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PYRRHIC VICTORY: *SMITH V. CITY OF SALEM* AND THE TITLE VII RIGHTS OF TRANSEXUALS

INTRODUCTION

Imagine that you are a veteran police officer named Philecia Barnes.¹ After passing the sergeant's exam, you start your probationary period.² But your supervisors repeatedly tell you that you are not "masculine enough" to be an effective sergeant.³ You become the first candidate for sergeant in seven years to fail the probationary period,⁴ even though a member of your class with lower evaluation scores passed.⁵ You believe your employer has discriminated against you because you do not fulfill sex stereotypes,⁶ so you want to file a Title VII claim.⁷ Imagine now that you were born Phillip, and that you were "a pre-operative male-to-female transsexual" when you went through your probationary period.⁸

Because you are a transsexual,⁹ you will likely lose your Title VII sex discrimination claim, unless you bring suit in the Sixth Circuit. The Sixth Circuit's decision in *Smith v. City of Salem*¹⁰ marked the

1. *Barnes v. City of Cincinnati*, 401 F.3d 729, 733 (6th Cir.), *cert. denied*, 126 S. Ct. 624 (2005).

2. *Id.*

3. *Id.* at 735.

4. *Id.*

5. *Id.*

6. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–57 (1989); *see also infra* notes 86–97 and accompanying text.

7. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2000) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .").

8. *Barnes*, 401 F.3d at 733.

9. The term "transsexual" refers to people with Gender Identity Disorder (GID), defined as "a strong and persistent cross-gender identification." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532 (4th ed. 1994) [hereinafter DSM-IV]. People with GID have "persistent discomfort about [their] assigned sex or a sense of inappropriateness in the gender role of that sex." *Id.* at 533. The term "transsexual" is a nontechnical, broad term, which describes people whose gender identities do not match their biological sex. Shannon Minter, Nat'l Ctr. for Lesbian Rights, Representing Transsexual Clients: Selected Legal Issues (Oct. 2003), <http://www.transgenderlaw.org/resources/translaw.htm>. Because the Sixth Circuit and other circuits use "transsexual" in most of the discussed cases, this Note will follow suit unless quoting or referring to a source that uses a different term.

10. 378 F.3d 566, 574–75 (6th Cir. 2004) (amended opinion).

first time a federal court extended Title VII protection against sex discrimination based on sex stereotypes to transsexual plaintiffs.¹¹

This Note addresses the conflict over the applicability of Title VII to transsexual plaintiffs and argues that the Sixth Circuit erred in reaching its conclusion. Part II examines the legislative history of Title VII as it pertains to sex discrimination, and summarizes Title VII sex discrimination cases involving transsexual plaintiffs.¹² Part III details the Sixth Circuit's decision in *Smith v. City of Salem*,¹³ while Part IV analyzes its reasoning.¹⁴ Part V predicts the likely impact of the decision; it suggests that transsexuals and their supporters lobby for local and state antidiscrimination laws that specifically protect transsexuals.¹⁵ It also cautions that continued Title VII litigation under *Smith's* reasoning could provoke Congress to amend Title VII and explicitly exclude transsexuals.¹⁶

II. BACKGROUND

This Part discusses the legislative history of Title VII as it pertains to sex discrimination.¹⁷ It then introduces the legal difficulties transsexuals face in the United States.¹⁸ Finally, it summarizes relevant case law regarding Title VII and transsexual plaintiffs.¹⁹

A. *Legislative History of Title VII's Prohibition of Sex Discrimination*

Title VII is part of the Civil Rights Act of 1964, and it specifically addresses employment discrimination:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex*, or national origin²⁰

11. Dee McAree, *Courts Still at Odds over Transsexuals' Rights* (Aug. 10, 2005), <http://www.law.com/jsp/article.jsp?id=1123578315284>; see also *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977); *Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at *4 (E.D. La. Sept. 16, 2002).

12. See *infra* notes 17–97 and accompanying text.

13. See *infra* notes 98–120 and accompanying text.

14. See *infra* notes 121–182 and accompanying text.

15. See *infra* notes 183–214, 226–235.

16. See *infra* notes 215–225.

17. See *infra* notes 20–29.

18. See *infra* notes 30–43.

19. See *infra* notes 44–97.

20. 42 U.S.C. § 2000e-2(a)(1) (2000) (emphasis added). This section also makes it unlawful "to limit, segregate, or classify . . . employees or applicants for employment in any way which

The legislative history regarding the Title VII provision prohibiting sex discrimination is sparse.²¹ Representative Howard Smith, a Democrat from Virginia who many considered an opponent of the Civil Rights Act, introduced the amendment that added “sex” as a basis upon which employers could not discriminate.²² He did this the day before the House was to vote on Title VII.²³ Smith said the amendment was needed “to prevent discrimination against another minority group, the women.”²⁴ The amendment passed, as did Title VII. Because the amendment was introduced after an earlier version of Title VII had been debated,²⁵ the official legislative history does not include the usual findings of facts that would shed light on what was meant by “sex.”²⁶ In 1972, Congress passed the Equal Employment Opportunity Act, which made amendments to Title VII but “left the

would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” *Id.* § 2000e-2(a)(2).

21. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (stating that there is a “total lack of legislative history supporting the sex amendment”); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977); *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975); see also *Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at *4 (E.D. La. Sept. 16, 2002).

22. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 443 (1966).

23. *Willingham*, 507 F.2d at 1090.

24. Jo Freeman, *How “Sex” Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 163 (1991) (internal quotation marks omitted) (quoting 110 CONG. REC. 2577 (1964) (statement of Rep. Howard Smith)). There is considerable debate regarding the motive behind Smith’s amendment. Charles and Barbara Whalen write, “Smith counted on the amendment passing and making [the Civil Rights Act of 1964] so controversial that eventually it would be voted down either in the House or Senate.” CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 116 (1985). Freeman disagrees:

This view, appealing though it seems, ignores several factors apparent to anyone who has tried to influence a Congressional vote: 1) The potential beneficiaries of the amendment—women—had experienced lobbyists on the Hill and were not uninterested in the bill; 2) most Southerners had conceded defeat and gone home by Wednesday; the vote occurred on a Saturday, which is not Members’ favorite day to be in Washington; 3) the number of Members voting on the amendment—301—was larger than any other counted vote that day (the others ranged from 178 to 240); 4) other amendments which might “clutter up” the bill, including “sex” amendments to other titles, were voted down.

Freeman, *supra*, at 164–65 (citation omitted).

25. Miranda Oshige McGowan, *Against Interpretation*, 42 SAN DIEGO L. REV. 711, 719 n.30 (2005) (noting that “[b]ecause ‘sex’ was added as an amendment, the House Report said nothing about sex discrimination”).

26. See *Willingham*, 507 F.2d at 1090.

language of § 2000e-2(a)(1) unchanged.”²⁷ Title VII was again amended by the Pregnancy Discrimination Act of 1978 (PDA),²⁸ which explicitly stated that the phrase “because of sex” prohibited employers from discriminating against women because of pregnancy and childbirth.²⁹

B. Legal Difficulties Faced by Transsexuals

People who identify themselves as transsexuals face numerous legal and societal difficulties.³⁰ In addition to being victims of “pervasive discrimination,”³¹ “transgender people are disproportionately affected by poverty.”³² Discrimination abounds in “housing, public accommodations, credit, marriage, parenting and law enforcement.”³³ Employ-

27. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (“[T]he clear intent of the 1972 legislation was to remedy the economic deprivation of women as a class.”).

28. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2000)).

29. *Id.* (internal quotation marks omitted); *accord In re Union Pac. R.R. Employment Practices Litig.*, 378 F. Supp. 2d 1139, 1143 (D. Neb. 2005) (“Congress enacted the PDA in 1978 to overrule the Supreme Court’s decision in *General Electric Co. v. Gilbert*, holding that an employer’s denial of coverage for pregnancy-related conditions in an otherwise comprehensive health insurance plan did not violate Title VII.” (citations omitted)).

30. Dr. Connie Wheeler has “commented on the nature of gender identity disorder/transsexualism”:

[H]istories of psychiatric treatment for substance abuse, adjustment disorders, serious suicidal thoughts, and depression are not uncommon in [patients with GID] . . . [But] [m]any of these disorders are defense mechanism[s] against the frustration, psychological pain, anxiety, and discrimination stemming from patients’ inability to live safely and comfortably in society with their condition or in their desired gender roles.

Connie Wheeler et al., *Gender Identity Disorders*, in 2 TREATMENT OF PSYCHIATRIC DISORDERS (Glen O. Gabbard ed., 1995) (quoted in *Manago v. Barnhart*, 321 F. Supp. 2d 559, 565 (E.D.N.Y. 2004)). There is disagreement regarding the rate of transsexuality—*Manago* cites a figure of “one male per 30,000,” while another authority estimates “one in 11,900 persons ‘born male’ and one in 30,400 persons ‘born female.’” *Compare Manago*, 321 F. Supp. 2d at 564, with Neil Dishman, *The Expanding Rights of Transsexuals in the Workplace*, 21 LAB. LAW. 121, 122 (2005).

