# THE WEAK AGENCY RETURNS? THE EEOC AND TITLE VII TRANSGENDER EMPLOYMENT DISCRIMINATION LAWSUITS, 2008–2020

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ABSTRACT

*In studying how and how much administrative agencies influence how judges interpret statutes, researchers face this problem: Judges write court opinions strategically, making those opinions sometimes unreliable measures of why judges read statutes the way they do. This paper suggests another approach: Trace agency influence by looking at how often* lawyers *refer to agency views in their briefs on dispositive motions. To illustrate this approach, this paper examines how much the Equal Employment Opportunity Commission (EEOC) during the period 2008–2020 affected how likely courts would read Title VII's ban on "sex" discrimination to cover transgender individuals. The paper relies on an original hand-coded sample of documents in Title VII lawsuits in federal district court during 2008–2020. In those lawsuits, transgender plaintiffs alleged employer transgender discrimination as violating Title VII's ban on employer "sex" discrimination. Based on what we found, we infer that the EEOC opinions and guidance documents on this issue* alone *weakly influenced, if at all, what lawyers argued. In so doing, the paper illustrates a way to test for a possible path of agency influence that researchers may otherwise mis-measure by relying solely on court opinion text. It also adds to past research into how lawyers, judges, and social movement actors pressed for or against legal protections of transgender workers.*



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## INTRODUCTION

In studying U.S. administrative agencies, researchers often rely on court opinion text to infer how much those agencies influence how judges read statutes. The problem: Court opinions are often unreliable evidence for why those judges read the statute the way they did, because judges write opinions strategically, including whether they expressly refer to administrative agency interpretations. This problem is even more salient now that the U.S. Supreme Court has killed off so-called *Chevron* doctrine, which at least nominally directed courts to defer to agency interpretations of their statutes.

This paper suggests an alternative path: Trace an agency's influence on court statutory interpretation by relying upon *lawyers'* references to the agency's reading of the relevant statute in their briefs and motion papers in those cases. To illustrate this approach, this paper traces how much the Equal Employment Opportunity Commission (EEOC) during the period 2011–2020 affected how likely courts would read Title VII's ban on "sex" discrimination to cover transgender individuals. At the time, the EEOC had issued opinions and guidance documents reading Title VII "sex" discrimination to cover discrimination against transgender employees and job applicants. The paper, however, finds minimal evidence of EEOC influence of that type in those lawsuits.

In so doing, the paper makes two distinctive contributions. First, the paper motivates and illustrates how researchers can and should isolate multiple pathways of administrative agency influence that might otherwise be overlooked by focusing primarily on what judges write in court opinions. Second, the paper advances research into efforts by lawyers, judges, and social movement actors in the United States to expand or defend the legal protections of transgender workers and job applicants.[1] In particular, the paper complicates what prior research has suggested about the extent of the EEOC's role and influence in affecting how federal courts interpreted federal employment discrimination law during 2008–2020 to cover transgender workers. Such research is particularly salient given current efforts by the Trump Administration to reduce legal protections for transgender workers.[2]

1. *See generally* Sandra F. Sperino, *Bostock and the Forgotten EEOC*, 103 TEX. L. REV. 141 (2024); SUSAN GLUCK MEZEY, TRANSGENDER RIGHTS: FROM OBAMA TO TRUMP 2 (2020); Chai Feldblum, *Law, Policies in Practice and Social Norms: Coverage of Transgender Discrimination Under Sex Discrimination Law*, 14 J.L. SOC'Y 1 (2013); JASON A. PIERCESON, BEFORE BOSTOCK: THE ACCIDENTAL LGBTQ PRECEDENT OF PRICE WATERHOUSE V. HOPKINS (2022); Amanda K. Baumle, Steven Boutcher, M. V. Lee Badgett, & Donald Tomaskovic-Devey, *Enforcement Agencies and an Emerging Category of Law: Examining EEOC Processing of Sexual Orientation and Gender Identity Charges*, 58 L. & SOC'Y REV. 607 (2024); Amanda K. Baumle, Steven Boutcher, & M.V. Lee Badgett, *Experiences with Sexual Orientation and Gender Identity Employment Discrimination in the USA: Analyzing EEOC Discrimination Charge Narratives*, 22 SEXUALITY RSCH. & SOC. POL'Y 650 (2025); Brook Hutchinson, Jesse E. Shircliff, Christy Glass, Gabe H. Miller, Guadalupe Marquez-Velarde, & Mario I. Suárez, *Analyzing Trans And Nonbinary Workers' Response to Workplace Discrimination*, 52 WORK & OCCUPATIONS 278 (2025).

2. *See, e.g.*, Kristen Jaramillo, Sean M. Bogart, & Lindsay Yasmin Dhanani, *Policy And Prejudice: The Impact of Trump-Era Executive Orders on Transgender Employees*, 18 INDUS. & ORGANIZATIONAL PSYCH. 355 (2025).

