Sex-Differentiated Appearance Standards Post-*Bostock*

*Justin Blount**

Introduction

In June of 2020, the Supreme Court issued its long-awaited opinion in *Bostock v. Clayton County, Georgia*.[1] This opinion was hailed as a landmark of Title VII employment discrimination law, as it held that discriminating against an employee because of their sexual orientation or status as a transgender person constitutes sex discrimination under Title VII.[2] Much of the media and advocacy group focus on this opinion has understandably been on this ultimate conclusion, long sought by advocates for homosexual and transgender rights.[3] What has been less focused on is the very simple, literal approach that Justice Gorsuch, in writing for the majority, takes in interpreting Title VII. Although Gorsuch's statutory interpretation approach has been referred to as textualist,[4] in his dissenting opinion Justice Kavanaugh refers to Gorsuch's interpretation of the statute as literalist, not textualist, and a departure from textualist interpretation principles which focuses on the "ordinary meaning" of words and phrases.[5]

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* Justin Blount is an Associate Professor of Business Law in the Rusche College of Business at Stephen F. Austin State University in Nacogdoches, Texas. B.B.A. in Finance, Southwestern Oklahoma State University; J.D., Baylor Law School; M.B.A., The University of Texas at Austin.

1 Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020).

2 *Id.* at 1754 ("We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.").

3 *See, e.g.*, Press Release, *Victory! Supreme Court ruling affirms legal protections for LGBTQ workers nationwide*, GLBTQ Legal Advocates and Defenders, (June 15, 2020), https://www.glad.org/post/victory-supreme-court-ruling-affirms-legal-protections-for-lgbtq-workers-nationwide/ (discussing how this ruling "affirms critical legal protections for LGBTQ people across the country).

4 *See* Ezra Ishmael Young, *Bostock is a Textualist Triumph*, Jurist Legal News and Research, June 25, 2020, https://www.jurist.org/commentary/2020/06/ezra-young-bostock-textualist-triumph/ (discussing the textualist nature of Gorsuch's majority opinion).

5 *See Bostock*, 140 S. Ct. at 1824-25 (Kavanaugh, J., dissenting) (noting how literal meaning and ordinary meaning are different concepts).

This Article argues that Justice Kavanaugh's analysis of Justice Gorsuch's approach is substantially correct, and that the majority opinion can best be understood as a literalist interpretation of the statute. This interpretative approach is distinct in important respects from Justice Scalia's textualist approach, which Justice Gorsuch is often asserted as following.[6] If the Supreme Court continues to follow this method of statutory interpretation for Title VII, then *Bostock* should have implications for employment discrimination law far outside of just including homosexual and transgender individuals within the ambit of its protected classes. This Article discusses a specific example of this potential impact of *Bostock*—sex-differentiated dress codes and appearance standards in the workplace.[7] If the logic of the *Bostock* opinion is applied to the existing Title VII case law on workplace appearance standards, it is difficult to see how the current legal standards survive. Under the *Bostock* literal interpretation rubric, a sex-differentiated appearance standard of any kind, with very limited exceptions such as a bona fide occupational qualification, would appear to be a *per se* violation of Title VII.

This Article proceeds in four parts. Section I discusses the majority opinion in *Bostock*, and explains its simple, literalist approach to interpreting Title VII. Section II discusses the existing case law regarding sex-differentiated appearance standards under Title VII, which generally allows for companies to enact different appearance standards for men and women. Section III applies the rationale of *Bostock* to this existing case law and argues that it impliedly overrules this line of cases. Section IV discusses the types of appearance standards which may survive *Bostock*, including how the bona fide occupational qualification exception could be applied to sex-differentiated appearance standards.

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[6] *Id.*

[7] For purposes of clarity and convenience, the term "appearance standard(s)" will be used hereinafter to refer to any employer dress code, grooming policy, or other standard which governs how employees are required to present at work with respect to their appearance.

BACKGROUND

I. BOSTOCK AND A LITERALIST INTERPRETATION OF TITLE VII

The *Bostock* opinion involves three separately filed cases:[8] Gerald Bostock sued Clayton County, Georgia, under Title VII for firing him for being a homosexual;[9] Donald Zarda, a skydiving instructor, sued his employer for firing him for the same reason;[10] and Aimee Stephens worked for a funeral home, and presented as a male when hired.[11] During Ms. Stephens' employment with the funeral home, she was diagnosed with gender dysphoria, and as a result, explained to her employer that she was going to "live and work full-time as a woman."[12] She was subsequently fired by her employer.[13] The Supreme Court granted certiorari to address whether Title VII's prohibition against discrimination based upon "sex" includes discrimination based upon being homosexual or transgender.[14]

Justice Gorsuch, writing for the majority, took a very simple, literal statutory interpretation approach to decide this question in the affirmative.[15] He affirmed that the role of the court is to do nothing more than to determine the ordinary public meaning of Title VII's words that prohibit discrimination "because of . . . sex."[16] To accomplish this task, Justice Gorsuch relied upon essentially nothing more than the text of the statute itself, basic dictionary definitions of the terms employed, and a smattering of prior case precedents.[17] Although the conclusion reached by the majority is politically controversial, the reasoning employed to reach it (whether one agrees with it or not) is straightforward and easy to follow.

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8 *Bostock*, 140 S. Ct. at 1737.

9 *Id.* at 1737-38.

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 Bostock v. Clayton Cty., 140 S. Ct. 1731, 1738 (2020).

15 *Id.*

16 *Id.* ("We must determine the ordinary public meaning of Title VII's command that it is 'unlawful . . . for an employer to fail or refuse to hire or 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.'") (internal citations omitted).

17 *Id.* at 1743 ("At bottom, these cases involve no more than straight-forward application of legal terms with plain and settled meaning.").

A. *The Opinion's Reasoning*

First, the Court defined the term "sex."[18] The Court did not rely upon a unique definition of "sex" or "gender" that posits that either of these terms can or should be defined apart from biology.[19] Rather, the Court assumed for the sake of argument the employers' proffered definition of the term—"status as either male or female [as] determined by reproductive biology."[20] However, the Court noted that the definition of "sex" is only the starting point and does not itself demand that Title VII omit coverage of discrimination based upon sexual orientation or transgender status.[21]

Next, the Court addressed Title VII's causation standard of "because of."[22] The Court noted that based upon the plain meaning of these words, as held in prior precedent, this is a simple "but for" causation standard.[23] "But for" causation means nothing more than "a particular outcome would not have happened 'but for' the purported cause."[24] In this Court's reasoning, this means if all variables are held constant in the facts other than a change in the variable of "sex," and the outcome changes, then sex is a "but for" cause of the outcome.[25]

Finally, the Court addressed what Title VII means by "discriminate."[26] The Court relies upon a straightforward, 1954 Webster's Dictionary definition of the term—"to make a difference in treatment or favor (of one as compared with others)."[27] The Court did note that another possible interpretation of the term "discriminate" is categorical—to treat one group differently than another.[28] However, the Court dismissed the categorial interpretation as a possible interpretation of the term as used in Title VII because of the statute's express focus on discrimination against "individuals."[29] Thus, in Title VII

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18 *Id.* at 1739.

19 *Id.*

20 Bostock v. Clayton Cty., 140 S. Ct. 1731, 1739 (2020).

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.* ("In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.").

26 Bostock v. Clayton Cty., 140 S. Ct. 1731, 1740 (2020).

27 *Id.* (internal citations omitted).

28 *Id.*

29 *Id.*

terms, discrimination means nothing more than treating an individual worse than another based upon the individual's membership in a protected class.[30] This is an important distinction that plays a key role in driving the Court's conclusion, and as further discussed in this Article, this distinction undercuts the logic behind prior appellate cases upholding sex-differentiated appearance standards.[31]

The Court pulled these simple definitions together to focus on a basic proposition to resolve the case: "So, taken together, an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII."[32] A much more literal interpretation of Title VII's prohibition against sex discrimination is hard to imagine.

Based upon this literal interpretation, the Court ruled that firing an employee for being homosexual or transgender violates Title VII.[33] Because an employer cannot know whether an employee is transgender or homosexual without knowing the employee's sex, any negative employer action against that employee based upon their transgender or homosexual status is necessarily "because of . . . sex," and thus a violation of Title VII.[34] The Court drove this point home with a simple example:

> Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired?[35]

The Court asserted that this question is impossible to answer without knowing the sex of the employee.[36] If the employee is a male,

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30 *Id.*

31 *See* infra Part III.

32 *Bostock*, 140 S. Ct. at 1740.

33 *Id.* at 1741 ("The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against a person for being homosexual or transgender without discriminating against that individual based upon sex.").

34 *Id.* at 1742.

35 *Id.*

36 *See id.* ("If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman.").

the employer's policy has not been violated. If the employee is female, the employer's policy has been violated. Because the outcome is determined by the employee's sex, the employer's policy is discrimination "because of . . . sex" under Title VII.[37]

Of course, a reasonable argument can, and has, been made against such an approach.[38] One could argue that the defining characteristic that drives the policy is sexual orientation, and that although the employer must know the employee's biological sex to know the employee's sexual orientation, that does not mean that the employer is discriminating based upon the biological sex.[39] Justice Alito made this point in his dissenting opinion by expanding the Court's example.[40] Suppose that four model employees come to the above-referenced party: Employee A with husband, Employee B with husband, Employee C with wife, and Employee D with wife.[41]

Which employees have violated the policy and will be fired? As noted by the majority opinion, it is impossible to know without knowing the employees' respective sexes.[42] However, if Employee A is a man, and Employee C is a woman, they will both be fired. However, Employee B (woman) and Employee D (man) are not fired. Thus, the argument goes, biological sex cannot be the causative factor in the firing.[43] The common determinant in the employees firing, and thus the "but for" cause, is their attraction to the same sex, not their own biological sex.[44] This is a separate and distinct class of individuals that is not included as a protected class in Title VII.[45]

Justice Kavanaugh gave a similar, but slightly different, example in his dissent.[46] He provided the example of an employer with four employees—a straight man, a straight woman, a gay man, and a les-

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37 *Id.*

38 Bostock v. Clayton Cty., 140 S. Ct. 1731, 1755-58 (2020) (Alito. J., dissenting).

39 *Id.* at 1758.

