THE STRAINED RELATIONSHIP BETWEEN HAIR DISCRIMINATION AND TITLE VII LITIGATION AND WHY IT IS TIME TO USE A DIFFERENT SOLUTION

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ABSTRACT

The Civil Rights Act of 1964 was supposed to create ultimate protections against racial discrimination in the workplace, but the reality is that it has been a far from perfect solution. Minority groups across the United States still face significant barriers to employment, with African Americans in particular facing employment discrimination because of the personal choice of whether or not to wear their natural hair. For decades, African Americans have been denied from working opportunities and fired from held positions for wearing their hair naturally. Despite early decisions providing protections for Afros, courts have recently been unwilling to apply Title VII race protections to cases involving natural African American hair. The Eleventh Circuit Court of Appeals in EEOC v. Catastrophe Management Solutions *used the immutability doctrine to withhold employment discrimination protections found in Title VII from natural African American hair discrimination. With not much current hope in the Court's ability to provide much needed protections for African Americans, it is time to turn to state legislation to get the job done. States like New York, New Jersey, and California have all established protections for this type of racial discrimination in ways that the courts have been unable or unwilling to do up until this point. The CROWN Act has taken the United States by storm, and it avoids the biggest pitfalls that have prevented the extension of Title VII protections against race discrimination for traditional African American hairstyles. Although the Supreme Court has not made a ruling on this specific topic, it is clear that the lower courts have significant problems with providing these protections through Title VII, and it is time to change the focus of the conversation to provide protections through state legislation instead.*

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INTRODUCTION

In 2018, Andrew Johnson was a high school sophomore who prepared for what he thought would be a normal high school wrestling match. Instead, what Andrew experienced that day would spark national debate and outrage not specifically about wrestling, but about the way he wore his hair.[1] Before Johnson could wrestle his match, the referee gave him a grim choice: Johnson's hair did not conform to the rulebook so he had to forfeit the match or cut his dreadlocks off.[2] Johnson ultimately chose to cut his hair so that he could play this match, and not very long after a video of a white trainer cutting off his dreadlocks swept across the nation.[3] The incident sparked national outrage about racial discrimination in sports with New Jersey Governor Phil Murphy stating: "No student should have to needlessly choose between his or her identity and playing sports."[4] The ACLU echoed the statements from the Governor, releasing a statement that read: "This is not about hair. This is about race. How many different ways will people try to exclude Black people from public life without having to declare their bigotry?"[5]

For Andrew Johnson, his natural dreadlocks meant he had to choose between his identity and participating in his high school wrestling match. There is no doubt that this was a difficult decision for Andrew, but unfortunately for many others the situation has more dire implications. African Americans have to make analogous difficult decisions about whether to keep their natural hair or cut it so they can get a job. This Note explores the different avenues that can be used to protect against race discrimination based on natural African American hair. Part I will explore the historical context of this problem within the United States, including the statutory origins for racial discrimination protections in Title VII, the history of racial hair discrimination in the United States, and the lengths African American men and women must go through to conform to the expectations of white corporate America. Part II looks into the common law development in hair discrimination cases. Part II.A looks at early protective development in the analysis of natural hair cases in case law. Part II.B details the arguments in *EEOC v. Catastrophe Management Solutions* which regresses from the initial protective stances described in Part II.A. Part III explores recent efforts in New York, New Jersey, and California to pivot away from judicial solutions towards state statutory protections against racial discrimination based on natural African American hair. This Article argues that the state legislation solutions used by New York, New Jersey, and California can more quickly provide employment

1. *See* Jacob Bogage, *A White Referee Told a High School Wrestler to Cut His Dreadlocks or Forfeit. He Took the Cut*, WASH. POST (Dec. 22, 2018, 1:36 PM), https://www.washingtonpost.com/sports/2018/12/21/referee-high-school-wrestler-cut-your-dreadlocks-or-forfeit/.

2. *See id.*

3. *See id.*

4. *Id.*

5. *Id.*

protections for African Americans rather than waiting for a solution from the courts.

I. THE STATUTORY AND CULTURAL BACKGROUND

A. Title VII of the Civil Rights Act of 1964

Currently, there is no federal law that protects against appearance discrimination, and that is why instead many people have turned to seek protections under Title VII of the Civil Rights Act of 1964. Title VII was the first act of Congress to expressly prohibit certain types of workplace discrimination.[6] The Act makes it illegal for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[7]

The creation and implementation of Title VII largely came as a backlash response to disproportionately high levels of African American unemployment in the 1950s and 1960s.[8] Before 1964, African Americans were largely limited to "unskilled and semi-skilled jobs,"[9] and yet those jobs were disappearing as a result of automation.[10] Title VII was crafted, at least in part, to address the problem of African Americans being pushed out of the

6. Courts have interpreted Section 1981 of the Civil Rights Act of 1866 to prohibit intentional race and color discrimination in the employment context. *See* Johnson v. Ry. Express Agency Inc., 421 U.S. 454, 459–60 (1975); Jordan v. Whelan Sec. of Illinois, Inc., 30 F. Supp. 3d 746, 753 (N.D. Ill. 2014). However, Title VII goes beyond just racial discrimination and is not limited to intentional discrimination.

7. 42 U.S.C. § 2000e–2 (2018).

8. *See* United Steelworkers v. Weber, 443 U.S. 193, 202 (1979). "In 1947, the non-white unemployment rate was only 64% higher than the white rate; in 1962 it was 124% higher." *Id.* (citing 110 CONG. REC. 6547 (1964) (remarks of Sen. Humphrey)). *See also* Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 806 n.6 (1994) (citing 110 CONG. REC. 2556 (1964) (remarks of Congressman Cellar) ("You must remember that the basic purpose of Title VII is to prohibit discrimination in employment on the basis of race or color.")).

9. *Weber*, 443 U.S. at 202; 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey).

10. *See* 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey).

economy, or, as Senator Humphrey put it, to improve the lot of those who had been "excluded from the American dream for so long."[11]

Although at the time the statute provided many never-seen-before protections, it does have its limitations. The statute only provides protections for five different protected characteristics: race, color, religion, sex, and national origin.[12] Title VII does not protect anything that falls outside of those protected statuses. This generally means that appearance-based discrimination, such as discrimination based on how attractive you are, how thin you are, or what kind of shoes you wear, is not illegal. [13] Unless a convincing argument can be made that the appearance-based discrimination somehow falls into one of the five protected categories of Title VII, it will not afford any protections to the employee. Of course, this has led to cases arguing about whether or not certain types of discrimination fall within those five discrete categories.

The Supreme Court has interpreted Title VII to prohibit both intentional and unintentional discrimination. Intentional discrimination includes employment decisions that are consciously motivated by animus,[14] stereotypes,[15] and mere consideration of a protected classification.[16] Unintentional discrimination protections have developed out of a disparate impact theory of discrimination that was codified in 1991 in 42 U.S.C. § 2000e-2(k)(1)(A)–(C).[17] It covers employer policies that might be neutral on their face but disproportionately affect a certain protected status. For recoveries based on a disparate impact theory of discrimination, the plaintiff must demonstrate that: 1) a facially neutral employment practice causes a disproportionate impact on individuals who share the same religion, color, national origin, race, or sex; and 2) the covered employer fails to adopt a less discriminatory alternative that is job related and meets the employer's business needs.[18]

On the employer side, the statute creates an affirmative defense for companies, known as the Bona Fide Occupational Qualification (hereinafter "BFOQ") defense.[19] Under this exception, an employer may discriminate on

11. *Id.* at 6552; *Weber*, 443 US at 204.

