

RUNNING UP AGAINST THE CIVIL RIGHTS ACT: DOES JOE BIDEN’S PROMISE OF A FEMALE RUNNING MATE VIOLATE TITLE VII?

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I. INTRODUCTION

During a Democratic primary debate on March 15, 2020, Joe Biden announced, “I commit that I will in fact pick a woman to be vice president.”¹ Biden received mostly praise for his position, and commentators have opined that this was likely a beneficial tactic for the Biden campaign.² Some political commentators have even posited that this female vice-presidential candidate will be more important than Joe Biden himself.³

Regardless of the public response Biden received, refusing to consider an entire gender for a job raises questions concerning Title VII employment discrimination protections. Title VII of the Civil Rights Act of 1964 states, “It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual . . . because of such individual’s race, color, religion, sex, or national origin.”⁴ This article analyzes the relevant case law and considers potential defenses available to the Biden campaign. Part II analyzes whether a vice presidential candidate is properly classified as an employee or independent contractor under the relevant *Darden* factors. Part III considers whether a vice presidential candidate could be treated as a volunteer. Part IV assesses whether the exception of a valid bona fide occupational qualification exists. Part V discusses the spirit of Title VII protections and how the accompanying narrow construction permeates the entire analysis. Part VI considers whether a campaign is functioning as an employment agency for the later position of vice president of the United States. Part VII concludes by

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¹ Brian Schwartz, *Joe Biden pledges to pick a woman to be his running mate*, CNBC (Mar. 15, 2020, 9:20 PM), <https://www.cnbc.com/2020/03/15/democratic-debate-joe-biden-pledges-to-pick-a-woman-as-his-running-mate.html>. Biden’s debate opponent, Bernie Sanders, was more restrained when asked if he would pick a female running mate by responding, “In all likelihood, I will.”

² Joan E. Greve, *Joe Biden pledges to choose a woman as his running mate*, GUARDIAN (Mar. 15, 2020, 10:10 PM), <https://www.theguardian.com/us-news/2020/mar/15/joe-biden-vp-woman-female-running-mate> (“[Biden] and Sanders have been under pressure to consider a woman or person of color as a running mate as the once historically diverse field of Democratic presidential candidates has dwindled to two white men.”); Evan Halper & Janet Hook, *Biden says he wants a female running mate. Who?*, L.A. TIMES (Mar. 16, 2020, 4:28 PM), <https://www.latimes.com/politics/story/2020-03-16/biden-woman-running-mate-who> (“Joe Biden set off a chorus of cheers by flatly declaring in the presidential debate Sunday night that his running mate would be a woman.”).

³ Brett Bruen, *Joe Biden is not the most important person the Democrats’ ticket for November*, BUS. INSIDER (Apr. 26, 2020, 8:15 AM), <https://www.businessinsider.com/joe-biden-running-mate-is-more-important-than-he-is-2020-4> (“Joe Biden will not be the most important person on the Democratic ticket this November. . . . [It is his female running mate’s] historic opportunity that is going to matter over the long-term for our country.”).

⁴ 42 U.S.C. § 2000e-2(a)(1) (2018).

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summarizing the likely conclusion of the various arguments for and against a potential Title VII claim and considers pragmatic implications.

II. VICE PRESIDENTIAL CANDIDATE AS EMPLOYEE

Title VII protections apply only to employees; they do not apply to independent contractors.⁵ Unfortunately, Title VII's definition of employee as "any individual employed by an employer"⁶ is "completely circular and explains nothing," according to the Supreme Court.⁷ Courts implement a variety of tests to determine if a worker is properly classified as either an employee or an independent contractor.⁸ For Title VII purposes, the test created by the Supreme Court in *Nationwide Mutual Insurance v. Darden* is applied.⁹ These "*Darden* factors" mostly evaluate "the hiring party's right to control the manner and means by which the product is accomplished."¹⁰ The application of such worker classification tests are inherently subjective.¹¹ Furthermore, the infrequent occurrence of people working as vice presidential candidates and the unique nature of their duties result in some difficulty in applying the *Darden* factors. Nevertheless, analyzing the work of a vice presidential candidate under the *Darden* factors suggests that the proper classification is that of an employee, which therefore triggers Title VII protections. The following is a brief analysis of each of the factors.

