

TWISTED UP: THE ELEVENTH CIRCUIT STANDARD FOR IMMUTABILITY IN *EEOC v. CATASTROPHE MANAGEMENT SOLUTIONS*

Abstract: On December 13, 2016, in *EEOC v. Catastrophe Management Solutions*, the United States Court of Appeals for the Eleventh Circuit held that discrimination on the basis of hairstyle is not actionable under Title VII of the Civil Rights Act of 1964, even if that hairstyle is closely associated with a particular race. In doing so, the Court continued an antiquated tradition in how “immutable characteristics” are viewed and declined to advance a more contemporary notion of “race,” resting instead on decades-old understandings of how race is construed. This Comment argues that with respect to race, courts should follow the Seventh Circuit’s understanding of immutability. Barring that, courts should apply the Supreme Court’s logic in *Price Waterhouse v. Hopkins* that prohibits stereotype-based sex discrimination to discrimination based on hairstyle and other sociocultural characteristics.

THE CURIOUS CASE OF RACHEL DOLEZAL

When Rachel Dolezal, a white woman, decided to live and identify as a Black woman, her transformation may not have been quite so convincing if not for her hair.¹ Dolezal coaxed her naturally straight, blonde hair into Afros, braids, and twists, without which she may have merely appeared to be a white woman with a particular affinity for tanning.² Although her hair, of course, was only one of many physical elements she altered, the importance of Dolezal’s hairstyles demonstrates the importance of these traditionally-Black hair-

¹ See Kirk Johnson, Richard Pérez-Peña & John Eligon, *Rachel Dolezal, in Center of Storm, Is Defiant: ‘I Identify as Black,’* N.Y. TIMES (June 16, 2015), <https://www.nytimes.com/2015/06/17/us/rachel-dolezal-nbc-today-show.html> [<https://perma.cc/E2M9-SCX9>] (describing Dolezal’s transformation from identifying as a white woman to identifying as a Black woman who eventually became a professor of Africana studies and chapter president of the NAACP); D. Wendy Green, *Splitting Hairs: The Eleventh Circuit’s Take on Workplace Bans Against Black Women’s Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 U. MIA. L. REV. 987, 1028, n.219 (2017) (noting the importance of Dolezal’s hairstyle—achieved through wigs and weaves—in her “self-identification or portrayal as a Black woman”).

² See Allison Samuels, *Rachel Dolezal’s True Lies*, VANITY FAIR (July 19, 2015), <https://www.vanityfair.com/news/2015/07/rachel-dolezal-new-interview-pictures-exclusive> [<https://perma.cc/32WX-MBB8>] (contrasting Dolezal with women who alter their appearance through self-tanner or other cosmetic measures to appear more “exotic” without changing their racial self-identification).

styles—not only for members of the community to celebrate their heritage, but for outsiders to make racial identifications.³

But what is “race?”⁴ If it were simply a matter of self-identification, Dolezal would unequivocally be a Black woman.⁵ Federal courts disagree with this self-identification premise, but beyond that have yet to coalesce around a common understanding of “race” and the role that sociocultural factors like hairstyle play in defining what it means to belong to a particular race.⁶ Given this uncertainty in the courts, state legislatures have begun drafting legislation designed to better define the contours of “race.”⁷ A handful of states including California, Massachusetts, and New York, have recently enacted legislation specifically protecting traditionally Black hairstyles from discrimination.⁸ These Acts, along with case law, generally understand race as including “traits historically associated with race,” and broadly expand the definition of “race”

³ See Kara Brown, *Rachel Dolezal Definitely Nailed the Hair, I'll Give Her That*, JEZEBEL (June 12, 2015), <https://jezebel.com/rachel-dolezal-definitely-nailed-the-hair-ill-give-her-1710899988> [<https://perma.cc/XY8J-E3UW>] (writing that Dolezal was aware of how women in the Black community talk about, and care for, their hair, and the role hair texture plays in “determining a person’s background”). If Dolezal “had kept her hair like this and just waved her Africana Studies curriculum around, people weren’t gonna buy that”; however, her commitment to learning about—and advocating for—natural hair was “for real.” *Id.*

⁴ See *Race*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/race#dictionary-entry-1> [<https://perma.cc/QEB5-VLN5>] (defining “race” as “any one of the groups that humans are often divided into based on physical traits regarded as common among people of shared ancestry”); see also Peter Wade, Yasuko I. Takezawa & Audrey Smedley, *Race*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/race-human> [<https://perma.cc/M6VR-S3AG>] (describing how “race” has been used historically to describe, among other things, linguistic groups, phenotypic differences among populations, and human “subspecies”).

⁵ See Denene Millner, Opinion, *Why Rachel Dolezal Can Never Be Black*, NPR: CODE SWITCH (Mar. 3, 2017), <https://www.npr.org/sections/codeswitch/2017/03/03/518184030/why-rachel-dolezal-can-never-be-black> [<https://perma.cc/M6KY-2XBU>] (writing that Blackness is rooted in history and culture, rather than merely being a set of physical characteristics).

⁶ See *Village of Freeport v. Barrella*, 814 F.3d 594, 607 (2d Cir. 2016) (“[P]eople who both appear to be ‘white’ in the vernacular sense of the term, and who would both identify as ‘white’ on Census forms . . . may nonetheless belong to different ‘races’ for purposes of [42 U.S.C.] § 1981.”); *Gathenji v. Autozoners, LLC*, 703 F. Supp. 2d 1017, 1029 (E.D. Cal. 2010) (interpreting “race” as “classes of persons identifiable because of their ancestry or ethnic characteristics” (citing *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 612–13 (1987))).

⁷ See, e.g., Create a Respectful and Open Workplace for Natural Hair (CROWN) Act, ch. 58, 2019 Cal. Stat. 1822–27 (codified at CAL. EDUC. CODE § 212.1 and CAL. GOV’T CODE § 12926) (extending antidiscrimination protections to “include traits historically associated with race”); An Act Prohibiting Discrimination Based on Natural and Protective Hair Styles, 2022 Mass. Acts 179–80 (modifying MASS. GEN. LAWS ch. 4 § 7 to prohibit race-based discrimination, including that based on “natural or protective hairstyles”); CROWN Act, 2019 N.Y. Laws 814 (modifying N.Y. EXEC. LAW § 292 (McKinney 2023) to similarly include “natural or protective hairstyles” as protected racial characteristics).

⁸ See *supra* note 7 and accompanying text (collecting legislation from these jurisdictions).

as a legal matter.⁹ Efforts at the federal level to pass parallel legislation, however, have stalled.¹⁰ The result is an uneven patchwork of statutory and common law at the state and federal level which fails to fully acknowledge the ways in which contemporary racial discrimination may manifest—and the contemporary concept of “race” itself.¹¹

The situation came to a head in 2016, in *EEOC v. Catastrophe Management Solutions*, when the United States Court of Appeals for the Eleventh Circuit found that an employment policy prohibiting the wearing of dreadlocks did not constitute race-based discrimination under Title VII.¹² The court relied on how “race” was understood at the time Title VII was promulgated, concluding that the statute was not intended to cover sociocultural characteristics.¹³ The Equal Employment Opportunity Commission (EEOC), however, argued that the law permitted this type of claim because the policy tends to discriminate against a particular race.¹⁴

Part I of this Comment details the statutory and case law at the time the Eleventh Circuit decided *Catastrophe Management Solutions*, as well as the history and purpose of Title VII of the Civil Rights Act of 1964.¹⁵ Part II discusses how various circuits have defined immutability in the context of race discrimination, and contrasts this against a more expansive definition of “sex” under Title VII.¹⁶ Lastly, Part III argues that the Eleventh Circuit’s treatment of hairstyle as a mutable characteristic misinterprets the purpose of Title VII, and

⁹ See *Village of Freeport v. Barrella*, 814 F.3d 594, 607 (2d Cir. 2016) (holding that the “meaning of the word ‘race’ in Title VII is, like any other question of statutory interpretation, a question of law for the court”).

