

INTERPRETING TITLE VII'S "SEX" INCLUSIVELY: A PROPOSAL OF HOW AND WHY TO INTERPRET TITLE VII TO PROTECT TRANSGENDER EMPLOYEES

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I. INTRODUCTION

The Trump Administration is stripping the transgender community of civil rights protections guaranteed to it under federal statutory law. In October 2018, a leaked Department of Health and Human Services memorandum about Title IX, the statute that bans gender discrimination in education programs receiving federal funding, defined "sex" as "a person's status as male or female based on immutable biological traits identifiable by or before birth" that can only be verified through genetic testing.¹ In that same month, the Administration double-downed on its policy from October 2017 in which gender identity is excluded from "sex" in Title VII, the federal employment anti-discrimination statute.² Where anti-discrimination laws should be protecting transgender individuals from discrimination in schools and in the workplace, these recent government actions call attention to "the inequities that arise when the government organizes society by outdated constructs by biological sex and gender."³ Such institutionalized discrimination against transgender persons suggests "the perpetuation of stereotypes[,] one of the many forms of invidious discrimination" prohibited by law, aggressively persists today.⁴

Throughout our nation's legal history, "recognition [of equality of rights 'on account of sex']⁵ has remained a matter of interpretation rather than a mandate of express constitutional dimension."⁶ Interpretation of statutes is the vehicle through which these rights have been protected in advance of constitutional recognition. Title VII epitomizes such proactive statutory protection: the statute provided statutory rights to women in employment seven years before the Supreme Court recognized anti-sex discrimination rights were protected by the Constitution.⁷ Title VII prohibits employers from discriminating against employees on the basis of an individual's "race, color, religion, sex, or national origin."⁸ When Title VII was passed, there was little confusion as to the core prototype of the protected classes covered -- "sex" referred to women.⁹ The text of Title VII, however, provides minimal guidance as to who or what claims are

¹ Erica L. Green, Katie Benner and Robert Pear, *'Transgender' Could Be Defined Out of Existence Under Trump Administration*, N.Y. Times (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>.

² DOJ Memorandum, "Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964," (Oct. 4, 2017).

³ *G.G. v. Gloucester County School Board*, 853 F.3d 729, 2017 WL 1291219 (4th Cir. 2017) (vacating the preliminary injunction to the district court).

⁴ *Id.*

⁵ H.R.J. Res. 208, 92d Cong., 1st Sess., 117 CONG. REC. 35,326 (1971). The Equal Rights Amendment, which ultimately failed to pass in 1971, would have prohibited federal and state governments from denying equal rights "on account of sex."

⁶ Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 Yale L.J. 1281, 1284 (1991).

⁷ *Reed v. Reed*, 404 U.S. 71 (1971). See Charles F. Abernathy, *Civil Rights and Constitutional Litigation*, 723 n. 1, (5th ed. 2012).

⁸ 42 U.S.C. § 2000e-2.

⁹ See *DeSantis v. P. Tel. & Telegraph Co. Inc.*, 608 F.2d 327, 329 (9th Cir. 1979) (interpreting Title VII sex discrimination provisions as "intended to place women on equal footing with men."). See also Shannon H. Tan,

unambiguously covered by “sex,” much less what qualifies as discrimination.¹⁰ Presently, the transgender community is facing discrimination based on sex-stereotyping similar to the discrimination that originally provoked Title VII’s protections. Recognition of transgender discrimination as discrimination on the basis of “sex,” however, is lagging.

This article will utilize two tools of statutory interpretation to suggest how “sex” in Title VII should be interpreted to include transgender employees. Since the text of the statute does not resolve the ambiguity of “sex,” this article examines tools for interpreting the text through different lenses. First, this article will briefly review recent and pending litigation regarding Title VII’s protections of LGBTQ employees, including the pending Supreme Court about Title VII’s application to transgender employees. Second, this article will demonstrate that relying upon the legislative history of Title VII provides little guidance as to the meaning of “sex” and, therefore, cannot be determinative of the term’s interpretive scope. Finally, this article will explore a constitutional avoidance approach to including transgender in Title VII’s “sex” by showing that to avoid an equal protection question, the statute should be construed to include transgender sex-stereotyping within the term “sex.”

