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## I Now Pronoun-ce You: A Proposal for Pronoun Protections for Transgender People

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# I Now Pronoun-ce You: A Proposal for Pronoun Protections for Transgender People

Erin E. Clawson\*

## ABSTRACT

Title VII of the Civil Rights Act protects employees from discrimination “because of sex,” which the Supreme Court found includes gender and sex/gender stereotyping. The circuit courts, however, are split on whether discrimination against transgender people is “because of sex.” In the circuits that extend Title VII’s protection to transgender people, the courts differ as to whether a claim must be based on sex stereotyping or based on a person’s status as transgender or transitioning alone. This issue was recently granted certiorari by the Supreme Court.

Not only do the circuit courts conflict but government agencies disagree on this matter as well. In 2014, the Department of Justice considered discrimination against transgender people to be because of sex but rescinded this policy in 2017. Conversely, the Equal Employment Opportunity Commission regards discrimination based on transgender status as discrimination because of sex under Title VII.

Currently, no federal law exists that provides protections for transgender people in the workplace. Proposed acts that have aimed to provide protections have failed, due to their broad protections and conservative opposition. However, two states have passed laws that prevent against discrimination by the systematic misuse of one’s preferred pronouns, known as misgendering, but were met with claims of First Amendment free speech violations.

This Comment will first examine the concepts of sex, gender, gender identity, and gender expression, and their relation to the transgender community. Next, this Comment will discuss federal protections for transgender people, First Amendment rights in the workplace, and the Circuit Split. Finally, this Comment will recommend that the Supreme Court hold that Title VII protects transgender people based on (1) their

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status as transgender and (2) sex stereotyping under *Price Waterhouse*. Lastly, this Comment will propose a federal law that would protect transgender people from intentional misgendering discrimination in the workplace.

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#### I. INTRODUCTION

For many years, sex and gender have been considered synonymous, and the terms are often used interchangeably in everyday language.<sup>1</sup> However, as the study of sex and gender has become more prevalent, and the rates of openly transgender and gender non-conforming people

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1. See David Haig, *The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001*, 33 ARCHIVES SEXUAL BEHAV. 87, 96 (2004).

increase,<sup>2</sup> the distinctions between sex and gender have become more important to distinguish.<sup>3</sup> While sex refers to a person's biology,<sup>4</sup> defined by one's genetics, gender refers to the psychological and social constructs used to express one's sex.<sup>5</sup> Often, gender identity and expression coincide with a person's biological sex; however, a person whose gender identity and gender expression do not align to that person's sex assigned at birth is known as a "transgender" person.<sup>6</sup>

Some transgender people go through the process of changing physically, mentally, or emotionally to become the gender they identify with, which is called "transitioning."<sup>7</sup> Notably, not all transgender people transition the same way. Some transgender people desire to have their anatomical body match their identified gender through medical procedures, while others may desire to alter the expression of their identified gender socially,<sup>8</sup> and some may chose not to transition at all.<sup>9</sup> Regardless of the way or extent in which a transgender person transitions, a transgender person's preferred pronouns should be as equally respected as any other person's.<sup>10</sup> Continuous and intentional misgendering, or being referred to by the incorrect pronouns, can be mentally damaging to a transgender person.<sup>11</sup>

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2. See ANDRE R. FLORES ET AL., *How Many Adults Identify as Transgender in the United States?*, WILLIAMS INST. 2, 6 (2016), <https://bit.ly/2sGo15M> (explaining that the number of people who identify as transgender doubled from 2011 to 2016 and is currently estimated at 1.4 million people and growing).

3. See Laurel Westbrook & Aliya Saperstein, *New Categories are Not Enough: Rethinking the Measurement of Sex and Gender in Social Surveys*, 29 GENDER & SOC'Y 534, 536 (2015).

4. See Virginia Prince, *Sex vs. Gender*, 8 INT'L J. TRANSGENDERISM 29, 30 (2005).

5. See *What is Gender Dysphoria?*, AM. PSYCHOL. ASS'N, <https://bit.ly/2FNQ2hW> (last visited Jan. 16, 2019).

6. See *Transgender People, Gender Identity and Gender Expression*, AM. PSYCHOL. ASS'N, <https://bit.ly/1mhwsvc> (last visited Oct. 31, 2018).

7. *Information on Transitioning & Transgender Health*, REVEL & RIOT, <http://bit.ly/2ZdQg89> (last visited Jan. 20, 2019).

8. "Social transitioning may include: coming out to your friends and family as transgender, asking people to use pronouns (she/her, he/him, they/them) that match your gender identity, going by a different name, dressing/grooming in ways that match your gender identity." *What do I need to know about transitioning?*, PLANNED PARENTHOOD, <https://bit.ly/2wCqD75> (last visited Jan. 19, 2019).

9. See *id.*

10. See *id.*; see also Alina Bradford, *What does 'Transgender' Mean?*, LIVE SCI., <https://bit.ly/2OV8uY3> (last visited Oct. 31, 2018) (explaining that most transgender people wish to be called by the pronouns of the gender they identify with, however, some prefer the non-gendered pronoun "they").

11. See Kevin A. McLemore, *Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals*, 14 J. SELF & IDENTITY 51, 52 (2014) (explaining that "misgendering is associated with more negative affect[s], less authenticity, lower appearance[,]. . . less identity strength and coherence").

Although several states have proposed laws aimed at protecting LGBTQ<sup>12</sup> people, only two states, California and New York, have proposed and passed laws regarding the use of preferred pronouns.<sup>13</sup> In fact, some states, as well as cities, have passed laws that make systematic misgendering illegal under the umbrellas of human rights, public health, and employment laws.<sup>14</sup>

Unfortunately, many of these laws have been highly criticized as infringements on the First Amendment right of free speech.<sup>15</sup> One example is the Employment Non-Discrimination Act<sup>16</sup> (ENDA), which aimed to protect people from employment discrimination based on sexual orientation and gender identity, died in Congress.<sup>17</sup> Supporters of the ENDA proposed the law almost every year for nearly twenty years, but the ENDA's passage was ultimately unsuccessful.<sup>18</sup>

Most recently, the ENDA was set aside in favor of a broader law, the Equality Act.<sup>19</sup> The Equality Act was proposed to amend Title VII of the Civil Rights Act of 1964<sup>20</sup> to include protection from discrimination in areas such as housing, employment, and places of public accommodation based on gender identity and sexual orientation.<sup>21</sup> The 2017 version of the Equality Act died in committee, but was reintroduced and passed by the

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12. LGBTQ stands for “lesbian, gay, bisexual, transgender, and queer . . . the Q . . . can also mean questioning.” *GLAAD Media Reference Guide - Lesbian / Gay / Bisexual Glossary Of Terms*, GLAAD, <https://bit.ly/2pqTvcq> (last visited Feb. 8, 2019).

13. See *Know Your Rights: Transgender People and the Law*, AM. CIV. LIBERTIES UNION, <http://bit.ly/308zSHa> (last visited Oct. 31, 2018) (explaining that every state has procedures for changing one's name and gender marker on state identity card, but that requirements vary by state); see also CAL. HEALTH & SAFETY CODE § 1439.51 (West 2017); see also S.B. 8580, 241th Leg. (N.Y. 2017).

14. See CAL. HEALTH & SAFETY CODE § 1439.51 (West 2017) (stating that under the “Lesbian, Gay, Bisexual, and Transgender Long-Term Care Facility Residents’ Bill of Rights,” discrimination exists where a long-term care facility or its staff repeatedly and intentionally misgenders any LGBTQ resident); see also S.B. 8580, 241th Leg. (N.Y. 2017) (protecting against systematic misgendering and denial of gender expression for long-term care facility residents); N.Y.C. COMM’N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION 4–5 (Dec. 2018), <https://on.nyc.gov/2HYUdtP> (requiring employers to use a person's preferred pronoun and explaining failure to do so is in violation of the New York City Human Rights Laws and subject to penalties); see *infra* Section II.C.2.

15. See Hans Bader, *Politically Correct Transgender Pronoun Mandates Violate First Amendment*, COMPETITIVE ENTER. INST. (June 11, 2016), <http://bit.ly/2TBLdgt>.

16. S. 815, 113th Cong. (1st Sess. 2013).

17. See H.R. Res. 678, 113th Cong. (2014).

18. See *id.*

19. See S. Rep. No. 113-105, at 3–8 (2013); see also Equality Act, H.R. 2282, 115th Cong. (2017).

20. Title VII, 42 U.S.C. § 2000e-1 (2012).

21. Equality Act of 2017, H.R. 2282, 115th Cong. (2017).

House of Representatives in May 2019.<sup>22</sup> Although the Democratic Party gained control of the House of Representatives in 2019 and the highest number of LGBTQ lawmakers to date were sworn into Congress,<sup>23</sup> the likelihood that the Equality Act passes the Senate remains slim. The low chance of passage is due in part to the inability to garner enough conservative support,<sup>24</sup> as well as recent concerns that the Equality Act could pose a threat to the sex-based rights of women.<sup>25</sup> Without passage of the Equality Act, transgender people continue to live with little to no federal anti-discrimination protections.

