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## Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in *EEOC v. Catastrophe Management Solutions*

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# **Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in *EEOC v. Catastrophe Management Solutions***

D. WENDY GREENE\*

*What does hair have to do with African descendant women's employment opportunities in the 21<sup>st</sup> century? In this Article, Professor Greene demonstrates that Black women's natural hair, though irrelevant to their ability to perform their jobs, constitutes a real and significant barrier to Black women's acquisition and maintenance of employment as well as their enjoyment of equality, inclusion, and dignity in contemporary workplaces. For nearly half a century, the federal judiciary has played a pivotal role in establishing and preserving this status quo. The Eleventh Circuit Court of Appeal's recent decision in *EEOC v. Catastrophe Management Solutions* exacerbates what Professor Greene calls employers' "hyper-regulation of Black women's bodies via their hair." This Article considers how federal courts and namely the Eleventh Circuit have issued hair splitting*

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\* Visiting Professor of Law, University of Iowa College of Law; Professor of Law, Cumberland School of Law at Samford University. As always, I am especially grateful for the unwavering support and encouragement of my family and friends; special thanks to my sister, Colonel Kimberly Greene (USAF, Retired), and my niece, Morgan Parker Pettihome, for their cheerful assistance and genuine engagement with this article. For their tremendous support of this work, I would also like to thank Professor Deleso Alford, Professor Charlton Copeland, Professor Kristin Johnson, Professor Trina Jones, the late Adrian Rashid, Professor Jessica Roberts, and Professor Angela Onwuachi-Willig. Lastly, I would like to express my sincere appreciation to the editorial staff of the Eleventh Circuit Issue and Sharidan Hollis, J.D., for her research assistance.

*decisions in race-based “grooming codes discrimination cases” that decree: federal anti-discrimination law protects African descendants when they are discriminated against for adorning afros but statutory protection ceases once they grow their naturally textured or curly hair long or don it in braids, twists, or locks. Professor Greene explains that courts’ strict application of a “legal fiction” known as the immutability doctrine—and the biological notion of race that informs it—have greatly contributed to this incoherency in anti-discrimination law, which triggers troubling, tangible consequences in the lives of Black women.*

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## INTRODUCTION

In 2010—like many if not most job seekers—Chastity Jones, an African American woman, searched online for employment.<sup>1</sup> Ms. Jones submitted a job application with Catastrophe Management Solutions (“CMS”), a company based in Mobile, Alabama that provides customer service support to insurance companies’ claims processing.<sup>2</sup> She applied for a Customer Service Representative position, which required handling customer inquiries via telephone and basic computer knowledge.<sup>3</sup> Along with thirty other applicants, CMS invited her to interview for the position.<sup>4</sup> Jones wore a blue business suit, black pumps, and her hair in locks to the interview.<sup>5</sup> After an initial assessment of the required skills, CMS extended a job offer to Ms. Jones.<sup>6</sup> Jones then met privately with CMS’ human resources manager, Jeannie Wilson, to reschedule required lab tests.<sup>7</sup> As Ms. Jones departed the meeting, Ms. Wilson asked her if she was donning “dreadlocks,” to which Jones replied in the affirmative.<sup>8</sup> Ms. Wilson informed Jones that she could no longer hire her if she continued to wear locks, explaining “they tend to get messy, although I’m not saying yours are, but you know what I am talking about.”<sup>9</sup> Ms. Wilson added that previously an African American male applicant was asked to cut off his locks to secure a position with CMS.<sup>10</sup> Ms. Jones refused this condition of employment, returned her initial paper work to Ms. Wilson, and left the building.<sup>11</sup>

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<sup>1</sup> EEOC v. Catastrophe Mgmt. Solutions, No. 14-13482, 2016 WL 7210059, at \*1 (11th Cir. Dec. 13, 2016).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at \*2.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

Regrettably, Ms. Jones' encounter with grooming codes discrimination<sup>12</sup> at the intersection of race and gender<sup>13</sup> is not an isolated incidence.<sup>14</sup> Countless employers have instructed African descendant<sup>15</sup> women to cut off, cover, or alter their naturally textured hair in order to obtain and maintain employment for which they are qualified.<sup>16</sup> Like Ms. Jones, other African descendant women have endured a barrage of offensive, stereotypical perceptions, denigrating their naturally textured hair as "messy," "unkempt," "dirty," and "unprofessional," not only during the hiring process, but also during

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<sup>12</sup> "Grooming codes discrimination" is a term that I developed to describe the specific form of inequality and infringement upon one's personhood resulting from the enactment and enforcement of formal as well as informal appearance and grooming mandates, which bear no relationship to one's job qualifications and performance. However, such mandates implicate protected categories under anti-discrimination law like race, color, age, disability, sex, and/or religion.

<sup>13</sup> For the seminal article on intersectional claims of discrimination involving Black women, see Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) [hereinafter *Demarginalizing the Intersection of Race and Sex*].

<sup>14</sup> See *Catastrophe Mgmt. Solutions*, 2016 WL 7210059 at \*11 (citing ten cases from various courts where grooming policies were at issue).

<sup>15</sup> This Article will use African descendant, African American, and Black interchangeably to describe individuals who identify as having African ancestry. Professor Kimberlé Crenshaw has explained that "Black" deserves—capitalization because "Blacks, like Asians [and] Latinos. . . constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) [hereinafter *Race, Reform, and Retrenchment*] (citing Catharine A. MacKinnon, *Feminism, Marxism, Method and State: An Agenda for Theory*, 7 SIGNS 515, 516 (1982)). Additionally, Professor Neil Gotanda contends that the capitalization of Black is appropriate since it "has deep political and social meaning as a liberating term." Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 4 n.12 (1991). I agree with both Professors Crenshaw and Gotanda and for both reasons throughout this article when I reference people of African descent individually and collectively the word, Black, will be represented as a proper noun. However, I maintain the preference of authors to whom I cite directly as it pertains to their reference of particular racial groups with proper nouns.

<sup>16</sup> See *Catastrophe Mgmt. Solutions*, WL 7210059 at \*11 (citing ten cases where grooming policies were the basis for dismissal).

the course of their employment.<sup>17</sup> As a result, in lieu of donning twists, locks, braids, or afros, many African descendant women don straightened hairstyles to avoid the stigmatization of their natural hair, which often engenders harassment, unfavorable performance evaluations, as well as loss or denial of employment.<sup>18</sup> Notably, federal courts have not treated these instances of grooming codes discrimination, uniquely and commonly affecting African descendant women,<sup>19</sup> as unlawful race and/or gender discrimination under federal law—except when employers regulate or ban afros adorned by African descendant women.<sup>20</sup>

This Article explores the origins and the most recent judicial reaffirmation of this hair-splitting distinction between permissible and impermissible regulation of natural hairstyles under federal anti-discrimination law. In Part II, this Article briefly discusses the federal anti-discrimination laws that African descendant women have utilized to challenge the legality of natural hair bans in the workplace. Part II also examines the seminal case, *Rogers v. American Airlines*, wherein private employers were essentially afforded an unfettered right to regulate and proscribe natural hairstyles adorned by African descendant women except afros.<sup>21</sup> Part III details the litigation history of the most recent federal case of grooming codes discrimination against natural hairstyles, *Equal Employment Opportunity Commission (“EEOC”) v. Catastrophe Management Solutions*. Both the federal district court and the Eleventh Circuit in *EEOC v. Catastrophe Management Solutions* strictly applied the immutability doctrine to hold that CMS’ prohibition against Ms. Jones’ locks

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<sup>17</sup> In 2014, the United States Army re-issued Regulation 670-1, “Wear and Appearance of Army Uniforms and Insignia”: a grooming regulation that expressly barred servicewomen from donning two-strand twists and locks as well as severely regulated the width of braids namely cornrows. Maya Rhodan, *U.S. Military Rolls Back Restrictions on Black Hairstyles*, TIME: POLITICS (Aug. 13, 2014), <http://time.com/3107647/military-black-hairstyles/>. The Army’s grooming policy described these ways in which African American service women commonly wear their natural hair in derogatory terms—as “matted and unkempt.” *Id.*

<sup>18</sup> D. Wendy Greene, *Black Women Can’t Have Blonde Hair. . . in the Workplace*, 14 J. GEN. RACE & JUST. 405, 405–06 (2011) [hereinafter *Black Women Can’t Have Blonde Hair*].

<sup>19</sup> *Id.* at 406–07.

<sup>20</sup> *Rogers v. Am. Airlines Inc.*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981).

<sup>21</sup> *Id.* at 231–33.

did not constitute unlawful race discrimination under Title VII of the 1964 Civil Rights Act. Per the courts, Title VII's protections against race discrimination only extend to covered employers' regulation of immutable characteristics— characteristics with which one is born, are fixed, difficult to change, and/or displayed by all individuals who share the same racial identity. This Article argues that the immutability doctrine, namely strict immutability, is a “legal fiction”: a judicially created rule which is not based in fact yet is treated as such in legitimizing zones of legal protection and inclusion. Guided by this legal fiction, the Eleventh Circuit in *EEOC v. Catastrophe Management Solutions* fortified the lawful deprivation of not only employment opportunities for which African descendant women are qualified but also *equal terms, privileges, and conditions of employment* when they grow their naturally textured hair long or when it simply does not fit the mold of an afro.<sup>22</sup> In so doing, the Eleventh Circuit's decision sanctions the “hyper-regulation” of Black women's bodies via their hair in contemporary American workplaces.<sup>23</sup>

I. TWISTED COVERAGE: AN OVERVIEW OF FEDERAL  
ANTIDISCRIMINATION STATUTES AND *ROGERS V. AMERICAN AIRLINES*

A. *Federal Antidiscrimination Legislation: Title VII of the 1964  
Civil Rights Act and Section 1981 of the 1866 Civil Rights Act*

No federal law specifically governs appearance discrimination and only a few jurisdictions prohibit workplace discrimination on the basis of appearance.<sup>24</sup> Consequently, Black women contesting employers' formal or informal hair regulations have brought race and/or sex discrimination claims under federal anti-discrimination laws—namely Section 1981 of the 1866 Civil Rights Act and Title

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<sup>22</sup> Per federal precedent, employers are also able to prohibit or regulate the donning of wigs or hair extensions shaped in the form of twists, braids, or locks that are made from synthetic or natural hair. *See, e.g., Rogers*, 527 F. Supp. At 231–32 (holding that an employer can lawfully prohibit an African descendant woman from donning cornrow braids).

<sup>23</sup> *EEOC v. Catastrophe Mgmt. Solutions*, No. 14-13482, 2016 WL 7210059, at \*1–14 (11th Cir. Dec. 13, 2016).

<sup>24</sup> *See, e.g., Elliot-Larsen Civil Rights Act*, Mich. Comp. Laws § 37.2202 (2015).

VII of the 1964 Civil Rights Act—or state analogues.<sup>25</sup> Section 1981, a Reconstruction-era statutory provision, provides that all individuals possess the same right to “make and enforce contracts. . . as is enjoyed by white citizens.”<sup>26</sup> Courts have interpreted Section 1981 to prohibit intentional race<sup>27</sup> and color<sup>28</sup> discrimination in the employment context.<sup>29</sup> Over a century later, with the enactment of the 1964 Civil Rights Act, Congress promulgated a more express and expansive proscription against workplace discrimination on the basis of race, color, sex, religion, and national origin.<sup>30</sup> The substantive provisions of Title VII of the 1964 Civil Rights Act make it unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his

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<sup>25</sup> See *Catastrophe Mgmt. Solutions*, WL 7210059 at \*11; see also *Johnson v. Ry. Express Agency, Inc.* 421 U.S. 454, 459–60 (1975).

<sup>26</sup> 42 U.S.C. § 1981(a) (2012). The Supreme Court has interpreted this statutory language as a prohibition against intentional race discrimination in private employment. See *Johnson*, 421 U.S. at 459–60.

<sup>27</sup> See *Johnson*, 421 U.S. at 459–60.

<sup>28</sup> See e.g., *Jordan v. Whelan Sec. of Illinois, Inc.*, 30 F. Supp. 3d 746, 753 (N.D. Ill. 2014) (recognizing Section 1981 encompasses employment discrimination claims on the basis of color).

<sup>29</sup> Courts have held that Section 1981 does not permit independent claims of national origin discrimination; however, due to the often indistinguishable nature between these bases of discrimination, courts may allow national origin discrimination claims to proceed when the evidence supports a claim of race discrimination. See *Short v. Mando Am. Corp.*, 805 F. Supp. 2d 1246, 1267–68 (M.D. Ala. 2011).

<sup>30</sup> See 42 U.S.C. §2000e–2 (2012).



status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>31</sup>

Federal anti-discrimination laws also protect current, former,<sup>32</sup> and prospective employees who suffer retaliation for opposing an unlawful employment practice or participating in an investigation related to unlawful discrimination.<sup>33</sup> The United States Supreme Court has interpreted Title VII to prohibit intentional discrimination—employment decisions that are *consciously* motivated by animus,<sup>34</sup> stereotypes,<sup>35</sup> and mere consideration of a protected classification<sup>36</sup>—as well as unintentional discrimination.<sup>37</sup> In grooming codes discrimination cases challenging express policies that mandate different grooming or dress requirements for men and women,

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<sup>31</sup> 42 U.S.C. § 2000e-2(a)(1)–(2) (2012). Specifically, Title VII prohibits an employer from retaliating “against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” 42 U.S.C. § 2000e-3(a) (2012). *See* CBOCS W., Inc. v. Humphries, 553 U.S. 442, 445 (2008) (holding that retaliation claims are actionable under Section 1981).