II. RECENT AND PENDING LITIGATION

On October 24, 2018, the Administration filed a brief in *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission* in support of a funeral home owner who fired a transgender employee for violating the sex-specific dress code when the employee asked to abide by the female dress code while transitioning to a female.¹¹ You read that correctly: the Administration is opposing the EEOC, but the Solicitor General, who also signed the Administration’s brief, will be arguing the case on behalf of the EEOC if the case proceeds to oral argument.¹²

In its brief, the government argues that the funeral home owner did not discriminate on the basis of sex because the sex-specific dress code did not result in “members of one sex [being] exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”¹³ In other words, the Administration argues that an employment policy discriminates in violation of Title VII only if the policy disadvantages one sex but not the other. Because the dress code “applies equally to employees based on their sex regardless of their gender identity,” the government argues, the policy did not discriminate against the terminated employee.¹⁴ The brief suggests, therefore, that the employer’s termination of a transgender employee because the employee sought to dress in accordance with a dress code different from

When Steve is Fired for Becoming Susan: Why Courts and Legislators Need to Protect Transgender Employees from Discrimination, 37 Stetson L. Rev. 579, 584 (2008).

¹⁰ In its definitional provision, Title VII stipulates “[t]he terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment purposes...” 42 U.S.C. 2000e(k) (emphasis added). This definition therefore only identifies some of the individual and conditions covered by “sex,” but does not represent the entire universe of who or what is statutorily covered.

¹¹ Brief for the Federal Respondent at 3-4, *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC, et al.*, No. 18-107 (Oct. 24, 2018).

¹² The Supreme Court will consider whether to hear the case during its conference on November 30, 2018. See Supreme Court of the United States, Docket Files for No. 18-107, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-107.html>.

¹³ *Id.* at 22 (citing *Oncale v. Sundowner Offshore Servs.*, 532 U.S. 75, 80 (1998)).

¹⁴ *Id.* at 22-23.

the one applicable to their biological sex, similarly was not discriminatory because the employee was fired for violating an allegedly non-discriminatory policy.

This is not the first-time courts have had to confront whether Title VII applies to LGBTQ employees. In fact, the Administration cites circuit court precedent on Title VII's inclusion of sexual orientation and gender identity as a reason to delay the Supreme Court's hearing of *Harris Funeral Homes*.¹⁵ Appellate courts have recently interpreted "sex" in Title VII to include sexual orientation within the statute's protected class.¹⁶ In his concurrence in *Hively v. Ivy League Community College*, Judge Posner noted that courts "fairly frequently" impose updated meanings upon older statutes "to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch."¹⁷ "Sex" may have meant gender in 1964, but "because we live in a different era [and] different culture" that recognizes sexual orientation discrimination as a form of sex discrimination, we understand "sex" to mean more than the narrow genetic notion that the Eighty-Eighth Congress understood "sex" to be.¹⁸ The Eleventh Circuit declined to extend Title VII protection to a claim of sexual orientation discrimination because Supreme Court precedent recognizing a cause of action for sexual orientation discrimination under Title VII was "neither clearly on point nor contrary" to its en banc precedent.¹⁹ The Eleventh Circuit side-stepped the issue by resting on procedural constraints: although the court ultimately held it could not depart from its own precedent without a Supreme Court holding precisely ruling sexual orientation is a Title VII claim, it still looked to Supreme Court Title VII precedent and federal agency decisions that have updated the interpretation of "sex."²⁰

While no appellate court has ruled directly on the issue of updating the interpretation of "sex" to include transgender employees,²¹ cultural perceptions of the transgender community are evolving toward similar recognition and acceptance as sexual orientation anti-discrimination rights. Therefore, judicial recognition should reflect the similar cultural norms of acceptance for transgender persons.

