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## Running from the Gender Police: Reconceptualizing Gender to Ensure Protection for Non-Binary People

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RUNNING FROM THE GENDER POLICE:  
RECONCEPTUALIZING GENDER TO ENSURE  
PROTECTION FOR NON-BINARY PEOPLE

*Katie Reineck\**

ABSTRACT

*Non-binary people who are discriminated against at work or school are in a unique and demoralizing position. Not only have some courts expressed reluctance to use existing antidiscrimination law to protect plaintiffs who are discriminated against based on their gender identity and not simply because they are men or women, in most states non-binary genders are not legally recognized. I argue that a fundamental right to self-identification grounded in the Due Process Clause of the Fourteenth Amendment would provide non-binary plaintiffs with the ability to assert their gender in court and have that assertion carry legal weight, regardless of how friendly the Court is to queer rights issues. I argue that a fundamental right to self-identification would require courts to give the same wide degree of deference to a plaintiff's self-identification of their gender as they do to a plaintiff's self-identification of their religious beliefs. This legal framework would prohibit courts from policing the gender of the parties before them and allow them only to assess whether the plaintiff's gender-related beliefs are sincerely held. Such a legal framework would allow non-binary plaintiffs to bring claims under federal anti-discrimination law without worrying that the Court will refuse to recognize their gender as valid.*

INTRODUCTION

In this Note, I examine the inadequacy of current antidiscrimination law in protecting transgender people and the uncertainty in the level of protection, if any, non-binary people can expect under our current legal regime. I then propose a new framework for assessing gender, based on the

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framework currently used for evaluation of religious discrimination claims, that would ensure protection for transgender, including non-binary, people under antidiscrimination law. Finally, I lay out the constitutional hook needed to entitle gender self-identification to the same degree of deference afforded to religious self-identification.

I will discuss binary transgender people—trans men and trans women, gender non-conforming cisgender<sup>1</sup> people, and non-binary people—who do not identify within the accepted gender binary as men or women.<sup>2</sup> Non-binary people may identify with a specific label under the non-binary umbrella, such as neutrois,<sup>3</sup> bigender,<sup>4</sup> genderfluid,<sup>5</sup> androgyne,<sup>6</sup> or agender,<sup>7</sup> or with a more general label, such as genderqueer<sup>8</sup> or non-binary. Non-binary individuals may present in a way typically associated with women, by wearing makeup, keeping their hair long, or wearing clothing sold in the women's section; in a way typically associated with men, by keeping their hair short, growing facial hair, or wearing clothing sold in the men's section; or may present androgynously by mixing elements of the two. Some non-binary people use she/her/hers or he/him/his pronouns, while others use they/them/their pronouns or neo-pronouns.<sup>9</sup> Some non-binary people experience body dysphoria, a physical or emotional discomfort with their body and desire to change at least some sex characteristics, and may seek medical intervention. Others do not.

In Part I, I review how binary transgender plaintiffs fare under antidiscrimination law when they experience an adverse action in a realm where the law requires gender-blindness. In Part II, I review how courts assess

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1. Cisgender refers to those who identify with the gender they were assigned at birth. *Glossary of Terms*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/glossary-of-terms> (last visited Nov. 10, 2017).
  2. Kyle Smith & Meghan Schindler, *Glossary*, TRANS YOUTH EQUALITY FOUNDATION, <http://www.transyouthequality.org/glossary/> (last modified June 2015).
  3. Neutrois is often understood as being associated with a neutral gender. *Id.*
  4. Bigender individuals identify with two genders. They may identify with both simultaneously or shift between identifying with one or the other. *See id.*
  5. Genderfluid individuals experience persistent changes in their gender. *See id.*
  6. Androgyne individuals have a gender that is simultaneously masculine and feminine. *Id.*
  7. Agender individuals do not identify with gender as a concept. *See id.*
  8. Genderqueer, like non-binary, is an umbrella term for individuals who identify outside the gender binary. *See id.*
  9. *See* Robin Marantz Henig, *How Science is Helping Us Understand Gender*, NAT'L GEOGRAPHIC, (Jan. 2017), <http://www.nationalgeographic.com/magazine/2017/01/how-science-helps-us-understand-gender-identity/>. Neo-pronouns include but are not limited to xe/xem/xyr, ze/hir/hirs, and ey/em/eir. *See Gender Pronouns*, UNIV. OF WIS., MILWAUKEE LESBIAN, GAY, BISEXUAL, TRANSGENDER RES. CTR., <https://uwm.edu/lgbtrc/support/gender-pronouns/> (last visited July 7, 2017).

binary transgender plaintiffs' claims in situations where the law does not require gender-blindness, instead allowing different treatment based on gender. In Part III, I argue that courts should apply a sincerely held belief standard to plaintiffs' self-identified gender and require accommodations to be made for non-binary plaintiffs in situations where the law allows men and women to be treated differently. In Part IV, I argue that individuals are entitled to legal recognition of their self-identified gender under the Due Process Clause of the Fourteenth Amendment.

### I. WHEN THE LAW IS GENDER-BLIND

Prior cases brought by binary transgender plaintiffs indicate that non-binary employees may be able to successfully bring sex stereotyping claims. This is especially true when courts have already recognized that the challenged action taken against the plaintiffs is prohibited if it is motivated by gender.

In 2000, the Ninth Circuit held in *Schwenk v. Hartford* that the attempted rape of a transgender inmate in a men's prison by a corrections officer violated the Gender Motivated Violence Act ("GMVA")<sup>10</sup> because it was motivated by gender, after considering that the inmate exhibited "a feminine rather than typically masculine appearance or demeanor"<sup>11</sup> and that the corrections officer's demands for sex began only after he discovered that "she considered herself female."<sup>12</sup> The court rejected earlier cases, which held that conduct taken on the basis of transgender status was motivated by gender, not by sex—by the plaintiff's presentation and behavior, not their anatomy—and therefore did not offend Title VII of the Civil Rights Act of 1964 ("Title VII"), which prohibits employment discrimination "based on sex."<sup>13</sup> The Ninth Circuit determined that the early Title VII case law that distinguished sex from gender was implicitly overturned by *Price Waterhouse v. Hopkins*, when the Supreme Court held that discrimination because of an employee's failure to conform to traditional gender norms is discrimination because of sex.<sup>14</sup> The Ninth Circuit contended that after *Price Waterhouse*, sex and gender are interchangeable under Title VII and the federal antidiscrimination laws modeled after it.<sup>15</sup>

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10. 34 U.S.C. § 12361 (Westlaw through P.L. 115-72).

11. *Schwenk v. Hartford*, 204 F.3d 1187, 1203 (9th Cir. 2000).

12. *Schwenk*, 204 F.3d at 1202.

13. 42 U.S.C. § 2000e-2 (Westlaw through P.L. 115-72). The Gender Motivated Violence Act, 34 U.S.C. § 12361 (Westlaw through P.L. 115-82), like many federal antidiscrimination laws, was modeled after Title VII and is interpreted based on Title VII's more extensive case law. *Schwenk*, 204 F.3d at 1200–01.

14. *Price Waterhouse v. Hopkins*, 490 U.S. 241, 250–51 (1989).

15. *Schwenk*, 204 F.3d at 1202.

In 2004, the Sixth Circuit heard an appeal out of Salem, Ohio after the City of Salem began the process of terminating an employee at the fire department, Jimmie Smith,<sup>16</sup> when Smith disclosed that he had been diagnosed with Gender Identity Disorder<sup>17</sup> and planned to transition from male to female.<sup>18</sup> The district court determined that the petitioner was fired not because of his gender non-conformity, but because of his “transsexuality.”<sup>19</sup> The Sixth Circuit disagreed. The court pointed out that the district court had relied on case law from before *Price Waterhouse* and clarified that courts should no longer understand sex discrimination under Title VII as applying strictly to “the traditional concept of sex.”<sup>20</sup> The court then accused other courts, including itself in previous cases, of “legitimizing discrimination based on the plaintiff’s gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification” based on the plaintiff’s “mode of self-identification.”<sup>21</sup> Finally, the Sixth Circuit held that the petitioner’s transgender status did not preclude him from Title VII protection.<sup>22</sup> For the purposes of his sex stereotyping theory, the petitioner’s transgender status was irrelevant. What mattered was how his employer perceived him and the actions that were taken based on that perception.<sup>23</sup> The Eleventh Circuit held similarly in 2011.<sup>24</sup>

In 2008, a Washington, D.C. district court decided a case brought by a transgender woman, Diana Schroer, who had been offered a position with the Library of Congress and had the job offer rescinded after she informed Charlotte Preece, the employee tasked with filling the position, that she was transgender and would be transitioning.<sup>25</sup> Among its reasons for rescinding

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16. Although the plaintiff was in the process of transitioning from male to female, he referred to himself in the litigation materials by the name Jimmie, and he used he/him/his pronouns. Complaint at 2, *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).
  17. *Smith*, 378 F.3d at 568. The DSM-IV characterizes Gender Identity Disorder as “a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex[.]” with a “persistent discomfort about one’s assigned sex or a sense of inappropriateness in the gender role of that sex.” AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532–33 (4th ed. 1994).
  18. *Smith*, 378 F.3d at 567.
  19. *Smith*, 378 F.3d at 571.
  20. *Smith*, 378 F.3d at 572 (quoting *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984)).
  21. *Smith*, 378 F.3d at 574.
  22. *Smith*, 378 F.3d at 574–75.
  23. *Smith*, 378 F.3d at 574–75.
  24. *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (“[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”).
  25. *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

the offer, the Library of Congress expressed concern over whether Schroer would be able to maintain her military contacts, which had factored heavily into their decision to hire her, after transitioning and whether members of Congress would perceive her as credible, making it difficult for her to work with their staff. The court determined that these two asserted reasons for rescinding Schroer's offer were facially discriminatory.<sup>26</sup> The court acknowledged that circuit courts have overwhelmingly held that discrimination on the basis of gender identity is not prohibited under Title VII. Still, it found that the Library of Congress had discriminated against Schroer under a sex stereotyping theory.<sup>27</sup> Specifically, the court noted that Preece's perception of Schroer "as especially masculine made it all the more difficult for her to visualize Diana Schroer as anyone other than a man in a dress."<sup>28</sup> The court also held that Schroer prevailed on the text of Title VII itself, determining that even if the case law defining the word "sex" as a reference only to anatomical or chromosomal characteristics survived *Price Waterhouse*, the Library of Congress' rescission of Schroer's job offer "after being advised that she planned to change her anatomical sex was *literally* discrimination 'because of . . . sex.'"<sup>29</sup> *Schroer* was the first federal antidiscrimination case to recognize that discrimination against transgender workers because they are transgender is sex discrimination within the meaning of Title VII.

In 2012, the Equal Employment Opportunity Commission ("EEOC") publicly agreed with the D.C. district court through its decision in *Macy v. Holder*.<sup>30</sup> The EEOC outlined two theories a transgender employee could utilize to make out a *prima facie* case of sex discrimination for conduct motivated by the employee's transgender status. The EEOC explained that a transgender employee could show sex discrimination through gender stereotyping by showing that they had suffered an adverse employment action because their employer believed "that biological men should consistently present as men and wear male clothing"<sup>31</sup> and vice versa for employees assigned female at birth. Additionally, using the same burden-shifting model used for traditional Title VII cases, a transgender employee could prove sex discrimination without showing sex stereotyping if they could prove that their employer was about to confer a benefit on them, such as hiring or promotion, but then retracted it when they found out the

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26. *Schroer*, 577 F. Supp. 2d at 302.

27. *Schroer*, 577 F. Supp. 2d at 305.

28. *Schroer*, 577 F. Supp. 2d at 305.

29. *Schroer*, 577 F. Supp. 2d at 308.

30. *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, at \*11–14 (E.E.O.C. Apr. 20, 2012).

31. *Macy*, 2012 WL 1435995, at \*13.

employee was transgender.<sup>32</sup> For example, in *Macy v. Holder*, the plaintiff, Mia Macy, was in the process of being hired by the Bureau of Alcohol, Firearms, Tobacco, and Explosives (“ATF”) and had been informed that the job was hers pending her successful completion of a background check. However, after she informed ATF that she was transgender and would begin transitioning, she was told that the position was no longer available.<sup>33</sup> The EEOC compared Macy’s sex discrimination claim to the religious discrimination claim of a Christian employee who is fired after their employer discovers that the employee’s parents are Muslim, and therefore believes that the employee should be Muslim.<sup>34</sup> The EEOC reasoned that since an adverse action taken because an employer believed their employee should be a different religion indisputably constitutes religious discrimination, then the adverse action ATF took against Macy because it believed she should be a different sex constituted sex discrimination.<sup>35</sup>

In 2014, the Department of Education, Office for Civil Rights (“ED OCR”) oversaw a resolution agreement between the parents of a transgender middle school student and Downey Unified School District.<sup>36</sup> The student’s parents asserted that she had been harassed by other students based on her transgender status and that her elementary school teachers had disciplined her for exhibiting stereotypically feminine mannerisms and had insisted on calling her by her birth name instead of the name she used post-transition.<sup>37</sup> In its letter of findings, the ED OCR explained that a school may violate Title IX of the Education Amendments of 1972 (“Title IX”)<sup>38</sup> under a sex stereotyping theory if a transgender student is being harassed by peers on the basis of her transgender status and the school fails to respond appropriately.<sup>39</sup> The ED OCR said that “[a]ll students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX.”<sup>40</sup> Importantly, the letter of findings concluding this investigation was released in October 2014, a year and a half before the ED OCR implemented its now revoked guidelines—

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32. *Macy*, 2012 WL 1435995, at \*13.

33. *Macy*, 2012 WL 1435995, at \*1–2.

34. *Macy*, 2012 WL 1435995, at \*13.

35. *Macy*, 2012 WL 1435995, at \*14.

36. Letter of Findings, Office for Civil Rights, U.S. Dep’t of Educ., Downey Unified Sch. Dist., CA: OCR Case No. 09-12-1095 (Oct. 14, 2014).

37. *Id.* at 2–3.

38. 20 U.S.C. § 1681 (Westlaw through P.L. 115-51).

39. Letter of Findings, *supra* note 36, at 1–2.

40. *Id.*

which specified that Title IX entitled transgender students to treatment based on their self-identified gender at school—in May 2016.<sup>41</sup>

These decisions demonstrate that a binary transgender person can successfully bring a claim under Title VII and federal antidiscrimination laws modeled after Title VII, as long as the complained-of conduct is impermissible if motivated by gender, as is the case with attempted rape, unlawful firing, and failure to correct harassment. While the friendliness of executive agencies toward transgender claimants is now questionable, the EEOC and ED OCR decisions lend support for transgender petitioners bringing sex discrimination claims in court under Title VII and Title IX respectively.

The way these decisions were reached suggests that a non-binary claimant could similarly make a sex discrimination claim based on conduct already recognized as illegal under antidiscrimination law. None of these decisions include invasive discussions about the personal lives or anatomy of the claimants, where the court substitutes its understanding of the plaintiff's gender for the plaintiff's understanding of their own gender, and all include a successful sex stereotyping claim based on the sex that the respondent believed the claimant to be. If it is impermissible for an employer to treat a transgender woman employee adversely because the employer believes her to be a man and because she does not conform to his idea of how a man should behave, the employer has violated Title VII.<sup>42</sup> It stands to reason that a non-binary employee would also be able to make out a successful claim on similar facts. Such an argument would not even require a court to determine whether the employee's self-identified gender is correct because the only factor relevant to the claim is the respondent's state of mind. The petitioner's actual gender is irrelevant to the claim. Because this theory of sex discrimination against transgender individuals does not require the court to actually recognize the plaintiff's gender identity, it has found traction even in circuits that have been otherwise conservative on queer issues.<sup>43</sup>

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41. U.S. Dep't of Educ., Office for Civil Rights, & U.S. Dep't of Just., Civil Rights Division, *Dear Colleague Letter on Transgender Students* (May 13, 2016), <https://www.justice.gov/crt/page/file/942021/download>.

42. *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, at \*13–14 (E.E.O.C. Apr. 20, 2012).

43. *Compare* *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (upholding a transgender sex stereotyping claim), *with* *DeBoer v. Snyder*, 772 F.3d 388, 399–418 (6th Cir. 2014), *rev'd sub nom*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that bans on same-sex marriage do not violate the Equal Protection or Due Process Clauses). The Sixth Circuit's holding on same-sex marriage bans was preceded by the Supreme Courts of Massachusetts, California, Connecticut, Iowa, and New Mexico and district court orders that resulted in legalization in Oregon, Pennsylvania, North Carolina, Wyoming, Arizona, Kansas, and Florida. *See* Megan Garvey et al., L.A. TIMES, *Gay Marriage Chronology*, L.A. TIMES, June 6, 2015, <http://graphics.latimes.com/usmap-gay-marriage-chronology/>. It was followed by South Carolina

Additionally, in 2017, the Seventh Circuit decided *Hively v. Ivy Tech Community College of Indiana*. In *Hively*, the Seventh Circuit determined that discrimination against an employee because of the gender of her partner was discrimination based on sex.<sup>44</sup> The court made this determination based on case law holding that adverse employment action taken against an employee because of their association with a person of another race was racial discrimination under Title VII.<sup>45</sup> While this particular reason is difficult to apply to gender identity cases, the court also determined that Hively's termination because of her sexual orientation constituted an adverse action based on an impermissible sex stereotype.<sup>46</sup> This decision is significant because it shows that courts are beginning to accept "sex," under Title VII, as a broad term that encompasses even the most fundamental assumptions about men and women.

