

# The Case for Deferring to the EEOC’s Interpretations in *Macy* and *Foxx* to Classify LGBT Discrimination as Sex Discrimination Under Title VII

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*ABSTRACT: In 2012 and 2015, the United States Equal Employment Opportunity Commission determined that Title VII of the Civil Rights Act of 1964 prohibits federal employers from discriminating against employees on the basis of gender identity and sexual orientation, respectively. The agency’s determinations reflect not only the policy preferences of the Obama Administration, but also of a growing percentage of Americans who believe LGBT citizens should enjoy the same federal statutory protections as other protected classes. Although a select number of states have enacted statutes prohibiting workplace discrimination on the basis of gender identity and sexual orientation, many private employers face no legal consequences for discriminating against LGBT employees. This Note argues that rather than wait for legislative action, courts should defer to the EEOC’s interpretations in *Macy* and *Foxx* in order to swiftly incorporate gender identity and sexual orientation within Title VII, thereby prohibiting private employers from discriminating on these bases.*

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## I. INTRODUCTION

On June 26, 2015, the Supreme Court announced that the Fourteenth Amendment requires states to recognize and grant marriage licenses to same-sex couples.<sup>1</sup> The decision was heralded as an enormous step forward for the LGBT<sup>2</sup> community—even the White House joined in the celebration by projecting rainbow-colored lights onto its exterior.<sup>3</sup> However, the victory was bittersweet. Same-sex couples can now wed on Saturday and then, in a majority of states, be fired from their jobs on Monday solely because of their sexual orientation.<sup>4</sup> An even greater number of states fail to protect against workplace discrimination on the basis of gender identity.<sup>5</sup> A 2014 study

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1. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (“[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”).

2. LGBT is an acronym that stands for Lesbian, Gay, Bisexual, and Transgender. The complete acronym is “LGBTQIA,” which stands for Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Asexual. Kayley Weinberg, *NOW Updates Acronym: LGBTQIA*, NOW (Aug. 11, 2014), <http://www.now.org/blog/now-updates-acronym-lgbtqia>. Because this Note focuses on the workplace rights of only lesbian, gay, bisexual, and transgender employees, this author uses the LGBT acronym.

3. Allie Malloy & Karl de Vries, *White House Shines Rainbow Colors to Hail Same-Sex Marriage Ruling*, CNN POL. (June 30, 2015, 1:33 PM), <http://www.cnn.com/2015/06/26/politics/white-house-rainbow-marriage>.

4. See *infra* Part III.B.

5. See *infra* Part III.B.

revealed that approximately 75% of Americans incorrectly assume that federal workplace anti-discrimination statutes address gender identity and sexual orientation discrimination.<sup>6</sup> Thus, the LGBT community continues to suffer significant discriminatory treatment in the workplace without meaningful public awareness.

In 2012 and 2015, the United States Equal Employment Opportunity Commission (“EEOC”) adjudicated the cases of *Macy* and *Foxx*, respectively.<sup>7</sup> In these cases, the EEOC interpreted Title VII of the 1964 Civil Rights Act (“Title VII”) to incorporate gender identity and sexual orientation within the statute’s prohibition against workplace “sex” discrimination.<sup>8</sup> Through these decisions, the EEOC provided a new vehicle for addressing LGBT employment discrimination: administrative deference. The doctrine of administrative deference permits courts to defer to a reasonable agency interpretation of a statute that Congress has given the agency authority to enforce.<sup>9</sup> Because the EEOC is tasked with enforcing Title VII, by deferring to the EEOC’s decisions in *Macy* and *Foxx*, courts could enforce Title VII against private employers, thereby providing an immediate remedy to victims of impermissible gender identity and sexual orientation discrimination.

This Note argues that courts should defer to the EEOC’s interpretations of Title VII in *Macy* and *Foxx*, and thereby incorporate gender identity and sexual orientation within Title VII’s statutory protections. Part II explores the origins and powers of administrative agencies, the doctrine of judicial review, and the role that the EEOC plays in enforcing Title VII in both the public and private sectors. Part III discusses the current climate of LGBT workplace discrimination, provides an overview of which states have enacted ordinances to combat such discrimination, and discusses how *Obergefell v. Hodges* made the need to incorporate gender identity and sexual orientation within Title VII imminent. Part IV explores the facts of *Macy* and *Foxx*, and examines the EEOC’s proffered rationales in each case. Finally, Part V notes the inconsistent history of awarding deference to the EEOC, argues that *Macy* and *Foxx* should be awarded *Chevron* deference, and then argues in the alternative that *Macy* and *Foxx* are entitled to *Skidmore* deference.

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6. ROBERT P. JONES ET AL., PUB. RELIGION RESEARCH INST., A SHIFTING LANDSCAPE: A DECADE OF CHANGE IN AMERICAN ATTITUDES ABOUT SAME-SEX MARRIAGE AND LGBT ISSUES 35 (2014), [http://www.prr.org/wp-content/uploads/2014/02/2014.LGBT\\_REPORT.pdf](http://www.prr.org/wp-content/uploads/2014/02/2014.LGBT_REPORT.pdf) (“Three-quarters (75%) of Americans incorrectly believe it is currently illegal under federal law to fire or refuse to hire someone because they are gay, lesbian, bisexual, or transgender.”).

7. *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015); *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

8. *See Foxx*, 2015 WL 4397641, at \*4; *Macy*, 2012 WL 1435995, at \*4.

9. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.” (footnote omitted)).

## II. THE EEOC AND JUDICIAL REVIEW

A. *THE ORIGIN AND POWERS OF ADMINISTRATIVE AGENCIES*

Administrative agencies are executive bodies created by Congress that establish rules and regulations within a designated field of control.<sup>10</sup> Administrative agencies perform all government action outside of the three constitutionally established branches of the Executive, Legislature, and Judiciary.<sup>11</sup> There are two types of administrative agencies: cabinet agencies and independent agencies.<sup>12</sup> Cabinet agencies are led by a secretary, who reports to and serves at the pleasure of the President.<sup>13</sup> Independent agencies are led by an individual or group of individuals, often labeled a Commission, who serve for a term of years and are only removable for cause.<sup>14</sup>

Congress creates an agency by passing an “organic” act, which enumerates the agency’s structure, powers, and limitations.<sup>15</sup> An indispensable requirement of an organic act is that it contain “an intelligible principle to which the person or body authorized to [act] . . . is directed to conform,” thereby avoiding unconstitutionally delegating legislative power.<sup>16</sup>

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10. PETER L. STRAUSS ET AL., *GELLHORN AND BYSE’S ADMINISTRATIVE LAW: CASES AND COMMENTS* 12 (11th ed. 2011).

11. *Id.*

12. *Id.* at 14.

13. *Id.*; see also, e.g., *About the Department of Defense (DoD)*, U.S. DEP’T DEF., <http://www.defense.gov/About-DoD> (last visited Jan. 1, 2017) (led by Secretary of Defense Ash Carter); *Who We Are*, U.S. DEP’T INTERIOR, <https://www.doi.gov/whowear> (last visited Jan. 1, 2017); *Office of the Secretary*, U.S. DEP’T LAB., [http://www.dol.gov/\\_sec](http://www.dol.gov/_sec) (last visited Jan. 1, 2017) (led by Secretary of Labor Thomas E. Perez).

14. See, e.g., *The Commission and the General Counsel*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/commission.cfm> (last visited Jan. 1, 2017) (led by a five-person bipartisan Commission); *Current Leadership*, U.S. ENVTL. PROT. AGENCY, <http://www2.epa.gov/aboutepa/current-leadership> (last visited Jan. 1, 2017); *Who We Are*, NAT’L LABOR RELATIONS BOARD, <https://www.nlr.gov/who-we-are> (last visited Nov. 10, 2016) (led by a five-member board appointed by the President to a five-year term, with consent of the Senate, and one member expiring every year).

15. STRAUSS ET AL., *supra* note 10, at 13.

16. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (establishing the standard to which Congress must abide when delegating rulemaking authority to a federal agency).