40 *Id.* at 1760 (Alito, J., dissenting).

41 *Id.* While the example in this article is worded slightly differently than Justice Alito's for clarity, the logical argument is the same.

42 *See id.* at 1742.

43 *Id.* at 1742.

44 Bostock v. Clayton Cty., 140 S. Ct. 1731, 1742 (2020).

45 *Id.* at 1763 (Alito, J., dissenting) (""Homosexuality and transgender status are distinct concepts from sex,' and discrimination because of sexual orientation or transgender status does not inherently or necessarily constitute discrimination because of sex. The Court's arguments are squarely contrary to the statutory text.") (internal citations omitted).

46 *Id.* at 1828 (Kavanaugh, J., dissenting).

bian.[47] Suppose that because of financial reasons, the employer must fire two of these employees.[48] If the employer has animosity against women (discrimination based upon sex) he would fire the two women.[49] If the employer has animosity against homosexuals, he would fire the gay man and the lesbian.[50] He argued that there are two distinctly different outcomes because discrimination based upon sexual preference is a distinct type of discrimination separate and apart from discrimination based upon sex.[51]

The majority defended their position by claiming that the dissenters' examples focus on *class-based* discrimination as opposed to Title VII's focus on *individual* discrimination.[52] The Court held that all that these examples show is that the employer has discriminated twice, rather than once.[53] Thus, under the Court's reasoning, in Justice Alito's example Employee A (a homosexual man) must be looked at individually, and because his biological sex was a "but for" cause of his firing (i.e., if one varies it, he would not be fired), with respect to him, Title VII has been violated.[54] The same can be said for Employee C (a homosexual woman).[55] It does not matter that one can point to a similarly situated woman and man who were not fired because "Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women."[56] For Justice Kavanaugh's example, sex discrimination has happened in both scenarios he mentions: against two women in one scenario and a man and a woman in the other.[57] But in each case, sex discrimination still occurred. Again, the

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47 *Id.*

48 *Id.*

49 *Id.*

50 Bostock v. Clayton Cty., 140 S. Ct. 1731, 1828 (2020) (Kavanaugh, J., dissenting).

51 *Id.*

52 *See id.* at 1742 (majority opinion) ("Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women.").

53 *Id.* at 1742-43 (2020) ("Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII. So just as an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same.").

54 *See id.*

55 *See id.*

56 Bostock v. Clayton Cty., 140 S. Ct. 1731, 1742-43 (2020).

57 *See id.* at 1828 (Kavanaugh J., dissenting).

Court's approach is very literal—in the particular situation, if one varies sex, does one get a different outcome from the employer?[58] If so, sex is the "but for" cause of the employment action, and Title VII has been violated.[59]

B. *The Majority's Approach as a Literalist Rather than Textualist Interpretation of Title VII*

Given the societally and politically contentious nature of this case, regardless of how the Court ruled, a large portion of the populace was destined to be dissatisfied with the result.[60] The main thrust of this Article is not to criticize, debate, or advocate for or against the ultimate conclusion reached by the Court. Justice Alito wrote a vigorous and well-reasoned dissent addressing the arguments made by the Court and reaching a different conclusion.[61] The author finds Justice Alito's arguments and interpretation of Title VII to be more persuasive than the majority's, and his dissenting opinion is worth reading. The author's opinion is that the majority makes a basic statutory interpretation error by conflating "sex" with the separate categories of being transgendered or homosexual. Although these categories are related to each other, they are separate and distinct. Both a biological woman and a man can also identify as transgender or homosexual, and discriminating based upon the latter two categories is inherently different than discriminating based upon the first.

Notably, the Court does not rely upon a policy argument that society has changed and thus, that Title VII protects homosexual and transgender individuals. Nor does it argue that the word "sex" is understood differently in modern times and thus the statute should be read differently now than when originally drafted. Rather, the Court justifies its conclusion by focusing exclusively on the language of the statute and the meaning of its words at the time the statute was drafted.[62] Because it focuses solely on the language of the statute, the

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[58] *See id.* at 1739, 1741.

[59] *Id.* at 1740.

[60] *See* Jane Coaston, *Social Conservatives Feel Betrayed by the Supreme Court – and the GOP that Appointed it*, VOX (Jul. 1, 2020 11:00 AM), https://www.vox.com/2020/7/1/21293370/supreme-court-conservatism-bostock-lgbtq-republicans (explaining that social conservatives were not satisfied with the decision and that many disagree on "gay and transgender rights").

[61] *See Bostock*, 140 S. Ct. at 1760 (Alito, J., dissenting).

[62] *Id.* at 1738 ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.").

Court's opinion in *Bostock* has been referred to by many commentators as "textualist."[63] This Article argues that Justice Kavanaugh's dissent is correct in noting that the majority opinion should not be understood as a textualist triumph.[64] Rather, the Court's approach is best understood as a literalist interpretation of Title VII that relies solely upon the literal meaning of the words of the statute to an extreme that even an ardent textualist like Scalia would not.[65]

In recent Supreme Court history, the statutory interpretation approach commonly referred to as "textualism" or "originalism," is often cited as the legacy of the late Justice Antonin Scalia.[66] Although this standard of statutory interpretation is common today, this was not always the case.[67] Before Justice Scalia's arrival on the Supreme Court, statutory interpretation was much more policy-based than text-based.[68] Although textualism is commonly seen as a "conservative" legal doctrine, it is a credit to Scalia's legacy that the majority opinion in *Bostock,* joined in by the four "liberal" justices on the Court, purportedly relies upon textualist principles even as it reaches a conclusion widely derided by political conservatives.[69] As stated by Justice Kagan, Scalia's textualist statutory interpretation has become so widely adopted that "[w]e're all textualists now."[70] It is now widely accepted that the meaning of the words of a statute should drive its interpretation and the outcome of court cases, not a judge's opinion about what the best policy outcome is.[71]

Although the *Bostock* opinion may seem textualist on the surface, it departs substantively from textualism in some important

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[63] *See* Young, *supra* note 4, at 3.

[64] *Bostock*, 140 S. Ct. at 1825 (Kavanaugh J., dissenting) (citing Justice Scalia for the proposition that "a good textualist is not a literalist").

[65] *See id.* at 1834.

[66] *See* Diarmuid F. O'Scannlain, *"We are all Textualists Now": The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 306 (2017) (discussing how Scalia is credited with bringing textualist statutory interpretation into the judicial mainstream).

[67] *Id.* at 304 (noting how Justice Kagan admitted that in the 1980s, the approach to statutory interpretation was policy based, and focused on what the statute "should be" rather than the words of the statute).

[68] *Id.* at 305.

[69] *See, e.g.,* Daniel Horowitz, *Conservatives get massacred by fake "conservative" SCOTUS*, CONSERVATIVE REV., (June 15, 2020) https://www.conservativereview.com/news/horowitz-conservatives-get-massacred-fake-conservative-scotus/ (criticizing recent Supreme Court rulings, but showing particular disdain for the *Bostock* opinion).

[70] *See* O'Scannlain, *supra* note 66, at 304 ("Two years ago, during the Antonin Scalia Lecture series at Harvard, Justice Elena Kagan declared 'we're all textualists now.'").

[71] *Id*. at 306.

respects. Textualism focuses on the "ordinary" meaning of words and phrases in a statute, not their literal meaning.[72] The ordinary meaning of words that textualism seeks requires the interpreter of the statute to try to determine how an ordinary, reasonable person would understand the text of the statute in its context.[73] This "ordinary" meaning of words can, but will not always, vary from a literal meaning.[74] This is an important distinction. As Justice Kavanaugh noted, the Court's basic logic "seizes on the meaning of the statute's individual terms, mechanically puts them back together, and generates an interpretation of the phrase 'discriminate because of sex' that is literal."[75] This observation is hard to characterize as inaccurate. As previously discussed, the Court mechanically defined "discriminate," "because of," and "sex," put those definitions together, and concluded that any discrimination that in any way requires knowledge of the employee's sex violates Title VII.[76] This mechanical approach is better understood as a "literalist" approach rather than a traditional textualist approach to statutory interpretation.

Justice Kavanaugh gave some helpful examples of how literal meaning and ordinary meaning can differ.[77] He noted that a statute might prohibit "vehicles in the park."[78] Although this prohibition would literally encompass baby strollers, a textualist interpretation of the statute would not require this interpretation because the ordinary meaning of the word "vehicle" would not encompass baby strollers.[79] Although a textualist interpretation and a literalist interpretation can often coincide, if a literal interpretation of a word or phrase conflicts with the ordinary meaning of the word or phrase in context, the textualist interpretation disposes of the literal meaning for the ordinary meaning.[80]

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[72] Bostock v. Clayton Cty, 140 S. Ct. 1731, 1825 (2020) (Kavanaugh, J., dissenting).

[73] *Id.*; *see also* Laura R. Dove, *Absurdity in Disguise: How Courts Create Statutory Ambiguity to Conceal their Application of the Absurdity Doctrine*, 19 NEV. L. J. 741, 747 (2019) (noting that "Modern textualists recognize that language is a social construct, drawing on work in philosophy of language originating with Wittgenstein. . . . Hence, some scholars employ the term "ordinary meaning" to distinguish the inquiry of modern textualists from that of the earlier 'literalist' textualists.") (internal citations omitted).

[74] *Bostock*, 140 S. Ct. at 1825 (Kavanaugh, J., dissenting).

[75] *Id.* at 1834.

[76] *See supra* Discussion Part I.A.

[77] *Bostock*, 140 S. Ct. at 1826 (Kavanaugh, J., dissenting).

[78] *Id.*

[79] *Id.*

[80] *See* Dove, *supra* note 73, at 747.

