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# EQUAL PROTECTION FOR TRANSGENDERED EMPLOYEES? ANALYZING THE COURT'S CALL FOR MORE THAN RATIONAL BASIS IN THE *GLENN V. BRUMBY* DECISION

**Gwen Havlik***

## INTRODUCTION

In studies conducted between 1996 and 2006, 20% to 57% of transgendered[1] respondents reported being discriminated against in the workplace, including being harassed, denied a promotion, being fired, or denied employment altogether.[2]

In October 2005, shortly after she was diagnosed with gender identity disorder, Vandiver Elizabeth Glenn, then known as Glenn Morrison, was hired by the Georgia General Assembly's Office of Legislative Counsel (OLC).[3] Two years later, Ms. Glenn informed her supervisor of her intention to begin gender transition.[4] After conducting research and confirming Ms. Glenn's intentions, OLC's Chief Legal Counsel, Sewell Brumby, informed Ms. Glenn she was being terminated, giving reasons ranging from the transition being "inappropriate" to "immoral and unnatural."[5]

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1. Transgender is "an umbrella term for people whose gender identity, expression, or behavior is different from that typically associated with their assigned sex at birth." M.V. LEE BADGETT, ET AL., BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION 9 (2007). The definition of transgender includes those who identify themselves as "transsexual." *Id.* The terms "transgender" and "transsexual" will be used interchangeably throughout this Note.

2. *Id.* at 2. For example, a 2006 study conducted by the San Francisco Bay Guardian and the Transgender Law Center reported that 40% of transgendered survey respondents had been denied employment based on their transgender status, 24% reported being sexually harassed, and 23% complained of co-workers' persistent use of their old names; all in what "should be one of the most tolerant cities for transgender people in the United States." *Id.* at 7.

3. Glenn v. Brumby, 724 F. Supp. 2d 1284, 1290 (N.D. Ga. 2010), *aff'd*, 663 F.3d 1312 (11th Cir. 2011).

4. *Id.* As part of her treatment for gender identity disorder, and in the hopes of providing psychological relief, Ms. Glenn acted on her therapist's recommendation to commence the real life experience by living as a woman full time. *Id.*

5. After researching the issue, Brumby concluded that "some authority indicated terminating an employee for undergoing gender transition was illegal, but some authority indicated that such firings are



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While Title VII of the Civil Rights Act of 1964 prohibits discrimination "based on sex,"[6] no federal law explicitly prohibits discrimination against transgendered employees.[7] Ms. Glenn nonetheless sought to challenge her employer's discriminatory actions, and brought a claim not under Title VII,[8] but under 42 U.S.C. § 1983 for violation of her right to equal protection under the Fourteenth Amendment of the United States Constitution.[9] Ms. Glenn's complaint alleged, inter alia, that she "did not conform to Defendants' sex stereotypes regarding males because of her appearance and behavior . . . and was terminated for this reason."[10] In granting Ms. Glenn's motion for summary judgment, United States District Judge Richard W. Story used a Title VII analogy to find the plaintiff stated her claim by using the sex stereotyping theory.[11] He also held that the State failed to meet its burden of showing the "exceedingly persuasive justification" needed to survive the heightened scrutiny of a gender based Equal Protection Clause claim.[12] Many federal courts have allowed the sex stereotyping

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permissible." *Id.* at 1291. Other reasons given for her termination were that "gender transition was inappropriate, . . . it would be disruptive, . . . some people would view it as a moral issue, and that it would make Glenn's coworkers uncomfortable." *Id.* at 1292 (footnote omitted).

6. "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (2006).

7. Glenn v. Brumby et. al., LAMBDA LEGAL, http://www.lambdalegal.org/in-court/cases/glenn-v-brumby-et-al.html (last visited Oct. 31, 2010) (providing a summary of the case *Glenn. v. Brumby*). Cole Thaler and Gregory Nevins of Lambda Legal represent plaintiff Vandiver Elizabeth Glenn. *Glenn*, 724 F. Supp. 2d at 1293.

8. It is unclear, based on the application of the 1991 amendments to the federal civil rights statute, whether employees of state elected officials are covered under Title VII. Jillian T. Weiss, *Georgia Federal Court Rules for Trans Woman on Sex Discrimination Claim*, BILERICO PROJECT (July 7, 2010), http://www.bilerico.com/2010/07/georgia_federal_court_rules_for_trans_woman_on_sex.php. It is possible Ms. Glenn did not bring suit under Title VII in an effort to make a "crystal clear, open and shut" case without giving the defense a chance to "muddy the waters" by arguing the coverage point. *Id.*

9. U.S. CONST. amend. XIV; 42 U.S.C. § 1983 (2006); Glenn v. Brumby, 724 F. Supp. 2d 1284, 1290 (N.D. Ga. 2010), *aff'd*, 663 F.3d 1312 (11th Cir. 2011).

10. Plaintiff also alleges she is a member of a particular and clearly identifiable group of people. *Glenn*, 724 F. Supp. 2d at 1293. Ms. Glenn's second claim alleges she was discriminated against by being prevented from undergoing medically necessary treatment for gender identity disorder. *Id.*

11. *See* discussion *infra* Part I.

12. *Glenn*, 724 F. Supp. 2d at 1305; Arthur S. Leonard, *Anti-Transgender Discrimination by State Government Employer Found Unconstitutional*, LEONARD LINK, (July 6, 2010), http://newyorklawschool.typepad.com/leonardlink/2010/07/antitransgender-discrimination-by-state-government-employer-found-unconstitutional.html.

theory in claims brought by transgender plaintiffs in employment discrimination claims, as well as under other federal statutes,[13] but such claims are not typically brought directly under the Equal Protection Clause.[14]

This Note seeks to analyze the logical but novel reasoning used by Judge Story to move a transgender discrimination claim from a rational basis to an intermediate scrutiny standard under an Equal Protection Clause claim.[15] Part I explores the historical treatment of discrimination claims brought by transgendered individuals.[16] Part II analyzes Judge Story's decision in *Glenn v. Brumby*, following the reasoning used in borrowing from Title VII precedent to reach his conclusion that the plaintiff did, in fact, state a claim of sex discrimination under the Equal Protection Clause.[17] Part II also discusses decisions holding that transsexual employees are not entitled to protection under Title VII or the Equal Protection Clause.[18] Part III proposes that when the United States Supreme Court is eventually faced with deciding a transgender employment discrimination claim, Judge Story's reasoning based on sex stereotyping should be extended to either, or both, Title VII and constitutional claims of discrimination brought by transgender employees.[19]

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13. *See* discussion *infra* Part I. Courts have extended the sex stereotyping theory to claims under the Equal Credit Opportunity Act and the Gender Motivated Violence Act as well as for employment discrimination claims. Rosa v. Park W. Bank & Trust, 214 F.3d 213, 216 (1st Cir. 2000); Schwenk v. Hartford, 204 F.3d 1187, 1200–01 (9th Cir. 2000).

14. *See* Leonard, *supra* note 12 (noting Judge Story "ventur[ed] into new territory as he ruled that sexual stereotyping encountered by transsexuals in a governmental workplace can provide the basis for a constitutional sex discrimination claim").

15. JoAnna McNamara, Employment Discrimination and the Transsexual 2 (1996) (unpublished manuscript) (on file with the author) (noting that claims for equal protection for transsexuals are "difficult to uphold because the courts generally use a rational basis analysis"); *see also* discussion *infra* Part I.D.

16. *See* discussion *infra* Part I. Part I includes an explanation of the Supreme Court's decision in *Price Waterhouse v. Hopkins* to extend sex discrimination claims to include sex stereotyping and the evolution of sex stereotype claims as they apply to transsexuals, as well as the treatment of transgender discrimination claims brought under the Equal Protection Clause. *Id.*

17. *See* discussion *infra* Part II.

18. *See* discussion *infra* Part II.D.

19. *See* discussion *infra* Part III. "To date, the Supreme Court has never decided a transgender workplace discrimination claim under either Title VII or the Constitution." Leonard, *supra* note 12.

