

***Bauer v. Lynch: a Push(up) to Exercise Change and Account for Physiological Differences Between Men and Women***

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## I. INTRODUCTION

Historically, gender discrimination burdens our society.<sup>1</sup> Congress, seeking to remedy such antiquated social constructs, codified extensive laws forbidding employment discrimination based on sex.<sup>2</sup> As a result, through the Civil Rights Act of 1964, Title VII statutory protections provided equal treatment in all phases of the employment process.<sup>3</sup>

Title VII prohibits employment discrimination on the basis of “. . . sex, race, color, national origin, and religion.”<sup>4</sup> These protections restrict unjustified and prejudicial employment treatment against individuals within the aforementioned protected classes.<sup>5</sup> Moreover, Title VII safeguards extend protection beyond disparate treatment.<sup>6</sup> The Civil Rights Act of 1991 codified prohibitions on employment practices that disparately impact individuals on the basis of “. . . sex, race, color, national origin, and religion.”<sup>7</sup> Therefore, employers may not use standards that result in a disparate effect upon individuals in the protected classes without a bona fide occupational qualification (“BFOQ”).<sup>8</sup> The BFOQ, a narrow textual exception to Title VII, permits otherwise invalid

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<sup>1</sup> See Diana Burgess et al., *Who Women are, Who Women Should be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 PSYCH. PUB. POL. AND L. 665, 665–67 (1999).

<sup>2</sup> 42 U.S.C.S. §§ 2000e et seq. (2017).

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

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

<sup>5</sup> See *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (stating that “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

<sup>6</sup> See generally Pub. L. No. 102-166, 105 Stat. 1071 (1991).

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

<sup>8</sup> 42 U.S.C.S. § 2000e-2(e) (2017).

employment requirements.<sup>9</sup> Here, an otherwise unlawful practice complies with Title VII if such employment action is reasonably necessary to “. . . the normal operation of [the] particular business or enterprise . . . .”<sup>10</sup>

Despite Title VII’s advancement of workplace rights, the statute—as currently written—fails to adequately account for average physiological differences between men and women when measured with bona fide physical fitness examinations. The narrow BFOQ exception sets a high bar restricting different treatment along gender lines, as a business must prove that an employment requirement exists as a reasonable necessity to its operation.<sup>11</sup> In light of the demanding BFOQ standard, employers cannot adequately account for the innate physiological differences between men and women when tested through bona fide physical fitness examinations. Accordingly, this Comment proposes to expand the current BFOQ exception to account for average physiological differences between men and women when assessed through a bona fide physical fitness examination.

Title VII’s inability to account for average physiological differences between men and women gave rise to the gender discrimination claim in *Bauer v. Holder*.<sup>12</sup> Here, Jay J. Bauer (“Bauer”) challenged the Federal Bureau of Investigation’s (“FBI” or “the Bureau”) use of different exercise scores for men and women.<sup>13</sup> Without satisfactory fitness scores, prospective FBI Special Agents fail to meet the Bureau’s graduation requirements.<sup>14</sup> Bauer, a male applicant, failed the physical fitness test under the applicable standards, and the FBI consequently dropped him from consideration as a Special Agent.<sup>15</sup> Had his scores been evaluated the same as his female counterparts, he would have possessed the requisite scores to graduate and become an FBI Special Agent.<sup>16</sup>

Subsequently, Bauer challenged the FBI’s physical fitness test as unlawful gender discrimination under Title VII.<sup>17</sup> Bauer argued that the

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

<sup>10</sup> *See Int’l Union v. Johnson Controls*, 499 U.S. 187, 201 (1991) (holding that “[t]he BFOQ defense is written narrowly, and this Court has read it narrowly.”); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981) (holding that “. . . stereotypic impressions of male and female roles do not qualify gender as a BFOQ.”).

<sup>11</sup> *Id.*; 42 U.S.C.S. § 2000e-2(e) (2017).

<sup>12</sup> *Bauer v. Holder*, 25 F. Supp. 3d 842, 845 (E.D. Va. 2014), *rev’d*, 812 F.3d 340 (4th Cir.), *cert. denied*, No. 15-1489, 2016 U.S. LEXIS 6598 (Oct. 31, 2016).

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

<sup>14</sup> *Id.* at 846.

<sup>15</sup> *Id.* at 848.

<sup>16</sup> *Bauer v. Lynch*, 812 F.3d 340, 348 (4th Cir.), *cert. denied*, No. 15-1489, 2016 U.S. LEXIS 6598 (Oct. 31, 2016).

<sup>17</sup> *Bauer*, 25 F. Supp. 3d at 850–51.

mandatory minimum scores, which differentiated on the basis of gender, were unfairly prejudicial.<sup>18</sup> More specifically, Bauer claimed his scores satisfied the minimum requirements to become an FBI Special Agent.<sup>19</sup> The numbers he referenced, however, pertained *only* to female applicants.<sup>20</sup> According to Bauer, the FBI violated Title VII by holding women to lesser physical fitness requirements for the same position.<sup>21</sup> Agreeing with Bauer, the district court granted Bauer's motion for summary judgment.<sup>22</sup> The Fourth Circuit, however, reversed the district court's decision and held that the FBI did not violate Title VII because the fitness test in question did not discriminate on the basis of sex.<sup>23</sup> The Fourth Circuit reasoned that the FBI's physical fitness test aligned with Title VII since the fitness requirements reflected the same level of physical fitness for both men and women.<sup>24</sup>

The reasoning adopted by the Fourth Circuit in *Bauer* conflicts with the text of Title VII.<sup>25</sup> Currently, 42 U.S.C.S. § 2000e-2(m) forbids the consideration of “. . . race, color, religion, sex, or national origin [as] a motivating factor for any employment practice, even though other factors also motivated the practice.”<sup>26</sup> Notwithstanding the aforementioned rule, the FBI considered gender and the associated physiological differences between men and women: a consideration that appears to run counter to § 2000e-2(m), despite a presumably inclusive intention.