Once an agency is tasked with an intelligible principle,<sup>17</sup> it is a valid agency and is governed by the Administrative Procedure Act (“APA”).<sup>18</sup>

The APA provides two avenues for agencies to create new policy: rulemaking and adjudication.<sup>19</sup> Unless an agency’s organic act requires a specific method of issuing regulations (e.g., through formal rulemaking procedures only), an agency has full discretion to decide whether to promulgate new regulations through rulemaking or adjudicatory processes.<sup>20</sup> A “rule” under the APA is “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.”<sup>21</sup> Conversely, an adjudicative “order” under the APA is “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.”<sup>22</sup> While both forms of regulation are legally binding, the agency’s choice between the two methods significantly affects the regulation’s use and review in federal court.<sup>23</sup>

Once an agency decides to create policy through either rulemaking or adjudication, it must then decide whether to create such policy using formal or informal procedures—with formal procedures requiring the agency to expend significantly greater time and resources.<sup>24</sup> This decision is either

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17. See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 473 (2001) (upholding Congress’ delegation of power to the Environmental Protection Agency to “establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air”); *Touby v. United States*, 500 U.S. 160, 163 (1991) (upholding Congress’ delegation of power to the Attorney General to “schedule a substance on a temporary basis when doing so is ‘necessary to avoid an imminent hazard to the public safety’” (quoting 21 U.S.C. § 811(h) (1970))); *Indus. Union Dep’t, AFL–CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 615 (1980) (upholding Congress’ delegation of power to the Secretary of the Occupational Safety and Health Administration to promulgate regulations that are “reasonably necessary or appropriate to provide safe or healthful employment and places of employment” (quoting 29 U.S.C. § 652(8))).

18. For example, when Congress decided that it needed to prevent unfair methods of competition in commerce, it enacted the Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2012), which created the Federal Trade Commission, and provided the Commission with a guiding intelligible principle of “prevent[ing] persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce,” and detailed the leadership structure of the Commission. *Id.* § 45(a)(2).

19. See *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (“[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.”).

20. See *id.*

21. 5 U.S.C. § 551(4) (2012).

22. *Id.* § 551(6).

23. See *infra* notes 49–58 and accompanying text.

24. See generally 5 U.S.C. §§ 553–554, 556–557. The FDA once used formal rulemaking to determine what amount of peanuts a substance can contain prior to being required to be labeled peanut butter. The formal procedure “took nine years and twenty weeks of hearings, generat[ed] 8,000 pages of hearing record, [and] produce[d] a six-page opinion to justify a decision to

governed by statute or left to the discretion of the agency. For example, should a statute require an agency to hold a hearing “on the record,” the agency must hold a trial-like hearing prior to issuing a new rule.<sup>25</sup> The agency must then base its decision only upon the record produced from the hearing.<sup>26</sup> Conversely, an agency that creates regulations by performing case-by-case adjudications of individual entities may be entitled to deference if it decides to proceed by formal procedures.<sup>27</sup> Just as an agency’s decision to employ rulemaking or adjudication affects how courts treat the resulting rule, an agency’s decision to employ formal or informal procedures plays an important role during judicial review.<sup>28</sup>

### B. THE EEOC AND TITLE VII

The EEOC is an independent federal agency established by Title VII of the 1964 Civil Rights Act.<sup>29</sup> The EEOC is tasked with enforcing the federal workplace anti-discrimination statutes: Title VII of the Civil Rights Act of 1964, The Pregnancy Discrimination Act, The Equal Pay Act of 1963, The Age Discrimination in Employment Act of 1967 (“ADEA”), Title I of the Americans with Disabilities Act of 1990 (“ADA”), and The Genetic Information Nondiscrimination Act of 2008.<sup>30</sup> The EEOC is comprised of five bipartisan members, each appointed by the President and approved by the Senate for a term of five years.<sup>31</sup> Additionally, the President appoints a General Counsel who is confirmed by the Senate for a term of four years, during which she will “have responsibility for the conduct of litigation.”<sup>32</sup>

Section 2000e-4(g) provides the EEOC with its primary powers,<sup>33</sup> which include engaging in conciliation processes with any employer or labor organization, producing technical studies, and “interven[ing] in a civil

require at least 90% peanuts.” STRAUSS ET AL., *supra* note 10, at 114.

25. See *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 237–38 (1973) (holding absent express requirement for a hearing to be “on the record,” an agency is under no obligation to follow formal rulemaking procedures).

26. 5 U.S.C. § 553(c).

27. Most circuits utilize the *Dominion Energy* standard, which relies on statutory interpretation to determine whether formal adjudication procedures are required. *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 17 (1st Cir. 2006). Under *Chevron*, an agency may be entitled to deference to determine for itself whether the statute requires formal procedures. *Id.* Therefore, should a court determine that a statute is ambiguous with regard to the amount of formality required in an administrative adjudication, and the agency has reasonably interpreted the statute to only require informal procedures, courts will defer to that interpretation. *Id.*

28. See *infra* notes 59–72 and accompanying text.

29. 42 U.S.C. § 2000e-4(a) (2012).

30. *Laws Enforced by EEOC*, U.S. EQUAL EMP’T. OPPORTUNITY COMM’N, <http://www.eeoc.gov/laws/statutes/index.cfm> (last visited Jan. 1, 2017).

31. 42 U.S.C. § 2000e-4(a).

32. *Id.* § 2000e-4(b)(1).

33. *Id.* § 2000e-4(g).

action . . . by an aggrieved party against a respondent other than a government, governmental agency or political subdivision.”<sup>34</sup> However, Title VII’s only reference to a power to issue regulations appears in the “Employment by Federal Government” section, which provides that the EEOC “shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities *under this section*.”<sup>35</sup> Therefore, EEOC regulations are only binding upon the federal government, not private employers.<sup>36</sup> Due to this limitation on the agency’s power, courts often treat the EEOC as a lesser agency, and therefore approach its interpretations with greater skepticism.<sup>37</sup>

Title VII prohibits both public and private employers from taking any adverse employment actions—such as refusing to hire, failing to promote, firing, or otherwise acting discriminately when determining compensation or other terms and conditions of employment—because of an employee’s “race, color, religion, sex, or national origin.”<sup>38</sup> Additionally, an employer may not “limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”<sup>39</sup> This Note argues that the category of “sex” can encompass discrimination based upon an employee’s gender identity or sexual orientation.

### C. ADMINISTRATIVE AGENCIES AND JUDICIAL REVIEW

Since the inception of judicial review in *Marbury v. Madison*,<sup>40</sup> judges have continuously struggled with the issue of who should ultimately decide questions of law. Of course, Justice Marshall resolved the issue of constitutional interpretation in favor of the Supreme Court.<sup>41</sup> However, statutory interpretation becomes more complicated when Congress tasks an executive agency with interpreting and enforcing a statute. Each time a court determines how much deference to give an administrative interpretation, there is a separation-of-powers concern simmering beneath the surface.<sup>42</sup>

34. *Id.* § 2000e-4(g)(6).

35. *Id.* § 2000e-16(b) (emphasis added).

36. *Id.*

37. *See infra* Part V.A; *see also* Theodore W. Wern, Note, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST. L.J. 1533, 1575-78 (1999).

38. 42 U.S.C. § 2000e-2(a)(1).

39. *Id.* § 2000e-2(a)(2).

40. *See generally* *Marbury v. Madison*, 5 U.S. 137 (1803).

41. *See id.* at 177 (“It is emphatically the province and duty of the judicial department to say what the law is.”).

42. *See, e.g.*, Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the Chevron and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921, 947 (2006) (noting that critics of *Chevron* believe it “shift[s] too much power from the courts to the executive branch”);

When an administrative agency creates or enforces policy through either rulemaking or adjudication, any entity with standing to challenge that policy may request judicial review of the agency's action.<sup>43</sup> Often, this litigation involves a challenge to an agency's interpretation of an element of a statute. Courts have long recognized the importance of giving *some* deference to an agency's decision.<sup>44</sup> After all, agencies boast specialized expertise, are able to conduct in-depth research, and are sufficiently removed from the political process to avoid the optics of partisanship.<sup>45</sup> For instance, many would argue that the scientists of the Environmental Protection Agency are in a far better position to define what it means to have safe levels of a toxin in public drinking water than a federal judge. Further, because lawmaking is the province of the elected legislative branch—not the politically insulated federal judiciary—courts should defer to agencies to avoid making impermissible policy assessments.<sup>46</sup>

In 1944, the Supreme Court first established a standard of administrative deference in *Skidmore v. Swift*.<sup>47</sup> In *Skidmore*, the interpretive issue was whether the “waiting time” of several firehouse employees qualified as “working time,” such that the employees should be awarded overtime pay under the Fair Labor Standards Act (“FLSA”).<sup>48</sup> Under the Act, Congress tasked the Administrator of the Division with preventing any unlawful employment conditions but declined to delegate any rulemaking authority to the Wage and Hour Division of the Department of Labor.<sup>49</sup> The Administrator had

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Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1282–86 (2002) (discussing the separation-of-powers flaws within administrative deference).

43. 5 U.S.C. § 702 (2012) (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

44. See *FTC v. Cement Inst.*, 333 U.S. 683, 720 (1948) (“The kind of specialized knowledge Congress wanted its agency to have was an expertness that would fit it to stop at the threshold every unfair trade practice . . .”).