12. 42 U.S.C. § 2000e–2 (2018). Protections against employment discrimination based on age and disability exist in separate laws codified as the Age Discrimination in Employment Act (29 U.S.C. §§ 621–633(a)) and Americans with Disability Act (42 U.S.C. §§ 12111–12117) respectively.

13. *See* Donna Ballman, *7 Ways You Can be Fired for Your Appearance—Legally*, AOL: JOBS (Feb. 20, 2013, 8:44 AM), https://www.aol.com/2013/02/20/appearance-discrimination/.

14. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973); Staub v. Proctor Hosp., 562 U.S. 411, 422 (2011).

15. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 256–58 (1989).

16. *See* Ricci v. DeStefano, 557 U.S. 557, 592–93 (2009).

17. 42 U.S.C. § 2000e-2(k)(1)(A)–(C) (2018). *See also* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

18. 42 U.S.C. § 2000e-2(k)(1)(A)–(C) (2018).

19. 42 U.S.C. § 2000e-2(e)(1) (2018).

the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ."[20] In order to qualify as BFOQ, the discrimination must relate to the ability to perform the duties of the job. The job qualification must relate to the "essence"[21] of the job or to the "central mission of the employer's business."[22] The Supreme Court has read the defense narrowly,[23] with employers finding success in cases where sex discrimination is necessary on the basis of safety[24] or for age discrimination in occupations where public safety is at risk, such as with pilots.[25] However, this legislatively created BFOQ can never apply to racial discrimination.[26]

Various courts have seen cases brought by African Americans seeking to classify employer regulation of natural hair as a form of racial discrimination in violation of Title VII.[27] As explained in the following Section, however, these efforts have been largely ineffective on the basis of judicial understanding of hairstyles as a mutable characteristic.[28]

B. Anti-Black Hair Sentiment in the United States is Nothing New

Black hair has never settled comfortably in mainstream American culture, and the root of that discomfort has very old origins. In the fourteen and fifteen hundreds in Western Africa, "hair was an integral part of a complex language system" that served as a marker of religion, social status, and regional loyalty.[29] During the forced transportation of African slaves to the New World, often times "their hair became matted with blood, feces, urine, sweat, tears, and dirt."[30] Some of the slave traders "referred to the slaves' hair as 'dreadful'" and thus dreadlock became a "commonly used word to refer to the locks that had formed during the slaves' long trips across the ocean."[31] When Africans were brought to the New World, many times the

20. *Id.*

21.Dothard v. Rawlinson, 433 U.S. 321, 333 (1977) (emphasis omitted).

22. W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 413 (1985).

23. *See* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991); *Dothard*, 433 U.S. at 332–337; Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 122–125 (1985).

24. *See Dothard*, 433 U.S. at 332–337; Harriss v. Pan Am. World Airways, Inc., 649 F.2d 670 (9th Cir. 1980).

25. *See Criswell*, 472 U.S. at 411.

26. *See* Miller v. Texas State Bd. of Barber Exam'rs, 615 F.2d 650, 653 (5th Cir. 1980).

27. *See* Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164 (7th Cir. 1976); Rogers v. Am. Airlines Inc., 527 F. Supp. 229, 232 (S.D.N.Y. 1981); EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1021 (11th Cir. 2016).

28. *See* Earwood v. Cont'l Se. Lines, Inc. 539 F. 2d 1349 (4th Cir. 1976).

29. AYANA D. BYRD & LORI L. THARPS, HAIR STORY: UNTANGLING THE ROOTS OF BLACK HAIR IN AMERICA 2 (St. Martin's Press 2001).

30. *Catastrophe Mgmt. Sols.*, 852 F.3d at 1022.

31. *Id.*

first thing their European capturers did to them was shave their heads as a step in erasing their African culture and identity.[32]

Once at the New World, hairstyles were still very important as they could demarcate important identity traits among different groups of slaves. In the 1700s, women who worked out in the fields commonly covered their heads in head-rags due to the harsh physical demands of their work.[33] On the other hand, slaves who worked in the house sometimes mimicked the hairstyles of their enslavers by wearing wigs or shaping their kinky hair to emulate them.[34] The identification powers of African hairstyles were not limited to those that were enslaved—freed slaves were also identified by different hairstyles. Laws like the Tignon Laws in New Orleans dictated that free slave women were required to wear a tignon, which was a kerchief that bound their hair to signify that they were members of the slave class.[35]

Even after emancipation, the African American community has had a complicated relationship with hair as beauty standards continued to favor lighter, straighter hair, and yet there were movements seeking to promote natural African American hair. At the end of the twentieth century, new hair-straightening combs allowed Black women to tame their hair to match white middle class standards.[36] Despite the fact that there are many tools that can be used to straighten African American hair, many women still choose to wear their hair naturally. Throughout the twentieth century there were various movements to embrace natural Black hair as beautiful,[37] but despite efforts to get African Americans themselves to embrace their natural hair, corporate America has not made similar movements.

Unfortunately, there are many examples of corporate America rejecting natural African American hair. Ashley Baker, a white, former associate editor of the magazine Glamour, told a room full of female attorneys that Afro-styled hairdos and dreadlocks were Glamour "don't's" and that their political hairstyles really had to go.[38] Carl Dameron, an African American owner of a public relations firm, "told his [B]lack female employees that outside of

32. *See* AYANA D. BYRD & LORI L. THARPS, HAIR STORY: UNTANGLING THE ROOTS OF BLACK HAIR IN AMERICA 4, 10 (St. Martin's Press 2001); Brenda A. Randle, *I Am Not My Hair; African American Women and Their Struggles with Embracing Natural Hair!*, 22 RACE, GENDER & CLASS J. 114, 117 (2015).

33. *See* Chanté Griffin, *How Natural Black Hair at Work Became a Civil Rights Issue*, JSTOR DAILY (July 3, 2019), https://daily.jstor.org/how-natural-black-hair-at-work-became-a-civil-rights-issue/; Randle, *supra* note 32, at 117.

34. *See* Cheryl Thompson, *Black Women, Beauty, and Hair as a Matter of Being,* 38 WOMEN'S STUD. 831, 833 (2009).

35. *See* Donald E. Everett, *Free Persons of Color in Colonial Louisiana*, 7 J. LA. HIST. ASS'N 21, 34 (1996); Griffin, *supra* note 33.

36. *See* Griffin, *supra* note 33.

37. *See id.*

38. Tania Padgett, *Having Ethnic Hair in Corporate America*, DAILY HERALD (Dec. 16, 2007), https://www.heraldextra.com/lifestyles/having-ethnic-hair-in-corporate-america/article_4e4d5272-71f4-552e-b563-e90dd82e442d.html.

short-cropped Afros, most ethnic hairstyles are a 'no-no' in his office."[39] Every day African-American men and women face the pressure of taming their hair to make themselves have a "professional" look,[40] with African American women being almost twice as likely as white women to experience social pressure at work to straighten their hair.[41] Joan Williams, founding director of the Center for WorkLife Law and distinguished professor of law at U.C. Hastings, explained that "[i]t's taken time for white people to recognize that African Americans have to self-edit in a way that is, in addition to and on top of, the ways that all of us have to self-edit to keep our jobs."[42]

C. The Physical Characteristics of African-American Hair and the Process of Changing Them To Conform to White Corporate American Standards

White corporate America believes that a conservative and professional look means straightening African American hair, which has resulted in a billion-dollar industry based on the manipulation of natural African American hair. For decades, employers have told African American employees and applicants that their natural hair would not be allowed in the workplace. African American women are consistently told that their naturally textured hair is "'messy,' 'unkempt,' 'dirty,' and 'unprofessional.'"[43] This perception combined with the aforementioned historical rejection of natural African American hair has led to an American opinion that "Good Hair" is hair that is "wavy or straight in texture, soft to the touch, has the ability to grow long, and requires minimal" treatments or products.[44] Good hair does not resemble natural African American hair.