Furthering the textual argument against the FBI's gender inclusive physical fitness examination, § 2000e-2(l) prohibits “. . . use [of] different cutoff scores for . . . employment related tests on the basis of race, color, religion, sex, or national origin.”<sup>27</sup> Importantly, the FBI's physical fitness test featured a gender specific scoring system to assess the overall fitness of male and female applicants.<sup>28</sup> Thus, the FBI's employment test—utilizing different cut-off scores between gender groups—violates the law in its current form.<sup>29</sup>

Furthermore, the FBI does not possess a valid BFOQ exception justifying the different cut-off scores for male and female applicants. Rather, the FBI believed the innate physiological differences between men

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

<sup>19</sup> *Id.* at 851.

<sup>20</sup> *Id.* (emphasis added).

<sup>21</sup> *Id.* at 846.

<sup>22</sup> *Id.* at 865.

<sup>23</sup> *Bauer*, 812 F.3d at 346.

<sup>24</sup> *Id.* at 352.

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

<sup>26</sup> 42 U.S.C.S. § 2000e-2(m) (2017).

<sup>27</sup> 42 U.S.C.S. § 2000e-2(l) (2017).

<sup>28</sup> *Bauer*, 812 F.3d at 342.

<sup>29</sup> 42 U.S.C.S. § 2000e-2(l) (2017).

and women warranted the separate testing requirements.<sup>30</sup> Nonetheless, the FBI lacked a valid BFOQ exception because it fell short of the demanding standard requiring such actions ensure “. . . the normal operation of [the] particular business or enterprise . . . .”<sup>31</sup> In fact, the FBI only evaluated the physical fitness of Special Agents during the admission process in question.<sup>32</sup> Therefore, the admission benchmark does not trigger the narrow BFOQ exception, because without substantiated fitness maintenance and/or follow-up testing the FBI cannot claim fitness was a business necessity.<sup>33</sup> Accordingly, the FBI’s physical fitness test should not require different standards based on sex.

As a matter of public policy, however, the Fourth Circuit ruled correctly. In line with the policy goals of Title VII legislation, the Fourth Circuit reasoned that the FBI’s physical fitness tests did not unfairly discriminate on the basis of sex, because it imposed equal fitness demands for both men and women.<sup>34</sup> The plain language of Title VII, nonetheless, does not support this decision. As it stands, Title VII allows (a) different employment standards; and/or (b) different cut-off scores for men and women under the narrow BFOQ provision.<sup>35</sup> Accordingly, Congress should expand the BFOQ provision to account for the average physiological differences between men and women as measured through bona fide physical fitness examinations. Codifying the unequal burden analysis in the context of bona fide physical fitness tests advances Title VII’s policy goals by permitting equally burdensome treatment for men and women.

## II. THE UNEQUAL BURDENS ANALYSIS AND JUSTIFIED ACCOUNTING FOR GENDER DIFFERENCES WHEN ASSESSING PHYSICAL FITNESS REQUIREMENTS

This section will examine different treatment between men and women in consideration of Title VII legislation by (a) explaining the unequal burden analysis and its application; (b) identifying the unequal burden critique; and (c) justifying the need to account for physiological differences between men and women.

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<sup>30</sup> J.A. at JA 87, *Bauer v. Lynch*, 812 F.3d 340 (4th Cir. 2016) (No. 14-2323).

<sup>31</sup> 42 U.S.C.S. § 2000e-2(e) (2017).

<sup>32</sup> *Bauer*, 25 F. Supp. 3d at 863.

<sup>33</sup> *See supra* note 30, at JA 755.

<sup>34</sup> *Id.* at 350.

<sup>35</sup> *Id.* at 347–48.

*A. The Unequal Burdens Analysis Applied: Cases Dealing with Dress and Grooming*

The unequal burden analysis tolerates different treatment between men and women if such treatment remains equally burdensome.<sup>36</sup> This analysis holds firm footing in the circuit courts.<sup>37</sup> Evaluating Title VII gender discrimination claims, courts assess the employment practices treating employees differently based upon sex. Despite inclusion of explicit gender classifications, these policies may survive Title VII challenges if the burden(s) imposed are equal between the sexes.<sup>38</sup>

The 2006 Ninth Circuit case, *Jespersen v. Harrah's Operating Co.*, illustrates the unequal burden analysis. Here, the court considered Harrah's "personal best" exterior grooming and appearance policy that applied to both men and women.<sup>39</sup> The Ninth Circuit interpreted a Title VII challenge to Harrah's different appearances and grooming rules for men and women.<sup>40</sup> Specifically, the policy in question restricted the appearances of male and female employees. For instance, Harrah's required men wear hair above the shirt collar without ponytails.<sup>41</sup> In addition, the policy required men to possess neatly trimmed fingernails without the use of colored nail polish.<sup>42</sup> Finally, men could not use facial or eye makeup.<sup>43</sup> Similarly, female employees possessed hair, nail and makeup requirements.<sup>44</sup> Nonetheless, female employees appeared to face different treatment based upon sex because Harrah's directed women to wear "make up (face powder, blush and mascara) [that] must be worn and applied neatly in complimentary colors [and] lip color must be worn at all

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<sup>36</sup> *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1109 (9th Cir. 2006).

<sup>37</sup> See *Frank v. United Airlines, Inc.*, 216 F.3d 845, 854 (9th Cir. 2000) ("An appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment."); *Knott v. Missouri Pac. Ry. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975) (reasoning that "... such policies are reasonable and [] imposed in an evenhanded manner on all employees [when] slight differences in the appearance requirements for males and females have only a negligible effect on employment opportunities."); *Gerdom v. Cont'l Airlines*, 692 F.2d 602, 606 (9th Cir. 1982) (validating a weight requirement for flight crews due to "... no significantly greater burden of compliance [] imposed on either sex."); *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1389-90 (11th Cir. 1998) (allowing hair length restrictions on employees due to equal burdens between men and women); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1092-93 (5th Cir. 1975) (en banc) (same).

<sup>38</sup> *Jespersen*, 444 F.3d at 1109.

<sup>39</sup> *Id.* at 1107-08.

<sup>40</sup> *Id.* at 1006-07.

<sup>41</sup> *Id.* at 1107.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Jespersen*, 444 F.3d at 1107.

times.”<sup>45</sup> In sum, the employment policies treated men and women differently with allegedly disproportionate burdens placed upon female employees.