However, even in these apparently clear-cut situations, one court struggled to make sense of a sex discrimination claim brought by an intersex woman who was first passed over for a promotion and then fired after her employer discovered she had undergone genital reconstructive surgery prior to being hired.<sup>47</sup> The Eastern District of Pennsylvania characterized the adverse treatment Wilma Wood, an intersex employee, experienced, as discrimination "on the basis of gender-corrective surgery" and held that it was not sex discrimination covered under Title VII.<sup>48</sup> In doing so, the court cited the "plain meaning" of sex: "discrimination against women because of their status as females and discrimination against males because of their status as males."<sup>49</sup> The court also pointed to the legislature's purpose in enacting Title VII: "achieving equality between the sexes" but not "remedy[ing] discrimination against individuals because they have undergone gender-corrective surgery,"<sup>50</sup> and to case law holding that discrimination against transgender people was not sex discrimination.<sup>51</sup> The court's statements reflect a lack of comprehension that some people exist outside the sex binary and that discrimination against an intersex person because they are intersex is literally discrimination "because of . . . sex."<sup>52</sup> It bears noting that *Wood* was decided in 1987, two years before *Price Waterhouse*, which many courts ac-

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and Montana later the same month, in addition to the Fourth, Seventh, Ninth, and Tenth Circuits. *Id.*

44. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017).

45. *Hively*, 853 F.3d at 347–49.

46. *Hively*, 853 F.3d at 346.

47. *Wood v. C.G. Studios, Inc.*, 660 F. Supp. 176, 176 (E.D. Penn. 1987).

48. *Wood*, 660 F. Supp. at 177–78.

49. *Wood*, 660 F. Supp. at 177.

50. *Wood*, 660 F. Supp. at 177.

51. *Wood*, 660 F. Supp. at 178.

52. 42 U.S.C. § 2000e-2 (Westlaw through P.L. 115-46).

knowledge as having invalidated the idea that sex discrimination under Title VII covers only discrimination based on an outright animus toward either women or men.<sup>53</sup> It seems likely that this case would be decided differently today.

*Wood* may nonetheless foreshadow how courts think of non-binary gender. This is particularly important for non-binary plaintiffs who present in a way typically associated with their sex assigned at birth. These individuals would likely need to make sex discrimination claims without relying on sex stereotyping. In this situation, a successful case would depend on the court being willing to interpret the antidiscrimination law in question as reaching beyond binary genders and being willing to acknowledge non-binary genders as valid.

## II. WHEN THE LAW ALLOWS FACIAL GENDER DISTINCTIONS

Under existing law, non-binary people face an uphill battle in trying to bring claims in areas where sex classifications have thus far been recognized as legal. When binary transgender plaintiffs bring discrimination cases based on policies that are legally allowed to distinguish between genders, they typically recognize the validity of the sex classification itself, but argue that they are being classified as the wrong sex. Unlike recognizing that a plaintiff was fired, harassed, or denied a promotion because of their sex or perceived sex, these cases require courts to adjudicate the plaintiff's gender in order to determine whether discrimination has taken place. This opens transgender plaintiffs up to invasive inquiries about their anatomy, medical history, and personal life and often results in the court adjudicating the plaintiff's sex over their objections.

For example, in 2007, the Tenth Circuit heard an appeal out of Salt Lake City. Krystal Etsitty was diagnosed with Gender Identity Disorder and began hormone replacement therapy ("HRT") almost four years before she applied for a position with the Utah Transit Authority ("UTA"). At the time, she was already presenting as a woman and using the name Krystal outside work. Etsitty presented as a man at work and used men's restrooms during her training with the UTA but transitioned at work shortly after being hired. Her transition included wearing makeup, jewelry, and acrylic nails, and using the women's restroom. Although her immediate supervisor was initially supportive, Etsitty was eventually fired because the UTA was concerned about liability for Etsitty using public women's restrooms while on her route and wearing a UTA uniform. Etsitty's claim included two

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53. *E.g.*, *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000).

theories of sex discrimination under Title VII: gender identity as a protected class and sex stereotyping.<sup>54</sup> The Tenth Circuit cited several pre-*Price Waterhouse* cases to reach its holding that “there is nothing in the record to support the conclusion that the plain meaning of ‘sex’ encompasses anything more than male and female.”<sup>55</sup> The Tenth Circuit then dispensed with Etsitty’s sex stereotyping claim by deciding that she had not presented a genuine issue of material fact as to whether the UTA’s stated motivation, avoiding liability, was pretextual.<sup>56</sup> Here, the court was willing to accept the UTA’s openly transphobic justification, Etsitty’s “intent to use women’s public restrooms while wearing a UTA uniform, despite the fact that she still had male genitalia,” as a legitimate, nondiscriminatory reason for her termination.<sup>57</sup>

Similarly, in 2009, the Ninth Circuit determined that Rebecca Kastl’s Title VII and Title IX sex discrimination claims could not survive summary judgment. Kastl’s employer, Maricopa County Community College District (“MCCCD”), banned her from using the women’s restrooms on campus “until she could prove completion of sex reassignment surgery,” after receiving a complaint that “a man was using the women’s restrooms.”<sup>58</sup> The district later failed to renew her contract.<sup>59</sup> While the Ninth Circuit acknowledged that transgender people, like cisgender people, are protected from discrimination based on sex stereotyping after *Price Waterhouse* and *Schwenk*,<sup>60</sup> it determined that Kastl had not presented sufficient evidence that MCCCD’s proffered justification, “safety reasons,” was pretextual.<sup>61</sup> Like the Tenth Circuit, the Ninth Circuit was willing to accept MCCCD’s baseless and overtly transphobic assumption that Kastl would be a danger in the women’s restroom as a legitimate and nondiscriminatory reason for the disparate treatment she experienced, requiring Kastl to show that this reason was pretextual in order to proceed to trial.

Finally, in 2015, the U.S. District Court for the Western District of Pennsylvania decided *Johnston v. University of Pittsburgh*.<sup>62</sup> The case was brought by a transgender man, Seamus Johnston. He first told his parents he was a boy when he was nine years old.<sup>63</sup> When he applied to the Univer-

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54. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221–24 (10th Cir. 2007).

55. *Etsitty*, 502 F.3d at 1221–22.

56. *Etsitty*, 502 F.3d at 1224.

57. *Etsitty*, 502 F.3d at 1224.

58. *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 F. App’x 492, 493 (9th Cir. 2009).

59. *Kastl*, 325 F. App’x at 493.

60. *Kastl*, 325 F. App’x at 493.

61. *Kastl*, 325 F. App’x at 494.

62. *Johnston v. Univ. of Pittsburgh of Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015).

63. *Johnston*, 97 F. Supp. 3d at 662.

sity of Pittsburgh at Johnstown (“UPJ”) in March 2009, he listed his gender on his application materials as “female.” However, in May 2009 he started presenting as a man and holding himself out as a man in all aspects of life.<sup>64</sup> In 2010, he received a diagnosis of Gender Identity Disorder from a psychotherapist and legally changed his name.<sup>65</sup> In 2011, he registered with the selective service, began HRT, amended the gender marker on his driver’s license, and requested that UPJ change his name and gender on his school records.<sup>66</sup> He amended the gender markers on his passport and social security record in February 2012 and November 2013, respectively.<sup>67</sup> He used the men’s restrooms on campus the entire time he was a student at UPJ.<sup>68</sup>

Johnston enrolled in a men’s weight training class and began using the men’s locker room before and after class in Spring 2011. He did so all semester without incident. He reenrolled in the class in Fall 2011 and used the men’s locker room before and after class, as he had done before.<sup>69</sup> However, in September 2011, school officials informed him that he was required to use a referee locker room unless his gender was updated with the university, for which he needed a court order or an amended birth certificate.<sup>70</sup> He continued to use the men’s locker room throughout the semester without incident until late November, when the university began to discipline him. The university responded by barring him from male-designated facilities on campus until his graduation and by eventually expelling him and filing criminal charges against him.<sup>71</sup> The court found that Johnston had not stated a cognizable claim of discrimination under the Equal Protection Clause.<sup>72</sup> In doing so, the court defined the university’s interest in banning Johnston from men’s facilities as “providing its students with a safe and comfortable environment for performing [some of life’s most basic and routine] functions consistent with society’s long-held tradition of performing such functions in sex-segregated spaces based on biological or birth sex.”<sup>73</sup> Here, the court accepted the very behavior that Johnston was challenging as discriminatory as a legitimate government interest without considering whether that behavior was actually discriminatory. The court later stated that “while Plaintiff might identify his *gender* as male, his *birth sex* is fe-

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64. See *Johnston*, 97 F. Supp. 3d at 662.

65. *Johnston*, 97 F. Supp. 3d at 662.

66. *Johnston*, 97 F. Supp. 3d at 662–63.

67. *Johnston*, 97 F. Supp. 3d at 662.

68. See *Johnston v. Univ. of Pittsburg of Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 663 (W.D. Pa. 2015).

69. *Johnston*, 97 F. Supp. 3d at 663.

70. See *Johnston*, 97 F. Supp. 3d at 663.

71. See *Johnston*, 97 F. Supp. 3d at 663–64.

72. See *Johnston*, 97 F. Supp. 3d at 670.

73. *Johnston*, 97 F. Supp. 3d at 668.

male. It is this fact—that plaintiff was born a biological female, as alleged in the complaint—that is fatal to Plaintiff’s sex discrimination claim.”<sup>74</sup> The parties later settled out of court.<sup>75</sup>

The flimsy justifications courts are willing to accept as legitimate and nondiscriminatory when a transgender plaintiff is trying to access a gender-affirming sex-segregated space are in stark contrast to the justifications required by courts while assessing other types of discrimination cases. Courts have long recognized that employers may not point to customer preference to excuse discrimination. The Fifth Circuit first rejected this rationalization in 1971, when Pan Am tried to argue that sex was a bona fide occupational qualification (“BFOQ”) for being a flight attendant because passengers preferred women flight attendants to men.<sup>76</sup> The court pointed out that the customer preferences and prejudices Pan Am pointed to as its justification were the exact ills the Civil Rights Act was meant to overcome.<sup>77</sup> In later years, other circuits also held that customer preference cannot justify discrimination.<sup>78</sup> Notably, the Ninth Circuit refused to recognize a BFOQ for a position at an oil company that required dealings with nations that might refuse to do business with women.<sup>79</sup>

These holdings are in accordance with the “heckler’s veto” doctrine in First Amendment law, which states that the government cannot shut down speech on the basis that it is so unpopular it might cause the audience to react violently toward the speaker. Our civil rights law, across subjects, is premised on the idea that discrimination cannot be validated based on the reactions of third parties. In contrast, when a transgender plaintiff files a sex discrimination claim, courts are willing to accept as a justification that the transgender employee’s presence in the restroom might make other employ-

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74. *Johnston v. Univ. of Pittsburg of Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 671 (W.D. Pa. 2015) (emphasis in original).

75. Lauren Rosenblatt & Emily Brindley, *Pitt Settles Johnston Lawsuit, Looks to Form Trans Inclusion Group*, PITT NEWS, Mar. 30, 2016, <http://pittnews.com/article/70006/news/pitt-settles-johnston-lawsuit-looks-to-form-trans-inclusion-group/>.

76. *See Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 381, 387–88 (5th Cir. 1971).

77. *See Diaz*, 442 F.2d at 389.

78. *See Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908 (7th Cir. 2010) (holding that a policy of assigning nurses according to residents’ racial preferences was hostile and abusive, and violated Title VII); *Ferrill v. Parker Group, Inc.*, 168 F.3d 468 (11th Cir. 1999) (holding that race-matching callers to customers when requested by customers during get-out-the-vote drives violated Title VII); *Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795 (8th Cir. 1993) (holding that a customer preference for pizza delivery workers without beards could not justify a no beard policy that had a disparate impact on black men); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981) (holding that a position requiring dealings with nations that may refuse to do business with women could not justify a male gender BFOQ).

79. *Fernandez v. Wynn Oil Co.*, 653 F.2d, 1273, 1276–77 (9th Cir. 1981).

ees, students, or in Krystal Etsitty's case, other residents of the city, uncomfortable. Defendants are likewise permitted to win based on justifications that, themselves, rest on transphobic assumptions, such as MCCCCD's assumption that Rebecca Kastl's presence in the women's restroom at the school where she taught was inherently dangerous.

Prior to the legalization of same-sex marriage, many states also insisted on considering transgender individuals their sex assigned at birth for the purpose of forbidding them to marry, regardless of their surgical status or documentation to the contrary. In 1999, the Court of Appeals of Texas declared a marriage between a cisgender man and a post-operative transgender woman, Christie Littleton, invalid on the basis that it was a same-sex marriage, disregarding Littleton's amended birth certificate as inaccurate and nonbinding.<sup>80</sup> In the opinion, the court went into detail about Littleton's transition, including what genitalia she was born with and currently had,<sup>81</sup> listed the internal reproductive organs she did not have,<sup>82</sup> and informed readers that she was named after her father at birth.<sup>83</sup> The court also repeatedly referred to Littleton as a "transsexual male" who "look[s] like a woman."<sup>84</sup>

Likewise, the Supreme Court of Kansas determined that a marriage between a deceased cisgender man and a transgender woman, whom the court only identified by the name J'Noel, was void because it did not fit the "opposite sex" requirement in Kansas law.<sup>85</sup> Again, the Court described in detail the procedures that J'Noel had undergone during her transition,<sup>86</sup> the internal reproductive organs and capabilities she lacked,<sup>87</sup> and her sexual activities with her deceased husband.<sup>88</sup> In 2003, the Ohio Court of Appeals considered the same issue when a transgender man, Jacob Nash, attempting to marry a cisgender woman brought suit after the couple was denied a marriage license.<sup>89</sup> Like the Texas court, the Ohio court intimated that Nash's original birth certificate was correct, and that recognizing his amended birth certificate, which accurately reflected his gender, would be adverse to public policy.<sup>90</sup> Again, the court defined Nash's sex based on the

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80. *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999).

81. *See Littleton*, 9 S.W.3d at 224.

82. *Littleton*, 9 S.W.3d at 230.

83. *Littleton*, 9 S.W.3d at 224.

84. *Littleton*, 9 S.W.3d at 230.

85. *See In re Estate of Gardiner*, 42 P.3d 120, 135–37 (Kan. 2002).

86. *See In re Estate of Gardiner*, 42 P.3d at 122–23.

87. *See In re Estate of Gardiner*, 42 P.3d at 135.

88. *See In re Estate of Gardiner*, 42 P.3d at 122.

89. *See In re Marriage License for Nash*, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at \*1 (Ohio Ct. App. Dec. 31, 2003).

90. *See In re Marriage License for Nash*, 2003 WL 23097095 at \*6.

reproductive functions he was not able to complete and determined that to issue him a marriage license would be “directly contrary to the state’s position against same-sex and common law marriages.”<sup>91</sup>

Courts have also been reluctant to protect gender non-conforming cis-gender people in situations where differentiation on the basis of sex is legal. In *Jespersen v. Harrah’s Operating Co.*, decided in 2006, the Ninth Circuit evaluated a gender-specific dress code that required women to wear makeup.<sup>92</sup> The case was brought by an employee, Darlene Jespersen, who asserted that wearing makeup conflicted with her self-image and that she felt so uncomfortable wearing makeup that it interfered with her ability to work.<sup>93</sup> Jespersen claimed that the makeup requirement violated Title VII’s prohibition on sex discrimination because it “subjected [women] to terms of employment to which men were not similarly subjected” and because it “require[ed] women to conform to sex stereotypes as a term and condition of employment.”<sup>94</sup> The Ninth Circuit disagreed. The court pointed to a long history of allowing employers to treat men and women differently with regard to dress codes, both in its own and other circuits, and upheld the dress code because Jespersen had not presented evidence that the dress code imposed an unequal burden on men versus women.<sup>95</sup> The court similarly rejected Jespersen’s sex stereotyping theory because it found no evidence that Harrah’s had adopted the policy with the intention of forcing women employees to conform to sex-based stereotypes, citing the parts of the policy that were unisex.<sup>96</sup> Here, the court failed to recognize that stereotyping can be based on implicit biases<sup>97</sup> and does not require the employer to realize that it is asking women employees to adhere to a gendered stereotype when

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91. See *In re Marriage License for Nash*, 2003 WL 23097095 at \*6 (quoting *In re Bicknell*, 771 N.E.2d 846, 849 (Ohio 2002) (Stratton, J., dissenting)).

