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Protecting Protected Characteristics: Statutory Solutions for Employment Discrimination Post-Bostock

Chase Mays

NOTES

Protecting Protected Characteristics: Statutory Solutions for Employment Discrimination Post-*Bostock*

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Significantly, these protected characteristics are undefined, and judicial interpretations of race, sex, and national origin have allowed employers to lawfully discriminate against proxies for these protected characteristics. This Note examines the use of race-based hairstyles, gendered-appearance standards, and citizenship as proxies for race, sex, and national origin, respectively, and how the availability of such proxies inhibits Title VII's goal of creating equal employment opportunities. The Supreme Court's dicta in Bostock v. Clayton County *offer potential redress to some victims of proxy discrimination through a protected characteristic plus proxy framework, but its application is limited and authority still unclear. Legislative intervention is likely necessary to strike the proper balance between equalizing employment opportunities and preserving employer autonomy to make employment decisions. This Note proposes varying levels of statutory enumeration—broad enumeration, narrow enumeration, and no enumeration—for race, sex, and national origin, respectively, to balance the competing goals of creating equal employment opportunities on the basis of protected characteristics and maintaining employer autonomy.*

INTRODUCTION

Protected characteristics are not always protected. A hallmark of current employment discrimination laws is that employers may lawfully discriminate against protected characteristics if there is a proxy to facilitate the discrimination.[1] The story of Chastity Jones provides a notable example.

Ms. Jones applied for a customer service position at Catastrophe Management Solutions ("CMS") in May of 2010.[2] CMS customer service representatives handle calls from a large room and do not have physical contact with the public.[3] Ms. Jones, who is Black, was selected for an

1. Discrimination by proxy occurs when an employer discriminates on the basis of a facially neutral characteristic that "either specifically identifies a cultural practice (or statistically correlated practice) associated with a particular . . . group for prohibition, or a neutral policy that is interpreted to prohibit [group]-specific behavior." Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1194 (2004).

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

3. *Id.*

interview and arrived with her hair in dreadlocks.[4] Following her interview with a company representative, Ms. Jones was brought into a room with other selected applicants.[5] CMS's human resources manager, who is White, informed the applicants that they had been hired, pending completion of scheduled lab tests and other paperwork.[6] While Ms. Jones was meeting privately with CMS's human resources manager to reschedule her lab test, the manager informed Ms. Jones that "CMS could not hire her 'with the dreadlocks.' "[7] CMS had a race-neutral grooming policy that read:

> All 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[.][8]

After Ms. Jones told the manager that she would not cut her dreadlocks, the manager told Ms. Jones that CMS could not hire her.[9]

The Equal Employment Opportunity Commission ("EEOC") filed suit on behalf of Ms. Jones, alleging that CMS's refusal to hire Ms. Jones because of her dreadlocks was race discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Civil Rights Act" or "Act").[10] In *EEOC v. Catastrophe Management Solutions*, the EEOC argued that the grooming policy prohibiting dreadlocks constituted race discrimination because "dreadlocks are a racial characteristic, i.e., they 'are a manner of wearing the hair that is physiologically and culturally associated with people of African descent.' "[11] The Eleventh Circuit, however, held that CMS's refusal to hire Ms. Jones did not violate Title VII, reading Title VII as protecting immutable characteristics but not cultural practices.[12] By reasoning that hairstyles are a cultural practice rather than an immutable characteristic, the court deemed racial hairstyles unprotected under Title VII.[13] Thus, the Eleventh Circuit denied Ms. Jones recovery based on its interpretation of race.[14] Ms. Jones is not alone in her denial; other plaintiffs have faced similar

4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 1022 (alteration in original).
9. *Id.*
10. *Id.* at 1020; 42 U.S.C. § 2000e-2(a)(1).
11. *Catastrophe Mgmt. Sols.*, 852 F.3d at 1031.
12. *See id.* at 1030.
13. *Id.* at 1032–33, 1035.
14. *Id.* at 1026–28 (discussing the meaning of "race" in Title VII).

denials of Title VII recovery based on the court's interpretation of a protected characteristic.[15]

Catastrophe Management Solutions illustrates a feature of current employment discrimination laws: a lack of enumeration allows employers to lawfully discriminate against proxies for protected characteristics. This Note contributes to existing scholarship by analyzing the consequences of using proxies for race, sex, and national origin discrimination. This Note is the first to address *how—if at all—* legislatures should address proxy discrimination[16] by examining enumeration implications in other employment discrimination statutes.[17] This inquiry is particularly timely as Congress and state legislatures continue to revisit race-based hairstyle discrimination.[18] Part I of this Note provides a brief background on Title VII and explains how the allowance of proxy discrimination may inhibit Title VII's goals of reducing employment discrimination and facilitating equal employment opportunities. In light of the Supreme Court's dicta in *Bostock v. Clayton County*, Part II analyzes the status of plus claims—claims based on a combination of a protected characteristic plus another factor—before addressing whether these claims provide redress to victims of proxy discrimination. Part II also analyzes the consequences of Congress's enumeration decisions in the Americans with Disabilities Act ("ADA") and ADA Amendments Act ("ADAAA") before evaluating

15. *See, e.g.*, Eatman v. UPS, 194 F. Supp. 2d 256, 259–67 (S.D.N.Y. 2002) (narrow interpretation of race); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1088 (5th Cir. 1975) (narrow interpretation of sex); Garcia v. Gloor, 618 F.2d 264, 268–72 (5th Cir. 1980) (narrow interpretation of national origin). A plaintiff may challenge proxy discrimination by bringing a disparate treatment or disparate impact claim. Rich, *supra* note 1, at 1136 n.2. In a disparate treatment case, the plaintiff must show that she was treated differently than a similarly situated employee who does not share the protected characteristic. *Id.* (citing *Gloor*, 618 F.2d at 267–69). In a disparate impact case, the plaintiff must show that a facially neutral rule falls more harshly on members of a protected class. *Id.* Yet even if a plaintiff can establish a prima facie case of disparate treatment or disparate impact, the plaintiff's employer may rebut the presumption of unlawful discrimination by offering a legitimate business justification or demonstrating the practice is job related and necessary for business. *See id.* (explaining why claims challenging proxy discrimination are difficult to win); Texas Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 254 (1981) (employer can present legitimate business reason in disparate treatment case); 42 U.S.C. § 2000e-2(k)(1)(A)(i) (employer can demonstrate that the challenged practice is job related and consistent with business necessity). The plaintiff then has the opportunity to prove pretext for discrimination. *Burdine*, 450 U.S. at 254; Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

16. For an analysis of how courts and employers may address one example of proxy discrimination, see Grayson Moronta, *Why Do You Care About My Hair?: A Proposal for Remedying Hair Discrimination in the Workplace on a Federal Level*, 43 CARDOZO L. REV. 1715, 1741–43 (2022) (arguing that courts should expand their definition of immutability to include hair); *see also id.* at 1743–45 (recommending how employers can create inclusive environments for employees).

17. *See infra* Section II.B (analyzing enumeration in the Americans with Disabilities Act).

18. *See infra* Section II.C (discussing state legislation prohibiting discrimination via race-based hairstyles).

varying legislative responses to race-based hairstyle discrimination. Part III argues that the optimal level of enumeration in Title VII requires a prudent balance between preserving autonomy of employer decisionmaking and improving equality of opportunity in the workplace.

I. BACKGROUND

Part I of this Note provides a brief background on Title VII and explains how narrow judicial interpretations of Title VII protected characteristics allow employers to discriminate against proxies for protected characteristics. Title VII's mandate against employment discrimination provides one of the most recognized exceptions to employment at will. Narrow judicial interpretations of race, sex, and national origin allow employers to discriminate against race-based hairstyles, gendered appearance, and citizenship, even when doing so facilitates race, sex, and national origin discrimination, respectively. Employees challenging proxy discrimination have historically done so by a protected characteristic plus framework, and courts have afforded strong protection to plus claims on the basis of constitutionally protected activity and immutable characteristics. Before *Bostock*, employees bringing plus claims on the basis of anything else (e.g., race-based hairstyles and gendered appearance) were afforded weak protection. Thus, employers remain able to discriminate against proxies for protected characteristics so long as the proxies are neither constitutionally protected activities nor immutable characteristics.

A. Employment at Will

Employment at will is the default rule in American employment law;[19] approximately seventy-four percent of United States workers are at-will employees.[20] Under the employment-at-will doctrine, either party in an employment relationship may terminate the relationship

19. Richard J. Kohlman, *Wrongful Discharge of At-Will Employee*, *in* 31 AM. JURIS. TRIALS 317 (1984).

20. Garth Coulson, *At-Will Employment*, BETTERTEAM, https://www.betterteam.com/at-will-employment (last updated Jan. 20, 2021) [https://perma.cc/L37E-EKEM]. Although an overwhelming majority of United States workers are at-will employees, most employees misunderstand the basics of the employment-at-will doctrine. *See* Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 133, 134 tbl. 1 (1997).

for any reason—or no reason at all.[21] Employment at will has a limited set of exceptions.[22] For instance, parties in an employment relationship may enter into a collective bargaining or contractual agreement to limit either party's ability to terminate the relationship.[23] The right to freely terminate an employment relationship may also be restricted by statute or public policy.[24]

The most recognized exception to employment at will is provided by employment discrimination statutes:[25] an employer may terminate an at-will relationship for any reason, so long as it is nondiscriminatory.[26] There are several federal employment statutes that prohibit employers from discriminating on the basis of a protected characteristic[27] or protected class membership.[28] This Note analyzes Title VII specifically, but the analysis herein applies to state employment discrimination statutes as well.[29]

B. History and Effectiveness of Title VII

Title VII of the Civil Rights Act was the first comprehensive federal employment discrimination statute.[30] Title VII makes it unlawful for an employer or employment agency "to fail or refuse to hire

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21. Kohlman, *supra* note 19. For an explanation of the early history and justifications of the American employment-at-will rule, see Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 132–34 (1976).

22. RESTATEMENT OF EMP. L. § 2.01 cmt. a (AM. L. INST. 2015).

23. Kohlman, *supra* note 19.

24. *Id.*

25. *At-Will Employment - Overview*, NAT'L CONF. STATE LEGISLATURES, https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx (last updated Apr. 15, 2008) [https://perma.cc/ZG4U-546V].

26. EEOC v. STME, LLC, 938 F.3d 1305, 1320 (11th Cir. 2019) (" '[A]n employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason' contrary to federal law.").

27. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (race, color, religion, sex, national origin discrimination). Title VII protects all people from discrimination against certain characteristics regardless of membership to one class. *Id.* (extending protection to men and women); *cf.* Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (extending protection to people over forty). For a discussion of how courts generally require a showing of protected class membership to prove a claim under Title VII, despite the distinction between characteristics and classes, see Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 102–03, 116–18 (2017). This Note occasionally describes groups sharing a protected characteristic (e.g., women) as a protected class.

28. *See, e.g.*, 29 U.S.C. §§ 621-634 (age discrimination); Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (disability discrimination); Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301-4335 (military service discrimination).

29. State employment discrimination statutes may provide employees more rights than at the federal level. *See infra* Section II.C.

30. Joni Hersch & Jennifer Bennett Shinall, *Fifty Years Later: The Legacy of the Civil Rights Act of 1964*, 34 J. POL'Y ANALYSIS & MGMT. 424, 441 (2015).

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 . . . ."[31] Enacted in the wake of protests throughout the South and the United States more broadly, the Civil Rights Act sought to address demands for racial antidiscrimination laws.[32] The introduction of the Act was met with strong opposition and hostile amendments from segregationists—including one from Howard Smith to prohibit employment discrimination on the basis of sex—to destroy majority support for the Act's passage.[33] Smith's amendment passed, adding the term "sex," undefined, as a Title VII protected characteristic.[34] Congress chose not to include statutory definitions of race, color, religion, sex, or national origin in Title VII, ultimately leaving the responsibility of defining unlawful discrimination with the federal courts.[35] This lack of congressional guidance created confusion among courts as to the precise meaning of these terms, given that they could be interpreted either broadly or narrowly.[36]

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31. 42 U.S.C. § 2000e-2(a)(1).

32. *See* Hersch & Shinall, *supra* note 30, at 428–29 (describing the political landscape surrounding the passage of the Civil Rights Act). For a discussion of how the five protected characteristics became included in the Civil Rights Act, see *id.* at 429–31.

33. *See* Caroline Fredrickson, *How the Most Important U.S. Civil Rights Law Came to Include Women*, 43 HARBINGER 122, 123 (2019) (discussing how some commentators view Smith's amendment as an effort to destroy majority support for the Act's passage). *But see id.* at 122–25 (discussing the role of the National Woman's Party in the sex discrimination amendment); Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 146–60 (1997) (describing the history and congressional debate of the sex discrimination amendment).

34. § 2000e-2(a)(1) to (2).

35. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) ("[F]inal responsibility for enforcement of Title VII is vested with federal courts."). Senator McClellan expressed concern that not explicitly defining discrimination in Title VII would leave something uncertain for courts to interpret. 110 CONG. REC. 7213, 13,837 (1964). This concern was realized as courts struggled to interpret the scope of the protected characteristics. *See infra* note 36.