31. MORGAN BASSICHIS, NAT’L CTR. ON LESBIAN RIGHTS, “IT’S WAR IN HERE”: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE PRISONS 1, 7 (2001) (reporting that “anti-transgender bias is . . . present in 13% of all bias incidents” and that transgender people are “disproportionately poor, homeless, and incarcerated”). A 2000 survey of transgendered people in Washington, D.C. found that “nearly 30% of respondents reported having no income at all, and another 32% reported earning \$10,000 or less per year.” *Id.* at 9. One website lists and provides information about dozens of transgendered people who were, or are suspected of having been, murdered. Remembering Our Dead, <http://www.rememberingourdead.org/#> (last visited Apr. 30, 2007).

32. Franklin H. Romeo, Note, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 714 (2005).

33. Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 37–38 (2000) [hereinafter Currah & Minter, *Unprincipled Exclusions*] (discussing efforts to address the scope of discrimination and lack of legal protections for the transgendered); *accord PAISLEY CURRAH & SHANNON MINTER*, NAT’L CTR. FOR LESBIAN RIGHTS, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS 11 (2000), available at <http://www.thetaskforce.org>.

ment discrimination is of particular significance to transsexuals because its effects are felt beyond the workplace. Indeed, employment discrimination only exacerbates the economic hardships that transsexuals already face when trying to secure housing and health care.³⁴

In addition to their relatively consistent exclusion from Title VII protection, transsexuals have also been excluded from civil rights statutes dealing with disabilities.³⁵ The Americans with Disabilities Act (ADA)³⁶ and the Rehabilitation Act of 1973³⁷ explicitly exclude “transvestism, transsexualism . . . [and] gender identity disorders not resulting from physical impairments”³⁸ from their protections, despite the medical community’s widespread acceptance of Gender Identity Disorder (GID) as a medical condition.³⁹ Thus, there is no cause of action under either Act for discrimination based on transsexuality.

Title VII challenges to discrimination against the transgendered “ha[ve] proved to be a singularly unsuccessful route to winning basic civil rights protections.”⁴⁰ Professor Richard Storrow notes the problems faced by transsexual plaintiffs asserting claims of employment discrimination:

Employment discrimination jurisprudence at both the federal and state levels . . . captures transsexuals in a discourse of exclusion from social participation. This wide net, cast using a remarkably refined system of semantic manipulations, snags all claims launched

org/downloads/reports/reports/TransgenderEquality.pdf [hereinafter CURRAH & MINTER, TRANSGENDER EQUALITY]; John M. Broder, *Police Mistreatment of Gay Men Is Called Common*, N.Y. TIMES, Sept. 23, 2005, at A16 (reporting an Amnesty International study finding mistreatment of transsexuals, including “verbal and physical abuse, inappropriate body searches, beatings and rapes, and failure to protect people in holding cells”); Human Rights Campaign: Transgender Basics, http://www.hrc.org/Content/NavigationMenu/HRC/Get_Informed/Issues/Transgender_Issues1/Transgender_Basics/Transgender_Basics.htm (last visited Apr. 30, 2007).

34. CURRAH & MINTER, TRANSGENDER EQUALITY, *supra* note 33, at 11 (discussing the legal and social issues facing the transgendered).

35. Minter, *supra* note 9.

36. 42 U.S.C. § 12211(b)(1) (2000).

37. 29 U.S.C. § 705(20)(F)(i) (2000).

38. 42 U.S.C. § 12211(b)(1); 29 U.S.C. § 705(20)(F)(i). Homosexuality and bisexuality were also excluded. 42 U.S.C. § 12211(a); 29 U.S.C. § 705(20)(E). Behaviors that are typically criminal were included in the same subsection as transsexuality: “pedophilia, exhibitionism, [and] voyeurism.” 42 U.S.C. § 12211(b)(1); 29 U.S.C. § 705(20)(F)(i). Senator Jesse Helms was concerned the ADA would prevent employers from using their “own moral standards” when screening job applicants and insisted these exclusions be included. 135 CONG. REC. S10765, 10765 (daily ed. Sept. 7, 1989).

39. DSM-IV, *supra* note 9, at 532–38.

40. Currah & Minter, *Unprincipled Exclusions*, *supra* note 33, at 39.

by transsexuals and reveals that no matter how a transsexual frames her discrimination claim, it will fail.⁴¹

Courts have decided sex discrimination cases brought by transsexuals by relying on a “legal distinction between discrimination because of sex and discrimination because of a *change of sex*.”⁴² *Smith v. City of Salem* represented the first major departure from this approach.⁴³

C. Relevant Case Law

This Part recounts seminal Title VII sex discrimination cases involving transsexual plaintiffs. These cases set the analytical structure—namely, the distinction between sex and transsexuality—on which courts typically relied and which *Smith* explicitly rejected.

1. Not “*Within the Scope*”: *Holloway v. Arthur Andersen & Co.*

In 1974, Arthur Anderson fired Ramona Holloway, who was biologically male, five months after she revealed she was about to undergo sex change surgery and shortly after changing her name in Arthur Anderson’s employment records.⁴⁴ Holloway argued that “sex,” as used in Title VII, was “[synonymous] with ‘gender,’ and gender would encompass transsexuals.”⁴⁵ Arthur Anderson countered that Congress intended sex to be construed in its “anatomical” sense.⁴⁶ After reviewing the legislative history of Title VII, the Court of Appeals for the Ninth Circuit interpreted sex by “its plain meaning . . . conclud[ing] that Congress had only the traditional notions of ‘sex’ in mind.”⁴⁷ The court also looked to recent attempts to amend Title VII to prohibit discrimination based on “sexual preference.”⁴⁸ Although ten such bills were introduced between 1975 and 1977, none were enacted.⁴⁹ The court viewed this as strong evidence that Congress had chosen not to broaden the definition of “sex” in Title VII, despite having had the opportunity to do so.⁵⁰ The Ninth Circuit then

41. Richard F. Storrow, *Naming the Grotesque Body in the “Nascent Jurisprudence of Transsexualism,”* 4 MICH. J. GENDER & L. 275, 310 (1997) (quoted in Currah & Minter, *Unprincipled Exclusions*, *supra* note 33, at 40).

42. Currah & Minter, *Unprincipled Exclusions*, *supra* note 33, at 40; accord *Etsitty v. Utah Transit Auth.*, No. 2:04CV616 DS, 2005 WL 1505610, at *5 (D. Utah June 24, 2005).

43. See *supra* note 11 and accompanying text.

44. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661 (9th Cir. 1977). This Note will refer to plaintiffs using the pronoun forms that their respective courts used.

45. *Id.* at 662.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* & n.6.

50. *Holloway*, 566 F.2d at 662.

held that “[a] transsexual individual’s decision to undergo sex change surgery does not bring that individual, [or] transsexuals as a class, within the scope of Title VII.”⁵¹

2. “*Manipulation of Semantics*”: *Sommers v. Budget Mktg., Inc.*

On April 22, 1980, Budget Marketing hired Audra Sommers.⁵² Two days later, Budget Marketing fired her, alleging “she misrepresented herself as an anatomical female.”⁵³ Budget explained that several female employees had voiced concerns about which restroom Sommers would use.⁵⁴ The District Court for the Southern District of Iowa required Sommers to state “whether she had been discriminated against because she was male, female, or transsexual.”⁵⁵ In her amended complaint, Sommers identified herself as “a female with the anatomical body of a male,” who had not yet undergone a sex change operation.⁵⁶ Sommers argued that the court was not “bound by the plain meaning of the term ‘sex’ . . . [and] should instead expand the coverage of [Title VII] to protect individuals . . . who are psychologically female, albeit biologically male.”⁵⁷ The district court rejected this argument, noting that other courts had “refused to extend Title VII coverage to those discriminated against because of their transsexuality.”⁵⁸ The court referred to Sommers’ description of her sex as a “manipulation of semantics.”⁵⁹ It proceeded to interpret “sex” as the court in *Holloway* had, stating that “courts [cannot] ignore anatomical classification and determine a person’s sex according to the psychological

51. *Id.* at 664.

52. *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 748 (8th Cir. 1982) (per curiam).

53. *Id.*

54. *Id.* at 748–49. A great deal of litigation springs from a transsexual employee being terminated because other employees are uncomfortable having a “man” in a women’s restroom, or vice versa. They justify terminating the employee on this basis, and often claim their decision is not based on any prejudice against the transgendered. Rather, they argue there is no reasonable solution to the problem, though the option of a one-toilet bathroom does not seem to have been seriously considered. *See, e.g.*, *Johnson v. Fresh Mark, Inc.*, 03-3344, 98 Fed. App’x 461 (6th Cir. 2004) (per curiam); *Etsitty v. Utah Transit Auth.*, No. 2:04CV616 DS, 2005 WL 1505610 (D. Utah June 24, 2005); *Dobre v. Nat’l R.R. Passenger Corp.*, 850 F. Supp. 284 (E.D. Pa. 1993).

55. *Sommers*, 667 F.2d at 749. It is unclear whether the district court judge viewed “transsexual” as describing a third category of sex on par with male and female, or implying “no sex” at all.

56. *Id.*

57. *Id.* The Eighth Circuit seemed to have used the terms “sex” and “gender” interchangeably. *See id.* at 748–49. However, it is clear from the rest of the opinion that “gender” referred to biological/anatomical sex, rather than a socially constructed identity. *See id.* at 750.

58. *Id.* at 749.