<sup>32</sup> *See e.g.*, Bailey v. USX Corp., 850 F.2d 1506, 1509–10 (11th Cir. 1988) (holding that former employees have standing to bring Title VII retaliation claims though the plain language does expressly contemplate current and prospective employees).

<sup>33</sup> 42 U.S.C. § 2000e-3(a).

<sup>34</sup> *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973); *see also* Staub v. Proctor Hosp., 562 U.S. 411, 422 (2011).

<sup>35</sup> Price Waterhouse v. Hopkins, 490 U.S. 228, 256–58 (1989).

<sup>36</sup> Ricci v. DeStefano, 557 U.S. 557, 592–93 (2009) (holding that municipal government's consideration of race in its decision not to certify promotional exam results, which disproportionately impacted African American firefighters and thus resulted in a negative employment decision for white male firefighters and a Hispanic male firefighter, constitutes intentional race discrimination under Title VII).

<sup>37</sup> Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (adopting a disparate impact theory of discrimination in Title VII cases to redress “not only overt discrimination but also practices that are fair in form, but discriminatory in operation”). In 1991, Congress codified the disparate theory of liability whereby the plaintiff can recover if she demonstrates that: (1) a facially neutral employment practice causes a disproportionate impact on individuals who share the same religion, color, national origin, race, or sex; and (2) the covered employer fails to adopt a less discriminatory alternative that is job related and meets the employer's business needs. *See* 42 U.S.C. § 2000e-2(k)(1)(A)–(C) (2012).

federal courts have treated such requirements—when they impose undue burdens upon women or men—as intentional sex discrimination, unless the employer can produce persuasive evidence that an employee’s conformity with the gender-based grooming or dress standard is a bona fide occupational qualification reasonably necessary to the operation of the employer’s business.<sup>38</sup>

Black women have contended employers’ regulation of their natural hair constitutes a form of race discrimination or discrimination at the intersection of race and gender<sup>39</sup> in violation of Section 1981 and/or Title VII.<sup>40</sup> However, almost uniformly, federal courts have decided that their cases of grooming codes discrimination are not actionable.<sup>41</sup> A primary reason for federal courts’ non-recognition of their race discrimination claims is a judicial understanding of race as an immutable characteristic: an identity trait that is fixed or difficult to change and/or with which one is born and is marked by

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<sup>38</sup> Where an employment practice makes terms and conditions of employment expressly on the basis of sex, religion, or national origin, Title VII provides a statutory affirmative defense: the Bona Fide Occupational Qualification (“BFOQ”) defense. *See* 42 U.S.C. § 2000e-2(e) (2012). In narrow circumstances, a covered employer can escape Title VII liability for intentional sex, religion, or national origin discrimination if the employer can produce persuasive evidence that the challenged employment practice is a “bona fide occupational qualification reasonably necessary to the normal operation of the particular business.” *Id.* According to the Supreme Court, the employer must demonstrate that the facially discriminatory employment requirement concerns job-related skills and aptitudes based upon objectively verifiable evidence rather than “general subjective standards.” *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 200–201 (1991).

<sup>39</sup> *See* *Jefferies v. Harris Cnty. Community Assn.*, 615 F.2d 1025 (5<sup>th</sup> Cir. 1980) (holding that Title VII permits discrimination claims on the basis of multiple impermissible characteristics and thus, a Black woman could pursue her claim that she was discriminated against because of both her race and gender).

<sup>40</sup> D. Wendy Greene, *A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair*, 8 FIU L. REV. 331, 336 (2013) [hereinafter *What Not to Wear in the Workplace*].

<sup>41</sup> In her groundbreaking work, Professor Crenshaw attributes the failure of Black women’s intersectional claims of discrimination to courts viewing their experience along a “single-axis analysis” that distorts the “multidimensionality of Black women’s experiences.” *Demarginalizing the Intersection of Race and Sex*, *supra* note 13, at 139.

features that all or only individuals who share a racial identity possess.<sup>42</sup> As explained in the following sections, this concept of immutability advanced in *Rogers v. American Airlines* and *EEOC v. Catastrophe Management Solutions* is a “legal fiction” that is rooted in a discredited view of race as biological and unchangeable.<sup>43</sup>

### B. *Rogers v. American Airlines*

Shortly after Title VII was enacted, discrimination cases contesting the legality of employment policies controlling the ways

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<sup>42</sup>See e.g., *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981) (holding that an employer’s regulation of a Black female employee’s cornrow braids did not violate Title VII because braids are not an “immutable characteristic”). Significantly, not all arbiters of race-based grooming discrimination cases have applied the immutability doctrine in analyzing whether a policy banning African descendants’ braided hair constitutes unlawful race discrimination. See Chicago Commission on Human Relations in the matters of *Scott v. Owner of Club 720 and Lyke v. Owner of Club 720* (February 16, 2011) (finding that a Chicago night club’s ban against braids adorned by African descendant men violated the Chicago Human Rights Ordinance’s prohibitions against race discrimination in part because the night club “disfavored a hairstyle associated with one racial group based on stereotypical assumptions about wearers of the hairstyle, imposing an additional burden on that group in order to enjoy the full use of the public accommodations it offered”). Opinion located here: <https://www.cityofchicago.org/content/dam/city/depts/cchr/DataPortalDocs/09P002Feb162011.pdf>

<sup>43</sup> See D. Wendy Greene, *Categorically Black, White, or Wrong: “Misperception Discrimination” and the State of Title VII Protection*, 47 U. MICH. J. L. REF. 87, 134 (2013) [hereinafter *Categorically Black, White, or Wrong*] (positing that our understanding of racial identity is influenced by broader social, political, legal, and economic forces, as well as specific personal experiences). A recently filed Title VII race discrimination claim frustrates the contention that racial identity is unchangeable. All of his life, police sergeant Cleon Brown self-identified as white; however, Brown claimed that after receiving the results of an Ancestry.com test, which reported that he was 18 percent African descendant, he began to identify as African-American. Brown alleged that he became the target of racially derogatory treatment after he shared the results of the Ancestry.com test with his colleagues and supervisors. <https://cbsdetroit.files.wordpress.com/2017/05/2017-04-11-brown-cleon-ecf-001-plaintiffs-complaint-and-jury-demand.pdf>. This case presses the court to contemplate similar, important queries posed in *EEOC v. Catastrophe Management Solutions*. For example: 1) what is race—is it a biological or social construct; 2) should Title VII’s definition of race be informed by historic or contemporary understandings of race; and 3) is statutory protection contingent upon the alleged discrimination related to an impermissible classification or the identity trait of the plaintiff?

Black women wore their natural hair surfaced.<sup>44</sup> For example, Black women argued that formal and informal mandates to change their afros or “bushy” hair as a condition of employment constituted unlawful race discrimination. Both the EEOC and federal courts treated such regulations as violative of Title VII’s substantive language.<sup>45</sup> Yet, it was the 1981 decision in *Rogers v. American Airlines* that came to define the contours of race-based challenges against grooming codes discrimination in the workplace.<sup>46</sup>

A year after becoming a customer service agent, Renee Rodgers, an eleven-year American Airlines employee, wore her hair in cornrows.<sup>47</sup> In turn, American Airlines implemented a grooming policy that banned employees in customer service positions from wearing braided hairstyles.<sup>48</sup> Rodgers argued that American Airlines’ grooming regulation constituted race and sex discrimination in violation of Title VII and other civil rights laws.<sup>49</sup> Through her contention that American Airlines’ policy uniquely discriminated against her and other Black women, she raised an intersectional claim of

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<sup>44</sup> See, e.g., *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164, 168 (7<sup>th</sup> Cir. 1976). In *Jenkins*, the plaintiff asserted a Title VII race discrimination claim because her supervisor informed her that she “could never represent Blue Cross with [her] Afro.” *Id.* at 167. The court held that the supervisor’s lone statement was sufficient to support a race discrimination claim because “[a] lay person’s description of racial discrimination could hardly be more explicit. The reference to the Afro hairstyle was merely the method by which the plaintiff’s supervisor allegedly expressed the employer’s racial discrimination.” *Id.* at 168.

<sup>45</sup> *Id.* But see *Carswell v. Peachford Hosp.*, No. C80-222A, 1981 WL 224, at \*2 (N.D. Ga. May 26, 1981) (holding that a Black woman’s discipline and subsequent termination for refusing to remove beads from her braids did not amount to a facially discriminatory policy on the basis of race in part because “the wearing of beads in one’s hair is [not] an immutable characteristic, such as national origin, race, or sex”).

<sup>46</sup> See *Rogers*, 527 F. Supp. at 231–32.

<sup>47</sup> Professor Paulette Caldwell reveals in her scholarly examination of the case that the accurate spelling of the plaintiff’s last name is Rodgers though the official case name spells it Rogers. See Paulette M. Caldwell, *Intersectional Bias and the Courts: The Story of Rogers v. Am. Airlines*, in *RACE LAW STORIES* 571, 575 n.12 (Devon W. Carbado & Rachel F. Moran eds., 2008) [hereinafter *Intersectional Bias and the Courts*].

<sup>48</sup> See *id.* at 576.

<sup>49</sup> See *Rogers*, 527 F. Supp. at 231.

discrimination.<sup>50</sup> Rodgers explained that cornrows were “historically, a fashion and style adopted by Black American women, reflective of cultural, historical essence of Black women in American society.”<sup>51</sup> To Rodgers, American Airlines’ braids ban implicated the same “racial dynamics” as an employer’s prohibition against afros and thus should likewise be deemed an act of unlawful race discrimination.<sup>52</sup> The court concurred that if American Airlines enacted a ban against afros such a policy would likely violate Title VII. However, it did not apply this reasoning to American Airlines’ no braids policy.

The *Rogers* court grounded its distinguishable legal treatment of cornrows and afros in the immutability doctrine. It pronounced that federal protections against race discrimination only extend to a covered employer’s regulation of or adverse treatment based upon immutable traits: traits with which one is born, are fixed, difficult to change, and/or displayed by individuals who share the same racial identity.<sup>53</sup> Therefore, an actionable claim of race discrimination necessitated evidence that African descendants exclusively or predominantly adorned braids.<sup>54</sup> By articulating this evidentiary standard, it appears that the *Rogers* court presumed that a workplace prohibition against afros constituted a form of race discrimination because African descendants predominantly or exclusively don or are born with an afro. However, as it pertained to American Airlines’ regulation of braids, the court reasoned that Rodgers was unable to satisfy this essentialist (and essentially impossible) prima facie requirement since Bo Derek, a white actress, donned cornrows in the movie “10.”<sup>55</sup> Despite the long history of African descendant women wearing braids as a matter of course, the court implied that Bo Derek popularized cornrows, thereby devaluing Ms. Rodgers’ claim that for Black women, cornrows are imbued with deep cultural and personal meaning.<sup>56</sup> The court effectively concluded that since a white woman braided her hair, donning cornrows could in no way inform

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<sup>50</sup> *Intersectional Bias and the Courts*, *supra* note 47, at 573.

<sup>51</sup> *See Rogers*, 527 F. Supp. at 231–32.

<sup>52</sup> *See id.*

<sup>53</sup> *See id.*

<sup>54</sup> *See id.* at 232.

<sup>55</sup> *See id.*

<sup>56</sup> *See id.*

Ms. Rodgers' understanding of herself as a Black woman. In essence, the judge dictated to Ms. Rodgers which of her individual characteristics he believed were consequential to her personhood as a Black woman, usurping the autonomy, freedom, and dignity embodied in defining her identity based upon her lived experience.<sup>57</sup> To add insult to injury, the court characterized Ms. Rodgers' cornrow braids, which were the result of synthetic hair extensions, as an "easily changeable artifice."<sup>58</sup> In so doing, the *Rogers* court suggested American Airlines' regulation of Ms. Rodgers' hair did not implicate Title VII's proscriptions against race discrimination because her cornrows were not natural since they were not an inevitable physical feature of African ancestry.<sup>59</sup> Rather, Ms. Rodgers' braids were a mutable, stylistic choice which she could easily change unlike an "immutable racial" characteristic presumably like her skin color or an afro.<sup>60</sup> Thus, the *Rogers* court opined that American Airlines' no braids policy had "at most a negligible effect on employment opportunity" and concerned "a matter of relatively low importance in terms of the constitutional interests protected by the Fourteenth Amendment and Title VII."<sup>61</sup>

It is important to note that the court erred in assuming that all, most, or only people who identify as African descendants have adorned, or can adorn, an afro. Not all or only individuals of African descent possess hair texture that can be shaped into an afro. Indeed, the hair texture and hairstyles among African descendant women specifically, and African descendant people generally, are diverse and infinite. In *A Multidimensional Analysis of What Not to Wear: Hijabs and Natural Hair*, I explained:

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<sup>57</sup> The *Rogers* court is not alone; relying upon *Rogers* and subsequent legal precedent, the federal district court in *EEOC v. Catastrophe Management Solutions* rejected the EEOC's argument that Ms. Jones' naturally locked hair is a defining characteristic of her identification as a Black woman. See *EEOC v. Catastrophe Mgmt. Solutions*, No. 14-13482, 2016 WL 7210059, at \*9-11 (11th Cir. Dec. 13, 2016).

<sup>58</sup> See *Rogers*, 527 F. Supp. at 232.

<sup>59</sup> *Intersectional Bias and the Courts*, *supra* note 47, at 580.

<sup>60</sup> See *Rogers*, 527 F. Supp. at 232. The court explained that American Airlines' regulation of Ms. Rodgers' braids did not violate Title VII because it did not "regulate on the basis of any immutable characteristic of the employees involved." *Id.* at 231.

