Notre Dame Law Review

Volume 95 | Issue 1 Article 9

12-2019

Narrowing the Trapdoor of the Government Employee Rights Act

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NOTES

NARROWING THE TRAPDOOR OF THE GOVERNMENT EMPLOYEE RIGHTS ACT

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INTRODUCTION

Title VII of the Civil Rights Act of 1964 protects individuals from employment discrimination, whether it is based on sex, religion, national origin,

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race, or color.[1] That is the part everyone knows. What most do not know is that the route to remedy depends on where you work. Private sector employees at qualifying employers[2] have a simple route: file a charge at the Equal Employment Opportunity Commission (EEOC) or its state-level equivalent, and either seek redress in the administrative realm, or get a "right-to-sue" letter and take the case to a federal district court.[3] This gives litigants autonomy to choose which path they prefer, depending on their goals. However, for some, the path has already been decided. These employees cannot file their suits in federal district courts.[4] They cannot argue their cases to juries.[5] They cannot even argue before Article III judges.[6] Instead, they must rely on an administrative framework, in front of administrative judges, with altered rules of evidence,[7] all because they fell through the "trapdoor" of Title VII: the "employee" exemptions in 42 U.S.C. § 2000e(f).

Normally, "employees" are allowed to file their cases with the EEOC and choose whether to follow the administrative resolution process or take their cases to court.[8] But the Equal Employment Opportunity Act of 1972 created three exemptions to Title VII's definition of "employee," applicable only to state government employees.[9] If individuals fit into one of these exemptions, they fall out of Title VII's protections.[10] Instead, they must rely on section 321 of the Government Employee Rights Act of 1991 (GERA), which establishes a mandatory administrative procedure for the aggrieved employees.[11] This is what makes Title VII's "employee" exemptions act as a "trapdoor"; the exemptions drop certain state-employed persons from Title VII's coverage, only for them to be caught in the "safety net" of GERA.

This is problematic for several reasons. First, GERA is far from a perfect safety net. GERA offers lesser protections from discrimination, both legally and practically speaking, and lesser remedies.[12] This problem is compounded by the fact that courts and EEOC investigators are not sure who is subject to the trapdoor and who is not. The trapdoor's rules seem clear—for example, the trapdoor applies to persons chosen to be the *personal staff* of an

1 *See* 42 U.S.C. § 2000e-2(a) (2012) (prohibited actions).

2 *See id.* § 2000e(b) (setting definitions for "employer" under Title VII).

3 45C AM. JUR. 2D *Job Discrimination* § 1965 (2018); *Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/employees/lawsuit.cfm (last visited Aug. 24, 2019).

4 Brazoria County v. EEOC, 391 F.3d 685, 696 n.1 (5th Cir. 2004) (Pickering, J., concurring in part and dissenting in part).

5 *See id.*

6 *See id.*

7 *See id.*; 29 C.F.R. § 1603.214 (2018).

8 *See supra* note 3 and accompanying text.

9 42 U.S.C. 2000e(f) (2012).

10 *Id.*

11 Government Employee Rights Act of 1991, Pub. L. No. 102–166, § 321, 105 Stat. 1088, 1098 (codified at 42 U.S.C. § 2000e-16c).

12 *See infra* Part I.

elected state official.[13] But what does "personal staff" mean? The circuit courts have splintered on who counts as "personal staff" and they disagree on what test should be used to determine if a charging party is "personal staff." This has led the EEOC to misclassify some plaintiffs, leading to fruitless district court lawsuits that end up being sent back to the EEOC.[14]

This murkiness is especially problematic given the recent revelations of discrimination in politics. As the #MeToo movement marches on, sexual harassment claims under Title VII are increasing[15] and many state political workers are reflecting on the appropriateness of their workplace cultures.[16] For instance, survey data in the Connecticut state legislature reported that many viewed "'sexual harassment [as] a pervasive problem' within the General Assembly."[17] In Washington, a letter decrying the tolerance for groping and sexual innuendo within the state legislature gathered more than two hundred signatures, with lobbyists and lawmakers being among the signatories.[18] Even Americans outside of state politics are weighing in on the issue; a jury in Iowa awarded a former Iowa Senate staffer over two million dollars for the sexual harassment she suffered in the state capitol.[19] This is not solely a state politics problem either: the #MeToo movement has also revealed accusations within the U.S. Congress.[20] For instance, allegations

13 *Compare* 42 U.S.C. § 2000e(f) (exempting persons "chosen by [a state elected official] to be on such officer's personal staff" from Title VII), *with id.* § 2000e-16c(a)(1) (stating that the catchall of GERA encompasses any "member of [an] elected official's personal staff.").

14 *See* Edelstein v. Stephens, No. 1:17-cv-305, 2018 WL 948769, at *2 (S.D. Ohio Feb. 16, 2018) (dismissing a Title VII claim since the plaintiff was "personal staff"), *adopted in part and rejected in part by* No. 1:17-cv-305, 2018 WL 1558868, at *7 (S.D. Ohio Mar. 31, 2018).

15 Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Releases Preliminary FY 2018 Sexual Harassment Data (Oct. 4, 2018), https://www.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm.

16 *See* Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 355 (7th Cir. 2017) (Posner, J., concurring) ("[I]t has taken our courts and our society a considerable while to realize that sexual harassment, which has been pervasive in many workplaces (including many Capitol Hill offices . . .), is a form of sex discrimination.").

17 Mike Savino, *Connecticut State Legislature Updates Sexual Harassment Policy After Survey Results*, Rec.-J. (Sept. 22, 2018), http://www.myrecordjournal.com/News/State/Legislature-updates-sexual-harassment-policy-after-survey-results.html.

18 Rachel La Corte, *Washington Lawmakers Working on Sexual Misconduct Policies*, AP News (Apr. 11, 2018), https://www.apnews.com/a2e70056aba24eaf8cfbde489f6c8fde.

19 Brianne Pfannenstiel, *Kirsten Anderson Offered State $1.25M Settlement in Harassment Case That Earned Her $2.2M Verdict*, Des Moines Reg. (Aug. 10, 2017), https://www.desmoinesregister.com/story/news/politics/2017/08/10/kirsten-anderson-offered-state-1-25-m-settlement-harassment-case-earned-her-2-2-m-verdict/557623001/.

20 *See generally* Christina C. Hopke, Note, *Is Congress Holding Itself to Account? Addressing Congress's Sexual Harassment Problem and the Congressional Accountability Act of 1995 Reform Act*, 94 Notre Dame L. Rev. 2159 (2019); Heidi M. Przybyla, *House Democrat Divisions Erupt as Sexual Harassment Issue Heats Up, Threatens Members*, USA Today (Nov. 29, 2017), https://www.usatoday.com/story/news/politics/2017/11/29/house-democrats-divided-sexual-harassment-issue-heats-up-threatens-members/906825001/.

against some U.S. representatives received considerable press after it was reported that the congressmen used taxpayer funds to settle complaints against them.[21] While additional protections have been enacted for congressional employees,[22] protections for state government employees have not received similar attention.[23] This Note focuses on the federal remedies available to one class of these employees: the "personal staff" of state-level elected officials. They must be given a fair opportunity to say "me too."

Given this context, we should revisit what protections are available to these state workers and push for reforms that further sexual equality. One way to do so is to decrease the size of Title VII's trapdoor. This Note aims to fight sexual harassment in politics by advocating for a narrower understanding of the trapdoor, such that more plaintiffs are eligible to bring Title VII actions rather than GERA actions. Specifically, this Note explains why the "personal staff" trapdoor should be narrowed and then provides a method for how to do so—by settling a circuit split on the interpretation of "personal staff."

Part I explains the relationship between Title VII and GERA. It illustrates the machinery behind the trapdoor and details how the "personal staff" exemption can take a charging party out of Title VII and plug them into GERA. Part II then presents policy reasons for narrowing the "personal staff" exemption. While GERA does offer some protection, the protections of Title VII are more desirable. Given the context of state politics, Title VII offers a better forum (federal court and juries), better remedies (punitive damages), and better oversight by the EEOC (through Commissioner charges).[24] Furthermore, extending Title VII protection to state government workers will give them equivalent protection to congressional workers.[25] Whereas Part II explains "why," Parts III and IV describe "how." Part III details the circuit split over the "personal staff" exemption. In deciding between two multifactor balancing tests, one by the Fourth Circuit and one by the Fifth Circuit, Section IV.A argues that the Fourth Circuit's test will better narrow the trapdoor and offer more litigants Title VII protection. Section IV.B then provides a legal basis for choosing the Fourth Circuit's test.

21 *See* Press Release, Comm. on Ethics, U.S. House of Representatives, Statement of the Chairwoman and Ranking Member of the Committee on Ethics Regarding Representative Patrick Meehan (Jan. 22, 2018), https://ethics.house.gov/sites/ethics.house.gov/files/20180118%20Public%20Statement.pdf; Katie Rogers & Kenneth P. Vogel, *Congressman Combating Harassment Settled His Own Misconduct Case*, N.Y. TIMES (Jan 20, 2018), https://www.nytimes.com/2018/01/20/us/politics/patrick-meehan-sexual-harassment.html.

22 *See* Congressional Accountability Act of 1995 Reform Act, Pub. L. No. 115-397, 132 Stat. 5297 (2018) (codified in scattered sections of 2 U.S.C.); Hopke, *supra* note 20, at 2182–85 (containing a general discussion of these reforms).

23 *See* 2 U.S.C. § 1301(a)(3) (2012) (providing that "covered employee[s]" under the Congressional Accountability Act of 1995 did not include state government employees); Congressional Accountability Act of 1995 Reform Act, 132 Stat. 5297 (reforming protections to federal government employees, without discussing state government employees).

24 *See infra* Sections II.A–B.

25 *See infra* Section II.C.

Because the Fourth Circuit test better aligns with congressional intent, Title VII's legislative purpose, and agency interpretations of the statue, it represents the proper interpretation of the "personal staff" exemption and should be favored.

I. Understanding the Title VII–GERA Relationship

First, we must examine why Title VII's definition of "employee" is a trapdoor hidden in plain sight. Title VII protects "employees" from disparate treatment and harassment,[26] and the word "employee" is a defined term in the statute.[27] While the statutory definition of "employee" under 42 U.S.C. § 2000e(f)[28] is broad, encompassing a large percentage of America's workforce, the definition specifically exempts three types of workers from Title VII's protections. Under these exemptions,

> the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.[29]

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26 Technically, Title VII protects "individuals" from disparate treatment and harassment. *See* 42 U.S.C. § 2000e-2(a) (2012); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63 (1986) (recognizing that sexual harassment can be discrimination "because of" sex); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973) (creating a burden-shifting framework for proving disparate treatment claims of discrimination). Section 2000e-2(a)(1) says that it is unlawful "to fail or refuse to hire or to discharge any *individual*, or otherwise to discriminate against any *individual*." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Note that the sentence does not include the word "employee." *Id.* Could disparate treatment or sexual harassment plaintiffs who are "personal staff" and thus not "employees" argue that they should be able to pursue Title VII relief anyway because § 2000e-2(a)(1) applies to "individuals," and not "employees"? In short, no. Many circuit courts have chosen to read in the word "employee," and thereby exempt anyone who falls through the trapdoor. *See* Birch v. Cuyahoga Cty. Prob. Court, 392 F.3d 151, 157 (6th Cir. 2004) (stating that "courts have limited Title VII's protections to individuals who are 'employees,'" notwithstanding the word "individuals" (citing Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1242 (11th Cir. 1998))). Thus, for all intents and purposes, whether someone is an "employee" under § 2000e(f) determines whether he or she is within Title VII's reach, or within GERA's. This also corroborates the drafting history of the provision. The "employee" exemptions were added to offset the expansion of the definition of "person," which was amended to include state governments. *See* Fischer v. N.Y. State Dep't. of Law, 812 F.3d 268, 278 (2d Cir. 2016); Alaska v. EEOC, 564 F.3d 1062, 1087 (9th Cir. 2009) (Ikuta, J., dissenting). Thus, the natural interpretation of the "employee" definition is that it serves as a threshold for who the cognizable charging parties and plaintiffs are, even if the term is not used in § 2000e-2(a).

