

FEMALE-ONLY PLATFORMS IN THE RIDE-SHARING ECONOMY: DISCRIMINATORY OR NECESSARY?

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ABSTRACT

The safety and privacy of female passengers have dogged ride-sharing companies, Uber and Lyft, throughout the country, underscored by the media's relentless news stories of male drivers raping, sexually assaulting, and harassing women during their rides. Concerned that Uber and Lyft have failed to adequately address the issue of sexual violence against female passengers, consumers have chosen to tackle it themselves by removing what they believe to be the aggravating factor: men. Companies like SheRides and Safr pair female drivers with female passengers in efforts to protect riders' safety and afford women the opportunity to experience the same perception of privacy as men who use Uber and Lyft. While SheRides and Safr may address these concerns, critics suggest that women-only taxis' exclusion of male drivers is illegal. In light of this tension, this Note analyzes female-taxi services' same-sex hiring policies under Title VII of the Civil Rights Act of 1964, and ultimately concludes that SheRides and Safr's employment practices are legal because gender is a bona fide occupational qualification for employment—justified by business, privacy, and safety interests, and necessitated by current events.

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I. INTRODUCTION

The safety and privacy of female passengers have dogged ride-sharing companies, Uber and Lyft, throughout the country, underscored by the media's relentless news stories of male drivers raping, sexually assaulting, and harassing women during their rides. With the advent and mounting popularity of these smartphone-based car services, the landscape of transportation has changed dramatically into what has

been coined the “sharing economy”—but the current reality reveals that participation has increasingly put women at risk.¹

Concerned that Uber and Lyft have failed to adequately address the allegations of sexual violence against female riders, customers have chosen to tackle the issue themselves. They have created women-centric companies, like SheRides in New York and Safr² in Massachusetts, which address issues of sexual safety by removing what they believe to be the aggravating factor: men.³ These business models pair female drivers with female passengers in order to protect riders’ safety and afford women the opportunity to experience the same perception of privacy as men who use Uber and Lyft. However, while SheRides and Safr may address female passengers’ safety and privacy concerns—they also raise others.

Critics suggest that women-only taxis’ employment practices are illegal and run afoul of anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964 (“Title VII”), which prohibits gender-discrimination in employment at the federal level.⁴ Some of these companies have already faced the legal repercussions of this issue.⁵ SheRides, for instance, delayed “its planned launch in 2014 after spending tens of thousands of dollars on legal fees as activists and male drivers threatened to sue.”⁶ Safr faced similar criticism and also pushed back its initial launch date.⁷

1. Bernard Marr, *The Sharing Economy: What It Is, Examples, and How Big Data, Platforms, and Algorithms Fuel It*, FORBES (Oct. 21, 2016, 2:16 AM), <https://www.forbes.com/sites/bernardmarr/2016/10/21/the-sharing-economy-what-it-is-examples-and-how-big-data-platforms-and-algorithms-fuel/#2e2fedef7c5a>.

2. Note that Safr was first launched as Chariots for Women, rebranded as SafeHer, then again as Safr. See Abbi Matheson, *There’s an All-Female Ride-Sharing App Called Safr in Boston*, BOSTON (Mar. 2, 2017, 5:24 PM), <http://www.bostonmagazine.com/news/2017/03/02/safr-ride-sharing-boston>. This Note will refer to the company as Safr, although articles cited *infra* may refer to the company by any one of its previous names.

3. Amanda Manning, *All Female Ride-Sharing App Is Launching Nationwide After Overwhelming Demand*, OBSERVER (Apr. 20, 2016, 12:13 PM), <http://observer.com/2016/04/all-female-ride-sharing-app-is-launching-nationwide-after-overwhelming-demand>.

4. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–716, 78 Stat. 241, 253–266 (1964) (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2012)).

5. Curt Woodward, *Can ‘Uber for Women’ App Really Refuse Service to Men? It Might Soon Find Out*, BOS. GLOBE (Jan. 26, 2017), <https://www.bostonglobe.com/business/2017/01/26/uber-for-women-app-close-launch-boston-amid-legal-questions/sy1pBjoTCCsW3husELGVeI/story.html>.

6. Philip Marcelo, *Women-Only Car Services Fill a Niche, But Are They Legal?*, AP (Apr. 13, 2016), <http://bigstory.ap.org/article/8b7d039d8e6e45408c66444dfde5eaf9/women-only-car-services-fill-niche-are-they-legal>.

7. Bruce Brown, *See Jane Go, a Ridesharing Service for Women, Begins Business in the O.C.*, DIGITAL TRENDS (Sept. 14, 2016, 3:11 PM), <https://www.digitaltrends.com/mobile/see-jane-go-ridesharing-for-women>.