## I. HISTORY OF TRANSGENDER DISCRIMINATION CLAIMS

### *A. Transgender Claims Brought Prior to Price Waterhouse v. Hopkins*

Beginning almost forty years ago when the first case of discrimination against a transsexual was decided,[20] courts have consistently ruled that transgender identity is not within the definition of "based on sex" for purposes of Title VII.[21] These early cases give the primary rationale for their decisions as statutory interpretation, finding that "sex" means "anatomical sex," or more simply put, that sex is "a simple matter of biological difference."[22] These cases also rely on legislative intent and interpret Congress's continuous rejection of proposed legislation giving protection based on sexual orientation to mean Congress did not intend to extend the meaning of "based on sex."[23] Courts were no more receptive to claims brought on constitutional grounds, finding that discrimination against a transgendered employee did not state a claim under Title VII and that transsexuals are not a protected class for purposes of the Equal Protection Clause.[24]

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20. Grossman v. Bernards Twp. Bd. of Educ., No. 74-1904, 1975 WL 302, at *4 (D.N.J. Sept. 10, 1975) (finding a firing based on a teacher's sex-reassignment surgery did not implicate Title VII).

21. Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984) (finding "sex" in Title VII means only anatomical sex rather than gender); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 749 (8th Cir. 1982); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662–63 (9th Cir. 1977) (refusing to extend Title VII to transsexuals because the discrimination is based on gender and not "based on sex"); Powell v. Read's, Inc., 436 F. Supp. 369, 371 (D. Md. 1977).

22. Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What is the "Plain Meaning" of "Sex" in Title VII of the Civil Rights Act of 1964?*, 18 TEMP. POL. & CIV. RTS. L. REV. 573, 574–75 (2009).

23. Mary Kristen Kelly, *(Trans)forming Traditional Interpretations of Title VII: "Because of Sex" and the Transgender Dilemma*, 17 DUKE J. GENDER L. & POL'Y 219, 224 (2010). In an ironic note, "sex" itself was a last minute addition to the original Title VII proposed legislation, added in an attempt to defeat the entire bill. The Equal Employment Opportunity Commission (EEOC) was surprised when one-third of the claims in the first year under the act were brought on the basis of sex. *Shaping Employment Discrimination Law*, EEOC, http://www.eeoc.gov/eeoc/history/35th/1965-71/shaping.html (last visited Oct. 30, 2010). The first attempt to prohibit discrimination on the basis of sexual orientation was made in 1975, when Congress proposed adding "affectional" and "sexual preference" to the language of Title VII. Civil Rights Amendments Act of 1975, H.R. 166, 94th Cong. (1975). From 1981 through 2001, over thirty proposed bills were introduced attempting to prohibit discrimination on the basis of "affectional" and "sexual" preference. Oiler v. Winn-Dixie La., Inc., No. Civ.A. 00-3114, 2002 WL 31098541, at *4 (E.D. La. Sept. 16, 2002). All have been unsuccessful. *Id.*

24. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1227–28 (10th Cir. 2007) (following *Brown v.*

### *B. Sex Stereotyping Under Price Waterhouse v. Hopkins*

Little change has come about in the last four decades concerning the meaning and interpretation of "based on sex" as it applies to transgender discrimination.[25] However, in its 1989 landmark decision in *Price Waterhouse v. Hopkins*, the Supreme Court for the first time recognized that a cause of action for sex discrimination under Title VII could be based on sex stereotyping.[26] In *Price Waterhouse*, the plaintiff brought suit against her employer under Title VII, claiming she was discriminated against on the basis of sex after being denied partnership.[27] In her claim, Ms. Hopkins pointed to the reasons given by the partners who opposed her partnership as being discriminatory, including statements that she was "too macho" and "needed a course at charm school."[28] The Court held that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[29] In response to the defendant's suggestion that sex stereotyping has no legal relevance, a well-quoted passage of the decision states: "we are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group."[30] A number of courts have since held that discriminating

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*Zavaras* and *Holloway v. Arthur Andersen & Co.* in holding transsexuals are not members of a protected class for purposes of Equal Protection); Brown v. Zavaras, 63 F.3d 967, 971 (10th Cir. 1995) (following *Holloway v. Arthur Andersen & Co.* in deciding transsexuals are not members of a protected class, but noting research about gender identity may call for a reevaluation of *Holloway v. Arthur Andersen & Co.*). *See generally Holloway*, 566 F.2d 659.

25. Weiss, *supra* note 22, at 576 (discussing *Etsitty v. Utah Transit Authority* as it relied on analyzing the current meaning of sex).

26. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Kelly, *supra* note 23, at 226 (noting the *Price Waterhouse v. Hopkins* decision as acknowledging a new specific cause of action).

27. *Price Waterhouse*, 490 U.S. at 232. Ms. Hopkins was working as a senior manager for the defendant, a nationwide professional accounting firm, when she was proposed for partnership. *Id.* at 233. The decision for partnership was not based on fixed guidelines, but considered comments and recommendations of existing partners. *Id.* at 232.

28. *Id.* at 235. Other comments made in opposition to Ms. Hopkins's partnership were that she was "overly aggressive" and "overcompensated for being a woman." *Id*. The partner who gave her the news went so far as to suggest that Ms. Hopkins "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.*

29. *Id.* at 250.

30. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1223 (10th Cir. 2007) (quoting *Price Waterhouse*, 490 U.S. at 251); Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) (quoting *Price Waterhouse*, 490 U.S. at 251); Glenn v. Brumby, 724 F. Supp. 2d 1284, 1297 (N.D. Ga. 2010) (quoting *Price*

against an employee for failing to conform to sex stereotypes is actionable under Title VII.[31]

### *C. Sex Stereotyping as It Applies to Transsexuals*

Transgender employees were optimistic that the Supreme Court decision of *Price Waterhouse* would pave the way for their discrimination claims.[32] As the Sixth Circuit explained, in "earlier jurisprudence, male-to-female transsexuals . . . whose outward behavior and emotional identity did not conform . . . were denied Title VII protection by courts because they were considered victims of 'gender' rather than 'sex' discrimination,"[33] but "the approach in *Holloway*, *Sommers*, and *Ulane* . . . has been eviscerated by *Price Waterhouse*."[34] For the Sixth Circuit, the extension of *Price Waterhouse* to transgender employees follows since "just as an employer who discriminates against women for not wearing dresses or makeup is engaging in sex discrimination under the rationale of *Price Waterhouse*, 'employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are

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*Waterhouse*, 490 U.S. at 251), *aff'd*, 663 F.3d 1312 (11th Cir. 2011); Schroer v. Billington, 525 F. Supp. 2d 58, 62 (D.D.C. 2007) (quoting *Price Waterhouse*, 490 U.S. at 251); Kastl v. Maricopa Cnty. Cmty. Coll. Dist., No. Civ.02-1531PHX-SRB, 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004) (quoting *Price Waterhouse*, 490 U.S. at 251); Kelly, *supra* note 23, at 227 (quoting *Price Waterhouse*, 490 U.S. at 251).

31. *Etsitty*, 502 F.3d at 1223 (citing Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 262–64 (3d Cir. 2001); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874–75 (9th Cir. 2001); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999); Doe *ex rel.* Doe v. City of Belleville, 119 F.3d 563, 580–81 (7th Cir. 1997)); Schroer v. Billington, 577 F. Supp. 2d 293, 303 (D.D.C. 2008) (citing Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005)).

32. Kelly, *supra* note 23, at 227 (citing Joel W. Friedman, *Gender Nonconformity and the Unfulfilled Promise of* Price Waterhouse v. Hopkins*,* 14 DUKE J. GENDER L. & POL'Y 205, 222 (2007)).

33. *Smith*, 378 F.3d at 572 (recognizing the reasoning of *Ulane v. Eastern Airlines*, *Holloway v. Arthur Andersen & Co.*, and *Sommers v. Budget Marketing, Inc.* as being based on a traditional definition of "sex" for the purposes of interpreting Title VII).