27 42 U.S.C. § 2000e(f); *see* Kelley v. City of Albuquerque, 542 F.3d 802, 807–08 (10th Cir. 2008).

28 42 U.S.C. § 2000e(f).

29 *Id.* While the other two exemptions—"appointee[s]" and "immediate adviser[s]"—also act as trapdoors, this Note is focused solely on the first exemption: "personal staff."

These provisions act as an off-ramp, allowing courts to grant Rule 12(b) motions and summary judgment motions against plaintiffs who seek the protection of Title VII.[30] Similar exemptions can also be found in the Age Discrimination in Employment Act (ADEA)[31] and the Fair Labor Standards Act (FLSA),[32] whose definitions are also exported to the Family and Medical Leave Act (FMLA)[33] and the Equal Pay Act.[34]

These exemptions were added to Title VII as part of the Equal Employment Opportunity Act of 1972.[35] But until 1991, there was no backstop for those who were exempted.[36] Instead, they had to rely upon other causes of action not based in the Civil Rights Act of 1964, such as § 1983, § 1981, state discrimination laws, and state tort law claims.[37] However, in the Civil Rights

30 *See, e.g.*, *Birch*, 392 F.3d at 155, 159 (affirming a grant of summary judgment on Title VII claim because of the "employee" exemption); Bland v. New York, 263 F. Supp. 2d 526, 531, 545 (E.D.N.Y. 2003) (dismissing plaintiff's Title VII claim on a Rule 12(b) motion because of the "employee" exemption).

31 29 U.S.C. § 630(f) ("The term 'employee' . . . shall not include . . . any person chosen by such officer to be on such officer's *personal staff* . . . .") (emphasis added). The language of the Government Employee Rights Act of 1991 (GERA) also extends the protections of the Americans with Disabilities Act (ADA) to "personal staff," despite no mention of the phrase "personal staff" in the ADA. 42 U.S.C. § 2000e-16c.

32 29 U.S.C. § 203(e)(2)(C)(ii)(II).

33 *See* Rutland v. Pepper, 404 F.3d 921, 924 n.2 (5th Cir. 2005) (citing Nichols v. Hurley, 921 F.2d 1101, 1103 (10th Cir. 1990) (per curiam)).

34 *See* Reardon v. Herring, 191 F. Supp. 3d 529, 536 (E.D. Va. 2016).

35 Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103 (codified as amended at 42 U.S.C. § 2000e).

36 *See Nichols*, 921 F.2d at 1103, 1111 (affirming summary judgment on the "personal staff" finding and ending the inquiry).

37 These avenues still exist today, but they are questionable alternatives. Litigants could turn to § 1983, which protects citizens from "deprivation of any rights, privileges, or immunities secured by *the Constitution and laws*." 42 U.S.C. § 1983 (emphasis added). But § 1983 is riddled with obstacles. If a litigant argues § 1983 based on the "and laws" portion, there is debate over whether GERA provides an exclusive remedy and thus precludes § 1983 suits. *See* Dyer v. Radcliffe, 169 F. Supp. 2d 770, 777 (S.D. Ohio 2001). If litigants instead argue on a constitutional basis (or if their statutory claims somehow survive the preclusion arguments), they must still topple qualified immunity, a "shield against government damages liability [that] is stronger than ever." Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1798 (2018). Litigants could avoid qualified immunity by suing officials in their official capacities, but then the plaintiffs cannot recover damages. *See* Evelyn Corwin McCafferty, Comment, *Age Discrimination and Sovereign Immunity: Does* Kimel *Signal the End of the Line for Alabama's State Employees?*, 52 ALA. L. REV. 1057, 1058 (citing Edelman v. Jordan, 415 U.S. 651, 663–68 (1974)). Then there is § 1981, which ensures citizens "shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). But this statute only prohibits *racial* discrimination. *See* Bobo v. ITT, Cont'l Baking Co., 662 F.2d 340, 342–44 (5th Cir. 1981) ("[N]o court has held that allegations of gender based discrimination fall within [§ 1981's] purview."). It is cold comfort for the victims of sexual harassment. Finally, there are state discrimination statutes and state tort laws, but these claims are unlikely to make it to federal court without supplemental jurisdiction on another claim, unless there is diversity of citizenship. *See* 28 U.S.C. §§ 1332, 1367. Federal court is

Act of 1991, Congress created a catchall civil rights statute to cover any plaintiffs who fell through the trapdoor. This was embodied in GERA, which created an administrative remedy for

> any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof—
>
> (1) to be a member of the elected official's personal staff;
>
> (2) to serve the elected official on the policymaking level; or
>
> (3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.[38]

Note how this provision mirrors the exemptions in Title VII.[39] Because of the identical provisions, circuit courts have concluded that the analysis under Title VII—regarding whether a worker is a protected "employee"—is the same analysis for deciding whether a worker qualifies for the catchall provision of GERA.[40] In other words, if a court held that a worker was "personal staff" of a state elected official, and not covered by Title VII, the court would by extension rule that the worker qualifies for the catchall of GERA. This two-step tango is how the "employee" exemptions act as a trapdoor: step one, a charging party falls out of Title VII, and, step two, they fall into the arms of GERA.

Determining whether an employee is "personal staff" is difficult, and courts are undecided on what test should be used to make this determination.[41] Two circuits have created tests—the Fourth Circuit and the Fifth Circuit[42]—to determine who is "personal staff." But for policy reasons, whichever test produces the narrower understanding of "personal staff" should be used. The following Part explains why.

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also preferable to state court for GERA claims. State court, while providing a jury trial and the publicity of a public forum, does not benefit from the political independence of an Article III judge. GERA claims all arise from state politics, and given that a vast majority of state trial judges are elected to the bench, the fear of political interference and pretextual dismissal lingers. *See* JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS 3–4 (2012) (discussing state judicial elections and the power of donations). In cases regarding sexual harassment in state governments, the integrity of the trier of fact is essential to reaching a just result.

38 Government Employee Rights Act, 42 U.S.C. § 2000e-16c(a).

39 *Compare id.* § 2000e(f) (the employee exemption), *with id.* § 2000e-16c(a) (GERA).

40 *See, e.g.*, Bd. of Cty. Comm'rs v. U.S. EEOC, 405 F.3d 840, 843–46 (10th Cir. 2005); Brazoria County v. EEOC, 391 F.3d 685, 689–90 (5th Cir. 2004).

41 *See* Lockwood v. McMillan, 237 F. Supp. 3d 840, 857 (S.D. Ind. 2017) ("[T]he Seventh Circuit has not determined the meaning of [personal staff]."); Croci v. Town of Haverstraw, 175 F. Supp. 3d 373, 379 (S.D.N.Y. 2016) ("The Second Circuit has not addressed the 'personal staff' exemption contained in § 2000e(f) . . . ."); Gupta v. First Judicial Dist., 759 F. Supp. 2d 564, 569 (E.D. Pa. 2010) ("The Third Circuit has not set forth standards for evaluating whether an employee falls within the personal staff exemption.").

42 *See infra* Part III.

II. POLICY JUSTIFICATIONS FOR NARROWING THE TRAPDOOR

To understand why courts should narrow the trapdoor, it is necessary to understand the shortcomings of GERA's catchall provision. There are three reasons to favor Title VII protections over GERA protections. First, by narrowing the trapdoor and keeping litigants in Title VII, plaintiffs will be given a better forum: federal district court. In addition, the remedies offered by Title VII provide better incentives to litigate and a stronger deterrent effect to respondent employers. Second, Title VII plaintiffs can have an EEOC charge filed on their behalf by the EEOC Commissioners themselves (known as a "Commissioner charge").[43] But this option is likely not available under GERA. This is a significant detriment. A Commissioner charge would be advantageous given the highly political and close-knit environment "personal staff" serve in. Finally, providing Title VII protections rather than GERA protections would produce consistency among discrimination statutes. Despite sexual harassment's presence in *both* state and federal government, Congress has only addressed part of the problem. In 1995, and again in 2018, Congress passed new protections for congressional employees, while leaving state-level employees behind. By narrowing the trapdoor of the "personal staff" exemption, more people can be afforded Title VII's advantages.

A. Better Forum and Remedies

First off, Title VII provides a better forum and better remedies for litigants. As for forums, an individual who qualifies for Title VII is able to file a Title VII action in federal district court after receiving a Notice of Right to Sue (or "right-to-sue" letter) from the EEOC.[44] The EEOC may issue a right-to-sue letter either at the close of an EEOC investigation, regardless of the investigation's final conclusion, or upon request at any point of the investigation.[45] Therefore, even if the EEOC does not find reasonable cause to believe a violation has occurred, a charging party can still access federal district court through a private civil action.[46] This path is closed off to "personal staff." "[P]ersonal staff" plaintiffs under GERA must instead utilize an administrative framework under the Administrative Procedure Act and cannot go to district court.[47] Instead of an Article III judge, EEOC regulations dictate that an administrative law judge (ALJ) will conduct a GERA hear-

43 *See* 42 U.S.C. § 2000e-5(b) (authorizing Commissioners to file charges); 29 C.F.R. § 1601.11(a) (2018).

44 *See* 45C AM. JUR. 2D *Job Discrimination* § 1965 (2018); *Filing a Lawsuit*, *supra* note 3.

45 *See Filing a Lawsuit*, *supra* note 3; *What You Can Expect After You File a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/employees/process.cfm (last visited Aug. 24, 2019).

46 *See, e.g.*, Bush v. Mapes Canopies, LLC, No. 4:17CV3135, 2018 WL 2049825, at *2 (D. Neb. Apr. 26, 2018).