¹⁰ See, e.g., Creating an Open and Respectful World for Natural Hair Act of 2022, H.R. 2116, 117th Cong. (as referred to S. Comm. on the Judiciary, Mar. 21, 2022) (outlining the House of Representatives’ proposed CROWN Act which seeks to expand the federal definition of “race” to encompass hairstyle and texture); Creating an Open and Respectful World for Natural Hair Act of 2021, S. 888, 117th Cong. (as proposed in Senate, Mar. 22, 2021) (attempting to expand the federal definition of “race” to encompass sociocultural characteristics). The proposed CROWN Act in the House was referred to the Senate without a final vote, and a parallel Senate bill has yet to be brought to the floor. See *H.R.2116: Creating a Respectful and Open World for Natural Hair Act of 2022, 117th Cong. (2022)*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/2116/actions> [https://perma.cc/H7X6-JNS5]; *S.888: CROWN Act of 2021, 117th Cong. (2021)*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/senate-bill/888/actions> [https://perma.cc/DVP3-SYVT].

¹¹ See *supra* notes 7, 10 (discussing various state laws protecting traditionally Black hairstyles from discrimination, and failed attempts by Congress to do the same); e.g., *Barrella*, 814 F.3d at 607 (ruling that ethnicity-based discrimination is prohibited under Title VII).

¹² See *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1021 (11th Cir. 2016).

¹³ See *id.* at 1027 (quoting *Race*, BLACK’S LAW DICTIONARY (4th ed. 1951), to equate “race” with “stock”).

¹⁴ See *id.* at 1023 (recounting EEOC’s argument that the claim was cognizable as a disparate treatment claim under Title VII because the policy, although facially neutral, would tend to disadvantage Black employees and job applicants).

¹⁵ See *infra* notes 18–46 and accompanying text.

¹⁶ See *infra* notes 47–71 and accompanying text.

if the United States Supreme Court takes up a similar case in the future, it should apply its precedents on sex-based discrimination and similarly make stereotypes based on race actionable under Title VII.¹⁷

I. THE LEGAL AND PROCEDURAL BACKGROUND OF *EEOC v. CATASTROPHE MANAGEMENT SOLUTIONS*

In 2016, in *EEOC v. Catastrophe Management Solutions*, the United States Court of Appeals for the Eleventh Circuit held that rescission of an applicant's job offer due to a violation of a facially neutral personal grooming code did not contravene Title VII of the Civil Rights Act of 1964.¹⁸ Section A of this Part discusses Title VII and the meaning of "race" as used in the statute, particularly for the purposes of bringing a disparate treatment claim.¹⁹ Section B of this Part discusses the factual and procedural history of *Catastrophe Management Solutions*.²⁰

A. Race, Title VII, and the Standard for Disparate Treatment Claims

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, sex, color, national origin, and religion.²¹ The seminal piece of legislation was passed during the civil rights era in the hope of dismantling the Jim Crow laws that perpetuated de facto discrimination against Black Americans and other minority groups.²² Although the statute ex-

¹⁷ See *infra* notes 72–91 and accompanying text.

¹⁸ See *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1021 (11th Cir. 2016) (affirming that discrimination against a job applicant based on characteristics such as hairstyle did not constitute discrimination on the basis of race under Title VII of the Civil Rights Act of 1964); 42 U.S.C. § 2000e-2(a)(1)–(2) (establishing protections against employment actions taken on the basis of race, sex, religion, and national origin).

¹⁹ See *infra* notes 21–37 and accompanying text.

²⁰ See *infra* notes 38–46 and accompanying text.

²¹ See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at scattered sections of 42 U.S.C.); 42 U.S.C. § 2000e-2(a)–(b) (prohibiting employers from engaging in practices that would “deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee”). The Act further established the Equal Employment Opportunity Commission (EEOC) to enforce the legislation. 42 U.S.C. § 2000e-4(a) (forming the EEOC, to be “composed of five members, not more than three of whom shall be members of the same political party”).

²² See Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, as Amended, Statement of Purpose, 29 C.F.R. § 1608.1(b) (2022) (explaining that “Congress enacted Title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the workplace”). These unequal conditions reflected a larger social practice of treating racial, ethnic, and religious minorities, as well as women, less favorably in political, professional, and economic life. 42 U.S.C. § 1981(a)–(c); see *The Civil Rights Act of 1964: A Long Struggle for Freedom: Immediate Impact of the Civil Rights Act*, LIBR. OF CONG., <https://www.loc.gov/exhibits/civil-rights-act/immediate-impact.html> [<https://perma.cc/4XT3-ZZ6B>] (describing the purpose of the Act as establishing a “more just and inclusive American society” by prohibiting

plicitly protects these enumerated categories, it does not define the contours of them, creating legal questions as to how they should be understood.²³

In 1972, in *McDonnell Douglas Corp. v. Green*, the Supreme Court first articulated the prima facie case for a Title VII employment discrimination claim.²⁴ This burden-shifting test ensures that although employers may continue to make personnel decisions based on legitimate criteria, discriminatory viewpoints may not replace those criteria.²⁵ The test accounts for claims of discrimination against members of protected classes that may not be facially obvious or based on animus by considering the weight of circumstantial evidence.²⁶ The protected classes themselves, however, are not defined in Title VII or any subsequent regulations promulgated by the EEOC.²⁷

discrimination in a number of facets of public life, including education and employment); *see also* 42 U.S.C. § 1981(a)–(c) (ensuring “full and equal benefit of all laws and proceedings for the security of persons and property” regardless of race, which may not be impaired by states or private entities).

²³ See 42 U.S.C. § 200e(j)–(k) (defining “religion” and “sex” but not “race,” “color,” or “national origin”); *see also* *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020) (expanding the definition of “sex” in Title VII to include protections for transgender and homosexual individuals). In 2020, in *Bostock v. Clayton County*, the Supreme Court held that if an adverse employment action occurs, in part, based on the employee’s sex or gender identity, the action violates Title VII. 140 S. Ct. at 1741. The Court further stated that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Id.*

²⁴ *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1972) (establishing a burden-shifting framework wherein the employer can provide a legitimate, non-discriminatory motivation for the personnel decision, which the complainant must then rebut to prevail on her claim). The framework requires a showing that (1) the complainant is a member of a protected class; (2) who satisfied the requirements for the position; (3) who was not hired for the position; and (4) the position stayed available as the employer pursued applications from similarly qualified applicants. *Id.* *McDonnell Douglas* dealt with racial discrimination and retaliation, with the Court writing that the shared goal of employers, employees, and consumers is good work “assured through fair and racially neutral employment and personnel decisions.” *Id.* at 801. The respondent-employee in this case had been laid off for what he believed to be race-based reasons, and engaged in protests against petitioner-corporation in response, including by obstructing traffic heading to the company. *Id.* at 794.