Given the rote, mechanical interpretation the majority employs in *Bostock*, whether one agrees with the conclusion or not, it is difficult to dismiss as invalid Justice Kavanaugh's analysis of the method of interpretation employed. The majority opinion is remarkably stark and mechanistic.[81] It expressly dismisses the employers' appeal to an ordinary person's interpretation of "discrimination because of sex" as a "conversational answer" that must give way to the statutes' "strict terms."[82] It considers the subsequent failed attempts by Congress to amend Title VII to include sexual orientation to be irrelevant.[83] It never discusses or addresses other interpretations or uses of the phrase "sex discrimination" found in other statutes, an interpretation method specifically used in Scalia's brand of textualism.[84] The Court even acknowledged that "homosexuality and transgender status are distinct concepts from sex."[85] However, because in a very literal sense an employer cannot fire an employee for being homosexual or transgender without first knowing the employee's sex, the Court simply ignored that Congress considers them to be separate concepts and has consistently used different terminology in statutes to describe them.[86]

Although on the surface the majority opinion may seem textualist, it eschews important principles of textualism and instead focuses solely on the literal definitions of the words employed. This literalist interpretation has obviously led to a tremendous change in employment discrimination law—discrimination against homosexual and transgender employees is now expressly illegal on a nationwide level.[87]

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[81] *Bostock*, 140 S. Ct. at 1731.

[82] *Id.* at 1744.

[83] *Id.* at 1747 (dismissing appeals to other statutes in interpreting Title VII as "speculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to reast an interpretation of an existing law a different and earlier Congress did adopt.").

[84] *See* West Virginia University Hospitals Inc. v. Casey, 499 U.S. 83, 88-92 (1991) (in determining whether "attorney's fees" in a statute also includes expert witness fees, Scalia, writing for the majority, refers to the "record of statutory usage" related to attorney's fees and expert witness fees to interpret what the term in the given statute means); *see also Bostock*, 140 S. Ct. at 1829 (Kavanaugh, J. dissenting) ("That longstanding and widespread congressional practice matters . . . When Congress chooses distinct phrases to accomplish distinct purposes, and does so over and over again for decades, we may not lightly toss aside all of Congress's careful handiwork.").

[85] *Bostock*, 140 S. Ct. at 1747 (majority opinion).

[86] *Id*. ("But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discriminate based on sex; the first cannot happen without the second.").

[87] *Id.* at 1754 ("In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate

However, if *Bostock* signals a change in Title VII jurisprudence to a consistently literal interpretation of its terms, other changes to employment law seem necessary. Based upon the straightforward logic of *Bostock*, another significant change is required—all sex-differentiated employer appearance standards, other than those for which there is a bona fide occupational qualification, likely constitute sex discrimination under Title VII. Despite Justice Gorsuch's insistence that his decision does not address issues such as sex-segregated bathrooms and sex-differentiated dress codes,[88] the cold logic of *Bostock* makes it hard to see how the decision does not apply. This Article will next discuss existing Title VII case law that allows for sex-differentiated appearance standards and argues that the interpretation of Title VII employed in these cases is cast into doubt, if not impliedly overruled, by *Bostock*.

II. CURRENT CASE LAW ON TITLE VII AND EMPLOYER APPEARANCE STANDARDS

Employers commonly employ appearance standards that govern how employees dress and groom themselves while at the workplace. One does not need a vivid imagination to understand why this would be the case. Employers have legitimate business interests related to employee appearance because how employees dress and are groomed presents a certain brand image to customers. Employees' appearance can affect how employees interact with each other. In some workplaces, dress and appearance can be a health and safety issue. Sex-differentiated dress and appearance standards have been addressed by courts numerous times since the passage of Title VII and have largely been upheld.[89] When this existing jurisprudence is examined, it

to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.").

[88] *Id.* at 1754 ("The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge such questions today. Under Title VII, too, we do not purpose to address bathrooms, locker rooms, or anything else of the kind.").

[89] *See* Jennifer L. Levi, *Some Modest Proposals for Challenging Established Dress Code Jurisprudence*, 14 DUKE J. GENDER L. & POL'Y 243, 243 (2007) ("Historically, most courts have sustained employer-imposed, gender-based dress codes.").

appears to stand in direct conflict with the *Bostock* opinion, bringing this entire line of cases into question.

The appellate courts which first addressed sex discrimination suits related to appearance standards ruled that sex-differentiated appearance standards did not violate Title VII.[90] These early opinions had to do with appearance standards that allowed women to have long hair in the workplace, but not men.[91] These opinions focused very little on the statutory text, and some have no reasoning other than following the consensus reached by the other courts of appeals that had addressed the issue.[92] The reasoning in these cases is best understood as being policy-based as opposed to being based upon a rigorous reading of the text of Title VII.

The *Earwood* and *Willingham* opinions provide examples of the policy-based reasoning used in these early cases. In *Earwood*, a male bus driver's employer took him off several runs because of his long

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[90] *See, e.g.,* Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104, 1110 (9th Cir. 2006) ("We have long recognized that companies may differentiate between men and women in appearance and grooming policies, and so have other circuits."); *see also* Earwood v. Cont'l Southeastern Lines, Inc., 539 F.2d 1349, 1350 (4th Cir. 1976) (holding that a grooming standard that required male bus drivers to keep their hair cut short did not violate Title VII unless it was used as pretext for precluding either sex from employment); *see also* Barker v. Taft Broad Co., 549 F.2d 400, 401 (6th Cir. 1977) ("The prohibition of sex discrimination must be interpreted in light of the purpose and intent of Congress in enacting the Civil Rights Act of 1964. Employer grooming codes requiring different hair lengths for men and women bear such a negligible relation to the purposes of Title VII that we cannot conclude they were a target of the Act."); *see also* Longo v. Carlisle DeCoppet & Co., 537 F.2d 685, 685 (2d Cir. 1976) (per curium) ("All four courts of appeals that have ruled on the question have held that requiring short hair on men and not on women does not violate Title VII. Without necessarily adopting all of the reasoning of those opinions, we are content to abide by this unanimous result.") (internal citations omitted); *see also* Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1252 (8th Cir. 1975) (holding that a hair length requirement applicable to males and not females does not violate Title VII); *see also* Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1092 (5th Cir. 1975) (en banc) (holding that an employment policy precluding men and not women from having long hair did not violate Title VII); *see also* Dodge v. Giant Food, Inc. 488 F.2d 1333, 1335 (D.C. Cir. 1973) (holding that a policy requiring males, but not females, to have short hair did not violate Title VII).

[91] *See, e.g., Jespersen*, 444 F.3d at 1110 ("We have long recognized that companies may differentiate between men and women in appearance and grooming policies, and so have other circuits.").

[92] *See, e.g., Longo*, 537 F.2d at 685 ("All four courts of appeals that have ruled on the question have held that requiring short hair on men and not on women does not violate Title VII. Without necessarily adopting all of the reasoning of those opinions, we are content to abide by this unanimous result."); *see also Knott*, 527 F.2d at 1251-52 ("The courts of appeals that have thus far considered the claim asserted here have concluded that the Act was never intended to interfere in the promulgation and enforcement of personal appearance regulations by private employers. These decisions represent the more realistic and reasonable interpretation of § 2000e-2. As stated in the Willingham *en banc* decision.") (internal citations omitted).

hair violating the employer's policy that male bus drivers "report for work cleanly shaved with a trim haircut."[93] The bus driver sued for sex discrimination, as female and male employees in other jobs were allowed to have longer hair, and the requirement that male bus drivers have shorter hair enforced a sex stereotype.[94] The court dispensed with this argument in fairly short order based upon the theory of immutable versus mutable characteristics.[95] Under this theory, Title VII is concerned only with discrimination based upon certain "immutable" characteristics of its named protected classes that may stand in the way of equal employment opportunities.[96] However, mutable characteristics such as hair length are considered simply matters of personal preference that can be changed at will and thus are not precluded by Title VII.[97] The court did hold that a policy that is used merely as pretext to preclude a protected class from employment opportunities, or even perhaps one that is irrational or arbitrary, might violate Title VII.[98] However, although the policy expressly differentiated between male and female employees, the court ruled that the policy did not violate Title VII on its face.[99] Notably, the concept of mutable or immutable characteristics of the protected classes cannot be found anywhere in the text of Title VII.[100]

The opinion in *Willingham* uses substantially similar reasoning. In 1970, an "International Pop Festival" was held in Byron, Georgia.[101] This festival attracted many "bearded and longhaired youths and scantily dressed young women," which was not appreciated by the

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93 *See Earwood*, 539 F.2d at 1350.

94 *Id.* at 1351.

95 *Id.*

96 *Id*. ("The objective of Title VII is to equalize employment opportunities. Consequently, discrimination based on either immutable sex characteristics or constitutionally protected activities such as marriage or child rearing violate the Act because they present obstacles to employment of one sex that cannot be overcome.") (internal citations omitted).

97 *Id.* at 1350 ("On the other hand, discrimination based on factors of personal preference does not necessarily restrict employment opportunities and thus is not forbidden.").

98 *Id*.

99 Earwood v. Cont'l Southeastern Lines, Inc., 539 F.2d 1349, 1351-52 (4th Cir. 1976).

100 *See* Peter Brandon Bayer, *Debunking Unequal Burdens, Trivial Violations, Harmless Stereotypes, and Similar Judicial Myths: The Convergence of Title VII Literalism, Congressional Intent, and Kantian Dignity Theory*, 89 St. John's L. Rev. 401, 416 (2015) (noting that no statutory provision suggests that Title VII is not concerned with mutable characteristics of the protected classes).

