implicate the policies underlying the prohibition of discrimination because an Afro/bush hairstyle is an "immutable characteristic."[92] However, the court refused to extend the same analysis to Rogers's cornrow hairstyle and provided that "[a]n all-braided hair style is an 'easily changed characteristic,' and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an

84 Rogers v. Am. Airlines Inc., 527 F. Supp. 229 (S.D.N.Y. 1981).

85 *Id.* at 231.

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.* at 232.

90 *Id.*

91 *Id.*

92 *Id.* An immutable characteristic is any sort of physical attribute which is perceived as being unchangeable, entrenched, and innate. *See Immutable*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/immutable [https://perma.cc/NX8W-CC4J].

employer."[93] Ultimately, the court found that a trait or style can have no cultural importance unless a plaintiff can show (1) that the trait is exclusive to the specified culture and (2) that nothing but that specified culture influenced their decision to adopt that particular style.[94]

The "disturbing crux" of *Rogers* is that it shows how "cultural reflections of [race and] national origin are weakly protected under Title VII."[95] The court's holding in *Rogers* essentially allows an employer to create any policy or maintain any practice, even those that do not fulfill a business necessity, that restrict or hinder an employee's cultural identity as long as this policy or practice is not associated with an immutable characteristic.[96] The court's application of the mutability analysis to aspects of cultural identity, as demonstrated in *Rogers*, is erroneous under Title VII's expansive definition of discrimination.[97] What's more is that the decision in *Rogers* establishes a precedent that dramatically limits the freedoms Black employees have in the workplace, as it relates to their hair. Essentially, the *Rogers* decision restricts Black women to wearing their hair in a natural Afro or "bush" style and illustrates that employers are free to set policies against allowing employees to wear their hair in styles such as braids, cornrows, dreadlocks, bantu knots, and others.[98] The court opined that an employer is free to set grooming policies that restrict these hairstyles because these hairstyles are mutable, meaning they are easily changed characteristics.[99]

However, a distinctive issue in the court's analysis is its flawed interpretation of Title VII as solely concerned with immutable characteristics.[100] Congress intended that Title VII be given the broadest interpretation possible;[101] however, when drafting Title VII, Congress selected the terms "race, color, sex . . . [and] national origin"[102] because they most accurately fulfill and describe those factors that would no

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93 *Rogers*, 527 F. Supp. at 232.

94 Bayer, *supra* note 55, at 875; *see Rogers*, 527 F. Supp. at 232.

95 Bayer, *supra* note 55, at 876.

96 *Id.*

97 *Id.* at 876–77.

98 *Rogers*, 527 F. Supp. at 232.

99 *See id.* Some courts have refused to interfere with an employer's ability to set grooming policies that may have a disparate impact on their employees. *See* Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091 (5th Cir. 1975) ("[A] hiring policy that distinguishes on some other ground, such as grooming codes . . . is related more closely to the employer's choice of how to run his business than to equality of employment opportunity.").

100 Bayer, *supra* note 55, at 844.

101 *Id.* at 770.

102 42 U.S.C. § 2000e-2(a)(1).

longer constitute legitimate employment considerations.[103] But, that is not to say that courts are without the ability to expand the notions of what is typical of those protected classes. Title VII is concerned with preserving the dignity and individuality of employees,[104] and Title VII's purpose is thwarted where, as in *Rogers*, an entire classification of discrimination is defined as falling outside of its purview.[105] Indeed, there is nothing to suggest that "discrimination based on mutable characteristics interferes to a lesser degree than does immutable characteristic discrimination."[106]

In 2016, plaintiff Chastity Jones's claims met the same fate as Rogers's claims.[107] In *EEOC v. Catastrophe Management Solutions*, Jones applied to be a customer service representative at Catastrophe Management Solutions (CMS).[108] As a customer service representative, Jones would have no in-person contact with customers; rather, she would speak with them over the phone from a large call center.[109] Jones was selected for an in-person interview, and a few days later, she appeared at CMS dressed in a business suit with her hair styled in short dreadlocks.[110] At the conclusion of the interview, Jones was offered the position.[111] Subsequently, she met with CMS's human resources manager, Jeannie Wilson, who—noticing that Jones' hair was in dreadlocks—advised Jones that "CMS could not hire her 'with the dreadlocks.'"[112] When Jones asked why her dreadlocks would be a problem, Wilson stated that "they tend to get messy, although I'm not saying yours are, but you know what I'm talking about"—to which Jones responded that she would not cut her hair off.[113] Ms. Wilson

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103 Bayer, *supra* note 55, at 844.

104 In enacting Title VII, Congress was concerned with preserving the rights of individuals and, therefore, an employee cannot assert a "bottom line" defense to a claim of discrimination. *See* Connecticut v. Teal, 457 U.S. 440, 455–56 (1982) ("It is clear that Congress never intended to give an employer license to discriminate against some employees . . . merely because he favorably treats other members of the employees' group. . . . Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired. That answer is no more satisfactory when it is given to victims of a policy that is facially neutral but practically discriminatory. Every *individual* employee is protected against both discriminatory treatment and 'practices that are fair in form, but discriminatory in operation.'" (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971))).

105 Bayer, *supra* note 55, at 845.

106 *Id.*

107 EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. 2016).

108 *Id.* at 1021.