Despite facially dissimilar treatment amongst men and women, the Ninth Circuit held Harrah’s separate appearance requirements did not violate Title VII.<sup>46</sup> Rather, the Ninth Circuit reasoned, even without a valid BFOQ exception, the employment challenge failed to prove that women suffered a greater burden compared to men.<sup>47</sup> Therefore, the court found Harrah’s mutable appearance requirements outside the discrimination protections afforded by Title VII.<sup>48</sup>

Although not a *per se* violation, different treatment between male and female employees fails under Title VII when such differences unequally impact the sexes.<sup>49</sup> For instance, in *Carroll v. Talman Fed. Sav. & Loan Ass’n*, the Seventh Circuit disallowed a business uniform policy that required employees to adhere to a dress code.<sup>50</sup> This requirement, applied neutrally, comports with Title VII.<sup>51</sup> These employment obligations, however, lacked equality. In fact, the requirements disproportionality burdened women by requiring them to wear uniforms.<sup>52</sup> By contrast, the employer required men to adhere to a less demanding directive of maintaining “customary business attire.”<sup>53</sup> Dissenting from the *Carroll* majority, Circuit Judge Pell argued that the dress policy imposed equal burdens because the lack of stylistic innovation for men’s clothing “. . . never really advanced beyond the status of being a uniform.”<sup>54</sup> This argument, however, failed.<sup>55</sup> An employment obligation like the business uniform policy in *Carroll* imposes unequal burdens, and

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1113.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1009–10.

<sup>49</sup> See *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 705 (1978) (holding the requirement for female employees to provide 14.84% higher retirement contributions compared to male employees violated Title VII as illicit gender discrimination).

<sup>50</sup> *Carroll v. Talman Fed. Sav. & Loan Ass’n*, 604 F.2d 1028, 1029 (7th Cir. 1979).

<sup>51</sup> See *EEOC v. Catastrophe Mgmt. Solutions*, 837 F.3d 1156, 1158–72 (11th Cir. 2016) (allowing a workplace grooming policy prohibiting dreadlocks despite alleged Title VII discrimination by an African-American female. The EEOC argued, “. . . dreadlocks are a natural outgrowth of the immutable trait of black hair texture.” This employment policy, however, did not treat employees differently based on gender or race because *all people* may grow dreadlocks. The policy, therefore, applied neutrally to all employees.) (emphasis added).

<sup>52</sup> *Carroll*, 604 F.2d at 1029.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1034 (Pell, dissenting).

<sup>55</sup> *Id.* at 1033 (majority opinion).

in the absence of a valid exception, it unfairly discriminates on the basis of gender and violates Title VII.<sup>56</sup>

*B. Reaction to the Unequal Burdens Analysis*

The unequal burden analysis lacks textual support. More specifically, this interpretation of Title VII's text, as applied, contravenes the law as written.<sup>57</sup> Accordingly, critics challenge the unequal burden theory as an "extratextual" Title VII interpretation.<sup>58</sup> Therefore, applying such a rule—in the absence of a BFOQ—runs counter to Title VII.<sup>59</sup>

Moreover, Title VII aimed to eradicate discrimination based upon immutable characteristics such as sex.<sup>60</sup> The remedial purpose of the statute sought to outlaw treating men and women differently because of gender.<sup>61</sup> Thus, an employment action that treats men and women differently because of sex violates Title VII.<sup>62</sup> Legal scholar Peter B. Bayer poignantly stated: "... discriminatory practices have little, if anything, to do with genuine or useful business considerations. Rather, racial and sexual discrimination perpetuate stereotypical presumptions that have resulted not in greater efficiency or safety, but in demeaning and debasing individuals because of their racial or sexual affiliations."<sup>63</sup> Thus, arguably, the unequal burden analysis "... illegitimately permits employers to impose the very class-based stereotypes, suppositions, and biases that Congress sensibly and legitimately outlawed."<sup>64</sup>

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<sup>56</sup> *Id.*

<sup>57</sup> Symposium, *Title VII at 50 Debunking Unequal Burdens, Trivial Violations, Harmless Stereotypes, and Similar Judicial Myths: The Convergence of Title VII Literalism, Congressional Intent, and Kantian Dignity Theory*, 89 ST. JOHN'S L. REV. 401, 406 (2015).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 405–06 ("Simply put, courts have no authority to create extrastatutory varieties of lawful discrimination under a banner of reasonableness, especially varieties thoroughly dissimilar from Congress's legislated exclusions. Contrary to fundamental separation of powers, unequal burden theory elevates to supremacy judicial determinations that certain forms of discrimination are lawful due simply to their seemingly widespread acceptance, which acceptance the courts feel is reasonable.") (internal quotations omitted).

<sup>60</sup> *Id.*

<sup>61</sup> See Peter B. Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 770 (1987) ("... Title VII must be interpreted as broadly as possible to give full effect to its remedial purposes.").

<sup>62</sup> *Id.* at 771.

<sup>63</sup> *Id.*

<sup>64</sup> See *supra* note 57, at 411; See also Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1398 (1992) (stating "[t]he rules and standards both exploit and repress female sexuality and punish women who depart from (largely) male-created expectations about proper female behavior and roles. Perhaps the central social function of appearance regulation is to maintain the sexual subordination of women to men.").