34. *Id.* at 573 (citing Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000)) (holding "Title VII encompasses both the anatomical differences between men and women and gender" and that the plaintiff stated a claim because "the perpetrator's actions stem from the fact that he believed that the victim was a man who 'failed to act like' one")). *But see* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1084–85 (7th Cir. 1984); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (denying relief to transsexual plaintiffs based on reasoning that the plain meaning of the statute "based on sex" should be given a dictionary definition); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662–64 (9th Cir. 1977).

also engaging in sex discrimination.'"[35] United States District Court Judge Nancy Atlas explained the reasoning alternatively by stating, "[T]ransexuality is not a bar to [a] sex stereotyping claim. Title VII is violated when an employer discriminates against an employee, transsexual or not, because he or she failed to act or appear sufficiently masculine or feminine enough . . . . "[36]

In analyzing precedent for sex stereotyping claims made by transgender employees, Judge Story noted in *Glenn v. Brumby* that several courts have followed the Sixth Circuit in recognizing that transgender employees may plead claims of sex stereotyping and gender discrimination under Title VII.[37] However, the Seventh Circuit, relying on pre-*Price Waterhouse* precedent, explicitly rejected the theory that a transsexual can bring a sex stereotyping discrimination claim under Title VII.[38] It should be noted that these favorable decisions are not giving relief based on a transgender status per se, but because the plaintiffs have shown evidence that actions taken by the employer were based on gender stereotypes.[39] Although some argue the Supreme Court's interpretation of Title VII in *Price Waterhouse* provides adequate protection for men and women who fail to conform to gender norms,[40] others argue the Supreme Court

35. *Etsitty*, 502 F.3d at 1223 (quoting *Smith*, 378 F.3d at 574).

36. Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (internal citations omitted).

37. Glenn v. Brumby, 724 F. Supp. 2d 1284, 1298 (citing *Smith*, 378 F.3d at 572, 575). *See* Kastl v. Maricopa Cnty. Cmty. Coll. Dist., 325 F. App'x 492, 493 (9th Cir. 2009); *Etsitty*, 502 F.3d at 1224; Creed v. Family Express Corp., No. 3:06-CV-465RM, 2009 WL 35237 at *6 (N.D. Ind. Jan. 5, 2009); *Schroer*, 577 F. Supp. 2d at 308; *Lopez*, 542 F. Supp. 2d at 667–68.

38. *Glenn*, 724 F. Supp. 2d at 1298 (citing Oiler v. Winn-Dixie La., Inc., No. Civ. A. 00-3114, 2002 WL 31098541 (E.D. La. Sept. 16, 2002) (relying on a Seventh Circuit pre-*Price Waterhouse* case in finding transsexuals do not have a cognizable claim under Title VII)). Judge Story notes that the Northern District of Georgia "has also previously held that transsexuals are not a suspect classification" in *Rush v. Johnson*, 565 F. Supp. 856, 868 (N.D. Ga.1983). *Glenn*, 724 F. Supp. 2d at 1299. However, Judge Story points to *Smith*, 378 F.3d 566, as addressing the reasoning previously given for the failure of claims brought by transsexuals before the decision in *Price Waterhouse*. *Glenn*, 724 F. Supp. 2d at 1299.

39. Kelly, *supra* note 23, at 230.

40. Mary Ann Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995); Colleen Keating, *Extending Title VII Protection to Non-Gender-Conforming Men,* 4 MOD. AM. 82, 82 (2008) (citing Friedman, *supra* note 32, at 222); Marvin Dunson III, Comment, *Sex, Gender, and Transgender: The Present and Future Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB.

should broaden the very definition of "based on sex" to include transgender identity.[41]

### *D. Transgender Discrimination Claims Under Equal Protection*

In analyzing a claim under the Equal Protection Clause,[42] a court must determine whether the disparate treatment is based on a suspect classification or affects a fundamental right.[43] Historically, the same cases denying protection for transgendered employees under Title VII have also specifically held transsexuals are not a protected class for purposes of the Equal Protection Clause.[44] The Supreme Court has stated, "[I]f the disparate treatment is not based on a suspect classification . . . the Court must apply the rational basis test."[45] Following this reasoning, courts have subjected claims based on transgender discrimination to a rational basis review,[46] requiring that the differential treatment only bear a rational relation to some legitimate end.[47]

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L. 465 (2001)).

41. *See, e.g.*, Kelly, *supra* note 23, at 230; Weiss, *supra* note 22 (analyzing the likelihood of the Supreme Court upholding application of sex discrimination law to transgender employees).

42. "No [s]tate shall . . . deny to any person within its jurisdiction the equal protection of laws." U.S. CONST. amend. XIV, § 1.

43. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

44. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1227 (10th Cir. 2007); Holloway v. Arthur Anderson & Co., 566 F.2d 659, 663 (9th Cir. 1977); Kastl v. Maricopa Cnty. Cmty. Coll. Dist., No. Civ.02-1531PHX-SRB, 2004 WL 2008954, at *8, n.11 (D. Ariz. June 3, 2004) (noting plaintiff in that case did not suggest transsexual status placed her in a class, but pointing out other courts have held transsexuals are not in a protected class).

45. Farmer v. Hawk-Sawyer, 69 F. Supp. 2d 120, 125 (D.D.C. 1999) (citing *City of Cleburne*, 473 U.S. at 440).

46. United States District Judge Naomi Buchwald notes, "As plaintiff points to no court decision that has found transgender individuals a protected class for purposes of Fourteenth Amendment analysis, and the Court has found none, her claims . . . are subject to a rational basis review." Lopez v. City of New York, No. 05 Civ. 10321(NRB), 2009 WL 229956, at *13 (S.D.N.Y. Jan. 30, 2009); *see also* Gomez v. Maass., No. 90-35390, 1990 WL 177776, at *2 (9th Cir. Nov. 16, 1990) (holding a transsexual is not a member of a suspect or quasi-suspect class entitled to greater than rational basis scrutiny); Stevens v. Williams, No. CV-05-1790-ST, 2008 WL 916991, at *13 (D. Or. Mar. 27, 2008) (noting "transsexuals are not a suspect class for purposes of the equal protection clause" and "therefore, classifications based upon these grounds must only be 'reasonably related to legitimate penological interests'" (quoting Pruitt v. Cheney, 963 F.2d 1160, 1164–66 (9th Cir. 1992))).

47. Romer v. Evans, 517 U.S. 620, 631 (1996). The first part of a rational basis review is "identifying . . . a goal which the enacting government body could have been pursuing," and next determining whether a rational basis exists to believe the action would further that goal. Joel v. City of Orlando, 232 F.3d 1353, 1358 (11th Cir. 2000).

Rational basis scrutiny has similarly been applied outside the employment context for transgender discrimination. For example, claims of discrimination under the Equal Protection Clause are commonly brought by transgendered inmates against authorities of the institution, given that the prison officials act under color of state law, and courts consistently hold that only a rational basis review is required when analyzing discrimination claims under the Equal Protection Clause for inmates.[48] Nor have courts given more than a rational basis review to claims under the Equal Protection Clause by homosexuals suffering from discrimination.[49] As neither transgender nor homosexual discrimination is considered within the definition of discrimination "based on sex,"[50] neither is given the heightened scrutiny the Supreme Court requires of a classification based on sex.[51] One court noted that "[w]hether discrimination on the basis of nonconformity with sex stereotypes constitutes discrimination on the basis of sex for the purposes of equal protection claims . . . is an open question."[52] It would seem Judge Story attempted to answer this open

48. *See, e.g.*, Fields v. Smith, 712 F. Supp. 2d 830, 868 (E.D. Wis. 2010) (applying rational basis review to plaintiff's challenge of a state law preventing treatment of gender identity disorder to inmates because there was no suspect classification at issue); *Lopez*, 2009 WL 229956, at *13 (recognizing the state had several sufficient rational bases for not allowing plaintiff inmate to wear women's clothing); *Stevens*, 2008 WL 916991, at *13 (holding the state's interest in ensuring inmate safety was substantially related to the action, but it only needed to be a legitimate and rationally related reason); Wolfe v. Horn, 130 F. Supp. 2d 648, 655 (E.D. Pa. 2001) (finding the state had a "legitimate penological interest in protecting inmates" sufficient to survive rational basis); *Farmer*, 69 F. Supp. 2d at 127.

49. *See, e.g.*, Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 953–54 (7th Cir. 2002) (finding harassment of a gay teacher accorded less protection under Equal Protection than race and gender-based harassment); Pruitt v. Cheney, 963 F.2d 1160, 1165–66 (9th Cir. 1992) (finding rational basis scrutiny needed for claims based upon homosexuality); Swift v. United States, 649 F. Supp. 596, 602 (D.D.C. 1986) (finding the government offered no explanation for terminating plaintiff that was rationally related to a legitimate government purpose).

50. *See* Weiss, *supra* note 22 (giving a detailed analysis of the history and development of the terms "transgender" and "sex"); *see also* discussion *supra* Part I.A, I.B.