101 *See* Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1087 (5th Cir. 1975). Byron is located approximately fifteen miles from Macon, Georgia. *Id.*

more conservative locals.[102] Consequently, the local population developed a bias against long-haired men which ultimately became a part of the grooming code of the Macon Telegraph Publishing Company.[103] When Mr. Willingham's shoulder-length hair precluded his employment with Macon Telegraph, he sued under Title VII, as women were allowed to have long hair.[104] The court categorized this discrimination as "sex plus"—it involved sex plus some other characteristic.[105] The court admitted that the text of Title VII does not preclude such a claim, and that the Supreme Court had recognized a "sex plus" claim under Title VII involving discrimination against women with preschool-age children.[106]

Nevertheless, the court proceeded to investigate the "legislative intent" of Title VII and determined that "sex plus" discrimination does not encompass sex-differentiated grooming standards.[107] The court first noted that "sex" was added as a protected class the day before Title VII was passed, and some believed it was just added to try to sabotage its passage.[108] The court draws from this the rather interesting inference that "Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications."[109] Based upon this reasoning, the court limited the emphasis of Title VII with respect to sex discrimination to acts that restrict employment opportunity.[110] With the reach of Title VII so limited, the court reverted to the same immutability reasoning utilized

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[102] *Id.*

[103] *Id.*

[104] *Id.* at 1088 ("Willingham's argument is that Macon Telegraph discriminates amongst employees based upon their sex, in that female employees can wear their hair any length they choose, while males must limit theirs to the length deemed acceptable by Macon Telegraph.").

[105] *Id.* at 1089.

[106] *Id.* ("In a short per curiam decision, the Supreme Court held that if the legislative purpose of giving persons of like qualifications equal employment opportunity irrespective of sex were to be effected, employers could not have one hiring policy for men and another for women. Thus 'sex plus' discrimination against being a woman plus having preschool age children, was under the facts of that case just as unlawful as would have been discrimination based solely upon sex.").

[107] Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1090-92 (5th Cir. 1975).

[108] *Id.* at 1090.

[109] *Id.*

[110] *Id.* at 1091 ("We perceive the intent of Congress to have been the guarantee of equal job opportunity for males and females. Providing such opportunity is where the emphasis rightly lies.").

in *Eastwood.*[111] In the context of sex discrimination, the court couched this in terms of "fundamental rights."[112] Based upon these factors, the court ruled that a hiring policy that discriminates between sexes based upon a characteristic that is neither immutable nor a fundamental right does not violate Title VII and, as such, is within the purview of the employer.[113] In the mind of the court, hair length is just a personal preference, not an immutable characteristic of sex or a fundamental right, and thus is not within the reach of Title VII.[114] In other words, "Hippy, if you want a job, just cut your hair."

The reasoning of these cases is a far cry from the literal interpretation of Title VII espoused in *Bostock*.[115] These opinions read like policy-based decisions in which the courts predetermined that sex-differentiated policies seem like a common and acceptable practice in most employment contexts that should continue, and then backed into the reasoning necessary to justify this result. Notably, some judges dissented at the time and pointed out that the immutability analysis flies in the face of the statutory text.[116] Nevertheless, these cases are enshrined in law, and thus their conclusions have been taken for granted in later cases involving sex-differentiated appearance standards.[117] Although there has been some slight chipping away around the edges of these original appearance standard holdings, their basic contentions allowing sex differentiation in most situations remain.

In the period following these appellate opinions allowing sex-differentiated grooming standards, courts faced employer policies that

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111 *Id.* ("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.").

112 *Id.* ("Similarly, an employer cannot have one hiring policy for men and another for women if the distinction is based on some fundamental right.").

113 Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1092 (5th Cir. 1975).

114 *Id.*

115 *See supra* Background Part I.

116 *See, e.g.,* Earwood v. Cont'l Southeastern Lines, Inc., 539 F.2d 1349, 1352 (4th Cir. 1976) (Winter, J., dissenting opinion) ("The vice in the majority's approach is that it imports constitutional notions of immutability and fundamentality into the process of statutory interpretation. I can find no warrant for concluding that in enacting Title VII, Congress intended to proscribe only sex discrimination which burdens persons who desire to exercise 'fundamental rights' or who possess certain 'immutable characteristics.'"); *see also* Barker v. Taft Broad Co., 549 F.2d 400, 402 (6th Cir. 1977) (McCree, J. dissenting opinion) (pointing out that the grooming policy treats men and women differently, and thus clearly violates the plain terms of Title VII).

117 *See, e.g.,* Jespersen v. Harrah's Operating Company, Inc., 444 F.3d 1104, 1110 (9th Cir. 2006) ("We have long recognized that companies may differentiate between men and women in appearance and grooming policies, and so have other circuits.").

were more difficult to ignore than the requirement for men to have short hair.[118] Many of these policies either sexualized or were demeaning towards women.[119] The immutable characteristic analysis previously employed proved unworkable in this context, so the courts just worked around it.[120] For example, the Ninth Circuit overruled employer policies that had more stringent weight standards for female airline stewards than for males in the same position.[121] The Seventh Circuit ruled an employer policy that allowed men to choose their own professional attire but required women to choose from an employer created list of acceptable outfits violated Title VII.[122] It is difficult to see how these cases run afoul of the immutability analysis the circuit courts had already laid out. For example, weight is not an immutable characteristic, nor is maintaining a certain weight a fundamental right.[123] Thus, under the reasoning of this previous line of cases, employers should be able to control it and impose different standards for men and women. It seems that the judges in these cases simply considered the policies at issue to be demeaning towards women, and thus ignored that they were based upon mutable characteristics not inherent to sex. The courts thus essentially built a zone of reasonableness around sex-differentiated appearance standards, functionally allowing policies that did not go "too far."[124]

The best example of how sex-differentiated appearance standards are currently treated under Title VII is *Jespersen v. Harrah's Operating Company, Inc.*[125] In *Jespersen*, a Harrah's casino had a "personal best" appearance policy with different standards for male and female employees.[126] One of these sex-based distinctions was that men were expressly prohibited from wearing makeup, but women were

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118 *See* Bayer, *supra* note 100100, at 419-20 (discussing various cases relating to employer dress codes that were ruled to violate Title VII's prohibition on sex discrimination).

119 *Id.*

120 *Id.*

121 *See* Frank v. United Airlines, Inc., 216 F.3d 845, 854-55 (9th Cir. 2000); *see also* Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602, 608-09 (9th Cir. 1982) (en banc).

122 *See* Carroll v. Talman Federal Savings & Loan Ass'n of Chi., 604 F.2d 1028, 1032-33 (7th Cir. 1979).

123 *See* Bayer, *supra* note 100, at 419.

124 *See id.* at 421 (discussing how the mutability analysis has grown to an analysis focusing on "reasonableness" and "undue burdens" posed by dress and appearance policies).

125 *See* Jespersen v. Harrah's Operating Company, Inc., 444 F.3d 1104 (9th Cir. 2006).

126 *Id.* at 1106.

expressly required to wear makeup.[127] Jespersen, a bartender at Harrah's, objected to this make-up requirement, as she found it degrading.[128] Jespersen ultimately left her employment at Harrah's and sued under Title VII for sex discrimination.[129] As previously noted, the Ninth Circuit began with the premise that a sex-differentiated appearance standard is not in and of itself violative of Title VII.[130] The court did provide two situations in which a sex-differentiated appearance standard might be discriminatory—if it posed an unequal burden on one gender and not the other, or if it engaged in impermissible sex stereotyping.[131]

With respect to an unequal burden, the court reasoned that "an appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment," but that if an appearance standard "unreasonably burdens one gender more than another," then it is discriminatory.[132] The court provided little in the way of clear guidance for when this line is crossed, nor did it appeal in any way to the language of Title VII itself for the proposition that reasonable discrimination between the sexes is allowed under the terms of the statute.[133] Under this reasonableness/unequal burden analysis, the court held that Jespersen had not provided any evidence that the makeup requirement imposed an unequal burden on female employees.[134] Jespersen asked the court to take judicial notice that requiring women, but not men, to put on makeup every day to go to work clearly imposed an unequal burden of both time and money on the female employees that male employees did not have to bear.[135]

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127 *Id.* at 1107 ("Make up (face powder, blush and mascara) must be worn and applied neatly in complimentary colors. Lip color must be worn at all times.").

128 *Id.* at 1108 ("Jespersen testified that when she wore the makeup she 'felt very degraded and very demeaned.'").

129 *Id.* at 1108.

130 *Id.* at 1109 ("Our settled law in this circuit, however, does not support Jespersen's position that a sex-based difference in appearance standards alone, without any further showing of disparate effects, creates a prima facie case.").

131 Jespersen v. Harrah's Operating Company, Inc., 444 F.3d 1104, 1109 (9th Cir. 2006).

132 *Id.* at 1109, 1110.

133 *See* Bayer, *supra* note 100, at 420 (noting that a jurisprudence allowing reasonable discrimination "remains infirm, for Title VII's text and structure define as unlawful all discrimination based on the five forbidden classes until proven necessary, and not simply useful, to the given defendant-business.").

134 *Jespersen,* 444 F.3d at 1111 ("Having failed to create a record establishing that the 'Personal Best' policies are more burdensome for women than for men, Jespersen did not present any triable issue of fact.").

135 *Id.*

However, the court ruled that it was inappropriate for an appellate court to take judicial notice of such facts when no evidence was presented at trial.[136]

The court next discussed the argument that the sex-differentiated appearance standard was impermissible sex stereotyping.[137] The court acknowledged that sex stereotyping may serve as a valid method for challenging an appearance standard.[138] The court, however, ruled that this was not such a case.[139] The court provided little in the way of a clear standard for when impermissible sex stereotyping has taken place but did give examples of certain policies that would constitute sex stereotyping.[140] Appearance standards that "objectively inhibit a woman's ability to do the job" appear to be out of bounds.[141] Likewise, standards that objectify or sexualize women are impliedly disapproved of by the court.[142] However, Harrah's appearance standard was largely the same for both sexes, and just had small differences (like the makeup requirement) to account for societal norms between male and female appearance.[143] Because the policy was reasonable, the court held that it did not violate Title VII.[144]

ANALYSIS

III. EVALUATING SEX-DIFFERENTIATED APPEARANCE STANDARDS UNDER *BOSTOCK*

Although it would be helpful to lawyers and businesses alike to have a more precise legal standard to evaluate appearance standards,

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136 *Id.* at 1110.

