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**GOOD FOR THE GOOSE BUT NOT FOR THE GANDER:
BIDEN’S PROMISE TO APPOINT A BLACK FEMALE TO THE SUPREME COURT
AND TITLE VII PRINCIPLES**

*by: Michael Conklin**

I. INTRODUCTION

The 2022 retirement of Justice Stephen Breyer and President Joe Biden’s promise to exclude all non-Black females from consideration for his replacement has sparked controversy. Some have praised the decision as essential to ensuring diversity on the Court and point out that there are more than enough qualified Black women to select from.¹ And some believe the decision will result in corporate leaders making similar calls for equity in their own companies.² Others have criticized the decision, expressing a belief that discriminating³ on the basis of race and gender is “not a great start in selecting someone sworn to provide equal justice under the law.”⁴ Even some commentators on the left have criticized Biden’s promise due to how it might “needlessly tokenize[]” the eventual candidate and “doom[] them to racist and sexist skepticism before they even [get] the nod.”⁵ A survey found that over three-fourths of respondents believe Biden should consider all possible nominees.⁶

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¹ Walter Dellinger, *Yes, the Supreme Court ‘Should Look Like the Country*, N.Y. TIMES (Feb. 3, 2022), <https://www.nytimes.com/2022/02/03/opinion/biden-supreme-court-black-woman.html> [https://perma.cc/7FZN-2YUX].

² Marguerite Ward, *Judge Ketanji Brown Jackson’s Supreme Court Nomination Could Push Corporate America into a New Age of Diversity*, BUS. INSIDER, <https://www.businessinsider.com/black-female-supreme-court-nominee-scotus-biden-diversity-corporate-2022-2> (Feb. 25, 2022, 10:16 AM) [https://perma.cc/6MQ7-FZEL].

³ For purposes of accuracy, this Article uses “discrimination” rather than “preference” as Biden did not voice a preference for Black females but, rather, an outright bar against non-Black females.

⁴ The Editors, *Replacing Justice Breyer*, NAT’L REV. (Jan. 26, 2022, 2:33 PM), <https://www.nationalreview.com/2022/01/replacing-justice-breyer/> [https://perma.cc/PG2Z-NL2B].

⁵ Christina Cauterucci, *How Biden’s Vow to Name a Black Woman to the Supreme Court Backfired*, SLATE (Jan. 31, 2022, 6:07 PM), <https://slate.com/news-and-politics/2022/01/biden-scotus-black-woman-nominee.html> [https://perma.cc/5C29-UBUW].

⁶ *Topline & Methodology: ABC News/Ipsos Poll*, IPSOS, <https://www.ipsos.com/sites/default/files/ct/news/documents/2022->

Biden’s promise was initially made at the 2020 Democratic primaries.⁷ It was likely a wise strategic move by then-candidate Biden, as the pledge prompted the loudest cheers of the night at the Democratic debate where it was announced.⁸ It was also a powerful signal to those who doubted Biden’s treatment of Black women after his role in the 1991 Anita Hill hearings.⁹ The pledge may also have been a response to how Democrats underperformed among the Black female demographic in the 2016 presidential election.¹⁰ Indeed, Biden improved among that demographic in 2020.¹¹ Regardless of the practicality of Biden’s pledge, refusing to consider people for a job based solely on their race and gender typically implicates Title VII employment discrimination protections.

Title VII employment discrimination protections do not apply to the position of Supreme Court Justice due to its classification as an employee in the excepted service and not the competitive service.¹² This Article looks beyond that fatal determination to analyze what the result of Title VII principles would be if applicable. This analysis provides valuable insight into the purpose of Title VII protections and the significance of discrimination in one of the highest

01/Topline%20ABC_Ipsos%20Poll%20January%2029%202022.pdf (last visited Feb. 7, 2022) [https://perma.cc/SM5G-SHRJ].

⁷ Ian Millhiser, *Biden Says He’ll Name a Black Woman to the Supreme Court. Here Are Five Names He Could Pick*, VOX, <https://www.vox.com/2020/2/25/21153824/biden-black-woman-supreme-court> (Mar. 15, 2020, 9:12 PM) [https://perma.cc/KW64-EF2H].

⁸ Gillian Brockell, *Joe Biden Is Making a Supreme Court Promise. Ronald Reagan Did, Too.*, WASH. POST (Feb. 26, 2020), <https://www.washingtonpost.com/history/2020/02/26/joe-biden-ronald-reagan-woman-supreme-court/> [https://perma.cc/9QNJ-SPQJ].

⁹ Michael Kranish & Matt Viser, *After the Anita Hill Hearings in 1991, Joe Biden Began a Long Quest to Redeem Himself with Women*, WASH. POST (Aug. 2, 2020), https://www.washingtonpost.com/politics/after-the-anita-hill-hearings-in-1991-joe-biden-began-a-long-quest-to-redeem-himself-with-women/2020/07/31/ee939b8a-9576-11ea-82b4-c8db161ff6e5_story.html [https://perma.cc/S6NT-5SPP].

¹⁰ Eugene Scott, *Attention to Biden’s Earlier Pledge to Nominate a Black Woman to the Supreme Court Increases*, WASH. POST (Sept. 20, 2020), <https://www.washingtonpost.com/politics/2020/09/20/attention-bidens-earlier-pledge-nominate-black-woman-supreme-court-increases/> [https://perma.cc/772H-RBEL].

¹¹ Samantha Schmidt, *The Gender Gap Was Expected to Be Historic. Instead, Women Voted Much as They Always Have.*, WASH. POST (Nov. 6, 2020), <https://www.washingtonpost.com/dc-md-va/2020/11/06/election-2020-gender-gap-women/> [https://perma.cc/CP5Q-CW97] (“[R]oughly 9 in 10 Black women said they voted for Biden”).