51. "Intermediate scrutiny is applied to classifications based upon sex." Glenn v. Brumby, 724 F. Supp. 2d 1284, 1297 (N.D. Ga. 2010) (citing Clark v. Jeter, 486 U.S. 456, 461 (1988)), *aff'd*, 663 F.3d 1312 (11th Cir. 2011). "Classifications on the basis of sex are closely scrutinized." Kastl v. Maricopa Cnty. Cmty. Coll. Dist., No. Civ. 02-1531PHX-SRB, 2004 WL 2008954, at *8 (D. Ariz. June 3, 2004) (quoting United States v. Virginia, 518 U.S. 515, 531 (1996)).

52. *Kastl*, 2004 WL 2008954, at *8. Leaving the question open, the court notes that while "[t]he Supreme Court has held that discrimination against those who fail to conform with sex stereotypes constitutes discrimination . . . for the purposes of Title VII, . . . there is little indication of whether this form of discrimination also violates the [E]qual [P]rotection [C]lause." *Id.* at *8 n.12 (citation omitted).

question in *Glenn v. Brumby*, holding that a transgender employee can state an Equal Protection claim under a sex stereotyping theory and requiring the state justification to survive intermediate, rather than rational basis, scrutiny.[53]

## II. ANALYSIS OF *GLENN V. BRUMBY*

### *A. Applying Title VII's Framework to an Equal Protection Claim*

Ms. Glenn brought her claim under 42 U.S.C. § 1983 to address the violation of her civil right to be free from discrimination on the basis of sex in public employment, a right protected by the Equal Protection Clause.[54] To establish her sex discrimination claim, Ms. Glenn had to prove she "suffered purposeful or intentional discrimination on the basis of sex."[55] The federal circuit courts have recognized that when a § 1983 claim is brought to challenge the same type of employer conduct that can be remedied under a Title VII claim, the elements of the two causes of action are the same.[56] As such, Judge Story used the Title VII "*McDonnell Douglas*[57] framework," which states that a plaintiff has the burden to first show an inference of discriminatory intent in order to establish a prima facie case of discrimination.[58] The burden then shifts to the employer

53. *Glenn*, 724 F. Supp. 2d at 1299.

54. *Id.* at 1296. "In a § 1983 action, a court must determine 'whether the plaintiff has been deprived of a right secured by the Constitution and laws.'" *Id.* (quoting Baker v. McCollan, 443 U.S. 137, 140 (1979)). Section 1983 is a statutory vehicle for addressing the "deprivation of any rights . . . secured by the Constitution and laws." 42 U.S.C. § 1983 (2006).

55. *Glenn*, 724 F. Supp. 2d at 1297 (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977)).

56. Demoret v. Zegarelli, 451 F.3d 140, 149 (2d Cir. 2006) (holding that once color of law is established, the analysis for a § 1983 claim is similar to an employment discrimination claim under Title VII, except that a § 1983 claim can be brought against an individual); Stuart v. Jefferson Cnty. Dep't of Human Res., 152 F. App'x 798, 802 (11th Cir. 2005) (recognizing that when § 1983 is a parallel remedy to Title VII, the elements are the same); Wright v. Rolette Cnty., 417 F.3d 879, 884 (8th Cir. 2005) (stating the elements of a prima facie case are the same regardless of whether a plaintiff seeks relief under a Title VII or § 1983 claim); Beardsley v. Webb, 30 F.3d 524, 527 (4th Cir. 1994) (pointing out that Title VII and § 1983 "coexist to afford relief for employment discrimination" and the standards are the same for litigation under both); Lipsett v. Univ. of P.R., 864 F.2d 881, 896 (1st Cir. 1988) (using the same precedent developed under Title VII to analyze a § 1983 claim); Klen v. Colo. State Bd. of Agric., No. CIVA05CV02452EWNCBS, 2007 WL 2022061, at *19 (D. Colo. July 9, 2007).

57. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

58. *Glenn*, 724 F. Supp. 2d at 1301 (quoting Brooks v. Cnty. Comm'n of Jefferson Cnty., Ala., 446

to rebut the presumption of discrimination and prove the challenged action was taken for a "legitimate, non-discriminatory reason."[59] The plaintiff then has the burden to show the employer's proffered reason was "pretext for unlawful discrimination."[60] Judge Story found the evidence presented by Ms. Glenn "more than sufficient to establish a prima facie case of discriminatory intent."[61] Under the framework, the burden then shifted to the defendant to prove a legitimate, nondiscriminatory reason for termination.[62] In the case of a sex-based claim brought under the Equal Protection Clause, this meant the defendant had to show an '"exceedingly persuasive justification' for [Ms. Glenn's] termination."[63] This analysis focuses on the heightened requirement of intermediate scrutiny as applied to the reasons given for terminating a transgender employee.[64]

### *B. The Parties' Arguments on Motion for Summary Judgment*

To prove her Equal Protection claim, Ms. Glenn had to demonstrate she was "a member of an identifiable group and that there was differential treatment 'based on [her] membership of that

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F.3d 1160, 1162 (11th Cir. 2006)). In *McDonnell Douglas Corp. v. Green*, the Supreme Court set forth the framework for analyzing a Title VII claim. *McDonnell Douglas*, 411 U.S. at 807. The plaintiff must show an inference of discrimination to make out a prima facie case. The defendant then has burden of production of showing a legitimate, nondiscriminatory reason for the action, and then the plaintiff must show the proffered reason was pretext for discrimination. *Id.*

59. *Glenn*, 724 F. Supp. 2d at 1301 (quoting *Brooks*, 446 F.3d at 1162).

60. *Id.* (quoting *Brooks*, 446 F.3d at 1162). The court noted that while "the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee remains at all times with the plaintiff." *Id.*

61. *Id.* at 1302 (finding defendant failed to identify anything unrelated to Ms. Glenn's intention to come to work as a woman as a reason for termination, and at the very least, her appearance was a motivating factor for the termination).

62. *Id.*

63. *Id.* (quoting United States v. Virginia, 518 U.S. 515, 524 (1996)). In his decision, Judge Story analyzed the conduct under the Title VII framework in deciding whether a prima facie case existed, and then, having found sex stereotype discrimination is "on the basis of sex," deemed those who do not conform to the stereotypes as being a "protected class based on sex." *Id.* at 1300. The courts in *Etsitty* and *Smith* similarly analyzed a discrimination claim under Title VII and Equal Protection interchangeably. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1227–28 (10th Cir. 2007) (analyzing only plaintiff's Title VII claim and finding her Equal Protection claim failed for the same reasons); Smith v. City of Salem, 378 F.3d 566, 577 (6th Cir. 2004) (finding, without separately analyzing, that plaintiff's "claims of gender discrimination pursuant to Title VII easily constitute a claim of sex discrimination grounded in the Equal Protection Clause").

64. *Id.*

very group.'"[65] The purpose of such a requirement is to "maintain . . . focus on discrimination, and to avoid constitutionalizing every state regulatory dispute."[66] To get beyond the defendants' motion to dismiss, plaintiff argued that she was indeed a member of a class based on sex[67] and pointed to court decisions finding failure to conform to employer sex stereotyping as stating a claim for discrimination.[68] The plaintiff cited cases brought by both transsexual and non-transsexual plaintiffs[69] that used the familiar *Price Waterhouse* theory of sex stereotyping to argue discrimination based on sex, both under Title VII and Equal Protection Clause claims.[70] However, the cases plaintiff cited under Equal Protection Clause claims did not specifically analyze or directly point to discrimination against a transsexual as requiring an intermediate scrutiny.[71]

On the other hand, the defendants' motion to dismiss pointed out that the court in *Rush v. Johnson* previously held "as a matter of law that transsexuals as a group are not a suspect class based on sex."[72] In

65. Glenn v. Brumby, 632 F. Supp. 2d 1308, 1314 (N.D. Ga. 2009) (quoting Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979)).

66. Griffin Indus., Inc. v. Irvin, 496 F.3d 1189, 1207 (11th Cir. 2007).

67. *Glenn*, 632 F. Supp. 2d at 1315.

68. *Id.* (citing Smith v. City of Salem, 378 F.3d 566, 577 (6th Cir. 2004); Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 117–21 (2nd Cir. 2004); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874–75 (9th Cir. 2001); Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008); Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008)).

69. The plaintiffs in *Smith v. City of Salem*, *Shroer v. Billington*, and *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.* were transsexuals transitioning from male to female; the plaintiff in *Back v. Hastings on Hudson Union Free School District* was female; and the plaintiff in *Nichols v. Azteca Restaurant Enterprises, Inc.* was a male whose coworkers perceived him as a homosexual. *Glenn*, 632 F. Supp. 2d at 1315.