"If the work performed by an individual . . . is a regular part of the contractor's normal business, this is an indicator that the individual may have an employment relationship with the contractor."¹² The work performed by a vice presidential candidate—fundraising, media interviews, debates, etc.—is certainly part of the campaign's normal business.

⁵ *Kakides v. King Davis Agency, Inc.*, 283 F.Supp.2d 411, 413 (2003) (" . . . it is settled law that Title VII and Chapter 151B do not apply to independent contractors. ").

⁶ 42 U.S.C. § 2000e(f).

⁷ *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992).

⁸ The four standard tests used for this purpose are the common law control test (*Darden* test), the economic-realities test, the ABC test, and the IRS twenty-factor test. Jennifer Pinsof, Note, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 350 (2016).

⁹ While the *Darden* case involved employee classification for purposes of the Employee Retirement Income Security Act of 1974 (ERISA), the definition of "employee" in ERISA is the same as in Title VII, "any individual employed by an employer." Keiko Rose, *Volunteer Protection under Title VII: Is Remuneration Required?*, Vol. 2014, U. CHI. LEGAL F. 605, 612 (2014).

¹⁰ *Darden*, 503 U.S. at 323.

¹¹ See *infra* notes 29–30 and accompanying text for how there is no objective rubric for evaluating the results of the *Darden* factors.

¹² *Frequently Asked Questions Employer-Employee Relationship: What are the Darden Factors?*, U.S. DEPT. LAB., <https://www.dol.gov/agencies/ofccp/faqs/employee-relationship> (last visited June 10, 2020).

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However, “[i]ndependent contractors typically have their own methods for doing the work and are hired because of their specialized knowledge and expertise, or because such expertise is not routinely used in the contractor’s business.”¹³ It could be argued that vice presidential candidates are “hired because of their specialized knowledge and expertise.” Although a strong case could be made that knowledge and expertise are secondary to the vice presidential candidate’s primary duty of balancing the ticket. Therefore, while arguments could be made on both sides regarding this factor, it seems to point to an employee status.

A. Source of the Instrumentalities and Tools

Generally, independent contractors provide their own instrumentalities, while employees have their instrumentalities provided by the contractor.¹⁴ The instrumentalities of a vice presidential candidate include clothes, lecterns, microphones, means of travel, etc. These are largely provided by the campaigns. Therefore, this factor points to an employee status.

B. Location of the Work

If the individual works at a location that is owned or controlled by the contractor, this may be an indicator that the individual is an employee, particularly if the individual’s work can be performed elsewhere. However, if the individual retains the discretion to perform the work at another location, this may indicate a nonemployee status.¹⁵

It is unclear exactly what percentage of work a vice presidential candidate performs at a location owned by the campaign and how amiable a campaign would be to a request to work more from home. Furthermore, it is unclear if, say, riding in an Uber provided by the campaign would be considered time spent working at a location “controlled by the contractor.” In the unique and infrequent occurrence of a vice presidential candidate’s work, this factor is largely inconclusive.

C. Duration of the Relationship between the Parties

An extended, continuing relationship between the individual and the contractor without a pre-defined duration may indicate the existence of an employment relationship. Independent contractors generally do not have

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

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such an extended relationship since they usually perform discrete tasks over a pre-determined period of time that is agreed upon by the parties.¹⁶

Vice presidential candidates certainly do not perform discrete tasks. And while they do only serve for “a pre-determined period of time that is agreed upon by the parties,” that is simply a function of presidential campaigns. Given the nature of the work, a court is likely to determine the vice presidential candidate’s relationship with the campaign as “extended.” Therefore, this factor points to an employee status.

D. Whether the Hiring Party has the Right to Assign Additional Projects to the Hired Party

“Independent contractors typically agree to provide very specific services to a company and usually have the freedom to accept or decline additional jobs. If the contractor has the right to assign additional work to an individual at its discretion, then this may indicate the existence of an employment relationship.”¹⁷ It is highly unlikely that a vice presidential candidate would feel free to decline duties assigned from the campaign. Therefore, this factor points heavily to an employee status.

