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Title VII's Deficiencies Affect #MeToo: A Look at Three Ways Title VII Continues to Fail America's Workforce

Taylor J. Freeman Peshehonoff

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Imagine yourself, your daughter, your son, or your parent as the employee in any one of the following situations: (1) An employee announces that she is transitioning from a male to a female and will present herself as a female at work, starting immediately. The next day, this employee is fired. (2) As part of the curriculum requirements to graduate with a degree in social work, a young employee is spending a semester working as an unpaid intern. The supervisor makes sexualized comments about the employee's body, leaving the employee uncomfortable and unsure where to turn. (3) A new employee arrives on the first day and receives dozens of documents to read and sign. The employment contract contains a mandatory arbitration provision subsuming any issues that arise during the employee's time with the company. Signing this document may obliterate the employee's ability to file a Title VII claim against the employer if sexual harassment or other discriminatory behavior occurs.

These scenarios are all too real to employees across the United States, as evidenced by the increased number of sexual harassment claims in 2018.[1] Notably, the Equal Employment Opportunity Commission's (EEOC) filings of sexual harassment lawsuits increased by fifty percent, and the overall number of charges involving sexual harassment increased by twelve percent.[2] These numbers should not be surprising, however, as one woman's plight with bringing a sexual assault claim against a Supreme Court Justice nominee recently played out on national television.[3] The fact that women in Hollywood have come forward with sexual harassment claims against prominent actors and directors seems to have made the average employee feel more comfortable airing his or her grievances.[4] Although it appears that women are more often considered victims of sexual harassment in the workplace, the EEOC noted that men filed nearly

1. Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Releases Preliminary FY 2018 Sexual Harassment Data (Oct. 4, 2018), https://www.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm.

2. *Id.*

3. Haley Sweetland Edwards, *How Christine Blasey Ford's Testimony Changed America*, TIME (Oct. 4, 2018), http://time.com/5415027/christine-blasey-ford-testimony/ (discussing Dr. Ford's testimony in front of the Senate Judiciary Committee regarding her allegations of sexual assault against now Justice Brett Kavanaugh).

4. *See infra* notes 7–13 and accompanying text.

seventeen percent of sexual harassment charges in the 2017 fiscal year.[5] Moreover, a look at data from years 2010 through 2017 reveals that the percentage of men reporting sexual harassment charges remains fairly consistent.[6]

The media has credited the #MeToo movement with making sexual harassment issues in the workplace an issue of national debate.[7] Over the past several years, celebrities such as Harvey Weinstein,[8] Bill Cosby,[9] and Kevin Spacey have been named in sexual harassment scandals.[10]

Though these scandals did not create the #MeToo Movement, they propelled its notoriety to national attention. Tarana Burke, a civil rights activist, actually crafted the phrase "me too" back in 2006 to help "empower[] [women] through empathy."[11] The phrase's notoriety spread when actress Alyssa Milano tweeted, "If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet."[12] With more than 22,000 retweets to date, the movement marched into the national spotlight, calling for women to stand together and fight back against sexual harassment.[13]

The #MeToo movement demands that individuals have an outlet to report and find justice for sexual harassment and other discriminatory behavior, and Title VII should be one of the mechanisms to which employees who experience sexual assault can turn. Unfortunately, Title VII

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5. *Charges Alleging Sex-Based Harassment (Charges Filed with the EEOC) FY 2010 – FY 2018*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm (last visited Oct. 1, 2019).

6. *Id.*

7. *See, e.g.*, Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES (Oct. 29, 2018), https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html.

8. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html.

9. Dennis Romero & Associated Press, *Bill Cosby to be Sentenced for Sexual Assault in Andrea Constand Case*, NBC NEWS (Sept. 24, 2018, 6:31 AM CDT), https://www.nbcnews.com/news/us-news/bill-cosby-be-sentenced-sexual-assault-andrea-constand-case-n912106.

10. Chloe Melas, *'House of Cards' Employees Allege Sexual Harassment, Assault by Kevin Spacey*, CNN MONEY (Nov. 3, 2017, 10:34 AM ET), https://money.cnn.com/2017/11/02/media/house-of-cards-kevin-spacey-harassment/index.html.

11. Abby Ohlheiser, *Meet the Woman Who Coined 'Me Too' 10 Years Ago — to Help Women of Color*, CHI. TRIBUNE (Oct. 19, 2017, 11:55 AM), http://www.chicagotribune.com/lifestyles/ct-me-too-campaign-origins-20171019-story.html.

12. Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 1:21 PM), https://twitter.com/alyssa_milano/status/919659438700670976?lang=en.

13. *Id.*

fails to protect certain classes of employees, while affording employers creative methods for avoiding Title VII actions. This Comment will limit its analysis to Title VII's failure to protect employees from sex-based discrimination.

Though these issues pervade every category of society, this Comment limits its analysis to three categories. Part II evaluates the nuances of sex-based discrimination protections for transgender employees under Title VII. Part III discusses how Title VII provides little to no recourse for sex-based discrimination against unpaid interns. Part IV analyzes a popular method for stripping employees of Title VII protections: arbitration provisions. Each section addresses potential solutions in turn.

I. A Brief Review of Title VII's History

Evaluating the history of Title VII and the meaning of "on the basis of sex" will help define the issues that surround sex-based discrimination. Title VII first became law as part of the Civil Rights Act of 1964.[14] Congress agreed to consider the Act in an attempt to rectify employment discrimination against African-Americans.[15] As enacted, however, Title VII protected discrimination "because of such individual's race, color, religion, *sex*, or national origin."[16] Despite judicial acknowledgement of women's "long and unfortunate history of sex discrimination" based on paternalistic sentiments,[17] including sex as a protected class in the Civil Rights Act of 1964 initially served only as a cunning attempt to kill the entire bill—not as a true endeavor to guarantee women workplace protections.[18] Since the venture failed and the Act passed, women had unprecedented statutory protections in the workplace.

Courts struggled with issues involving sex-based discrimination due to the uncertainty surrounding Congress's rushed decision to include the provision.[19] The legislative intent surrounding the prohibition of sex

14. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

15. Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 481 (1995) ("The Act was passed in response to the mounting popular demand to extend constitutional equality protections to African-Americans.").

16. 42 U.S.C. § 2000e-2(a)(1) (2012) (emphasis added).

17. Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

18. *See* Sangree, *supra* note 15, at 481–82.

19. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) ("[W]e are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'").

discrimination was unclear partly because it found its home in Title VII by accident.[20] The EEOC executive director at the time even referred to sex-based protections as a "fluke."[21] One scholar noted that Title VII's failure to prevent and protect against sex discrimination is unsurprising because the legislation "has often been rather narrowly construed, to the point that some critics have argued that Title VII is currently incapable of providing much-needed gender equality."[22]

That said, courts should engage a dynamic approach to interpreting Title VII, as these terms and their meanings have changed over time.[23] Because the current labor market has advanced significantly since Title VII's adoption, the Act's protections should mirror these transformations.[24] Altering the language to match modern concerns of the labor market is not unprecedented, as it was not until 1980 that the EEOC categorized sexual harassment as a form of sex discrimination.[25] It took another six years before the Supreme Court agreed with this finding.[26] Despite the time it took for the Supreme Court to incorporate sexual harassment into the Act's protections, it is clear that the Court has used its power to address labor market issues regardless of the unhelpful definitional framework.[27]

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20. Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1308 (2012) ("Title VII's prohibition of sex discrimination has no legislative history.").

21. Rachel Osterman, *Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII's Ban on Sex Discrimination Was an Accident*, 20 YALE J.L. & FEMINISM 409, 416 (2009) (quoting 61 Lab. Rel. Rep. (BNA) 253–55 (Apr. 26, 1966)).

22. Arianne Renan Barzilay, *Parenting Title VII: Rethinking the History of the Sex Discrimination Prohibition*, 28 YALE J.L. & FEMINISM 55, 58 (2016) (footnotes omitted).

23. *See generally* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) (rejecting the static approach to statutory interpretation and explaining why a more dynamic approach is beneficial); *see also* David A. Forkner & Kent M. Kostka, *Unanimously Weaving a Tangled Web:* Walters*,* Robinson*, Title VII, and the Need for Holistic Statutory Interpretation*, 36 HARV. J. ON LEGIS. 161 (1999) (pointing out the changes in the labor market since Title VII's enactment and arguing for a more holistic approach to interpreting the Act).

24. *See* Forkner & Kostka, *supra* note 23.

25. 29 C.F.R. § 1604.11(a) (1980) ("Harassment on the basis of sex is a violation of section 703 of [T]itle VII."). This regulation was noticed in the *Federal Register* on November 10, 1980. 45 Fed. Reg. 74676 (1980).

26. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986) ("Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.").

27. *See id.*

Shortly after the Supreme Court expressly found sexual harassment to be a form of sex-based discrimination, Congress enacted additional damages provisions, thus allowing injured employees to seek greater compensation and provide broader access to jury trials.[28] In effect, the Civil Rights Act of 1991 tied an employer's intentional discrimination to the company's bottom line.

Given the Act's broad language, it should protect employees from all types of sex-based discrimination,[29] but the Act arguably leaves some classes of people with little to no protection from sexual harassment and other forms of discrimination. Transgender employees are finding success in fighting discrimination in the circuit courts,[30] but their long-term protections are uncertain until the Supreme Court clearly interprets the Act, or Congress amends the Act to explicitly protect these employees.[31] While some classes of people face uncertainty, courts have undoubtedly interpreted the Act to exclude unpaid interns from its protection, leaving young adults at the mercy of the employers to act appropriately.[32]

To complicate these gaps in protection, in modern day society, discrimination has "become[] more subtle, more entrenched, and more systemic in nature,"[33] and employers often bypass Title VII protections by forcing employees to enter into mandatory arbitration provisions.[34] The Supreme Court or Congress must address these lapses in protection head-on, as employees should never have to wonder whether the law protects them from discriminatory or harassing employment practices.