## BACKGROUND

In killing off *Chevron* deference doctrine, the U.S. Supreme Court purported not to disturb *Skidmore v. Swift* (1944), which directs judges to assign some "weight" to an administrative agency's reading of a statute it enforces, albeit only to a degree that depends on the agency's "thoroughness," the "validity" of its reasoning, "its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[3] Accordingly, *Skidmore* and progeny are supposed to make judges write opinions that grapple with the merits of agency readings of statutes, even if those judges ultimately disagree with the agency or the premise that the agency has more relevant expertise. *Skidmore*-like state-law doctrines also govern how, in many states, the state courts must handle state agency readings of state statutes.[4]

And yet, well before *Chevron*'s demise, some had argued that *Skidmore* and similar doctrines are useless, because if a lawyer has already *raised* the agency's view as favoring a particular statutory reading, *Skidmore* does not cause judges to read a statute any differently than they otherwise would have.[5] At best, on this account, *Skidmore* doctrine tends to make judges more likely to write court opinions in which they act *as if* they take the agency's view seriously. Ignoring *Skidmore* is rarely the basis for reversible error where judges write opinions that completely ignore the agency's view, despite a party properly raising that view along with *Skidmore*. And a judge can sidestep *Skidmore* altogether by declaring that the statutory text is clear enough to settle the disputed issue[6]—a judgment about semantic clarity that is hard to objectively verify.[7]

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3. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *accord* United States v. Mead Corp., 533 U.S. 218, 227–28 (2001); *see* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 402 (2024) ("[Agency] expertise has always been one of the factors which may give an Executive Branch interpretation particular 'power to persuade, if lacking power to control.'") (quoting *Skidmore*, 323 U.S. at 140).

4. *See, e.g.*, Yamaha Corp. of Am. v. State Bd. of Equalization, 960 P.2d 1031, 1038-39 (Cal. 1998) (quoting *Skidmore*); Brunson v. Colo. Cab Co., 433 P.3d 93, 99 (Colo. App. 2018) (quoting *Skidmore*); Maryland Dep't of the Env't v. Assateague Coastal Tr., 299 A.3d 619, 650 (2023) (referring to *Skidmore* doctrine); In re Compl. of Rovas Against SBC Mich., 754 N.W.2d 259, 267–70 (Mich. 2008); In re Appeal of N.C. Sav. & Loan League, 276 S.E.2d 404, 410 (N.C. 1981) (quoting *Skidmore*); Harmon v. Unemployment Comp. Bd. of Rev., 207 A.3d 292, 299–300 (Pa. 2019) (referring to *Skidmore* doctrine); Najo Equip. Leasing, LLC v. Comm'r of Revenue, 477 S.W.3d 763, 769-770 (Tenn. Ct. App. 2015); Nielsen Co. (US) v. Cnty. Bd. of Arlington Cnty., 767 S.E.2d 1, 4 (Va. 2015); Port of Seattle v. Pollution Control Hr'gs Bd., 90 P.3d 659, 672 (Wash. 2004); *see also* Mass. Gen. Laws ch. 30A, § 14(7)(g) ("The court shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it.").

5. *See, e.g.*, Crown Castle NG E. LLC v. Pa. Pub. Util. Comm'n, 234 A.3d 665, 719 (Pa. 2020) (Wecht, J., concurring) ("*Skidmore* does nothing more than recite a judge's job description. As such, it is potentially confusing and essentially useless.").

6. *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUMBIA L. REV. 1235, 1254, 1264–65 (2007); Kristin E. Hickman, *Anticipating a New Modern Skidmore Standard*, 74 DUKE L.J. ONLINE 111, 138 (2025).

7. Ward Farnsworth, Dustin F. Guzior, & Anup Malani, *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257, 273–74 (2010).

Behind all this is the fundamental challenge for researchers trying to estimate how much a particular administrative agency influences how courts read statutes. Judges write their opinions strategically at least in part. A court opinion's text indicates what a judge ruled, but it is a noisy measure for *why* the judge ruled that way. Judges may disclaim, or just not mention, the agency's view, however much it in fact influenced them. Or judges may invoke the agency's view as ballast for a ruling they would have reached anyway, leading researchers to overestimate agency influence. To be sure, interviewers can sometimes discern whether what people *say* motivated them in fact did so.[8] But judges typically refuse to elaborate upon court opinions they write or join. This can complicate what we can infer about how much an agency influences how courts read statutes.