¹² See *infra* Part III.

government positions. Part II of this Article provides a brief historical context of Presidents who have either expressed or implied that race or gender was a motivating factor for their Supreme Court nominations. Part III explains why Title VII does not apply to Supreme Court Justices. Part IV evaluates whether Supreme Court Justices are “hired” under Title VII. Part V looks at whether liability under the expansive employment-agency rule is applicable. Part VI examines the difficulty of identifying a harmed party. Part VII considers whether Supreme Court Justices are employees or independent contractors. Part VIII assesses whether gender could qualify as a bona fide occupational qualification. Parts IX and X likewise assess the related issues of whether customer preference or the authenticity exception are applicable. Part XI looks at the overall spirit of Title VII, which creates a heavy burden for those attempting to defend discriminatory hiring practices. Part XII analyzes whether such actions could be allowed under an affirmative action theory. Part XIII transitions away from legal implications and instead considers practical and ethical issues. Part XIV concludes by considering the legal and ethical implications of Title VII protections on other governmental positions.

II. HISTORY

While some have denounced Biden’s promise to make his selection based on race and gender as “unprecedented,”¹³ such criticism is misleading. Modern presidents from both political parties have expressly made Supreme Court nominations based on race, gender, and other factors.

President Franklin Roosevelt nominated eight Justices to the Court, none of whom were Florence Allen, a highly qualified female jurist whom Roosevelt’s wife advocated for.¹⁴ There is

¹³ Jonathan Turley, Opinion, *Biden’s Supreme Court Pledge Is Not Reagan’s nor Trump’s—It’s Unfair*, FOX NEWS (Jan. 27, 2022, 2:00 PM), <https://www.foxnews.com/opinion/biden-supreme-court-reagan-trump-jonathan-turley> [<https://perma.cc/8XQC-Z8G2>].

¹⁴ Beverly B. Cook, *The First Woman Candidate for Supreme Court—Florence E. Allen*, Y.B. 1981 SUP. CT. HIST. SOC’Y 19, 23.

no direct evidence as to whether Roosevelt refused to nominate Allen because of her gender.¹⁵ While Allen was eminently qualified, Roosevelt did have a reputation for nominating Justices based on politics and not judicial experience.¹⁶ Also, Roosevelt did nominate Allen to a federal appellate court—making her the first woman to receive a lifetime federal appellate judicial appointment—perhaps an indication that he had no qualms with female judges.¹⁷

President Dwight Eisenhower indicated that he wanted to select a new Chief Justice based in part on religious grounds when he expressed a desire to restore the “Catholic seat” on the Court.¹⁸ He ultimately nominated William Brennan, a Catholic.¹⁹

Historians point out that President Lyndon Johnson was eager to cement his civil rights legacy by nominating the first Black Justice.²⁰ Johnson stated that Thurgood Marshall had the “peculiar qualifications” of being both an accomplished lawyer and a “negro.”²¹ Johnson also emphasized the importance of “Negro” representation in the justice system and how it would serve as symbolism for the “people of the world.”²² Johnson further described Marshall as a “race man” and a symbol for “negro representation.”²³

President Richard Nixon presents an intriguing dichotomy regarding discriminatory Supreme Court nominations. In a private conversation, he stated, “I don’t think a woman should

¹⁵ *See id.* at 32–33.

¹⁶ *Id.* at 30. Roosevelt even appointed a Justice without a law degree—Stanley Reed. *Id.* at 28.

¹⁷ *Id.* at 19.

¹⁸ RENEE KNAKE JEFFERSON & HANNAH BRENNER JOHNSON, *SHORTLISTED: WOMEN IN THE SHADOWS OF THE SUPREME COURT* 34 (2020).

¹⁹ *Id.*

²⁰ Erin Blakemore, *How Thurgood Marshall Became the First Black U.S. Supreme Court Justice*, NAT’L GEOGRAPHIC (Oct. 2, 2020), <https://www.nationalgeographic.com/history/reference/people/thurgood-marshall-first-black-supreme-court-justice-history/> [<https://perma.cc/PFV2-XVY9>].

²¹ TheLBJLibrary, *LBJ and Thurgood Marshall, 7/7/65, 1.30P.*, YOUTUBE (Sept. 21, 2012), <https://youtu.be/Qovbu8nf53I> [<https://perma.cc/J747-KWW7>].

²² Augusta Dell’Omo, *History Calling: LBJ and Thurgood Marshall on the Telephone*, NOT EVEN PAST (Dec. 7, 2016), <https://notevenpast.org/history-calling-lbj-and-thurgood-marshall-on-the-telephone/> [<https://perma.cc/45ZR-M8FR>].

²³ *Id.*

be in any government job whatever. I mean, I really don't."²⁴ But in this same conversation, he also voiced support for a female Supreme Court nomination to gain female voters in the upcoming election.²⁵ He explained, "I lean to a woman only because, frankly, I think at this time . . . we got to pick up every half a percentage point we can."²⁶ Nixon did have a female candidate on his shortlist for the Supreme Court, but some posit that she was only included to "create[] the appearance of valuing diversity but preserv[ing] the status quo."²⁷

Ronald Reagan's vow to nominate a woman to the Supreme Court was a key part of his successful presidential campaign in 1980.²⁸ Reagan's opponent, the incumbent President Jimmy Carter, voiced opposition to Reagan's pledge, saying that it would be a mistake to promise to nominate any particular kind of American.²⁹

When President George H. W. Bush nominated Clarence Thomas to the Supreme Court in 1991, he was accused of engaging in an affirmative action nomination.³⁰ Bush insisted that race had nothing to do with the decision to nominate Thomas.³¹ When confronted with questions about Thomas's race, Bush responded in a somewhat inconsistent way, claiming that race had nothing to do with his decision and also that Thomas's minority status was a bonus.³² Bush stated,

The fact that he is black and a minority has nothing to do with this sense that he is the best qualified at this time. I kept my word to the American people and to the

²⁴ Adam Clymer, *Book Says Nixon Considered a Woman for Supreme Court*, N.Y. TIMES (Sept. 27, 2001), <https://www.nytimes.com/2001/09/27/us/book-says-nixon-considered-a-woman-for-supreme-court.html> [<https://perma.cc/3QDQ-D5NA>].