E. The Extent of the Hired Party’s Discretion over When and How Long to Work

If the contractor exercises control over the hours that the individual begins work and the duration of the workday, then this may indicate that an employment relationship exists. Independent contractors are usually constrained by timeframes for deliverables, but can exercise discretion over when they begin work and how long their workday is within those general constraints.¹⁸

The campaign arranges many engagements that the vice presidential candidate must attend. But these are analogous to the “deliverables” of most jobs. Vice presidential candidates are likely not micromanaged as to their time management outside of these engagements. Therefore, this factor points to an independent contractor status.

F. Method of Payment

“Independent contractors are generally paid an amount that is agreed upon in advance for performing a particular job. If an individual is paid a

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

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regular salary or is paid by the hour, week, or month, that may indicate the existence of an employment relationship.”¹⁹

Under Federal Election Commission regulations, non-incumbent vice presidential candidates are allowed to receive a salary from the campaign.²⁰ For major party vice presidential candidates, it is uncommon to choose to receive a salary. Neither Tim Kaine nor Mike Pence received a salary from their respective campaigns in 2016.²¹ However, relevant to this *Darden* factor, in the event a vice presidential candidate chose to receive direct compensation, he or she would almost certainly be paid a salary—like an employee—rather than being paid commission for every point gained in the polls or paid per media appearance—like an independent contractor.²² The issue of whether a vice presidential candidate qualifies as a volunteer is discussed later. This factor is largely inapplicable and therefore inconclusive.

G. Hired Party’s Role in Hiring and Paying Assistants

“Employees generally do not hire and pay for their own assistants. If the individual has discretion to hire and pay for his or her own assistants without the approval of the contractor that may indicate that the individual is an independent contractor.”²³ Within reasonable limits, vice presidential candidates are likely able to choose their assistants. Therefore, this factor points to an independent contractor status.

H. Whether the Work is Part of the Regular Business of the Hiring Party

“Employees typically perform jobs that are a regular or routine part of the employer’s business, while independent contractors generally perform specialized work that lies outside of an employer’s normal business.”²⁴ As previously stated in the skills factor section, the work performed by a vice presidential candidate—fundraising, media interviews, debates, etc.—is certainly part of the campaign’s normal business. Therefore, this factor strongly points to an employee status.

¹⁹ *Id.*

²⁰ *Personal Use*, FED. ELECTION COMM’N, <https://www.fec.gov/help-candidates-and-committees/making-disbursements/personal-use/> (last visited June 10, 2020).

²¹ *Disbursements*, FED. ELECTION COMM’N, https://www.fec.gov/data/disbursements/?data_type=processed&recipient_name=Mike+Pence&recipient_name=Tim+Kaine&two_year_transaction_period=2016 (last visited June 10, 2020).

²² *Ware v. United States*, 67 F.3d 574, 580 (6th Cir. 1995) (holding that if a worker stands to incur a profit or loss as a result of his services, this indicates an independent contractor status).

²³ *Frequently Asked Questions Employer-Employee Relationship*, *supra* note 12.

²⁴ *Id.*

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“Employees are usually not engaged in their own separate business (or the business of another entity) when performing work for the contractor. Independent contractors, however, are usually engaged in their own separate business when they perform work for the contractor.”²⁵ While some vice presidential candidates technically maintain their previous employment—often as an elected official²⁶—it appears that the overwhelming amount of their attention is diverted to the campaign. Therefore, this factor seems to favor an employee status.

J. Provision of Employee Benefits

“Employees typically receive benefits from the contractor, such as health insurance, life insurance, leave, or workers’ compensation, while independent contractors do not normally receive such benefits from the contractor.”²⁷ Using 2016 as an example, both Tim Kaine and Mike Pence were already receiving benefits from their jobs as senator and governor, respectively. Therefore, this factor is largely inapplicable and therefore inconclusive.

K. Tax Treatment of the Hired Party

Here again, because vice presidential candidates are not paid a salary, this factor is inapplicable and therefore inconclusive.