This idea persists even today, with white women rating textured hair as "'less beautiful,' 'less sexy/attractive,' and 'less professional than smooth

39. *Id.*

40. *See generally* Renee Henson, Comment, *Are My Cornrows Unprofessional?: Title VII's Narrow Application of Grooming Policies, and its Effect on Black Women's Natural Hair in the Workplace*, 1 BUS., ENTREPRENEURSHIP & TAX L. REV. 521 (2017); Padgett, *supra* note 38; Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L. J. 1079 (2010).

41. ALEXIS MCGILL JOHNSON, ET AL., PERCEPTION INSTITUTE, THE "GOOD HAIR" STUDY: EXPLICIT AND IMPLICIT ATTITUDES TOWARDS BLACK WOMEN'S HAIR 1, 12 (Feb. 2017), https://perception.org/wp-content/uploads/2017/01/TheGood-HairStudyFindingsReport.pdf.

42. Nicquel Terry Ellis & Charisse Jones, *Banning Ethnic Hairstyles 'Upholds This Notion of White Supremacy.' States Pass Laws to Stop Natural Hair Discrimination*, USA TODAY (Oct. 14, 2019, 2:20 PM), https://www.usatoday.com/story/news/nation/2019/10/14/black-hair-laws-passed-stop-natural-hair-discrimination-across-us/3850402002/.

43. D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in* EEOC v. Catastrophe Management Solutions, 71 U. MIAMI L. REV. 987, 990 (2017); Randle, *supra* note 32, at 116.

44. JOHNSON, *supra* note 41, at 2.

hair.'"[45] This pressure has taken its toll on those that do not match that strict archetype, with Black women feeling more anxiety about their hair and more pressure to straighten it at their workplace.[46] A recent Dove study found that "[a] Black woman is 80% more likely to change her natural hair to meet social norms or expectations at work[,]" and that "Black women are [50%] more likely to be sent home or know of a Black woman sent home from the workplace because of her hair."[47]

Straightening natural Black hair is not as easy as just taking fifteen minutes in the morning to straighten it with a straightening iron. Black women and men's hair is not naturally straight; "[i]t is tightly coiled into tiny curls."[48] It has a shape and composition different from other races, and it makes it so that Black hair is more fragile and prone to breakage than other types of hair.[49] Repeated manipulation or chemical treatment of this kind of hair can be physically damaging to both the hair and scalp. Pulling back natural hair into pony tails, or straightening the hair either chemically or with heat can cause conditions such as trichorrhexis nodosa and traction alopecia.[50] Trichorrhexis nodosa occurs because of manipulation and tension in Black hair that causes the hair to dry and break.[51] Traction alopecia results from years of using hairpieces and hairstyles that exert tension on the hairs along the perimeter of the hairline, causing coarse hair to disappear from follicles leaving only peach fuzz.[52] Medical harm might even go beyond just scalp harm; a 2012 study published in the American Journal of Epidemiology found a correlation between the use of hair relaxers and an increase in uterine fibroids, which disproportionally impact Black women.[53] In order to combat these medical conditions, Black women often wear their hair in what are

45. Karen Grigsby Bates, *New Evidence Shows There's Still Bias Against Black Natural Hair*, NPR (Feb. 6, 2017, 6:01 AM), https://www.npr.org/sections/codeswitch/2017/02/06/512943035/new-evidence-shows-theres-still-bias-against-black-natural-hair.

46. *See* JOHNSON, *supra* note 41.

47. *The Crown Act: Working to Eradicate Race-Based Discrimination*, DOVE, https://www.dove.com/us/en/stories/campaigns/the-crown-act.html.

48. *See* Onwuachi-Willig, *supra* note 40, at 1094.

49. *See* Venessa Simpson, *What's Going on Hair?: Untangling Societal Misconceptions That Stop Braids, Twists, and Dreads from Receiving Deserved Title VII Protection*, 47 SW. L. REV. 265, 265 (2017). *See generally* Aline Tanus et al., *Black Women's Hair: The Main Scalp Dermatoses and Aesthetic Practices in Women of African Ethnicity*, 90 AN BRAS DERMATOL 450 (2015).

50. *See* Simpson, *supra* note 49, at 276–77. To learn more about the biological science behind Trichorrhexis Nodosa see Ana Maria Pinheiro, *Acquired Trichorrhexis Nodosa in a Girl: The Use of Trichoscopy for Diagnosis*, J. DERMATOLOGY AND CLINICAL RSCH. (2016).

51. *See* Simpson, *supra* note 49, at 276.

52. *See id.* at 277–78.

53. *See* Lauren A. Wise et al., *Hair Relaxer Use and Risk of Uterine Leiomyomata in African-American Women*, 175 AM. J. EPIDEMIOLOGY 432, 435 (2012).

known as "protective styles"; styles like braids, twists and dreadlocks that protect against harmful hair breakage that causes these conditions.[54]

Not only do Black women face health challenges when they straighten their hair, but they also face steep financial burdens. Straightening Black hair with a relaxer "costs approximately $60 to $300 for each full permanent or $40 to $100 for each touch-up in between full relaxers . . . ."[55] Either full relaxers or touch-ups occur every four to eight weeks or sooner.[56] The straightening of natural African American hair has led to a billion-dollar industry, one where black women "spend an estimated three times more than white women on hair care."[57] Each treatment Black women receive takes money and time out of their pockets for expenses that their white counterparts simply do not have to deal with.

For these reasons and many others, some Black women make the very personal decision to wear their hair naturally. Black women may choose to wear a natural hairstyle to "minimize or eliminate the physical and financial inconveniences that come along with wearing straightened hairstyles," for aesthetic reasons, as a form of racial pride, or to "challenge pervasive expectations and pressures to wear a straightened hairstyle."[58] Despite the fact that the decision is very complicated and personal, however, other considerations might take the decision out of their hands. The decision to wear hair naturally might cost people their jobs. Therefore, the pressure to fit into corporate America is so prevalent it can overcome financial or health-related considerations. As Robinson said in *The Politics of Hair*: "[C]orporate America isn't the only adversary of natural styles. Some Black institutions discourage the 'natural' look, believing it's best to prepare African Americans to blend into a majority-White corporate environment."[59]

II. THE BUMPY COMMON LAW HISTORY OF PROTECTIONS FOR NATURAL AFRICAN AMERICAN HAIR

A. Early Cases Create Smooth Edges for Natural Hair Protections

1. A Brush in the Right Direction: The Case of *Jenkins v. Blue Cross Mutual Hospital Insurance*

On June 8, 1971, Beverly Jenkins filed a charge with the Equal Employment Opportunity Commission (hereinafter "EEOC") accusing her

54. Simpson, *supra* note 49, at 266.

55. Onwuachi-Willig, *supra* note 40, at 1114.

56. *Id.*

57. *Id.* at 1115.