70. *Nichols v. Azteca Restaurant Enterprises, Inc.*, *Shroer v. Billington*, and *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.* were Title VII claims; *Back v. Hastings on Hudson Union Free School District* was an Equal Protection Clause claim only; and the claim in *Smith v. City of Salem* was both. *Glenn*, 632 F. Supp. 2d at 1315.

71. The plaintiff in *Back v. Hastings on Hudson Union Free School District* claimed her employer terminated her based on the sex stereotypical notion that a woman with small children cannot be dedicated to her job. *Back*, 365 F.3d at 119. The court focused on the plaintiff's ability to survive summary judgment, finding the defendant's proffered non-discriminatory reasons for terminating plaintiff did not foreclose a material issue of fact, but the court did not analyze whether the reasons served a legitimate or important objective. *Id.* at 122. The court in *Smith v. City of Salem* analyzed the plaintiff's Title VII claim and, finding the elements to be the same as under an Equal Protection Clause discrimination claim, simply recognized the plaintiff stated a claim. *Smith*, 378 F.3d at 577.

72. *Glenn*, 632 F. Supp. 2d at 1315.

*Rush v. Johnson*, the plaintiff brought an Equal Protection Clause claim after being denied Medicaid assistance in paying for the cost of her sex reassignment surgery.[73] The court found that transsexuals were not a suspect class, and as such, applied the rational basis standard in finding Medicaid's prohibition against reimbursement for experimental surgery to be rationally related to the legitimate government interest in public health.[74] In his order granting Ms. Glenn's motion for summary judgment, Judge Story explained that the court's prior decision in *Rush v. Johnson* was "not at odds with the Supreme Court's interpretation . . . in the *Price Waterhouse* case" because the decision still holds that "while 'transsexuals' are not members of a protected class based on sex, those who do not conform to gender stereotypes *are* members of a protected class based on sex."[75] In finding Ms. Glenn sufficiently pleaded her claim of sex stereotyping and gender discrimination,[76] Judge Story denied defendants' motion to dismiss and declared the plaintiff's claim involved a "classification requiring more than rational basis scrutiny."[77] The defendants failed to plead any government purpose for Ms. Glenn's termination, and the claim was allowed to proceed.[78]

The decision was before the court on plaintiff Glenn and defendant Brumby's cross motions for summary judgment.[79] In her brief, plaintiff specified her argument that she was "a member of a class based on sex" by clarifying that the identifiable group she was a member of is "a group of individuals who do not conform to sex

73. Rush v. Johnson, 565 F. Supp. 856, 857 (N.D. Ga. 1983).

74. *Id.* at 868–69 (relying on *Holloway v. Arthur Andersen & Co.* in finding "'that transsexuals are not necessarily a "discrete and insular minority," nor has it been established that transsexuality is an "immutable characteristic determined solely by accident of birth" like race or national origin'").

75. *Glenn*, 632 F. Supp. 2d at 1315 (emphasis added).

76. *Id.* at 1316.

77. *Id.* at 1316–17 (explaining the heightened level of scrutiny the defendant must meet to justify differential treatment based on sex (citing United States v. Virginia, 518 U.S. 515 (1996))).

78. *Id.* at 1317. In his order denying defendants' motion to dismiss, Judge Story also cautioned that "[a]nticipated reactions of others" do not justify discrimination, nor will the discriminatory treatment survive any Equal Protection review when "'the disadvantage imposed is born of animosity toward the class of persons affected.'" *Id.* (quoting Romer v. Evans, 517 U.S. 620, 634–35 (1996)).

79. Glenn v. Brumby, 724 F. Supp. 2d 1284, 1295 (N.D. Ga. 2010), *aff'd*, 663 F.3d 1312 (11th Cir 2011). Defendants Richardson, Cagle, Johnson, and Underwood also filed a Motion for Summary Judgment, but plaintiff's Motion for Order for Dismissal of defendants Richardson, Cagle, Johnson, and Underwood was granted. *Id.*

stereotypes."[80] Plaintiff argued she was similarly situated with other persons who were treated differently because she, as with all other "similarly situated" employees in her position, completed all employer-required testing and her work product was average.[81] To satisfy the next required element of her Equal Protection Clause claim, plaintiff asserted she was treated differently by her employer because of her membership in the identifiable group—those who don't conform with sex stereotypes—and pointed out that defendant's comment on her nonconformity was inappropriate and "exactly what courts describe as paradigmatic sex stereotyping."[82] Having argued that her Equal Protection Clause claim based on sex requires a heightened level of scrutiny,[83] plaintiff then argued that her termination was neither rationally nor substantially related to a sufficient government interest.[84] In doing so, plaintiff insisted that the proffered nondiscriminatory reasons for termination—avoiding anticipated negative reactions of others and avoiding potential lawsuits—were neither legitimate nor important government interests.[85] Even if the interests were legitimate or important, plaintiff stated that the hypothesized interests of avoiding workplace distractions or preserving confidentiality in the workplace[86] were not substantially related to those interests.[87]

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80. Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment Against Defendant Sewell R. Brumby at 8, Glenn v. Brumby, 724 F. Supp. 2d 1284 (N.D. Ga. 2010) (No. 1:08-CV-2360), *aff'd*, 663 F.3d 1312 (11th Cir 2011).

81. *Id.* at 11. Showing plaintiff was similarly situated to other employees—but for membership in an identifiable group—is a required element on an Equal Protection claim in order to maintain focus on the discrimination. *Id.* (citing Griffin Indus., Inc. v. Irvin, 496 F.3d 1189, 1207 (11th Cir. 2007)).

82. *Id.* at 14 n.3 (citing Smith v. City of Salem, 378 F.3d 566, 577 (6th Cir. 2004); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1076 (9th Cir. 2002); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 263 n.5 (3d Cir. 2001); Doe *ex rel.* Doe v. City of Bellville, 119 F.3d 563, 580 (7th Cir. 1997)).

83. *Id.* at 8–9.

84. *Id.* at 14.

85. *Id.* at 14–19. The Supreme Court has rejected both reasons given by defendant as a rational basis. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448–49 (1985).

86. Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment Against Defendant Sewell R. Brumby, *supra* note 80, at 19–21 (anticipating the arguments of defendant in support of his Motion for Summary Judgment). Defendant did not point to any breach of confidentiality, nor anything that would give rise to potential lawsuits, and defendant was the only employee who appeared distracted by plaintiff's nonconformity. *Id.*

87. *Id.*

In support of his own motion for summary judgment, defendant Brumby recognized that an intermediate level of scrutiny is applied to classifications based on sex,[88] but argued that plaintiff's claims were not within the definition of a suspect class based on sex, and were therefore entitled only to a rational relationship test.[89] Defendant claimed that the plaintiff was simply trying to "elevate her status to the intermediate level of scrutiny" by claiming her termination was due to sex stereotype nonconformity[90] in an attempt to avoid the ruling of *Rush v. Johnson*.[91] Brumby did not ignore the reasoning of *Price Waterhouse* nor its extension to claims brought by transsexual plaintiffs, but pointed to several cases where transsexual plaintiffs were unsuccessful in their sex stereotyping claims.[92] Defendant went on to argue that the only instance where a sex stereotyping theory can state a claim is when the transsexual plaintiff actually produces evidence that the adverse decision was based on the sexual stereotyping itself.[93] But in this case, defendant stated there was no such direct evidence.[94] Therefore, plaintiff failed to prove defendant terminated her for being too feminine or not masculine enough and also had not proven nonconformity to sex stereotypes which place her in a protected class.[95] Defendant further attempted to persuade the court by arguing the termination action would have applied equally to males or females because it was based

88. Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 9, Glenn v. Brumby, 724 F. Supp. 2d 1284 (N.D. Ga. 2010) (No. 1:08-CV-2360).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 10–14 (citing Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1227 (10th Cir. 2007); Creed v. Family Express Corp., No. 3:06-CV-465RM, 2009 WL 35237 (N.D. Ind. Jan. 5, 2009); Kastl v. Maricopa Cnty. Cmty. Coll. Dist., No. Civ.02-1531PHX-SRB, 2004 WL 2008954 (D. Ariz. June 3, 2004); Oiler v. Winn-Dixie La., Inc., No. Civ. A. 00-3114, 2002 WL 31098541 (E.D. La. Sept. 16, 2002)).