To illustrate, consider *The Strength of a Weak Agency,* a classic study in the sociology of law.[9] To highlight influence on statutory interpretation as a dimension of agency capacity, Pedriana and Stryker (the study's authors) focused on the EEOC from July 1965 to March 1972.[10] By typical measures, the EEOC at that time was a "weak" agency: a limited budget, high staff turnover, and no legal authority to file lawsuits on its own to enforce Title VII.[11] Nonetheless, Pedriana and Stryker pointed to how the EEOC pressed a "disparate-impact" reading of section 703 of Title VII and, in turn, how that in part caused the Supreme Court to adopt that reading in *Griggs v. Duke Power Co*.[12] Their proof: the Court expressly acknowledged the EEOC and its guidelines in its *Griggs* opinion.[13] Thus, they concluded that the EEOC, ostensibly weak, was in fact stronger in 1971 than it was in 1965, even though it could not bring lawsuits on its own until 1972.[14]

This inference about the EEOC, however, illustrates the risk of relying on court opinions alone as proof of agency influence. To see why, consider the Supreme Court's two other Title VII opinions during this same time period. In *Love v. Pullman Co.* (1972), the Court considered two cases together, including one in which the government (representing the EEOC) was a party to the lawsuit, to consider a procedural issue about filing discrimination charges, not about the scope of Title VII's prohibition.[15] That the EEOC was a party to the lawsuit confounds any inference about the agency's influence as such.

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8. *E.g.*, Mario L. Small & Jenna M. Cook, *Using Interviews to Understand Why: Challenges and Strategies in the Study of Motivated Action*, 52 SOCIO. METHODS & RSCH. 1591 (2023).

9. Nicholas Pedriana & Robin Stryker, *The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965-1971*, 110 AM. J. OF SOCIO. 709 (2004).

10. *Id.* at 724–40.

11. *Id.* at 712–13.

12. 401 U.S. 424, 433–34 (1971); Pedriana & Stryker, *supra* note 9, at 740 ("Without the EEOC guidelines, the Court would have lacked a major resource on which to build its *Griggs* rationale.").

13. Pedriana & Stryker, *supra* note 9, at 738.

14. *Id.* at 743.

15. 404 U.S. 522 (1972).

In the other Title VII case, *Phillips v. Martin Marietta Corp.* (1971), the Court's first Title VII "sex" discrimination case, the Court treated EEOC guidelines in a way that cuts *against* EEOC influence.[16] There, the government's lawyers argued that the defendant-employer's challenged practice—refusing to hire women with preschool-age children—violated section 703 of Title VII, citing in part a conflict with EEOC Guidelines interpreting Title VII's bar on "sex" discrimination.[17] The Court vacated the district court's grant of summary judgment and remanded the case back to the district court in part for a "fuller development of the record" on whether the employer could qualify for Title VII's "bona fide occupational qualification" (BFOQ) exception to "sex" discrimination by showing that "such conflicting family obligations" were "more relevant to job performance for a woman than for a man."[18] The Court did not cite the EEOC BFOQ guidelines or otherwise address them, despite the government's reliance on them.[19]

In a concurring opinion, Justice Marshall disagreed that this BFOQ exception could in theory justify the employer's hiring practice, depending on the evidence in the case. He relied in part on the very EEOC guidance the government had pressed before the Court—but that the Court did not cite—as contrary to the Court majority's view. And he reminded the Court majority of a prior Court opinion from 1965 stating that the EEOC's reading of Title VII deserves "great deference," implying that the Court had not deferred to the EEOC's view of the BFOQ exception when it remanded the case.[20] But for Marshall's concurring opinion, one might have read the Court's majority opinion as *not* rejecting that EEOC view, simply because the Court majority opinion never mentioned it at all.

The lesson is simple: If you rely only on court opinions to measure an agency's influence on statutory interpretation by courts, you risk measurement error, because judges write court opinions strategically and rarely leave traces of their thinking outside of those opinions. Further complicating matters, ideological dispositions can also affect how judges rule *and* how willing they are to acknowledge or disclaim the influence of the agency's interpretation. This makes it hard for researchers to estimate how likely courts are to refer to agency influence as distinct from the probability of the court outcomes themselves.

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16. 400 U.S. 542 (1971).

17. Brief for the United States as Amicus Curiae Supporting Petitioner, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), 1970 WL 136379 at *4–5 ("The holding below—that an employment practice under which women, but not men, were required to be wholly without preschool age children does not violate the statute's proscription against discrimination on the basis of sex—is in conflict with the interpretation of the statute followed by the Equal Employment Opportunity Commission . . . ."); *id.* at *12–13, n.11 (citing the Commission's "Guidelines on Discrimination Because of Sex," 29 C.F.R. § 1604.1 (a)).

18. *Phillips*, 400 U.S. at 544.

19. *Id.*

20. *Id.* at 545 (Marshall, J., concurring).

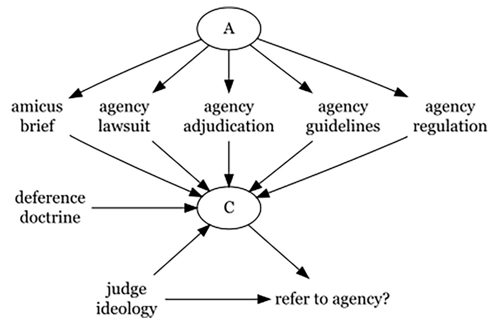


FIGURE 1. Model of Agency Influence.