²⁵ *Id.* at 804. Specifically, the holding in *McDonnell Douglas* ensures that employers are free to refuse to hire or rehire individuals as long as the criteria for the refusal are applied alike to similarly-situated individuals regardless of race. *Id.*

²⁶ *See* 42 U.S.C. § 2000e-2(a)(2) (making actions that “deprives or tends to deprive” an individual of equal opportunity based on a protected characteristic unlawful); *id.* § 2000e-2(k) (providing the burden of proof for establishing a disparate impact claim); U.S. EQUAL EMP. OPPORTUNITY COMM’N, CM-604.2, THEORIES OF DISCRIMINATION § 604.1(a) (1988) [hereinafter EEOC, THEORIES], <https://www.eeoc.gov/laws/guidance/cm-604-theories-discrimination> [<https://perma.cc/LL4B-UKCH>] (outlining the requirements for a disparate treatment claim under Title VII, which requires a showing of “discriminatory motive” but permits inferential evidence of negative differences in treatment, rather than direct evidence, to prove the case).

²⁷ *See* 42 U.S.C. § 2000(a)–(b) (prohibiting discrimination in employment based on “race, color, religion, sex, or national origin,” without defining any of these terms); *e.g.*, *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1026 (11th Cir. 2016) (noting that Title VII and the EEOC both have not defined “race”); *see also* *EEOC Regulations*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc-regulations> [<https://perma.cc/J5E3-WN9W>] [hereinafter EEOC, REGULATIONS] (amalgamating the new, proposed, and existing regulations the EEOC promulgated or may promulgate). Although the EEOC has promulgated regulations related to sex, religion, and national origin—three of the classes

EEOC guidance in place since 1988 states that a disparate treatment claim—a claim based on unequal impact of a facially neutral policy—merely requires showing “differences in treatment between similarly situated individuals.”²⁸ This mirrors the purpose of disparate treatment under Title VII more broadly, permitting claims to be brought on the basis of inequitable treatment without needing to prove discriminatory animus as the but-for cause, as long as it is part of the employer’s motivation.²⁹ The classes protected by Title VII are generally understood as possessing “immutable characteristics,” or traits which cannot be changed.³⁰

Because Congress and the EEOC have declined to further define “race” in the context of bringing a Title VII case, this calculus has been left up to the courts.³¹ In 1987, in *St. Francis College v. Al-Khazraji*, the United States Supreme Court determined that Congress intended 42 U.S.C. § 1981, the federal antidiscrimination statute, to protect individuals from discrimination on the basis of race, ancestry, or “ethnic characteristics,” based on the contemporaneous understanding of “race” at the time the legislation was enacted.³² The

protected under Title VII—it has yet to issue a parallel regulation further defining what race-based discrimination in employment would look like. *See generally* 29 C.F.R. pts. 1604–1606 (2022) (establishing guidelines for discrimination on the basis of sex, religion, and national origin, respectively). And, though the EEOC has established a regulation relating to affirmative action, that regulation does not itself define any of the protected categories. *Id.* pt. 1608. Nevertheless, Section 15 of the EEOC’s compliance manual, a practical guide for employers to adhere to relevant laws, states that “Title VII prohibits employment discrimination against a person because of cultural characteristics often linked to race or ethnicity, such as a person’s name, cultural dress and grooming practices, or accent or manner of speech.” U.S. EQUAL EMP. OPPORTUNITY COMM’N, DIRECTIVES TRANSMITTAL 915.003, SECTION 15: RACE AND COLOR DISCRIMINATION COMPLIANCE MANUAL 4 (2006), https://www.eeoc.gov/sites/default/files/migrated_files/policy/docs/race-color.pdf [<https://perma.cc/D3AV-ERMP>] [hereinafter EEOC, COMPLIANCE MANUAL] (footnotes omitted).

²⁸ *See* EEOC, THEORIES, *supra* note 26, § 604.2 (outlining the standard for a disparate treatment claim, both individually and in contrast to an adverse impact claim). A disparate treatment claim requires only a facial showing of differences in treatment between a member of a protected class and other individuals for discriminatory reasons, even if those reasons are not “willful[.]” *Id.* An adverse impact claim, however, requires a showing that a neutral employment practice has the effect of “excluding or otherwise adversely affecting” members of protected classes. *Id.* § 604.7; *see also* EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 772 (2015) (ruling that discriminatory animus is not required to prove a disparate treatment claim if discrimination was “a motivating factor” in the employer’s adverse employment decision) (emphasis added).

²⁹ *See* EEOC, THEORIES, *supra* note 26, § 604.1(a); *McDonnell Douglas Corp.*, 411 U.S. at 802–04 (establishing a burden-shifting framework to accommodate the reality that direct evidence of discriminatory animus is difficult to obtain).

³⁰ *See* *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981) (stating that “immutable characteristics,” such as race, are those which are not readily changed).

³¹ *See, e.g., Catastrophe Mgmt. Sols.*, 852 F.3d at 1026 (determining on appeal “what ‘race’ encompasses under Title VII”); EEOC, COMPLIANCE MANUAL, *supra* note 27, at 3 (“Title VIII does not contain a definition of ‘race’ . . .”).

³² *See* *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 612 (1987) (finding that “Caucasian” does not necessary encompass persons of Arabic descent for the purposes of making out a discrimination

Court, however, did not define “ethnic characteristics” with any specificity, leaving lower courts to determine how the rule should be applied.³³

For example, the United States Court of Appeals for the Second Circuit, for example, has held that discrimination based on ethnicity constitutes racial discrimination under Title VII.³⁴ Several California District Courts have reached the same conclusion, determining that discrimination based on ethnicity is actionable as race-based discrimination.³⁵ Although these courts extended interpretations of race-based discrimination under Title VII more broadly than the language of the statute, they have not gone as far as to define “race” beyond ancestry and ethnic background.³⁶ It is unclear what characteristics, within the confines of *Al-Khazraji*, would be sufficient to make a showing of discrimination.³⁷

B. Factual and Procedural History of EEOC v. Catastrophe Management Solutions

In 2010, Chastity Jones, a Black woman, applied for a position as a customer service agent with Catastrophe Management Solutions, an insurance claims administrative support agency.³⁸ Ms. Jones wore her hair in “short dreadlocks” at the initial interview; later, she and others were told that they would be hired.³⁹ At that point in time, no one had commented on Ms. Jones’ hair or mentioned the personal grooming guidelines in place at the company; it was only when Ms. Jones spoke with the hiring manager that she was informed

claim under § 1981); *Village of Freeport v. Barrella*, 814 F.3d 594, 607 (2d Cir. 2016) (extending Title VII to encompass ethnicity-based discrimination as a subset of racial discrimination).

³³ See, e.g., *Barrella*, 814 F.3d at 607 (“[O]nly for purposes of Title VII, ‘race’ encompasses ethnicity . . .”); *Gathenji v. Autozoners, LLC*, 703 F. Supp. 2d 1017, 1029 (E.D. Cal. 2010) (same).

³⁴ See *Barrella*, 814 F.3d at 607 (determining that, under Title VII, discrimination based on ethnicity is actionable because it falls within race-based discrimination).

