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Hair Me Out: Why Discrimination Against Black Hair is Race Discrimination Under Title VII

Alexis Boyd

HAIR ME OUT: WHY DISCRIMINATION AGAINST BLACK HAIR IS RACE DISCRIMINATION UNDER TITLE VII

ALEXIS BOYD*

* Alexis Boyd was born and raised in Memphis, Tennessee. She later moved to Massachusetts to attend Wellesley College, where she graduated with a bachelor's degree in political science and a minor in psychology. The author has had a passion for social justice from a young age, which is why she decided to attend law school to advocate for her community and other marginalized groups. She currently attends American University Washington College of Law as a 3L and is interested in practicing labor & employment law or civil rights law. The author is a member of the Black Law Student Association, where she served as the Director of Community Service, and the Journal of Gender, Social Policy & the Law, where she serves as a Note & Comment Editor.

I. INTRODUCTION

In May 2010, Chastity Jones sought employment as a customer service representative at Catastrophe Management Solutions ("CMS"), a claims processing company located in Mobile, Alabama.[1] When asked for an in-person interview, Jones, a Black woman, arrived in a suit and her hair in "short dreadlocks," or locs, a type of natural hairstyle common in the Black community.[2] Despite being qualified for the position, Jones would later have her offer rescinded because of her hair.[3] CMS claimed that locs "tend to get messy" and violated the "neutral" dress code and hair policy requiring

1. *See* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1021 (11th Cir. 2016) (detailing that the company's only listed requirements for the position were computer knowledge and professional phone skills).

2. *See* NYC COMM'N ON HUM. RTS., NYC COMMISSION ON HUMAN RIGHTS LEGAL ENFORCEMENT GUIDANCE ON RACE DISCRIMINATION ON THE BASIS OF HAIR 1 (Feb. 2019) [hereinafter NYC HAIR GUIDANCE], https://www1.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf. Hereinafter, dreadlocks will be referred to as locs due to the derogatory origins of the term dreadlocks. See *Catastrophe Mgmt. Sols*., 852 F.3d at 1021–22 (describing the derogatory origins of the term "dreadlocks").

3. *See Catastrophe Mgmt. Sols.*, 852 F.3d at 1021–22 (noting that plaintiff chose to forgo employment rather than cut her hair).

employees to be "professional and business-like."[4] Therefore, CMS refused to hire Ms. Jones unless she cut her locs off.[5] When Jones sought redress in court because she was not hired based on the employer's racial bias of Black hair,[6] the Eleventh Circuit denied that CMS committed any form of proscribed discrimination because discrimination based on a mutable racial characteristic is not protected under Title VII.[7]

Jones's case is not an isolated incident and represents the continued structural racism in America, which legally allows private and public entities to police and control the appearance of Black people in the United States.[8] Many Black professionals have admitted that they constantly worry whether they will be judged professionally and societally when they wear their natural hair in typically Black styles.[9] For these reasons, civil rights advocates and Black legal scholars have written extensively on why federal courts should expand the definition of race discrimination to include hair discrimination.[10]

Although the Eleventh Circuit stated that expanding Title VII's definition

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4. *See id*.

5. *See id.*

6. Hereinafter, "Black hair" will be used to describe the hair of women who are African or of African descent.

7. *See id.* at 1023–24 (holding that only immutable characteristics of race, like hair texture, are protected under the Title VII).

8. *See* PBS News Hour, *How Hair Discrimination Impacts Black Americans in Their Personal Lives and the Workplace*, PBS (Apr. 2, 2021, 6:40 PM), https://www.pbs.org/newshour/show/how-hair-discrimination-impacts-black-americans-in-their-personal-lives-and-the-workplace (describing Black workers' experiences with their hair in the workplace); Evan Ross Katz, *Doris "Wendy" Greene Helped Fight for New York City's Ban on Natural-Hair Discrimination*, TEEN VOGUE (Feb. 28, 2019), https://www.teenvogue.com/story/doris-wendy-greene-natural-hair-anti-discrimination-ban (detailing the different ways legal hair discrimination negatively affects Black people).

9. *See* PBS News Hour, *supra* note 8 (questioning whether Black hairstyles fit into non-Black coworkers' perceived notion of professionalism in the workplace).

10. *See, e.g.*, D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 U. MIAMI L. REV. 987 (2017) (discussing that the immutability doctrine is a legal fallacy rooted in defining race as biological); Ra'Mon Jones, *What the Hair: Employment Discrimination Against Black People Based on Hairstyle*s, 36 HARV. BLACKLETTER L.J. 27 (2020); Veronica Craig, Comment, *"Does My Sassiness Upset You?" An Analysis Challenging Workplace and School Regulation of Hair and its Connection to Racial Discrimination*, 64 HOW. L. J. 239 (2020) (analyzing the ways the federal courts fail to protect Black people from discrimination based on hair).

of race discrimination to include hair discrimination should be left for Congress to decide,[11] both the Supreme Court and Congress have established precedents for expanding protection to another protected class under Title VII: sex discrimination.[12] Sex-based discrimination can include both immutable and mutable characteristics, such as sex assigned at birth, the ability to become pregnant, and other characteristics associated with a certain sex, such as having children or life expectancy.[13] Conversely, the Eleventh Circuit in Jones' case found that while Title VII protects immutable characteristics like hair texture, it does not protect mutable racial characteristics such as hairstyle.[14] States have relied on local legislation to prevent discriminatory policies that target Black hair by passing the CROWN Act (Creating a Respectful and Open Workplace/World for Natural Hair Act).[15] As of March 2021, Congress reintroduced a federal CROWN Act, which passed in the House on March 18, 2022.[16]

This Comment argues that Title VII should protect employees against racially based hair discrimination at work because courts should interpret racially discriminatory behavior as broadly as sex-based discrimination and because discrimination against Black hairstyles is discrimination against Black culture and, thus, Black people as a race. Part II explains the cultural

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11. *See Catastrophe Mgmt. Sols.*, 852 F.3d at 1035 (discussing that the different definitions and characteristics of culture are too difficult for a court to decide).

12. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1734 (2020) (prohibiting discrimination based on sexuality or transgender identity); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998) (prohibiting same sex sexual harassment); Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (prohibiting sex stereotypes).

13. *See, e.g.*, *Bostock*, 140 S. Ct. at 1734 (listing seminal cases which have broadened the definition of sex discrimination).

14. *See Catastrophe Mgmt. Sols*., 852 F.3d at 1021–24 (defining mutable characteristics as changeable and immutable characteristics as unchangeable and biologically associated with race).

15. *See* Kalyn Womack, *Dove with Tabitha Brown Launches Campaign Against Hair Discrimination*, THE ROOT (Jan. 26, 2022, 1:02 PM), https://www.theroot.com/dove-with-tabitha-brown-launches-campaign-against-hair-1848425787 (stating that fourteen states have passed CROWN Acts to protect people from race-based discrimination against hair texture and protective styles in the workplace and public schools).

16. *See* D. Wendy Greene, *The Republication of Title VII: What's Hair (And Other Race-based Characteristics) Got to Do with It?*, RACE, RACISM & THE LAW (Oct. 24, 2021),__https://racism.org/articles/basic-needs/employment/408-title-vii/9841-republication-of-title-vii (detailing the 117th Congress' updated bill which explains that race discrimination includes characteristics that are often associated with race); CROWN Act, H.R. 2116, 117th Cong. (2022) (passing House vote on March 18, 2022).

importance of Black hairstyles, the historical context of Black hair discrimination with race discrimination, pivotal cases involving Black hair, and the expanding protections for sex discrimination.[17] Part III argues that Title VII's prohibition on discrimination because of race should expand to preclude discrimination of Black hair and hairstyles to mirror the same expanding statutory interpretation of discrimination because of sex.[18] Part III then analyzes how expanding the definition of race discrimination would change the outcome of the Eleventh Circuit's holding in *Catastrophe Management Solutions*.[19] Part IV proposes that Congress should clarify the definition of race-based discrimination under Title VII to include cultural hairstyles of Black people, and courts should expand the definition of race-based discrimination to include both mutable and immutable definitions of race, such as hair types and styles common in certain racial groups.[20] Finally, Part V concludes that Title VII's prohibition against racial discrimination should include the discrimination of Black hairstyles because federal legislative and judicial precedent should expand race discrimination under Title VII just as it has done with sex discrimination.[21]

II. BACKGROUND

A. Discrimination Against Black Hair in Context

While Black hair can come in a variety of shapes and textures, it is commonly associated with naturally tight coils or tightly curled hair.[22] Current hairstyles associated with Black Americans include: locs, cornrows, twists, braids, Bantu knots, fades, and Afros.[23] Throughout history, Black people have chosen how to wear their hair for a variety of reasons, including

17. *See infra* Part II (explaining legal history of hair and sex discrimination).