L. Hiring Party’s Right to Control the Manner and Means by Which the Product is Accomplished

The degree to which the contractor retains the right to direct and control how and when an individual performs his or her work is a strong indicator of whether an employment relationship exists, regardless of whether the contractor exercises that right. If the contractor retains substantial control over when, where, and how the individual performs work, that is a strong indicator that the individual is an employee. However, if the contractor has little control over the manner in which the work is performed, that may indicate that the individual is not an employee.²⁸

Vice presidential candidates are generally experienced campaigners with vast political experience who are selected after very careful vetting. Therefore, it is not necessary for the campaign to exert much control

²⁵ *Id.*

²⁶ For example, in the 2016 election Tim Kaine continued as senator and Mike Pence continued as governor during the campaign.

²⁷ *Frequently Asked Questions Employer-Employee Relationship*, *supra* note 12.

²⁸ *Id.*

directing how they perform their work. But under this *Darden* factor, it is not the actual exercise of control that is dispositive. Rather, it is the mere ability to do so. Campaigns are free to control the “when, where, and how” the vice presidential candidate campaigns. Therefore, this factor favors an employee status.

M. Darden Factors Conclusion

There is no objective scoring rubric for applying the *Darden* factors. One does not simply conclude a worker is an employee, or an independent contractor, because more factors support that classification than the alternative. As the Supreme Court in *Darden* explained, “[There is] no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.”²⁹ “The relative weight given each factor may differ depending upon the legal context of the determination Certain factors may deserve added weight in some contexts”³⁰

Given the unique nature of working as a vice presidential candidate, it is not surprising that four of the *Darden* factors are largely inconclusive. Of the nine remaining factors, seven favored employee status, while two favored independent contractor status. Viewing all of the factors as a whole, and the potential weights that may be afforded among them, it is hard to escape the conclusion that—for Title VII purposes—a vice presidential candidate is considered an employee rather than an independent contractor.

Even if the contractual agreement between the vice presidential candidate and the Biden campaign expressly stipulates that the vice presidential candidate is an independent contractor, that does not necessarily make it so. In *Vizcaino v. Microsoft Corp.*, the stipulation of independent contractor status was determined to be a “mutual mistake” and “meaningless.”³¹

III. VOLUNTEER, NEVER HIRED

The best strategy for the Biden campaign to avoid the conclusion of an employee classification under the *Darden* factors is to evoke the antecedent question of whether the vice presidential candidate was ever truly “hired” in the first place. Indeed, “[t]he *Darden* factors require [the worker in

²⁹ *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258).

³⁰ *Ware v. United States*, 67 F.3d 574, 578 (6th Cir. 1995).

³¹ *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996), *rev'd en banc*, 120 F.3d 1006, 1010–13 (9th Cir. 1997).

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question] to be a hired party.”³² If the Biden campaign could show that the vice presidential candidate was never hired, this would circumvent the *Darden* factor analysis entirely and result in the inapplicability of Title VII protections. However, this strategy is unlikely to be successful, as relevant case law suggests that vice presidential candidates are hired by the campaign.³³

Determinations that a worker was not a “hired party” involve either volunteers or situations in which no contractual relationship existed between the worker and company. An example of the latter is provided in *Demski v. U.S. Department of Labor*.³⁴ There, Demski was the president of a company that contracted with I & M—a power company—to maintain equipment at a nuclear plant.³⁵ Demski was compensated by her company and received no benefits from I & M and was not paid a salary from I & M.³⁶ Demski did have an on-site office, security clearance, and the right to use I & M office supplies.³⁷ After Demski reported a safety issue, I & M terminated its contract with Demski’s company.³⁸ Demski then filed a complaint with the Department of Labor’s Occupational Safety and Health Administration alleging, among other things, wrongful termination.³⁹ The Sixth Circuit ruled that the *Darden* factors for determining whether Demski was an employee or independent contractor do not apply because Demski was not a “hired party.”⁴⁰

I & M never hired [Demski] in the sense that we understand the term. It is undisputed that no contractual relationship of any sort existed between I & M and Demski. Instead, I & M had contracts with [Demski’s company], and [Demski] was the sole shareholder of [that company]. That [Demski] was the sole shareholder does not mean that I & M had any sort of contractual or employment relationship with [Demski].⁴¹

Contractual issues for determining who is a hired party—such as that in *Demski*—are not applicable to a vice presidential candidate. But a vice presidential candidate could still be considered to never have been hired if he or she is viewed as a volunteer. But even if Biden’s running mate elects to forego a salary from the campaign, this does not necessarily render her a

³² *Demski v. U.S. Dep’t of Lab.*, 419 F.3d 488, 492 (6th Cir. 2005).