93. *Id.* at 15 (citing Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004); Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F.Supp.2d 653 (S.D. Tex. 2008); Schroer v. Billington, 525 F.Supp.2d 58 (D.D.C. 2007)).

94. Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment, *supra* note 88, at 16.

95. *Id.*

on the transition from one sex to the other, and not on the appearance or behavior that is expected from one particular gender.[96]

### *C. The Decision in* Glenn v. Brumby

In deciding that plaintiff made her prima facie case of discrimination,[97] Judge Story necessarily accepted not only that a *Price Waterhouse* Title VII sex stereotyping theory claim could be applied to a claim of discrimination brought under the Equal Protection Clause, but also that the claim could be made by transsexual employees.[98] In analyzing the sex stereotyping claim brought by Ms. Glenn, Judge Story began by describing the action before the court as "not the first in which an individual with [gender identity disorder] has relied upon . . . *Price Waterhouse* to assert a claim resulting from an adverse employment action."[99] After reviewing precedent from various circuits, Judge Story decided to concur with the majority of courts that have addressed the issue, and found discrimination against a transgendered individual because of his or her failure to conform to gender stereotypes constitutes discrimination based on sex.[100] In so holding, the court found the plaintiff to be a member of an identifiable group based on her sex.[101] This meant the defendant had to satisfy the burden of intermediate scrutiny by "showing at least that the classification serves 'important governmental objectives and that the discriminatory means

96. Defendant Sewell Brumby's Memorandum of Law in Response to Plaintiff's Motion for Summary Judgment at 3–4, Glenn v. Brumby, 724 F. Supp. 2d 1284 (N.D. Ga. 2010) (No. 108CV02360). Defendant found support in the excerpt, "Gender Identity Disorder can be distinguished from simple non-conformity to stereotypical sexual behavior by the extent and pervasiveness of the cross-gender wishes, interests, and activities." *Id.* (quoting DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS §11.3 AM. PSYCHIATRIC ASS'N (1994)).

97. Glenn v. Brumby, 724 F. Supp. 2d 1284, 1305 (N.D. Ga. 2010) ("Plaintiff's desire to come to work dressed as a woman did not comport with how Defendant Brumby believed a biological male should act . . . ."), *aff'd*, 663 F.3d 1312 (11th Cir. 2011).

98. *Id.*

99. *Id.* at 1297–98 (discussing *e.g.*, Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004)).

100. *Id.* at 1298 (citing *Smith*, 378 F.3d at 572, 575 and Kastl v. Maricopa Cnty. Cmty. Coll. Dist., 325 F. App'x. 492, 493 (9th Cir. 2009), among others, as examples).

101. *Id.* at 1296.

employed' are 'substantially related to the achievement of those objectives.'"[102]

As discussed,[103] and as noted by Judge Story in his opinion, the defendant based his defense on the theory that plaintiff was not a member of a protected class, and therefore, her claim was not based on sex.[104] Under this belief, Mr. Brumby only argued that his decision to terminate Ms. Glenn survived the rational relationship test, and urged that the rational basis test should be the appropriate scrutiny applied. [105] He did not argue, in the alternative, that his actions could meet an intermediate scrutiny.[106] As the case was before the court on a motion for summary judgment, Judge Story still considered defendant's proffered nondiscriminatory reason of avoiding lawsuits under the substantially related relationship test,[107] and found it did not survive because the justification could not be invented *post hoc* in response to litigation.[108]

In finding the defendant's reasons were not substantially related to an important government interest, Judge Story held the decision to terminate Ms. Glenn violated her rights under the Equal Protection

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102. *Id.* at 1302 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)). Plaintiff's second claim asserted that defendant discriminated against her as a result of her gender identity disorder and that her termination prevented her from undergoing treatment. *Id.* at 1305. "[T]he Equal Protection Clause protects individuals with disability and illness (physical and mental) from discrimination by the states and that laws classifying individuals on such a basis must meet rational basis scrutiny." *Id.* (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 466). Possible lawsuits for invasion of privacy or sexual harassment resulting from an individual with male genitalia using a women's restroom, "even meritless suits, [are] a rational, legitimate government interest." *Id.* at 1307. Since her claim of discrimination based on a medical condition failed under the rational relationship test, given the reasons proffered for termination, Ms. Glenn would have been denied all relief had Judge Story not found her sex stereotyping theory required the heightened intermediate scrutiny. *Id.*

103. *See* discussion *supra* Part I.B.

104. *Glenn*, 724 F. Supp. 2d at 1302; *see also* Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment, *supra* note 88, at 9–18; Defendant Sewell Brumby's Memorandum of Law in Response to Plaintiff's Motion for Summary Judgment, *supra* note 96, at 2–5.

105. Defendant Sewell Brumby's Memorandum of Law in Response to Plaintiff's Motion for Summary Judgment, *supra* note 96 (arguing that plaintiff misinterpreted the rational relationship test in an attempt to heighten the scrutiny or "create a hybrid of the rational relationship test and the substantial relationship test").

106. *Glenn*, 274 F. Supp. 2d at 1302. .

107. *Id.* at 1303.

108. *Id.* (finding there was no evidence that Ms. Glenn's bathroom usage was an actual concern at the time of termination). However, avoiding lawsuits, such as those by other employees for invasion of privacy based on restroom usage, was found to survive a rational basis test needed under Ms. Glenn's medical condition discrimination claim. *Id.* at 1306.

Clause, and granted her motion for summary judgment.[109] In so doing, and without saying as much, the *Glenn v. Brumby* decision followed a logical step by step process: (1) *Price Waterhouse* created a cause of action for nonconformity to sex stereotypes under Title VII based on sex,[110] (2) the application of the sex stereotype theory has been extended to claims brought by transsexuals under Title VII,[111] and (3) the elements of a Title VII claim are the same as an Equal Protection claim brought under § 1983.[112] Therefore, a sex stereotyping claim brought by a transsexual employee is a claim based on sex that requires the government interest to survive a heightened intermediate scrutiny, rather than a rational basis test.

### *D. Decisions Denying Relief To Transsexual Employees*

Not all courts have reached the same decision, nor have they used the same reasoning as Judge Story in granting relief to a transsexual employee alleging discrimination. In *Oiler v. Winn-Dixie*, the court relied on the "repeated failure of Congress to amend Title VII" to "support[] the argument that Congress did not intend Title VII to prohibit discrimination on the basis of a gender identity disorder."[113] The opinion begins by stating that numerous courts have held transsexual employees did not have cognizable discrimination claims under Title VII, even if they were terminated for being transsexual, because "based on sex" is interpreted to mean biological sex.[114] But,

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109. *Id.* at 1305. At the subsequent remedies hearing, the parties agreed that reinstatement of the plaintiff's prior employment position was an appropriate remedy. Glenn v. Brumby, No. 1:08-CV-2360-RWS, 2010 WL 3731107, at *1 (N.D. Ga. Sept. 15, 2010). In addition, Ms. Glenn sought seniority restoration, an injunction against future discriminatory conduct, and sex discrimination training for defendant Brumby. *Id.* Ms. Glenn's injunction and seniority requests were granted, however the court did not find sex discrimination training for Brumby an appropriate remedy and denied the request. *Id.* at *2. The court reasoned Mr. Brumby did not believe his conduct violated the plaintiff's legal rights, and nothing indicated he would discriminate against plaintiff on the basis of sex in the future. *Id.*

110. *See* discussion *supra* Part I.B.

111. *See* discussion *supra* Part I.C.

112. *See* discussion *supra* Part II.A.

113. Oiler v. Winn-Dixie La., Inc., No. Civ. A. 00-3114, 2002 WL 31098541, at *6 (E.D. La. Sept. 16, 2002). Plaintiff, a heterosexual transgendered employee, only presented as a woman outside of work. *Id.* at *1. Plaintiff's supervisors stated the reason for terminating the plaintiff was fear that Winn-Dixie customers would recognize the plaintiff while off-duty and disapprove of his "lifestyle." *Id.* at *2.