18. *See infra* Part III (arguing that Title VII protects against Black hair discrimination by prohibiting race-based discrimination similar to its protection against sexuality and gender identity discrimination by prohibiting sex-based discrimination).

19. *See infra* Part III (hypothesizing that EEOC v. CMS should have held that an employer who does not hire an employee based on their Black hairstyle violates Title VII).

20. *See infra* Part IV (promoting that courts and Congress must explicitly expand Title VII to include prohibition of race-based hair discrimination).

21. *See infra* Part V (concluding that the *Bostock* decision applies to all Title VII protected classes, including race, and thus, race discrimination should include hair discrimination).

22. *See* NYC HAIR GUIDANCE, *supra* note 2, at 3. (discussing that Black hair is specifically protected under the New York Human Rights Law because its unique characteristics are often targeted for discrimination).

23. *See id.* (noting that how a person chooses to style their hair is highly personal).

religious, cultural, health, or personal reasons.[24] At the same time, Black hair has always been regulated by white America due to white beauty standards and systemic racism.[25]

Because of white Americans' derogatory views and outward discrimination toward Black people, especially toward Black women's hair, Black people have had to adapt and curtail their hair to fit white standards.[26] In the 1800s, Black people began to smooth their hair with hot combs.[27] In the early 20th century, they transitioned to using chemical straighteners, which contained lye, a toxin.[28] In the decades that followed, Black hairstyles evolved to include to Jheri curls, wigs, and braids.[29] During the height of the Civil Rights Movement in the 1960s, many Black people decided to embrace their natural hair as a political statement.[30]

Today's natural hair movement, which began in the early 2000s but became widely popular after 2010, has reemerged in popularity for several reasons, such as support for the Black Lives Matter movement and health concerns about the damaging effects of straightening Black hair.[31] Although natural hair has become more popular within the Black community, Black people still face discrimination at both their jobs and schools because of their

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24. *See id.* (listing reasons for the natural hair movement and Black people's connection to their hair in the United States).

25. *See* Tayo Bero, *Tangled Roots: Decoding the History of Black Hair*, CANADIAN BROAD. CORP. (last updated Oct. 15, 2021), https://www.cbc.ca/radio/ideas/tangled-roots-decoding-the-history-of-black-hair-1.5891778 (noting the importance of Black hairstyles in 15th century west Africa and tracing the history of Black hair discrimination to the transatlantic slave trade where slave owners policed Black people's hair as a form of cultural erasure).

26. *See* Shaunjaney L. Bryan, *The Politics of the Natural Hair Movement*, BROWN U. BLOG SERV. (Dec. 4, 2019), https://blogs.brown.edu/afri-0090-s01-2019-fall/2019/12/04/the-politics-of-the-natural-hair-movement/ (explaining that white people referred to the hair of Black slaves as "nappy" because "nap" meant cotton, which was the plant many enslaved people were forced to cultivate on plantations).

27. *See* Aimee Simeon, *Politics, Policy, & Social Media: How Natural Hair Has Influenced a Generation*, REFINERY 29 (Feb. 23, 2021, 10:30 AM), https://www.refinery29.com/en-us/natural-hair-industry-history-evolution (describing the different ways Black people, especially women, attempted to assimilate their hair).

28. *See id.*

29. *See id.*

30. *See* Bryan, *supra* note 26 (highlighting that many Black activists in the Black Panther Party like Angela Davis, wore Afros and other natural hairstyles to show their support of the Black Power movement).

31. *See id.*; NYC HAIR GUIDANCE, *supra* note 2, at 5 (revealing research that chemical-based styling can cause hair loss, breakage, and "conditions such as trichorrhexis nodosa and traction alopecia").

hair.[32] In 2014, the U.S. Department of Defense, the nation's largest employer, banned service members from wearing common Black hairstyles because they were "unkempt."[33] The military finally reversed its ban in 2017 only after massive protest from Black servicewomen.[34]

B. Is Hair Discrimination Race Discrimination?

1. Federal Protection: Under Title VII, Employers Cannot Discriminate Against a Person Because of Their Race

Congress enacted the Civil Rights Act of 1964, which includes Title VII.[35] Title VII states:

> 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 origin . . . .[36]

Although Title VII prohibits discrimination based on race, the statute does not define the term.[37] The Supreme Court has inconsistently defined race under Title VII by its meaning at the time of the statute's enactment or noted race is a sociopolitical construct defined by what was commonly conceived as race at the time of the case.[38] However, inconsistently defining race is not new to the Court. For example, the Court has historically wavered on the definition of race in immigration cases, where it has defined race as sociocultural or biological.[39] The American legal system has historically

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32. *See, e.g.*, Womack, *supra* note 15 (stating Black children start to face hair discrimination as young as five years old and continue to face discrimination into adulthood while employed).

33. *See* Bryan, *supra* note 26 (describing Black servicewomen's resistance to DOD's 2014 ban on Black hairstyles); NYC HAIR GUIDANCE, *supra* note 2 at 5, 7—8 (listing acceptable hairstyles associated with white people but banning practical Black hairstyles, such as Afros, twists, cornrows, and braids).

34. *See* NYC HAIR GUIDANCE, *supra* note 2 (lifting the ban only after continued protest from Black female soldiers on the easier maintenance of locs versus other styles).

35. 42 U.S.C. § 2000e *et seq.* (stating that employers cannot discriminate on the basis of race, color, religion, sex, or national origin).

36. *Id.* at § 2000e-2.

37. *See* § 2000e *et seq.*

38. *See* Al-Khazraji v. Saint Francis Coll., 481 U.S. 604, 608 (1987) (noting that nineteenth century and modern-day dictionaries defined race as "a family, tribe, people, or nation belonging to the same stock"); Morrison v. California, 291 U.S. 82, 85 (1934) (defining the Caucasian race as the common understanding of race).

39. *See* Laura E. Gómez, *Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field*, 6 ANN. REV. L. & SOC. SCI. 487, 490 (2010)

used an ambiguous definition of race to enforce racial apartheid amongst citizens, specifically targeting Black people or perceived Blackness to enforce discriminatory policies.[40]

2. Federal Court Precedent: Traditionally, Race-Based Hair Discrimination is Not Recognized as Race Discrimination

Over the past forty years, while many strides have been made to expand protection for sex discrimination, federal courts have refused to address Black people's complaints of harassment and discrimination based on their hair texture and style.[41] Specifically, courts have held that Title VII does not protect mutable characteristics of race, such as hairstyle but may protect immutable characteristics such as hair texture.[42]

One of the first race-based hair discrimination cases in the federal courts was *Jenkins v. Blue Cross Mutual Hospital Insurance*, which has been used by subsequent courts to hold that Title VII only protects immutable characteristics of Black hair, like hair texture.[43] In *Jenkins*, the Seventh Circuit held that a Black woman, who was fired after wearing her hair in an Afro, sufficiently claimed hair discrimination to support her race discrimination case under Title VII.[44] The court reasoned that the plaintiff's supervisor targeted the plaintiff's hair as "merely the method" to express his racial discrimination.[45] The court made no distinction between discrimination against traits that are mutable or immutable and simply stated

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(describing common conceptions of race); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 3–5 (1991) (discussing different definitions of race throughout history, including status-race, formal-race, culture-race).

40. *See* Destiny Peery, *(Re)defining Race: Addressing the Consequences of the Law's Failure to Define Race*, 38 CARDOZO L. REV. 1817, 1835–39 (2017) (highlighting the plethora of ways the law uses race to denote status or access to rights throughout American history).

41. *See* Greene, *supra* note 10, at 1036 (noting that the Eleventh Circuit's opinion in *EEOC v. CMS* "maintain[ed] this status quo and exacerbat[ed] the hyper-regulation of Black women's bodies via their hair").

42. *See id.* at 997 (citing Rogers v. Am. Airlines, 527 F. Supp. 229 (S.D.N.Y. 1981), as the origin of the legal fiction that Title VII's prohibition race discrimination only protects against biological race traits).

43. *See generally* Jenkins v. Blue Cross Mut. Hosp. Ins., 538 F.2d 164, 168 (7th Cir. 1976) (prohibiting employers from discriminating against Black employees' Afro hairstyle).

44. *See id.* (clarifying that hair discrimination is race discrimination).