In light of this tension, this Note posits that under Title VII, these single-sex hiring policies are legal because gender is a bona fide occupational qualification (“BFOQ”) for employment. Title VII provides that employers may not discriminate based on sex; however, employers may rebut a prima facie case of discrimination by raising the affirmative defense of the BFOQ. The BFOQ permits the employer to discriminate on the basis of sex when sex is reasonably necessary to the normal operation of the particular business or enterprise.⁸

Courts have generally interpreted the BFOQ defense quite narrowly, based on guidance from the U.S. Equal Opportunity Commission (EEOC)—the agency that enforces the law.⁹ The EEOC has stated that employment decisions based on a consumer preference for gender should not be a basis for a BFOQ;¹⁰ however, courts have permitted gender-based BFOQ claims in limited circumstances.¹¹ In analyzing these claims, courts typically apply the “essence of the business” test, which states that discrimination based on sex is valid when the essence of the business operation would be undermined by not hiring members of one sex exclusively.¹² Case law illustrates that employers are successful in satisfying this test when they are able to prove that the consumer preference is supported by at least one strong, non-gender justification, so that hiring employees of the opposite sex would undermine the business or enterprise.¹³

8. *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 299 (N.D. Tex. 1981) (citations omitted) (“[C]ourts have held . . . customer preference for one sex may be taken into account in those limited instances where satisfying customer preference is ‘reasonably necessary to the normal operation of the particular business or enterprise.’”).

9. *Id.*

10. *Small Business Fact Sheet National Origin Discrimination*, EEOC, <https://www.eeoc.gov/laws/guidance/national-origin-factsheet.cfm> (last visited Jan. 17, 2018) (“Employers covered under Title VII cannot justify employment discrimination based on the preferences of others.”).

11. *See Util. Workers Union v. S. Cal. Edison Co.*, 320 F. Supp. 1262, 1265 (C.D. Cal. 1970) (“[R]ules restricting certain types of employment to one sex are invalid Such restrictions can be made where sex is relevant.”).

12. *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969) (“[I]n order to rely on the [BFOQ] exception an employer has the burden of proving that he had . . . a factual basis for believing, that all or substantially all [people of that sex] would be unable to perform . . . the duties of the job involved.”); *see also Userly v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976) (“The greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications designed to insure safe driving.”).

13. *See Everson v. Mich. Dep’t of Corr.*, 391 F.3d 737, 750 (6th Cir. 2004) (citation omitted) (“These decisions teach that the reasoned decisions of prison officials are entitled to deference and that the goals of security, safety, privacy, and rehabilitation can justify gender-based assignments in female correctional facilities.”).

Accordingly, female-only taxis fall within the BFOQ exception because their same-sex hiring practices are supported by three non-gender justifications: (i) the businesses' primary function and the gender of their employees are inseparable; (ii) the threat male drivers pose to female passengers' safety; and (iii) the presence of male drivers implicates customer privacy concerns. Specifically, sex is integral to the female-taxi services' continued participation in the market, and the hiring of male drivers would undermine the businesses. Moreover, customer preference for female drivers stems from valid safety concerns: the prevalence of sexual assault and violence by male drivers against their passengers during transport. With respect to privacy interests, female riders experience heightened consciousness of their bodies and feelings of vulnerability due to the presence of male drivers—and although courts have typically interpreted the privacy interest as limited to exposure of intimate areas, this understanding should be broadened to encompass the privacy interests implicated here.¹⁴

Thus, same-sex hiring policies of female-taxi services like Safr and SheRides are legal under Title VII. These women-centric business models satisfy the courts' test for analyzing BFOQ claims because the consumer preference for gender is supported by strong, non-gender justifications. The strength of these justifications—individually and more so combined—lend support to finding that hiring men would result in failure of the businesses. The legislative history of federal anti-discrimination laws and separate economic justifications also favor this finding, while current events necessitate it. In conclusion, female-taxis should be successful in defending their sex-based employment practices.

II. FEMALE-ONLY TAXIS AND THE QUESTION OF LEGALITY

“Lyft Driver, 49, ‘Dragged a Woman into a Derelict House and Raped Her after Picking Her Up from a Bar.’”¹⁵ “Uber Driver Arrested After Allegedly Groping, Harassing Passenger for 45 Miles.”¹⁶ These

14. See *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (finding anti-contraceptive state law unconstitutional for encroaching on married individuals' intimate zone of privacy).

15. Chris Summers, *Lyft Driver, 49, Dragged a Woman into a Derelict House and Raped Her after Picking Her Up from a Bar' - And Police Fear He Could Have More Victims*, DAILYMAIL (Sept. 30, 2016, 12:02 PM), <http://www.dailymail.co.uk/news/article-3815920/Lyft-driver-sexually-assaulted-woman-picking-cab-bar-police-fear-victims.html>.

16. Sage Lazzaro, *Uber Driver Arrested After Allegedly Groping, Harassing Passenger for 45 Miles*, OBSERVER (July 6, 2016, 1:33 PM), <http://observer.com/2016/07/uber-driver-arrested-after-allegedly-groping-harassing-passenger-for-45-miles>.

headlines are only an inkling of news stories currently belaboring ride-sharing giants Uber and Lyft across the country.