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28. Timothy D. Loudon, *The Civil Rights Act of 1991: What Does It Mean and What Is Its Likely Impact?*, 71 NEB. L. REV. 304, 307, 312 (1992) (noting that injured employees suing in violation of Title VII now have access to compensatory and punitive damages in cases of intentional discrimination, as well as a right to ask for a jury trial).

29. *See* 42 U.S.C. § 2000e-2(a)(1) (2012).

30. *See infra* Part II. Section II.A will discuss the success of plaintiffs who pursue gender non-conformity claims, while Section II.B will elaborate on the struggle for sexual orientation discrimination claims to survive dismissal.

31. The Supreme Court has accepted three writs of certiorari for cases specifically examining sexual orientation and transgender claims under Title VII. *See* Adam Liptak, *Supreme Court to Decide Whether Landmark Civil Rights Law Applies to Gay and Transgender Workers*, N.Y. TIMES (Apr. 22, 2019), https://www.nytimes.com/2019/04/22/us/politics/supreme-court-gay-transgender-employees.html.

32. *See infra* Part III.

33. Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 WIS. L. REV. 937, 940.

34. *See infra* Part IV.

II. The Transgender Legal Predicament: Which Claim to Bring

With over 700,000 individuals in the United States identifying as transgender,[35] employers must understand what actions they may legally take upon discovering an employee's transgender status. The EEOC explicitly holds sex discrimination to include "[d]iscrimination against an individual because of gender identity, including transgender status, or because of sexual orientation."[36] Despite the EEOC's inclusion of transgender identity issues in its definition of sex discrimination, many circuits rely solely on gender non-conformity claims to provide these individuals protection, rather than letting transgender identity serve as its own basis for sex-discrimination.[37] Whether a sexual orientation claim receives Title VII protections, however, remains part of an ongoing circuit split.[38] Therefore, a growing concern in litigation is under what legal theories a transgender employee might find protections from workplace harassment or discrimination.

Before evaluating the differences between gender non-conformity and sexual orientation claims, it is important to understand why transgender individuals so desperately seek protection under Title VII. The identifier "transgender employee" most commonly "refers to people whose gender identity . . . differs from the sex they were identified with at birth."[39] Many transgender individuals will encounter a diagnosis of gender dysphoria at some point in their life.[40] The American Psychiatric Association's (APA) definition of gender dysphoria comports with the standard understanding of transgender.[41] The APA, however, notes that "[g]ender dysphoria is not the

35. ANDREW R. FLORES ET AL., WILLIAMS INST., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 2 (June 2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf.

36. *Sex-Based Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/types/sex.cfm (last visited Oct. 1, 2019).

37. *See, e.g.*, EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 600 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599.

38. *See infra* Section II.B.

39. Sandra B. Reiss, *Transitioning to the Transgender Workplace: What Lawyers and Their Clients Need to Know*, 77 ALA. LAW. 429, 429 (2016).

40. *See* Walter Bockting, *How Far Has Transgender Health Come Since Stonewall?*, 109 AM. J. PUB. HEALTH 852, 853 (2019) ("Transgender is an identity, not a disorder, yet many—but not all—transgender people experience gender dysphoria at some point in their lives.").

41. *What Is Gender Dysphoria?*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria (last visited Jan. 15, 2019)

same as gender nonconformity [sic]" or "being gay/lesbian."[42] Though some may intuitively see this type of diagnosis as providing transgender employees with adequate access to a claim under the Americans with Disabilities Act (ADA), the ADA explicitly excludes protections for "transvestism, transsexualism, . . . [or] gender identity disorders not resulting from physical impairments."[43]

As such, a transgender plaintiff must prove that the gender dysphoria is connected to a physical impairment.[44] Because a transgender individual must show that the physical impairment led to the gender dysphoria, the ADA has created a high burden.[45] Though transgender employees could bring claims for accommodations under the ADA based on gender dysphoria,[46] the potential success of these claims exceed the scope of this Comment. Rather, due to this lack of protection under the ADA, transgender employees' inability to find protections under other federal laws exemplifies the importance of Title VII protections.

A. Discrimination Based on Gender Non-Conformity: The Successful Approach

The Supreme Court's decision in *Price Waterhouse v. Hopkins* opened the door to expanded Title VII protections through gender non-conformity claims.[47] *Price Waterhouse* did not involve a transgender employee; rather,

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("Gender dysphoria involves a conflict between a person's physical or assigned gender and the gender with which he/she/they identify.").

42. *Id.* (emphasis removed).

43. 42 U.S.C. § 12211(b)(1) (2012).

44. *See, e.g.*, Doe v. Mass. Dep't of Corr., No. 17-12255-RGS, 2018 WL 2994403, at *6 (D. Mass. June 14, 2018) ("The ADA's exclusion applies only to 'gender identity disorders *not resulting* from physical impairments,' and Doe has raised a dispute of fact that her [gender dysphoria] may result from physical causes.") (citation omitted) (quoting 42 U.S.C. § 12211(b)(1)); Blatt v. Cabela's Retail, Inc., No. 5:14-CV-04822, 2017 WL 2178123, at *4 (E.D. Pa. May 18, 2017) (finding that the ADA does protect gender dysphoria when it arises as a result of a physical disability).

45. *See* Parker v. Strawser Constr., Inc., 307 F. Supp. 3d 744, 755 (S.D. Ohio 2018) ("Nowhere in the Amended Complaint did Parker allege that her gender dysphoria was caused by a physical impairment or that gender dysphoria always results from a physical impairment. Moreover, the Court is not convinced that a mere difference in brain structure or physiology, by itself, is necessarily a 'physical impairment'—it may have physical underpinnings in the brain, but not every physical difference between two groups implies that one of the groups is impaired in some way.").

46. *See supra* notes 41–43 and accompanying text.

47. 490 U.S. 228, 239 (1989) ("Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.").

partners in an accounting firm felt that a female employee did not act enough like a lady and denied her promotion to partner.[48] The Supreme Court allowed this employee to maintain a Title VII claim under the theory of sex stereotyping.[49] Notably, the Court held that an "employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[50] With this precedent, Title VII's measures protect both men and women from sexual harassment through gender non-conformity claims.[51] Thus, the theory that many LGBTQ employees rely on in Title VII claims is the idea that "sex stereotyping" is a form of sex discrimination that Title VII prohibits.[52] Courts have relied on the logic espoused in *Price Waterhouse* and have explicitly interpreted sex discrimination to include sex-stereotyping against transitioning employees.[53]

The Sixth Circuit, in *EEOC v. R.G. & G.R. Harris Funeral Homes*, followed *Price Waterhouse*'s logic in its protection of a transgender employee.[54] The EEOC filed a claim on behalf of a transitioning male-to-

48. *Id.* at 234–36.

49. *Id.* at 250.

50. *Id.*

51. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81–82 (1998) (establishing that individuals could engage in sexual harassment against other members of the same-sex); *see also* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 263–64 (3d Cir. 2001) (using gender stereotypes in same-sex harassment claims); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874–75 (9th Cir. 2001) (using the *Price Waterhouse* analysis in a case where a man argued that "he was harassed because he failed to conform to a male stereotype"); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) ("In other words, just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.") (citation omitted).

52. *Price Waterhouse*, 490 U.S. at 259 (establishing that gender stereotyping—i.e., gender based discrimination—qualified as discrimination prohibited by Title VII); *see also* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81–82 (1998) (establishing that individuals could engage in sexual harassment against other members of the same-sex).

53. *See, e.g.*, Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011) ("Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."). These courts oftentimes justify this reasoning based on the Supreme Court's rationale in *Price Waterhouse. Id.* ("These instances of discrimination against plaintiffs because they fail to act according to socially prescribed gender roles constitute discrimination under Title VII according to the rationale of *Price Waterhouse*.").

54. 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599.

female employee who was fired from a funeral home.[55] The employee, Aimee Stephens, informed the business's owner that she would begin transitioning "and would represent herself and dress as a woman while at work."[56] Shortly after providing her boss with this information, the funeral home terminated Stephens.[57] As a result, the EEOC filed charges, claiming that the firing was unlawful because the termination occurred "on the basis of her transgender or transitioning status and her refusal to conform to sex-based stereotypes."[58] The Sixth Circuit analyzed whether this firing related to discrimination based on sex stereotypes.[59] Since the discrimination in question arose "because Stephens was 'no longer going to represent himself as a man' and 'wanted to dress as a woman' [the discrimination fell] squarely within the ambit of sex-based discrimination."[60] The court concluded that "discrimination on the basis of transgender status necessarily entails discrimination on the basis of sex."[61]

The funeral home filed a writ of certiorari on July 24, 2018.[62] Thirteen state attorneys general filed an amicus brief in response, arguing that the Sixth Circuit improperly expanded Title VII's definition of sex.[63] The Supreme Court could positively dispose of this issue after hearing arguments in October 2019.[64] This decision could clarify an entire category of employees' rights under Title VII and remove the uncertainty created in the circuit courts.

Another court espoused a similar rationale years before the *Harris Funeral Homes* decision. In 2011, the Eleventh Circuit provided analogous reasoning for protecting transgender individuals in *Glenn v. Brumby*.[65] The employee, in this case, was born male,[66] diagnosed with Gender Identity

55. *Id.* at 566.
56. *Id.*
57. *Id.*
58. *Id.* at 566–67.
59. *Id.* at 571.
60. *Id.* at 572 (citations omitted) (quoting deposition testimony).
61. *Id.* at 578.
62. Petition for Writ of Certiorari, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (U.S. July 24, 2018), 2018 WL 3572625.
63. *See* Brief for the States of Nebraska et al. as Amici Curiae in Support of Petitioner at 2, *Harris Funeral Homes*, No. 18-107, 2018 WL 4105814.
64. *October Term 2019*, SCOTUS BLOG, https://www.scotusblog.com/case-files/terms/ot2019/ (last visited Oct. 27, 2019).
65. 663 F.3d 1312, 1320 (11th Cir. 2011).
66. *Id.* at 1314.

