White Hair Only: Why the Concept of Immutability Must Be Expanded to Address Hair Discrimination Against Black Women in the Workplace

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INTRODUCTION

Imagine you are a white woman in a Black dominated industry. You are fully qualified for a position in the company of your choosing. You apply to a company, receive an interview, and exceed expectations only to be turned away because your hairstyle was too straight. Not because your hair was in an unkept, dirty, or distracting style but because your hairstyle was considered to be unprofessional because its origins are not aligned with the majority's view of professionalism.

While it is uncommon for white women in the workplace to face discrimination for straight hair or to be forced to change their hairstyle, it is a common reality that Black persons, especially Black women, experience often. Many Black persons are forced to make essentially one of two choices in professional spaces as it pertains to their grooming. The first choice is to wear hairstyles that are a reasonable result of your natural hair texture and closely related to your racial identity and possibly limit your opportunity for professional success. The second choice is to choose a hairstyle more closely related to whiteness in an effort to successfully navigate your chosen career for jobs and promotions.[1]

In 2010, a Black woman named Chastity Jones became yet another Black woman impacted by the very real reality that Black employees must often choose between their hair and gainful employment or prospective growth in their career. Chastity Jones applied for a customer service representative position with Catastrophe Management Solutions (CMS), a claims processing company in Alabama, in May of 2010.[2] Shortly after applying Ms. Jones received an interview with CMS amongst other applicants for a customer service representative position.[3] After Ms. Jones' interview she was alerted by CMS that she was qualified for the position and had been offered a position with the company.[4] Ms. Jones, after being told that she

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1 *See* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1021 (11th Cir. 2016); *see also* Smith v. Delta Air Lines, Inc., 486 F.2d 512, 513 (5th Cir. 1973); Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164, 165 (7th Cir. 1976).

2 *Catastrophe Mgmt. Sols.*, 852 F.3d at 1021.

3 *Id.*

4 *Id.*

was hired, was then told by a white CMS Human Resources Manager that CMS could not hire her with dreadlocks because, as the HR manager put it, "they tend to get messy, although I'm not saying yours are, but you know what I'm talking about."[5] Unfortunately, Ms. Jones would never work for CMS because she refused to cut her dreadlocks and as a result was not hired by CMS.[6] Like so many of her Black counterparts in the workplace, she was told that in order to work at CMS she could not keep her dreadlocks because of what CMS called their race neutral grooming policy[EM1].[7]

The Equal Employment Opportunity Commission (EEOC) later filed suit on behalf of Chastity Jones when her offer was rescinded by CMS after her refusal to get rid of her dreadlocks, alleging that CMS' discriminatory actions were in violation of Title VII of the Civil Rights Act.[8] The Southern District of Alabama dismissed Ms. Jones' complaint and denied the EEOC's motion for leave to amend.[9] The EEOC appealed the decision to the United States Court of Appeals Eleventh Circuit who also held against the EEOC and Ms. Jones.[10] That day, the Eleventh Circuit ruled that Ms. Jones' hairstyle was not an immutable trait and that wearing dreadlocks is a choice.[11] Thus, the court maintained a longstanding interpretation of immutable traits that has failed to protect Black persons in the workplace from a culture of professionalism that rewards appearance proximate to whiteness and punishes appearance closely related to Blackness.

Over the last decade a number of scholars and legislators have taken on the task of addressing the disparate impact grooming policies have had and continue to have on Black persons in the workplace. The issue is not a novel one for Black persons maneuvering through spaces that at their foundation were never meant to welcome or accommodate persons of a darker hue.[12] But the growing amount of attention paid to this issue has directly been correlated to a movement rooted in the reclamation of hairstyles directly related to Black identity. Historically, hairstyles rooted in Black history and culture were deemed unprofessional and unkept in both the workplace and in society.[13] This movement, in conjunction with the 2016 Eleventh Circuit ruling

5 *Id.*

6 *Id.* at 1022.

7 *Id*. at 1023

8 *Id.* at 1020.

9 *Id.* at 1020–21 (*see* EEOC v. Catastrophe Mgmt. Sols., 11 F. Supp. 3d 1139, 1142–44 (S.D. Ala. 2014) (holding the complaint should be dismissed under FRCP 12(b)(6) because it did not plausibly allege intentional racial discrimination by CMS against Ms. Jones)).

10 EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1030 (11th Cir. 2016) (holding that CMS did not discriminate against Ms. Jones on the basis of race because dreadlocks are not an immutable characteristic of Black persons).

11 *Id.*

12 *See also Smith*, 486 F.2d at 513–514; Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164, 165 (7th Cir. 1976).

13 AYANA D. BYRD & LORI THARPS, HAIR STORY: UNTANGLING THE ROOTS OF BLACK HAIR IN AMERICA 1 (2nd ed. 2014).

in the case of Chastity Jones, ignited the creation of new legislation and scholarship aimed at finding solutions to address the disparate impact hair discrimination has on Black employees.[14] Nevertheless, little attention has been given to the role the judiciary has played in upholding legal principles that perpetuate hair discrimination, and as a result racial discrimination, in the workplace. This note focuses on the issue presented by the interpretation of immutability the judiciary uses in relation to racial discrimination claims and the blockade it presents for Black workers, specifically Black women, who face hair discrimination in the workplace.

The judiciary's interpretation of the immutability doctrine in race discrimination cases continues to be detrimental to suits brought by Black plaintiffs claiming they were discriminated against in the workplace as a result of grooming policies.[15] "Courts have overwhelmingly favored employers, denoting the wearing of natural hairstyles like braids and locs as trendy, or mutable and easily changeable."[16] So, even as the legislature and the Equal Employment Opportunity Commission create policies and laws that focus on ending hair discrimination, the judiciary has created a bar to those who seek relief as a result of the same thing. Considering the roots of Title VII were founded in the legislature's attempts to provide equal access to employment for identified minorities, specifically Black persons, it is evident that the current interpretation fails to fall in line with Congress' intent.[17] Title VII prohibits employment discrimination, whether it be through the hiring processes or through the course of employment, based on an individual's race, color, religion, sex, or national origin.[18] The Supreme Court stated that the purpose of Title VII "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[19] However, the judiciary's interpretation of the definition of immutable characteristics, traits that are unchangeable or fundamental to identity, used in review of some Title VII cases has not been extended to cases considering claims alleging racial discrimination in the workplace.[20] The judiciary still defines racial identity as an identity based on biological differences rather than as a socially constructed identity separating persons based on physiological and cultural differences. Thus, they have been unwilling to recognize traits fundamental to racial

14 *Catastrophe Mgmt. Sols.*, 852 F.3d at 1030.

15 *Id.*

16 Ra'mon Jones, *What the Hair: Employment Discrimination Against Black People Based on Hairstyles*, 36 HARV. J. RACIAL & ETHNIC JUST. 27, 44–45 (2020).

17 Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

18 42 U.S.C. § 2000e–2(a).

19 *Griggs*, 401 U.S. at 429–430.

20 Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1517 (2011).

identity in racial discrimination cases. Instead, courts only recognize immutable traits that are considered "accidents of birth" in race-based claims.[21]

An interpretation expanding the recognized immutable traits of a person's racial identity to include characteristics that are fundamentally related to racial identity would recognize Black hairstyles as being fundamental to Black identity. This sociologically based interpretation would provide greater protection for Black employees from hair discrimination in the workplace. A more expansive conception of immutability in racial discrimination cases will aid in the elimination of businesses' reliance on stigmas related to Black hairstyles as guideposts for their enforcement of grooming policies in the workplace. Also, hopefully, a more expansive interpretation would encourage society as a whole to reconsider why Black hairstyles have been excluded from past and current conceptions of professionalism in the workplace. Nevertheless, despite these benefits the judiciary has remained steadfast in its maintenance of its definition of immutable traits related to racial identity providing numerous arguments in support of their interpretation. These arguments include interpreting hairstyles as a choice, detaching texture from hairstyles related to its outgrowth, connecting grooming policies to the private right of businesses to operate in its interest rather than its disparate impact on certain groups, and more. In light of the judiciary's commitment to maintaining immutability as a concept for review of employment discrimination claims it is important that the judiciary expand its interpretation of immutability in racial discrimination cases. This article takes a stand against the judiciary's incorrect application of immutability in racial discrimination cases.