³⁵ See *Gathenji*, 703 F. Supp. 2d at 1029 (writing that “[r]ace” is interpreted broadly to mean classes of persons identifiable because of their ancestry or ethnic characteristics” (citing *Al-Khazraji*, 481 U.S. at 612–13)); *Chacon v. Ochs*, 780 F. Supp. 680, 681 (C.D. Cal. 1991) (noting that, with respect to discrimination based on interracial relationships, courts, including the Eleventh Circuit, have reasoned that such discrimination is race-based discrimination actionable under Title VII (citing *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.3d 888 (11th Cir. 1986))).

³⁶ See, e.g., *Barrella*, 814 F.3d at 607 (expanding Title VII protections to ethnic discrimination without defining either race or ethnicity); *Gathenji*, 703 F. Supp. 2d at 1029 (extending Title VII protections to prohibit discrimination based on “interracial associations” without defining “race”).

³⁷ See *Al-Khazraji*, 481 U.S. at 613 (noting that facial characteristics traditionally associated with certain ethnicities are “not essential to qualify” for protection under § 1981).

³⁸ See *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1021 (11th Cir. 2016) (providing factual background on the case); *About CMS*, CATASTROPHE MGMT. SOLS., INC., <https://catastrophe-managementsolutions.com/about-us> [<https://perma.cc/HXE7-P9FD>] (describing the company’s core business as a claims support operation).

³⁹ *Catastrophe Mgmt. Sols.*, 852 F.3d at 1021. The record in the case is not clear as to whether Ms. Jones was the only Black applicant offered a position that day. See *id.* The Eleventh Circuit specifies in its opinion, however, that Ms. Jones was dressed in a blue suit for the interview, indicating that her hairstyle was the only factor in CMS’s determination about her professionalism. *Id.*

she could not be hired with dreadlocks.⁴⁰ Specifically, Ms. Jones was told that dreadlocks would be out of conformance with the company's professional standards.⁴¹ When Ms. Jones said she would not change her hairstyle, she was asked to return the employment paperwork she had been given, ending her candidacy with the company.⁴² The EEOC subsequently filed suit on Ms. Jones' behalf, alleging race-based discrimination under Title VII in the form of disparate treatment, following an agency finding that Catastrophe Management Solutions interpreted its policy as prohibiting dreadlocks.⁴³

The United States District Court for the Southern District of Alabama dismissed the case under Federal Rule of Civil Procedure 12(b)(6) for failure to plausibly allege intentional racial discrimination, determining that a cultural practice of wearing dreadlocks predominantly by members of one race was not equivalent to "race" as contemplated in Title VII.⁴⁴ The court held that Title

⁴⁰ See *id.* at 1021–22 ("When Ms. Jones said that she would not cut her hair, Ms. Wilson told her that CMS could not hire her At the time, CMS had a race-neutral grooming policy"). The policy at issue states in relevant part that "[a]ll personnel are expected to be dressed and groomed in a manner that projects a professional and businesslike image while adhering to company and industry standards and/or guidelines. . . . [H]airstyle should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable." *Id.* (modification in original). It does not make explicit references to race, religion, or other classes protected by Title VII. *Id.*

⁴¹ *Id.* The manager told Ms. Jones that "they [dreadlocks] tend to get messy, although I'm not saying yours are, but you know what I'm talking about." *Id.* The hiring manager, Jeannie Wilson, also shared with Ms. Jones an anecdote about a Black man who had been told he would be required to cut his dreadlocks if he wanted to work at the company. See *id.* at 1021–22 (suggesting a pattern or practice of disallowing dreadlocks in the workplace).

⁴² *Id.* at 1022.

⁴³ *Id.* at 1023. Specifically, the suit alleged that Ms. Jones had suffered disparate treatment under the facially neutral personal grooming policy because she was told she could not wear her hair in dreadlocks. *Id.* Title VII prohibits discrimination in hiring or job advancement based on race in the context of private employment. 42 U.S.C. § 2000e-2(b). As the Eleventh Circuit notes in *Catastrophe Management Solutions*, however, neither Title VII nor its implementing regulations define "race." 825 F.3d at 1026; see also EEOC, COMPLIANCE MANUAL, *supra* note 27, at 3 (discussing how the EEOC has not promulgated regulations defining "race").

⁴⁴ See *EEOC v. Catastrophe Mgmt. Sols.*, 11 F. Supp. 3d 1139, 1143 (S.D. Ala. 2014) (writing that "to define race by non-unique cultural characteristics could lead to absurd results"), *aff'd*, 852 F.3d 1018, 1023 (11th Cir. 2016). The district court specifically pointed out that a policy tying dreadlocks to race would potentially make dreadlocks permissible for Black wearers, but impermissible for white wearers, creating an "absurd" result. *Id.* Dreadlocks and other natural or protective hairstyles, however, are generally associated with Black individuals and are intended to protect Black hair, which is considered more fragile. See, e.g., Venessa Simpson, Note, *What's Going On Hair?: Untangling Societal Misconceptions That Stop Braids, Twists, and Dreads from Receiving Deserved Title VII Protection*, 47 SW. L. REV. 265, 266 (2021) (arguing that "[s]ocial stigmas attached to certain hairstyles have led to employment bans against the primary, if not only, viable protective styles in a black woman's arsenal—braids, twists, and dreadlocks" (citing BEN AROGUNDADE, BLACK BEAUTY: A HISTORY OF AFRICAN AMERICAN HAIR & BEAUTY THROUGH THE AGES loc. 1959–62 (2011) (ebook))); see also Patricia A. Banks, No Dreadlocks Allowed: Race, Hairstyles, and Cultural Exclusion in Schools 5 (Dec. 30, 2021) (unpublished manuscript), <http://dx.doi.org/10.2139/ssrn.3781005> [<https://perma.cc/5VY2-UV7Z>] (using sociological and typological reasoning to show that "students who wear dreadlocks in some schools are subject to structural discrimination and stereotyping" based

VII does not extend to sociocultural characteristics that are not permanent.⁴⁵ The EEOC appealed, arguing that the district court erred in failing to rule that discrimination based on stereotypes related to hairstyle constituted “race” under Title VII, and in refusing expert testimony on this issue.⁴⁶

II. CIRCUIT DISAGREEMENT OVER THE CORRECT UNDERSTANDING OF “IMMUTABLE CHARACTERISTICS”

In *Catastrophe Management Solutions*, the EEOC argued to the Eleventh Circuit that the company’s policy against dreadlocks constitutes race-based discrimination under Title VII, based on a theory of disparate treatment, because of the hairstyle’s “physiological[] and cultural[]” association with Black people.⁴⁷ Specifically, the agency suggested that natural and protective hairstyles such as dreadlocks are a “natural outgrowth” of the immutable characteristics of Black hair, which has a different physiology than Caucasian hair.⁴⁸ More broadly, the EEOC advocated for a more expansive definition of “race” that encompasses sociocultural characteristics, including hairstyle, as opposed to merely biological features.⁴⁹

On appeal, the Eleventh Circuit determined that the EEOC’s argument was sufficient to make a facial showing of individual discrimination based on

on race). In 2016, the Perception Institute ran an implicit bias test, which showed that white women, on average, perceive natural Black hairstyles, including dreadlocks, as less attractive and less professional. ALEXIS MCGILL JOHNSON ET AL., THE PERCEPTION INST., THE “GOOD HAIR” STUDY 6 (2017).

