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EMPLOYMENT LAW — TITLE VII — EEOC AFFIRMS PROTECTIONS FOR TRANSGENDER EMPLOYEES. — *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

Charged with enforcing federal employment discrimination statutes, the Equal Employment Opportunity Commission (EEOC or Commission) has been instrumental in protecting individual rights since its inception in 1965.<sup>1</sup> Although the EEOC's decisions are not binding on the judiciary,<sup>2</sup> the Supreme Court has recognized that its interpretations "are entitled to great deference"<sup>3</sup> and "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."<sup>4</sup> In this respect, EEOC decisions have powerful informal authority, even if they lack the precedential value of court opinions.<sup>5</sup> Over the last few years, the Commission has worked to advance lesbian, gay, bisexual, and transgender (LGBT) rights.<sup>6</sup> Recently, in *Macy v. Holder*,<sup>7</sup> the EEOC held that claims of transgender discrimination are cognizable under Title VII of the Civil Rights Act of 1964,<sup>8</sup> which prohibits employment discrimination because of sex.<sup>9</sup> Though the EEOC recognized that transgender women are women, it articulated theories of discrimination that are in tension with that recognition. Further, it overlooked a text-based approach to including transgender discrimination within the scope of Title VII that courts have not yet considered: that transgender discrimination is based on sex because it is rooted in aversion to or assumptions about biological sex characteristics.

Mia Macy is a transgender woman.<sup>10</sup> Transgender persons, who form a small minority of the population, have a gender identity differ-

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<sup>1</sup> See Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 390 (2010) (noting that when the EEOC addressed issues in Supreme Court Title VII litigation, it adopted liberal, pro-plaintiff positions ninety-one percent of the time).

<sup>2</sup> 2 L. CAMILLE HEBERT, EMPLOYEE PRIVACY LAW § 9:13 (2012), available at Westlaw EMPPL.

<sup>3</sup> *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279 (1976).

<sup>4</sup> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976)) (internal quotation mark omitted).

<sup>5</sup> Cf. Tim Wu, Essay, *Agency Threats*, 60 DUKE L.J. 1841, 1841, 1844 (2011) (arguing that agencies regulate through "soft law" mechanisms such as interpretative guides and press releases).

<sup>6</sup> See Douglas NeJaime, *Cause Lawyers Inside the State*, 81 FORDHAM L. REV. 649, 675 (2012) (discussing praise of EEOC Commissioner Chai Feldblum's LGBT-related work); *id.* at 688 (describing an EEOC session on transgender employment issues).

<sup>7</sup> No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

<sup>8</sup> 42 U.S.C. §§ 2000e to 2000e-17 (2006 & Supp. V 2011); see *Macy*, 2012 WL 1435995, at \*4.

<sup>9</sup> 42 U.S.C. § 2000e-2 (2006). Title VII also prohibits discrimination on the basis of race, color, religion, and national origin. *Id.*

<sup>10</sup> *Macy*, 2012 WL 1435995, at \*1.

ent from the one they were assigned at birth.<sup>11</sup> In contrast, most people are cisgender, meaning that their “assignment of sex at birth is congruent with their current gender identity.”<sup>12</sup> As of December 2010, Macy had not yet transitioned to living full time as a woman and still presented publicly as a man.<sup>13</sup> She applied for a position in the Walnut Creek crime laboratory, part of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF or Bureau).<sup>14</sup> In two separate phone conversations, the Walnut Creek Director informed her that she could have the position as long as her background check did not uncover any problems.<sup>15</sup>

On March 29, 2011, Macy informed Aspen, the staffing firm responsible for filling the position, that she was “in the process of transitioning from male to female.”<sup>16</sup> At her request, Aspen informed Walnut Creek of her transition.<sup>17</sup> Two days later, the Aspen investigator told Macy that he hoped to complete his report by the following week.<sup>18</sup> However, Macy never learned the results of her background check. Instead, Aspen informed her that the Walnut Creek position was no longer available due to federal budget restrictions.<sup>19</sup>

Suspicious of this sudden change, Macy contacted an Equal Employment Opportunity (EEO) counselor, who informed her that the position had not been cut; it had been given to another candidate who the ATF claimed was furthest along in the background-investigation process.<sup>20</sup> Arguing that this explanation was pretextual, Macy filed a formal complaint with the Bureau claiming discrimination based on gender identity, sex, and sex stereotyping.<sup>21</sup> The ATF responded that “gender identity stereotyping” claims could not be adjudicated under Title VII, and that it would instead process her claims according to Department of Justice (DOJ) policies pertaining to gender identity.<sup>22</sup> Macy objected because those policies provide fewer remedies and procedural rights than Title VII.<sup>23</sup> When the ATF reiterated its refusal to

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<sup>11</sup> See Mark E. Berghausen, Comment, *Intersex Employment Discrimination: Title VII and Anatomical Sex Nonconformity*, 105 NW. U. L. REV. 1281, 1291 n.68 (2011).