Along these lines, Figure 1 depicts a simple model of agency influence on how courts read statutes. For any given agency reading of a statute (*A*), we can assume multiple pathways by which the agency can affect how closely a court reads that same statute (*C*) in the way the agency has (*A*→. . .→*C*). For any given set of administrative agencies, their paths of influence may vary based on the statutes that provide what the agency may do or the agency's actual capacity (what it *can* do, given political and budget constraints). We depict here five possible paths, i.e. by intervening and filing briefs in a lawsuit (e.g. as amici), by filing its own lawsuit, by administrative adjudication, by issuing agency guidance documents, and by promulgating regulations.

For simplicity, suppose there are only two other independent influences on the court's statutory interpretation. First, there may be a legal doctrine (e.g., *Skidmore*) that may affect how much courts in fact defer to the agency's view (*deference doctrine* → *C*). Second, judges may hold policy or ideological preferences that may affect how close a court ruling is to the agency's view. Again, a problem is that those same judge preferences may also affect how likely a court will write an opinion that expressly refers (favorably or disfavorably) to the agency view.

Here, we widen our focus to include not only courts but also the lawyers who argue before them. Any agency influence on courts is mediated by lawyers' decisions about whether and how to file lawsuits and to expressly refer to the agency's view in arguments to judges therein. This includes lawyers simply referring to the agency's view as consistent with their own statutory interpretation arguments. And it includes lawyers invoking a legal rule as requiring judges to defer to the agency, as some lawyers did when they relied on *Chevron* and progeny in their briefs to the court.

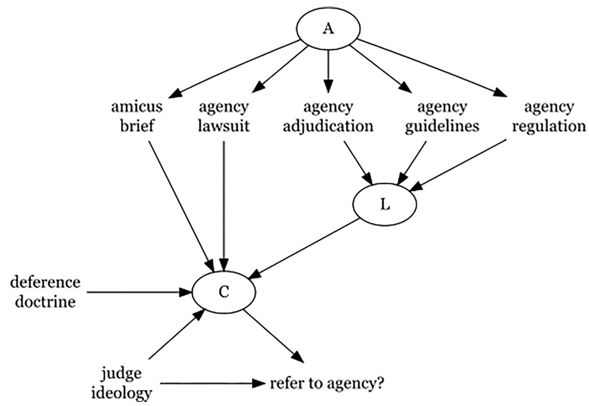


FIGURE 2. Revised Model of Agency Influence.

Figure 2 depicts a revised model of agency influence that includes lawyers in this way. Here, the lawyer's litigation decision (*L*) mediates the effect of the agency's reading on what courts do ($A \ldots \rightarrow L \rightarrow C$). Depending on the research question, that lawyer's decision could include the decision to *argue* the agency's view before the court as a reason the court should conform to that view. Another lawyer's decision could be the decision to file a lawsuit in the first place.

Our focus here is the idea that an agency's reading of a statute, as well as the pathway by which the agency presses that reading, can have influence by *at least* affecting lawyer beliefs about the probabilities and payoffs of various litigation decisions, including whether to file suit and what to argue. This implies a research strategy: For any given agency's view of the law, the researcher should identify the distinctive mechanisms by which the agency aims to diffuse that view. Agencies vary, but such mechanisms may include opinion letters, guidance documents, amicus briefs, and agency adjudicative opinions. Then, the researcher should measure how and how often the *lawyers* in litigated cases expressly refer to those agency outputs in their arguments to courts. For example, evidence of the early EEOC's influence is that lawyers at the NAACP Legal Defense Fund relied on EEOC opinion letters in their own litigation efforts.[21] In contrast, we can infer the lack of such influence on lawyer decisions by the complete absence of any mention of the agency's view in the lawyers' arguments to courts.

Where the target of inquiry is what lawyers decide to argue to courts, this approach to tracing agency influence in turn requires more assumptions (a more complicated model) about what causes lawyers to press or avoid certain arguments. Those assumptions differ for researchers trying to measure the *effect* of lawyer arguments on what courts write in their opinions.[22] In the simplest model,

21. ROBERT BELTON, THE CRUSADE FOR EQUALITY IN THE WORKPLACE: THE GRIGGS V. DUKE POWER STORY 90 n.35 (Stephen L. Wasby ed., 2014).

22. *See, e.g.*, Morgan L. W. Hazelton, Rachael K. Hinkle, & James F. Spriggs II, *The Influence of Unique Information in Briefs on Supreme Court Opinion Content*, 40 JUST. SYST. J. 126 (2019).

an agency view, once made public, will cause the lawyer, if exposed to it, to be more likely to argue it, if that lawyer believes that doing so will make litigation success (e.g., prevailing on a motion for summary judgment) more likely, all else equal. This depends on whether litigation success for that lawyer means a large monetary settlement, some kind of injunctive relief, a declaration of law with precedential value, or something else.