The concept of race is not a fixed result of biology that separates persons based on genetic differences.[22] No genetic makeup exists that can be attributed only to all human beings that are Black, or white, or Asian.[23] In fact, it is more likely that there are more genetic variations within one racial group than there would be between two different groups.[24] But, if the biological conception of race is incorrect, how do we define racial identity? Race is a social construction[25] that relies on physical appearance, cultural characteristics, and behaviors to separately assign communities of persons a certain identity.[26] As a result, certain characteristics, both external

21 *Id.*

22 Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HAR. C.R.-C.L. L. REV. 1, 11 (1994).

23 *Id.*

24 *Id.* at 12–13.

25 Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629, 634 (2002) (stating social construction focuses on "how the identity category itself is formed," and contends that identity categories are "social creations" that "result from social belief and practice, are themselves complex social practices, and may be evaluated in terms of whose interests they serve").

26 Lopez, *supra* note 22, at 53–55.

manifestations and cultural practices or behaviors, are attributed by society to certain racial groups.[27] Thus, the concept of immutability when applied to racial discrimination cases should not only protect the physical traits associated with certain racial identities but also should protect behaviors or practices that are fundamental to racial identity. Applying this conception of immutability that considers traits and practices fundamental to personal identity will provide greater protection for Black persons in the workplace who frequently fall victim to so-called "racially neutral" grooming policies.

The first section of this article focuses on defining the connection between Black hairstyles and Black identity to lay the foundation for why these hairstyles deserve protection under Title VII in race discrimination cases and presents society's progression of understanding Black hair. The second section of this article provides where the concept of immutability comes from, what it means for employment law, and presents where the judiciary stands today on the issue of hair discrimination as a result of the concept of immutability. The third section of this article then pinpoints the judiciary's major arguments for denying recognition of Black hairstyles as traits and provides rebuttals to these arguments. The fourth and final section of the article encompasses all these sections in an effort to demonstrate the benefits of expanding the judiciary's interpretation of immutability in racial discrimination cases to include traits considered fundamental to racial identity.

I. BACKGROUND

A. The Fundamental Connection Between Black Hair and Black Identity

Understanding the connection between Black hair and Black identity is extremely important when understanding why hair discrimination, disparately impacting Black persons, is synonymous with racial discrimination. As many courts and businesses question whether Black hairstyles are simply a choice unrelated to Black identity, it is important to review history and recognize the context that has left Black hairstyles excluded and created the need for movements focused on reclaiming an essential piece of Black identity. In order to truly understand why Black hairstyles are a part of Black identity one need only look back through time to their origin on the African continent and track their history to the modern day. At every turn, Black hairstyles have been a treasured fixture in the history of Black persons from an individual level to whole civilizations. But as Black persons were taken away from their native lands and forced into white spaces Black Hair became an issue rather than a celebrated tradition.

As stated previously, in order to understand the connection between Black hair and identity a person need only look toward the first African civilizations. Specifically, looking at the West African coast, which is considered to be the original source of many of the persons who fall under Black

27 EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1031 (11th Cir. 2016).

identity in the United States.[28] In this region there existed a number of nations of Black persons diverse in heritage and cultural practices. Nevertheless, they were united by the "spiraling curls'' that rested upon their heads, considered to be an evolutionary development to protect them from the intensity of the sun's rays.[29] But while Black Africans were united by the often kinky textured hair on their heads, the hair textures seen amongst West Africans were just as diverse as the people occupying this region.[30] From the deep ebony, kinky curls of the Mandingos, to the loosely curled, flowing locs of the Ashanti, hair textures varied in this region.[31]

Yet, while there was great diversity in textures and styles seen within the region, Black hair's role in many nations served a similarly important purpose. Ayana Byrd highlights the role Black hair played as a source of identity for Black West Africans in her book *Hair Story*. In early 15th century West African civilizations, hair functioned as a carrier of messages, an integral part of a complex language system in many civilizations.[32] Hairstyles could indicate marital status, age, religion, ethnic identity, wealth, and societal status.[33] Hairstyles were so important to African identity that a prominent West African who was forced into slavery, Ayuba Suleiman Diallo, wrote, "[t]he 'highest indignity,' . . . was when his Mandingo Assailants shaved his head and beard to make him appear as if he were a prisoner taken in war."[34]

These same West African nations, where hair was an important identifier, were also home to a population of Africans that would one day be forced onto ships as currency in the ever-growing Trans-Atlantic slave trade.[35] As a result of the nearly four-hundred-year-old Trans-Atlantic slave trade, more than 20 million Africans were taken from Africa and sold into bondage.[36] These men, women, and children were brutalized and dehumanized as they became the property of European settlers looking to take advantage of their newly acquired free labor as European Nations expanded their reach west to the Americas.[37] Part of the process of the dehumanization that slaves endured was the erasure of their individual African identity. Slave captors and traders shaved the heads of their captives, committing an unspeakable crime

28 Byrd, *supra* note 13, at 2.
29 *Id.* at 1.
30 *Id.*
31 *Id.*
32 *Id.* at 2.
33 *Id.*
34 *Id.* at 10.
35 *Id.*
36 *Id.*
37 *Id.*

and taking the first step in the process of erasing the African slave's identity.[38]

As Africans were forced into slavery on American land their hair was deemed wholly unattractive and inferior by Europeans.[39] For instance, during the pinnacle of slavery in the United States even free Blacks were forced by law to cover their hair in cities like New Orleans to enforce White American's inferiorization of Black hair.[40] The time Africans spent in bondage was the foundation from which the stereotype of the "savage Negro" emerged creating a barrier between newly freed Blacks and White Americans terrified by their very presence.[41] Aware of this reality Blacks innovated care systems and tools to morph their hair into the socially accepted European hairstyles leaving their once symbolic and elaborate hair in the past.[42] In the 1900s, as Blacks attempted to integrate into a white world disgusted by the very traits which defined Black racial identity, many attempted to alter their appearance.[43] During this period some Blacks held a deep resentment of the traits used once to label them savages and many attempted to comply with Euro-centric beauty standards in exchange for acceptance into society from a personal to professional level.[44]

That was until the Civil Rights Movement of the 1950s and 1960s sparked the "Black is Beautiful" Movement led by leaders like Marcus Garvey, Angela Davis, Malcolm X, and many more.[45] The "Black is Beautiful" Movement, set to the backdrop of an intense period of struggle for Black Americans fighting for their civil rights, was an extremely important movement as Black Americans attempted to reclaim pride in their natural appearance.[46] Activists encouraged Black men and women to wear their "natural kinks" and embrace self-love as a way of denying white beauty standards and the inferior position American society had placed Black traits.[47] During the 1970s, activists like Angela Davis donned Afros as a political statement,

38 *Id.* at 10–11 ("Frank Herreman, director of exhibitions at New York's Museum for African Art and specialist in African hairstyles stated, 'a shaved head can be interpreted as taking away someone's identity.'").

39 *Id.* at 13.

40 Chanté Griffin, *How Natural Black Hair at Work Became a Civil Rights Issue*, JSTOR DAILY 1, 3 (July 3, 2019) https://daily.jstor.org/how-natural-black-hair-at-work-became-a-civil-rights-issue/ ("In cities like New Orleans, however, where free Creole women of color donned elaborate hairstyles that displayed their kinks and coils with an air of regality, the city implemented laws—the Tignon Laws—that required these women to wear a tignon (scarf or handkerchief) over their hair to signify that they were members of the slave class, regardless of whether they were free or enslaved.").

41 Byrd, *supra* note 13, at 25.

42 *Id.* at 29.

43 *Id.*

44 *Id.* at 29–30.