The advent and increasing popularity of these application-based companies have transformed the landscape of transportation dramatically, into what has been coined the “sharing economy.”¹⁷ The sharing economy allows consumers to receive “convenient, inexpensive[,] and safe taxi service[s]”¹⁸ through the click of a smartphone-button. Ridesharing companies then “connect people who need a reliable ride with people looking to earn money driving their [personal] car.”¹⁹ However, the current reality demonstrates that participation in this economy has increasingly put female consumers at risk.²⁰

Concerned that Uber and Lyft have failed to adequately address the mounting instances of violence against female passengers during their rides, customers have chosen to tackle the issue themselves. They have created women-only companies which address issues of passenger safety and privacy by removing what they believe is the aggravating factor: men. These new business models pair female drivers with female passengers in order to curb the risk of sexual violence, and afford women the opportunity to experience the same perception of privacy as men who use Uber and Lyft.

Two of these companies include SheRides²¹ in New York, and Safr²² in Massachusetts. SheRides launched in 2014 and was started by Stella

17. See generally Benita Matofska, *What is the Sharing Economy?*, PEOPLE WHO SHARE (Sept. 1, 2016), <http://www.thepeoplewhoshare.com/blog/what-is-the-sharing-economy> (providing an overview of the sharing economy); Shu-Yi Oei & Diane M. Ring, *Can Sharing Be Taxed?*, 93 WASH. U. L. REV. 989, 997–1004 (2016) (“While there is no universal definition of the term ‘sharing economy,’ commentators have described it as a model of production, consumption, and distribution of goods and services whereby people ‘share’ their assets or other resources on an excess capacity basis via peer-to-peer arrangements.”).

18. So, *What Is Uber?*, UBERESTIMATE, <http://uberestimate.com/about-uber> (last visited Jan. 17, 2018).

19. *Finding the Way: Creating Possibilities for Riders, Drivers, and Cities*, UBER, <https://www.uber.com/our-story> (last visited Jan. 17, 2018); see also *What Is Lyft?*, LYFT, <https://www.lyft.com/drive-with-lyft> (last visited Jan. 17, 2018).

20. See Lauren Gambino, *Uber Faces Lawsuit in US Over Two Alleged Sexual Assaults by Drivers*, GUARDIAN (Oct. 8, 2015, 7:20 PM), <https://www.theguardian.com/technology/2015/oct/08/uber-lawsuit-alleged-sexual-assaults-boston-south-carolina>.

21. SHERIDES, <http://sheridesnyc.com> (last visited Jan. 17, 2018). SheRides is known as SheTaxis in areas outside of New York City due to regulation preventing the use of “taxis” in company names. See Winnie Hu, *New Service Offers Taxis Exclusively for Women*, N.Y. TIMES (Sept. 7, 2014), <https://www.nytimes.com/2014/09/08/nyregion/new-service-offers-taxis-exclusively-for-women.html>.

22. SAFR, <https://www.gosafr.com> (last visited Jan. 17, 2018). See SEE JANE GO, <https://seejanego.co> (last visited Jan. 17, 2018). See Jane Go was a ridesharing service that

Mateo.²³ Mateo created the company because she wanted to provide a safe transportation option for female patrons that could empower them personally and financially.²⁴ As a mother to two daughters, Mateo understood the usefulness of having drivers on call to transport children to their various after-school events, and that a service like SheRides would be invaluable because of the comfort of knowing that the driver was a woman.²⁵

Meanwhile, Safr launched in the fall of 2016.²⁶ The business was founded by former Uber driver, Michael Pelletz, who stated that “he would watch college-aged women pour out of clubs, often getting into the wrong rideshare car. ‘Just one bad apple behind the wheel, and those women would not be safe at all.’”²⁷ Pelletz, also a father to young daughters, claimed that “[t]he thought of them doing this was like a knife to the chest,”—which consequently led to his decision to create SafeHer with his wife.²⁸

Although these companies seek to add value to the sharing economy by addressing the safety and privacy concerns of female customers, critics suggest that they raise serious legal implications. Opponents claim that the gender-specific hiring of female-only drivers is illegal and runs afoul of anti-discrimination laws.²⁹

Some female-ridesharing services have already faced the legal repercussions of these criticisms. SheRides delayed its “planned launch in 2014 after spending tens of thousands of dollars on legal fees as

launched in Orange County, California in September 2016. See Andrew Bender, *See Jane Go: New Ride-Share Service Exclusively for Women Aims to Ease Passengers’ Fears*, FORBES (Sept. 13, 2016, 12:17 PM), <https://www.forbes.com/sites/andrewbender/2016/09/13/see-jane-go-new-ride-share-service-exclusively-for-women-aims-to-ease-passengers-fears>. However, See Jane Go ceased operations on January 9, 2018. SEE JANE GO, *supra*.

23. Stella Mateo, *Founder and CEO of SheTaxis/SheRides*, SHERIDES, <http://sheridesnyc.com/stellalbio.html> (last visited Jan. 17, 2018) [hereinafter *Stella Mateo*].