In a more complex model, however, a lawyer's probability of referring to the agency's view may actually *decrease* as more courts adopt the agency's view as their own. If any court adopts the view as binding precedent, then the lawyer's argument is stronger by referring to that precedent in lieu of the agency's view in subsequent lawsuits. If a court adopts the view but its ruling lacks status as precedent, the same pattern may hold, because the ruling still carries higher status than any agency output. Just as people are more likely to adopt an innovation as the number of higher-status adopters increases,[23] for any particular agency view as more courts (i.e., the higher-status actors) adopt the agency's view as their own, we should expect lawyers to be more likely to refer to *those* actors (citing their non-binding court opinions) instead of the agency itself (e.g., citing the agency guidance document). In either case, counts of references to agency views in lawyer briefs should tend to decrease over time as more courts definitively adopt or reject the agency's view, all else equal.

## METHOD AND RESULTS

To illustrate this approach here, we focus again on the EEOC and, in particular, how much it influenced what lawyers argued in Title VII transgender discrimination litigation from 2008 up to the date of the U.S. Supreme Court's *Bostock* decision, in which the Court construed Title VII "sex" discrimination by employers to cover transgender discrimination.[24] Congress has afforded the EEOC no rulemaking authority over Title VII, except for a few procedural rules. Thus, before and during *Chevron* doctrine, the EEOC's views on them are ostensibly not eligible for any more solicitude from the U.S. Supreme Court than whatever traditional *Skidmore* doctrine is supposed to require.[25]

Moreover, legal commentary has varied about the EEOC's Title VII expertise. In the 1980s, one commentator reasoned that by adding a private right of action to Title VII, Congress gave courts "substantial policymaking responsibility" in interpreting Title VII and asserted that the EEOC knows more about "practices subject to the Act than do the courts. Moreover, EEOC guidelines avoid the

23. Lance Noel et al., *Conspicuous Diffusion: Theorizing How Status Drives Innovation in Electric Mobility*, 31 ENV'T INNOVATION & SOCIETAL TRANSITIONS 154 (2019).

24. Bostock v. Clayton Cnty., 590 U.S. 644 (2020).

25. *E.g.*, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 642 n.11 (2007). For *Skidmore* as applied by the U.S. Supreme Court to EEOC interpretations of Title VII, see, e.g., Young v. United Parcel Serv., Inc., 575 U.S. 206, 224–25 (2015); Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 360–61 (2013); Federal Express Corp. v. Holowecki, 552 U.S. 389, 399–402 (2008); and Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141–42 (1976).

problems of delay and intercircuit variation endemic to judicial enforcement."[26] Decades later, commentators read U.S. Supreme Court opinions to infer skepticism about the EEOC's views when reading statutes that the agency enforces,[27] though arguably less than the Court's skepticism about the views of other agencies enforcing federal labor and employment law.[28]

In the decade before *Bostock*,[29] the EEOC pressed for reading section 703(a) of Title VII to cover transgender employees and job applicants in six ways: (1) issuing guidance documents on Title VII;[30] (2) issuing agency adjudicative opinions deciding cases involving transgender federal employees alleging discrimination under section 717 of Title VII;[31] (3) changing how it processed employment discrimination complaints;[32] (4) filing amicus briefs in Title VII lawsuits; (5) filing amicus briefs; and (6) filing or joining Title VII lawsuits against employers.[33]

Accordingly, we should expect that traces, if any, of the EEOC's agency influence of any of those efforts on lawyers would appear in documents submitted by those lawyers in such Title VII litigation. Put another way, our theoretical target of inference is how much the EEOC's reading of Title VII "sex" discrimination affected what lawyers argued in briefs filed in Title VII lawsuits alleging transgender discrimination by employers.

To pursue this target, we built a dataset of all lawsuits filed in federal court from January 1, 2008, up through June 15, 2020 (the date of the *Bostock* decision) that alleged that an employer discriminated against a transgender individual in violation of Title VII, section 703. Figure 4 depicts our sampling process. We started by searching the Bloomberg Law database of federal court dockets for all cases with the "442" nature of suit code (for job-discrimination lawsuits) and with complaints or pleadings captured by the search string "(transgender! OR transsexual!)" in the Bloomberg database native search function (n = 291). For each case in this initial sample, we read the last amended complaint filed to determine whether that complaint included a Title VII claim alleging transgender discrimination. If not, we excluded the case.

26. Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 UNIV. OF PA. L. REV. 549, 595 (1985).

27. *See, e.g.*, Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937 (2006).

28. James J. Brudney, *Chevron and Skidmore in the Workplace: Unhappy Together*, 83 FORDHAM L. REV. 497, 520-525 (2014).

29. Sperino, *supra* note 1; MEZEY, *supra* note 1 at 2; Feldblum, *supra* note 1.

30. U.S. Equal Emp. Opportunity Comm'n, Preventing Employment Discrimination Against Lesbian, Gay, Bisexual or Transgender Workers, OLC Control No. EEOC-NVTA-2016-2 (Apr. 29, 2014), https://perma.cc/NBA8-VWJJ.