36. Sex discrimination provides an example of this confusion. *See generally* David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1706–09 (2002) (discussing the "confusion among the concepts and terminology of sex, sexuality, and gender" in sex discrimination law). Federal courts initially interpreted "sex" narrowly to exclude pregnancy discrimination. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k). Congress subsequently amended Title VII to explicitly include pregnancy in the statutory definition of sex. § 2000e(k) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions."). Some federal courts also initially interpreted "sex" narrowly to exclude sexual orientation discrimination. *Compare* DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 330 (9th Cir. 1979) (sexual orientation discrimination is not sex discrimination), Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999), Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996), *and* Williamson v. A.G. Edwards & Sons, Inc. 876 F.2d 69, 70 (8th Cir. 1989) (per curiam) ("Title VII does not prohibit discrimination against homosexuals."), *with* Hivley v. Ivy Tech Cmty. Coll. of

Empirically, it is difficult to determine Title VII's effectiveness in reducing employment discrimination.[37] Some critics have argued that judicial interpretations of Title VII have undermined its effectiveness in reducing discrimination; namely, these critics argue that courts' interpretations of protected characteristics have allowed employers to discriminate against proxies for the protected characteristics, providing an end run around the Act's protections.[38] An employer discriminates by proxy when using a facially neutral characteristic (the proxy) that "either specifically identifies a cultural practice (or statistically correlated practice) associated with a particular . . . group for prohibition, or a neutral policy that is interpreted to prohibit [group]-specific behavior."[39] Courts have permitted employment discrimination on the basis of race-based hairstyles,[40] gendered appearance,[41] and citizenship,[42] despite these attributes functioning as proxies for protected characteristics.

C. Examples of Proxy Discrimination

1. Race-Based Hairstyles

Legally, employers can prohibit certain protective hairstyles, even when doing so facilitates race discrimination.[43] In *Catastrophe Management Solutions*, the EEOC challenged CMS's refusal to hire based on such prohibitions, arguing that dreadlocks are a racial characteristic because of the style's physiological and cultural

Ind., 853 F.3d 339, 346–47 (7th Cir. 2017), *and* Zarda v. Altitude Express, Inc., 883 F.3d 100, 112 (2d Cir. 2018) ("[S]exual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination."). The Supreme Court resolved this inconsistency among courts in *Bostock v. Clayton County*, 590 U.S. 644, 655–65 (2020) (sexual orientation discrimination is sex discrimination).

37. *See* Hersch & Shinall, *supra* note 30, at 431–36.

38. *See* Rich, *supra* note 1, at 1140–41 (discussing the costs on employees of a Title VII regime that focuses on biological race and ethnicity).

39. *Id.* at 1194.

40. *See* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1021 (11th Cir. 2016) (rejecting a claim for race discrimination when employer policy was interpreted to prohibit dreadlocks); Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 233 (S.D.N.Y. 1981) (rejecting a claim for race discrimination when employer prohibited all-braided hairstyles). *But see* Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164, 168 (7th Cir. 1976) (recognizing a claim for race discrimination when plaintiff was denied a promotion because she wore her hair in a natural Afro).

41. *See* Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1092 (5th Cir. 1975) (rejecting a claim for sex discrimination when employer policy required male employees to have short hair); Tavora v. N.Y. Mercantile Exch., 101 F.3d 907, 908–09 (2d Cir. 1996) (same).

42. *See* Espinoza v. Farah Mfg. Co., 414 U.S. 86, 91 (1973) (rejecting a claim for national origin discrimination when employer refused to hire non-citizens).

43. *See Catastrophe Mgmt. Sols.*, 852 F.3d at 1030. For a discussion on protective hairstyles, see *infra* note 46.

association with people of African descent.[44] Although ultimately unsuccessful, the EEOC supported its argument by submitting evidence that Black people are the primary wearers of dreadlocks.[45] Additionally, commentators cite inherent differences between White and Black hair texture, which can result in financial, temporal, and physical burdens as driving the decision to wear dreadlocks and other protective hairstyles.[46] In this way, wearing protective hairstyles is a proxy for race because of its cultural and statistical association with Black applicants and employees.[47] Thus, by prohibiting a practice that is culturally and statistically associated with Black applicants and employees, employers can effectively block Black applicants from particular labor market opportunities.[48]

2. Gendered Appearance

Similar to the use of race-based appearance as a proxy to facilitate race discrimination, employers may enforce gender-based appearance standards, even when doing so facilitates sex discrimination. For example, the employer in *Willingham v. Macon Telegraph Publishing Co.* prohibited long hair in men but not women.[49] The Fifth Circuit held that discriminatory grooming standards were not sex discrimination in violation of Title VII.[50] Professor Camille Gear Rich explains the *Willingham* decision by recognizing the court's assumptions that it "need[ed] to preserve heterosexually informed gender categories" and "employers could be trusted to assist in

44. *Catastrophe Mgmt. Sols.*, 852 F.3d at 1031.

45. Plaintiff's Brief in Opposition to Defendant Catastrophe Management Solutions' Motion to Dismiss, *Catastrophe Mgmt. Sols.*, 852 F.3d 1018 (No. 13-cv-00476), 2014 WL 4745282; *see also* 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, 1008, 1015 (2017).

46. *See* Ashleigh Shelby Rosette & Tracy L. Dumas, *The Hair Dilemma: Conform to Mainstream Expectations or Emphasize Racial Identity*, 14 DUKE J. GENDER L. & POL'Y 407, 411 (2007) (explaining why protective hairstyles are the primary style choice for Black women); Greene, *supra* note 45, at 1012–14 (discussing the financial and temporal burdens of Black hair); Tonya Astor, *How Is Black Hair Different from White Hair - or Other Types, for that Matter?*, ALLURIUM BEAUTY (June 17, 2021), https://www.alluriumbeauty.com/blogs/news/how-black-hair-is-different [https://perma.cc/BN9N-36DQ].

47. *See supra* notes 44–46 and accompanying text.

48. *See* Rich, *supra* note 1, at 1194 (describing proxy discrimination); *see also* Bostock v. Clayton County, 590 U.S. 644, 657–60 (2020) (noting that Title VII's focus is on individuals rather than groups).

49. 507 F.2d 1084, 1087 (5th Cir. 1975).

50. *Id.* at 1088.

maintaining [these] categories."[51] Judge Bootle, writing for the district court, was more explicit in animating the Fifth Circuit's assumptions:

> [I]f it [were] mandated that men must be allowed to wear shoulder length hair . . . because the employer allows women to wear hair that length, then it must logically follow that men, if they choose, could not be prevented by the employer from wearing dresses to work if the employer permitted women to wear dresses . . . . Continuing the logical development of plaintiff's proposition, it would not be at all illogical to include lipstick, eyeshadow, earrings, and other items of typical female attire among the items which an employer would be powerless to restrict female attire and bedeckment. It would be patently ridiculous to presume that Congress ever intended such result . . . .[52]

Willingham demonstrates that an employer may lawfully impose differentiated grooming standards based on sex.[53] The use of gendered-appearance standards may facilitate proxy discrimination, however, if a prohibited grooming practice is statistically correlated with a particular group or subgroup.[54] Assume, for example, that men wearing makeup is a proxy for sexual orientation.[55] An employer refusing to hire a man who wears makeup precludes some men from working for that employer on the basis of their sexual orientation.[56] This is permissible under *Willingham* (although subject to the unequal burdens test discussed in Subsection I.D.3); consequently, employers

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51. Rich, *supra* note 1, at 1216.

52. Willingham v. Macon Tel. Publ'g Co., 352 F. Supp. 1018, 1020 (M.D. Ga. 1972), *rev'd*, 482 F.2d 535 (5th Cir. 1973), *opinion vacated on reh'g*, 507 F.2d 1084 (5th Cir. 1975), *and aff'd*, 507 F.2d 1084 (5th Cir. 1975).

53. 507 F.2d at 1088; *see also* Dodge v. Giant Food, Inc., 488 F.2d 1333, 1336–37 (D.C. Cir. 1973):

> [H]air-length regulations[] are classifications by sex which do not limit employment opportunities by making distinctions based on immutable personal characteristics, which do not represent any attempt by the employer to prevent the employment of a particular sex, and which do not pose distinct employment disadvantages for one sex. Neither sex is elevated by these regulations to an appreciable higher occupational level than the other. We conclude that Title VII never was intended to encompass sexual classifications having only an insignificant effect on employment opportunities;

Schroer v. Billington, 424 F. Supp. 2d 203, 209 (D.D.C. 2006) ("Evenhanded and evenly applied grooming codes may be enforced even where the code is based on highly stereotypical notions of how men and women should appear.").

54. The use of gendered-appearance standards may also facilitate proxy discrimination if the policy is interpreted to prohibit group-specific behavior. *See* Rich, *supra* note 1, at 1194.

55. *See, e.g.*, Complaint at 19, 24, 26, Kunkle v. Cooper Health Sys., No. 1:17-cv-11643 (D.N.J. Nov. 15, 2017) (gay man alleging his employer fired him because of his sexual orientation and for wearing makeup). This Note refers to makeup use in men as a proxy for sexual orientation discrimination, as has been specifically argued in some case law. It is important to note, however, that this is an imperfect proxy and may also be used to facilitate gender identity-based discrimination rather than or in addition to sexual orientation.

56. *See, e.g.*, *id.*

may use gendered-appearance standards to discriminate against particular subgroups.[57]

3. Citizenship

Proxies may also be unrelated to personal appearance. One such example is citizenship. The seminal citizenship-as-proxy case is *Espinoza v. Farah Manufacturing Co.*, where the Supreme Court upheld an employer's policy discriminating on the basis of citizenship.[58] A majority of the Court reasoned that the undefined term "national origin" does not expressly include citizenship, thereby excluding it from Title VII protection.[59] Justice Douglas wrote a compelling dissent, however, recognizing that citizenship status is a perfect proxy for national origin: a noncitizen is *always* born outside of the United States.[60] Yet even though a majority of the Court rejected the use of citizenship as a proxy, the majority nonetheless noted that citizenship requirements may be pretextual evidence of national origin discrimination.[61] In the absence of a "scheme of . . . national-origin discrimination,"[62] applicants like Cecilia Espinoza may be denied employment for no reason other than a characteristic inherently related to their national origin.[63]

These cases all suggest that employers can lawfully discriminate against protected characteristics, provided there is a proxy to facilitate

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57. *See* 507 F.2d at 1088 (grooming standards are not sex discrimination); *see also* Marc Chase McAllister, *Extending the Sex-Plus Discrimination Doctrine to Age Discrimination Claims Involving Multiple Discriminatory Motives*, 60 B.C. L. REV. 469, 478 (2019) (describing subgroup discrimination).

58. 414 U.S. 86, 92–93 (1973).

59. *Id.* at 88–89 (acknowledging that the plain language of the statute refers only to "the country where a person was born, or, more broadly, the country from which his or her ancestors came").

60. *Id.* at 96 (Douglas, J., dissenting):

> Alienage results from one condition only: being born outside the United States. Those born within the country are citizens from birth. It could not be more clear that [the employer's] policy of excluding aliens is de facto a policy of preferring those who were born in this country. Therefore the construction placed upon the "national origin" provision is inconsistent with the construction this Court has placed upon the same Act's protections for persons denied employment on account of race or sex.

61. *Id.* at 92 (majority opinion):

> In some instances, for example, a citizenship requirement might be but one part of a wider scheme of unlawful national-origin discrimination. In other cases, an employer might use a citizenship test as a pretext to disguise what is in fact national-origin discrimination. Certainly [Title] VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin.

62. *Id.*

63. *See id.* at 92–93.

the discrimination.[64] The allowance of discrimination by proxy may, in some instances, inhibit the purpose of Title VII and render the statute less effective in application.[65]

D. Plus Claims Before Bostock

The cases where plaintiffs have challenged proxy discrimination—race-based hairstyles,[66] gendered appearance,[67] and citizenship[68]—have historically proceeded as "plus" claims. Plus claimants can successfully allege disparate treatment by showing that their employers discriminated because of a protected characteristic *plus* some additional factor.[69] Plus claims prevent employers from justifying discriminatory action toward a particular subgroup of a protected class (e.g., women with children) by citing nondiscriminatory treatment to members of the protected class outside of the particular subgroup (e.g., women without children).[70]

Federal courts have recognized three categories of plus claims: fundamental rights, immutable characteristics, and anything else that is not captured by the aforementioned categories.[71]

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64. *See, e.g.*, EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. 2016) (race discrimination); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084 (5th Cir. 1975) (sex discrimination); Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) (national origin discrimination).

65. *See* Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 794 (1987) ("Any form of discrimination that affects individuals on the basis of race, gender, sex, religion, or national origin represents the intrusion of a stereotype into employment situations. This is contrary to Title VII's plain language and purpose."); Rich, *supra* note 1, at 1141 ("[T]he discriminatory animus in cases involving so-called biological racial or ethnic traits and voluntary, performed racial or ethnic traits operates identically.").

66. *E.g.*, *Catastrophe Mgmt. Sols.*, 852 F.3d 1018.

67. *E.g.*, *Willingham*, 507 F.2d 1084; Tavora v. N.Y. Mercantile Exch., 101 F.3d 907 (2d Cir. 1996).

68. *E.g.*, *Espinoza*, 414 U.S. 86. The claim in *Espinoza* may be construed as a national-origin-plus-citizenship claim. *See infra* notes 69–71 (describing plus claims).

69. McAllister, *supra* note 57, at 476–77. The additional factor may be a protected or unprotected characteristic. *See, e.g.*, Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (sex-plus-having children claim); Jefferies v. Harris Cnty. Cmty. Action Ass'n, 615 F.2d 1025, 1032–33 (5th Cir. 1980) (recognizing a sex-plus-race claim because otherwise employers could point to favorable treatment of Black men and White women and escape liability for discrimination directed only at Black women).

70. McAllister, *supra* note 57, at 477–78.

71. *See id.* at 477 (describing the recognition of immutable characteristic and fundamental right plus factors). Federal courts have not recognized the terminology "plus anything else" claims. This Note uses the terminology to reference plus factors that are neither fundamental rights nor immutable characteristics. These claims typically relate to grooming or appearance requirements, *see id.* at 486–87, but are not limited to those contexts, *see Espinoza*, 414 U.S. 86 (national-origin-plus citizenship claim).

1. Plus Fundamental Rights

The Supreme Court first recognized discrimination on the basis of a protected characteristic *plus* denial of a fundamental right in *Phillips v. Martin Marietta Corp.*[72] The employer in *Phillips* had a policy prohibiting the employment of women with preschool-aged children but not men.[73] The Supreme Court unanimously held that employers can be held liable for policies regulating a protected characteristic *plus* a constitutionally protected characteristic, such as having children.[74]

Plus-fundamental-rights claims are afforded strong protection by courts.[75] For this reason, fundamental rights rarely facilitate discrimination by proxy.