¹⁵ *Id.* at 23-25

¹⁶ *See, e.g., Hively v. Ivy League Community College*, 853 F.3d 339, 357 (7th Cir. 2017) (J. Posner concurring), *Christiansen v. Omnicorn Group, Inc.*, 852 F.3d 195, 206-07 (2d Cir. 2017) (J. Katzmman concurring).

¹⁷ *Hively*, 853 F.3d at 357.

¹⁸ *Id.*

¹⁹ *Evans v. Georgia Regional Hospital*, 850 F.3d 1248, 1256 (11th Cir. 2017).

²⁰ *Id.*

²¹ Although Judge Posner relied heavily upon dynamic interpretation of Title VII in his *Hively* concurrence, the majority opinion did not reference evolving social and cultural norms regarding transgender to reach the Court's ultimate holding. Appellate courts tend to rely on the theory of sex-stereotyping to protect transgender plaintiffs under Title VII. *See, e.g., Smith v. City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004) (prohibition of discrimination on the basis of gender non-conformity does not "exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual"). Recent district court opinions have followed suit. *See, e.g., Roberts v. Clark County School District*, 215 F. Supp. 3d 1001, 1011-14 (D. Nev. Oct. 4, 2016), *Fabian v. Hospital of Central Connecticut*, 172 F. Supp. 3d 509, 527 (D. Conn. Mar. 18, 2016), *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 603 (E.D. Mich. Apr. 23, 2015). *See infra* IV.B. for a full discussion of sex-stereotyping. However, courts have noted that changes in "scientific" definition of "sex" could prompt a change from the term's current interpretation. *See Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1222 (10th Cir. 2007) ("Scientific research may someday cause a shift in the plain meaning of the term "sex" so that it extends beyond the two starkly defined categories of male and female."), *Schroer v. Billington*, 424 F. Supp. 2d 203, 213 (D.D.C. Mar. 31, 2006) ("scientific observation may well confirm... that sex is not a cut-and-dried matter of chromosomes) (internal quotations omitted).

III. THE ELUSIVE LEGISLATIVE HISTORY OF “SEX”

Legislative history is a tool of statutory interpretation that looks to “the internal institutional progress of a bill to enactment and the deliberation accompanying that process.”²² This tool focuses on the lawmaking content, the evolution of the statutory text throughout the legislative process, and the various procedural and political constraints that dictated the text’s final form. To discern changes throughout the legislative process, this interpretive tool looks to legislative materials such as committee reports, records of floor debate, and statements by the statute’s drafters and opponents.²³

A. THERE IS TOO LITTLE LEGISLATIVE HISTORY TO RELY UPON

The legislative history of Title VII is insufficient to conclude whether the term included transgender employees. The last-minute addition of “sex” to the bill resulted in very little legislative history about the term’s meaning.²⁴ Although the Eighty-Eighth Congress left an extensive record of its robust debate about most of Title VII’s provisions and collective purpose, we are left with a “meager” record of one afternoon of debate without committee reports or legislative hearings to illuminate what members of Congress thought “sex” discrimination encompassed.²⁵ The Supreme Court emphasizes frequently how “little legislative history [there is] to guide us in interpreting the Act’s prohibition against discrimination based on ‘sex,’” to bypass reliance on legislative history.²⁶ Therefore, there may simply be too little legislative history about what Congress meant by “sex” to rely upon such evidence when interpreting the term’s definition and scope.

B. “SEX” WAS ADDED FOR STRATEGIC, RATHER THAN SUBSTANTIVE, REASONS

Critics of relying on Title VII’s legislative history also emphasize that “sex” was not included as a genuine means of expanding the statute’s protections to women (or any individual within that protected class), but to defeat the bill by extending its scope preposterously.²⁷ Chairman of the House Rules Committee Judge Smith allegedly added “sex” to derail Title VII.²⁸ Supporters of the bill hesitated to endorse any legislation extending beyond the bill’s focus on racial discrimination because their political capital was devoted to this singular civil rights

²² William N. Eskridge, Jr., Abbe R. Gluck & Victoria F. Nourse, *Statutes, Regulations, and Interpretation: Legislation and Administration in the Republic of Statutes*, 601 (2014).