47 *See* 42 U.S.C. § 2000e-16c(b) ("Enforcement by administrative action"). It is an open question whether "personal staff" workers can force their way into district court using § 1983 and § 1981 claims. *Compare* Dyer v. Radcliffe, 169 F. Supp. 2d 770, 777 (S.D. Ohio 2001) (finding that GERA's mandatory administrative remedy precludes § 1983 claims),

ing.[48] These ALJs are empowered to take any appropriate actions their Article III counterparts could under the Federal Rules of Civil Procedure, with a few exceptions.[49]

While ALJs are afforded a good deal of independence,[50] they, and the administrative framework they operate in, lack several tactical advantages compared to their brother and sister judges in the federal judiciary. These range from the small and minute, such as the lesser number of interrogatories available to litigants,[51] to the more substantive, like the instruction that "the rules on hearsay will not be strictly applied."[52] This is troublesome, as the rules on hearsay were created to safeguard the trier of fact against potentially untrustworthy information and ensure procedural justice by prohibiting "evidence information from accusers whom the defendant cannot or could not confront."[53]

The most striking difference between the forums is the trier of fact: there is neither a public bench trial nor a "jury trial under GERA."[54] GERA actions will never reach federal trial courts, since the ALJ's decision is instead appealed first to the Commission, and then subsequently to a circuit court of appeals.[55] Furthermore, there is likely less publicity in general for GERA procedures. While the EEOC has not issued guidelines on the publicity of GERA hearings, they have ruled that attendance is limited in other administrative hearings.[56] This is a loss not only for the plaintiff, but for society. Public jury trials—and public bench trials for that matter—provide societal benefits that the EEOC's administrative hearings cannot provide.

The first social benefit is public awareness of the claims. This helps the protected classes as a whole for both legal and societal reasons. For instance, one legal benefit arising from the publicity of discrimination claims is that it encourages other accusers to come forward. This benefit is most well noted in the realm of sexual harassment, which is actionable under both Title VII and GERA.[57] The national publicity given to the allegations and legal pro-

with Levin v. Madigan, 41 F. Supp. 3d 701, 703–07 (N.D. Ill. 2014) (finding that GERA and the ADEA do not preclude § 1983).

48 *See* 29 C.F.R. § 1603.202.

49 *See id.* ("In addition, the administrative law judge shall have the power to . . . [t]ake any appropriate action authorized by the Federal Rules of Civil Procedure . . . .").

50 *See* Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1654–55 (2016).

51 *Compare* 29 C.F.R. § 1603.210 (allowing twenty interrogatories), *with* FED. R. CIV. P. 33(a)(1) (allowing twenty-five interrogatories).

52 29 C.F.R. § 1603.214.

53 Justin Sevier, *Testing Tribe's Triangle: Juries, Hearsay, and Psychological Distance*, 103 GEO. L.J. 879, 883 (2015) (describing both believed bases for the rule).

54 Levin v. Madigan, 41 F. Supp. 3d 701, 706 (N.D. Ill. 2014).

55 29 C.F.R. §§ 1603.304–.306.

56 For instance, federal sector discrimination claims can be heard under an administrative judge (AJ), where attendance is limited. 29 C.F.R. § 1614.109(e).

57 For examples in Title VII and GERA, respectively, see *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (recognizing sexual harassment as sex discrimination) and

ceedings against Harvey Weinstein,[58] Jeffrey Epstein,[59] and Bill Cosby,[60] and the subsequent cascade of allegations that followed these revelations,[61] support the notion that publicity encourages other victims to come forward.[62] This extends beyond just the accused harasser or assailant, and may bring other, unrelated accusations to light: "The women asserting allegations against Weinstein have spurred others (both men and women) to come forward and take action. . . . By the end of November, *Entertainment Weekly* had tracked nearly 60 public accusations lodged against the entertainment elite."[63] Thus, by encouraging other plaintiffs to come forward, society can discover more of these acts and hold those aggressors accountable.

Bringing other claims to light is also a societal benefit, as it encourages other victims to seek nonlegal help, such as counseling or crisis intervention. For instance, the national publicity of Dr. Christine Blasey Ford's allegations led to spikes in the number of phone calls at sexual assault crisis hotlines.[64] This was not an isolated incident; the Rape, Abuse & Incest National Network (RAINN) reported that since the #MeToo movement began, the number of survivors reaching out to the National Sexual Assault Hotline has risen to record levels.[65] Even members of Congress have noted this effect when releasing their own personal stories about sexual harassment.[66] For instance,

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Brazoria County v. EEOC, 391 F.3d 685, 687 (5th Cir. 2004) (showing an example of a GERA claim based on sexual harassment).

58 *See* Elahe Izadi, *Harvey Weinstein Indicted on New Sexual Assault Charges, Could Face Life in Prison*, WASH. POST (July 2, 2018), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/07/02/harvey-weinstein-indicted-on-new-sexual-assault-charges-could-face-life-in-prison/.

59 EJ Dickson, *More Than a Dozen Jeffrey Epstein Accusers Have Come Forward Since His Indictment*, ROLLING STONE (July 12, 2019), https://www.rollingstone.com/culture/culture-news/jeffrey-epstein-arrest-new-accusers-858394/.

60 *See* Manuel Roig-Franzia, *Bill Cosby Sentenced to 3 to 10 Years in State Prison*, WASH. POST (Sept. 25, 2018), https://www.washingtonpost.com/lifestyle/style/bill-cosby-sentenced-to-3-to-10-years-in-state-prison/2018/09/25/9aa620aa-c00d-11e8-90c9-23f963eea204_story.html.

61 *See* Dickson, *supra* note 59.

62 Public knowledge of an accusation was one of the reasons an accuser came forward against Harvey Weinstein, a powerful and influential figure in the victim's line of work. *See* Jason Kravarik, *Harvey Weinstein's Toughest Fight Is Looming*, CNN, https://www.cnn.com/2018/05/02/entertainment/harvey-weinstein-los-angeles-investigation/index.html (last updated May 3, 2018).

63 Christopher Butler & Kristin Starnes Gray, *Despicable #MeToo: Lessons from Weinstein, Other Sexual Harassment Allegations*, 30 GA. EMP. L. LETTER 3 (2017).

64 Willa Frej, *Sexual Assault Hotline Calls Spiked During Kavanaugh Hearing*, HUFFINGTON POST (Sept. 28, 2018), https://www.huffingtonpost.com/entry/sexual-assault-hotline-spike-kavanaugh-hearings_us_5badec39e4b0425e3c227446.

65 Lisa Lambert, *#MeToo Effect: Calls Flood U.S. Sexual Assault Hotlines*, REUTERS (Jan. 17, 2018), https://www.reuters.com/article/us-usa-harassment-helplines/metoo-effect-calls-flood-u-s-sexual-assault-hotlines-idUSKBN1F6194.

66 Sunlen Serfaty, *Congresswoman Describes Sexual Assault in #MeToo Video*, CNN, https://www.cnn.com/2017/10/27/politics/jackie-speier-me-too-sexual-assault-harassment/index.html (last updated Oct. 27, 2017).

since U.S. Representative Jackie Speier publicly described her experience with sexual harassment when she was a congressional staffer, "an aide to the congresswoman says her office has been flooded by telephone calls and email messages," many thanking her and some even sharing "their own stories of alleged harassment within the halls of Congress."[67] Increasing public knowledge of discrimination claims is beneficial even outside the sexual harassment and sexual assault context, as it can encourage individuals who have been discriminated against to seek support for the trauma stemming from the discrimination.[68]

The value of public awareness rings even more true in the context of state politics. In the small worlds of Springfield, Illinois; Albany, New York; and Sacramento, California, the fear of retaliation is high. In an op-ed to *Teen Vogue* written by Illinois State Representative Litesa Wallace, Ms. Wallace detailed the harassment she and others experienced, both as a staffer and as an elected official.[69] She noted that the "[c]onsequences for sexual harassment are few and far between in Springfield. But the political consequences for speaking out are almost guaranteed."[70] However, placing justice in the hands of Article III courts may negate these concerns. The publicity surrounding a given case may protect plaintiffs by making the public more attuned to any attempts at retaliation. The fear of public backlash from perceived retaliation should chill malicious actions by the elected official.[71] In addition, allowing these accusations to come forward will aid the political process. Directly, accusations of discrimination may cast light on whether an official holds discriminatory views. Indirectly, an official's response to these allegations may shed light on that official's views regarding the significance of discrimination and harassment. In the end, publicity of these claims informs the electorate of the official's character.

Finally, public exposure to cases like these prevent "stacking the deck" against either party.[72] For instance, the *Wall Street Journal* reported in 2015 that the Securities and Exchange Commission (SEC), which utilizes five

67 *Id.*

68 *See Discrimination: What It Is, and How to Cope*, AM. PSYCHOL. ASS'N, https://www.apa.org/helpcenter/discrimination.aspx (last visited Aug. 31, 2019) (showing how discrimination can take a toll on an individual, and advocating these victims seek assistance).

69 Litesa Wallace, *Rep. Litesa Wallace Details Sexual Harassment of Black Women in Government*, TEEN VOGUE (Nov. 15, 2017), https://www.teenvogue.com/story/rep-litesa-wallace-details-sexual-harassment-of-black-women-in-government.

70 *Id.*

71 *See Arizona House Votes to Expel Member over Sexual Harassment Complaints*, CBS NEWS (Feb. 1, 2018), https://www.cbsnews.com/news/rep-don-shooter-voted-out-arizona-house-state-legislature-sexual-harassment-report/ (providing an example of how public awareness of complaints may lead to political consequences, giving officials a reason to avoid retaliation).

72 This fear appears in other aspects of administrative law as well, most notably in the concept of "agency capture." *See* J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543, 1552–55 (2018) (describing agency capture theory in general).

ALJs,[73] won ninety percent of its administrative proceedings during a five-year period but only won sixty-nine percent of its cases in federal court during the same time span.[74] While there is little data on how administrative judges (AJs) rule in GERA claims, or in EEOC proceedings generally,[75] the fear of a one-sided proceeding lingers. This scenario can be adequately prevented by narrowing the trapdoor, thereby pushing more claims into federal court, where verdicts can be publicly displayed, understood, and dissected. For these reasons, the public awareness associated with bringing a discrimination claim to federal district court, rather than an AJ hearing, benefits society overall.

The second societal advantage with public trials is specific to the use of a jury. Jury trials better serve litigants because discrimination is highly contextual and subject to contemporary understandings of what is appropriate, which juries—as laypersons of the community—are better able to assess. The use of multiple jurors provides diversity of opinion in interpreting and weighing the evidence and allows for a more objective understanding of "severe and pervasive."[76] It also provides a check on government interpretation of what is "harassment." For example, in the wake of the #MeToo movement, many have raised questions about our current view on what used to be seen as vulgar, but not actionable, conduct.[77] In this aspect, jury trials offer a better window into what society deems "discrimination."[78] While this Note does not advocate for transforming Title VII into a civility code, reexamining the lines between acceptable and unacceptable conduct is important in a changing country. This aids society by keeping the law in tune with contemporary values.

GERA not only provides a forum that lacks the societal benefits of public trials but also offers fewer incentives to bring lawsuits. GERA claims do not

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73 Sarah A. Good & Laura C. Hurtado, *Questionable Proceedings*, L.A. LAW., Feb. 2017, at 30, 30.

74 *Id.* at 30, 35 n.1 (citing Jean Eaglesham, *SEC Wins with In-House Judges*, WALL ST. J. (May 6, 2015), https://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803).

75 The EEOC primarily relies on AJs rather than ALJs. *See Hearings*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/federal/fed_employees/hearing.cfm (last visited Aug. 31, 2019) (noting that "Administrative Judge[s]," not ALJs, review cases).