2. Plus Immutable Characteristics

Federal courts interpret Title VII as protecting individuals on the basis of immutable characteristics[76] and repeatedly recognize protected characteristic *plus* immutable characteristic claims.[77] Accordingly, claimants may be successful in challenging proxy discrimination when the proxy facilitating discrimination is an immutable characteristic.[78] For example, one district court recognized that prohibiting Afro hairstyles "implicate[s] the policies underlying the prohibition of discrimination on the basis of immutable characteristics."[79]

The success of plus-immutable-characteristic claims inherently depends on the concept of immutability, but varying concepts of

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72. 400 U.S. at 544.

73. *Id.* at 543.

74. *Id.* at 544; *see also Jefferies*, 615 F.2d at 1033.

75. *See Phillips*, 400 U.S. at 544; *Jefferies*, 615 F.2d at 1033.

76. EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1030 (11th Cir. 2016); *see* Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1489 (2011); William R. Corbett, *The Ugly Truth About Appearance Discrimination and the Beauty of Our Employment Discrimination Law*, 14 DUKE J. GENDER L. & POL'Y 153, 175 (2007):

> The popularly-held understanding of employment discrimination law is that it promotes fairness because it forbids consideration of immutable traits . . . . [T]he concept of immutability is deeply entrenched in the law, and the more immutable a characteristic, the more unfair and immoral the discrimination is likely to be considered and the more urgent the need for law to address the unfairness and immorality.

77. *See Jefferies*, 615 F.2d at 1034 (recognizing a sex-plus-race claim); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416–17 (10th Cir. 1987) (recognizing a sex-plus-race hostile work environment claim).

78. *See* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232 (S.D.N.Y. 1981).

79. *Id.*

mutability have led to confusion among courts as to which characteristics are protected under Title VII.[80] Some courts, such as the Eleventh Circuit in *Catastrophe Management Solutions*, define immutable characteristics as those that cannot be changed.[81] Yet other courts construe immutability as encompassing traits that are either "beyond the power of an individual to change *or* [are] so fundamental to individual identity or conscience that it ought not be required to be changed."[82] This distinction results in some courts holding Afro hairstyles to be immutable, and thus afforded Title VII protection, while other courts refuse to see dreadlocks as similarly fundamental to identity.[83] This inconsistency among courts allows employers to discriminate on the basis of mutable traits, regardless of whether those traits are fundamentally associated with a particular subgroup of a protected class.[84]

3. Plus Anything Else

Federal courts generally afford the least protection to plus claims on the basis of anything else—including grooming and appearance requirements—because such claims do not involve a constitutionally protected activity or immutable characteristic.[85]

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80. *See* Bayer, *supra* note 65, at 842–73.

81. 852 F.3d at 1027; *see* Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 13–23 (2015) (discussing the "old" concept of immutability).

82. Clarke, *supra* note 81, at 28 (quoting *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985)); *see also* Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring) (" '[I]mmutability' may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically."). Part II of this Note briefly analyzes why the concept of revised immutability is in itself an incomplete solution to discrimination by proxy. *See infra* notes 199–202 and accompanying text.

83. *Compare Rogers*, 527 F. Supp. at 232 (Afro hairstyles are protected under Title VII), *with* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1030, 1032–33, 1035 (11th Cir. 2016) (dreadlocks are not protected under Title VII).

84. *See* Rich, *supra* note 1, at 1194–95 (describing how employers win under both disparate treatment and disparate impact claims so long as an employer's rule concerns a mutable aspect of racial identity); *see also* Bayer, *supra* note 65, at 842–73.

85. *E.g.*, Jefferies v. Harris Cnty. Cmty. Action Ass'n, 615 F.2d 1025, 1033 (5th Cir. 1980):

> The only significant group of cases to reject the "sex plus" theory of discrimination are cases in which plaintiffs have claimed that hair length regulations for men constitute "sex plus" discrimination. In holding that these rules do not constitute unlawful discrimination, courts have distinguished the other sex plus cases as involving regulations which concern sex plus an immutable characteristic or a constitutionally protected activity . . . . ;

Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091 (5th Cir. 1975):

> Hair length is not immutable and in the situation of employer vis a vis employee enjoys no constitutional protection. If the employee objects to the grooming code he has the

One example of a plus-anything-else case is *Jespersen v. Harrah's Operating Co.*[86] In *Jespersen*, Harrah's began enforcing appearance standards that required women to wear some facial makeup and prohibited men from wearing any.[87] Ms. Jespersen was effectively terminated when she refused to comply with Harrah's makeup requirement.[88] Ms. Jespersen alleged that Harrah's appearance standards discriminated against women who refused to wear makeup (i.e., sex plus not wearing makeup),[89] but the Ninth Circuit rejected her claim for failing to establish that the differentiated grooming policy created an unequal burden on women as compared to men.[90]

The Ninth Circuit's (very) unequal burden requirement establishes a difficult[91]—but not impossible[92]—bar for plus-anything-else claimants to overcome. Applying the unequal burden requirement to the earlier *Catastrophe Management Solutions* case illustrates the difficulty of bringing such claims. Recall that the EEOC argued that CMS intentionally discriminated against Ms. Jones because of her race by refusing to hire her with dreadlocks,[93] and that the Eleventh Circuit regarded this allegation as a race-plus-mutable hairstyle claim.[94] The

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right to reject it by looking elsewhere for employment, or alternatively he may choose to subordinate his preference by accepting the code along with the job.

86. 444 F.3d 1104 (9th Cir. 2006).

87. *Id.* at 1106.

88. *Id.* at 1108.

89. *Id.*

90. *Id.* at 1110:

> Jespersen did not submit any documentation or any evidence of the relative cost and time required to comply with the grooming requirements by men and women. As a result, we would have to speculate about those issues in order to then guess whether the policy creates unequal burdens for women.

But see id. at 1117 (Kozinski, J., dissenting) ("I find it perfectly clear that Harrah's overall grooming policy is substantially more burdensome for women than for men.").

91. *See* Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1038 (7th Cir. 1979) (rejecting a sex-plus-uniform claim because the differentiated uniform policy "did not substantially burden female employees more than male employees").

92. *See* Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602, 610 (9th Cir. 1982) (recognizing a sex-plus-weight claim); Frank v. United Airlines, Inc., 216 F.3d 845, 854–55 (9th Cir. 2000) (recognizing a sex-plus-proportional body size claim). For instance, in *Gerdom*, the employer imposed strict weight conditions for women but not men. 692 F.2d at 604. Flight hostesses weighing more than permitted by the employer's policy were required to lose weight or be suspended or terminated. *Id.* The court held that the employer's sex-specific weight policy was unlawful sex discrimination because men and women performed the same physical tasks, and there was no evidence that weight affected performance. *Id.* at 610.

93. EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1020 (11th Cir. 2016).

94. *See id.* at 1030. Note that such classification is not necessarily correct; jurisdictions with different concepts of immutability may have come to a different conclusion. *See supra* notes 81–82 and accompanying text (discussing different concepts of immutability); Henry L. Chambers, Jr.,

inclusion of a plus factor theoretically prevents CMS from justifying discriminatory action toward a particular subgroup of a protected class (e.g., Black people with dreadlocks) by citing its nondiscriminatory treatment of members of the protected class outside of the particular subgroup (e.g., Black people without dreadlocks).[95] Wearing dreadlocks, however, is neither immutable (according to the Eleventh Circuit) nor a constitutionally protected activity;[96] thus, Ms. Jones would need to submit evidence of the unequal burden that CMS's no-excessive-hairstyle policy imposes on Black applicants.[97] Ms. Jones may try to satisfy this requirement by presenting evidence of the relative cost and time expenditures for compliance with the challenged policy,[98] as well as evidence of the physiological,[99] cultural,[100] and historical associations between race and protective hairstyles.[101] Yet Ms. Jones may still be unable to demonstrate a (very) unequal burden on Black applicants so long as CMS's policy prohibits "excessive" hairstyles associated with other races.[102] A ban against excessive hairstyles may also burden other groups, including "Latin-x/a/o, Indo-Caribbean, or Native American" applicants who also "face barriers in maintaining 'natural hair' or specific cultural hairstyles."[103] Consequently, evidence of the relative costs and time needed to comply with the grooming requirements may

Bostock*, the Crown Acts, and a Possible Right to Self-Expression in the Workplace*, 25 EMP. RTS. & EMP. POL'Y J. 53, 90 (2021) (arguing that race-based hairstyles help shape racial identity).

95. *See* McAllister, *supra* note 57, at 477–78 (describing subgroup discrimination).

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

97. *See* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1110 (9th Cir. 2006); Chambers, *supra* note 94, at 80 (noting that the *Catastrophe Management Solutions* court did not apply—but should have applied—the unequal burdens requirement).

98. *See* Greene, *supra* note 45, at 1012–14 (discussing the financial and temporal burdens of Black hair); *see also Removing Dreadlocks – How to Get Rid of Dreads with Little Damage*, DREADLOCK CENT., https://dreadlockcentral.com/removing-dreadlocks/ (last visited May 19, 2024) [https://perma.cc/959T-XS9H].

99. *See Catastrophe Mgmt. Sols.*, 852 F.3d at 1031; Astor, *supra* note 46.

100. *See* Greene, *supra* note 45, at 1008. *But see* Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1102 (2010) (cautioning against relying on culture-based arguments for Black female plaintiffs in grooming-discrimination cases).

101. *See* Greene, *supra* note 45, at 998, 1008.

102. *See* Chambers, *supra* note 94, at 80 (emphasizing that an unequal burdens analysis would depend on the comparative burdens placed on Black and White employees). *But see id.* at 81 ("Grooming codes that ban employees from wearing many hairstyles typically associated with Black people may not impose equivalent limitations on Black and White employees.").

103. *Legal Enforcement Guidance on Race Discrimination on the Basis of Hair*, NYC COMM'N ON HUM. RTS. 1 n.2 (Feb. 2019), https://www.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf [https://perma.cc/CBH4-W4Z6].

be insufficient to establish an unequal burden on Black applicants when other groups are similarly burdened.[104]

Underlying these plus-anything-else claims remains the strong default of employment at will, which allows an employer to terminate an employment relationship for any nondiscriminatory reason.[105] The recognition of plus claims provides a further limitation to the employment at will doctrine: employers can terminate an employment relationship for any reason—so long as the termination is not (1) discriminatory against a protected characteristic or members of a protected class, (2) discriminatory against a protected characteristic *plus* a fundamental right, or (3) discriminatory against a protected characteristic *plus* an immutable characteristic.[106] Plus-anything-else plaintiffs, however, have historically remained subject to the (very) unequal burdens test.[107] Thus, employers may lawfully discriminate against characteristics associated with a particular protected class or subgroup (so long as the plaintiff cannot establish an unequal burden) and deny individuals in underrepresented groups labor market opportunities.[108] The allowance of proxy discrimination therefore frustrates Title VII's goal of facilitating equality of opportunity in the workplace.[109]

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104. Evidence of the relative cost and time to comply with the grooming requirements may also be insufficient as courts continue to emphasize that protective hairstyles can be changed to comply with an employer's policy. *See* Dena Elizabeth Robinson & Tyra Robinson, *Between a Loc and a Hard Place: A Socio-historical, Legal, and Intersectional Analysis of Hair Discrimination and Title VII*, 20 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 263, 267 (2020).

105. *See* EEOC v. STME, LLC, 938 F.3d 1305, 1320 (11th Cir. 2019).

106. *See* Jefferies v. Harris Cnty. Cmty. Action Ass'n, 615 F.2d 1025, 1033 (5th Cir. 1980).

107. *See* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1110 (9th Cir. 2006). Employment at will and the unequal burdens test may be limited if the employer has specifically defined for-cause termination in the employment contract. *See, e.g.*, Benson v. AJR, Inc., 599 S.E.2d 747, 749 (W. Va. Sup. Ct. 2004) (an employer could not terminate its Director of Safety for cocaine abuse when its contract stipulated continued employment in the absence of "(a) dishonesty; (b) conviction of a felony; and (c) voluntary termination of the agreement by [the employee]"). Yet a majority of low-skill employees do not have the bargaining power to negotiate contract terms and thus remain at-will employees. *See* Coulson, *supra* note 20 (approximately seventy-four percent of United States workers are at-will employees).

108. *See* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1021 (11th Cir. 2016). This Note has established that Ms. Jones may have a difficult time establishing that CMS's no-excessive-hairstyle policy created an unequal burden on Black applicants. *See supra* notes 98–104 and accompanying text. Because of the biological and cultural associations between protective hairstyles and Black hair, CMS may deny Black applicants labor market opportunities based on these traits. *See* Greene, *supra* note 45, at 1025 (noting that race and culture are overlapping constructs).

109. *See* Bayer, *supra* note 65, at 794 ("Any form of discrimination that affects individuals on the basis of race, gender, sex, religion, or national origin represents the intrusion of a stereotype into employment situations. This is contrary to Title VII's plain language and purpose."); *id.* at 845:

Part II discusses the effectiveness of plus claims after the Supreme Court's dicta in *Bostock v. Clayton County*, which may have increased statutory protection for plaintiffs alleging plus-anything-else claims.[110]

II. ANALYSIS

A. Plus Claims After Bostock

The Supreme Court's dicta in *Bostock v. Clayton County* may have repudiated the historical distinction between the categories of plus claims.[111] In *Bostock*, the Supreme Court held that discrimination based on sexual orientation and gender identity is inherently unlawful sex discrimination in violation of Title VII.[112] Justice Gorsuch, joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan, recognized that a discriminatory employment decision may have more than one causal factor; an employer will be liable for an employment decision involving multiple causal factors, so long as a statutorily protected characteristic is one of the causal factors.[113] Justice Gorsuch explained the implication of having multiple causal factors in his Yankees hypothetical:

> Consider an employer with a policy of firing any woman he discovers to be a Yankees fan. Carrying out that rule because an employee is a woman *and* a fan of the Yankees is a firing "because of sex" if the employer would have tolerated the same allegiance in a male employee.[114]

Justice Gorsuch equated his Yankees hypothetical to instances of sexual orientation and gender identity discrimination, where "*both* the individual's sex *and* something else (the sex to which the individual is attracted or with which the individual identifies)" are in play.[115] Accordingly, Justice Gorsuch emphasized that Title VII's causation

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> Title VII's purpose is frustrated when an entire classification of racially or sexually premised discrimination—mutable aspects associated with race and gender—is defined as outside its purview. The Supreme Court has recognized that Title VII was designed to eliminate racial and gender discrimination from employment. Neither logic nor law demonstrates that discrimination based on mutable characteristics interferes to a lesser degree than does immutable characteristic discrimination with regard to terms, conditions, and employment opportunities of affected individuals.