137 *Id.* at 1111.

138 *Id.* at 1113 ("We emphasize that we do not preclude, as a matter of law, a claim of sex-stereotyping on the basis of dress or appearance codes.").

139 *Id.*

140 Jespersen v. Harrah's Operating Company, Inc., 444 F.3d 1104, 1112 (9th Cir. 2006).

141 *Id.* ("The record contains nothing to suggest the grooming standards would objectively inhibit a woman's ability to do the job.").

142 *Id.* ("This is not a case where the dress or appearance requirement is intended to be sexually provocative, and tending to stereotype women as sex objects.").

143 *Id.* at 1111 (noting how the Harrah's policy required the same uniform of both men and women, just had small differences in sexes, and that "There is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear.").

144 *Id.* at 1113 ("As we said in *Nichols*, in commenting on grooming standards, the touchstone is reasonableness.").

the cases discussed in the previous section provide reasonable outcomes from a policy standpoint. They recognize that a sex-differentiated appearance standard can be unfair or sexualizing to an extent that it violates Title VII but allow companies to have reasonable variances in standards to account for societally common differences in appearance between sexes. This is arguably a fair compromise. The real question is whether the language of Title VII allows for this level of judicial policymaking, regardless of its reasonableness. Title VII does not say "reasonable" sex discrimination is acceptable. This allowance for reasonable sex discrimination in appearance standards is judicial gloss that is difficult to make sense of in light of the text of Title VII. This section will analyze the reasoning of this line of cases under the literalist interpretation of Title VII found in *Bostock*. If the reasoning of *Bostock* is logically and literally applied by other courts, then the answer to this question seems to clearly be "no."

Criticism of the case law allowing gender differentiation in appearance standards is not new.[145] So far, however, Title VII based challenges to sex-differentiated appearance standards have been largely unsuccessful under this existing line of cases.[146] This may change, as the *Bostock* opinion provides specific Supreme Court precedent that can be used to argue very persuasively that this existing case law must be overruled, and that any gender differentiation in employer appearance standards are on their face violative of Title VII.

A. *Applying* Bostock *to Gender-Based Appearance Standards*

The *Bostock* opinion's literalist approach to interpreting Title VII provides attorneys with a strong basis for arguing against these existing cases allowing for "reasonable" discrimination in gender-based appearance standards.[147] The Court in *Bostock* boiled sex dis-

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145 *See, e.g.,* Bayer, *supra* note 100, at 474-75 (arguing that the reasonableness standard used by courts in appearance standard cases runs afoul of the plain text of Title VII); *see also* Jennifer L. Levi, *Some Modest Proposals for Challenging Established Dress Code Jurisprudence,* 14 Duke J. Gender L. & Pol'y 243, 250 (2007) (noting that "The problem with the additional unequal-burden requirement is, of course, that neither the history nor the text of Title VII support it.) (internal footnotes omitted).

146 *See* Bayer, *supra* note 100, at 404 ("Specious when introduced roughly forty years ago, 'unequal burden' continues to flourish notwithstanding United States Supreme Court rulings plainly invalidating its underpinnings, although admittedly without mentioning that doctrine by name.").

147 *See supra* Discussion Part II.

crimination down to a very simple proposition—if one changes the gender of the employee, does one get a different employment outcome?[148] If an employer holds an employee to any type of different appearance standard based upon the employee's sex, then this definition of sex discrimination is clearly met.

The examples used by the Court in *Bostock* are particularly helpful to illustrate this point. Recall the following example from *Bostock*:

> Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired?[149]

The Court reasoned that you cannot know if the employee will be fired without knowing the employee's sex.[150] Thus, the policy of firing homosexual employees is discrimination "because of sex," and a violation of Title VII.[151]

Now consider this example, slightly modified:

> Imagine an employer who has an appearance policy requiring all employees to report to work in "business professional" dress, or else be fired. This policy expressly states that this requires female employees to wear tastefully applied make-up, and that male employees may not wear makeup. A model employee arrives at work with no make-up on. Will that employee be fired?

Just as in *Bostock*, this question cannot be answered without first knowing the sex of the employee, and if one varies the sex of the employee, one gets a different employment outcome.[152] Thus, just as in *Bostock*, the answer must be that this policy violates Title VII.[153] It treats men and women at the workplace differently. The employer

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148 *See* Bostock v. Clayton Cty.,140 S. Ct. 1731, 1741 (2020) ("If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred.").

149 *Id.* at 1742.

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.*

policy in this example seems facially reasonable. But under *Bostock*, there is no room for inquiring into whether the policy is reasonable, based upon social norms, or demeaning or sexualizing to women.

One could imagine an employer making the following argument: "I am equally happy to fire both male and female employees who violate our appearance standards, thus I am discriminating based upon rule following, not sex." *Bostock* expressly addresses this argument, and based upon the individual discrimination mandate of Title VII, explains that this simply doubles the discrimination; it does not eliminate it.[154] Because the rule is based upon adherence to a separate, sex-based standard for how employees should appear, the employer is discriminating against men for not complying with its standard male appearance, and likewise for women.[155] Neither of these is allowed under the simple logic of *Bostock*.[156]

The *Bostock* opinion also expressly contradicts the "undue burden" standard currently used in appearance policy cases.[157] The Court expressly held that Title VII focuses on individual, not class-based, discrimination.[158] Thus, the argument that a sex-differentiated appearance standard treats men and women "separately but equally" appears facially invalidated by *Bostock*.[159] The "undue burden" analysis employed in *Jespersen* is expressly class-based.[160] The court expressly looked at the policy and the impact it has on each sex as a whole, not on the individual employee who it is applied to.[161] *Bostock* expressly forbids such class-based reasoning, holding that "Title VII's

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154 Bostock v. Clayton Cty., 140 S. Ct. 1731, 1741 (2020) ("An employer musters no better a defense by responding that it is equally happy to fire male *and* female employees who are homosexual or transgender. . . So just as an employee who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same.").

155 *Id.*

156 *Id.*

157 *See supra* Part II.

158 *Bostock*, 140 S. Ct. at 1742-43. (noting the individual discrimination mandate of Title VII and stating "Nor is it a defense for an employer to say it discriminates against both men and women because of sex.").

159 *Id.*

160 *See* Jespersen v. Harrah's Operating Company, Inc., 444 F.3d 1104, 1109-10 (9th Cir. 2006) (noting how under the undue burden analysis, appearance standards can "appropriately differentiate" between men and women as long as they don't pose an undue burden on one gender over the other.).

161 *Id.* at 1113 (expressly noting that Jespersen objected to the make-up policy based upon her own "subjective reaction" to the requirement, and this was inadequate because the policy "applies largely the same requirements to both men and women.").

plain terms and our precedents don't care if an employer treats men and women comparably as groups . . ."[162] If a similarly situated person of the opposite sex would have been treated differently, then actionable discrimination has occurred.[163] The impact on the class as a whole is irrelevant.

Notably, this conclusion is not dependent upon Title VII covering transgendered or homosexual employees and does not flow from *Bostock's* inclusion of these individuals under the umbrella of sex discrimination. This conclusion flows directly from the brute logic of *Bostock's* literalist interpretation of Title VII's mandate against sex discrimination.[164] Under this logic, a male employee who wants to dress like a female should not need to plead and prove that he is transgendered, or that the appearance standard discriminates against him as such. Under *Bostock's* logic, the male employee would need only to establish that he wanted to wear clothing traditionally associated with females and was not allowed to do so, but female employees were so allowed.[165] Based upon this alone, he has been discriminated against based upon his sex.[166]

B. *Potential Issues with Employer Appearance Standards Post-Bostock*

If *Bostock* is applied to sex-based appearance standards as discussed above, determining what appearance standards violate Title VII's prohibition against sex discrimination is far simpler than under the current line of appellate cases. Employers must simply answer one question—is the appearance standard in any way predicated upon the employee's sex? If the answer is yes, under *Bostock*, sex discrimination has occurred.[167] If the answer is no, sex discrimination has not

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162 *See Bostock*, 140 S. Ct. at 1748 ("Title VII's plain terms and our precedents don't care if an employer treats men and women comparably as groups . . .").

163 *Id.* at 1740.

164 *Id.* at 1741 ("Title VII's message is 'simple but momentous': An individual employee's sex is 'not relevant to the selection, evaluation, or compensation of employees.") (internal citations omitted).

165 *Id.*

166 *Id.* ("If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred.").

167 *Id.*

occurred.[168] Thus, employers can require all employees to dress in all black. They can prevent employees from wearing any clothing that supports the New York Yankees.[169] They can require every employee to wear a khaki jumpsuit.[170] But, they cannot require women to wear make-up, skirts, or high heels in professional settings and require men to wear suit jackets and ties.

On the surface, this seems like a simple standard that is easy for employers to comply with. And no doubt this conclusion is welcome by critics of sex-differentiated appearance standards, many of whom have long argued that these policies clearly violate Title VII.[171] It has become more common for human resource companies and trainers to argue that sex differentiation in workplace appearance standards as a practical matter is unnecessary and should be avoided.[172] This seems to be reasonable advice for many, if not most, employers. If your employees are not physically interacting with customers on a regular basis, societal norms surrounding sex and dress would likely not be a pressing business concern. For customer-facing employees, it is common to see sex-neutral uniforms such as a company polo shirt with khaki pants. And with respect to dress, our society as a whole has become far less formal than it used to be.[173] However, for some businesses, sex neutrality is not so easily implemented.

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168 Of course, appearance standards that discriminate against other protected classes would also be prohibited. However, this article addresses only sex differentiation in appearance standards.

169 Bostock v. Clayton Cty., 140 S. Ct. 1731, 1742 (2020) (noting that "Take an employer who fires a female employee for tardiness or incompetence or simply supporting the wrong sports team. Assuming the employer would not have tolerated the same trait in a man, Title VII stands silent.").