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.* at 1021–22.

responded that CMS could no longer hire her.[114] Although CMS's grooming policy did not specifically list dreadlocks as a prohibited hairstyle, the employer's determination that they were unprofessional justified their decision to rescind Jones's job offer.[115]

The EEOC filed suit on behalf of Jones alleging that CMS's conduct constituted discrimination on the basis of Jones's race in violation of Title VII.[116] In the district court, the EEOC argued that (1) "hairstyle can be a determinant of racial identity"; (2) *Rogers* and cases that rely on *Rogers* were wrongly decided because "their construct of race is far too narrow" and because the definition of race failed to "encompass both physical and cultural characteristics, even when those characteristics are not unique to a particular group"; and (3) "the immutable versus mutable distinction should be rejected" and the law should provide protection for certain mutable traits.[117]

CMS moved to dismiss the complaint, asserting that the facts did not support a claim for intentional discrimination because a grooming policy based on a mutable characteristic such as hairstyle is not racially discriminatory.[118] The district court dismissed the complaint for failure to state a claim.[119] The court based its decision on the notion that "employers' grooming policies are outside the purview of Title VII."[120] The court stated that Title VII prohibits discrimination on the basis of immutable characteristics such as race, sex, color, or national origin and that "[a] hairstyle, even one more closely associated with a particular ethnic group, is a mutable characteristic."[121]

The court went on to state that "defin[ing] race by non-unique cultural characteristics could lead to absurd results."[122] The court offered an example of an instance where a policy prohibiting dreadlocks would not apply to Black employees but would apply to their white counterparts, signaling that the court may have been concerned with

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114 *Id.*

115 *Id.* at 1022 ("CMS had [an internal] grooming policy which read as follows: 'All personnel are expected to be dressed and groomed in a manner that projects a professional and businesslike image while adhering to company and industry standards and/or guidelines. . . . [H]airstyle[s] should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable[.]'").

116 *See id.* at 1023–24. Specifically, the EEOC claimed that "prohibition of dreadlocks in the workplace constitutes race discrimination because dreadlocks are a manner of wearing the hair that is physiologically and culturally associated with people of African descent." *Id.* at 1023.

117 EEOC v. Catastrophe Mgmt. Sols., 11 F. Supp. 3d 1139, 1143 (S.D. Ala. 2014).

118 *Id.* at 1141.

119 *Id.* at 1144.

120 *Id.* at 1142.

121 *Id.* at 1143.

122 *Id.*

policies having an adverse impact on white employees.[123] However, this analysis employed a rather limited view of Title VII. If, as in the example employed by the court, an employer had a policy allowing a Black employee to wear their hair in dreadlocks, but denied that same right to a white employee, the white employee would have an actionable claim under Title VII.[124]

The EEOC appealed the district court's decision to the Eleventh Circuit, which affirmed the dismissal, focusing its reasoning on the mutability of hairstyles.[125] The court found that while the distinction between immutable and mutable characteristics may be difficult to distinguish, courts have drawn a line.[126]

The Eleventh Circuit further highlighted that the EEOC confirmed during oral argument that they were proceeding only on a disparate treatment theory and were not pursuing a disparate impact claim.[127] The court noted that the two theories are not interchangeable, and that courts must be careful to distinguish between them.[128] This is important because the court refused to consider whether CMS's grooming policy had a disparate impact on Black applicants.[129] Had the court considered this argument, the case could have potentially had a different outcome for Jones.

The court in *Catastrophe Management* highlights a more recent application of the immutability analysis and further demonstrates the erroneous and, perhaps outdated, nature of the concept. Courts' understanding of race is grounded in long established beliefs that one's racial identity is fixed and that one's biological identity and/or race is determined by an immutable characteristic, such as their skin color.[130]

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123 *Id.*

124 For an in-depth analysis of the Eleventh Circuit's decision in *Catastrophe Mgmt Sols.*, see D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in* EEOC v. Catastrophe Management Solutions, 71 U. MIA. L. REV. 987 (2017); *id.* at 1016.

125 EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1030 (11th Cir. 2016) ("Title VII protects persons in covered categories with respect to their immutable characteristics, but not their cultural practices.").

126 *Id.* ("We recognize that the distinction between immutable and mutable characteristics of race can sometimes be a fine (and difficult) one, but it is a line that courts have drawn. So, for example, discrimination on the basis of [B]lack hair texture (an immutable characteristic) is prohibited by Title VII, while adverse action on the basis of [B]lack hairstyle (a mutable choice) is not.").

127 *Id.* at 1024.

128 *Id.*

129 *Id.* at 1024–25 ("Because this is a disparate treatment case, and only a disparate treatment case, we do not address further the EEOC's arguments that CMS' race-neutral grooming policy had (or potentially had) a disproportionate effect on other [B]lack job applicants.").

130 Greene, *supra* note 124, at 1027.

This concept is not at all extraordinary; many cling to the idea, whether consciously or unconsciously, that race is a static, unchangeable, biological construct and that all facets of one's racial identity are those that one is born with and can be unchanged.[131] The consequence of rulings such as those in *Rogers* and *Catastrophe Management* is that judges' decisions treat issues involving racial identity as a monolith that remains involuntary and unchangeable.[132]

B. *State and City Approaches Toward Banning Hair Discrimination*

Courts have generally not considered discrimination based on hairstyles to be associated with race and, therefore, have not prohibited it under Title VII.[133] Identifying that this issue is not one that has been addressed on the federal level, many states have chosen to enact their own legislation to tackle hair discrimination in employment and educational settings.[134]

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131 *Id.* at 1028.

132 *Id.*

133 *See* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981); *Catastrophe Mgmt. Sols.*, 852 F.3d 1018.

134 Nicquel Terry Ellis & Charisse Jones, *Banning Ethnic Hairstyles "Upholds This Notion of White Supremacy." States Pass Laws to Stop Natural Hair Discrimination*, USA TODAY (Oct. 14, 2019, 2:20 PM), https://www.usatoday.com/story/news/nation/2019/10/14/black-hair-laws-passed-stop-natural-hair-discrimination-across-us/3850402002 [https://perma.cc/76MY-4DEN].