²³ *Id.* at 631.

²⁴ *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986).

²⁵ Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 Harv. L. Rev. 1307, 1319 (2012) (hereinafter Franklin).

²⁶ *Meritor*, 477 U.S. at 64; see, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 263 (1989) (O’Connor, J. concurring) (using excerpt from Congressional Record to analyze “but for” causation requirement in burden-shifting test), *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 201-04 (1979) (citing senators’ remarks as evidence that Congress’s statutory purposes that support voluntary affirmative action plans); see also 110 Cong. Rec. 2,577 (1964).

²⁷ Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, Cornell IRL, 461 (1981).

²⁸ Franklin, *supra* note 25 at 1320.

purpose.²⁹ Opponents, like Smith, pined for another reason to criticize the bill.³⁰ If “sex” was primarily a strategic maneuver with collateral substantive bearing on the statute,³¹ the legislative history documenting its inclusion provides marginal insight into the prototypical definition of “sex.”

C. SHOULD WE CONSIDER LEGISLATIVE HISTORY ANYWAY?

Given the minimal record and potential ulterior motive for the inclusion of “sex,” should we rely on legislative history nevertheless? The Administration attempts to do so in its brief in *Harris Funeral Homes*.³² A minority of legal scholars who still find significant value in the legislative history of “sex” favor utilizing the legislative history by looking beyond the Congressional Record of 1964.³³ These proponents look to post-enactment personal correspondences by Representative Smith, such as a letter from Smith to a journalist in which Smith refutes any invidious motive when proposing the addition of the term.³⁴ They also fit Title VII’s inclusion of “sex” into the general development of women’s rights leading up to the bill’s enactment by framing the statutory coverage of “sex” as a logical outgrowth of the social movements that prompted the Fourteenth Amendment, Nineteenth Amendment, and Equal Rights Amendment.³⁵ Legislative history proponents also argue that when the bill was drafted, not even Smith could ignore “the strong political forces seeking to further the cause of equality for women,” namely the National Women’s Party.³⁶ The influence of such public interest groups is framed as the driving force of the term’s intentional inclusion.³⁷ This evidence, however, is not as reliable as legislative history derived from the Congressional Record, and therefore does not sufficiently refute the general presumption that the amendment’s limited legislative history provides little insight into whether Title VII’s drafters considered transgender individuals as covered by the “sex.”

Accordingly, the scholarly³⁸ and jurisprudential³⁹ consensus rejects relying on legislative history to resolve the correct interpretation of “sex.” Courts should therefore look to alternative tools of interpretations to decisively answer who is included in Title VII’s “sex” protection.

²⁹ 110 Cong. Rec. 2,577, 2,581 (1964). Even some women in the House were considered that adding “sex” would diminish the bill’s primary focus on racial hierarchy and tensions. Women representatives were also concerned that white women would be harmed by the amendment because black women would be afforded additional employment opportunities based on the statute’s protections of race and sex. *See Franklin, supra* note 25 at 1321.

³⁰ *See MacKinnon, supra* note 6 at 1283-84.

³¹ *See Robert C. Bird, More Than A Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 Wm. & Mary J. Women & L. 137, 156. (1997) (hereinafter Bird).

³² Brief for the Federal Respondent at 10, *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC, et al.*, No. 18-107 (Oct. 24, 2018).

³³ Bird, *supra* note 31 at 159.

³⁴ *Id.*

³⁵ *Id.* at 158.

³⁶ *Id.*

³⁷ *Id.* at 160-61.