170 *Id.*

171 *See, e.g.,* Bayer, *supra* note 100, at 424 (noting in 2015 that the author has argued against the undue burden theory governing appearance standards for the past 30 years).

172 *See, e.g.*, Monster, *11 Tips for creating a modern work dress code*, https://hiring.monster.com/employer-resources/workforce-management/leadership-management-skills/dress-code/ (advising companies to "make references to all articles of clothing gender neutral"); *see also* Jennifer Carsen, *Why More Workplaces are Simplifying their Employee Dress Codes*, HR DIVE, May 14, 2018, https://www.hrdive.com/news/why-more-workplaces-are-simplifying-their-employee-dress-codes/522863/ (noting that many employers are moving to more general dress codes without sex differentiation).

173 *See, e.g.,* Amanda Mull, *After the Pandemic, the Office Dress Code Should Never Come Back*, THE ATLANTIC, May 2020, https://www.theatlantic.com/magazine/archive/2020/05/kill-the-office-dress-code/609070/ (discussing how less formal attire continues to become more common place in both office and social settings); *see also* Janhvi Bhojwani, *Not Just Fridays: More Companies Embrace Casual Dress Codes*, NPR, March 9, 2019, https://www.npr.org/2019/03/09/701070560/not-just-fridays-more-companies-embrace-casual-dress-codes (discussing how

Take for example a law firm. Law firms have an important business interest in requiring professional dress for lawyers, particularly for those practicing in a courtroom, but also for those meeting with clients. Certainly, nothing in *Bostock* prevents an employer from requiring professional dress, so long as professional dress is not defined or enforced differently for men and women.[174] Certain aspects of maintaining a sex-neutral professional appearance standard are simple and should have little to no effect on a law firm's business. For example, a female attorney who prefers to wear flat shoes, pants rather than a skirt, and no make-up to court would likely raise few, if any, eyebrows so long as she presents as clean, neat, and professional. But what about a female attorney who prefers to wear a more traditionally masculine cut suit with a tie? Or a male attorney who prefers not to wear a tie with his suit? Or a male attorney who wants to wear high-heeled women's shoes with his suit, or prefers to wear a skirt suit? Or a male attorney who prefers to wear makeup and nail polish in professional settings? The more one moves to the fringes of what society considers "appropriate" dress for each gender, the more that some degree of sympathy for the law firm begins to seem more reasonable.

On the one hand, it is easy to say that society's views of what is "appropriate" for each sex to wear is outdated and people should be free to dress how they like. However, the decision is not always that simple for the employer. Even if the employer itself does not care about societal norms of sex differentiation in dress, the employer has to consider that clients or customers may have different views. In the law firm example, a male attorney wearing high heels or a skirt could seem sufficiently abnormal to a juror in a trial that the attorney's appearance jeopardizes the client's case. Certain clients may determine that it is not in their best interest to have an attorney represent them at a negotiation who is not attired in a way that comports with societal norms. One can imagine numerous scenarios in which a law firm, or other professional service provider, could lose clients, or be forced to maintain an employee who clients do not want to utilize, because of sex-based dress considerations. Some may wish for a soci-

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employee dress codes continue to become more casual, even at white collar firms like Goldman Sachs, which is at least partially based upon a younger generation entering the workforce that prefers more casual attire).

174 *See* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1742 (2020).

ety in which this is not the case, but businesses have to function within society as it exists now.

The point of this example is not to make a hyperbolic argument for sex-differentiated appearance standards based upon a "parade of horribles." The point is merely that, under *Bostock*'s reasoning, as one moves to the fringes of how employees may wish to present with respect to their appearance, businesses can encounter legitimate difficulties that would seem to indicate that some degree of sex differentiation is reasonable. Contrarily, the existing appellate cases related to appearance standards allow for some degree of nuance here through the reasonableness/undue burden analysis.[175] However, the literalist analysis of *Bostock* appears to permit none.[176] A legitimate response to this problem, and a response expressly embraced by the Court in *Bostock,* is simply that Title VII says what it says, and it is not up to the court system to change outcomes demanded by Title VII's terms.[177] As textualist jurists are fond of pointing out, if a statute's terms cause societal problems, then those problems can and should be addressed by Congress, not the courts.[178] Fortunately, there is some hope for a degree of nuance in this area found in the text of Title VII—the bona fide occupational qualification (hereinafter "BFOQ") exception.[179]

IV. BONA FIDE OCCUPATIONAL QUALIFICATIONS AND APPEARANCE STANDARDS

A. *Bona Fide Occupational Qualifications Cannot Adequately Address Appearance Standards*

Title VII expressly allows employers to consider religion, sex, or national origin in hiring and employment policy decisions when they are "a bona fide occupational qualification reasonably necessary to

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175 *See supra* Discussion Part II.

176 *See supra* Discussion Part III. A.

177 *See* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1753 (2020) ("The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us.").

178 *Id.* at 1823 (Kavanaugh J., dissenting) ("The policy arguments for amending Title VII are very weighty. . . But we are judges, not Members of Congress. . . Our role is not to make or amend law.").

179 *See* CIVIL RIGHTS ACT, TITLE VII, 42 U.S.C. § 2000e-2(e)(1) (2020).

the normal operation of that particular business or enterprise."[180] The BFOQ exception represents a congressional understanding that there may be times where employment discrimination based upon these particular protected classes furthers a legitimate business interest and thus should be allowed. In the typical BFOQ case, the employer has a facially discriminatory employment policy but claims a legitimate business justification that necessitates the discriminatory policy.

Healey v. Southwood Psychiatric Hospital provides an excellent example of the BFOQ exception applied.[181] In this case, Southwood Psychiatric Hospital had a practice of taking into account sex when determining shift assignments.[182] The reason for this policy was that the hospital had both male and female psychiatric patients, and thus both male and female attendants were needed on each shift to care for them.[183] Southwood assigned Ms. Healey to the less desirable night shift because of the need for a female attendant at this time, and Ms. Healey sued for sex discrimination.[184]

This was a clear case of the hospital engaging in sex discrimination, as Southwood admitted to expressly using sex as a factor in determining shift assignments.[185] Southwood argued that it was allowed to engage in this sex discrimination under the BFOQ exception.[186] The court noted that the "essence" of Southwood's business was to treat adolescents who had been emotionally and sexually abused.[187] Southwood presented evidence that both for treatment and privacy concerns associated with this vulnerable patient population, males and females were necessary on all shifts to provide appropriate care.[188] Based upon this evidence, the court ruled that the BFOQ exception applied, and Southwood's facially discriminatory policy did not violate Title VII.[189]

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[180] *Id.*

[181] Healey v. Southwood Psychiatric Hosp., 78 F.3d 128 (3d Cir. 1996).

[182] *Id.* at 130.

[183] *Id.*

[184] *Id.*

[185] *Id.* at 132 ("When open and explicit use of gender is employed, as is the case here, the systematic discrimination is in effect "admitted" by the employer, and the case will turn on whether such overt disparate treatment is for some reason justified under Title VII.").

[186] *Id.*

[187] Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 133 (3d Cir. 1996).

[188] *Id.*

[189] *Id.* at 135.

On the surface, the BFOQ exception would seem to be an excellent fit for sex-differentiated appearance standards. However, because of the way the case law in this area has developed, it is not at all clear whether and how the BFOQ exception should be applied in the area of appearance standards. Because existing case law on appearance standards has ruled that sex differentiation in and of itself does not violate Title VII, the court rulings in these cases have not proceeded to the next step of determining whether the BFOQ exception would apply.[190] Accordingly, there is no existing body of case law fully fleshing out the application of the BFOQ exception in the area of sex-differentiated appearance standards. Unfortunately, the existing BFOQ case law in other areas of discrimination contains standards that are problematic for addressing employer appearance policies.

To prevent the BFOQ exception from becoming the exception that swallows the rule, the Supreme Court has held that it must be applied narrowly.[191] The Supreme Court has stated that the employer's proffered reasons for the BFOQ cannot be some idiosyncratic preference of the employer but must be specifically related to the employee's ability to do the job and accomplish the "essence" of the business.[192] Courts have taken great pains to make sure that this exception is very limited, and the tests commonly used by courts do not on their face appear to be directly applicable to sex differentiation in appearance standards. For example, a commonly used standard is that an employer must show that it has "reasonable cause to believe that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved" or that it would be "impossible or highly impractical to deal with women on an individualized basis."[193] This standard does not fit an appearance standard well, because in the situation of an appearance standard the employer is not claiming that either sex can or cannot perform the job better or worse. Rather, the expressly discriminatory conduct relates to

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190 *See, e.g.,* Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1088 (5th Cir. 1975) (en banc) ("Since we agree with the district court that Macon Telegraph's dress and grooming policy does not unlawfully discriminate on the basis of sex, the applicability of the B.F.O.Q. exception will not be considered in this opinion.").

191 *See* Int'l Union v. Johnson Controls, 499 U.S. 187, 201 (1991) ("The BFOQ defense is written narrowly, and this Court has read it narrowly. . . The wording of the BFOQ defense contains several terms of restriction that indicate that the exception reaches only special situations.").

192 *Id.*

193 *See* Harris v. Pan Am. World Airways, Inc., 649 F.2d 670, 676 (9th Cir. 1980).

employees of each sex presenting themselves in line with some level of societal expectation.

Of particular importance to appearance standards is the determination made by both courts and the Equal Employment Opportunity Commission (EEOC) that mere customer preference is not a sufficient reason, or even a relevant consideration, for a BFOQ defense.[194] In most contexts, this standard makes complete sense. If customer preference was a valid consideration for BFOQ, sex discrimination would be easily justifiable for many businesses. For example, as has been tried in the past, airlines could defend a policy of not allowing female flight attendants to be married by arguing "Most of our customers prefer being served by beautiful single women."[195] This would obviously undermine the anti-discrimination goals of Title VII.