45. See Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. REV. 1271, 1286–91 (2008) (discussing the virtues of administrative agencies).

46. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 (1989) (discussing the argument that “the constitutional principle of separation of powers requires *Chevron*,” and ultimately disagreeing that the separation of powers alone necessitates *Chevron's* degree of deference). Justice Scalia further states:

When, in a statute to be implemented by an executive agency, Congress leaves an ambiguity that cannot be resolved by text or legislative history, the “traditional tools of statutory construction,” the resolution of that ambiguity necessarily involves policy judgment. Under our democratic system, policy judgments are not for the courts but for the political branches; Congress having left the policy question open, it must be answered by the Executive.

*Id.*

47. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

48. *Id.* at 135–36.

49. *Id.* at 137–38.



issued an interpretive bulletin that attempted to shed light on the definition of “working time” under the FLSA.<sup>50</sup> The Court opined that although the Administrator’s interpretation was not binding on the courts, the Administrator’s views “constitute[d] a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”<sup>51</sup> The court then famously held that “[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”<sup>52</sup> This multi-factor analysis is now known as *Skidmore* deference.<sup>53</sup>

Forty years later, the Supreme Court revisited administrative deference in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>54</sup> In *Chevron*, the interpretation at issue was whether the Environmental Protection Agency’s plantwide definition was a “permissible construction” of the statutory term “stationary source.”<sup>55</sup> The Court then articulated its new approach to administrative deference:

If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute. . . . If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.<sup>56</sup>

In short, courts discerning the appropriateness of deference will (1) determine whether Congress has unambiguously addressed the precise question at issue, and if the legislation is susceptible to multiple interpretations, then (2) defer to “a reasonable interpretation made by the

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50. *Id.* at 138.

51. *Id.* at 140.

52. *Id.*

53. This deference standard is less-commonly referred to as “earned deference.” Wern, *supra* note 37, at 1539–40. When a court weighs the *Skidmore* factors and “finds that a non binding agency rule suffers from some procedural infirmity, or is not consistent with what the court believes is Congress’s intent, then the court may disregard the agency interpretation and substitute its own views as to what the statute means.” *Id.* at 1541.

54. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

55. *Id.* at 843–44.

56. *Id.* at 843–44 (footnotes omitted).

administrator of an agency.”<sup>57</sup> This analysis is now known as *Chevron* deference.<sup>58</sup>

Recall that not all agency regulations are created equal—some policies are born from informal adjudications<sup>59</sup> or notice-and-comment rulemaking,<sup>60</sup> and other policies are the result of an extensive, trial-like hearing on the record.<sup>61</sup> If agency determinations and regulations involve varying levels of scrutiny and expertise, should courts afford one procedure more deference than the other? The Supreme Court resolved this inquiry in a trilogy of cases: *Christensen v. Harris County*,<sup>62</sup> *United States v. Mead Corp.*,<sup>63</sup> and *Barnhart v. Walton*.<sup>64</sup>

In *Christensen*, the Court considered the validity of an opinion letter from the Acting Administrator of the Wage and Hour Division of the Department of Labor.<sup>65</sup> While holding that the letter was not worthy of deference, the majority in *Christensen* stated in dicta that interpretations that are not the result of “a formal adjudication or notice-and-comment rulemaking,” such as “interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law,” are not entitled to *Chevron* deference.<sup>66</sup> The Court then performed a *Skidmore* deference analysis and ultimately declined to defer to the agency.<sup>67</sup> *Christensen* created the dual-approach to agency deference that continues to govern courts today: If an

57. *Id.*

58. This standard is less-commonly referred to as “compelled deference.” This term refers to the decision’s apparent mandate that courts *must* defer to an agency whenever an explicit grant of authority exists, absent a showing of the agency’s determination being “arbitrary, capricious, or manifestly contrary to the statute.” See Jerome Nelson, *The Chevron Deference Rule and Judicial Review of FERC Orders*, 9 ENERGY L.J. 59, 61, 71 (1988) (citation omitted).

59. William L. Andreen, *An Introduction to Federal Administrative Law Part I: The Exercise of Administrative Power and Judicial Review*, 50 ALA. LAW. 322, 325 (1989) (“Informal adjudication . . . describes all agency decisions not encompassed by rulemaking or formal adjudication. It often includes the processing of applications and claims, tests and inspections, advice, and similar routine decisions. . . . Due to the wide variety of informal administrative decisions, the APA establishes no procedural framework for informal adjudication.”).

60. If an agency wishes to create policy through notice-and-comment rulemaking, the agency must provide a public notice of the proposed rule and “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.” 5 U.S.C. § 553(a)–(c) (2012). After consideration of the public’s input, the agency will issue the rule. *Id.* § 553(c). The agency is not bound to follow the public’s considerations, but the new rules must include “a concise general statement of their basis and purpose.” *Id.*

61. See *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 238–41 (1973) (discussing the “hearing” requirement of the Interstate Commerce Act).

62. *Christensen v. Harris Cty.*, 529 U.S. 576 (2000).

63. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

64. *Barnhart v. Walton*, 535 U.S. 212 (2002).

65. *Christensen*, 529 U.S. at 580–81, 587.

66. *Id.* at 587.

67. *Id.*

agency interpretation does not warrant *Chevron* deference, courts are nonetheless able to afford varying degrees of deference to an administrative interpretation depending upon the *Skidmore* factors.

Following *Christensen*, the Supreme Court decided *Mead*, which affirmed *Christensen*'s dual-approach to agency deference<sup>68</sup> and created "*Chevron* Step Zero."<sup>69</sup> In *Mead*, the Supreme Court held that *Chevron* deference is due "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."<sup>70</sup> The Court explained that the clearest indication that Congress delegated rulemaking authority is "congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed."<sup>71</sup> Additionally, Congress may indicate its intent by prescribing "a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."<sup>72</sup> In sum, if Congress gave an agency the power to use formal procedures to issue rules that carry the force of law, and the interpretation in question stems from such formal procedures, then *Chevron* requires that the court defer to the agency's reasonable interpretation.

The next year, Justice Breyer authored *Barnhart v. Walton*, which muddied the waters of *Mead*'s seemingly bold distinction between the appropriate uses of *Skidmore* and *Chevron* deference.<sup>73</sup> The Court interpreted *Mead* to hold that whether an agency interpretation should be awarded *Chevron* deference depends "upon the interpretive method used and the nature of the question at issue" rather than an agency's procedure alone.<sup>74</sup> When holding that the Social Security Administration's interpretation of "impairment" was worthy of *Chevron* deference, Justice Breyer opined that:

[T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens

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68. *Mead*, 533 U.S. at 228–29.

69. Prior to *Mead*, *Chevron*'s two-part inquiry satisfied the deference analysis. However, *Mead* introduced a pre-*Chevron* inquiry: whether the agency action has the sufficient force of law, or requisite formal procedures, to warrant a *Chevron* analysis. *Id.* at 231–34. This new step in the analysis is commonly referred to as "*Chevron* Step Zero." See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 211–12 (2006).

70. *Mead*, 533 U.S. at 226–27.

71. *Id.* at 229.

72. *Id.* at 230.

73. See generally *Barnhart v. Walton*, 535 U.S. 212 (2002).

74. *Id.* at 222.

through which to view the legality of the Agency interpretation here at issue.<sup>75</sup>

Following *Barnhart*, courts must still engage in “*Chevron Step Zero*” and determine what interpretive power Congress intended the agency to exercise. Yet, the ability to act with the force of law is now a sufficient, rather than necessary, condition of affording *Chevron* deference to an agency interpretation.

### III. GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE

To wholly understand how and why the courts should defer to the EEOC’s interpretation of Title VII and incorporate gender identity and sexual orientation within the statute, it is imperative to have an accurate understanding of the experiential realities of LGBT employees in the modern workplace. This Part gives an overview of the current pervasiveness of gender identity- and sexual orientation-based workplace discrimination, discusses which states have attempted to rectify this discrimination through state-wide anti-discrimination statutes, and explores the effect of the recent Supreme Court opinion, *Obergefell v. Hodges*.