59. *Sommers*, 667 F.2d at 749. *But see* *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (amended opinion) (criticizing the district court and City of Salem’s use of quotation marks around the phrase “sex stereotype”).

makeup of that individual."⁶⁰ Because Sommers had the anatomy of a man, the district court classified her as a man;⁶¹ Title VII, therefore, did not protect her.⁶² The district court then granted summary judgment to Budget.⁶³

The Court of Appeals for the Eighth Circuit affirmed the district court's decision.⁶⁴ In looking to the legislative history, the Eighth Circuit found that Congress had created the sex discrimination prohibition to protect women; there was no indication that Congress had "any intention to include transsexualism in Title VII."⁶⁵ The court also noted Congress's refusal to amend Title VII to prohibit discrimination based on sexual preference.⁶⁶ In closing, the court acknowledged that it was "not unmindful of the problem Sommers faces,"⁶⁷ but stated that it would be up to the parties to come up with a solution.⁶⁸

3. "From What Remains of a Man": *Ulane v. E. Airlines, Inc.*

Eastern Airlines hired Kenneth Ulane in 1968.⁶⁹ In 1979, Ulane was diagnosed with GID⁷⁰ and underwent sex change surgery a year later.⁷¹ Subsequently, the Federal Aviation Administration and the State of Illinois certified her as a female named Karen Ulane.⁷² Eastern Airlines fired Ulane in 1981 after learning of her sex change.⁷³ Ulane brought suit, and the District Court for the Northern District of Illinois determined that Title VII prohibited discrimination based on a plaintiff's transsexualism.⁷⁴ The district court interpreted "sex" to encompass "sexual identity,"⁷⁵ which involved "a question of how soci-

60. *Sommers*, 667 F.2d at 749.

61. *Id.*

62. *Id.* This case was decided before *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, which held that men were also protected from sex discrimination under Title VII. 462 U.S. 669 (1983).

63. *Sommers*, 667 F.2d at 749.

64. *Id.* at 750.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* Given that Budget fired Sommers, it is unlikely that it, or any other employer, would have much of an incentive to work with Sommers or similarly situated employees in reaching an accommodation.

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

70. *Id.* at 1083.

71. *Id.*

72. *Id.*

73. *Id.* at 1084.

74. *Id.*

75. *Ulane*, 742 F.2d at 1084 (internal quotation marks omitted).

ety perceive[d] the individual.”⁷⁶ Noting that remedial statutes such as Title VII are to be liberally construed, the district court held that “sex” applied to transsexuals, even though Congress had not explicitly said so.⁷⁷

The Seventh Circuit disagreed, however, holding that “words should be given their ordinary, common meaning.”⁷⁸ Because Title VII does not explicitly prohibit “discrimination against a person who has a sexual identity disorder . . . a prohibition against discrimination based on an individual’s sex is not synonymous.”⁷⁹ The court looked at the sparse legislative history for Title VII’s prohibition of sex discrimination: “Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex. . . . There is not the slightest suggestion in the legislative record to support an all-encompassing interpretation.”⁸⁰ The Seventh Circuit agreed with the district court that remedial statutes should be liberally construed, but noted that the “concept has reasonable bounds beyond which a court cannot go without transgressing the prerogatives of Congress.”⁸¹

The Seventh Circuit also overruled the district court’s finding that Eastern Airlines discriminated against Ulane based on her status as a female, holding that the district court did not make sufficient factual findings to determine that Ulane was actually a woman.⁸² The Seventh Circuit discounted Ulane’s claim of being a woman, “even if one believes that a woman can be so easily created from what remains of a man.”⁸³ While holding out the possibility that a transsexual plaintiff could have a valid Title VII claim based on biological sex,⁸⁴ the court held that Eastern Airlines terminated Ulane because she was a transsexual.⁸⁵

76. *Id.*

77. *Id.*

78. *Id.* at 1085.

79. *Id.*

80. *Id.*

81. *Ulane*, 742 F.2d at 1086.

82. *Id.* at 1087.

83. *Id.* It appears that the court believed Ulane had no sex. See Currah & Minter, *Unprincipled Exclusions*, *supra* note 33, at 42.

84. *Ulane*, 742 F.2d at 1087. For example, a female-to-male transsexual could not make a claim that he was discriminated against because he was a transsexual, but he could make a claim that he was discriminated against because he was biologically female.

85. *Id.*

D. *A Possible Opening: Price Waterhouse v. Hopkins and Sex Stereotyping*

Ann Hopkins worked as an accountant for Price Waterhouse, and her supervisors recommended her for promotion to partner.⁸⁶ The firm, however, placed her nomination on "hold" for a year.⁸⁷ When the time came to nominate her again, her supervisors refused.⁸⁸ Hopkins then brought suit under Title VII, claiming Price Waterhouse discriminated against her based on her sex.⁸⁹ At trial, Hopkins supported her claim by presenting the written statement of nomination made by her supervisors, written comments on her candidacy by partners, and statements made by her supervising partner.⁹⁰ The nominating statement praised Hopkins for her "deft touch"⁹¹ and for work that was "virtually at the partner level,"⁹² but some partners described her as "macho"⁹³ and in need of "a course at charm school."⁹⁴ They also took issue with "a lady using foul language."⁹⁵ Hopkins' supervisor told her that if she were to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry," she would increase her chances of a promotion.⁹⁶

The Supreme Court ruled for Hopkins, finding Price Waterhouse had discriminated against her because she did not fulfill stereotypes of how a woman should look and act. The Court stated, "Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute. . . . We take these words to mean that gender must be irrelevant to employment decisions."⁹⁷

III. SUBJECT OPINION: *SMITH v. CITY OF SALEM*

This Part discusses the Sixth Circuit's decision in *Smith v. City of Salem*.⁹⁸ *Smith* marked the first time a court of appeals allowed the

86. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 233 (1989).

87. *Id.*

88. *Id.* at 231-32.

89. *Id.* at 232.

90. *Id.* at 232-35.

91. *Id.* at 234 (internal quotation marks omitted).

92. *Price Waterhouse*, 490 U.S. at 233 (internal quotation marks omitted).

93. *Id.* at 235 (internal quotation marks omitted).

94. *Id.* (internal quotation marks omitted).

95. *Id.* (internal quotation marks omitted).

96. *Id.* (internal quotation marks omitted).

97. *Id.* at 239-40.

98. See *infra* notes 99-120.

Price Waterhouse prohibition of sex stereotyping to extend to a transsexual plaintiff in a Title VII case.⁹⁹ Although *Smith* may, at first blush, appear to advance equal employment rights for transsexuals, its relief may be only temporary. Indeed, *Smith* is premised on both an incorrect application of *Price Waterhouse* and an incorrect interpretation of congressional intent.

A. Facts

Jimmie Smith was a lieutenant and seven-year veteran of the City of Salem Fire Department.¹⁰⁰ During that time, he had no negative incidents on the job.¹⁰¹ After years of successful service, Smith was diagnosed with GID and began “expressing a more feminine appearance on a full-time basis.”¹⁰² His co-workers questioned him about his appearance and told him that “his appearance and mannerisms were not ‘masculine enough.’”¹⁰³ Smith informed his supervisor of his GID and the treatment plan that he was following, including the likelihood that he would undergo a “complete physical transformation from male to female.”¹⁰⁴

The City’s executive body met on April 18, 2001 to figure out how to end Smith’s employment.¹⁰⁵ This group decided “to require Smith to undergo three separate psychological evaluations,” and “[t]hey hoped that Smith would either resign or refuse to comply.”¹⁰⁶ On April 26, 2001, the fire chief “suspended Smith for one twenty-four hour shift” for allegedly violating “a City and/or Fire Department policy.”¹⁰⁷

B. Prior History

Following his suspension, Smith sued the City of Salem in the District Court for the Northern District of Ohio, alleging sex discrimina-

99. Interestingly, just weeks before *Smith*, the Sixth Circuit upheld a district court’s dismissal of a transsexual plaintiff’s Title VII claim on the grounds that “Title VII does not prohibit discrimination based on an individual’s status as a transsexual,” and found that *Price Waterhouse* was not applicable. *Johnson v. Fresh Mark, Inc.*, 98 Fed. App’x 461, 462 (6th Cir. 2004) (per curiam). None of the judges deciding *Fresh Mark*, however, were on the panels that decided *Smith* and *Barnes*; *Fresh Mark* was an unreported case.

100. *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2004) (amended opinion).

101. *Id.*

102. *Id.* (internal quotation marks omitted).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Smith*, 378 F.3d at 569.

107. *Id.*

tion under Title VII.¹⁰⁸ The court characterized Smith's claim as "disingenuous,"¹⁰⁹ describing his use of the *Price Waterhouse* sex stereotyping claim "as an end run around his 'real' claim . . . 'based upon his transsexuality.'"¹¹⁰ The district court ultimately held that "Title VII does not prohibit discrimination based on an individual's transsexualism."¹¹¹ Smith appealed to the Sixth Circuit, which then considered "whether Smith properly alleged a claim of sex stereotyping, in violation of . . . *Price Waterhouse v. Hopkins*."¹¹²

C. Holding

The Sixth Circuit unanimously reversed the district court, finding Smith had "sufficiently pleaded claims of sex stereotyping and gender discrimination."¹¹³ The Sixth Circuit noted that "his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions."¹¹⁴

The Sixth Circuit refused to follow other courts that had held that a plaintiff's transsexuality was an absolute bar to Title VII's protection from sex discrimination.¹¹⁵ Rather, the court invoked *Price Waterhouse*: "Title VII protect[s] a woman who failed to conform to social expectations concerning how a woman should look and behave . . . [thus,] Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination . . . based on a failure to conform to stereotypical gender norms."¹¹⁶

108. *Id.*

109. *Id.* at 571.