²⁵ *Id.*

²⁶ *Id.*

²⁷ JEFFERSON & JOHNSON, *supra* note 18, at 3.

²⁸ Brockell, *supra* note 8.

²⁹ *Id.*

³⁰ Alexander Abad-Santos, *Would Justice Clarence Thomas Overturn the Nomination of Clarence Thomas?*, ATLANTIC (June 25, 2013), <https://www.theatlantic.com/politics/archive/2013/06/would-justice-clarence-thomas-overturn-nomination-clarence-thomas/313910/> [<https://perma.cc/S5ZD-N4UX>].

³¹ See John E. Yang & Sharon LaFraniere, *Bush Picks Thomas for Supreme Court*, WASH. POST (July 2, 1991), <https://www.washingtonpost.com/archive/politics/1991/07/02/bush-picks-thomas-for-supreme-court/943b9fda-e079-405e-974e-14c2d0cd999b/> [<https://perma.cc/CFP8-KGPH>].

³² See *id.*

Senate by picking the best man for the job on the merits. And the fact that he's a minority, so much the better.³³

The fact that Thomas was nominated to replace Thurgood Marshall, the first Black Justice on the Court, lends credence to the explanation that Thomas's race was a contributing factor to his nomination. A Bush administration official even acknowledged that Thomas was chosen because of a "semiconscious sense . . . [that] this was a black man to be replaced."³⁴ Although this official then immediately backed off his statement and instead said, "Strike that. He was the best person."³⁵

Although President Barack Obama's nomination of Sonia Sotomayor—the first Latina Justice—was hailed as "smart base politics,"³⁶ there is no record of her nomination being the result of race or gender.

President Donald Trump promised to nominate a female to fill Ruth Bader Ginsburg's seat on the Supreme Court, which he ultimately did nominating Amy Coney Barrett.³⁷

Finally, when considering discriminatory practices that would potentially be illegal in the private sector, it must also be pointed out that when presidents choose their Supreme Court appointments they likely discriminate based on age as well.³⁸ For example, President Trump's three appointments were aged 48, 49, and 53 when sworn in.³⁹ Considering the importance of

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Jonathan Martin & Mike Allen, *How, Why Obama Picked Sotomayor*, POLITICO, <https://www.politico.com/story/2009/05/how-why-obama-picked-sotomayor-022970> (May 26, 2009, 4:19 PM) [<https://perma.cc/8KED-TGR8>].

³⁷ Maeve Reston, *Trump Vows to Appoint a Woman to Supreme Court as Vacancy Re-Energizes His Political Prospects*, CNN, <https://www.cnn.com/2020/09/20/politics/trump-supreme-court-woman-nominee-2020/index.html> (Sep. 20, 2020, 5:19 PM) [<https://perma.cc/PRL3-J3ML>].

³⁸ Jonathan Chait, *Biden Didn't Invent Affirmative Action for the Supreme Court*, INTELLIGENCER (Jan. 27, 2022), <https://nymag.com/intelligencer/2022/01/biden-supreme-court-breyer-black-woman-qualified-ketanji-brown-jackson.html> [<https://perma.cc/76FX-NBVS>] ("The absurd actuarial logic of lifetime appointments incentivizes both parties to find the youngest possible nominee who can be plausibly sold to the public as having cleared the qualification bar.")

³⁹ Micah Schwartzman & David Fontana, *Trump Picked the Youngest Judges to Sit on the Federal Bench. Your Move, Biden.*, WASH. POST (Feb. 16, 2021), <https://www.washingtonpost.com/outlook/2021/02/16/court-appointments-age-biden-trump-judges-age/> [<https://perma.cc/5PZE-HTZZ>].

experience for the position and the amount of time it takes a judge to rise through the ranks and obtain such experience, it is likely that politicians are willing to make a slight concession in the quality of candidates, in favor of an increased probability of longevity on the Court.⁴⁰

III. EXCEPTED OR COMPETITIVE SERVICE

Title VII provides that only an enumerated list of federal employees “shall be made free from any discrimination based on race, color, religion, sex, or national origin.”⁴¹ This list includes, in relevant part, “those units of the judicial branch of the Federal Government having positions in the competitive service”⁴² The default position for federal employees is that they are classified as in the excepted service.⁴³ If a position is not explicitly classified as in the competitive service or Senior Executive Service, then it is an excepted service position.⁴⁴ Supreme Court Justices are not classified as in the competitive service under 5 U.S.C. § 2102 or anywhere else.⁴⁵ Therefore, they are in the excepted service, which means that Title VII protections do not apply. The rest of this Article intentionally disregards this fact in order to analyze what the results of applying Title VII principles would be if applicable.

IV. ARE SUPREME COURT JUSTICES HIRED?

Title VII of the Civil Rights Act of 1964 states that “[i]t shall be an unlawful employment practice for an employer to fail or refuse to *hire* or to discharge any individual because of such

⁴⁰ See Kristen Bialik & John Gramlich, *Younger Supreme Court Appointees Stay on the Bench Longer, but There Are Plenty of Exceptions*, PEW RSCH. CTR. (Feb. 8, 2017), <https://www.pewresearch.org/fact-tank/2017/02/08/younger-supreme-court-appointees-stay-on-the-bench-longer-but-there-are-plenty-of-exceptions/> [https://perma.cc/C75K-JUV4].