<sup>61</sup> *Id.* at 231.

not all Black women wear natural hairstyles, and for those Black women who do, the reasons are likewise varied and are not mutually exclusive. Black women may wear a natural hairstyle to minimize or eliminate the physical and financial inconveniences that come along with wearing straightened hairstyles. Black women may wear their hair naturally for aesthetic reasons, as a form of racial/ethnic expression, and/or to challenge pervasive expectations and pressures to wear a straightened hairstyle as an implicit petition for genuine inclusion, respect, and equal treatment. Finally, Black women donning natural hairstyles are also simply wearing their hair the way in which it grows on their heads—with or without any motive or meaning. Thus, like hijabs for some Muslim women, donning natural hairstyles for some Black women is a defining feature of their identity and personhood.<sup>62</sup>

The reasons for donning natural hairstyles and the processes by which Black women achieve them are also varied and often times more complicated than what meets the eye.<sup>63</sup> The court may have inaccurately concluded that braids are an easily changeable characteristic based upon a lack of knowledge about the process of braiding and removing braids, especially those that are created with hair extensions. A lack of understanding may also explain the court's view of Ms. Rodgers' braided hair as a simple aesthetic choice rather than a matter which can be simultaneously complex, deeply personal, and organic.<sup>64</sup> The court's miseducation about African descendant women's hair produced a powerful legal precedent—one that accorded employers essentially limitless freedom, authority, and privilege to stigmatize, exclude, and marginalize African descendant women in the workplace because of their hair.

For nearly fifty years, U.S. federal courts have adjudicated a variety of legal challenges against employers' formal and informal regulation of Black women's hair. Since the 1970s, Black women

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<sup>62</sup> *Id.*

<sup>63</sup> *What Not to Wear in the Workplace*, *supra* note 40, at 358–59.

<sup>64</sup> *See Rogers*, 527 F. Supp. at 232 (suggesting that Ms. Rodgers donned the all-braided hairstyle in response to the popularity of the film “10”).

have opposed workplace prohibitions against their adornment of synthetic braids,<sup>65</sup> twists,<sup>66</sup> locks,<sup>67</sup> cornrows with beads,<sup>68</sup> straightened blonde hair,<sup>69</sup> locked blonde hair,<sup>70</sup> finger waves<sup>71</sup>, and pony-tails<sup>72</sup>. The breadth of litigation exposes not only the diversity of Black women's hair but also the hyper-regulation of Black women's bodies in the workplace via their hair. Indeed, one employer sought to restrain a Black woman's agency and desire to wear her hair differently by requiring her to seek supervisory approval before she changed her hair but did not impose the same mandates on white female employees.<sup>73</sup> Other employers have directed or advised Black women to change their hair or hair color until their appearance satisfies a supervisor's subjective standards of acceptability and beauty.<sup>74</sup> Employers have also publicly stigmatized Black women's hair and placed Black women in a humiliating Catch-22: either cover,<sup>75</sup> alter,<sup>76</sup> or cut off your hair altogether or be deprived of current or prospective employment. Black women's hair has also colored supervisors' perceptions of their job performance, resulting in

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<sup>65</sup> Rogers v. American Airlines, 527 F. Supp. 229 (S.D.N.Y. 1981).

<sup>66</sup> Pitts v. Wild Adventures, No. 7:06-CV-62-HL, 2008 WL 1899306 (M.D. Ga. Apr. 25, 2008).

<sup>67</sup> EEOC v. Catastrophe Management Solutions, Inc., 2016 WL 7210059.

<sup>68</sup> Carswell v. Peachford Hosp., No. C80-222A, 1981 WL 224, at \*1 (N.D. Ga. May 26, 1981).

<sup>69</sup> See D. Wendy Greene, *Black Women Can't Have Blonde Hair . . . in the Workplace*, 14 J. GENDER, RACE & JUST. 405 (2011) [hereinafter *Black Women Can't Have Blonde Hair*].

<sup>70</sup> EEOC v. Catastrophe Management Solutions, Inc., 2016 WL 7210059.

<sup>71</sup> Hollins v. Atl. Co., 188 F.3d 652 (6th Cir. 1999).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> See generally, Pitts v. Wild Adventures, No. 7:06-CV-62-HL, 2008 WL 1899306 (M.D. Ga. Apr. 25, 2008).

<sup>75</sup> Pitts v. Wild Adventures, No. 7:06-CV-62-HL, 2008 WL 1899306 (M.D. Ga. Apr. 25, 2008); Burchette v. Abercrombie & Fitch Stores, Inc., No. 08 Civ. 8786, 2009 WL 856682 (S.D.N.Y. Mar. 30, 2009).

<sup>76</sup> Rogers v. American Airlines, 527 F. Supp. 229 (S.D.N.Y. 1981); Pitts v. Wild Adventures, No. 7:06-CV-62-HL, 2008 WL 1899306 (M.D. Ga. Apr. 25, 2008); Burchette v. Abercrombie & Fitch Stores, Inc., No. 08 Civ. 8786, 2009 WL 856682 (S.D.N.Y. Mar. 30, 2009).



decreased compensation,<sup>77</sup> discipline,<sup>78</sup> and termination<sup>79</sup> often accompanied by demoralizing and subordinating judgments about their professionalism and femininity as well as the judiciousness of their personal grooming choices.

For example, in *Pitts v. Wild Adventures*, Patricia Pitts alleged that when she reported to work with her hair in cornrows, her supervisor expressed disapproval and offered an unsolicited “suggestion” that she change her hair into a “pretty” style.<sup>80</sup> Despite the cost and time involved, Ms. Pitts attempted to comply with the supervisor’s “recommendation” while also donning her natural hair presumably in a way Ms. Pitts found attractive. In lieu of cornrows, Ms. Pitts returned to work donning two-strand twists.<sup>81</sup> Her supervisor again disapproved because she felt Ms. Pitts’ two-strand twists too closely resembled locks.<sup>82</sup> Ms. Pitts refused to expend additional cost and time to restyle her hair since Wild Adventures did not have formal grooming policy in place. Furthermore, in no way was Ms. Pitts’ hair relevant to her job performance. Within days, however, Wild Adventures disseminated a written policy that banned “dreadlocks, cornrows, beads, and shells” unless they were covered by a hat or visor.<sup>83</sup> Effectively, Ms. Pitts and other Black employees<sup>84</sup> could

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<sup>77</sup> *Hollins v. Atl. Co.*, 188 F.3d 652 (6th Cir. 1999).

<sup>78</sup> In March 2015, a Black woman who worked as a restaurant hostess for a Canadian franchise reported that management publicly reprimanded her when she began wearing her hair in braids, calling her hair unacceptable, instructing her to go home, and subsequently denying her shifts because they did not “want that kind of look . . . at the restaurant.” The former hostess filed a race discrimination complaint against the restaurant with the Quebec Human Rights Commission, which is the first of its kind. <http://www.diversityinc.com/news/hairstyles-of-black-women-cases-of-discrimination/>.

<sup>79</sup> See, e.g., *id.* See also *Bryant v. BEGIN Manage Program*, 281 F. Supp. 2d 561 (E.D.N.Y. 2003); *Burchette v. Abercrombie & Fitch Stores, Inc.*, No. 08 Civ. 8786, 2009 WL 856682 (S.D.N.Y. Mar. 30, 2009).

<sup>80</sup> *Pitts*, No. 7:06-CV-62-HL, 2008 WL 1899306 at \*1 (M.D. Ga. Apr. 25, 2008).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> It is important to note that Black women are not singularly affected by grooming policies regulating natural hairstyles. Black men have also challenged these policies on the ground that they are racially discriminatory. See *Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256, 262 (S.D.N.Y. 2002). For a more detailed discussion of the *Eatman* case, D. Wendy Greene, *Title VII: What’s Hair*

neither wear their natural hair freely nor freely make choices about their natural hair. Like Renee Rodgers, Patricia Pitts challenged Wild Adventures' hyper-regulation of her natural hair as a form of race discrimination.<sup>85</sup> And like Renee Rodgers, Patricia Pitts' race discrimination claim was rejected by the court.<sup>86</sup> Citing to *Rogers*, the *Pitts* court legalized an employer's hyper-regulation of a Black woman's natural hair when not shaped like an afro based upon subjective and paternalistic ideals about what management finds "attractive," "acceptable," and therefore "permissible" in the workplace.

Also like *Pitts*, the *Rogers* court made invisible the burdens and attendant injury Ms. Rodgers, and countless African descendant women like her, suffer as a consequence of the hyper-regulation of their bodies via their hair. As I explained in earlier work:

[The *Rogers*] court could not concede the particular stigmatization and offense that Renee Rodgers, as a Black woman, would experience when American Airlines instructed that: as a customer service representative, her donning cornrows was specifically prohibited because it did not reflect the "conservative and business-like image" that American Airlines' grooming policy intended to enforce; she could wear the cornrows off-duty; and if she were to maintain her cornrows she could not wear her hair freely but rather she would need to "wear her hair into a bun and wrap a hairpiece around the bun during working hours." American Airline's grooming regulations conveyed the message (which the court reified) that cornrows—a natural hairstyle Black women commonly and most notably wear—was an unprofessional and immodest hairstyle in need of covering and thus, an unacceptable and impermissible hairstyle for Black women to wear in their professional capacities, especially when engaging with the public.

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(and Other Race-Based Characteristics) Got to Do With It?, 79 U. COLO. L. REV. 1355, 1372-76, 1385-91 (2008) [hereinafter *What's Hair*].

<sup>85</sup> *Pitts*, 2008 WL 1899306 at \*6.

<sup>86</sup> *Id.*

Indeed, the court was rather dismissive of not only the stigmatic but also the physical injury that American Airlines inflicted upon Rodgers by requiring that she wear a hairpiece to mask her natural hairstyle. In response to Rodgers' claims that she suffered severe headaches from wearing a hairpiece, the court suggested rather imperviously "a larger hairpiece would seem in order."<sup>87</sup>

Furthermore, the court intimated that American Airline's regulation of Ms. Rodgers' hair would need to rise to the level of a hostile work environment in order for her injury to be cognizable.<sup>88</sup> Since Ms. Rodgers' seminal case of race-based grooming codes discrimination, courts have preserved the *Rogers* court's narrow constitution of race, discrimination, and remediable injury under federal civil rights laws.<sup>89</sup> Courts have thereby treated employment policies banning African descendant women's natural hair as harmless acts of employer prerogative unrelated to race and gender and inconsequential to workplace equality.<sup>90</sup>

In sanctioning the heightened scrutiny and occupational injuries that Black women endure at the intersection of race and gender when they freely don their naturally textured or curly hair in braids, twists, or locks,<sup>91</sup> *Rogers* has aided the suppression of Black women's exercise of freedom, autonomy, and agency over their hair and through

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<sup>87</sup> *What Not to Wear in the Workplace*, *supra* note 40, at 349.

<sup>88</sup> *Rogers*, 527 F. Supp. at 232 at 233 (remarking "plaintiff's allegations do not amount to charging American with 'a practice of creating a working environment heavily charged with ethnic or racial discrimination,' or one 'so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers. . . .') (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)).

<sup>89</sup> See *EEOC v. Catastrophe Mgmt. Solutions*, No. 14-13482, 2016 WL 72210059, at \*11 (11th Cir. Dec. 13, 2016).

<sup>90</sup> See generally *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975); see generally *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981); *Catastrophe Mgmt. Solutions*, 2016 WL 7210059.

<sup>91</sup> See *Rogers v. Am. Airlines Inc.*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981); see also *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164, 169 (1976) (holding that a Black female plaintiff filed a sufficient EEOC charge alleging race and gender discrimination after her supervisor allegedly informed her that she was

their hair. Indeed, *Rogers* buttresses the lawfulness of making straightened hairstyles—a racialized and gendered appearance norm resulting from a long history of privileging hair texture and hairstyles associated with white women<sup>92</sup>—an implicit or explicit term or condition of employment for Black women.<sup>93</sup> As a result, Black women’s hair plays a defining—and lawful—role in their employability and attendant economic and emotional security. With the filing of *EEOC v. Catastrophe Management Solutions*<sup>94</sup> in 2014, the Equal Employment Opportunity Commission undertook a herculean feat to disrupt this reality. The EEOC endeavored to invalidate over three decades of negative precedent stemming from the *Rogers* decision, which courts mechanically applied to reject not only Black women’s substantive claims of unlawful race discrimination, but also their claims of retaliation for opposing an express hiring practice of excluding from consideration qualified applicants with braided hair as a form of racial discrimination.<sup>95</sup>

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denied a promotion because she was unable to represent the company wearing an afro).

<sup>92</sup> See D. Wendy Greene, *Black Women Can’t Have Blonde Hair. . . in the Workplace*, 14 J. Gen. Race & Just. 405, 428 (2011) [hereinafter *Black Women Can’t Have Blonde Hair*].

<sup>93</sup> A recent Google search for “unprofessional hairstyles for women” primarily generated pictures of Black women donning natural hairstyles whereas a search for “professional styles for women” yielded pictures of white women with straightened coiffed hairstyles. Leigh Alexander, *Do Google’s “Unprofessional Hair” Results Show It Is Racist?*, GUARDIAN (Apr. 8, 2016, 3:50 AM), <https://www.theguardian.com/technology/2016/apr/08/does-google-unprofessional-hair-results-prove-algorithms-racist>.

<sup>94</sup> First Amended Complaint at ¶ 27, *EEOC v. Catastrophe Mgmt. Solutions*, 2014 WL 4745282 (S.D. Ala. Apr. 17, 2014) (No. 1:13-cv-00476-CB-M) [hereinafter First Amended Complaint].