110. *Id.*

111. *Id.* (internal quotation marks omitted).

112. *Smith*, 378 F.3d at 571. There were four issues addressed by the Sixth Circuit that will not be addressed in this Note: (1) whether Smith alleged an adverse employment action; (2) whether he satisfied all elements necessary to allege a prima facie case of employment discrimination and retaliation; (3) whether Smith stated a § 1983 claim based on violations of his right to due process; and (4) whether he stated a § 1983 claim of sex discrimination. *Id.* at 575-78. The district court had held that Smith "failed to demonstrate that he suffered an adverse employment action . . . [and that] he failed to state a claim based on the deprivation of a constitutional or federal statutory right, pursuant to 42 U.S.C. § 1983." *Id.* at 569-70. The Sixth Circuit reversed with respect to the adverse employment action, finding that the twenty-four hour suspension was an adverse employment action. *Id.* at 576. Although the court affirmed the dismissal of Smith's § 1983 claim of denial of due process, it reversed on his § 1983 claim of sex discrimination. *Id.* at 578.

113. *Id.* at 572. As to the prima facie element regarding disparate treatment, the complaint alleged that Smith "would not have been treated differently, on account of his non-masculine behavior and GID, had he been a woman instead of a man." *Smith*, 378 F.3d at 570 (emphasis added).

114. *Id.* at 572.

115. *Id.* at 572-73.

116. *Id.* at 573.

The Sixth Circuit then held that an employee's failure to abide by the social constructs of how a man or woman should act was an illegitimate ground for adverse employment action.¹¹⁷ Because Smith alleged that he suffered an adverse employment action as a result of his feminine appearance and mannerisms, he had stated a claim under Title VII.¹¹⁸ The court noted that “[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior.”¹¹⁹ Transsexuality, therefore, would not preclude a Title VII sex discrimination claim.¹²⁰

IV. ANALYSIS

This Part analyzes the key issues raised by the Sixth Circuit in *Smith v. City of Salem*: (1) the relationship of “sex” to “gender”;¹²¹ (2) the extension of Title VII sex discrimination protections to transsexual plaintiffs in light of their explicit exclusion from the Rehabilitation Act and the ADA;¹²² and (3) the circuit split regarding the viability of sex discrimination claims brought by transsexual plaintiffs.¹²³

A. *The Relationship of Sex to Gender*

Smith turned on the Sixth Circuit's understanding of the relationship between sex and gender. A transsexual person has a biological

117. *See id.* at 575.

118. *Id.* at 574–75.

119. *Smith*, 378 F.3d at 575. The Sixth Circuit rebuked the district court and the City of Salem for repeatedly placing quotation marks around “sex stereotype,” thus implying that sex stereotyping lacked “legal relevance.” *Id.*

120. *Id.* Notably, two months earlier, the Sixth Circuit issued an opinion considerably different from the amended opinion that is the subject of this Note. *Smith v. City of Salem*, 369 F.3d 912 (6th Cir. 2004). In this earlier opinion, the court announced a per se rule that discrimination based solely on a plaintiff's transsexuality was sufficient for a Title VII sex stereotype complaint:

By definition, transsexuals are individuals who fail to conform to stereotypes about how those assigned a particular sex at birth should act, dress, and self-identify. *Ergo*, identification as a transsexual is the statement or admission that one wishes to be the opposite sex or does not relate to one's birth sex. Such an admission—for instance the admission by a man that he self-identifies as a woman and/or that he wishes to be a woman—itself violates the prevalent sex stereotype that a man should perceive himself as a man. Discrimination based on transsexualism is rooted in the insistence that sex (organs) and gender (social classification of a person as belonging to one sex or the other) coincide. This is the very essence of sex stereotyping.

Id. at 921–22. Without comment, the court abandoned this per se rule, and the reasoning behind it, in its amended opinion. *See Smith*, 378 F.3d 566.

121. *See infra* notes 124–163.

122. *See infra* notes 164–169.

123. *See infra* notes 170–182.

sex and gender that do not match.¹²⁴ As such, transsexuality is a gender identity issue.¹²⁵ In order to bring biological sexual characteristics and gender into accord, a transsexual takes various steps to transition from living as a male to living as a female, or vice versa.¹²⁶ This transition may include hormone treatments and sex reassignment surgery.¹²⁷ Despite these increasingly sophisticated medical advances, transsexuals retain the biological sex with which they were born; it is determined by their chromosomes¹²⁸ and remains unaffected by hormone treatment or surgery.¹²⁹ Thus, Title VII cases involving transsexual plaintiffs are more about gender than sex. Congress had no intention of including gender or transsexuality within the Title VII sex discrimination provision in 1964 or in subsequent amendments. In addition, the Sixth Circuit misunderstood the Court's use of "gender" in *Price Waterhouse*.

1. Congress's Intention for the Sex Provision in Title VII

Title VII states that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's . . . sex."¹³⁰ "Gender" does not appear anywhere in the text of Title VII, nor is there any mention of transsexuality or discrimination "against a person who has sexual identity disorder."¹³¹ When the Civil Rights Act was passed in 1964, "gender" had not even been introduced into the American legal system as a synonym for sex,¹³² let alone something distinct from biological sex.¹³³ Indeed, the

124. Julie A. Greenberg, *What Do Scalia and Thomas Really Think About Sex? Title VII and Gender Nonconformity Discrimination: Protection for Transsexuals, Intersexuals, Gays and Lesbians*, 24 T. JEFFERSON L. REV. 149, 151 (2002).

125. See *supra* note 9 and accompanying text.

126. Samantha J. Levy, Comment, *Trans-forming Notions of Equal Protection: The Gender Identity Class*, 12 TEMP. POL. & CIV. RTS. L. REV. 141, 145 (2002).

127. *Id.* at 145–46. Sex reassignment surgery can be expensive: "The average MTF cost was about \$10,400, and the average FTM surgery . . . was about \$17,900." See Transgender Network, *The Cost of Transgender Health Benefits*, <http://www.tgender.net/taw/thbcost.html> (last visited Apr. 30, 2007); Transgender Network, *Transgender Health Benefits*, <http://www.tgender.net/taw/tsins.html> (last visited Apr. 30, 2007).

128. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1083 n.6 (7th Cir. 1984).

129. *Id.* at 1083 n.5 ("An XX configuration denotes female; XY denotes male. These chromosome patterns cannot be surgically altered.")

130. 42 U.S.C. § 2000e-2(a)(1) (2000).

131. *Ulane*, 742 F.2d at 1085.

132. *Excerpts from Senate Hearing on the Ginsburg Nomination*, N.Y. TIMES, July 22, 1993, at A20. During her Supreme Court nomination hearings, Ginsburg was asked to tell the story of how she came up with the term "gender discrimination." She recounted how her secretary thought the male judges on appellate courts in the 1970s would be "distracted" by the repeated use of the word "sex." The secretary suggested using the "grammar book term" gender instead, so to "ward off distracting associations." *Id.*

legislative history of Title VII indicates that Congress's intention was to prohibit discrimination against women. As Representative Smith explained, the amendment that he proposed added "sex" to the list of protected classes "to correct the present 'imbalance' which exists between males and females in the United States."¹³⁴ "Sex" had two common meanings at the time: the act of sexual intercourse and the physical characteristics that differentiate men from women.¹³⁵ The debate on the sex discrimination provision consisted solely of discussions about the biological differences between men and women.¹³⁶ At no point did Congress discuss the more complex issues of transsexuality and gender.¹³⁷

Since Title VII was passed, Congress has had multiple opportunities to amend it to define "sex" more broadly,¹³⁸ but it has not done so. In 1972, Congress amended Title VII to strengthen its provisions with respect to the organization and powers of the Equal Employment Opportunity Commission.¹³⁹ Congress did not in any way redefine "sex" in these amendments. In 1978, Congress passed the PDA,¹⁴⁰ which clarified that employers could not discriminate against women because of pregnancy or childbirth. The Civil Rights Act of 1991 allowed for parties to request jury trials and to "recover compensatory and punitive damages in intentional employment discrimination

133. *J.E.B. v. Alabama*, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting) ("The word 'gender' has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes.").

134. *WHALEN & WHALEN*, *supra* note 24, at 116.

135. *WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED* 1560 (Harold Whitehall et al. eds., 1951) (defining "sex" as "[t]he distinction between male and female; that property or character by which an animal is male or female" and as "[o]ne of the two divisions of animals founded on the distinction of male and female"); *id.* (defining "sexual" as "[d]enoting the method of reproduction by sexes").

136. *WHALEN & WHALEN*, *supra* note 24, at 116–17. Representative Emanuel Celler opposed Smith's amendment, seeing it as a ploy to defeat the Civil Rights Act as a whole. Celler and Smith then engaged in a discussion "about the biological differences between men and women." *Id.* (internal quotation marks omitted).

137. *See generally id.* at 100–23.

138. *See Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at *4 (E.D. La. Sept. 16, 2002) ("From 1981 through 2001, thirty-one proposed bills have been introduced in the United States Senate and the House of Representatives which have attempted to amend Title VII and prohibit employment discrimination on the basis of affectional or sexual orientation. None have passed.").