24. Hu, *supra* note 21.

25. *Id.*

26. Aaliyah, *Driving Safer with SafeHer*, HER DAILY (Sept. 15, 2016), <http://herdaily.com/empowerment/26237/driving-safer-with-safeher>. Safr was formerly known as Chariot for Women. See Kristen Hall-Geisler, *Chariot for Women is a New Ridesharing Service for Women Only*, TECHCRUNCH (Apr. 8, 2016), <https://techcrunch.com/2016/04/08/chariot-for-women-is-a-new-ride-sharing-service-for-women-only>.

27. Susan Zalkind, *Confessions of a Female Uber Driver: Women-Only Rideshare Has Many Pluses*, GUARDIAN (Apr. 21, 2016, 8:00 PM), <https://www.theguardian.com/technology/2016/apr/21/chariot-for-women-female-only-rideshare-uber>.

28. *Id.*

29. See Curt Woodward, *Uber, But for Women? Probably Illegal, Experts Say*, BOSTON GLOBE (Mar. 28, 2016), <https://www.bostonglobe.com/business/2016/03/28/uber-but-for-women-probably-illegal-experts-say/QP5fYbQfvXUnKcEs0BqEP/story.html> (demonstrating how civil rights attorneys are concerned a local female-ride sharing service, Chariot for Women, might conflict with antidiscrimination laws).

activists and male drivers threatened to sue.”³⁰ In an effort to take precautionary measures to prevent the possibility of legal battles, the company launched a subsidiary of its business in 2016, called SheHails.³¹ SheHails permits men as drivers and passengers, but female drivers can decide whether to accept male passengers, and female passengers can decide whether to accept rides from male drivers.³²

Safr has faced similar criticism that its employment practices may be illegal.³³ Although its legal team has not faced any challenges yet, Pelletz stated:

[I]f [they] do, [they would] love to go in front of the Supreme Court and actually try and change some laws, because there is such a need for that. . . . [The business model is] resonating and the real reason it’s resonating is because there’s unfortunately such a need for what [these female-ridesharing companies are] doing.³⁴

A. *The Impetus for Change and Necessity of New Ride-Sharing Models*

This cited need for female-only taxis stems from Uber and Lyft’s alleged failure to address the escalating concern of their female riders with respect to safety and privacy, as well as the desire to empower women to enter with greater force into a traditionally male-dominated field.³⁵

30. See Marcelo, *supra* note 6.

31. *About Us*, SHEHAILS, <http://shehails.com/about-us> (last visited Jan. 17, 2018); see also Marcelo, *supra* note 6.

32. SheHails’ Terms and Conditions state that “[w]hile the SheHails application is open to everyone, and we are happy to connect male passengers with cars to get them where they need to go, ST is tailored as a ‘women-for-women’ car service that connects female passengers who seek transportation to certain destinations (‘Riders’) with female drivers operating vehicles that are either affiliated with the Company or are affiliated with another licensed Dispatch Base (‘Drivers’). . . . If a Rider seeks a female driver, a female passenger must be present and accompany any male passengers.” *Terms and Conditions*, SHEHAILS, <http://shehails.com/terms-and-conditions> (last visited Jan. 17, 2018).

33. See Zalkind, *supra* note 27; Marcelo, *supra* note 6.

34. Amanda Manning, *All Female Ride-Sharing App Is Launching Nationwide After Overwhelming Demand*, OBSERVER (Apr. 20, 2016, 12:13 PM), <http://observer.com/2016/04/all-female-ride-sharing-app-is-launching-nationwide-after-overwhelming-demand>.

35. See *id.*

1. Safety and Privacy Concerns Belabor Uber and Lyft

As stated previously, smartphone-based transportation has been growing rapidly, made apparent by the number of rides provided by its two most popular companies: Uber and Lyft. As of June 2016, Uber provided more than fifty million passengers over two billion rides,³⁶ while Lyft performed 13.9 million rides in July 2016 alone.³⁷ With the overwhelming use of these platforms, safety and privacy issues have become a hot spot for dialogue. Uber states that it “is dedicated to keeping people safe on the road. [Its] technology enables [it] to focus on rider safety before, during, and after every trip.”³⁸ Likewise, Lyft claims that “safety is [its] top priority” and its goal is to “make every ride safe, comfortable, and reliable.”³⁹ However, statistics of sexual violence against female passengers have painted a different picture.

Between December 2012 and August 2015, the count of Uber rides that led to sexual assault may have been between 170 and 6160.⁴⁰ One news site published screenshots, provided by a former customer service representative for Uber, which showed a search for the words “sexual assault” pulling up 6,160 tickets in the company’s database, and a search for the word “rape” returning 5,827 tickets.⁴¹ Lyft has been silent on its own count, but according to a 2016 survey of 453 application-

36. See Claire, *5 Benefits of Carpooling Using uberPOOL*, UBER (Sept. 20, 2016), <https://www.uber.com/blog/5-benefits-of-carpooling-using-uberpool>.

37. See Johana Bhuiyan, *Lyft Hit a Record of 14 Million Rides Last Month with Run-Rate Revenue of as Much as \$500 Million*, RECODE (Aug. 2, 2016, 9:20 PM), <http://www.recode.net/2016/8/2/12364756/lyft-leaked-investor-letter-july-record>.