#### A. THE CURRENT CLIMATE OF LGBT WORKPLACE DISCRIMINATION

Scholars estimate that more than eight million individuals within the current workforce identify as gay, lesbian, bisexual, or transgender.<sup>76</sup> In 2008, the University of Chicago’s National Opinion Research Center conducted the “General Social Survey.”<sup>77</sup> The survey found that 42% of gay, lesbian, or bisexual respondents “experienced at least one form of employment discrimination because of their sexual orientation at some point in their lives and 27% had experienced [employment] discrimination” within the five years preceding the survey.<sup>78</sup> Of the respondents who were open about their sexuality at work, “56% had experienced at least one form of employment discrimination . . . at some point in their lives, and 38% had experienced [such] discrimination within the five years” preceding the survey.<sup>79</sup> Comparatively, of the gay, lesbian, or bisexual respondents who were not open about their sexuality at work, only ten percent reported experiencing

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75. *Id.*

76. Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 719 (2012).

77. BRAD SEARS & CHRISTY MALLORY, DOCUMENTED EVIDENCE OF EMPLOYMENT DISCRIMINATION & ITS EFFECTS ON LGBT PEOPLE 4 (2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-2011.pdf>.

78. *Id.*

79. *Id.*

employment discrimination within the five years preceding the survey.<sup>80</sup> Additionally, 58% of gay, lesbian, or bisexual respondents in a 2009 survey “reported hearing derogatory comments about sexual orientation and gender identity in their workplaces.”<sup>81</sup>

“Harassment was the most [widely] reported form of sexual orientation-based discrimination by [employees] who were open” with their sexuality at work.<sup>82</sup> Thirty-five percent of openly gay, lesbian, or bisexual respondents reported experiencing workplace harassment within their lifetime, and 27% reported experiencing harassment within the five years preceding the survey.<sup>83</sup> Further, 16% of openly gay, lesbian, or bisexual respondents reported having lost a job due to their sexual orientation within their lifetimes, and seven percent reported losing a job within the five years preceding the survey.<sup>84</sup> Finally, other studies have shown that up to 41% of gay, lesbian, or bisexual employees have experienced verbal or physical abuse in the workplace or have had their workspaces vandalized.<sup>85</sup>

In 2011, the National Center for Transgender Equality and the National Gay and Lesbian Task Force published the findings of the largest, most comprehensive transgender discrimination survey ever conducted.<sup>86</sup> The survey produced devastating statistics surrounding transgender discrimination in the workplace. First, transgender individuals experience “[d]ouble the rate of unemployment . . . of the general population,” while transgender people of color are unemployed at “up to four times” the rate of the general population.<sup>87</sup> Respondents who had been terminated due to gender-identity discrimination are four times more likely to experience homelessness than respondents who had not.<sup>88</sup> An astounding 90% of transgender individuals experience harassment in the workplace—almost triple the rate reported by the gay, lesbian, and bisexual survey.<sup>89</sup> Approximately 47% of respondents indicated they had experienced an adverse employment action—such as losing their job or not being hired—

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80. *Id.*

81. *Id.* at 5.

82. *Id.* at 4.

83. *Id.*

84. *Id.*

85. M.V. Lee Badgett et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination 1998–2008*, 84 CHL-KENT L. REV. 559, 559–60 (2009).

86. See generally JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2011), [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf). The study included 6,450 transgender or gender nonconforming individuals “from all 50 states, the District of Columbia, Puerto Rico, Guam and the U.S. Virgin Islands.” *Id.* at 3.

87. *Id.* at 51.

88. *Id.* at 66.

89. *Id.* at 56. Types of reported harassment ranged from deliberate and repeated misuse of pronouns, denial of access to correct restrooms, being asked intrusive or inappropriate questions about their anatomy, physical assault, and sexual assault. *Id.* at 56–62.

because of their status as transgender.<sup>90</sup> Further, of the transgender individuals fired due to biases, 16% reported being “compelled to engage in underground employment”—11% reported resorting to sex work.<sup>91</sup> Perhaps the most devastating finding revealed that 41% of the transgender respondents indicated having “attempt[ed] suicide[,]” compared to 1.6% of the general population.”<sup>92</sup> Indeed, 55% of transgender respondents who had lost a job due to gender identity discrimination reported having attempted suicide.<sup>93</sup>

### B. STATE ANTI-DISCRIMINATION STATUTES

As of 2016, 34 states and Washington, D.C. have taken some form of statewide action aimed at eradicating workplace discrimination on the bases of gender identity or sexual orientation.<sup>94</sup> However, only 22 states and Washington, D.C. provide a private right of action for victims of workplace gender identity or sexual orientation discrimination.<sup>95</sup> Arizona, for example, took action to eradicate workplace discrimination but failed to provide legal recourse to victims of that discrimination. Former Arizona Governor Janet Napolitano issued Executive Order 2003-33, which prohibited state agencies from discriminating against public employees on the basis of sexual orientation.<sup>96</sup> However, the Executive Order did not allow victims of alleged discrimination recourse to sue the agency in court for damages.<sup>97</sup> Similarly, in 2003 former Michigan Governor Jennifer Granholm issued Executive

90. *Id.* at 53. Male-to-female respondents experienced “job loss, denial of promotion and discrimination in hiring” at a much higher rate than female-to-male respondents. *Id.* at 56. People of color generally reported the highest levels of harassment and abuse. *Id.*

91. *Id.* at 51. Underground employment usually refers to sex work or drug trafficking. Black and Latino transgender respondents had the highest rates of underground work, and male-to-female transgender respondents indicated slightly higher rates of underground work than female-to-male. *Id.* at 64.

92. *Id.* at 72.

93. *Id.* Additionally, 60% of respondents who had done sex work reported having attempted suicide—a rate “more than 37 times [greater] than the general population.” *Id.* at 65.

94. See HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAWS & POLICIES (2016), <http://www.hrc.org/map/pdf?tid=15>; see also JEROME HUNT, CTR. FOR AM. PROGRESS ACTION FUND, A STATE-BY-STATE EXAMINATION OF NONDISCRIMINATION LAWS AND POLICIES 7 (2012), [https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state\\_nondiscrimination.pdf](https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf).

95. HUMAN RIGHTS CAMPAIGN, *supra* note 94 (identifying “California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, [and] Washington” as states that provide legal recourse for both sexual orientation and gender identity discrimination, while Wisconsin and New Hampshire only provide legal recourse for sexual orientation discrimination).

96. Ariz. Exec. Order No. 2003-22 (June 21, 2003), <http://azmemory.azlibrary.gov/cdm/ref/collection/execorders/id/430>.

97. *Id.* (giving “notice to all state employees that acts of sexual harassment or other harassment based on sexual orientation shall be a cause for discipline, up to and including termination of employment with the State”).

Directive No. 2003-24, which barred any “department, board, commission, or other agency subject to supervision by the Governor,” from discriminating on the basis of sexual orientation.<sup>98</sup> Further, some states have taken affirmative steps to deny gay, lesbian, bisexual and transgender employees access to any type of legal recourse. For example, in 2016, North Carolina passed the Public Facilities Privacy & Security Act, or HB2, which, *inter alia*, nullified all local employment discrimination ordinances that enumerated gender identity or sexual orientation as protected classes.<sup>99</sup>

### C. THE OBERGEFELL EXIGENCY

Although many celebrated the *Obergefell* decision as an enormous step toward LGBT equality, sanctioning same-sex marriage may have increased the vulnerabilities of some LGBT employees. In 2013, the year the Supreme Court invalidated the Defense of Marriage Act, approximately 20% of same-sex couples were married.<sup>100</sup> By October of 2015, four months after the *Obergefell* decision, approximately 45% of same-sex couples reported being married.<sup>101</sup> It stands to reason that now, more than ever, same-sex couples will be seeking spousal benefits—thereby constructively notifying their employers of their sexual orientation and potentially increasing their vulnerability to adverse employment actions. Therefore, it is imperative that gender identity- and sexual orientation-based discrimination become cognizable under Title VII as quickly as possible to prevent a growing number of LGBT employees from facing the regrettable choice: be married or be employed?

## IV. THE DECISIONS

In 2012 and 2015, two plaintiffs wished to pursue workplace discrimination claims against their employer, the federal government, and filed equal employment claims. This Part discusses the facts surrounding these landmark cases and the EEOC’s reasoning when it decided each case. Part IV.A explores Mia Macy’s groundbreaking case, which prompted the EEOC to extend Title VII’s sex discrimination doctrine to transgender employees. Part IV.B explains the facts surrounding David Baldwin and the EEOC’s

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98. Mich. Exec. Directive No. 2003-24 (Dec. 23, 2003), [http://www.michigan.gov/formergovernors/0,4584,7-212-57648\\_36898-83560-,00.html](http://www.michigan.gov/formergovernors/0,4584,7-212-57648_36898-83560-,00.html). Governor Granholm issued a second Executive Directive in 2007 to bar gender identity discrimination against state employees. Mich. Exec. Directive No. 2007-24 (Nov. 21, 2007), [http://www.michigan.gov/formergovernors/0,4584,7-212-57648\\_36898-180697-,00.html](http://www.michigan.gov/formergovernors/0,4584,7-212-57648_36898-180697-,00.html).