Part II of this Comment will discuss the disparity between sex and gender and how the difference is especially important to transgender people.<sup>26</sup> Part II of this Comment will then explore the importance of gender pronouns, and provide a background on the discrimination that transgender people face.<sup>27</sup> Then, Part II will address the federal laws and regulations that may protect transgender people,<sup>28</sup> including Title VII of the Civil Rights Act, and address the inconsistent statements regarding Title VII protections for transgender people.<sup>29</sup> Part II will next discuss the First Amendment and its implications in the workplace.<sup>30</sup> Part II will conclude with a discussion of the current circuit split regarding the application of Title VII protections to transgender people in the workplace.<sup>31</sup>

Next, Part III of this Comment will analyze the state of Title VII protections with respect to the current circuit split.<sup>32</sup> Then, Part III will

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22. See Katelyn Burns, *New Congress Opens Door for Renewed Push for LGBTQ Equality Act*, REWIRE NEWS (Dec. 5, 2018, 10:21 am), <http://bit.ly/2OUyypZ>; see also Nancy Pelosi & John Sarbanes, *The Democratic Majority's First Order of Business: Restore Democracy*, WASH. POST (Nov. 25, 2018) <https://wapo.st/2RzGga9>; Eric Bachman, *What is the Equality Act and what will Happen if it Becomes a Law?*, FORBES (May 30, 2019), <http://bit.ly/2YKrMnv>.

23. Nick Duffy, *Record number of out LGBT lawmakers sworn into US Congress*, PINK NEWS (Jan. 3, 2019), <https://bit.ly/2DqMejU>.

24. See Burns, *supra* note 22 (explaining that the likelihood the act would be allowed to come to a vote in the Senate is slim); *Cosponsors - H.R.1755 - 113th Congress (2013-2014): Employment Non-Discrimination Act of 2013*, CONGRESS.GOV (2013), <https://bit.ly/2MrZXLr> (last visited Jan 16, 2019) (noting of the 206 cosponsors of the ENDA in the House of Representatives, only eight were Republican).

25. See Madeleine Kearns, *Bipartisan Women's Rights Groups Protest the Equality Act*, NAT'L REVIEW (Jan. 30, 2019), <https://bit.ly/2SibsuW>; see Natasha Chart & Penny Nancy, *Feminists, Conservatives Join Forces to Oppose 'Equality Act'*, REALCLEAR POLITICS (May 6, 2019) <http://bit.ly/32mjLqK>.

26. See *infra* Sections II.A.1, II.A.2.

27. See *infra* Sections II.A.2, II.B.

28. See *infra* Section II.C.1.

29. See *infra* Section II.C.1.c.

30. See *infra* Section II.C.2.

31. See *infra* Section II.D.

32. See *infra* Section III.A.

recommend that the Supreme Court clarify whether the meaning of “because of . . . sex” includes transgender status and sex stereotyping<sup>33</sup> in *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*<sup>34</sup> Part III will ultimately propose a narrow federal law that would strike a balance between free speech and protections for transgender and gender non-conforming people in the workplace.<sup>35</sup> Finally, Part IV of this Comment will offer concluding statements on issues raised in this Comment.<sup>36</sup>

## II. BACKGROUND

The many descriptive terms used by, and in relation to, the LGBTQ community may seem initially overwhelming to some cisgender<sup>37</sup> people. Grasping some of the basic terms and distinctions is important in understanding people in the LGBTQ community and respecting their individual identities.<sup>38</sup> While the LGBTQ community encompasses a wide range of people and identities, this Comment will focus on transgender people specifically.

### A. Definition Discussion

“Transgender” means “being a person whose gender identity differs from the sex the person had or was identified as having at birth.”<sup>39</sup> Thus, understanding the difference between gender and sex is imperative. While these terms are often used interchangeably, notable differences exist that are crucial to understanding transgenderism.<sup>40</sup>

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33. *Equal Emp’t Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599, 1599 (U.S. Apr. 22, 2019) (No. 18-107).

34. *See id.*

35. *See infra* Section III.B.

36. *See infra* Part IV.

37. Cisgender is defined as those who identify and present as the sex they were assigned at birth. *See Transgender Identity Terms and Labels: Common Gender Identity Terms*, PLANNED PARENTHOOD, <https://bit.ly/2Dh16zW> (last visited Nov. 2, 2018).

38. *See LGBTQ+ Student Advising Guide for Education Abroad Professionals*, NAFSA, <https://bit.ly/2QXc0AU> (last visited Jan. 17, 2019).

39. *Transgender*, MERRIAM-WEBSTER, <https://bit.ly/2o1s8rA> (last visited Jan. 20, 2019).

40. *See Transgender Identity Terms and Labels: Common Gender Identity Terms*, *supra* note 37.

### 1. Sex v. Gender

Gender reveal celebrations have become a popular trend in recent years,<sup>41</sup> but the term “gender reveal” is quite the misnomer.<sup>42</sup> More accurately, these celebrations are sex reveals, as they actually reveal whether the child is biologically a male or female.<sup>43</sup> Thus, gender reveal celebrations misrepresent the difference between gender and sex. Gender refers to the behavioral, cultural, or psychological traits that are typically, but not always, associated with one’s sex.<sup>44</sup> By contrast, the term sex refers to the biological classification of male or female, as defined by genetics, such as chromosomes and reproductive systems.<sup>45</sup>

For decades, the term gender was only used in reference to grammar.<sup>46</sup> In many languages, nouns are gendered, or classified as either masculine or feminine.<sup>47</sup> In such languages, sentences are structured around ensuring that nouns, verbs, and adjectives are in gender agreement.<sup>48</sup> In 1955, however, sexologist John Money introduced a new usage of the word gender when he proposed the idea of gender roles, defining such roles as:

[A]ll those things that a person says or does to disclose himself or herself as having the status of boy or man, girl or woman, respectively. It includes, but is not restricted to sexuality in the sense of eroticism. Gender role is appraised in relation to the following: general mannerisms, deportment and demeanor; play preferences and recreational interests; spontaneous topics of talk in unprompted conversation and casual comment; content of dreams, daydreams and fantasies; replies to oblique inquiries and projective tests; evidence of erotic practices, and, finally, the person's own replies to direct inquiry.<sup>49</sup>

Nonetheless, Money’s usage of the term was not prevalent until the 1970s, when the feminist movement adopted Money’s definition to

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41. Gender reveals are where expecting parents discover and/or reveal the sex of their child(ren) to friends and family. See Josh Hafner, *Gender reveals: Insanely popular – and also outdated?*, USA TODAY (Mar. 12, 2017), <https://bit.ly/2Q9EEiF>.

42. See Daniel L. Carlson, *What “Gender Reveals” Really Reveal*, PSYCHOLOGY TODAY (June 12, 2018), <http://bit.ly/33CUJob>.

43. See *id.*

44. See *What is Gender Dysphoria?*, *supra* note 5.

45. See *Sex vs. Gender*, *supra* note 4, at 30.

46. J. Richard Udry, *The Nature of Gender*, 31 DEMOGRAPHY 561, 561 (1994) (noting that in “a comprehensive bibliography of 12,000 titles for marriage and family literature from 1900 to 1964, *gender* does not appear once”).

47. Steven B. Jackson, *Masculine or Feminine? (And Why It Matters)*, PSYCHOLOGY TODAY (Sep. 21, 2012), <http://bit.ly/2Y0gJNY>.

48. See *id.*

49. John Money et al., *An Examination of Some Basic Sexual Concepts: The Evidence of Human Hermaphroditism*, 97 BULL. JOHNS HOPKINS HOSP., 301–19 (1955).



emphasize the social differences between males and females.<sup>50</sup> After the 1970s, sex and gender gained recognition as separate concepts.<sup>51</sup> However, the differences between the terms sex and gender, have been blurred since the 1970s and are often used interchangeably,<sup>52</sup> which has led to a need for a renowned distinction, especially considering the current debate surrounding whether Title VII protects transgender individuals.

## 2. Transgender

Understanding the difference between gender and sex is paramount, as a transgender person's gender identity may differ from their assigned sex.<sup>53</sup> Many people fall under the transgender umbrella including gender nonconforming,<sup>54</sup> genderqueer,<sup>55</sup> and drag queens.<sup>56</sup> While the transgender umbrella encompasses a wide variety of people, a person under this umbrella does not necessarily identify as a transgender person.<sup>57</sup>

Gender identity and gender expression are two distinct concepts that are pivotal to understanding transgenderism.<sup>58</sup> Gender identity is defined as “[o]ne's innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call

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50. See *Politically Correct Transgender Pronoun Mandates Violate First Amendment*, *supra* note 15, at 93–94.

51. See Haig, *supra* note 1, at 87.

52. See *id.*; see also *infra* Section II.A.1.

53. “Transgender is an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth.” *Transgender People, Gender Identity and Gender Expression*, *supra* note 6.