⁴⁵ *Catastrophe Mgmt. Sols.*, 11 F. Supp. 3d at 1144. The court stated that “Title VII does not protect against discrimination based on traits, even a trait that has sociocultural racial significance.” *Id.* The district court also denied the EEOC’s efforts to introduce expert testimony on the social and cultural relationship between Black people and protective hairstyles like dreadlocks. *Id.* The court stated that “a hairstyle is not inevitable and immutable just because it is a reasonable result of hair texture, which is an immutable characteristic. No amount of expert testimony can change the fact that dreadlocks is a hairstyle.” *Id.*

⁴⁶ See *Catastrophe Mgmt. Sols.*, 852 F.3d at 1023–24 (outlining the procedural history and the EEOC’s basis for appeal); Brief of Plaintiff-Appellant at 48, *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018 (11th Cir. 2016) (No. 14-13482) (emphasizing the “nuances” of contemporary racial discrimination (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1972))).

⁴⁷ *Catastrophe Mgmt. Sols.*, 852 F.3d at 1023; see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1972) (describing the *prima facie* case for a disparate treatment claim).

⁴⁸ *Catastrophe Mgmt. Sols.*, 852 F.3d at 1023; see also Simpson, *supra* note 44, at 266 (describing the innate properties of Black hair). The EEOC’s Section 15 Compliance Manual extends Title VII protections to characteristics associated with race. EEOC, COMPLIANCE MANUAL, *supra* note 27, at 3. The Eleventh Circuit noted, however, that the EEOC ruled in an administrative decision in 2008 that grooming policies are “typically outside the scope of federal employment discrimination statutes because they do not discriminate on the basis of immutable characteristics.” *Catastrophe Mgmt. Sols.*, 852 F.3d at 1032 (quoting *Oohna D. Thomas, Complainant, EEOC Doc. 0120083515, 2008 WL 4773208*, at *1 (E.E.O.C. Oct. 24, 2008)).

⁴⁹ See Brief of Plaintiff-Appellant, *supra* note 46, at 40 (arguing that “Congress announced its ‘intention to define discrimination in the broadest possible term’” to further the goals of Title VII (quoting *Rogers*, 454 F.2d at 238)).

race.⁵⁰ Nevertheless, the court affirmed the district court's ruling, agreeing that "race" did not encompass sociocultural traits under Title VII.⁵¹ In its opinion, the court declined to extend the definition of "race" to such factors, given the fluid nature of culture and the difficulty in determining which features are worthy of Title VII protection.⁵² In 2018, the United States Supreme Court denied the EEOC's petition for review of the Eleventh Circuit's decision.⁵³ Section A of this Part explores how different circuits have considered hairstyle and other "changeable" characteristics associated with race under the immutability doctrine.⁵⁴ Section B evaluates how the Supreme Court and Eleventh Circuit have adopted a different approach for sex-based discrimination compared to race-based discrimination where policies based on appearance are concerned.⁵⁵

A. The Circuit Split on Race, Hair, and Immutability

In the absence of a United States Supreme Court ruling clarifying the scope of Title VII protections in the context of race, the lower courts have been left to interpret "immutable characteristics."⁵⁶ In 1981, in *Rogers v. American Airlines, Inc.*, the United States District Court for the Southern District of New

⁵⁰ See *Catastrophe Mgmt. Sols.*, 852 F.3d at 1024 (finding that the EEOC's complaint adequately alleged intentional discrimination). The Eleventh Circuit noted, however, that the EEOC "at times conflates" disparate treatment and disparate impact claims—the latter would require a showing that the policy tended to disadvantage Black applicants. *Id.*

⁵¹ *Id.* at 1027–28. The Eleventh Circuit relied in part on contemplations of how "race" was defined at the time Title VII was promulgated, determining that "[t]here is little support for the position of the EEOC that the 1964 Congress meant for Title VII to protect 'individual expression . . . tied to a protected race.'" See *id.* at 1027 (quoting Brief of Plaintiff-Appellant, *supra* note 46, at 20). In 2017, however, the United States Census Bureau published guidance in which "race" was defined as "a person's self-identification with one or more *social* groups." See U.S. CENSUS BUREAU, RACE & ETHNICITY 1 (2017) (emphasis added) (articulating a definition of race more expansive than skin tone, which conflicts with a clear distinction between culture and race). Under the district court's interpretation in *Catastrophe Management Solutions*, "[c]ulture is 'a set of behavioral characteristics and therefore significantly dissimilar from the immutable characteristics of race and national origin.'" EEOC v. *Catastrophe Mgmt. Sols.*, 11 F. Supp. 3d 1139, 1143 (S.D. Ala. 2014) (quoting *United States v. Guzman*, 236 F.3d 830, 835 (7th Cir. 2001) (Ripple, J., concurring in part and dissenting in part)), *aff'd*, 852 F.3d 1018, 1023 (11th Cir. 2016).

⁵² *Catastrophe Mgmt. Sols.*, 852 F.3d at 1033 (citing Richard T. Ford, *Race as Culture? Why Not?*, 47 UCLA L. REV. 1803, 1811 (1999)). The article cited by the Eleventh Circuit argues that extending "disparate impact" to encompass "voluntarily adopted traits" is too subjective and will "undermine the already embattled position of all disparate impact arguments." Ford, *supra*, at 1811.

⁵³ EEOC v. *Catastrophe Mgmt. Sols.*, 138 S. Ct. 2015 (2018).

⁵⁴ See *infra* notes 56–66 and accompanying text.

⁵⁵ See *infra* notes 67–71 and accompanying text.

⁵⁶ See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (defining an "immutable characteristic" as an "accident of birth"); *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 231–32 (S.D.N.Y. 1981) (finding that a traditionally Black hairstyle "is not the product of natural hair growth but of artifice" and therefore is not an "immutable characteristic"); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975) (finding that distinctions based on grooming do not implicate "immutable characteristics").

York defined “immutable characteristics” as those which are not “easily changed.”⁵⁷ In that case, a Black woman who had worked for the airline for eleven years challenged its policy prohibiting all-braided hairstyles on the basis that such hairstyles are culturally and historically significant to Black women, and a prohibition therefore constitutes race and sex discrimination.⁵⁸ The court disagreed, concluding that hairstyles do not afford a plausible Title VII discrimination claim because they can be readily changed.⁵⁹

In coming to this determination, the Southern District of New York was not alone: the Fifth and Eleventh Circuits have also agreed that hairstyle is not a racial characteristic entitling an individual to protection under Title VII.⁶⁰ Then, in 2002, in *Eatman v. United Parcel Service*, the Southern District of New York again refused to extend Title VII protections to encompass natural hairstyles such as dreadlocks.⁶¹

⁵⁷ See *Rogers*, 527 F. Supp. at 232 (denying that an airline’s policy prohibiting the wearing of loose braids, including cornrows, constituted race-based discrimination under Title VII). The court in *Rogers* answered the question of what is an “immutable characteristic,” denying that braided hairstyles qualified because they are an “easily changed characteristic.” *Id.* The court also cited the United States Court of Appeals for the Fifth Circuit’s 1980 decision in *Garcia v. Gloor*, which stated that “[s]ave for religion, the discriminations on which the [Equal Employment Opportunity] Act focuses its laser of prohibition are those that are either beyond the victim’s power to alter, or that impose a burden on an employee on one of the prohibited bases.” 618 F.2d 264, 269 (5th Cir. 1980) (internal citation omitted) (citing *Willingham*, 507 F.2d 1084).

⁵⁸ *Rogers*, 527 F. Supp. at 232. The employee alleged that the policy, contrary to concerning a “matter of relatively low importance” as the court suggested, targeted the “cultural, historical essence of the Black woman in American society.” *Id.* at 231–32.