139. *Milestones in the History of the U.S. Equal Employment Opportunity Commission: 1991*, <http://www.eeoc.gov/abouteeoc/35th/milestones/1991.html> (last visited Apr. 30, 2007).

140. *See Pub. L. No. 95-555*, 92 Stat. 2076 (1978) (codified at 42 U.S.C. §2000e(k) (2000) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . .")).

cases.”¹⁴¹ When Congress amended the Title VII sex discrimination provision, it focused exclusively on two matters tied directly to biological sex—pregnancy and childbirth. Congress evidently did not believe the *Holloway*, *Sommers*, and *Ulane* courts had erred in ruling that Title VII did not prohibit discrimination against transsexuals.¹⁴² Indeed, Congress amended Title VII with the PDA in response to a Court ruling with which it disagreed.¹⁴³ The logical conclusion is that Congress was quite content having “sex” understood as a function of biology.

2. “We Need Not Leave Our Common Sense at the Doorstep”: *Sex and Gender in Price Waterhouse and Smith*

The *Smith* decision relied on a definition of gender that is at odds with the one used by the Supreme Court in *Price Waterhouse*. In *Smith*, the Sixth Circuit understood gender to mean something along the lines of “the cultural and attitudinal qualities that are characteristic of a particular sex.”¹⁴⁴ But the *Price Waterhouse* Court quite obviously used “gender” as an interchangeable synonym for “sex,” rather than a distinct concept.¹⁴⁵ The Fourth Circuit noted this in *Hopkins v. Baltimore Gas & Electric Co.*¹⁴⁶

Because Congress intended that the term “sex” in Title VII mean simply “man” or “woman,” there is no need to distinguish between the terms “sex” and “gender” in Title VII cases. Consequently,

141. Milestones in the History of the U.S. Equal Employment Opportunity Commission, *supra* note 139.

142. Courts have long recognized the significance of congressional acquiescence. In *Cannon v. University of Chicago*, the Court discussed whether Title IX afforded a private right of action: [I]n 1967, a distinguished panel of the Court of Appeals for the Fifth Circuit squarely decided this issue [regarding Title VI, upon which Title IX was modeled] in an opinion that was repeatedly cited with approval and never questioned during the ensuing five years [when Title IX was passed]. In addition, at least a dozen other federal courts reached similar conclusions in the same or related contexts during those years. It is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX.

441 U.S. 677, 696–98 (1979) (citations omitted).

143. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145–46 (1976) (holding that an employee benefits plan that excluded disabilities resulting from pregnancy did not violate Title VII).

144. Greenberg, *supra* note 124, at 150.

145. Given that most people’s biological sex and gender are in accord, this usage by the Court is understandable and reflects the viewpoint of the majority of society. Transsexuals, whose biological sex and gender are *not* in accord, are sensitive to the distinction between sex and gender.

146. 77 F.3d 745 (4th Cir. 1996). For clarity, it should be noted that *Hopkins v. Baltimore Gas & Electric Co.* and *Price Waterhouse v. Hopkins* involved separate plaintiffs.

courts, speaking in the context of Title VII, have used the term[s] “sex” and “gender” interchangeably to refer simply to the fact that an employee is male or female.¹⁴⁷

In other words, the Court believed Congress meant Title VII to refer to “sex” as biological, rather than cultural or attitudinal. This is most evident in the *Price Waterhouse* opinion, where the Court wrote that “Congress’ intent to forbid employers to take *gender* into account in making employment decisions appears on the face of the statute.”¹⁴⁸ Then the Court quoted Title VII directly,¹⁴⁹ as prohibiting discrimination “*because of* such individual’s . . . *sex*.”¹⁵⁰ Given that Title VII uses the word “sex,”¹⁵¹ and makes no use of the word “gender,” one must conclude that the Court simply used gender as a synonym for “biological sex.”¹⁵²

Throughout the *Price Waterhouse* opinion, the Court used “sex” and “gender” interchangeably. When the Court attempted to explain what it meant by “gender play[ing] a motivating part in an employment decision,” it wrote, “if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a *woman*.”¹⁵³ An understanding of sex as biological is at the foundation of this definition. Before discriminating against a woman because she is not acting as a woman “should” act (gender), the employer has to first target the employee’s sex: “In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”¹⁵⁴ The Court saw sex stereotyping as a subcategory of sex discrimination, where cultural or attitudinal qualities are evaluated by an employer only *after* targeting the employee’s sex. Since *Price Waterhouse*, a number of federal courts have differentiated between sex and gender in this way.¹⁵⁵

147. *Id.* at 749 n.1 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989)).

148. *Price Waterhouse*, 490 U.S. at 239 (emphasis added).

149. *Id.* at 239–40.

150. *Id.* at 240 (second emphasis added) (alteration in original) (internal quotation marks omitted).

151. See 42 U.S.C. § 2000e(k) (2000).

152. See *supra* notes 130–143.

153. *Price Waterhouse*, 490 U.S. at 250 (emphasis added).

154. *Id.*

155. See, e.g., *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076, 1083 (9th Cir. 2004) (holding that *Price Waterhouse* does not apply to “appearance and grooming standards cases”); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000) (stating that “Spearman’s co-workers maligned him because of his apparent homosexuality, and not because of his sex”); *Etsitty v. Utah Transit Auth.*, No. 2:04CV616 DS, 2005 WL 1505610, at *4–5 (D. Utah June 24, 2005) (holding that *Price Waterhouse* was inapplicable because the “drastic action” of a sex change

The Sixth Circuit's understanding of gender as the cultural and attitudinal qualities of a particular sex made *Smith* fairly easy to decide.¹⁵⁶ The City of Salem, through its agents, took adverse employment action against Smith once it learned of his intent to undergo a "complete physical transformation from male to female."¹⁵⁷ Given Smith's "feminine" attributes, and because he did not meet traditional notions of how a man should act and look,¹⁵⁸ he failed to exhibit the traditional cultural and attitudinal qualities that are characteristic of men. The Sixth Circuit compared Smith's situation to that of Ann Hopkins during her employment at Price Waterhouse and found them analogous.¹⁵⁹ Just as Hopkins' employers believed she was unacceptably "macho,"¹⁶⁰ the City of Salem believed that Smith did not act "masculine enough."¹⁶¹ In each case, the employers took discriminatory action against their "non-conforming"¹⁶² employee.

The determination that the City of Salem committed sex discrimination against Smith, however, was based on an incorrect understanding of the Supreme Court's definition of "gender." The city did not take adverse employment action against Smith because he failed to fulfill stereotypes of how a man should act; it took this action because of his efforts to change his sex.¹⁶³ The city's actions were not predicated on Smith's biological sex; it did not matter whether Smith was a male or female. Thus, the City did not discriminate against Smith on the basis of sex.

"cannot be fairly characterized as a mere failure to conform to stereotypes"); *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 1000 (N.D. Ohio 2003) (holding that *Price Waterhouse* did not apply to transsexuals), *aff'd*, 98 Fed. App'x 461 (6th Cir. 2004) (per curiam); *Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at *1 (E.D. La. Sept. 16, 2002) (holding that the termination of a male employee with GID was not prohibited by Title VII). *But see* *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (relying on *Price Waterhouse* in holding that "sex" under Title VII refers to both biological sex and gender).

156. *See* *Greenberg*, *supra* note 124, at 150-51.

157. *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2004) (amended opinion).

158. *Id.*

159. *Id.* at 571-75.

160. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (internal quotation marks omitted).

161. *Smith*, 378 F.3d at 568 (internal quotation marks omitted).

162. *Id.* at 571.

163. *Id.* at 568. While Smith's co-workers did comment that he was not "masculine enough," the City of Salem did not take any action against him until *after* he informed them of his intent to go through the complete sex reassignment treatment. *Id.* There was no evidence in the record that any of his supervisors took any action against him before learning of his desire to complete the reassignment treatment. *See id.*

B. Congress Has Explicitly Excluded Transsexuals from Other Civil Rights Statutes

The Sixth Circuit's ruling that Title VII's prohibition of sex discrimination applies to transsexuals is curious, given that Congress has explicitly excluded transsexuals from both the Rehabilitation Act and the ADA. These two statutes were enacted nine and twenty-five years after the Civil Rights Act of 1964, respectively.¹⁶⁴ Congress did not discuss transsexuality when debating Title VII,¹⁶⁵ and at the time Title VII was passed, "sex" was understood in accordance with its more traditional definition.¹⁶⁶ It makes little sense to believe that Congress intended for the "sex" provision in Title VII to encompass transsexuality when it explicitly excluded transsexuality from the two disability acts. Further, Congress lumped transsexuality with pedophilia, exhibitionism, and voyeurism in both disability acts,¹⁶⁷ which is strong evidence that Congress was unsympathetic, and even hostile, to the plight of transsexuals.

Between 1981 and 2000, Congress rejected thirty-one proposals to amend Title VII to prohibit discrimination based on sexual orientation.¹⁶⁸ Congress has proved unwilling to explicitly include sexual orientation within Title VII's sex provision and has explicitly excluded sexual orientation from the protection of subsequent legislation. In comparison, during this same twenty-year period, it appears *no* member of Congress thought the issue of including transsexuality under Title VII's sex provision was sufficiently important to propose such legislation.¹⁶⁹ It is hard to believe, therefore, that Congress intended to include transsexuality within Title VII.