Disorder,[67] and began the transition to a female.[68] Around the time that the employee began transitioning, but before presenting as a woman, the employer hired her as an editor.[69] About a year later, the employee told her employer that she was transgender and dressed as a woman at a Halloween event.[70] Her employer expressed extreme distaste for the costume, ultimately asking her to leave the party.[71] Despite the company's clear disdain for the employee's situation, the employee pursued her transition.[72] Thus, the employee informed her supervisor of her plans to present as a woman at work.[73] Upon learning of the employee's plans, the company fired her because it felt that the "intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make [her] coworkers uncomfortable."[74] Among other causes of action, the employee sued for sex discrimination in violation of the Equal Protection Clause.[75]

Although the plaintiff raised a violation of the Equal Protection Clause based on gender non-conformity, the court analogized that if Title VII bars such discrimination, then discrimination based on gender non-conformity violated the Equal Protection Clause as well.[76] In reviewing the claim, the Eleventh Circuit evaluated gender non-conformity issues under Title VII.[77] Most specifically, the court noted that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."[78] After recognizing that "[a]ll persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype,"[79] the court concluded that sex-based discrimination under the

67. *Id.* Gender identity disorder was the medical community's previous diagnosis for gender dysphoria. *See generally* Arlene Istar Lev, *Gender Dysphoria: Two Steps Forward, One Step Back*, 41 CLINICAL SOC. WORK J. 288 (2013).

68. *Glenn*, 663 F.3d at 1314.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* (quoting the employer).

75. *Id.*

76. *Id.* at 1316–18.

77. *Id.* at 1316.

78. *Id.*

79. *Id.* at 1318.

Equal Protection Clause necessarily encompassed discrimination in cases of gender non-conformity.[80]

In stark contrast to the Sixth Circuit's explicit use of Title VII as a safeguard for transgender workers, other circuits have expressly denied that Title VII includes transgender protections.[81] Even the past two presidential administrations have been at odds over whether Title VII may extend to protect transgender employees from gender-based discrimination.[82] Although gender non-conformity claims have been successful, without express protection from the Supreme Court or Congress, the protections could evaporate at any moment.

B. Discrimination Based on Sexual Orientation: An Uncertain Outcome

Sexual orientation discrimination claims do not enjoy the steady protection under Title VII that gender non-conformity claims do. One recent decision noted that "because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected."[83] The Second Circuit's decision in *Zarda v. Altitude Express, Inc.* brought two government agencies at odds, as the EEOC filed an amicus brief in support of finding that sexual orientation was protected[84] and the Department of Justice filed an amicus brief in support of the opposite.[85] Ultimately, the *Zarda* court held that it was a natural conclusion to find that "sex is necessarily a factor in sexual

80. *Id.* at 1320.

81. *See, e.g.*, Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007) ("[W]e conclude discrimination against a transsexual because she is a transsexual is not 'discrimination because of sex.'"); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984) ("[I]f the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress."); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (refusing to include transsexuals within the definitional framework of Title VII).

82. Robert Iafolla, *Supreme Court Can Settle Split on LGBT Bias in the Workplace*, BLOOMBERG (Apr. 22, 2019, 8:54 AM), https://news.bloomberglaw.com/daily-labor-report/supreme-court-can-settle-split-on-lgbt-bias-in-the-workplace.

83. Zarda v. Altitude Express, Inc., 883 F.3d 100, 113 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 ("Because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex.").

84. En Banc Brief of Amicus Curiae Equal Employment Opportunity Commission in Support of Plaintiffs/Appellants and in Favor of Reversal, *Zarda*, 883 F.3d 100 (No. 15-3775), 2017 WL 2730281.

85. Brief for the United States as Amicus Curiae, *Zarda*, 883 F.3d 100 (No. 15-3775), 2017 WL 3277292.

orientation."[86] The Eleventh Circuit, on the other hand, has noted that "workplace discrimination because of [the employee's] sexual orientation" does not amount to a claim under Title VII.[87] The courts finding that sexual orientation discrimination falls outside the scope of Title VII typically distinguish these claims from gender non-conformity and same-sex harassment claims.[88] Congress has also repeatedly refused to adopt measures that would include protections for sexual orientation discrimination.[89]

The Seventh Circuit was the initial circuit to depart from precedent and protect employees facing sexual orientation discrimination in *Hively v. Ivy Tech Community College of Indiana*.[90] Starting in 2000, the "openly lesbian" professor taught as an adjunct at the college.[91] After the professor applied for and was rejected from several full-time openings over five years, the college terminated the professor's part-time contract.[92] The court noted that its job was not to change Title VII but to determine whether Title VII's prohibition of sex-based discrimination banned sexual orientation discrimination.[93] The court understood the impact of its decision and commented that "[t]oday's decision must be understood against the backdrop of the Supreme Court's decisions, not only in the field of employment discrimination, but also in the area of broader discrimination on the basis of sexual orientation."[94] Because one cannot "remove the 'sex' from 'sexual orientation,'"[95] "it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex."[96]

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86. *Zarda*, 883 F.3d at 112.

87. Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255 (11th Cir. 2017).

88. *Id.* at 1256 ("These Supreme Court decisions do not squarely address whether sexual orientation discrimination is prohibited by Title VII."); *see also* Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) ("Title VII's protections, however, do not extend to harassment due to a person's sexuality . . . . 'Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation.'") (quoting *Bibby*, 260 F.3d at 261); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) ("Title VII does not prohibit discrimination based on sexual orientation.").

89. *See, e.g.*, Employment Non-discrimination Act of 1996, S. 2056, 104th Cong. (1996); Employment Non-discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Non-discrimination Act of 1994, H.R. 4636, 103d Cong. (1994).

90. 853 F.3d 339 (7th Cir. 2017).

91. *Id.* at 341.

92. *Id.*

93. *Id.* at 343.

94. *Id.* at 349.

95. *Id.* at 350.

96. *Id.* at 351.

In the same year that the Seventh Circuit departed from precedent, the Eleventh Circuit reaffirmed in *Evans v. Georgia Regional Hospital* that sexual orientation discrimination was beyond the scope of Title VII's protections.[97] In *Evans*, a hospital security officer alleged that her employer terminated her for presenting in a more masculine manner than would be normally expected of a woman.[98] After the hospital ended the employment relationship, the security officer complained that the termination violated several hospital policies and procedures.[99] Once presented with these complaints, the hospital's senior human resources manager asked the officer "about her sexuality," which led the officer and others to conclude that her masculinity played a role in the hospital's employment decisions.[100] In finding that Title VII did not provide protections for sexual orientation claims, the court acknowledged that the majority of circuit courts reached the same conclusion.[101] The Eleventh Circuit refused to break from the established precedent, which summarily held that Title VII did not protect against sexual orientation discrimination.[102] The *Evans* court exemplifies the predicament for many similarly situated employees, as it remanded the gender non-conformity claim but upheld dismissal of the sexual orientation claim.[103]

Sexual orientation's status as a component of sex-based protections under Title VII is important to transgender employees because many transgender employees also face discrimination for their sexual orientation.[104] The continued conflict between circuits as to whether Title VII provides protections based on sexual orientation discrimination makes it more likely that a transgender employee will succeed with a charge for discrimination on the basis of gender non-conformity because there is Supreme Court rationale to support such a claim.[105] Since only two circuits have expressly found that sexual orientation discrimination offends Title

97. 850 F.3d 1248, 1257 (11th Cir. 2017).
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 1256.
102. *Id.*
103. *Id.* at 1255, 1257.
104. *See generally* Crosby Burns & Jeff Krehely, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment*, CTR. FOR AM. PROGRESS (June 2, 2011, 9:00 AM), https://www.americanprogress.org/issues/lgbt/news/2011/06/02/9872/gay-and-transgender-people-face-high-rates-of-workplace-discrimination-and-harassment/.
105. *See supra* Section II.A.

VII,[106] transgender employees should only make these claims in the alternative and not rely on either of them as the sole basis for a lawsuit. Until the Supreme Court, or a larger coalition of circuit courts at least, finds that sexual orientation qualifies for sex-based discrimination protection, transgender employees may be more successful claiming discrimination on the basis of gender non-conformity. Fortunately for these plaintiffs, the Supreme Court has the opportunity to do exactly that when it hears two sexual orientation issues in October 2019.[107]

C. The Need for Congressional Clarity

The lack of legislative intent behind Title VII's sex-based discrimination provision continues to limit federal courts' ability to interpret and apply the provision properly.[108] The Supreme Court now has the opportunity to address this problem when it hears three Title VII cases in October 2019,[109] but some justices may find this issue to be best left to congressional resolution.[110]

The definitional framework in Title VII is unclear, and there is no congressional history for courts to use when determining whether protections are afforded to certain types of sex-based discrimination.[111] Creating a clear precedent is not only important for employees whom this ambiguity affects but also for employers who need to know how to legally conduct their business given the growing expense of litigation. Consequently, a legislative measure would most aptly address the ambiguity surrounding the original intent of sex-based discrimination. Amending or clarifying the language congressionally could definitively

106. *See*, *e.g.*, Zarda v. Altitude Express, Inc., 883 F.3d 100, 113 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599; Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 351–52 (7th Cir. 2017).

107. *October Term 2019*, SCOTUS BLOG, https://www.scotusblog.com/case-files/terms/ot2019/ (last visited Oct. 27, 2019). The Court will hear the *Zarda* case, discussed above, and *Bostock v. Clayton County Board of Commissioners*. *Id. Zarda* came down in favor of sexual orientation protections under Title VII. *Zarda*, 883 F.3d at 116. *Bostock*, on the other hand, simply affirmed the Eleventh Circuit's position that sexual orientation claims were beyond the scope of Title VII without further discussion. Bostock v. Clayton Cty. Bd. of Comm'rs, 723 F. App'x 964, 964 (11th Cir. 2011), *cert. granted*, 139 S. Ct. 1599.

108. *See supra* Part I.

109. *See supra* notes 64 and 107 and accompanying text.