*C. The Need to Account for Innate Physiological Differences when Considering Physical Fitness*

Gender differences among members of the same species, referred to as sexual dimorphism, occurs in humans.<sup>65</sup> Although humans display these dissimilarities at a young age, composition differences between males and females intensify during and after puberty.<sup>66</sup> Moreover, these differences further develop and become significant following adult maturation.<sup>67</sup>

Evaluating men and women in terms of (i) body composition; and (ii) cardiorespiratory capabilities supports the (average) anatomical and physiological differences between men and women. The result: men and women possess innate differences that create distinct exercise performance capabilities.<sup>68</sup>

i. Body Composition and the Musculoskeletal System

Examining (a) the average muscle composition; and (b) the average body fat percentages between combat ready females and female athletes as compared to male counterparts highlights the innate physiological differences between men and women.<sup>69</sup>

(a) Muscle Composition

On average, combat ready males in the United States Military possess more muscle in comparison to combat ready females.<sup>70</sup> Specifically, men possess “. . . approximately 50% more upper-body muscle mass and 30% more lower-body muscle mass [compared to women]”.<sup>71</sup> Unsurprisingly, such differences in muscle mass directly relate to muscular strength.<sup>72</sup> The strength achievement of women, measured by the maximum output of force, declines by 50 to 70% when compared to men.<sup>73</sup> Moreover, such strength differences compound when

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<sup>65</sup> Bradley C. Nindl et al., *Operational Physical Performance and Fitness in Military Women: Physiological, Musculoskeletal Injury, and Optimized Physical Training Considerations for Successfully Integrating Women Into Combat-Centric Military Occupations*, 181 MILITARY MEDICINE 50, 50–53 (2016); D.A. Lewis et al., *Physiological Differences Between Genders. Implications for Sports Conditioning*, 3 SPORTS MEDICINE 357, 357–58 (1986).

<sup>66</sup> See Nindl et al., *supra* note 65, at 50–51.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*; James J. Do et al., *Gender Bias and Pluralistic Ignorance in Perceptions of Fitness Assessments*, 25 MILITARY PSYCHOLOGY 23, 24–25 (2013).

<sup>69</sup> Nindl et al., *supra* note 65, at 50–51.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*; see also Do et al., *supra* note 68, at 24–25.

<sup>73</sup> See *supra* note 30, at JA 87.

isolating upper body strength.<sup>74</sup> In fact, men possess a greater amount of upper body and upper extremity muscle mass than females.<sup>75</sup>

*(b) Cumulative Body Fat*

In addition, adult males have less body fat compared to adult females because women require additional body fat to support reproductive necessities related to fetal gestation and viability.<sup>76</sup> As a result, women naturally accumulate body mass essential for carrying and sustaining offspring.<sup>77</sup> This mass, often characterized as “dead weight” in the context of exercise performance, burdens the musculoskeletal system of all women, resulting in a greater body fat composition than men.<sup>78</sup> More specifically, women support an average fat composition around 24 to 27% of gross body weight.<sup>79</sup> By contrast, men average 12 to 18% of fat compared to gross body weight.<sup>80</sup>

ii. Cardiovascular and Respiratory Fitness

Comparing (a) oxygen levels in the blood; (b) oxygen circulation; and (c) aerobic capacity reveals physiological differences that disadvantage the exercise performance capabilities of women as compared to men.

*(a) Oxygen Levels in the Blood*

Hemoglobin, a protein responsible for transporting oxygen in the circulatory system, impacts endurance capacity.<sup>81</sup> Women possess less hemoglobin compared to men, which impacts exercise performance.<sup>82</sup> In fact, “[a]verage hemoglobin levels in women are approximately 10 to 16% lower than in men.”<sup>83</sup> Given less oxygen in the blood, women may struggle with cardiovascular exercise when comparing peak exercise capabilities between the sexes.<sup>84</sup>

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<sup>74</sup> Nindl, at 50–51, *supra* note 65, at 58.

<sup>75</sup> *Id.*

<sup>76</sup> *See supra* note 30, at JA 489.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*; *See also* Lewis et al., *supra* note 65, at 366.

<sup>79</sup> *See supra* note 30, at JA 88; *See also* Nindl et al., *supra* note 65, at 51 (citing that women possess 20-25% of fat as compared to body mass while men have 13-16% body fat compared to total body mass).

<sup>80</sup> *See supra* note 30, at JA 88.

<sup>81</sup> Nindl et al., *supra* note 65, at 52.

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

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

<sup>84</sup> *Id.*

(b) *Oxygen Circulation*

Moreover, coupled with the decreased amount of hemoglobin, women possess “. . . smaller hearts and thinner left ventricle walls than men.”<sup>85</sup> As a result, “[d]ifferences in stroke volume and ejection fraction contribute to lower maximal cardiac outputs in women.”<sup>86</sup> Therefore, with less oxygen carried and less blood pumped during physical exertion women lack a comparable exercise efficiency compared to men.<sup>87</sup>

(c) *Aerobic Capacity*

In addition, women lack the same aerobic capacity as men.<sup>88</sup> Aerobic capacity measures oxygen consumption during physical activity.<sup>89</sup> The output, commonly expressed as a numeric VO<sub>2</sub>max grade, gauges cardiovascular fitness and maximal aerobic power.<sup>90</sup> Testing aerobic capacity through VO<sub>2</sub>max measures the efficiency of oxygen extraction from the muscle tissue during a given aerobic performance.<sup>91</sup> Men, on average, outperform women in terms of VO<sub>2</sub>max.<sup>92</sup> Specifically, women possess 15 to 30% lower VO<sub>2</sub>max compared to men.<sup>93</sup> This lower VO<sub>2</sub>max capacity results in less efficient oxygen consumption, which hinders the cardiovascular performance of women when compared to their male counterparts.<sup>94</sup>

*D. The FBI's Need for Physical Fitness Standards and the Importance of a Gender Inclusive Model*

FBI evaluators regard fitness as an important assessment criterion.<sup>95</sup> While the physical fitness examination assesses cardiovascular endurance and muscular strength, the fitness examination also tests otherwise indiscernible intangibles.<sup>96</sup> For instance, the FBI's physical fitness exam helps evaluate the commitment, devotion and resolve of potential Special Agent applicants.<sup>97</sup> Indeed, mandatory minimums are not set to create an

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<sup>85</sup> *Id.*

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

<sup>87</sup> Nindl et al., *supra* note 65, at 52.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Nindl et al., *supra* note 65, at 52.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *See supra* note 30, at JA 96.

<sup>96</sup> *Id.* at JA 449.

<sup>97</sup> *See id.* at JA 292–93.

impossible standard.<sup>98</sup> Rather, the FBI merely requires a basic level of physical fitness to ensure all applicants pass the clearly delineated admission standards.<sup>99</sup> Setting and following the strict admission requirements may help substantiate the essential discipline, motivation, and ability to precisely follow orders required of FBI Special Agents.<sup>100</sup> Accordingly, the FBI set and required a bright line fitness achievement standard to graduate as a Special Agent. Specifically, the fitness tests assess core strength, speed, and endurance in the following fitness evaluations:

(1) One-minute of continuous sit-ups to test core muscle strength and endurance of core muscles. Males must reach 38 sit-ups and females must reach 35 sit-ups.