(footnote omitted).

110. 590 U.S. 644 (2020).

111. *See id.* at 660–62.

112. *Id.* at 683.

113. *Id.* at 661.

114. *Id.*

115. *Id.*

standard is met, and liability may attach, if an employer would not have discharged an employee but for that individual's sex.[116]

Justice Gorsuch's Yankees hypothetical provides a typical sex-plus claim: The employer discriminates because of a protected characteristic (sex) *plus* some additional factor (allegiance to the Yankees).[117] But being a Yankees fan is neither an immutable characteristic nor a constitutionally protected activity. Consequently, such a claim would historically proceed as a sex-plus-anything else claim. Plaintiffs would need to establish that their employer's policy against Yankees fans imposed a (very) unequal burden on a subgroup of women, making it quite difficult for a plaintiff to prevail.[118] And yet, by asserting that an employment decision is *because of* an individual's sex, despite there being two causal factors (sex and allegiance to the Yankees), Justice Gorsuch seems to grant being a Yankees fan the same strong protection previously reserved for constitutionally protected activities or immutable characteristics.[119] Justice Gorsuch's Yankees hypothetical thus suggests that a majority of the *Bostock* Court endorsed increased protection for plus-anything-else claims.[120]

It is unclear whether Justice Gorsuch's dicta in *Bostock* are sufficient to extend statutory protection to plus-anything-else claims, as its scope and authority remain unclear. Although the Supreme Court is not necessarily bound by its dicta,[121] lower courts generally are,[122] especially when the dicta are recent and detailed.[123] Nevertheless, plus-dress code and plus-grooming claims may be outside the scope of the *Bostock* dicta; indeed, the Supreme Court explicitly reserved the

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116. *Id.*

117. *Id.*

118. *See* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1110 (9th Cir. 2006) (establishing the unequal burden requirement for claimants challenging employee treatment based on something other than an immutable characteristic or a constitutionally protected activity).

119. *See Bostock*, 590 U.S. at 661:

> When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—*both* the individual's sex *and* something else . . . . But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach;

see also id. at 656 ("[A] defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law.").

120. *See id.* at 661.

121. Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 548 (2013).

122. Hollis v. Lynch, 827 F.3d 436, 448 (5th Cir. 2016); *see also* Reynolds v. Behrman Cap. IV L.P., 988 F.3d 1314, 1322 (11th Cir. 2021).

123. *Hollis*, 827 F.3d at 448; *see also* McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991); Utah Republican Party v. Cox, 892 F.3d 1066, 1079 (10th Cir. 2018).

question of whether *Bostock* applies to dress codes for a future date.[124] And in the years since *Bostock*, lower courts have disagreed as to whether Title VII prohibits sex-specific dress codes post-*Bostock*. At least one court applied *Bostock* to discriminatory dress codes, albeit outside of the Title VII context.[125] Another court held that Title VII does not prohibit sex-specific dress codes, even post-*Bostock*,[126] but the Fifth Circuit vacated judgment and declined to address how *Bostock* may affect the scope of Title VII claims.[127]

Despite the Supreme Court's reservation to decide the lawfulness of sex-specific dress codes in *Bostock*, there is a colorable argument that the dicta do apply to dress codes. Federal courts have historically applied Title VII to dress and grooming standards,[128] which is important because *Bostock* describes when liability may attach to an employer under Title VII.[129] A lower court encountering a sex-specific dress or grooming claim would typically apply the *Jespersen* (very) unequal burden requirement to determine whether an employee had a claim under Title VII.[130] But now *Bostock* provides a new understanding of when liability may attach under Title VII: an employer will be liable for an employment decision if changing a protected characteristic would yield a different result.[131] Such is precisely the case in plus-dress and plus-grooming cases, and the recent dicta in *Bostock* implicitly grant

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124. *See Bostock*, 590 U.S. at 681:

> [U]nder Title VII itself, [the employers] 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 any such question today.

125. Monegain v. Dep't of Motor Vehicles, 491 F. Supp. 3d 117, 143 (E.D. Va. 2020) (applying *Bostock* to dress codes in § 1983 action).

126. Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 623–24 (N.D. Tex. 2021), *aff'd in part*, *vacated in part*, *rev'd in part sub nom.* Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914 (5th Cir. 2023).

127. *Braidwood Mgmt., Inc.*, 70 F.4th at 940.

128. *See, e.g.*, Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1110 (9th Cir. 2006) (acknowledging merits of a sex-plus-grooming standard claim under Title VII if plaintiff can establish an unequal burden). *But see* Dodge v. Giant Food, Inc., 488 F.2d 1333, 1336–37 (D.C. Cir. 1973) (refusing to recognize a sex-plus-hair length claim due to the insignificant effect of hair length on employment opportunities).

129. *Bostock*, 590 U.S. at 661–62.

130. *See Jespersen*, 444 F.3d at 1110.

131. *Bostock*, 590 U.S. at 659–60; Maner v. Dignity Health, 9 F.4th 1114, 1122 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 899 (2022); *see also* Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1047 (10th Cir. 2020).

stronger protection for these claims, as demonstrated by revisiting *Jespersen*[132] and *Willingham*.[133]

In *Jespersen*, the Ninth Circuit rejected Ms. Jespersen's claim challenging her employer's gendered-appearance standards because she failed to establish that her employer's gendered-appearance standards imposed a greater burden on women than men.[134] Yet, the *Bostock* dicta suggest that terminating a woman because of her refusal to wear makeup is inherently terminating her "*because of* sex" if her employer would tolerate the same refusal in male employees.[135] In *Jespersen*, not only did the employer tolerate male employees refusing to wear makeup—it required it.[136] Accordingly, after *Bostock*, such discriminatory enforcement of gendered-appearance standards meets Title VII's causation standard without a showing of an unequal burden.[137]

In *Willingham*, Judge Bootle cautioned against recognizing gendered hair-length claims that would leave employers powerless in restricting male employees from wearing female attire—a result he considered "patently ridiculous."[138] Again, assuming that men wearing makeup is a proxy for sexual orientation,[139] an employer could, pre-*Bostock*, lawfully preclude some men on the basis of their sexual orientation by enforcing gendered no-makeup policies. *Bostock* likely extends statutory protection to this group since the employer's decision is *because of* sex (sex plus makeup).[140] Thus, after *Bostock*, an employer may face Title VII liability if its appearance standards allow (or require) one protected class to present themselves in a manner denied to another.[141] So long as lower courts continue to apply Title VII to dress codes and grooming standards, *Bostock* may be sufficient to address gendered-appearance proxies.

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132. *Jespersen*, 444 F.3d at 1110–11.

133. Willingham v. Macon Tel. Publ'g Co., 352 F. Supp. 1018, 1020 (M.D. Ga. 1972), *rev'd*, 482 F.2d 535 (5th Cir. 1973), *opinion vacated on reh'g*, 507 F.2d 1084 (5th Cir. 1975), *and aff'd*, 507 F.2d 1084 (5th Cir. 1975).

134. *Jespersen*, 444 F.3d at 1110–11.

135. *Bostock*, 590 U.S. at 661.

136. *Jespersen*, 444 F.3d at 1106.

137. *Jespersen* likely produces a different result under Justice Gorsuch's analysis in *Bostock*. *See Bostock*, 590 U.S. at 661–62.

138. *Willingham*, 352 F. Supp. at 1020; *see also* Dodge v. Giant Food, Inc., 488 F.2d 1333, 1336–37 (D.C. Cir. 1973) (analogizing hair-length requirements to mandates that men not wear dresses).

139. *See, e.g.*, Complaint at 19, 24, 26, Kunkle v. Cooper Health Sys., No. 1:17-cv-11643 (D.N.J. Nov. 15, 2017) (gay man alleging his employer fired him because of his sexual orientation and for wearing makeup).

140. *See Bostock*, 590 U.S. at 661.

141. *See id.*

The dicta in *Bostock*, however, do not increase protection for all plus-anything-else plaintiffs. The Tenth Circuit identifies an important distinction in Justice Gorsuch's Yankees hypothetical: a hypothetical employer who fires all Yankees fans would not violate Title VII because that policy is based on being a Yankees fan—not a protected characteristic.[142] Consequently, "a female sex-plus plaintiff must show that her employer treated her unfavorably relative to a male employee who also shares the 'plus-' characteristic."[143] Employers with policies based solely on a plus characteristic are immune from Title VII liability regardless of whether the plus characteristic is a proxy for a statutorily protected characteristic.[144]

Recall the race-neutral grooming policy in *Catastrophe Management Solutions* prohibiting "excessive hairstyles or unusual colors," which CMS interpreted to prohibit dreadlocks.[145] Under this policy, Ms. Jones cannot show that CMS treated her unfavorably relative to a White employee who also wears dreadlocks or a similarly "excessive hairstyle" because the characteristic is prohibited in all employees.[146] Consequently, Ms. Jones is still without remedy, depending on her state law protections.[147] But this should raise eyebrows: an employer can discriminate on the basis of racial behavior so long as the employer prohibits the group-specific behavior in nonmembers as well.[148] Ultimately, this incidence of discrimination by proxy remains legally permissible after *Bostock*.

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142. Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1046–47 (10th Cir. 2020).

143. *Id.* at 1047. The Tenth Circuit acknowledges that a plus plaintiff bringing a disparate treatment claim must show that she was treated differently than a similarly situated employee who does not share the protected characteristic. Rich, *supra* note 1, at 1136 n.2.

144. *Frappied*, 996 F.3d at 1045–46. The Tenth Circuit's distinction may be extended to the hypothetical assuming that men wearing makeup is a proxy for sexual orientation. An employer that terminates *all* employees who wear makeup is not engaging in prohibited discrimination because the terminations are not because of sex. *See id*.

145. 852 F.3d 1018, 1022 (11th Cir. 2016).

146. *See id.*; *see also* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981) (rejecting challenge against employer policy prohibiting all braided hairstyles because "the grooming policy applies equally to members of all races"). Note, however, that Ms. Jones would likely be able to demonstrate that CMS treated her unfavorably relative to a similarly situated White employee wearing dreadlocks if the White employee wearing dreadlocks was not terminated because of her hair.

147. Alabama, the state where CMS is located, has not passed a CROWN Act extending statutory protection to race-based hairstyle claims. *See* Jasmine Payne-Patterson, *The CROWN Act: A Jewel for Combating Racial Discrimination in the Workplace and Classroom*, ECON. POL'Y INST. 7 (July 26, 2023) (citing S.B. 188, 2019–20 Assemb., Reg. Sess. (Cal. 2019)), https://files.epi.org/uploads/270289.pdf [https://perma.cc/U9R9-PTCE].

148. *See* Plaintiff's Brief in Opposition to Defendant Catastrophe Management Solutions' Motion to Dismiss, EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. 2016) (No. 13-cv-00476), 2014 WL 4745282 (arguing that African descendants are the primary wearers of dreadlocks). The grooming policy in *Catastrophe Management Solutions* prohibited "excessive

The persistence of discrimination by proxy may, in some cases, require legislative action. Some states have responded to the problem of race-based hair discrimination by passing a version of the Create a Respectful and Open World for Natural Hair ("CROWN") Act.[149] These statutes aim to broaden employees' protection from proxy discrimination by enumerating which traits—such as protective hairstyles—are included in "race." Notably, the states that have passed these amendments differ in the breadth of enumerated characteristics that they have chosen to protect by statute.[150] The differences in enumeration raise questions about how much statutory enumeration—if any—is desirable. As a point of comparison, the ADA and ADAAA together illustrate situations where Congress opted against enumerating specific health conditions that qualify as protected disabilities, yet chose to enumerate major life activities.[151] The implications of these enumeration decisions in the ADA and ADAAA provide useful guidance in drafting amendments to other employment discrimination statutes.

B. Enumeration in the Americans with Disabilities Act

1. Americans with Disabilities Act

Congress enacted the ADA in 1990 as part of a national mandate to eliminate discrimination against disabled individuals.[152] To receive statutory relief from such discrimination, ADA claimants must demonstrate that they have a "disability" within the meaning of the ADA before a court will consider the merits of the case.[153] The ADA defines "disability" as: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such

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hairstyles." 852 F.3d at 1022. The problem with this policy is that some of the hairstyles CMS deemed "excessive" are physiologically, culturally, and historically associated with race. *See supra* notes 91–93, 99–101.

149. *See infra* notes 159–188 (discussing legislative efforts to prevent race-based hairstyle discrimination), 217–221 (discussing protections under narrow enumeration amendments), 240–243 (discussing protections under broad enumeration amendments) and accompanying text.

150. *Compare* WASH. REV. CODE ANN. § 49.60.040(21) (West 2020) (defining "race" to include "traits historically associated or perceived to be associated with race"), *with* COLO. REV. STAT. ANN. § 24-34-301(21) (West 2023) (defining "race" to include "hair texture, hair type, or a protective hairstyle that is commonly or historically associated with race").

151. Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(1).

152. *Id.* § 12101(b)(1).