⁴¹ 42 U.S.C. § 2000e-16(a).

⁴² *Id.*

⁴³ 5 U.S.C. § 2103 (“(a) For the purpose of this title, the ‘excepted service’ consists of those civil service positions which are not in the competitive service or the Senior Executive Service. (b) As used in other Acts of Congress, ‘unclassified civil service’ or ‘unclassified service’ means the ‘excepted service.’”).

⁴⁴ *Id.*

⁴⁵ See 5 U.S.C. § 2102.

individual’s race, color, religion, sex, or national origin.”⁴⁶ Sitting Supreme Court Justices are clearly employed by the federal government, but it is unclear who hires them. Voters decide who will be President. The President nominates a candidate to fill a Supreme Court vacancy.⁴⁷ And the Senate holds hearings and votes on whether the Supreme Court nominee is confirmed and ultimately appointed to the Court.⁴⁸ Therefore, the Senate collectively makes the final decision of whether a specific nominee will be appointed to the Supreme Court, but it can only confirm someone the President has nominated. One could argue that the President does not technically “hire” a Supreme Court Justice. But this is ultimately an irrelevant distinction because the President and the Senate, on behalf of the federal government, collectively hire Supreme Court Justices.

The following analogy will help illustrate: Imagine a business with a two-stage hiring process whereby the president of the company selects a candidate and management interviews the candidate and then votes on whether to extend an offer of employment. Further, imagine that the company’s president publicly stated his refusal to select any candidate who was not a Black female. In such a scenario, the company could not defend itself against the inevitable Title VII suit by explaining that the hiring was technically done by management and not by the president who engaged in the discriminatory behavior. Any attempt to bifurcate the role of the President and the Senate in hiring a Supreme Court Justice would be equally ineffective. Title VII prohibits not only intentional discrimination but also practices that have a similar discriminatory effect.⁴⁹

⁴⁶ 42 U.S.C. § 2000e–2(a) (emphasis added).

⁴⁷ *Frequently Asked Questions: General Information*, SUP. CT. U.S., https://www.supremecourt.gov/about/faq_general.aspx [<https://perma.cc/6486-34LY>].

⁴⁸ *Id.*

⁴⁹ *Federal Laws Prohibiting Job Discrimination Questions and Answers*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/fact-sheet/federal-laws-prohibiting-job-discrimination-questions-and-answers> (Nov. 21, 2009) [<https://perma.cc/P5XM-9GJ3>] (“Title VII prohibits not only intentional discrimination, but also practices that have the effect of discriminating against individuals because of their race, color, national origin, religion, or sex.”).

V. EMPLOYMENT AGENCY LIABILITY

Title VII stipulates that:

[I]t shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.⁵⁰

Like many Title VII provisions, the employment agency provision is interpreted broadly to allow for greater protection against discrimination.⁵¹ An employment agency can be liable for discrimination that originated with the employer of the jobs the agency is attempting to fill.⁵² Indeed, an employment agency can be held liable for the discriminatory practices of an employer whose positions it is filling, even if that employer does not have enough employees to be classified as an “employer” under the relevant statute.⁵³

For Title VII purposes, “employment agency” is defined as “any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer.”⁵⁴ Courts have implemented an expansive definition of what constitutes an employment agency.⁵⁵ For example, a court held that a community college truck driver vocational program could be defined as an employment agency for Title VII purposes.⁵⁶

A President is the functional equivalent of an employment agency for such government positions. Indeed, it would not be an exaggeration to describe the President as the ultimate

⁵⁰ 42 U.S.C. § 2000e–2(b).

⁵¹ *Wilborn v. S. Union State Cmty. Coll.*, 720 F. Supp. 2d 1274, 1290–93 (M.D. Ala. 2010).

⁵² *See* 29 C.F.R. § 1604.6(b) (2021).

⁵³ *See* *Brennan v. Root*, No. 2507, 1974 WL 201, at *2 (E.D. N.C. May 21, 1974).

⁵⁴ 42 U.S.C. § 2000e(c).

⁵⁵ *Wilborn*, 720 F. Supp. 2d at 1291.

⁵⁶ *Id.*

employment agency for Supreme Court positions. This is because, with traditional employment agencies, it may be possible for the worker to acquire the job through alternative avenues. But the job of Supreme Court Justice is impossible to acquire without first being nominated by the President. And consistent with the role of an employment agency, a President's Supreme Court nomination entails "not a remote but a highly visible nexus with the creation . . . of direct employment relationships"⁵⁷

VI. DIFFICULTY IDENTIFYING A HARMED PARTY

It would be difficult for any one person to persuasively argue that such discrimination cost him or her a seat on the Supreme Court. Biden is unlikely to state, "If I were considering everyone, I would choose to nominate Kiyoo Matsumoto to the Supreme Court, but because I am excluding non-Black people from consideration, I will instead nominate" Furthermore, anyone who would be considered for the position by the Biden administration would likely not want to incur the negative press that would accompany such an accusation of discrimination.

However, filing a complaint with the Equal Employment Opportunity Commission (EEOC) is not the only way to initiate an investigation into a Title VII violation.⁵⁸ A charge may be filed "by or on behalf of a person claiming to be aggrieved"⁵⁹ But a charge may also be filed by a member of the EEOC.⁶⁰ Furthermore, Title VII provides that the Attorney General may unilaterally bring a cause of action in the absence of a complaint.⁶¹ This brings up the extra-legal, practical consideration regarding the willingness of these entities to pursue such litigation. The Attorney General is appointed by the President and serves at his pleasure.⁶² Therefore, it would be

⁵⁷ Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1342 (D.C. Cir. 1973).