⁵⁹ See *id.* at 232 (describing such braided hairstyles, in contrast to Afros, as an “artifice” rather than “natural hair growth”). One argument posits that the Eleventh Circuit’s decision in *Catastrophe Management Solutions* was based on “natural” hairstyles—those that “are formed through the process of leaving the hair uncombed and uncut, which is then allowed to knot and mat into distinctive locks. By virtue of definition, dreadlocks are a natural derivation of hair that has not been subject to artificial influence . . . to obtain its distinct texture or characteristics.” See, e.g., Cortney Bryson, Note, ‘Hair’ Today, Gone Tomorrow: How Immutable Traits May Become the New Face of Discrimination as Interpreted in Equal Employment Opportunity Comm’n v. Catastrophe Mgmt. Sols., 39 N.C. CENT. L. REV. 166, 170–71 (2017) (describing how the immutable characteristics of Black hair, including its texture, make hairstyles an extension of those characteristics); see also Simpson, *supra* note 44, at 265–66 (noting the importance of protective hairstyles to Black women both as a means of cultural expression and protecting the natural hair).

⁶⁰ See *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975) (ruling that “a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer’s choice of how to run his business than to equality of employment opportunity”); *Harper v. Blockbuster Ent. Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998) (adopting the logic of *Willingham*, 507 F.2d at 1092, in dismissing the Title VII race discrimination claim).

⁶¹ *Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256, 265 (S.D.N.Y. 2002). The court reasoned that “[l]ocked hair, however, is not so closely associated with black people that a racially neutral comment denigrating it can reasonably be understood as a reflection of discriminatory animus, at least where there is no objective evidence that the speaker perceived the plaintiff’s locked hair as related to his race.” *Id.* The court granted summary judgment for the employer. *Id.*

There are two outlier cases: in 1999, in *Hollins v. Atlantic Co.*, the United States Court of Appeals for the Sixth Circuit held that a Black woman had plausibly alleged a Title VII violation after allegedly being subject to disciplinary action because of her hairstyles, which were also worn by white women.⁶² Those white coworkers did not receive the same negative treatment.⁶³ In *Hollins*, however, the style at the center of the dispute—finger waves—is not associated with the Black population in the same manner as dreadlocks and braids, and the case was thus not based on negative racial stereotypes, but more general racial discrimination.⁶⁴

More significantly, in 1976, in *Jenkins v. Blue Cross Mutual Hospital Insurance*, the United States Court of Appeals for the Seventh Circuit found that an employer denying a Black woman a promotion in part because she wore her hair in an Afro was sufficient for a Title VII claim.⁶⁵ The court further determined that a complaint under Title VII may reasonably include claims that arise from a central allegation of discrimination based on race or another protected class; thus, discrimination based on hairstyles associated with Black women was sufficient to carry the claim.⁶⁶

⁶² *Hollins v. Atl. Co.*, 188 F.3d 652, 655–56, 660 (6th Cir. 1999) (recounting the employee’s hairstyles and the disparate treatment of employees).

⁶³ *Id.* at 660 (“These five white women were never reprimanded, never required to present pictures of proposed hairstyles, or otherwise required to provide notice or request approval in advance for a hairstyle change.”).

⁶⁴ *See id.* (describing the unique disciplinary treatment applied solely to a Black employee for her “identical hairstyle[.]”); *see also* Sarah Daniel, *Charting the History of Finger Waves*, FASHION MAG. (Jan. 5, 2017), <https://fashionmagazine.com/beauty-grooming/history-of-finger-waves/> [<https://perma.cc/5EDC-Z9TG>] (writing that the hairstyle was first popularized in the 1920s by Black actress Josephine Baker and white actress Bette Davis). Finger waves emerged during the Jazz Age. *Id.* The style surged again in popularity in the 1990s, with trends led by Black artists including Lil’ Kim and Missy Elliott. *Id.* Despite this association with Black culture, unlike dreadlocks and other protective styles, finger waves are accomplished with “a lot of gel.” *Id.* (quoting Chuck Amos, Stylist); *see also* Bryson, *supra* note 59, at 171 (describing the process of creating dreadlocks as one of non-intervention).

⁶⁵ *Jenkins v. Blue Cross Mut. Hosp. Ins.*, 538 F.2d 164, 168 (7th Cir. 1976) (en banc). The court relied on *Smith v. Delta Air Lines, Inc.*, 486 F.2d 512 (5th Cir. 1973), in which “[a] charge alleging discrimination stemming from grooming requirements which applied particularly to black persons constituted a sufficient charge of racial discrimination” when the claim also included a “general allegation of racial discrimination.” *Id.* In *Jenkins*, because the practice was accompanied by the statement that the employee “could never represent [the company]” while wearing an Afro, it was deemed to be racially discriminatory. *Id.* Citing *Jenkins*, the Eleventh Circuit in *Catastrophe Management Solutions* determined that although discrimination based on hair texture is actionable, discrimination based on hairstyle is not. *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1030 (11th Cir. 2016) (citing *Jenkins*, 538 F.2d at 168). This distinction, however, fails at the level of its own internal logic. *See* Ronald Turner, *On Locs, “Race,” and Title VII*, 2019 WIS. L. REV. 873, 904 (arguing that if immutable traits are “beyond the [plaintiff]’s power to alter” . . . then neither dreadlocks nor Afros are immutable traits of black people” because “like any hairstyle,” they can be changed).

⁶⁶ *See Jenkins*, 538 F.2d at 167 (adopting the standard of *Danner v. Phillips Petrol. Co.*, 447 F.2d 159, 162 (5th Cir. 1971), which states that “[t]he complaint in the civil action . . . may properly encompass any . . . discrimination like or reasonably related to the allegations of the charge and growing out of such allegations” (quoting *Danner*, 447 F.2d at 162)).

B. Eleventh Circuit Approach to Stereotype Discrimination: Sex

Although the majority of courts have thus far failed to extend Title VII protections to sociocultural characteristics with respect to race, some have taken a more expansive view where stereotypes based on sex are concerned.⁶⁷ In 1989, in *Price Waterhouse v. Hopkins*, the Supreme Court held that company policies and practices based on sex stereotypes—specifically traditional ideas of femininity—are actionable under Title VII.⁶⁸ The Court wrote that although “stray remarks” that stereotype an individual may not be sufficient to give rise to a cause of action, they can constitute evidence of discriminatory motive, particularly when they are directed at an employee.⁶⁹

Similarly, in 2011, in *Glenn v. Brumby*, the Eleventh Circuit held that, with respect to transgender individuals, stereotyping based on expected gender norms for uniform and personal grooming policies is impermissible sex-based discrimination.⁷⁰ The result is that employees who face adverse employment actions for failing to adhere to expected stereotypes based on their style of dress or mannerisms—mutable characteristics, to be sure—are able to state a cause of action under Title VII.⁷¹

⁶⁷ See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (ruling that sex discrimination under Title VII could be proven if the employee is subject to sex stereotyping at work), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075. Like race, sex is also a suspect classification. See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (stating that classifications based on race, sex, and alienage are inherently suspect classifications because they “frequently bear[] no relation to ability to perform or contribute to society” (citing *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1173–75 (1969))).