99. Public Facilities Privacy & Security Act, H.B. 2, 2016 Gen. Assemb., 2d Extra Sess. (N.C. 2016) (codified as amended at N.C. GEN. STAT. § 143-422.2 (2016)).

100. GARY J. GATES & TAYLOR N. T. BROWN, THE WILLIAMS INST., MARRIAGE AND SAME-SEX COUPLES AFTER *OBERGEFELL* 1, 3 (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Marriage-and-Same-sex-Couples-after-Obergefell-November-2015.pdf>.

101. *Id.* at 1. Indeed, 96,000 same-sex couples got married within four months of the *Obergefell* ruling. *Id.* at 3.

reasoning when it incorporated sexual orientation within Title VII's sex discrimination jurisprudence.

A. *MACY V. HOLDER* (2012)

In 2010, Mia Macy, a transgender woman, was presenting as male and working as a police detective in Phoenix, Arizona.<sup>102</sup> After expressing interest in relocating to San Francisco, in December of that year, she was informed of an open position for which she was qualified within the Bureau of Alcohol, Tobacco, Firearms and Explosives' ("ATF") Walnut Creek laboratory.<sup>103</sup> She discussed the position over the phone with the lab's director and he informed her that, pending a successful background check, she would be hired for the position.<sup>104</sup> In March of 2011, Macy informed the outside contractor performing her background check that she was in the process of transitioning from male to female and that she wanted the contractor to notify ATF.<sup>105</sup> On April 3, Macy received confirmation that ATF had been notified of her name and gender change.<sup>106</sup> Five days later, the outside contractor informed Macy that the position with the ATF was no longer available due to federal budget cuts.<sup>107</sup> On May 10, Macy contacted an EEO counselor<sup>108</sup> about her concerns with the application.<sup>109</sup> The counselor informed her that the position had not been eliminated, but rather ATF had hired another candidate for the position.<sup>110</sup>

In June of 2011, Macy filed a formal EEO sex-discrimination complaint against ATF, specifically alleging that she was discriminated against due to her "sex, gender identity (transgender woman) and on the basis of sex stereotyping."<sup>111</sup> ATF informed Macy that her claim would be transferred to the Department of Justice because the EEO did not adjudicate claims of gender identity discrimination.<sup>112</sup> When Macy challenged the accuracy of

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102. *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, at \*1 (E.E.O.C. Apr. 20, 2012).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. An EEO Counselor is an employee within a government agency tasked with overseeing complaints of workplace discrimination within that government agency. Public employees, unlike private employees, do not bring claims of workplace discrimination directly to the EEOC. Instead, public employees bring claims to the internal EEO Counselor at the agency where they either work or applied to work. *Overview of Federal Sector EEO Complaint Process*, U.S. EQUAL EMP'T. OPPORTUNITY COMM'N, [https://www.eeoc.gov/federal/fed\\_employees/complaint\\_overview.cfm](https://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm) (last visited Jan. 1, 2017).

109. *Macy*, 2012 WL 1435995, at \*2.

110. *Id.*

111. *Id.*

112. *Id.* The Department of Justice utilizes separate systems for adjudicating claims of sex discrimination under Title VII and claims of gender identity discrimination. Unlike Title VII



ATF's letter, ATF offered to adjudicate her sex discrimination claim under Title VII, and her gender identity claim under ATF's "policy and practice."<sup>113</sup>

Macy appealed the ATF's determination, and the EEOC found in favor of Macy, holding that allegations of discrimination on the basis of gender identity are properly adjudicated under Title VII.<sup>114</sup> The agency first considered the relationship between gender and Title VII.<sup>115</sup> Title VII bars covered employers from taking adverse actions against an employee "because of such individual's . . . sex."<sup>116</sup> In *Price Waterhouse v. Hopkins*, the Supreme Court held that sex discrimination encompasses both biological sex and gender stereotyping.<sup>117</sup> The Court opined that "Congress' intent to forbid employers to take *gender* into account in making employment decisions appears on the face of the statute" and that any "employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of *gender*."<sup>118</sup> Therefore, *Price Waterhouse* established that not only biological sex falls within Title VII's protections, but also "the cultural and social aspects associated with masculinity and femininity."<sup>119</sup> Relying on the language of *Price Waterhouse*, the EEOC determined that:

When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment "related to the sex of the victim." This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that "an employer may not take gender into account in making an employment decision."<sup>120</sup>

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claimants, gender identity discrimination claimants cannot "request a hearing before an EEOC Administrative Judge" or seek an appeal of "the final Agency decision to the Commission." *Id.* Additionally, gender identity claimants have far less remedial options than Title VII claimants. *Id.*

113. *Id.* at \*3.

114. *Id.* at \*5.

115. *Id.*

116. *Id.* (emphasis omitted) (quoting 42 U.S.C. § 2000e-2(a)(1), (2) (2012)).

117. *Id.* (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989)).

118. *Id.* at \*5-6 (second emphasis added) (quoting *Price Waterhouse*, 490 U.S. at 239, 250).

119. *Id.* at \*6.

120. *Id.* at \*7 (citations omitted) (quoting *Price Waterhouse*, 490 U.S. at 244).

The EEOC further bolstered its logic by citing several circuit courts that also relied upon *Price Waterhouse* to incorporate gender identity claims within Title VII's sex discrimination prohibition.<sup>121</sup>

The EEOC then discussed Congress's intent when it drafted Title VII and subsequently amended it in 1972.<sup>122</sup> The EEOC noted that, although it was highly unlikely that Congress contemplated discrimination against transgender individuals when drafting Title VII, the Supreme Court in *Oncale v. Sundowner Offshore Services, Inc.* opined that "statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."<sup>123</sup> In *Oncale*, the Court ultimately held that male-on-male sexual harassment was actionable under Title VII, regardless of whether the drafters of Title VII had originally contemplated it.<sup>124</sup>

Next, the EEOC examined the circumstances in which a transgender individual may bring a Title VII claim and clarified that a potential plaintiff is not limited to claims relating to sex stereotyping.<sup>125</sup> Rather, a plaintiff may also show that, for example, an employee was hired when a company believed her to be a man but was no longer willing to hire her when it found out she was now a woman.<sup>126</sup> Because gender influenced the employer's decision, the claim would be viable under Title VII's prohibition against sex discrimination.<sup>127</sup>

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121. *Id.* at \*7–9 (citing *Glenn v. Brumby*, 663 F.3d 1312, 1314–16 (11th Cir. 2011) (affirming the district court's grant of summary judgment in favor of a Title VII plaintiff who was fired by a supervisor who believed she was "a man dressed as a woman and made up as a woman" and found her to be "unsettling" and "unnatural," and holding that "[t]here is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms"); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) ("[D]iscrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against [the plaintiff] in *Price Waterhouse* who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000) (finding that a prison guard's sexual assault on a pre-operative male-to-female transgender prisoner was motivated at least in part by the victim's gender and, because transgender females are "anatomical males whose outward behavior and inward identity [do] not meet social definitions of masculinity," such discrimination is actionable under Title VII pursuant to *Price Waterhouse*)).

122. *Id.* at \*9.

123. *Id.* at \*10 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)).

124. *Oncale*, 523 U.S. at 79.

125. *Macy*, 2012 WL 1435995, at \*10.

126. *Id.*

127. *Id.*

Additionally, the EEOC noted that this type of sex discrimination parallels religious discrimination.<sup>128</sup> The EEOC cited *Schroer v. Billington*, which held that if a woman converts from Christianity to Judaism and is subsequently fired because her boss disapproves of “converts,” she would be protected by Title VII.<sup>129</sup> Similarly, individuals who transition from one sex to another must also fall within the statute’s scope.<sup>130</sup> Finally, the EEOC confirmed that protecting transgender individuals under Title VII would not create a new protected class, but rather would properly extend sex discrimination doctrine to individuals adversely affected by employers who impermissibly take their gender into account when making employment decisions.<sup>131</sup>

B. BALDWIN V. FOXX (2015)

Baldwin, an openly gay man, was working in Miami, Florida, as a Supervisory Air Traffic Control Specialist for the Federal Aviation Administration (“FAA”).<sup>132</sup> In October of 2010, Baldwin applied for, and received, a temporary management position within the FAA.<sup>133</sup> He retained that temporary position for two years.<sup>134</sup> When the FAA sought an employee to act as a permanent manager, Baldwin was not selected for the position.<sup>135</sup>

The FAA asserted that the management position was never filled, so no discriminatory action could have occurred.<sup>136</sup> Conversely, Baldwin maintained that he was not selected for the position because of his sexual orientation.<sup>137</sup> He alleged that his supervisor, who contributed to the applicant selection process, had made numerous degrading comments related to Baldwin’s homosexuality.<sup>138</sup> For example, the supervisor said “[w]e don’t need to hear about that gay stuff,” when Baldwin discussed his recent vacation with his partner.<sup>139</sup> Additionally, the supervisor told Baldwin that he was “a distraction in the radar room” whenever he discussed his male partner.<sup>140</sup> In December of 2012, Baldwin filed a formal EEO complaint with the FAA’s EEO Counselor.<sup>141</sup> The FAA did not reach the merits of the

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128. *Id.* at \*11.