45 Griffin, *supra* note 40, at 4.

46 *Id.*

47 *Id.*

symbolizing Black pride and solidarity.[48] Many Black Americans followed suit by intentionally maintaining their hair in Afro-centric styles as a means to deny the promotion of Eurocentric beauty standards in the ongoing struggle for racial equality in the United States.[49] And for a moment, there seemed to be some hope that the maintenance of centering Eurocentric beauty standards would be challenged after the Civil Rights Act of 1964 was enacted, thus establishing Title VII, amongst a number of other policies dedicated to giving Black Americans equal access and banning discriminatory practices.[50] In 1976, The Seventh Circuit Court in *Jenkins v. Blue Cross Mutual Hospital Insurance* even ruled that Title VII protected Black workers' right to wear Afros in the workplace.[51] Sadly, the Seventh Circuit ruling would stand alone as the only positive outcome of a number of claims brought before the judiciary as a result of Black workers alleging racial discrimination due to hair discrimination in the workplace.[52] Cued by the lack of social progress and minimal legal protections provided for Black hair, it was not long before Black Americans returned to emulating white beauty and professionalism standards.[53] For many, emulating these standards represented a path toward assimilation into a society uninterested and, at times, actively hostile toward Black traits.[54]

Over the course of the 1980s and 1990s, while many Black Americans attempted to find a way to fit into white society, Black artists took the mantle from the activists of the mid 20th century and began popularizing Black hairstyles like braids and locs.[55] Unfortunately, unlike the court in *Jenkins*, the judiciary as a whole did not interpret Title VII to protect Black workers' right to wear these hairstyles in the workplace.[56] Instead, the judiciary established the standing legal standard that hairstyles are not protected under Title VII in 1981—and the needle has not moved since.[57] Even after what is considered to be the second wave of the Natural Hair Movement beginning in the 2000s, the judiciary has not shifted its position on hair discrimination in the workplace.[58] Nevertheless, while the judiciary has remained stagnant, the Equal Employment Opportunity Commission (EEOC) and some legislators have taken a stance against hair discrimination in the workplace.[59]

48 *Id.*
49 *Id.*
50 *Id.* at 5.
51 *Id.* at 6.
52 *Id.* at 11.
53 *Id.* at 6.
54 *Id.*
55 *Id.* at 7.
56 *Id*. at 7–8.
57 *Id.*
58 *Id.* at 8; Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 233 (S.D.N.Y. 1981).
59 Griffin, *supra* note 40, at 12–13.

B. The CROWN Movement

In recent years, legislators and the EEOC have focused on addressing hair discrimination in the workplace by implementing new policies and offering forums to discuss the impact grooming policies have on Black persons entering the workplace.[60] In response to the Black Natural Hair Movement, along with the outcry for greater protection and inclusion of Black natural hairstyles, some legislatures and the relevant employment authorities have begun addressing the disparate impact hair discrimination has on Black persons in the workplace. The "Create a Respectful and Open Workspace for Natural Hair" Act (CROWN Act) first became law in California in 2019 and has quickly gained popularity, evidenced by its consideration by multiple states.[61] The CROWN Act expands the definition of "race" in both the Fair Employment and Housing Act (FEHA) and the Education Code to include "traits historically associated with race, including but not limited to, hair texture and protective styles."[62] Within the definition of protective styles the bill includes hairstyles like braids, locs, and twists.[63] New York, Colorado, New Jersey, and other states have also passed similar bills, joining California in codifying the act, and now the CROWN Act has passed the United States House of Representatives and is before the U.S. Senate.[64]

These legislative branches are not alone in their attempts to address hair discrimination in the workplace. Authorities such as the EEOC have also begun addressing the negative impact defining racial identity as a result of biology and grooming policies have had on Black persons in the workplace. In 2006, the EEOC redefined racial discrimination in the context of Title VII enforcement.[65] The EEOC stated, "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."[66] The EEOC's new definition of racial discrimination acknowledged racial identity as a social construct rather than a result of biology. The Commission also stated that, "[a]n employment policy or practice that applies to everyone, regardless of race or color, can be illegal if it has a negative impact on the employment of people of a particular race or color and is not job-related and necessary to the operation of the business."[67] The EEOC has also released the CM-619 Grooming Standards in order to encompass their definition of race encouraging grooming policies to

60 *Id.* at 12–14.

61 Cal. Educ. Code § 212.1 (West).

62 *Id.*

63 *Id.*

64 *Id.*; N.Y. Exec. Law § 292 (McKinney) (2020); H.R. 5309, 116th Cong. (2020).

65 EEOC Compliance Manual, § 15–II (2006), https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination.

66 *Id.* at 13.

67 *Race/Color Discrimination*, EEOC.GOV, https://www.eeoc.gov/racecolor-discrimination (last visited Nov. 2, 2020).

consider other attributes like cultural and physical characteristics in addition to the color of one's skin.[68] Nevertheless, as the legislature and entities like the EEOC continue to promote policies to further protect Black employees from hair discrimination in the workplace, the judiciary has continued to be a blockade for plaintiffs bringing claims for hair discrimination under Title VII racial discrimination protections.

II. DEFINING IMMUTABILITY

The judiciary only recognizes "accidents of birth" as recognizable immutable traits in racial discrimination claims. "Accidents of birth" are essentially traits that are unchangeable. As a result of only recognizing unchangeable traits, the judiciary has denied providing legal protections for hairstyles in the workplace.[69]

The concept of immutability was first recognized by the Supreme Court in cases addressing constitutional issues founded in the Equal Protection Clause.[70] The Fourteenth Amendment's Equal Protection Clause was drafted to prohibit the government from denying people equal protection of its governing laws.[71] The Equal Protection Clause does not prohibit all forms of discrimination.[72] Rather, it requires states to not make distinctions between individuals based on differences that are irrelevant to a legitimate governmental objective.[73] In order to determine whether the government has violated an individual's guaranteed equal rights under the law, courts scrutinize governmental action that have caused harm to a claimant.[74] But, before scrutinizing a government's actions, a claimant must first demonstrate that they were discriminated against and suffered harm due to the government's action.[75] It is from the court's review of an individual's claim of harmful discrimination that the concept of immutability is born.

The Supreme Court first recognized the concept of immutability in *Frontiero v. Richardson*, an equal protections case which reviewed a military provision that only prohibited female members of the uniformed services from claiming their spouses as "dependents."[76] The provision in question

68 *CM-619 Grooming Standards*, EEOC.GOV, https://www.eeoc.gov/laws/guidance/cm-619-grooming-standards (last visited Nov. 2, 2020).

69 *In re* Acosta, 19 I. & N. Dec. 211, 233-34 (B.I.A. 1985) (overruled on other grounds by *In re* Mogharrabi, 19 I. & N. Dec. 439, 447 (B.I.A. 1987)).

70 *See* Bowen v. Gilliard, 483 U.S. 587, 602 (1987).

71 *See generally*, *Equal Protection*, Legal Information Institute, https://www.law.cornell.edu/wex/equal_protection.

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.* ("[T]he court will typically scrutinize the governmental action in one of several three ways to determine whether the governmental body's action is permissible: these three methods are referred to as strict scrutiny, intermediate scrutiny, and rational basis scrutiny.").

76 411 U.S. 677, 678–79 (1973).

differentiated between service members solely based on their sex identity.[77] The Court stated, "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."[78] The Supreme Court held that the provision was unconstitutional—reasoning that sex, like race and national origin, has no impact on a person's ability to perform or contribute to society and is merely an "accident of birth."[79]

The Supreme Court later reemphasized their ruling from *Frontiero* in *Vieth v. Jubelirer*, an equal protections case challenging the constitutionality of a Pennsylvania congressional redistricting plan.[80] The claimants alleged that Pennsylvania General Assembly's redistricting plan was an unconstitutional gerrymander and discriminated against their chosen political affiliation.[81] The Court upheld the redistricting plan—reasoning, "[p]olitical affiliation is not an immutable characteristic, but may shift from one election to the next."[82] *Vieth* further affirmed the stance from *Frontiero* that immutable characteristics are not traits for which a person is at liberty to freely choose or easily change.[83]

Nevertheless, while the *Frontiero* and *Vieth* cases established the judiciary's foundational interpretation of immutability as characteristics that are "accidents of birth," the judiciary's interpretation has expanded in equal protection cases. The Supreme Court in the case *Obergefell v. Hodges* relied upon a new conception of immutability that expanded beyond just characteristics that were "accidents of birth." The petitioners filed suit against their states alleging the denial of their right to marry or recognize lawful marriages performed in another state because the marriage between two same sex persons violated the Fourteenth Amendment.[84] The Court held, "[t]he Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State."[85] The Court reasoned that differentiating the treatment of same sex and opposite sex couples right to marry based on sexuality violated the Fourteenth Amendment because sexuality is directly tied to the petitioners personhood.[86] While the Court shied away from considering sexuality as an

77 *Id.* at 679.

78 *Id.* at 686–87.

79 *Id.* at 686 (a characteristic considered to be an "accident of birth" is one that is considered to be unchangeable).

80 Vieth v. Jubelirer, 541 U.S. 267, 267 (2004).

81 *Id.*

82 *Id.* at 287.