(2) A 300-hundred-meter sprint to evaluate anaerobic power and speed. Men must finish within 52.4 seconds and women must finish within 64.9 seconds.

(3) Maximum push-up output to assess upper body strength and muscular endurance. Men must complete 30 push-ups and females must complete 14 push-ups.

(4) One and a half mile run measuring sustained aerobic capacity and endurance. Men must complete the run within 12:24 and females must complete the run within 13:59.<sup>101</sup>

The FBI designed a program with a straightforward and statistically reliable physical fitness test.<sup>102</sup> The FBI sought to “. . . measure a general level of fitness in a comprehensive and unbiased manner [that] has [also] been professionally validated such that policy and practice decisions based on the results of the assessment could be more easily implemented and defended from a legal perspective.”<sup>103</sup> Although the FBI historically tested incoming recruits, it revamped the testing in order to adjust

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at JA 449 (reasoning the FBI’s admission requirements evaluate the “. . . conscientiousness, cooperativeness, emotional maturity, initiative, integrity and judgment [of prospective FBI agents].”).

<sup>100</sup> *Id.*

<sup>101</sup> *See supra* note 30, at JA 197, JA 201–08.

<sup>102</sup> *See id.* at JA 371–73; *See also The Cooper Institute*, COOPERINSTITUTE.ORG, <http://www.cooperinstitute.org/about/> (last visited September 10, 2017) (providing “[t]he Cooper Institute (CI), established in 1970, is a 501.c.3. nonprofit research and education organization dedicated globally to preventive medicine. The Institute’s founder, Kenneth H. Cooper, M.D., M.P.H., the Father of Aerobics, was an Air Force physician who became interested in the role of exercise in preserving health. When he published his first best seller, *Aerobics*, in 1968, he introduced a new word and was the spark for millions to become active.”) (internal quotations omitted).

<sup>103</sup> *See supra* note 30, at JA 223.

requirements to account for physiological differences between men and women.<sup>104</sup>

Notably, the FBI's physical fitness assessments do not directly track the Special Agents' job requirements.<sup>105</sup> Despite the various responsibilities of Special Agents, neither timed runs nor bodyweight exercises fall under required workplace tasks. Unlike specific tests to determine the ability of an employee to perform essential job functions, the FBI's physical fitness tests served as a discrete graduation requirement.<sup>106</sup> Thus, the conditions tested need not directly replicate Special Agent job tasks.

Nonetheless, the FBI's physical fitness test assesses the fitness of trainees.<sup>107</sup> All trainees, regardless of gender, must reach the same—minimum—scaled level of physical fitness to become a Special Agent.<sup>108</sup> In order to ensure the test fairly measures results across gender, the FBI's physical fitness test utilizes different cut-off scores for males and females to account for physiological differences between men and women.<sup>109</sup> Scaling the requirements account for average strength and speed differences between men and women.<sup>110</sup> For instance, the FBI test equates 14 push-ups for women to 30 push-ups for men.<sup>111</sup> All such data adjustments resulted from a statistical analysis coordinated by Psychologist Amy D. Grubb, Ph.D. Dr. Grubb and her team compiled and scaled the FBI's admission results between 2004 and 2012 to build a statistical model to fairly score physical fitness examinations.<sup>112</sup> The resultant test—confirmed with a high degree of statistical confidence—imposed demands with equal burdens upon men and women.<sup>113</sup>

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<sup>104</sup> *Id.* at JA 223–26.

<sup>105</sup> *Id.* at JA 434.

<sup>106</sup> *Id.* at JA 313–15.

<sup>107</sup> *Id.* at JA 196.

<sup>108</sup> *Id.*

<sup>109</sup> *See supra* note 30, at JA 88.

<sup>110</sup> *Id.* at JA 196–201.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at JA 197.

<sup>113</sup> *Id.* at JA 196–97.

## III. ANALYSIS

*A. Creating Standards to Adequately Account for Physiological Differences Between Men and Women**i. The FBI's Bona Fide Fitness Test Correctly Accounts for Average Body Composition and Musculoskeletal System Differences Between the Sexes.*

The musculoskeletal differences between men and women create disparities in average strength output and body fat composition.<sup>114</sup> In light of these differences, the FBI need not hold men and women to the same physical fitness requirements for baseline fitness testing. Such requirements, without modification along gender lines, unfairly impact women without adequate justification. For this reason, the FBI scales its testing. While Special Agents may be required to accomplish tasks requiring muscular strength and/or endurance, the FBI's physical fitness test is not a binary construct tracking the ability to perform specific employment tasks.<sup>115</sup> By contrast, when testing the ability to accomplish a discrete job task, the employee either can or cannot accomplish the task in question. Consequently, the binary job-related test confirms the applicants' ability to complete a specific task required for the job in question. Here, rather, the FBI's physical fitness exam serves as a clearly delineated baseline for required physical fitness separate from any specific job function. In other words, the FBI's required exercise standards serve to weed out underperforming or undesirable candidates, irrespective of specific job tasks.<sup>116</sup>

Considering the average differences in body composition and musculoskeletal systems, the FBI's fitness test cannot fairly mandate the same push-up or sit-up requirements for men and women.<sup>117</sup> The scientific evidence confirming the innate differences between men and women discredits the notion that men and women must obtain the same fitness scores because such outputs require different levels of fitness.<sup>118</sup> The FBI, accounting for the fact that women have less muscle and more cumulative body fat, correctly adjusted the strength requirements assessed via push-ups and sit-ups.

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<sup>114</sup> *Id.*

<sup>115</sup> *Bauer*, 812 F.3d at 344–45; *See also supra* note 30, at JA 449.

<sup>116</sup> *See supra* note 30, at JA 449.

<sup>117</sup> *See discussion infra* Part II.C.i.

<sup>118</sup> *See supra* note 30, at JA 196–97.

ii. The FBI's Bona Fide Fitness Test Rightfully Accounts for Average Cardiovascular and Respiratory Differences Between Men and Women.