As of May 2021, California,[135] New York,[136] Colorado,[137] Maryland,[138] New Jersey,[139] Virginia,[140] Washington,[141] Connecticut,[142] New Mexico,[143] Delaware,[144] and Nebraska[145] are among the growing list of states that have passed or amended existing legislation prohibiting race-based hair discrimination. Each of these laws works to prevent biases and stereotypes related to race in education, employment, and other areas. These states have shown that they recognize a cognizable issue in the workplace and have offered a remediation to provide employees relief when they are subjected to employment discrimination based on their natural hair.[146] The first two states to pass legislation, California, and New York, have provided the framework that other states have followed.

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135 *See infra* Section II.B.1.

136 *See infra* Section II.B.2.

137 H.B. 20-1048, 72d Gen. Assemb., 2d Reg. Sess., at 1 (Colo. 2020) ("[F]or purposes of anti-discrimination laws in the context of public education, employment practices, housing, public accommodations, and advertising, protections against discrimination on the basis of one's race includes . . . hair texture, hair type, and protective hairstyles [such as braids, locs, twists, tight coils or curls, cornrows, Bantu knots, Afros, and headwraps].").

138 H.B. 1444, 2020 Leg., Reg. Sess., at 1 (Md. 2020) ("For the purpose of defining 'race,' for the purposes of certain laws prohibiting discrimination, to include certain traits associated with race, including hair texture and certain hairstyles; defining 'protective hairstyle'; and generally relating to discrimination and the definition of 'race.'").

139 S. 3945, 218th Leg., 2018–2019 Reg. Sess. (N.J. 2019) (prohibiting discrimination on the basis of hair under "Law Against Discrimination").

140 VA. CODE ANN. § 2.2-3900 (2021) ("It is the policy of the Commonwealth to: . . . [s]afeguard all individuals within the Commonwealth from unlawful discrimination in employment because of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, sexual orientation, gender identity, disability, or military status . . . ."); *id.* § 2.2-3901 ("The terms 'because of race' or 'on the basis of race' or terms of similar import when used in reference to discrimination in the Code and acts of the General Assembly include because of or on the basis of traits historically associated with race, including hair texture, hair type, and protective hairstyles such as braids, locks, and twists.").

141 H.R. 2602, 66th Leg., 2020 Reg. Sess., at 6 (Wash. 2020) ("'Race' is inclusive of traits historically associated or perceived to be associated with race including, but not limited to, hair texture and protective hairstyles. For purposes of this subsection, 'protective hairstyles' includes, but is not limited to, such hairstyles as afros, braids, locks, and twists.").

142 H.B. 6515, Reg. Sess., at 4 (Conn. 2021) ("'Race' is inclusive of ethnic traits historically associated with race, including, but not limited to, hair texture and protective hairstyles; and '[p]rotective hairstyles' includes, but is not limited to, wigs, headwraps and hairstyles such as individual braids, cornrows, locs, twists, Bantu knots, afros and afro puffs.").

143 New Mexico's protections are limited to students in schools. *See* S.B. 80, 55th Leg., 1st Reg. Sess., at 1 (N.M. 2021).

144 S.B. 192, 150th Gen. Assemb., Reg. Sess. (Del. 2020) ("'Race' includes traits historically associated with race, including hair texture and a protective hairstyle.").

145 Legis. B. 451, 107th Leg., 1st Sess., at 6 (Neb. 2021).

146 *See infra* notes 163–67.

1. California

In July 2019, California became the first state to ban discrimination based on one's natural hair.[147] Senate Bill 188, also known as The CROWN Act,[148] as it is similarly referred to in nearly every other jurisdiction that has adopted a similar law, seeks to expand the definition of "race" under California's Fair Employment and Housing Act.[149] This expansion includes protection for traits that are associated with race, such as hair texture, and natural or protective hairstyles, such as braids, dreadlocks, and twists.[150] The Bill was authored and introduced by State Senator Holly Mitchell, who remarked that California's strength is in its diversity.[151]

The California Legislature recognized the implications that decisions such as *Rogers* and *Catastrophe Management* have on the workforce and denounced similar decisions.[152] The Bill further entitles an employee to "affirmative" or "prospective" relief including, among other things: reinstatement; awards of backpay; grants of tenure; promotions; and training of personnel.[153]

The California Bill is revolutionary because it tackles the issue of hair discrimination head on. It further recognizes the implications that hair discrimination can have on those who fall within the religious

147 S.B. 188, 2019 Leg., Reg. Sess. (Cal. 2019). I chose to start with California because not only was it the first law to tackle hair discrimination nationally, but the text of the Bill has served as an example and framework for all laws enacted in other states after it.

148 CROWN is an acronym for "Creating a Respectful and Open Workplace for Natural Hair." The title, CROWN Act, has been adopted by nearly all jurisdictions who have adopted hair-based discrimination legislation.

149 *See* S.B. 188 § (1)(d) ("Workplace dress code and grooming policies that prohibit natural hair, including afros, braids, twists, and locks, have a disparate impact on Black individuals as these policies are more likely to deter Black applicants and burden or punish Black employees than any other group.").

150 *Id.*

151 Holly J. Mitchell (@HollyJMitchell), TWITTER (July 3, 2019, 7:45 PM), https://twitter.com/HollyJMitchell/status/1146565602363863040 [https://perma.cc/Q3SG-WH8V] ("California's strength is in its diversity. No one should be discriminated against at work . . . for their natural hair or hair styles. I'm proud to have authored the C.R.O.W.N. Act and to share that today it has become the first anti-discrimination law of its kind in the U.S.").

152 *See* S.B. 188 § 1(e) ("Federal courts accept that Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, and therefore protects against discrimination against afros. However, the courts do not understand that afros are not the only natural presentation of Black hair. Black hair can also be naturally presented in braids, twists, and locks.").