⁵⁸ See 42 U.S.C. § 2000e-5(b).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ 42 U.S.C. § 2000e-6(a).

⁶² 28 U.S.C. § 503.

highly unlikely that the Attorney General would be willing to pursue such litigation. The EEOC would potentially be more amiable to such litigation. Currently, three of the five members that make up the EEOC and its General Counsel are Trump appointees.⁶³

This section also brings up the related issue that lower-court judges likely do not want to involve themselves in ruling on such an issue.⁶⁴ Additionally, the optics involved in ruling against an appointment of the first Black, female Justice would create a strong incentive dissuading judges from such a verdict. Conversely, however, standing up against discrimination even when conducted by the President would send a strong message that the practice will not be tolerated at any level.

VII. EMPLOYEE VERSUS INDEPENDENT CONTRACTOR

Title VII protections apply to employees only; independent contractors are not covered.⁶⁵ The definition of “employee” in Title VII as “any individual employed by an employer”⁶⁶ provides little guidance as it is “completely circular and explains nothing.”⁶⁷ In *Nationwide Mutual Insurance v. Darden*, the Supreme Court created the test used for making the independent contractor or employee determination in the Title VII context.⁶⁸ The test consists of twelve “*Darden* factors,” which mostly revolve around “the hiring party’s right to control the manner and

⁶³ See *The Commission and the General Counsel*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/commission> [<https://perma.cc/22MW-UCR3>].

⁶⁴ Whom the President chooses to nominate for a position on the Supreme Court could be considered a political question and, thus, a nonjusticiable issue outside of the Court’s jurisdiction. See generally *Marbury v. Madison*, 5 U.S. 137, 164–70 (1803) (explaining that “the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience”).

⁶⁵ *Kakides v. King Davis Agency, Inc.*, 283 F. Supp. 2d 411, 413 (D. Mass. 2003).

⁶⁶ 42 U.S.C. § 2000e(f).

⁶⁷ *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318, 323 (1992).

⁶⁸ The *Darden* case involved worker classifications under the Employee Retirement Income Security Act of 1974 (ERISA). *Id.* at 320–21. Because the definition of “employee” in ERISA is the same as in Title VII, “any individual employed by an employer,” courts apply the *Darden* test to worker classifications in the Title VII context. Keiko Rose, *Volunteer Protection under Title VII: Is Remuneration Required?*, 2014 U. CHI. LEGAL F. 605, 612 (2014).

means by which the product is accomplished.”⁶⁹ The twelve factors are skill required, source of the instrumentalities and tools, location of the work, duration of the relationship between the parties, whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party’s discretion over when and how long to work, method of payment, the hired party’s role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, whether the hiring party is in business, provision of employee benefits, and tax treatment of the hired party.⁷⁰

The *Darden* test does not contain a quantifiable scoring rubric for how to arrive at an ultimate classification based on the twelve factors. As the Supreme Court explained, “[there is] no shorthand formula or magic phrase that can be applied to find the answer. [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive.”⁷¹ “The relative weight given each factor may differ depending upon the legal context of the determination. . . . Certain factors may deserve added weight in some contexts”⁷² Regardless, applying the *Darden* factors to the working relationship of Supreme Court Justices produces a clear result that they are properly classified as employees and not independent contractors. While Supreme Court Justices likely have more freedom to determine how they perform their duties than the average employee, there is only one *Darden* factor that does not point to an employee classification. That is “the hired party’s role in hiring and paying assistants” factor.⁷³ Therefore, the position of Supreme Court Justice would not be exempt from Title VII protections based on a theory that Justices are independent contractors rather than employees.

⁶⁹ *Darden*, 503 U.S. at 323.

⁷⁰ *Employer-Employee Relationship Frequently Asked Questions*, U.S. DEP’T LAB., <https://www.dol.gov/agencies/ofccp/faqs/employee-relationship> (Aug. 5, 2014) [<https://perma.cc/88ND-WBHY>].

⁷¹ *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)).

⁷² *Ware v. United States*, 67 F.3d 574, 578 (6th Cir. 1995).

⁷³ *Rose*, *supra* note 68, at 611 (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989)).

VIII. BONA FIDE OCCUPATIONAL QUALIFICATION

Gender discrimination is allowed when it functions as a bona fide occupational qualification (BFOQ) for the job.⁷⁴ Title VII explicitly allows employers to discriminate “in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”⁷⁵ Biden could attempt to argue that having more female perspectives on the Supreme Court is a BFOQ reasonably necessary to the normal operation of the Court.

Such a defense would be challenging because establishing a BFOQ defense is a high burden to meet. Biden would have to show “a high correlation between sex and ability to perform job functions.”⁷⁶ It is not enough to present mere speculation as to how female and male candidates may differ generally.⁷⁷ Furthermore, BFOQs only apply to job-related skills and aptitudes that relate to an employee’s ability to perform the duties of the job.⁷⁸ Biden would be unable to demonstrate that there is something inherent in the male gender that renders them incapable of performing the duties of a Justice.

The history of the Supreme Court would also work against an attempted BFOQ defense. Title VII requires that a BFOQ be “reasonably necessary to the normal operation of [the] particular business.”⁷⁹ Given that over 90% of Supreme Court Justices have been male,⁸⁰ it would be difficult

⁷⁴ 42 U.S.C. § 2000e–2(e).

⁷⁵ *Id.*

⁷⁶ *Breiner v. Nev. Dep’t of Corr.*, 610 F.3d 1202, 1213 (9th Cir. 2010).