58. D. Wendy Greene, *A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair*, 8 FIU. L. REV. 333, 359 (2013).

59. Lori S. Robinson, *The Politics of Hair*, THE CRISIS, Sept./Oct. 2006, at 9.

employer, Blue Cross Blue Shield, of discriminating against her on the basis of race or color.[60] Ms. Jenkins described her experience of discrimination as follows:

> I feel that I am being discriminated in the terms and conditions of my employment because of my race, Negro. I have worked for Blue Cross and Blue Shield approx. 3 years during which time I [had] no problem until May 1970 when I got my natural hair style. Later when I came up for promotion it was denied because my supervisor, Al Frymier, said I could never represent Blue Cross with my Afro.[61]

The Seventh Circuit Court said that Ms. Jenkins' description of her employer's racial discrimination "could hardly be more explicit" and that "[t]he reference to the Afro hairstyle was merely the method by which the plaintiff's supervisor allegedly expressed the employer's racial discrimination."[62] The court ultimately concluded "that the EEOC charge was sufficient to support the racial discrimination allegations of the complaint."[63] This decision echoed an earlier decision from the Fifth Circuit where "the court held that a charge alleging discrimination stemming from grooming requirements [that] applied particularly to black persons" did constitute "a sufficient charge of racial discrimination . . . ."[64] In this landmark case, the Seventh Circuit Court in *Jenkins* determined that Afros are protected under Title VII of the Civil Rights Act of 1964. However, this win would not last long. In terms of Title VII litigation, *Jenkins* has primarily been cited and used for its precedent related to the way discrimination charges are analyzed within an EEOC charge, instead of its protections for African American hair.[65]

2. Creating a New Part: *Rogers v. American Airlines*

The win for protections of natural African American hair found in *Jenkins* was unfortunately short lived. Only five years after the decision was made in *Jenkins* to protect Afros from discrimination, a decision made by the District Court of the Southern District of New York severely restricted those protections.[66] At the time this case came to court, Renee Rogers had been working as an American Airlines employee for approximately eleven years

60. Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164, 167 (7th Cir. 1976). The plaintiff did not put a check mark next to the box that read "Sex" on the EEOC charge form.

61. *Id.*

62. *Id.* at 168.

63. *Id.*

64. *Id.*; Smith v. Delta Air Lines, Inc., 486 F.2d 512, 516 (5th Cir. 1973).

65. *See* Preyer v. Dartmouth Coll., 968 F. Supp. 20, 24 (D.N.H. 1997); Williamson v. Bethlehem Steel Corp., 488 F. Supp. 827, 833 (W.D.N.Y. 1980); Kristufek v. Hussmann Foodservice Co., 985 F.2d 364, 368 (7th Cir. 1993).

66. *See* Rogers v. Am. Airlines Inc., 527 F. Supp. 229 (S.D.N.Y. 1981).

and wore her hair in cornrows.[67] While Rogers worked there, American Airlines had a policy that prohibited employees in certain employment categories from wearing an all-braided hairstyle.[68] While working there, it was suggested to Rogers that she pull her hair back in a bun and wrap a hairpiece around it during work hours.[69] Rogers filed a suit against her employer for sex and racial discrimination in violation of Title VII, among other civil rights laws.[70] Rogers alleged that the denial of the right to wear her hair in the cornrow style intruded on her civil rights and violated the Thirteenth Amendment, 42 U.S.C. § 1981, and Title VII.[71]

Rogers argued that the cornrow style "has been, historically, a fashion and style adopted by Black American women, reflective of cultural, historical essence of the Black women in American society."[72] The court, however, did not find this compelling. The court used the immutability doctrine to draw a line in the sand between hair texture on one side and hairstyles on the other. The court agreed with Rogers and *Jenkins* that an Afro/bush style might offend Title VII "because banning a natural hairstyle would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics."[73] However, the court saw braided hairstyles like cornrows as a completely different story. The court stated that all-braided hairstyles were "not the product of natural hair growth but of artifice . . . [which] is an 'easily changed characteristic' . . . ."[74]

The court reasoned that because the hairstyle can be changed and manipulated, it is not an impermissible form of discrimination.[75] In order for Rogers to win on her discrimination claim, she would have had to show that cornrows were "exclusively or even predominantly worn by black people[,]" however, the court reasoned that was not the case here because one white actress popularized the look in the film "10" which came out before Rogers

67. *Id.* at 231. It has been revealed that the accurate spelling of the plaintiff's last name is Rodgers. Greene, *supra* note 43, at 997 (citing Paulette M. Caldwell, *Intersectional Bias and the Courts: The Story of* Rogers v. Am. Airlines, RACE L. STORIES 571, 575 n.12 (Devon W. Carbado & Rachel F. Moran eds., 2008)). For the sake of clarity I will continue to use the spelling that the official case name has, which is Rogers.

68. *See Rogers*, 527 F. Supp. at 231.

69. *Id.* at 233.

70. *See id.*

71. *Id.* at 231.

72. *Id.* at 231–32.

73. *Id.* at 232.

74. *Id.*

75. *Id.* This reasoning can be found in many other cases as well. *See, e.g.*, Eatman v. United Parcel Serv., 194 F. Supp. 2d 256 (S.D.N.Y. 2002) (finding UPS's grooming policy requiring drivers to wear hats to cover "unconventional" hairstyles was not discriminatory because "locked hair" is not unique to African Americans); Pitts v. Wild Adventures, Inc., No. 06-CV-62, 2008 WL 1899306 (M.D. Ga. Apr. 25, 2008) (finding dreadlocks and cornrows are not immutable characteristics therefore a policy prohibiting those hairstyles is not discriminatory).

changed her hair.[76] Thus, the court concluded that the American Airlines braid policy had "at most a negligible effect on employment opportunity" and concerned "a matter of relatively low importance in terms of the constitutional interests protected by the Fourteenth Amendment and Title VII . . . ."[77]

The immutability doctrine used in *Rogers* has been applied in employment discrimination contexts for decades. It is based on the idea that traits such as race and national origin are determined solely at birth and cannot be changed; therefore, treating people differently based on those traits would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . ."[78] People cannot change their race, therefore it would be unfair to treat them differently because of it. In many cases it appears the court has operationalized this immutability distinction to draw a line in the sand between "corporeal" and "social" traits.[79] Courts have found things that are perceived as biological traits such as race, sex, and national origin are immutable and deserve protections,[80] yet cultural traits such as hairstyles can be changed and therefore are not afforded protection.[81]

However, scholars have criticized this theory as being "both over- and underinclusive[,]"[82] and, as with any line drawing test, it has problems with borderline cases that do not seem to fall neatly into either category. In recent years, some federal courts have suggested a changing understanding of what the immutability analysis should look like. Instead of a question of whether or not the characteristic could be changed, some federal courts have instead inquired into whether or not the trait is central or fundamental to one's identity.[83] That kind of inquiry may be persuasive when thinking about the

76. *Rogers*, 527 F. Supp. at 232.

77. *Id.* at 231.

78. Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

79. Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L. J. 485, 495 (1998).

80. *See Frontiero*, 411 U.S. at 686.

81. *See Rogers*, 527 F. Supp. at 232.

82. Yoshino, *supra* note 79, at 504. Yoshino further argues that the immutability doctrine inappropriately causes courts to focus on the question of whether or not one has the ability to assimilate or change, instead of focusing on whether or not assimilation in that context would be appropriate in the first place. *See also* Jessica A. Clarke, *Against Immutability*, 125 YALE L. J. 2 (2015).