114. *Id.* at *4 (citing Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 749 (8th Cir. 1982); Rentos v. Oce-Office Sys., No. 95 CIV. 7908

it is also recognized in *Oiler v. Winn-Dixie* that the social climate is much different today than when Title VII was originally passed in 1964, and "[m]any individuals having such [sexual identity and sexual orientation] issues have opened wide the closet doors" and brought the issues to mainstream attention.[115] And yet, despite the public acknowledgement of these issues, Congress has never clarified Title VII's definition of "based on sex."[116] In fact, none of the more than thirty proposals that would amend Title VII to include protection for discrimination against "affectional and sexual orientation" have passed.[117] However, despite all of these attempts to include sexual orientation as a protected class under Title VII, as the court in *Oiler v. Winn-Dixie* pointed out, no attempts have been made by Congress to ban discrimination based on sexual or gender identity.[118] The court considered Congress' failure to clearly include sexual orientation and identity in the definition of "based on sex" to be ample indication that it did not intend those classes to be included in the protection, especially considering Congress' awareness of courts' twenty-year struggle over the issue.[119] In considering whether the plaintiff in *Oiler v. Winn-Dixie* could find relief under a *Price Waterhouse* sex stereotyping theory, the court stated that transgenderedness was a "matter of a person of one sex assuming the role of a person of the

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LAP, 1996 WL 737215, at *7 (S.D.N.Y 1996); James v. Ranch Mart Hardware, Inc., No. 94-2235-KHV., 1994 WL 731517, at *1 (D. Kan. Dec. 23, 1994); Dobre v. Nat'l R.R. Passenger Corp., 850 F.Supp.284, 286–87 (E.D. Pa. 1993); Doe v. U.S. Postal Serv., Civ. A. No. 84-3296, 1985 WL 9446 at *2 (D.D.C. June 12, 1985); Powell v. Read's, Inc., 436 F. Supp. 369, 370 (E.D. Md. 1977)).

115. *Id.* at *4.

116. *Id.*

117. *Id.* at *4 n.53 (citing more than thirty rejected or pending legislative proposals spanning from 1981 to 2001).

> Sexual or affectional orientation means having or being perceived as having an emotional or physical attachment to another consenting adult person or persons, or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or one's biological femaleness.

Paisley Currah, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 64 (2000).

118. *Oiler*, 2002 WL 31098541, at *4. The court instructed both parties to provide support showing Congress' intent to include gender identity—as opposed to sexual orientation—in the definition of based on sex for purposes of employment discrimination, but neither could. *Id.* at *4 n.54.

119. *Id.* at *4 n.52.

opposite sex," versus "exhibiting characteristics associated with the opposite sex," and found that claim failed as well.[120]

## III. PROPOSAL FOR PROTECTION AGAINST TRANSGENDER EMPLOYMENT DISCRIMINATION

As mentioned, the Supreme Court has not definitively answered the question of whether transsexual employees are entitled to protection against employment discrimination[121] under Title VII or the Equal Protection Clause. Nor has the Court decided whether the sex stereotype theory established in *Price Waterhouse* applies to a constitutional discrimination claim.[122] Given the lower courts' differing interpretations of the meaning of "based on sex," the issue will likely soon come before the Supreme Court.[123] On appeal, the Eleventh Circuit affirmed the order granting plaintiff's motion for summary judgment in *Glenn v. Brumby*.[124] Although most of the precedent relied on by Judge Story came from different circuits,[125] a reversal of *Glenn v. Brumby* by the Eleventh Circuit would have been

120. *Id.* at *6.

121. Leonard, *supra* note 12. The plaintiff in *Ulane v. Eastern Airlines* petitioned the Supreme Court in 1985 for writ of certiorari after the seventh circuit held transsexuals are not entitled to protection under Title VII, but certiorari was denied. Ulane v. E. Airlines, Inc., 471 U.S. 1017 (1985).

122. Leonard, *supra* note 12; *see also* Kastl v. Maricopa Cnty. Cmty. Coll. Dist., No. Civ.02-1531PHX-SRB, 2004 WL 2008954, at *8 (D. Ariz. June 3, 2004).

123. Weiss, *supra* note 22, at 575. The "meaning of the term sex has changed since 1964, and now includes concepts of gender and gender identity." *Id.* at 638.

124. Glenn v. Brumby, 663 F.3d 1312, 1321 (11th Cir. 2011). Defendant Sewell Brumby timely appealed the decision of the district court, stating that the lower court erred in granting summary judgment because the decision to terminate plaintiff was not based on sex. Corrected Brief of Appellant Sewell R. Brumby at 2–3, Glenn v. Brumby, 663 F.3d 1312 (2011) (No, 10-14833-D). Acknowledging that "if gender stereotyping motivates an adverse employment decision, it can be considered discrimination based on sex," Brumby urged the court to distinguish "whether the decision to terminate Glenn was based on his being transgender and his stated intention to surgically transition to a woman, or was it based on a gender stereotype that Glenn was not sufficiently masculine." *Id.* at 15, 20. Brumby focused on Glenn's transition as the cause of termination rather than gender motivation, and again only argued governmental interests under the rational basis test rather than the heightened scrutiny ordered by Judge Story. *Id.* at 27–28. Plaintiff cross-appealed, claiming the district court erred in granting summary judgment to Brumby on the medical condition claim. Corrected Brief of Appellee Vandiver Elizabeth Glenn at 2, Glenn v. Brumby, 663 F.3d 1312 (2011) (Nos. 10515-DD, 10-14833-D).

125. In "concur[ing] with the majority of courts that have addressed this issue," Judge Story cited Sixth, Tenth, and Ninth Circuit decisions, and cases from the Northern District of Indiana, Southern District of Texas, and District of Columbia. Glenn v. Brumby, 724 F. Supp. 2d 1284, 1299 (N.D. Ga. 2010), *aff'd*, 663 F.3d 1312 (11th Cir. 2011).

a "sharp departure from the growing body of case law supporting the use of sex discrimination theory in transgender discrimination cases that focus heavily on gender expression."[126] If *Glenn v. Brumby* made its way to the Supreme Court, the Court should follow the Eleventh Circuit and Judge Story's reasoning and affirm the decision.[127]

### *A. Deciding a Case of Discrimination Against a Transgender Employee Using a "Plain Meaning" Approach*

If and when the issue of whether transgender employees are entitled to protection against workplace discrimination reaches the Supreme Court, one approach the Supreme Court could take is to follow the reasoning used in the early cases brought on the issue,[128] and more recently in *Oiler v. Winn-Dixie*.[129] Under this approach, the Supreme Court could look to congressional intent and the lack of specific inclusion of gender identity, focusing on the plain meaning of "based on sex." This approach would deny the protections of Title VII to transsexual employees since this reasoning leads to the conclusion that sex discrimination can only exist as a result of being a man or a woman, not the transition from one to the other.[130] This is the same biological definition logic used in holding that transsexuals are not a protected class for purposes of the Equal Protection Clause; as the Ninth Circuit described in *Holloway v. Arthur Andersen & Co.*, "[T]ranssexuality is [not] an 'immutable characteristic determined solely . . . [at] birth' like race or national origin."[131]

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126. Leonard, *supra* note 12.

127. In analyzing whether a stereotyped transgendered individual is entitled to protection, the court stated that the "nature of the discrimination is the same; it may differ in degree but not in kind, and discrimination on this basis is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause." Glenn v. Brumby, 663 F.3d 1312, 1319 (11th Cir. 2011).

128. *See, e.g.*, Ulane v. E. Airlines, Inc., 471 U.S. 1017 (1985); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 749 (8th Cir. 1982); Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977).

129. Oiler v. Winn-Dixie La., Inc., No. Civ. A. 00-3114, 2002 WL 31098541, at *4 (E.D. La. Sept. 16, 2002) (following the reasoning of earlier decisions *Ulane*, *Sommers*, and *Holloway*).

130. *See* Todd Weiss, *supra* note 22, at 576 ("Transgender identity is not sex; it is changing sex, a different concept altogether.").

131. *Holloway*, 566 F.2d at 663. A number of courts have held as a matter of law that transsexuals are not a protected class under the Equal Protection Clause. *See, e.g.*, Brown v. Zavaras, 63 F.3d 967, 971 (10th Cir. 1995); Rush v. Johnson, 565 F. Supp. 856, 868 (N.D. Ga. 1983).

Should the Supreme Court follow the plain meaning or legislative intent approach, a transsexual bringing a claim of employment discrimination under the Equal Protection Clause would be entitled to the lowest level of scrutiny—the rational relationship test—to determine whether the employer's reasons for the employment action are justified. Under this standard, the employer would only need to show a reasonably conceivable state of facts that provide a rational basis for the action without considering the employer's actual purpose or motivation since the employment action is not "based on sex."[132] This requires very little in the way of justification for actions—almost any action could pass the test[133]—which would make it difficult for a transgendered employee to ever find relief from suffering workplace discrimination.