Equivalent fitness standards between men and women must account for the average cardiovascular and respiratory differences between the sexes.<sup>119</sup> Physiological differences hinder the peak performance of women in terms of cardiovascular output and exercise performance capability compared to men.<sup>120</sup> The physiological differences between men and women create a gap in the performance obtainable for women as compared to men.<sup>121</sup> Furthermore, women cannot extract oxygen from muscle tissue with comparable efficiency to men.<sup>122</sup> Indeed, women may be able to obtain comparable fitness scores relative to male counterparts. This result, however, would (on average) impose greater demands upon the female body compared to men. Thus, exercise performance capabilities differ based upon sex, and the FBI's fitness test fairly accounts for average physiological differences when assessing the timed 1.5 mile run and 300-meter run.

iii. The FBI Correctly Accommodates for Gender Differences when Scoring Fitness Results.

The FBI's physical fitness test enforces a minimum level of physical fitness. If assessed in an evenhanded manner, fitness evaluations must consider average physiological differences between men and women.<sup>123</sup> As such, the FBI cannot implement a facially neutral test scoring men and women the same because attaining the same scores would require different levels of fitness. In other words, any such concessions made to the current scoring model would undercut the statistical analysis that resulted in a 47% pass rate for males and a 42.1% pass rate for females.<sup>124</sup> Therefore, adjusting the testing to create a single fitness standard would unfairly burden female applicants.

In practice, the FBI could (i) adopt the scoring currently utilized for men; (ii) adopt the scoring currently utilized for women; or (iii) create a new scoring system somewhere between proposed options one and two. Considering proposed option one, the FBI's data accumulated between 2004 and 2012 highlights the disparities created with holding men and

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<sup>119</sup> See discussion *infra* Part II.C.ii.

<sup>120</sup> See *supra* note 30, at JA 196–97.

<sup>121</sup> Nindl et al., *supra* note 65, at 52.

<sup>122</sup> *Id.* at 53–54.

<sup>123</sup> See discussion *infra* Part II.C.

<sup>124</sup> See *supra* note 30, at JA 207.

women responsible for the same fitness scores.<sup>125</sup> For instance, utilizing the male 30 push-up standard for both men and women would subject females to failure at a rate of 86.1%, compared to males failing at a mere 12%.<sup>126</sup> Further, instituting the second proposed option also sacrifices the current gender inclusive model, as the 14 push-up female standard would result in a 13.9% failure rate for women, compared to men at 0.5%.<sup>127</sup> Finally, proposed option three presents an unworkable solution because any adjustment to the current scoring would alter the aforementioned statistical analysis that resulted in a 47% pass rate for males and a 42.1% pass rate for females.<sup>128</sup> Therefore, the FBI's test correctly scales the fitness requirements in light of innate biological gender differences.

*B. Despite Adjusting Cut-off Scores, Bias Persists within the FBI's Physical Fitness Exam*

The FBI's physical fitness test subjects women, not men, to bias. Despite adjusting scores to account for physiological sex differences, the FBI's fitness test focuses solely on male dominated exercises. Currently, the test scores cardiovascular endurance and strength, which inadequately test female strengths in favor of male dominated exercises.<sup>129</sup> Although the scoring accommodates strength and endurance disparities between men and women, the test itself lacks procedural fairness because it solely tests male dominated exercises. Stacking the deck against the female applicants—regardless of subsequent accommodations—reflects bias within the FBI's test. Accordingly, women, not men, face unequal treatment.

For instance, although men possess more muscle mass and greater strength, such innate traits hinder range of motion and contour ability required during flexibility exercises.<sup>130</sup> As such, women possess greater flexibility compared to men.<sup>131</sup> Notably, the FBI does not test the flexibility of Special Agent candidates.<sup>132</sup> It did, however, view this characteristic as important to the FBI Special Agent's job-related tasks.<sup>133</sup> To this end, the FBI created a workplace task survey that tracked the

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<sup>125</sup> *Id.* at JA 77–78.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at JA 229.

<sup>129</sup> *Id.* at JA 72.

<sup>130</sup> *See supra* note 30, at JA 229.

<sup>131</sup> W.B. Kibler, M.D. et al., *A Musculoskeletal Approach to the Preparticipation Physical Examination Preventing Injury and Improving Performance*, 17 THE AM. J. OF SPORTS MEDICINE 4, 527 (1989).

<sup>132</sup> *See supra* note 30, at JA 200.

<sup>133</sup> *Id.*



fitness components “. . . required for safe and successful performance of the Special Agent position.”<sup>134</sup> FBI agents responded to the comprehensive empirical job analysis indicating the importance of flexibility.<sup>135</sup> More specifically, FBI Special Agents noted that varying iterations of bending, stooping and squatting related to occupational tasks.<sup>136</sup> Despite such findings, none of the FBI’s physical fitness requirements directly gauge flexibility for Special Agent candidates.<sup>137</sup>

*C. The FBI’s Bona Fide Physical Fitness Test and Title VII*

i. Accounting for Innate Physiological Differences:

The FBI, cognizant of Title VII legislation, relied upon language from the U.S. Supreme Court decision *United States v. Virginia* to help justify a gender based physical fitness test.<sup>138</sup> Specifically, the FBI’s validation report remarked that despite the Civil Rights Act of 1991 (codifying Title VII), “. . . physiological differences between males and females should not necessarily be precluded from the use in employment settings.”<sup>139</sup> The *Virginia* decision, despite a holding based upon the Equal Protection Clause, favors different treatment for men and women when considering physical fitness.<sup>140</sup> In fact, the FBI relied on the *Virginia* court’s language stating: “. . . academic and other standards for women . . . shall be the same as those required for male individuals, except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals.”<sup>141</sup> Based in part on these statements, the FBI accounted for such average physiological differences between men and women.<sup>142</sup>

Despite the FBI’s carefully planned and thoughtfully implemented physical fitness test, Bauer’s legal challenge emerged.<sup>143</sup> Here, in evaluating the Title VII claim, the district court held that the FBI unlawfully discriminated against Bauer.<sup>144</sup> The district court reasoned that Bauer successfully completed the physical fitness standards required for female FBI Special Agent applicants, and therefore his performance on the

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<sup>134</sup> *Id.* at JA 210.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

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

<sup>138</sup> *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996); *See also supra* note 30, at JA 202.