<sup>95</sup> See, e.g., *McBride v. Lawstaf, Inc.*, No. 1:96-cv-0196-cc, 1996 WL 755779, at \*1–2 (N.D. Ga. Sept. 19, 1996) (rejecting plaintiff’s Title VII retaliation claim by holding that the plaintiff’s opposition to her employer–temporary staffing agency’s policy of not referring “qualified applicants with ‘braided’ hair styles for employment positions” was not protected activity because such policy as a matter of law did not violate Title VII’s proscriptions against race–based employment practices). See also Pitts, 2008 WL 1899306 at \*8 (citing to *McBride* as precedential support for denying plaintiff’s retaliation claim based upon her opposition to informal and formal regulations of her natural hair).

## II. SPLITTING HAIRS: EEOC V. CATASTROPHE MANAGEMENT SOLUTIONS

### A. *The Federal District Court Decision*

#### 1. CHASTITY JONES' HAIR STORY

In 2010, Chastity Jones applied for a customer service representative position with Catastrophe Management Solutions (“CMS”), an Alabama-based insurance claims processing company.<sup>96</sup> In this position, she would man phone calls in a call center.<sup>97</sup> Based on her online application, Ms. Jones, along with numerous other applicants, was invited by CMS to participate in a group interview.<sup>98</sup> To the interview, she wore a blue business suit<sup>99</sup> and her locked blonde hair in a curly formation also known as “curlilocks.”<sup>100</sup> After a successful group interview and an individual interview with a company trainer who reviewed the job responsibilities and her ability to perform them, CMS offered Ms. Jones the job.<sup>101</sup> Shortly thereafter, CMS’ Human Resources manager announced to the successful applicants the schedule for lab tests and the completion of paper work that needed to take place before they began working.<sup>102</sup> The Human Resources manager informed the new hires that they could meet with her individually about any conflicts they may have.<sup>103</sup> At no point during the group sessions or the individual meeting with the trainer, did any CMS representative comment on Ms. Jones’ hair.<sup>104</sup>

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<sup>96</sup> See *EEOC v. Catastrophe Mgmt. Solutions*, No. 14-13482, 2016 WL 7210059, at \*1 (11th Cir. Dec. 13, 2016).

<sup>97</sup> See *id.*

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

<sup>100</sup> Mark Fijman, *EEOC Lawsuit Over Dreadlocks Sparks Criticism and Highlights Issues with Workplace Grooming Policies*, MARTINDALE.COM (Oct. 11, 2013), [https://www.martindale.com/labor-employment-law/article\\_Phelps-Dunbar-LLP\\_1993564.htm](https://www.martindale.com/labor-employment-law/article_Phelps-Dunbar-LLP_1993564.htm).

<sup>101</sup> See *Catastrophe Mgmt. Solutions*, 2016 WL 7210059 at \*2.

<sup>102</sup> See *id.*

<sup>103</sup> See *id.*

<sup>104</sup> See *id.*

Per instructions, Ms. Jones spoke with the Human Resources manager about a scheduling conflict and the Human Resources manager granted her request to take the lab tests on a different day.<sup>105</sup> As Ms. Jones was preparing to depart, the Human Resources manager asked Ms. Jones if her hair were “dreadlocks.”<sup>106</sup> Ms. Jones confirmed that her curly “look” was in fact locks, to which the Human Resources manager replied that she was unable to hire her “with the dreadlocks.”<sup>107</sup> Naturally, Ms. Jones inquired why her locks were problematic.<sup>108</sup> The Human Resources manager responded, “they tend to get messy, although I’m not saying yours are, but you know what I’m talking about.”<sup>109</sup> The Human Resources manager also confided that previously, CMS asked a Black male applicant to cut off his locks as a condition of employment, implying that Ms. Jones would, too, have to cut off her hair.<sup>110</sup> Ms. Jones indicated that she would not cut her hair; immediately thereafter CMS’ Human Resources manager rescinded the job offer and requested that Ms. Jones return the paperwork provided earlier.<sup>111</sup> Ms. Jones returned the paperwork and left the premises.<sup>112</sup> Though CMS’ Human Resources manager did not inform Ms. Jones of a formal policy prohibiting locks, CMS did have a grooming policy in place which advised that “[a]ll personnel are expected to be dressed and groomed in a manner that projects a professional and businesslike image while adhering to company and industry standards and/or guidelines . . . .[H]airstyles should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable[.]”<sup>113</sup>

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<sup>105</sup> *See id.*

<sup>106</sup> *See id.*

<sup>107</sup> *See id.*

<sup>108</sup> *See id.*

<sup>109</sup> *See id.*

<sup>110</sup> *See id.*

<sup>111</sup> *See id.*

<sup>112</sup> *See id.*

<sup>113</sup> *See id.*

## 2. THE EEOC'S LEGAL ARGUMENTS: SOME THINGS OLD, SOME THINGS NEW

On behalf of Ms. Jones, the EEOC challenged CMS' "no locks" hiring practice as a form of intentional race discrimination in violation of Title VII.<sup>114</sup> Armed with over thirty years of legal precedent supporting the proposition that workplace proscriptions against Black women's braided hair are beyond the scope of Title VII, CMS sought a dismissal of the EEOC's case.<sup>115</sup> In response, the EEOC revived Renee Rodgers' contention that mutable characteristics like hair are central to Ms. Jones' subjective understanding of her racial identity.<sup>116</sup> The EEOC maintained that "[b]ecause of the historical truths and experiences of African Americans, it is only prudent for courts to recognize that African-American hair identity is rooted in African tradition. As such, natural [hair] styles are as much of a determinate of racial identity as melanoid skin."<sup>117</sup> Lastly, the EEOC offered to present expert testimony to substantiate that "the wearing of dreadlocks by Blacks has socio-cultural racial significance."<sup>118</sup>

The EEOC also advanced novel legal theories to confront the long-standing strict application of the immutability doctrine in race-based grooming code discrimination cases.<sup>119</sup> On the one hand, the EEOC sought to discontinue its application by offering a more expansive notion of race.<sup>120</sup> Alternatively, the EEOC sought to demonstrate how a dreadlocks ban triggers the biological underpinnings of

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<sup>114</sup> *See id.* at \*1.

<sup>115</sup> *See id.*

<sup>116</sup> *See id.* at \*2–3. Relatedly, the EEOC asserted that the concept of race does not simply embody immutable characteristics, *see id.* at \*2; thus, Title VII's prohibitions against race discrimination proscribes "employment discrimination against a person because of cultural characteristics often linked to race or ethnicity, such as a person's name, cultural dress and grooming practices, accent or manner of speech," *id.* at \*10 (quoting the EEOC Compliance Manual, § 15–II, at 4 (2006)).

<sup>117</sup> Plaintiff's Brief in Opposition to Defendant Catastrophe Mgmt. Solutions' Motion to Dismiss at 8, *EEOC v. Catastrophe Mgmt. Solutions*, 11 F. Supp. 3d (2014) (No. 13-cv-00476-CB-M), 2014 WL 4745282, at \*13 [hereinafter *Plaintiff's Brief*].

<sup>118</sup> *Id.*

<sup>119</sup> *See id.* at 11–12.

<sup>120</sup> *See id.*

the immutability doctrine.<sup>121</sup> Both of these new legal arguments were informed in part by the legal scholarship of critical race theorists.<sup>122</sup> First, the EEOC posited that the immutability doctrine is rooted in a discredited view of race as a fixed, biological construct and not reflective of Congress' legislative intent.<sup>123</sup> Academics have persuasively demonstrated that race is not a fixed, biological truth but rather a social construction.<sup>124</sup> In order to legitimize and facilitate a racial hierarchy as well as individual and systematic acts of racial oppression and exclusion—like racial slavery, racial apartheid, and racially motivated violence—social, political, and legal actors actively fostered notions of race and racial difference as inheritable and fixed.<sup>125</sup> As a consequence of both orchestrated attempts to characterize, as well as subconscious mapping, race has never been limited to one's ancestry or one's skin color. Historically and contemporarily, mutable characteristics like one's hair texture, dress, name, or accent have also been treated as signifying racial identity by both law and society.<sup>126</sup> Consequently, mutable characteristics like hair are continuously racialized in law and society even

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<sup>121</sup> See *id.* at 2.

<sup>122</sup> See *id.* at 10.

<sup>123</sup> See *id.* at 6.

<sup>124</sup> See, e.g., Ian Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. C.R.-C.L. L. REV. 1, 11–12 (1994) (explaining “[t]here are no genetic characteristics possessed by all Blacks but not by non-Blacks; similarly, there is no gene or cluster of genes common to all Whites but not to non-Whites”).

<sup>125</sup> See, e.g., *Perkins v. Lake Cty. Dep't of Utilities*, 860 F. Supp. 1262, 1271 (N.D. Ohio 1994) (“Regrettably, racial classifications may be, and traditionally have been, used to justify the exploitation of certain groups”); see also Christian B. Sundquist, *Science Fictions and Racial Fable: Navigating the Final Frontier of Genetic Interpretation*, 25 HARV. BLACKLETTER L.J. 57, 57 (2009) (explaining “[t]he perception that race should be defined in terms of genetic and biological difference fueled the ‘race science’ of the eighteenth and nineteenth centuries, during which time geneticists, physiognomists, eugenicists, anthropologists and others purported to find scientific justification for denying equal treatment to non-white persons”).

<sup>126</sup> As Professor Angela Onwuachi-Willig and I have both noted, during the era of racial slavery, one's hair texture marked an individual as either presumptively free or enslavable. See Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1100 (2010) (“[H]air served as the true signifier of race in early racial trials” and served to determine whether women “were American Indian and free, rather than black and



when such characteristics “‘are not ‘uniquely’ or ‘exclusively’ ‘performed’ by or are attributed to a particular racial group.’”<sup>127</sup> In earlier work, I have posited that race should be viewed as a socio-legal construct, acknowledging the ways in which law and society have affixed and continue to affix racial meanings and associations to mutable and immutable characteristics.<sup>128</sup> Therefore, I have urged courts to employ a broader understanding of race so that anti-discrimination law can attend to the deeper dimensions of racialization.<sup>129</sup> Informed by my work<sup>130</sup> and the scholarship of foundational critical race theorists like Professor Paulette Caldwell<sup>131</sup> the EEOC urged the court to adopt a social constructionist understanding of race and thus recognize that CMS’ prohibition against locks fit within the purview of Title VII, as locks, like afros, twists, and braids have been, and continue to be, associated with Blackness.<sup>132</sup> The EEOC further submitted that by conferring absolute deference to employers’ blanket prohibitions against locks—policies which facially apply to all employees regardless of race, yet almost exclusively regulate the hair of Black employees—“courts generally have licensed employers to enforce a racial hierarchy that sanctions hairstyles and appearance associated with whites and outlaws those associated with Blacks.”<sup>133</sup>

In addition to stressing the ways in which African descendant women’s naturally textured hair shape their personal identification as Black women as well as the ways in which law and society have marked them as Black on the basis of their hair, the EEOC posited

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enslaved.”); see also Greene, *What’s Hair*, *supra* note 84, at 1366. (explaining how a Virginia court in 1806 declared that despite one’s skin color or other physical characteristics that would signify whiteness, the propensity of one’s hair texture to become “woolly” or “kinky” marked an individual as an African descendant and presumptively enslavable).

<sup>127</sup> See *Plaintiff’s Brief*, *supra* note 117, at 10 (quoting *What’s Hair*, *supra* note 84, at 1386).

<sup>128</sup> See generally, *What’s Hair*, *supra* note 84, at 1359; see also *Categorically Black, White, or Wrong*, *supra* note 43, at 133–35.

<sup>129</sup> See, e.g., *What’s Hair*, *supra* note 84, at 1393–94.

<sup>130</sup> See *id.*; *Black Women Can’t Have Blonde Hair*, *supra* note 67.

<sup>131</sup> Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 40 DUKE L.J. 365, 379 (1991) [hereinafter *A Hair Piece*].

<sup>132</sup> See *Plaintiff’s Brief*, *supra* note 117, at 10.

<sup>133</sup> See *id.* at 12–13.

an equally novel legal argument—one that emphasized the *physiological* qualities of Black women’s hair.<sup>134</sup> Indeed, this argument draws upon the influential scholarship of Professor Angela Onwuachi-Willig.<sup>135</sup> The EEOC highlighted *Rogers* and subsequent courts’ lack of recognition that the hair textures with which many, if not most, African descendant women are born allows them to more easily lock, twist, and braid their hair, unlike most women who identify as white.<sup>136</sup> The EEOC explained that “both [afros and braids] are ways of styling natural [chemically] unprocessed hair.”<sup>137</sup> Consequently, “[t]here is no principled or legal distinction between policies prohibiting Afros and policies prohibiting dreadlocks. . . . [i]t is thus disingenuous to distinguish between natural hair growth as immutable and natural hairstyles as mutable. They are inextricably linked.”<sup>138</sup> The EEOC submitted that it would present expert witness testimony that would confirm: 1) African descendants are the *primary* wearers of dreadlocks;<sup>139</sup> 2) locks “are a reasonable and natural method of managing the physiological construct of Black hair”; and 3) dreadlocks are an immutable characteristic, unlike hair length or other hairstyles.”<sup>140</sup>

Significantly, for the first time in litigation challenging employers’ hyper-regulation of African descendant women’s hair, the EEOC brought to light the burdens and consequences Black women uniquely encounter when conforming to grooming policies that proscribe natural hairstyles.<sup>141</sup> In its First Amended Complaint, the

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<sup>134</sup> See *id.* at 11. The EEOC also posited that the ban against locks was motivated by a particular stereotype that African descendants’ natural hair is “unconventional, unprofessional and/or not sufficiently conservative.” See *id.* at 12. Therefore, CMS’ enactment and implementation of the grooming policy constituted unlawful racial stereotyping in light of the Supreme Court’s decision in *Price Waterhouse v. Hopkins* wherein the court held that evidence of supervisors’ reliance upon conscious gender stereotypes about how a woman candidate should dress, wear her hair, and behave to deny her a promotion can establish Title VII liability. See *Hopkins*, 490 U.S. at 258.