83 *Id.*

84 Obergefell v. Hodges, 576 U.S. 644 (2015).

85 *Id.* at 644.

86 *Id.* at 672.

"accident of birth," they still acknowledged sexuality as immutable because it is a characteristic that is fundamental to petitioners' personal identities.[87]

As the judiciary developed its interpretation of immutability in equal protections cases and legislatures began taking aim at workplace discrimination by passing laws like Title VII, the two areas of law began to overlap and immutability was also recognized in employment law.[88] The Supreme Court's rulings in these equal protection cases and others defining immutable traits as traits that are an "accident of birth" or as traits fundamental to personhood have acted as the foundation for the judiciary's understanding of immutability in employment law. Today, courts have begun moving away from applying only the traditional concept of immutability, "accidents of birth," in equal protection cases—but it still remains a fixture in employment law.[89]

A. Immutability in Employment Law: Title VII Legal Protections from Discrimination

In order to understand the concept of immutability, specifically in relation to hair discrimination, it is important to understand the legal doctrine from which courts use the concept to review in employment law. Since the enactment of the Civil Rights Act of 1964, Title VII has provided protections for classes of persons based on their race, color, sex, or national origin in an effort to end segregation and rid the workplace of discrimination based on these recognized identities.[90] In order to maintain an equal work environment free from discrimination, Title VII provides protections to classes of persons that are supposed to be protected. Under Title VII, it is unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[91]

The Supreme Court of the United States further emphasized that Congress created Title VII with the intent to "achieve equality of employment

87 *Id.*

88 Hoffman, *supra* note 20, at 1514.

89 *Id.* at 1514; Jessica A. Clarke, *Against Immutability*, 125 Yale L.J. 2, 25–27 (2015).

90 *Civil Rights Act of 1964*, HISTORY.COM (Jan. 25, 2021), https://www.history.com/topics/black-history/civil-rights-act.

91 42 U.S.C. § 2000e–2(a) (2008).

opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[92]

If an employee believes that they have faced discrimination in the workplace based on their race, color, religion, sex, or national origin, Title VII offers two pathways for which they can file suit against their employer. An employee can file suit against their employer using the legal theory of "disparate treatment" or "disparate impact."[93] An employee filing a claim under the "disparate treatment" provision of Title VII need only show that his or her race, color, sex, or national origin was a motivating factor in the employer's adverse decision.[94] The "disparate treatment" provision provides a pathway to prove intentional discrimination on behalf of an employer against an employee.[95] Alternatively, an employee filing suit against an employer under the "disparate impact" provision of Title VII need only prove that a facially neutral policy operates in a manner that perpetuates the effects of intentional discrimination by treating a protected group of persons worse than others.[96] Unlike disparate treatment, disparate impact claims need not prove intentional discrimination and instead focus on the negative effects even neutral policies may have on certain protected groups of persons.[97] Most cases alleging racial discrimination before courts tend to focus on disparate treatment, which is also recognized as intentional discrimination.[98] Nevertheless, under both theories alleging violation of Title VII, an aggrieved employee must prove that the discrimination they faced, intentional or unintentional, was based on a trait related to their protected identity that is *immutable* in the eyes of the court.

B. Interpreting Immutability in Title VII Jurisprudence

The Supreme Court stated, "'equal employment *opportunity*' . . . 'may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin.'"[99] The question, though, that still remains is what traits are recognized as being immutable under Title VII? Based on current employment

92 *Griggs*, 401 U.S. at 429–30. The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.

93 EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 771 (2015).

94 *Id.*

95 *Id.* at 778.

96 Watson v. Ft. Worth Bank and Tr., 487 U.S. 977, 987–88 (1988).

97 *Id.*

98 *Id.*

99 EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1028 (11th Cir. 2016) (quoting Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091 (5th Cir. 1975).

law jurisprudence there are two definitions of "immutability" recognized by current constitutional and employment jurisprudence.[100] The application of these definitions depends on the identity for which a person may have been discriminated against. Nevertheless, there is a break between the Supreme Court of the United States and the United States Courts of Appeals in their understanding and application of immutability as a concept in employment law.

1. Where the Supreme Court and Circuit Courts Agree: Traits Considered to Be "Accidents of Birth" for Protected Classes of Persons Are Protected by Title VII[EM2][MOU3]

The first definition of traits recognized as being immutable are characteristics that are an "accident of birth."[101] Both circuit courts and the Supreme Court agree that immutable traits include those traits that are defined as being "accidents of birth" or traits which a person does not choose nor has the ability to change. The "accidents of birth" definition of immutability is seemingly a bright line rule separating traits protected by Title VII from those that are not based on the identity the claimant alleges was discriminated against. Yet, while the Supreme Court ends its understanding of immutability here, circuit courts push further in their interpretation and application of immutability in employment law.

2. Where the Circuit Court Splits Away in Employment Law: For Religious Protections Courts Have Recognized Traits That Are Fundamental to Religious Identity[EM4][MOU5]

A number of circuit courts are in agreement that there is a more expansive definition of immutable traits that falls in line with Congress' intent in creating Title VII. While United States circuit courts recognize the Supreme Court's definition of immutability in their consideration of Title VII discrimination cases, there has also been a second definition recognized amongst several circuit courts. Circuit courts have also defined immutable traits as those traits that are "characteristics that are unchangeable or so fundamental to personal identity that workers effectively cannot and should not be required to change them for employment purposes."[102] The definition maintains the Supreme Court's conception of immutable traits as traits to which a person has no choice but to maintain while also expanding to accommodate traits relevant to certain identities like religion.[103]

100 Hoffman, *supra* note 20, at 1516–17 ("Accidents of birth" and characteristics "'beyond the power of an individual to change or that is so fundamental to [individual] identity or conscience' that it is effectively unalterable and 'ought not be required to be changed.'").

101 Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

102 Clarke, *supra* note 89, at 5.

103 *Id.*

The "unchangeable or fundamental" interpretation of immutability amongst circuit courts considers not only whether the trait in question can be changed but also considers the difficulty of changing the trait and the impact of changing the trait in question.[104] While the Supreme Court has not often recognized or accepted this definition asserted by circuit courts, it has become an important fixture in Title VII jurisprudence.[105]

Today, many courts now not only ask whether a trait in question is unchangeable but also ask whether that trait is a "core trait or condition that one cannot or should not be required to abandon."[106] This definition has become commonplace in employment discrimination jurisprudence across certain protected classes of persons, but not all. The judiciary as a whole has not recognized the circuit courts' interpretation of the "unchangeable or fundamental" definition of immutable traits in racial discrimination cases.

C. Immutability's Impact on Hair Discrimination Claims: The Judiciary Interprets Hair Texture as Immutable but Hairstyles Are a Choice

1. The "Afro" Recognized by the Seventh Circuit

The United States Court of Appeals for the Seventh Circuit first recognized that discrimination based on a person's natural hair texture is sufficient to sustain a claim of racial discrimination in accordance with Title VII in 1976.[107] In 1974, the EEOC brought forth a claim on behalf of Beverly Jeanne Jenkins before the court after facing hair discrimination in the workplace based on her "Afro" styled hair. Ms. Jenkins brought the action before the court alleging that her former employers discriminated against her by denying her promotions and better assignments, and eventually terminating her because of her race and sex in violation of Title VII.[108] The plaintiff stated, "when I came up for promotion it was denied because my supervisor, Al Frymier, said I could never represent Blue Cross with my Afro."[109] While the district court held against the plaintiff, the Seventh Circuit found that based on the factual findings presented the plaintiff could sustain a claim of racial discrimination in accordance with Title VII. The court reasoned, "[t]he reference to the Afro hairstyle was merely the method by which the plaintiff's supervisor allegedly expressed the employer's racial discrimination."[110] The court's holding reiterated a Fifth Circuit ruling that, "a charge alleging discrimination stemming from grooming requirements which

104 *Id.* at 2.

105 *See* Bostock v. Clayton County, Georgia, 140 S. Ct. 1731 (2020); *see also* Abercrombie & Fitch Stores, Inc., 575 U.S. 768 (2015); *see also* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. 2016).

106 Clarke, *supra* note 89, at 4–5.

107 Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164 (7th Cir. 1976).

108 *Id.* at 165.

109 *Id.* at 167.