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

93. *Jespersen*, 444 F.3d at 1107–08.

94. *Jespersen*, 444 F.3d at 1108.

95. *Jespersen*, 444 F.3d at 1110 (citing *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755 (9th Cir. 1977); *Barker v. Taft Broad. Co.*, 549 F.2d 400, 401 (6th Cir. 1977); *Earwood v. Cont’l Se. Lines, Inc.*, 539 F.2d 1349, 1350 (4th Cir. 1976); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685, 685 (2d Cir. 1976) (per curiam); *Knott v. Mo. P.R. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975); *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (en banc); *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 896 (9th Cir. 1974); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973)).

96. *Jespersen*, 444 F.3d at 1112.

97. Implicit biases are unconscious assumptions about groups of people that can become “embedded in the organizational structures, authority lines, job classifications, institutional rules, and administrative procedures of employment firms.” Cecilia Ridgeway & Shelley J. Correll, *Unpacking the Gender System: A Theoretical Perspective on Gender Beliefs and Social Relations*, 18 GENDER & SOC’Y 510, 524 (2004).

it determines, for example, that they must wear makeup to look professional.

Some recent decisions have been friendly to transgender and gender non-conforming individuals. In 2016, the U.S. District Court for the Southern District of Ohio granted a preliminary injunction requiring a transgender student's school district to allow her to use the girls' restroom on the basis that her Title IX and Equal Protection claims were substantially likely to succeed on the merits.<sup>98</sup> In that case, Jane Doe, an eleven-year-old in Highland Local School District, intervened in a case brought by the DOE. The Court's assessment of the plaintiff's Title IX claim was based in part on the DOE's now defunct guidance<sup>99</sup> and in part on case law that predates the guidance, such as *Smith*, *Schwenk*, and *Price Waterhouse*,<sup>100</sup> so it is unclear how the revocation of the DOE's guidance affects this holding. However, the Court determined gender identity was a quasi-suspect class entitled to intermediate scrutiny under the Equal Protection Clause. The court based its determination on the history of discrimination against transgender people, the irrelevance of one's gender identity to their ability to contribute to society, and the fact that "transgender people have . . . immutable [and] distinguishing characteristics that define them as a discrete group."<sup>101</sup> The court held that the policy was not substantially related to the school district's interest in preserving its students' dignity and privacy. The court based this determination on *amici curiae* from other grade schools that had adopted trans-inclusive policies and had experienced no disruption or complaints about specific violations of privacy.<sup>102</sup> The court similarly rejected the district's stated interest in safety, noting that "*no* incidents of individuals using an inclusive policy to gain access to sex-segregated facilities for an improper purpose have *ever* occurred."<sup>103</sup> The court also expressly declined to consider *Johnston* persuasive, citing its reliance on pre-*Price Waterhouse* case law and rejection of *Smith*.<sup>104</sup> The Sixth Circuit declined to stay the preliminary injunction. The court stated that the school district had

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98. Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850, 870–71, 887 (S.D. Ohio 2016), *aff'd*, *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016).

99. U.S. Dep't of Educ., *supra* note 41.

100. *Bd. of Educ. of Highland Local Sch. Dist.*, 208 F. Supp. 3d at 868–70.

101. *Bd. of Educ. of Highland Local Sch. Dist.*, 208 F. Supp. 3d at 873 (quoting *Lyng v. Castillo*, 477 U.S. 635, 638 (1986)).

102. *Bd. of Educ. of Highland Local Sch. Dist.*, 208 F. Supp. 3d at 874–76.

103. *Bd. of Educ. of Highland Local Sch. Dist.*, 208 F. Supp. 3d at 876 (emphasis in original).

104. *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 870–71, 875 (S.D. Ohio 2016).

not shown a likelihood of success on the merits or irreparable harm and that staying the injunction was not in the public interest.<sup>105</sup>

In a similar case, decided after the DOE's guidance was revoked, the Seventh Circuit upheld a preliminary injunction restricting a high school from enforcing an unwritten policy prohibiting transgender students from using gender-affirming restrooms unless they had completed a full medical transition.<sup>106</sup> The court noted that the required procedure was prohibited for individuals under eighteen years old and acknowledged that not all transgender individuals wish to undergo a complete surgical transition.<sup>107</sup> The Court stated that a policy prohibiting transgender students from using restrooms in accordance with their self-identified gender punished them for their gender non-conformity and violated Title IX.<sup>108</sup> The court also considered the increased stigmatization the plaintiff, a transgender student, experienced when the school required him to use a gender-neutral restroom that no one else used.<sup>109</sup> It bears noting that the court placed some weight on both the student's medical diagnosis of Gender Dysphoria and the fact that he was living in accordance with this gender identity.<sup>110</sup> It is unclear whether a student without a medical diagnosis would have obtained the same outcome.

In an aforementioned case, the ED OCR brokered a resolution agreement between Downey Unified Public School District and the parents of a transgender middle school student who filed the complaint which ensured that the district would "treat the Student as a girl in all respects," including allowing her to use the girls' restroom at school.<sup>111</sup> Likewise, the ED OCR entered into a resolution agreement with Arcadia Unified School District after its investigation revealed that, despite the fact that the transgender student who filed the complaint was well-accepted among his peers, he was not permitted to use the boys' restroom or locker room at school.<sup>112</sup> He had also been required to stay by himself in a cabin with a parent on a school trip, although several other students had requested him as a cabin mate and the camp had informed the district of alternative accommodations that

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105. *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221-22 (6th Cir. 2016), *aff'g* Bd. of Educ. of Highland Local Sch. Dist., 208 F. Supp. 3d at 876.

106. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017).

107. *Whitaker*, 858 F.3d at 1041.

108. *Whitaker*, 858 F.3d at 1049.

109. *Whitaker*, 858 F.3d at 1050.

110. *Whitaker*, 858 F.3d at 1050.

111. Letter of Findings, *supra* note 36, at 4.

112. Letter of Findings, Office for Civil Rights, U.S. Dep't of Educ., Arcadia Unified Sch. Dist., CA: OCR Case No. 09-12-1020 (July 24, 2013) at 3-4.

would allow the student to share a cabin with other boys.<sup>113</sup> The resolution agreement instructed the school to allow the student access to all boys' facilities and treat the student as a boy in every respect.<sup>114</sup>

The Fourth Circuit ruled favorably in the case of a transgender plaintiff alleging discrimination in a situation where gender classifications are legal. In *G.G. v. Gloucester County School Board*, the Fourth Circuit upheld ED OCR guidance instructing schools to allow transgender students to use the restrooms that match their gender identity under the rationale that such an interpretation of Title IX was not arbitrary or capricious.<sup>115</sup> This decision has been vacated as moot due to the rescission of the guidance at issue. However, the opinion is still telling because it rests on the Fourth Circuit's acceptance that the text of Title IX is ambiguous with respect to transgender students' access to gender-affirming restrooms.<sup>116</sup> The Court determined that, although the law is clear that schools are able to provide separate girls' and boys' restrooms, it is silent on what defines a girl or a boy for the purposes of restroom usage.<sup>117</sup> The decision is significant because it represents a break from earlier case law, where courts tended to interpret Title IX as unambiguously not protecting transgender students' access to gender-affirming restrooms.<sup>118</sup>

Non-binary plaintiffs specifically have also seen some success in recent months in the arena of gender markers on identifying documents. In June 2016, Jamie Shupe became the first American to have their legal sex changed to non-binary after a district court in Oregon found that Shupe had completed the requirements to qualify for a legal sex change and that no person had shown cause for why their request should not be granted.<sup>119</sup> Kelly Keenan, an intersex individual from California, became the second legally recognized non-binary person in September of the same year.<sup>120</sup> In November 2016, Dana Zzyym successfully sued the State Department in federal district court in Colorado to have their gender marker on their

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113. *Id.* at 3–6.

114. Resolution Agreement, Office for Civil Rights, U.S. Dep't of Educ., Arcadia Unified Sch. Dist., CA: OCR Case No. 09-12-1020 (July 24, 2013) at 3.

115. *G.G. ex rel Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016), *vacated as moot and remanded*, 137 S. Ct. 1239 (2017).

116. *Id.* at 720–21.

117. *Id.* at 720.

118. The court distinguished this case from *Johnston* by noting that the *Johnston* court did not consider the DOE's guidance and, therefore, did not grapple with the administrative law concerns posed by *G.G. ex rel Grimm*, 822 F.3d at 723 n.9.

119. *In re Sex Change of Jamie Shupe*, Or. Cir. Ct. Multnomah, No. 16CV13991, 1 (June 10, 2016).

120. Decree Changing Name and Gender, Santa Cruz Cty. Sup. Ct., No. 16CV02024, 1 (Sept. 25, 2016).

passport changed to X.<sup>121</sup> In support of their petition, Zzyym submitted documents from the Veterans Affairs Medical Center in Cheyenne, Wyoming that noted that their sex was “intersex.”<sup>122</sup> The court determined that the State Department’s binary-only gender marker policy was not the result of a rational decision-making process, and therefore, did not satisfy the “arbitrary or capricious” standard for reviewing agency action.<sup>123</sup> The State Department argued that it could not register an individual’s gender as X because the documentation required as proof of gender only allowed for F and M gender designations.<sup>124</sup> However, the court noted that the State Department accepted third party affidavits attesting to gender as proof of gender, as long as they suggested a binary gender.<sup>125</sup> The court similarly rejected the State Department’s arguments that passport information needed to be able to be recorded in databases that only accepted M and F gender designations and that a passport with a non-binary gender marker might cause confusion when used in countries that only acknowledge two genders.<sup>126</sup> Finally, in March 2017, the same Oregon district court that granted Jamie Shupe’s petition allowed a Portland resident named Patch to receive a legal designation of agender, making Patch the first known legally genderless American.<sup>127</sup>

As legal recognition of non-binary genders grows, it is uncertain what requirements might be put into place for individuals hoping to change their legal gender. Jamie Shupe, for example, was required to show that they had undergone “surgical, hormonal, or other treatment appropriate for this person for the purpose of gender transition” and that “sexual reassignment ha[d] been completed” in order to have their legal sex changed in Oregon.<sup>128</sup> The statute does not define the terms “treatment” or “sexual reassignment.” This wording suggests that, while surgical or hormonal treatment are not necessary, some form of medical or psychological care is required. The cost of either could be prohibitive to low-income people. This requirement also implies that the Oregon legislature understands body

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121. *Zzyym v. Kerry*, 220 F. Supp. 3d 1106, 1108 (D. Colo. 2016).

122. *Zzyym*, 220 F. Supp. 3d at 1109.

123. *Zzyym*, 220 F. Supp. 3d at 1111–14.

124. *Zzyym*, 220 F. Supp. 3d at 1113.

125. *Zzyym*, 220 F. Supp. 3d at 1113.

126. *Zzyym*, 220 F. Supp. 3d at 1113–14.

127. See Mary Emily O’Hara, *Judge Grants Oregon Resident the Right to be Genderless*, NBC NEWS, Mar. 23, 2017, <http://www.nbcnews.com/feature/nbc-out/judge-grants-oregon-resident-right-be-genderless-n736971>. Patch, who does not use pronouns, was also granted the right to become mononymous, meaning that Patch has only one name instead of a first and last name. *Id.*

128. *In re Sex Change of Jamie Shupe*, Or. Cir. Ct. Multnomah, No. 16CV13991, 1 (June 10, 2016); OR. REV. STAT. § 33.460 (Westlaw through 2017 Reg. Sess.).

dysphoria to be a necessary aspect of trans-ness. This misconception is likely to disproportionately impact non-binary individuals.

### III. A NEW FRAMEWORK FOR ASSESSING SEX DISCRIMINATION

Because existing law is inadequate in its ability to address the discrimination that non-binary people face, I propose a new framework for assessing sex discrimination as a whole. In this Section, I argue that the framework best suited to sex discrimination claims, and especially cases brought by transgender people, is the one already applied to religious discrimination. I will refer to this framework as the self-identification framework because it would give transgender individuals the agency to define their own gender as they experience it.

#### A. *The Self-Identification Framework as Applied to Religion*

The First Circuit has outlined the elements of a religious discrimination case.<sup>129</sup> To make out a *prima facie* case based on failure to accommodate, an employee must establish that a “*bona fide* religious practice” conflicted with an employer’s policy, and this conflict was the reason for the adverse employment action.<sup>130</sup> A *bona fide* religious practice is a religious practice based on a sincerely held belief that is religious in nature. The burden then shifts to the employer to show that they either offered a reasonable accommodation allowing the employee to practice their religious beliefs or that any accommodation would have been an undue hardship for the employer.<sup>131</sup> When the claim is simply based on religious discrimination, and not a failure to accommodate, the court’s assessment is identical to its assessment of gender discrimination claims, with the caveat that the court is not allowed to adjudicate the plaintiff’s religion beyond whether it is a sincerely held belief.

#### 1. The Sincerely Held Belief Standard

The standard under which courts assess a plaintiff’s religious belief, including whether they are entitled to an accommodation, is whether the

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129. *Sánchez-Rodríguez v. AT&T Mobility P.R., Inc.*, 673 F.3d 1, 8 (1st Cir. 2012).

130. *Sánchez-Rodríguez*, 673 F.3d at 8. The First Circuit also listed as a requirement that the employee inform the employer of her need for an accommodation. After the Supreme Court’s decision in *E.E.O.C. v. Abercrombie & Fitch Stores*, the employer need only suspect that the employee needs an accommodation. *EEOC v. Abercrombie & Fitch Stores*, 135 S. Ct. 2028, 2028 (2015).

131. *Sánchez-Rodríguez*, 673 F.3d at 8.

plaintiff's asserted belief is sincerely held and religious in nature.<sup>132</sup> Pursuant to the Free Exercise Clause of the First Amendment of the Constitution, the Court may not evaluate the validity or truthfulness of the plaintiff's religious beliefs.<sup>133</sup> The Court acknowledges that "[r]eligious experiences which are as real as life to some may be incomprehensible to others"<sup>134</sup> and that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others."<sup>135</sup> Courts are likewise not permitted to assess how central or indispensable a practice is to a plaintiff's religious beliefs or whether other members of the plaintiff's professed religion subscribe to the practice.<sup>136</sup> The Court recognizes that "holding that some sincerely held religious beliefs and practices are not 'central' to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit . . . would require us to rule that some religious adherents misunderstood their own religious beliefs."<sup>137</sup> It further acknowledged that any consideration of these ideas would essentially require courts to play religion police, a role in which courts were never intended to be cast and that would offend the First Amendment.<sup>138</sup>

In assessing the sincerity of a religious belief, courts have considered factors such as whether the plaintiff has told anyone they subscribe to the belief or practice for a religious reason, whether they have been persistent in their need to exercise the belief or practice,<sup>139</sup> whether there is documentation of the plaintiff's asserted religion, whether the plaintiff engages in any other practices consistent with the asserted religion, and whether others can

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132. *United States v. Seeger*, 380 U.S. 163, 185 (1965).

133. *Seeger*, 380 U.S. at 184–85 (quoting *United States v. Ballard*, 322 U.S. 78, 86 (1944)).

134. *Seeger*, 380 U.S. at 184.

135. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981).

136. *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457–58 (1988) (declining to assess the centrality of certain lands to the religious practices of the Yurok, Karok, and Tolowa Tribes); *see also Clay v. United States*, 403 U.S. 698, 702–03 (1971) (stating that the plaintiff's beliefs were founded on the tenants of Islam "as he understands them" and therefore fell within the religious training and belief provision of the draft exemption).

137. *Lyng*, 485 U.S. at 457–58. However, in some non-employment settings where an individual's rights are restricted, such as prisons, some circuits require plaintiffs to show that the practice is doctrinally required. *Kay v. Bemis*, 500 F.3d 1214, 1220 (10th Cir. 2007).

138. *See Lyng*, 485 U.S. at 457–58.