110. Tucker Higgins, *Supreme Court Clashes Over Meaning of 'Sex' in LGBT Discrimination Case*, CNBC (Oct. 8, 2019, 12:17 PM EDT), https://www.cnbc.com/2019/10/08/supreme-court-clashes-over-meaning-of-sex-in-lgbt-discrimination-cases.html.

111. *See Zarda*, 883 F.3d at 113–15.

conclude whether some some courts' interpretations that "the plain meaning of 'sex' encompasses [nothing] more than male and female."[112]

Notwithstanding federal courts' precedent, some states already have laws to prevent discrimination against transgender people.[113] These state laws, however, may not adequately protect individuals facing sexual harassment, as the states can impose a higher burden on the plaintiff than is found in Title VII.[114] Although the majority of circuits apply Title VII protections to gender non-conformity claims, the courts may still reverse course absent a definitive Supreme Court decision or congressional action. Further, the ongoing circuit split over Title VII's applicability to sexual orientation discrimination demands immediate clarification.

III. Unpaid Interns: Applying an Archaic Definition to Modern Economic Practices

Students gain meaningful and necessary job experience through unpaid internships, but they may be putting their safety at risk. Internships are "one of the most common methods that students use to gain real world experience and attempt to secure employment for post-graduation."[115] Interning while still a student is "a virtual requirement in the scramble" to secure full-time employment.[116] Even with this seemingly high demand for students to intern, a lack of Title VII protections for unpaid interns poses a major dilemma because these individuals essentially function as employees without pay or legal protections.[117]

Internships were not always a prerequisite to full-time employment. In the late twentieth century, graduate-level institutions began offering

112. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007).

113. *See* JEROME HUNT, CTR. FOR AM. PROGRESS ACTION FUND, A STATE-BY-STATE EXAMINATION OF NONDISCRIMINATION LAWS AND POLICIES 3–4 (June 2012), https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf (providing a chart that displays which states protect gender non-conformity claims and sexual orientation claims).

114. *See, e.g.*, *Zarda*, 883 F.3d at 110 ("The panel held that 'Zarda's [federal] sex-discrimination claim [was] properly before [it] because [his state law claim was tried under] a higher standard of causation than required by Title VII.'") (quoting the panel opinion, 855 F.3d 76, 81 (2d Cir. 2017)) (alterations in original).

115. Sean Hughes & Jerry Lagomarsine, *The Misfortune of the Unpaid Intern*, 32 HOFSTRA LAB. & EMP. L.J. 409, 409 (2015).

116. David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 215 (2002).

117. *See* Hughes & Lagomarsine, *supra* note 115, at 421.

students class credit for participating in internships.[118] This shift created "a sharp expansion in standard, formal internships at many firms in various industries."[119] Additionally, the 2008 recession increased demand for internships because employers could not afford to hire inexperienced workers, and students needed experience to obtain jobs.[120] Since these programs have continued to play a vital role in the modern economy, it is appalling to discover that these interns have no legal protections or recourse under Title VII.[121]

To access Title VII coverage, an individual must qualify as an employee of the company he or she seeks to charge with discrimination.[122] Title VII defines an employee as an "individual employed by an employer."[123] Unfortunately, Title VII is not the only piece of federal legislation that defines an employee so ambiguously.[124] This circular definition provides little help in understanding whether the drafters intended the law's protections to wholly exclude unpaid interns. To be certain, if interns receive monetary payment for their time and services, then they most likely fit within Title VII's definition of employee. This Comment focuses on individuals who intern without pay and thus fall outside the protection of Title VII.

A. Qualifying as an Employee Under Title VII

Courts apply various tests to determine whether an individual qualifies as an employee under Title VII's ambiguous definition.[125] The five most notable tests are as follows: (1) the benefits analysis test, (2) the common law agency test, (3) the primary purpose test, (4) the economic realities test, and (5) the hybrid test.[126] These tests typically consider some kind of

118. Elizabeth Heffernan, Comment, "*It Will Be Good for You," They Said: Ensuring Internships Actually Benefit the Intern and Why It Matters for FLSA and Title VII Claims*, 102 IOWA L. REV. 1757, 1762 (2017).

119. *Id.*

120. *See id.*

121. *See, e.g.*, Wang v. Phx. Satellite Television US, Inc., 976 F. Supp. 2d 527, 529 (S.D.N.Y. 2013).

122. *See, e.g.*, Marie v. Am. Red Cross, 771 F.3d 344, 351–52 (6th Cir. 2014) (stating that plaintiffs must have been employees to maintain a Title VII claim).

123. 42 U.S.C. § 2000e(f) (2012).

124. *See, e.g.*, 29 U.S.C. § 203(e)(1) (2012) (Fair Labor Standards Act); 29 U.S.C. § 1002(6) (2012) (Employee Retirement Income Security Act); 42 U.S.C. § 12111(4) (2012) (Americans with Disabilities Act).

125. Heffernan, *supra* note 118, at 1768.

126. *Id.*

compensation as a primary factor in determining whether the individual qualifies as an employee.[127]

Some courts even require that a plaintiff prove remuneration as an "essential condition" before applying their respective test of choice.[128] Basically, as a preliminary step, these courts require a showing that the plaintiff received something of benefit, including a salary or employee benefit like health insurance, vacation time, or sick pay.[129] The Sixth Circuit, however, considers remuneration as part of the analysis itself rather than an independent, preliminary step.[130]

1. Benefits Analysis Test

Typically, courts use the benefits analysis test in one of two ways: (1) as a threshold test before considering an alternate test or (2) as a stand-alone analysis to determine whether an individual qualifies as an employee.[131] The stand-alone examination often focuses on the "essential condition" of whether an individual received monetary compensation, as the monetary compensation creates a plausible employment relationship.[132] Courts, however, can still find that other "numerous job-related benefits" could satisfy the test in the absence of direct compensation.[133]

When used as a threshold test, "the key question is whether, and to what extent, the worker receives remuneration."[134] The plaintiff must first show that the employer hired her in exchange for some sort of remuneration before the court analyzes the facts under a separate test.[135] To show remuneration, the employee need not necessarily show that she was paid wages, although wages provide the simplest approach. Even without

127. *Id.*

128. *See, e.g.*, O'Connor v. Davis, 126 F.3d 112, 116 (2d Cir. 1997).

129. *Id.*

130. Bryson v. Middlefield Volunteer Fire Dep't, Inc., 656 F.3d 348, 354 (6th Cir. 2011).

131. Lauren Fredericksen, Comment, *Falling Through the Cracks of Title VII: The Plight of the Unpaid Intern*, 21 GEO. MASON L. REV. 245, 256 (2013).

132. *Id.* (citing *O'Connor*, 126 F.3d at 116; Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 73 (8th Cir. 1990); Neff v. Civil Air Patrol, 916 F. Supp. 710, 712–13 (S.D. Ohio 1996); Smith v. Berks Cmty. Television, 657 F. Supp. 794, 796 (E.D. Pa. 1987)).

133. *Id.* (quoting Pietras v. Bd. of Fire Comm'rs of the Farmingville Fire Dist., 180 F.3d 468, 473 (2d Cir. 1999); Haavistola v. Cmty. Fire Co. of Rising Sun, Inc., 6 F.3d 211, 221–22 (4th Cir. 1993)).

134. *Id.*

135. *Id.* Typically the two tests used in conjunction with the benefits analysis test as a threshold analysis are the common law agency test and the economic realities test. *Id.*

traditional benefits or direct compensation, "some courts have found a jury question as to the issue of remuneration and benefits."[136]

Indirect remuneration through a service-for-benefits exchange may be satisfactory.[137] "[A]n employment relationship can exist without a salary so long as the putative employee receives numerous job-related benefits."[138] However, these "other benefits" that courts have considered as satisfying the remuneration requirement have not typically extended to benefits that an unpaid intern might receive from the program. Namely, "a clear pathway to employment . . . might constitute sufficient compensation,"[139] but courts have rejected quintessential internship benefits, such as on-the-job training and future career opportunities as being too speculative.[140] In summary, no consistent holding determines what type of indirect benefit amounts to remuneration and thus qualifies the unpaid intern as an employee.

The most notable case applying the benefit analysis test as a threshold test to unpaid student interns is *O'Connor v. Davis*.[141] In that case, a student enrolled in a local college's social work program and had to "perform 200 hours of field work" to graduate.[142] She began an internship where she "attended morning staff meetings . . . [and] met with the patients assigned to her both one-on-one and in groups."[143] During the internship period, one of the licensed psychiatrists referred to the female intern as "Miss Sexual Harassment."[144] Even after the intern complained to her supervisor, the psychiatrist continued to refer to her with a "repertoire of inappropriate sexual remarks."[145] Despite the fact that the student-intern reported the

136. Marie v. Am. Red Cross, 771 F.3d 344, 354 (6th Cir. 2014).

137. *Haavistola*, 6 F.3d at 221–22 (holding that benefits such as a pension, group life insurance, reimbursement for courses, and worker's compensation coverage should be considered enough to overcome the threshold analysis).

138. Fredericksen, *supra* note 131, at 257 (citing *Pietras*, 180 F.3d at 473).

139. Rafi v. Thompson, No. 02-2356(JR), 2006 WL 3091483, at *1 (D.D.C. Oct. 30, 2006).

140. *Marie*, 771 F.3d at 355 ("[A]rguments about enhanced career opportunities, access to training, or possible future employment have been rejected by courts when these opportunities are accessible to the public generally or when they are too speculative.") (citing Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 73 (8th Cir. 1990); Moran v. Harris Cty., No. H-07-582, 2007 WL 2534824, at *1 (S.D. Tex. Aug. 31, 2007); Holder v. Town of Bristol, No. 3:09-CV-32PPS, 2009 WL 3004552, at *6 (N.D. Ind. Sept. 17, 2009)).

141. 126 F.3d 112 (2d Cir. 1997).

142. *Id.* at 113.