76 Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive . . . .").

77 *See* Sonia Miller-Van Oort, *#MeToo as a Moment of Opportunity*, BENCH & B. MINN., Mar. 2018, at 4, 4 (noting that the #MeToo movement has opened up discussion on "the sorts of conduct (intentional or unintentional) that cannot be tolerated"); *Meritor*, 477 U.S. at 67 (observing that "not all workplace conduct that may be described as 'harassment'" violates Title VII).

78 *See* Jasmine B. Gonzales Rose, *Race Inequity Fifty Years Later: Language Rights Under the Civil Rights Act of 1964*, 6 ALA. C.R. & C.L. L. REV. 167, 169–70 (2014) (noting the changing nature of racial discrimination); Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1369 (2012) ("The benefits of group decision making in the deliberative context include individuals being able to correct one another's biases . . . .").

allow for punitive damages,[79] whereas actions under Title VII do.[80] Allowing for punitive damages would further encourage plaintiffs to come forward despite fears of retaliation and would offer a bounty for plaintiffs' attorneys who may be hesitant to represent a client who suffered discrimination in the political arena for fear of hurting their own political standing. Title VII's advantages—public awareness, jury trials, and punitive damages—weigh in favor of narrowing the trapdoor.

B. Commissioner Charges

While persons who are discriminated against have the right to file charges of discrimination with the EEOC, there often may be reasons why they are hesitant to come forward. They may fear retaliation, or they may not trust their complaints will be taken seriously.[81] Unlike victims qualifying for GERA, victims qualifying for Title VII are given an additional safety net should they be afraid to come forward: a Commissioner charge. The EEOC Commissioners are authorized by Congress to file a charge of discrimination even when an aggrieved person does not.[82] The Commissioners are empowered to file charges themselves when they suspect that the fear of retaliation is inhibiting individuals from filing their own charges, and when the Commission suspects a "pattern or practice" of discrimination.[83] However, while not explicitly prohibited, it is unlikely that those falling through the trapdoor will get this additional layer of protection. Several sources warn hesitation against a Commissioner charge for GERA violations. First, Congress clearly expressed in the enforcement provisions of Title VII that charges could be filed "by a member of the Commission,"[84] whereas when it drafted GERA, Congress instead wrote that "[a]ny *individual* referred to [in GERA] may file a complaint alleging a violation."[85] Second, the EEOC's own regulations seem to hint that the Commissioners cannot file charges under GERA. In part 1603, the part of the Code of Federal Regulations (CFR) that governs GERA, the EEOC has explicitly written that *individuals* may file claims under GERA.[86] This contrasts with part 1601, the part governing the procedural

79 Pub. L. No. 102-166, §§ 307(h), 321(a), 105 Stat. 1088, 1092, 1097–98 (1991) (noting that GERA incorporates the same remedies that are available to hearing boards, which "have no authority to award punitive damages"); *see also* Alaska v. EEOC, 508 F.3d 476, 484 (9th Cir. 2007) (Paez, J., dissenting) ("GERA provides for compensatory but not punitive damages as a remedy for covered 'State employees' intentionally discriminated against by any 'personnel actions affecting [them].'") (alteration in original) (quoting 42 U.S.C. § 2000e-16b(a)–(b) (2012)).

80 42 U.S.C. § 1981(a).

81 *See supra* notes 69–75 and accompanying text.

82 42 U.S.C. § 2000e-5(b).

83 42 U.S.C. § 2000e-6(e); EEOC v. Shell Oil Co., 466 U.S. 54, 62 (1984) (citing 42 U.S.C. §§ 2000e-5(b), 2000e-6(e) (1982); 29 C.F.R. §§ 1601.7, .11 (1983)).

84 42 U.S.C. § 2000e-5(b) (2012).

85 *Id.* § 2000e-16c(b)(1) (emphasis added).

86 29 C.F.R. § 1603.102(a) (2018) ("(a) *Who may make a complaint.* Individuals . . . may file a complaint . . . .").

regulations of Title VII charges, which expressly authorizes the members of the Commission to file charges.[87] Furthermore, Commissioner charges for GERA claims would present a puzzling scenario. Consider this hypothetical: if the Commissioners were to file a GERA charge, they would represent an individual in front of an ALJ, whose presence was requested by the Office of Federal Operations "on behalf of the Commission."[88] Thus, the EEOC would be involved in both representing one litigant and selecting the decisionmaker. Even more puzzling would be the appeal: if the Commissioners chose to appeal, they would have to appeal it to themselves, since all appeals from ALJ GERA hearings are reviewed by the Commission.[89] In a hypothetical Commissioner charge under GERA, the Commissioners would have to wear two hats, acting as both the litigating party and as the appellate body. Thus, not only do the EEOC regulations counsel against a Commissioner charge under GERA, it also would be impractical.

This is to the detriment of state government employees who have fallen through the trapdoor. They would directly benefit from the availability of Commissioner charges, given the considerable fear of retaliation in the realm of politics. Washington State Representative Nicole Macri summed up what leaves staffers nervous about speaking out: "People are not reporting because they don't trust reports will be really vetted, that there will be consequences to harassers and that careers won't be ruined . . . ."[90] Illinois State Representative Wallace also observed that the fear of political consequences for reporting often silences victims of harassment.[91] Such fear of retaliation is not without merit either. The EEOC reported that the fiscal year of 2017 had the second highest number of retaliation charges ever filed.[92]

87 *Id.* § 1601.11(a) ("Any member of the Commission may file a charge with the Commission.").

88 *Id.* § 1603.201(a).

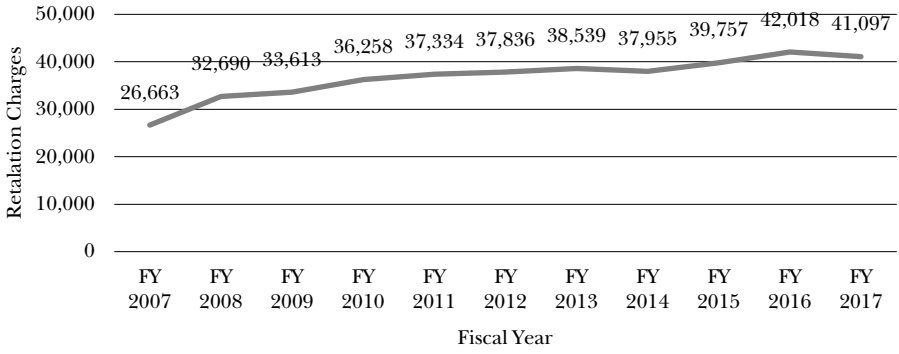
89 *See id.* § 1603.304(d).

90 La Corte, *supra* note 18.

91 Wallace, *supra* note 69.

92 *See infra* Figure 1.

FIGURE 1: RETALIATION CHARGES FILED WITH THE EEOC UNDER ALL STATUTES BETWEEN FISCAL YEAR 2007 AND FISCAL YEAR 2017



Note: Based on data compiled by the Office of Research, Information and Planning and published by the EEOC.[93] This data does not include charges reported with state or local Fair Employment Practices Agencies.[94]

The Commission also reported that nearly half of the EEOC's total 84,254 charges in 2017 included a charge of retaliation, and that thirty-eight percent of the total charges were retaliation charges under Title VII alone.[95] Given this data, a member of a public official's "personal staff" is certainly reasonable in fearing retaliation, especially in the small world of state politics. A telling example of this fear unfolded in the Illinois State Legislature. In May of 2018, Illinois State Representative Kelly Cassidy alleged that associates of Illinois House Speaker Michael Madigan targeted her after she called for inquiries into sexual harassment within the state legislature and the Speaker's office.[96] While the retaliation here is aimed at the elected official and not a member of "personal staff," try and imagine the reaction of Representative Cassidy's "personal staff." If the elected official isn't safe from retaliation, then who is?

C. The Desire for Legislative Consistency

Employees of the U.S. Senate, like the "personal staff" of state elected officials, were also originally exempt from Title VII's protections.[97] That changed with sections 301–20 of the Government Employee Rights Act of

93 *Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2017*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Aug. 31, 2019).

94 *Id.*

95 *Id.*

96 *See* Monique Garcia, *Madigan Under Fire Again over Handling of Sexual Harassment Claims, Asks for Watchdog Investigation*, CHI. TRIB. (May 23, 2018), https://www.chicagotribune.com/politics/ct-met-michael-madigan-kelly-cassidy-20180522-story.html.

97 Hopke, *supra* note 20, at 2171 (citing 42 U.S.C. § 2000e(b) (2012)).

1991.[98] Under section 302, "[a]ll personnel actions affecting employees of the Senate shall be made free from any discrimination" based on "race, color, religion, sex or national origin," within the meaning of Title VII's federal protections; "age," as defined in the ADEA; or "handicap or disability," within the meaning of the Rehabilitation Act and the Americans with Disabilities Act.[99]

The remedy for these Senate employees was administrative; they could seek counseling, mediation, and a hearing with the newly created Office of Senate Fair Employment Practices.[100] The U.S. House of Representatives passed a similar resolution a few years earlier, protecting employees from discrimination by providing them with an administrative remedy.[101] Both houses' provisions were similar to GERA's "personal staff" protections: both provided for agency review rather than causes of action in federal district court, and the Senate, like the EEOC, allowed appeal to a federal circuit court.[102]

But this framework did not last. Less than five years later, Congress repealed the administrative procedures for congressional employees by passing the Congressional Accountability Act of 1995 (CAA).[103] This legislation expanded protections for congressional staffers[104] and awarded them the better forums that GERA-qualifying staffers lacked.[105] The CAA gave covered employees the autonomy to seek justice in an administrative framework with the Office of Compliance, or to take their cases straight to federal district court.[106] This gave the "personal staff" of representatives and senators more autonomy and better protection than their state-employed counterparts. Congress gave congressional aides even more protection in the Congressional Accountability Act of 1995 Reform Act, which eliminated CAA's mandatory mediation and counseling requirements.[107] Thus, under the current law, congressional aides can immediately file their cases in district court without first seeking relief with the Office of Compliance.

This presents an inconsistency in equal opportunity protection laws. Members of Congress gave their own "personal staff" these protections but did not take the opportunity to give the same protections to workers in state

98 *See* Government Employee Rights Act of 1991, Pub. L. No. 102-166, § 301–21, 105 Stat. 1088, 1088–97.

99 *Id.* at § 302.

100 *Id.* §§ 303, 305–07.

101 H.R. Res. 558, 100th Cong.,134 CONG. REC. 27,840 (1988) (enacted).

102 *See id.*; *see also* Government Employee Rights Act § 309(a).

103 Congressional Accountability Act of 1995, Pub. L. No. 104-1, § 504(a)(2), 109 Stat. 3, 41 (1995) (repealing GERA sections 303–319).

104 *See id.* § 101(3) (broadly defining "covered employee").

105 *See id.* § 401(3) (giving the litigant a choice between the administrative framework and a civil action in federal district court); *id.* § 408 (providing a jury trial right and federal subject matter jurisdiction).

106 *See id.* § 401; *id.* § 101(12) (defining "Office" as the Office of Compliance).