<sup>12</sup> Kae Greenberg, *Still Hidden in the Closet: Trans Women and Domestic Violence*, 27 BERKELEY J. GENDER L. & JUST. 198, 199 n.4 (2012).

<sup>13</sup> *Macy*, 2012 WL 1435995, at \*1.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* The Commission noted that Aspen and the ATF may have had “a ‘joint employment’ relationship” but did not reach a determination on that issue. *Id.* n.2.

<sup>18</sup> *Id.* n.3.

<sup>19</sup> *Id.* at \*1.

<sup>20</sup> *Id.* at \*2.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See *id.*

process her gender identity discrimination claim under Title VII, Macy appealed to the EEOC.<sup>24</sup>

The EEOC held that “claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII’s sex discrimination prohibition.”<sup>25</sup> The Commission remanded the claim to the ATF for further processing.<sup>26</sup> While recognizing that all of Macy’s claims were “simply different ways of describing sex discrimination,”<sup>27</sup> the Commission articulated various ways to state a valid claim and provided more thorough descriptions of two theories courts have advanced in the past: the sex-stereotyping approach, which describes discrimination against transgender individuals as rooted in gender stereotypes, and the per se approach, which posits that such discrimination is inherently sex discrimination because it relates to a change in sex.<sup>28</sup>

To explain the sex-stereotyping approach, the Commission began by analyzing *Price Waterhouse v. Hopkins*,<sup>29</sup> a landmark Supreme Court case that extended Title VII protections to employees who face discrimination based on gender stereotypes.<sup>30</sup> Price Waterhouse had denied a female manager a promotion to partner at least in part because her supervisors believed that her demeanor and attire were not sufficiently feminine.<sup>31</sup> The Supreme Court held that this treatment violated Title VII because, as the EEOC summarized, “gender discrimination occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms.”<sup>32</sup>

Following *Price Waterhouse*, many courts have recognized sex-stereotyping theory as a valid way to prove discrimination based on sex, and several have applied this theory to cases involving discrimination against transgender individuals.<sup>33</sup> Drawing on previous cases from federal district and appellate courts,<sup>34</sup> the EEOC argued that

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<sup>24</sup> *Id.* at \*3. The ATF responded that her appeal was premature because it had agreed to process her sex discrimination claim under Title VII. *Id.* To avoid this ripeness issue, Macy withdrew her claim of “discrimination based on sex (female),” *id.* at \*4 (internal quotation marks omitted), and advanced only a claim based on “gender identity, change of sex, and/or transgender status,” *id.*

<sup>25</sup> *Id.* at \*4. The *Macy* decision overturned three prior decisions. *See id.* at \*11 n.16; Arthur S. Leonard, *What Arbitrators Need to Know About Anti-Discrimination Protection for Transgender Employees*, DISP. RESOL. J., Aug.–Oct. 2012, at 9, 9.

<sup>26</sup> *Macy*, 2012 WL 1435995, at \*1.

<sup>27</sup> *Id.* at \*10.

<sup>28</sup> *Id.* at \*5–11.

<sup>29</sup> 490 U.S. 228 (1989).

<sup>30</sup> *See id.* at 250 (plurality opinion); *Macy*, 2012 WL 1435995, at \*5–6.

<sup>31</sup> *Macy*, 2012 WL 1435995, at \*6 (citing *Price Waterhouse*, 490 U.S. at 230–31, 235).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at \*7.

<sup>34</sup> *Id.* at \*7–9 (describing cases from the Sixth, Ninth, and Eleventh Circuits as well as from the District Court for the District of Columbia).