54. Gender nonconforming means that “a person’s gender expression does[] [not] fit inside the traditional male or female categories (sometimes called the gender binary) . . . . The term is[] [not] a synonym for transgender and should only be used if someone self-identifies as gender nonconforming or non-binary.” *Transgender Identity Terms and Labels*, *supra* note 37.

55. Genderqueer is defined as “a term that some people use who identify their gender as falling outside the binary constructs of ‘male’ and ‘female.’ They may define their gender as falling somewhere on a continuum between male and female, or they may define it as wholly different from these terms.” *Transgender People, Gender Identity and Gender Expression*, *supra* note 6.

56. The term drag queen generally refers to men who dress as women for the purpose of entertaining others at bars, clubs, or other events. See *id.*

57. See *id.* This Comment acknowledges that “transgender” is a broad term encompassing a wide variety of people and identities, some of whom do not necessarily identify as transgender people, but rather only fall under the wide umbrella. This Comment is aimed to encompass those people who do identify as transgender and who’s gender identity and gender expression do not match their assigned sex.

58. See German Lopez, *9 questions about gender identity and being transgender you were too embarrassed to ask*, VOX (Feb. 22, 2017, 7:25 P.M.), <https://bit.ly/2QXpXi5>.

themselves,” which may differ from one’s sex assigned at birth.<sup>59</sup> Gender expression, on the other hand, is the “[e]xternal appearance of one’s gender identity”<sup>60</sup> that is often expressed through elements such as behavior, clothing, haircut, or voice.<sup>61</sup> A person’s gender expression may or may not conform to traditional gender norms as defined by society.<sup>62</sup> Thus, gender identity can perhaps be characterized as an internalization while gender expression is an externalization.

From a young age, people learn to describe people, places, and things with pronouns. Masculine and feminine pronouns are traditionally used to identify people, such as him and her, as are gender neutral pronouns, such as they and them. For many transgender people, the use of the pronouns that correspond to their gender identity is of major significance and can be a positive affirmation of their transitioning journey.<sup>63</sup> The continuous misuse of a transgender person’s preferred pronouns, however, can lead to negative mental health effects.<sup>64</sup> One contributing factor to the misuse of transgender people’s preferred pronouns may be that many transgender people do not have their preferred gender or name denoted on their identity documents (IDs), such as birth certificates, passports, and driver’s licenses.<sup>65</sup>

### B. *Discrimination Against Transgender People*

Violence against transgender people is not uncommon.<sup>66</sup> In fact, in 2017 alone, more transgender people were killed than in any year in the last decade.<sup>67</sup> The 2015 U.S. Transgender Survey,<sup>68</sup> which had almost

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59. *Sexual Orientation and Gender Identity Terminology and Definitions*, HUMAN RIGHTS CAMPAIGN, <http://bit.ly/2TFBi9F> (last visited Oct. 7, 2018) (explaining that one’s gender identity can be the same or different from one’s sex assigned at birth).

60. *Id.*

61. *See id.*

62. *See id.*

63. *See What Does it Mean to Misgender Someone?*, HEALTHLINE (Nov. 4, 2018), <https://bit.ly/2W4C7cW>; *see also What does ‘Transgender’ Mean?*, *supra* note 10.

64. *See Experiences with Misgendering*, *supra* note 11, at 51 (“[M]isgendering is associated with more negative affect, less authenticity, lower appearance . . . less identity strength and coherence . . .”).

65. *See* Sandy E. James et al., *Executive Summary of the Report of the 2015 U.S. Transgender Survey*, NAT’L CTR. FOR TRANSGENDER EQUAL. 1, 8 (2015), <https://bit.ly/2Fhneve> (finding that only 11% have their preferred name and gender on all of their identification, while 68% have it on none of their identification); *see also What Does it Mean to Misgender Someone?*, *supra* note 63.

66. Mark Lee, *A Time to Act: Fatal Violence Against Transgender People in America 2017*, HUMAN RIGHTS CAMPAIGN & TRANS PEOPLE OF COLOR COAL. 1, 4 (2017), <https://bit.ly/2log2bB>.

67. *Id.* at 3.

68. *Executive Summary of the Report of the 2015 U.S. Transgender Survey*, *supra* note 65, at 2 (describing the survey as “a follow-up to the groundbreaking 2008–09

28,000 respondents, found that during 2014, “46% of respondents were verbally harassed and 9% were physically attacked because of being transgender.”<sup>69</sup> Additionally, 15% of respondents were verbally harassed or attacked at work.<sup>70</sup> The survey also reported that 10% of respondents were sexually assaulted in 2014, but that 47% were sexually assaulted at some point during their lifetime.<sup>71</sup>

Violence, however, is not the only way transgender people experience discrimination.<sup>72</sup> Of the nearly 28,000 respondents, 27% reported experiencing employment discrimination,<sup>73</sup> and 30% experienced homelessness.<sup>74</sup> Additionally, the unemployment rate of the respondents was three times the national average at the time of the survey,<sup>75</sup> 29% lived in poverty, and 16% reported their gender identity or gender expression led to the loss of their job.<sup>76</sup>

Discrimination against transgender people may also come in the form of microaggressions.<sup>77</sup> Microaggressions include addressing a transgender person by the incorrect gender pronoun, inquiring about the person’s “real” identity, or asking the person to explain their gender identity.<sup>78</sup> A common microaggression affecting transgender people is referred to as misgendering.<sup>79</sup>

Misgendering occurs when a person intentionally or unintentionally<sup>80</sup> refers to a transgender person with names, pronouns, or other words that

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National Transgender Discrimination Survey (NTDS), which helped to shift how the public and policymakers view the lives of transgender people and the challenges they face”).

69. *Id.*

70. *Id.*

71. *See id.*

72. *See id.*

73. *See id.* at 10.

74. *See id.* at 11.

75. *See id.* at 3.

76. *See id.* at 10.

77. Microaggressions are “the everyday verbal, nonverbal, and environmental slights, snubs, or insults, whether intentional or unintentional, which communicate hostile, derogatory, or negative messages to target persons based solely upon their marginalized group membership.” Derald Wing Sue, *Microaggressions: More than Just Race*, PSYCHOLOGY TODAY (Nov. 17, 2010) <https://bit.ly/2FURKz3>.

78. *See* Sonny Nordmarken, *Microaggressions*, 1 TRANSGENER STUD. Q. 129, 130 (2014). The author of this Comment recognizes that such microaggressions are not limited only to transgender people. Rather, the author contends that transgender people may often experience microaggressions in their everyday life. For a deeper understanding about microaggressions in the workplace, see M. Paz Galupo & Courtney A. Resnick, *Experiences of LGBT Microaggressions in the Workplace: Implications for Policy*, in SEXUAL ORIENTATION & TRANSGENDER ISSUES IN ORG. GLOB. PERSP. ON LGBTQ WORKFORCE DIVERSITY, 271, 277 (Springer, 2018).

79. *See supra* Part I.

80. *See* Dean Daley, *Misgendering, a not so silent killer*, CHRONICLE (Mar. 24, 2017), <https://bit.ly/2sC1m96>.

do not accurately reflect the person's gender identity.<sup>81</sup> Such discrimination in the workplace can adversely impact a transgender employee's mental health<sup>82</sup> and contributes to higher rates of unemployment and poverty among transgender people compared to the non-transgender population.<sup>83</sup>

### C. *Laws and Regulations Concerning Transgender People Generally*

Presently, no federal laws provide comprehensive protections for transgender people who are treated adversely because of their gender identity or gender expression in the employment, housing, or educational contexts.<sup>84</sup> Moreover, federal programs offering protection for transgender people are available only in limited circumstances.<sup>85</sup>

#### 1. Title VII

In 1964, Congress passed Title VII of the Civil Rights Act of 1964 (Title VII).<sup>86</sup> Title VII states that an employer must not “discriminate against any individual with respect to his . . . employment because of such individual's . . . sex . . . .”<sup>87</sup> Congress, however, did not clearly define the phrase “because of . . . sex,”<sup>88</sup> which has resulted in litigation to determine the boundaries of the phrase as our society's concepts of sex and gender have evolved.<sup>89</sup>

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81. See *Misgender*, OXFORD DICTIONARY, <https://en.oxforddictionaries.com/definition/misgender> (last visited Nov. 4, 2018); see also *What Does it Mean to Misgender Someone?*, *supra* note 63; *Misgendering, a not so silent killer*, *supra* note 80. This Comment recognizes the importance of unintentional misgendering, however, repeated intentional misgendering is the primary focus of this Comment and the subject of the narrow federal law that it proposes. See *infra* Section III.B.2.

82. See Jacob Passy, *As Trump administration seeks to redefine gender, workplace discrimination is still a problem for transgender Americans*, MARKETWATCH (Oct. 22, 2018), <https://on.mktw.net/2DkuozW>.

83. See *id.* (explaining that transgender people are two times more likely to be unemployed or impoverished).

84. See Deena Fidas & Liz Cooper, *A Workplace Divided: Understanding the Climate for LGBTQ Workers Nationwide*, HUMAN RIGHTS CAMPAIGN 3, 5 (2018), <https://bit.ly/2U5Ofs7>.