38. *Trip Safety*, UBER, <https://www.uber.com/ride/safety> (last visited Jan. 17, 2018).

39. *Drive with Lyft*, LYFT, <https://www.lyft.com/drive-with-lyft> (last visited Jan. 17, 2018); *Safety*, LYFT, <https://www.lyft.com/safety> (last visited Jan. 17, 2018).

40. See Nora Caplan-Bricker, *Get Home Safe*, SLATE (Mar. 9, 2016, 1:50 PM), http://www.slate.com/articles/double_x/doublex/2016/03/sexual_assault_happens_via_uber_and_lyft_but_the_statistics_are_unclear.html.

The exact number is unavailable because most major urban police departments do not track the precise location where sexual crimes occur, and Uber and Lyft have been secretive (or inconclusive) with their statistics. *Id.* Moreover, the actual number may be greater than estimated because of problems with underreporting. According to the National Sexual Violence Resource Center, “[r]ape is the most under-reported crime” and “[sixty-three percent] of sexual assaults are not reported to police.” See *Statistics About Sexual Violence*, NAT’L SEXUAL VIOLENCE RES. CTR. 2 (2012), http://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media_packet_statistics-about-sexual-violence_0.pdf.

The numbers may also be inaccurate because Uber’s database does not reflect situations where women report assaults to Uber, but go directly to the police. See Caplan-Bricker, *supra*.

41. See Charlie Warzel & Johana Bhuiyan, *Internal Data Offers Glimpse at Uber Sex Assault Complaints*, BUZZFEED (Mar. 6, 2016, 1:34 PM), https://www.buzzfeed.com/charliwarzel/internal-data-offers-glimpse-at-uber-sex-assault-complaints?utm_term=.ojybvynd8#fdqqdwwk6n0.

based drivers, fifty-six percent of respondents “said that they either currently drive, or used to drive, for Uber and Lyft simultaneously,”⁴² suggesting that there may be overlap in the data.⁴³

An organization called Who’s Driving You has compiled a database listing “incidents involving ‘ridesharing’ passengers [who have been] harmed [with] criminal offenders behind the wheel,”⁴⁴—most of which are women—in efforts to provide transparency.⁴⁵ The website offers a well-documented history of rape, sexual assault, and harassment allegations against Uber and Lyft since 2013.⁴⁶

Stunningly, some jurisdictions have even attributed a growth in general sexual offense statistics to these ride-sharing services.⁴⁷ For example, in New York City alone, police said that there was a six percent rise in reports of rape, from 1,354 in 2014, to 1,439 in 2015,⁴⁸ while reports of stranger-rape increased from 117 in 2014 to 166 in 2015.⁴⁹ New York City police attributed at least part of the increase to Uber and Lyft, due to the upsurge in rape cases involving vehicles-for-hire.⁵⁰

In addition to sexual violence allegations, harassment claims and privacy violations have also been prevalent. A 2016 study by the National Bureau of Economic Research found that on average, female passengers were taken on rides five percent longer than their male counterparts.⁵¹ The study noted that “female riders reported ‘chatty’ drivers who drove extremely long routes, [and] on some occasions, even

42. Tess Townsend, *Why Leaked Data About Uber Sex Complaints Matters for Lyft*, INC. (Mar. 8, 2016), <http://www.inc.com/tess-townsend/if-its-a-problem-for-uber-its-a-problem-for-lyft.html>.

43. *See id.* As one driver for both companies said, “What happens in the back of Uber cars, most likely . . . is happening in the back of Lyft cars.” *Id.*

44. *Reported List of Incidents Involving Uber and Lyft*, WHO’S DRIVING YOU?, <http://www.whosdrivingyou.org/rideshare-incidents> (last visited Jan. 17, 2018) [hereinafter *Reported List of Incidents*] (“Uber’s process for onboarding drivers is dangerously negligent. Neither Uber nor Lyft uses fingerprints or law enforcement to background-check their drivers. And Uber doesn’t even bother to meet with drivers in person before allowing them to ferry passengers.”).

45. *Id.*

46. *Id.*

47. *See, e.g.*, Thomas Macmillan & Pervaiz Shallwani, *Rise in Sexual Assaults Reported by Taxi Passengers*, WALL ST. J. (Jan. 10, 2016, 8:48 PM), <http://www.wsj.com/articles/rise-in-sexual-assaults-reported-by-taxi-passengers-1452476904>.

48. *See id.*

49. *Id.*

50. *Id.* (“The increase comes amid the rise in popularity of ride-hailing apps and questions about rider security.”).