143. *Id.*

144. *Id.*

145. *Id.*

behavior on multiple occasions, the behavior and commentary became so pervasive that she no longer felt comfortable working at the facility.[146]

After the escalating harassment forced her to quit, the student brought suit.[147] As a prerequisite to evaluating the student's employee status under the ideals of "the conventional master-servant relationship," the court had to determine whether the student received Title VII's protections.[148] So, the court applied the benefits analysis test.[149] The court explicitly held:

> Where no financial benefit is obtained by the purported employee from the employer, no "plausible" employment relationship of any sort can be said to exist because although "compensation by the putative employer to the putative employee in exchange for his services is not a sufficient condition . . . it is an essential condition to the existence of an employer-employee relationship."[150]

The court decided that the student was not afforded any Title VII protections because the student received no "direct or indirect economic remuneration or the promise thereof."[151] The absence of a "salary, health benefits, retirement benefits, and [lack of] regular hours" lent itself to finding the plaintiff to be solely an unpaid intern who did not qualify as an employee.[152] Since the plaintiff failed the benefits analysis as a preliminary step, the court concluded its analysis.[153]

2. Common Law Agency Test

The common law agency test requires that "Title VII . . . be construed in light of general common law concepts."[154] Courts decided that the common law agency test, taken from the *Restatement (Second) of Agency*, applies as a result of congressional failure to indicate which test it intended courts to

146. *Id.* at 114.
147. *Id.*
148. *Id.* at 115 (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–23 (1992)).
149. *See id.* at 115–16.
150. *Id.* (quoting Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 73 (8th Cir. 1990)).
151. *Id.* at 116.
152. *Id.*
153. *Id.*
154. Cobb v. Sun Papers, Inc., 673 F.2d 337, 341 (11th Cir. 1982).

apply directly.[155] The *Restatement (Second) of Agency* provides many factors for courts to consider when determining the existence of agency relationships,[156] and the Supreme Court recognized that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[157] In spite of this guidance, courts have focused on the degree of an employer's ability to control the individual's work in the Title VII context.[158] Though the common law agency test initially sought to decide whether an individual qualifies as an employee or independent contractor, the logic has been extended to determining whether an individual qualifies as a volunteer or an employee.[159] Arguably, it extends even further to analyze whether an intern qualifies as an employee.[160]

In *Cobb v. Sun Papers, Inc.*, the Eleventh Circuit determined that "it is the economic realities of the relationship viewed in light of the common law principles of agency and the right of the employer to control the employee that are determinative."[161] The Eleventh Circuit had to determine whether the lower court properly classified a custodian as an independent contractor, which would disqualify him from Title VII protections.[162] Because the lower court properly applied the common law agency test and found that the employer did not supervise the janitorial work, the Eleventh Circuit affirmed the custodian's non-employee status.[163]

In a similar scenario, the Sixth Circuit considered whether volunteer nuns could be considered employees under Title VII in *Marie v. American Red Cross*.[164] Although it seems possible for volunteers to attain employee

155. Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 79–80 (1984).

156. RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958).

157. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992) (quoting NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968)).

158. *See* Dowd, *supra* note 155, at 81–83.

159. *See* Marie v. Am. Red Cross, 771 F.3d 344, 351–53 (6th Cir. 2014).

160. *See, e.g.*, Keiko Rose, *Volunteer Protection under Title VII: Is Remuneration Required?*, 2014 U. CHI. LEGAL F. 605 (2014) (discussing the interplay between volunteer status and Title VII's requirements).

161. 673 F.2d 337, 341 (11th Cir. 1982).

162. *See id.* at 341–42.

163. *Id.* at 342.

164. *Marie*, 771 F.3d at 351. Because the court in this instance considered the benefits analysis almost in conjunction with the common law agency principles, the Sixth Circuit may have applied more of a hybrid test; however, the analysis of the types of remuneration considered helps to flesh out what might overcome the benefits analysis either as a stand-alone test or as a threshold test.

status under Title VII,[165] the Sixth Circuit found that plaintiffs in this case had not.[166] The Sixth Circuit clarified that it considered the benefits analysis as "a nondispositive factor that should be assessed in conjunction with the other . . . factors to determine if a volunteer is an employee" and not a threshold analysis.[167] Specifically, in analyzing the non-tangible benefits available to the nuns, the court held that the "liability insurance for injuries sustained during service, in-kind donations, and reimbursements for travel . . . are contingent or were simply incidental to their work."[168] Further, "the educational opportunities, possibility of promotions, increased standing in the community, networking opportunities, opportunities for grants, and access to opportunities to serve [were] speculative and insufficient to constitute remuneration here."[169] Ultimately, the nuns failed to overcome the presumption that they simply served as volunteers for the Red Cross.[170]

Since this rigid test "tends to exclude the greatest number of persons from Title VII coverage," some scholars have come to disfavor its use.[171] The common law agency test often "focus[es] only on characteristics [of the employment relationship that] indicat[e] control within the putative employment relationship that are easily measured."[172] This narrowed focus fails to reveal what the relationship between the employer and the plaintiff truly looks like because it fails to appreciate the nearly identical functions present in unpaid internships and employment relationships.[173]

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165. *See* Bryson v. Middlefield Volunteer Fire Dep't, Inc., 656 F.3d 348, 355 (6th Cir. 2011). The *Bryson* court did not independently hold the firefighters to be employees but noted that the lower court had improperly applied the remuneration factor as an independent factor, rather than one of many to consider. *Id.*

166. *Marie*, 771 F.3d at 359.

167. *Id.* at 353.

168. *Id.* at 355.

169. *Id.* at 356.

170. *Id.* at 359.

171. Craig J. Ortner, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613, 2628 (1998); *see also* Dowd, *supra* note 155, at 85 ("In sum, the application of the common law test results in the arbitrary exclusion of independent contractors from Title VII coverage based on an analysis which is unduly simplistic."); Fredericksen, *supra* note 131, at 258–59 ("Critics of the common law agency test as applied by lower courts argue that the test is limited by its emphasis on an overly formal structure between the employer and the putative employee, rather than considering the reality and context of the relationship.").

172. Fredericksen, *supra* note 131, at 259.

173. *Id.*

3. Primary Purpose Test

Some courts choose to evaluate an individual's employment status based on the primary purpose of the entire relationship.[174] The Tenth Circuit applied this logic in *Williams v. Meese* when deciding whether a prisoner qualified as an employee under Title VII.[175] The court specifically noted that the prisoner could not be an employee under Title VII because "his relationship with the Bureau of Prisons, and therefore, with the defendants, [arose] out of his status as an inmate, not an employee."[176] Because "[t]he primary purpose of [the defendant and plaintiff's] association [was] incarceration, not employment," the prisoner could not establish that his relationship with the Bureau of Prisons amounted to more than an accommodation for his sentence.[177] Given that the primary purpose of the inmate's relationship with the prison system was solely for incarceration and no other employment-related purpose, the prisoner did not receive employee status.[178]

By contrast, some courts interpret the primary purpose test to focus on the intent of Title VII itself, which was to initially protect certain classes of individuals from discriminatory employment practices.[179] Although not evaluating Title VII, an example of examining the purpose and intent of employment legislation is found in *NLRB v. Hearst Publications*, where the Supreme Court evaluated the National Labor Relations Act (NLRA).[180] Here, the court analyzed Congress's intent behind the NLRA,[181] and ultimately found that newspaper boys fit within the Act's framework of employee.[182]

Looking to the primary purpose of the relationship appears to be the modern approach to applying the primary purpose test, but both appear to be applicable in understanding whether an individual qualifies for employee

174. *Id.*

175. Williams v. Meese, 926 F.2d 994, 997 (10th Cir. 1991) (first alteration in original) (second alteration added).

176. *Id.*

177. *Id.* (quoting EEOC Decision No. 86-7, 40 Fair Empl. Prac. Cas. (BNA) 2–3 (1986)).

178. *Id.*

179. *See supra* Part I; *see also* NLRB v. Hearst Publ'ns, 322 U.S. 111, 129 (1944) ("That term, like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship."); Jackson Taylor Kirklin, Comment, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America's Prisons*, 111 COLUM. L. REV. 1048, 1064 (2011).

180. *Hearst Publ'ns*, 322 U.S. at 113.

181. *Id.* at 123–28.

182. *Id.* at 132.

protections. Both approaches require looking at the "underlying economic relationship" as a primary rather than secondary consideration, effectively excluding any unpaid party from achieving employee status.[183]

4. Economic Realities Test

Under the economic realities test, "one must examine the economic realities underlying the relationship between the individual and the so-called principal in an effort to determine whether that individual is likely to be susceptible to the discriminatory practices which the act was designed to eliminate."[184] The Sixth Circuit transitioned from the primary purpose test to the economic realities test because courts broadly construe loosely defined terms, such as employee.[185] In *Armbruster v. Quinn*, two former secretaries sued for sexual harassment under Title VII.[186] The court was "unpersuaded that the term 'employee' was meant in a technical sense, divorced from the broad[] humanitarian goals of the Act."[187] Therefore, the Sixth Circuit held that it must also consider the "economic realities underlying the relationship,"[188] ultimately directing the lower court to consider this factor on remand.[189]

Based on the facts that the university provided the student with a stipend, benefits, sick leave, and annual leave,[190] the Eleventh Circuit held that a graduate student research assistant was an employee of the university.[191] However, to the detriment of some unpaid interns, the Eleventh Circuit noted in this same case that courts tend to only grant graduate students employee-status when "their academic requirements were truly central to the relationship with the institution."[192]

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183. Fredericksen, *supra* note 131, at 259–60.

184. Armbruster v. Quinn, 711 F.2d 1332, 1340 (6th Cir. 1983), *abrogated by* Arbaugh v. Y & H Corp., 546 U.S. 500 (2006).

185. *Id.* (noting that the Fair Labor Standards Act which has the same circular definition for employee "ha[s] been given the broadest definition ever included in any one act").

186. *Id.* at 1334.

187. *Id.* at 1341.

188. *Id.* at 1340.

189. *Id.* at 1342.