110 *Id.* at 168.

applied particularly to black persons constituted a sufficient charge of racial discrimination."[111] Yet, while the Seventh Circuit's decision focused on the connection between the "Afro hairstyle," as they stated, and Black racial identity, the ruling in *Jenkins v. Blue Cross* has set a precedent that today establishes hair texture as an immutable trait of racial identity rather than hairstyles.[112]

2. Hairstyles Not Included in the Definition of Racial Identity

Nevertheless, while the Seventh Circuit recognized the "Afro hairstyle" as a trait that should be afforded the protection given to immutable traits related to Black identity, courts have interpreted the ruling from *Jenkins v. Blue Cross* to protect "Afro" hair texture rather than the hairstyle itself. This interpretation now acts as the foundation from which the judiciary refuses as a whole to extend recognition to hairstyles reasonably related to that same hair texture as an immutable trait of Black identity. So, while the Seventh Circuit's ruling in *Jenkins* was a monumental step in creating equal work opportunities in accordance with Title VII's aims, that step was an extremely limited one. Now the *Jenkins* ruling, amongst a number of cases, remains an important fixture amongst district and circuit court decisions denying claims of racial discrimination for hair discrimination in the workplace.

The judiciary has established that hairstyles that are reasonably related to a particular race are not included amongst traits related to racial identity that are considered immutable. The Eleventh Circuit readdressed whether hairstyles should be considered an immutable trait of racial identity in the case of Chastity Jones. In 2014, the EEOC, on behalf of Chastity Jones, brought forth a claim before the United States District Court for the Southern District of Alabama alleging Catastrophe Management Solutions (CMS) intentionally discriminated against her because of her race. The plaintiff argued that CMS's grooming policy was racially motivated after she was told that CMS could not hire her with dreadlocks because, as the CMS HR manager put it, "they tend to get messy, although I'm not saying yours are, but you know what I'm talking about."[113] After the district court dismissed the plaintiff's claim, the Seventh Circuit granted her an appeal. In an effort to sustain her claim of racial discrimination on appeal, the plaintiff made a number of arguments. First, contending that:

111 *Id.* The case quotes Smith v. Delta Airlines, where a Black man, a former agent of Delta, claimed he was terminated by the company as a result of racial discrimination after he failed to comply with the company's facial hair grooming policy. The plaintiff contended that the company's grooming policy dealing with facial hair discriminated against him as a Black man because it was more difficult for Black persons to comply with the grooming policy. The court reasoned that the plaintiff's hairstyle/facial grooming style of choice was mutable and that even where the policy in question may not cast an equal burden on all races if the burden is not too difficult the policy in question should not be considered discriminatory.

112 *Id.* at 165.

113 EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1021–22 (11th Cir. 2016).

> a "prohibition on dreadlocks in the workplace constitutes race discrimination" because dreadlocks are a racial characteristic, i.e., they "are a manner of wearing the hair that is physiologically and culturally associated with people of African descent."[114]

Essentially, the plaintiff argued that the court should consider hairstyles related to Black culture and history as being fundamental to Black racial identity. If the Eleventh Circuit would have recognized this argument, it would have been the first time that the judiciary expanded the concept of immutability in relation to race to acknowledge traits other than those considered to be "accidents of birth" or those attributed to biology as immutable traits related to Black identity. Nevertheless, the court was not moved by the plaintiff's argument and asserted that hairstyles are not an immutable trait of racial identity. The court reasoned that a hairstyle is not inevitable and immutable just because it is a reasonable result of hair texture, which is an immutable characteristic of racial identity.[115] Title VII, in the court's eyes, does not protect against race based discrimination based on mutable traits, even those with sociocultural racial significance.[116] The plaintiff then pleaded with the court to change its definition of race and implored the court to recognize the EEOC's definition of race because the court's biological definition of race limited its application of immutability in racial discrimination cases and did not follow the EEOC's definition given in its compliance manual.[117] The plaintiff argued that race was not a result of biology but rather was a result of social constructs that assign a person's racial identity based on a number of similar physical, cultural, and historical traits that certain groups of person's share.[118] The plaintiff asserted that the EEOC's definition better encompassed this fact and that if the court were to recognize it, it would allow for traits fundamental to racial identity, such as hairstyles, to receive protection under Title VII.[119] However, the Eleventh Circuit refused to adopt the EEOC's amended definition of racial discrimination even after acknowledging the deference often accorded to "agencies charged with enforcing a particular statute."[120] The Eleventh Circuit gave two reasons for

114 *Id.* at 1031.

115 *Id.* at 1021.

116 *Id.*

117 *Id.* at 1031–32 (referencing EEOC Compliance Manual, § 15–II, EEOC's 2006 amendment to EEOC Compliance Manual which states: "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.").

118 *Id.* at 1022.

119 *Id.*

120 *Id.* at 1031 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("[T]he rulings, interpretations, and opinions" of an agency charged with enforcing a particular statute, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.")).

their dismissal of the EEOC's amended definition of racial discrimination. First, the Eleventh Circuit argued that the EEOC's Compliance Manual 2006 definition was in direct confliction with the position the EEOC held in an appeal in 2008[EM6].[121] In 2008, the EEOC in *Thomas v. Chertoff* affirmed the dismissal of the complainant's complaint alleging racial and sex-based discrimination after he was required to cut off his braids in accordance with the TSA's grooming policy.[122] The EEOC stated that the complainant failed to state a claim for either sex-based or racial discrimination.[123] The Commission addressed the claimant's claims referencing the *Willingham* Court's holding in a sex-based discrimination case that stated, "hair length is not an immutable characteristic and therefore grooming policies governing hair length do not violate Title VII."[124] The EEOC also cited a number of cases establishing the judiciary's stance opposing recognition of "ethnic" hairstyles as an immutable characteristic of a racial/ethnic identity.[125] It was this reasoning which the Eleventh Circuit focused on in its denial of the EEOC Compliance Manual's definition of racial discrimination. The Eleventh Circuit argued that the EEOC's ruling from *Thomas* was in direct confliction with its 2006 adopted racial discrimination definition.[126] The EEOC's "change of course" in conjunction with the litany of contrary caselaw invalidated any weight the court may have given to the EEOC's guidance.[127]

Nonetheless, even without recognizing the EEOC's definition of racial discrimination, a mass of scholarship has focused on the inadequacies of the biological conception of race; this scholarship adopts instead a socially constructed conception of race and racial identity.[128] The court recognized this scholarship and the pleas made for courts to abandon the biological conception of race and expand to a sociocultural conception.[129] Yet, the Eleventh Circuit Court still relied on the biological conception of race and refused to recognize any other conception of race. The court reasoned that its refusal to expand its conception of race was due to what the court called an inconsistency amongst scholars redefining race as a social construct.[130] The court argued that it was beyond the court's power to redefine race given the inconsistency in guiding scholarship and that the definition of race should be

121 *Id.* at 1031–32.

122 Oohna D. Thomas, Complainant, EEOC DOC 0120083515, 2008 WL 4773208, at *1 (E.E.O.C. Office of Federal Operations Oct. 24, 2008).

123 *Id.*

124 *Id.* (referencing Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084 (5th Cir. 1975)).

125 *Id.*

126 EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1032 (11th Cir. 2016).

127 *Id.*

128 *Id*. at 1033.

129 *Id.*

130 *Id.*

resolved through the democratic process.[131] Overall, the Eleventh Circuit's finding only further cemented the judiciary's stance against recognizing traits fundamental to identity in racial discrimination cases and its interpretation that hairstyles are not an immutable trait of racial identity.

III. HAIR DISCRIMINATION = RACIAL DISCRIMINATION

The crux of arguments contesting recognition of hair discrimination presented before a number of courts in the United States are founded on the established legal principle that hairstyles are not an immutable trait. Thus, they should not be directly linked to racial protections from workplace discrimination. Nevertheless, in both disparate treatment and disparate impact claims brought before courts it is evident that while hairstyles are not necessarily linked to all racial groups, they are fundamental to Black racial identity. The judiciary has ruled that hair texture, specifically "Afro" texture, is an immutable trait to Black racial identity.[132] However, they have refused to include hairstyles that are a direct result of "Afro" textured hair within those protections afforded by the inclusion of "Afro" texture as an immutable trait. Courts have consistently held that hairstyles are mutable characteristics, easily changeable, and that neutral grooming policies don't intentionally discriminate against Black candidates and employees. But the courts seemingly ignore arguments made that certain hairstyles are fundamental to Black racial identity and that their proximity to Blackness is the sole reason for their erasure in conceptions of professionalism.