³⁸ *See Dianne Avery et al., Employment Discrimination Law* 331 (8th ed. 2010); Joel Wm. Friedman, *The Law of Employment Discrimination* 375-77 (6th ed. 2007); George A. Rutherglen & John J. Donohue III, *Employment Discrimination* 222 (2005); Sandra Day O’Connor, *The Majesty of the Law* 161-62 (2003); Charles Whalen & Barbara Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act* 115-18 (1985).

³⁹ *See, e.g., Meritor*, 477 U.S. at 57; *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976).

IV. CONSTITUTIONAL AVOIDANCE AND THE PROHIBITION OF SEX-STEREOTYPING

The canon of constitutional avoidance holds that where the validity of a statute is in doubt, a court should interpret the statute to avoid a constitutional violation.⁴⁰ In other words, where there are multiple possible interpretations of a statute, a court should not use the interpretation that construes the statute as violating with the Constitution. In his book, Justice Antonin Scalia bifurcated the modern application of this canon into two parts.⁴¹ First, the traditional canon of constitutional doubt states “[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt.”⁴² Second, the constitutional avoidance canon additionally requires that where there are two possible interpretations of the same statute, the court must use the interpretation that does not construe that statute as violating the Constitution or even calling into question a potential constitutional violation.⁴³

The canon of constitutional doubt is based on the presumption that Congress does not knowingly legislate unconstitutional statutes.⁴⁴ Justice Scalia argues this presumption can be translated from a purely interpretive tool to a “judicial policy” of “not interpreting ambiguous statutes to flirt with constitutionality, thereby minimizing judicial conflicts with the legislature.”⁴⁵ For this reason, the canon was traditionally characterized as a “species of judicial restraint,” and served as a standard that judges could rely upon to avoid exercising excessive discretion in their individual interpretations of a statute.⁴⁶ Recent Supreme Court precedent, however, has demonstrated the Court’s expansive use of this allegedly narrow canon.⁴⁷

A. JUSTIFICATIONS AND CRITICISMS OF CONSTITUTIONAL AVOIDANCE

Arguments surrounding the canon of constitutional avoidance focus on the desired relationship between Congress and the courts. Proponents argue that Congress decides the meaning of a statute, so courts should not supplant Congress’s intended meaning with the court’s interpretation.⁴⁸ Instead, when courts strike down a statute because they construe the statute as unconstitutional, Congress would have a second shot to cure the interpretive error by returning to the statute to clarify its meaning as constitutional.⁴⁹ For this reason, this tool also supports the presumption that Congress does not legislate unconstitutional statutes.⁵⁰

Conversely, critics view the modern application of constitutional avoidance as an opportunity for judges to exploit the interpretive tool by reinforcing their preferred constitutional

⁴⁰ Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 245 (2012) (hereinafter *Scalia & Garner*).

⁴¹ *Id.* at 251.

⁴² *Id.* at 245.

⁴³ *Id.* This second prong is attributed to Justice Brandeis’s concurrence in *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936), noting “[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”

⁴⁴ *See* *Scalia & Garner*, *supra* note 40 at 247.

⁴⁵ *Id.* at 249.

⁴⁶ Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 *Harv. L. Rev.* 2109, 2128 (2015) (hereinafter *Katyal*).

⁴⁷ *See infra* IV.A.

⁴⁸ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 111-98 (2d ed. 1986).

⁴⁹ *See* *Scalia & Garner*, *supra* note 40 at 248-49.

⁵⁰ *Id.* at 24-48 (referring to the canon of constitutional avoidance as “go[ing] much further than” the general presumption of validity).

norms. Recently, “the Supreme Court [has] commonly use[d] the avoidance canon to create statutory meanings that conflict with Congress’s intent, and does so in the name of new constitutional rules that Congress did not foresee.”⁵¹ Judges can creatively use constitutional law to effectively rewrite statutes in the name of constitutional avoidance.⁵² This enables the judiciary to exceed its institutional competency and encroach upon Congress’s legislative and interpretive authority.