³³ See *infra* notes 34-53 and accompanying text.

³⁴ 419 F.3d at 488.

³⁵ *Id.* at 490.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 492.

⁴¹ *Id.*

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volunteer for Title VII purposes. CEOs sometimes choose not to accept a salary,⁴² and it is unlikely that such an action transforms their duties into volunteer work. It would be highly peculiar if employees who graciously agreed to work for free for a period of time were rewarded by losing employment protections. Furthermore, if Mike Pence and Tim Kaine were asked to provide a list of all their volunteer work, it is doubtful either would include, “Vice presidential candidate, 2016.” Case law also supports the notion that not everyone who works without receiving a salary is a volunteer for Title VII purposes.

Even in the absence of salary, other significant benefits may constitute a worker being classified as an employee and not a volunteer. For example, in *Daggitt v. United Food & Commercial Workers International Union, Local 304A*, the benefits of paid union dues, lost-time pay, and 401(k) contributions were considered compensation and therefore the worker was considered an employee despite not receiving a salary.⁴³ In *York v. Association of the Bar of the City of New York*, the court held that “in the absence of traditional compensation,” an employment relationship may exist where indirect benefits “meet a minimum level of significance. . . .”⁴⁴ This minimum level of significance was then hinted at when the court explained that benefits such as clerical support and networking opportunities are “merely incidental” and therefore not enough to constitute an employment relationship with an unpaid worker.⁴⁵ Furthermore, the court in *York* held that employee benefits such as health insurance and vacation time are “indicative of financial benefit.”⁴⁶ Other cases have determined that being reimbursed for continuing legal education courses and receiving training is not “substantial job-related benefits that give rise to an employment relationship.”⁴⁷

The benefits vice presidential candidates receive go far beyond the “merely incidental.” They have access to large support staff. Expenses such as for clothing are covered by the campaign.⁴⁸ Even expenditures such

⁴² Ethan Volf-Mann, *Here’s a List of CEOs Taking Pay Cuts Amid the Coronavirus Crisis*, YAHOO! FIN. (Mar. 30, 2020), <https://finance.yahoo.com/news/heres-a-list-of-ce-os-taking-pay-cuts-amidst-the-coronavirus-crisis-171206258.html>, (listing some CEOs as reducing their salary to \$0). Although, it should be noted that these CEOs may receive other forms of compensation.

⁴³ *Daggitt v. United Food & Commercial Workers Int’l Union, Local 304A*, 245 F.3d 981, 987–88 (8th Cir. 2001).

⁴⁴ *York v. Ass’n of the Bar of the City of N.Y.*, 286 F.3d 122, 126 (2d Cir. 2002).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Pastor v. P’ship for Children’s Rights*, No. 10–cv–5167, 2012 WL 4503415, at *2 (E.D.N.Y. Sept. 28, 2012).

⁴⁸ *See infra* notes 51–53 and accompanying text.

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as haircuts are paid for by the campaign.⁴⁹ Additionally, there are valuable indirect benefits, such as making political connections, acquiring experience, gaining name recognition, and a strong likelihood of becoming the vice president.

John McCain's running mate, Sarah Palin, is illustrative of the vast benefits a vice presidential candidate can receive other than salary. Before being selected as the vice presidential candidate, Palin was the somewhat obscure governor of Alaska. In less than two years from accepting the vice presidential candidate position, it was estimated that Palin had earned \$12 million.⁵⁰ And while campaigning, vast campaign expenditures were spent on Palin. In September 2008 alone, \$4,700 was spent on her hair and makeup.⁵¹ Over \$150,000 was spent on high-end clothing and accessories, including for Palin's family.⁵² Palin also received a \$317 pair of headphones.⁵³ Based on Title VII case law, the numerous benefits vice presidential candidates receive forecloses the possibility of avoiding Title VII protections due to volunteer status.