The second definition of immutable characteristics recognized by circuit courts provides that unchangeable characteristics or those fundamental to the identity of a protected class of persons should not be discriminated against in the workplace.[133] Courts assert that hairstyles such as braids, dreadlocks, and twists, are not fundamental to Black racial identity because they are not universally worn by all Black persons, can be changed, or because other races wear these hairstyles, etc.[134] And while it is evident that these hairstyles are not an "accident of birth," there is evidence that these hairstyles are "fundamental to the identity" of Black persons and that the banning of these hairstyles has a disparate impact on many Black persons. Nevertheless, courts seem to ignore the very reasoning behind why these certain hairstyles are popularized and why they have been deemed unprofessional, which simply stated, is due to their relation to Black persons, Black culture, and Black identity. The following section pinpoints the judiciary's major arguments for denying recognition of Black hairstyles as immutable traits of racial identity and provides rebuttals to these arguments.

131 *Id.* at 1034–35.

132 Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164, 165–67 (7th Cir. 1976).

133 *Catastrophe Mgmt. Sols.*, 852 F.3d at 1029 n.4.

134 Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232 (1981).

A. Race is Not a Monolith: Why the Judiciary Needs to Abandon the Biological Conception of Race

The judiciary refuses to recognize any traits that are not "accidents of birth" in racial discrimination cases because they adopt the biological conception of "race."[135] Essentially, courts assert that race, in the context of Title VII cases, is a fixed identity based on genetic and physiological differences between groups. The biological conception of racial identity dramatically limits the judiciary's application of immutability in racial discrimination cases to the detriment of Black persons, specifically Black women. The judiciary's biological conception of race, which attributes generalized characteristics to entire groups of persons,[136] is a remnant of the scientific community of the 19th century and its failed attempts to differentiate between racial groups through characteristics such as skin color, cranial capacity, jaw size, and more.[137] Besides the obvious racist overtones associated with this period of scientific exploration,[138] it seems evident that racial identity is much more than something that can be attributed solely to genetic differences. Defining racial identity based only on physical or genetic attributes is not only morally questionable but also fails to fully encompass the characteristics that form a racial identity. Ian F. Haney Lopez discusses this failure in his article, *The Social Construction of Race*, where he highlights the inadequacy of defining race solely through genetic differences and physiological manifestations.[139] For example, some populations from Asian countries share similar physical traits to populations of Southern and West African countries like dark skin and frizzy hair.[140] Nevertheless, these groups are genetically quite different[141] and it is also true that these groups fall into distinctly different racial identities. As a result, today the EEOC and many scholars have taken note of the inadequacy of the biological conception of race, instead adopting a sociocultural/sociopolitical conception of race.[142]

B. Why Are We Really Seeing a Resurgence in Black Hairstyles: Courts Hold That Black Hairstyles Are Merely Trends That Appear and Disappear Based on Popularity so Black Hairstyles Cannot Be a

135 *Catastrophe Mgmt. Sols.*, 852 F.3d at 1033.

136 *See Rogers*, 527 F. Supp. at 232. Hence, the judiciary's generalization of Black hair texture as being only "Afro" textured.

137 Lopez, *supra* note 22, at 14.

138 *Id.* at 13–14.

139 *Id.* at 12.

140 *Id.* at 15.

141 *Id.* ("[T]he Philippine or Malay Negritos are genetically quite different from the African Pygmies or Bushmen, though they have many common morphological features.").

142 EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1033 (11th Cir. 2016).

Fundamental Trait.

1. The Dismissal of Black Traits in the Professional World

"The accepted image of the day was a groomed White man [or woman]."[143]

"If your hair is relaxed, they are relaxed. If your hair is nappy, they are not happy."[144]

The Eleventh Circuit in the case of Chastity Jones relied heavily upon the Fifth Circuit's ruling in 1975 in *Willingham v. Macon Tel. Publ'g Co.* that, "a hiring policy that distinguishes on some other ground, such as grooming or length of hair, is related more closely to the employer's choice of how to run his business than equality of employment opportunity."[145] The Eleventh Circuit's affirmation of the *Willingham* ruling was a glowing example of the judiciary's apathy towards the experience of Black persons in the professional world. It was a naive interpretation ignoring the centuries long inferiorization of traits related to non-white racial identities, specifically Black racial identity. The Supreme Court stated the purpose of Title VII, "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[146] So, while it is important to maintain an employer's choice of how to run his business, that choice should not be maintained regardless of the disparate impact that choice has on Black persons. A grooming policy that implicitly favors white traits and punishes those traits related to Black identity represents a barrier to equal employment and is in direct conflict with the purpose of Title VII. If it is the intention of the judiciary to uphold the purpose of Title VII, then the judiciary must recognize the long American history of dismissing traits associated with Black identity—like hairstyle—and ask why businesses feel so inclined to ban certain hairstyles and not others.

When considering the prohibition of naturally textured hairstyles by grooming policies, such as braids or locs, the judiciary asserts that these hairstyles are not protected under racial identity[EM7].[147][MOU8] Nevertheless, when reviewing the facts of many complaints regarding the prohibition of these hairstyles by "facially neutral" grooming policies, the businesses enforcing these policies focus on the unprofessional appearance provided by

143 Byrd, *supra* note 13, at 25.

144 Griffin, *supra* note 40, at 8.

145 *Catastrophe Mgmt. Sols.*, 852 F.3d at 1028–29. (citing Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091 (5th Cir. 1975)).

146 Griggs v. Duke Power Co., 401 U.S. 424, 429–430 (1971).

147 *See* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1021 (11th Cir. 2016); *see also* Smith v. Delta Air Lines, Inc., 486 F.2d 512, 513 (5th Cir. 1973); Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164, 165 (7th Cir. 1976).

naturally textured hairstyles[EM9][MOU10].[148] Recognizing that people rarely—if ever—see long, straight hair fall victim to these "facially neutral" grooming policies, one must ask why naturally textured hairstyles are deemed unprofessional. Are people who wear these hairstyles innately unintelligent? No. Do these hairstyles affect a person's ability to do their job? No. Then why are these hairstyles often deemed "unkept," "messy," or "distracting" in the workplace[EM11]?[149][MOU12] Why do they fall victim to so-called "facially neutral" grooming policies? The simple answer is that these hairstyles are related to Black identity. And disdain for Black hair remains a reality of American society.[150] And while the judiciary often argues that these hairstyles are not fundamental to Black identity, it is their proximity to Blackness that causes many employers to deem these hairstyles unprofessional.[151]

In order to comprehend why certain hairstyles and traits related to Black racial identity do not conform to the standard for "professional" appearance, one must acknowledge that what American society and, really, the world view to be the standard for "professional" appearance is founded in white supremacy.[152] Tema Okun, an American grassroots organizer scholar, defines it to be the systemic and institutionalized centering of traits and characteristics associated with whiteness.[153] American society rewards proximity to white cultural practices and places traits unassociated with whiteness in an inferior position. As a result, the American workplace tends to punish or discriminate against persons whose identifying traits fail to conform to white professionalism standards both intentionally and unintentionally.[154] So, while it can explicitly be acknowledged that there is no superior race, implicit bias favoring white culture still maintains the ideal that traits closely related to whiteness signify a higher level of competence.[155] And this bias does not just exist amongst white Americans.

148 *See Catastrophe Mgmt. Sols.*, 852 F.3d at 1021 ("CMS' human resources manager told Ms. Jones that CMS could not hire her 'with dreadlocks'. . . because 'they tend to get messy.").

149 *See id.* at 1021–22.

150 Areva Martin, *The Hatred of Black Hair Goes Beyond Ignorance*, TIME (Aug. 23, 2017, 4:01 PM), https://time.com/4909898/black-hair-discrimination-ignorance/ ("As long as black women have existed in America, we have been put down for our skin color, our bodies and our natural hair." Citing societal examples such as when *Fashion Police* host Giuliana Rancic said that the dreadlocks Zendaya rocked at the Oscars must have smelled of "patchouli" and "weed" in 2015. Or in 2014, when the U.S. Army issued a new policy that banned traditional black hairstyles, including cornrows, twists and dreadlocks. The regulations even described these styles as "unkempt" and "matted.").

151 *Catastrophe Mgmt. Sols.*, 852 F.3d at 1032–33.