153. Danielle J. Ravencraft, *Why the "New ADA" Requires an Individualized Inquiry as to What Qualifies as a "Major Life Activity"*, 37 N. KY. L. REV. 441, 442–43 (2010).

impairment."[154] Federal courts have typically interpreted the first definition of "disability" as having three requirements: (1) a physical or mental impairment (2) that substantially limits (3) one or more major life activities.[155]

The definition of disability in the ADA has some notable implications. Congress chose not to enumerate specific disabilities to be covered by the ADA and instead adopted an expansive definition of what constitutes a disability to "encompass all disabled individuals, despite the diversity of their disabling conditions."[156] In the ADA, Congress also chose not to define the phrase "substantially limits" or enumerate what constitutes a "major life activit[y]."[157]

Congress's choice against enumeration gave courts substantial discretion in determining whether plaintiffs sufficiently demonstrated that their impairments constitute disabilities within the meaning of the ADA.[158] Specifically, in a series of early cases, the Supreme Court narrowly interpreted the ADA's "substantially limits" language as requiring an impairment that prevents or severely restricts a major life activity.[159] Moreover, the Supreme Court recognized that the disability determination is an "individualized inquiry" of whether an impairment substantially limits a major life activity, requiring extensive analysis of whether plaintiffs had a disability as defined by the ADA.[160] As a result of these standards, many claimants could not establish that they had a disability within the meaning of the ADA.[161] Indeed, ADA litigation became focused on determining whether a claimant qualified as having

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154. 42 U.S.C. § 12102(1).

155. Ravencraft, *supra* note 153, at 443–44.

156. Jennifer Bennett Shinall, *The Substantially Impaired Sex: Uncovering the Gendered Nature of Disability Discrimination*, 101 MINN. L. REV. 1099, 1099 & n.2 (2017) ("Never has federal law attempted to distinguish between different types of substantial impairments, or between degrees of substantial impairments, or between different subgroups of substantially impaired individuals."); *id.* at 1099 n.2 ("Congress's intention when passing the ADA was to find a common-ground definition of disability . . . ." (citing NAT'L COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT 80 (2d ed. 2010))).

157. Ravencraft, *supra* note 153, at 443–44 (citing 29 C.F.R. 1630.2(i)).

158. *Id.* at 443–44.

159. *See* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197–98 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(4), 122 Stat. 3553; Sutton v. United Airlines, Inc., 527 U.S. 471, 483 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(2)-(3), 122 Stat. 3553.

160. *Sutton*, 527 U.S. at 483; *see* Bragdon v. Abbott, 524 U.S. 624, 639–42 (1998) (court doing an extensive individualized inquiry of whether HIV substantially limits conception and childbirth).

161. *See* Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1434 (1999) ("[T]he definition [of disability] is 'much more restrictive than those who drafted and supported the ADA had thought it would be' and has resulted in the summary dismissal of a large number of cases between 1992 and 1998."); Wendy Wilkinson, *Judicially Crafted Barriers to Bringing Suit Under the Americans with Disabilities Act*, 38 S. TEX. L. REV. 907, 908 (1997).

a disability, rather than whether discrimination had occurred.[162] In response, Congress enacted the ADAAA in 2008 to address concerns that the ADA had failed to deliver on its promise to eliminate discrimination against individuals with disabilities.[163]

2. Americans with Disabilities Act Amendments Act

The ADAAA reinstated the broad protections available under the ADA and refocused disability litigation on establishing whether covered entities had complied with their statutory obligations.[164] The ADAAA did so by rejecting the Supreme Court's line of cases narrowly interpreting disability in the ADA and stipulating that inquiries into submitted disabilities "should not demand extensive analysis."[165] The Eleventh Circuit recognized that "Congress intended that 'the establishment of coverage under the ADA should not be overly complex nor difficult, and expect[ed] that the [ADAAA] will lessen the standard of establishing whether an individual has a disability for purposes of coverage under the ADA.' "[166]

The ADAAA lessened the burdensome standard of establishing whether an individual has a disability by broadening the phrase "substantially limits" and enumerating an inexhaustive list of major life activities,[167] decreasing the amount of litigation devoted to defining these activities.[168] For example, prior to the ADAAA, plaintiffs with cancer struggled to establish which major life activity cancer substantially limited.[169] The ADAAA's enumeration of normal cell

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162. *See* Curtis D. Edmonds, *Lowering the Threshold: How Far Has the Americans with Disabilities Act Amendments Act Expanded Access to the Courts in Employment Litigation?*, 26 J. L. & POL'Y 1, 10 (2018) ("The ADA did not define the term 'major life activity,' and the issue of whether an individual's impairment did or did not impact a specific life activity, and whether said activity was 'major' or not, was the subject matter of a great deal of litigation and commentary.").

163. Ravencraft, *supra* note 153, at 444–45.

164. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(1), 122 Stat. 3553; § 2(b)(5), 122 Stat. 3553.

165. § 2(b)(2)-(4), 122 Stat. 3553 (rejecting the Supreme Court's line of cases narrowly interpreting disability in the ADA); § 2(b)(5), 122 Stat. 3553.

166. Mazzeo v. Color Resols. Int'l, LLC, 746 F.3d 1264, 1268 n.2 (11th Cir. 2014) (quoting H.R. REP. NO. 110-730, at 9 (2008)).

167. 42 U.S.C. § 12102(4)(B) ("The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008."); *id.* § 12102(2)(A) ("[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."); *id.* § 12102(2)(B) ("[A] major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.").

168. *See* Edmonds, *supra* note 162.

169. *See* Ellison v. Software Spectrum, Inc., 85 F.3d 187, 189 (5th Cir. 1996).

growth as a major life activity made this easier for such plaintiffs.[170] Congress's enumeration of certain major life activities provides an example of how enumeration can improve judicial efficiency and extend statutory protection to individuals who previously struggled to establish protected-class membership.[171] Empirical evidence indeed indicates that the ADAAA made it easier for disability claimants to demonstrate disability and survive summary judgment.[172] The broad definition of disability under the ADAAA, however, has arguably extended statutory protection to individuals beyond the true purpose of anti-disability discrimination laws.[173]

Although Congress enumerated major life activities in the ADAAA, Congress again declined to enumerate specific health conditions that qualify as disabilities,[174] recognizing that the same condition can substantially impair one person but leave another person relatively unaffected.[175] The nonenumeration of specific health conditions has effectively narrowed the statute to protect only employees inhibited by their impairment.[176] At the same time,

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170. *Cancer in the Workplace and the ADA*, U.S. EEOC (May 15, 2013), https://www.eeoc.gov/laws/guidance/cancer-workplace-and-ada [https://perma.cc/DXQ4-LCTM]; 42 U.S.C. § 12102(2)(B) (defining major life activities).

171. *See Ellison*, 85 F.3d at 189 (employee with cancer could not establish disability); Schluter v. Indus. Coils, Inc., 928 F. Supp. 1437, 1441 (W.D. Wis. 1996) (employee with diabetes could not establish disability); *see also* Kerri Stone, *Substantial Limitations: Reflections on the ADAAA*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 509, 526 (2011) (describing the "many cases pre-dating the ADAAA in which plaintiffs with clearly disabling conditions, such as cancer and HIV, were foreclosed from bringing cases that challenged discrimination based undisputedly on their conditions, because they were not found to be 'disabled' within the meaning of the statute").

172. *See* Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2050–51 (2013) (finding "a 28.5 percentage point drop in pro-employer summary judgment rulings" after the ADAAA's passage).

173. *See* Amelia Michele Joiner, *The ADAAA: Opening the Floodgates*, 47 SAN DIEGO L. REV. 331, 366–69 (2010) ("As it currently stands, the ADAAA may have opened the door to more litigants, while certainly watering down the true purpose of the Act."); Andrew E. Henry, *The ADA Amendments Act of 2008: Why the Qualified Individual Analysis is the New Battleground for Employment Discrimination Suits*, 67 OKLA. L. REV. 111, 112 (2014) ("[C]ourts applying the Amendments Act almost always find that an employee's impairment 'substantially limits one or more [of her] major life activities.' "); Jeffrey Douglas Jones, *Enfeebling the ADA: The ADA Amendments Act of 2008*, 62 OKLA. L. REV. 667, 669–70 (2010):

> [T]he ADAAA's finding that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis" translates into a default rule for courts to follow: when disability determinations are close, courts should ignore doctrine and give plaintiffs a pass (rather than crafting judicial tests, as in the *Sutton* case).

(footnote omitted).

174. 42 U.S.C. § 12102(1).

175. *See* Shinall, *supra* note 156, at 1099.

176. *See* NAT'L COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT 80–81 (2d ed. 2010).

Congress's decision against enumeration has also *increased* coverage for rare health conditions that may otherwise be excluded from a list of covered disabilities: so long as a claimant can establish that they have an impairment that substantially limits one or more major life activities, the claimant can demonstrate disability within the meaning of the ADAAA.[177]

Though Congress's decision to enumerate major life activities while leaving disabilities unenumerated strikes an important balance of which employees warrant protection from disability discrimination, it is not without drawbacks. Some plaintiffs who seemingly warrant ADAAA coverage are denied protection because they cannot demonstrate disability under the statute.[178] One prominent example of this is obesity; plaintiffs are unable to establish which major life activity obesity affects.[179] Consequently, courts interpret the ADAAA as excluding obese plaintiffs[180] unless they can argue that they are regarded as having an impairment.[181] Denying statutory relief to plaintiffs challenging obesity discrimination seems contrary to the promise of the ADAAA.[182] Yet the underinclusion of some individuals in statutory protection may be a necessary consequence of legislative efficiency: it is impractical for Congress to enumerate (nor does Congress necessarily want to enumerate) every disability or major life activity that the ADAAA intends to protect.[183] Enumeration does not

177. *See* Shinall, *supra* note 156, at 1099 n.2; *see also* Ravencraft, *supra* note 153, at 445 (discussing how the ADAAA theoretically increased disability coverage by making it easier for ADA claimants to establish a physical or mental impairment which substantially limits the ability to perform a major life activity).

178. *See* Richardson v. Chi. Transit Auth., 926 F.3d 881, 884 (7th Cir. 2019) (obese employee could not establish disability).

179. *See id.* at 888 ("Without evidence that [the plaintiff's] extreme obesity was caused by a physiological disorder or condition, his obesity is not a physical impairment under the plain language of the EEOC regulation."); *see also* Morriss v. BNSF Ry. Co., 817 F.3d 1104, 1108–13 (8th Cir. 2016), *cert. denied*, 580 U.S. 875 (2016); EEOC v. Watkins Motor Lines, Inc., 463 F.3d 436, 441–43 (6th Cir. 2006); Francis v. City of Meriden, 129 F.3d 281, 286–87 (2d Cir. 1997).

180. Note that people with disabilities have different preferences when referring to their disability. Some people see their disability as an essential part of who they are and prefer to be identified with their disability first (e.g., obese plaintiffs). Others may not want to view their disability as central to their identity and prefer to be identified as a person first (e.g., plaintiffs with obesity). *See also infra* notes 199–202 and accompanying text (discussing the implications of personal identity in a broadened immutability analysis).

181. *But see* Shell v. Burlington N. Santa Fe Ry. Co., 941 F.3d 331, 335–36 (7th Cir. 2019) (explaining that "the ADA's 'regarded as' prong [does not] cover[ ] a situation where an employer views an applicant as at risk for developing a qualifying impairment in the future").

182. *See supra* notes 164–166 and accompanying text.

183. *See* NAT'L COUNCIL ON DISABILITY, *supra* note 176, at 80 ("It would also be impractical to name, in a statute, each and every type of disability."). Enumerating each disability covered in the ADAAA would require Congress to amend the statute every time a disability/health condition was lobbied or newly discovered. This process would likely require Congress to continually revisit the

necessarily solve underinclusion, and inexhaustive, narrow enumeration may be even *more* underinclusive by excluding unknown or rare disabilities.[184] Additionally, the underinclusion of some individuals may be marginally more desirable than the overinclusion of others.

The enumeration decisions in the ADA and ADAAA provide insight into the consequences of enumeration and the compromises inherent in drafting legislation. This guidance is particularly timely as legislatures face enumeration decisions when responding to race-based hairstyle discrimination.

C. Comparing Legislative Responses to Race-Based Hairstyle Discrimination

Because Ms. Jones's case is by no means an anomaly, race-based hairstyle discrimination has recently gained significant attention.[185] Legislatures have responded to this form of proxy discrimination by passing versions of the CROWN Act.[186] On July 3, 2019, California became the first state to sign the CROWN Act into law;[187] five years later, twenty-four states have enacted the CROWN Act or similarly inspired laws to prohibit discrimination of race-based hairstyles.[188]

ADAAA enumerated disabilities to continue providing broad protection against disability discrimination. *See* Shinall, *supra* note 156, at 1099 n.2 (discussing Congress's intent in defining "disability").

184. *See* Shinall, *supra* note 156, at 1099 n.2.

185. *See* Greene, *supra* note 45, at 990 ("Countless employers have instructed African descendant women to cut off, cover, or alter their naturally textured hair in order to obtain and maintain employment for which they are qualified." (footnote omitted)); Chelsea Stein, *MSU Research Exposes Discrimination Against Black Women with Natural Hair*, MICH. STATE UNIV. (Sept. 18, 2020), https://broad.msu.edu/news/msu-research-exposes-discrimination-against-black-women-with-natural-hair/ [https://perma.cc/AYQ6-4VSN].

186. Senator Holly J. Mitchell introduced the Create a Respectful and Open World for Natural Hair ("CROWN") Act in California as a legislative response to employers using race-based hairstyles as a proxy for race discrimination. *See* Payne-Patterson, *supra* note 147, at 5.