⁶⁸ See *Price Waterhouse*, 490 U.S. at 250 (ruling that employment policies and practices based in sex stereotyping are impermissible under Title VII). Specifically, *Price Waterhouse* dealt with a woman under consideration for partnership at an accounting firm who was deemed too “aggressive.” *Id.* at 235, 250. She was also subjected to comments suggesting she needed to “take ‘a course at charm school’” and that she was “overcompensated for being a woman.” *Id.* at 235.

⁶⁹ See *id.* at 251 (describing sex stereotyping as outdated and stating that employers may no longer evaluate employees by “assuming or insisting that they matched the stereotype associated with their group”). Specifically, “[t]he plaintiff must show that the employer actually relied on her gender in making its decision. . . . [S]tereotyped remarks can certainly be evidence that gender played a part.” *Id.*

⁷⁰ See *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011) (“A government agent violates the Equal Protection Clause’s prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity.”). The court noted that had the case been a Title VII case rather than a case under the Equal Protection Clause of the Fourteenth Amendment, the fact that the employee was terminated for gender-nonconforming behavior would have been dispositive. *Id.* at 1321; see also *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 572 (6th Cir. 2018) (ruling that “sex stereotyping based on a person’s gender-nonconforming behavior is impermissible discrimination” (quoting *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004))).

⁷¹ See *supra* notes 67–70 and accompanying text (illustrating the rationale several Courts have adopted for sex stereotyping decisions to avoid enforcing sex-based norms on individuals, which will invariably lead to requiring conformation); *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981) (explaining that characteristics which are “easily changed,” including hairstyle and manner of dress, do not qualify as “immutable” under Title VII).

III. CUT BETTER: ARGUING FOR APPLYING THE *PRICE WATERHOUSE/GLENN* FRAMEWORK TO RACE DISCRIMINATION

How to best apply Title VII with respect to race-based characteristics is not a simple matter of statutory construction; the statute itself says little about its own scope.⁷² Nevertheless, the minority approach taken in 1976 by the United States Court of Appeals for the Seventh Circuit in *Jenkins v. Blue Cross Mutual Hospital Insurance* best satisfies the purpose behind Title VII's prohibition on race-based discrimination by taking context into consideration when allegations arise out of the central claim.⁷³ Had the *Jenkins* line of reasoning been applied to the 2016 case of *EEOC v. Catastrophe Management Solutions*, the decision from the United States Court of Appeals for the Eleventh Circuit Appeals may have been different.⁷⁴ Under this approach, Chastity Jones's claim of race discrimination, based on Catastrophe Management Solutions's policy prohibiting dreadlocks, would have likely qualified as race-based discrimination because the policy arose from broader stereotypes about race.⁷⁵

Nevertheless, even if the Eleventh Circuit declined to adopt the Seventh Circuit's reasoning on race discrimination from *Jenkins*, its own pronouncements on sex stereotyping as impermissible discrimination are instructive.⁷⁶ Applying the rule the Eleventh Circuit articulated in 2011 *Glenn v. Brumby*, extending interpretations of stereotype-driven discrimination to instances of race-based discrimination would provide employees with better protections and give the courts clearer guidance on how best to approach stereotype-driven race discrimination.⁷⁷

⁷² See *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1027–28 (11th Cir. 2016) (demonstrating the court's reasoning in absence of any clear guidance on how to construe "race") (considering a variety of sources that attempt to define race) Ultimately, the *Catastrophe Management* court concluded that modern definitions of race provide little guidance about what Congress intended race to mean when it passed Title VII. *Id.* at 1028.

⁷³ See *Jenkins v. Blue Cross Mut. Hosp. Ins.*, 538 F.2d 164, 168 (7th Cir. 1976) (en banc) (recognizing claims of discrimination based on sociocultural characteristics when those claims arise out of a base allegation of race discrimination).

⁷⁴ See *Catastrophe Mgmt. Sols.*, 852 F.3d at 1035 (finding no race-based discrimination in violation of Title VII); *Jenkins*, 538 F.2d at 168 (finding a sufficient allegation of race-based discrimination based, in part, based on the employee's hairstyles).

⁷⁵ See *Catastrophe Mgmt. Sols.*, 852 F.3d at 1021 (quoting the sentiments and policies CMS employees told Ms. Jones about her hair); *Jenkins*, 538 F.2d at 167 (finding that claims arising out of a charge of race-based discrimination, including employer disciplinary action for hairstyles, are actionable under Title VII).

⁷⁶ See *Glenn v. Brumby*, 663 F.3d 1312, 1319–20 (11th Cir. 2011) (determining that a policy requiring conformity with gender stereotypes is impermissible).

⁷⁷ See *id.* at 1319 (clarifying that discrimination based on gender stereotypes may manifest differently than more obvious forms of discrimination); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (demonstrating the unique ways which stereotype-based discrimination may manifest, such as in demands that a woman not be "aggressive"), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075.

Policies requiring makeup, or a certain hairstyle or manner of dress consistent with biological sex, have all been described, under the *Price Waterhouse* framework adopted in *Glenn*, as rooted in stereotypes and deemed impermissible under Title VII.⁷⁸ Had the Eleventh Circuit applied this framework in *Catastrophe Management Solutions*, it would almost certainly have come out the other way.⁷⁹

Similarly, in *Glenn*, testimony that an employer found a transgender woman wearing traditionally feminine attire to be “unnatural” and “inappropriate” was sufficient to show that the employee’s termination was based on impermissible gender stereotypes.⁸⁰

Chastity Jones was allegedly told that her dreadlocks were prohibited because of how they were perceived—as messy and unprofessional—and that she could not be hired unless she removed them.⁸¹ This perception of dreadlocks is rooted in stereotypes, not dissimilar to the stereotypes at issue in *Price Waterhouse* and *Glenn*.⁸² Indeed, unlike the gender stereotyping demanding conformity with gender norms, the stereotype invoked by the employer in *Catastrophe Management Solutions* was explicitly negative, drawing on centuries-old racist caricatures of Black people as unkempt and unprofessional.⁸³ The application of the *Price Waterhouse/Glenn* framework prohibiting gender stereotyping as a basis for adverse employment actions based on racial charac-

⁷⁸ See *Glenn*, 663 F.3d at 1317 (adopting the framework from *Price Waterhouse* that stereotyping based on sex is impermissible under Title VII). Thus, the Eleventh Circuit is not universally opposed to prohibiting discrimination rooted in stereotypes. *Id.*

⁷⁹ See *Catastrophe Mgmt. Sols.*, 852 F.3d at 1027–28 (explaining the rationale for declining to extend Title VII protections to Ms. Jones as rooted in antiquated perceptions about what constitutes race).

⁸⁰ See *Glenn*, 663 F.3d at 1319 (ruling that policies that would require conformity with a stereotype are impermissible). Not only did the court determine mandating conformity with a gender stereotype is impermissible, it described the United States Supreme Court’s “consistent purpose” in sex discrimination cases as “eliminat[ing] discrimination on the basis of gender stereotypes.” *Id.*

⁸¹ See *Catastrophe Mgmt. Sols.*, 852 F.3d at 1021–22 (describing the racial stereotypes allegedly applied to Ms. Jones).

⁸² See Martin Childs IV, Note, *Who Told You Your Hair Was Nappy?: A Proposal for Replacing an Ineffective Standard for Determining Racially Discriminatory Employment Practices*, 2019 MICH. ST. L. REV. 287, 303–04 (writing that the negative stereotypes associated with braids, dreadlocks, and other natural hairstyles are derived from the most grotesque display of American racism: the enslavement of African and Black individuals). Post-emancipation, “caricatures depicting African Americans who wore natural hairstyles as ignorant, subservient, and dangerous reinforced the notion that African-American natural hairstyles were bad.” *Id.* at 304.