85. See Violence Against Women, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322 § 40001 (1994); Fair Housing Act, 42 U.S.C. § 3601 (2008); Equal Access in Accordance With an Individual's Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. 64,763 (Oct. 21, 2016).

86. Title VII, 42 U.S.C. § 2000e-1 (2012).

87. Title VII, 42 U.S.C. § 2000e-1. (2012).

88. The definition section of Title VII states that “the terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.” 42 U.S.C. § 2000e (2012).

89. See *supra* Section II.A.I.

In 1989, the Supreme Court of the United States clarified the definition of “because of . . . sex” in *Price Waterhouse v. Hopkins*.<sup>90</sup> In *Price Waterhouse*, the Court held that Title VII’s proscription of discrimination “because of . . . sex” encompasses gender as well as sex.<sup>91</sup> Since the Court’s holding in *Price Waterhouse*, however, courts have struggled to determine whether “because of . . . sex” also encompasses gender identity and gender expression.<sup>92</sup> Notwithstanding the difficulty courts have faced in determining the extent of the phrase, Congress has not passed any legislation to clarify the extent of protections offered under Title VII in relation to sex and gender.<sup>93</sup>

a. President Barack Obama’s Executive Order 13672

President Barack Obama attempted to codify protections for transgender people under Title VII.<sup>94</sup> In 2014, President Obama signed Executive Order 13672, which amended Title VII to include protections from discrimination based on “gender identity” for federal workers and employers.<sup>95</sup>

During his time in office, President Obama also encouraged Congress to pass the ENDA, which would have provided protections for people from employment discrimination based on sexual orientation or gender identity.<sup>96</sup> President Obama’s attempts to persuade Congress to pass the ENDA did not prevail and the ENDA has now been set aside in favor of the broader Equality Act, which he also supported,<sup>97</sup> but Congress has yet to pass.

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

91. See *id.* at 241.

92. See *Glenn v. Brumby*, 663 F.3d 1312, 1314 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000). *But see* *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982).

93. See Lisa J. Banks & Mannah Alejandro, *Changing Definitions of Sex under Title VII*, A.B.A. LAB. EMP’T L. SEC.: NAT’L CONF. EQUAL EMP’T OPPORTUNITY L. (2016) available at <http://bit.ly/33NZr2y>.

94. See Exec. Order No. 13,672, *reprinted as amended in* 79 Fed. Reg. 42,971 (July 23, 2014).

95. See *id.*

96. See Employment Non-Discrimination Act of 1994, H.R. 4636, 103rd Cong. (1994).

97. Juliet Eilperin, *Obama supports altering Civil Rights Act to ban LGBT discrimination*, WASH. POST (Nov. 10, 2015), <https://wapo.st/2HhMbMa>.

b. The Equality Act and the Employment Non-Discrimination Act

In 1974, the Equality Act<sup>98</sup> was introduced in Congress in response to an increase in violence against LGBTQ people.<sup>99</sup> The Equality Act was intended to protect people from discrimination in housing, employment, and public accommodations based on their sex, marital status, and sexual orientation.<sup>100</sup> Although its likelihood of success seemed promising, the Equality Act did not garner enough support in the House of Representatives and ultimately died in 1974.<sup>101</sup>

Twenty years after the Equality Act died in Congress, the narrower ENDA was introduced.<sup>102</sup> The ENDA focused on prohibiting employment discrimination based on sexual orientation.<sup>103</sup> With a few exceptions, versions of the ENDA were introduced in almost each subsequent Congress until 2014.<sup>104</sup>

Early versions of the ENDA did not initially attempt to provide protections for transgender people.<sup>105</sup> However, in 2007, “gender identity” was added to the EDNA, aiming to extend protections to transgender employees.<sup>106</sup> The 2007 version of the ENDA died in committee and a second version was introduced that removed “gender identity,” which also failed.<sup>107</sup> Despite the subsequent failures to pass the ENDA, a consensus arose that gender identity was a necessary inclusion<sup>108</sup> and each subsequent version of the ENDA included gender identity protections.<sup>109</sup> Unfortunately, although the ENDA arguably garnered strong support from the public<sup>110</sup> and passed the Senate in 2013, the ENDA failed once it reached the Republican-controlled House.<sup>111</sup> The Speaker of the House expressed his belief that passing the ENDA would “increase frivolous

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98. Equality Act, H.R. 15692, 93rd Cong. (1974).

99. See Jerome Hunt, *A History of the Employment Non-Discrimination Act*, CTR. FOR AM. PROGRESS (July 19, 2011), <https://ampr.gs/2qmEGbq>.

100. See Equality Act, H.R. 15692, 93rd Cong. (1974).

101. See Hunt, *supra* note 99 (explaining why the Equality Act failed to pass).

102. See *id.*

103. See Employment Non-Discrimination Act of 1994, H.R. 4636, 103rd Cong. (1994).

104. See S. REP. NO. 113-105, at 2–8 (2013).

105. See S. REP. NO. 113-105, at 8 (2013).

106. See Hunt, *supra* note 99.

107. See *id.*

108. See *id.*

109. See S. REP. NO. 113-105, at 8 (2013).

110. Winnie Stachelberg & Crosby Burns, *10 Things to Know About the Employment Non-Discrimination Act*, CTR. FOR AM. PROGRESS (Apr. 24, 2013), <https://ampr.gs/2Tb8apu>.

111. See *Legislative Failures: Employment Non-Discrimination Act*, POLITICAL SAINTS BLOG (Jan. 14, 2017), <https://bit.ly/2sCRpIw>.

litigation and cost American jobs, especially small business jobs.”<sup>112</sup> To the contrary, data shows that states with similar laws to the ENDA have not seen an increase in sexual orientation or gender identity-based litigation.<sup>113</sup>

After the failed attempts at passing the ENDA, the ENDA was set aside and the Equality Act was instead reintroduced to Congress in 2015, more than 30 years after the original Equality Act’s first introduction.<sup>114</sup> The Equality Act, much broader than the ENDA,<sup>115</sup> aimed to amend current civil rights laws and to include protections from discrimination based on gender identity and sexual orientation in areas including **employment, education, public services, and federally funded programs.**<sup>116</sup> Similar to the ENDA’s fate, the Equality Act was not brought to a vote in the House or the Senate due to Republican control of both chambers, and died in committee.<sup>117</sup> The Equality Act was reintroduced again in 2017 with unprecedented level of support,<sup>118</sup> but failed in a similar fashion.<sup>119</sup> In 2019, the Speaker of the House, Nancy Pelosi, reintroduced the Equality Act to the House of Representatives and in May, the Act passed the House.<sup>120</sup> . However, the Equality Act has continuously faced conservative opposition,<sup>121</sup> and now also faces developing concerns that the inclusion of “gender identity” in the definition of “sex” could pose a threat to the sex-based rights afforded to women.<sup>122</sup> Therefore, the passage of the Equality Act by the Senate remains in question.

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112. *Id.*

113. See Ed O’Keefe, *ENDA, explained*, WASH. POST (Nov. 4, 2013), <https://wapo.st/2Cv2srC>.

114. See Equality Act of 2015, S. 1858, 114th Cong. (2015).

115. See *The Equality Act*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/the-equality-act> (last visited Jan 17, 2019).

116. See *id.* (noting that such civil rights laws include “the Civil Rights Act of 1964, the Fair Housing Act, the Equal Credit Opportunity Act, the Jury Selection and Services Act, and several laws regarding employment with the federal government”).

117. See *Facing Congressional Opposition, Obama Leaves Office without ENDA enacted*, POLITIFACT (Dec. 12, 2016), <https://bit.ly/2ASQmJ0>.

118. See Equality Act of 2017, S. 1006, 115th Cong. (2017). Even though this version also failed to pass, the Equality Act is likely going to be reintroduced in 2019 in the 116<sup>th</sup> Congress. See Stephen Peters, *Equality Act Reintroduced in Congress with Unprecedented Corporate Support*, HUMAN RIGHTS CAMPAIGN (May 5, 2017), <http://bit.ly/2yZv1Mz>.

119. See Samantha Allen, *The Equality Act Would Outlaw LGBT Discrimination. Will It Ever Be Passed?*, DAILY BEAST (Nov. 02, 2018), <https://bit.ly/2RMRkvW>.