31. Macy v. Dep't of Just., EEOC Appeal No. 0120120821 (Apr. 20, 2012); Lusardi v. Dep't of the Army, EEOC Appeal No. 0120133395 (Mar. 27, 2015).

32. *See* Baumle, Boutcher, Lee, Badgett, & Tomaskovic-Devey, *supra* note 1.

33. Plaintiff United States Equal Employment Opportunity Commission's Complaint and Demand for Jury Trial, EEOC v. Lakeland Eye Clinic, No. 8:14-cv-02421 (M.D Fla. Sept. 25, 2014); Complaint and Jury Demand, EEOC v. R.G. & G.R. Harris Funeral Homes, No. 2:14-cv-13710, (E.D. Mich. Sept. 25, 2014).

For the cases that remained (n = 134), Table 1 reports the number of such lawsuits by State, while Figure 3 depicts the number of such lawsuits filed by quarter during the 2008–2020 time period.

TABLE 1: TALLY OF FEDERAL LAWSUIT SAMPLE BY STATE

| State | N |
| --- | --- |
| New York | 19 |
| Georgia | 13 |
| California | 10 |
| Pennsylvania | 10 |
| Illinois | 7 |
| Maryland | 7 |
| Alabama | 5 |
| Ohio | 5 |
| Arizona | 4 |
| Louisiana | 4 |
| Michigan | 4 |
| Tennessee | 4 |
| Kansas | 3 |
| New Jersey | 3 |
| Texas | 3 |
| Virginia | 3 |
| Florida | 2 |
| Indiana | 2 |
| Iowa | 2 |

TABLE 1: (CONTINUED)

| State | N |
|---|---|
| Massachusetts | 2 |
| Minnesota | 2 |
| North Carolina | 2 |
| Oregon | 2 |
| Alaska | 1 |
| Arkansas | 1 |
| Colorado | 1 |
| Connecticut | 1 |
| Idaho | 1 |
| Kentucky | 1 |
| Mississippi | 1 |
| Nebraska | 1 |
| Nevada | 1 |
| North Dakota | 1 |
| Oklahoma | 1 |
| South Dakota | 1 |
| Utah | 1 |
| Washington | 1 |
| West Virginia | 1 |
| Wisconsin | 1 |

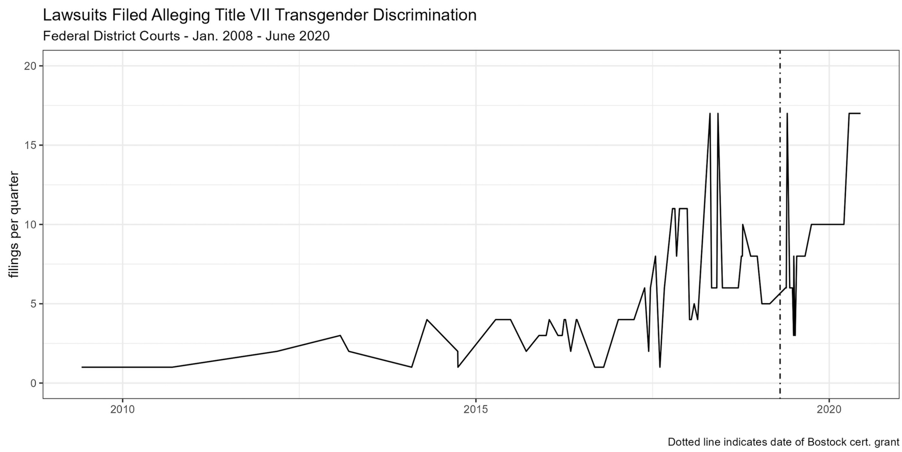


FIGURE 3. Number of Sampled Lawsuits Filed by Quarter, 2008–2020.

For each of these lawsuits, we inspected the available litigation documents for whether, after the last amended complaint, any defendant filed a motion to dismiss, motion for summary judgment, or another motion that would have affected the plaintiff's Title VII claim on the merits. For those that did, we read the parties' briefs for whether the defendant's lawyers argued that Title VII "sex" discrimination did not cover transgender individuals. If they did, we examined the plaintiff lawyer's arguments in response, searching specifically for whether they referred in that response to the EEOC's views to argue for reading Title VII's bar on "sex" discrimination to cover transgender discrimination.

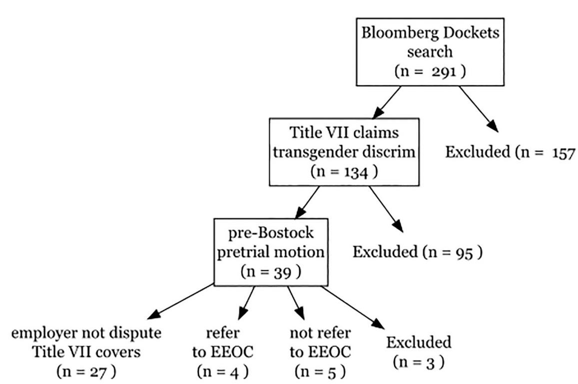


FIGURE 4. Sampling Workflow and Results.