IV. BONA FIDE OCCUPATIONAL QUALIFICATIONS

If a vice presidential candidate is classified as an employee of the campaign, rather than an independent contractor or a volunteer, the Biden campaign could still implement a gender preference in filling the role if gender is a bona fide occupational qualification (BFOQ) for the position. Title VII allows employers to discriminate "on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."⁵⁴ Gender is not a BFOQ for the job of serving as the vice president, as those duties—presiding over the Senate, supervising electoral vote counts, potentially serving as acting president, etc.—are gender-neutral. While a successful vice presidential candidate will go on to acquire those duties, those are not the duties of a vice presidential candidate. It could be argued that the ultimate job of a vice presidential

⁴⁹ *Cost of Edwards' Haircut Hits \$1,250*, CBS NEWS (July 5, 2007), <https://www.cbsnews.com/news/cost-of-edwards-haircut-hits-1250/>.

⁵⁰ Matthew Mosk, *Sarah Palin Has Earned an Estimated \$12 Million Since July*, ABC NEWS (Apr. 12, 2010), <https://abcnews.go.com/Blotter/sarah-palin-earned-estimated-12-million-july/story?id=10352437>.

⁵¹ Jeanne Cummings, *RNC Shells out \$150,000 for Palin Fashion*, POLITICO (Oct. 21, 2008), <https://www.politico.com/story/2008/10/rnc-shells-out-150k-for-palin-fashion-014805>.

⁵² *Id.*

⁵³ Michael Joseph Gross, *Sarah Palin's Shopping Spree: Yes, There's More*, VANITY FAIR (Sep. 1, 2010), <https://www.vanityfair.com/news/2010/10/sarah-palin-spending-201010>.

⁵⁴ 42 U.S.C. § 2000e-2(e) (2018).

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candidate is to balance the ticket,⁵⁵ resulting in winning the election. In this sense, Biden could argue that the female gender is a BFOQ for his running mate. Indeed, political commentators point to Biden's promise to select a female running mate as an "inevitable and necessary" tactic.⁵⁶ Furthermore, it could be argued that the female gender is a BFOQ for symbolic purposes. A female vice president—which first requires a female vice presidential candidate—would be a strong, empowering message to women. As one political commentator explains, "[i]rrespective of what [Biden's female running mate] says or does, sometimes even symbols themselves are significant."⁵⁷

While there is no case law regarding a potential gender BFOQ for a vice presidential candidate, it is unlikely that the exception would apply. The Supreme Court has held that BFOQ is "an extremely narrow exception to the general prohibition of discrimination on the basis of sex."⁵⁸ Case law confirms this limited application. Assigning only male janitors to clean male restrooms during business hours was an acceptable BFOQ.⁵⁹ Transferring only female nurses to work in an obstetrics and gynecology department was an acceptable BFOQ.⁶⁰ Conversely, a company's attempt to claim that the male gender is a BFOQ for a manager because managers take male clients to football games and hunting trips was not allowed.⁶¹ The Biden campaign's decision to exclude males from the position of vice presidential candidate is more analogous to the latter case, in which BFOQ was not recognized as a defense, than in the former two, in which it was.

The burden of establishing a BFOQ exception would be on the Biden campaign.⁶² The Supreme Court has recognized that "[t]he BFOQ defense is written narrowly, and this Court has read it narrowly."⁶³ To justify a BFOQ exception, the employer must show "a high correlation between sex and ability to perform job functions."⁶⁴ Mere speculation as to the highly subjective perception voters may have regarding a female vice presidential candidate falls far short of this standard. Furthermore, BFOQs must

⁵⁵ *Balancing of Tickets Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/b/balancing-of-tickets/>, (last visited June 10, 2020).

⁵⁶ Joan Walsh, *Biden's Promise to Choose a Female Vice President Is Why He's Winning*, NATION (Mar. 16, 2020), <https://www.thenation.com/article/politics/biden-sanders-vice-president/>.

⁵⁷ Bruen, *supra* note 3.

⁵⁸ *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

⁵⁹ *Norwood v. Dale Maint. Sys.*, 590 F. Supp. 1410 (N.D. III. 1984).

⁶⁰ *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191 (E.D. Ark. 1981).

⁶¹ EEOC Decision No. 71-2338, 1973 EEOC Dec. 4437 (1971).

⁶² *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of America v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991).

⁶³ *Id.* at 201.