120. See Bachman, *supra* note 22.

121. See Burns, *supra* note 22 (discussing conservative concerns about reproductive and women’s rights).

122. See Kearns, *supra* note 25.

c. Conflicting Statements

Beyond the lack of codified rights and the conflicting judicial interpretations<sup>123</sup> of the protections afforded to transgender people, the transgender community has also faced inconsistencies in administrative policies. The two most recent presidential administrations issued conflicting statements on Title VII protections.<sup>124</sup>

In 2014, the United States Attorney General announced that the Department of Justice under the Obama Administration would “consider discrimination against transgender people to be discrimination ‘because of sex’ in violation of federal employment law.”<sup>125</sup> However, in 2017, the Attorney General under the Trump Administration announced that Title VII “encompasses discrimination between men and women but does not encompass discrimination based on gender identity per se, including transgender status.”<sup>126</sup> Given the Department of Justice’s stark change in position following the change in administration, uncertainty exists as to which protections from discrimination are accorded to transgender people.<sup>127</sup> The confusion is amplified by the direct contrast between the positions of the Department of Justice and the Equal Employment Opportunity Commission (EEOC).<sup>128</sup>

The EEOC<sup>129</sup> has stated that it believes discrimination based on transgender status constitutes discrimination under Title VII.<sup>130</sup> In *Macy v. Holder*,<sup>131</sup> the EEOC held that “discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII.”<sup>132</sup>

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123. See *infra* Section II.D.

124. See Memorandum from the Att’y Gen. Jeffrey Sessions to U.S. Att’ys, Heads of Dep’t Components 2 (Oct. 4, 2017) (on file with author); see also *Attorney General Holder Directs Department to Include Gender Identity Under Sex Discrimination Employment Claims*, DEP’T OF JUSTICE (Dec. 18, 2014), <https://bit.ly/2nXpwsC>.

125. Lesbian Gay Bisexual Transgender & HIV Project, *Transgender People and the Law: Frequently Asked Questions*, AM. CIVIL LIBERTIES UNION 3 (2015), <https://bit.ly/2R1yWyJ>.

126. Memorandum from the Att’y Gen. Jeffrey Sessions to U.S. Att’ys, *supra* note 124, at 2 (referencing the “Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964”).

127. See Charlie Savage, *In Shift, Justice Dept. Says Law Doesn’t Bar Transgender Discrimination*, N.Y. TIMES (Oct. 5, 2017), <https://nyti.ms/2ge9Jld>.

128. See *id.*

129. The EEOC is a federal agency “responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person’s race, color, religion, sex . . . national origin, age . . . disability or genetic information.” *Overview*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/>, (last visited Feb. 8, 2019).

130. See *What You Should Know about EEOC and Enforcement Protections for LGBT Workers*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N (Sept. 28, 2018), <https://bit.ly/2DmLi19>.

131. *Macy v. Holder*, EEOC DOC. 0120120821, 2012 WL 1435995 (Apr. 20, 2012).

132. *Id.* at \*1.



Although the EEOC's holding in *Macy* is not binding on the federal courts,<sup>133</sup> this holding could provide the opportunity for transgender people to bring a Title VII claim without having to base their arguments on sex stereotyping. In fact, the Sixth Circuit in *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, similarly held that "discrimination on the basis of transgender and transitioning status violates Title VII."<sup>134</sup>

The EEOC specifically addressed gender pronouns in *Jameson v. U.S. Postal Service*<sup>135</sup> in which the EEOC stated that supervisors and coworkers should use a person's preferred name and pronouns in the workplace.<sup>136</sup> The EEOC reasoned that the intentional misuse of an employee's incorrect name and pronouns could cause the employee harm and could also constitute sex-based discrimination and harassment.<sup>137</sup> Additionally in *Lusardi v. Department of the Army*,<sup>138</sup> the EEOC found that the repeated, intentional use of a person's previous name and incorrect gender pronouns created a hostile work environment on the basis of sex.<sup>139</sup>

Transgender people have not only faced a stark change in position within the Department of Justice from one administration to the next, but also are confronted with conflicting positions between government agencies. The lack of consistent policies among and between government agencies has contributed to the uncertainty surrounding Title VII protections for transgender people.<sup>140</sup> One contributing factor to the contrasting positions held by the various administrations and agencies may be due to the concern that regulations protecting transgender people could violate the First Amendment right to free speech.<sup>141</sup>

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133. While courts may look to the EEOC for guidance and may afford the EEOC's decisions some deference, federal courts are not bound by the EEOC's administrative decisions. See *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 793 (1986).

134. *Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574–75 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (U.S. Apr. 22, 2019) (No. 18-107); see also *infra* Section II.D.

135. *Jameson v. U.S. Postal Serv.*, EEOC Appeal No. 0120130992, 2013 WL 2368729 (May 21, 2013).

136. See *id.* at 2.

137. See *id.*

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

139. See *id.* at 13.

140. See Julie Moreau, *Federal Civil Rights Law Doesn't Protect Transgender Workers, Justice Department Says*, NBC NEWS (Oct. 5, 2017), <https://nbcnews.to/2DwXoTY>.

141. See KC Clements, *The Transgender 'Threat' To Free Speech Is A Lie*, MEDIUM (May 3, 2017), <http://bit.ly/2Nbop5P>.

## 2. The First Amendment, Compelled Speech, and the Workplace

The First Amendment of the United States Constitution is exceptionally clear: “Congress shall make no law . . . abridging the freedom of speech.”<sup>142</sup> To protect this right, the Supreme Court has sculpted the doctrine known as “Compelled Speech,” which is the principle that the First Amendment right to free speech prohibits the government from dictating what people must say.<sup>143</sup> Recently, the Court stated that “compulsion so plainly violates the Constitution, most of our free speech cases have involved restrictions on what can be said, rather than laws compelling speech.”<sup>144</sup>

Compelled Speech and First Amendment infringement were the foundational issues underlying the severe backlash that occurred after California and New York passed laws that protected transgender people from discrimination, specifically addressing preferred pronouns.<sup>145</sup> Critics argued that the laws, which penalized repeated incorrect pronoun usage, constituted Compelled Speech in violation of the First Amendment.<sup>146</sup>

Freedom of speech, however, is not an absolute right, and there are certain areas of speech that the government is able to regulate.<sup>147</sup> For example, the First Amendment restricts the government from limiting most forms of speech, but it does not prevent companies or private citizens

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142. U.S. CONST. amend. I.

143. See *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006); see also *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (holding that a “[s]tate may [not] constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public”).

144. *Janus v. Am. Fed’n of State, City, & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (holding that “Illinois’ agency-fee scheme violated the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern”).

145. See CAL. HEALTH & SAFETY CODE § 1439.51 (West 2017); see also S.B. 8580, 241th Leg. (N.Y. 2017); N.Y.C. COMM’N ON HUMAN RIGHTS, Local Law No. 3 (2002); N.Y.C. ADMIN. CODE § 8-102(23) (adopted in 2016).

146. See *Transgender Pronouns Are Just the Beginning. How Coerced Speech Could Erode Liberty for Everyone*, THE DAILY SIGNAL (Sep. 7, 2018), <https://bit.ly/2SBUzea>; see also Josh Blackman, *The Government Can’t Make You Use ‘zhir’ or ‘ze’ in Place of ‘she’ and ‘he’*, WASH. POST (June 16, 2016), <https://wapo.st/2RVlkd3>; Brooke Singman, *New California law allows jail time for using wrong gender pronoun, sponsor denies that would happen*, FOX NEWS (Oct. 9, 2017), <https://fxn.ws/2sKcuJn>.

147. See *Virginia v. Black*, 538 U.S. 343, 358 (2003) (offering the examples of “fighting words” and “true threats” of violence as areas of speech that the government may regulate); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–84 (1992) (listing limited areas where the First Amendment permits restrictions on the content of speech).

people from doing so in the workplace.<sup>148</sup> As Oliver Wendell Holmes, Jr. once noted, “[a]n employee may have a constitutional right to talk politics, but he has no constitutional right to be employed.”<sup>149</sup> In other words, while the Constitution protects a person’s right to free speech, it does not protect against the consequences that a person may face in the workplace as a result of their speech.<sup>150</sup>

Notably, Congress has not expanded First Amendment free speech rights to the private sector workforce,<sup>151</sup> whereas government employees do have some First Amendment protections in the workplace.<sup>152</sup> The First Amendment protects government employees’ speech when the speech addresses a matter of public concern<sup>153</sup> but does not protect speech made in conjunction with their job duties.<sup>154</sup> The rationale behind not extending the First Amendment to a government employee’s speech made within the scope of their employment is that the “government’s interest in the smooth functioning of the workplace outweighs the government employee’s First Amendment speech rights.”<sup>155</sup>

Some federal laws that prevent discrimination and harassment also regulate speech in the workplace.<sup>156</sup> For example, Title VII, enforced by the EEOC, protects employees from discrimination and harassment in the workplace.<sup>157</sup> When a charge alleging workplace harassment is filed with the EEOC, the EEOC investigates the claim to determine whether the

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148. See *Retaliation—Public Employees and First Amendment Rights*, WORKPLACE FAIRNESS, <https://www.workplacefairness.org/retaliation-public-employees#1> (last visited Jan. 19, 2019).

149. Jeannette Cox, *A Chill around the Water Cooler: First Amendment in the Workplace*, 15 *INSIGHTS ON L. & SOC’Y* 12 (2014–2015), <https://bit.ly/2DmSx9a/>.