107 Congressional Accountability Act of 1995 Reform Act, Pub. L. No. 115-397, § 101(b)(2), 132 Stat. 5297, 5300–01 (2018) (amending § 408(a) of the CAA).

legislatures, courts, and executive offices. If not for the practical considerations that aid the elimination of sexual harassment, then the trapdoor should at least be narrowed to provide consistency between these groups.

III. The "Personal Staff" Split

For the above reasons, narrowing the trapdoor is clearly beneficial on policy grounds. So how can the trapdoor be narrowed? The "employee" exemptions could be narrowed by Congress, but a less burdensome path exists. Currently, the circuit courts are split on what test determines if an individual is "personal staff" under Title VII.[108] By selecting the test that produces a smaller subset of GERA employees, the judiciary can narrow the trapdoor on its own. The following section details the two different "personal staff" tests.

A. The Fourth Circuit's Guided Approach

The Fourth Circuit was the first circuit to create a test for the personal staff exemption.[109] Over the course of two cases, the court created a multifactor balancing test, guided by a central principle. The principle was articulated first. In *Curl v. Reavis*,[110] Barbara Curl worked as a deputy sheriff with the Iredell County Sheriff's Department.[111] Despite holding the title of deputy sheriff, she worked as a secretary for the detective division.[112] Ms. Curl was told that she could not be promoted to the position of road patrol deputy because, in the words of the Chief Deputy, "there was no way [the department] would put a woman on the road . . . in uniform."[113] Ms. Curl subsequently filed suit under Title VII and § 1983.[114] After a bench trial, the district court ruled for Ms. Curl on the merits, prompting an appeal to the Fourth Circuit.[115]

On appeal, the defendants argued that Ms. Curl fell through the trapdoor and was not an "employee" under § 2000e(f).[116] Instead, they argued she was "personal staff" of the sheriff.[117] In looking to see if Ms. Curl was exempted as "personal staff" of an elected official, the Fourth Circuit looked

108 *See infra* Sections III.A–B.

109 Cases preceding *Curl* had articulated principles that have today largely been subsumed by current Fourth and Fifth Circuit tests. *See* Curl v. Reavis, 740 F.2d 1323, 1328 (4th Cir. 1984) (noting the principles of *Owens v. Rush*, 654 F.2d 1370 (10th Cir. 1981), and *Calderon v. Martin County*, 639 F.2d 271 (5th Cir. Unit B Mar. 1981), previous "personal staff" cases); Teneyuca v. Bexar County, 767 F.2d 148, 150–52 (5th Cir. 1985) (same).

110 740 F.2d 1323 (4th Cir. 1984).

111 *Id.* at 1324–25.

112 *Id.* at 1325.

113 *Id.* (omission in original).

114 *Id.* at 1324.

115 *Id.* at 1324–25.

116 *Id.* at 1327 (explaining defendant's appeal that Curl was not an "employee" under 42 U.S.C. § 2000e(f) (2012)).

117 *Id.* at 1327–28.

to the Tenth Circuit's recent holding in *Owens v. Rush*.[118] Under *Owens*, the Tenth Circuit viewed the "personal staff exemption" as only covering "those individuals who are in highly intimate and sensitive positions of responsibility on the staff of the elected official."[119] Using this principle, the Fourth Circuit began assessing Ms. Curl's position, analyzing the "nature and circumstances of her role in the Sheriff's Department."[120]

As a starting point, the Fourth Circuit noted that Ms. Curl was not under the personal direction of the elected official (the sheriff), and her promotion requests were brought to the sheriff's subordinate—the chief deputy.[121] Ms. Curl was not high in the chain of command, and her duties as secretary to the detective division were mostly clerical: she typed documents, handled phone calls and correspondences for the detectives, and assigned case files.[122] Since she did not work in a highly intimate and sensitive position of responsibility on the sheriff's staff, the Fourth Circuit found that Ms. Curl was not "personal staff" under Title VII.[123]

While the Tenth Circuit later replaced *Owens* with a multifactor balancing test,[124] its "highly intimate and sensitive position[ ]" principle lived on in the Fourth Circuit.[125] But the Fourth Circuit also mixed in a list of factors to supplement the principle. In *Cromer v. Brown*, the plaintiff, Patrick Cromer, was an African American captain for the sheriff of Greenville County, South Carolina.[126] When Cromer was demoted to the position of lieutenant, and then fired from that position, he filed a Title VII action against the sheriff.[127] The district court granted the defendant sheriff's motion for summary judgment, ruling that Mr. Cromer was serving as "personal staff" for an elected official.[128]

On appeal, the *Cromer* court first began by emphasizing that the word "personal" narrowed the exemption to "some intimate subset of the elected official's staff."[129] The court then imposed a flexible list of factors, guided by the central principle from *Curl*: "[T]he examination should focus on whether the employee worked in an intimate and sensitive position of trust,

118 *Id.* at 1328 (citing Owens v. Rush, 654 F.2d 1370 (10th Cir. 1981)). *Owens* is no longer the guiding test in the Tenth Circuit. *See infra* note 124 and accompanying text.

119 *Owens*, 654 F.2d at 1375.

120 *Curl*, 740 F.2d at 1328.

121 *Id.*

122 *Id.*

123 *See id.*

124 *See* Nichols v. Hurley, 921 F.2d 1101, 1110 (10th Cir. 1990) (per curiam).

125 *See* Cromer v. Brown, 88 F.3d 1315, 1323 (4th Cir. 1996) (noting that the Fourth Circuit has concluded that the "personal staff exception" applies "only to those individuals who are in highly intimate and sensitive positions of responsibility on the staff of an elected official" (quoting Brewster v. Barnes, 788 F.2d at 985, 990 (4th Cir. 1986)).

126 *Id.* at 1318–19.

127 *Id.* at 1318.

128 *Id.* at 1322.

129 *Id.* at 1323.

close to the elected official."[130] That list of factors started with four factors evaluated by the district court: (1) "Is promotion of the employee solely up to the sheriff"; (2) "[d]oes the employee occupy a position high in the chain of command"; (3) "[d]oes the employee have a highly intimate working relationship with the sheriff"; and (4) "[d]oes the employee contribute to the making of policy decisions in the sheriff's department?"[131]

The Fourth Circuit then decided to add in four factors of its own:

> (5) whether the position in question was created pursuant to state law and compensated pursuant to state law or was the position funded from the sheriff's discretionary budget; (6) what the full range of the individual's duties were; (7) whether the individual worked on the sheriff's campaigns; and (8) whether the employee worked under the direction of the sheriff or someone else.[132]

Thus, the Fourth Circuit test was born. In assessing Mr. Cromer's position of lieutenant, the court noted the lack of a working relationship between Mr. Cromer and the sheriff: Mr. Cromer reported to his own captain, not the sheriff; Mr. Cromer rarely saw the sheriff and did not work under the sheriff's personal direction; Mr. Cromer had no hand in creating department policy; Mr. Cromer did not assist in election efforts; and his position was created and compensated under state law.[133]

However, when Mr. Cromer served as a captain, the court held that he did fit the "personal staff" exemption.[134] The captain position was the third highest in the department, falling below only the major and the sheriff.[135] The captains were included in command staff meetings with the sheriff, where they discussed policy and procedure.[136] Captains dealt with citizens' complaints, requiring Mr. Cromer to represent the sheriff outside the department in an authoritative capacity.[137] Thus, under this framework, he was part of the sheriff's personal staff.[138]

The Fourth Circuit's approach—relying on a mixture of factors with emphasis on the "highly intimate" principle—has not left the Fourth Circuit,

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130 *Id.* While not word-for-word identical with the principle in *Curl*, the emphasis on "intimate" and "sensitive" was sufficiently similar to say *Cromer* reaffirmed *Curl*.

131 *Id.* The Fourth Circuit has indicated that the first factor also extends to hiring and firing decisions, making it akin to the first factor in *Teneyuca*, discussed *infra* Section III.B. *See* Harris v. Anne Arundel County, No. CCB-12-0829, 2014 WL 4924308, at *4 (D. Md. Oct. 1, 2014), *aff'd sub nom.* Harris v. Leopold, 600 Fed. App'x 114 (4th Cir. 2015) (per curiam)

132 Crain v. Butler, 419 F. Supp. 2d 785, 790 (E.D.N.C. 2005) (citing *Cromer*, 88 F.3d at 1323).

133 *Cromer*, 88 F.3d at 1323–24.

134 *Id.* at 1324.

135 *Id.* at 1319.

136 *Id.*

137 *Id.* at 1324.

138 *Id.*

and when given the option, many courts have avoided it.[139] Instead, courts opt for the Fifth Circuit's *Teneyuca* factors, which are explained next.

B. The Fifth Circuit's Multifactor Balancing Test

In *Teneyuca v. Bexar County*,[140] the Fifth Circuit, looking to *Curl* and a Ninth Circuit case, *Ramirez v. San Mateo County District Attorney's Office*,[141] created a slightly different multifactor test to decide whether an individual is exempted "personal staff." The case involved Sharyl Teneyuca, an attorney in Bexar County, Texas.[142] Ms. Teneyuca applied to be an assistant district attorney with Bexar County, but was not hired.[143] She filed a Title VII sex discrimination claim, alleging that lesser-qualified male applicants were hired in her stead.[144] The County moved for summary judgment, arguing that the position of assistant district attorney was the "personal staff" of the district attorney—an elected official—and thus excluding Ms. Teneyuca from Title VII protection.[145]

The Fifth Circuit opted to merge the holdings of *Curl* and *Ramirez* with the Eighth Circuit's view in *Goodwin v. Circuit Court of St. Louis County*,[146] and the Tenth Circuit's holding in *Owens v. Rush*.[147] The result was a list of six factors:

> (1) whether the elected official has plenary powers of appointment and removal, (2) whether the person in the position at issue is personally accountable to only that elected official, (3) whether the person in the position at issue represents the elected official in the eyes of the public, (4) whether the elected official exercises a considerable amount of control over the position, (5) the level of the position within the organization's chain of command, and (6) the actual intimacy of the working relationship between the elected official and the person filling the position.[148]

The *Teneyuca* court then provided instruction on the scope of the exemption. First, the court said that the "consideration of these factors must be tempered by the legislative history of this provision which indicates that

139 *See, e.g.*, Bland v. New York, 263 F. Supp. 2d. 526, 542–44 (E.D.N.Y. 2003) (relying on *Teneyuca* rather than the Fourth Circuit's approach in *Curl* and *Cromer*.)

140 767 F.2d 148 (5th Cir. 1985).

141 639 F.2d 509 (9th Cir. 1981).

142 *Teneyuca*, 767 F.2d at 149.

143 *Id.*

144 *Id.*

145 *Id.* at 149–50.

146 729 F.2d 541 (8th Cir. 1984). Today, the Eighth Circuit uses *Teneyuca* for determining who is "personal staff." Hemminghaus v. Missouri, 756 F.3d 1100, 1107–08 (8th Cir. 2014) ("The next question is whether Hemminghaus was . . . 'personal staff' in the FMLA context. . . . We apply the *Teneyuca* factors to assist us here.").