51. Yanbo Ge et al., *Racial and Gender Discrimination in Transportation Network Companies* 1–3, 12 (Nat’l Bureau of Econ. Research, Working Paper No. 22776, 2016) <http://www.nber.org/papers/w22776.pdf>.

driving through the same intersection multiple times.”⁵² The research established that “the additional travel that female riders [were] exposed to [appeared] to be a combination of profiteering and flirting to a captive audience.”⁵³

The results of this study mirror female passengers’ main grievances regarding harassment and privacy concerns. Their complaints often arise from intimate and intrusive questioning by their drivers—such as their age, relationship status, and sexual history.⁵⁴ Female riders also often cite to inappropriate propositioning by their drivers for personal phone numbers,⁵⁵ sexual acts,⁵⁶ and sex.⁵⁷ The extent to which riders have been subject to unwanted questioning and sexual propositioning has even forced Uber to remind drivers in its Community Guidelines to not flirt with their passengers or ask for sex:⁵⁸

We all value our personal space and privacy. It’s OK to chat with other people in the car. But please don’t comment on someone’s appearance or ask whether they are single . . . And don’t touch or flirt with other people in the car. As a reminder, Uber has a no sex rule. That’s no sexual conduct between drivers and riders, no matter what.⁵⁹

Due to these concerns, female passengers, along with regulators around the country, have pressed Uber and Lyft to provide stronger

52. *Id.* at 18.

53. *Id.*

54. See Olivia Nuzzi, *Uber’s Biggest Problem Isn’t Surge Pricing. What If It’s Sexual Harassment by Drivers?*, DAILY BEAST (Mar. 28, 2014, 1:19 PM), <http://www.thedailybeast.com/articles/2014/03/28/uber-s-biggest-problem-isn-t-surge-pricing-what-if-it-s-sexual-harassment-by-drivers.html> (documenting women’s personal stories of uncomfortable interactions with their drivers); *Reported List of Incidents*, *supra* note 44 (including a section dedicated specifically to addressing harassment allegations by Uber and Lyft passengers on account of their drivers).

55. See UBERPEOPLE, <https://uberpeople.net/threads/dont-ask-your-passenger-out-you-idiot.16061> (last visited Jan. 17, 2018).

56. See, e.g., *Va. Police: Taxi Driver Asks Passenger to Perform Sex Acts*, CBS DC (June 2, 2015, 2:48 PM) [hereinafter *Va. Police*], <http://washington.cbslocal.com/2015/06/02/va-police-taxi-driver-asks-passenger-perform-sex-acts>.

57. See, e.g., *Mesa PD: Taxi Driver Asks for Sex in Lieu of Fare*, CBS 5 AZ (Feb. 27, 2013, 4:41 PM) [hereinafter *Mesa PD*], <http://www.cbs5az.com/story/21417178/mesa-pd-taxi-driver-asks-for-sex-in-lieu-of-fare>.

58. See *Uber Community Guidelines*, UBER, <https://www.uber.com/legal/community-guidelines/en> (last visited Jan. 17, 2018); Samantha Schmidt, *Uber Reminds Its Passengers: Don’t Have Sex in the Car*, WASH. POST (Dec. 13, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/12/13/uber-reminds-its-passengers-dont-have-sex-in-the-car/?Utm_term=.1be35b8da3aa.

59. *Uber Community Guidelines*, *supra* note 58.

safety and security policies—especially with respect to driver requirements.⁶⁰ Uber and Lyft currently require third-party background and Department of Motor Vehicles checks;⁶¹ however, Uber and Lyft do not require fingerprinting—which is considered the gold standard for background checks in the public transportation industry.⁶² As a result, men with criminal backgrounds may be permitted to drive for Uber and Lyft if the companies fail to screen them during the hiring process. This exact problem occurred in Los Angeles, where prosecutors in a 2016 lawsuit against Uber found that twenty-five drivers who had serious criminal histories “were not flagged during the background check.”⁶³

Despite these stumbles, Uber and Lyft have refused to subject potential drivers to fingerprinting because they claim that it would be “unfair, onerous, racially tilted[,] and unreliable.”⁶⁴ Lawmakers have been unable to impose regulation since ride-sharing companies are not governed by the existing framework that governs taxis, buses, and other means of public transportation.⁶⁵ The ride-sharing companies have even been dismissive of sexual violence and harassment claims, which had compelled the requests for stronger safety procedures. For instance, when Uber’s Chief Executive Officer Travis Kalanick was interviewed by the premier men’s magazine, GQ, he referred to his company as “Boob-er” and stated that a number of the assault accusations against Uber drivers “[weren’t] even real in the first place.”⁶⁶

60. See *Concerns Arise Over Safety of Uber Versus Taxi Rides*, CLAIMS J. (Mar. 1, 2016), <http://www.claimsjournal.com/news/national/2016/03/01/269134.htm>.

61. See *Driver Requirements*, UBER, <https://www.uber.com/drive/requirements> (last visited Jan. 17, 2018); *Safety*, LYFT, <https://www.lyft.com/safety> (last visited Jan. 17, 2018).

62. See *Concerns Arise Over Safety of Uber Versus Taxi Rides*, *supra* note 60.

63. See *id.*

64. Editorial Board, *Uber and Lyft’s Arguments Against Fingerprinting Make Little Sense*, WASH. POST (Jan. 2, 2017), https://www.washingtonpost.com/opinions/uber-and-lyfts-arguments-against-fingerprinting-make-little-sense/2017/01/02/a0926aae-ce1b-11e6-b8a2-8c2a61b0436f_story.html?Utm_term=.61ef88d6df2c.