The focal point of the debate regarding where to draw the line between Congressional and judicial interpretation when employing the canon lies with the expanding notion of what qualifies as sufficient constitutional “doubt” to trigger constitutional avoidance. Traditionally, only “substantial” doubt about the statute implicating a constitutional violation triggered the canon.⁵³ The modern application has deviated from this classic approach by allowing less than substantial doubt to permit the use of constitutional law to interpret the statute at issue. This becomes problematic because courts are applying constitutional law under the guise of statutory interpretation. Unlike the common notion of statutory interpretation constraining the judiciary to reflect Congress’s decisions, constitutional law provokes a counter-majoritarian tension in which the court no longer heeds Congress’s conclusion, but rather uses judge-made doctrine to change the statute.⁵⁴

In recent decisions, the Court has become increasingly lax in its identification of constitutional doubt. For example, in *Bond v. United States*, the Court found that the plain meaning of the Chemical Weapons Convention designated that poisoning a neighbor was a criminal violation.⁵⁵ The Court, however, interpreted “an exception into the statute providing that it did not apply to individual acts of poisoning” to evade ruling on the constitutional question of whether Congress can criminalize such acts through a treaty like the Chemical Weapons Convention.⁵⁶ More aggressively, the Court invalidated the preclearance provision of the Voting Rights Amendment in *N.W. Austin Municipal Utility District Number One v. Holder* by interpreting “political subdivision” contrary to the definition in the statute.⁵⁷ Where the statute plainly excluded utility districts like the N.W. Austin Municipal Utility from the statutory definition of “political subdivision,” the Court interpreted the definition to include the utility district, thereby avoiding resolving whether the preclearance requirement extended to state entities unconstitutionally.⁵⁸

Finally, in a drastic departure from the constrained use of the canon, the Court in *National Federation of Independent Business v. Sebelius* interpreted the individual mandate of the Affordable Care Act as a tax— which the federal government has clear power to enact — rather than a command.⁵⁹ The majority opinion asserted that while the statutory mandate was written as a command, the Court must interpret the mandate as a tax “only because [the Court has] a duty to construe a statute to save it, if fairly possible,” and while the Commerce Clause gives Congress

⁵¹ Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 Mich. L. Rev. 1275, 1291 (2016) (hereinafter *Fish*).

⁵² *Id.* at 1275.

⁵³ Scalia & Garner, *supra* note 40 at 250.

⁵⁴ Katyal, *supra* note 46 at 2128.

⁵⁵ 134 S. Ct. 2077, 2094 (2014) (J. Scalia concurring)

⁵⁶ *Id.* at 2087. *See* Fish, *supra* note 51 at 1276.

⁵⁷ 557 U.S. 193, 210-11 (2009).

⁵⁸ *Id.* *See* Fish, *supra* note 51 at 1277.

⁵⁹ 132 S. Ct. 2566 (2012).

the power to tax, it does not authorize Congress to command the purchase of health insurance.⁶⁰ Therefore, rather than merely avoid a constitutional question, the Court in *Sebelius* confronted the issue of Congress's Commerce Clause power directly. The Court interpreted the insurance mandate in a manner contrary to the statute, classifying the mandate as a command to resolve the constitutional issue in favor of the Court's desired outcome of preserving the mandate.⁶¹

Regardless of its recent criticism,⁶² this canon is alive and well in Supreme Court jurisprudence. In accordance with the modern usage of the canon, courts should identify any potential constitutional doubt raised by a statute and feel empowered to resolve that doubt to avoid constitutional violations. In the context of Title VII, the canon should similarly be used to interpret "sex" to avoid a violation of the Equal Protection Clause of the Fourteenth Amendment.