⁶⁴ *Breiner v. Nev. Dep't of Corr.*, 610 F.3d 1202, 1213 (9th Cir. 2010).

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concern job-related skills and aptitudes that affect an employee's ability to perform the job duties.⁶⁵

History would also work against a Biden claim that gender is a BFOQ for a vice presidential candidate. Title VII requires the BFOQ to be "reasonably necessary to the normal operation of [the] particular business."⁶⁶ Given that every successful vice presidential candidate in the nation's history has been male, a female running mate is not "reasonably necessary" to the operation of a presidential campaign.

A. BFOQ Customer Preference

The claim that gender is a legitimate BFOQ because voters prefer a female vice president is essentially just a variation of the customer preference theory, which is rarely an acceptable justification for discrimination unless privacy is involved. For example, in *Olsen v. Marriott International, Inc.*, the court considered a BFOQ defense based on an overwhelming customer preference for female massage therapists at a spa.⁶⁷ It held that even this was not enough to justify discrimination against male massage therapists.⁶⁸

Related to the issue of customer preference, courts are unlikely to apply the BFOQ exception based on mere "business convenience."⁶⁹ In *Wilson v. Southwest Airlines Co.*, the business judgment that exploiting "female sex appeal" in ticket sales positions would lead to increased sales—even if true—was not a sufficient basis for sex-based discrimination.⁷⁰

Finally, the outcome of the 2020 Democratic primaries may cast doubt on notions of voter preference for female politicians. Despite initially having six females, the race quickly resulted in a two-way runoff between two males.⁷¹ Elizabeth Warren, who was originally thought to be a frontrunner, finished behind Joe Biden and Bernie Sanders even in her home state.⁷²

⁶⁵ See generally *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of America v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

⁶⁶ 42 U.S.C. § 2000e-e(2) (2018).

⁶⁷ *Olsen v. Marriott Int'l, Inc.* 75 F. Supp. 2d 1052, 1056 (N.D. Tex. 1999).

⁶⁸ *Id.* at 1076.

⁶⁹ *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 303 (1981).

⁷⁰ *Id.* at 303–04.

⁷¹ See Grace Panetta & Ellen Cranley, *Here's Everyone Who's Running for President in 2020, and Who Has Quit the Race*, BUS. INSIDER (Mar. 5, 2020), <https://www.businessinsider.com/everyone-who-is-running-for-president-in-2020-2019-1>. The female candidates included Tulsi Gabbard, Elizabeth Warren, Amy Klobuchar, Marianne Williamson, Kamala Harris, and Kristen Gillibrand. *Id.*

⁷² Joshua Jamerson, *Elizabeth Warren Loses Primary in Home State of Massachusetts*, WALL STREET J. (Mar. 3, 2020), <https://www.wsj.com/articles/elizabeth-warren-loses-primary-in-home-state-of-massachusetts-11583294609>.

B. BFOQ Authenticity or Genuineness

In a last-ditch effort to apply the BFOQ exception, the Biden campaign might be tempted to posit that its behavior is allowed for the purposes of “authenticity or genuineness.”⁷³ After all, selecting a female running mate would likely help Biden appear more authentic and genuine when discussing female issues. While authenticity or genuineness is an exception recognized by the Equal Employment Opportunity Commission, the narrow example provided of “an actor or actress”⁷⁴ is telling. Biden’s refusal to consider male running mates due to a belief that it will result in voters viewing him as more authentic does not rise to the level of a movie about Abraham Lincoln refusing to consider female actors for the role.

V. SPIRIT OF TITLE VII

An overriding principle that serves to increase the burden on the Biden campaign in every aspect of this debate is the clear intent of Title VII protections. “In enacting Title VII, Congress sought to eliminate a pervasive, objectionable history of denying or limiting one’s livelihood simply because of one’s race, color, sex, religion or national origin.”⁷⁵ Title VII is designed to “rid the *world of work* of the evil of discrimination because of an individual’s . . . sex”⁷⁶ In order to obtain these ends, “Title VII of the Civil Rights Act should not be construed narrowly.”⁷⁷ It would be highly peculiar to posit that Title VII protections should apply to trivial, part-time minimum-wage jobs but not apply in the case of a vice presidential candidate. The text of Title VII gives no indication that its intent was to provide less protection the more important the job.