187. *Id.*

188. The CROWN Act or similarly inspired laws have been passed in twenty-four states: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, Oregon, Tennessee, Texas, Virginia, and Washington. *Id.* at 7. The CROWN Act was passed by the House of Representatives on March 18, 2022, and its companion bill was introduced to the Senate on March 22, 2022. Creating a Respectful and Open World for Natural Hair Act of 2022, H.R. 2116, 117th Cong. (2022); CROWN Act of 2021, S. 888, 117th Cong. (2021). On December 14, 2022, Senate Republicans blocked passage of a federal CROWN Act for the second time. Jayla Whitfield-Anderson, *Senate Republicans Block CROWN Legislation Again. But Advocates Aren't Deterred.*, YAHOO! NEWS (Dec. 21, 2022, 3:08 PM), https://news.yahoo.com/senate-republicans-block-crown-legislation-again-but-advocates-arent-deterred-200840509.html?guccounter=1 [https://perma.cc/UX9X-8TEC]. The CROWN Act has not been reintroduced in the 2023–2024 Congress. Payne-Patterson, *supra* note 147, at 6.

Notably, states have sought to prevent race-based hairstyle discrimination using two different strategies of enumeration: narrow or broad enumeration.[189]

Learning from the implications of the enumeration decisions in the ADA and ADAAA, this Note subsequently analyzes how these implications can inform legislative responses to proxy discrimination. This Section analyzes existing legislative responses to race-based hairstyle discrimination to assess potential legislative responses to other forms of proxy discrimination.[190] Beyond discussing the implications of opting in favor of nonenumeration, it also compares narrow enumeration, which lists particular traits to be included in a statutory definition of a protected characteristic, against broad enumeration, which provides general guidance of which traits are protected under an employment statute.

1. No Amendment

Twenty-six states (and Washington, D.C.) have not passed a CROWN Act amendment, leaving the term "race" undefined in employment discrimination statutes.[191] Indeed, by not amending Title VII, Congress has also maintained this unenumerated approach.[192]

The problem with nonenumeration is that the term "race," undefined, is ambiguous and allows for race-based proxy discrimination.[193] The strongest arguments for nonenumeration are: (1) hairstyle is a mutable characteristic and, by simply changing their hairstyle, Black applicants or employees can enjoy equal employment opportunities;[194] and (2) extending statutory protection to mutable

189. *See, e.g.*, COLO. REV. STAT. ANN. § 24-34-301(21) (West 2023) (example of narrow enumeration); WASH. REV. CODE ANN. § 49.60.040(21) (West 2020) (example of broad enumeration).

190. For a discussion of how courts and employers can prevent discrimination on the basis of hair, see Moronta, *supra* note 17, at 1741–45.

191. The states that have not yet passed CROWN Act legislation include: Alabama, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Mississippi, Missouri, Montana, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming. Payne-Patterson, *supra* note 147, at 7. This list includes states where CROWN Act legislation is pending.

192. *See* Whitfield-Anderson, *supra* note 188 (discussing how Senate Republicans blocked passage of a federal CROWN Act for the second time).

193. *See* Rich, *supra* note 1, at 1194; *see also* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1030 (11th Cir. 2016).

194. *See* Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091 (5th Cir. 1975) ("If the employee objects to the grooming code he has the right to reject it by looking elsewhere for employment, or alternatively he may choose to subordinate his preference by accepting the code along with the job.").

traits unreasonably encroaches on an employer's autonomy to make employment decisions.[195]

Title VII was enacted to give underrepresented groups equal opportunity in the workplace.[196] Requiring underrepresented groups to change a trait culturally or statistically associated with a protected characteristic to access such equal employment opportunities inhibits the goal of Title VII.[197] Immutability has often served as an indicator of fairness in interpreting Title VII; it is unfair to discriminate against something an individual cannot change.[198]

Although some courts indicate a willingness to broaden the concept of immutability to capture characteristics so central to individual identity that one should not be required to change them,[199] a broadened concept of immutability alone is insufficient to address proxy discrimination.[200] Consider an example from disability discrimination: Prior to the passing of the ADAAA, some employees with cancer struggled to establish disability under the ADA.[201] A broadened concept of immutability would have been insufficient to extend statutory protection to plaintiffs with cancer because cancer is treatable (a mutable condition) and plaintiffs may reject having cancer as being central to their individual identity. And yet, although cancer is not immutable—even under a broadened concept of immutability—a plaintiff with cancer should be protected under disability

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195. *See* Corbett, *supra* note 76, at 166:

> When the goal of reducing discrimination would encroach too much on other important goals, such as employers' autonomy of decision-making, some in society will speak up about the potential excesses of employment discrimination law . . . . It is at those points of compromise between the goal of employment discrimination law and other societal goals that the delicate balance must be maintained, and sometimes that requires a subordination of the discrimination law;

see also Willingham v. Macon Tel. Publ'g Co., 352 F. Supp. 1018, 1020 (M.D. Ga. 1972), *rev'd*, 482 F.2d 535 (5th Cir. 1973), *opinion vacated on reh'g*, 507 F.2d 1084 (5th Cir. 1975), *and aff'd*, 507 F.2d 1084 (5th Cir. 1975) (expressing concern that recognizing hair-length claims would make employers powerless).

196. 29 C.F.R. § 1608.1(b) (1979).

197. *See* Rich, *supra* note 1, at 1194 (describing proxy discrimination); *supra* notes 44–48 and accompanying text (discussing how proxy discrimination can effectively block individual applicants from labor market opportunities); *see also* 29 C.F.R. § 1608.1(b) (1979) (describing the purpose of Title VII as providing "equality of opportunity in the work place").

198. *See* Hoffman, *supra* note 76, at 1537–39; Corbett, *supra* note 76, at 175. *But see* Hoffman, *supra* note 76, at 1522–23 (discussing immutable traits not addressed by employment discrimination laws).

199. *E.g.*, Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring).

200. *See* Clarke, *supra* note 81, at 32–53 (discussing the concerns of the revised understanding of immutability and how immutability is incomplete in justifying protections).

201. *See* Ellison v. Software Spectrum, Inc., 85 F.3d 187, 189–93 (5th Cir. 1996).

discrimination laws.[202] This example illustrates how a broadened concept of immutability may be insufficient in some circumstances. Moreover, even if a broadened concept of immutability were sufficient, it is unclear whether courts will adopt this broadened understanding.[203] Thus, legislative intervention may be necessary to extend statutory protection to mutable characteristics and therefore effectuate the purpose of Title VII.[204]

Increasing statutory protection for applicants and employees inherently imposes a cost to employers. The allowance of proxy discrimination may, in some situations, be necessary to avoid subordinating employer autonomy in decisionmaking.[205] Legislatures must balance the goal of creating equal opportunity in employment with other societal goals; when other societal goals prevail, nonenumeration, and thus the allowance of some proxy discrimination, may be socially desirable.[206]

A comparison between race-based hairstyles and citizenship demonstrates this point. Prohibitions against race-based hairstyles frustrate the goal of Title VII while only marginally promoting employer autonomy in decisionmaking; employers often have little or no legitimate business-related reason for prohibiting race-based hairstyles.[207] For instance, Ms. Jones could not wear dreadlocks despite lacking physical contact with the public.[208] The style of Ms. Jones's hair did not materially affect her ability to handle calls.[209] Expanding statutory protection is thus desirable in cases of race-based hairstyle discrimination because the goal of reducing employment discrimination

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202. *Cf.* Clarke, *supra* note 81, at 38–42 (discussing how a broadened concept of immutability excludes inessential and stigmatized traits). The ADAAA made it easier for plaintiffs with cancer to establish disability by including the operation of a major bodily function in the definition of a major life activity. 42 U.S.C. § 12102(2)(B).

203. *See, e.g.*, EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1030 (11th Cir. 2016) (refusing to adopt a broadened concept of immutability).

204. *See* Clarke, *supra* note 81, at 38–42; Bayer, *supra* note 65, at 794.

205. *See* Corbett, *supra* note 76, at 166:

> When the goal of reducing discrimination would encroach too much on other important goals, such as employers' autonomy of decision-making, some in society will speak up about the potential excesses of employment discrimination law. . . . It is at those points of compromise between the goal of employment discrimination law and other societal goals that the delicate balance must be maintained, and sometimes that requires a subordination of the discrimination law.

206. *Id.*

207. *See* Chambers, *supra* note 94, at 81 ("Employers may claim to want their workers to look professional. That desire should not provide a free pass to interpret 'professionalism' in a manner that has significant negative effects on Black women.").

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

209. *Cf. id.* (discussing qualifications for the position).

(even by proxy) outweighs preserving employer autonomy in prohibiting race-based hairstyles, as it seemingly imposes minimal administrative costs on employers.[210]

Citizenship requirements differ from race-based hairstyle prohibitions because hiring noncitizens imposes substantial administrative costs on employers. The process of hiring a noncitizen is more expensive and longer than hiring a citizen.[211] Additionally, an employer may be opposed to paying workers the prevailing wage in their area of employment (as required by the H-1B) or concerned about visa availability during its hiring timeline.[212] A statute that enumerates national origin to plainly include citizenship would infringe upon employer autonomy in deciding against incurring substantial administrative costs.[213] This instance of nonenumeration, however, would not leave plaintiffs powerless against proxy discrimination; as a majority of the Supreme Court in *Espinoza* acknowledged, citizenship requirements may be evidence of pretext for national origin discrimination.[214]

Thus, while the nonenumeration of race inhibits the substantial goal of reducing racial employment discrimination by allowing employers to discriminate against proxies for race,[215] the nonenumeration of national origin appreciates the importance of employer autonomy in controlling administrative costs. [216]

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210. *See* Corbett, *supra* note 76, at 166.

211. Roy Maurer, *Employers Invest Heavily When Hiring Foreign Talent*, SOC'Y FOR HUM. RES. MGMT. (Mar. 13, 2017), https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/employers-cost-time-hiring-foreign-talent.aspx [https://perma.cc/A49R-535G] ("Employers in the U.S. that hire workers from abroad can spend more than three times what they do for domestic hires, while it can take six times longer to bring a foreign worker on board than a native worker . . . ."); Skye Schooley, *Everything You Need to Know About Hiring Foreign Nationals*, BUSINESS.COM, https://www.business.com/articles/hiring-foreign-nationals/ (last updated Nov. 2, 2023) [https://perma.cc/3VLR-UJTS] (discussing the cost of sponsoring a foreign worker).

212. NATHANIEL INGRAHAM, BERNARD KOTEEN OFF. OF PUB. INT. ADVISING HARV. L. SCH., CITIZENSHIP GUIDE: HIRING NON-CITIZENS 2, 6 (2011), https://hls.harvard.edu/wp-content/uploads/2022/08/Citizenship-Non-Citizens-Guide.pdf [https://perma.cc/7UP7-GTEN].

213. *See id.* (discussing some employers' hiring decisions as cost-saving measures).

214. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 92 (1973):

> In some instances, for example, a citizenship requirement might be but one part of a wider scheme of unlawful national-origin discrimination. In other cases, an employer might use a citizenship test as a pretext to disguise what is in fact national-origin discrimination. Certainly Tit[le] VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin.

215. *See* Rich, *supra* note 1, at 1141; Bayer, *supra* note 65, at 794.

216. *See* Corbett, *supra* note 76, at 166 (advocating for balancing the goals of Title VII against other societal goals); Maurer, *supra* note 211 (noting the higher cost and longer time needed to hire a foreign employee); *Espinoza*, 414 U.S. at 92, 95.

2. Narrow Enumeration Amendment

The first type of amendments that states have passed to prohibit race-based hairstyle discrimination utilizes narrow enumeration.[217] Narrow enumeration amendments list particular traits included in the statutory definition of "race."[218] For example, Colorado narrowly enumerates "race" to "include[ ] hair texture, hair type, or a protective hairstyle that is commonly or historically associated with race."[219] Amendments utilizing narrow enumeration unambiguously provide protection for racial hair textures and protective hairstyles by explicitly enumerating such protections.[220] These amendments do not, however, provide protection for traits culturally or statistically associated with race but not enumerated in the statutory definition.[221] By way of comparison, Congress declined to narrowly enumerate "disability" and "major life activities" in the ADA.[222] The implications of Congress's enumeration decisions in the ADA provide a lens for evaluating enumeration approaches at large.[223]

Narrow enumeration amendments plainly provide plaintiffs protection from discrimination based on identified proxies (e.g., race-based hairstyles). The benefit of these amendments is that they promote judicial and commercial efficiency.[224] Narrow enumeration promotes judicial efficiency by decreasing litigation about what characteristics and traits are statutorily protected.[225] The enumeration of a particular characteristic allows plaintiffs challenging discrimination by an enumerated proxy to proceed past the summary judgment stage—a phenomenon observed by plaintiffs when Congress

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217. *See, e.g.*, COLO. REV. STAT. ANN. § 24-34-301(21) (West 2023).

218. *See, e.g.*, *id.* (defining "race" as inclusive of protective hairstyles); *see also id.* § 24-34-301(17) (West 2023) (defining "protective hairstyle"). The CROWN Act passed by the House and blocked by Senate Republicans is another example of a narrow enumeration amendment. *See* Creating a Respectful and Open World for Natural Hair Act of 2022, H.R. 2116, 117th Cong. (2022) ("This bill prohibits discrimination based on a person's hair texture or hairstyle if that style or texture is commonly associated with a particular race or national origin."); CROWN Act of 2021, S. 888, 117th Cong. (2021) (same); *see also* Whitfield-Anderson, *supra* note 188 (commenting that Senate Republicans blocked the federal CROWN Act).

219. § 24-34-301(21).

220. *See id.*

221. *See id.* (extending statutory protection only to "hair texture, hair type, or a protective hairstyle that is commonly or historically associated with race").

222. *See* 42 U.S.C. § 12102(1).

223. The enumeration of "major life activities" is not narrow because the statute explicitly includes activities not mentioned. 42 U.S.C. § 12102(2)(A).

224. *Cf. supra* notes 171–172 and accompanying text (discussing the efficiencies realized by enumeration in the ADAAA).