45. *Id.* at 169 (holding that employer discriminated against plaintiff's race and sex when terminating her employment).

that an employer could not use Black hair as a proxy for race discrimination.[46]

In 1981, the United States District Court for the Southern District of New York held that Title VII protected "immutable characteristics" of race like the "Afro/bush" hairstyle but did not protect employees from discrimination against mutable characteristics such as braided hairstyles.[47] The seminal case involved Rogers, a Black woman who was employed by American Airlines as an airport operation agent.[48] American Airlines would not allow Rogers to wear her hair in cornrows despite the style's cultural and historical significance to Black women.[49] Thus, Rogers brought a lawsuit against her employers, claiming race and gender discrimination.[50] The court reasoned that braided hairstyles are not protected under Title VII because they are mutable, and thus, employers could permissibly discriminate against hairstyles that are socioculturally associated with a race or nationality.[51]

Similarly, in *Catastrophe Management Solutions*, the Eleventh Circuit reiterated that Title VII only prohibits discrimination based on immutable characteristics and not mutable characteristics that are culturally associated with race.[52] The court held that the definition of race should be determined by "looking at dictionaries in existence around the time of enactment" of Title VII, which during the 1960s was defined as biological traits and not culture or "individual expression."[53] Therefore, the court upheld the district court's dismissal of the EEOC claim against Ms. Jones's employer because locs were not considered an immutable characteristic of Black people.[54]

The EEOC argued that race discrimination under Title VII should include

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46. *See id.* at 168 (noting that an Afro is a hairstyle but not stating that an Afro is a biological attribute of Black people).

47. *See* Rogers v. Am. Airlines, 527 F. Supp. 229, 232 (S.D.N.Y. 1981) (describing Afros as hair texture and thus a biologically immutable characteristic of the Black race).

48. *See id.* at 231 (noting plaintiff was in a customer service role).

49. *See id.* at 231–32 (noting the employer did allow plaintiff to cover her hairstyle).

50. *See id*.

51. *See id.* at 232 ("An all-braided hairstyle is an 'easily changed characteristic,' and, even if socio-culturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer").

52. *See* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1021 (holding that an employer can discriminate based on Black hairstyles).

53. *See id.* at 1027–28 (defining race as culmination of biological traits).

54. *See id.* at 1031 (denying the EEOC's claim that locs are a "natural outgrowth" of the texture of black hair and, thus, an immutable characteristic of race).

mutable characteristics like locs since race is a social construct.[55] However, the court dismissed the EEOC's argument because no federal court had ever allowed Title VII discrimination claims to include race-based hair discrimination.[56] It also determined that even if the EEOC's definition of race was correct, defining race by cultural characteristics would be too difficult for courts because they would have to decide which cultural characteristics to protect under Title VII.[57]

The EEOC also argued the definition of race discrimination must expand because sex-based discrimination had already been expanded to include pregnancy discrimination.[58] However, the court determined that the EEOC's cited case, *Young v. United Parcel Service, Inc.*,[59] relied on the Pregnancy Discrimination Act, which the court held was not transferable to Title VII claims of intentional racial discrimination.[60]

In 2018, the NAACP Legal Defense Fund ("LDF") attempted to intervene on behalf of Ms. Jones after the Eleventh Circuit dismissed the EEOC case.[61] The LDF amicus brief argued that *Price Waterhouse*,[62] a famous sex discrimination case, applied to race discrimination because Title VII protected employees from discrimination based on stereotypes and that the court should abandon the immutable characteristics requirement for race

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55. *See id.* at 1022 (disregarding the EEOC Compliance Manual mandate that race includes cultural characteristics associated with a race, like grooming habits, and that locs are a racial characteristic unique to Black people, although other races can also have locs).

56. See *id.* at 1032 (citing federal court cases denying interpreting hair discrimination as race discrimination in federal district courts and in the Fourth and D.C. Circuits).

57. *See id.* at 1033–35 (explaining that Congress should define race).

58. *See id.* at 1025 (arguing that sex-based discrimination does not rely on the immutable/mutable characteristic standard created for race under Title VII*).*

59. *See generally* Young v. United Parcel Serv., Inc., 575 U.S. 206, 231–32 (2015) (holding that plaintiffs can sue under the Pregnancy Discrimination Act by showing that an employer's policies create a significant burden on a large percentage of pregnant employees by showing that non-pregnant employees receive more accommodation than pregnant employees).

60. *See Catastrophe Mgmt. Sols.*, 852 F.3d at 1029 (stating that for sex discrimination it does not violate Title VII for an employer to discriminate between men and women based on traits other than "immutable or protected characteristics").

61. *See EEOC v. Catastrophe Management Solutions*, NAACP LEGAL DEF. FUND, https://www.naacpldf.org/case-issue/eeoc-v-catastrophe-management-solutions/ (last visited Jan. 28, 2022) (noting that the EEOC refused to appeal the case to the Supreme Court).

62. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228, 255 (1989) (holding that sexual stereotyping violates Title VII).

discrimination since the "distinction ignored common sense and clear precedent of [the Supreme Court]."[63] However, the Supreme Court declined to review the Eleventh Circuit decision, maintaining the status quo that ensures Black people lack adequate federal protection against race-based hair discrimination.[64]

C. Expanding Definitions of Other Protected Classes: Title VII Protection Against Sex Discrimination

1. Federal Protection: Congress Has Broadened the Definition of Sex Discrimination Under Title VII.

Title VII did not originally define sex.[65] However, sex discrimination has expanded to include sexual orientation, gender identity, pregnancy, and other mutable characteristics.[66] Unlike the other protected classes in Title VII, Congress directly amended the law to define sex as pregnancy, childbirth, and any related medical conditions.[67] A plaintiff may prove sex discrimination like any other plaintiff suing under Title VII: by showing that their employer's action caused a disparate treatment or had a disparate impact on the plaintiff because of their protected class.[68]

2. Federal Court Precedent: The Court Has Expanded the Definition of Sex Discrimination Under Title VII to Include Mutable and Immutable

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63. *See* Brief for NAACP Legal Defense & Educational Fund, Inc. et al. as Amici Curiae Supporting Appellant, at 19–20, EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. 2016) (No. 14-13482), https://www.naacpldf.org/files/about-us/EEOC_v_CMS_Final.pdf (arguing that Title VII does not protect against only immutable characteristics because sex discrimination protects workers from discrimination based on mutable characteristics such as pregnancy, parenthood, and gender norms such as dress and makeup).

64. *See EEOC v. Catastrophe Management Solutions*, *supra* note 61 (noting Legal Defense Fund petitioned the Supreme Court to reconsider plaintiff's case but was denied).

65. *See* 42 U.S.C. § 2000e-2(a).

66. *See* 42 U.S.C. § 2000e(k) (expanding definition of the term "sex"); Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1745 (2020) (holding that discrimination based on sexual orientation or gender identity is discrimination "because of sex").

67. *See* Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (expanding sex discrimination to include pregnancy-related issues); Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071 (stating Title VII was amended in 1978 to include the Pregnancy Discrimination Act of 1978 and again in 1991 to allow plaintiff to receive compensatory damages for violations).

68. *See* 42 U.S.C. § 2000e-2(k) (detailing that a plaintiff may prove a Title VII violation by proving disparate treatment or impact).

Characteristics of Sex.

a. Prohibiting Sex Discrimination Based on Mutable Characteristics

Over the last half-century, courts have greatly expanded the definition of sex under Title VII.[69] For example, sex is not just the immutable biological characteristic of sex; courts have expanded the definition to include mutable characteristics such as sex stereotyping, sexual activity, and pregnancy.[70] Sex discrimination also includes "sex plus," which courts have defined as when an employer creates a different criterion for employment based on the applicant's gender.[71]

b. Bostock Decision: Expanding Sex Discrimination to Include Sexuality and Gender Identity

In 2020, the Supreme Court held that sexual orientation and gender identity were both covered under the term sex in Title VII.[72] According to the Court, these identities are protected from discrimination because (1) discrimination based on sexual orientation is disparate treatment based on the employee's sex and the sex of their partner, and (2) discrimination based on gender identity is disparate treatment of an employee who does not identify with their sex assigned at birth, as compared with a cisgender employee, who identifies with their sex assigned at birth.[73]

In *Bostock*, the Supreme Court addressed the question of whether an

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69. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (prohibiting discrimination based on sex stereotyping); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (permitting sex discrimination claims against persons of the claimant's sex); Young v. United Parcel Serv., 575 U.S. 206, 229 (2015) (discrimination based on capacity to work due to pregnancy).

70. *See generally Price Waterhouse*, 490 U.S. at 251 (sex stereotyping); *Bostock*, 140 S. Ct. at 1731 (sexual orientation and gender identity); *Young*, 575 U.S. at 229 (pregnancy).

71. *See* Squire Patton Boggs, *Federal Appeals Court Allows Title VII "Sex-Plus-Age" Claims (US)*, EMP. L. WORLDVIEW (July 28, 2020), https://www.employmentlawworldview.com/federal-appeals-court-allows-title-vii-sex-plus-age-claims-us/ (determining that sex discrimination still occurs when an employer discriminates based on a person's sex and another factor not considered a protected characteristic under Title VII); *see also* Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 198 (1991) (holding that an employer who barred fertile women but not fertile men from working jobs that exposed them to lead violated Title VII by discriminating because of sex).