139. *Kay v. Bemis*, 500 F.3d 1214, 1220 (10th Cir. 2007) (noting that an inmate had repeatedly asked prison officials for a set of tarot cards in order to practice his religion).

attest to the plaintiff's religious beliefs.<sup>140</sup> However, despite the fact that third party affidavits may be used as evidence in support of the plaintiff's sincerity, they may not be used to show that the plaintiff's belief that they belong to a certain religion is inaccurate.<sup>141</sup> In practice, the sincerely held belief standard is a low bar and, ultimately, determining whether the plaintiff's religious beliefs are sincerely held comes down to a credibility assessment of the plaintiff.<sup>142</sup>

## 2. The Religious in Nature Standard

To be entitled to accommodations, the employee must subscribe to a belief or practice that is religious in nature, not based on personal philosophical, or moral ideals.<sup>143</sup> This bar is also low and deferential to the plaintiff's assertion. The plaintiff must be able to describe the scope of the belief but may not be penalized for not being as articulate as the Court might like.<sup>144</sup> The Court may not hold against the plaintiff that the plaintiff is not a member of an established religious sect;<sup>145</sup> that the plaintiff's beliefs are not an outlined tenet of the religion to which the plaintiff belongs;<sup>146</sup> that the particular practice at issue is uncommon among members of the plaintiff's religion;<sup>147</sup> that other members of the plaintiff's religion, including religious authorities, do not consider the plaintiff to be a member of the religion;<sup>148</sup> or that the plaintiff is struggling with their beliefs.<sup>149</sup> The only

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140. *See Jackson v. Mann*, 196 F.3d 316, 320 (2nd Cir. 1999) (noting that an inmate had listed his religious preference as Jewish on prison documentation and that he participated in the kosher meal program).

141. *See Jackson*, 196 F.3d at 320 (determining that the district court had erroneously substituted accuracy for sincerity in relying on a rabbi's testimony that the plaintiff was not, in fact, Jewish because he was not born Jewish and had not formally converted).

142. *Snyder v. Murray City Corp.*, 124 F.3d 1349, 1352 (10th Cir. 1997).

143. *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 713–14 (1981).

144. *Thomas*, 450 U.S. at 715. Thomas terminated his employment when he was transferred to a department where he would be producing turrets for tanks. He stated that he “really could not . . . continue to work with armaments. It would be against all of the . . . religious principles that . . . I have come to learn.” *Id.* at 714 (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 391 N.E.2d 1127, 1133 (Ind. 1979)). However, he also stated that he would not object to “produc[ing] the raw product necessary for the production of any kind of tank” because he “would not be . . . chargeable in . . . conscience.” *Id.* at 715 (quoting *Review Bd.*, 391 N.E.2d at 1131-31).

145. *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 834–35 (1989).

146. *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. at 834–35.

147. *Thomas*, 450 U.S. at 715–16.

148. *Jackson v. Mann*, 196 F.3d 316, 320–21 (2nd Cir. 1999).

149. *Thomas*, 450 U.S. at 715.

requirement is that the plaintiff believes the policy for which they are seeking an accommodation is prohibited by their religion as written.<sup>150</sup>

### 3. The Duty to Accommodate

Title VII defines religious discrimination in employment to include failure to accommodate, to the extent reasonable, an employee's religious observance or practice, as long as doing so is not an undue hardship on the employer.<sup>151</sup> In assessing the reasonableness of an accommodation, the court considers the totality of the circumstances, including any combination of accommodations offered by the employer.<sup>152</sup> Notably, while Title VII requires employers to make reasonable accommodations for religious employees, it does not require employers to make the employee's most preferred accommodation.<sup>153</sup> The inquiry ends once the court determines that the accommodation offered is reasonable.<sup>154</sup> The court does not consider whether the employer could have provided the accommodation preferred by the employee at the same cost if the employee finds the accommodation offered by the employer to be adequate.<sup>155</sup>

An undue hardship is defined as "requir[ing the employer] to bear more than a de minimis cost,"<sup>156</sup> which "entails not only monetary concerns, but also the employer's burden in conducting its business."<sup>157</sup> The Supreme Court has suggested that this includes favoring some employees over others in allocating a coveted limited resource, especially when it would otherwise be allocated based on a neutral system.<sup>158</sup> An accommodation can also be an undue hardship when it would require the employer to hire extra work or undergo a loss in production.<sup>159</sup> However, courts have repeatedly

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150. *Thomas*, 450 U.S. at 716.

151. 42 U.S.C. § 2000e(j) (Westlaw through P.L. 102-166).

152. *E.g.*, *Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1030 (8th Cir. 2008).

153. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986).

154. *Philbrook*, 479 U.S. at 68.

155. *See Philbrook*, 479 U.S. at 68 (refusing to consider an employee's offer to pay all costs associated with one of his preferred accommodations).

156. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

157. *Beadle v. City of Tampa*, 42 F.3d 633, 636 (11th Cir. 1995) (citing *Hardison*, 432 U.S. at 84).

158. *Hardison*, 432 U.S. at 84 (holding that an accommodation giving an employee Saturdays off for religious observance would impose an undue hardship because it would violate the system for allocating days off based on seniority).

159. *E.g.*, *Brown v. Polk Cty.*, 61 F.3d 650, 655 (8th Cir. 1995) (finding that an employer rightfully fired an employee who directed a secretary to type up his Bible study notes "since the work that that employee would otherwise be doing would have to be postponed, done by another employee, or not done at all"); *Lee v. ABF Freight Sys., Inc.*, 22 F.3d 1019, 1023 (10th Cir. 1994) (holding that accommodating an employee's Sabbath observation would impose undue hardship on an em-

held that employers cannot save a discriminatory policy by arguing that customers might prefer someone else over the plaintiff.<sup>160</sup>

As the Supreme Court held in *EEOC v. Abercrombie & Fitch*, actual knowledge of the employee's need for an accommodation is not required for an adverse employment action to be deemed discriminatory.<sup>161</sup> In this case, the Court considered a complaint filed by the EEOC on behalf of a Muslim teenager, Samantha Elauf, whose job application Abercrombie rejected.<sup>162</sup> This rejection was premised on a manager's belief that the Elauf's headscarf would violate the company's no-headwear policy,<sup>163</sup> despite the fact that Elauf had not told the manager that her headscarf was a religious garment and that she would need a religious accommodation to wear it at work.<sup>164</sup> Therefore, the company argued that, because it had no actual knowledge of Elauf's need for a religious accommodation, it was not subject to Title VII liability.<sup>165</sup> The Court determined that an employer need not have actual knowledge as long as the plaintiff can show that their need for an accommodation was a motivating factor in the employer's decision to take action against them.<sup>166</sup>

Likewise, employers are not exempt from Title VII liability when their policies are facially neutral. The Court rejected this argument in *Abercrombie* as well, reasoning that "Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment . . . Title VII requires otherwise-neutral policies to give way to the need for an accommodation."<sup>167</sup> Religion's favored treatment lies in its specification in Title VII, compared to philosophical or otherwise secular practices that are not tied to any enumerated classification. The reasonable accommodation standard is an individualized version of the disparate impact theory recognized for other protected classifications.<sup>168</sup> Instead of looking for a disparate impact on an entire group—members of the plaintiff's religion, for example—the Court

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ployer who operated its truck driving business on a rotating dispatch schedule); *see also* *Endres v. Ind. State Police*, 349 F.3d 922, 926 (7th Cir. 2003) (holding that Title VII does not require law enforcement agencies to allow officers to choose their assignments).

160. *See infra* Section C2.

161. *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028, 2033 (2015).

162. *Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. at 2031.

163. *Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. at 2031.

164. *Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. at 2031.

165. *Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. at 2032.

166. *Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. at 2032.

167. *Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. at 2034.

168. *See* *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (explaining that the absence of discriminatory intent does not redeem a policy that operates as a "built-in headwind" for marginalized groups and is unrelated to job performance).

evaluates whether the challenged policy has a disparate impact on the employee's own religious practices or beliefs. The Court's respect for the fact that religion is deeply personal and individualized and its avoidance of generalizations about people of any religion is tied in part to the protections provided under the Free Exercise Clause.<sup>169</sup>

### *B. The Self-Identification Framework as Applied to Gender*

Applied to gender, the self-identification framework would prohibit courts from adjudicating whether an employee's self-identified gender is worthy of legal effect and would allow transgender and gender nonconforming employees to seek accommodations when their ability to express their gender conflicts with an employment or school policy. The legal standard that I propose plaintiffs meet when seeking accommodations for policies that burden their gender expression is that the behavior is a sincerely held gender-related expression or practice. In practice, this should be analogous to the sincerely held religious belief standard.

#### 1. Similarities Between Gender and Religion

When the Civil Rights Act was passed in 1964, America, as a whole, thought of sex as a more rigid mechanism for categorization than we now know it to be. Although there was some acknowledgement that transgender people existed, queer identity of any kind was considered a mental illness.<sup>170</sup> The standard of care for intersex infants with ambiguous sex characteristics

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169. See *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457–58 (1988) (holding that allowing courts to determine how central a particular tenant is to the plaintiff's religious beliefs would conflict with the Constitution and “cast the judiciary in a role [it was] never intended to play.”).

170. The first and second editions of the DSM list “homosexuality” and “transvestitism” under Sexual Deviations. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS 38–39 (1st ed. 1952); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 44 (2d ed. 1968). The DSM-III lists “transsexualism” under Gender Identity Disorders and “ego-dystonic homosexuality”—colloquially known as gay panic—under Other Psychosexual Disorders. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 261–64, 281–82 (3d ed. 1980). Homosexuality was removed from the DSM-III-R, except under “sexual disorder not otherwise specified,” which was written to include persistent and marked distress about one's sexual orientation.” AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 426 (3d ed. rev. 1987). The DSM-IV lists “gender identity disorder,” with largely the same diagnostic criteria as “transsexualism,” under Gender Identity Disorders. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532–38 (4th ed. 1994). In the DSM-V, “gender identity disorder” becomes “gender dysphoria,” and requires “clinically significant distress or im-

was surgical intervention to “correct” the “abnormality.”<sup>171</sup> Men were born men, had certain physical characteristics, and were attracted to women. Women were born women, had different physical characteristics, and were attracted to men. Any deviation was the result of a psychological or medical condition that called for correction.<sup>172</sup> Sex was thought to exist as a distinct, immutable classification akin to nationality, ethnicity, or race.<sup>173</sup>

The current struggle courts face in differentiating discrimination on the basis of sex from discrimination on the basis of gender identity results in arbitrary line drawing, confusing inquiries into motive, and conflicting judgments. This struggle reflects a legal doctrine that insists on treating gender like something that can be broken up into definable groups with identifiable, objective characteristics when society is beginning to understand it as a social construct that is much more amorphous,<sup>174</sup> giving rise to as many ways to experience and express gender as there are people on the planet. Because of this, only people who fit into the two neat boxes the law accommodates—cisgender men who experience manhood in a traditionally

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pairment.” AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451–59 (5th ed. 2013).

171. Ellen K. Feder, *Tilting the Ethical Lens: Shame, Disgust, and the Body in Question*, 26 *HYPATIA* 632, 633–35 (2011).
172. *Supra* note 170; SHARON E. PREVES, INTERSEX AND IDENTITY: THE CONTESTED SELF 22 (2003).
173. *See* *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (“[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth. . . .”).
174. The Williams Institute found that “feelings thermometer” ratings, which measure general favorability of attitudes towards the transgender community, rose thirteen points between 2005 and 2011, from 32% to 45% of those surveyed having a favorable attitude towards transgender people. Andrew R. Flores, *National Trends in Public Opinion on LGBT Rights in the United States*, WILLIAMS INSTITUTE 16 tbl.1 (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/POP-natl-trends-nov-2014.pdf>. More recently, in a 2015 survey the Human Rights Campaign found that 22% of likely voters reported that they personally knew a transgender person, up from 17% in 2014. Liz Halloran, *Survey Shows Striking Increase in Americans Who Know and Support Transgender People*, HUMAN RIGHTS CAMPAIGN (Apr. 24, 2015), <http://www.hrc.org/blog/survey-shows-striking-increase-in-americans-who-know-and-support-transgende>. A similar survey conducted in 2016 showed an increase to 35%. *National Survey of Likely Voters: Trans Visibility Matters*, HUMAN RIGHTS CAMPAIGN, [http://www.hrc.org/resources/hrc-national-survey-of-likely-voters?\\_ga=2.210933653.1415707594.1501604877-1565081548.1499408948](http://www.hrc.org/resources/hrc-national-survey-of-likely-voters?_ga=2.210933653.1415707594.1501604877-1565081548.1499408948) (last visited Nov. 10, 2017). The 2016 survey also reported that, of those who knew a transgender person, 66% had a favorable impression of transgender people, compared to 13% who felt unfavorably about them. *Id.* The survey did not ask about non-binary people specifically. *Id.* Another recent survey of 1,000 individuals between the ages of eighteen and thirty-four found that half thought of gender as “a spectrum, and some people fall outside conventional categories.” Henig, *supra* note 9.

masculine way and cisgender women who experience womanhood in a traditionally feminine way—are protected under a doctrine that, at the same time, condemns sex stereotypes.

Despite the sex discrimination caselaw to the contrary, gender is more mutable and less rigid than previously understood. There is no determinate number of genders and two people belonging to the same gender can experience and express it in completely different and seemingly contradictory ways. Legal scholars have wrestled with how to reconcile a legal structure that views gender as a multiple-choice question with two mutually exclusive answers in a world where many feel strongly about expressing their gender in a way that does not conform to tradition and is not accepted by the mainstream. Anton Marino describes gender as “a person’s innate core identity,” and gender expression as “the manifestation of one’s inner self.”<sup>175</sup> Gender cannot be proven by looking at a person or their lineage or their birth certificate. In these ways, gender resembles religion more than it resembles any other protected class under Title VII. As Sue Landsittel succinctly notes, both gender and religion have a “deeply personal, internal genesis, [and] lack a fixed external referent.”<sup>176</sup>

Courts have started to make this comparison as well. The *Schroer* court compared the Library of Congress’ discrimination against Diana Schroer to an employer’s discrimination against religious converts. The court concluded that, because discrimination based on a change of religion is still discrimination based on religion, discrimination based on a change in gender must still be discrimination based on gender.<sup>177</sup> The EEOC recognized in *Macy* that an employer’s discrimination against a woman employee based on the employer’s belief that the employee should be a man since she was assigned that gender at birth is no different from an employer who discriminates against a Christian employee because the employer believes that the employee should be Muslim since the employee’s parents are Muslim. Both are actionable.

### C. Applying the Self-Identification Framework to Gender in Practice

The self-identification framework is ideal for gender because, as its name suggests, it revolves around self-identification. When applied to religion, it not only acknowledges that, while two Christians, two Jews, or two

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175. Anton Marino, *Transgressions of Inequality: The Struggle Finding Legal Protections Against Wrongful Employment Termination on the Basis of Transgender Identity*, 21 AM. U. J. OF GENDER SOC. POL’Y & L. 865, 871 (2013).

176. Sue Landsittel, Comment, *Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII*, 104 NW. U.L. REV. 1147, 1150 (2010).

177. *Schroer v. Billington*, 577 F. Supp. 2d 293, 306–08 (D.D.C. 2008).

Muslims might believe in and practice the same religion differently, both interpretations are valid. It also recognizes that not everyone falls into a finite number of categories. Some practice well-known religions, others practice lesser-known religions, and some hold religious beliefs unique to themselves and unconnected to any recognized religion. Likewise, many identify outside of the well-known binary genders: man and woman. Some identify with lesser known genders, such as agender, neutrois, or androgyne, and others feel that no existent word adequately describes their experience and may identify under an umbrella term, such as non-binary or gender-queer, or invent their own word altogether. Additionally, two people who do identify as the same gender may not experience it the same way, but their experiences are equally valid. The self-identification framework brings all of these people within legal protection.

Under the self-identification framework, the court would first assess whether the plaintiff's gender-related beliefs are sincerely held. Analogizing to the religion cases, the court might look to whether any witnesses can attest to the plaintiff's beliefs, whether any documentation of the plaintiff's gender exists,<sup>178</sup> whether the plaintiff engages in any behaviors (or any behaviors other than the one for which they are seeking an accommodation) that the court believes are consistent with the gender they are identifying,<sup>179</sup> whether they have been persistent in their gender or their need to express their gender,<sup>180</sup> and, if the plaintiff is seeking an accommodation, whether they have told anyone they need to engage in that behavior for a gender-related reason.<sup>181</sup> These are examples of the evidence courts have looked for in religious accommodation cases, and a plaintiff's inability to produce evidence for any one of these factors should not, by itself, be fatal to the plaintiff's claim. If the plaintiff was seeking an accommodation, the court would then determine whether the behavior for which the accommodation was sought was gender-related and whether the accommodation imposed an undue burden.

I will now evaluate how the self-identification framework would apply to four previously discussed cases and how it would result in outcomes that validate, instead of disregard, all four plaintiffs' self-identified gender.

#### 1. Seamus Johnston and Krystal Etsitty

Seamus Johnston, a transgender former student at the University of Pittsburgh at Johnstown, alleged that the university had him charged with

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178. *See Jackson v. Mann*, 196 F.3d 316, 320 (2d Cir. 1999).

179. *See Jackson*, 196 F.3d at 320.

180. *See Kay v. Bemis*, 500 F.3d 1214, 1220 (10th Cir. 2007).