65. See Matthew Feeney, *Is Ridesharing Safe?*, CATO INST. 1–2 (Jan. 27, 2015), <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa767.pdf>. Uber and Lyft insist that their drivers are private contractors rather than employees, and are consequently not subject to regulation. See *infra* note 96 and accompanying text. Conceding to fingerprinting procedures would essentially strengthen regulators’ arguments that Uber and Lyft’s drivers are employees, and as employees, they would be eligible to press for a range of benefits that would “upend the firms’ labor costs and business models.” Editorial Board, *supra* note 64. However, Uber has supported regulators’ insistence on requiring sexual assault training for their drivers. See Miranda Katz, *New Bill Would Require Cab Drivers to Receive Sexual Assault Prevention Training*, GOTHAMIST (Mar. 10, 2016, 1:50 PM), http://gothamist.com/2016/03/10/taxi_sex_assault_training.php.

66. Mickey Rapkin, *Uber Cab Confessions*, GQ (Feb. 27, 2014), <http://www.gq.com/story/uber-cab-confessions?Currentpage=1>.

a. SafeHer and SheRides Offer Heightened Security and Peace of Mind

Consequently, Uber and Lyft's tepid responses and dismissive attitudes towards rider safety and privacy issues have been the impetus for the creation of female-only ridesharing companies like Safr and SheRides, which aim to address those issues directly by excluding men and requiring stricter safety standards.

With respect to heightened security measures, Safr drivers must undergo thorough background checks in criminal and motor history.⁶⁷ Passengers are offered a multitude of in-ride security features, including an "SOS" button which allows users to tap on their phones in case of an emergency where they cannot dial 911.⁶⁸ The app then gives the user the option to either contact Safr, 911, or a pre-determined emergency contact who will immediately receive a text message indicating that the user feels unsafe as well as the user's location.⁶⁹ Safr also offers riders a feature called "Color Matching," which assigns drivers and passengers a specific color for each ride.⁷⁰ Colors must be verified by the driver and passenger to guarantee that the driver is picking up the correct passenger.⁷¹ SheRides offers similar features to ensure passenger safety. SheRides vehicles are all tracked by Global Positioning System, and the rider's friends and family can track the passenger throughout her journey.⁷² Additionally, SheRides has an "affiliated fleet" of sedans painted with a "distinctive pink logo and accents," so riders know that the car they are entering is a SheRides vehicle.⁷³

b. New Ridesharing Businesses Promote Women's Empowerment

In addition to added security, Safr and SheRides allow women to enter with greater force into the ride-hailing and -sharing market—a traditionally male-dominated field. According to a 2015 survey, the percentages of women drivers were 14% for U.S. Uber drivers, 12.7% for

67. *Safr Riders FAQs*, SAFR, <https://www.gosafr.com/terms/rider-faqs.html> (last visited Jan. 17, 2018).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *See Our Affiliated Fleet*, SHERIDES, <http://sheridesnyc.com/ourfleet.html> (last visited Jan. 17, 2018).

73. *Id.*

U.S. taxi drivers and chauffeurs, and 1% for New York City cab drivers.⁷⁴ Although Lyft had the highest proportion of female to male drivers—30%—Lyft still recruited women at a lower rate.⁷⁵

Although Uber and Lyft may not purposefully exclude women from participating in the ride-sharing market, many women choose to self-select out of positions due to safety risks involved.⁷⁶ A large portion of sexual violence allegations involve passengers as the victims;⁷⁷ however, female drivers are often victims as well. Thus, driving is not an option for many women because of this reality. Consider Maggie Young, a former Uber driver, who fell victim to sexual assault.⁷⁸ She describes her experience, stating that:

About five minutes through the I-5 north, we hit a bit of traffic and I slowed to about 50 mph. Suddenly, [my passenger] lunged from the back seat, grabbed my breast, and began kissing my neck and cheek. . . . [After further attempts despite my constant opposition], [h]e finally backed off and curled onto my backseat, mumbling something about how he was “going to fuck me.”⁷⁹

Young was able to safely contact the police, who later arrested her perpetrator.⁸⁰ Uber released a statement through their spokeswoman after the arrest, reiterating Uber’s commitment “to the safety and security of [its] drivers”;⁸¹ however, situations like Young’s illustrate the risks that women must consider before deciding to drive for Uber and Lyft.

Because of these risks, some activist groups have even argued against increasing women’s presence through employment with traditional ride-sharing services.⁸² Take Uber’s partnership with the United Nations (UN) in pledging “to create one million Uber jobs for

74. Ellen Huet, *Why Aren't There More Female Uber and Lyft Drivers?*, FORBES (Apr. 9, 2015, 11:00 AM), <http://www.forbes.com/sites/ellenhuet/2015/04/09/female-uber-lyft-drivers/#913912e52986>.

75. *Id.*

76. *Id.*

77. See Stella Mateo, *supra* note 23; Hu, *supra* note 21; SAFR, *supra* note 22.

78. See Maggie Young, *I Was Sexually Assaulted by My Uber Passenger*, BUSTLE (Feb. 26, 2016), <https://www.bustle.com/articles/138416-i-was-sexually-assaulted-by-my-uber-passenger>.