Although this prohibition on considering customer preference makes sense in most contexts, it causes problems when applied to appearance standards. The primary business driver for most, if not virtually all, employer appearance standards is customer preference. In most situations, the employer has determined that it wants its employees to appear a certain way to satisfy or entice customers. Considering and satisfying customer preferences is something every business has to do, and thus considering these preferences should not immediately be discounted as an invalid practice on its face. As previously discussed, customer preferences at their extremes can certainly serve as an excuse for employers to undermine the anti-discrimination purpose of Title VII.[196] However, some customer preferences reflect the valid interests of the customers that employers need to be able to fulfill as a matter of business practice.

Courts have tacitly acknowledged that this is the case by acknowledging at least one situation where customer preference is a relevant consideration to the BFOQ defense.[197] Several lower courts

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194 *See* 29 C.F.R. § 1604.2 (a)(iii) (2020) (stating that the preferences of customers, coworkers, clients, or the employer will not warrant application of the BFOQ exception); *see also* Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1277 (1981) (holding that customer preference cannot be a BFOQ); *see also* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (holding that a customer preference for female stewardesses cannot provide a justification for a BFOQ defense).

195 *See, e.g.,* Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1199 (7th Cir. 1971) (holding that United Airlines policy of requiring female flight attendants to be single violated Title VII, and that customer preference could not serve as valid basis for a BFOQ).

196 *Id.*

197 Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971)

have held that sexually-based privacy interests are a customer preference that will be considered legitimate with respect to a BFOQ.[198] For example, courts have held that a business could expressly hire only female or male employees for positions that would require intimate contact or exposure to nudity of customers.[199] This is, at its core, a customer preference. Because of societal norms, most individuals are not as comfortable being nude or being personally touched by someone of the opposite sex as they are of someone of the same sex. Courts have acknowledged this customer preference as valid and permitted employers to consider it in hiring decisions.[200] Just as with appearance standards, this customer preference is purely rooted in societal norms of sexuality. However, a customer preference in appearance seems to be a much less important justification than the intimate contact associated with this privacy interest line of cases. Nevertheless, these cases serve as an example of how customer preference can be a legitimate consideration under Title VII.

In some situations, like those requiring sexualized attire for female employees to appeal to customers, it is easy to see how mere customer preference undermines the purpose of Title VII.[201] In other situations, such as with the earlier example of the law firm, the customers' preference for professional attire that comports with generally accepted societal norms seems to, at least conceptually, fit more comfortably within the BFOQ exception of Title VII. This is particularly the case when the standard between male and female employees is neither sexualized nor more burdensome for one sex than the other. But given the current state of the case law that focuses on narrowly interpreting the BFOQ exception and not considering customer preference, it is not clear when employers would be allowed to consider customer preference with respect to appearance standards. The author argues that courts will need to develop new standards for the BFOQ exception in this area, as the current BFOQ case law does not adequately address employer concerns as they relate to appearance

198 *See* United States EEOC v. Sedita, 816 F. Supp. 1291 (N.D. Ill. 1993) (holding that privacy interests of members of an athletic club could be a valid customer preference justifying hiring only female employees, and noting numerous other courts have held the same).

199 *Id.*

200 *Id.*

201 The exception here would be the business that is expressly sexual in nature, such as a legal strip club. In that case, sexualized dress is clearly part of the "essence" of the business enterprise.

standards. Next, this Article will provide a suggested standard for courts to use when applying the BFOQ exception to sex-differentiated appearance standards.

B. *Tailoring the Bona Fide Occupational Qualification Exception for Appearance Standards*

As previously discussed, the *Bostock* opinion is predicated on a very literal reading of Title VII.[202] If this very literal interpretation of Title VII is now the new norm, then to address the proper meaning of BFOQ in the context of sex-differentiated appearance standards, the statutory standard for the BFOQ defense should be the starting point. The text of Title VII expressly allows for the consideration of religion, sex, or national origin in employment decisions when they are "reasonably necessary to the normal operation of that particular business or enterprise."[203] As previously noted, the Supreme Court has stated that this exception should be interpreted narrowly.[204] However, even if interpreted narrowly, the statutory text says what it says. It states that the classification need only be "reasonably necessary," not "absolutely necessary" or the "least intrusive possible manner," to accomplish the "normal operations" of the business.[205]

Accordingly, the author argues that there is no reason rooted in the statutory text of Title VII to interpret the BFOQ exception as narrowly as some courts and commentators, and even the EEOC, have. The text of Title VII does not expressly preclude consideration of customer preference with respect to the BFOQ.[206] Nor does the statutory text expressly preclude companies from consideration of issues like business profits or efficiency of operations like some commentators have suggested.[207] Certainly the term "reasonably necessary" should preclude sexualizing female workers' dress simply because it might help the business gain a little more profit.[208] Conversely, however, there is no reason for the term to preclude the con-

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202 *See* supra Part I.B.

203 CIVIL RIGHTS ACT, TITLE VII, 42 U.S.C. § 2000e-2(e)(1) (2020).

204 *See* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991).

205 42 U.S.C. § 2000e-2(e)(1) (2020).

206 *Id.*

207 *See* Bayer, *supra* note 100, at 438 (stating "BFOQs do not concern business practices that may be lawful, even rational in a business sense, such as maximizing profits or enhancing efficiency.").

208 *Id.*

sideration of profit to some extent, as profits are "reasonably necessary" to a business's existence.

The most reasonable solution, which honors both a literal reading of the statutory text as well as the realities of business decision making, is for the courts to employ a flexible test that incorporates all of the evidence available in a particular case to determine whether or not the employer's appearance standard is "reasonably necessary to the normal operation" of the business.[209] A previous commentator has advocated such an approach with respect to Title VII discrimination in general, calling it a "totality of the circumstances" approach.[210] Although the author disagrees that such an approach is appropriate with respect to all discrimination claims under Title VII, a broad, flexible approach works well in the context of the BFOQ exemption and appearance standards.

Under such an approach, the process of a sex-differentiated appearance standard case would be different than under the current case law, although in many cases, the result could admittedly be the same. As previously discussed, under current case law the employee bears the burden of proving that the appearance standard either creates an unequal burden for one sex and not the other, or that it consists of impermissible sex stereotyping, typically sexualization of women.[211] As post-*Bostock* such a requirement appears to be facially invalid, to have a prima facie case of discrimination an employee should be required to plead and prove nothing more than that the employer had a policy that required different appearance standard for each sex.[212] Once the employee has met this very low burden, the burden would then be on the employer to establish its BFOQ defense. Under the flexible test advocated for in this Article, the employer would then be allowed to produce the evidence it had available to argue that the sex-differentiated appearance standard used by the employer was "reasonably necessary to the normal operation" of the employer's business.[213] Such an analysis should be multifactored and

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209 42 U.S.C. § 2000e-2(e)(1) (2020).

210 *See* Mark R. Bandsuch, *Dressing up Title VII's Analysis of Workplace Appearance Policies*, 40 COLUM. HUM. RTS. L. REV. 287, 304 (2009) ("The totality of the circumstances" framework combines disparate treatment and disparate impact theories into a more comprehensive, yet simplified, analytic framework; it weighs the harm to the protected employee against the business justification of the employer.").

211 *See supra* Part II.

212 *See supra* Part III.A.

213 42 U.S.C. § 2000e-2(e)(1) (2020).

take into account the idiosyncrasies of the business at issue. Notably, this meshes with a literal reading of Title VII which states that the BFOQ defense takes into account the "normal operation of that particular business or enterprise."[214] Under this approach, the court should consider evidence related to exactly what the statute calls for—whether the appearance standard is reasonably necessary and whether it is related to the normal operation of the business. This evidence should be examined by the court as part of a three-part analysis: (1) What is the nature of the business at issue? (2) Does the appearance standard bear a reasonable relationship to the carrying on of the business, and if so, how strong is this relationship? and (3) If the necessity of the appearance standard is based upon customer preferences, are the preferences rooted in harmful stereotypes or normal, reasonable societal expectations?

1. What is the nature of the business at issue?

As the statute calls for the consideration of the "normal operation of that particular business or enterprise," this first step of the analysis is critically important.[215] Different businesses obviously might have different reasonable needs related to dress. For example, a casino operating in Las Vegas that is providing entertainment to an adult clientele should have a larger "zone of reasonableness" surrounding how it expects its employees to appear. If part of the business's "normal operation" is to entertain adult patrons, then the business should obviously have more discretion in controlling employee appearance, even if that includes a degree of sexualization. An appearance standard in this context might have a rather high degree of sex differentiation. However, a normal business office setting should reasonably have far less of a business interest in sex differentiation in dress for its employees.

214 *Id.*
215 *Id.*

2. Does the appearance standard bear a reasonable relationship to the carrying on of the business, and if so, how strong is this relationship?

This step is related to the "reasonably necessary" prong of the statute.[216] The company should be able to articulate some reason, accompanied by evidence, that the appearance standard is reasonably necessary for the carrying on of the business. With respect to this prong, evidence of customer preference should be allowed. As previously noted, customer preference is not expressly precluded by the text of the statute.[217] And when considering appearance standards, outside of clothing requirements for safety in hazardous occupations, employer appearance standards will almost always be related to some customer preference or attempt to make the business and its employees appealing to customers. To return to the example of a law firm, the reason for having a professional appearance standard for trial and client meetings would be due to the expectations of customers, and courts, with respect to professional appearance. And to some degree, these expectations will have a component of sex differentiation.

Take, for example, a professional appearance standard. Even if the employer gives a high degree of flexibility to employees with respect to more traditionally masculine or feminine dress, there will almost always be some restrictions based upon sex differentiation (whether expressly spelled out or through practical enforcement). For example, a female employee wearing a sleeveless blouse or dress would likely be considered appropriately attired for many professional settings. A male employee almost certainly would not. Because of the requirements of some courtrooms, men might be required to wear a jacket and tie, but women would not.[218] One simple but often overlooked sex distinction in dress is undergarments. It would seem to be manifestly reasonable for a professional business to discipline or fire a female employee who insisted on wearing a white

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216 *Id.*

217 *Id.*

218 *See, e.g.,* United States Bankruptcy Court, Western District of Texas, *Courtroom Attire,* https://www.txwb.uscourts.gov/courtroom-attire#:~:text=%22Courtroom%20attire%20should%20be%20restrained,the%20United%20States%20Bankruptcy%20Court.&text=professional%20attire%20for%20women%20is,at%3A%20Rule%20AT%2D5, (requiring male attorneys to wear a "suit or blazer/jacket and tie" but allowing women to wear a "suite, blazer/jacket, conservative dress, or comparable professional attire") (last accessed October 2, 2020).

blouse without a brassiere in a professional setting but to have no such requirement for male employees.