### *B. Adopting the Approach of Glenn v. Brumby*

#### *1. Sex Stereotyping Theory Should Apply to Transsexuals*

Instead of taking an approach based on perceived legislative intent[134] and a restrictive meaning of "based on sex," when the Supreme Court is finally faced with deciding whether transsexual employees are protected against discrimination, it should adopt the approach taken by Judge Story in *Glenn v. Brumby*. In adopting this suggestion, the Court need not even debate whether the 1964 Congress was just speaking about chromosomes when it originally made discrimination based on "sex" unlawful, nor stress over whether thirty-plus attempts to amend Title VII without including "gender identity" means Congress does not intend for that class to be protected. In fact, Ms. Glenn did not argue,[135] and Judge Story did

132. *See* Joel v. City of Orlando, 232 F.3d 1353, 1358 (11th Cir. 2000) (explaining the steps of the rational basis test).

133. Sabrina Ariel Miesowitz, *ERA is Still the Way*, 3. N.Y.U. J.L. & LIBERTY 124, 142 (2008) (analyzing the history of the equal rights amendment and the constitutional standard of intermediate scrutiny used in sex based equal protection challenges).

134. The legislative intent argument is based on an "absence of evidence" since it hinges on the argument that if Congress *did* intend for transsexuals to be protected, it would have specifically included this provision. Weiss, *supra* note 22, at 638.

135. Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment Against

not address, the issue of whether the meaning of sex itself should be or was altered, nor whether discrimination based on changing sex is the same as discrimination based on being a man or woman.[136]

The court had no need to focus on whether it is unlawful to discriminate against a transsexual for being a transsexual because the Supreme Court already recognized a separate interpretation of "based on sex" when it decided *Price Waterhouse*.[137] Courts that have given relief to transsexual plaintiffs have done so on the basis of the sex stereotyping theory set forth in *Price Waterhouse*,[138] and so this will likely be at least one of the theories of discriminatory conduct that reaches the Supreme Court. Most lower courts have accepted that the sex stereotype theory may be extended to transsexual employees because the theory established that "Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms."[139] The Supreme Court should follow the lower courts' lead and find that the sex stereotyping theory applies to men failing to conform to masculine stereotypes. To hold the theory only applies to women failing to conform to an employer's perception of how a woman should behave would be discriminatory.

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Defendant Sewell R. Brumby, *supra* note 80 (relying on arguments based on plaintiff being a member of a group of individuals who do not conform to sex stereotypes, rather than arguing that plaintiff, as a transsexual, is in a group based solely on that status).

136. Glenn v. Brumby, 724 F. Supp. 2d 1284 (N.D. Ga. 2010), *aff'd*, 663 F.3d 1312 (11th Cir. 2011). Plaintiff's claims for relief were based on being treated differently due to her failure to conform to sex stereotypes, and for discrimination based on a medical condition. *Id.* at 1293. Therefore Judge Story did not analyze whether transsexuality falls within the meaning of sex per se, except to note the distinction between transsexuals being members of a protected class versus the class of those not conforming to sex stereotypes. *Id.* at 1300.

137. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); *see also* discussion *supra* Part II.B.

138. *E.g.*, Smith v. City of Salem, 378 F.3d 566, 571 (6th Cir. 2004); Schroer v. Billington, 525 F. Supp. 2d 58, 62 (D.D.C. 2007).

139. *Smith*, 378 F.3d at 573.

*2. Sex Stereotyping Theory Should Apply to Claims Under the Equal Protection Clause and be Subject to an Intermediate Scrutiny*

Once the Supreme Court decides whether the *Price Waterhouse* sex stereotyping theory applies to transsexuals—or men at all[140]—it should also hold that the sex stereotyping theory applies to sex discrimination claims brought under the Equal Protection Clause. It is well established that the elements of a Title VII claim are used to analyze an employment discrimination claim brought under the Equal Protection Clause,[141] and so the Court should also apply the sex stereotyping theory created under a Title VII claim to constitutional claims. It is not a stretch to extend the stereotype theory to an Equal Protection Clause claim brought essentially to remedy the same employer conduct, especially given that the Title VII sex stereotyping theory has been used as an analogy in non-employment contexts. For example, the First Circuit held a transsexual plaintiff stated a claim under the Equal Credit Opportunity Act and the Ninth Circuit applied the sex stereotyping theory of Title VII to allow a claim by a transsexual under the Gender Motivated Violence Act.[142]

In borrowing from Title VII precedent and reasoning, Judge Story recognized that a separate protected class existed: "those who do not conform to gender stereotypes."[143] This placed the transsexual plaintiff in an identifiable group "based on sex," entitling her to the heightened intermediate scrutiny for all claims based on sex. This is the approach the Supreme Court should adopt in deciding an employment discrimination claim brought under the Equal Protection Clause. Again, as it is essentially the same elements and same conduct as a claim the Supreme Court has already recognized as a class deserving of protection, it is a logical decision to give an

140. The Supreme Court has decided that a sex discrimination claim can be brought by a male based on sexual harassment by a fellow male. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998).

141. *See* discussion *supra* Part II.A.

142. Rosa v. Park W. Bank & Trust, 214 F.3d 213, 215–16 (1st Cir. 2000); Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000).

143. Glenn v. Brumby, 724 F. Supp. 2d 1284 at 1300 (N.D. Ga. 2010), *aff'd*, 663 F.3d 1312 (11th Cir. 2011).

intermediate rather than rational basis scrutiny to constitutional claims. Indeed, the burden is on the defendant to show a legitimate, nondiscriminatory reason for an adverse employment action to defeat a Title VII claim, so it is illogical to reason that the governmental agency defendant in a constitutional discrimination claim should be allowed to rely on "rational speculation unsupported by any evidence or empirical data" or require that a plaintiff disprove "every conceivable basis which might support" the state action.[144]

## CONCLUSION

The question of whether a transsexual employee is protected against employment discrimination is a question that needs to be definitively answered by the Supreme Court. In the decades since the Civil Rights Act was passed in 1964, courts have struggled over the meaning of the word "sex," especially as it applies to nontraditional groups such as transsexual employees.[145] The Supreme Court should put an end to this struggle by deciding that a transsexual plaintiff can bring a claim based on the *Price Waterhouse* theory of sex stereotyping, and also that the sex stereotyping theory be used in Equal Protection Clause claims.

The proposed Supreme Court decision does not provide an easy route for the transsexual employee who feels he or she has been discriminated against in the workplace. The proposed solution is not to hold transsexuality as a protected class in and of itself, but rather to conclude that transsexuals are within the class—in the case of a constitutional claim, an identifiable group—that was created by the Supreme Court's *Price Waterhouse* decision. Therefore, to obtain relief, a plaintiff will not need to simply show an employment action was taken because he or she was a transsexual, but will need to prove

144. FCC v. Beach Comm'n, 508 U.S. 307, 315 (1993). In his brief, defendant Brumby points to *FCC v. Beach* in arguing the government "has no obligation to produce evidence to support the rationality of its . . . classifications," and the fact the reasons "are arguable is sufficient to withstand rational basis review." Defendant Sewell Brumby's Memorandum of Law in Response to Plaintiff's Motion for Summary Judgment, *supra* note 96, at 3.

145. *See generally* Weiss, *supra* note 22.

by specific, direct evidence that the actions taken were because of gender stereotypes.[146] This may mean clever lawyering in a plaintiff's pleadings to survive a motion to dismiss, but by requiring more than a rational basis scrutiny, it will also mean a defendant's pleadings will need more than just a conceivable set of facts rationally related to a legitimate interest. The best consequence of the proposed Supreme Court decision would be to enable lower courts to focus on the conduct of the parties in a discrimination case rather than sorting out the meaning of sex and gender; after all, "the Equal Protection Clause forbids sex discrimination no matter how it is labeled."[147]

146. Kelly, *supra* note 23, at 230 (suggesting the standard of "specific, direct evidence" for sex stereotyping claims makes it unlikely that transgender employees will find relief under Title VII, short of actually hearing an employer state they are "too masculine for a woman" or "too feminine for a man").

147. Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 118–19 (2d Cir. 2004).