152 Aysa Gray, *The Bias of 'Professionalism' Standards*, STAN. SOC. INNOVATION REV. (2019), https://ssir.org/articles/entry/the_bias_of_professionalism_standards.

153 *Id.*

154 *Id.*

155 *Id.*

In 2016, the Perception Institute conducted The "Good Hair" Study in order to examine explicit bias or negative attitudes toward Black women's hair, as well as measure implicit bias toward textured hair and its impact on the perception of naturally textured hair and related hairstyles.[156] Participants included 502 women in the national sample and 688 women from the natural hair community.[157] The study utilized survey instruments and observation in order to measure explicit bias or negative attitudes toward Black women's hair.[158] Recognizing a brain's ability to reject implicit biases with conscious expressions, the study used an Implicit Association Test (IAT).[159] The Perception Institute created the first natural Hair IAT to measure how strongly participants associate certain concepts with stereotypes or attitudes related with hairstyles.[160]

A portion of the "Good Hair" Study focused on measuring participants' implicit biases toward Black textured hairstyles when compared to "smoother" hairstyles or those closely associated with European culture and beauty standards in a professional setting.[161] The Perception Institute asked participants if they would wear each hairstyle example presented for both Black textured hairstyles and "smoother" hairstyles in a professional setting.[162] The study found that even black women showed a preference for smooth hairstyles in professional settings.[163] Also, when asked whether they feel pressure related to their hairstyle in the workplace, one in five Black women responded that they feel social pressure to straighten their hair for work, which was twice as many as white women.[164] Overall, the "Good Hair" Study proved what many Black women already know: people, regardless of race and gender, show implicit bias against Black textured hair and styles that are a reasonable result of that texture.[165] Nevertheless, white men and women produced stronger levels of implicit bias against textured hair.[166] The study in its conclusion stated, "[i]n a sense, white women penalize natural hair, and black women recognize this stigma."[167]

156 Alexis McGill Johnson et al., *The "Good Hair" Study: Explicit and Implicit Attitudes Toward Black Women's Hair*, PERCEPTION INST., 1 (Feb. 2017), https://perception.org/goodhair/.

157 *Id.* at 6.

158 *Id.* at 1.

159 *Id.*

160 *Id.*

161 *Id.* at 12.

162 *Id.* (presenting examples to participants by the study of Black textured hair styles, including: Afro, Braids, Dreads (also known as locs or dreadlocks), and Twist Outs. Examples of smooth styles or styles closely related to European (white) beauty standards, presented to participants by the study included: Straight, Long Curls, Short Curls, and a Pixie cut).

163 *Id.*

164 *Id.*

165 *Id.* at 13.

166 *Id.*

167 *Id.* at 14.

The "Good Hair" Study exemplified that all people, Black persons included, as a result of American and Western cultural indoctrination, recognize both explicitly and implicitly the value associated with proximity to whiteness.[168] As a result, many employers and the policies they implement favor white, Western, English-speaking workers.[169] More specifically, in the case of hairstyles, it is this ever-present culture of white supremacy or favor for proximity to whiteness that dismisses and punishes Black hairstyles in the workplace. So, when a court, or even a business, begins to question the present resurgence of these hairstyles as if they just popped up rather than the reality that they have existed for centuries, it ignores this very long history.

C. Courts Have Argued That Black Natural Hairstyles Cannot Be Fundamental to a Black Racial Identity because Not All Black Persons Wear These Hairstyles, and Other Groups Wear These Hairstyles.[170]

1. Black Personhood Is Not a Monolith: "Plaintiff does not allege that an all-braided hair style is worn exclusively or even predominantly by black people."[171]

Much to the disappointment of the judiciary, Black people should not all have to wear the same naturally textured hairstyles in order for those hairstyles to be related to Black identity. There is no singular version of Black personhood in the United States. Black racial identity is as diverse as the many cultures that fall underneath the umbrella of the African diaspora.[172] Nevertheless, the judiciary, under the guise of its incorrect definition of race as a biological truth, has maintained the racist notion that Black personhood is a monolith.

The judiciary interpreted the Seventh Circuit's ruling in *Jenkins v. Blue Cross* as establishing hair texture as an immutable trait of racial identity protected under Title VII from discrimination.[173] The Seventh Circuit uses the

168 *Id.* at 3.

169 *Id.*

170 EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1032 (11th Cir. 2016) (citing Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 262 (S.D.N.Y.2002)) (concluding that "locked hair" is not unique to African–Americans and that "it is beyond cavil that Title VII does not prohibit discrimination on the basis of locked hair")).

171 Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232 (1981).

172 Colin A. Palmer, *Defining and Studying the Modern African Diaspora*, J. NEGRO HIST. 85, 27–32 (2000), https://www.jstor.org/stable/2649097?seq=1 (explaining that the modern African diaspora, at its core, consists of the millions of peoples of African descent living in various societies who are united by a past based significantly but not exclusively upon "racial" oppression and the struggles against it; and who, despite the cultural variations and political and other divisions among them, share an emotional bond with one another and with their ancestral continent; and who also, regardless of their location, face broadly similar problems in constructing and realizing themselves).

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

term "Afro hairstyle" as a description of the hair texture it reasonably attributed to Black racial identity.[174] But an "Afro" is not a type of hair texture; it is a hairstyle. In 1976, when the Seventh Circuit reviewed *Jenkins v. Blue Cross*, the court's use of the term "Afro" to describe the dark, tightly coiled, and somewhat stagnant hair atop the head of plaintiff Beverly Jeanne Jenkins was representative of the time. The "Afro" was a popular hairstyle during this period of time for Black Americans deeply invested in restoring pride in their Black identity. The "Afro" hairstyle was a reasonable result of the natural tightly coiled curls generally associated with the Black race. So, in a period where Black persons were generally characterized as a monolith and not often considered within the mainstream beauty industry, it makes sense that a hairstyle seen frequently in pop culture would be used to describe the hair texture of an entire group of persons.

Nevertheless, if the *Jenkins* court intended to recognize hair texture as an immutable characteristic of racial identity, the use of the term "Afro" to label the texture they associated with Black identity would fail on two fronts. First, the tightly coiled hair that naturally grows into an "Afro" hairstyle is one of many textures of hair seen amongst Black persons. The use of the term "Afro" to describe the hair texture associated with Black identity in a monolithic manner is an outdated conception that should no longer have a place in the judiciary. Instead, courts should look toward the work of beauty industry experts like Andre Walker who have created a universal system to differentiate between the hair textures in the modern world. In the 1990s, Andre Walker,[175] a proclaimed expert in the textured hair industry, created the Hair Typing System™, which has since been widely adopted in the beauty industry.[176] Walker's Hair Typing System™ separates hair textures into categories based on the curl pattern and thickness of a person's hair.[177]

The Hair Typing System™ consists of four types with subtypes ranging from Type 1 which is found the least in Black hair to Type 4 which is found the most in Black hair. [178] Type 1 is categorized as straight hair, with three subtypes consisting of fine and fragile hair, coarse and thin hair, or curl resistant hair. [179] Type 2 is for wavy hair and two subtype ranges for fine and thin hair to coarse and frizzy hair.[180] Type 3 is categorized as curly hair with

174 Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164, 165 (7th Cir. 1976).

175 *See* Joan Wagner, *Q&A with Andre Walker*, OPRAH.COM (Oct. 5, 2009), https://www.oprah.com/style/african-american-hair-advice-from-oprahs-stylist/all.

176 Andre Walker, *Andre Walker Hair Typing System* (last updated 2021), https://andrewalkerhair.com.

177 *Id.*

178 *Id.*

179 Zainab Olasege, *Finding Your Hair Type: The Andre Walker Hair Typing System*, WORDPRESS (Apr. 8, 2019), https://afrocurls.home.blog/2019/04/08/finding-your-hair-type-the-andre-walker-hair-typing-system/.

180 *Id.*

subtypes for loose curls to corkscrew curls.[181] Type 4 is categorized as kinky hair with a subtype range of tight curls to Z-angled curls.[182][MOU13]

Walker's Hair Typing System shows the universal diversity in hair texture, but it also demonstrates that the concept assumed in *Jenkins*—that the natural outgrowth of Black hair texture will result in an "Afro"—is a deeply flawed assertion. Second, if it was the intention of the *Jenkins* court to recognize the "Afro" hairstyle as an immutable characteristic of Black identity, that interpretation would likely be understood to be a hairstyle that is not universally worn by Black persons. Which, considering all the precedents set following the *Jenkins* ruling, would be a complete break from the judiciary's current stance on hair discrimination in the workplace.