72. *See generally* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020) (holding that sexual orientation and gender identity are protected under Title VII).

73. *See id.* at 1746 (stating sex discrimination should be expanded to include protection for a person's sexuality and gender identity).

employer who fires an employee for their sexual orientation or gender legally discriminates against its employee.[74] The Supreme Court expanded the definition of sex discrimination by ruling that an employer violates Title VII when it discriminates against an individual (by terminating them or treating them differently) on the basis in part or wholly based on the individual's sex.[75] The employer's motivation or label for its discrimination against gender identity or sexuality is irrelevant in determining if a Title VII violation occurred.[76] Additionally, an employer discriminates against its employee's sex if it fires the employee because of "both the individual's sex and something else."[77] The Court further states that an employer is liable for sex discrimination even if it treats males and females comparably as a group.[78] Finally, the Court, citing that sex discrimination has expanded to include sexual harassment and discrimination against motherhood, held that sex discrimination should be viewed broadly since Congress included no exceptions to what constituted sex discrimination.[79] Therefore, any form of sex discrimination is prohibited under Title VII.[80]

While the case is notable for expanding the definition of sex discrimination, the Court also discussed how to interpret Title VII.[81] The Court determined that the legislative history is irrelevant when the plain, unambiguous statutory language prohibits employment discrimination because of gender.[82] The Court emphasized that the legislature's definition

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74. *See id.* at 1737 (combining cases from the Second, Sixth, and Eleventh Circuit courts where employees were fired due to their sexuality or gender identity).

75. *See id.* at 1745 (finding that discrimination based on sexuality and gender identity naturally involve considering the plaintiff's sex and the sex of their partner or the plaintiff's sex assigned at birth).

76. *See id.* at 1742–45 (clarifying that firing an employee for being gay or transgender is necessarily sex discrimination despite motivation to not discriminate against an entire gender).

77. *See Bostock*, 140 S. Ct. at 1745, 1748 (comparing the plaintiff being fired due to their sex and the sex of their partner to a woman being fired because she is a mother).

78. *See id.* at 1742 (reasoning that "homosexuality and gender identity are inextricably bound up with sex" because an employer intentionally treats the employee differently because of their sex).

79. *See id.* at 1747 (declaring that "when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule").

80. *See id.* (stating that any form of sex discrimination is prohibited no matter how it manifests itself or the employer labels the discrimination).

81. *See id.* at 1740—41 (finding that discrimination because of a protected class under Title VII means the court (1) looks at a protected class (sex, race, nationality, etc.); (2) determines whether the employer discriminated against a protected class; and (3) determines that the discrimination was directed at an individual of this class).

82. *See id.* at 1749 (finding that Title VII's language is not ambiguous when

of sex during the drafting of the statute is not up for debate, and Title VII should be viewed broadly to include any groups affected by the "because of sex" category.[83]

III. ANALYSIS

A. Title VII's Prohibition on Discrimination Because of Race Should Expand to Preclude Discrimination of Black Hair.

1. Because Both Race and Sex are Protected Under Title VII, the Statutory Interpretation of Race Discrimination Should Broaden to Include Hair Discrimination.

In *Catastrophe Management Solutions*, the Eleventh Circuit denied comparing racial discrimination to sex-based pregnancy discrimination because protections against pregnancy discrimination rely on the Pregnancy Discrimination Act in Title VII.[84] However, sex-based discrimination based on sexuality and gender identity relies on the same subsection of Title VII as race-based discrimination.[85] Therefore, the Court's interpretation of Title VII's statutory language for race discrimination should mirror statutory interpretation for sex discrimination.[86] To apply this rule, the court should first determine if the plaintiff was a member of a racial group, which is a protected characteristic under Title VII.[87] Second, it should determine whether the employer discriminated against the plaintiff's racial group, meaning that the employer treated racial groups differently or favored one group over the other.[88] Finally, it should determine whether the employer's

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involving this case's facts).

83. *See Bostock*, 140 S. Ct. at 1751 (citing Pa. Dept. of Corr. v. Yeskey, 524 U.S. 206, 208 (1998) (holding that prisoners were covered under the Americans with Disability Act, despite debate that Congress did not intend to help prisoners)). *But see id.* at 1755 (Alito, J., dissenting) (stating that Congress did not intend Title VII to extend to sexuality or gender identity).

84. *See Catastrophe Mgmt. Sols.*, 852 F.3d at 1029 (denying the EEOC's reliance on the Pregnancy Discrimination Act as an example of Title VII protecting mutable characteristic of a protected class).

85. *See Bostock*, 140 S. Ct. at 1738 ("Each employee brought suit under Title VII alleging unlawful discrimination on the basis of sex" under 42 U.S.C. § 2000e–2(a)(1)).

86. *See id.* at 1747–49 (finding that discrimination because of a protected class under Title VII for sex discrimination is unambiguous and applied broadly to discrimination against the protected class no matter how the discrimination manifests itself).

87. *See id.* at 1740–41 (outlining the steps to determine if plaintiff meets definition of discrimination under Title VII).

88. *See id.* (describing what was required to make a finding of discrimination).

discrimination was directed at the plaintiff as an individual.[89]

In *Bostock*, the Supreme Court determined that legislative history is irrelevant when reviewing Title VII's protection of a protected class when the plain, unambiguous statutory language prohibits employment discrimination of that class.[90] Therefore, although the 88th Congress may not have intended Title VII to protect gay and transgender individuals from discrimination, this does not mean courts can interpret Title VII as precluding these individuals from being covered under protection from sex-based discrimination.[91] Many Black hair discrimination cases look to precedent to determine if hair discrimination is covered under Title VII's prohibition against race discrimination, leading courts to perpetuate the legal fiction that race discrimination only prohibits discrimination against biological traits.[92] However, whether the 88th Congress wanted to protect Black people from hair discrimination is irrelevant to whether hair discrimination should be considered a type of race-based discrimination.[93]

The Supreme Court has consistently stated that Title VII should be viewed broadly.[94] While the majority in *Bostock* purport not to redefine "sex" as it was interpreted when Title VII was enacted, the Court clarifies that there is a difference between the legislature's intention for Title VII and the plain statutory language within Title VII itself.[95] Under a broad reading of Title VII's protection because of race, any type of race-based discrimination is

89. *See id.* (stating that a employee can discriminate against an individual's protect class even if they do not discriminate against all members of the individual's protected class).

90. *See id.* at 1749 (deciding that Title VII presents unambiguous language when prohibiting employment discrimination because of gender).

91. *See id.* at 1748–54 (stating that who the drafters intended to protect when writing Title VII is irrelevant).

92. *See, e.g.*, *Catastrophe Mgmt. Sols.*, 852 F.3d at 1027 (determining that race discrimination could not include mutable characteristics of race like hairstyle because legislative drafters at the time likely would have considered race to include common biological traits traced to a similar ancestry).

93. *See Bostock*, 140 S. Ct. at 1750 (holding that a legislature's intention on who the statute applies to is not relevant when the statutory language is broader and more inclusive).

94. *See id.* at 1747 (applying a broad statutory interpretation to Title VII sex discrimination); Jenkins v. Blue Cross Mut. Hosp. Ins., 538 F.2d 164, 168–69 (7th Cir. 1976) (stating that courts should interpret Title VII broadly to protect discrimination against "Afro hairstyles").

95. *See Bostock*, 140 S. Ct. at 1741 (holding that an "employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff's sex contributed to the decision.").

prohibited.[96] When a hairstyle is linked to a certain race, it becomes a characteristic or indicator of the race.[97] Therefore, an employee's racially linked hairstyle must be protected from discrimination.[98] This interpretation of Title VII simplifies the factors a court must consider by avoiding what the definition of race was when Title VII was drafted because the plaintiff only needs to prove they belong to a certain race and their race played a role in why they were discriminated against.[99]

2. Discrimination "Because of Race" Under Title VII Should Meet the Same Standard as Sex Discrimination in Bostock.

a. An Employer Who Discriminates Against an Employee in Part or in Whole Because of Their Race Violates Title VII.

In *Bostock*, the Supreme Court held that an employer violates Title VII if the employer discriminates against an individual's sex by disparately treating a person partially or wholly because of their sex.[100] The Supreme Court further explained that an employer who fires a person based on their protected class and "something else" still commits a Title VII violation because the employer considered the individual's protected class when it fired the employee.[101] Applying this holding to race discrimination, an employer discriminates against an individual's race if it disparately treats a person partially or wholly because of their race and/or when it fires an employee based on their race and some other characteristic.[102] In the hair

96. *See* § 2000e-2(a) (prohibiting discrimination "because of" race by employers).