C. The Circuit Split: What Can Employers and Their Transsexual Employees Take from Smith?

Smith is noteworthy because it declined to follow the earlier holdings of the Seventh Circuit, Eighth Circuit, and Ninth Circuit.¹⁷⁰ *Smith* creates uncertainty about whether, where, and under what circumstances transsexuals are protected under Title VII.

164. Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified at 29 U.S.C. §§ 701-796 (2000)); Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213 (2000)).

165. See *supra* notes 21-26 and accompanying text.

166. See *supra* note 135 and accompanying text.

167. See *supra* note 38 and accompanying text.

168. *Oiler v. Winn-Dixie La., Inc.*, Civ.A. 00-3114, 2002 WL 31098541, at *4 & n.53 (E.D. La. Sept. 16, 2002).

169. It appears no bills were proposed during this time period to extend Title VII to transsexuals. *Id.* at *4.

170. *Smith v. City of Salem*, 378 F.3d 566, 572-73 (6th Cir. 2004) (amended opinion).

Holloway, *Sommers*, and *Ulane* held that transsexual employees terminated for being transsexuals have no recourse under Title VII regardless of gender stereotyping.¹⁷¹ To reach that result, the courts relied on the legislative history of Title VII and what they considered to be its plain language.¹⁷² These courts reasoned that discrimination against a transsexual employee because of the employee's decision to alter his or her physical appearance is not sex discrimination because it is not based on the employee's biological sex.¹⁷³ In other words, the employer would have taken this adverse action regardless of whether the employee was a male-to-female or a female-to-male transsexual. Thus, the argument goes, because the employer's decision was not based on the employee's *biological* sex, it cannot, by definition, be sex discrimination under Title VII.

The *Smith* decision found this rationale outdated.¹⁷⁴ According to the Sixth Circuit, the reasoning of earlier Title VII cases was "eviscerated"¹⁷⁵ by *Price Waterhouse*: "Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms."¹⁷⁶ Therefore, transsexual employees like *Smith* must have been discriminated against because of their failure to live up to stereotypical beliefs about how a man or woman "should" act.¹⁷⁷ This decision, however, creates problems for both employers and transsexual employees.

First, it creates a conflict in the enforcement of the Title VII sex discrimination provision. The defendants in both *Smith* and *Barnes v. City of Cincinnati*,¹⁷⁸ the Sixth Circuit's most recent Title VII case involving a transsexual plaintiff, were municipalities located solely

171. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984).

172. *Holloway*, 566 F.2d at 661-63; *Sommers*, 667 F.2d at 750; *Ulane*, 742 F.2d at 1084-85.

173. *Holloway*, 566 F.2d at 663 ("The manifest purpose of Title VII's prohibition against sex discrimination in employment is to ensure that *men* and *women* are treated equally, absent a bona fide relationship between the qualifications for the job and the person's [biological] sex." (emphasis added)); *Sommers*, 667 F.2d at 750 ("It is . . . generally recognized that the major thrust of the 'sex' amendment was towards providing equal opportunities for *women*." (emphasis added)); *Ulane*, 742 F.2d at 1085 ("The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men.").

174. *Smith*, 378 F.3d at 572-73.

175. *Id.* at 573.

176. *Id.*

177. *Id.* at 574.

178. 401 F.3d 729 (6th Cir.), *cert. denied*, 126 S. Ct. 624 (2005).

within the circuit.¹⁷⁹ But employers with operations both in and outside the Sixth Circuit must now utilize two different employment guidelines regarding transsexual employees.¹⁸⁰ For example, assume a company learns it has two transsexual employees, one working in Fort Wayne, Indiana and the other in Cincinnati, Ohio. The company can terminate the Fort Wayne employee at will and without fear of losing a sex discrimination suit, but it cannot do the same to the Cincinnati employee without the risk of Title VII liability. While these companies have the option of altering their policies in all their locations, employers should not be forced to choose between competing interpretations of Title VII.

Perhaps more importantly, this split could mislead transsexual employees. Transsexual employees in Indiana may read about *Smith* or *Barnes* and think that they are now protected by Title VII. The employee, however, is still very much unprotected.¹⁸¹ The split thus creates problems for both employers and transsexuals. Title VII protects employees from certain types of discrimination and guides employers in how they must treat those who work for them. As the law currently stands, however, neither employers nor transsexual employees know their rights when it comes to discrimination based on transsexuality.

The *Smith* decision only protects transsexuals in the Sixth Circuit, but it remains to be seen whether this decision can stand the test of time. Recently, the Supreme Court denied certiorari to the City of Cincinnati,¹⁸² allowing the *Barnes* decision to stand. The Sixth Circuit's decision and the Court's subsequent denial of certiorari allows the circuit split to remain in effect, and may be seen as denying protection under Title VII to transsexuals living outside the Sixth Circuit.

V. IMPACT

Contrary to the views of many commentators,¹⁸³ *Smith* is unlikely to significantly benefit transsexual plaintiffs in Title VII sex discrimina-

179. *Smith*, 378 F.3d at 567; *Barnes*, 401 F.3d at 733.

180. This assumes that their operations outside the Sixth Circuit are not in municipalities or states with antidiscrimination ordinances and statutes that protect transsexuals. See NAT'L GAY & LESBIAN TASK FORCE, TRANSGENDER CIVIL RIGHTS PROJECT, JURISDICTIONS WITH EXPLICITLY TRANSGENDER-INCLUSIVE ANTI-DISCRIMINATION LAWS (2006), http://www.thetaskforce.org/downloads/reports/fact_sheets/PopJurisdictions_12_06.pdf [hereinafter NAT'L GAY & LESBIAN TASK FORCE, JURISDICTIONS].

181. Being fired is not, of course, the only danger facing transsexuals. See Currah & Minter, *Unprincipled Exclusions*, *supra* note 33.

182. Gina Holland, *Court to Let Bias Ruling Stand*, CINCINNATI POST, Nov. 7, 2005, available at 2005 WL 18043177.

183. See, e.g., Melinda Chow, Comment, *Smith v. City of Salem: Transgendered Jurisprudence and an Expanding Meaning of Sex Discrimination Under Title VII*, 28 HARV. J.L. & GENDER

tion cases. Outside of the Sixth Circuit, courts have not readily embraced *Smith's* holding regarding Title VII and transsexuals.¹⁸⁴ In fact, *Smith* may actually lead to a loss of Title VII protection for transsexuals.¹⁸⁵ This Part proposes that efforts would be better expended lobbying for local and state antidiscrimination laws that specifically protect transsexuals.

A. *The Holding in Smith Was Narrow*

Regardless of whether the Sixth Circuit's understanding of *Price Waterhouse* was correct, the Sixth Circuit's holding in *Smith* was narrow. The decision simply stands for the proposition that a transsexual plaintiff is not automatically barred from bringing a Title VII sex discrimination claim.¹⁸⁶ Although allowing suits under Title VII is a positive step for the rights of transsexuals, the Sixth Circuit did not go so far as to rule that discrimination based on an employee's transsexuality is a per se violation of Title VII.¹⁸⁷ At best, *Smith* puts transsexuals on equal footing with other Title VII plaintiffs in sex discrimination actions. Any Title VII plaintiff must still show that "(1) he is a member of a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position in question; and (4) he was treated differently from similarly situated individuals outside of his protected class."¹⁸⁸ These elements are essential for all plaintiffs to prove. The *Smith* decision merely gives transsexual plaintiffs the opportunity to pursue their claim. It certainly does not upend the world of employment law.

207, 214 (2005) ("The Sixth Circuit's holding and reasoning in *Smith* represents a significant victory for transgendered people. By reiterating that discrimination based on both sex and gender is forbidden under Title VII, the court steers transgendered jurisprudence in a more expansive and just direction."); see also Arthur S. Leonard, *Sexual Minority Rights in the Workplace*, 43 BRANDEIS L.J. 145, 157 (2004); Abigail W. Lloyd, *Defining the Human: Are Transgender People Strangers to the Law?*, 20 BERKELEY J. GENDER L. & JUST. 150, 179-80 (2005); Johnny Lo, Note, *Smith v. City of Salem, Ohio*, 11 WASH. & LEE RACE & ETHNIC ANCESTRY L.J. 277, 281 (2005).

184. See *Etsitty v. Utah Transit Auth.*, No. 2:04CV616 DS, 2005 WL 1505610, at *4-5 (D. Utah June 24, 2005); see also *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ.A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006).

185. See *infra* notes 215-225 and accompanying text.

186. *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (amended opinion) ("[A] label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. Accordingly, we hold that *Smith* has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination.").

187. See *supra* notes 113-120 and accompanying text.

188. *Smith*, 378 F.3d at 570 (citing *Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir. 2000)).

B. Other Courts Have Had Mixed Reactions to Smith's Reasoning Regarding Transsexual Plaintiffs in Title VII Cases

Since the Sixth Circuit announced the *Smith* and *Barnes* decisions, the response from other courts has been mixed. These cases have mostly been cited by courts outside the Sixth Circuit in reference to issues unrelated to whether Title VII's prohibition of sex discrimination applies to transsexuals.¹⁸⁹ Three other cases more on point with *Smith* and *Barnes* represent this mixed response.