190. Cuddeback v. Fla. Bd. of Educ., 381 F.3d 1230, 1232, 1234 (11th Cir. 2004). The court also found that the facts that a collective bargaining agreement was in place, that the University provided the equipment and training, and that the decision not to renew the student's position for employment reasons (rather than academic) all indicated that the student was an employee rather than solely a student. *Id.*

191. *Id.* at 1232, 1235.

192. *Id.* at 1235.

5. Hybrid Test

The hybrid test, now employed by a majority of courts, combines elements from the common law agency test and the economic realities test.[193] Essentially, courts consider the economic realities of the employment relationship alongside the employer's control over the individual.[194] The Tenth Circuit applied this test in *Zinn v. McKune* when it considered whether a Kansas Department of Corrections nurse qualified as an employee under Title VII.[195] The court evaluated the relationship through the common law agency test by evaluating who had the right to control the nurse's activities in conjunction with other factors, such as the level of supervision, requisite skill, and type of benefits involved.[196] Under the hybrid test, courts should evaluate all of these factors by looking "to the totality of the circumstances surrounding the working relationship between the parties."[197]

B. Unpaid and Unprotected

Almost every test that a court may consider when evaluating the existence of an employment relationship requires determining whether one party paid the other. This determination almost always leaves unpaid interns without protections from discriminatory and harassing behaviors. Generally, an unpaid intern fails to prove remuneration as a threshold matter, thus creating a nearly insurmountable hurdle. *O'Connor v. Davis*, discussed above, illustrates the struggles that interns face when attempting to prove remuneration, even when completing an internship as an educational requirement.[198]

The precedent established in *O'Connor* also implies that a student lacks protection against an employer during an externship. Though not a published decision, in *Allen v. Cumberland Medical Center, Inc.*, a federal district court held that a student extern received no Title VII protections because she failed the remuneration requirement.[199] Within the first few

193. Fredericksen, *supra* note 131, at 261.

194. *Id.* at 262.

195. 143 F.3d 1353, 1354–55 (10th Cir. 1998).

196. *Id.* at 1357 (citing Lambertsen v. Utah Dep't of Corr., 79 F.3d 1024 (10th Cir. 1996)).

197. *Id.* It is possible that other factors would be relevant under the hybrid test, but it is clear that the Tenth Circuit felt these three factors were of specific importance.

198. 126 F.3d 112 (2d Cir. 1997); *see also supra* Section III.A.1.

199. Allen v. Cumberland Med. Ctr., Inc., No. 2:10–cv–0045, 2010 WL 3825667, at *4 (M.D. Tenn. Sept. 24, 2010).

weeks of her externship at a medical center, the plaintiff-extern reported that an employee had "sexually harassed [her] by making unwanted sexual advances and by inappropriately touching her."[200] Relying on the Second Circuit's decision in *O'Connor*, the court held that externships did not meet the remuneration requirement either.[201] Therefore, since the student did not receive any form of remuneration and "was placed in the unpaid externship because it was required by her school's curriculum," the plaintiff's quest for Title VII protection was futile.[202]

Because unpaid interns work without pay, their claims rarely survive initial determinations of employee status.[203] Simply because the benefits are not in the form of money, an unpaid intern should not automatically be without Title VII's safeguards. Not only do these individuals remain unpaid, but they also lack Title VII's statutory protections against sexual harassment and discrimination. *O'Connor* clearly evinces that unpaid interns should worry about their lack of protection from unwanted sexual advances and sexualized comments.

C. Including Unpaid Interns Under Title VII: Expanding Definitions Judicially or Legislatively

Because Title VII's "wide-sweeping goal [was] equality in employment," its failure to protect unpaid student interns from discrimination directly undermines its purpose.[204] Title VII was meant to protect all workers from discriminatory behavior, and interpreting the definition of employee narrowly fails to accomplish this goal.[205] Consequently, either courts should extend the judicially-created tests for determining employee status to include unpaid interns, or Congress should modernize the archaic and ineffective definition of employee to include anyone who performs services for an employer's benefit. These changes would arguably broaden Title VII eligibility to include unpaid interns. Because unpaid interns contribute to our economy, society should protect them from discrimination and harassment. Even more, unpaid interns often engage in the same type of work as employees but do not receive compensation or legal protection. The law should not weaponize

200. *Id.* at *1.
201. *Id.* at *4.
202. *Id.*
203. *See, e.g.*, *O'Connor*, 126 F.3d at 116.
204. Fredericksen, *supra* note 131, at 248–49.
205. *See id.*

individuals' "intern" status to encumber their ability to seek protection from harassment and discrimination.

1. Expanding Remuneration

Given the way the courts define benefit, the remuneration requirement immediately disadvantages student interns.[206] As discussed above, when courts limit their focus to monetary components of the employment relationship and refuse to consider other forms of remuneration, unpaid interns are unable to convince courts of their employment status.[207] Courts, however, can address this problem by lowering the judicially created threshold for what qualifies as remuneration. As it stands, courts do not protect students from workplace discrimination under Title VII when they receive an educational or career benefit.[208] This analysis must change.

If the remuneration requirement must persist, the requirement should broaden to include interns who receive educational benefits while working. The company, in such a situation, provides a benefit to the intern through introducing the intern to work experience and teaching the intern necessary workplace skills. The intern, in turn, provides the employer with benefits as well, such as free labor and access to a pipeline of potential employees. Notably, an employer can mold these interns into ideal employees while gauging their compatibility with the company's culture before hiring them. Employers face little risk when acquiring student workers at no cost and reserving the option to decide whether the student's performance warrants a job offer, ultimately providing the company strong bargaining power. Because both interns and employers receive clear benefits from the unpaid internship relationship, courts should find that unpaid interns satisfy the remuneration requirement and should be classified as employees under Title VII.

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206. *See* Marie v. Am. Red Cross, 771 F.3d 344, 355 (6th Cir. 2014) ("[A]rguments about enhanced career opportunities, access to training, or possible future employment have been rejected by courts when these opportunities are accessible to the public generally or when they are too speculative.") (citing Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 73 (8th Cir. 1990); Moran v. Harris Cty., No. H-07-582, 2007 WL 2534824, at *1 (S.D. Tex. Aug. 31, 2007); Holder v. Town of Bristol, No. 3:09-CV-32PPS, 2009 WL 3004552, at *6 (N.D. Ind. Sept. 17, 2009)).

207. *See generally O'Connor*, 126 F.3d at 116 (finding an unpaid student intern could not be an employee as defined in Title VII)

208. *Id.* (discussing whether an internship provides any substantive benefit to the student).

2. Modernizing the Definition of Employee

Existing limitations on the term "employee" prevent Title VII from accomplishing its goals. Nothing in Title VII indicates that an unpaid student intern should not receive protection from age, gender, sex, religion, or national origin discrimination. Specifically, unpaid interns were likely not even a consideration at the time that the legislature crafted this definition, which is why a dynamic interpretation of the Act is necessary.[209] Because courts continue to focus on the Act's broad and circular definition,[210] there is no compelling justification for courts or Congress not to expand this definition to include unpaid interns. A better definition of employee would cover any "individual working in exchange for salary, wage, *or other consideration*."[211]

This "other consideration" component would qualify unpaid interns for Title VII protections, as unpaid interns would be working in exchange for other consideration. These individuals agree to participate in unpaid intern programs for required course credit, on the job experience, and/or the ability to grow their professional network.[212] These intangible benefits should establish enough of an employment relationship to shelter unpaid interns from discriminatory business practices. In a just society, working without pay should not expose unpaid interns to sexual harassment in the workplace without legal recourse.

To address this issue, Congress may have to expressly identify unpaid interns as an employee under Title VII or, at the very least, provide a clearer definition than what is currently in place. Because society has a better understanding of sexual harassment in the workplace and unpaid internships have grown since Title VII's adoption, the 1964 definition of "employee" must not be permitted to continue to deprive today's workers.

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209. *See generally* Forkner & Kostka, *supra* note 24, at 162–66 (pointing out that Title VII's enacting Congress likely could not imagine the modern economy and dynamic labor market, so applying static definitions to the Act does more harm than good).

210. *O'Connor*, 126 F.3d at 115 ("The definition of the term 'employee' provided in Title VII is circular."); Barnes v. Colonial Life & Accident Ins. Co., 818 F. Supp. 978, 980 (N.D. Tex. 1993) ("To determine employee status within that broad and circular definition, the Fifth Circuit has adopted a hybrid economic realities/common-law control test.").

211. Fredericksen, *supra* note 131, at 249 (emphasis added). Fredericksen believes this definition to be the "dictionary definition" of the term employee, making it even more appropriate to apply this definition to Title VII's definitional framework. *Id.* at 249 & n.24.

212. Penny Loretto, *The Benefits of Doing an Unpaid Internship*, BALANCE CAREERS, https://www.thebalancecareers.com/are-there-benefits-to-doing-an-unpaid-internship-1986787 (last updated Sept. 9, 2019).

D. A Brief Note as to Why the Definition of Employee Should Not Change in All Federal Legislation

Several federal employment laws contain a definition of employee similar to that found in Title VII.[213] Though at least one article suggests that the Fair Labor Standards Act (FLSA) and Title VII should adopt a uniform test to analyze employee status, [214] this Comment does not go that far. While both labor laws use the same ambiguous definition for employee,[215] classifying every unpaid intern as an employee under the FLSA would negate the purpose of an unpaid intern because the company would be forced to compensate the intern—a result that may do more harm than good.[216] If interns can qualify for FLSA benefits and minimum wage protections, companies may refuse to offer unpaid internships in the first place because they will become too costly. Since the purpose of an internship is to exchange free labor for job experience, mandatory minimum wage protections would violate the principles upon which many companies' programs are founded.[217] Therefore, though the definition of employee under the FLSA provides a useful comparison, this Comment does not argue that a finding of employee status under Title VII necessitates the same finding under the FLSA.