⁷⁷ *See id.*

⁷⁸ *See generally* *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 201–06 (1991) (discussing the BFOQ as it applies to sex and pregnancy in the workplace).

⁷⁹ 42 U.S.C. § 2000e–2(e).

⁸⁰ Jessica Campisi & Brandon Griggs, *Of the 115 Supreme Court Justices in US History, All but 7 Have Been White Men*, CNN (March 21, 2022, 8:23 AM), <https://www.cnn.com/2022/03/24/politics/supreme-court-justices-minorities-cec/index.html> [<https://perma.cc/Q6TS-LNNF>].

to demonstrate that the female gender is reasonably necessary to the normal operation of the Supreme Court.

The Supreme Court has explained that the BFOQ is “an extremely narrow exception to the general prohibition of discrimination on the basis of sex.”⁸¹ For example, it was held to be a legitimate BFOQ to consider only males for a janitorial position that involved the cleaning of male restrooms during business hours.⁸² And it was held to be a legitimate BFOQ to only consider female nurses for a position in an obstetrics and gynecology department.⁸³

Rejections of BFOQ defenses further demonstrate their narrow nature. For example, a court rejected a company’s attempt to use the BFOQ exception to discriminate against female applicants for a managerial position.⁸⁴ The company’s unsatisfactory argument was that managers sometimes take male clients to football games and hunting trips and that males are better suited for such tasks.⁸⁵

IX. CUSTOMER PREFERENCE AS BONA FIDE OCCUPATIONAL QUALIFICATION

Biden may attempt to claim that gender is a BFOQ for a Supreme Court nomination because of the important symbolism it would portray and because that is what voters prefer.⁸⁶ Indeed, voters in 2020 listed Supreme Court appointments as their third most important issue.⁸⁷ And these same voters selected Biden as President, the candidate who expressly stated he would nominate a Black woman to the Court. Regardless, such public support is far from the justification

⁸¹ *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

⁸² *Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410, 1413–14, 1423 (N.D. Ill. 1984).

⁸³ *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191, 1195–96 (E.D. Ark. 1981).

⁸⁴ EEOC Decision No. 71-2338, 3 Fair Empl. Prac. Cas. (BNA) 1249 (1971).

⁸⁵ *Id.*

⁸⁶ See, e.g., James D. King & James W. Riddlesperger Jr., *Diversity and Presidential Cabinet Appointments*, 96 Soc. Sci. Q. 93, 93–94 (2015).

⁸⁷ *Election 2020: Voters Are Highly Engaged, but Nearly Half Expect to Have Difficulties Voting*, PEW RSCH. CTR. (Aug. 13, 2020), <https://www.pewresearch.org/politics/2020/08/13/important-issues-in-the-2020-election/> [<https://perma.cc/2U4R-2CAA>].

courts require to allow discrimination based on a customer preference BFOQ. Customer preference is rarely an acceptable justification for discrimination, and in the narrow cases where it is, privacy is almost always involved. In *Olsen v. Marriott International, Inc.*, the court considered a BFOQ defense based on a substantial customer preference for female massage therapists at a spa.⁸⁸ The court held that even this did not rise to the level necessary to justify discrimination against male massage therapists.⁸⁹

Customer preference is also related to the attempted Title VII exception of a “business convenience,”⁹⁰ which similarly would not justify the discrimination in the present case. In *Wilson v. Southwest Airlines Co.*, the court considered the business judgment that exploiting “sex appeal” in ticket sales positions would lead to increased sales.⁹¹ Even if this gender discrimination was a beneficial practice for the business, it was nevertheless not a sufficient basis for sex-based discrimination.⁹² Furthermore, there is no BFOQ exception for racial discrimination.⁹³ Thus, even if gender was held to be a BFOQ for a Supreme Court Justice, this would not allow Biden to circumvent Title VII protections because the racial discrimination element to his nomination could not be protected as a BFOQ.

X. AUTHENTICITY OR GENUINENESS AS BONA FIDE OCCUPATIONAL QUALIFICATION

Gender discrimination is allowed when it is necessary for purposes of “authenticity or genuineness.”⁹⁴ One could argue that the Supreme Court would gain perceptions of authenticity among Americans by having more female Justices. This could help motivate more women to

⁸⁸ *Olsen v. Marriott Int’l, Inc.*, 75 F. Supp. 2d 1052, 1056 (D. Ariz. 1999).

⁸⁹ *Id.* at 1076.

⁹⁰ *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 303 (N.D. Tex. 1981).

⁹¹ *Id.* at 303–04.

⁹² *Id.*

⁹³ 42 U.S.C. § 2000e-2(e) (2022).

⁹⁴ 29 C.F.R. § 1604.2(a)(2) (2021).

pursue careers in law and government. And perhaps Americans would be more accepting of Supreme Court opinions on women's issues if more women were on the Court. Furthermore, Biden could argue that following through on his promise would help him appear more genuine regarding his campaign promise specifically and women's issues more generally.

While the EEOC does recognize an exception for authenticity or genuineness, the narrow example provided of "an actor or actress"⁹⁵ is illustrative of how limited this exception is. Biden's refusal to consider a male for the Supreme Court certainly does not implicate issues of authenticity or genuineness to the same extent as a movie studio refusing to consider female actresses to play the role of Abraham Lincoln. And as with customer preference, this BFOQ exception is only available to excuse gender discrimination. Any racial discrimination would remain unexcused.