225. *See* Edmonds, *supra* note 162, at 8–13; Ravencraft, *supra* note 153, at 445.

enumerated "major life activities" in the ADAAA.[226] Narrow enumeration also promotes commercial efficiency by providing notice about what constitutes unlawful discrimination;[227] plaintiffs will avoid bringing frivolous lawsuits and discriminatory employers will have more incentive to settle when their conduct clearly violates the statute. Narrow enumeration inherently requires legislatures to be intentional in deciding which characteristics should be protected under employment discrimination laws.[228]

Congress's choice against narrowly enumerating the term "disability" in the ADA is instructive.[229] The broad definition of "disability" extended statutory protection to individuals with rare health conditions and avoided the legislative inefficiency of repeatedly amending the statute to cover new disabilities.[230] Limited coverage[231] and legislative inefficiencies[232] are the primary defects of narrow enumeration, as legislatures must decide which proxies warrant protection and revisit questions of innovative proxy discrimination. Federal courts may be hesitant to recognize discrimination against mutable proxies not expressly enumerated in the statute.[233]

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226. *See* Edmonds, *supra* note 162, at 10–13; Befort, *supra* note 172, at 2050–52.

227. Parties have more notice about which characteristics are statutorily protected because protected characteristics are enumerated or recognized by precedent.

228. Sharona Hoffman, *Is There a Place for "Race" as a Legal Concept?*, 36 ARIZ. ST. L.J. 1093, 1159 (2004) ("[R]enunciation of the catchall 'race' concept would require legislators to elucidate the intended beneficiary class of various statutes and would encourage both policymakers and those engaged in public debate to think more carefully about public policy goals.").

229. *See* 42 U.S.C. § 12102(1).

230. *See supra* notes 156, 177, 183 and accompanying text.

231. Narrow enumeration amendments do not address proxies for discrimination other than those expressly addressed. This may be insufficient given the broad social construction of race. *See* Natalie A. Tupta, *Reconsidering the Immutability of "Race": An Examination of the Disconnect Between "Race" in Title VII Jurisprudence and Social Science Literature*, DUQ. SCHOLARSHIP COLLECTION 9 (Mar. 15, 2018), https://dsc.duq.edu/cgi/viewcontent.cgi?article=1009&context=gsrs [https://perma.cc/6BLX-T39J] ("If Congress were to update Title VII to reflect the modern understanding of race, the focus of Title VII should continue to be prohibiting discrimination based on personal characteristics that do not materially affect a person's ability to perform a job."); *see also* Joseph S. Murray IV, EEOC v. Catastrophe Management Solutions*: Title VII Does Not Prohibit Race Discrimination Based on Mutable Characteristics*, NCBARBLOG (Sept. 29, 2016), https://www.ncbarblog.com/eeoc-v-catastrophe-management-solutions-title-vii-does-not-prohibit-race-discrimination-based-on-mutable-characteristics/ [https://perma.cc/WBY9-3553] ("We now understand that race includes social context, culture, and life experiences (mutable characteristics).").

232. *See* NAT'L COUNCIL ON DISABILITY, *supra* note 176, at 80. The unsuccessful efforts of the federal CROWN Act offer a good example of the inefficiencies in amending statutes. *See* Whitfield-Anderson, *supra* note 188 (discussing how Senate Republicans blocked passage of a federal CROWN Act for the second time).

233. *See Expressio Unius Est Exclusio Alterius*, MERRIAM WEBSTER, https://www.merriam-webster.com/legal/expressio%20unius%20est%20exclusio%20alterius (last visited May 19, 2024) [https://perma.cc/Q6TZ-2KFG] (defining expressio unius est exclusio alterius as "a principle in

Accordingly, such hesitation may create a viciously inefficient cycle: (1) employers discriminate by proxy, (2) legislatures respond through narrow enumeration, and (3) employers find a new proxy to facilitate discrimination of a protected characteristic.

The limited coverage provided by narrow enumeration may be advantageous where the legislature has decided that protecting a *particular* proxy dominates the goal of preserving employer autonomy. Suppose that Justice Gorsuch's dicta in *Bostock* do not substantially increase statutory protection for plus-anything-else claims.[234] Legislatures may want to narrowly enumerate protection for a particular proxy—say, wearing makeup (as a proxy for sexual orientation),[235] but not gendered-hair length. Discrimination against gendered-hair length may not warrant the same protection as other proxies, such as race-based hairstyles.[236] For instance, Professor Wendy Greene argues that Black women suffer a harm from hair discrimination not shared by other women given the historical and contemporary stigmatization of Black women's hair.[237]

Moreover, the plain language of Title VII also suggests that the goal of reducing race discrimination is more substantial than for other protected characteristics; Title VII allows employers to explicitly consider religion, sex, or national origin—but never race—in instances where protected class membership is a "bona fide occupational qualification reasonably necessary to the normal operation of that

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statutory construction: when one or more things of a class are expressly mentioned others of the same class are excluded").

234. *See* Bostock v. Clayton County, 590 U.S. 644, 661 (2020).

235. *See, e.g.*, Complaint at 19, 24, 26, Kunkle v. Cooper Health Sys., No. 1:17-cv-11643 (D.N.J. Nov. 15, 2017).

236. Dodge v. Giant Food, Inc., 488 F.2d 1333, 1336–37 (D.C. Cir. 1973):

> [H]air-length regulations[ ] are classifications by sex which do not limit employment opportunities by making distinctions based on immutable personal characteristics, which do not represent any attempt by the employer to prevent the employment of a particular sex, and which do not pose distinct employment disadvantages for one sex. Neither sex is elevated by these regulations to an appreciably higher occupational level than the other. We conclude that Title VII never was intended to encompass sexual classifications having only an insignificant effect on employment opportunities.

(footnote omitted).

237. *See* Greene, *supra* note 45, at 1014:

> Black women's deliberations over their hair may be shared to a certain extent by all women; however, the extent to which these decisions are emotional, personal, political, and professional . . . are unique to the Black women's experience—historically and contemporarily. This experience is deeply rooted in American constructs of race, racism, and racial hierarchy out of which a particular negative stigmatization of Black women's hair and resulting separation, discrimination, and marginalization manifested in both private and public spheres.

particular business . . . ."[238] Additionally, preserving employer autonomy may dominate the interest in reducing discrimination when allowing proxy discrimination has "only an insignificant effect on employment opportunities."[239] All of these arguments support the idea that an employer may be entitled to greater autonomy in regulating some traits (e.g., gendered hair) than others (e.g., racial hair or wearing makeup). This, in turn, supports the narrow enumeration of particular proxies.

3. Broad Enumeration Amendment

The second type of amendments that states have enacted to prohibit race-based hairstyle discrimination utilizes broad enumeration.[240] Broad enumeration amendments provide general guidance as to which traits are included in the statutory definition of "race" and may enumerate an inexhaustive list of trait examples.[241] For instance, Washington broadly defines "race" as including "traits historically associated or perceived to be associated with race including, but not limited to, hair texture and protective hairstyles."[242] Broad enumeration theoretically provides greater protection against proxy discrimination than narrow enumeration because it prohibits discrimination by unenumerated proxies, so long as the proxies fall within the broadened definition of the protected characteristic.[243] A broad enumeration of "race" is similar to the approach Congress used when declining to enumerate particular disabilities in the definition of "disability" in the ADA.[244]

Broad enumeration provides guidance as to which traits warrant statutory protection (e.g., traits culturally or historically associated with race) and may also enumerate an inexhaustive list of trait examples (e.g., race-based hairstyles).[245] Combining a broadened

238. 42 U.S.C. § 2000e-2(e).

239. *Dodge*, 488 F.2d at 1337.

240. *See, e.g.*, WASH. REV. CODE ANN. § 49.60.040(21) (West 2020); CAL. GOV'T CODE § 12926(w) (West 2023) (" 'Race' is inclusive of traits historically associated with race, including, but not limited to, hair texture and protective hairstyles."); § 12926(x) (" 'Protective hairstyles' includes, but is not limited to, such hairstyles as braids, locks, and twists.").

241. *See, e.g.*, § 49.60.040(21); GOV'T § 12926(w), § 12926(x).

242. § 49.60.040(21).

243. *Compare id.* (extending protection to "traits historically associated or perceived to be associated with race"), *with* COLO. REV. STAT. ANN. § 24-34-301(21) (West 2023) (extending protection to "hair texture, hair type, or a protective hairstyle that is commonly or historically associated with race").

244. *See* Shinall, *supra* note 156, at 1099.

245. *See, e.g.*, § 49.60.040(21); GOV'T § 12926(w), § 12926(x).

definition with an inexhaustive list of protective traits avoids the underinclusivity issue of narrow enumeration. It is also legislatively efficient, as legislatures need not continually revisit newly emergent questions of proxy discrimination—the broad definition ostensibly captures any forms of proxy discrimination that the listed examples overlook.[246] Broad enumeration, however, may create judicial inefficiencies as courts must reckon with essential questions: *Which traits are culturally or historically associated with race?*[247] It is imaginable that a clever circuit judge could interpret these laws as protecting only immutable traits historically associated with race, with race-based hairstyles as the sole exception because of their explicit enumeration.[248] This hypothetical demonstrates how even broad enumeration may sometimes be narrowly interpreted.[249]

Additionally, broad enumeration may extend statutory protection to individuals outside of the scope originally intended by Title VII.[250] This is the same criticism that has plagued the ADAAA, which arguably offers protections beyond the ADA's original purpose.[251] The expansive effects of the ADAAA led courts to ignore doctrine and "give plaintiffs a pass . . . when disability determinations are close . . . ."[252] A broad enumeration of race may similarly "give plaintiffs a pass" and extend protection to characteristics culturally or historically associated with race but not having a significant effect on employment opportunities.[253] Extending protection to characteristics

246. *See supra* notes 177, 183 and accompanying text.

247. *See* RICHARD T. FORD, RACIAL CULTURE: A CRITIQUE 12 (2005).

248. California defines "race" as "inclusive of traits historically associated with race, including, but not limited to, hair texture and protective hairstyles." GOV'T § 12926(w). This could be read as: "race" is inclusive of immutable traits historically associated with race, including, but not limited to, the one mutable characteristic the legislature has enumerated.

249. *Cf. supra* notes 161–162 (individuals struggled to establish whether their impairment constituted a "disability" within the meaning of the ADA).

250. *Cf. supra* note 173 and accompanying text.

251. *See supra* note 173 and accompanying text. Broad enumeration of mutable and voluntary characteristics in Title VII raises the question: *To what extent should mutable characteristics be protected by statute? Compare* Corbett, *supra* note 76, at 158–61 (arguing that appearance should *never* be protected under employment discrimination laws), *with* Bayer, *supra* note 65, at 794 (arguing that mutable characteristics should *always* be protected under employment discrimination laws).

252. Jones, *supra* note 173, at 669–70.

253. One example of a trait that may be culturally or historically associated with race but not have a significant effect on employment opportunities is diet. *See* Maya Sen & Omar Wasow, *Race as a Bundle of Sticks: Designs that Estimate Effects of Seemingly Immutable Characteristics*, 19 ANN. REV. POL. SCI. 499, 506 (2016) (arguing that race is inclusive of norms, diet, and dialect); Wenjun Li, Gretchen Youssef, Elizabeth Procter-Gray, Barbara Olendzki, Tasha Cornish, Rashelle Hayes, Linda Churchill, Kevin Kane, Kristen Brown & Michelle F. Magee, *Racial Differences in Eating Patterns and Food Purchasing Behaviors Among Urban Older Women*, 21 J. NUTRITION, HEALTH, & AGING 1190, 1190–99 (2017). Arguably, an employer should not face Title VII liability

that have an insignificant effect on employment opportunities is beyond Title VII's goal of creating equality of opportunity in the workplace.[254] The concern of overinclusivity arguably favors promoting employer autonomy and allowing the use of some proxies to facilitate discrimination because overinclusivity itself cuts against the goal of employment discrimination laws.[255]

This concern emphasizes the carefulness required in drafting broad enumeration amendments. A statute extending protection to all "hairstyles associated with race" may also require employers to tolerate mohawks, which are predominantly worn by White people.[256] Yet employers have a stronger justification for retaining autonomy in prohibiting mohawks than protective hairstyles because mohawks do not implicate physiological, cultural, or historical associations like protective hairstyles.[257] A more carefully drafted amendment may extend protection to "hairstyles culturally or historically associated with race," which likely excludes the protection of mohawks.[258] The concern of expansion beyond Title VII's goals reemphasizes the benefits of narrow enumeration: a legislature may choose *not* to broadly enumerate a protected characteristic if it wants to extend statutory protection to only one identified proxy.[259]

Broad enumeration amendments provide the most protection against proxy discrimination—but they do so at the risk of overinclusivity. Narrow enumeration may be more desirable when this risk of overinclusivity is outweighed by another societal interest, such as employer autonomy.

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for firing employees who consume a particular diet—if diet has an insignificant effect on employment opportunities—even if such diet is historically associated with a particular race. *Cf.* 29 C.F.R. § 1608.1(b) (1979) (describing the purpose of Title VII as providing "equality of opportunity in the work place").

254. *Cf. id.*

255. *See* Corbett, *supra* note 76, at 166; Tupta, *supra* note 231, at 10 ("[A]ny court's recognition of a definition of race that extends beyond the traditional, albeit ambiguous, legal conceptions of race, could set a controversial precedent that would broaden the reach of Title VII outside the legislatures' (and employers') desired scope.").

256. *See* Jessica Harrington, *Is the Mohawk Hairstyle Cultural Appropriation? It's Complicated*, POPSUGAR (Aug. 12, 2022, 3:45 PM), https://www.popsugar.com/beauty/mohawk-hairstyle-history-48916724 [https://perma.cc/SH6G-8XR7] (discussing the whitewashing and White appropriation of mohawks).

257. *Cf. supra* notes 44–46 and accompanying text.

258. *But see* Onwuachi-Willig, *supra* note 100, at 1102 (cautioning against the dangers of relying on cultural arguments).