<sup>135</sup> Onwuachi-Willig, *supra* note 126, at 1100.

<sup>136</sup> See *Plaintiff’s Brief*, *supra* note 117, at 11.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 13.

<sup>140</sup> *Id.*

<sup>141</sup> See *EEOC v. Catastrophe Mgmt. Solutions*, No. 14-13482, 2016 WL 7210059, at \*2–5 (11th Cir. Dec. 13, 2016).

EEOC explained that workplace prohibitions against locks, twists, and braids effectively require African descendant women to wear straightened hair by donning hair weaves, wigs, or hair extensions, along with applying chemical relaxers and/or extreme heat to their hair.<sup>142</sup> The EEOC pointed out that these methods of achieving *and* maintaining straightened hair can be expensive, time-consuming, and damaging to Black women's physical well-being.<sup>143</sup> Doing so can also be damaging to Black women's emotional well-being.<sup>144</sup> Indeed, Black women may experience conforming to a straightened hairstyle as an inauthentic "identity performance," which Professors Devon Carbado and Mitu Gulati have explained "can be at odds with the employee's sense of identity [and thus,] to the extent the employee's continued existence and success in the workplace is contingent upon her behaving in ways that operate as a denial of self, there is continual harm to that employee's dignity."<sup>145</sup>

Professor Angela Onwuachi-Willig has enumerated the ways in which wearing one's naturally textured hair relieves Black women of significant financial and temporal burdens that accompany donning straight hair via the use of permanent relaxers, temporary straightening agents, hair extensions or wigs, which can result in irreparable hair and/or scalp damage.<sup>146</sup> Professor Onwuachi-Willig has also highlighted the negative psychological costs that Black women endure to conform to a raced and gendered beauty norm of donning straight hair.<sup>147</sup> Moreover, fulfilling a straightened hairstyle mandate or expectation can be not only harmful to one's emotional

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<sup>142</sup> First Amended Complaint, *supra* note 94.

<sup>143</sup> *Id.*

<sup>144</sup> ALEXIS MCGILL JOHNSON ET AL., PERCEPTION INST., THE "GOOD HAIR" STUDY: EXPLICIT AND IMPLICIT ATTITUDES TOWARD BLACK WOMEN'S HAIR 11 (2017), <https://perception.org/wp-content/uploads/2017/01/TheGood-HairStudyFindingsReport.pdf>.

<sup>145</sup> Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 719-28 (2001).

<sup>146</sup> Onwuachi-Willig, *supra* note 126, at 1112-20.

<sup>147</sup> *Id.* A recent Google search for "unprofessional hairstyles for women" primarily generated pictures of Black women donning natural hairstyles whereas a search for "professional styles for women" yielded pictures of white women with straightened coiffed hairstyles. Leigh Alexander, *Do Google's "Unprofessional Hair" Results Show It Is Racist?*, GUARDIAN (Apr. 8, 2016, 3:50 AM), <https://www.theguardian.com/technology/2016/apr/08/does-google-unprofessional-hair-results-prove-algorithms-racist->

well-being, but also to one's physical health.<sup>148</sup> In Dr. Nadia Brown's enlightening study examining how Black female legislators navigate colleagues' and constituents' expectations that they don't straightened hair, two legislators admitted that they purposefully avoided physical activities that might cause their hair to "revert back" to its natural state.<sup>149</sup> The following findings of a more recent study, *The "Good Hair" Study: Explicit and Implicit Attitudes Toward Black Women's Hair*, published in February 2017 by the Perception Institute, further substantiates the EEOC's legal arguments:

- Black women are more likely to report spending more time on their hair than white women;
- Black women are more likely to report having professional styling appointments more often than white women;
- Black women are more likely to spend more money on products for their hair than white women;
- Black women reported high levels of anxiety about their hair and greater levels of anxiety than white women reported;
- Of those surveyed, twice as many Black women feel social pressure to straighten their hair for work; and
- Three times as many Black women than white women report that they disengage in exercise and other physical activities *because of their hair* in

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<sup>148</sup> Onwuachi-Willig, *supra* note 126, at 1116–18.

<sup>149</sup> Nadia Brown, "It's More than Hair . . . That's Why You Should Care": *The Politics of Appearance for Black Women State Legislators*, 2 POL., GROUPS, AND IDENTITIES 295, 304 (2014).

light of the significant monetary and temporal investment alongside the heightened professional and social pressures to maintain straight hair.<sup>150</sup>

The Perception Institute's timely study confirms insights I have shared in earlier work:

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 (and often driven by fears of the resulting consequences) 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.<sup>151</sup>

The EEOC made visible this under-discussed or unknown experience of many Black women like Chastity Jones; the onus placed upon Black women to satisfy an employer's requirement or preference for straightened hair is often substantial. Therefore, when a Black woman dons her naturally textured hair and thus does not assume the additional financial, temporal, and health-related burdens to comply with this condition of employment—unrelated to her job performance or ability—a direct violation of Title VII's plain language results: she is deprived of employment opportunities for which she is qualified on the basis of her race and gender.<sup>152</sup> Ac-

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<sup>150</sup> JOHNSON, *supra* note 144, at 11.

<sup>151</sup> See *Black Women Can't Have Blonde Hair*, *supra* note 67, at 406–07.

<sup>152</sup> See First Amended Complaint, *supra* note 94, at ¶ 31.; see also *What Not to Wear in the Workplace*, *supra* note 40, at 365 (positing that disqualifying African descendant women from employment opportunities when they don their natural hair “arbitrarily deprives or tends to deprive [Black women from the] acquisition and maintenance of employment for which they are qualified in violation of Title VII's plain language”).

cordingly, the EEOC argued Ms. Jones and other Black women consequently suffer “a penalty for employment that White [female] applicants and employees are not required to endure.”<sup>153</sup>

### 3. THE DISTRICT COURT’S ANALYSIS: AFROS ARE RACIAL BUT LOCKS ARE CULTURAL

Upon reviewing the motions of the EEOC and Catastrophe Management Solutions, the federal district court rejected the well-supported social constructionist view of race, and once again applied the biologically rooted immutability doctrine to conclude that the EEOC could never put forth an actionable race discrimination case.<sup>154</sup> First, according to the court, adopting a broader notion of race would lead to “absurd results” because both white and Black employees who donned locks could challenge the application of CMS’ grooming policy.<sup>155</sup> Strictly adhering to the immutability doctrine and the beliefs that informed it, the district court in *Catastrophe Management Solutions* endorsed the idea that CMS’ subjective grooming policy could not be race-based if individuals who did not share the same racial identity can be subject to its enforcement.<sup>156</sup>

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<sup>153</sup> See Petition for Rehearing En Banc at 7, *EEOC v. Catastrophe Mgmt. Solutions*, No. 14-13482, (11th Cir. Oct. 31, 2016) [hereinafter Petition for Rehearing].

<sup>154</sup> *EEOC v. Catastrophe Mgmt. Solutions*, No. 14-13482, 2016 WL 7210059, at \*3 (11th Cir. Dec. 13, 2016). In making this argument, the EEOC relied upon the scholarship of critical race legal theorists and the guidance in its Compliance Manual which states that the “concept of race encompasses cultural characteristics related to race and ethnicity [including] grooming practices.” See also supra n. 44 (highlighting the decision of the Chicago Commission on Human Relations that barring the entry of African descendant male patrons because they donned braids constituted unlawful race discrimination in part because it recognized braids as a “disfavored a hairstyle associated with one racial group based on stereotypical assumptions about wearers of the hairstyle, imposing an additional burden on that group in order to enjoy the full use of the public accommodations it offered”). Notably, the Commission considered legal scholarship in developing its opinion. See Constance Dionne Russell, *Styling Civil Rights: The Effect of S 1981 and the Public Accommodations Act on Black Women’s Access to White Stylists and Salons*, 24 HARV. BLACKLETTER L.J. 189 (2008); Onwuachi-Willig, *supra* note 126; Greene, *What’s Hair*, *supra* note 84.

<sup>155</sup> *EEOC v. Catastrophe Mgmt. Solutions*, 11 F. Supp. 3d 1139, 1143 (S.D. Ala. 2014).

<sup>156</sup> *Id.* at 1143–44.

However, this is a very restrictive view of Title VII's scope of protection.<sup>157</sup> For example, if an employer banned white employees from wearing locks but allowed Black employees to do so, the former would have an actionable Title VII claim.<sup>158</sup> Such evidence is a textbook example of intentional race discrimination or differential treatment on the basis of race. Furthermore, if an employer expressed that donning locks were "too Black,"<sup>159</sup> evidence that this racial stereotype consciously motivated a negative employment action would establish a violation of Title VII regardless of the racial identity of the lock wearer.<sup>160</sup> Accordingly, statutory protection generally is not dictated by the identity of the complainant, but rather, the impermissible conduct of the covered employer.<sup>161</sup>

Guided by the immutability doctrine, the district court also declared that "Title VII does not protect against discrimination based on traits, even a trait that has sociocultural racial significance."<sup>162</sup>

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Professor Paulette Caldwell explained in her seminal work:

[T]he rationalizations that accompanied opposition to Afro hairstyles in the 1960s—extreme, too unusual, not businesslike, inconsistent with a conservative image, unprofessional, inappropriate with business attire, *too "black"* (*i.e., too militant*), unclean—are used today to justify the categorical exclusion of braided hairstyles [and other natural hairstyles adorned by African descendants] in many parts of the workforce, particularly in jobs that are either traditionally conservative or highly structured, involve close immediate supervision, or require significant contact with the public.

Caldwell, *supra* note 47, at 384–85 (emphasis added).

<sup>160</sup> 42 U.S.C. § 2000e-2(a)(1)–(2) (2012).

<sup>161</sup> *Id.*; *But see, e.g.,* Jackson v. Deen, 959 F. Supp. 2d 1346, 1354 (S.D. Ga. Aug. 12, 2013) (holding that a female plaintiff who identified as white did not have standing to challenge discriminatory comments directed toward and made about African American employees and segregation of African American employees in the workplace because she was "not an aggrieved party under Title VII" since none of the "racially offensive comments [and segregationist policies] were either directed toward [her] or made with the intent to harass her.").

<sup>162</sup> *Catastrophe Mgmt. Solutions*, 11 F. Supp. 3d at 1144. *See generally* Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 Wm. & Mary L. Rev. 805, 810 (1994). (examining the overlapping nature of race and ethnicity).

Relying upon Seventh Circuit precedent, the court pontificated “culture and race are two distinct concepts [. . .] [c]ulture is ‘a set of behavioral characteristics and therefore significantly dissimilar from the immutable characteristics of race and national origin.’”<sup>163</sup>[L1] The district court thereby reiterated that an afro is an immutable, racial characteristic protected against discrimination, whereas the unimpeded growth of an afro like locks is a mutable, cultural characteristic beyond the scope of Title VII protection.<sup>164</sup> It opined that “a hairstyle is *not* inevitable and immutable just because it is a *reasonable* result of hair texture, which is an immutable characteristic.”<sup>165</sup> The court emphatically declared that “*no* amount of expert testimony can change the fact that dreadlocks is a hairstyle.”<sup>166</sup> Yet, the court suggested that CMS’ prohibition against locks could transform from a matter of permissible cultural discrimination into one of impermissible race discrimination if the EEOC’s expert witnesses could demonstrate “Blacks are the *exclusive* wearers of dreadlocks.”<sup>167</sup> Thus, by treating afros as legally protected hair *texture* and any other configuration of afro hair texture as legally unprotected *hairstyles*, the court literally split hairs to preserve four decades of legal precedent protecting the former.<sup>168</sup>

Ultimately, the federal district court in *Catastrophe Management Solutions* dismissed the EEOC’s complaint and request to amend the original complaint, holding that the EEOC could not bring a plausible claim of intentional race discrimination.<sup>169</sup> Procedurally and substantively, the court constricted the possibility of initiating a viable race-based grooming codes discrimination case.<sup>170</sup>

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<sup>163</sup> *Catastrophe Mgmt. Solutions*, 11 F. Supp. 3d at 1144.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* (emphasis added).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 1142–43.

<sup>169</sup> *Id.* at 1144; Order Denying Motion to Amend Complaint, EEOC v. Catastrophe Mgmt. Solutions, No. 13-00476-CB-M (S.D. Ala. Jun. 2, 2014).

<sup>170</sup> *Catastrophe Mgmt. Solutions*, 11 F. Supp. 3d at 1141. On a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the district court dismissed the EEOC’s Title VII intentional race discrimination employing the Supreme Court’s heightened “plausibility” pleading standard adopted in *Bell Atlantic Corp v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). By dismissing the EEOC’s complaint the court held that based upon the allegations asserted in the EEOC’s original and amended complaints, the



The federal district court foreclosed the opportunity for plaintiffs to: 1) engage in meaningful discovery to uncover the motivations for and application of a “no-locks” policy; 2) produce expert witness testimony to educate the court on African descendants’ naturally textured hair and the racial dynamics of workplace prohibitions against natural hair; and 3) pursue a cognizable theory of intentional race discrimination which permits plaintiffs to produce evidence of the disparate race-based burdens in complying with a “neutral” grooming policy.<sup>171</sup> Thus, more expressly than the *Rogers* court, the district court in *EEOC v. Catastrophe Management Solutions* signaled to employers that they may not condition a Black woman’s employment upon changing her natural hair texture when worn short but that they are authorized to do so under any other circumstances.<sup>172</sup>

### B. *The Eleventh Circuit Decision*

In 2014, the EEOC appealed the district court’s decision to the Eleventh Circuit Court of Appeals. Notably, the Eleventh Circuit entertained the EEOC’s appeal in the wake of public controversy

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EEOC could not establish a plausible claim of intentional race discrimination nor could it engage in discovery to uncover additional evidence to establish its claims. Consequently, the courts’ decisions in *EEOC v. Catastrophe Management Solutions* presents important substantive *and* procedural issues specific to employment discrimination cases in need of addressing. See e.g., Suzette Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 67–68 (2010) (arguing “[c]ourt’s new plausibility pleading standard, is more outcome determinative for civil rights cases because of the informational inequity that exists between the parties and the evidentiary hurdles that exist for such claims . . . [and] [p]laintiffs alleging intentional discrimination are at a distinct evidentiary disadvantage pre-discovery because of the difficulty in uncovering facts sufficient to demonstrate illegal motive”).