XI. SPIRIT OF TITLE VII

While evaluating each element of Title VII analysis in this Article, one must interpret everything in light of the clear intent of Title VII protections. "In enacting Title VII, Congress sought to eliminate a pervasive, objectionable history of denying or limiting one's livelihood simply because of one's race, color, sex, religion, or national origin."⁹⁶ Title VII is designed to "rid from the *world of work* the evil of discrimination because of an individual's race, color, religion, sex or national origin."⁹⁷ In order to accomplish this goal, "Title VII of the Civil Rights Act...should not be construed narrowly."⁹⁸ And indeed, Title VII case law consistently interprets the statute in a manner consistent with an effort to apply its protections to as many situations as possible. Title VII has even been interpreted to protect non-employment relationships.⁹⁹

⁹⁵ *Id.*

⁹⁶ *McBroom v. W. Elec. Co.*, 429 F. Supp. 909, 911 (M.D.N.C. 1977).

⁹⁷ *Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983) (emphasis added).

⁹⁸ *Tipler v. E. I. duPont deNemours & Co.*, 443 F.2d 125, 131 (6th Cir. 1971).

⁹⁹ *See, e.g., Christopher v. Stouder Mem'l Hosp.*, 936 F.2d 870, 875 (6th Cir. 1991).

This clear intent imposes a high burden on anyone attempting to justify a discriminatory hiring decision. Furthermore, it would be highly peculiar for one to maintain that Title VII protections should apply to part-time, minimum-wage jobs but not apply in the case of a Supreme Court Justice. The text of Title VII contains no indication that it is intended to provide less protection the more important the job is.

XII. AFFIRMATIVE ACTION EXCEPTION

President Biden could attempt to argue that his actions are protected as an affirmative action policy aimed at correcting past discrimination. This argument would be challenging to defend as such policies face the daunting standard of strict scrutiny.¹⁰⁰ It would be difficult to prove how a policy that explicitly refuses to consider all Asian Americans, Native Americans, Hispanics, Black males, gay males, transgender males, physically handicapped non-Black females, and Muslim non-Black males for a job is narrowly tailored to right the injustices of past discrimination. An affirmative action claim by Biden would be made even more difficult by the general trend of the Supreme Court becoming increasingly skeptical of government-imposed affirmative action hiring. Furthermore, there is reason to believe that the current makeup of the Court would go even further in distancing itself from affirmative action precedent.¹⁰¹ Chief Justice Roberts's position in *Parents Involved* on affirmative action in college admissions is telling as to how he would likely view an affirmative action theory for justifying discrimination in a Supreme Court nomination: “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹⁰²

¹⁰⁰ *United States v. Paradise*, 480 U.S. 149, 196–97 (1987).

¹⁰¹ See Vinay Harpalani, *The Supreme Court and the Future of Affirmative Action*, AM. CONST. SOC'Y: EXPERT F. (Oct. 28, 2019), <https://www.acslaw.org/expertforum/the-supreme-court-and-the-future-of-affirmative-action/> [<https://perma.cc/Q5VC-284J>].

¹⁰² *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

Even more dispositive on this matter is the precedent that affirmative action plans are not allowed to create an absolute bar to non-minorities.¹⁰³ Since Biden’s comments explicitly state that only Black females will be considered, this would function as an absolute bar to every non-Black female. Therefore, this would not be allowed as an acceptable affirmative action policy.

XIII. PRAGMATIC AND ETHICAL IMPLICATIONS

Setting aside the legal considerations discussed up to this point, the decision to make Supreme Court nominations based on race and gender implicates pragmatic and ethical issues as well. Such a decision could have the unintended consequence of causing harm to the very group it was intended to help. The practice of singling out a group of people for special consideration could be interpreted by some as implying inferiority. After all, such people might wonder if a member of this group was the best candidate for the job, then they would have been selected based on the merits and such special consideration would not be required. Relatedly, the implicit notion that special consideration is required for a specific demographic to acquire a position is not a very empowering message. Additionally, such explicit special consideration could work to undermine the legitimacy of the new Justice’s decisions. And it could serve to validate the perceived martyrdom status that some non-minority groups promote. For example, excluding white males from consideration is consistent with the narrative espoused by white supremacist groups and “men’s rights” groups.¹⁰⁴ Such a high-profile, explicit example could be used by these groups as both a powerful recruitment tool and a powerful anecdote to motivate existing members. It is true

¹⁰³ *Valentine v. Smith*, 654 F.2d 503, 510 (8th Cir. 1981); *Palmer v. Dist. Bd. of Trustees*, 748 F.2d 595, 601 (11th Cir. 1984).

¹⁰⁴ Olga Khazan, *How White Supremacists Use Victimhood to Recruit*, ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/science/archive/2017/08/the-worlds-worst-support-group/536850/> [<https://perma.cc/M68K-QJ34>].

that these groups would not cease to exist in the absence of such fodder, but by limiting their recruitment tools, their ability to grow and exert more influence can be minimized.

President Biden's actions could also have the unintended consequence of harming his overall efforts to promote an anti-discriminatory agenda. This is because the practice may allow critics to accuse Biden of hypocrisy and selective enforcement. The Obama–Biden administration emphatically stated that, regarding presidential appointments, they would “not discriminate on the basis of race, color, religion, sex, age, national origin, veteran status, sexual orientation, gender identity, disability, or any other basis of discrimination prohibited by law.”¹⁰⁵ Explicitly going against these principles for one of the most important positions in government would send harmful mixed messages. After all, it is a peculiar position to posit that it should be illegal and morally wrong to engage in race and gender discrimination when filling a trivial job, such as a seasonal, hourly worker, while concurrently maintaining that such a practice is legally and morally permissible when filling one of the most significant jobs in the nation. Doing so would allow critics to reason that if it is acceptable for Biden to pick and choose when to engage in race and gender discrimination as he sees fit, then he loses the moral authority to condemn when others behave likewise. A more consistent anti-discrimination message would provide more support for when Biden condemns discrimination by others and when his Justice Department prosecutes discrimination.