83. *See* Latta v. Otter, 771 F.3d 456, 464 n.4 (9th Cir. 2014) ("We have recognized that '[s]exual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them.'") (quoting Hernandez-Montiel v. I.N.S., 225 F.3d 1084, 1093 (9th Cir. 2000)); Whitewood v. Wolf, 992 F. Supp. 2d 410, 429 (M.D. Pa. 2014) (holding that sexual orientation is "so fundamental to one's identity that a person should not be required to abandon [it]") (quoting *Hernandez-Montiel*, 225 F.3d at 1093); Bassett v. Snyder, 951 F. Supp. 2d 939, 960 (E.D. Mich. 2013) ("Even if sexual orientation were not immutable, sexual orientation is an integral part of personal identity.").

deeply personal ties African American men and women may feel to their hairstyles. Regardless of what inquiry you use the concepts are too amorphous and subjective to be able to say with any certainty that they would afford protections to hairstyles.

Although the decision in *Rogers* supported protections for natural African American hair found in *Jenkins*, it distinguished hairstyles using the immutability doctrine's "easily changeable" standard. Some have argued that this decision came as a result of the court's fundamental ignorance in both the symbolic role natural hair plays in the identity of African American women and the practical and technical requirements these types of braids entail.[84] Even if that is true, however, the analysis in *Rogers* stuck with the court and influenced their jurisprudence in relation to natural hair policies for years to come.

B. Backcombing: EEOC v. Catastrophe Management Solutions *Pulls Back on* Jenkins *Protections*

Chastity Jones filled out an online employment application for a customer service position at Catastrophe Management Solutions (hereinafter "CMS") in May of 2010.[85] CMS is an Alabama-based insurance claims processing company and Jones was applying to take calls made to the call center.[86] After sending in the online application, Jones and a few others were selected for an in-person group interview.[87] Jones wore a blue business suit with her hair in short dreadlocks to this interview.[88] At no point during the interview process did anyone say anything about Jones's hair.[89] Jones was hired for the position and met with Jeannie Wilson, the CMS human resources manager, to talk about a scheduling conflict Jones had with the completion of lab tests and paperwork that needed to be done before she could start work.[90]

Jones met with Wilson about this conflict and Wilson scheduled to have Jones take the tests on a different day.[91] Before Jones got up to leave from the meeting, Wilson asked her whether she had her hair in dreadlocks and Jones replied yes.[92] Wilson informed Jones that CMS could not hire her with her dreadlocks because "they tend to get messy, although I'm not saying yours are, but you know what I'm talking about."[93] The human resources manager told Jones about a male applicant who was asked by CMS to cut off his

84. *See* Greene, *supra* note 43, at 998–1002.

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

86. *See id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

dreadlocks in order to obtain a job with them.[94] When Jones said she would not cut off her dreadlocks for the position, Wilson told her CMS could not hire her, rescinded her employment offer, and asked her to turn her paperwork back in.[95] Jones did as she was told.[96] Although Jones was not informed by Wilson about it, at the time CMS had a grooming policy which stated that "[a]ll personnel are expected to be dressed and groomed in a manner that projects a professional and businesslike image while adhering to company and industry standards and/or guidelines . . . . [H]airstyle should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable . . . ."[97]

The EEOC filed a complaint on Jones's behalf alleging CMS's conduct constituted discrimination on the basis of Jones's race in violation of Title VII of the Civil Rights Act of 1964.[98] The complaint was filed in the United States District Court for the Southern District of Alabama.[99] The Alabama District Court granted CMS's motion to dismiss because they believed the EEOC "did not plausibly allege intentional racial discrimination by CMS against Ms. Jones."[100] The EEOC appealed the case up to the Eleventh Circuit.[101]

The EEOC complaint proceeded upon a disparate treatment theory of discrimination only.[102] They did not bring a claim under a disparate impact theory.[103] This was a big misstep on the EEOC's part, which ultimately led to their claim being dismissed. Bringing a claim under the disparate treatment theory requires the EEOC to prove that CMS *intentionally* discriminated against Ms. Jones because of her race.[104] In contrast, if the EEOC had brought a claim under the disparate impact theory, they would not have the burden of proving any discriminatory intent, they would just have to prove that the grooming policy had a disparate, adverse impact on African Americans generally.[105] The Eleventh Circuit points out that, throughout the EEOC's argument, they appear to conflate the two ideas,[106] which undoubtedly made their arguments less persuasive. In future litigation, the EEOC should focus their efforts on bringing disparate impact claims alongside their disparate treatment claims. The claims can be brought together, and it would give the

94. *Id.* at 1021–22.
95. *Id.* at 1022.
96. *Id.*
97. *Id.*
98. *Id.* at 1020.
99. *Id.*
100. *Id.*
101. *Id.* at 1021.
102. *Id.* at 1024.
103. *See id.*
104. *See id.*
105. *See id.*
106. *Id.*

EEOC the opportunity to bring in evidence on ways these types of grooming policies disproportionately affect African American populations. Bringing a disparate impact claim would also help the EEOC circumvent arguments about discriminatory intent. It would also relieve them of the tricky business of tying the discrimination specifically to race. Instead, the EEOC would just have to prove that there is a disparate impact on a specific race. Unfortunately, that is not what the EEOC did in this case and, therefore, the Eleventh Circuit did not address the EEOC's arguments that this grooming policy had disproportionate effects on Black job applicants.[107]

The EEOC complaint contained four arguments in favor of concluding CMS's action amounted to racial discrimination against Ms. Jones.[108] First, the EEOC stated that race "is a social construct and has no biological definition."[109] Second, the EEOC asserted, "the concept of race is not limited to or defined by immutable physical characteristics."[110] Third, the EEOC Compliance Manual stated the "concept of race encompasses cultural characteristics related to race or ethnicity" including "grooming practices."[111] Fourth, although some non-black persons "have a hair texture that would allow the hair to lock," the EEOC argued, "'dreadlocks are nonetheless a racial characteristic, just as skin color is a racial characteristic.'"[112]

The EEOC argued that the definition of race needs to be expanded beyond its current biological focus.[113] As the Eleventh Circuit acknowledges, in the last several decades there has been an increasing call to interpret Title VII more expansively to encompass cultural characteristics associated with race.[114] This frees the concept of race from the rigid interpretation of it born just by someone's ancestry or skin color. The EEOC hoped that the Eleventh Circuit would adopt this more expansive conceptualization of race so that CMS's prohibitions against locks fall under the protections afforded by Title

107. *See id.* at 1024–25.

108. *See id.* at 1022.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 1033.

114. *See id. See also* Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994) (defining "race" as "a vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry."); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1142 (2004) ("there is an urgent need to redefine Title VII's definition of race and ethnicity to include both biological, visible racial/ethnic features and performed features associated with racial and ethnic identity"); D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do With It?*, 79 U. COLO. L. REV. 1355, 1385 (2008) ("Race includes physical appearances and behaviors that society, historically and presently, commonly associates with a particular racial group, even when the physical appearances and behaviors are not 'uniquely' or 'exclusively' 'performed' by, or attributed to a particular racial group.").