129. *Id.* (citing *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008)).

130. *Id.*

131. *Id.*

132. *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at \*1 (E.E.O.C. July 15, 2015).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at \*2.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at \*1.

complaint because it held that the complaint was not filed within the statutory timeframe.<sup>142</sup> Baldwin appealed this determination to the EEOC, requesting that it review his sexual orientation claim as a violation of Title VII.<sup>143</sup>

The EEOC found in favor of Baldwin, holding that claims of sexual orientation discrimination should be adjudicated under Title VII.<sup>144</sup> According to the EEOC, the proper Title VII inquiry is “whether the agency has ‘relied on sex-based considerations’ or ‘take[n] gender into account’ when taking the challenged employment action,” rather than whether the statute includes the phrase “sexual orientation.”<sup>145</sup> The EEOC then held that, because “sexual orientation is inherently a ‘sex-based consideration,’ . . . an allegation of discrimination based on sexual orientation is necessarily an allegation . . . that the agency took his or her sex into account.”<sup>146</sup>

The EEOC supported its conclusion that sexual orientation is intrinsically linked to sex with three rationales. First, sexual orientation discrimination “necessarily entails treating an employee less favorably because of the employee’s sex.”<sup>147</sup> If a male employee is discriminated against because he is married to a man, yet female employees who are similarly married to men are not subject to discrimination, then of course the employer has impermissibly considered the sex of the employee.<sup>148</sup>

Second, sexual-orientation discrimination is a form of associational discrimination.<sup>149</sup> It has long been held that discrimination on the basis of having a relationship or being friends with an individual of a different race is actionable under Title VII.<sup>150</sup> Additionally, courts have consistently held that the doctrines of race and sex discrimination are treated identically under Title VII.<sup>151</sup> Therefore, if taking an adverse employment action against an

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142. *Id.* at \*2.

143. *Id.* at \*1.

144. *Id.* at \*4–5. The Commission first held that the issue of timeliness is resolved by assessing when Baldwin “*reasonably* should have first suspected discrimination.” *Id.* at \*4. Because Baldwin only learned that he was denied the position within 45 days of filing his formal EEO complaint, his complaint was timely. *Id.* This finding permitted the Commission to reach the issue of whether sexual orientation discrimination is cognizable under Title VII. *See id.*

145. *Id.* at \*4–5.

146. *Id.* at \*5.

147. *Id.*

148. *Id.* at \*6 (citing *Hall v. BNSF Ry. Co.*, No. C13-2160 RSM, 2014 WL 4719007, at \*2 (W.D. Wash. Sept. 22, 2014)).

149. *Id.*

150. *Id.* (citing *Floyd v. Amite Cty. Sch. Dist.*, 581 F.3d 244, 249 (5th Cir. 2009) (affirming that “Title VII prohibit[s] discrimination against an employee on the basis of a personal relationship between the employee and a person of a different race.”)); *Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008) (holding “that an employer may violate Title VII if it takes action against an employee because of the employee’s association with a person of another race.”).

151. *Id.* at \*7 (“[T]he same standards apply to both race-based and sex-based hostile environment claims.” (citing *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 69 n.6 (2d Cir. 2000))). The EEOC also cited to *Price Waterhouse v. Hopkins*, which noted that Title VII

individual because of a relationship with a member of another race necessarily involves impermissibly considering the employee's race, then Title VII must also prohibit employers from taking adverse employment actions against an individual on the basis of a relationship with a member of the same sex.<sup>152</sup>

Finally, discrimination on the basis of sexual orientation inherently consists of discrimination on the basis of gender stereotypes.<sup>153</sup> Sexual orientation discrimination often involves "assumptions about overt masculine or feminine behavior."<sup>154</sup> For example, a gay male employee will often be the subject of discrimination because he does not conform to what others believe to be the male stereotype—that is, he does not conform to the stereotype that men should date women.<sup>155</sup> Because the Supreme Court in *Price Waterhouse* expressly proscribed discrimination on the basis of nonconformance with gender stereotypes, Title VII must also prohibit discrimination on the basis of not conforming to masculine or feminine stereotypes—in other words, not conforming to stereotypes that assume individuals should only be attracted to the opposite sex must also be prohibited under Title VII.<sup>156</sup>

The EEOC then addressed three rationales that courts have provided when declining to apply Title VII to sexual orientation discrimination. First, some courts have reasoned that Title VII cannot protect sexual orientation because Congress did not contemplate sexual orientation when drafting the statute in 1964.<sup>157</sup> The EEOC countered this logic with the Supreme Court's precedent in *Oncale*—also relied upon in *Macy*.<sup>158</sup> Further, "[n]othing in the text of Title VII" indicates congressional intent to limit these benefits to heterosexual employees.<sup>159</sup> Therefore, if the courts are free to enforce statutory prohibitions beyond those initially contemplated by the drafters and

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"on its face treats each of the enumerated categories exactly the same. By the same token, our specific references to gender throughout this opinion, and the principles we announce, apply with equal force to discrimination based on race, religion, or national origin." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 n.9 (1989).

152. *Fox*, 2015 WL 4397641, at \*7.

153. *Id.*

154. *Id.*

155. *See id.* at \*8 ("Plaintiff has alleged that he is a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles, that his status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men under [his supervisor's] supervision or at the LOC, and that his orientation as homosexual had removed him from [his supervisor's] preconceived definition of male." (quoting *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014)).

156. *See id.*

157. *Id.* at \*9 (citing *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329 (9th Cir. 1979) (stating that "Congress had only the traditional notions of 'sex' in mind" when passing Title VII, and therefore non-traditional notions such as sexual orientation or preference were not included).

158. *See supra* text accompanying notes 122–23.

159. *Fox*, 2015 WL 4397641, at \*9 (citing *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1222 (D. Or. 2002)).

there is no express statutory language limiting the statute to heterosexual individuals, then courts and the EEOC are free to conclude that sexual orientation discrimination is actionable sex discrimination under Title VII.

Second, it is irrelevant that Congress has previously debated, yet failed to pass, legislation that would expressly proscribe sexual orientation discrimination.<sup>160</sup> The Supreme Court foreclosed this argument when it held in 1990 that “[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.”<sup>161</sup> Thus, congressional inaction is not a valid indication of whether sex discrimination encompasses sexual orientation.<sup>162</sup>

Finally, despite some courts’ concerns, the EEOC confirmed that incorporating sexual orientation within Title VII’s sex discrimination category would not create a new protected class of persons.<sup>163</sup> The EEOC argued that when courts first prohibited discrimination on the basis of association with another race, they did not create a new class of “people in interracial relationships.”<sup>164</sup> Further, when the Supreme Court first barred discrimination on the basis of gender stereotypes, “it did not . . . create a[n additional] protected class of ‘masculine women.’”<sup>165</sup> Similarly, recognizing that discrimination on the basis of sexual orientation is discrimination on the basis of sex does not create a new protected class of “non-heterosexual individuals.” Rather, it appropriately applies Title VII to another situation of impermissible consideration of an employee’s sex.

## V. THE CASE FOR DEFERENCE

The EEOC’s decisions in *Macy* and *Foxx* provide a vital lifeline to the struggling LGBT workforce. When congressional inaction, the *Obergefell* exigency, and the well-crafted reasoning supporting both *Macy* and *Foxx* are viewed as a whole, the judicial system becomes the clear route for achieving federal workplace anti-discrimination protection for LGBT employees. When presented with plaintiffs who allege gender identity- or sexual orientation-based discrimination under Title VII, courts should defer to the EEOC’s interpretation of “sex” and thereby find the claims cognizable. This Part explores the levels of deference that courts are permitted to—and should—award the EEOC’s interpretations. Part V.A explores the lack of deference

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160. *See id.* (“Congress has repeatedly rejected legislation that would extend Title VII to cover sexual orientation.” (quoting *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001))).

161. *Id.* (alteration in original) (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)).