In *Etsitty v. Utah Transit Authority*, the District Court of Utah criticized and ultimately rejected *Smith's* reasoning.¹⁹⁰ *Etsitty*, a transsexual employee, alleged that the Transit Authority terminated her from her position as a bus driver shortly after she told her supervisor that she was a transsexual.¹⁹¹ The district court granted summary judgment in favor of the Transit Authority, holding that *Etsitty* could not make a prima facie case of discrimination under Title VII.¹⁹² The court concluded that transsexuals are not protected under Title VII,¹⁹³ and specifically repudiated the reasoning in *Smith*.¹⁹⁴ In addition to preferring the *Ulane* approach, the court disagreed with the Sixth Circuit's belief that the sex stereotyping rule from *Price Waterhouse* applied in cases involving transsexual plaintiffs.¹⁹⁵

There is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman. Such drastic action cannot be fairly characterized as a mere failure to conform to stereotypes.¹⁹⁶

189. See *Dawson v. Bumble & Bumble*, 398 F.3d 211, 213, 218 (2d Cir. 2005) (Title VII sex discrimination case involving a lesbian plaintiff in which the court quoted *Smith's* restatement of the *Price Waterhouse* rule regarding sex stereotypes); *Theno v. Tonganoxie Unified Sch. Dist.* No. 464, 377 F. Supp. 2d 952, 969 (D. Kan. 2005) (Title IX case citing *Smith* in a string cite of cases dealing with same-sex harassment); *EEOC v. Grief Bros. Corp.*, No. 02-CV-468S, 2004 WL 2202641, at *13 (W.D.N.Y. Sept. 30, 2004) (quoting *Smith* as an example of a court following *Price Waterhouse*); *Manago v. Barnhart*, 321 F. Supp. 2d 559, 561 (E.D.N.Y. 2004) (disability insurance benefits case involving a transsexual plaintiff citing *Smith* in a string cite of decisions "expanding" the legal protections of transsexuals).

190. No. 2:04CV616 DS, 2005 WL 1505610 (D. Utah June 24, 2005).

191. *Id.* at *1.

192. *Id.* at *7.

193. *Id.* at *3-4.

194. *Id.* at *4.

195. *Id.* at *4-6.

196. *Etsitty*, 2005 WL 1505610, at *5. The court's opinion then addresses some far-fetched scenarios. If transsexuals were to be found protected under Title VII's sex provision, the court wrote, workplace rules involving an employee's sex in any way (such as dress codes) would constitute sex discrimination against transsexual and nontranssexual employees alike. Thus, the court opined, "[T]here is no social custom or practice associated with a particular sex that is not a stereotype. And if that is the case, then any male employee could dress as a woman, appear

In short, the *Etsitty* court rejected the Sixth Circuit's strained reasoning for expanding the scope of the sex provision in Title VII.

On the other end of the spectrum, *Mitchell v. Axcan Scandipharm, Inc.*¹⁹⁷ approvingly cited both *Smith* and *Barnes* for their reliance on *Price Waterhouse*. The district court rejected the *Ulane* line of cases¹⁹⁸ and denied the defendant's 12(b)(6) motion, ruling that the plaintiff had sufficiently pleaded claims of gender discrimination based on sex stereotypes.¹⁹⁹ The court relied on *Price Waterhouse* and cited *Smith* and *Barnes* for support.²⁰⁰ Regardless of the eventual outcome of *Mitchell*, it is significant because it is the only case outside the Sixth Circuit to rely on *Smith* and *Barnes* in the nearly two years since *Smith* was decided.

Lastly, the case of *Schroer v. Billington*²⁰¹ warrants attention. In March 2006, Judge James Robertson went beyond *Smith*'s reasoning in denying the defendant's motion to dismiss,²⁰² holding that discrimination against a transsexual job applicant based on that person's transsexuality is per se sex discrimination under Title VII.²⁰³ While the district court did not cite *Smith*, its holding was reminiscent of the earlier, but ultimately withdrawn, *Smith* opinion; which had come to a similar conclusion.²⁰⁴ The plaintiff in *Schroer* was Diane Schroer, a male-to-female transsexual who applied for, and was offered, "a position as a terrorism research analyst with the Congressional Research Service (CRS), an arm of the Library of Congress."²⁰⁵ Schroer "was highly qualified for the position."²⁰⁶ She interviewed for the position

and act as a woman." *Id.* The court acknowledged that it was taking the *Smith* decision to an extreme, but it is curious that a court of law would use this as an example of the shortcomings of the sex-stereotype theory. Even if large numbers of nontranssexual men would go against the dominant social norms and wear women's clothing, women frequently wear pants (traditionally male clothing), and the republic still stands. One must also remember the Transit Authority terminated *Etsitty* out of concern over which restroom she would use, and whether it would face any liability if she used a women's restroom. *Id.* at *2-6. It appears that the Transit Authority made no attempt to work with *Etsitty* to provide restroom accommodations for her. *See id.* at *2; *see also supra* note 54.

197. No. Civ.A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006).

198. *Id.* at *2.

199. *Id.*

200. *Id.*

201. 424 F. Supp. 2d 203 (D.D.C. 2006).

202. *Id.* at 205.

203. *See id.* at 213.

204. *See supra* note 120.

205. *Schroer*, 424 F. Supp. 2d at 205-06.

206. *Id.* at 205. Before her transition into a female, Schroer served in the U.S. Army for twenty-five years, much of it in the Special Forces. She also graduated from the prestigious National War College and Army Command and General Staff College, and earned master's degrees in history and international relations. *Id.* at 205-06. The last seven-and-a-half years of

as a man and disclosed her transsexuality after accepting the position.²⁰⁷ The next day, CRS withdrew its offer, “given [Schroer’s] circumstances.”²⁰⁸ Schroer filed suit “alleging sex discrimination under Title VII.”²⁰⁹ The court found that *Smith*, as well as other sex stereotype cases that did not involve transsexuals, overstated the Supreme Court’s holding in *Price Waterhouse*.²¹⁰ The court rejected *Smith*’s reasoning regarding sex stereotyping as it applied to Schroer: “[Schroer sought] to express [a] female identity, not as an effeminate male, but as a woman. She does not wish to go against the gender grain, *but with it*.”²¹¹

The court found that Schroer did not face discrimination based on sex stereotypes: “Rather, her problems stem[med] from the Library’s intolerance toward a person like her, whose gender identity does not match her anatomical sex.”²¹² The court suggested that the district court’s decision in *Ulane*, which the Seventh Circuit reversed, served as a better justification for extending Title VII protections to transsexuals: “[I]t may be time to revisit Judge Grady’s conclusion in [*Ulane*] that discrimination against transsexuals *because they are transsexuals* is ‘literally’ discrimination ‘because of . . . sex.’”²¹³ In other words, the court was advocating, albeit in dicta, a per se rule similar to the one the Sixth Circuit flirted with in the first *Smith* opinion. Such an approach could actually lead to a loss of Title VII protections for transsexuals.²¹⁴

C. *Smith May Lead to a Loss of Title VII Protection for Transsexuals*

To the extent there is concern in America over so-called judicial activism,²¹⁵ efforts to expand Title VII through litigation could back-

her Army career were spent with the U.S. Special Operations Command, which conducts operations against terrorist organizations. *Id.* In addition, the Bush Administration had appointed her to direct an organization which “track[ed] and target[ed] high-threat international terrorist organizations.” *Id.* at 206.

207. *Id.*

208. *Schroer*, 424 F. Supp. 2d at 206 (alteration in original).

209. *Id.* at 207.

210. *Id.* at 209.

211. *Id.* at 211 (emphasis added).

212. *Id.*

213. *Id.* at 212 (second alteration in original) (quoting *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 825 (N.D. Ill. 1983), *vacated*, 742 F.2d 1081 (7th Cir. 1984)).

214. See *infra* notes 215–225.

215. Martha Neil, *Half of U.S. Sees “Judicial Activism Crisis,”* A.B.A. J. REPORT, Sept. 30, 2005, <http://www.abanet.org/journal/redesign/s30survey.html>.

fire. It could, in fact, lead to federal legislation prohibiting protection for transsexuals under Title VII or other federal civil rights laws.

Debates over the last ten years regarding same-sex marriage have shown that the notion of Congress passing such legislation is not far-fetched. On Election Day 2004, for example, voters in eleven states approved amendments to their state constitutions explicitly outlawing same-sex marriages.²¹⁶ With Texas approving a similar amendment in November 2005, twenty-two states now have these constitutional amendments.²¹⁷ Overall, forty-four states ban same-sex marriage, either by constitutional amendment or by statute.²¹⁸ The gay, lesbian, bisexual, and transgender (GLBT) community has a fairly strong political presence in local, state, and national politics,²¹⁹ and recent polls demonstrate a growing acceptance of homosexuality.²²⁰ Nonetheless, the states that approved the 2004 amendments did so with an average of seventy percent of the vote.²²¹ In contrast, with the exceptions of Massachusetts, New Hampshire, and New Jersey, no state explicitly permits same-sex marriage or civil unions.²²² If the GLBT community and its allies are not able to convince voters and legislatures that same-sex marriage should be legal, it is unrealistic to expect that the transsexual community can convince Congress to amend Title VII to protect transsexuals.²²³ Moreover, there is little for a member of Congress to gain politically by supporting such legislation.

216. Lisa Anderson, *Faith Takes Key Role in Political Landscape*, CHI. TRIB., NOV. 4, 2004, at A1. In November 2006, however, Arizona voters narrowly rejected just this type of constitutional amendment, but Arizona still has a statute that outlaws same-sex marriage. Monica Davey, *Liberals Find Rays of Hope on Ballot Measures*, N.Y. TIMES, NOV. 9, 2006, at P16.