97. *See* NYC HAIR GUIDANCE, *supra* note 2, at 6–7 (noting that New York's hair discrimination statute assumes employers are aware of the cultural and racial ties certain hairstyles (such as twists, braids, cornrows, Afros, Bantu knots, fades, and/or locs) have to the Black community).

98. *Cf. Bostock*, 140 S. Ct. at 1741 (finding that Title VII protects characteristics associated with a protected class of sex).

99. *Contra* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1033–34 (11th Cir. 2016) (arguing that hair discrimination cannot be a protected characteristic of race under Title VII because defining race as cultural characteristic would be too difficult for courts because they would have to decide which cultural characteristics to protect under Title VII).

100. *See Bostock*, 140 S. Ct. at 1737 (holding that because "[s]ex plays a necessary and undisguisable role" when discriminating against someone based on their sexuality or gender identity, this violates Title VII).

101. *See id.* at 1742, 1748 (holding that the "something else" need not be a characteristic of a protected class if the employer also fired the employee because of their sex).

102. *See id.* at 1741 (holding that an employer who fires an employee at least in part based on sex violates Title VII even if other factors contributed to firing the employee).

discrimination cases discussed, the plaintiffs were Black individuals who sued because their employer discriminated against them on the basis of their race and hairstyles.[103] Because these hair discrimination cases are based at least partially on the plaintiff's race, it should not matter if their hairstyles are not specifically protected under Title VII.[104] Thus, courts must interpret Title VII to protect Black employees from discrimination whenever an employer considers the employee's race to treat the employee differently.[105]

b. An Employer's Motivation or Label for its Discrimination is Irrelevant under Title VII When the Employer Discriminates Based on a Characteristic that is Naturally Associated with Race.

In *Bostock*, the Supreme Court held that an employer who does not intentionally discriminate on the basis of sex still commits a Title VII violation if they intentionally discriminate against an employee's sexual orientation or gender identity.[106] The Court supports its assertion by comparing employers discriminating based on sexual orientation or transgender status to employers discriminating against mothers but not all women.[107] In both cases, an entire gender is not discriminated against, but rather, a subset of the gender is targeted for discrimination based on their gender and some other undesirable characteristic.[108] Although Title VII does not specifically define sex, the Supreme Court clarified in *Bostock* that sex

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103. *See* Jenkins v. Blue Cross Mut. Hosp. Ins., 538 F.2d 164, 165 (7th Cir. 1976) (plaintiff alleged discrimination because she was Black and wore an Afro hairstyle); Rogers v. Am. Airlines, 527 F. Supp. 229, 231 (S.D.N.Y. 1981) (plaintiff alleged discrimination because she was Black and wore cornrow hairstyle); Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 259–60 (S.D.N.Y. 2002) (plaintiff alleged discrimination because he was Black and had a loc hairstyle); *Catastrophe Mgmt. Sols.*, 852 F.3d at 1020-22 (plaintiff alleged discrimination because she was Black and had a loc hairstyle).

104. *Cf. Bostock*, 140 S. Ct. at 1742, 1748 (holding that employer's actions are discriminatory if it discriminates based on the employee's protected class and some unrelated characteristic).

105. *Cf. id.* at 1737–38 (stating that employer violates Title VII by discriminating against an employee's sexuality or gender identity).

106. *See id.* at 1745 (stating that an employer, who intentionally discriminates against a gay woman or a trans woman but does not intentionally discriminate against heterosexual or cisgender women, commits a Title VII violation because the employer targets the gay or trans woman's identity because of their sex).

107. *See id.* (citing Phillips v. Martin Marietta Corp., 400 U.S. 542, 543 (1971)) (holding that considering a woman's status as a mother, but not a man's status as a father, is sex discrimination).

108. *See id.* (citing Phillips v. Martin Marietta Corp., 400 U.S. 542, 543 (1971)) (holding that considering a woman's status
as a mother, but not a man's status as a father, is sex discrimination).

includes sexual orientation or gender identity because both are associated with sex and characteristics of sex.[109]

This same logic can be applied to discrimination against Black hair. Although hairstyle and grooming culture may not constitute race by itself, discriminating against Black employees because of their hairstyles, which are associated with Black people, is discrimination because of race.[110] Some courts have argued that hairstyle cannot be protected under Title VII because it is a cultural characteristic of race rather than an immutable, biological characteristic of race; however, Black employees who are discriminated against for wearing Black hairstyles still fit the Court's biological definition of racially Black.[111]

Additionally, the Seventh Circuit, in *Jenkins v. Blue Cross Mutual Hospital*, made a comparable analysis to *Bostock*.[112] It held that discrimination against a Black woman for her "Afro hairstyle" is protected under race discrimination because the style "was merely the method by which the plaintiff's supervisor allegedly expressed the employer's racial discrimination."[113] Studies have shown that perceptions of racial appearance influence how a person racially categorizes others, especially if the observer thinks the other person is an "obvious member[] of a particular racial group."[114] When federal courts acknowledge that hairstyles can be a mutable characteristic of race, they necessarily acknowledge that these Black hairstyles are typically associated with Black people.[115] Thus, using the reasoning developed in *Bostock*, courts must also acknowledge that Title VII

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109. *See id.* at 1747 (stating that discriminating against a characteristic associated with sex, like sexuality or gender identity, is sex discrimination).

110. *See id.*; *see also Rogers*, 527 F. Supp. at 232; EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1030–32 (11th Cir. 2016) (acknowledging that the Black plaintiffs' hairstyles are culturally associated with Black people but denying their race discrimination claims because hairstyle is mutable). *But see* Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 262 (S.D.N.Y. 2002) (denying the plaintiff's claim that the Black hairstyle, locs, is associated only with Black people).

111. *See Catastrophe Mgmt. Sols.*, 852 F.3d at 1027–28; *see also* Rogers v. Am. Airlines, 527 F. Supp. 229, 232 (S.D.N.Y. 1981) (stating that Title VII may protect against discrimination based on hair texture because it is an immutable, biological characteristic of race).

112. *See* Jenkins v. Blue Cross Mut. Hosp. Ins., 538 F.2d 164, 168 (7th Cir. 1976) (holding that plaintiff's employer discriminated against her because of her race and sex).

113. *See id.* (omitting any mention that Title VII only protects against biological racial traits).

114. *See* Peery, *supra* note 40, at 1859 (providing research from three studies that revealed appearance mattered more to racial categorization than to racial ancestry).

115. *See Rogers*, 527 F. Supp. at 232; *Catastrophe Mgmt. Sols.*, 852 F.3d at 1030–32 (acknowledging that the Black plaintiffs' hairstyles are culturally associated with the Black race but denying their race discrimination claims because hairstyle is mutable).

protects employees from discrimination on the basis of their Black hairstyles because the hairstyles are necessarily associated with the Black race.[116]

c. An Employer Who Discriminates Against a Characteristic Naturally Associated with One Race but Applies the Discrimination Equally Across All Races Violates Title VII Because All Manifestations of Discrimination Against a Protected Class are Prohibited.

Federal courts have reasoned that because an employer's grooming policy is "neutral," meaning it is applied to all workers equally, Black plaintiffs cannot allege that they face discrimination because of their hairstyle.[117] However, the Supreme Court in *Bostock* rebuked this argument, stating that Title VII does not require the plaintiff to show that both genders have the same adverse consequences because this would incorrectly imply that a plaintiff must show that their protected class was the sole reason for the employer's negative action.[118] Similarly, New York's hair discrimination bill prohibits any discriminatory hair policy, despite its "neutral" application.[119] The legislature reasoned that what an employer deems as "messy grooming" is generally tied to racist stereotypes toward Black people and their appearance.[120] Additionally, these supposedly neutral grooming policies rarely target non-Black hairstyles, which reinforces that the employer's policy is racially discriminatory in nature.[121]

Finally, Title VII prohibits discrimination toward an individual of a

116. *See Bostock*, 140 S. Ct. at 1747*; see also* NYC HAIR GUIDANCE, *supra* note 2, at 3-4 (noting different hairstyles associated with the Black Community).

117. *See Rogers*, 527 F. Supp. at 232; Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 264 (S.D.N.Y. 2002); *Catastrophe Mgmt. Sols.*, 852 F.3d at 1031–32 (denying Black plaintiffs' claims of Title VII violation because the employers' policies were race-neutral, and discrimination based on hairstyle is not race discrimination).

118. *See Bostock*, 140 S. Ct. at 1745–49 (denying the employer's argument that stricter scrutiny must be used if the employer's policies have the same negative impact on men and women); *see also* Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(m) (West) (stating that is unlawful for an employer to consider an employee's race, color, religion, sex, or national origin as a motivating factor for any discriminatory employment practice).

119. *See* NYC HAIR GUIDANCE, *supra* note 2, at 1, 7 (highlighting that racial stereotyping is illegal under New York law).