As Figure 4 depicts, we excluded from the sample any lawsuits involving Title VII claims of transgender discrimination (n = 95) if they were resolved (a) before or in the absence of any pre-trial motion in which the parties could have disputed whether Title VII "sex" discrimination covers transgender discrimination or (b) if the first such pre-trial motion was filed *after* the *Bostock* decision.

In thirty-nine (39) of the remaining lawsuits in the sample, a defendant did file such a pretrial motion—either a motion to dismiss or for summary judgment—but *did not dispute* that Title VII "sex" discrimination covered transgender discrimination, mostly by not addressing that issue, or assuming *arguendo* that Title VII did cover such discrimination and arguing that the plaintiff lacked enough evidence of such discriminatory motive.

In one lawsuit, the defendant-employer's lawyer was more equivocal, writing that the defendant "acknowledges" that in *Macy v. Holder*, the EEOC "held . . . that claims of transgender discrimination are cognizable under Title VII," but then also noting that the Tenth Circuit "has yet to find accordingly," and then citing a Tenth Circuit decision from 2007 as ruling to the contrary.[34]

And in a few such lawsuits, the defendant's lawyers went a bit further and invoked the defendant's own anti-discrimination policies or norms. For example, when Delta Airlines, the named defendant-employer, moved for summary judgment in one lawsuit, its lawyers explained: "Delta is not suggesting here that transgender status is not a protected classification under the relevant laws or its own policies. To the contrary, Delta is proud to be at the forefront of supporting its transgender employees." Rather, they argued, the plaintiff had no evidence "connecting her transgender status to her termination."[35]

Another example: In a lawsuit against the University of Pennsylvania Hospital, the defendant-employer, Penn Hospital's lawyers initially disputed that Title VII covers transgender discrimination.[36] About a week later, perhaps in response to adverse publicity,[37] the lawyers for Penn Hospital withdrew that argument, citing Penn's "longstanding policies of non-discrimination with respect to sex, sexual orientation, and gender identity, among other protected characteristics" and adding that, regardless of the outcome of the (then-pending) *Bostock* appeal at the U.S. Supreme Court, "the Penn Defendants remain fully committed to affording the full measure of protection under their policies to our transgender patients and employees."[38]

In any case, these twenty-seven lawsuits cannot support or undermine what we might infer about the EEOC's influence on what lawyers argue, because we

34. Defendant's Amended Motion for Partial Summary Judgment and Brief in Support at 10 n.1, Taghavi v. Oklahoma Tax Comm'n, No. 5:16-cv-00303 (W.D. Okla. Feb. 6, 2017). We coded this lawsuit as one in which the defendant did not actively argue that Title VII "sex" discrimination does not cover transgender discrimination. The parties agreed to a joint stipulation of dismissal before any plaintiff's response.

35. Defendant's Memorandum of Law in Support of its Motion for Summary Judgment at 1–2, Carangi v. Delta Air Lines, Inc., No. 1:16-cv-02136 (S.D.N.Y. May 26, 2017).

36. Memorandum of Law in Support of Motion of Penn Defendants to Dismiss Counts V, VI, VII, VIII, IX, XI, XII, and XIII of the Amended Complaint at 11–12, Doe v. The Hosp. of Univ. of Pa., No. 2:19-cv-02881 (E.D. Pa. Nov. 7, 2019).

37. *See e.g.*, Tim Cwiek, *Penn Claims Trans People are not Protected Under Federal Antibias Law*, PHILA. GAY NEWS (Nov. 7, 2019), https://perma.cc/C62Z-6UC8.

38. Letter of Joe H. Tucker, Jr. to the Hon. Mitchell S. Goldberg, Doe v. The Hosp. of Univ. of Pa., No. 2:19-cv-02881 (E.D. Pa. Nov. 13, 2019) (ECF, No. 24).

would not expect any plaintiff's attorney to spend time arguing about an element of their legal claim (here, that Title VII "sex" discrimination covers transgender discrimination) that the defendant's lawyer does not dispute. That leaves just nine lawsuits in which the plaintiff's lawyer could have referred in any way to the EEOC's view (that Title VII "sex" discrimination includes transgender discrimination) as part of their effort to defeat a defendant's pretrial motion arguing the opposite view. Of these, four did indeed cite the EEOC's view, among other arguments, while the lawyers in the other five did not. Table 2 reports the case caption, jurisdiction, and filing year for these lawsuits.