However, an unpaid intern may seek qualification as an employee under the FLSA before bringing a Title VII claim. Because successfully proving qualification for FLSA coverage would help an intern satisfy the remuneration requirement, she would be more likely to qualify as an employee under Title VII. The Department of Labor test for determining

213. *See, e.g.*, 29 U.S.C. § 203(e)(1) (2012) (Fair Labor Standards Act); 29 U.S.C. § 1002(6) (2012) (Employee Retirement Income Security Act); 42 U.S.C. § 12111(4) (2012) (Americans with Disabilities Act).

214. *See, e.g.*, Heffernan, *supra* note 118, at 1781–83.

215. 29 U.S.C. § 203(e)(1) ("[T]he term 'employee' means any individual employed by an employer.").

216. *See* Fredericksen, *supra* note 131, at 269 (discussing the Department of Labor's guidelines for FLSA coverage and noting that a finding under of employee status under both FLSA and Title VII could have a "chilling effect").

217. *See* Nicolas A. Pologeorgis, *Unpaid Internship Impact on the Labor Market*, INVESTOPEDIA, https://www.investopedia.com/articles/economics/12/impact-of-unpaid-internships.asp#benefits-to-employers (last updated June 25, 2019) (noting that employers benefit from unpaid interns through reduced costs, the ability to mold potential future employees, and receiving fresh perspective and energy).

employee status may still prove difficult for an unpaid intern to satisfy, as there are seven relevant factors for a court to consider.[218]

In *Wang v. Hearst Corp.*, the Second Circuit applied the primary beneficiary test to a group of unpaid interns' class action claim where they argued that they fit the definition of employee and should therefore receive compensation under the FLSA.[219] The company in *Wang* hired student interns to work without pay, on the condition that each student was enrolled for class credit.[220] The court applied a "flexible" totality of the circumstances test.[221] After reviewing the seven factors necessary to determine the existence of an employee-employer relationship, the lower court held that the students all qualified as interns and granted the corporation summary judgment.[222] The Second Circuit held that summary judgment was proper because a judge can properly assess those factors based on the undisputed facts in the record.[223]

One of the main factors the court considered was the connection between the internship and the student's education.[224] The court highlighted that the internship's timing (i.e., during the summer months), relevance to the student's academic goals, and connection to the student's specific degree program all weighed in favor of the interns *not* qualifying for FLSA.[225] The other factors the court analyzed focused more on the way that the interns' work impacted the work environment, which is helpful for unpaid interns who engage in meaningful work during their time with a company.[226] The Second Circuit's focus on the interns' connection to a university program,

218. WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET 13: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (revised July 2008), https://www.dol.gov/whd/regs/compliance/whdfs13.pdf. The seven relevant factors include: (1) The extent to which the services rendered are an integral part of the principal's business; (2) the permanency of the relationship; (3) the amount of the alleged contractor's investment in facilities and equipment; (4) the nature and degree of control by the principal; (5) the alleged contractor's opportunities for profit and loss; (6) the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor; and (7) the degree of independent business organization and operation. *Id.*

219. 877 F.3d 69, 71 (2d Cir. 2017).

220. *Id.*

221. *Id.* at 72–76.

222. *Id.* at 76; *see supra* note 218 and accompanying text (providing the list of the factors).

223. *Wang*, 877 F.3d at 76.

224. *Id.* at 74–75.

225. *Id.* at 74.

226. *Id.* at 75.

however, creates tension for any student who participates in a degree program that requires an internship to graduate.

Consequently, courts should not adopt a uniform test for determining employee status under the many federal laws that utilize the same circular language to define employee because doing so would likely reduce the availability of unpaid internships. If a uniform test indicated that an individual was an employee under both Title VII and the FLSA, companies would be forced to pay these individuals in order to comply with federal law. While it might be strategically beneficial for an unpaid intern to first seek employee status under the FLSA because it would help prove remuneration, which is required under Title VII's tests, it will likely still be a challenge. Despite using different tests to analyze employee status under both Acts, individuals who receive credit with their academic institution still struggle to find FLSA protections.

IV. The Title VII Workaround: Mandatory Arbitration Provisions

Even if the courts decide in favor of transgender employees or Congress legislates unpaid intern protections under Title VII, these protections can be easily contracted around via mandatory arbitration provisions. Employees around the country increasingly find that employers insert arbitration provisions in employment contracts. More than fifty percent of private sector employees—more than sixty million American workers—are subject to these agreements.[227] When employment contracts contain arbitration provisions, employees are unable to access state or federal courts to resolve many issues that arise out of the employment relationship.[228] Employees often agree to mandatory arbitration when signing the employment agreement, but companies also adopt these practices "by announcing that these procedures have been incorporated into the organization's employment policies."[229] Larger companies tend to use mandatory arbitration provisions more often than smaller companies, most likely because they have better access to "sophisticated human resource policies and better legal counsel."[230]

227. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECONOMIC POL'Y INST. (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.

228. *Id.*

229. *Id.*

230. *Id.*

Easily accessible form employment agreements specify that employees must arbitrate any wage claim, wrongful termination claim, and "any claim based upon any statute, regulation, or law, including those dealing with employment discrimination, sexual harassment, civil rights, age, or disabilities."[231] This all-encompassing language leaves employees vulnerable to abusive behavior without standard legal recourse. Research shows that "employees are less likely to win arbitration cases and they recover lower damages in mandatory arbitration than in the courts."[232] In the Title VII context, employees who agree to these provisions may be forfeiting their right to file a discrimination claim in court assuming the arbitration provision is upheld.[233]

A. The Supreme Court's Path to Supporting Arbitration Provisions

During the rise of mandatory arbitration clauses in boilerplate employment contracts, courts had to decide how to enforce these provisions and what types of claims to exclude from mandatory arbitration clauses. Initially, courts held that Title VII protections were beyond the reach of compulsory arbitration provisions, finding that employees who agreed to these provisions could still file Title VII claims in court.[234] However, the Supreme Court has since chipped away at Title VII protections, ultimately leaving employees subject to mandatory arbitration provisions without much recourse in court.[235]

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231. *Form of Simple Employment Contract Containing Arbitration Clause*, ARBITRATION SERV. OF PORTLAND, http://www.arbserve.com/pdfs/employment_agr2.pdf (last visited Sept. 20, 2019).

232. Colvin, *supra* note 227.

233. It may be possible to challenge these arbitration provisions in court for unconscionability or other contractual issues. *See* Sonic-Calabasas A, Inc. v. Moreno, 311 P.3d 184, 202–03 (Cal. 2013). However, Supreme Court precedent likely prevents states from uniformly excluding claims from "mandatory arbitration." *See generally* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (striking down a California rule frequently used to find arbitration clauses as unconscionable as a violation of the Federal Arbitration Act); *see also, e.g.*, Latif v. Morgan Stanley & Co. LLC, No. 18cv11528 (DLC), 2019 WL 2610985 (S.D.N.Y. June 26, 2019) (slip opinion) (finding a New York state law that prevented arbitration of sexual harassment claims contravened the intention of the Federal Arbitration Act). The focus of Part IV of this Comment is only to explain that arbitration provisions can subsume Title VII claims.

234. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974).

235. *See generally* Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir. 1994).

1. Initial Protections for Title VII Claims

In 1974, the Supreme Court appeared to favor protecting the statutory right to file Title VII claims. In *Alexander v. Gardner-Denver Co.*, the Court evaluated whether an employee (here, a drill operator) could still sue his employer under Title VII after entering into a collective-bargaining agreement that contained an arbitration provision.[236] When the company discharged the operator, he "filed a grievance under the collective-bargaining agreement in force between the company and [his] union."[237] Although the employee accused the company of firing him for racially discriminatory reasons at an arbitration proceeding, the arbitrator ultimately found that the employer released him for just cause.[238] Six months after the arbitrator's final decision, the EEOC also investigated and determined not to pursue the claim, issuing the drill operator with a right to sue letter.[239]

At this point, the employee brought suit in the appropriate district court.[240] However, the court granted the company's motion for summary judgment because "the claim of racial discrimination had been submitted to the arbitrator and resolved adversely to [the employee-operator]."[241] The Tenth Circuit agreed with this reasoning and affirmed the decision.[242] The lower "courts evidently thought that this result was dictated by notions of election of remedies and waiver and by the federal policy favoring arbitration of labor disputes."[243]

The Supreme Court took the opposite stance, ultimately finding that Title VII's policy goal of preventing and remedying discriminatory practices would be best served by allowing "an employee to pursue fully both his remedy under the . . . arbitration clause" and in the courts.[244] The Court reached this conclusion for several reasons. First, Congress intended the "final responsibility for enforcement of Title VII [to be] vested with federal courts."[245] Further, "[t]here [was] no suggestion in the statutory scheme that

236. *Alexander*, 415 U.S. at 42–44.
237. *Id.* at 39.
238. *Id.* at 42.
239. *Id.* at 43.
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.* at 45–46 (citing Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1975)).
244. *Id.* at 59–60.
245. *Id.* at 44.

a prior arbitral decision either foreclose[d] an individual's right to sue or divest[ed] federal courts of jurisdiction."[246]

The Court further surmised that Congress intended Title VII to provide procedures to protect an individual and that these same procedures did not evaporate upon the adverse conclusion in an arbitration proceeding.[247] Distinguishing between Title VII claims and arbitration proceedings, the Court acknowledged that contract rights and statutory rights are distinct and that "statutory rights [are] not vitiated merely because both were violated as a result of the same factual occurrence."[248] The Court concluded by finding that the employee could not have prospectively waived his statutory rights under Title VII and that arbitration proceedings are not the best forum to adjudicate statutory rights under Title VII.[249] The arbitral decision could be used as evidence in the judicial system, but the arbitral process was not the proper forum to adjudicate Title VII claims.[250] At this point, all indications suggested that Title VII claims could survive mandatory arbitration provisions, serving the employees' best interests.