162. *See id.*

163. *See id.*

164. *Id.*

165. *Id.*

historically awarded to the EEOC. Part V.B argues that *Macy* and *Foxx* are entitled to *Chevron* deference. Finally, Part V.C posits that if courts decline to extend *Chevron* deference, then *Macy* and *Foxx*'s holdings should nonetheless be awarded *Skidmore* deference.

#### A. THE EEOC'S HISTORY OF LESSER DEFERENCE

Although Congress specifically tasked the EEOC with the responsibility of presiding over all federal efforts to eliminate workplace discrimination, the Supreme Court has been remarkably inconsistent with its respect towards the agency.<sup>166</sup> When interpreting workplace discrimination statutes, the Supreme Court has historically opted to “chart its own course” rather than defer to the EEOC's expertise.<sup>167</sup> Scholars have proffered several theories as to why the Supreme Court feels less compelled to defer to the EEOC's interpretations compared to other agencies.<sup>168</sup> The most widely accepted theory asserts that the Supreme Court believes discrimination is an issue of common knowledge, as opposed to the more scientific or technical regulations promulgated by, say, the Environmental Protection Agency.<sup>169</sup> Accordingly, the Supreme Court does not feel the need to defer to an agency for expertise when ruling on discrimination—it already understands the concept.<sup>170</sup> However, this view of discrimination is myopic. When amending Title VII, Congress understood the complexities of workplace discrimination.<sup>171</sup> The Senate Committee Report explained that “[e]mployment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of ‘systems’ and ‘effects’ rather than simply intentional wrongs . . . .”<sup>172</sup> In fact, social psychologists, organizational psychologists, human resource specialists, academics, anthropologists, historians, and economists have studied discrimination and

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166. See Wern, *supra* note 37, at 1549–50 (noting that, between 1964 and 1998, “[t]he [Supreme] Court accepted the EEOC view in 15 of [its accepted] cases[] and rejected the EEOC view in 13 cases. This yields a deference rate of approximately 54%. Compared to the baseline figure of 72%, this number is considerably low. According to these statistics, one could fairly characterize the EEOC as a ‘second class agency,’ at least in the eyes of the Supreme Court.” (footnotes omitted)).

167. Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *FORDHAM L. REV.* 1937, 1937 (2006) (quoting *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 513 (1999) (Stevens, J. dissenting)).

168. They include: (1) the political nature of civil rights statutes, and the political ideologies of the judges, influencing whether to broaden or narrow the availability of civil rights remedies, *id.* at 1959; (2) the Court's own perceived expertise over discrimination stemming from its interpretations of the Equal Protection Clause, *id.* at 1954–55; and (3) previous imperfect actions taken by the EEOC, Wern, *supra* note 37, at 1580 (“A . . . reason why the EEOC has received little deference arises from its own carelessness.”).

169. Hart, *supra* note 167, at 1951.

170. *Id.*

171. *Id.* at 1952.

172. *Id.* (quoting S. Rep. No. 92-415, at 5 (1971)).

its permutations.<sup>173</sup> The nature of workplace discrimination is constantly changing. The EEOC is uniquely qualified to identify and record new issues and trends within discrimination claims.<sup>174</sup> Therefore, not only do employment discrimination determinations need expertise, but the EEOC is uniquely equipped to provide that expertise, as it is the federal government's sole anti-discrimination agency.<sup>175</sup>

## B. AWARDING CHEVRON DEFERENCE TO MACY AND FOXF

### 1. *Chevron* Step Zero: The Force of Law

When courts assess whether to defer to an agency interpretation under *Chevron*, they begin with *Chevron* Step Zero: whether the agency action carries the force of law. Congress vested the EEOC with the authority to “issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under [Title VII].”<sup>176</sup> When the EEOC issues a rule or an order, all federal agencies are bound by the new rule or order.<sup>177</sup> Further, the Supreme Court in *Mead* opined that if Congress delegated the ability to conduct formal procedures to the agency, and the agency interpretation resulted from such formal procedures, then the interpretation likely carries the force of law.<sup>178</sup> The decisions in both *Macy* and *Foxf* were the product of formal administrative adjudications.<sup>179</sup> Therefore, pursuant to the language of *Christensen* and *Mead*, the holdings of *Macy* and *Foxf* sufficiently carry the force of law to satisfy the initial inquiry and warrant proceeding with a traditional *Chevron* deference analysis.

### 2. *Chevron* Step One: Statutory Ambiguity

The Court in *Chevron* announced that when a court is reviewing an agency's interpretation of the statute it is tasked with administering, the court must first resolve “whether Congress has directly spoken to the precise question at issue” or whether the statute is ambiguous.<sup>180</sup> Ascertaining whether the statute is ambiguous entails not only that the court determine the

173. *Id.* at 1952–53.

174. *See id.* at 1954.

175. *Id.*; see 42 U.S.C. § 2000e-4(e) (2012) (empowering the Commission to produce reports to advise the federal government “on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable”).

176. 42 U.S.C. § 2000e-16(b).

177. *See supra* notes 34–37 and accompanying text.

178. *See* United States v. *Mead Corp.*, 533 U.S. 218, 229 (2001).

179. *See* Baldwin v. *Foxf*, Appeal No. 0120133080, 2015 WL 4397641, at \*1 (E.E.O.C. July 15, 2015); *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, at \*1 (E.E.O.C. Apr. 20, 2012); see also Taylor Alyse Pack Ellis, Comment, *Why the EEOC Got It Right in Macy v. Holder: The Argument for Transgender Inclusion in Title VII Interpretation*, 16 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 375, 395 (2013).

180. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).



definition of a term or phrase within a statute, but also that the court assess whether Congress either explicitly or implicitly “left a gap for the agency to fill.”<sup>181</sup>

The term “sex” within Title VII is clearly ambiguous. The plain language of the statute reads: “[t]he terms ‘because of sex’ or ‘on the basis of sex’ include, *but are not limited to*, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions . . . .”<sup>182</sup> The express intent of the drafters indicates that the statutorily included definitions of sex are a non-exhaustive list of characteristics that may be encompassed within “sex” discrimination. Further, the Supreme Court has already exhibited its understanding of the malleability of the term “sex” by broadening the definition to include all accounts of “sex stereotyping” in *Price Waterhouse*.<sup>183</sup> Moreover, the definition of “sex” has evolved significantly over time, evincing the ultimate ambiguity of the term.<sup>184</sup> The second prong of the ambiguity inquiry—whether Congress intended the EEOC specifically to resolve textual ambiguities within the statute—is a more difficult question. Because Congress declined to extend express policy-making authority to the agency, the EEOC must demonstrate that Congress nonetheless implicitly delegated it the authority to interpret Title VII.<sup>185</sup>

Three reasons support the conclusion that Congress intended the EEOC to interpret terms within Title VII. First, Congress tasked the EEOC with receiving all charges of discrimination prior to the initiation of any private litigation.<sup>186</sup> Congress intended for the EEOC to facilitate early resolutions of disputes through administrative procedures, rather than resolving each dispute with private litigation.<sup>187</sup> However, for the EEOC to resolve a dispute, it must be able to authoritatively interpret Title VII. If the EEOC’s interpretations of Title VII “are without force, the conciliation process

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181. *Id.* at 843–44.

182. 42 U.S.C. § 2000e(k) (2012) (emphasis added).

183. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

184. See generally Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What Is the “Plain Meaning” of “Sex” in Title VII of the Civil Rights Act of 1964?*, 18 TEMP. POL. & C.R. L. REV. 573, 597–616 (2009) (providing an in-depth analysis of the evolution of the term “sex” throughout history and the law).

185. See Hart, *supra* note 167, at 1940 (explaining that the Supreme Court in *Chevron* presumed an agency had interpretive authority if Congress granted the agency policymaking authority).

186. 42 U.S.C. § 2000e-5(b) (“Whenever a charge is filed by or on behalf of a person claiming to be aggrieved . . . the Commission shall serve a notice of the charge . . . and shall make an investigation thereof.”).

187. *Id.* (“If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”).

becomes perfunctory until the courts resolve the statutory issue.”<sup>188</sup> Therefore, because Congress created the administrative exhaustion requirement,<sup>189</sup> and did not intend for that requirement to be meaningless, Congress must have intended for the Commission’s interpretations of Title VII to carry weight.

Second, granting the EEOC the power to interpret Title VII furthers one of the central tenets of administrative law: promoting uniformity.<sup>190</sup> Rather than having each district and circuit court attempt to analyze the definition of “sex” or “race”—which would result in inconsistent protections for employees depending on their location—granting the EEOC interpretive authority facilitates the application of a uniform interpretation to all plaintiffs across the country.