153 *Id.* at § 3(a) ("'Affirmative relief' or 'prospective relief' includes the authority to order reinstatement of an employee, awards of backpay, reimbursement of out-of-pocket expenses, hiring, transfers, reassignments, grants of tenure, promotions, cease and desist orders, posting of notices, training of personnel, testing, expunging of records, reporting of records, and any other similar relief that is intended to correct unlawful practices under this part.").

protected class by extending protections to include all forms of head, facial, and body hair that are part of an individual observing a religious creed.[154]

2. New York

In February 2019, The New York City Commission on Human Rights released their Legal Enforcement Guidance on Race Discrimination on the Basis of Hair.[155] Their guidelines point specifically to the rights of people to maintain their "natural hair, treated or untreated hairstyles such as locs, cornrows, twists, braids, Bantu knots, fades, Afros, and/or the right to keep hair in an uncut or untrimmed state."[156] Soon after this guidance was released, Bill S6209A was signed into law and amended New York's Human Rights Law and its Dignity for All Students Act to make clear that discrimination based on race includes hairstyles or traits associated with race.[157] The Bill was first introduced by State Senator Jamaal T. Bailey and received overwhelming support from the New York State Legislature and Governor Andrew Cuomo.[158]

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154 *Id.* § 3(q) ("'Religious creed,' 'religion,' 'religious observance,' 'religious belief,' and 'creed' include all aspects of religious belief, observance, and practice, including religious dress and grooming practices. 'Religious dress practice' shall be construed broadly to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of an individual observing a religious creed. 'Religious grooming practice' shall be construed broadly to include all forms of head, facial, and body hair that are part of an individual observing a religious creed.").

155 NYC COMM'N ON HUM. RTS., LEGAL ENFORCEMENT GUIDANCE ON RACE DISCRIMINATION ON THE BASIS OF HAIR (Feb. 2019), https://www1.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf [https://perma.cc/JET4-QZBM].

156 *Id.*

157 S.B. S6209A, 2019–2020 Reg. Sess. (N.Y. 2019).

158 *See* Press Release, N.Y. Governor's Office, Governor Cuomo Signs S6209A/A7797A to Make Clear Civil Rights Laws Ban Discrimination Against Hair Styles or Textures Associated with Race (July 12, 2019). New York Governor Andrew Cuomo stated:

> For much of our nation's history, people of color—particularly women—have been marginalized and discriminated against simply because of their hair style or texture. By signing this bill into law, we are taking an important step toward correcting that history and ensuring people of color are protected from all forms of discrimination.

Id. Assembly Speaker Carl Heastie stated:

> No one should face discrimination at school or in the workplace, but too often we see people of color, particularly women, who are told their hair is unprofessional or not appropriate in public settings. These discriminatory policies sideline people of color—keeping children out of their classrooms and diminishing who they are. That

a. New York City

In 1991, the New York City Council passed the New York City Human Rights Law (NYCHRL), which sought to protect the rights of city residents and employees from discrimination.[159] The NYCHRL is much more expansive than other civil rights laws enacted in other states and cities across the country.[160] However, this has not always been the case. In 2005, New York City passed the Local Civil Rights Restoration Act of 2005, which sought to "clarify the scope" of the NYCHRL.[161] The City Council observed that courts had construed the NYCHRL "too narrowly to ensure protection of the civil rights of all persons covered by the law."[162] Importantly, the Act clarified that the NYCHRL is "to be construed independently from similar or identical provisions of New York state or federal statutes."[163] The Act further elucidated that federal and state antidiscrimination laws were a mere "floor below which the [NYCHRL] cannot fall, rather than a ceiling above which the local law cannot rise."[164]

Today, the New York City Human Rights Commission recognizes that many communities "have a religious or cultural connection with uncut hair, including Native Americans, Sikhs, Muslims, Jews, Nazirites, or Rastafarians, some of whom may also identify as Black, [and that] natural hair may include maintaining hair in an uncut or untrimmed state."[165] The Commission further states that grooming policies that generally target communities of color, religious minorities, or other communities protected under the NYCHRL are also unlawful.[166]

> discrimination has no place in New York State. The Assembly Majority will continue to fight so every New Yorker is treated with dignity and respect.

Id.

159 NYC ADMIN. CODE § 8-101 (1991).

160 *See* Mark S. Goldstein & Alexandra C. Manfredi, *NYC Human Rights Law: The "Gold Standard" of Anti-Discrimination Laws?*, N.Y. L.J. (Oct. 27, 2020, 11:06 AM), https://www.law.com/newyorklawjournal/2020/10/27/nyc-human-rights-law-the-gold-standard-of-anti-discrimination-laws/?slreturn=20211010225500 [https://perma.cc/Z3ZF-G9DZ].

161 N.Y.C. LOC. L. NO. 85 § 1 (2005).

162 *Id.*

163 *Id.*

164 *Id.*; *see also* Goldstein & Manfredi, *supra* note 160.

165 NYC COMM'N ON HUM. RTS., *supra* note 155, at 1 n.5.

166 *Id.* at 2 n.7 ("Grooming or appearance policies that generally target communities of color, religious minorities, or other communities protected under the NYCHRL are also unlawful. Examples of religious, disability, age, or gender based discrimination with respect to hair include: a Sikh applicant denied employment because of his religiously-maintained uncut hair and turban;

C. *The Intersection of Hair Discrimination with Other Protected Classes Beyond Race*

America is replete with many intersecting identities which elucidate our diverse ideals. Thus, many people often fall into more than one protected class. As the NYCHRL demonstrates, hair discrimination often can intersect with other protected classes beyond race, including national origin and religion.[167]