120. *See id.* at 7 (highlighting that racial stereotyping is illegal under New York law and citing to Jenkins v. Blue Cross Mutual Hospital).

121. *See id.* (noting that employers do not make hair or grooming policies that are commonly associated with white people).

protected class.[122] Therefore, the plaintiff is not required to prove that all employees who are similarly situated also faced negative actions by the employer.[123] The plaintiff must only prove that they, as an individual, were discriminated against because of their protected class.[124] Thus, even if other Black employees were not discriminated against for their hairstyle, like in *Eatman*,[125] the plaintiff may still prove a valid Title VII violation by showing that their Black hairstyle and race contributed to their employer's negative treatment of them.[126]

B. What the Eleventh Circuit Gets Wrong About Racial Discrimination Against Black Hair: The Eleventh Circuit Court's Decision in EEOC v. Catastrophe Management Solutions Incorrectly Interprets Race Discrimination under Title VII and Incorrectly Defines Race.

Wendy Greene, the premiere legal scholar on discrimination against Black hair, recently summarized the Eleventh Circuit's decision in *EEOC v. Catastrophe Management Solutions* as a:

> . . . narrow understanding of race and racial discrimination [giving] employers license to engage in the hyper-regulation or policing of Black workers who expressed themselves in ways that reflected their racial or cultural identity, which effectively perpetuated harmful, deeply entrenched stigmas associated with Blackness. Moreover, courts' adoption of the immutability doctrine simply sustained the structures that civil rights legislation like Title VII was poised to dismantle: institutionalized barriers to Black workers' equal employment opportunity, attendant economic security, and full inclusion in the contemporary workplace rooted in the stigmatization of Blackness.[127]

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122. *See Bostock*, 140 S. Ct. at 1740–41 (emphasizing that an employer may not discriminate against an individual).

123. *See id.* at 1741 (providing the example that a male boss harassing his female employee commits sex discrimination even if the boss treats women favorably overall).

124. *See id.* (stating that an employer who discriminates against a masculine woman and a feminine man violates both employees' rights under Title VII).

125. *See* Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 264, 267 (S.D.N.Y. 2002) (holding in favor of the employer because the plaintiff failed to show that the employer's grooming policy severely impacted Black people as a class).

126. *See Bostock*, 140 S. Ct. at 1741 (stating that an employer who discriminates against a masculine woman and a feminine man violates both employees' rights under Title VII).

127. *See* Greene, *supra* note 10, at 1019–21 (discussing her surprise at the Eleventh Circuit's decision despite an increase in employers, like the United States military, allowing Black people to wear their natural hair in protective styles and a resurgence in

Even though the EEOC Compliance Manual was updated to ensure Black people's natural hair and hairstyles are protected, the Eleventh Circuit broke away from the common notions that race is sociocultural and that certain hairstyles are commonly associated with certain races.[128] Thus, the court perpetuated the myth that Title VII only protects against discrimination of biological characteristics of race.[129] However, in light of the Supreme Court's decision in *Bostock*, the Eleventh Circuit's holding is incorrect because it considers whether the racial characteristic discriminated against is immutable and it defines race as biological.[130]

1. Determining Whether Racial Characteristics are Mutable is Irrelevant Because Racial Discrimination Under Title VII Should Be Interpreted Broadly.

a. Applying Bostock's Definition of Title Discrimination to EEOC v. Catastrophe Management Solutions.

The Eleventh Circuit in *Catastrophe Management Solutions* incorrectly decided in favor of the employer because it believed that Title VII only protects against immutable characteristics.[131] However, if the Eleventh Circuit applied *Bostock*'s statutory interpretation of Title VII, it would have ruled that CMS (Ms. Jones's employer) discriminated against Ms. Jones by refusing to hire her unless she cut her locs.[132] CMS relied, at least in part, on Ms. Jones's race when it declared that locs are unprofessional since Ms. Jones was a visibly Black woman and wore a hairstyle commonly associated with Black people.[133] Additionally, CMS's belief that locs are "messy" is

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the natural hair movement amongst Black people).

128. *See id.* (defining race as sociocultural). *But see* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1021, 1026 (11th Cir. 2016) (denying the EEOC's new stance on hair discrimination because it contradicted its stance from a decade ago).

129. *See Catastrophe Mgmt. Sols.*, 852 F.3d at 1026–27 (defining race as biological).

130. *See id.*; *see also Bostock*, 140 S. Ct. at 1741 (holding that an employer violates Title VII when it discriminates partially or wholly because of sex).

131. *See Catastrophe Mgmt. Sols.*, 852 F.3d at 1021, 1028 (holding that Title VII protects only immutable characteristics of both sex and race); *see also* Bostock v. Clayton Cnty. Bd. of Comm'rs, 723 F. App'x 964 (11th Cir. 2018), *rev'd and remanded sub nom.* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020) (holding that discrimination based on sexuality is not discrimination based on sex under Title VII).

132. *Cf. Bostock*, 140 S. Ct. at 1741 (holding that employer violates Title VII when it discriminates partially or wholly because of sex).

133. *See Catastrophe Mgmt. Sols.*, 852 F.3d at 1021–22 (showing that Ms. Jones's employer was aware she was Black and that she wore locs).

rooted in racial stereotyping.[134] Therefore, race played a "necessary and undisguisable role" when CMS discriminated against a specifically Black hairstyle, which violated Title VII's provision against race discrimination.[135] Additionally, contrary to the Eleventh Circuit's belief, Title VII does not allow discrimination just because it is neutrally applied.[136] Therefore, although CMS had a "neutral" grooming policy that required "professional and business-like" appearance, the policy was applied in a discriminatory fashion that targeted Black hairstyles and Black people in violation of Title VII.[137]

b. The Eleventh Circuit's Requirement that Racial Discrimination Only Involve Immutable Characteristics is Outside the Statutory Language of Title VII.

Ms. Jones successfully proved that CMS considered her race when they fired her.[138] CMS openly admitted that it would have hired Ms. Jones, but for her locs, a culturally Black hairstyle, and that it hired another Black employee only after it forced him to cut his locs.[139] Although the Eleventh Circuit argues that there is precedent for federal courts not to protect hair discrimination under Title VII, the court's statutory interpretation is at odds with a broad reading of the statute.[140] Historically, the courts have broadly

134. *See id.* (stating employer fired Ms. Jones because locs "tend to get messy" and therefore violated the "businesslike image" the employer wanted to convey).

135. *Cf. Bostock*, 140 S. Ct. at 1737–38 (finding that discriminating against a person's sexuality or gender identity requires the employer to consider the person's sex); *see also* NYC HAIR GUIDANCE, *supra* note 2, at 1 (noting that a common racial stereotype is associating Black people's hair with being messy and unprofessional).

136. *See Bostock*, 140 S. Ct. at 1741, 1745–49 (stating that a plaintiff must only prove that employer discriminated against them at least partially because of their protected class). *But see Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1026 (11th Cir. 2016) (reaffirming the McDonnell Douglas Test requiring a plaintiff to prove the employer intentionally discriminated against plaintiff because of their protected status, but not allowing in evidence that employer's disparate treatment impacted the protected class as a whole).

137. *See Catastrophe Mgmt. Sols.*, 852 F.3d at 1021–22 (stating that CMS's policy did not explicitly prohibit locs, but CMS's human resources manager later decided that Ms. Jones's locs could be messy and therefore violated the company grooming policy).

138 *See id.* at 1022.

139 *See id.* (stating that locs violated the employer's "neutral" grooming policy requiring businesslike appearance).

140. *Compare id.* at 1032–33 (citing prior cases such as Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 259–67 (S.D.N.Y. 2002)) *and* Rogers v. Am. Airlines, 527 F. Supp. 229, 232 S.D.N.Y. 1981); Cooper v. Am. Airlines, Inc., 149 F.3d 1167 (4th Cir. 1998) (holding that hair discrimination is not race discrimination), *with Bostock*, 140 S.

read that sex discrimination encompasses mutable characteristics such as pregnancy, appearance, and, most recently, sexual orientation and gender identity.[141] Therefore, courts have precedent to interpret race, another protected class, as broadly as sex discrimination under Title VII discrimination.[142]

2. The Definition of Race

a. Federal Circuits Lack the Authority to Define Race When Both Congress and the Supreme Court Have Intentionally Left the Term Undefined.

The Eleventh Circuit's finding that race is biological is significant and controversial.[143] Because race is not defined under Title VII, it is consequential that the Eleventh Circuit incorrectly stated that the courts have consistently defined race as biological.[144] The Supreme Court has gone back and forth on how it has defined race when deciding eligibility for citizenship.[145] By the time the 1964 Legislature drafted Title VII, there were

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Ct. at 1747 (finding that Congress has always viewed discrimination against Title VII protected classes broadly).