<sup>171</sup> *Catastrophe Mgmt. Solutions*, 11 F. Supp. 3d at 1144. See generally *Jespersen v. Harrah’s Oper. Co., Inc.*, 444 F.3d 1104, 1108–09 (9th Cir. 2006) (articulating the undue burdens analysis that can be used establish intentional discrimination violative of Title VII if a plaintiff can demonstrate that compliance with an employer’s grooming policy results in more onerous burdens on a group of individuals on the basis of a protected trait like sex or race).

<sup>172</sup> *Catastrophe Mgmt. Solutions*, 11 F. Supp. 3d at 1142–43. Unless there is evidence that individuals were treated differently on the basis of race or that the employer consciously crafted the policy to exclude individuals on the basis of race.

surrounding the United States Army's grooming policy that barred natural hairstyles commonly and traditionally worn by African descendant servicewomen like two-strand twists, locks, braids, and afros.<sup>173</sup> The regulation also referred to these hairstyles as "matted and unkempt."<sup>174</sup> Strikingly, the same demeaning stereotypes about Black women's naturally textured hair that CMS verbally communicated to Ms. Jones as the rationale for its informal "no locks" policy motivated the Army's written natural hairstyle ban.<sup>175</sup> Though any person's hair can become unkempt, matted, or messy, both employers treated the unimpeded growth of Black women's hair as uniquely susceptible to being disheveled or unclean and thereby penalized Black women who grew their naturally textured hair long or wore it in more efficient or subjectively pleasing formations like twists, locks, or braids.<sup>176</sup> Upon reconsideration, Secretary of Defense Hagel and other military leaders agreed with the female mem-

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<sup>173</sup> See Rhodan, *supra* note 17.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* See also *Catastrophe Mgmt. Solutions*, 11 F. Supp. 3d at 1140.

<sup>176</sup> See Rhodan, *supra* note 17. Unfortunately, the punishment Black women endure for simply wearing their natural hair is not limited to adulthood or their professional experiences; the penalties they suffer with impunity often begin during childhood. During the span of one week in the spring of 2017, private school administrators in Florida and Massachusetts punished African descendant girls for donning their hair in afros and braids respectively. <http://www.wctv.tv/content/news/Local-teen-told-cant-wear-hairstyle-at-school-423232994.html> <https://www.yahoo.com/style/time-stop-hair-policing-children-143201370.html> <http://www.fox32chicago.com/news/254824241-story>. These recent incidences of race-based grooming codes discrimination in the education context illustrate the tangible impact of judicial decisions like *Rogers v. American Airlines* and *EEOC v. Catastrophe Management Solutions*. In its public statement defending the decisions to proscribe synthetic braids and discipline twin sisters for refusing to remove their braids, the private school in Massachusetts cited federal precedent authorizing parallel workplace prohibitions as legal support. Alluding to the race-immutability/culture-mutability distinction the federal judiciary has maintained in the workplace context, the school's administration expressly stated, "[s]ome have asserted that our prohibition on artificial hair extensions violates a 'cultural right,' but that view is not supported by the courts, which distinguish between policies that affect a person's natural 'immutable' characteristics and those that prohibit practices based on changeable cultural norms." [http://www.newsweek.com/malden-ma-dress-code-charter-school-policy-613691?utm\\_content=buffer953da&utm\\_medium=social&utm\\_source=twitter.com&utm\\_campaign=buffer](http://www.newsweek.com/malden-ma-dress-code-charter-school-policy-613691?utm_content=buffer953da&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer)

bership of the Congressional Black Caucus, finding that the military's proscriptions were not simply offensive, but also racially discriminatory.<sup>177</sup> The United States Army and the United States Air Force removed the bans against Black servicewomen's natural hairstyles as well as accompanying, derogatory descriptors from their grooming policies.<sup>178</sup>

In its appellate brief, the EEOC situated CMS' workplace ban within broader social context, noting the U.S. military's appreciation of: the intersectional dimensions of its natural hair bans; the unequal burdens these grooming mandates imposed upon African descendant servicewomen to obtain and maintain their employment; and the irrelevance of Black women's hair to their serving and protecting our country. Thus, just as the United States military acknowledged the racially discriminatory nature of its grooming policy, the EEOC implored that the time was ripe for the federal judiciary to reconsider its rigid stance in race-based challenges against parallel natural hair bans instituted by private employers. The EEOC maintained:

[e]ven the Army, Navy and Air Force, which are known for strict uniform standards governing military appearance, have revised their recent bans on dreadlocks, cornrows, and braids after receiving numerous complaints indicating that the service-level grooming policies were racially biased against Black women who choose to wear their hair in natural hairstyles rather than to use heat or chemicals to straighten the hair or wigs to cover it.<sup>179</sup>

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<sup>177</sup> Rhodan, *supra* note 17.

<sup>178</sup> In January 2017, the Army's ban against twists, locks, and braids adorned by African descendant servicewomen was effectively reversed yet the policy continues to impose burdensome and subjective conditions for compliance, requiring twists, braids, and locks to have a "uniform dimension; have a diameter no greater than a half-inch; and present a neat, professional and well-groomed appearance." Zeba Blay, *U.S. Army Lifts Ban on Dreadlocks*, HUFFINGTON POST (Feb. 10, 2017, 4:31 PM), [http://www.huffingtonpost.com/entry/us-army-lifts-ban-on-dreadlocks\\_us\\_589e1cfee4b03df370d64723](http://www.huffingtonpost.com/entry/us-army-lifts-ban-on-dreadlocks_us_589e1cfee4b03df370d64723) (updated Feb. 21, 2017).

<sup>179</sup> Brief of the EEOC as Plaintiff-Appellant, *EEOC v. Catastrophe Mgmt. Solutions*, 837 F.3d 1156 (11th Cir. 2016) (No. 14-13482), 2014 WL 4795874.

Though the three-judge panel recognized Ms. Jones' "intensely personal" nature of wearing locks and Ms. Jones' refusal to cut them, it was not persuaded by the military's decision to rescind its grooming policies. Rather, the court amplified employers' legal right to engage in the hyper-regulation of African descendant women's bodies via their hair.

A little over a year after oral arguments, the three-judge panel issued its first opinion followed by a revised opinion in December 2016.<sup>180</sup> Notably, the panel first addressed the EEOC's theory of liability. It concluded that by describing the consequences of a "no locks" policy with terms like "impact," "disadvantage," and "adverse effects" during oral arguments and in its complaints, the EEOC conflated the disparate impact and disparate treatment theories of liability.<sup>181</sup> Thus, the panel did not consider the EEOC's allegations concerning the burdens or consequences that the locks ban imposed upon Black women like Ms. Jones as such allegations seemingly cannot support a claim of intentional race discrimination.<sup>182</sup> The panel asserted that it would focus its analysis on "whether the protected trait actually motivated the employer's decision."<sup>183</sup> To answer this query, similarly to the court below, the Eleventh Circuit applied a restrictive definition of an immutable characteristic previously articulated in circuit decisions, concluding that a "protected trait" under Title VII is one that an individual "is born with or cannot change."<sup>184</sup> The court also expressed that the

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<sup>180</sup> EEOC v. Catastrophe Mgmt. Sol., 837 F.3d 1156 (11th Cir. 2016), *withdrawn and superseded by*, No. 14-13482, 2016 WL 7210059 (11th Cir. Dec. 13, 2016).

<sup>181</sup> *Id.* at 9–14.

<sup>182</sup> A plaintiff is not precluded from articulating the burdens, consequences, or impact of an employment practice in an intentional discrimination case nor does doing so compel the automatic application of a disparate impact theory of liability. Title VII's plain language does not require such a line of demarcation between disparate treatment and disparate impact. Furthermore, a litigant should not be confined to a particular set of allegations or evidence in order to state an actionable claim of unlawful discrimination. A litigant should be able to support her claim with allegations or evidence that illuminates the injury or harm that results from an employment practice. *See id.*

<sup>183</sup> *Id.* at 14 (citing *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003) (ellipses and internal quotation marks omitted)).

<sup>184</sup> *Id.* at 21 (citing *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1389 (11th Cir. 1998); *Gilchrist v. Bolger*, 733 F.2d 1551, 1553 (11th Cir. 1984)).

specific focus of Title VII's prohibitions against discrimination are "matters that are either beyond the victim's power to alter or that impose a burden on an employee on one of the prohibited bases."<sup>185</sup>

The Eleventh Circuit reiterated the district court's hair splitting demarcation between impermissible and permissible regulation of African descendants' hair.<sup>186</sup> According to the panel, "discrimination on the basis of black hair *texture* (an immutable characteristic) is prohibited by Title VII, while adverse action on the basis of black *hairstyle* (a mutable choice) is not."<sup>187</sup> To derive this holding, the panel in part rigidly applied nearly four decades of legal precedent, explaining that "the distinction between and mutable characteristics of race can sometimes be a fine (and difficult one), but it is a line that courts have drawn."<sup>188</sup> The panel distinguished the *Rogers* decision denying Renee Rodgers statutory protection for discrimination against her braids from another federal district court recognizing a Black woman's intentional race discrimination claim when she was denied a promotion because she donned an afro.<sup>189</sup> As a result, the Eleventh Circuit ruled that in order for locks to be deemed a racial characteristic as opposed to a cultural characteristic, the EEOC (and plaintiffs to follow) would have to allege that locks were not a function of personal choice, but rather that all, and/or only, individuals who identify as African descendants donned locks or are born with them.<sup>190</sup> As Professor Ian Haney Lopez has explained "[t]here are no genetic characteristics possessed by all Blacks but not by non-Blacks; similarly, there is no gene or cluster of genes common to all Whites but not to non-Whites."<sup>191</sup> Therefore, it is impossible for a race discrimination plaintiff to produce evidence that the proscribed trait is exclusively adorned by individuals who share the same racial identity.<sup>192</sup> By establishing an unfulfillable evidentiary standard, the court significantly departed from the *Rogers*

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<sup>185</sup> *Catastrophe Mgmt. Solutions*, 837 F.3d at 22 (quoting *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975)).

<sup>186</sup> *Id.* at 24.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* (citing *Jenkins v. Blue Cross Mut. Hosp. Ins. Inc.*, 538 F.2d 164, 168 (7th Cir. 1976)).

<sup>190</sup> *Id.*

<sup>191</sup> Lopez, *supra* note 124, at 11.

<sup>192</sup> *See id.*

court, which hypothesized an actionable race-based grooming codes discrimination case if it were shown that predominantly Black people adorn braids.<sup>193</sup> Thus, with this heightened evidentiary standard, the Eleventh Circuit (like the district court) signaled that workplace discrimination against racialized, mutable characteristics would never implicate Title VII protection.

It is important to note that unlike the district court, the Eleventh Circuit examined the query: what is race?<sup>194</sup> The three-judge panel engaged the work of race and law scholars who have posited that race is a social construct “rather than an absolute biological truth.”<sup>195</sup> Acknowledging the persuasiveness of these scholarly arguments, the panel nonetheless maintained that the current definition of race be guided by the outdated (arguably biological) understanding of race *in 1964* when the Civil Rights Act became law.<sup>196</sup> To discern how Congress might have understood the concept of race when it enacted Title VII, the court reviewed dictionary entries published in the 1960s.<sup>197</sup> It surmised that race “referred to common physical characteristics shared by a group of people and transmitted by their ancestors over time.”<sup>198</sup> Noting that none of the sources examined used the term “immutable” in defining race, the panel still maintained, “it is not a linguistic stretch to think that [racial] characteristics are a matter of birth, and not culture.”<sup>199</sup> To the panel, an interpretive rule like the immutability doctrine which limits protection against race discrimination to characteristics with which one is born is sound and logical. However, the Eleventh Circuit complicated the race-immutability/culture-mutability distinction that previous courts constructed to deny statutory protection in race-based grooming codes discrimination cases. Applying this framework, the panel denominated afros a “black hair *texture*” and locks a “black *hairstyle*” despite recognizing the EEOC’s claim that Ms. Jones’

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<sup>193</sup> See *Catastrophe Mgmt. Solutions*, 11 F. Supp. at 1143; *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981).

<sup>194</sup> *Id.* at 15–18.

<sup>195</sup> *Id.* at 18.

<sup>196</sup> *Id.* at 18–19.