VII because the hairstyle is associated with Blackness.[115] This more expansive view of race has been contemplated and used by the EEOC itself when making administrative decisions about race discrimination.[116] The Eleventh Circuit, however, did not find this argument convincing. The Eleventh Circuit was concerned that the definition of culture was too broad and fluid to be able to pin it down to a usable legal concept, and even if a definition could be picked there would be an interpretative battle as to which cultural traits should be protected.[117] Instead, the court doubled down on the immutability doctrine, deciding that Title VII more likely protects immutable characteristics as "a matter of birth, and not culture."[118]

This demarcation between immutable and mutable characteristics led the Eleventh Circuit to draw a line in the sand between hair texture and hair styles. The court affirmed the decision made in *Jenkins* that Black hair texture is an immutable characteristic, and Title VII prohibits discriminating on the basis of it.[119] On the other hand, the courts consider *hairstyles* a mutable choice; therefore, there are no Title VII prohibitions against it.[120] This argument is reminiscent of the demarcation between Afros and braids established in *Rogers*.[121] The court acknowledges "the distinction between immutable and mutable characteristics of race can sometimes be a fine (and difficult) one, but it is a line that courts have drawn."[122]

A part of the Eleventh Circuit's strict conception of race comes from its analysis of the meaning of "race" that was likely understood by those that worked to pass Title VII.[123] In choosing its more restrictive view of the term race, the court argues that "[t]here is little support for the position of the

115. *Catastrophe Mgmt. Sols.*, 852 F.3d at 1024–25.

116. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2006-1, QUESTIONS AND ANSWERS ABOUT RACE AND COLOR DISCRIMINATION IN EMPLOYMENT (April 19, 2006), https://www.eeoc.gov/policy/docs/qanda_race_color.html.

Title VII race discrimination "includes discrimination on the basis of ancestry or physical or cultural characteristics associated with a certain race, such as skin color, hair texture or styles, or certain facial features." Under "What is 'Race' Discrimination," the EEOC defines race discrimination based on physical characteristics as "[e]mployment discrimination based on a person's physical characteristics associated with race, such as a person's color, hair, facial features, height and weight." U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2006-1, SECTION 15 RACE AND COLOR DISCRIMINATION (April 19, 2006), https://www.eeoc.gov/policy/docs/race-color.html#N_15_.

117. *Catastrophe Mgmt. Sols*., 852 F.3d at 1033–34.

118. *Id.* at 1027. Some scholars argue the court's reliance on the immutability doctrine is "'legal fiction': a rule created by judicial, legislative, and political bodies, which is not based in fact, yet is treated as such in legitimating zones of protection and inclusion." Greene, *supra* note 43, at 1029.

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

120. *See id.*

121. *Id.*

122. *Id.*

123. *See id.* at 1028.

EEOC that the 1964 Congress meant for Title VII to protect 'individual expression . . . tied to a protected race.'"[124] In other contexts, however, the Supreme Court has been willing to read Title VII's protected categories expansively. In *Price Waterhouse v. Hopkins*, the Supreme Court expanded the conception of sex discrimination to include discrimination on the basis of sex stereotyping.[125] Similarly, although Congress did not originally conceptualize sex discrimination to include sexual harassment, in *Meritor Savings Bank, FSB v. Vinson* the Supreme Court held sexual harassment is a form of sexual discrimination covered by Title VII.[126] In *Oncale v. Sundowner Offshore Services*, the Supreme Court again expanded the conception of sex-based discrimination by including same-sex discrimination (discrimination of men by men).[127] In all of these cases, the Supreme Court stretched the concept of sex discrimination beyond the concept it held at the creation of Title VII. In *Oncale*, Justice Scalia shed some light on why the Supreme Court was doing this: "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[128]

If this logic were applied to race discrimination, it seems like the Court would be willing to expand racial discrimination to also protect against hair discrimination, a reasonably comparable evil. As stated earlier in this Note, Title VII was created to fight against the evil of creating barriers of entry into economic society for minorities, and hair discrimination perpetuates that same evil. It is clear that the Eleventh Circuit was not willing to apply that philosophy in *Catastrophe Management Solutions*, but it is unclear if that argument would be more successful at the Supreme Court.

The Eleventh Circuit's focus on the immutability doctrine and texture/style distinctions has kept African American hairstyles such as dreadlocks and braids outside of the protections of Title VII. Many scholars have criticized this line drawing as not recognizing the reality that society can mark someone's racial identity with more than just the traits they are born with, and that mutable characteristics have an important role to play in someone's racial identity.[129] There is a chance that in the coming years the courts will change their outlook on the meaning of race. We saw the Supreme Court's meaning of the idea of sex rapidly expand over the last few decades and if that philosophy gets applied in the racial context hair-based discrimination could receive Title VII protections. Because the Supreme Court of the United States denied certiorari on this case, however, the

124. *Id.* at 1027.

125. Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989).

126. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

127. Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998).

128. *Id.* at 79.

129. Greene, *supra* note 43, at 1024–25.

Eleventh Circuit's decision in *Catastrophe Management Solutions* is the precedent we currently have in this area.

II. TIME FOR A NEW 'DO: STATE STATUTES CAN FILL THE PART CREATED BY THE ELEVENTH CIRCUIT

Now that the Supreme Court denied certiorari for the *Catastrophe Management Solutions*, there will be no definitive ruling on the extent of race as a Title VII status as it relates to hair discrimination any time soon. For the foreseeable future, the circuits will be the ones to work that question out for themselves, and, as we have seen, certain circuits are sticking with the more restrictive view of race. In response, some states have passed their own state statutory reforms to protect against hair discrimination. This Section will show how states like New York, California, and New Jersey have led the charge to incorporate more inclusive racial protections into their civil rights statutes.[130]

A. New York Protections

New York City was the first place to make waves in the hair discrimination arena. In February of 2019, the New York City Commission on Human Rights released legal enforcement guidance specifically about race discrimination on the basis of hair.[131] As the legal enforcement guidance says, the New York City Human Rights Law ("NYCHRL") "protects the rights of New Yorkers to maintain natural hair or hairstyles that are closely associated with their racial, ethnic, or cultural identities."[132]

The guidance explains why New York City chose to protect against hair discrimination as a form of racial discrimination: "because [hairstyles] are an

130. There has been recognition of hair discrimination in other areas outside of the courts and state legislatures as well. In 2014, the United States Army updated their AR 670-1 official dress code regulations to effectively outlaw afros, most braids and all twists. The regulation basically left female soldiers of color with three options: chemical straightening, heat straightening, or extensions. The explanation for the new regulation was that it was a way to promote uniformity and safety. *See* Phoebe Gavin, Opinion, *What Does a Black Female Soldier's Hair Have to do with Defending Her Country?*, GUARDIAN (Apr. 25, 2014, 7:45 AM), https://www.theguardian.com/commentisfree/2014/apr/25/black-female-soldier-hair-us-army-afros. The Congressional Black Caucus sent a letter to Secretary of Defense Chuck Hagel protesting the new regulations as being "biased and racially insensitive." The regulations were rolled back, and the Army, Navy, and Air Force now allow cornrows, twists and some braids. *See* Karen Grigsby Bates, *Pentagon Does About-Face on Hair Regulations – Black Women Approve*, NPR: CODE SWITCH (Aug. 13, 2014, 6:40 PM), https://www.npr.org/sections/codeswitch/2014/08/13/340155211/pentagon-does-about-face-on-hair-regulations-black-women-approve.

131. N.Y.C. COMM'N ON HUM. RTS., NYC COMMISSION ON HUMAN RIGHTS LEGAL ENFORCEMENT GUIDANCE ON RACE DISCRIMINATION ON THE BASIS OF HAIR (Feb. 2019), https://www1.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf.