In January of 2017, Guy Usher—a resident of Nashville, a Black man, and practicing Rastafarian—applied and was interviewed for a part-time position with the grocery chain Publix Super Markets (Publix).[168] Usher, who keeps his hair in dreadlocks as a part of his faith, was told at the end of his interview that he would need to cut his hair to work at Publix.[169] When he advised the assistant manager that he could not cut his hair because of his religious beliefs and inquired as to whether he could wear his hair inside of a hat, the assistant manager informed him that the company could not accommodate his religious beliefs by allowing an exemption to their grooming policy, which "prohibit[s] male employees from wearing their hair longer than the collars of their shirts."[170] After receiving an offer of employment, Usher advised that he did not feel comfortable cutting his hair due to religious purposes.[171] He was asked whether he wanted Publix to withdraw its offer of employment, to which Usher responded yes.[172]

The EEOC filed suit on behalf of Usher, asserting that Publix failed to provide a religious accommodation and that Usher was constructively discharged from his employment.[173]

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an Orthodox Jewish employee ordered to shave his beard and cut his payot (sidelocks or sideburns) to keep his job; a Black salesperson forced to shave his beard despite a medical condition that makes it painful to shave; a 60 year-old employee with gray hair told to color their hair or lose their job; or a male server ordered to cut his ponytail while similar grooming policies are not imposed on female servers.").

167 *See id.* I recognize that hair discrimination can and does have an impact on protected classes beyond race, national origin, and religion. However, that discussion is beyond the scope of this Note.

168 EEOC v. Publix Super Mkts., Inc., 481 F. Supp. 3d 684, 689 (M.D. Tenn. 2020).

169 *Id.*

170 *Id.*

171 *Id.*

172 *Id.* at 689–90.

173 *Id.* at 690 ("Plaintiff alleges that Defendant's withdrawal of its offer of employment amounted to constructive discharge and that its practice of refusing to provide accommodation for his religious beliefs deprived Usher of equal employment opportunities, was intentional, and was malicious or undertaken with reckless indifference to the federally protected rights of Usher.").

On a motion for summary judgment, the court found that genuine issues of material fact existed as to whether Usher informed Publix's customer service manager of a conflict between his religious beliefs and Publix's grooming policy.[174] Further, the court found that there existed genuine issues of material fact as to whether Usher's belief that his dreadlocks conflicted with Publix's grooming policy qualified as a "sincere religious belief[]."[175] Therefore, the court denied Publix's motion for summary judgment, allowing Usher's failure-to-accommodate and failure-to-hire claims to survive.[176] In July 2021, the parties reached a settlement.[177] Without admitting liability, Publix agreed to pay $50,000 to Usher and conduct religious accommodation training to all human resources, management, and supervisory personnel at the location where Usher was allegedly discriminated against.[178]

The 2014 New York case *Ibraheem v. Wackenhut Services, Inc.* calls further attention to the intersection of hair discrimination and religion.[179] The plaintiff here was a Black male and practicing Muslim, who wore a beard for religious reasons.[180] This plaintiff was hired as a security guard, and the employer was aware that he kept a beard for religious reasons.[181] The employer, however, maintained a policy that required all security personnel to remain clean-shaven, with exceptions afforded to those who wear beards for religious reasons.[182] The employee obliged and submitted a letter affirming his religious status.[183] For the first two years of his employment, he was not questioned about or asked to prove his religious status.[184] Although the employer kept these letters in its offices, in June 2009, the employer informed the plaintiff that he should keep a copy of his proof of religion letter on his person while at work, although this was not a regular policy or practice

174 *Id.* at 697.

175 *Id.* at 698.

176 *Id.* at 703.

177 Patrick Dorrian, *Publix Settles EEOC Suit over Rastafarian Worker's Dreadlocks*, BLOOMBERG (July 1, 2021, 12:11 PM), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X5DPVOD0000000?bna_news_filter=daily-labor-report#jcite [https://perma.cc/6TWS-M6WN].

178 *Id.*

179 Ibraheem v. Wackenhut Servs., Inc., 29 F. Supp. 3d 196 (E.D.N.Y. 2014).

180 *Id.* at 203.

181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.*

of the employer.[185] For the next week, the plaintiff was asked multiple times by supervisors to produce the letter.[186]

About two months after being asked to furnish the proof-of-religion letter, it was reported that the plaintiff was observed asleep on duty, which is a terminable offense under Wackenhut's disciplinary rules.[187] As such, the plaintiff was recommended for termination.[188] The plaintiff contested the claim "that he was asleep on the job and demanded that videotape evidence be produced to prove that he had not been asleep."[189] The plaintiff then received a two-day suspension for being "inattentive to duty."[190]

After the sleeping incident, the plaintiff alleged that he was subjected to various retaliatory actions, such as having limited access to a heated booth, despite his coworkers having access to one.[191] In April 2010, the plaintiff was terminated for violating conditions of his employment, including the sleeping incident and for being away from his post twice on the day he was terminated.[192]

The plaintiff filed a charge of employment discrimination with the EEOC, alleging discrimination based on his religion.[193] The EEOC issued the plaintiff a right-to-sue letter.[194] The plaintiff sued the employer alleging employment discrimination based on age, race, and religion, along with a hostile-work-environment claim and various tort claims.[195] The employer moved for summary judgment, which was granted in part and denied in part.[196] In its holding, the court determined that the plaintiff's claim for racial discrimination under Title VII was not reasonably related to the EEOC's charge of religious discrimination.[197] Essentially, because the plaintiff did not assert a claim of racial discrimination with the EEOC and because the basis of his complaint stemmed from his assertion that he was discriminated against because he wore a beard due to his Muslim faith, the court rejected the claim of racial discrimination and stated that the claim "would not 'reasonably be expected to grow out of the [EEOC] charge

185 *Id.* at 203–04.
186 *Id.* at 204.
187 *Id.*
188 *Id.*
189 *Id.*
190 *Id.*
191 *Id.* at 204–05.
192 *Id.* at 206.
193 *Id.*
194 *Id.*
195 *Id.*
196 *Id.*
197 *Id.* at 208.