147 654 F.2d 1370 (10th Cir. 1981). The Tenth Circuit has since abandoned *Owens*, relying on *Teneyuca* instead. Nichols v. Hurley, 921 F.2d 1101, 1110 (10th Cir. 1990) (per curiam) ("[W]e believe that the nonexhaustive list of factors to be considered in evaluating the 'personal staff' exception were well articulated in *Teneyuca v. Bexar County* . . . .").

148 Teneyuca v. Bexar County, 767 F.2d 148, 151 (5th Cir. 1985).

the exception is to be narrowly construed."[149] The court also announced an application principle as well—that many of the factors can be determined by looking to state law, but state law is only relevant for describing the plaintiff's position, duties, method of hiring, supervision, and firing.[150]

Ultimately, the *Teneyuca* court did not apply the six-factor test to the assistant district attorney position, finding that Teneyuca failed to present any evidence in response to the summary judgment motion.[151] The Fifth Circuit later demonstrated and expounded upon these factors in *Montgomery v. Brookshire*.[152] In *Brookshire*, the sheriff of Ector County hired Alton Montgomery as a deputy sheriff to investigate financial crimes.[153] Montgomery was terminated after he issued an arrest warrant for his daughter's ex-husband—a decision that violated department policy.[154] Montgomery subsequently filed § 1983 and ADEA claims.[155] The district court dismissed the ADEA claim, noting that Montgomery fell within the ADEA's "personal staff" trapdoor.[156] The Fifth Circuit, in turn, applied the *Teneyuca* factors.[157] For the first three factors, they observed that the Texas legislature had deemed deputies to serve "at the pleasure of the sheriff,"[158] and that "[t]he sheriff is responsible for the official acts of his deputies."[159] Furthermore, the court wrote that because the public is "generally unaware of the hierarchy" of the sheriff's department, "all deputies regardless of position or rank represent the sheriff in the eyes of the public to some extent."[160] Thus, the first three factors of *Teneyuca* were met.

As to the last three factors, the *Brookshire* court added a gloss of its own. As to the "amount of control" factor, the *Brookshire* court narrowed its consideration to "whether customarily the sheriff *actually exercise[d]* control," rather than considering solely *if* the sheriff held the power to exercise control.[161] For the "level in chain of command" factor, the court noted that the exemption "becomes less applicable the lower the particular employee's position."[162] This observation was guided not by policy, but by the congressional record, which indicated that "the [personal staff] exception was primarily

149 *Id.* at 152 (citing *Owens*, 654 F.2d at 1375).

150 *Id.* at 150 (citing Calderon v. Martin County, 639 F.2d 271, 273 (5th Cir. Unit B Mar. 1981)).

151 *Id.* at 152.

152 34 F.3d 291 (5th Cir. 1994).

153 *Id.* at 293.

154 *Id.* at 293–94.

155 *Id.* at 294.

156 *Id.* Recall that the trapdoor is the same in ADEA as in Title VII. *See supra* note 31 and accompanying text.

157 *Brookshire*, 34 F.3d at 295–96.

158 *Id.* at 295 (quoting Tex. Loc. Gov't Code Ann. § 85.003(c) (West 1988)).

159 *Id.* at 296 (alteration in original) (quoting Samaniego v. Arguelles, 737 S.W.2d 88, 89 (Tex. App. 1987)).

160 *Id.* at 296.

161 *Id.* at 296 n.3.

162 *Id.* at 296.

intended to exempt the elected official's immediate subordinates or those 'who are his first line advisors.'"[163] Thus, the *Brookshire* court found this factor to weigh in favor of the plaintiff, since "[the] deputy sheriffs in Ector County could not possibly be characterized as the Sheriff's first line advisors."[164] For the final factor, "intimacy," the court noted the size of the sheriff's department and the amount of contact between the plaintiff and the elected official.[165] The Fifth Circuit then reversed and remanded the case, saying there was a genuine issue as to whether Montgomery was "personal staff."[166]

The *Teneyuca* factors have since been adopted by the Sixth Circuit,[167] Eighth Circuit,[168] and the Tenth Circuit.[169] While a number of circuit courts of appeals have not ruled on the split, several district courts have leaned toward *Teneyuca*.[170] However, no court has addressed the Fourth Circuit's approach with the policy goal of narrowing the trapdoor of "personal staff." Part IV addresses the statutory interpretations advocating for a narrower trapdoor.

IV. SETTLING THE SPLIT: WHY COURTS SHOULD USE *CURL-CROMER*, AND HOW *CURL-CROMER* WILL BETTER NARROW THE TRAPDOOR

A. *Understanding How the* Curl-Cromer *Test Narrows the Trapdoor*

Despite the similarities between the two tests, the differences demonstrate that the Fourth Circuit's approach (hereafter, the "*Curl-Cromer* test") is more suitable for narrowing the trapdoor.[171] In Table 1, the Fifth Circuit's *Teneyuca* test has been placed side-by-side with the Fourth Circuit's *Curl-Cromer* test, and the unique factors for each test have been highlighted in bold. These unique factors demonstrate why the Fifth Circuit's test inherently creates a wider exemption, while the Fourth Circuit's approach produces a narrower exemption.

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163 *Id.* (quoting Owens v. Rush, 654 F.2d 1370, 1375 (10th Cir. 1981)).

164 *Id.*

165 *Id.* at 296–97.

166 *Id.* at 297–98.

167 Birch v. Cuyahoga Cty. Prob. Court, 392 F.3d 151, 158 (6th Cir. 2004) (citing Walton v. Michigan, No. 90-1116, 1990 WL 182033, at *2 (6th Cir. Nov. 23, 1990) (per curiam)).

168 Hemminghaus v. Missouri, 756 F.3d 1100, 1107–08 (8th Cir. 2014).

169 Nichols v. Hurley, 921 F.2d 1101, 1110 (10th Cir. 1990) (per curiam).

170 *See* Lockwood v. McMillan, 237 F. Supp. 3d 840, 857 (S.D. Ind. 2017) ("[T]he Seventh Circuit has not determined the meaning of [personal staff]. . . . [C]ourts commonly apply [*Teneyuca*] . . . ."); Croci v. Town of Haverstraw, 175 F. Supp. 3d 373, 379–80 (S.D.N.Y. 2016) (using *Teneyuca* in absence of a Second Circuit opinion on the definition of "personal staff"); Milliones v. Fulton Cty. Gov't, No. 1:12-CV-3321, 2013 WL 2445206, at *4 (N.D. Ga. June 5, 2013) (citing *Teneyuca*); Gupta v. First Judicial Dist., 759 F. Supp. 2d 564, 569 (E.D. Pa. 2010) (using *Teneyuca* in absence of a Third Circuit framework).

171 For a more concise summation of the differences between the tests, see *infra* Table 1.

TABLE 1: COMPARING THE *CURL-CROMER* AND *TENEYUCA* FACTORS

Fourth Circuit: *Curl-Cromer*[172]	Fifth Circuit: *Teneyuca*[173]
(1) whether "promotion of the employee [is] solely up to [the elected official]"	(1) "whether the elected official has plenary powers of appointment and removal"
(2) whether "the employee occup[ies] a position high in the chain of command"	(2) "whether the person in the position at issue is personally accountable to only that elected official"
(3) whether "the employee ha[s] a highly intimate working relationship with [the elected official]"	**(3) "whether the person in the position at issue represents the elected official in the eyes of the public"**
(4) whether "the employee contribute[s] to the making of policy decisions in [the elected official's]"	**(4) "whether the elected official exercises a considerable amount of control over the position"**
(5) "whether the position in question was created pursuant to state law and compensated pursuant to state law or was the position funded from [the elected official's] discretionary budget"	(5) "the level of the position within the organization's chain of command"
(6) "what the full [scope] of the individual's duties were"	(6) "the actual intimacy of the working relationship between the elected official and the person filling the position"
(7) "whether the individual worked on [the elected official's] campaigns"	
(8) "whether the employee worked under the direction of [the elected official] or someone else"	

Note: Factors that do not appear in both tests have been bolded to highlight the differences.

Teneyuca creates a larger subset of exempted individuals because it includes factors that are not in the Fourth Circuit's test. The first exclusive factor presented in *Teneyuca* is the third factor: "whether the person in the position at issue represents the elected official in the eyes of the public."[174] This factor proves problematic because courts both inside and outside the Fifth Circuit have interpreted it to include individuals who are not authorized to exercise the power of the office or represent them in official proceed-

172 The first four factors appear in *Cromer v. Brown*, 88 F.3d 1315, 1323 (4th Cir. 1996), and the latter four factors appear in *Crain v. Butler*, 419 F. Supp. 2d 785, 790 (E.D.N.C. 2005), which cites *Cromer*, 88 F.3d at 1323.

173 Teneyuca v. Bexar County, 767 F.2d 148, 151 (5th Cir. 1985).

174 *Id.*

ings. For instance, in *Hutchison v. Texas County*,[175] the Western District Court of Missouri, applying *Teneyuca*, held that an administrative assistant to the county prosecuting attorney met the "personal staff" exemption, and thus fell through the trapdoor and out of Title VII, because having duties "such as answering phones and attending the office" satisfied whether the individual represented the elected official in the eyes of the public.[176] Similarly, a district court in the Second Circuit—a circuit that has not defined "personal staff"—found that a secretary for a state judge was "personal staff" under *Teneyuca*, reasoning that "by answering [the judge's] phone and attending his chambers, [the individual] represented [the judge] in the eyes of the public."[177]

This is problematic, as it pushes the outer limit of the exemption farther than the Fourth Circuit would using *Curl-Cromer*. In *Curl*, the plaintiff, while serving as a "deputy sheriff," actually held a similar position to the plaintiffs in the two cases above; the plaintiff's work was ministerial, answering phones and filing paperwork.[178] When *Cromer* followed—holding that a captain with much more authority in the sheriff's department *was* "personal staff," while the lieutenant position, which did not have that authority, *was not* "personal staff"—a line was drawn in the sand. The exemption should be narrowed to apply to only those who represent the official in some official, authoritative capacity. After all, as a captain, Mr. Cromer dealt with citizen complaints and was an outward-facing figure with power to act for the department.[179] This line narrows the trapdoor such that many support staff roles—like technicians and intraoffice personnel—would not be considered "personal staff," thus giving them the protections of Title VII. The Fifth Circuit's rationale that any employee represents the official "to some extent" grossly expands the third factor to consider the fact of employment a factor weighing in favor of the trapdoor.[180]

The Fifth Circuit's other unique factor, "whether the elected official exercises a considerable amount of control over the position," widens the scope of the exemption more broadly than the Fourth Circuit's test does. This factor tends to sweep in most categories of employment and does little to explain how the plaintiff is a member of the elected official's *personal* staff. An elected official would hold control over all of his or her staff, whether personal or not. While the Fifth Circuit has tried to limit this factor's inquiry to situations where the elected official "actually controls" the plaintiff's job,[181] that guidance has not sufficiently narrowed the trapdoor. For instance, in *Hemminghaus v. Missouri*,[182] the Eighth Circuit was asked to

175 No. 09-3018-CV-S, 2010 WL 11509269 (W.D. Mo. July 23, 2010).

176 *Id.* at *3–4.