<sup>197</sup> *Id.* at 16–18.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 18.

locks are a “natural outgrowth of black hair texture” or the unimpeded growth of an afro.<sup>200</sup> Notably, the Eleventh Circuit affirmed the lower court’s loose assertion that even though locks are a “‘natural outgrowth’ of the texture of black hair [it] does not make [locks] an immutable characteristic of race.”<sup>201</sup> Like the *Rogers* court, the Eleventh Circuit and the district court dictated to Black women what their natural hair is and means. Per the court’s reasoning, afros are an immutable characteristic of Blackness because either only African descendants are born with an afro-like hair texture or those who have such hair texture are African descendants. Thus, employer discrimination against afros constitutes unlawful race discrimination. Whereas, locks are mutable, cultural characteristics since African descendants are neither the exclusive wearers of locks nor are they born with them. As such, discrimination against locks falls beyond Title VII’s scope of protection. In effect, this puzzling race-immutability/culture-mutability framework the Eleventh Circuit reinforced legally defines not only locks but also any other formation of textured or curly hair, like braids or twists, as mutable, cultural hair-styles which employers are free to regulate or prohibit.

The panel appeared to interpret the arguments of race and law scholars who have urged courts to adopt a social constructionist view of race as support for this head-scratching conclusion.<sup>202</sup> According to the court, “there have been some calls by [legal scholars] for courts to interpret Title VII more expansively by eliminating the biological conception of ‘race’ and encompassing cultural characteristics associated with race.”<sup>203</sup> However, when these legal scholars, including myself, have advocated for courts to treat mutable characteristics such as skin color, hair, language, and dress as constitutive of race, it is not simply because they may be culturally significant to the wearer. Rather, the scholarship to which the court cites for this proposition simply explains that traits with which one is born are not the sole characteristics that law and society have used to mark one’s racial identity.<sup>204</sup> Mutable characteristics have played and continue to play a critical role in the external classification of

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<sup>200</sup> *Id.* at 24, 29.

<sup>201</sup> *Id.* at 25.

<sup>202</sup> *Id.* at 17–20.

<sup>203</sup> *Id.* at 30.

<sup>204</sup> *Id.* at 6.

an individual's race and attendant discrimination; mutable characteristics also inform individuals' subjective understanding of their racial identity.<sup>205</sup> Consequently, legal scholars have urged courts to employ a broader notion of race which acknowledges this historic and contemporary reality. Moreover, the race-immutability/culture-mutability distinction that courts have created fails to acknowledge the reality that race and culture are overlapping constructs just as race and religion or race and national origin can be.<sup>206</sup> However, it does not follow that because a characteristic can be deemed both racial and cultural, an employer's discrimination against this characteristic falls outside Title VII's purview.

### III. LOCKED OUT: THE CONSEQUENCES OF THE IMMUTABILITY DOCTRINE

#### A. *Strict Immutability: "A Legal Fiction"*

The Fifth Circuit Court of Appeal's 1975 decision in *Willingham v. Macon Telephone Publishing Company* shaped the courts' decisions in *Rogers v. American Airlines* and *EEOC v. Catastrophe Management Solutions*.<sup>207</sup> In *Willingham*, the Fifth Circuit held that a private employer did not engage in unlawful sex discrimination when it refused to hire a qualified male applicant as a copy layout artist because he donned shoulder length hair.<sup>208</sup> In doing so, the Fifth Circuit attempted to carve out a definitive sphere of employment practices that could subject an employer to Title VII liability

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<sup>205</sup> *Categorically Black, White, or Wrong*, *supra* note 43, at 134.

<sup>206</sup> *See, e.g.*, *Smith v. Specialty Pool Contractors*, No. 02:07cv1464, 2008 WL 4410163 (W.D. Pa. Sept. 24, 2008) (denying summary judgment in a Title VII race and religious discrimination case where the plaintiff, a practicing Catholic, alleged racial and religious harassment because his father is Jewish). *See also*, *Ortiz v. Bank of America*, 547 F. Supp. 550, 560 (E.D. Cal. 1982) (arguing "the notion of "race" as contrasted with national origin is highly dubious"). *See Perkins v. Lake Cty. Dep't of Utilities*, 860 F. Supp. 1262, 1272 (N.D. Ohio 1994) (arguing courts have engaged in "mental gymnastics" to define race and national origin and characterize them as discrete concepts for the purposes of deciding whether a plaintiff's discrimination claims are actionable under federal anti-discrimination laws).

<sup>207</sup> *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 231 (S.D.N.Y. 1981); *EEOC v. Catastrophe Mgmt. Solutions*, No. 14-13482, 2016 WL 7210059, at \*8-10.

<sup>208</sup> *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975).



for unlawful sex or race discrimination and those that employers could freely implement without judicial oversight. The court pronounced that:

[e]qual employment opportunity may be secured *only* when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin. . . . But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, *is related more closely to the employer's choice of how to run his business than to equality of employment opportunity*. . . . 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.<sup>209</sup>

Though it is not supported in Title VII's plain language, since *Willingham*, the Fifth Circuit's strict immutability doctrine has served as a prerequisite to statutory protection in a variety of civil rights cases;<sup>210</sup> in the race discrimination context, the immutability doctrine has been employed to dismiss cases involving employer regulation of mutable characteristics like hair color,<sup>211</sup> hairstyles,<sup>212</sup>

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<sup>209</sup> *Id.* (emphasis added).

<sup>210</sup> See Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 29 (2015) (Explaining "[e]ven though the term immutability does not appear in any employment discrimination statute, courts have borrowed immutability concepts [from the constitutional context] to answer definitional questions about the scope of statutory prohibitions on discrimination").

<sup>211</sup> See e.g., *Santee v. Windsor Court Hotel Ltd. P'ship*, No. Civ.A.99-3891, 2000 WL 1610775, at \*3-4 (E.D. La. Oct. 26, 2000) (holding that a Black woman with dyed blonde hair, who was denied employment because her blonde hair violated the hotel's grooming policy banning "extreme" hairstyles, could not establish a prima facie case of race discrimination under Title VII because hair color was not an immutable characteristic).

<sup>212</sup> See, e.g., *Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256, 262 (S.D.N.Y.2002) (dismissing a Black male employee's Title VII race discrimination case challenging an employer's requirement that employees who wore locks to cover them with a wool hat because the employee could not demonstrate per the immutability doctrine that locks were unique to African descendants). Opinion located at:

and language<sup>213</sup>. The immutability doctrine, like other central features of anti-discrimination jurisprudence “is not required by the operative language of the federal employment discrimination statutes, but flows from the ways in which the courts tend to think. . . .”<sup>214</sup> One can surmise that courts’ conceptualization of race in *Rogers v. American Airlines* and in *EEOC v. Catastrophe Management Solutions* is grounded in entrenched perceptions that one’s racial identity is a static, biological identity and/or that one’s race is marked by immutable physical characteristics, arguably like skin color.<sup>215</sup> Indeed, numerous legal scholars have convincingly demonstrated how these notions of identity shape antidiscrimination law. For example, Professor Natasha Martin has explained:

[d]iscrimination law confronts identity as if it were static, and this approach has been shown to be inadequate in capturing the complexity of identity and the perceptions of employees in contemporary work settings. The protected-class approach under Title VII has focused largely on the physical embodiment of the identity category—the immutable aspects of an individual’s identity.<sup>216</sup>

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<https://www.cityofchicago.org/content/dam/city/depts/cchr/DataPortalDocs/09P002Feb162011.pdf>.

<sup>213</sup> See, e.g., *Kahakua v. Friday*, 876 F.2d 896 (9th Cir. 1989) (unpublished table decision), No. 88-1668, 1989 WL 61762, at \*3 (9th Cir. June 2, 1989) (declining to decide the issue of whether an employer’s decision was based on plaintiffs’ dialect constitutes race and national origin discrimination where plaintiffs claimed race and national origin discrimination because they were allegedly denied positions as broadcasters because of their Hawaiian Creole accent or dialect). See generally Greene, *What’s Hair*, *supra* note 84, at 1369; see also Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 773 (1987).

<sup>214</sup> Sandra Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 101–02 (2011) (critiquing courts’ interpretation of 703(a)(1) of Title VII as prohibiting disparate treatment and 703(a)(2) as prohibiting unintentional discrimination though such a distinction is unsupported by the text and it frustrates the goals of the statute).

<sup>215</sup> See *Categorically Black, White, or Wrong*, *supra* note 43, at 131–36.

<sup>216</sup> Natasha T. Martin, *Diversity and the Virtual Workplace: Performance Identity and Shifting Boundaries of Workplace Engagement*, 16 LEWIS & CLARK

Accordingly, it appears that the strict immutability doctrine is a consequence of judicial understanding of identity, namely racial and gender identity, as constitutive of fixed, biological characteristics—despite scholars’ persuasive arguments to the contrary.<sup>217</sup> It is therefore reasonable to conclude that this concept of immutability embraced by the courts in *Willingham*, *Rogers*, and *Catastrophe Management Solutions* reflects a reflexive understanding of race as a stable biological construct and in turn, there are inexorably fixed characteristics that denote one’s race. This notion is not extraordinary; many adhere to the idea—consciously and unconsciously—that race is a fixed, biological construct and characteristics constituting one’s racial identity are those with which one is born, inheritable, impossible or difficult to change, and singularly displayed by individuals who share the same racial identity.<sup>218</sup> Consequently, it seems that judges’ endorsement of strict immutability in race-based grooming codes discrimination cases is distinctively informed by understandings of racial identity—namely Black identity—as an involuntary, genetic, and unchangeable state of being marked by a darker skin complexion and textured hair, which contemporary events like Rachel Dolezal’s claim of Blackness complicate.<sup>219</sup> Indeed, the Eleventh Circuit’s and the district court’s pronouncement in *Catastrophe*

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L. REV. 605, 642 (2012). See also Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1509 (2011) (arguing that “[t]he concept of immutability has been a fixture in both constitutional and statutory analysis of discrimination issues . . . [and] is a unifying principle that satisfactorily explains the protected classifications [covered in employment discrimination statutes]”).

<sup>217</sup> See MICHAEL OMI & HOWARD WINNANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (2d ed. 1994); see also Lopez, *supra* note 124, at 11.

<sup>218</sup> See *Categorically Black, White, or Wrong*, *supra* note 43, at 133-36 (2013) (recognizing the undetected salience of race as a biological construct within contemporary social and legal thinking even though it has been firmly established that race is not a genetic but rather a social construct—a construct which has real, defining meaning).

<sup>219</sup> Chris McGreal, *Rachel Dolezal: ‘I wasn’t identifying as black to upset people. I was being me’*, GUARDIAN (Dec. 13, 2015, 1:00 PM), <https://www.theguardian.com/us-news/2015/dec/13/rachel-dolezal-i-wasnt-identifying-as-black-to-upset-people-i-was-being-me>. I am in no way making a judgment as to whether Rachel Dolezal can stake a legitimate claim to Black American identity. I mention her story merely as a contemporary example of racial fluidity. It is also important to point out that hair played a critical role in Rachel Dolezal’s self-identification

*Management Solutions* that an afro is “an immutable Black hair texture,” appears to derive from a belief that African descendants are exclusively born with an afro or possess a hair texture that will inevitably grow into an afro. Richard Simmons’ afro challenges this operating assumption.<sup>220</sup> Despite clear evidence to the contrary, courts have calcified as fact an evident belief that undergirds the application of strict immutability in race discrimination cases challenging natural hair bans: all and/or only African descendants are born with or are capable of adorning afros. Strict immutability, therefore, serves as a “legal fiction”: a rule created by judicial, legislative, and political bodies, which is not based in fact, yet is treated as such in legitimating zones of protection and inclusion. To satisfy the contours of strict immutability articulated in *EEOC v. Catastrophe Management Solutions*, race discrimination plaintiffs challenging discrimination against mutable characteristics must demonstrate one of the following: 1) all individuals or only individuals who share a particular racial identity possess the regulated characteristic; 2) the regulated characteristic cannot be changed; or 3) the regulated characteristic is one with which an individual is born.<sup>221</sup> This heightened version of strict immutability superficially narrows the purview of

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or portrayal as a Black woman. Over the years, she has covered her naturally straight blonde hair by wearing synthetic braids and cornrows along with weaves or wigs styled like an afro.

<sup>220</sup> Richard Simmons is a celebrity fitness guru who identifies as white and is widely known for his large red afro. It is important to make clear the fact that Richard Simmons dons an afro does not now transform a workplace ban against afros into a regulation of a non-racial, cultural characteristic beyond the scope of Title VII proscriptions against race discrimination. It merely confirms that there is no one characteristic that only individuals who identify as Black or white, for example, possess. See Lopez, *supra* note 124, at 11 (explaining “[t]here are no genetic characteristics possessed by all Blacks but not by non-Blacks; similarly, there is no gene or cluster of genes common to all Whites but not to non-Whites”). Therefore, more accurate bases for conferring statutory protection to employer regulation of afros are that law and society link afros to African ancestry and African descendants often wear afros as an expression of their racial identity like locks, twists, and braids.

<sup>221</sup> See generally *EEOC v. Catastrophe Mgmt. Solutions*, 11 F. Supp. 3d 1139, 1144 (S.D. Ala. 2014) (holding that the dreadlocked hair style was a mutable characteristic because “Blacks are not the *exclusive* wearers of dreadlocks”) (emphasis in original).

protection against race discrimination under current anti-discrimination laws, which the following examples illustrate.<sup>222</sup>

Imagine that one day, a Black woman comes to work with her naturally textured or curly hair in a cropped style likely deemed an afro. The next day, she arrives at work with her naturally textured or curly hair in defined two-strand twists. Applying the strict immutability doctrine and the attendant demarcation between Black hair texture and Black hairstyles the Eleventh Circuit espoused, if the employer fires the woman because her hair appears to be an afro then she can benefit from Title VII's protections against race discrimination. Yet, at the point she twists or braids her hair, federal protection against race discrimination is no longer available to her. Similarly, based upon the Eleventh Circuit's race-immutability/culture-mutability distinction, it would have been unlawful for CMS to disqualify Ms. Jones from employment for which she was demonstrably qualified if she wore her natural hair texture in a cropped, unstraightened hairstyle. However, because Ms. Jones grew her natural hair texture longer and locked, the EEOC's Title VII claim of race discrimination on her behalf failed and (magically) CMS' grooming policy and Ms. Jones' rescinded job offer fell within the bounds of lawfulness. All of these instances of discrimination involve the same woman with the same hair texture. However, one act of discrimination is deemed unlawful and the other is legal; one act of discrimination is deemed remediable and the other irreparable. The legal fiction, strict immutability, produces these incoherent and unfair results.