⁸³ See *id.* at 304 (suggesting that descriptions of natural hairstyles as “inferior” and “bad” draws on these negative racial stereotypes, rather than being a more neutral value judgment); *Catastrophe Mgmt. Sols.*, 852 F.3d at 1021 (recounting the manager’s reason for rejecting the employee’s application—that her dreadlocks could be “messy”).

teristics would therefore have ensured that Ms. Jones was not deprived a job opportunity because of perceptions of her hairstyle.⁸⁴

Beyond the single instance of race discrimination in *Catastrophe Management Solutions*, however, adopting this logic would give courts the flexibility to grapple with the more subversive features of contemporary racism.⁸⁵ This “new” racism is defined by a resistance to changes in social structures and norms rather than disgust for Black people, and is critical of perceived nonconformity; thus, a traditional “immutability” view of race-based discrimination will fail to capture the shift away from biological inferiority being determinative of such prejudices.⁸⁶ Applying *Price Waterhouse* and *Glenn*’s logic would better account for the ways in which nonconformity—such as wearing hair in a

⁸⁴ See *Catastrophe Mgmt. Sols.*, 852 F.3d at 1021 (declining to find race discrimination where the company rescinded an employment offer based on the employee’s dreadlocks); cf. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (“[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . .”), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075; *Glenn*, 663 F.3d at 1317 (finding discrimination where plaintiffs were disciplined “because they fail to act according to socially prescribed gender roles”). But see *Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256, 259 (S.D.N.Y. 2002) (declining to find race discrimination where a manager used his “common sense” to determine that dreadlocks, braids, and cornrows were “unacceptable”); *Pitts v. Wild Adventures, Inc.*, No. 7:06-CV-62-HL, 2008 WL 1899306, at *6 (M.D. Ga. Apr. 25, 2008) (ruling that a policy prohibiting cornrows, braids, and dreadlocks, in concert with comments to an employee disapproving of her cornrows, did not constitute race discrimination). In cases declining to find racial discrimination in policies disfavoring traditionally Black hair, the rationale for the employment decisions was not rooted in a legitimate employment concern such as safety, but seemingly in perpetuating the perception that natural hairstyles are unprofessional. See Childs, *supra* note 82, at 304 (noting that “African Americans began straightening their hair with hair products and tools in an effort to achieve a Eurocentric standard of beauty” in order to combat these negative stereotypes); e.g., *Eatman*, 194 F. Supp. 2d at 259 (noting that “[a]ll but one [of the employees forced to cover their hair] were African-American”); see also MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND ETHICS OF KNOWING 35 (2007) (arguing that although “stereotypes” may be value neutral as widely-held associations between groups and attributes, “negative identity stereotype prejudices” are morally pernicious as “prejudices with a negative valence held against people *qua* social type”). Although the value of the sex discrimination protections may be to “liberat[e] both sexes from prescriptive sex stereotyping” as a symmetric law, applying the stereotype principle to race-based stereotyping would further help reduce the binary-opposite race framework. See Bradley A. Areheart, *The Symmetry Principle*, 58 B.C. L. REV. 1085, 1118–19 (2017) (quoting Cary Franklin, *The Anti-stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 104 (2010)) (internal quotation marks omitted) (exploring how the reciprocal nature of certain identities, and accompanying antidiscrimination laws, may have a broader social effect than merely providing a remedy for unlawful discrimination).

⁸⁵ See Tony N. Brown et al., *Differentiating Contemporary Racial Prejudice from Old-Fashioned Racial Prejudice*, 1 RACE & SOC. PROBS. 97, 98 (2009) (describing contemporary racism as less facially obvious than past expressions of racism).

⁸⁶ See *id.* (characterizing contemporary racism as consisting of “attributions about [the] violation of American values meshed with anti-black affect rather than on beliefs about biological difference and inferiority”).

natural style and rejecting Eurocentric aesthetic standards—functions as a new target for old prejudices by enforcing negative stereotypes.⁸⁷

This shift in jurisprudence would not, however, make all policies limiting hairstyle or style of dress illegal under Title VII, provided the employer can show a legitimate business reason as required by the *McDonnell Douglas* burden-shifting framework.⁸⁸ Thus, a move toward expanding immutability in the context of race would not abrogate the necessity of the burden-shifting framework, but would avoid defaulting to a strict immutability standard in cases where the discrimination is based on stereotype.⁸⁹ This would ultimately realize the purpose of Title VII while ensuring that valid policies that restrict hairstyle or manner of dress for legitimate purposes may continue.⁹⁰

Furthermore, shifting from a strict immutability standard to the more flexible, stereotype-oriented standard in *Price Waterhouse* and *Glenn* would enable the courts to better effectuate Title VII in making such classifications in the first place: ensuring that employment actions are not undertaken on bases that have “no relation to [the] ability to perform or contribute to society.”⁹¹

CONCLUSION

Rachel Dolezal’s hairstyles were neither necessary nor sufficient to make her Black: Blackness, as with any other core identifier, cannot merely be distilled into one presentational element. In determining that sociocultural characteristics such as dreadlocks, braids, and twists—which have a deep history among Black women—are insufficient to give rise to a claim for race-based discrimination, the Eleventh Circuit failed to fully grasp not only what ele-

⁸⁷ See *id.* (describing contemporary racism); Childs, *supra* note 82 at 304 (describing the “Black is Beautiful” movement and shift away from white standards of attractiveness during the 1960s).

⁸⁸ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1972) (establishing a framework where if the employee has shown some discriminatory practice, the burden shifts to the employer to show that it is necessary); *Timmons v. AGC Glass Works N. Am., Inc.*, 2015 WL 6511552, at *2–3, *6 (D. Kan. Oct. 28, 2015) (ruling that requiring an employee at a glass-packing plant to either cut his dreadlocks or keep his hair contained was not racially discriminatory under Title VII, but that even if it was, the purpose of the neutral policy was to maintain the safety of the employees, providing a legitimate, non-discriminatory reason for the policy). Safety and other legitimate policy rationales contrast with the reasoning of the court in *Eatman*, where the policy was primarily aesthetic. See *Timmons*, 2015 WL 6511552, at *6 (finding that a hairstyle policy designed to avoid injury was non-discriminatory); *Eatman*, 194 F. Supp. 2d at 259.

⁸⁹ Compare *Glenn v. Brumby*, 663 F.3d 1312, 1319–20 (11th Cir. 2011) (prohibiting discrimination against transgender individuals based on sex stereotyping), with *Jenkins v. Blue Cross Mut. Hosp. Ins.*, 538 F.2d 164, 167 (7th Cir. 1976) (advocating for a more workable immutability standard with respect to race).

⁹⁰ See *supra* notes 21–22 and accompanying text (articulating the purpose for which the Civil Rights Act of 1964, and Title VII, were promulgated).

⁹¹ See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (explaining that the goal of antidiscrimination in employment legislation is to ensure that one’s identity is not used as a proxy for capability (citing *Developments in the Law—Equal Protection*, *supra* note 67, at 1173–74)).

ments may be constitutive of identity, but the way negative stereotypes about those characteristics may be projected on to those who possess them. Thus, a more flexible approach is needed to account for the new ways old prejudices may make themselves known.

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