141. *See generally Bostock*, 140 S. Ct. at 1747 (holding that discrimination against sexuality and gender identity is sex discrimination); Oncale v. Sundowner Offshore Servs., Inc., 118 S.Ct. 1003, 1003 (1998) (holding that same-sex harassment is sex discrimination); Phillips v. Martin Marietta Corp, 91 S. Ct. 496, 498 (1971) (holding that discrimination against mothers with young children is sex discrimination); Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1343 (2015) (holding discrimination against pregnant women is sex discrimination).

142. *See generally Bostock*, 140 S. Ct. at 1747 (holding as recently as 2020 that Title VII should be interpreted broadly); *see also* Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 25, 2021) (announcing that the *Bostock* definition of sex discrimination extends to Title IX, the Fair Housing Act, and section 412 of the Immigration and Nationality Act).

143. *See Catastrophe Mgmt. Sols.*, 852 F.3d at 1027 (holding that Title VII legislature in 1964 likely thought race was a biological trait).

144. *See id.* at 1034–35 (stating that every court has dismissed the claim that Title VII protects hairstyles culturally associated with race, and that describing race as not biological is a more recent phenomena); 42 U.S.C. § 2000e *et seq.*

145. *Compare* Dow v. United States, 226 F. 145, 148 (4th Cir. 1915) (holding that certain immigrants from Asian regions could be considered white and could therefore become naturalized citizens because they were legally and scientifically classified as white), *with* Ozawa v. United States, 43 Sup. Ct. 65, 68–69 (1922) (holding that a Japanese immigrant was not a citizen because the white race is not defined by phenotypic characteristics but rather who is historically considered white), *and* United States v. Thind, 43 S. Ct. 338, 340 (1923) (holding that, although an Indian immigrant was

already several legal interpretations of race: including race as biological, cultural, socially-constructed, status-based, and historically-based.[146] In fact, race has never been truly defined by either the courts or Congress, and since the founding of this country, race has been used as a categorical barrier to rights for Black Americans.[147]

b. Common Conception of Race: Race is a Sociocultural Identity.

Because the United States legal community has failed to provide an adequate definition of race, courts should define race as a sociocultural characteristic since this is the definition currently used by most social scientists and people in the United States.[148] By defining race as sociocultural, the definition of race would encompass the different styles, dress, grooming habits, and cultural norms commonly held by certain races.[149] Title VII was meant to protect people from being discriminated against because of their race.[150] Therefore, a broader definition better protects people from employers' race-based discrimination via neutral policies that mask the malignant nature of the employers' actions.[151]

While *Bostock* did not change the definition of sex as biological, it did alter the definition of sex discrimination under Title VII to include discrimination against sexual orientation and gender identity.[152] However,

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considered biologically white due to his "Aryan" roots, he was not a citizen because a person is only legally white if they are commonly considered as white).

146. *See* Laura Gomez, *Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field*, 6 ANN. REV. L. & SOC. SCI. 487, 490 (2010) (discussing different definitions of race throughout history); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 3–5 (1991) (discussing how the Supreme Court has defined race in four separate categories to promote color-blind Constitutionalism).

147. *See* Peery, *supra* note 40, at 1851 (highlighting that race was used in race determination cases to decide a person's status as free or enslaved, in anti-miscegenation laws to prevent race mixing, and in generalized race statutes to determine whether a person was not Black and thus eligible for certain rights).

148. *See id.* at 1851, 1872 (explaining that courts have failed to define race but that race has become more commonly defined as sociocultural rather than biological).

149. *See* Greene, *supra* note 10, at 1009 (arguing that race encompasses a person's skin color, dress, speech, behavior, and way of thinking).

150. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a) (stating that employers cannot adversely affect their employees "because of" race).

151. *See* Greene, *supra* note 10, at 988 (discussing how broadly defining race protects Black employees from discrimination).

152. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1747–49 (2020) (applying a broad statutory interpretation to Title VII sex discrimination cases).

the *Bostock* decision was not the first time the Supreme Court altered the definition of sex discrimination: it previously held that discrimination of pregnancy and conditions of pregnancy, motherhood or parenthood, gender stereotyping, and sexual harassment were all forms of sex discrimination.[153] Thus, the Supreme Court has precedent for defining race discrimination as inclusive of all characteristics related to a race, whether biological or cultural, without defining race itself.[154]

IV. POLICY RECOMMENDATION

A. Congress Should Clarify and Expand the Definition of Race-Based Discrimination to Include Hair Type and Style Like it Has Expanded Sex-Based Discrimination Under Title VII.

In 1978, Congress amended Title VII to ensure the term "sex" protected employees from pregnancy-based discrimination.[155] Yet, neither Congress nor the courts have created a definitive definition of race or race discrimination.[156] Thus, federal courts have maintained the exclusionary status quo that only immutable traits of race are protected under Title VII by citing several decades of precedent and highlighting Congress's inaction.[157]

Congress can ensure private employers respect the cultural characteristics of a person's race by amending Title VII to explicitly include discrimination against racially associated hairstyles as race discrimination. Other legal scholars have argued that hair discrimination can be protected by passing the Federal CROWN Act.[158] However, the CROWN Act specifically ensures

153. *See, e.g.*, Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (holding that discrimination against mothers with young children is sex discrimination).

154. *But see* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1021, 1026 (11th Cir. 2016) (defining race as biological).

155. *See* 42 U.S.C.A. § 2000e(k) (stating Title VII was amended in 1978 to include the Pregnancy Discrimination Act of 1978 and again in 1991 to allow plaintiff to receive compensatory damages for violations).

156. *See* Peery, *supra* note 40, at 1851 (explaining that both Congress and courts have failed to define race).

157. *See Catastrophe Mgmt. Sols.*, 852 F.3d at 1032 (citing to prior cases that have held hair discrimination is not race discrimination such as: Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 259–67 (S.D.N.Y. 2002); Rogers v. Am. Airlines, 527 F. Supp. 229, 232 (S.D.N.Y. 1981); Brown v. D.C. Transit Sys., 523 F.2d 725, 726 (D.C. Cir. 1975); Cooper v. Am. Airlines, Inc., 149 F.3d 1167 (4th Cir. May 26, 1998)).

158. *See generally* Greene, *supra* note 16. *See also* Nadijah Campbell, *Protecting the Black Crowning Glory: Why Legislation is Needed to Make up for Federal Discrimination Statutes' Failure to Protect Black Hair*, 13 DREXEL L. REV. 143, 188 (2020) (advocating for state and federal CROWN Acts but acknowledging gaps in these

that workplaces and private and public schools do not discriminate against "traits historically associated with race, such as hair texture and protective hairstyles . . . "[159] This fails to address the elephant in the room: race has never been defined, despite the constitutional and federal protections for race.[160] While there are many conceptions of race within the field of social sciences, most scholars have moved away from defining race as biological.[161] In the United States, race is most popularly described as a sociocultural characteristic.[162] Professor Wendy Greene has proposed that race should be defined as "physical appearances and behaviors that society, historically and presently, commonly associates with a particular racial group, even when the physical appearances and behaviors are not 'uniquely' or 'exclusively' 'performed' by, or attributed to a particular racial group."[163]

Congress must amend Title VII to include race-based hair discrimination to ensure that an employer does not escape liability by discriminating against a person's race by targeting their mutable characteristics. Therefore, adopting a sociocultural definition of race, like Professor Greene's, would ensure that if a characteristic is associated with a certain race, Title VII would prohibit employers from discriminating because of this characteristic.[164]

B. Courts Should Expand the Definition of Race-Based Discrimination to Include Hair Type and Style Discrimination.

Not only should Congress amend Title VII to explicitly prohibit discrimination based on mutable and immutable racial characteristics, but

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types of bills).

159. *See The Crown Act*, DOVE, https://www.dove.com/us/en/stories/campaigns/the-crown-act.html (last visited Mar. 13, 2022).

160. *See* Peery, *supra* note 40, at 1851 (explaining that both Congress and the courts have failed to define race).

161. *See id.* at 1872 (stating that American law has struggled to define race since the inception of this country).

162. *See id.* (highlighting that even the United States Census Bureau acknowledges that race is not necessarily scientific and that the categories were created to maintain records).

163. *See* Greene, *supra* note 16 (proposing that courts and lawmakers can use this definition of race because (1) defining race as a sociocultural concept acknowledges that race is a social and legal construct that is not commonly understood to only include immutable characteristics and (2) an employer's racially discriminatory policies can be based on bias towards both immutable and mutable characteristics of race).