B. SEX-STEREOTYPING IS CONSTITUTIONALLY AND STATUTORILY PROHIBITED

The Court should interpret "sex" to include claims of sex-stereotyping against transgender employees to avoid violating the Equal Protection Clause. Without this inclusive interpretation, the Court risks acting contrary to an established line of equal protection cases that confirm that sex-stereotyping violates the Constitution.⁶³

"Sex" covers sex-stereotyping as sex discrimination in both the equal protection and Title VII contexts.⁶⁴ Sex-stereotyping, therefore, violates both constitutional and statutory law. In *Price Waterhouse v. Hopkins*, the Supreme Court held that "assuming or insisting that [the employees] matched the stereotype associated with their group" was sex discrimination because "Congress [through Title VII] intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."⁶⁵

Multiple appellate courts have held that Title VII covers sex-stereotyping claims brought by gender non-conforming plaintiffs.⁶⁶ Sex discrimination is evidenced in sex-stereotyping cases

⁶⁰ *Id.* at 2592-93. See Fish, *supra* note 51 at 1277.

⁶¹ 132 S. Ct. 2566, 2600-01 (2012).

⁶² See Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 Sup. Ct. Rev. 181, 220-21, Katyal, *supra* note 46 at 2128, Nicholas Quinn Rosenkranz, *Roberts Was Wrong to Apply the Canon of Constitutional Avoidance to the Mandate*, SCOTUSreport (July 11, 2012, 8:36 AM), <https://web.archive.org/web/20131005230520/http://www.scotusreport.com/2012/07/11/roberts-was-wrong-to-apply-the-canon-of-constitutional-avoidance-to-the-mandate/> [[<https://perma.cc/5L5W-7LZH>]].

⁶³ See *Frontiero v. Richardson*, 411 U.S. 677, 685-87 (1973), *U.S. v. Virginia*, 518 U.S. 515, 555 (1996).

⁶⁴ See *Heller v. Columbia*, 195 F. Supp. 2d 1212, 1223-24 (D. Or. 2002). As private entities rather than state actors, employers subject to Title VII cannot themselves violate the Equal Protection Clause of the Fourteenth Amendment because the Fourteenth Amendment applies only to state actors. In *Washington v. Davis*, the Court confirmed Title VII is a more rigorous standard than the Equal Protection Clause, and therefore does not extend to private actors as a constitutional obligation. However, Congress can still require private conduct meet constitutional standards through statutes like Title VII. See *Ricci v. DeStefano*, 557 U.S. 557 (2009). When undertaking a constitutional analysis of Title VII, it is not the conduct of the private employers that is subject to constitutional law review, but that Title VII as a whole condones discrimination in violation of the Equal Protection Clause.

⁶⁵ *Price Waterhouse*, 490 U.S. at 251 (citing *City of Los Angeles, Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978)).

⁶⁶ See, e.g., *Smith v. City of Salem*, 378 F.3d 566, 572-73 (6th Cir. Aug. 5, 2004) (first federal circuit court to allow transgender plaintiff to bring a successful gender-stereotyping claim under Title VII analogues). See also *Hunter v. United Parcel Service, Inc.*, 697 F.3d 697, 702-03 (8th Cir. Sept. 17, 2012) (rejecting plaintiff's Title VII prima facie claim but upholding gender-stereotyping as Title VII violation and qualifying transgender as a "protected status"), *Glenn v. Brumby*, 663 F.3d 1312, 1319-20 (11th Cir. 2011), *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. June 8, 2000) (applying Title VII and *Price Waterhouse* sex-stereotyping claims to the Equal Credit Opportunity Act), *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. Feb. 29, 2000) (applying Title VII and *Price Waterhouse* sex-stereotyping claims to the Gender Motivated Violence Act).

where an employer discriminates because of an employee’s non-conformity to sex-based expectations. For example, in the Third Circuit a gay employee attempted to bring multiple Title VII claims against his employer – one for sexual orientation discrimination and one for sex discrimination.⁶⁷ The court vacated the employee’s sexual orientation harassment claim because the sexual orientation claim was “not cognizable under Title VII” as “sex” discrimination.⁶⁸ However, the Third Circuit remanded the “gender stereotyping” claim because sex-stereotyping is firmly grounded in sex-based discrimination.⁶⁹ Harassing comments about the employee’s “effeminate” mannerisms and clothing did not discriminate on the basis of his sexual orientation, but rather on the basis of physical qualities that did not conform to male sex-stereotypes.⁷⁰ This discrimination falls squarely within the notion of “sex” accepted by both Title VII and the Equal Protection Clause.⁷¹ The Eleventh Circuit affirmed that where a transgender or transsexual employee faces adverse employment actions “because of his or her gender non-conformity,” the employer has committed sex-based discrimination in violation of the Equal Protection Clause.⁷²