[of religious discrimination].'"[198] The court further reasoned that the plaintiff was able to demonstrate that he was subjected to adverse employment actions, but there remained a genuine issue of material fact as to whether the employer's stated reason for terminating the plaintiff served as pretext for unlawful discrimination on the basis of religion.[199] Thus, the plaintiff's claims of religious discrimination survived, while his claim for race discrimination was not successful.[200] The final outcome of *Ibraheem* has not yet been reported.

In *EEOC v. Publix Super Markets*, the court recognized that a policy prohibiting dreadlocks could give rise to religious discrimination.[201] In *Ibraheem*, the plaintiff presented a claim which asserted that he was discriminated against based on his religion due to his beard.[202] Although the plaintiff's claim for racial discrimination failed, the holdings in *Publix Super Markets* and *Ibraheem* exhibit how hair can intersect with the protected class of religion.

III. PROPOSAL

A. *What's the Right Approach? A Look Toward Banning Hair Discrimination on the Federal Level*

1. Recommendations

As states continue to consider policies and legislation eradicating hair discrimination in the workplace, it is clear that society is moving in a positive direction. Nonetheless, there is a need for federal law that specifically forbids hair discrimination in the workplace. Adopting a federal amendment to Title VII would be the most effective way to fulfill its intent of eliminating workplace discrimination. Aside from a federal amendment, there is an overarching need for courts to expand their interpretation of immutability to include characteristics that may be tied to one's race, religion, or national origin. Finally, employers can work within their organizations to guarantee that their policies do not disadvantage any class of employees.

198 *Id.* (alteration in original) (quoting Deravin v. Kerik, 335 F.3d 195, 201 (2d Cir. 2003)).

199 *Id.* at 211–12.

200 *Id.* at 218.

201 EEOC v. Publix Super Mkts., Inc., 481 F. Supp. 3d 684 (M.D. Tenn. 2020).

202 *Ibraheem*, 29 F. Supp. 3d 196.

a. H.R. 5309—CROWN Act of 2020

On December 5, 2019, Representative Cedric Richmond of Louisiana introduced H.R. 5309, also known as the CROWN Act of 2020 to the 116th Congress.[203] On September 21, 2020, the Bill was passed by the House of Representatives and then went to the Senate for consideration.[204] However, upon the completion of the 116th Congress in January 2021, the Senate had not yet voted on it, so, by rule, it would need to be reintroduced in the 117th Congress.[205] Senator Cory Booker of New Jersey introduced a similar bill to the Senate on January 8, 2020, but that also was not voted on during the 116th Session.[206]

While the 116th Congress was unable to pass a version of the CROWN Act on a federal level, this issue remains at the forefront of current social justice issues.[207] In March 2021, Senator Booker and Representative Bonnie Watson Coleman re-introduced the CROWN Act to the 117th Congress.[208] On March 18, 2022, H.R. 2116 was passed by the House of Representatives and is now awaiting Senate consideration.[209]

b. Proposed Amendment to Title VII

The amendment to Title VII that is proposed here would revise the definitions of race, religion, and national origin to include protection of hair texture and style, and by extension would prohibit discrimination

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203 CROWN Act of 2020, H.R. 5309, 116th Cong. (2020).

204 *See id.*

205 *Government 101: How a Bill Becomes Law*, VOTE SMART, https://votesmart.org/education/how-a-bill-becomes-law#.YEGKyV1KiEs [https://perma.cc/6HNN-FKGZ] ("If either chamber does not pass the bill then it dies.").

206 *See* CROWN Act of 2019, S. 3167, 116th Cong. (2020). Both of the Bills are identical and identify that "[a]pplying [a] narrow interpretation of race or national origin has resulted in a lack of Federal civil rights protection for individuals who are discriminated against on the basis of characteristics that are commonly associated with race and national origin." *Id.* § 2(10); *see also* CROWN Act of 2020, H.R. 5309, 116th Cong. § 2(10) (2020).

207 The CROWN Act continues to gain traction in many states and within companies nationwide. *See generally* Allison Keys, *CROWN Act Aims to End Natural Hair Discrimination in Workplace, Schools*, KRQE (Oct. 20, 2020, 8:51 AM), https://www.krqe.com/news/albuquerque-metro/crown-act-aims-to-end-natural-hair-discrimination-in-workplace-schools [https://perma.cc/QQQ5-5MEV]; N'dea Yancey-Bragg, *UPS Allows Employees to Wear Natural Black Hairstyles and Beards*, USA TODAY (Nov. 12, 2020, 5:52 PM), https://www.usatoday.com/story/news/nation/2020/11/12/ups-allows-employees-have-natural-black-hairstyles-and-facial-hair/6262112002 [https://perma.cc/6HP7-XUJW]; Michael Lozano, *Fayetteville City Council Considers Policy Which Prohibits Race-Based Hair Discrimination*, ABC NEWS 11 (Mar. 3, 2021, 11:00 PM), https://abc11.com/crown-act-creating-a-respectful-and-open-world-for-natural-hair-sb-165-hb-170/10387120 [https://perma.cc/PJR8-FC3U].

208 CROWN Act of 2021, H.R. 2116, 117th Cong. (2021); CROWN Act of 2021, S. 888, 117th Cong. (2021).

209 CROWN Act of 2021, H.R. 2116, 117th Cong. (2021).

of an individual's texture or style of hair based on one of those protected characteristics.

As *Rogers*, *Catastrophe Management*, *Publix Super Markets*, and *Ibraheem* demonstrate, hair discrimination intersects with other protected classes beyond that of race, including national origin and religion. H.R. 5309 provides a strong initial framework; however, the Bill does not suggest that hair discrimination claims can be asserted based on one's religion or national origin. And, as made clear by this Note, hair discrimination connected to someone's race, religion, or national origin should be illegal.