VI. EMPLOYMENT AGENCY EXCEPTION

In the unlikely event that a vice presidential candidate was adjudicated to be an independent contractor or a volunteer, it is still possible Title VII protections could apply based on a theory that a major party campaign is the functional equivalent of an employment agency for the position of vice president. Title VII provides that “it shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of

⁷³ 29 C.F.R. § 1604.2(a)(2) (2019).

⁷⁴ 29 C.F.R. § 1604.2(a)(2).

⁷⁵ *McBroom v. W. Elec. Co., Inc.*, 429 F. Supp. 909, 911 (M.D.N.C. 1977).

⁷⁶ *Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983).

⁷⁷ *Tipler v. E.I. du Pont de Nemours & Co.*, 443 F.2d 125, 131 (6th Cir. 1971).

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his . . . sex . . . or to classify or refer for employment any individual on the basis of his . . . sex”⁷⁸

Becoming a vice presidential candidate on a major party ticket is essentially a prerequisite to becoming the vice president. Therefore, allowing discrimination at the level of the vice presidential candidate translates into discriminatory outcomes as to the vice president. Just as with an employment agency, a major party candidate’s selection of a running mate has “not a remote but a highly visible nexus with the creation . . . of direct employment relationships between third parties.”⁷⁹ Title VII can protect even non-employment relationships if it is determined that they “significantly affect[] access of any individual to employment opportunities.”⁸⁰

VII. CONCLUSION

The analysis in this article leads to the conclusion that—if Title VII was faithfully applied—the actions of a presidential candidate refusing to consider potential vice presidential running mates based solely on their gender would be prohibited. Vice presidential candidates would be classified as employees and not independent contractors under the relevant *Darden* factors. Under relevant case law, they would likely not be considered volunteers due to the vast benefits they receive. Additionally, attempting to apply the various theories of the BFOQ exception would fail. The spirit of Title VII protections casts a heavy burden on the Biden campaign regarding its behavior. In the unlikely event that the Biden campaign was able to categorize the vice presidential candidate as a volunteer, even this might not be enough to avoid Title VII protections. This is because the campaign could be held to function as an employment agency for the later position of United States vice president.

This article focuses only on the legality of Biden’s actions regarding his vice presidential selection. However, the pragmatic implications should not be ignored. Biden’s refusal to consider males for his running mate—or at least publicly stating he had already committed to picking a female—is likely to result in negative externalities in some circles. For some, the necessity of special consideration may reinforce harmful stereotypes of female inferiority.⁸¹ For others, it may serve to cast doubt as to the qualifications of the vice presidential candidate, therefore undermining her

⁷⁸ 42 U.S.C. § 2000-e(2)(b) (2018) (emphasis added).

⁷⁹ *Sibley Mem’l Hosp. v. Wilson*, 488 F.2d 1338, 1342 (D.C. Cir. 1973).

⁸⁰ *Christopher v. Stouder Mem’l Hosp.*, 936 F.2d 870, 875 (6th Cir. 1991) (quoting *Doe v. St. Joseph’s Hosp.*, 788 F.2d 411, 422–25 (7th Cir. 1986)).

⁸¹ These people may rationalize this position by positing that, if males and females truly possessed the same abilities, such special considerations would not be necessary.

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actions for the rest of her political career, which could very well include the presidency. And finally, “men’s rights” activist groups could use this to promote their perceived martyrdom status.

Biden’s pronouncement regarding his vice presidential selection is peculiar when juxtaposed with previous positions. In 2009, the Obama–Biden administration made the following statement regarding presidential appointments: “The Obama-Biden Administration does not discriminate on the basis of race, color, religion, sex, age, national origin, veteran status, sexual orientation, gender identity, disability, or any other basis of discrimination prohibited by law.”⁸² While a vice presidential candidate is not technically an “appointment,” Biden’s stated position regarding his running mate seems to contradict previous anti-discrimination rhetoric.

⁸² HUMAN RIGHTS CAMPAIGN, U.S. FEDERAL GOVERNMENT EMPLOYMENT POLICIES, <https://www.hrc.org/resources/u-s-federal-government-employment-policies> (last visited June 8, 2020).