132. *Id.*

inherent part of Black identity."[133] Hairstyles like Afros, cornrows, and locks have a commonly known racial association with Black people and employers are assumed to know of this association.[134] The guidance says that grooming policies that specifically target natural hairstyles associated with Black people are discriminatory because they subject Black employees to disparate treatment.[135] Although this guidance restricts employers' ability to control grooming policies, New York City does not relinquish all employer control. The guidance still allows employers to make policies for legitimate health or safety concerns, such as requiring the use of hair ties, hairnets, and hair coverings.[136]

After the commission released this new law, they further explained their rationale in a press release: "Bans or restrictions on natural hair or hairstyles associated with black people are often rooted in white standards of appearance and perpetuate racist stereotypes that black hairstyles are unprofessional. Such policies exacerbate anti-Black bias in employment, at school, while playing sports, and in other areas of daily living."[137]

New York City's "guidance on natural hairstyles is reported to be the first in the country,"[138] and it came less than a year after the Supreme Court denied certiorari on Chastity Jones's case.[139] Individuals can file complaints against their employers to the NYC Commission on Human Rights' Law Enforcement Bureau.[140] Employers with four or more employees will face fines of up to $250,000 if they do not comply with this guidance, and the Commission can also punish non-compliant companies by imposing internal policy changes within companies.[141]

The state of New York did not stop with this guidance produced by New York City Commission on Human Rights. On July 12, 2019, New York's Governor Andrew Cuomo amended the state's Human Rights Law and Dignity for All Students Act to include protections against more forms of

133. *Id.* at 6.

134. *Id.* at 6–7.

135. *Id.* at 7.

136. *Id.* at 8.

137. Sonia Thompson, *New York City Just Banned Hair Discrimination: The Commonly Overlooked Reason It Impacts Your Brand*, FORBES (Feb. 22, 2019, 8:05 AM), https://www.forbes.com/sites/soniathompson/2019/02/22/new-york-city-just-banned-hair-discrimination-the-commonly-overlooked-reason-it-impacts-your-brand/#3f1de0782ca7.

138. *See* Katie Kindelan, *Black, Natural Hair Gets New Protections in New York City*, ABC NEWS (Feb. 19, 2019, 12:37 PM), https://abcnews.go.com/style/story/black-natural-hair-protections-york-city-61162699.

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

140. *See* N.Y.C. COMM'N ON HUM. RTS., *supra* note 131, at 3.

141. *See* Blanche Vathonne & Ruqayyah Moynihan, *Hair Discrimination is Now Illegal in New York City*, BUSINESS INSIDER FRANCE (Feb. 19, 2019, 12:10 PM), https://www.insider.com/hair-discrimination-was-just-made-illegal-in-new-york-city-2019-2.

racial discrimination.[142] Governor Cuomo explained the reasons behind the amendment:

> For much of our nation's history, people of color - particularly women - have been marginalized and discriminated against simply because of their hair style or texture. By signing this bill into law, we are taking an important step toward correcting that history and ensuring people of color are protected from all forms of discrimination.[143]

The bill amended their existing Human Rights Law, expanding the definition of the term "race" in the bill to include "traits historically associated with race, including but not limited to, hair texture and protective hairstyles."[144]

The guidance and amendment have already proven to have bite. A luxury Upper East Side hair salon was accused of telling Black workers that Afros and braids did not fit the area's upscale image.[145] Sharon Dorram, part owner of the salon Sally Hershberger, sent text messages to the general manager complaining of the "awful" hairstyles of three Black receptionists and instructing the manager to tell them they could no longer wear their hair down in braids or Afros.[146] The salon reached a settlement with the New York City Commission on Human Rights that required it pay a $70,000 fine as well as train their employees to work with Black hair and advance the careers of non-white stylists.[147]

B. CROWN Act in California, New Jersey, and Elsewhere

The legal guidance released by NYC's Human Rights Commission was the first of its kind to expand racial protections to cover natural Black hair, but, before New York State passed protections statewide, California passed the first statewide protections. California was the first state to outlaw racial

142. *Governor Cuomo Signs S6209A/A7797A to Make Clear Civil Rights Laws Ban Discrimination Against Hair Styles or Textures Associated with Race*, GOVERNOR'S PRESS OFF. (July 12, 2019), https://www.governor.ny.gov/news/governor-cuomo-signs-s6209aa7797a-make-clear-civil-rights-laws-ban-discrimination-against-hair.

143. *Id.*

144. S.B. S6209A, 2019-2020 Legis. Sess. (N.Y. 2019), https://www.nysenate.gov/legislation/bills/2019/s6209.

145. Ed Shanahan, *Salon Accused of Bias Will Be Taught to Style Black Hair*, N.Y. TIMES (Nov. 12, 2019), https://www.nytimes.com/2019/11/12/nyregion/nyc-salon-racial-natural-hair-discrimination.html.

146. Maiysha Kai, *CROWNing Glory: New York City Just Resolved Its First Hair Discrimination Case—and a Celebrity Stylist is Going to Pay*, ROOT (Nov. 12, 2019), https://theglowup.theroot.com/crowning-glory-new-york-city-just-resolved-its-first-h-1839808906.

147. *Id.*

discrimination based on hairstyle.[148] On July 3, 2019, California Governor Gavin Newsom signed the CROWN (Create a Respectful and Open Workplace for Natural Hair) Act into law, making it illegal for employers and schools to enforce dress code policies that prohibit natural hairstyles like Afros, braids, twists and locks.[149] Section one of the act goes as far as to call out the federal courts for not understanding that Black hair can naturally be presented in braids, twists, and locks, and therefore deserves to be protected by Title VII, like Afros are.[150]

Senator Holly Mitchell, the bill's author, said the bill's protections would hopefully help African Americans feel comfortable wearing their natural hair without the fear of repercussions, thus helping to reduce pressure to change their natural hair.[151] The Act received unanimous support in both the California Assembly and Senate and it took effect on January 1, 2020.[152] Since the Act only just went into effect, there is no data on its impact yet.

Shortly after California passed CROWN, New Jersey became the third state to ban discrimination based on hair. On December 19, 2019, New Jersey enacted CROWN to amend the New Jersey Law Against Discrimination Act. The New Jersey governor signed the bill one year to the day that Andrew Johnson had his dreadlocks cut off by a wrestling referee.[153] Governor Phil Murphy signed the bill into law, in effect saying, "[r]ace-based discrimination will not be tolerated in the State of New Jersey. . . . No one should be made to feel uncomfortable or be discriminated against because of their natural hair."[154] Virginia quickly became the fourth state to pass the CROWN Act[155] after the bill unanimously passed in the senate and passed in the house.[156] The

148. *See* Phil Willon & Alexa Díaz, *California Becomes First State to Ban Discrimination Based on One's Natural Hair*, L.A. TIMES (July 3, 2019), https://www.latimes.com/local/lanow/la-pol-ca-natural-hair-discrimination-bill-20190703-story.html.

149. S.B. 188, 2019-2020 Legis. Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB188.

150. *Id.*

151. Willon & Díaz, *supra* note 148.

152. S.B. 188, 2019-2020 Legis. Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB188.

153. Dakin Andone, *New Jersey Banned Discrimination Based on Hairstyle a Year After a Black Student Wrestler Cut His Dreadlocks to Compete*, CNN (Dec. 19, 2019, 6:56 PM), https://www.cnn.com/2019/12/19/us/new-jersey-governor-discrimination-hairstyle-trnd/index.html.