177 Bland v. New York, 263 F. Supp. 2d 526, 531, 536, 540 (E.D.N.Y. 2003).

178 Curl v. Reavis, 740 F.2d 1323, 1328 (4th Cir. 1984).

179 Cromer v. Brown, 88 F.3d 1315, 1324 (4th Cir. 1996).

180 Montgomery v. Brookshire, 34 F.3d 291, 296 (5th Cir. 1994).

181 *See id.* 296 n.3.

182 756 F.3d 1100 (8th Cir. 2014).

determine if an elected state judge's court reporter was considered "personal staff" for FMLA purposes.[183] In applying the *Teneyuca* factors, the court applied the "control" factor in duplicative fashion. It noted that the judge had "complete authority to hire and fire his official court reporter," in essence duplicating the first *Teneyuca* factor.[184] The court also considered that the judge set the plaintiff's hours and that her schedule often depended on the judge's events.[185] However, these are traits of employment that would be present even outside the "first line advisor" position for which Congress designed the exemption.[186]

The *Hemminghaus* case also illustrates another problem with the Fifth Circuit's test. The *Teneyuca* factors enlarge the personal staff exemption beyond its narrow construction by cabining the "highly intimate" principle. In *Teneyuca*, the concept of "intimacy" only weighs in as a single factor, rather than letting it guide the whole analysis.[187] This is problematic, as it tends to enlarge the scope of the exemption by considering traditional employment tenets ("who has power to fire"; "are they accountable only to the elected official") equally with the factor that arguably focuses on Congress's intent the most: the "intimacy" factor.

The Fourth Circuit's test does not have any of these problems. First, the overall guiding principle of the *Curl-Cromer* test, whether the individual "worked in an intimate and sensitive position of trust," places a much greater weight on facts which tend to embody Congress's goal of encapsulating the "first line advisors."[188] Whereas the Fifth Circuit considers intimacy as only one factor on a nonexhaustive list of factors, the Fourth Circuit's test frames this inquiry as "the central issue."[189] This added emphasis here shows how the Fourth Circuit's test better achieves congressional intent.

Second, the unique factors in the *Curl-Cromer* test better guide the court's analysis toward facts indicative of one being a "first line advisor." For instance, the fourth factor of the *Curl-Cromer* test, "[d]oes the employee contribute to the making of policy decisions in the [elected official's] department," is more specific and finely tailored to the authority vested in the individual's position. Unlike the Fifth Circuit's "representation" factor, the Fourth Circuit's analysis weeds out those who "represent" the elected official solely by nature of their employment with the official.[190] Contributing to

183 *Id.* at 1104, 1107.

184 *Id.* at 1108.

185 *Id.* at 1108–09.

186 *See* Owens v. Rush, 654 F.2d 1370, 1375 (10th Cir. 1981).

187 *See Hemminghaus*, 756 F.3d at 1109.

188 Cromer v. Brown, 88 F.3d 1315, 1323 (4th Cir. 1996) (citing Curl v. Reavis, 740 F.2d 1323, 1328 (4th Cir. 1984)).

189 Harris v. Anne Arundel County, No. CCB-12-0829, 2014 WL 4924308, at *5 (D. Md. Oct. 1, 2014), *aff'd sub nom.* Harris v. Leopold, 600 Fed. App'x 114 (4th Cir. 2015) (per curiam).

190 *See Curl*, 740 F.2d at 1328 (finding a sheriff's deputy was not personal staff where the deputy "handled the detectives' telephone calls and correspondence").

policy decisions is certainly more in line with the duties of an elected official's "first line advisors," and not those of technicians and staffers.

Lastly, the seventh factor also produces a smaller set of "personal staff." Under the seventh factor, a court should look to "whether the employee worked in the [elected official's] political campaign."[191] This factor tends to narrow the exemption to only those individuals who assisted in the official's campaign, likely in some high capacity, such that they would be rewarded with a position in the official's office. For instance, in *Harris v. Anne Arundel County*,[192] the District Court of Maryland was asked to see if a "community services person" for the county executive of Anne Arundel County fit the "personal staff" exemption.[193] In using the *Curl-Cromer* factors, the court noted that the plaintiff not only met the central principle of being in "an intimate and sensitive position of trust, close to" the elected official but had also helped on two prior campaigns, even setting up email accounts and domains for the elected official at the elected official's instruction.[194] This example shows how the "campaign" factor creates a smaller definition of "personal staff," because it tends to narrow the definition down to those who both work in the office currently and worked previously on the official's campaigns.

The unique factors of the Fifth Circuit test tend to enlarge the trapdoor, while the Fourth Circuit's exclusive factors tend to shrink it. By focusing on facts that emphasize the intimate relationship with the elected official, rather than focusing on factors that are common in many employment relationships, the Fourth Circuit's *Curl-Cromer* test better narrows the trapdoor of the "personal staff" exemption.

It is clear that the trapdoor should be narrowed and which circuit test will have such an effect. Next, this Note addresses the legal arguments for preferring *Curl-Cromer* over *Teneyuca*. In short, *Curl-Cromer* is the better interpretation of the "personal staff" exemption not only because of the real-world advantages addressed above, but also because it is more in line with congressional intent, the purposes of federal discrimination statutes, and agency interpretations of the provision.

B. Basis for Selecting the Curl-Cromer *Test*

1. Congressional Intent

First and foremost, the narrower *Curl-Cromer* test is appropriate because Congress intended the exemption to be narrow. This is most clearly seen in the drafting history of GERA. When first enacted, Title VII did not contain any exemptions to the definition of "employee."[195] "[E]mployee" was

191 *Cromer*, 88 F.3d at 1323.
192 *Harris*, 2014 WL 4924308.
193 *Id.* at *1–3.
194 *Id.* at *4–5.
195 Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(f), 78 Stat. 241, 255.

defined as "an individual employed by an employer."[196] Instead, a broader exemption was found in the definition of "employer," which exempted "State[s] [and] political subdivision[s] thereof."[197] In other words, "personal staff" were not protected not because of an "employee" exemption, but because Title VII broadly exempted all state governments from the definition of "employer." The trapdoor as we know it today was added during the 1972 amendments to Title VII.[198]

Amendment efforts first began in 1971, when Representative Augustus F. Hawkins introduced the Equal Employment Opportunities Enforcement Act (House Bill 1746 or the "Hawkins bill").[199] Representative Hawkins had two aims: increase the enforcement power of the EEOC and expand its jurisdiction to include state and local employees.[200] These goals ran headfirst into federalism concerns, the defenders of which objected to expanding the EEOC's jurisdiction to state and local governments. Opponents of the Hawkins bill instead preferred a substitute bill provided by Representative John N. Erlenborn (House Bill 9247,[201] which later took the label of House Bill 1746,[202] also known as the "Erlenborn bill"), "which lacked provisions to enlarge the jurisdiction of the EEOC."[203] Representative Mazzoli, a supporter of the Erlenborn bill, echoed these federalism concerns: "[The Erlenborn bill] does not change the present EEOC operations with respect to courage of State and local government employees. . . . [T]here is an interposition under the [Hawkins] bill which I think is disastrous, that is, the interposition of the Federal Government into State and local matters."[204] The Erlenborn bill did not contain any amendments to the definition of "employee" or "employer."[205] Thus, it would not tamper with the broad state government exemption in the definition of "employer."

These federalism concerns ultimately won out, with the Erlenborn bill defeating the Hawkins bill by six votes.[206] Thus, under the House's bill, the

196 *Id.*

197 *Id.* § 701(b)(1).

198 Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103; *see* Alaska v. EEOC, 564 F.3d 1062, 1087 (9th Cir. 2009) (Ikuta, J., dissenting) (briefly explaining the amendment).

199 Equal Employment Opportunities Enforcement Act of 1971, H.R. 1746, 92d Cong.; Richard R. Rivers, *In America, What You Do Is What You Are: The Equal Employment Opportunity Act of 1972*, 22 CATH. U. L. REV. 455, 460 (1973) (illustrating the first efforts in the House).

200 Rivers, *supra* note 199, at 460.

201 H.R. 9247, 92d Cong. (1971).

202 Katherine J. Thomson, *The Disparate Impact Theory: Congressional Intent in 1972—A Response to Gold*, 8 INDUS. REL. L.J. 105, 106–07 (1986) ("The House eventually agreed to substitute the text of [H.R. 9247] for that of H.R. 1746. The House passed H.R. 1746, with the substituted text of H.R. 9247 . . . ." (footnotes omitted)).

203 Rivers, *supra* note 199, at 461.

204 92 CONG. REC. 31,971 (1971).

205 H.R. 1746, 92d Cong. (1971), *reprinted in* SUBCOMM. ON LABOR OF THE S. COMM. ON LABOR & PUB. WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 498 (Comm. Print 1972) [hereinafter LEGISLATIVE HISTORY].

206 Rivers, *supra* note 199, at 461.

exemption would stay broad. However, thanks to the pressure of Father Theodore Hesburgh, Chairman of the United States Commission on Civil Rights,[207] the Senate did not adopt the Erlenborn bill.[208] Instead, the Senate adopted a bill identical to the Hawkins bill, thereby expanding Title VII to cover all government employees.[209] This set the stage for a showdown.[210] A conference committee was formed to work out the differences between the House bill (the Erlenborn bill) and the Senate bill (essentially, the Hawkins bill).[211]

It is here that we see Congress's intent behind the trapdoor.[212] At the conference, the Senate conferees originally proposed expanding Title VII to include "State and local governments, governmental agencies, [and] political subdivisions (except for elected officials, *their personal assistants and immediate advisors*)."[213] This language did not survive the conference. In a joint explanatory statement of the managers on the conference committee, the conferees reported that

> [i]t is the intention of the conferees to exempt elected officials and *members of their personal staffs,* and persons appointed by such elected officials as advisors or to policymaking positions at the highest levels of the departments or agencies of State or local governments, such as cabinet officers, and persons with comparable responsibilities at the local level,[214]

but that the exemption "shall be construed *narrowly*."[215]

In light of the disagreement between the two houses and the express command to apply the exemption narrowly, it is clear that the trapdoor in § 2000e(f) was not meant to encapsulate a wide swath of employees. Since *Curl-Cromer* produces a narrower group of exempt employees, it is thus more in line with Congress's intent.

2. Legislative Purpose

Curl-Cromer is also more appropriate than *Teneyuca* because it better aligns with Title VII's noble purpose of ending employment discrimination. "In passing Title VII, Congress made the simple but momentous announce-

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207 And, at the time, noted president of this *Law Review*'s University. *See generally* MICHAEL O'BRIEN, HESBURGH: A BIOGRAPHY (1998).

208 Rivers, *supra* note 199, at 461–62. Given the scarce focus on the employee exemptions in the congressional record, it is unlikely that this language in particular was the impetus of Father Hesburgh's advocacy.

209 S. 2515, 92d Cong. (1971), *reprinted in* LEGISLATIVE HISTORY, *supra* note 205, at 344.

210 *See* Rivers, *supra* note 199, at 462.