TABLE 2: FINAL SUBSAMPLE OF TITLE VII LAWSUITS BY NAME, JURISDICTION, AND FILING YEAR

| **case** | **court** | **year** |
|---|---|---|
| Michaels v. Akal Sec., Inc. | D. Colo. | 2010 |
| Jamal v. Saks & Company | S.D. Tex. | 2014 |
| Dawson v. H&H Elec., Inc. | E.D. Ark. | 2015 |
| Chavez v. Credit Nation Auto Sales | N.D. Ga. | 2016 |
| Robinson v. Dignity Health | N.D. Cal. | 2016 |
| Simonson v. Oswego County | N.D.N.Y. | 2017 |
| Musgrove v. Board of Regents | M.D. Ga. | 2018 |
| Fletcher v. Alaska | D. Alaska | 2020 |
| Krei v. Nebraska | D. Neb. | 2020 |

## DISCUSSION

The findings here imply a weak influence of the EEOC's actions in interpreting Title VII "sex" discrimination on what lawyers argued in Title VII transgender discrimination litigation. During the 2008–2020 time period, only 4 out of the 9 lawsuits (about 44%) in our final subsample were ones in which the plaintiff's lawyers referred to the EEOC's view. Given the small sample size, however, any inference from this finding is highly sensitive to different measurement assumptions. For example, if we had further excluded from our final subsample those lawsuits in which the EEOC filed an amicus brief, it would have been even smaller. Put another way, if we started by believing that *any* possible probability—here, that a plaintiff's lawyer in such lawsuits would refer to the EEOC's view of Title VII "sex" discrimination—was equally likely, the credible interval of likely values of that probability, given the data, would, as a measure of our continued uncertainty, remain quite large. This finding should dampen or at least complicate previous accounts that stress the importance of the EEOC's influence.[39]

The most striking finding is the twenty-seven lawsuits in our sample in which the defendant's lawyer *refused to even dispute* the proposition that Title VII "sex" discrimination covers transgender discrimination. For that finding, here are a few plausible explanations.

One explanation is that during 2008–2020, some appellate courts had already extended *Price Waterhouse* and *Oncale* to read Title VII to cover transgender discrimination in cases where, for example, such discrimination can be taken as premised on gender stereotypes.[40] Thus, perhaps in lawsuits filed in jurisdictions with such appellate court precedent, defense lawyers would be more likely to avoid litigating the issue of whether transgender discrimination qualifies as "sex" discrimination under Title VII, as judicial precedent would have already settled *that* issue to the contrary. If so, this implies that the EEOC's reading of Title VII had especially little influence in those circuits that already had circuit precedent predicated on *Price Waterhouse* and *Onacle*.

Another explanation is that, at that time, local or company-specific norms favored social acceptance of transgender individuals, and thus those norms discouraged some defendants' lawyers from expressly arguing that Title VII did not cover transgender discrimination. In turn, those lawyers were more likely to argue instead that the facts alleged or collected during discovery did not suffice to prove a discriminatory motive. The lawsuit examples involving Delta and Penn Hospital, discussed above, are consistent with this explanation. However, given that we only collected data from filed lawsuits, this study cannot support any robust inference about how strong or widespread such norms were.

A third explanation, however, is that the absence of defendant's lawyers disputing Title VII coverage is itself actually evidence that the EEOC's views exerted some influence. This explanation takes issue with a key premise of our measurement strategy, i.e., traces of EEOC influences can be discerned in the presence or absence of the arguments of plaintiff lawyers responding to defendant pre-trial motions challenging Title VII coverage. The idea here is that the EEOC's view might have increased the odds that plaintiff lawyers referred to the EEOC's view *and* also decreased the odds that defense lawyers would dispute Title VII coverage in the first place. Moreover, if the EEOC's actions influenced how likely lawyers would reach a settlement before *filing* a lawsuit or any pre-trial motion, then the measurement strategy adopted here would simply fail to

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39. *See, e.g.,* PIERCESON, *supra* note 1, at 101–06; Baumle, Boutcher, Lee Badgett, & Tomaskovic-Devey, *Enforcement Agencies*, *supra* note 1, at 626.

40. PIERCESON, *supra* note 1, at 91–101; Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989); Oncale v. Sundowner Offshore Services, 523 U.S. 75, 80–81 (1998).

detect it. With the data collected here, however, we cannot assess the relative plausibility of any of these explanations.

## CONCLUSION

This paper argues that researchers should isolate and separately study the different pathways of administrative agency influence. To illustrate, we focused on a pathway of influence for which lawyers' litigation decisions played a key mediating role. The faint traces of EEOC influence on what lawyers argued in Title VII transgender litigation, however, does not imply that the EEOC had no influence at all. For example, where the EEOC appeared as a party or as amici, it had plausibly some influence in lawyers' litigation decisions in those particular cases. This includes *EEOC v. R.G. & G.R. Harris Funeral Homes*, the only one of the three cases consolidated on appeal to the U.S. Supreme Court in *Bostock* that alleged transgender discrimination. Researchers would do well to go beyond studying court opinions by identifying multiple possible paths of influence on courts and separately testing for traces of the extent of influence, if any, along each pathway.

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## COLOPHON

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