164. *See id.* at 1305 (defining race as sociocultural); *see also* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1747–49 (2020) (finding that statutory language of Title VII for sex discrimination is unambiguous and applied broadly to discrimination against the protected class no matter how the discrimination manifests itself).

the courts should also rectify past decisions that provide a legal loophole for racial discrimination and contradict the Civil Rights Act's purpose.[165] For example, courts can define race broadly as sociocultural, thus, requiring employers to provide a substantial reason for implementing exclusionary grooming policies.[166] Courts can also shift their perspectives to account for the effects that discriminatory policies have on plaintiffs.[167] Since the Civil Rights Act of 1964 was implemented, Black Americans have sought redress under Title VII to prevent discrimination based on their hair and hairstyles.[168] However, federal courts have not been challenged on the legal fiction that race is immutable.[169] One of the reasons lower courts have been unable to change the will of questionable precedent is that the Supreme Court has refused to hear Black hair discrimination cases.[170]

If Congress will not act to amend Title VII's language, the Supreme Court must look to the statutory interpretation of sex discrimination, especially the recent decision in *Bostock*, to ensure that both mutable and immutable characteristics of race are protected from discrimination.[171] Although the Eleventh Circuit argued that defining race as anything other than biological would be too difficult, in reality, the framework of *Bostock* and other sex discrimination cases allows courts to avoid the question of defining race.[172] Instead, courts can focus on whether the employer discriminates against a trait naturally associated with an employee's race or whether the employer considers the employee's trait in tandem with an employee's race.[173]

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165. *See* Greene, *supra* note 10, at 992–93 (arguing that the Civil Rights Act was meant to protect all forms of discrimination based on race).

166. *See id.* (discussing steps courts must take to protect Black employees from discrimination).

167. *See id.*

168. *See id.* at 996 (citing the seminal decision of Rogers v. American Airlines, 527 F. Supp. 229 (S.D.N.Y. 1981), which first perpetuated the myth that race discrimination only accounts for immutable characteristics).

169. *See id.* (arguing that there are no physical characteristics that a person of any race cannot change or that another race does not also possess).

170. *See* NAACP LEGAL DEFENSE FUND, *supra* note 61 (advocating on behalf of the plaintiff in EEOC v. Catastrophe Management Solutions but being denied cert by the Supreme Court).

171. *See supra* Part III (arguing that Title VII's definition of race discrimination includes discrimination against race-based hairstyles since the *Bostock* decision broadened the definition of discrimination to include all other protected classes).

172. *See supra* Part III.

173. *See id. But see* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1033–54 (11th Cir. 2016) (arguing that defining race as cultural would be too difficult for courts because they would have to decide which cultural characteristics to protect under Title VII).

Therefore, it is up to the Supreme Court and the circuit courts to expand Title VII's interpretation of race discrimination to include discrimination against race-based hairstyles.

C. The Social/Economic Cost and Effect of Hair Discrimination

Federal court decisions regarding race discrimination via Black hair and hairstyles have perpetuated negative stereotypes of Black hair that are rooted in slavery and apartheid and ignore the harm these "facially neutral" policies cause Black people, especially Black women.[174] By permitting employers to prioritize "business culture," courts sanction employers to negate Black culture and restrict Black people's bodily autonomy and culture.[175]

The hyper-regulation of Black people's bodies has a huge mental, emotional, and financial toll on Black Americans.[176] Therefore, Congress and the courts must ensure that Black people are federally protected from discrimination based on their hairstyle and type.[177] Expanding Title VII protection against racial discrimination to Black hair and hairstyle neutralizes subtler forms of racism that have become pervasive in workplaces.[178] A broader definition of race discrimination would also remove roadblocks for Black women trying to enter and advance their professional careers.[179] Finally, prohibiting discrimination against Black

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174. *See* NYC HAIR GUIDANCE, *supra* note 2, at 7–8 (highlighting that facially neutral policies that are rooted in racial stereotyping are a form of racial discrimination).

175. *See* Rogers v. Am. Airlines, 527 F. Supp. 229, 232–33 (S.D.N.Y. 1981) (ignoring plaintiff's claim that covering her hair caused her severe headaches and dismissing the cultural significance of cornrows to Black women); *see also* Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 260–65 (S.D.N.Y. 2002) (ignoring plaintiff's claim that covering his hair made him feel faint and damaged his hair, and that plaintiff was harassed because of his hair).

176 *See* D. Sharmin Arefin, *Is Hair Discrimination Race Discrimination?*, ABA (Apr. 17, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/05/hair-discrimination/ (discussing a study that found African American women are the most likely to face hair discrimination and be sent home from work because of a hair violation, and over eighty percent felt the need to change their hairstyle to fit the Eurocentric standard at work).

177. *See* Greene, *supra* note 16 (noting that federal courts do not consider race-based discrimination against hairstyles as race discrimination).

178. *See* NYC HAIR GUIDANCE, *supra* note 2, at 7 (discussing that anti-Black bias can be based on characteristics and cultures associated with the Black race).

179. *See* PBS News Hour, *How Hair Discrimination Impacts Black Americans in Their Personal Lives and the Workplace*, PBS (Apr. 2, 2021), https://www.pbs.org/newshour/show/how-hair-discrimination-impacts-black-americans-in-their-personal-lives-and-the-workplace; Evan Ross Katz, *Doris "Wendy" Greene Helped Fight for New York City's Ban on Natural-Hair Discrimination*, TEEN

hair and hairstyles allows Black people to freely express their cultural and religious identity.[180]

V. CONCLUSION

Courts and Congress must reassess their interpretation of Title VII's prohibition against race discrimination. Much like how the definition of sex discrimination has become more inclusive, the definition of race discrimination must also expand to protect more insidious forms of race-based discrimination.[181] In the United States, Black people's hair and hairstyles were often used to denote their class and, in many cases, to take away or police their freedom.[182] Under the current definition of race discrimination, employers are allowed to employ these same tactics to police, harass, or fire Black employees.[183]

Even in the legal field, Black legal professionals have discussed feeling anxious or judged for wearing their natural hair in the workplace or courtrooms, which affects their mental health and ability to adequately accomplish their jobs.[184] However, many Black professionals have felt empowered seeing Ketanji Brown Jackson adorn her locs at her Senate confirmation hearing.[185] Jackson's nomination as the first Black woman to sit on the Supreme Court has not only inspired many more Black girls and women to pursue a legal degree but also has encouraged Black women to wear their natural hair in professional settings.[186] However, neither Jackson

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VOGUE (Feb. 28, 2019), https://www.teenvogue.com/story/doris-wendy-greene-natural-hair-anti-discrimination-ban (detailing the different ways legal hair discrimination negatively affects Black people).

180. *See* Greene, *supra* note 16 (noting that Black hairstyles serve as a "source of cultural pride and tradition" in Black communities).

181. *See* Iris Hentze & Rebecca Tyus, *Sex and Gender Discrimination in the Workplace*, NCSL (Aug. 12, 2021), https://www.ncsl.org/research/labor-and-employment/-gender-and-sex-discrimination.aspxaspx.

182. *See* Peery, *supra* note 40 (highlighting the different ways race has been used to deny rights and benefits to non-white Americans).

183. *See* Greene, *supra* note 16 (arguing that the federal courts' interpretation of Title VII promotes negative racial stereotypes of Black hair).

184. *See* Law 360, *Wearing Natural Hair in Big Law*, YOUTUBE (Oct. 20, 2020), https://youtu.be/xCcpdvKkU24; *see also* Arefin, *supra* note 178 (discussing study finding that over eighty percent of Black women change their hairstyle to fit the Eurocentric standards at work).

185. *See* Mirenda Meghelli, *Why Judge Ketanji Brown Jackson's Locs Are about More Than Just Hair*, OPRAH DAILY (Mar. 24, 2022), https://www.oprahdaily.com/entertainment/a39520244/judge-ketanji-brown-jacksons-locs/ (discussing why the author and other Black lawyers felt inspired by Jackson's nomination).

186 *See id.* (stating that Jackson's locs show that women can present their "authentic" selves in the workplace).

nor all the other Black women who choose to wear their natural hair are federally protected from hair discrimination.[187]

To adhere to the spirit of the Civil Rights Act, courts must interpret Title VII to prohibit discrimination against hair and hairstyles associated with race.[188] Title VII can only truly protect Black workers from racial discrimination if the statute protects all characteristics of race, including hair and hairstyles.[189]

[187] *See* LZ Anderson, *A Person Learns a Lot While Growing Locs Like Judge Jackson's*, L.A. TIMES (Mar. 26, 2022), https://www.latimes.com/opinion/story/2022-03-26/ketanji-brown-jackson-natural-hair-dreadlocks-black-discrimination (noting the juxtaposition between Jackson wearing her locs with pride and the reality that discrimination against Black hair is still legal).

[188] *See* Greene, *supra* note 16 (stating that the purpose of Title VII was to diminish economic barriers to Black workers and promote equal opportunity employment).

[189] *See* NYC HAIR GUIDANCE, *supra* note 2, at 1 (discussing that anti-Black bias can be based on characteristics and cultures associated with the Black race).