181. *See Kay*, 500 F.3d at 1220.

criminal disorderly conduct, banned him from using the athletic center, and ultimately expelled him for using the men's restrooms and locker rooms.<sup>182</sup> At the time, his driver's license reflected that he was a man, he had begun HRT and had his name changed on his university records, and he was registered with the Selective Service.<sup>183</sup> Johnston sued the university for violating Title IX and the Equal Protection Clause. He lost before the district court and settled the case with the university.<sup>184</sup>

Krystal Etsitty was a transgender woman who began transitioning at work shortly after being hired by the Utah Transit Authority ("UTA") as a bus driver.<sup>185</sup> While her supervisor initially expressed support for her transition, she was ultimately fired because the UTA was concerned that her use of public women's restrooms while she was on her route would subject the agency to liability.<sup>186</sup> She sued the UTA for violating Title VII. The district court granted summary judgment for the UTA, and the ruling was affirmed by the Tenth Circuit.<sup>187</sup>

Both courts based their holdings on the plaintiffs' anatomy. The Pennsylvania district court called the fact that Johnston had not had bottom surgery, or genital reconstructive surgery, "fatal to [his] sex discrimination claim."<sup>188</sup> The Tenth Circuit considered the UTA's justification for firing Etsitty,<sup>189</sup> that it feared lawsuits, legitimate and non-discriminatory, despite a body of case law condemning customer preference as a justification. Similarly, Johnston's court recognized the university's desire to keep facilities segregated based on "biological or birth sex" as a legitimate state interest,<sup>190</sup> despite the fact that segregation on those bases was the very behavior Johnston was challenging as discriminatory. Under the current framework, courts understand that sex discrimination is illegal and are willing to prohibit discrimination based on outright animus toward transgender people under some circumstances, but do not understand that the safety and privacy concerns often cited by defendants and given substantial weight by courts are, in and of themselves, discriminatory.

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182. *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 663–64 (W.D. Pa. 2015).

183. *Johnston*, 97 F. Supp. 3d 657 at 662–63.

184. Lauren Rosenblatt & Emily Brindley, *Pitt Settles Johnston Lawsuit, Looks to Form Trans Inclusion Group*, PITT NEWS, Mar. 30, 2016, <http://pittnews.com/article/70006/news/pitt-settles-johnston-lawsuit-looks-to-form-trans-inclusion-group/>.

185. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1218–19 (10th Cir. 2007).

186. *Etsitty*, 502 F.3d at 1219.

187. *Etsitty*, 502 F.3d. at 1215–16.

188. *Johnston*, 97 F. Supp. 3d at 671.

189. *Etsitty*, 502 F.3d at 1224.

190. *Johnston*, 97 F. Supp. 3d at 668.

In contrast, under the self-identification framework, the court would only be able to evaluate whether the plaintiff's gender was sincerely held. Both Johnston and Etsitty would be able to provide this evidence. Johnston had been living as a man for more than five years when his case was decided and had a long history of identifying as male, evidenced by his informing his parents he was a boy at age nine. He had as much documentation as a court could reasonably expect, including a driver's license, passport, and social security records reflecting his gender; was registered with the Selective Service; had his name legally changed; and could produce medical records showing that he had been diagnosed with Gender Identity Disorder. Etsitty had less legal documentation but had still been living as a woman in all settings, except at work, for four years and had also been diagnosed with Gender Identity Disorder.

In cases brought by transgender plaintiffs, the court would look to whether the plaintiff has expressed their gender in a way typically associated with that gender. Neither Etsitty nor Johnston asserted their gender only to use sex-segregated facilities. They were both living as their genders in all aspects of life, including their names and pronoun usage, their presentation, and the fact that they were undergoing HRT.

A court might next ask whether the plaintiff has been persistent in their need to exercise the behavior that is the subject of the lawsuit. Seamus Johnson had a documented history of using the men's facilities in the face of serious consequences, including college disciplinary measures, expulsion, and legal action. Krystal Etsitty might struggle more to show persistence because she was apparently terminated relatively quickly after she began using the women's restrooms at work. However, if she could show that she was using women's restrooms in other situations, this would weigh in her favor.

Finally, if a plaintiff has told others that they engage in the practice at issue for a gendered reason, the court might note this. In both Johnston and Etsitty's cases, this should be clear. They are seeking to use sex-segregated facilities consistent with their self-identified gender.

These factors are merely things that courts have looked at as evidence in religious discrimination cases, and they need not all be met for a court to find a sincerely held belief.<sup>191</sup> A court would be unlikely to give much

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191. See *e.g.*, *Kay v. Bemis*, 500 F.3d 1214, 1220 (10th Cir. 2007) (finding that a petitioner's religious belief that he needed access to tarot cards was sincere because he persistently asked for them and was disciplined twice for obtaining them on his own); *Jackson v. Mann*, 196 F.3d 316, 320 (2d Cir. 1999) (finding that a petitioner had produced sufficient evidence to raise a genuine issue of material fact as to whether his' religious belief was sincerely held because he produced documentation that listed his religion as Jewish, had participated in kosher meal programs in the

weight to Krystal Etsitty's inability to present evidence of her persistence unless it contributed to a lack of evidence overall. No one piece of evidence is required. For example, though both Johnston and Etsitty were diagnosed with Gender Identity Disorder, a lack of a diagnosis would not be fatal to an individual's claim. Notably, courts do not recognize third party testimony that the plaintiff should not receive protection because they are not really a member of the religion<sup>192</sup>—unless the third-party testimony reflects that the plaintiff did not believe they were really a member of the religion—even if it comes from a religious authority. This means that, had UPJ presented testimony that Johnston should not be protected from sex discrimination because transgender men are not really men, it would be legally meaningless. The only person whose belief matters is the plaintiff.

A court would then look to the knowledge requirement. Actual knowledge is not required for a defendant to be found liable for religious discrimination. The plaintiff simply must have suspected that the employee was a member of a protected class or engaging in protected behavior and that this suspicion motivated the adverse employment action. In both Johnston and Etsitty's cases, however, the defendant had actual knowledge of the plaintiff's gender. Etsitty informed her immediate supervisor that she was transgender and would be using the women's restrooms because she was a woman. Johnston attempted to change his gender on his university records and was told that he could not.

The court would then assess whether the practice that is the subject of the lawsuit was gender-motivated. In religion cases, this is not usually a lengthy inquiry. In some instances, it is not even present in the court's reasoning because it seems obvious. These cases would both likely fall into that category. That Etsitty's desire as a woman to use women's restrooms is gender-motivated stands without question. The same is true of Johnston.

After finding that the plaintiff's belief is sincerely held and gender-motivated, the court would determine whether the actions that took place were discriminatory. The court, accepting as true that Etsitty is a woman or that Johnston is a man, regardless of their anatomy or the gender marker on their birth certificate, would ask if the defendant had a legitimate, non-discriminatory reason for preventing them from using the correct facilities. Although there is no case law on point in the Third or Tenth Circuit, the courts would likely recognize that upholding the UTA and UPJ's asserted

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past, had gone without food to avoid eating non-kosher food, and produced an affidavit from his mother attesting that she had "raised [him] according to the Jewish faith and dietary laws.").

192. See *Jackson v. Mann*, 196 F.3d 316, 320 (2d Cir. 1999).

justifications would give weight to societal prejudice that contravenes the purpose of Title VII, as other circuits have.<sup>193</sup>

## 2. Darlene Jespersen

Darlene Jespersen was terminated from Harrah's casino in Reno for refusing to comply with the makeup requirement in the casino's newly enforced dress code.<sup>194</sup> The dress code was gender-neutral except that it required men to have short hair and wear no makeup or nail polish, allowed women to wear nail polish in select colors, and required women to wear makeup, including face powder, blush, mascara, and lipstick and have their hair "teased, curled, or styled" while at work.<sup>195</sup>

Jespersen felt that wearing makeup "conflict[ed] with her self-image" and caused her enough discomfort to affect her ability to work.<sup>196</sup> She testified in her deposition that wearing makeup made her feel "degraded" and demeaned, affected her sense of dignity, and cost her credibility as an individual.<sup>197</sup>

The Ninth Circuit pointed to prior case law demonstrating that gender-specific appearance standards alone do not offend Title VII.<sup>198</sup> Jespersen was therefore required to show that the appearance standard placed an unequal burden on women versus men. Though the court acknowledged that an unequal burden could be obvious from the policy itself and would require no additional evidence, it did not believe that Harrah's appearance standard was such a policy because "grooming standards that *appropriately* differentiate between the genders are not facially discriminatory."<sup>199</sup> The Ninth Circuit upheld Harrah's appearance standard because Jespersen had not provided evidence that the policy imposed an unequal time or financial burden on women. The dissent argued that this was not a question reasonably subject to dispute because there was no doubt that wearing makeup costs money and takes time, the policy required no similar daily routine from men, and the court should not have "need[ed] an expert witness to figure out that [face powder, blush, mascara, and lipstick] don't grow on trees."<sup>200</sup>

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193. *Supra* note 78 and accompanying text.

194. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1105–06 (9th Cir. 2006).

195. *Jespersen*, 444 F.3d at 1107.

196. *Jespersen*, 444 F.3d at 1107–08.

197. *Jespersen*, 444 F.3d at 1108.

198. *Jespersen*, 444 F.3d at 1109.

199. *Jespersen*, 444 F.3d at 1109–10 (emphasis added).

200. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1117 (9th Cir. 2006) (Kozinski, J., dissenting).

Jespersen's case fell victim to the court's unwillingness to use common sense to determine that wearing a full face of makeup costs women more time and money on a daily basis than it costs men to simply keep their hair short, because the court accepted as appropriate the employer's ability to decide that women should be required to wear makeup in order to look "professional and very similar"<sup>201</sup> despite a concurrent determination that men look professional and similar enough without adding anything to their faces.

Though Darlene Jespersen was not transgender, her desire not to wear makeup would have been protected under the self-identification framework. The court would first go through the process of determining whether Jespersen's feeling that not wearing makeup was an essential part of her gender expression was a sincerely held belief. In this instance, expecting documentation would not be reasonable, but Jespersen might be able to produce witnesses willing to sign affidavits expressing that she felt strongly about not wearing makeup. The weightiest piece of evidence in Jespersen's favor is that she worked at the casino for twenty years and did not wear makeup on or off the job during that time. Then, when Harrah's began enforcing the dress policy and actually requiring women employees to wear makeup, she refused, even though it resulted in her termination. This consistency of practice and persistence in the face of adversity would probably be enough to persuade a court that her belief that she could not wear makeup was sincerely held.

The court would then need to determine whether Jespersen's desire to not wear makeup was gender-related. This would be a more thorough inquiry than in Seamus Johnston and Krystal Etsitty's cases, because, while makeup is gendered, the connection is less obviously related to gender than a woman wanting to use the women's restroom. Jespersen testified to how she felt about wearing makeup when she initially tried to comply with the appearance standard after first being hired at Harrah's in her deposition:

I felt very degraded and very demeaning. [*sic*] I actually felt sick that I had to cover up my face and become pretty or feminine in a sex stereotyping role to keep my job or to do my job. I actually felt ill and I felt violated. . . . It prohibited me from doing my job. I felt exposed. I actually felt like I was naked. I mean, I—I felt that I—that I was being pushed into having to be revealed or forced to be feminine to do that job. . . . I felt that I had become dolled up and that I was a sexual object. . . . It was too harmful. It affected my self-dignity. It portrayed me in a role that I wasn't

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201. *Jespersen*, 444 F.3d at 1109.

comfortable, that I wasn't taken seriously as myself. I also felt that it took away my credibility as an individual and as a person. . . . I went home and threw the makeup in the garbage.<sup>202</sup>

Jespersen's testimony contains multiple mentions of how she felt uncomfortable with how feminine the policy required her to look. She implies that she did not feel like herself when she was wearing makeup and describes feeling physically ill when she saw herself with makeup on. The visceral reaction Jespersen describes gets at something more fundamental than a political belief that a woman should not have to wear makeup if she does not want to. It shows that Jespersen's refusal to wear makeup is tied to her identity.

Unlike Johnston and Etsitty who wished to be treated like people of their gender who were assigned that gender at birth, Jespersen would need to seek an accommodation exempting her from a policy that lawfully distinguishes between men and women. This puts Jespersen's case squarely in the area of accommodations.

To make out a *prima facie* case of sex discrimination, Jespersen would have to show that her gender presentation conflicted with her employer's policies and this conflict was the reason for her termination. This much was uncontested by the parties. The burden then shifts to Harrah's to show that either it offered Jespersen a reasonable accommodation or that any accommodation would impose an undue hardship on the company. While Harrah's allowed Jespersen to look into other positions with the company, she did not find any positions she was qualified for that had a similar pay scale.<sup>203</sup> In any case, a court is unlikely to decide that forcing an employee to transfer to an entirely different position is a reasonable accommodation because Title VII guarantees employees the right to work in the position of their preference. In Jespersen's case, the circumstances would have necessitated a switch from bartender to room attendant or bellhop, for which she was not immediately qualified.<sup>204</sup>

Likewise, a court is unlikely to determine that the accommodation Jespersen would request, an exemption from the makeup requirement in the appearance standards, would impose an undue hardship on her employer.<sup>205</sup>

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202. Deposition of Darlene Betty Jespersen at 138–39, *Jespersen v. Harrah's Operating Co.*, 280 F. Supp. 2d 1189 (D. Nev. 2002) (No. 01-0401).

203. *See Jespersen*, 444 F.3d at 1108.

204. Deposition, *supra* note 202, at 80.

205. In the past, courts have found accommodations unreasonable when they would require an employer to hire additional labor or undergo a loss in production or when the employee requests priority in the employer's allotment of a coveted, limited resource, such as time off on Saturdays. *E.g.*, *Trans World Airlines, Inc. v. Hardison*,

Here, Harrah's only possible argument is that the atmosphere they are trying to project to their customers requires their employees to look uniform and professional and that allowing Jespersen to not wear makeup would distract from that objective. This justification would fail because courts have rejected the idea that customer preferences and the desire to project a certain image to customers cannot be used to rationalize a discriminatory policy.<sup>206</sup> This reasoning should extend to an employer's refusal to provide an accommodation as well. Therefore, under this new standard, Darlene Jespersen would prevail on the facts of her case.

### 3. Wilma Wood

Wilma Wood, an intersex woman, was passed over for promotion and later terminated from her employment with C.G. Studios after her employer discovered that she had undergone "gender corrective surgery" prior to being hired.<sup>207</sup> Wood brought a lawsuit against C.G. Studios, alleging that her termination was a result of sex discrimination in violation of Title VII.

The District Court for the Eastern District of Pennsylvania determined that Title VII was not intended to protect against discrimination on the basis of surgical status.<sup>208</sup> In doing so, the court cited cases denying protection to transgender plaintiffs<sup>209</sup> and emphasized that the term "sex" should be interpreted based on its "traditional meaning."<sup>210</sup>

Wood's case is different from Johnston's, Etsitty's, or Jespersen's because Wood's case does not lie in an area where gender classifications are legal. Wood was terminated from her employment on the basis of her intersex status and the court simply refused to credit this as sex discrimination, instead characterizing it as discrimination based on surgical status. While the court does not give much information about the facts of Wilma Wood's

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432 U.S. 63, 84 (1977) (holding that requiring an employer to subvert a seniority system for assigning off days to give the plaintiff Saturdays off imposed an undue burden); *Endres v. Ind. State Police*, 349 F.3d 922, 926 (7th Cir. 2003) (holding that allowing a police officer with a religious objection to gambling to refuse to provide full-time services at a casino imposed an undue burden); *Brown v. Polk Cty*, 61 F.3d 650, 655 (8th Cir. 1995) (holding that requiring an employer to allow the employee-plaintiff to have his secretary type up his Bible study notes on the clock would impose an undue burden); *Lee v. ABF Freight Sys., Inc.*, 22 F.3d 1019, 1023 (10th Cir. 1994) (holding that requiring an employer to subvert a rotating dispatch schedule to give the plaintiff Saturdays off imposed an undue burden).

206. *See supra* note 76; note 77.

207. *Wood v. C.G. Studios, Inc.*, 660 F. Supp. 176, 176 (E.D. Penn. 1987).

208. *Wood*, 660 F. Supp. at 177.

209. *Wood*, 660 F. Supp. at 178.

210. *Wood*, 660 F. Supp. at 178.

case, plaintiffs like her would also be protected under the self-identification framework.

Under the self-identification framework, Wood would have two available arguments. First, she could argue that she was, in fact, terminated because she had surgery and that her termination for that reason was sex discrimination because the surgery was connected to her gender. Second, she could argue that she was terminated because she did not conform to her employer's binary concept of gender.