211 *See id.*

212 *See* Rivers, *supra* note 199, at 460; Kristin Sommers Czubkowski, Comment, *Equal Opportunity: Federal Employees' Right to Sue on Title VII and Tort Claims*, 80 U. CHI. L. REV. 1841, 1845 (2013) (describing the effect of the Act).

213 H.R. REP. NO. 92-238 (1972) (Conf. Rep.), *as reprinted in* 1972 U.S.C.C.A.N. 2137, 2180 (emphasis added).

214 *Id.* (emphasis added).

215 *Id.* (emphasis added).

ment that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees."[216] Its proscriptions "evince[ ] a congressional intent 'to strike at the *entire spectrum* of disparate treatment of men and women' in employment,"[217] and "entrench a merit-based workplace where specified traits or status-based criteria (race, color, national origin, religion, and sex) are supposed to be irrelevant to a person's job opportunities."[218] Even the 1972 amendments, which created the trapdoor, were supposed to "bring an end to job discrimination once and for all."[219]

Since 1964, the Supreme Court has expanded Title VII to better effectuate this purpose. Racial discrimination,[220] sexual discrimination,[221] and religious discrimination[222] under Title VII all have been enlarged to provide greater protections. Procedural steps have also been relaxed to better accommodate plaintiffs.[223] And while these protections have grown, the exceptions and exemptions, in turn, have shrunk. One of Title VII's notable exceptions, the bona fide occupational qualification exception—which allows discrimination based on sex, religion, and national origin where "reasonably necessary to the normal operation of that particular business or enterprise"[224]—has been described by the Supreme Court as "extremely narrow."[225] The religious organizations exemption has also been deemed limited in scope.[226] In sum, *Curl-Cromer* is the better interpretation because it is more in line with this Title VII jurisprudence—it increases protections by

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216 Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (plurality opinion).

217 Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (emphasis added) (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

218 William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 322 (2017).

219 Alaska v. EEOC, 564 F.3d 1062, 1078 (9th Cir. 2009) (O'Scannlain, J., concurring in part and dissenting in part) (quoting H.R. REP NO. 92-238, at 2141 (1972) (Conf. Rep.)).

220 *See* Faragher v. City of Boca Raton, 524 U.S. 775, 787 n.1 (1998) (noting that racial harassment cases are actionable); Barrett v. Whirlpool Corp., 556 F.3d 502, 512 (6th Cir. 2009) (noting the judicial creation of associational racial discrimination).

221 *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998) (unanimous holding) (expanding sex discrimination to include same-sex sexual harassment); Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (eliminating concrete psychological harm requirements); *Price Waterhouse*, 490 U.S. at 256–57 (creating "sex stereotyping" as a form of discrimination); *Meritor*, 477 U.S. at 73 (establishing sexual harassment as actionable).

222 *See* EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032 (2015) (holding that there is no "knowledge" requirement in a failure to accommodate claim).

223 *See* Fed. Express Corp. v. Holowecki, 522 U.S. 389, 402 (2008) (easing the requirements for an EEOC charge); Calloway v. Partners Nat'l Health Plans, 986 F.2d 446, 450 (11th Cir. 1993) (expanding the single filing rule).

224 42 U.S.C. § 2000e–2(e) (2012).

225 Dothard v. Rawlinson, 433 U.S. 321, 334 (1977); *accord* Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991).

226 Spencer v. World Vision, Inc., 633 F.3d 723, 735 (9th Cir. 2011) (O'Scannlain, J., concurring).

offering better forums and remedies and is narrow like Title VII's other exceptions and exemptions.

3. Agency Interpretations

Finally, *Curl-Cromer* is most appropriate because it is more in line with administrative interpretations of the "personal staff" exemption. The specific weight of these interpretations will depend on a deference inquiry which need not be addressed here.[227] For present purposes, it suffices to say that these interpretations will be afforded *some* weight in determining the meaning of "personal staff."[228]

Only two agencies have interpreted the "personal staff" exemption. The EEOC has offered guidance in its Compliance Manual,[229] and the U.S. Department of Labor has interpreted the FLSA's "personal staff" exemption,[230] which is identical to the Title VII provision.[231] Both interpretations favor the *Curl-Cromer* test. First, the EEOC's Compliance Manual approves of *Cromer* by name.[232] The Commission also includes an example of how to apply the "personal staff" exemption:

> CP, a deputy sheriff, performed primarily clerical and secretarial duties, including serving subpoenas, typing complaints and reports, handling detectives[']telephone calls and correspondence, and assigning case files. *The position was created and compensation was provided pursuant to state law.* CP did not occupy a high place in the chain of command. She was not under the sheriff[']s personal *direction*, and *promotion* requests were brought to the sheriff's subordinate. There was no evidence that CP had a highly confidential and sensitive relationship with the sheriff. Under these circumstances, CP was not a member of the sheriff[']s personal staff.[233]

Note, here, the emphasized text. First, a *Curl-Cromer*-exclusive factor is present. Only the *Curl-Cromer* test considers whether the position in question was created by and compensated under state law.[234] Second, this hypothetical also uses the language of *Curl-Cromer*, and not of *Teneyuca*. For example, when considering the staffer's role relative to the official's role, the *Curl-Cromer* test considers whether "*promotion* of the employee [is] solely up to the [elected official]" and "whether the employee worked under the *direction* of

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227 *See* United States v. Mead Corp., 533 U.S. 218, 228 (2001) (recapping when to afford deference to an agency's statutory interpretation); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

228 Courts have relied on these interpretations without using a deference analysis. *See, e.g.*, Bland v. New York, 263 F. Supp. 2d 526, 538 (E.D.N.Y. 2003).

229 *See EEOC Compliance Manual*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/policy/docs/threshold.html (last updated Aug. 6, 2009).

230 *See* 29 C.F.R. § 553.11(b) (2018).

231 *Bland*, 263 F. Supp. 2d at 538.

232 *EEOC Compliance Manual*, *supra* note 229, at n.86 (citing Cromer v. Brown, 88 F.3d 1315, 1323–24 (4th Cir. 1996)).

233 *Id.* § 2-III(A)(5)(d) (emphasis added).

234 *Cromer*, 88 F.3d at 1323.

the [elected] official."[235] While the *Teneyuca* factors touch on similar themes, they do not use these words, electing instead to ask if the employee is "personally accountable" only to the official or if the official has "plenary powers of appointment and removal."[236] Yet, look at the words used by the EEOC in its hypothetical: the EEOC noted that the hypothetical plaintiff "was not under the sheriff[']s personal *direction*," and that her "*promotion* requests were brought to the sheriff's subordinate."[237] Mirroring the specific language from *Curl-Cromer* gives the Fourth Circuit's test another tally. In these two ways, the EEOC's interpretation leans in favor of *Curl-Cromer*.

The Department of Labor's interpretation also favors *Curl-Cromer*, because the Department's regulations support a narrow definition of "personal staff." The relevant regulations here explain that "[t]he statutory term 'member of personal staff' generally includes *only* persons who are under the direct supervision of the selecting elected official *and* have regular contact with such official."[238] This echoes the "highly intimate" principle that is key in *Curl-Cromer*. The regulations further draw a narrow scope by saying "[t]he term typically does not include individuals who are directly supervised by someone other than the elected official even though they may have been selected by the official. For example, the term might include the elected official's personal secretary, but would not include the secretary to an assistant."[239] The regulations also set mandatory and strict requirements, writing that "such personal staff members *must* be appointed by, and serve *solely* at the pleasure or discretion of, the elected official."[240] These rules indicate a smaller exemption scope, as they are littered with qualifications that must be met. While this language is similar to *Teneyuca*, the regulations here actually advocate for an even stricter standard than in *Teneyuca* due to the Department's use of the word "must."[241] Thus, the Department of Labor's regulations advocate for whichever test will produce a smaller set of exempt employees. As shown above, that would be *Curl-Cromer*.

Conclusion

Kimberly Edelstein, a Butler County staff attorney claiming religious discrimination, fell through the "personal staff" trapdoor.[242] Her case is emblematic for why clarity in the trapdoor is needed: the EEOC classified her

235 *Id.* (emphasis added). For an illustration of the exclusive factors in each test, see *supra* Table 1.

236 Teneyuca v. Bexar County, 767 F.2d 148, 151 (5th Cir. 1985).

237 *EEOC Compliance Manual*, *supra* note 229, § 2-III(A)(5)(d) (emphasis added). These words are italicized in the above block quote.

238 29 C.F.R. § 553.11(b) (2018) (emphasis added).

239 *Id.*

240 § 553.11(c) (emphasis added).

241 *Id.*

242 *See* Edelstein v. Stephens, No. 1:17-cv-305, 2018 WL 948769, at *1–2, 19 (S.D. Ohio Feb. 16, 2018), *adopted in part and rejected in part by* No. 1:17-cv-305, 2018 WL 1558868, at *7 (S.D. Ohio Mar. 31, 2018).

charge as a Title VII religious discrimination charge rather than as a GERA charge.[243] Because of this label, Ms. Edelstein did not proceed into GERA's administrative framework, and instead, she mistakenly was given a right- to-sue letter, which led to her filing her GERA claim in district court.[244] The court dismissed her GERA claim, noting that Ms. Edelstein's only remedy under GERA was the EEOC administrative framework.[245] Thus, months after filing her initial charge, she was back at square one all because of a misunderstanding during her intake.

This error causes more than just lost time. Plaintiffs who fall into GERA lose the chance to argue in federal district court before an Article III judge using the Federal Rules of Evidence. They lose the ability to argue publicly to a judge or jury, thereby losing the chance to increase awareness and generate power through publicity. They lose the chance to seek punitive damages even in the most heinous of cases. A broad definition of "personal staff" forecloses the potential of a Commissioner Charge, which would be especially helpful in the world of state politics where victims fear the "political consequences for speaking out."[246] A broad definition also creates a dichotomy of protection between congressional aides who receive trial court rights and GERA plaintiffs who do not.

To better protect these individuals, courts should adopt the Fourth Circuit's *Curl-Cromer* framework. The Fourth Circuit's test narrows the definition of "personal staff" by putting a larger emphasis on the intimacy between the plaintiff and the elected official rather than on common characteristics found in many employment relationships. By focusing its analysis on those vested with authority and who act as "first line advisors," the Fourth Circuit's test shrinks the scope of the exemption, thus allowing more state employees to utilize Title VII. Furthermore, there is ample legal justification for siding with *Curl-Cromer*. Congress's guidance that the "personal staff" exemption be "narrowly construed" shows that Congress intended the trapdoor to be narrow. Congress's purpose in passing Title VII and related statutes will only be furthered by narrowing the trapdoor. A narrower trapdoor is also most consistent with agency interpretation of the "personal staff" language.

In light of the #MeToo movement, a narrower trapdoor can only be seen as a benefit. By having a narrower exemption, we increase accountability while promoting sexual equality. This will extend an invitation to state-employed workers: now you too are free to say, "Time's up!"

243 *Edelstein*, 2018 WL 948769, at *2.

244 *Id.* at *2–4; Complaint at 7–9, *Edelstein*, No. 1:17-cv-305, 2018 WL 948769.

245 *Edelstein*, 2018 WL 948769, at *4.

246 Wallace, *supra* note 69.