The practice of using gender and race labels for hiring purposes is further problematic in that it perpetuates harmful stereotypes of gender and racial differences. Notably, the need to prefer one gender or race over another implies that race and gender account for cognitive differences

¹⁰⁵ *U.S. Federal Government Employment Policies*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/u-s-federal-government-employment-policies> [<https://perma.cc/K8WZ-K4X9>].

significant enough to result in disparate judicial determinations. Such a view mirrors the impetus behind much racist and sexist thought. The Supreme Court recognizes how racial distinctions “threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.”¹⁰⁶

Biden’s public statements regarding the refusal to consider all non-Black female candidates could even end up causing harm to his eventual pick. This is evidenced by how, before even being selected, legal scholars had already started questioning the qualifications and legitimacy of Biden’s eventual pick.¹⁰⁷ This is unfair to the new Justice and could function to reduce the perceived legitimacy of her published opinions.

A similar backlash may help explain the low approval ratings of Biden’s Vice President, Kamala Harris.¹⁰⁸ Then-candidate Biden made a similar promise, vowing to consider only females for the position of his running mate, and preferably a female of color.¹⁰⁹ This resulted in attacks on Kamala Harris as being an underqualified “diversity hire.”¹¹⁰ Other criticism of Harris also demonstrates an underlying notion of her being underqualified. For example, the criticism that she is “clearly in over her head” strongly implies a lack of competence for the position.¹¹¹

Biden is a skilled politician who no doubt carefully considered the political ramifications of his position regarding Supreme Court nominations. And indeed, stating his intention to only

¹⁰⁶ Shaw v. Reno, 509 U.S. 630, 643 (1993).

¹⁰⁷ Debra Cassens Weiss, *Georgetown Law Places New Hire on Administrative Leave After ‘Lesser Black Woman’ Tweet*, ABA J. (Feb. 1, 2022, 10:53 AM), <https://www.abajournal.com/news/article/georgetown-law-places-new-hire-on-administrative-leave-after-lesser-black-woman-tweet> [<https://perma.cc/6DEL-HXXM>].

¹⁰⁸ Anthony Zurcher, *Kamala Harris One Year: Where Did It Go Wrong for Her?*, BBC NEWS (Jan. 20, 2022), <https://www.bbc.com/news/world-us-canada-60061473> [<https://perma.cc/5Q67-MC6Y>].

¹⁰⁹ Michael Conklin, *Running up Against the Civil Rights Act: Does Joe Biden’s Promise of a Female Running Mate Violate Title VII?*, 27 CARDOZO J. EQUAL RTS. & SOC. JUST. 19, 20 (2020).

¹¹⁰ Adam B. Coleman, Opinion, *Kamala Harris Is a Diversity Hire*, NEWSWEEK (Dec. 28, 2021, 6:05 PM), <https://www.newsweek.com/kamala-harris-diversity-hire-opinion-1663788> [<https://perma.cc/7CKL-RVGV>].

¹¹¹ *Kamala Harris Is Clearly in ‘Over Her Head’: Concha*, FOX NEWS (Oct. 14, 2021), <https://video.foxnews.com/v/6277119335001#sp=show-clips> [<https://perma.cc/7FQK-NGFG>].

consider Black females seems to have helped his candidacy for President.¹¹² However, this same position may also function to harm Biden's legacy. It will limit his ability to place a young Justice on the Court that will be an effective advocate for Biden's judicial philosophy for decades to come. Considering only Black women necessarily excludes roughly 93% of the population as a potential candidate.¹¹³ This is especially problematic because the traditional avenues for becoming a Supreme Court Justice have few candidates that meet Biden's criteria.¹¹⁴ Very few Black women serve on the federal judiciary, and there are no Black women serving on federal appeals courts under the age of 67.¹¹⁵

XIV. CONCLUSION

This Article demonstrates how, setting aside the excepted service classification, appointing a Supreme Court Justice based on explicitly discriminatory standards would not survive Title VII scrutiny. Furthermore, doing so is likely to be counterproductive. The high-profile nature of a Supreme Court Justice functions to enhance the harmful stereotypes that are perpetuated through discriminatory employment decisions.¹¹⁶ The legal and ethical analysis in this Article invites further discussion into whether Title VII employment discrimination protections should be extended to Supreme Court Justices. Additionally, a similar discussion could be had regarding

¹¹² See *supra* notes 8–11 and accompanying text.

¹¹³ This is based on Black women comprising roughly 22 million of the 328 million U.S. population. *Black Women: Statistics*, BLACK DEMOGRAPHICS, <https://blackdemographics.com/population/black-women-statistics/> [https://perma.cc/B3FB-5YV3].

¹¹⁴ See Sahil Kapur, *Biden Pledged to Put a Black Woman on the Supreme Court. Here's What He Might Have to Do*, NBC NEWS (May 6, 2020, 8:12 AM), <https://www.nbcnews.com/politics/2020-election/problem-biden-s-pledge-black-woman-justice-n1200826> [https://perma.cc/359G-J44U].

¹¹⁵ *Id.* The Trump administration even touted the youth of his appointments, "The average age of circuit judges appointed by President Trump is less than 50 years old – a full 10 years younger than the average age of President Obama's circuit nominees." *President Donald J. Trump Is Appointing a Historic Number of Federal Judges to Uphold Our Constitution as Written*, WHITE HOUSE (Nov. 6, 2019), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-appointing-historic-number-federal-judges-uphold-constitution-written/> [https://perma.cc/PQ22-6BXT].

¹¹⁶ See discussion *supra* Part XIII.

other high-profile employment decisions by the President, such as cabinet picks and running mates. While such jobs are limited in number, the important symbolism of whether we as a society are going to take a consistent stand against employment discrimination should not be downplayed.