150. See *Retaliation—Public Employees and First Amendment Rights*, *supra* note 148.

151. See *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 819 (4th Cir. 2004).

152. See *id.*; see also *A Chill around the Water Cooler: First Amendment in the Workplace*, *supra* note 149, at 12.

153. See *Retaliation—Public Employees and First Amendment Rights*, *supra* note 148 (stating examples of matters of public concern). Some states have laws that protect employees from termination based on their speech, but these laws are limited and only apply to speech outside the workplace. See *A Chill around the Water Cooler: First Amendment in the Workplace*, *supra* note 149, at 14. In addition, the National Labor Relations Act (NLRA) also offers protections for speech on behalf of a group aiming to better working conditions, but does not apply to people speaking only for themselves. See *id.* at 13.

154. See *A Chill around the Water Cooler: First Amendment in the Workplace*, *supra* note 149, at 14.

155. *Id.*

156. See *Laws Enforced by EEOC*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/statutes/> (last visited Jan. 19, 2019); see also *Harassment-Free Workplace*, COMPLY RIGHT, <https://bit.ly/2W7fODA> (last visited Jan. 19, 2019).

157. See *Laws Enforced by EEOC*, *supra* note 156 (explaining the laws cover employers with fifteen or more employees); see also *Harassment-Free Workplace*, *supra* note 156.

harassment is “severe or pervasive enough to be illegal.”<sup>158</sup> For example, if an employee verbally harasses a co-worker on the basis of sex, and such harassing speech is severe enough to be considered illegal as a violation of Title VII, the First Amendment does not protect the employee from adverse employment actions, such as being fired, for their speech.<sup>159</sup>

Employers are generally liable for the harassing behaviors<sup>160</sup> of their employees, although the tests for liability differ for supervisor and non-supervisor employees.<sup>161</sup> Employers are automatically liable for harassment perpetrated by a supervisor and can only avoid liability in limited circumstances.<sup>162</sup> Additionally, employers can be liable for harassment by employees not in a supervisory role.<sup>163</sup> Harassment can come in the form of severe and pervasive speech, including “offensive jokes, slurs, epithets or name calling. . . ridicule or mockery . . . and interference with work performance.”<sup>164</sup> The First Amendment does not protect individuals from liability for using speech to create a harassing or hostile work environment.<sup>165</sup> For instance, in *Bailey v. USF Holland, Inc.*,<sup>166</sup> employees who repeatedly and persistently used the word “boy” to refer to black male workers created a hostile work environment under Title VII and the employer was liable for the employees’ harassing conduct.<sup>167</sup>

Prohibiting the use of speech to create a harassing or hostile work environment has been a generally accepted limitation on freedom of speech. Rather than stating what the employees must say in lieu of the harassing speech, these limits simply regulate what cannot be said. Similarly, the laws passed in California and New York prohibiting long-term care facilities and employees from systematically misgendering

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158. *Harassment*, EQUAL EMP’T OPPORTUNITY COMM’N, <http://bit.ly/2TERHeq> (last visited Jan. 19, 2019).

159. *See Retaliation—Public Employees and First Amendment Rights*, *supra* note 148; *see also* Tom Spiggle, *Your Free Speech Rights (Mostly) Don’t Apply At Work*, FORBES (Sept. 28, 2018), <https://bit.ly/2syi0Gs>.

160. *See Harassment*, *supra* note 158 (stating examples of harassment in the workplace that would rise to a level of illegality).

161. *See id.*

162. *See id.* The employer can avoid liability if: “1) [the employer] reasonably tried to prevent and promptly correct the harassing behavior; and 2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.” *Id.*

163. *See id.* (stating that an “employer will be liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors or customers on the premises), if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action”).

164. *See id.*

165. *See id.*; *see also Retaliation—Public Employees and First Amendment Rights*, *supra* note 148.

166. *See generally* *Bailey v. USF Holland, Inc.*, 526 F.3d 880 (6th Cir. 2008).

167. *See id.* at 887–88.

transgender residents<sup>168</sup> are not directing the facilities and employees as to what they can say, but rather what they cannot say. These state laws align more so with the category of laws restricting discriminatory speech and harassment in the workplace, rather than with laws that compel speech. When workplace discrimination against transgender people is at issue, however, the courts have not reached a consensus on applying protections.<sup>169</sup>

*D. Circuit Split*

In *Price Waterhouse v. Hopkins*, the Supreme Court of the United States held that Title VII's ban on discrimination "because of . . . sex" also encompasses discrimination based on gender or sex stereotypes.<sup>170</sup> The Court noted, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."<sup>171</sup> Notwithstanding the Court's holding in *Price Waterhouse*, however, federal courts are split as to whether gender identity and expression, or a person's transgender status, is included as discrimination "because of . . . sex."<sup>172</sup>

The circuit courts differ on whether transgender people are protected from discrimination based on Title VII's "because of . . . sex" prohibitions, and if so, on what basis the claims must be stated.<sup>173</sup> The Sixth, Ninth, and Eleventh Circuits have all concluded that discrimination based on a person not conforming to gender norms is discrimination under Title VII, regardless of whether the claimant is transgender.<sup>174</sup> Recently, the Sixth Circuit extended Title VII protections to allow a person to bring a Title VII claim if discriminated against for being transgender or transitioning, without having to prove a sex stereotyping claim.<sup>175</sup> In contrast, the Seventh, Eighth, and Tenth Circuits have held that Title VII protections

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168. See CAL. HEALTH & SAFETY CODE § 1439.51 (West 2017); see also S.B. 8580, 241th Leg. (N.Y. 2017).

169. See *infra* Section II.D.

170. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989) (explaining that not conforming to sex stereotypes is the failure to act and appear according to expectations defined by one's sex).

171. *Id.* at 251.

172. See *infra* Section II.D.

173. See *infra* Section II.D.

174. See *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000).

175. See *Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574–75 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (U.S. Apr. 22, 2019) (No. 18-107).

do not extend to transgender people, based on a strict reading of the statute.<sup>176</sup>

1. Title VII's Coverage Extends Protection to the Transgender Community

In *Schwenk v. Hartford*,<sup>177</sup> the Ninth Circuit noted that “[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.”<sup>178</sup> The Ninth Circuit stated that courts basing their refusal to extend protections to transgender people on the supposition that “because of . . . sex” applied only to anatomical sex had been overruled by *Price Waterhouse*.<sup>179</sup> Discrimination can be based either on being a member of a sex or by a person’s failure to comply with society’s gender expectations.<sup>180</sup>

Similarly, in *Smith v. City of Salem*,<sup>181</sup> the Sixth Circuit concluded that “[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination.”<sup>182</sup> The Sixth Circuit reasoned that in *Price Waterhouse*, the Supreme Court’s holding prohibited discrimination based on “sex,” including a person’s “failure to conform to stereotypical gender norms.”<sup>183</sup> Further, the Sixth Circuit stated that the reliance on decisions prior to *Price Waterhouse*, holding that transgender people were barred from protection under Title VII due to a narrow and unadaptable definition of “sex” by Congress,<sup>184</sup> was an error.<sup>185</sup> *Price Waterhouse* provided no reason to exclude transgender people from Title VII coverage for discrimination based on behavior that does not conform to sex stereotypes.<sup>186</sup>

Additionally, in *Glenn v. Brumby*,<sup>187</sup> the Eleventh Circuit concluded that discriminating against someone based on non-conformity to gender stereotypes is sex-based discrimination.<sup>188</sup> The court stated that all people, including those who are transgender, are afforded protection from

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176. See *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221–22 (10th Cir. 2007); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982).

177. See *Schwenk*, 204 F.3d at 1187.

178. *Id.* at 1202.

179. *Id.* at 1201 (discussing *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984)).

180. *Id.* (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989)).

181. *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

182. *Id.* at 575.

183. *Id.* at 573.

184. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982).

185. See *id.* at 572, 575.

186. See *id.*

187. See generally *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

188. See *id.* at 1316.

discrimination based on gender stereotypes.<sup>189</sup> The court also reasoned that the Supreme Court has consistently worked to eliminate discrimination based on gender stereotypes.<sup>190</sup>

Most recently, the Sixth Circuit in *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*,<sup>191</sup> expanded its decision in *Smith*, and held that “Title VII protects transgender persons . . . because transgender or transitioning status constitutes an inherently gender non-conforming trait.”<sup>192</sup> The court stated that discrimination based on an employee’s change of sex is inherently discrimination because of “sex” and thus prohibited by Title VII.<sup>193</sup> The court reasoned that *Price Waterhouse* precluded construing Title VII to read that “sex” would only apply to person’s “chromosomally driven physiology and reproductive function.”<sup>194</sup> Under the Sixth Circuit’s ruling, plaintiffs are able to bring claims of discrimination under Title VII based on their status as transgender or transitioning alone, without having to base their claim on a showing of sex stereotyping.<sup>195</sup>

## 2. Title VII’s Coverage Does Not Extend Protection to the Transgender Community

In two pre-*Price Waterhouse* decisions, the Seventh and Eighth Circuits declined to extend Title VII protections to transgender people.<sup>196</sup> The Seventh Circuit in *Ulane v. Eastern Airlines, Inc.*,<sup>197</sup> held that Title VII protections do not extend to transgender people based on a plain language analysis of Title VII.<sup>198</sup> The court reasoned that Congress’s intent was for “sex” to be read only in a biological sense.<sup>199</sup> Similarly, the Eighth

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189. *See id.* at 1318.