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

<sup>140</sup> *Virginia*, 518 U.S. at 550 n.19.

<sup>141</sup> *Id.*

<sup>142</sup> *See supra* note 30, at JA 202.

<sup>143</sup> *Bauer*, 25 F. Supp. at 850–51.

<sup>144</sup> *Id.* at 855 (citing *City of L.A. v. Manhart*, 435 U.S. 702, 711 (1978)).

gender-based physical fitness examination barred him from graduation.<sup>145</sup> Ultimately, however, the Fourth Circuit overruled the district court in favor of the FBI.<sup>146</sup> Paralleling the *Virginia* court's reasoning, the Fourth Circuit did not find that the FBI's different treatment along gender lines unfairly discriminated against men or women.<sup>147</sup>

ii. Considering a BFOQ Defense for the FBI's Physical Fitness Examination:

The FBI's fitness test does not fit within the scope of the narrow BFOQ exceptions required to survive Title VII scrutiny. Although validated along empirical lines, the FBI's physical fitness test does not meet the current requirements for BFOQ safe harbor. The BFOQ exception, as it currently stands, only relaxes Title VII protections when ". . . reasonably necessary to the normal operation of that particular business or enterprise . . ." <sup>148</sup> Illustrating the requisite business necessity, *International Union v. Johnson Controls* featured a discrimination challenge to a fetal protection policy prohibiting fertile women from lead exposure during the battery manufacturing process.<sup>149</sup> This protectionist design prevented women from securing numerous positions within the manufacturing company.<sup>150</sup> The laudable safety concerns, however, only applied to fertile women.<sup>151</sup> Accordingly, fertile men, unlike fertile women, could ". . . risk their reproductive health for [any] particular job."<sup>152</sup> Here, in the absence of a justified business necessity—centrally linked to the business itself—the discriminatory treatment fell short of the BFOQ safe harbor provision.<sup>153</sup> Consequently, the Title VII challenge succeeded because Johnson Controls, Inc. lacked the necessary justification to treat men and women differently.<sup>154</sup>

The BFOQ exception remains narrow and does not ensure business preferences or profit motives in the face of a Title VII claim.<sup>155</sup> For example, in *Fernandez v. Wynn Oil Co.*, the Ninth Circuit held ". . . stereotypic impressions of male and female roles do not qualify

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<sup>145</sup> *Id.* at 845, 864–65.

<sup>146</sup> *Bauer*, 812 F.3d at 352.

<sup>147</sup> *Id.* at 351.

<sup>148</sup> 42 U.S.C.S. § 2000e-2(e) (2017).

<sup>149</sup> *Int'l Union v. Johnson Controls*, 499 U.S. 187, 190–92 (1991).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 197.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 200–01.

<sup>154</sup> *Id.* at 211.

<sup>155</sup> 42 U.S.C.S. § 2000e-2(e) (2017).

gender as a BFOQ.”<sup>156</sup> In this case, the employer, an oil company, refused to promote an employee due to (a) lack of qualification; and (b) potential stigma from foreign business partners perceiving a female executive.<sup>157</sup> Although the Ninth Circuit affirmed the employment action on the former ground, the latter justification impermissibly discriminated on the basis of gender.<sup>158</sup>

Considering the current BFOQ, the FBI’s physical fitness test fails to meet the stringent safe harbor requirements. Indeed, the Bureau admitted numerous Special Agents prior to the institution of the compulsory testing requirements at issue.<sup>159</sup> Furthermore, the FBI did not conduct follow-up testing for admitted Special Agents.<sup>160</sup> Thus, the FBI did not require all Special Agents to complete the physical fitness test.<sup>161</sup> Accordingly, the FBI did not possess a viable BFOQ defense.<sup>162</sup>

iii. Considering a Ricci Defense to Justify the FBI’s Physical Fitness Test:

As a practical matter, the spirit of Title VII arguably required the FBI’s newly designed physical fitness test to account for the physiological differences between men and women.<sup>163</sup> As demonstrated by the U.S. Supreme Court decision, *Ricci v. DeStefano*, an employer may engage in disparate treatment even without a BFOQ defense.<sup>164</sup> In *Ricci*, the New Haven, Connecticut fire department allegedly acted unfairly with respect to the officer promotion process.<sup>165</sup> More specifically, white firefighters disproportionately obtained higher marks on the officer promotion examination compared to minority applicants.<sup>166</sup> Subsequently, the city recognized these disparities as a lack of fairness and barred the examination.<sup>167</sup> The Supreme Court held that an employer may engage in disparate treatment if such treatment operates on a “strong-basis-in-

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<sup>156</sup> *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981).

<sup>157</sup> *Id.* at 1274.

<sup>158</sup> *Id.* at 1277.

<sup>159</sup> See *supra* note 30, at JA 455; See also Michael S. Schmidt, *Battling Crime and Calories at F.B.I. (Fit Bureau of Investigation)*, N.Y. TIMES, Apr. 5, 2015, <https://www.nytimes.com/2015/04/06/us/battling-crime-and-calories-at-fbi-fit-bureau-of-investigation.html>.

<sup>160</sup> *Bauer*, 25 F. Supp. 3d at 863.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 863–64.

<sup>163</sup> See generally Pub. L. No. 102-166, 105 Stat. 1071 (1991).

<sup>164</sup> *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009).

<sup>165</sup> *Id.* at 561–62.

<sup>166</sup> *Id.* at 562.

<sup>167</sup> *Id.* at 593.

evidence,” and that but for such action, the employer would otherwise be liable under disparate impact theory.<sup>168</sup>

Considering *Ricci*, if the FBI failed to account for physiological differences between men and women, this failure would result in a disparate impact. Indubitably, women would be disproportionately burdened by the physical fitness requirements if administered without accommodation along gender lines. Given the innate physiological differences between men and women, a physical fitness test that did not account for gender differences would pose a disproportionate burden upon female FBI applicants. Therefore, the FBI’s physical fitness test rightfully considered this potential disparate impact when instituting the gender based physical fitness examination.