154. *Id.*

155. Francisco Guzman & Saba Hamedy, *It's Official: Virginia is Now the Fourth State to Ban Hair Discrimination*, CNN (Mar. 5, 2020, 11:31 AM), https://www.cnn.com/2020/03/05/us/virginia-ban-hair-discrimination-bill-trnd/index.html.

156. Leah Asmelash, *If the Governor Signs This Bill, Virginia Will Become the Fourth State to Ban Hair Discrimination*, CNN (Feb. 22, 2020, 4:09 PM), https://www.cnn.com/2020/02/22/us/virginia-bill-hair-discrimination-trnd/index.html.

Act passed in its fifth state (Colorado)[157] and sixth state (Washington)[158] in quick fashion.

As momentum grows for the natural hair movement, more cities and states are proposing the CROWN acts in their legislatures. Cincinnati, Ohio, and Montgomery County, Maryland, are two localities that have passed CROWN amendments.[159] Twenty other states across the country have proposed the CROWN Act to their legislatures.[160] The CROWN Act has also been introduced in Congress.[161]

The Act itself received some attention in popular culture during the 2020 Oscars. During the show, "Hair Love" took home an Oscar for best-animated short.[162] The animated short tells the story of an African American father who learns how to style his daughter's hair.[163] During his acceptance speech, co-director Michael A. Cherry specifically called for support in passing the CROWN Act in all fifty states.[164] While the effect of this speech is currently unknown, the Act being mentioned during movies' biggest night is certainly a win for the visibility of the CROWN Act campaign.

C. It Is Time to Refocus on State Legislation

Preventing hair discrimination through state legislative reform instead of attempting to get the courts to do it through an interpretation of Title VII allows the reforms to be made without falling into the pitfalls of the Title VII analysis. There are two main advantages to the state law reform strategy: It does not require a case or controversy to be decided in court and it avoids

157. Saja Hindi, *Colorado Becomes 5th State to Ban Natural Hair Discrimination*, DENV. POST (Mar. 6, 2020, 5:58 PM), https://www.denverpost.com/2020/03/06/crown-act-colorado-hair-discrimination/. *See also* Jennifer Ford, *CROWN Act Passes Colorado House, Moves on to Senate*, ESSENCE (Feb. 13, 2020), https://www.essence.com/hair/colorado-house-passes-crown-act/.

158. Associated Press, *Ban on Race-Based Hairstyle Discrimination Signed Into Law*, U.S. NEWS (Mar. 19, 2020, 5:47 PM), https://www.usnews.com/news/best-states/washington/articles/2020-03-19/ban-on-race-based-hairstyle-discrimination-signed-into-law. *See also* Jim Camden, *Washington House Votes to Ban Hair Discrimination*, SPOKESMAN-REV. (Feb. 12, 2020), https://www.spokesman.com/stories/2020/feb/12/house-votes-to-ban-hair-discrimination/.

159. *The CROWN Act: Working to Eradicate Race-Based Hair Discrimination*, DOVE, https://www.dove.com/us/en/stories/campaigns/the-crown-act.html (last visited Feb. 16, 2021).

160. *See id.*

161. Harmeet Kaur, *In Just 1 Week, 3 States Considered Bills to Ban Discrimination Based on Hair Texture or Style*, CNN (Feb. 16, 2020, 7:24 AM), https://www.cnn.com/2020/02/16/us/hair-discrimination-bills-trnd/index.html. *See* CROWN Act of 2019, H.R. 5309, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/5309?q=%7B%22search%22%3A%22crown+act%22%7D&s=1&r=2.

162. Chevaz Clarke, *"Hair Love" Wins Oscar for Best Animated Short*, CBS NEWS (Feb. 9, 2020, 9:53 PM), https://www.cbsnews.com/news/hair-love-wins-oscar-for-best-animated-short-matthew-cherry-2020-02-09/.

163. *Id.*

164. *Id.*

tricky discussions about immutability/race definitions that may have no definitive answers.

First and foremost, state law reform avoids the need to find the perfect case to litigate all the way up to the Supreme Court. Reforming law completely negates any need to have a legal case in the first place, much less one that has the perfect set of facts and perfect complainant to convince a majority of the Supreme Court to afford protections against hair discrimination. As was seen with *EEOC v. CMS*, one mistake in the presentment of the theory of the case meant that the plaintiff could not proceed on a disparate impact theory. Instead, stories like "Hair Love" and Andrew Johnson's can inspire legislators around the country to take action now, instead of waiting for the right case to come along. Instead of waiting with bated breath to see if the Supreme Court will even choose to hear a hair discrimination case, arguments to add hair protections are being made right now to state houses and senates across the country.

Second, it avoids any need to get into the tricky business of defining race and maneuvering the immutability doctrine. As was shown earlier in this Note, courts have been grappling with these complicated concepts for decades. These cases have been bogged down by arguments trying to pin down the concept of race and the applicability of the immutability doctrine to different types of hairstyles. They are problems that arise by trying to fight this battle in courts that are restricted to deciding these cases specifically by their interpretation of the words written in Title VII, and they are bound to follow precedents created by the courts. The Supreme Court would have to overturn *Rogers* and *Jenkins* in order to expand Title VII protections to hair discrimination. Although it appears the Court has been willing to do this in sex and sexual orientation discrimination cases, there is no precedent that currently suggests they would be willing to do that in hair discrimination cases. Even if the Court were willing to expand or change the immutability doctrine, there is no guarantee that its test will not fall into the same pitfalls of ambiguity and rigidity that the current test has. State legislators do not have the same restrictions. They are not slaves to the words and history of Title VII, and they are not a court that has to give deference to precedents. Instead, the state legislators can be innovative and create new protections that did not already exist.

Allowing this battle to be fought in state legislation could also provide the Supreme Court with the necessary data and shift in American attitudes that it needs to change its perspective on racial discrimination. If enacted state legislation causes the state to begin collecting data about enforcement actions based on hair discrimination that data could be used later in federal courts to prove disparate impact exists among black men and women. Additionally, some of these state legislations have started to call out the federal courts for not having a more progressive and modern view about what race encompasses. If the CROWN Act and similar pieces of state legislation continue to successfully be enacted in various states, the Court might be more willing to adapt their view of race to modern expansive conceptions of race. Current small steps in state legislation today could have an immensely

influential impact in the federal courts when that perfect hair discrimination case finally makes its way up to the Supreme Court.

It is time for the discussion about hair discrimination to break out from the rigid confines of Title VII protection and into a sphere where change can happen now. State legislation changes can afford protections for African American men and women today, and the CROWN Act's success should be continued until all Americans are covered.

CONCLUSION

The choice of whether to keep hair natural or put it into locks or braids is a deeply personal decision for every African American man and woman. It is not just a simple question of what they think is pretty or in style, but it is a question that involves important considerations about identity, health, time, and finances. As Title VII is currently interpreted, it also involves considering whether or not you are willing to sacrifice your job. Although the Supreme Court has been willing to expand the protections afforded by other protected classes in Title VII, its interpretation in *Jenkins* showed they were unwilling to read race protections expansively. Understandably, the Court may be unwilling to insert itself into the tricky job of defining race or changing the immutability doctrine. Unfortunately, it has chosen to stick by a precedent of rigid immutability doctrine that provides no protections for hair discrimination. In order to get African Americans protections today, it is time to focus attention on passing state legislation to solve this problem. States like New York, New Jersey, and California have proven that passing these protections is possible, and the success of the CROWN Act gives us hope that someday soon, all African Americans will be free to choose the hairstyle they want without fear of losing their jobs.