Nonetheless, no matter the intention of the *Jenkins* court, it seems evident that the judiciary's argument that a hair texture or hairstyle need to be universally worn amongst Black persons to be recognized as an immutable characteristic of racial identity is erroneous. And the judiciary's attempt to assign Black hair texture to a fixed identity further exemplifies the greatest problem with adopting the biological conception of race.[183] Biological conceptions of race limit our understanding of racial identity. The biological conception of racial identity presents race as a monolith attributed solely to genetic differences and their physical manifestations. It fails to recognize the collection of shared characteristics that, while not universal, are prevalent and define the racial identity of groups of persons due to historical, cultural, and geographical connections. Under the biological conception of race, Black persons have "Afro" textured hair and traits have to be universally unique to Black persons in order for the judiciary to accord them protection. But we know this is a falsehood. Textured hair and dreadlocks are associated with Black identity, not because they are a universally fixed trait of Black identity, but because society has associated this hair texture as a physical manifestation of Blackness and Black culture.

2. Who Really Wears Naturally Textured Hairstyles?

The court in *Equal Employment Opportunity Commission v. Catastrophe Management Solutions*, reiterated the conclusion made by the *Eatman* court that locked hair was not unique to African Americans, and also highlighted other cases that came to the same conclusion about other similar naturally textured hairstyles.[184] The court asserted that, given the fact that other races also can and do wear locs and other braided hairstyles, a grooming policy banning these hairstyles when applied to all races could not be

181 *Id.*

182 *Id.*

183 Lopez, *supra* note 22, at 7.

184 Johnson, *supra* note 157, at 2 (explaining that the term "textured" is used to describe the difference between Black hair curl patterns in compared to the curl patterns seen amongst white persons).

intentionally discriminatory against one race.[185] That said, even though members of other races can and do choose to wear hairstyles like locs or braids, does that mean that a grooming policy impacts all races at the same level, thus making it racially neutral? In order to determine whether grooming policies that ban naturally textured hairstyles equally impact all races, one must consider who really wears these prohibited naturally textured styles and who actually is required to engage with these grooming policies.

In order to better conceptualize who actually wears naturally textured hairstyles, one can turn to the "Good Hair" Study. As discussed previously, the Perception Institute conducted the "Good Hair" Study in 2016.[186] The study examined explicit bias or negative attitudes toward Black women's hair, and it measured implicit bias toward textured hair and its impact on the perception of naturally textured hair and related hairstyles.[187] A portion of that study was dedicated to a survey that asked women about the hairstyles they chose to wear. The survey separated styles into two sub-categories: textured styles and smooth styles.[188] The study found that of the 502 women included in the national sample (51% black, 49% white) who completed the survey, the majority of Black women wore textured hairstyles, while the majority of white women wore a smooth style.[189] The study also found that of the 688 polled women in the naturalista community,[190] Black women were nearly twice as likely to wear a textured hairstyle when compared to their white counterparts.[191]

3. Who Actually Is Required to Engage with Grooming Policies?

It seems clear that natural hairstyles are worn primarily by Black women. That said, it is true that because of the impact Black culture has on the public sphere, other racial and ethnic groups do often mimic Black

185 EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1029 (11th Cir. 2016) (citing Rogers v. Am. Airlines, Inc., 527 F.Supp 229, 232 (S.D.N.Y. 1981)).

186 Johnson, *supra* note 157, at 1.

187 *Id.*

188 *Id.* at 5 (presenting examples to participants by the study of Black textured hair styles, including: Afro, Braids, Dreads (also known as locs or dreadlocks), and Twist Outs. Examples of smooth styles or styles closely related to European (white) beauty standards, presented to participants by the study included: Straight, Long Curls, Short Curls, and a Pixie cut).

189 *Id.* at 6. The study notes that 52% of black women currently wear their hair in a natural style, and 48% wear a smooth style. The most common hairstyles are relaxed (29%), braids (14%), wash-and-go (10%), and afro (10%). While 31% of white women currently wear their hair in a natural style, and 69% wear a smooth style. The most common hairstyles are relaxed (45%), wash- and-go (25%), loose curls (10%), and smooth waves (9%)).

190 *Id.* The study defines "naturalistas" as women who are a part of the natural hair community. This community tends to have more positive attitudes toward textured hairstyles.

191 *Id.* (noting that 75% of black women currently wear their hair in a natural style, and 25% wear a smooth style while 39% of white women currently wear their hair in a natural style, and 61% wear a smooth style).

cultural practices. So, asking only who really wears these natural hairstyles may not be enough when attempting to fully demonstrate the disparate impact "racially neutral" grooming policies have on Black women in the workplace. Instead, it may be proper to ask not only who wears these hairstyles, but also who actually ends up engaging with so-called "racially-neutral" grooming policies.

In 2019, the Joy Collective conducted the CROWN Research Study in order to gauge and demonstrate the discrimination Black women experienced in the workplace.[192] The study polled over 2,000 women—both Black and non-Black—between the ages of 25-64 who either worked in a corporate office setting at the time or at least within the past six months.[193] After participants answered a number of questions about their experience, the study showed that Black women and Black hair engage more frequently with grooming policies in the workplace.[194] The study found that Black women are 30% more likely to be made aware of a formal workplace appearance policy and one and a half times more likely to be sent home from the workplace because of their hair.[195] Black women are aware of the reality that they are more likely to engage with workplace grooming policies as a result of their natural hair. "When asked if they agreed with the statement, 'I have to change my hair from its natural state to fit in at the office' Black women were 80% more likely than white women to agree with this statement."[196] Yet, even though it seems evident that Black women are impacted by grooming policies more frequently than any other group as a result of the stigmas attached to their appearance under the current conception of immutability, there is no legal recourse for them.

IV. RECOGNIZING TRAITS AND PRACTICES FUNDAMENTAL TO BLACK IDENTITY IS THE PROPER INTERPRETATION OF IMMUTABILITY IN RACIAL DISCRIMINATION CASES

The Supreme Court stated that the purpose of Title VII, "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[197] The current interpretation of immutability fails to uphold the purpose of Title VII in employment law litigation related to racial discrimination. The current interpretation of immutability in racial discrimination cases attempts to define race—a social construct—as a result of biology rather than a result of societal construction. The biological conception, as

192 JOY Collective, *The CROWN Research Study* 2 (2017), https://www.law.nova.edu/current-students/orgs/blsa/dove_the_crown_reseach_study.pdf.

193 *Id.* (surveying 1,017 Black Women and 1,050 non-black women (92% white)).

194 *Id.* at 4.

195 *Id.*

196 *Id.*

197 Griggs v. Duke Power Co., 401 U.S. 424, 429–430 (1971).

discussed earlier, fails to properly protect Black persons because Black identity is not a universal monolith that applies to all persons who fall within the Black community. Instead, Black identity is defined by physical manifestations, cultural practices, and historical connections that society has attributed to this group. In order to properly protect racial identity, it is essential to acknowledge the social construction of race and recognize the traits and cultural practices that society has used to define racial groups.

For example, compare the conception of immutability applied in the case of Title VII claims for religious discrimination. While religious identity and racial identity are not socially constructed in the exact same way, they are both social constructs that separate groups based on traits and practices that are socially attributed to specific groups. "Title VII defines 'religion' to include 'all aspects of religious observance and practice as well as belief,' not just practices that are mandated or prohibited by a tenet of the individual's faith."[198] The conception of immutability in religious discrimination cases adopts this definition of "religion" that includes traits and practices fundamental to a person's religious belief.[199] As a result, claimants are protected, even in cases where the trait or practice in question is not universally attributable to all persons practicing a certain religion.[200]

V. CONCLUSION

As this note suggests, the adoption of an interpretation immutability that considers traits and practices fundamental to racial identity as traits that should be protected from discrimination will be more consistent with Title VII's purpose of creating equal professional settings for racial minorities, specifically Black persons. A sociocultural understanding of racial identity and the traits that are associated historically and culturally with specific racial groups will provide greater protection for Black persons in the workplace who frequently fall victim to so-called "racially neutral" grooming policies.

198 EEOC Compliance Manual, § 12–I(A)(1), at 1–12 (Aug. 21, 2021, 3:52 PM).

199 *See* EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768 (2015).

200 *See id.*