Under the first theory, Wood would need to show that she had a sincerely held belief that she was a woman and that her surgery was related to that belief. This would not be an issue for her. All of Wood's legal documents reflected that she was a woman. She had presumably lived as a woman for her entire life. She presented in a way traditionally associated with being a woman. She went by a name and pronouns that are also associated with being a woman. She would have had no problem producing affidavits from witnesses testifying that she identified as a woman. This is more than enough evidence to show a sincerely held belief. Likewise, Wood would easily be able to explain that her surgery was gender-related. While it is unclear from the available documents how old Wood was when she underwent this operation, the surgery brought her body into line with how either she or her parents felt that she needed to look in order to embody her gender. Once Wood made these showings, her case would become analogous to the case of an employee who was fired after their employer discovered that they engaged in a religious practice the employer did not approve of, such as taking time to pray at certain times of day. In both instances, an employee has been fired because of behavior directly related to their protected status, surgery to gender and prayer breaks to religion. This clearly falls under Title VII's purview. However, this theory would be unavailable to intersex plaintiffs who suffered an adverse action because they were intersex, not because of any surgery or medical intervention related to their gender. Likewise, the many intersex people who feel that the surgeries they have undergone do not affirm their gender may be unwilling to make this argument.

Under the second theory, Wood would argue that she was terminated not because her employer found her surgery itself distasteful, but because her employer simply did not like that she was intersex. Wood would need to show that she was a member of the protected class—that she was intersex—and that this status was the motivating factor in her termination. Although Wood would not need to show all the elements of the surgery sex discrimination claim under this theory, in some ways it may be a more difficult case for her. She would need to produce evidence that her intersex status was the

real reason for her termination, which may be difficult if her employer only explicitly objected to the surgery itself, and not her intersex status.

*D. Applying the Self-Identification Framework to Non-Binary Plaintiffs*

The self-identification framework would protect non-binary plaintiffs from discrimination they might experience because they are non-binary or engage in behavior that is connected to their non-binary gender. This includes using a name and/or pronouns that are commonly associated with a gender different from the gender with which their presentation is associated, switching gender presentation from day to day, mixing clothing bought in the men's section and clothing bought in the women's section or otherwise presenting androgynously, and using they/them/their pronouns or neo-pronouns. Like the plaintiffs discussed above, non-binary plaintiffs would have to demonstrate that they suffered an adverse employment action because of their non-binary gender, lack of gender, or gender-related behaviors in which they engaged to make out a *prima facie* case of discrimination. The burden would then shift to the employer or educator to show that they either offered a reasonable accommodation or that any potential accommodation would have been an undue burden.

1. Sincerely Held Belief

Like in Darlene Jespersen's case, in order to be entitled to an accommodation, a court would first have to determine whether the plaintiff sincerely believed that they belonged to the gender they identified and, if the adverse action was the result of a behavior, whether that behavior was gender-related. Because only a few states currently allow individuals to obtain gender markers that reflect their non-binary identity on their legal documents,<sup>211</sup> it would be difficult for non-binary plaintiffs to provide the legal documentation of their gender that Seamus Johnston was able to provide. Similarly, because non-binary individuals are somewhat less likely than binary transgender individuals to have undergone any type of medical transition, that component may also be absent.

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211. Oregon and Washington, D.C. allow residents to select a gender-neutral option on their driver's licenses. California will allow residents to select a gender-neutral option on driver's licenses and birth certificates starting on January 1, 2019. Christina Caron, *Californian Will Soon Have Nonbinary as a Gender Option on Birth Certificates*, N.Y. TIMES, Oct. 19, 2017, <https://www.nytimes.com/2017/10/19/us/birth-certificate-nonbinary-gender-california.html>; Daniella Diaz, *Brown signs law OK'ing third option for gender on California driver's licenses*, CNN POLITICS, Oct. 17, 2017, <http://www.cnn.com/2017/10/17/politics/governor-jerry-brown-california-law-non-binary/index.html>.

However, these factors are not required. Plaintiffs may be able to provide emails where they notified their colleagues or professors of their gender and asked them to use certain pronouns or blog posts they wrote referencing their gender. They would also be allowed to produce affidavits from third parties attesting to their gender and any other evidence they might have supporting their gender, just as binary transgender plaintiffs are allowed to do. For plaintiffs who suffered an adverse action because of their gender alone and who are not seeking an accommodation, this is where the inquiry ends. The court should proceed to evaluate the case just as it does the case of a cisgender man or woman alleging discrimination.

For plaintiffs who are seeking an accommodation for a behavior related to their gender expression, the court must take its inquiry a step further and evaluate whether the plaintiff sincerely believes they need to engage in that behavior as a part of their gender expression. To make this showing, the plaintiff might, again, produce affidavits attesting to the importance the plaintiff places on wearing clothing designed for both men and women at the same time or using certain restrooms. Testimony that this importance was related to a part of the plaintiff's gender expression would be even stronger evidence. The Court might look at whether the plaintiff has been persistent in their need to engage in the behavior, although courts should not penalize plaintiffs who conformed to their employer's wishes to keep their jobs after being told their employer would not tolerate the behavior. Additionally, the court might assess whether the plaintiff engages in any other behaviors that it believes are consistent with the plaintiff's gender.

This factor presents a potential difficulty because it is inherently tied to stereotypes and because most judges are unlikely to know what types of expression are consistent with non-binary genders and to understand that there is no one way to express a non-binary identity, and that is the point. I speculate that plaintiffs who present androgynously, use neutral pronouns, and go by a gender-neutral name will have an easier time than plaintiffs who present as traditionally male or female at persuading a court that the component of gender expression at issue is sincerely held. The plaintiffs who would struggle the most to demonstrate a sincerely held belief are likely to be non-binary plaintiffs who express their gender in a way commonly associated with the gender they were assigned at birth in every way except the behavior for which they are seeking an accommodation. For example, a non-binary employee who was assigned male at birth, went by the name, "Jonathan," used he/him/his pronouns, maintained short hair and had facial hair, and wore suits, shoes, and a watch designed for men would struggle more to show that his desire to wear makeup was sincerely held than an employee who was assigned male at birth, but went by the name "Ari," used xe/xem/xir pronouns, wore nail polish, and kept xir hair long or wore suits

and boots designed for women. However, if Jonathan could show that he had been publicly identifying as non-binary and wearing makeup in other contexts for a significant amount of time, this should still be enough to demonstrate a sincerely held belief. After all, sincerely held belief is a low bar because courts recognize that it is not their place to play religion police. The constitutional scheme I will propose in the next Section would require courts to treat gender with the same caution.

Additionally, a non-binary plaintiff who had recently come out and was just starting to present themselves in the way that they felt expressed their gender may also struggle under this standard. That plaintiff would likely need to show that they were publicly identifying as their gender and engaging in the behaviors they wished to have accommodated across multiple settings, and would probably need to be able to articulate to the judge why the way they were presenting before was not a true expression of their gender. If there is one personal detail that has a potential to be openly argued about during litigation and discussed in an opinion the way that anatomy currently is in cases with transgender plaintiffs, it is the coming out stories of plaintiffs who worked or attended school with the defendant for a long time before seeking accommodations because they were not out yet.

## 2. Gender-Related Behavior

After deciding that the behavior for which the plaintiff was seeking an accommodation was part of a sincerely held belief about their gender, the court would move on to whether the behavior was gender-related; in other words, whether it was a component of the plaintiff's gender expression. Whether a plaintiff would struggle to make this showing depends largely on how gendered the judge perceives the behavior in question to be. A plaintiff who wants to use the restroom or locker room that more closely aligns with their gender or who wants certain pronouns used would probably struggle less than a plaintiff who wants to wear makeup, jewelry, nail polish, or certain hair styles, who would struggle less than a plaintiff who wants to wear facial piercings or dye their hair a bright color.

These problems are inherent in asking a court to assess whether a certain behavior is part of the gender expression of a person when that person's gender is not well known, is much less rigid in its stereotypes and expectations than the two widely recognized genders, and values things that most would not recognize as being associated with gender at all. Some non-binary people feel that their brightly colored hair, half sleeve of tattoos, or eyebrow piercing are expressions of their gender in a way that cisgender men and women might feel about facial hair or makeup, but these things are not

thought of as being gendered because they are not gendered for men and women.

When courts make this inquiry as part of religious discrimination cases, they ask the plaintiff to articulate the scope of the belief and use the plaintiff's statement to determine whether the belief is religious in nature or whether it stems from some other political, philosophical, or moral ideology.<sup>212</sup> Courts should be expected to do the same in gender cases. In these situations, judges will probably expect plaintiffs to identify physical discomfort and emotional pain, as these are the narratives most judges will associate with transgender people, and plaintiffs should be wary of discussing theoretical concepts that may make their expression look like a political statement to a judge.

Analogizing from religion cases, judges should not consider whether the plaintiff's gender is widely recognized, whether the plaintiff's expression is a common practice among individuals who identify with the plaintiff's gender, whether individuals who identify with the plaintiff's gender consider the plaintiff to be a member of their gender, or whether the plaintiff is struggling with their gender. This means that courts should not consider as relevant that the plaintiff previously came out as a different gender, as is common for non-binary people, or that the plaintiff is not sure which non-binary gender, if any, they identify with. The court's only consideration should be whether the expression that conflicts with the school or employer's practice is a means through which the plaintiff expresses their gender.

Judges may be tempted to assess how critical to the plaintiff's gender expression the behavior is. However, Courts have repeatedly decided that it is not their place to determine how important a practice is to a plaintiff's religious beliefs in determining whether a practice should be afforded protection because doing so would require the court to assume that it knows more about the plaintiff's religious beliefs than the plaintiff themselves.<sup>213</sup> Again, the constitutional argument I outline in the next Section would forbid courts from engaging in this analysis toward gender expression. Therefore, courts should not be able to determine that a behavior must be "central" to the plaintiff's gender expression to be protected.

### 3. Reasonable Accommodations

After a plaintiff demonstrates that they suffered an adverse action because of a component of their gender expression, and after the court

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212. *See* *Thomas v. Review Bd. Ind. Emp't Sec. Div.*, 450 U.S. 707, 713 (1981).

213. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457–58 (1988).

determines that the plaintiff sincerely believes they must engage in the behavior as a part of their gender expression, the defendant must show that they either offered the plaintiff a reasonable accommodation or that any accommodation would be an undue hardship.<sup>214</sup> The accommodation offered to the plaintiff does not have to be the plaintiff's most preferred accommodation, even if the plaintiff can show that their preferred accommodation would not be an undue hardship on the defendant.<sup>215</sup> Additionally, circuit courts differ on whether an accommodation must completely eliminate the conflict between the employer's policies and the employee's beliefs in order to be considered reasonable or whether the employer may require some sacrifices from the employee.<sup>216</sup>

Most religious accommodation cases in which courts have found undue hardships are cases where an employee was regularly unable to work on certain days of the week. Those cases are irrelevant here, as an employee is unlikely to consistently need a certain day of the week off because of their gender. Non-binary plaintiffs might worry about employers arguing that accommodating a visibly gender non-conforming plaintiff would impose an undue hardship because it would alienate their conservative customer base. This argument would be impermissible because every appellate court that has considered the issue has held that discriminatory customer preferences are no defense to discrimination.<sup>217</sup>

Non-binary individuals should be more concerned about accommodations an employer or school could offer that a court might find reasonable but that would not be adequate for the plaintiff. I will walk through three examples that demonstrate how these situations might play out.

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214. 42 U.S.C. § 2000e(j) (Westlaw through P.L. 115-82).

215. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986).

216. *Compare* *E.E.O.C. v. Firestone Fibers & Textiles, Co.*, 515 F.3d 307, 314 (4th Cir. 2008) ("A duty of 'reasonableness' cannot be read as an invariable duty to eliminate the conflict between workplace rules and religious practice."), *with* *Baker v. Home Depot*, 445 F.3d 541, 548 (2nd Cir. 2006) ("The offered accommodation cannot be considered reasonable . . . because it does not eliminate the conflict between the employment requirement and the religious practice.") (quoting *E.E.O.C. v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1576 (7th Cir. 1997)), *and* *Opuku-Boateng v. California*, 95 F.3d 1461, 1467 (9th Cir. 1996) ("Where the negotiations do not produce a proposal by the employer that would eliminate the religious conflict, the employer must either accept the employee's proposal or demonstrate that it would cause an undue hardship were it to do so.").

217. *See* *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010); *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 473 (11th Cir. 1999); *Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795, 799 (8th Cir. 1993); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 387, 389 (5th Cir. 1971).

Jason is an androgyne employee who wants to grow a beard and wear makeup. They are seeking an accommodation from a gender-specific office dress code that allows women to wear makeup and allows men to keep neatly trimmed facial hair but prohibits men from wearing makeup. Jason's employer offered to let them either grow a beard or wear makeup, but not both at the same time. Because Jason's employer requires them to present as either traditionally masculine or traditionally feminine but not as androgynous, it is clear that Jason's employer's request is motivated by discomfort (either the employer's, other employees', or customers') with Jason's androgynous gender expression. An offer for an accommodation meant to minimize the visibility of Jason's gender that is motivated by prejudice against individuals of Jason's gender and other non-binary genders or individuals who express their gender the way Jason does is unlikely to be found reasonable by a court. Jason should win their case.

Alex is a genderfluid employee who shifts between being a man and being a woman. She goes by she/her/hers pronouns when she is a woman and he/him/his pronouns when she is a man. Her employer does not want to ask other employees to switch back and forth and has offered to use they/them/their pronouns all the time instead. Pronoun use is generally thought of as being very gendered, but here, a judge's ignorance regarding gender fluidity might cause the judge to incorrectly believe that consistent use of neutral pronouns is no different from sometimes using one set of commonly gender pronouns and sometimes using a different set. Alex's case may come down to her ability to articulate to a judge that masculinity and femininity do not cancel each other out to equal neutrality and that, while she/her/hers pronouns do not describe her sometimes and he/him/his pronouns do not describe her sometimes, they/them/their pronouns do not describe her ever. Incorrect pronouns are not a reasonable alternative to correct ones. While it may be slightly more difficult for Alex's colleagues to switch the pronouns they use for her, slight inconvenience cannot be considered an undue hardship. Alex should win her case.

Sage is a neutrois employee who uses the men's restroom. Xir employer has asked xem to use a gender-neutral single stall restroom instead. Because Sage is non-binary, a judge may have a difficult time understanding why a gender-neutral restroom is not a reasonable accommodation, especially if Sage does not identify as male-aligned and presents androgynously. Sage's best argument is probably that, in requiring xem to use the single stall restroom, xir employer is drawing attention to the fact that Sage is different from xir colleagues and depriving xem of the community that comes with being included in a group because Sage is the only non-binary employee in the office. Xe could argue that this is discriminatory in itself. Sage's employer would probably argue that he is simply treating Sage as xir gender,

that Sage is neither a man nor a woman and should use neither the men's nor women's restrooms, and that this cannot possibly be discriminatory. The result of this case would depend on how sympathetic the judge is toward non-binary plaintiffs.

Although I have applied it here, the sincerely held belief standard that courts use to determine whether a belief or behavior is entitled to accommodation is not outlined in Title VII. Rather, this language comes from First Amendment Free Exercise case law. Therefore, we need a constitutional hook in order to justify applying this language to gender. In the following Section, I outline a Fourteenth Amendment Due Process right to self-identification.

#### IV. THE DUE PROCESS RIGHT TO SELF-IDENTIFY

In the following Section, I argue that the Supreme Court should recognize a Due Process right to self-identify one's gender under the Fourteenth Amendment. A substantive Due Process argument would be more inclusive for non-binary plaintiffs than an Equal Protection argument. While a holding that transgender people are a protected class under the Equal Protection Clause could be interpreted to protect only people whose genders have been legally recognized, just as sex as a protected class has been interpreted to exclude transgender people, a holding that the Due Process Clause protects an individual's ability to self-identify their gender could not be cabined to exclude non-binary people. Additionally, a Due Process victory would necessarily prevent courts from refusing protection to non-binary plaintiffs based on a belief that their gender does not exist in a way that an Equal Protection victory would not. A constitutional right to self-identify would entitle an individual's own concept of their gender to the deference allowed under the sincerely held belief standard because it would operate, like the Free Exercise Clause, to take gender out of the category of things courts are able to adjudicate based on their own understanding of the party's gender or the understanding of third parties.

##### *A. Prior Case Law in the Realm of Personal Autonomy*

In *Obergefell v. Hodges*, the Supreme Court recognized that, in addition to the liberties protected under the Bill of Rights, the Due Process Clause of the Fourteenth Amendment "extend[s] to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."<sup>218</sup> While *Obergefell* was not decided

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218. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2597 (2015).

until 2015, the Supreme Court's case law over the past century reflects this ideology.

The Court's substantive Due Process cases can be broken into three categories: cases extending the right to marry, cases recognizing parental autonomy in making decisions about children, and cases recognizing rights related to bodily autonomy. All three lines of cases are interconnected and reflect the Court's firm belief that decisions that get at the core of who an individual is should be left to the individual alone, and the government should play no role in legislating who an individual can be. I will collectively refer to these cases as the personal autonomy cases.