“consideration of gender stereotypes will inherently be part of what drives discrimination against a transgendered individual.”<sup>35</sup> For example, if Macy established that she did not get the job “because the employer believed that biological men should consistently present as men and wear male clothing,” that would constitute discrimination because of sex under a sex-stereotyping theory.<sup>36</sup>

To explain the *per se* approach, the Commission borrowed an analogy from a 2008 district court opinion: If an employer fired someone because she converted from Islam to Christianity, it would constitute discrimination because of religion.<sup>37</sup> Whether the termination was based on hatred of Christians, stereotypes about Muslims, or discomfort with the transition itself, the adverse action would be *per se* religious discrimination.<sup>38</sup> Under parallel reasoning, discriminatory treatment because of change in sex impermissibly considers sex in making an employment decision.<sup>39</sup>

The Commission acknowledged that Congress did not have gender-identity discrimination in mind when it passed Title VII.<sup>40</sup> Yet it noted that statutory prohibitions can combat “reasonably comparable evils” and that the Supreme Court has repeatedly extended Title VII to new circumstances.<sup>41</sup> Even so, the *Macy* decision did not create a new class of persons protected by Title VII; just as the statute has always protected religious converts from discrimination based on religion, Title VII has always protected transgender persons from discrimination because of sex.<sup>42</sup>

In addition to describing the sex-stereotyping and *per se* approaches, the Commission could have argued that Macy faced discrimination related to her anatomical sex characteristics, which is also discrimination because of sex. Preferring one man over another or one woman over another based on the nature of his or her anatomical sex characteristics violates Title VII under a reasonable interpretation of statutory text and relevant precedent.<sup>43</sup> When women have claimed discrimination due to breast size, for example, neither courts nor defendants have challenged the notion that sex discrimination includes such

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<sup>35</sup> *Id.* at \*8.

<sup>36</sup> *Id.* at \*10.

<sup>37</sup> *Id.* at \*11 (discussing *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008)).

<sup>38</sup> *See id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at \*9.

<sup>41</sup> *Id.* at \*10 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (sexual harassment)) (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 679–81 (1983) (discrimination against men)).

<sup>42</sup> *Id.* at \*11.

<sup>43</sup> *See, e.g.*, *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (adopting the view that “the term sex should be given the traditional definition based on anatomical characteristics”).

treatment.<sup>44</sup> As this analogy suggests, Title VII's prohibition on sex discrimination encompasses discriminatory treatment motivated by assumptions or prejudices regarding an employee's anatomical sex characteristics.

Sexual harassment doctrine also supports the proposition that employer conduct related to sex-linked body parts constitutes sex discrimination. Sexual harassment is actionable sex discrimination under Title VII,<sup>45</sup> and courts have held that touching or talking about an employee's genitalia, buttocks, or breasts violates the statute, reasoning that attacks targeting those body parts are attacks because of sex.<sup>46</sup> If Title VII prohibits patterns of mistreatment related to anatomical sex characteristics in the sexual harassment context, then it should logically also forbid adverse actions based on those same body parts in the transgender discrimination context.<sup>47</sup>

Past and present biological sex characteristics are the only factors distinguishing transgender women from cisgender women, making it reasonable to infer that discrimination against transgender employees is a reaction to those differences. As some commentators have argued, "[r]evulsion" to transgender bodies "seems to lie at the root of most transgender discrimination."<sup>48</sup> In events leading to a recent Title VII case, for example, an employer told a transgender employee that "it's

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<sup>44</sup> See, e.g., *Pelletier v. Reedy Creek Improvement Dist.*, No. 6:05-cv-637-Orl-r8DAB, 2007 WL 1192410, at \*2 (M.D. Fla. Apr. 23, 2007) (reporting plaintiff's claim of discrimination based in part on her breast size); *EEOC v. Foodcrafters Distribution Co.*, Nos. Civ. 03-2796(RBK), Civ. 04-2394(JED), 2006 WL 489718, at \*1 (D.N.J. Feb. 24, 2006) (describing plaintiff's complaint that a supervisor hired women based on breast size). No reported judicial opinion has explicitly addressed whether discrimination based on breast size — or penis size, or the nature of any other anatomical sex characteristic — constitutes discrimination because of sex. However, no opinion features a judge or defendant questioning the reasonable textual interpretation and intuitive logic of that argument.

<sup>45</sup> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986).

<sup>46</sup> See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1066 (9th Cir. 2002) ("The physical attacks to which Rene was subjected, which targeted body parts clearly linked to his sexuality, were 'because of . . . sex.'").

<sup>47</sup> One court has considered this approach but articulated it as a variation of the sex-stereotyping theory. See *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, No. Civ.02-1531PHX-SRB, 2004 WL 2008954, at \*2 (D. Ariz. June 3, 2004) ("The presence or absence of anatomy typically associated with a particular sex cannot itself form the basis of a legitimate employment decision . . . [N]either a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that non-conforming trait"). This approach is consistent with *Price Waterhouse* and its progeny, but claims of discrimination arising from biological sex characteristics need not be articulated indirectly as based on gender stereotypes.