190. *See id.* at 1319.

191. *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 577 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (U.S. Apr. 22, 2019) (No. 18-107).

192. *Id.* at 574–75, 577.

193. *Id.* at 575.

194. *Id.* at 578.

195. *See id.* at 579; *see also* Schroer v. Billington, 424 F. Supp. 2d 203, 212 (D.D.C. 2006) (holding that discrimination based on gender transitioning itself is per se sex discrimination and does not require further proof of sex stereotyping).

196. *See Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982).

197. *See Ulane*, 742 F.2d at 1081. The Seventh Circuit has not issued a post *Price Waterhouse* decision regarding transgender employee protections under Title VII but has recently recognized sex discrimination for transgender students under Title IX. *See Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1050 (7th Cir. 2017); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc) (regarding sexual orientation).

198. *See Ulane*, 742 F.2d at 1084–85.

199. *See id.* at 1087.

Circuit in *Sommers v. Budget Marketing*<sup>200</sup> held that discrimination based on being transgender does not fall within Title VII.<sup>201</sup> The court reasoned that a plain meaning must be attributed to the term “sex” under Title VII without a showing of clear congressional intent to the contrary.<sup>202</sup>

Furthermore, in the Tenth Circuit’s post-*Price Waterhouse* decision, *Etsitty v. Utah Transit Authority*,<sup>203</sup> the court held that discrimination based on a person’s transgender status is not discrimination under Title VII.<sup>204</sup> The court cited *Ulane* and *Sommers*, reasoning that the “plain language of the statute and not the primary intent of Congress,” guided their interpretation that transgender status is not protected under Title VII.<sup>205</sup> The court stated that the “binary conception of sex”<sup>206</sup> indicates that transgender people could only be protected under Title VII if they were discriminated against because they were male or female.<sup>207</sup> The court, however, declined to consider whether the *Price Waterhouse* sex stereotyping claims may extend to transgender people who do not conform to the gender stereotypes of their assigned sex.<sup>208</sup>

The circuit split is further evidence of the widespread confusion surrounding protections for transgender people. An alarming percentage of transgender people face discrimination in various aspects of their lives, including in their places of work.<sup>209</sup> Yet, the inconsistency throughout administrations, federal agencies,<sup>210</sup> and the courts has only further obfuscated the question of what protections from discrimination exist for transgender people.

### III. ANALYSIS

Over the last several decades, courts have struggled to determine whether transgender people are protected under Title VII.<sup>211</sup> Proposed legislative attempts to codify protections for transgender people under

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200. See *Sommers*, 667 F.2d at 748. The Eighth Circuit has not issued a post *Price Waterhouse* decision regarding transgender employee protections under Title VII, however, in *Cruzan v. Special Sch. Dist. No. 1*, the court concluded that a school policy which protected a transgender employee’s restroom use did not violate another employee’s rights under Title VII. See *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 983 (8th Cir. 2002).

201. See *Sommers*, 667 F.2d at 750.

202. See *id.*

203. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007).

204. See *id.* at 1221.

205. *Id.* at 1222.

206. *Id.*

207. See *id.*

208. See *id.* at 1224.

209. See *supra* Section II.B.

210. See *supra* Section II.C.1.c.

211. See *supra* Section II.D.



Title VII have failed throughout the last 40 years.<sup>212</sup> The Supreme Court of the United States is in the unique position to end the confusion surrounding Title VII's applicability to the transgender community due to granting certiorari to *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*<sup>213</sup>

The most recent version of the Equality Act aims to extend protections for transgender people under Title VII.<sup>214</sup> The possibility of the Equality Act's passage in the Senate remains unlikely in today's political climate, following in the footsteps of the narrower ENDA, which also faced conservative congressional opposition.<sup>215</sup> Coupled with the lack of judicial consensus and the inconsistent administration policies, clearer protections for transgender people are needed at the federal level.

A. *The Judicial Approach to Extending Title VII Protection to the Transgender Community*

The Supreme Court, in *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*,<sup>216</sup> should hold that Title VII protections extend to discrimination transgender people based on (1) their status as transgender and (2) sex stereotyping under *Price Waterhouse*, in line with the holdings of the Sixth Circuit. In the current circuit split,<sup>217</sup> the courts each attempted to interpret whether Title VII protections include gender expression or transgender status, and under what circumstances a successful claim may be made.<sup>218</sup>

Arguably, the decisions of the Seventh and Eighth Circuits have been overturned by the *Price Waterhouse* decision.<sup>219</sup> However, as neither circuit has heard another case regarding transgender protections under Title VII post-*Price Waterhouse*, the question of what protections do exist within these circuits still persists.<sup>220</sup> The Tenth Circuit's recent ruling,

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212. See *supra* Sections II.C.1.a, II.C.1.b.

213. See *Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (U.S. Apr. 22, 2019) (No. 18-107); see also *supra* Section II.D.

214. Equality Act, H.R. 5, 116th Cong. (2019).

215. See *Facing congressional opposition*, *supra* note 117; *Legislative Failures*, *supra* note 111; see *infra* Section III.B.1.

216. *Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 560.

217. See *supra* Section II.D.

218. See *supra* Sections II.D.1, II.D.2.

219. See *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) (stating that the "initial judicial approach taken in cases such as [*Ulane*] has been overruled by the logic and language of *Price Waterhouse*").

220. See *supra* Section II.D.

however, is cause for concern, as it seems to run afoul of the *Price Waterhouse* decision.<sup>221</sup>

The reasoning of the Seventh, Eighth, and Tenth Circuits is flawed given that it relies on an outdated reading of the term “sex.”<sup>222</sup> The Tenth Circuit relied heavily on the Seventh and Eighth Circuit’s reasoning, which predates the determination of sex-stereotyping claims in *Price Waterhouse*.<sup>223</sup> Although the Tenth Circuit declined to address whether the plaintiff was entitled to a claim based on sex-stereotyping, the court acknowledged several cases in which these claims were successful.<sup>224</sup> The unresolved question regarding sex-stereotyping claims in the Tenth Circuit may open the door for transgender people to receive protection from discrimination based on non-conformity to gender stereotypes, however, this possibility remains to be seen.

As the Supreme Court in *Price Waterhouse* reasoned, “the words ‘because of’ do not mean ‘solely because of.’”<sup>225</sup> In a subsequent case, *Oncale v. Sundowner Offshore Servs., Inc.*,<sup>226</sup> the Court reasoned that statutory prohibitions often rightly expand beyond the legislature’s original intentions to cover related evils.<sup>227</sup> Therefore, regardless of Congress’s original intent, constricting the term “sex” to apply only to a person’s anatomical sex cannot serve as a valid basis for denying transgender people protections from discrimination in the workplace. The Court’s holding in *Price Waterhouse*<sup>228</sup> thus necessarily applies to transgender people.

As the Sixth Circuit noted, the courts that fail to extend Title VII protections to transgender people “legitimize discrimination based on the plaintiff’s gender non-conformity” by determining that the discrimination is against a classification that is unprotected, namely, being a transgender person.<sup>229</sup> Exempting people from discrimination protections purely on the basis that they are transgender cannot, and should not, be rationally justified.

The Sixth, Ninth, and Eleventh Circuits each recognized that sex-stereotyping occurs based on a person’s non-conformity to socially-prescribed gender norms, thus prohibiting discrimination based on a

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221. See *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007) (holding that discrimination based on a person’s transgender status is not discrimination under Title VII).

222. See *supra* Section II.D.2.

223. See *Etsitty*, 502 F.3d at 1221.

224. See *id.* at 1223–24.

225. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989).

226. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

227. See *id.* at 79–80.

228. *Price Waterhouse*, 490 U.S. at 258.

229. See *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004).

person's gender non-conformity under Title VII, in accordance with *Price Waterhouse*.<sup>230</sup> The Sixth Circuit's extension of this reasoning in concluding that transgender or transitioning status is inherently gender non-conforming, thus protecting people from discrimination purely based on such statuses, is a logical nexus.<sup>231</sup> One cannot discriminate against a transgender person for being transgender without taking the person's biological sex into account, thereby making the discrimination fundamentally "because of . . . sex."<sup>232</sup> The reasoning used by the courts in opposing these protections, which relied on the belief that "sex" should only be construed biologically and is not applicable to transgender people, is outdated and should not be validated in a post-*Price Waterhouse* landscape.

The Supreme Court is in the best position to end the confusion surrounding the extension of Title VII to transgender people. By granting certiorari to *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, the Supreme Court now has the opportunity to solidify protections for members of the transgender community. The Supreme Court should formally hold that Title VII's prohibition on discrimination "because of sex" applies to transgender status and sex stereotyping. This ruling would ensure that transgender people are protected from discrimination in the workplace and have a valid and consistent basis for raising claims if their rights are violated. Such rights are integral to combatting discrimination against transgender people.