Like Maryland's hair discrimination Bill, the amendment should define race as "includ[ing] certain traits associated with race, including hair texture and certain hairstyles."[210] This application should likewise be applied to national origin and religion, such that characteristics associated with these traits are protected. For example, coverage should apply to a Sikh man who wears a turban or a Hasidic Jewish man who wears a beard for religious reasons.

The proposed amendment should closely adopt much of the language provided in the New York City Human Rights Enforcement Guidance on Hair and take an expansive approach.[211]

Furthermore, drawing reference from the EEOC Compliance Manual, any proposed amendment should make clear that employers are within their rights to impose neutral hairstyle rules such as rules that say hair must be neat, clean, and well-shaven.[212] Yet, like the EEOC Compliance Manual, any proposed policy should require that any neutral hairstyle rules be respectful of racial and religious differences in hair textures and be applied evenhandedly.[213]

c. Courts Should Expand Their Interpretation of Immutability to Include Hair

In our current age, "employment discrimination rarely presents itself in policies that explicitly exclude employees" on the basis of their protected characteristics and, thus, the longevity of Title VII is dependent on "its ability to root out more subtle practices . . . that still operate to disfavor [employees]."[214] *Rogers* and *Catastrophe*

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210 *See* H.B. 1444, 2020 Leg., Reg. Sess., at 1 (Md. 2020).

211 *See* LEGAL ENFORCEMENT GUIDANCE ON RACE DISCRIMINATION ON THE BASIS OF HAIR, *supra* note 155.

212 *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1989-10, GROOMING STANDARDS § 619.5 (1989).

213 *Id.*

214 Petition for Writ of Certiorari at 3, EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. 2016) (No. 14-13482).

Management highlight that courts have historically been reluctant to broaden their interpretation of immutability to include hairstyles such as dreadlocks, braids, bantu knots, and other styles typically associated with Afrocentric culture. Even in 1981, when *Rogers* was decided, the court's refusal to broaden the definition of immutability disregarded the link between hair and one's identity, and time has only shown how outdated this interpretation has become. It is far beyond time for courts to revise their definition of immutability to recognize how intrinsic hair is to protected characteristics.

Courts have regularly applied other antidiscrimination laws more broadly, such as in *Bostock v. Clayton County Georgia*, where the Court extended the definition of sex under Title VII to include sexual orientation and gender identity.[215]

There also currently exist some federal antidiscrimination laws which afford plaintiffs protection from discrimination on the basis of traits that are alterable, such as the Fair Housing Act's protection of "familial status," which includes those with children, those who adopt, and those who are pregnant.[216] This raises the question of why Title VII has not been similarly extended to allow for a broad general interpretation.[217] In light of the extension of the meaning of sex under Title VII and interpretations of the Fair Housing Act, it is time for courts to modernize their approach to immutability in the context of Title VII.[218]

Some scholars have proposed a new definition of immutability that defines it as a characteristic, that in addition to being beyond the individual's ability to change, is so engrained in one's identity that it is effectively unalterable and "ought not be required to be changed."[219] Courts should adopt this interpretation of the immutability doctrine in order to fulfill the truest intent of Title VII.[220] Adopting this approach would further create consistency between antidiscrimination acts and provide clarity for plaintiffs seeking to bring claims under Title VII.

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215 *See, e.g.*, Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

216 Henson, *supra* note 6, at 533; *see also* 42 U.S.C. § 3602(k) ("'Familial status' means one or more individuals (who have not attained the age of 18 years) being domiciled with (1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.").

217 Henson, *supra* note 6, at 533.

218 *Id.* at 533–34.

219 *Id.* at 533.

220 *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); Bayer, *supra* note 55, at 780; D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355, 1361 (2008).

d. Recommendations for Employers

Notwithstanding the need for intervention on a federal level, there is much that can be done by employers to ensure their workplace is a welcoming and inclusive environment for all employees, while ensuring that the policies they enact do not have a disparate impact on any of their employees. Indeed, Congress designed the remedial measures of Title VII to serve as a "spur or catalyst" to cause employers "to self-examine and to self-evaluate their employment practices," and to set out to eliminate any instances of discrimination.[221] The following recommendations serve to assist employers with creating a more inclusive environment and should be considered for implementation, regardless of whether there is any shift of hair discrimination laws in an employer's respective jurisdiction.

Employers may have grooming polices in place; however, it is imperative that employers proceed with extreme caution when the policies relate to immutable characteristics or unduly burden one protected class.[222] When seeking to implement a grooming policy, there are certain questions that employers should ask to ensure that their policies will not disproportionally impact any one group of their employees.[223] Implementing policies according to these recommendations should assist employers in creating policies that will not have a disparate impact on their employees.[224]

These questions should consider the purpose of their proposed policy; whether the policy recognizes the full range of natural hair styles and textures; the employer's industry; whether there are health and safety concerns associated with imposing such a policy; the potential impact the policy will have on employees; if there is a less restrictive means that can be implemented; exceptions to the proposed policy; approaches for those instances where an employee opposes the policy based on their protected characteristics; and whether there is a legitimate, nondiscriminatory business justification for the suggested grooming policy.[225]

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221 *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975) (quoting United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973)).