Finally, granting interpretive authority to the EEOC is consistent with the goal of relying upon administrative expertise when interpreting complex subject matter.<sup>191</sup> In his *Chevron* opinion, Justice Stevens noted that Congress tasked the EPA to “implement[] policy decisions in a technical and complex arena.”<sup>192</sup> Because “[j]udges are not experts in the field,” administrative agencies must be given room to interpret and implement policies pursuant to Congressional delegation.<sup>193</sup> Indeed, “courts [routinely] rely on agencies’ expertise to anticipate the effects of the courts’ interpretations on the regulatory scheme as a whole.”<sup>194</sup> Thus, granting the EEOC the authority to interpret the complicated and dynamic phenomenon of workplace discrimination is wholly consistent with deference principles.

In sum, because “sex” is ambiguous and Congress implicitly granted the EEOC interpretive authority to enforce Title VII, the Court must defer to the EEOC’s interpretation of “sex discrimination” in both *Macy* and *Fox*—so long as the EEOC’s interpretations are “permissible construction[s] of the statute.”<sup>195</sup>

### 3. *Chevron* Step Two: A Permissible Construction

The Court in *Chevron* was clear that an agency’s challenged interpretation need not be the best—or even what the Court believes the correct

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188. Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency’s Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 96 (1995).

189. For a discussion of administrative exhaustion and its rationales, see Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289, 1307–10 (1997).

190. Clark Bye, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron’s Step Two*, 2 ADMIN. L.J. 255, 257 (1988).

191. See *supra* Part V.A.

192. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984).

193. *Id.* at 865.

194. Criddle, *supra* note 45, at 1287.

195. *Chevron*, 467 U.S. at 843.

interpretation should be—to warrant deference.<sup>196</sup> Rather, the agency interpretation need only be “reasonable.”<sup>197</sup> While there is no formal test for assessing reasonableness, this Section analyzes the decisions of *Macy* and *Foxx* under the Court’s traditional hard look analysis utilized in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobiles Insurance Co.*<sup>198</sup> When considering an agency’s determinations under a hard look analysis, the court will ascertain:

[I]f the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>199</sup>

Both *Macy* and *Foxx* pass the *State Farm* hard look analysis. First, the EEOC in *Macy* and *Foxx* did not rely on any factors that Congress did not, or would not, intend it to consider; both opinions rely almost exclusively on case law.<sup>200</sup> Second, the EEOC did not fail to address any critical aspect of the problem presented. On the contrary, the EEOC in both decisions squarely addressed the prevailing lower courts’ counterarguments when adjudicating each case.<sup>201</sup> Third, the EEOC’s explanations in each decision did not run counter to the evidence in front of the agency, as each case’s conclusions were adequately supported by relevant and persuasive case law.<sup>202</sup> Finally, the EEOC’s conclusions were clearly not so implausible that no court could understand its reasoning. The EEOC bolstered each of its conclusions with significant case law and a well-supported analysis.<sup>203</sup> In sum, even under the more stringent hard look approach, the EEOC’s interpretations were reasonable and therefore deserving of deference.

### C. AWARDING SKIDMORE DEFERENCE TO MACY AND FOXX

Should a court find that the EEOC was not acting pursuant to an express congressional delegation of power, it still may defer to the EEOC’s

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196. *Id.* at 845.

197. *Id.*

198. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Although the hard look analysis is used to review agency actions under the arbitrary and capricious standard, this analysis has since been utilized by courts when applying *Chevron* Step Two.

199. *Id.*

200. *See generally* Baldwin v. Foxx, Appeal No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015); *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

201. *Foxx*, 2015 WL 4397641, at \*8–9 (addressing congressional intent to include gender identity-based discrimination); *Macy*, 2012 WL 1435995, at \*9 (same).

202. *See supra* Part IV.

203. *See supra* Part IV.

interpretation under the *Skidmore* standard. To determine how much weight a given agency interpretation deserves, courts will consider “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”<sup>204</sup>

The EEOC’s interpretations in *Macy* and *Foxx* are sufficiently thorough, cogent, and persuasive such that a court should award the adjudications *Skidmore* deference. First, the thoroughness of the EEOC’s examinations is evident in the length and detail in each opinion.<sup>205</sup> The agency employed all traditional procedural safeguards associated with the formal adjudication process, which ensures that both sides had ample opportunity to present their cases.<sup>206</sup> Second, the EEOC exhibited valid reasoning. It relied upon long-settled Supreme Court case law,<sup>207</sup> drew comparisons within existing Title VII doctrine,<sup>208</sup> and cited preexisting judicial reasoning behind its most significant propositions.<sup>209</sup>

Third, although *Macy* and *Foxx* represent material deviations from previous agency positions, the EEOC proffered sufficiently reasonable explanations for its departure.<sup>210</sup> Under *FCC v. Fox Television Stations, Inc.*, when an agency reverses its previous position on a policy, it must: (1) display an awareness that the new policy deviates from prior policy; (2) establish that the new policy is permissible under the statute; (3) believe the new policy is

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204. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

205. *See generally Foxx*, 2015 WL 4397641; *Macy*, 2012 WL 1435995.

206. In formal procedures, parties are entitled to, among other rights, “present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.” 5 U.S.C. § 556(d) (2012).

207. *Foxx*, 2015 WL 4397641, at \*4–9 (citing numerous longstanding Supreme Court cases, including *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998)); *Macy*, 2012 WL 1435995, at \*5 (drawing support from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

208. *Foxx*, 2015 WL 4397641, at \*6 (comparing sexual orientation discrimination to racial association discrimination); *Macy*, 2012 WL 1435995, at \*11 (comparing gender identity discrimination to religious conversion discrimination).

209. *Foxx*, 2015 WL 4397641, at \*6–9 (citing *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990), to bolster its proposition that congressional inaction lacks persuasive significance; *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 69 n.6 (2d Cir. 2000), to bolster its conclusion that, because Title VII doctrine treats sex and race identically, associational discrimination is actionable under a sex discrimination framework; *Hall v. BNSF Ry. Co.*, No. C13-2160 RSM, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014), to bolster its proposition that sexual orientation discrimination necessarily involves disparate treatment due to one’s sex; *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002), to bolster its proposition that sexual orientation discrimination necessarily invokes stereotypes of defined gender norms); *Macy*, 2012 WL 1435995, at \*7–8 (citing *Price Waterhouse*, 490 U.S. at 244, to bolster its proposition that the employer is prohibited from considering one’s sex when making an employment decision; and *Smith v. City of Salem*, 378 F.3d 566, 574–75 (6th Cir. 2004), to bolster its proposition that gender identity-based discrimination is encompassed within Title VII’s prohibition on sex stereotyping).

210. *See supra* Part IV.

better; and (4) provide good reasons for the new policy.<sup>211</sup> In both *Macy* and *Foxx*, the EEOC clearly knew it was deviating from prior precedent. It spent a significant portion of each opinion establishing that incorporating gender identity and sexual orientation is permissible under Title VII. Through advocating for inclusion, it established its preference for this policy. Finally, the EEOC satisfied the requirement of providing “good reasons” for a new policy by bolstering its conclusions with significant and relevant law.

Overall, the EEOC’s interpretations in *Macy* and *Foxx* “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”<sup>212</sup> Courts reviewing Title VII allegations of gender identity- or sexual orientation-based sex discrimination should afford significant weight to the EEOC’s well-reasoned interpretations in *Macy* and *Foxx*.

## VI. CONCLUSION

LGBT employees across the country are currently suffering from severe and pervasive workplace discrimination. Although some states have attempted to take action to remedy these biases, many private employers lack statutory incentives to prevent harassment or adverse employment actions motivated by gender identity or sexual orientation prejudices. Further, as more same-sex couples marry following the Supreme Court’s decision that it is unconstitutional to withhold the right to marry on the basis of sexual orientation, more employees than ever will be constructively notifying their employers of their sexual orientation. The EEOC’s interpretations of “sex” under Title VII in *Macy* and *Foxx* held that Title VII sex discrimination encompasses workplace discrimination on the bases of gender identity and sexual orientation, respectively. The decisions in *Macy* and *Foxx* should receive *Chevron* deference, as the term “sex” is ambiguous within Title VII, and the EEOC’s interpretations are reasonable. However, if courts decline to extend *Chevron* deference to the interpretations, they should nonetheless grant them *Skidmore* deference, as they were exceptionally well-reasoned and carry the power to persuade. By awarding some degree of deference to the EEOC’s interpretation of “sex,” the judicial system will have a swift, powerful, and constitutionally permissible avenue of providing immediate redress for LGBT victims of workplace discrimination.

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211. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–16 (2009).

212. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).