Unlike the cases in which courts have updated the meaning of “sex” to expand statutory protection to claims that the statute may not have originally encompassed,⁷³ the above appellate cases look to pre-existing sources of constitutional law. Under the canon of constitutional avoidance, Title VII’s protection should also extend where a constitutional violation would occur by failing to recognize sex-stereotyping of LGBT employees. Title VII’s protection extends to such sex-stereotyping claims because that discrimination is already prohibited by the Equal Protection Clause.

Questions about the minimal level of scrutiny owed to equal protection questions regarding sex do not invalidate the conclusion that sex-stereotyping is “sex” discrimination. Precedent utilizing mere rational basis review of sex — or sexual orientation — discrimination claims does not overrule the prohibition of sex-stereotyping under the Equal Protection Clause.⁷⁴ Even more so than for discrimination on the basis of sexual orientation, transgender individuals rely upon sex-stereotyping claims to vindicate discrimination they have experienced.⁷⁵

If a court were to interpret “sex” to exclude transgender discrimination by neglecting to acknowledge sex-stereotyping claims, they risk violating the well-established equal protection constitutional guarantee against sex-stereotyping. Courts should interpret transgender sex-stereotyping claims as “sex” discrimination even if such claims are not overtly within the plain meaning of Title VII to avoid violating the Equal Protection Clause, just as the Court in *Bond* interpreted the act of poisoning contrary to the plain meaning of the Chemical Weapons Convention to avoid violating the treaty power.⁷⁶ Accordingly, “sex” in Title VII should be

⁶⁷ *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 289 (3d Cir. 2009).

⁶⁸ *Id.* at 292-93.

⁶⁹ *Id.*

⁷⁰ *Id.* at 291-293.

⁷¹ See *Price Waterhouse*, 490 U.S. at 251 (holding that sex-stereotyping is a statutory violation of Title VII) and *U.S. v. Virginia*, 518 U.S. 515, 565-66 (finding an equal protection violation where the Virginia Military Institute attempted to rely on stereotypes about women’s physical capacity to justify excluding women from the school).

⁷² *Glenn v. Brumby*, 663 F.3d 1312, 1319-20 (11th Cir. 2011).

⁷³ See *supra* II.

⁷⁴ Namely, sexual orientation is not a recognized suspect class, and is therefore afforded rational basis review. *Romer*, 517 U.S. at 631.

⁷⁵ See Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. Pa. L. Rev. 1, 35 (1995), Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 565-66 (2007).

⁷⁶ *Bond*, 134 S. Ct. at 2087.

interpreted to include transgender employees' sex-stereotyping claims to avoid a constitutional violation.

V. CONCLUSION

In conclusion, statutory protection of “sex” in Title VII should be interpreted to include transgender employees because multiple tools of statutory interpretation provide legitimate means and justifications for this inclusive interpretation. There is too little legislative history to decisively clarify the text’s ambiguity about what claims are covered by “sex.”⁷⁷ Further, to avoid applying the statute in violation of the Equal Protection Clause’s prohibition of sex discrimination through sex-stereotyping, the constitutional avoidance canon should also warrant interpreters to include transgender employees within “sex.”⁷⁸

The transgender community has yet to be afforded the same statutory protection as other communities enduring similar discrimination. This exact sex discrimination motivated Title VII’s original protections and has since been explicitly prohibited through sex-stereotyping jurisprudence. By interpreting “sex” in Title VII to include discrimination against transgender persons on the basis of sex, we can guarantee the transgender community their statutory rights.

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⁷⁷ See *supra* III.A-C.

⁷⁸ See *supra* IV.B.