<sup>48</sup> Carolyn E. Coffey, *Battling Gender Orthodoxy: Prohibiting Discrimination on the Basis of Gender Identity and Expression in the Courts and in the Legislatures*, 7 N.Y. CITY L. REV. 161, 167 (2004); see also Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 HARV. L. & POL'Y REV. 201, 226 (2012) (arguing that antagonists have an "obsessive focus . . . on the surgical and genital alterations involved in gender transition, reducing transgender people to a synecdochic caricature of physical mutilation").

unsettling to think of someone dressed in women's clothing with male sexual organs inside that clothing."<sup>49</sup> The biological sex characteristics approach works best with this kind of "smoking gun" evidence of revulsion, but it can apply to most if not all sets of facts. Macy's employer may have assumed that she would have "incorrect" genitalia that failed to "match" her female identity or may have disliked the idea that she would surgically alter her biological sex characteristics. Adverse action motivated by such aversion to Macy's sex-related body parts violates Title VII's bar on sex discrimination.

Presenting this formulation as a third option for courts to consider would have provided several unique benefits. First, while the sex-stereotyping and *per se* theories forced the EEOC to implicitly characterize Macy as a man for the purpose of analysis, this alternative approach would have allowed the Commission to consistently recognize Macy as a woman.<sup>50</sup> Throughout the opinion, the Commission recognized that Macy is female: the opinion described Macy as a woman<sup>51</sup> and uniformly referred to her using female pronouns.<sup>52</sup> However, this recognition is in tension with the theories of discrimination the Commission advanced: the sex-stereotyping approach argues that Macy faced discrimination because she is a gender-nonconforming man, and the *per se* approach maintains that she faced discrimination because she used to be a man and changed her sex. Under the biological sex characteristics approach, the Commission would have argued that Macy was born a girl with "mismatched" anatomical characteristics and that she faced discrimination because of these "incorrect" physical traits.

Second, federal courts have not uniformly accepted the sex-stereotyping approach<sup>53</sup> or the *per se* approach,<sup>54</sup> so offering a new

<sup>49</sup> *Glenn v. Brumby*, 663 F.3d 1312, 1314 (11th Cir. 2011) (internal quotation marks omitted).

<sup>50</sup> Courts are divided on whether to accept transgender women as women. *Compare* *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (questioning whether "a woman can be so easily created from what remains of a man"), *with* *Richards v. U.S. Tennis Ass'n*, 400 N.Y.S.2d 267, 272 (N.Y. Sup. Ct. 1977) ("When an individual . . . undergo[es] a sex reassignment, the unfounded fears and misconceptions of defendants must give way to the overwhelming medical evidence that this person is now female."). In this context, the EEOC's decision to recognize Macy as a woman without explanation was surprising; discussion of this point could have provided helpful guidance for courts.

<sup>51</sup> *See Macy*, 2012 WL 1435995, at \*1, \*10.

<sup>52</sup> *See, e.g., id.* at \*1.

<sup>53</sup> *Compare Glenn*, 663 F.3d at 1316 ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."), *with* *Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at \*5 (E.D. La. Sept. 16, 2002) ("[T]his is not a situation where the plaintiff failed to conform to a gender stereotype. . . . Rather, the plaintiff disguised himself as a person of a different sex . . ." (footnote omitted)).

<sup>54</sup> *Compare* *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) ("[R]efusal to hire [plaintiff] after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination 'because of . . . sex.'"), *with* *Etsitty v. Utah*

theory could have increased the odds that federal courts would find *Macy* persuasive. Courts reluctant to recognize claims based on gender-identity stereotyping or transgender status may be willing to recognize discrimination claims based on physical sex characteristics, an approach more clearly grounded in the text of Title VII.

Additionally, though no single formulation perfectly reflects the experiences of all transgender persons,<sup>55</sup> this approach can coherently describe plaintiffs in all stages of transition. The sex-stereotyping approach makes little sense in some cases; discrimination against a fully transitioned transgender woman is unlikely to be rooted in gender nonconformity if she conforms to societal expectations of feminine appearance and behavior. Similarly, the *per se* approach's emphasis on the process of transition may not accurately describe discrimination against a woman whose transition is complete. By contrast, post-transition discrimination may be rooted in the perception that transgender individuals have "inauthentic" genitalia or "incorrect" chromosomes. By allowing courts to treat all transgender plaintiffs alike, the biological sex characteristics approach creates an easy-to-apply rule.