The reason for such a sex-based distinction between employees is at its core rooted in societal expectations related to dress. If an employer's customers hold these societally-based distinctions, and if the employer can show that it is reasonably necessary to follow these societal norms to carry on business effectively, this should be considerable under the BFOQ defense. Again, the text of Title VII states that the BFOQ exception just requires that the employer policy is "reasonably necessary," not "absolutely necessary."[219] Even if this exception is construed narrowly, this should allow the employer a degree of deference in how to carry on its own business in these matters.

What should not be allowed under the BFOQ exception is a sex-based appearance standard that simply reflects the personal preferences or biases of the employer and is not specifically tied to the carrying on of the business. Employer personal preferences related to dress that are not related to a protected class are not within the ambit of Title VII and thus are clearly allowed.[220] However, once a protected class is implicated, Title VII does expressly state that the policy has to be reasonably related to the carrying on of business.[221] Thus, employers should be required to provide evidence that the sex-based distinction at issue is rooted in some business-related reason and not just how the employer prefers to see employees attired.

Once it is established that the appearance standard is reasonably related to the carrying on of business, the next question under this prong is how strong that relationship is. How necessary is the appearance standard to the effectiveness of the business? As with the other factors laid out herein, this is not a clear "black and white" standard, but rather should be seen as a sliding scale. To return to the example of the law firm, if a firm has a professional dress standard that requires male employees to wear a tie to court, this standard should be given a high degree of deference if the firm routinely practices in a court that requires this as a part of its rules of practice. This appearance standard has a high level of necessity for the business. However,

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219 *See* 42 U.S.C. § 2000e-2(e)(1) (2020).

220 *See* Jespersen v. Harrah's Operating Company, Inc., 444 F.3d 1104, 1109-10 (9th Cir. 2006); *see also* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1732 (2020).

221 *See* 42 U.S.C. § 2000e-2(e)(1) (2020).

a professional firm that just requires male employees to wear a tie for client meetings based upon firm preferences related to professional appearance would be given a lower degree of deference.

3. If the necessity of the appearance standard is based upon customer preferences, are the preferences rooted in harmful stereotypes or normal, reasonable societal expectations?

Although customer preferences should be considerable for purposes of the BFOQ exception, it is clear that not all customer preferences should be given the same level of deference. Courts have expressly and consistently held that Title VII is intended to cover stereotypical assumptions about differences between men and women's capabilities and preferences.[222] Thus, it seems clear that customer preferences that are rooted in stereotypical assumptions should typically not be given the same deference under the BFOQ exception as more neutral customer preferences that are not based upon traditional stereotypes, particularly those related to the capability to do a job or overtly sexualizing a particular sex. Although this line can admittedly be blurry and can require a fairly high degree of judgment by courts in some cases, the author argues that this determination must be made to make the statutory determination of whether the policy is "reasonably necessary" to the operation of the business.[223]

For example, a professional appearance standard might allow, but not require, women to wear skirts and dresses at work, but prohibit men from doing so. Although this would be a distinction based upon sex, it does not perpetuate any type of harmful sexual stereotype about men or women. Rather, it simply allows women to wear clothing that our society, including the customers of the business, deems appropriate professional attire for women but not for men. Another example would be color in clothing. Our society generally deems it

222 *See, e.g.,* City of Los Angeles, Dept. of Water and Power v. Manhart, 435 U.S. 702, 707 (1978) ("There are both real and fictional differences between women and men. It is true that the average man is taller than the average woman; it is not true that the average woman driver is more accident prone than the average man. . . It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.").

223 *See* 42 U.S.C. § 2000e-2(e)(1) (2020).

acceptable for women to dress in a much broader color palette than men in professional settings. A female attorney in a green suit or dress appearing in court would not be considered out of place. A male attorney in a green suit likely would. However, this difference in norms related to the color of clothing does not perpetuate any sort of harmful stereotype between the sexes. Differences such as these should be given more leeway to be considered "reasonably necessary" under a BFOQ exception because they are not inherently harmful. An employer might have a male employee who would like to wear a green suit to work, but it is difficult to argue that not allowing the employee to do so is in any way requires the employee to be more stereotypically "masculine" or "feminine." Nor does it seem reasonable, or required under Title VII, to not allow women to dress in a broader array of colors simply to make sure they are treated exactly like men in a fairly trivial matter.

Conversely, there are differences in dress that should be harder to justify under a BFOQ exception. For example, a requirement, rather than just an allowance, that women wear skirts and dresses rather than pants is far more problematic. Such a requirement is rooted in, at best, stereotypical notions regarding feminine appearance, and, at worst, sexualization of women. The same can be said for requiring women to wear high heeled shoes. Such a requirement should require a much higher level of scrutiny related to job necessity to be justified under a BFOQ defense. Notably, however, it should still be possible for such a requirement to meet muster under a BFOQ defense for certain types of business. Take, for example, the previously mentioned casino catering to adult entertainment. Such a business might require waitresses to wear high heels and short skirts as part of the overall entertainment image of the business. The BFOQ exception might encompass such an appearance standard, depending upon how necessary appealing to sexual appetites is to the casino's business.[224] In such a situation, sex appeal is part of the product being offered by the business, and a broader scope of sexual stereotyping or

[224] *See, e.g.,* Wilson v. Southwest Airlines Co., 517 F.Supp. 292, 301 (U.S.D.C. N.D. Tex., 1981) (discussing the BFOQ as related to sex and customer preference, and noting "Similarly, in jobs where sex or vicarious sexual recreation is the primary service provided, e.g. a social escort or a topless dancer, the job automatically calls for one sex exclusively; the employee's sex and the service provided are inseparable. Thus, being female has been deemed a BFOQ for the position of a Playboy Bunny, female sexuality being reasonably necessary to perform the dominant purpose of the job which is forthrightly to titillate and entice male customers.").

sexualization of dress should be allowed.[225] This would seem to clearly be the case for an even more overtly sexual business, such as a strip club.[226] For a non-sexually-based business, customer preferences based upon sex-based stereotypes should be disqualifying for the BFOQ exception.

Admittedly, this approach will not yield clear results in all cases. For example, what about appearance standards that require make-up for women but expressly disallow men from wearing makeup, as in *Jespersen*?[227] Rather than simply showing that the appearance standard did not impose an unequal burden on female employees,[228] under the BFOQ standard proposed in this Article the employer would be required to make a stronger case that the make-up requirement is reasonably necessary to the carrying on of business. Based upon the facts outlined in *Jespersen*, Harrah's Casino would likely have a difficult time meeting this burden.[229] Although the business at issue was a casino catering to adult clientele, nothing in the case indicates that Harrah's was attempting to create a sexualized atmosphere as part of its brand.[230] Additionally, Ms. Jespersen was working behind the bar rather than serving drinks, so arguably her level of interaction with customers would be less related to brand image than that of the waitresses.[231] And requiring make-up is an appearance standard that blurs the line between being rooted in stereotypes or sexualizing females and basic societal expectations about appearance. However, Harrah's would certainly have the opportunity to make its case that the BFOQ exception applies, although the outcome would not be clear.

Given the panoply of sex-based appearance standards employers might use, it is virtually impossible to devise a BFOQ standard that provides a clear standard in every case. The author argues that the standard outlined in this Article is at least reasonably tailored to give employers flexibility in designing appearance standards while still providing a reasonable standard for determining whether the appearance

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225 *Id.*

226 *Id.*

227 *See* Jespersen v. Harrah's Operating Company, Inc., 444 F.3d 1104, 1106 (9th Cir. 2006).

228 *Id.* at 1110.

229 *Id.* at 1105-06.

230 *Id.*

231 *Id*

standard will pass muster. Most importantly post-*Bostock*, the standard follows the literal wording of the statute.

C. *Transgendered Employees and Appearance Standards*

An important question to answer post-*Bostock* is how sex-based appearance standards should apply to transgendered employees or other employees who do not neatly fit within the male or female sex categories. Most employer appearance standards that are sex-differentiated will likely be based upon male and female categories given that this is how most employees will identify and how most societal expectations regarding dress have developed. The simple answer appears to be that transgendered employees must be allowed to follow the appearance standard with respect to the gender they identify as. Because *Bostock* includes transgendered individuals within the protected class of "sex" under Title VII, it's difficult to make the argument that an employer could require a transgendered employee to dress in accordance with their biological gender as opposed to the gender they identify as.[232] The more difficult question is the employee who might identify as both male and female but at different times, or who the employer suspects of falsely claiming to identify as a particular gender. These are issues that are not clearly addressed by Title VII or existing case law, and that courts may have to confront in the future.

CONCLUSION

Although the *Bostock* opinion does not directly address sex differentiation in appearance standards, the logic that it uses to conclude that Title VII applies to transgendered and homosexual employees necessitates a rethinking of the existing Title VII case law that generally allows sex differentiation in employer appearance standards. This Article has made the case that Bostock impliedly overrules these cases. However, given the societal norms surrounding differences in dress and appearance between the sexes, employers should be allowed to have a degree of sex differentiation in their appearance standards. Courts can and should provide this flexibility to employers by applying the BFOQ exception of Title VII in a reasonable but statutorily

232 *See* Bostock v. Clayton Cty, 140 S. Ct. 1731, 1754 (2020).

appropriate way, as set out in this Article. By doing so, Title VII's goal of protecting the dignity and employment prospects of employees of different sexes can be achieved, while also respecting the needs of employers in managing their businesses.