1. Marriage's Connection to Identity:  
*Loving, Zablocki, and Obergefell*

When the Supreme Court was laying the groundwork for a fundamental right to marry in *Loving v. Virginia*, it stated that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>219</sup> The *Loving* Court focused largely on Equal Protection and the racially discriminatory nature of the anti-miscegenation statute at issue, but it concluded by proclaiming that:

Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes . . . is surely to deprive all the [s]tate’s citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the [s]tate.<sup>220</sup>

As early as 1967, the Court acknowledged marriage as a choice so fundamental and so tied up in the pursuit of happiness that the state could not be allowed to interfere. While the bulk of the opinion discussed the statute’s codification of white supremacy, the Court suggested that because of marriage’s status as a component on which individuals build lives, the fact that the state of Virginia placed any limitations on which individuals

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219. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

220. *Loving*, 388 U.S. at 12 (internal citations omitted) (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)).

could marry would have, on its own, constituted a substantive due process violation sufficient to invalidate the statute.

The Court next considered state limitations on marriage in *Zablocki v. Redhail*, when it invalidated a Wisconsin statute prohibiting parents with minor children not in their custody and who could not prove they were up to date on their child support payments from marrying, absent a court order granting permission.<sup>221</sup> The *Zablocki* Court inched closer to describing the decision to marry or not marry as one that takes part in shaping an individual's core identity. The Court referred to marriage as "the most important relation in life,"<sup>222</sup> "the relationship that is the foundation of the family,"<sup>223</sup> quoted language from *Griswold v. Connecticut* that describes marriage as "intimate to the degree of being sacred"<sup>224</sup> and "an association for as noble a purpose as any involved in our prior decisions,"<sup>225</sup> and echoed *Loving's* "freedom of choice" language.<sup>226</sup> *Zablocki* further confirmed that laws that restrict the right to marry but that are not motivated by an invidious desire to discriminate must still be subjected to "rigorous scrutiny" by courts if they "significantly interfere with decisions to enter into the marital relationship."<sup>227</sup>

*Obergefell v. Hodges* begins with the sentence: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."<sup>228</sup> The Court further stated that "the decision whether and whom to marry is among life's momentous acts of self-definition."<sup>229</sup> Here, the Court solidified the connection it had been building for fifty years between marriage as a fundamental right and marriage as a choice that shapes personal identity. *Obergefell* also emphasized the concept of dignity in the substantive due process doctrine. The *Obergefell* Court directly compared the dignity and autonomy of same-sex couples to make the "profound" choice to marry with the dignity and autonomy granted to interracial couples in 1967,<sup>230</sup> demonstrating that dignity, autonomy, and personal identity played roles in that decision, though they were not directly referenced. The

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221. *Zablocki v. Redhail*, 434 U.S. 374, 375 (1978).

222. *Zablocki*, 434 U.S. at 384 (quoting *Maynard v. Hill*, 125 U.S. 190, 205 (1888)).

223. *Zablocki*, 434 U.S. at 386.

224. *Zablocki*, 434 U.S. at 384 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)).

225. *Zablocki*, 434 U.S. at 384 (quoting *Griswold v. Connecticut*, 381 U.S. at 486).

226. *Zablocki*, 434 U.S. at 387; *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

227. *Zablocki*, 434 U.S. at 384–86.

228. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2593 (2015).

229. *Obergefell*, 135 S. Ct. at 2599 (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003)).

230. *Obergefell*, 135 S. Ct. at 2599.

Court eventually held that same-sex couples are entitled to this dignity of self-determination under the Constitution.<sup>231</sup>

## 2. Parenting and Family Identity:

*Meyer, Pierce, Stanley, Moore, and Troxel*

In *Meyer v. Nebraska*, the Supreme Court overturned a state law prohibiting instructors from teaching children any language other than English before the child had successfully completed eighth grade, even at a parent's request.<sup>232</sup> The Nebraska legislature's purpose in passing this law was to ensure that children developed an American identity.<sup>233</sup> The Supreme Court of Nebraska defined the state interest in its opinion upholding the statute:

To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language *and until it had become a part of them*, they should not in the schools be taught any other language.<sup>234</sup>

Clear xenophobia aside, the Court did not directly engage with the identity interest at stake in *Meyer*. It overturned the statute based on the rights of parents to control their children's education and the rights of students to learn,<sup>235</sup> but the identity issues inherent in growing up in an immigrant community where another language is frequently spoken or in a household where a language other than English is spoken at home are plain. The Nebraska legislature's intent was to deprive these children of their culture and ensure that they grew up identifying with American cultural ideals instead, based on an incorrect understanding that children who grow up

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231. See *Obergefell*, 135 S. Ct. at 2608 (“[Petitioners] ask for equal dignity in the eyes of the law. The Constitution grants them that right.”).

232. *Meyer v. Nebraska*, 262 U.S. 390, 397 (1923).

233. *Meyer*, 262 U.S. at 401.

234. *Meyer v. State*, 187 N.W. 100, 102 (Neb. 1922) (emphasis added).

235. *Meyer*, 262 U.S. at 401 (“[T]he legislature has attempted materially to interfere with . . . the opportunities of pupils to acquire knowledge, and the power of parents to control the education of their own.”).

immersed in another culture will identify as citizens of their parents' country of origin instead of the United States.

The Court engaged with identity interests more directly two years later in *Pierce v. Society of Sisters* when it invalidated an Oregon law requiring all children to attend public schools.<sup>236</sup> It described Oregon's law as an attempt to "standardize its children,"<sup>237</sup> recognizing that where a child attends school plays a role in shaping their identity. The Court concluded that "the child is not the mere creature of the state; those who nurture him and direct his destiny have the right . . . to recognize and prepare him for additional obligations."<sup>238</sup> *Meyer* and *Pierce* together represent clear refutations of the idea that a state can legislate in order to mold children into the people it wants them to be.

In *Stanley v. Illinois* and *Moore v. City of East Cleveland*, the Court considered the attempts of a legislature to define the composition of a family. *Stanley* dealt with an Illinois statute making a child of unwed parents a ward of the state after their mother died.<sup>239</sup> *Moore* revolved around an East Cleveland city housing ordinance defining families who may live together in single family housing to a narrow category of related individuals.<sup>240</sup> Illinois defined a parent as adoptive parents, both the mother and father of a legitimate child, or the mother of an illegitimate child,<sup>241</sup> while the city of East Cleveland defined family in a way that excluded the plaintiff, Inez Moore, her son, and her two grandsons, who were cousins.<sup>242</sup> The Court invalidated both laws under the Due Process Clause. The *Stanley* Court held that the plaintiff's interest in the "companionship, care, custody and management of his . . . children"<sup>243</sup> came before the Court with the "momentum for respect" of a fundamental right.<sup>244</sup> The language the Court used implied that it considered the plaintiff's ability to take care of his family an aspect of his identity as a father, of which Illinois could not deprive him without a hearing on his fitness as a parent.<sup>245</sup>

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236. *Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 536 (1925).

237. *Pierce*, 268 U.S. at 535.

238. *Pierce*, 268 U.S. at 535.

239. *Stanley v. Illinois*, 405 U.S. 645, 646 (1972).

240. *Moore v. City of E. Cleveland*, 431 U.S. 494, 495–96 (1977).

241. *Stanley*, 405 U.S. at 650.

242. *Moore*, 431 U.S. at 500.

243. *Stanley*, 405 U.S. at 651.

244. *Stanley*, 405 U.S. at 651 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).

245. See *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) ("Under the Due Process Clause that advantage [of administrative convenience] is insufficient to justify refusing a father a hearing with the issue at stake is the dismemberment of his family.").

In *Moore*, the Court discussed the family's impact on a person's identity.<sup>246</sup> It once again accused the government of attempting to "standardize its children"<sup>247</sup> by requiring them to live only in nuclear families. The Court held that fundamental family rights, such as the right to choose to live together as a family, cannot be cut off at the arbitrary boundary of the nuclear family.<sup>248</sup> Here, the Court recognized a right among individuals who are related to self-identify as a family and live together in single-family housing. The Court stated that this right "may not lightly be denied by the [s]tate."<sup>249</sup>

Finally, in *Troxel v. Granville*, the Court evaluated a Washington statute that deprived parents of their ability to decide those persons with whom their children interacted. The statute allowed a court to award visitation to any third party at any time, as long as the court determined that visitation would be in the best interest of the child.<sup>250</sup> The Supreme Court took issue with the fact that the law afforded no deference to a parent's determination that contact with the third party would not be in the child's best interest,<sup>251</sup> passing the role of making these crucial decisions to the courts. The Washington statute enabled courts to serve as second or third parents to children, absent any indication that the child's parent's decision-making should be questioned, removing from parents an essential part of their identity as a parent.<sup>252</sup>

### 3. Bodily Autonomy as Essential to Identity: The Contraception and Abortion Cases and *Lawrence*

While technically an Equal Protection case, *Skinner v. Oklahoma* set the stage for bodily autonomy as an identity right by recognizing the choice to procreate as a basic liberty.<sup>253</sup> The Court was clear that procreation's status as "one of the basic civil rights of man"<sup>254</sup> was instrumental to its

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246. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 504 (1977) ("It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.").

247. *Moore*, 413 U.S. at 506 (quoting *Pierce v. Society of Sisters*, 286 U.S. 510, 535 (1925)).

248. *Moore*, 413 U.S. at 502.

249. *Moore*, 413 U.S. at 505–06.

250. *Troxel v. Granville*, 530 U.S. 57, 67 (2000).

251. *Troxel*, 530 U.S. at 67.

252. See *Troxel*, 530 U.S. at 68–69 ("[S]o long as a parent adequately cares for his or her children . . . there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.").

253. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

254. *Skinner*, 316 U.S. at 541.

holding. The Court went on to discuss how allowing the state the power to sterilize its citizens causes “irreparable injury” and allowed the individual “no redemption.”<sup>255</sup> The Court held that this intrusion into the autonomy of the individual, which had permanent consequences, was impermissible.

The contraception cases connect bodily autonomy to personal identity. If not for the groundwork it laid in the bodily autonomy doctrine, *Griswold v. Connecticut* might be better classified as a marriage case. The Court’s reasoning in striking down a statute prohibiting individuals, including married couples, from using contraceptives revolves around preserving the integrity of the marital relationship.<sup>256</sup> The Court’s invalidation of the Connecticut statute demonstrated its unwillingness to allow a state legislature to act as the third party in a marriage the same way it was later unwilling to allow Washington state courts to act as parents to children in *Troxel*. Such an intrusion, the Court found, would have a “maximum destructive impact”<sup>257</sup> on marital relationships by rendering decisions made privately between spouses about matters that would have such an extreme impact on their lives no more “sacred” than any other decision, thereby stripping from marriage its identifying features and rendering its participants’ identities as married individuals meaningless.

*Eisenstadt v. Baird* took this reasoning to the next step, holding that the right to make a decision “so fundamentally affecting a person as the decision whether to bear or beget a child” was not limited only to married couples, but extended to all individuals.<sup>258</sup> The Court soundly rejected the idea that a legislature could prescribe a child as the punishment for sex outside of marriage.<sup>259</sup> It reasoned that, while *Griswold* revolved around the marital relationship, individuals maintain their separate identities within marriage and do not gain or lose individual rights when they marry.<sup>260</sup> *Eisenstadt* stands for the idea that an unmarried individual may make the critical decision of whether to become a parent, but it also stands for the concept that unmarried individuals may not be coerced into marriage by

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255. *Skinner*, 316 U.S. at 541.

256. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

257. *Griswold*, 381 U.S. at 485.

258. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

259. *Eisenstadt*, 405 U.S. at 448. This was true despite the fact that fornication was a misdemeanor in Massachusetts at the time. See 272 Mass. Gen. Laws § 18; Andrew Carden & Kristen Lee, *Antiquated State Laws Stir Modern-Day Worry*, BOSTON GLOBE, Jan. 3, 2013, <https://www.bostonglobe.com/metro/2013/01/03/antiquated-mass-laws-stir-modern-day-worry/zKkq0WXosc51wbIWg0z9nJ/story.html> (“Massachusetts is not the only state that still outlaws fornication (1692). . . .”).

260. See *Eisenstadt*, 405 U.S. at 453 (“[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.”).

legislatures who may prefer that their citizens fall into a single type of family structure, as the legislature in *Moore* did, by withholding individual rights from its citizens until they are married. People have the right to make decisions at the core of their identity, whether married or unmarried.

In *Roe v. Wade*, the Court noted that the ability to terminate a pregnancy implicated the right to privacy against government intrusion into personal affairs.<sup>261</sup> It determined that the state of Texas' belief that life begins at conception, inarguably an important determination, did not entitle it to invade the autonomy of pregnant individuals, given medical, philosophical, and theological disagreement on the subject.<sup>262</sup> The fact that the Constitution and statutory law did not recognize fetuses as possessing personhood entitling them to the same rights and protections as a born person was enough to prevent the state from placing the importance of that potential life, throughout pregnancy, above the autonomy of the pregnant person.<sup>263</sup> However, the Court rejected the idea that a person has a right to do whatever they want with their body without limitation.<sup>264</sup>

While *Roe* only discussed privacy, subsequent abortion decisions confirm that the right to receive an abortion is grounded in bodily autonomy<sup>265</sup> and that the state is not only restricted from intruding into those decisions itself, but may not give absolute decision-making authority to a third party, including the parents of a minor.<sup>266</sup> Beyond confirming that bodily autonomy rights apply to minors, as well as adults,<sup>267</sup> the Court's rejections of parental and spousal consent laws, especially after the Court's language in *Griswold* about the sacredness of marriage and courts' general unwillingness

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261. See *Roe v. Wade*, 410 U.S. 113, 155–56 (1973).

262. *Roe*, 410 at 159–62.

263. *Roe*, 410 U.S. at 158–59, 161–62.

264. *Roe*, 410 U.S. at 154.

265. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849 (1992) (internal citations omitted) (“It is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that the Constitution places limits on a State’s right to interfere with a person’s most basic decisions about family and parenthood . . . as well as bodily integrity.”).

266. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (striking down a law requiring parental consent during the first twelve weeks of pregnancy and spousal consent to a daughter or wife’s abortion); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 694 (1997) (striking down a law prohibiting the sale of contraceptives to minors under the age of sixteen). *Carey* interprets *Danforth* as prohibiting “a blanket provision . . . requiring the consent of a parent” for minors seeking abortions. *Id.* at 693.

267. *Danforth*, 428 U.S. at 74 (“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”).

to grant minors privacy rights against their parents,<sup>268</sup> demonstrate that the individual's right to make these life-defining decisions for themselves is the impetus behind these holdings. As the Court stated in *Planned Parenthood v. Casey*:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>269</sup>

Finally, the Court extended the reach of its personal autonomy cases beyond decisions involving whether to have a child and into self-definition of one's sexuality in *Lawrence v. Texas*, when it considered a Texas law prohibiting sodomy between consenting adults of the same sex. While the law at issue restricted only certain types of sexual intercourse, the Court explicitly rejected the suggestion that the issue before the Court was only about sex.<sup>270</sup> It defined the scope of the right as the ability of queer people in same-sex relationships to have the autonomy to make the kind of "intimate and personal choices" that heterosexual people may make.<sup>271</sup> In other words, the *Lawrence* Court framed the issue as the right of individuals to identify in a way that is true to who they are without loss of their bodily autonomy. The Court additionally considered the effect of stigma as part of its Due Process analysis for the first time, as it determined that, although the statute only made same-sex sodomy a class C misdemeanor, it deprived the people affected of their dignity and gave others permission to discriminate against them.<sup>272</sup> Part of *Lawrence's* essential holding is that "there is a

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268. See, e.g., *Wyatt v. Fletcher*, 718 F.3d 496, 510 (5th Cir. 2013) (holding that a minor did not have a clearly established privacy right under the Fourteenth Amendment that prevented faculty at her high school from disclosing her sexual orientation to her parent).

269. *Casey*, 505 U.S. at 851.

270. *Lawrence v. Texas*, 539 U.S. 559, 567 (2003) ("To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.").

271. *Lawrence*, 539 U.S. at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

272. *Lawrence*, 539 U.S. at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

realm of personal liberty which the government may not enter,”<sup>273</sup> which includes the ability of an individual to identify in a way the state legislature would rather they not without losing protection under the Constitution.

### *B. Recognizing a Right to Self-Identify*

The Court’s case law forbidding legislatures from interfering with the core identities that individuals may hold—as a spouse, as a parent, as a queer person—supports a fundamental right of individuals to self-identify their gender.