In addition to resolving an internal tension in the EEOC's opinion, this formulation would be consistent with state and federal policies: Most states allow individuals to change the sex designations on identification documents to match their lived genders.<sup>56</sup> Additionally, federal agencies including the Department of State have adopted policies that permit sex-designation changes to reflect lived gender when supported by physician recommendations.<sup>57</sup> Supporting these policies, some recent scientific research indicates that there is a "hard-wired, innately specified scaffold for body image," and that "the brains of transsexuals are 'hard-wired' in [a] manner [that] is opposite to that of their external morphological sex."<sup>58</sup> In other words, individuals like

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Transit Auth., 502 F.3d 1215, 1221 (10th Cir. 2007) ("[D]iscrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII.>").

<sup>55</sup> See Sue Landsittel, Comment, *Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII*, 104 NW. U. L. REV. 1147, 1168–71 (2010); Jason Lee, Note, *Lost in Translation: The Challenges of Remediating Transgender Employment Discrimination Under Title VII*, 35 HARV. J.L. & GENDER 423, 454–55 (2012).

<sup>56</sup> See Sharon M. McGowan, *Working With Clients to Develop Compatible Visions of What It Means to "Win" a Case: Reflections on Schroer v. Billington*, 45 HARV. C.R.-C.L. L. REV. 205, 236 & n.125 (2010).

<sup>57</sup> See 7 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 1320 app. m, para. b (2012), available at <http://www.state.gov/documents/organization/143160.pdf> (establishing policies for sex-designation changes in passports).

<sup>58</sup> V.S. Ramachandran & Paul D. McGeoch, *Occurrence of Phantom Genitalia After Gender Reassignment Surgery*, 69 MED. HYPOTHESES 1001, 1002 (2007); see also WORLD HEALTH ORG., THE ICD-10 CLASSIFICATION OF MENTAL AND BEHAVIOURAL DISORDERS 168 (2007), available at <http://www.who.int/classifications/icd/en/bluebook.pdf> (defining childhood gender identity disorder as "persistent and intense distress about assigned sex, together with a desire to be (or insistence that one is) of the other sex"); Matthew St. Peter et al., *Self-Castration by a*

Macy may have what is typically considered male genitalia but a female “brain-sex.”<sup>59</sup> Related, contemporary medical practice supports recognizing the validity of self-identified sex.<sup>60</sup> By adding a theory of discrimination grounded in Macy’s lived sex, the EEOC would have issued a decision more consistent with other governmental policies as well as with contemporary scientific evidence and medical practice.

Finally, the biological sex characteristics approach would create precedent that is more empowering to transgender plaintiffs. As Diane Schroer, the plaintiff in a landmark transgender rights case, declared, “I haven’t gone through all this only to have a court vindicate my rights as a gender-nonconforming man.”<sup>61</sup> “In her view,” Schroer’s attorney explained, “she had decided to transition — and thereby risk discrimination by actors like the [employer] — precisely so that she could finally live her life as a woman, and it was her female identity that she wanted a court to affirm.”<sup>62</sup> Advancing claims that start from the premise that transgender women are women, not gender-nonconforming men or ambiguous bodies in transition, affirms the dignity of plaintiffs like Diane Schroer and Mia Macy.

Courts have adopted conflicting positions on the questions of whether and how transgender plaintiffs may bring Title VII claims. Jumping into the fray, the EEOC affirmed protections for transgender employees and outlined multiple approaches courts may be willing to accept. Consistent with the Commission’s recognition that Macy is a woman, the opinion should have included an additional approach, holding that transgender women face discrimination because of their biological sex characteristics or others’ assumptions about these characteristics. While *Macy* represents an important advance in transgender rights, emphasizing that transgender women are women would have rendered the decision even more compelling.

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*Transsexual Woman: Financial and Psychological Costs: A Case Report*, 9 J. SEXUAL MED. 1216, 1217 (2012) (discussing the occasional occurrence of self-castration among transgender women denied access to sex-reassignment surgery).

<sup>59</sup> Laura K. Case & Vilayanur S. Ramachandran, *Alternating Gender Incongruity: A New Neuropsychiatric Syndrome Providing Insight into the Dynamic Plasticity of Brain-Sex*, 78 MED. HYPOTHESES 626, 629 (2012).

<sup>60</sup> See, e.g., WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 3 (7th ed. 2012), available at <http://www.wpath.org/documents/SOC%20V7%2003-17-12.pdf> (noting that health professionals should assist in affirming gender identity); Expert Report of Walter O. Bockting, PhD at 4, *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (No. 05-1090 (JR)) (explaining that when children are born with ambiguous anatomical sex characteristics, doctors may wait to assign sex until brain-sex emerges).

<sup>61</sup> McGowan, *supra* note 56, at 205.

<sup>62</sup> *Id.* at 214.