Moreover, the FBI can establish a strong basis in evidence for its bona fide physical fitness test, which utilized several years of data collection, statistically scaled requirements, and independent verification.<sup>169</sup> Therefore, the FBI may escape Title VII liability because in accounting for physiological differences between men and women, the Bureau rightfully sought to avoid disparate impact liability.

#### iv. The Fourth Circuit’s Ruling:

In *Bauer*, the Fourth Circuit ruled that the FBI assessed an equal level of fitness for men and women by accounting for average physiological differences between the sexes.<sup>170</sup> As a matter of policy, the Fourth Circuit’s rationale for this ruling is proper. The FBI took deliberate steps to create a physical fitness test that catered to a diverse applicant group. By leveling the playing field between men and women, the test comports with the principles Title VII sought to guarantee. Therefore, different testing requirements for men and women, accounting for average physiological differences, fits within Title VII’s policy goals.

The law as written, however, does not permit scoring based on gender without a BFOQ exception. On balance, the statutory interpretation employed in *Bauer* (as seen in the dress and grooming cases) remains inconsistent with the law.<sup>171</sup> Moreover, the entrenchment of the unequal burden analysis operates outside the statutory text. *Bauer*, therefore, conflicts with the plain language of the statute.

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<sup>168</sup> *Id.* at 583–84.

<sup>169</sup> *See supra* note 30, at JA 202.

<sup>170</sup> *Bauer*, 812 F.3d at 351.

<sup>171</sup> Holly C. Frey, *The Borgata Babes Case: The Weighty Matter of Appearance Standards*, 21 WIDENER L. REV. 95, 116 (2015) (stating that the unequal burden analysis functions as a “legal loophole”).

*D. A Proposed Solution: Revise the BFOQ Exception to Account for Average Physiological Differences Between Men and Women*

The Fourth Circuit ruled correctly in light of Title VII's purpose.<sup>172</sup> Nevertheless, the decision runs counter to the law as written. The BFOQ exception, in its current form, provides a very narrow set of circumstances permitting different treatment along gender lines.<sup>173</sup> This narrow exception inefficiently constrains otherwise fair assessments including, but not limited to, the FBI's bona fide physical fitness test. Without a reasonably necessary justification and valid occupational purposes, this type of employment practice—created along gender lines—fails.<sup>174</sup> As a result, Congress should amend the BFOQ exception to account for average physiological differences between men and women. Accordingly, the bolded and underlined portion codifies the bona fide use of physical fitness tests that account for average physiological differences between men and women.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; **businesses or enterprises with physical fitness assessments imposing equal burdens upon men and women accounting for average physiological sex differences;** educational institutions with personnel of particular religion.

Notwithstanding any other provision of this title [42 U.S.C.S. §§ 2000e-2(e) et seq.], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin 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, **(2) it shall not be an unlawful employment practice to use a bona fide physical fitness test that imposes equal burdens upon each sex accounting for average physiological differences between men and women,** and **(3)** it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or

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<sup>172</sup> 42 U.S.C.S. §§ 2000e et seq. (2017).

<sup>173</sup> 42 U.S.C.S. § 2000e-2(e) (2017).

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

other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.<sup>175</sup>

Adopting this revised BFOQ exception is the best remedy accounting for physiological differences between men and women as assessed using bona fide physical fitness tests. Codifying the unequal burden analysis, as it applies to bona fide physical fitness examinations, rightfully considers the innate biological differences between men and women. Indeed, the physiological differences between men and women inextricably link to human anatomy and physiology. Further, accounting for physiological differences between men and women differs compared to the dress and grooming cases. Specifically, physical fitness capacity, in consideration of average physiological differences between men and women, lacks the same degree of mutability as appearance and grooming. In fact, innate physiological characteristics exist as immutable traits. Thus, applying the unequal burden analysis to physical fitness requirements bears directly upon biological and anatomical sex characteristics. Consequently, the innate underpinnings of the physiological differences between men and women greatly differ compared to the mutable traits as seen in the dress and grooming cases.

Currently, a gap exists between the law as written and the law as applied. Although borrowing from a long line of dress and grooming cases, courts do not possess the statutory tools to grapple with scenarios that treat men and women differently based on physiological differences without a qualifying BFOQ exception. Therefore, absent a BFOQ amendment, the efficacy of the statutory text comes into question.

Ultimately, the revised BFOQ exception will further level the playing field between male and female applicants. While Title VII shall remain to thwart discrimination, imposing the abovementioned BFOQ expansion rightfully accounts for the physiological differences between the sexes.

#### *E. Implementing the Revised BFOQ Exception: A Practical Solution*

Codifying the revised BFOQ exception serves judicial economy and advances Title VII's purpose. In practice, the additional exception accounting for the (average) physiological differences between men and women will further expand the protections and prevent workplace gender

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<sup>175</sup> *Id.* (with proposed changes tracked with bold and underlined text).

discrimination. Currently, without the proposed BFOQ expansion, courts must consider whether the facial difference in treatment instituted based upon sex constitutes discrimination.<sup>176</sup> Next, they must evaluate the employment practice in question by examining the effect of the law in search of any discriminatory impact, which may stem from disparate treatment or disparate impact.<sup>177</sup> Expanding the BFOQ undercuts challenges to bona fide fitness assessments that account for physiological differences between the sexes. Thus, a bright line rule allowing different standards and different cut-off scores based upon physiological differences will help reasoned and fair scoring accommodations.

#### IV. CONCLUSION

The *Bauer* case illustrates the difficulty interpreting allegedly discriminatory employment action under 42 U.S.C.S. § 2000e-2(1) and (m). The current legislation fails to account for the average physiological differences between men and women in the absence of a qualified BFOQ exception. As a result, inclusive employment actions, such as the FBI's fitness test at issue in *Bauer*, fail to comply with Title VII's text. The gap between furthering Title VII policy and purpose initiatives and the current text establishes the need for legislative reform. As a push to exercise change and account for physiological differences between men and women, Congress should amend Title VII to codify the unequal burden analysis as assessed in bona fide physical fitness examinations.

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<sup>176</sup> 42 U.S.C.S. §§ 2000e et seq. (2017).

<sup>177</sup> *Id.*