#### 1. The (un)Importance of History and Tradition

The Court once determined that fundamental rights tend to be “deeply rooted in our legal tradition.”<sup>274</sup> In the past two decades, the Court has largely abandoned history and tradition as benchmarks for when to recognize a constitutional right. In fact, since *Lawrence* was decided in 2003, the Court has spent more pages explaining why it is not necessary for a fundamental right to be deeply rooted in this country’s history and tradition than it has recognizing rights that are.<sup>275</sup>

The *Lawrence* Court stated that “history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”<sup>276</sup> *Obergefell* similarly determined that “[h]istory and tradition guide and discipline this inquiry but do not set its outer bounds.”<sup>277</sup> This trend represents the Court’s recognition that as society progresses, society begins to see injustices of which it was once ignorant, and that the Constitution has effects that are not cabined to the rights that were believed to be fundamental when the Fourteenth Amendment was ratified. If constitutional protections are to mean anything to those who were excluded from its writing, the Constitution must be allowed to adapt to changing values and recognize that an injustice does not stop being an injustice because it is long-lived. In *Obergefell*, the Court stated that:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of

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273. *Lawrence*, 539 U.S. at 578 (quoting *Casey*, 505 U.S. at 847).

274. *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997).

275. *See generally Lawrence*, 539 U.S. at 571–79 (discussing how history and tradition are not the be-all, end-all of fundamental rights analysis, and the past fifty years are more relevant to the Court’s analysis than all the time before that).

276. *Lawrence v. Texas*, 539 U.S. at 572 (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

277. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2598 (2015).

Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.<sup>278</sup>

Among the members of the Court, there is a recognition that to hold the Constitution strictly to what the Founders recognized each of its clauses to mean would continue to leave out those who have always been excluded from society. Defining the Constitution's parameters by the problems that affected its Founders, all land-owning, white men, neglects the violations of rights experienced solely by members of oppressed communities. Cabining the Constitution in this way would be out of line with the intentions of the Founders themselves, who left the specific rights protected by the Constitution vague and unenumerated.<sup>279</sup> The Court recognized this in *Lawrence*:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>280</sup>

Self-identification falls into the category of rights inhabited by the right to marry, to care for one's children, and to have control over one's body, that were never systematically denied to men like the Founders and that they would not have thought to include.

## 2. International Precedent

In recent Due Process cases, the Court has looked for a definitive shift amongst courts and the public, both domestically and internationally, to-

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278. *Obergefell*, 135 S.Ct. at 2598.

279. Ruth Bader Ginsburg, Associate Justice, U.S. Supreme Court, 2015 Tanner Lecture on Human Values (Feb. 6, 2015), in UNIV. OF MICH. LAW SCH. SCHOLARSHIP REPOSITORY, 2015, at 201.

280. *Lawrence*, 539 U.S. at 578–79; see also *Obergefell*, 135 S.Ct. at 2598–99.

ward support for the right in question, in place of a long practice of recognition for the right.<sup>281</sup> Just as there is movement in some states to recognize non-binary genders, there is a growing body of international precedent supporting a movement toward recognition of genders beyond the binary.

Australia has recognized the New South Wales Registrar's ability to record an individual's gender as "non-specific."<sup>282</sup> The case was brought based on the state of New South Wales' Courts and Crimes Legislation Amendment Act, which provides that a person who has undergone a sex affirmation procedure may apply to register their sex.<sup>283</sup> The Court determined that the Act acknowledged that gender may be ambiguous, not every person is unequivocally male or female,<sup>284</sup> and the Act does not require a person who has undergone gender affirmation surgery and feels that their gender is still ambiguous to register inaccurately as either male or female.<sup>285</sup> Therefore, Australia has recognized that gender exists beyond the binary. However, in order to register as an unspecified gender, a person must provide notes from two medical professionals certifying that they have undergone gender affirmation surgery, just as they would have to do to change their gender from one binary gender to the other.<sup>286</sup> Australia also allows intersex people whose gender was recorded as indeterminate at birth to get an X on their passport, instead of an M or F.<sup>287</sup> Germany passed a similar law allowing parents to intersex children to record their child's gender as "undetermined" or "unspecified" in 2013.<sup>288</sup>

In 2007, in *Pant v. Nepal*, the Supreme Court of Nepal held that people of a third gender were entitled to the constitutionally guaranteed right to equality, that disparate treatment toward third gender people was discrimination, and that the state should recognize the existence of third gender people.<sup>289</sup> In practice, the third gender category is used to describe those assigned male at birth who identify as women or have a traditionally

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281. See *Lawrence*, 539 U.S. at 573–74.

282. *NSW Registrar of Births, Deaths, and Marriages v Norrie* (2014) 250 CLR 490 (Austl.).

283. *Courts and Crimes Legislation Amendment Act 2008* (N.S.W.) 32DA (Austl.).

284. *NSW Registrar of Births, Deaths, and Marriages v Norrie* (2014) 250 CLR 490, 499 (Austl.).

285. *NSW Registrar of Births, Deaths, and Marriages v Norrie* (2014) 250 CLR 490, 501 (Austl.).

286. *Courts and Crimes Legislation Amendment Act 2008* (N.S.W.) 32DB (Austl.).

287. Steve Dow, *Neither Man nor Woman*, SYDNEY MORNING HERALD, June 27, 2010, <http://www.smh.com.au/nsw/neither-man-nor-woman-20100626-zaye.html>.

288. Susan Donaldson James, *German Law: Parents of Intersex Kids Can Pick 'Gender Undetermined'*, ABC NEWS, Nov. 2013, <http://abcnews.go.com/Health/german-law-parents-intersex-kids-pick-gender-undetermined/story?id=20752191>.

289. *Pant v. Nepal*, Writ No. 917 of the Year 2064 BS (2007 AD), *translated in* 2 NAT'L JUD. ACAD. L.J., 2008, at 262, 278.

feminine gender expression and those assigned female at birth who identify as men or have a traditionally masculine gender expression.<sup>290</sup> In its determination, the Court notes that the Interim Constitution only uses the terms, man and woman, once, in the provision requiring equal remuneration. Otherwise, it simply uses citizen or sex.<sup>291</sup> The Court came to this conclusion based largely on cases that recognize transgender individuals in other countries. The most notable thing about *Pant* is the Court's direction that legal acknowledgment of a person as third gender should depend on "the concerned person's self-feeling."<sup>292</sup> Here, the Court recognizes a person's ability to determine their own gender and does not police gender on the basis of anatomy, presentation, or any other criteria.

Pakistan and India also recognize a third gender that is not dependent on any kind of alteration of one's body. In 2009, the Supreme Court of Pakistan mandated that the term "unix" (eunuch) be recorded under gender when applicable; that unix be allowed to vote, obtain an education, and enjoy all rights guaranteed under the Constitution; and that the state had a duty to ensure that unix receive their share, if any, of family inheritance.<sup>293</sup> In 2014, the Supreme Court of India held that failure to recognize a third gender violated the Constitutional guarantee of Equal Protection of the law, fundamental rights, protection of life and personal liberty, and prohibition on sex discrimination.<sup>294</sup> Bangladesh also recognizes a third gender, although this was achieved through a cabinet directive.<sup>295</sup>

Perhaps most on point is the Constitutional Court of Colombia's *The Decision of Y. Y.* in 1995.<sup>296</sup> The Constitutional Court of Colombia recognized a right to determine one's own identity and described this identity right as a component of human dignity.<sup>297</sup> The decision prohibited gender assignment surgeries from taking place without the consent of the person being operated on, regardless of the age of that person.<sup>298</sup> Four years later,

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290. Michael Bochenek & Kyle Knight, *Establishing a Third Gender Category in Nepal: Process and Prognosis*, 26 EMORY INT'L L. REV. 11, 13 (2012).

291. *Pant*, Writ No. 917 of the Year 2064 BS (2007 AD) at 278.

292. *Pant*, Writ No. 917 of the Year 2064 BS (2007 AD) at 281.

293. *Khaki v. Rawalpindi*, (2009) Const'l Petition No. 43 (SC) (Pak.).

294. *Nat'l Legal Serv. Auth. v. Union of India*, (2014) 5 SCC 438 ¶¶ 55–69 (India).

295. Farzana Hussain, *Ensure Rights of the Third Gender*, DHAKA TRIBUNE, Jan. 8, 2015, <http://archive.dhakatribune.com/juris/2015/jan/08/ensure-rights-third-gender> ("After a year of the government announcement, we are still waiting for a specific law to be enacted to cover third gender people's rights.")

296. Corte Constitucional [C.C.] [Constitutional Court], octubre 23, 1995, Sentencia T-477/95, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

297. Corte Constitucional [C.C.] [Constitutional Court], octubre 23, 1995, Sentencia T-477/95, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

298. Corte Constitucional [C.C.] [Constitutional Court], octubre 23, 1995, Sentencia T-477/95, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

the Court reaffirmed that parents often assume gender disambiguation is in the best interests of their child because of their own fears, but that in reality, the procedure is highly invasive and irrelevant to the child's health. In these situations, the child's own right to autonomy outweighs the parents' right to make decisions for their children.<sup>299</sup> These cases recognize the right of an individual to form their own identity, including their own concept of their gender, and place a higher value on that right than the preferences or prejudices of parents and doctors.<sup>300</sup> This decision did not come with any explicit right to identify as a gender outside the binary, but the identity right it outlines could be used to support one. A similar case was rejected by the Fourth Circuit in 2015, on the grounds that the sex assignment surgery performed on the petitioner as a child, which made him infertile and resulted in his assignment to the wrong gender, did not violate his clearly established rights to procreation and privacy.<sup>301</sup>

### 3. The Natural Next Step for Personal Autonomy

The U.S. Supreme Court's identity cases demonstrate that a state may not attempt to "control [a person's] destiny" by stepping into critical identity shaping decisions.<sup>302</sup> Few identities affect the lens through which an individual views the world as strongly as gender. However, under current law, an individual is only protected from sex discrimination if they identify as one of the two state-approved genders. Even then, in many situations they must identify as the gender they were assigned by a third party at birth when they were too young to consent to such an assignment. This effectively deprives individuals of any choice in this crucial identification.

The current state of the law requires individuals to go through a lengthy process that sometimes requires transgender individuals to have expensive surgeries they may not want in order to change their legal gender. Often the ability to change one's gender is also conditioned on a medical practitioner's support. This stands in contrast to *Planned Parenthood v. Danforth*, where the Court held that a legislature could not give a third party veto power over another individual's exercise of a right when the state

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299. Corte Constitucional [C.C.] [Constitutional Court], mayo 12, 1999, Sentencia SU-337/99, Gaceta de la Corte Constucional [G.C.C.] (Colom.).

300. See Ryan L. White, *Preferred Private Parts: Importing Intersex Autonomy for M.C. v. Aaronson*, 37 *FORDHAM INT'L L.J.* 777, 801 (2014).

301. *M.C. ex rel. Crawford v. Amrhein*, 598 Fed. Appx. 143, 148 (4th Cir. 2015).

302. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); see *Obergefell v. Hodges*, 135 S.Ct. 2584, 2599 (2015) ("Choices about marriage shape an individual's destiny."); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) ("The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.").

itself lacks the ability to deny that right.<sup>303</sup> The Court reasoned that when two spouses disagree over whether a pregnancy will be terminated, only one spouse can prevail.<sup>304</sup> Because the pregnant spouse is more immediately affected by the pregnancy, that spouse's wishes must prevail.<sup>305</sup>

The same is true of the ability to determine one's gender. It cannot be said that a doctor is more immediately affected by their patient's gender than the patient themselves. A doctor may determine an infant's gender based on arbitrary medical standards for anatomy,<sup>306</sup> or in the case of ambiguous genitalia, based on which gender the parents would rather raise the child to be. These determinations are made without the patient's consent and have legal and social ramifications that affect them throughout their lives. This continues to be the common practice despite the emerging understanding that gender is subjective and that looking at a person's anatomy is not the best way to discover their gender. A doctor may withhold support for a patient's legal gender transition for any number of reasons, including that the doctor does not believe the patient's gender is real. In the case of minors, who may not have control over which medical practitioners they see, these requirements could force them to live as a gender with which they do not identify simply because their parents do not support the minor's right to live as their true gender.

Moreover, the current law conflicts with the freedom of identity promised in *Casey*, *Lawrence*, and *Obergefell*. The *Casey* Court states that "choices central to personal dignity and autonomy" are at the heart of liberty protected under the Fourteenth Amendment.<sup>307</sup> *Lawrence* adds that when a state may proscribe conduct that defines a person's identity, it demeans that person's life.<sup>308</sup> Current law allows state legislatures and courts to decide that they understand an individual's gender better than the individual themselves. Allowing legislative determination and court adjudication of a concept as personal and unique to each individual as gender and empowering courts to determine that a person's own experience of their gender

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303. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 70 (1976) ("Notwithstanding these factors, we cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right.").

304. *Danforth*, 428 U.S. at 71.

305. *Danforth*, 428 U.S. at 71.

306. See SHARON E. PREVES, INTERSEX AND IDENTITY: THE CONTESTED SELF 139 (2003) (describing how the Intersex Society of North America used a plastic ruler, a "phall-o-meter," to draw attention to how infants were labeled female or male based on the size of their phallus).

307. *Casey*, 505 U.S. at 851.

308. See *Lawrence*, 539 U.S. at 574 ("[*Bowers v. Hardwick*]'s continuance as precedent demeans the lives of homosexual persons.").

is wrong or legally insufficient denies transgender people the autonomy to “define and express their identity,” a right explicitly guaranteed under *Obergefell*.<sup>309</sup>

The place of non-binary people in current law is even more complicated. In most jurisdictions, non-binary people do not legally exist. This forces non-binary people to falsely identify as one of the two state-approved genders in order to receive legal protections. This coercion flies in the face of *Lawrence*'s underlying premise that a state cannot condition protection under the law on an individual's conformity with how the state believes people should identify.<sup>310</sup> *Casey* condemns state compulsion surrounding beliefs belying the core attributes of personhood.<sup>311</sup> The governmental denial of dignity in transgender people's identities reflects the history of stigma against same-sex relationships outlined in *Obergefell*.<sup>312</sup> In both cases, the insistence of people who knew their identity was distinct and worthy of recognition were ignored in favor of others' perceptions about them.

Moreover, state attempts to define gender and to force everyone into two predetermined categories, regardless of whether either of those categories ring true to their lived experience, reflects the type of legislation the Court rejected in *Meyer*, *Pierce*, *Stanley*, and *Moore*. All of these cases involved state attempts to use legislation to govern the experiences of the state's residents into what the state believed appropriate. The *Pierce* and *Moore* Courts described this as the state's desire to “standardize” its people.<sup>313</sup> When the Court rejected the legislature's definition of a parent in *Stanley* and a family in *Moore* as an attempt by the legislature to substitute its own point of view for the equally valid experiences of the plaintiffs,<sup>314</sup>

309. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2593 (2015).

310. See *Lawrence*, 539 U.S. at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)) (“[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not sufficient reason for upholding a law preventing the practice. . . .”).

311. See *Casey*, 505 U.S. at 851 (“Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”).

312. See *Obergefell*, 135 S.Ct. at 2596 (“[M]any persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken.”).

313. *Moore v. City of E. Cleveland*, 431 U.S. 494, 506 (1977); *Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925).

314. *Moore*, 431 U.S. at 504–05 (“Our [most cherished moral and cultural values] are by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.”); *Stanley v. Illinois*, 405 U.S. 645, 651–652 (1972) (“Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. The Court has declared unconstitutional a

the Court demonstrated its valuation of experience over authority when evaluating laws pertaining to such central concepts.

The right to define one's own identity is meaningless if it does not include the right to define a part of a person's identity as personal and central to how that person experiences the world as their gender. The current legal landscape concerning transgender individuals' ability to have their gender recognized under the law is inconsistent with the Supreme Court's case law on matters at the core of self-identification.

## V. CONCLUSION

A holding that the Due Process Clause of the Fourteenth Amendment entitles individuals to define their own identity would give non-binary plaintiffs the tools they need to successfully challenge sex-based discrimination under Title VII and the anti-discrimination laws modeled after it. While there are available arguments under the Equal Protection Clause and existing statutory law, an Equal Protection holding would not necessarily give a non-binary plaintiff's self-identification of their gender legal weight, and courts in some circuits have steadfastly maintained their cabining of statutory law to reach only discrimination against cisgender men and women. A fundamental right to self-identification is the natural next step in the Supreme Court's Due Process jurisprudence and would prevent courts from adjudicating a plaintiff's gender beyond whether the plaintiff's beliefs about their gender are sincerely held. A sincerely held belief standard would operate, like it does in the First Amendment context, to prevent courts from refusing protection to people who identify with genders or subscribe to methods of gender expression unfamiliar to the court. The sincerely held belief standard is appropriate because gender, like religion, is a concept that is personal and unique to each individual and is deeply tied to an individual's identity. This framework would give non-binary plaintiffs access to legal protection, regardless of how obscure or poorly understood their gender might currently be. Non-binary plaintiffs would no longer have to wait until social consciousness catches up for legal protection. ❄

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state statute denying natural, but illegitimate, children a wrongful-death action for the death of their mother, emphasizing that such children cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit.”).