259. *See* Corbett, *supra* note 76, at 171–77 (discussing factors that contribute to passage of laws and that help determine the strength of such laws); *cf.* 42 U.S.C. § 2000e-2(e) (example of Congress narrowly excepting only religion, sex, and national origin as a bona fide occupational qualification).

III. SOLUTION

The ability of plus-anything-else claims to sufficiently address proxy discrimination is unclear after *Bostock*.[260] *Bostock* may provide an avenue for some plaintiffs to challenge discrimination by proxy, so long as a protected characteristic is one of the causal factors in an employment decision.[261] But *Bostock* may also prove insufficient to address proxy discrimination through plus-anything-else claims if courts do not follow the Supreme Court's dicta.[262] Additionally, plus-anything-else claims are not afforded statutory protection where an employer prohibits a proxy for a protected characteristic in all employees—even where that proxy disproportionately affects a particular race, gender, or sexuality.[263] Because the sufficiency of the *Bostock* dicta in addressing proxy discrimination is unclear, legislative responses to proxy discrimination must be considered.

The answer to *how—if at all*—legislatures should address proxy discrimination depends on balancing the interests of reducing discrimination and preserving employer autonomy.[264] This Note has identified three types of proxy discrimination—race-based hairstyles, gendered appearance, and citizenship—each of which fit the rationale for the different enumeration approaches.

A. Broad Enumeration of Race

Legislatures should broadly enumerate the term "race" in employment discrimination statutes because the goal of reducing race discrimination by proxy dominates the goal of preserving employer autonomy. The goal of preserving employer autonomy is less convincing when such autonomy infringes on cultural proxies that interfere with employment opportunities without a legitimate business reason.[265]

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260. *See* Bostock v. Clayton County, 590 U.S. 644, 661–62 (2020).

261. *See id.*

262. *See supra* notes 121–127 and accompanying text. For an argument that the *Bostock* dicta do apply to dress and grooming codes, see *supra* notes 128–133 and accompanying text.

263. *See* Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1046–47 (10th Cir. 2020).

264. *See* Corbett, *supra* note 76, at 166:

> Our society has many important goals, and abolishing discrimination based on particular characteristics is only one of them. A very strong goal at the other extreme is respecting employers' prerogatives to operate their businesses in ways they deem appropriate to create jobs, generate profits, and contribute to a robust economy.

265. *See* Chambers, *supra* note 94, at 81; EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1021 (11th Cir. 2016); Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 233 (S.D.N.Y. 1981) (employer prohibited an all-braided hairstyle to project "a conservative and business-like image" without preventing evidence that an all-braided hairstyle impedes professionalism).

Moreover, the plain language of Title VII instructs that the goal of reducing race discrimination is more substantial than other types of discrimination, as an employer may never explicitly consider race—but may explicitly consider religion, sex, or national origin.[266] This is similar to judicial interpretations of Fourteenth Amendment protections against race and sex discrimination, where race discrimination is subjected to strict scrutiny and rarely permitted, whereas sex discrimination is sometimes permitted under a lesser intermediate scrutiny standard.[267] Allowing the use of proxies to facilitate race discrimination inhibits the goal of Title VII to create equal employment opportunities for racial minorities.[268] A broad enumeration of race is thus desirable to capture all proxies—both foreseeable and unforeseeable—for race under Title VII. [269]

A model statute broadly enumerating race may read:

> **Race**: The terms "because of race" or "on the basis of race" include, but are not limited to, because of or on the basis of traits culturally and historically associated or perceived to be associated with race, including hair texture and protective hairstyles. For purposes of this section, "protective hairstyles" include, but are not limited to, hairstyles such as braids, locks, and twists.[270]

The model statute sufficiently protects plaintiffs like Ms. Jones from race-based hairstyle discrimination because it unambiguously extends protection to protective hairstyles.[271] Additionally, the model statute anticipates the use of unenumerated proxies to facilitate race discrimination by extending protection to traits culturally and historically associated with race.[272] One criticism of a broad enumeration model statute is that it might overextend protection contrary to the purpose of Title VII.[273] Avoiding overinclusivity is a difficult task; consequently, some legislatures may opt to avoid broad enumeration of race rather than risk overextending statutory protection. Nevertheless, employers rarely have a business-related

266. 42 U.S.C. § 2000e-2(e).

267. *Compare* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (racial classifications subject to strict scrutiny), *with* Craig v. Boren, 429 U.S. 190 (1976) (classifications on the basis of sex subject to intermediate scrutiny).

268. *See* Chambers, *supra* note 94, at 81; Greene, *supra* note 45, at 1014.

269. *Cf.* Shinall, *supra* note 156, at 1099 n.2 (describing the scope of "disability" in the ADA); *supra* note 173 and accompanying text (describing the expansive protections created by broad enumeration).

270. *Cf.* WASH. REV. CODE ANN. § 49.60.040(21) (West 2020).

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

272. *See* Rich, *supra* note 1, at 1141; Bayer, *supra* note 65, at 794.

273. *Cf. supra* note 173 and accompanying text (describing the effect of broad enumeration in the ADAAA as overextending statutory protection); *see also* Onwuachi-Willig, *supra* note 100, at 1102 (suggesting that "centering legal protections around cultural or racially-correlated characteristics presents the practical problem of determining where to draw the boundaries").

reason for prohibiting proxies for race, and prohibitions of such proxies substantially frustrate the goal of Title VII. Moreover, plaintiffs challenging the use of some proxies for race discrimination may not have alternative paths to relief if an employer policy similarly burdens other groups.[274] Consequently, legislatures should broadly enumerate the term "race" in employment discrimination laws.

B. Narrow Enumeration of Sex

Legislatures should narrowly enumerate the term "sex" in employment discrimination statutes. A broad enumeration of sex risks expanding statutory protection to characteristics having an insignificant effect on employment opportunities, watering down Title VII's true purpose.[275] Title VII suggests that the goal of equalizing employment opportunity may be less frustrated when an employer discriminates against proxies for sex;[276] consequently, the allowance of some proxy discrimination on the basis of sex may not substantially inhibit the goal of Title VII. Narrow enumeration of sex may also be more desirable if employers have some legitimate business interest in regulating proxies for sex or if plaintiffs challenging proxy discrimination have an alternative path for relief.[277]

Legislatures may decide that the use of some proxies, such as gendered-makeup standards, facilitate sex discrimination and reduce equality of opportunity in the workplace. Legislatures could then narrowly enumerate the term "sex" to extend protection to particular characteristics used as proxies to facilitate undesirable discrimination and harm particular subgroups. This is similar to Congress's approach in amending Title VII to include pregnancy in the statutory definition of sex.[278] A narrow enumeration of sex is desirable because it would

274. *See supra* notes 102–104 and accompanying text.

275. *See* Dodge v. Giant Food, Inc., 488 F.2d 1333, 1336–37 (D.C. Cir. 1973) (commenting that hair-length regulations do not evaluate one sex to "an appreciable higher occupational level than the other" and are outside the scope of Title VII); *see also* 29 C.F.R. § 1608.1(b) (1979) (describing the purpose of Title VII as providing "equality of opportunity in the work place"); *cf. supra* note 173 and accompanying text (discussing how an expansive definition of disability arguably watered down the Act's purpose).

276. *See* Greene, *supra* note 45, at 1009, 1014; Chambers, *supra* note 94, at 80; Astor, *supra* note 46 (describing the biological differences between Black and White hair); 42 U.S.C. § 2000e-2(e) (specifying that a bona fide occupational qualification is never permissible for race but is permissible for religion, sex, and national origin).

277. Corbett, *supra* note 76, at 166; *Dodge*, 488 F.2d at 1336–37.

278. *See* Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k).

increase judicial efficiency[279] and reduce the risk of extending Title VII protection to unintended individuals or traits.[280]

If a legislature decides that wearing makeup is a proxy in need of statutory protection, a model statute narrowly enumerating sex may read:

> **Sex**: The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of wearing makeup.[281]

The model statute intends to address wearing makeup as a proxy for sexual orientation: an employer refusing to hire men who wear makeup may discriminate against some men on the basis of their sexual orientation.[282] Sexual orientation discrimination is inherently sex discrimination[283] and allowing employers to use gendered-grooming standards to facilitate such discrimination prevents some men from accessing certain labor market opportunities because of their sexual orientation. A legislature may decide that employers have little legitimate business reason for prohibiting employees from wearing makeup and thus grant it statutory protection.

An employer may, however, have *some* legitimate business reason for requiring women in certain customer-facing positions, such as Ms. Jespersen, who worked as a bartender, to wear makeup to maintain a professional appearance.[284] The model statute seemingly extends coverage to plaintiffs challenging these makeup policies too: under the model statute, Ms. Jespersen would be successful in challenging her employee's gendered-dress code requiring women to wear makeup but prohibiting men from wearing any.[285] The narrow enumeration of sex may extend statutory protection to plaintiffs outside of the subgroup in which the proxy is used to discriminate against, which is likely a necessary consequence of reducing discrimination, and in identified instances, outweighs the employer's interest in requiring women to wear makeup.

Notably, the model statute does not mention (and, consequently, does not extend statutory protection to) gendered-hair length. The plaintiff in *Willingham* would have no recourse under the model

279. *Cf. supra* notes 171–172 and accompanying text.

280. *Cf. supra* note 173 and accompanying text.

281. *Cf.* 42 U.S.C. § 2000e(k) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . . .").

282. *See, e.g.*, Complaint at 19, 24, 26, Kunkle v. Cooper Health Sys., No. 1:17-cv-11643 (D.N.J. Nov. 15, 2017).

283. Bostock v. Clayton County, 590 U.S. 644, 652, 683 (2020).

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

285. *See id.*

statute; this is desirable if a legislature decides that gendered-hair length has only an insignificant effect on employment opportunities—and that an employer's autonomy outweighs the marginal benefit of reducing employment discrimination.

The allowance of *some* proxy discrimination under a narrow enumeration statute is likely consistent with Title VII's goal of reducing employment discrimination, so long as plaintiffs challenging proxy discrimination have *some* path for relief. Plaintiffs challenging discrimination by proxies for sex—such as gendered dress codes or grooming standards—currently may prevail on such claims where the sex-differentiated dress code or grooming standard poses a (very) unequal burden on one group or subgroup.[286] Specifically, the Ninth Circuit's (very) unequal burden requirement provides relief for proxy discrimination that significantly affects employment opportunities, while denying that relief for other instances of proxy discrimination.[287] Thus, the (very) unequal burden standard serves as a backstop, catching the most extreme instances of proxy discrimination that may slip through a narrow enumeration scheme. This arrangement is desirable because it extends statutory protection to the most egregious forms of discrimination by sex proxies while permitting discrimination by unenumerated proxies—unless those proxies sufficiently undermine Title VII's goal of ensuring equal employment opportunity.

C. No Enumeration of National Origin

Legislatures should leave "national origin" nonenumerated in employment discrimination statutes. Requiring employers to hire noncitizen employees, unlike requiring employers to tolerate race- or sex-based appearance, imposes direct administrative costs on employers.[288] For instance, the process of hiring a noncitizen is both more expensive and lengthier than hiring a citizen.[289] Unlike in situations where employers have no legitimate business reason in claiming that certain hairstyles or appearances are unprofessional,[290]

286. *See id.*

287. *See id.*

288. *See* Maurer, *supra* note 211 ("Employers in the U.S. that hire workers from abroad can spend more than three times what they do for domestic hires, while it can take six times longer to bring a foreign worker on board than a native worker . . . ."); Schooley, *supra* note 211 (noting disadvantages, including legal risks and additional time and money expenditures).

289. Maurer, *supra* note 211; Schooley, *supra* note 211.

290. *See* Chambers, *supra* note 94, at 81.

employers have substantial business reasons for requiring citizenship.[291]

Nonenumeration of national origin is thus desirable, despite citizenship being a perfect proxy for national origin.[292] The nonenumeration determination places substantial consideration on the societal goal of employers maintaining autonomy over the decision to incur administrative costs. Arguably, nonenumeration authorizes the use of citizenship policies as a proxy for national origin discrimination.[293] Nonenumeration does not, however, allow employers to liberally use citizenship as a proxy to facilitate discrimination. In recognizing this potential loophole for discrimination, the Court in *Espinoza* held that citizenship policies may be evidence of broader schemes of discrimination.[294] *Espinoza* recognizes that the nonenumeration of national origin may be sufficient to capture schemes of proxy discrimination while preserving employer autonomy in making business decisions regarding administrative costs.[295] Thus, so long as plaintiffs challenging proxy discrimination have *some* path for relief, the allowance of *some* proxy discrimination on the basis of national origin is not entirely contrary to the goals of Title VII.

CONCLUSION

Despite *Bostock*'s potential expansion of protections against workplace proxy discrimination, significant loopholes remain—namely, most proxy discrimination is still permissible under Title VII. Thus, legislative action is necessary. Without legislative intervention, applicants and employees like Chastity Jones will continue to encounter innovative proxies to discriminate against protected characteristics. The question in response to proxy discrimination then becomes: *How can legislatures best protect protected characteristics?* This Note recommends a broad enumeration of "race" to fully capture the use of proxy discrimination, as courts and Congress have deemed race discrimination rarely (or never) permissible. A narrow enumeration of "sex" recognizes that a legislature may deem some proxies for sex, but not others, as inhibiting equal employment opportunities with little or no legitimate business reason. No enumeration of "national origin" recognizes the significant

291. *See* Maurer, *supra* note 211.

292. *See* Espinoza v. Farah Mfg. Co., 414 U.S. 86, 96 (1973) (Douglas, J., dissenting).

293. *See id.*

294. *Id.* at 92 (majority opinion).

295. *See id.*

administrative costs employers incur by hiring noncitizens, while acknowledging the availability of alternative paths of relief. Enumeration decisions must contend with the competing goals of improving equality of workplace opportunities and preserving employer autonomy in decisionmaking, and the desired level of enumeration in Title VII should balance these goals in deciding whether protected classes should be broadly or narrowly enumerated, or not enumerated at all.

*Chase Mays**

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