217. John M. Broder, *In a Rebuke of Governor, California Voters Reject Spending Cap*, N.Y. TIMES, NOV. 9, 2005, at A24; National Conference of State Legislatures, *Same-Sex Marriage* (Jan. 2007), <http://www.ncsl.org/programs/cyf/samesex.htm>.

218. National Conference of State Legislatures, *supra* note 217.

219. For example, the Human Rights Campaign, "a civil rights organization working to achieve gay, lesbian, bisexual and transgender equality," has a self-reported membership of 600,000. Human Rights Campaign, *About HRC, Our Mission, What We Do*, http://www.hrc.org/Template.cfm?Section=about_HRC (last visited Apr. 30, 2007).

220. See, e.g., James Ricci & Patricia Ward Biederman, *Acceptance of Gays on Rise, Polls Show*, L.A. TIMES, Mar. 30, 2004, at B1. The American Enterprise Institute compiled polling data from 1977 to 2003, which revealed a growing acceptance of homosexuality amongst the American population. *Id.* A sample question was, "Do you think homosexuals should or should not be hired for each of the following occupations?" *Id.* In June 1977, 27% of Americans felt homosexuals should be hired as elementary school teachers. By May 2003, that number had risen to 61%. Likewise, in June 1977, only 51% felt homosexuals should be allowed in the armed forces, but that figure increased to 80% by May 2003. *Id.*

221. Anderson, *supra* note 216.

222. Pam Belluck, *Advocates Hail a Triumph for Civil Rights*, N.Y. TIMES, May 18, 2004, at A1.

223. See *Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at *4 n.54 (E.D. La. Sept. 16, 2002).

If other circuits begin to follow *Smith*, it is possible that Congress may respond by passing legislation that limits the definition of “sex” within Title VII to biological sex. Congress could also follow the example set in the Rehabilitation Act and the ADA and amend Title VII to explicitly exclude transsexualism, transvestitism, and homosexuality.²²⁴ Transsexual citizens, as a group or individually, simply do not have the political or economic power to effectively fight such legislation.²²⁵ An explicit exclusion of transsexuality under Title VII’s “sex” provision would destroy the Title VII protection that may arise out of *Smith*, and would preclude any other legal theory that would protect transsexuals under Title VII.

D. Lobbying for Local Legislation May Be More Effective than Title VII Litigation

A slower, but perhaps ultimately more successful, strategy for transsexuals would be to focus lobbying efforts at the municipal, county, and state level. Such efforts already have resulted in antidiscrimination statutes and ordinances with transgender-inclusive antidiscrimination provisions in nine states, the District of Columbia, and eighty-one localities.²²⁶ Notably, twenty municipalities and counties in the so-called Red States have passed transgender-inclusive ordinances.²²⁷ In fact, statewide statutes of this type are in effect in three states with Republican governors, and nine states with Republican governors have municipalities with transgender-inclusive antidiscrimination ordinances.²²⁸ Together, these statutes cover approxi-

224. See *supra* notes 35–38 and accompanying text.

225. See *supra* notes 30–34 and accompanying text.

226. NAT’L GAY & LESBIAN TASK FORCE, TRANSGENDER LAW & POLICY INST., SCOPE OF EXPLICITLY TRANSGENDER-INCLUSIVE ANTI-DISCRIMINATION LAWS (2006), <http://www.transgenderlaw.org/ndlaws/index.htm#jurisdictions> [hereinafter NAT’L GAY & LESBIAN TASK FORCE, SCOPE].

227. *Id.* These municipalities and counties are located in Arizona, Colorado, Florida, Indiana, Kentucky, Louisiana, Missouri, Ohio, and Texas. In addition, Indiana and Kentucky, as well as the cities of Chapel Hill, North Carolina, Decatur, Georgia, and Pine Lake, Georgia prohibit discrimination in public employment on the basis of gender identity and expression. *Id.*

228. The following is a list of Republican governors of states with transgender antidiscrimination statutes or which contain municipalities with transgender antidiscrimination ordinances: Arnold Schwarzenegger, California; Charlie Crist, Florida; Sonny Perdue, Georgia; Linda Lingle, Hawaii; Mitch Daniels, Indiana; Ernie Fletcher, Kentucky; Tim Pawlenty, Minnesota; Donald Carcieri, Rhode Island; and Rick Perry, Texas. See NAT’L GOVERNORS ASS’N, GOVERNORS OF THE AMERICAN STATES, COMMONWEALTHS AND TERRITORIES (2007), available at <http://www.nga.org/Files/pdf/BIOBOOK.pdf>. Before the 2006 elections, this number stood at fourteen. Colorado, Maryland, Massachusetts, New York, and Ohio changed from Republican governors to Democrats in the 2006 elections. CNN, America Votes, <http://www.cnn.com/ELECTION/2006/pages/results/governor/> (last visited Apr. 30, 2007).

mately ninety-four million people, or about 34% of the country's population.²²⁹

There are several advantages to working on the local level. First, taking a legislative approach may quell any resistance to these laws based on claims of judicial activism.²³⁰ Such an approach would have an increased air of legitimacy about it, given the current suspicion of federal and state courts interpreting legislation beyond the "plain meaning" of the text.²³¹ Indeed, the Republican Party has made judicial conservatism a centerpiece of their political philosophy: "Recent events have made it clear that these [activist] judges threaten America's dearest institutions and our very way of life."²³² By working within the legislative process on the local and state level, supporters of transgendered-inclusive antidiscrimination laws will be better able to avoid turning this issue into a national debate. Again, one need only look to the same-sex marriage controversy to see that a national debate on transsexual rights would most assuredly result in a defeat for transsexual citizens.²³³ Working on the local and state level has succeeded, however, as illustrated by the passage of antidiscrimination laws.²³⁴

Second, after these local and state statutes have become more common, federal and state courts may be less inclined to view discrimination against transsexuals as being outside the scope of statutes like Title VII. Indeed, several recent shifts in the Supreme Court's jurisprudence have rested in part on the changing state of laws, which the Court felt reflected current social norms.²³⁵ Congress may be less apt to pass legislation that explicitly excludes transsexuals if such laws are

229. NAT'L GAY & LESBIAN TASK FORCE, JURISDICTIONS, *supra* note 180.

230. See Neil, *supra* note 215.

231. See *id.*

232. REPUBLICAN PARTY, 2004 REPUBLICAN PARTY PLATFORM: A SAFER WORLD AND A MORE HOPEFUL AMERICA 76 (2004), available at <http://www.gop.com/media/2004platform.pdf>.

233. See *supra* notes 216–223 and accompanying text.

234. See NAT'L GAY & LESBIAN TASK FORCE, SCOPE, *supra* note 226.

235. For instance, *Roper v. Simmons* held that the execution of prisoners who were minors when they committed their crimes violated the Eighth and Fourteenth Amendments:

[T]he objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles . . . as "categorically less culpable than the average criminal."

543 U.S. 551, 567 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)); accord *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (invalidating a law forbidding sodomy between consenting homosexual adults and noting that "the 25 States with laws prohibiting . . . [sodomy] are reduced now to 13, of which 4 enforce their laws only against homosexual conduct"); *Atkins*, 536 U.S. at 316 ("[A] national consensus has developed against [the execution of mentally retarded prisoners].").

fairly common, especially in their own states. If, however, this attempt at interpreting Title VII to include transsexuality becomes a contentious *national* debate, few members of Congress would see any political gain to be had by supporting such a measure. Accordingly, a legislative approach at state and local levels is preferable to federal Title VII litigation.

VI. CONCLUSION

The lack of a broad definition for “sex” as used within Title VII has resulted in courts dismissing Title VII sex discrimination claims brought by transsexual plaintiffs, regardless of whether they were alleging discrimination because of their sex or because of their transsexuality. The Sixth Circuit now defines “sex” to include transsexuality, and has held that a plaintiff’s transsexuality is not a bar to stating a claim for sex discrimination under Title VII.²³⁶ It is the only federal circuit to do so, and the Supreme Court has refused to review these decisions.²³⁷ The legislative history of Title VII’s sex discrimination provision and the understanding of the word “sex” that was common at the time Title VII was passed strongly indicate that Congress had no intention of including transsexuality within the sex provision. Furthermore, any victories by transsexual plaintiffs because of the Sixth Circuit’s ruling could prove to be pyrrhic. A continued strategy of Title VII litigation could lead to a backlash in Congress, which in turn could lead to a complete preclusion of Title VII sex discrimination claims by transsexuals. Widespread suspicion of so-called judicial activism and broad statutory interpretation could result in congressional legislation explicitly excluding transsexuality from the definition of “sex” within Title VII. For a community of citizens so poorly protected by government at all levels, such a result would be disastrous.

While Smith’s and Barnes’s litigation efforts were surprisingly successful, it is unlikely that future transsexual plaintiffs outside the Sixth Circuit will win. Even if they do, such individual victories could prove fleeting in the long run. Instead of pursuing a litigation strategy in the federal courts, supporters of employment rights for transsexuals may find more permanent success in lobbying for municipal and state stat-

236. See *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir.), *cert. denied*, 126 S. Ct. 624 (2005); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (amended opinion).

237. See *supra* note 182 and accompanying text.

utes that explicitly prohibit discrimination on the basis of transsexuality.

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