Unfortunately, the circuit split evidences the vast disparity in interpretations of Title VII protections.<sup>233</sup> Even if the Supreme Court holds that Title VII prohibits discrimination against transgender people based on their status as transgender and sex stereotyping, in order to bridge the gap and ensure equal protection throughout the country, a clear federal law is needed.

### B. Recommendation to Congress

Based on this Comment's suggested Supreme Court determination in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, as well as the state laws that provide protections for transgender people, this Comment proposes a narrow federal law. Unlike the broader Equality Act and the

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230. See *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Smith*, 378 F.3d at 575; *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000).

231. *Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (U.S. Apr. 22, 2019) (No. 18-107).

232. See *id.* at 578.

233. See *supra* Section II.D.

ENDA, this narrower law would focus on protecting against the discrimination of systematic misgendering in the workplace.

A narrow law is the necessary cornerstone to building a foundation of laws protecting transgender people while also balancing the First Amendment right of free speech.<sup>234</sup> A federal law focused solely on the issue of systematic misgendering in the workplace is essential to ensuring protections for transgender people. Furthermore, such a federal law would clarify that continuous, intentional usage of a person's incorrect pronouns constitutes harassment in the workplace, and will have repercussions.

### 1. Flaws with Previous Attempts

Although the ENDA did receive popular support as well as the support of some Republican lawmakers,<sup>235</sup> in the end, the final version of the ENDA died in committee after the Speaker of the House refused to bring it to a vote.<sup>236</sup> The ENDA faced conservative congressional opposition for fear of being too broad, increasing frivolous litigation, and putting American workers at risk of legal ramifications.<sup>237</sup> These fears are arguably unfounded, as data has shown that states with similar laws have not experienced such effects.<sup>238</sup>

After the failure of the ENDA, the likelihood that the far broader Equality Act will pass in the Senate is slim due to the conservative congressional opposition for its expansive proposed protections of the LGBTQ community, specifically transgender people across various industries.<sup>239</sup> Although the Democratic party's control of the House arguably contributed to the latest passage of the Equality Act in the House, getting the Equality Act to a vote in the conservative Senate remains a roadblock to enactment.<sup>240</sup> Although the need for such protections has become increasingly evident, the current political climate suggests that the road to passage may be a long journey.

### 2. Proposal of the Gender Expression in Employment Act

A federal law is necessary to clarify the status of transgender people as a protected class and to codify the protections afforded to all people in

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234. *See supra* Section II.C.2.

235. *See ENDA, explained, supra* note 113.

236. *See Legislative Failures, supra* note 111.

237. *See ENDA, explained, supra* note 113.

238. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-135R, SEXUAL ORIENTATION AND GENDER IDENTITY EMPLOYMENT DISCRIMINATION: OVERVIEW OF STATE STATUTES AND COMPLAINT DATA (2009).

239. *See Facing congressional opposition, supra* note 117; *see also Legislative Failures, supra* note 111.

240. *See Burns, supra* note 22 (stating that the likelihood the act would be allowed to come to a vote in the Senate is slim).

regard to gender identity and expression in the workplace.<sup>241</sup> This Comment's proposed narrow federal law aims to protect transgender people from discrimination and harassment in the workplace based on their preferred pronouns. While the current proposed federal legislation necessarily seeks to encompass a broad range of protections across multiple industries, a narrower law has a higher chance of passage, thereby laying a necessary stepping stone on the path to protecting transgender people from discrimination.<sup>242</sup>

No person should have to choose between being treated respectfully in the workplace and maintaining their employment. As simply as someone named Robert may ask to be referred to as "Bob," if a person requests to be referred to by a specific name or pronoun, that wish should be respected for all people. The Gender Expression in Employment Act should be loosely structured with similarity to the state laws that include protections from misgendering.<sup>243</sup> Misgendering should be made unlawful under the same conditions that other harassment becomes illegal; not in isolated incidents or through petty slights, but where "[ (1) enduring the offensive conduct becomes a condition of continued employment, or (2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive."<sup>244</sup> In other words, people should not be automatically liable for an isolated incident of unintentionally misgendering another employee. If, however, the conduct became pervasive enough that an investigator would find the conduct rose to the level of legally actionable harassment, then liability should arise.

Importantly, this law also would not infringe on the right of free speech afforded to people under the First Amendment. Instead, this narrower federal law should only hold employers liable for perpetuating harassment and a hostile work environment. The people engaging in such speech should not be held directly liable.<sup>245</sup> This liability structure parallels the statutes prohibiting discrimination in the workplace that

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241. See discussion *supra* Sections II.C, III.B.1.

242. The author recognizes that this proposed act could fall under Title VII's "because of sex" prohibition, however, as other acts have attempted to adapt Title VII without success, this proposal aims to create a law that would stand alone, while working with Title VII, in order to hopefully have a higher chance of passage and provide the transgender community with a starting point for protection.

243. See CAL. HEALTH & SAFETY CODE § 1439.51 (West 2017); see also S.B. 8580, 241th Leg. (N.Y. 2017).

244. *Harassment*, *supra* note 158.

245. This is not to suggest that the employers may not hold the employees liable for their conduct, or that employees may not suffer consequences of harassing others in the workplace.

violates Title VII, such as harassment by the use of racial or sexual slurs, or epithets.<sup>246</sup>

As noted, Congress has not extended First Amendment free speech protections to private sector employees.<sup>247</sup> However, the proposed federal law would not necessarily compel employees to use specific language, but would rather prevent them from using intentional and repeated misgendering to harass or discriminate against transgender people in the workplace. For these reasons, the law would not infringe on the First Amendment right of free speech.<sup>248</sup>

Furthermore, the extension of Title VII's "because of . . . sex" protection to gender identity and expression in the government,<sup>249</sup> as well as the EEOC policy regarding "because of . . . sex" as applying to transgender people,<sup>250</sup> indicates that repeated misgendering by government employees in the workplace could potentially support a workplace harassment claim under existing law. However, this law would also solidify the grounds for transgender people who work in the government and face discrimination through intentional and persistent misgendering.

#### IV. CONCLUSION

The time has come for the Supreme Court and Congress to take the necessary steps to clarify and solidify protections for transgender people against discrimination. The transgender umbrella encompasses a wide variety of people,<sup>251</sup> with 1.4 million people in the United States alone identifying as transgender.<sup>252</sup> Unfortunately, many transgender people face violence and discrimination across various aspects of their lives.<sup>253</sup> Intentional misgendering is one concerning form of discrimination that can negatively affect transgender people, specifically in the workplace.<sup>254</sup> Nonetheless, a circuit split still persists regarding whether transgender people are accorded Title VII protections from discrimination "because of

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246. *See Harassment, supra* note 158.

247. *See supra* Section II.C.2.

248. *See supra* Section II.C.2.

249. Exec. Order No. 13672, 79 Fed. Reg. 42,971 (July 23, 2014).

250. *See What You Should Know about EEOC and Enforcement Protections for LGBT Workers, supra* note 130.

251. *See supra* Section II.A.2.

252. *See How Many Adults Identify as Transgender in the United States?, supra* note 2, at 6.

253. *See supra* Section II.B.

254. *See supra* Part I; *see also supra* Section II.B. The author recognizes that misgendering can affect transgender people in various areas of life, however, this comment is focused on achieving protections for transgender people in the workplace specifically as a starting point for legislation.

. . . sex.”<sup>255</sup> The inconsistencies regarding the extension of Title VII protections to transgender people are pervasive and require a solution.

Therefore, the Supreme Court should extend Title VII’s “because of . . . sex” protections from discrimination to transgender people based on (1) their status as transgender and (2) sex stereotyping under *Price Waterhouse*. As the Sixth Circuit noted in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, discrimination against a person for being transgender necessarily cannot occur without taking that person’s biological sex into account, thereby making such discrimination fundamentally “because of . . . sex.”<sup>256</sup>

Further, no federal law exists that provides comprehensive protections for transgender people who are discriminated against because of their gender identity or gender expression.<sup>257</sup> Both the ENDA and the Equality Act aimed to overcome the lack of protections accorded to transgender people, yet have consistently failed to pass through both houses of Congress.<sup>258</sup> Nevertheless, the lack of protections for transgender people from discrimination cannot be allowed to persist. Therefore, Congress should pass the Gender Expression in Employment Act to provide transgender people protection from systematic and intentional misgendering in the workplace.<sup>259</sup> By passing this narrow federal law, Congress would initiate protections for transgender people while circumventing concerns with the broader ENDA and Equality Act.<sup>260</sup> This law would thereby lay a necessary foundation for further acts to build upon the protections for transgender people.<sup>261</sup>

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255. *See supra* Section II.D.

256. *Equal Emp’t Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (U.S. Apr. 22, 2019) (No. 18-107).

257. *See A Workplace Divided*, *supra* note 84, at 5.

258. *See supra* Section II.C.1.b.

259. *See supra* Section III.B.2.

260. *See supra* Section III.B.1.

261. *See supra* Section III.B.2.