2. A Shift in Theory to Favor Arbitration Provisions

While *Alexander* protected statutory claims for almost two decades, the Supreme Court has since explicitly upheld the practice of contractually removing an employee's access to the court system.[251] In *Gilmer v. Interstate/Johnson Lane Corp.*, the Court evaluated whether a claim under the Age Discrimination in Employment Act (ADEA) was subject to a mandatory arbitration provision under which the manager-employee "agree[d] to arbitrate any dispute, claim or controversy."[252] After the employer terminated the sixty-two-year-old manager, he filed suit under the ADEA.[253] Immediately thereafter, the company filed a motion to compel arbitration.[254] The district court denied the motion, but the Fourth Circuit reversed.[255] The circuit court noted that nothing in the ADEA's language precluded arbitration and that more recently, the Supreme Court had

246. *Id.* at 47.
247. *Id.* at 49.
248. *Id.* at 50.
249. *Id.* at 51, 56.
250. *Id.* at 60.
251. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991).
252. *Id.* (quoting the employee's registration application).
253. *Id.* at 23–24.
254. *Id.* at 24.
255. *Id.*

allowed employment arbitration provisions to preclude several statutory rights.[256]

On appeal to the Supreme Court, the manager argued that the compulsory nature of an arbitration provision was "inconsistent with the statutory framework and purposes of the ADEA."[257] The Supreme Court, however, rejected this assertion, finding that an employer's ability to enforce an arbitration provision does not harm the EEOC or individuals.[258]

The manager also challenged the adequacy of arbitration procedures and decisions.[259] The Court refused to consider the possibility of pro-employer bias during arbitration proceedings because rules existed to provide proper protections.[260] The employee also noted that the limited discovery available in arbitration created difficulties in proving discriminatory decisions or behavior.[261] By acknowledging that the employee "trade[d] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration," the Court disposed of this concern.[262] The manager's final concern was the secretive nature that allowed companies to hide discriminatory practices, such as a lack of written opinions.[263] The Court dispensed of this issue by relying on the fact that such concerns are simply part of the arbitration proceedings.[264] The Court also noted that, "it [was] unlikely that all or even most ADEA claimants [would] be subject to arbitration agreements."[265]

Relying on *Alexander* and its progeny, the manager contended that previous Supreme Court precedent prevented arbitration from nullifying his ADEA action before reaching the courts.[266] The Court distinguished its

256. *Id.* at 24–26.

257. *Id.* at 27.

258. *Id.* at 28 ("We also are unpersuaded by the argument that arbitration will undermine the role of the EEOC in enforcing the ADEA. An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action.").

259. *Id.* at 30.

260. *Id.*

261. *Id.* at 31.

262. *Id.* (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

263. *Id.*

264. *Id.* at 31–32.

265. *Id.* at 32.

266. *Id.* at 33. The Court recognized that this line of cases the employee advanced included: *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), and *McDonald v. West Branch*, 466 U.S. 284 (1984). *Gilmer*, 500 U.S. at 33.

holding in *Alexander* by noting that the real issue present in *Alexander* "was whether a discharged employee whose grievance had been arbitrated pursuant to an arbitration clause in a collective-bargaining agreement was precluded from subsequently bringing a Title VII action based upon the conduct that was the subject of the grievance."[267] Though the arbitrator's role "is to effectuate the intent of the parties,"[268] the *Alexander* Court recognized "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit."[269] Notably, the Court distinguished cases that protected statutory claims from arbitration provisions for two main reasons:

> First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present cases.[270]

Therefore, the Court prohibited the manager in *Gilmer* from maintaining his ADEA claim in federal court and enforced the arbitration provision that he had agreed to when he entered into the employment relationship.[271]

Circuit courts have explicitly held that Title VII claims are subject to mandatory arbitration agreements.[272] Specifically, in *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the Tenth Circuit held that a Title VII claim was subject to the mandatory arbitration provisions included in a non-

267. *Gilmer*, 500 U.S. at 33–34.
268. *Id.* at 34 (quoting *Alexander*, 415 U.S. at 53).
269. *Id.* (quoting *Alexander*, 415 U.S. at 58 n.19).
270. *Id.* at 35.
271. *Id.*
272. *See, e.g.*, EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir. 1994); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 229–30 (5th Cir. 1991).

employment contract.[273] The employee, here an account executive, signed a "registration contract" pursuant to her job with the National Association of Securities Dealers, which required mandatory arbitration between herself and Merrill Lynch.[274] It was during Merrill Lynch's appeal process that the Supreme Court handed down the *Gilmer* decision, and Merrill Lynch argued that this new precedent changed the analysis.[275] In light of the *Gilmer* decision, the Tenth Circuit found that "Title VII claims [were] in fact subject to compulsory arbitration."[276] Other circuits have also interpreted *Gilmer* to clearly extinguish a plaintiff's right to bring a Title VII claim when an arbitration provision was in place.[277]

3. Arbitration Provisions Serve as a Waiver to Class Actions

In the modern trend toward expansive arbitration provisions, the Supreme Court has also allowed arbitration provisions to serve as a waiver of class actions. In *AT&T Mobility LLC v. Concepcion*, two consumers "entered into an agreement for the sale and servicing of cellular telephones" with the company,[278] which included a provision that required the consumer to bring his arbitration in an "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."[279] The central issue in the case hinged upon the ability of an arbitration provision to include a waiver of any class action suits.[280] In evaluating such an issue, the Court relied on the Federal Arbitration Act, which "was designed to promote arbitration."[281] The plaintiff-consumers relied on a California rule that did "not *require* class-wide arbitration, [but] it allow[ed] any party to a consumer contract to demand it *ex post*."[282] The Court acknowledged that class arbitration would complicate issues of confidentiality, absentee

273. *Metz*, 39 F.3d at 1486, 1488.

274. *Id.* at 1486.

275. *Id.* 1486–87.

276. *Id.* at 1488.

277. EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 752 (9th Cir. 2003) (Finally, . . . it would be ironic to interpret statutory language encouraging the use of arbitration and containing no prohibitory language as evincing Congress' intent to preclude arbitration of Title VII claims."); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 229–30 (5th Cir. 1991) ("We now conclude that *Gilmer* requires us to reverse the district court and compel arbitration of [the plaintiff's] Title VII claim.").

278. 563 U.S. 333, 336 (2011).

279. *Id.* (quoting Petition for a Writ of Certiorari at 61a, *Concepcion*, 563 U.S. 333 (No. 09–893)).

280. *Id.* at 338.

281. *Id.* at 345.

282. *Id.* at 346.

parties, and selecting a fair and impartial arbitrator.[283] Therefore, "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[284] The Court broadly decided that class arbitration serves as an obstacle to the inherent benefits of arbitration, and, therefore, it could not be allowed.[285]

Although *Concepcion* examined arbitration provisions in a consumer context, it illustrates the Supreme Court's strong preference for arbitration provisions and the benefits they provide. The Court re-espoused this preference for protecting arbitration by ensuring that California's state contract law did not allow class actions to avoid a binding arbitration provision.[286]

In an attempt to protect employees, district courts, like that of *Gomez v. MLB Enterprises, Corp.*, have pushed back on the new Supreme Court trend by finding any reason to prevent employment litigation from getting lost behind the closed doors of arbitration.[287] In this case, waitresses at a gentleman's club "signed arbitration agreements that require[d] them to adjudicate employment-related claims against [the] Defendants through arbitration."[288] However, since the company had materially breached the provisions by "refus[ing] to pay the required arbitration fees," the court refused to enforce the arbitration provision.[289]

B. Mandatory Arbitration Provisions Destroy the Purpose of Title VII

The Supreme Court has effectively provided employers with a workaround to Title VII claims. Not only has the Court essentially neutered the statute when arbitration provisions are in place, but its rulings favoring arbitration provisions perpetuate the culture of sexual harassment that #MeToo attempts to address. When employers can settle disagreements behind closed doors and force employees to sign non-disclosure agreements, victims lose the ability to tell their stories. Meanwhile, offending individuals and companies avoid public punishment. When victims know that arbitration provisions destroy their Title VII claims, they may refuse to come forward.

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283. *Id.* at 348.
284. *Id.* at 348–49.
285. *Id.* at 352.
286. *Id.*
287. No. 15-cv-3326(CM), 2018 WL 3019102 (S.D.N.Y. June 5, 2018).
288. *Id.*
289. *Id.* at *12.

Further, the Supreme Court reasoned that arbitration provisions would not become common occurrences when it shifted to allow arbitration provisions to cover statutory rights.[290] This rationale has turned out to be incorrect, as these provisions can be found in nearly every type of form contract, including employment agreements. Therefore, the Court's failure to predict the widespread use of mandatory arbitration in the employment context should limit *Gilmer*'s precedential value.

Substantial changes to employee protections are vital to move forward and adequately address the issues discussed in this Comment. At the least, sexual harassment and discrimination claims under Title VII should be exempt from the ambit of arbitration provisions. Ideally, Title VII claims, as a whole, should not be subject to arbitration provisions. Such claims should be treated as they were under the *Alexander* rationale—separate. An exemption that prevents employers from contracting around Title VII protections would once again protect employees from harassment and discrimination and shine a light on the companies that perpetuate discriminatory behavior. Without this change, companies will continue to hide misconduct and employees will continue to suffer behind closed doors.

V. Conclusion

Title VII is not functioning effectively in the modern economy as there are clear gaps in protection. If Congress intended Title VII to protect those in the workforce broadly, the Act is no longer working as intended. Transgender individuals often only succeed in bringing gender non-conformity claims, while sexual orientation claims face uncertain outcomes. Unpaid interns are left vulnerable and without legal recourse. Companies contract away an employee's legal right to bring Title VII claims in the courts via arbitration provisions. It is time for Title VII to receive an update, either judicially, legislatively, or both. The outdated definition of employee and unclear legislative intent behind sex-based discrimination in the Act have negatively impacted society for long enough. While states should continue to try and protect workers within their borders, it is time that Title VII protects #MeToo.

Taylor J. Freeman Peshehonoff

290. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991) ("[I]t is unlikely that all or even most ADEA claimants will be subject to arbitration agreements.").