222 Pamela E. Palmer, *A Dreaded Situation: Title VII and Grooming Policies*, 12 MINORITY TRIAL LAW. 13 (2014).

223 Bennett-Alexander & Harrison, *supra* note 73, at 457.

224 *Id.*

225 *Id.* These questions were developed by Professor Bennett-Alexander and Professor Harrison in *My Hair Is Not like Yours*. *Id.* These questions perfectly capture the analysis employers need to conduct to ensure their policies do not have a disparate impact on their employees. As the professors note, "[t]he factors take into consideration the legal arguments

Generally, an employer will have to consider what they deem to be "professional" while balancing the interests of their business and constitutional rights of their employees.[226] If the employer does not associate typical hairstyles more closely attributed with Black employees, such as braids, dreadlocks, bantu knots, and so on as professional, the employer should adapt its viewpoint, as these hairstyles can be considered clean, neat, and well-groomed.[227] If the employer's perception of what is considered "professional" encompasses an inclusive wide array of hair textures, the policy will be less likely to violate Title VII.[228]

The employer should additionally aim to have a policy that is industry specific, as different industries will require different policies.[229] If the employer cannot furnish a safety reason, then the employer will need to consider whether its suggested policy meets the EEOC's business necessity exception.[230] The employer should bear in mind that catering to a certain customer base is not a valid justification.[231] If the

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likely to confront an employer sued for a discriminatory hair grooming policy. The queries are designed to be prophylactic and avoid litigation, as well as to better position an employer sued for racial discrimination for using a hair grooming policy." *Id.* The exact questions for consideration are as follows:

> 1. What is the purpose of the employer's hair grooming policy? 2. Does the employer acknowledge the full range of natural hair textures before establishing the grooming policy? 3. For what type of industry or position is the employer establishing the grooming policy? 4. Are there health, safety, or hygiene issues associated with imposing the grooming policy? 5. Does the employer know the impact of the policy on the full spectrum of protected employee groups? 6. Will there be a disparate impact on such groups by imposing the grooming policy? 7. Are there alternatives to the grooming policy that may avoid potential discrimination? 8. Are exceptions to the policy permitted? If so, on what basis? 9. How does the employer plan to handle those employees who voice opposition to the grooming policy on the basis of protected criteria? 10. Is there a legitimate nondiscriminatory business justification for the grooming policy?

Id.

226 *Id.* at 457–58.

227 *Id.*

228 *Id.*

229 *Id.*

230 *Id.* at 458; *see also Prohibited Employment Policies/Practices*, EEOC, https://www.eeoc.gov/prohibited-employment-policiespractices# [https://perma.cc/T62K-L7CJ] ("The laws enforced by EEOC prohibit an employer or other covered entity from using neutral employment policies and practices that have a disproportionately negative effect on applicants or employees of a particular race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), or national origin, or on an individual with a disability or class of individuals with disabilities, *if the polices or practices at issue are not job-related and necessary to the operation of the business*." (emphasis added)).

231 Bennett-Alexander & Harrison, *supra* note 73, at 458.

employer is able to furnish a health, safety, or hygiene justification, then the suggested policy becomes more defensible.[232]

The employer should further analyze the disparate impact a suggested policy will have on the protected classes of employees and should ensure that polices that appear to be neutral do not adversely impact any employees.[233]

These considerations provide employers with a framework, and it allows employers to maintain necessary control over their workplace, while ensuring employees that employers are doing what they can to minimize policies that may have a disparate impact or may result in the disparate treatment of employees.[234] These considerations are further beneficial for employers because they will reduce the amount of litigation against employers.[235]

If there is a need to implement a grooming policy, the employer should refrain from using subjective terminology such as "excessive hairstyles," or maintaining policies that require employees to have hair that is "smooth," or "contained," unless there is a legitimate business necessity, or the employer can provide some health or safety justification.[236]

A final suggestion for employers is to implement company-wide diversity and inclusion training, with the goal of changing perceptions surrounding natural hair.[237] This would be crucial toward eradicating workplace biases as it would not only work toward ending the stigma against natural hair, but would allow employees to ascertain that a person's hair texture or hair style has no bearing on their ability to successfully perform their job duties and draws no conclusions regarding their level of professionalism.[238] Further, these trainings could prove significant because they would motivate employees to reassess their own implicit biases and educate them in an effort to support their colleagues in upholding a discrimination-free workplace.[239]

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232 *Id.* at 459.

233 *Id.*

234 *Id.* at 457.

235 *Id.*

236 *Id.*

237 Ra'Mon Jones, *What the Hair: Employment Discrimination Against Black People Based on Hairstyles*, 36 HARV. BLACKLETTER L.J. 27, 43–44 (2020); Reba Letsa, *Avoiding Workplace Discrimination Against Employees with Natural Hairstyles*, BLOOMBERG L. (Oct. 28, 2020, 4:01 AM), https://news.bloomberglaw.com/us-law-week/avoiding-workplace-discrimination-against-employees-with-natural-hairstyles [https://perma.cc/JY8P-GQZL].

238 Jones, *supra* note 237, at 44.

239 *Id.*

CONCLUSION

The physical appearance standards that currently dominate society's notion of professionalism in the workplace clearly conflict with the spirit of Title VII. In enacting Title VII, Congress intended "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[240] Research shows that hair is intrinsically linked to the identities of many and the repercussions associated with hair discrimination in the workplace have profound and far-reaching consequences, such that individuals like Chastity Jones and Guy Usher have been denied job opportunities because of their natural hair, and individuals like Renee Rogers and Daoud Ibraheem have received unfavorable treatment due to their employers' grooming policies.[241] These cases further highlight how grooming policies, specifically those that place limitations on hair, can impact employees, creating barriers to professional advancement.[242]

Beyond having an impact on race, hair discrimination has been shown to affect the national origin- and religion-protected characteristics, such that any federal or state law seeking to eradicate hair discrimination need consider this issue when drafting an amendment to Title VII. It is not idealistic to desire that society work toward eliminating the biases that plague our workplace environments. The recommendations set forth in this Note seek to offer a step in the right direction toward a more inclusive society.

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240 Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

241 *See* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. 2016); EEOC v. Publix Super Mkts., Inc., 481 F. Supp. 3d 684 (M.D. Tenn. 2020); Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981); Ibraheem v. Wackenhut Servs., Inc., 29 F. Supp. 3d 196 (E.D.N.Y. 2014).

242 *See generally* Greene, *supra* note 124.