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<sup>222</sup> Not all federal courts have applied the immutability doctrine to determine whether an employer's regulation of non-physical, mutable characteristics constitutes unlawful race discrimination. The Ninth Circuit held that an employer's discrimination against a plaintiff's non-physical, mutable characteristic was unlawful. *See, e.g., El-Hakem v. BJJ Inc.*, 415 F.3d 1068, 1073–74 (9th Cir. 2005) (holding that an employer's directives to an Arab-American employee to change his name to a "Western" sounding name as well as renaming the employee against his objections because clients may find him "more acceptable" constitutes intentional race discrimination under Section 1981). Acknowledging that "names are often a proxy for race and ethnicity" the Ninth Circuit held that discrimination against a "genetically-determined physical trait" is not required for an actionable race discrimination claim. *Id.* at 1073.

B. *Strict Immutability: At Odds with the Law?*

The immutability doctrine is not simply unsupported by Title VII's plain language; courts' strict application is also at odds with the statutory language and established evidentiary routes to prove intentional race discrimination. Again, section 703(a) of Title VII makes it unlawful for a covered employer:

- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his . . . *terms, conditions, or privileges* of employment . . . ; or
- (2) to *limit, segregate, or classify* his employees or applicants for employment in any way which would *deprive or tend to deprive* any individual of employment opportunities . . . because of such individual's race, color, religion, sex, or national origin.<sup>223</sup>

Employers' hyper-regulation of Black women's hair renders discriminatory terms, conditions, and privileges of employment on the basis of race and/or gender. Additionally, the implementation and enforcement of these grooming policies do in fact deprive Black women employment—for which they are qualified or successfully perform—because of their race and/or gender.<sup>224</sup>

For example, it appears that at no point throughout the series of interviews with Ms. Jones did CMS representatives perceive her hair as unprofessional or unkempt and thus violative of CMS' written grooming policy. In fact, upon learning that Ms. Jones' was wearing her hair in locks, CMS' Human Resources Manager conveyed to Ms. Jones that she did not find her hair to be unkempt; nevertheless, she informed Jones that she was required to cut off her hair because it *could* become messy—in the future. It is important to note that the Human Resources Manager's perceptions about Ms. Jones' hair changed simply because Jones confirmed that she was wearing

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<sup>223</sup> 42 U.S.C. § 2000e-2(a)(1)–(2) (2010) (italics added).

<sup>224</sup> *Catastrophe Mgmt. Solutions*, 2016 WL 7210059 at \*4 (choosing to only view the case through the lens of disparate treatment as opposed to disparate impact).

locks.<sup>225</sup> The Human Resources Manager's reaction is not surprising if one considers the ways society stigmatizes locks as unprofessional or indicative of criminality and uncleanness and how these preconceived, pejorative associations manifest themselves in the workplace especially when African descendants adorn locks.<sup>226</sup> With that said, if the EEOC had the opportunity to engage in discovery, evidence gathered could reveal that CMS' Human Resources Manager associated such negative stereotypes with locks and/or that she was instructed to exclusively regulate locks adorned by African descendants. Indeed, it appears that CMS only instructed Black applicants who wore locks to cut off their hair as a condition of employment.<sup>227</sup> Relatedly, the court foreclosed the EEOC's opportunity to uncover evidence concerning the enforcement of the human resources manager's "propensity to have messy hair standard." In other words, was this subjective standard exclusively applied to Black applicants and/or employees, or did all employees or applicants—regardless of their race—have to cut their hair if a CMS representative perceived it as having a propensity to become messy?<sup>228</sup> If the EEOC uncovered the former during discovery, this would be quintessential evidence to support a claim of intentional race discrimination.<sup>229</sup> The

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<sup>225</sup> *Id.* at 4.

<sup>226</sup> See generally, Greene, *What's Hair*, *supra* note 84, at 1387–88 (discussing how African descendants' natural hair is often referred to in derogatory terms like "nappy" or "kinky," perceived as "unclean" or often times associated with criminality).

<sup>227</sup> *Catastrophe Mgmt. Solutions*, 2016 WL 7210059 at 11.

<sup>228</sup> In *Burdine*, the Supreme Court emphasized that the plaintiff is allowed to liberally engage in discovery in order to sustain her burden of persuasion in a Title VII intentional discrimination case. See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981) (internal citation omitted) ("the liberal discovery rules applicable to any civil suit in federal court are supplemented in a Title VII suit by the plaintiff's access to the Equal Employment Opportunity Commission's investigatory files concerning her complaint. . . [A Title VII] plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext").

<sup>229</sup> It appears that the court might have held that EEOC put forth a plausible claim of intentional race discrimination had the EEOC alleged that CMS applied the grooming policy more favorably toward white applicants and employees than Black applicants and employees. See *EEOC v. Catastrophe Mgmt. Solutions*, 837 F. 3d 1156 (11th Cir. 2016), *withdrawn and superseded by*, No. 14-13482, 2016 WL 72120059 at 11 (11th Cir. Dec. 13, 2016). (court explaining that evidence of

EEOC might have uncovered rare evidence that white applicants or employees who wore locks were not instructed to remove them as a condition of employment. This evidence, too, would support a claim of intentional race discrimination. Lastly, the EEOC could have also discovered that CMS' motivation behind the "neutral" policy was to regulate the display of African descendants' natural hairstyles such as locks. All of this evidence would undoubtedly substantiate a claim of intentional race discrimination. Notably, however, the Eleventh Circuit held that the EEOC's complaint failed to state a claim of intentional race discrimination, implying it was unsuccessful since the EEOC did not allege "that dreadlocks are an immutable characteristic of black persons."<sup>230</sup> As a result, the Eleventh Circuit's exacting application of the immutability doctrine led the court to affirm the district court's untenable declaration: any attempt on the part of the EEOC to prove intentional race discrimination would be "futile."<sup>231</sup>

*C. A More Expansive Notion of Immutability: An Avenue to Freeing Black Women's Hair?*

After the Eleventh Circuit issued its opinion, the EEOC filed a petition for rehearing en banc<sup>232</sup> and amici also filed a brief in support of the EEOC's petition.<sup>233</sup> Appreciating immutability's stronghold in anti-discrimination jurisprudence and its consequences, amici urged the court to adopt a more expansive notion of immuta-

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uneven enforcement of a grooming policy can demonstrate intentional discrimination).

<sup>230</sup> *Id.* at 11 n.2 (court explaining that evidence of uneven enforcement of a grooming policy can demonstrate intentional discrimination).

<sup>231</sup> *Id.* at 13.

<sup>232</sup> Petition for Rehearing En Banc, EEOC v. Catastrophe Mgmt. Solutions, No. 14-13482, (11th Cir. Oct. 31, 2016). It is important to note that at the time of this article's publication the Eleventh Circuit had not issued a decision regarding the EEOC's petition for rehearing.

<sup>233</sup> See generally Brief for NAACP et al., as Amici Curiae Supporting Appellants, EEOC v. Catastrophe Mgmt. Solutions, No. 14-13482 (11th Cir. Dec. 28, 2016). Professor Angela Onwuachi-Willig and I joined the NAACP-Legal Defense Fund and the Legal Aid Society—Employment Law Center to file this amicus brief.



bility which federal courts have applied in constitutional cases challenging sexual orientation discrimination.<sup>234</sup> In these cases, courts permitted sexual orientation discrimination claims based upon the concept that immutability embodies characteristics that are “central and fundamental” to one’s identity; therefore, the Constitution guarantees protection against discrimination when one is “required to abandon” such a characteristic.<sup>235</sup> Amici also argued that in *Obergefell v. Hodges*, the United States Supreme Court interpreted the Fourteenth Amendment to guarantee a parallel protection against discrimination based upon “personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”<sup>236</sup> Therefore, in determining whether to dispense statutory protection, amici pressed the Eleventh Circuit to shift its query from “whether a person *could* change a particular characteristic” to “whether the characteristic is something that the person *should be required* to change” because of its centrality to her identity.<sup>237</sup> Though not perfect,<sup>238</sup> judicial application of this more expansive notion of immutability—which some legal scholars have coined the “new immutability,”<sup>239</sup> “personhood” immutability,<sup>240</sup>

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<sup>234</sup> *Id.* at 26–28. See also generally Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 23–27 (2015).

<sup>235</sup> See *id.* (citing to Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294, 326 (D. Conn. 2012)).

<sup>236</sup> See *id.* at 13–14 (citing to Obergefell v. Hodges, No. 14–556, slip op. at 10 (2015)).

<sup>237</sup> See *id.* (citing to Wolf v. Walker, 986 F. Supp. 2d 982, 1013 (W.D. Wis. 2014)).

<sup>238</sup> See Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 11 (2015) (critiquing the “new immutability” as a unifying concept across employment discrimination law, as it does not cure the difficulty of distinguishing between which characteristics are central to one’s personhood and those that are not and it could continue to justify only limited forms of statutory protection like strict immutability).

<sup>239</sup> See generally Clarke, *id.* (in passim).

<sup>240</sup> Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell”*, 108 YALE L.J. 485, 494 (1998) (explaining that the Ninth Circuit in *Watkins v. United States Army* “distinguished among three different kinds of immutability—‘strict’ immutability, in which the bearer must be unable to change the trait; ‘effective’ immutability, in which changing the trait is possible but difficult; and ‘personhood’ immutability, in which the bearer’s ability to change the trait is irrelevant, as long as it is central to her identity) (citing *Watkins v. United States Army* 837 F.2d 1428 (9th Cir.),

and “soft immutability”<sup>241</sup>—would bring about a seismic, yet feasible (and warranted) change in positionality in race-based grooming codes discrimination cases. It would require courts to acknowledge fully the contentions of African descendants like Renee Rodgers and Chastity Jones that their hair texture and the ways in which it grows and is styled are central to *their* personhood as Black women, rather than dismissing or refuting their claims.<sup>242</sup> As a result, it may cause judges to pause before supplanting Black women’s understanding of their hair with their own judgments. Moreover, courts may come to better appreciate the indignity of employers compelling Black women to cut, alter, or cover their natural hair as a condition of employment.

### CONCLUSION

Naturally, the Eleventh Circuit’s decision in *EEOC v. Catastrophe Management Solutions* generated swift and massive media attention.<sup>243</sup> It has been well documented that informal and formal grooming policies present a unique yet ubiquitous barrier to employability *and* professional advancement for Black women.<sup>244</sup> For

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amended by 847 F.2d 1329 (9th Cir. 1988), vacated and aff’d on other grounds, 875 F.2d 699 (9th Cir. 1989) (en banc).

<sup>241</sup> See, e.g., Joseph Landau, “Soft Immutability” and “Imputed Gay Identity”: *Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law*, 32 *FORDHAM URB. L.J.* 237, 263 (2005).

<sup>242</sup> See Part II.B. (discussing how the court in *Rogers v. American Airlines* dismissed Ms. Rodgers’ claim that her cornrows played an essential role in her personhood and self-understanding as a Black woman in parallel ways that donning a hijab for some Muslim women plays a defining role in both the external signification and subjective understanding of their religious identity).

<sup>243</sup> See, e.g., Matt Fernandez, *Federal Appeals court upholds ruling in dreadlock workplace lawsuit*, WIAT (Sept. 24, 2016, 8:23 PM), <http://wiat.com/2016/09/24/federal-appeals-court-upholds-ruling-in-dreadlock-workplace-lawsuit/>; Jacob Gershman, *Appeals Court: Employees Don’t Have a Right to Wear Dreadlocks*, WALL ST. J.: L. BLOG (Sept. 16, 2016, 2:29 PM), <http://blogs.wsj.com/law/2016/09/16/appeals-court-employees-dont-have-a-right-to-wear-dreadlocks/>; Victoria M. Massie, *Federal appeals court rules it’s okay to discriminate against black hairstyles like dreadlocks*, VOX (Sept. 19, 2016, 5:00 PM), <http://www.vox.com/2016/9/19/12971790/court-discriminate-dreadlocks>.

<sup>244</sup> See generally *id.*

many Black women, altering one's natural hair, or rather, maintaining straightened hair is an explicit or implicit term or condition of employment. This article makes clear that the Eleventh Circuit's opinion maintains this status quo and exacerbates the hyper-regulation of Black women's bodies via their hair. The Eleventh Circuit's premature dismissal of the EEOC's grooming codes discrimination case shields covered employers from Title VII liability even where they may have engaged in textbook intentional race discrimination, as it legitimizes barring complainants from engaging in discovery in grooming codes cases not involving afros. The Eleventh Circuit's early dismissal of the EEOC's case also insulates covered employers who ban African descendant women from donning their naturally textured hair—when not shaped like an afro—as long they are acting pursuant to a formal or an informal grooming policy that expects “professional” or “business-like” hairstyles. Moreover, the panel's enhanced version of strict immutability and the race-immutability/culture-mutability distinction makes it impossible for race discrimination plaintiffs to challenge discrimination against mutable characteristics despite their nexus to race. Thus, the Eleventh Circuit's hair splitting decision amplified nearly forty years of federal precedent permitting the lawful deprivation of employment opportunities for which African descendant women are qualified alongside their equal inclusion, dignity, and privileges of employment when they grow their unstraightened, naturally textured hair long or when their hair does not perfectly resemble an afro.