79. *Id.*

80. *Id.*

81. Maria Guerrero, *Seattle Uber Driver Claims Customer Sexually Assaulted Her; Uber Responds*, KIRO 7 (Jan. 4, 2016, 11:29 PM), <http://www.kiro7.com/news/seattle-uber-driver-claims-customer-sexually-assau/40014908>.

82. Charlotte Alter, *UN Women Breaks Off Partnership with Uber*, TIME (Mar. 23, 2015), <http://time.com/3754537/un-women-breaks-off-partnership-with-uber>.

women by 2020, as part of their endeavor to increase economic empowerment for women around the world.”⁸³ The announcement was met with widespread skepticism due to Uber’s history of sexual assault allegations.⁸⁴ Following pressure from trade unions and women’s rights organizations to dismantle the partnership with Uber, Phumzile Mlambo-Ngcuka, UN Under-Secretary-General and Executive Director of UN Women, publicly cancelled the collaboration.⁸⁵

Consequently, companies like Safr and SheRides encourage women that are hesitant to drive for Uber and Lyft to participate in the sharing economy by joining these female-only companies—or what they call, the “sisterhood”⁸⁶—as drivers. They provide incentives, such as heightened security measures to protect drivers’ safety and privacy, along with increased compensation. As Safr articulates: “Women make up less than 25% of drivers in the ridesharing space and make on average 34% less than men.”⁸⁷ Safr drivers can increase their compensation through “driver rewards, incentives, and bonus programs,”⁸⁸ and earn more than they would otherwise through typical compensation schemes. Hence, Safr and SheRides provide women with a wider array of job opportunities and afford them the possibility of increasing their economic status, in addition to heightened security and peace of mind.

III. FEMALE-TAXIS’ EMPLOYMENT PRACTICES ARE LEGAL

Despite the added benefits that female-only taxi services offer, critics contend that these ride-sharing services are illegal because their gender-specific hiring policies are prohibited by Title VII.⁸⁹ But as set forth below, Safr’s and SheRides’ employment practices are legal because gender is a bona fide occupational qualification (“BFOQ”) for employment.⁹⁰ Gender is integral to their businesses, customers’ safety would be implicated by hiring drivers of the opposite sex, and

83. *Id.*

84. Jessica M. Goldstein, *U.N. Women’s Partnership with Uber Dead Before It Even Began*, THINKPROGRESS (Mar. 23, 2015, 2:37 PM), <https://thinkprogress.org/u-n-womens-partnership-with-uber-dead-before-it-even-began-75ec64493602#.xzyray6rg>.

85. Alter, *supra* note 82.

86. SAFR, *supra* note 22 (“Join the sisterhood . . .”).

87. *Id.*

88. See *Why Drive for Safr?*, SAFR, <https://www.gosafr.com/customer/web/driver> (last visited Jan. 17, 2018).

89. See Nicole Weber, *No Boys Allowed: Is an All-Female Ride-Sharing Service Illegal?*, VAULT (Sept. 10, 2014), <http://www.vault.com/blog/vaults-law-blog-legal-careers-and-industry-news/no-boys-allowed-is-an-all-female-ride-sharing-service-illegal>.

90. See 42 U.S.C. § 2000e-2(e) (2012).

customers' privacy would be violated by the presence of a male driver.⁹¹ Failure to address these concerns will result in failure of the businesses; therefore, female-taxis should be successful in defending their same-sex hiring policies.

A. Ride-Sharing Services Fall Within the BFOQ Exception to Title VII

Title VII provides the relevant statutory grounds for analyzing whether companies like Safr and SheRides' gender-specific employment practices constitute unlawful discrimination.⁹² Title VII is a federal law that was enacted to "improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place,"⁹³ and is enforced by the U.S. Equal Employment Opportunity Commission (EEOC).⁹⁴ It prohibits discrimination on the basis of "race, color, religion, sex or national origin"⁹⁵ by covered employers.⁹⁶

91. See SAFR, *supra* note 22.

92. See 29 C.F.R. § 1608.1(b) (2014).

93. Title 29, section 1.608.1(b) of the Code of Federal Regulations states that "Congress enacted title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place. These conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many areas of life. The Legislative Histories of Title VII, the Equal Pay Act, and the Equal Employment Opportunity Act of 1972 contain extensive analyses of the higher unemployment rate, the lesser occupational status, and the consequent lower income levels of minorities and women."

94. 42 U.S.C. § 2000e-4 (2012); *Title VII of the Civil Rights of 1964*, EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/statutes/titlevii.cfm> (last visited Jan. 17, 2018).

95. 42 U.S.C. § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .").

96. Title VII applies to and covers an employer "who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b). Note that there is ongoing debate concerning whether Title VII even applies to ride-sharing companies. See Benjamin Sachs, *Uber: A Platform for Discrimination?*, ONLABOR (Oct. 22, 2015), <https://onlabor.org/uber-a-platform-for-discrimination/>. Uber and Lyft contend that they are not employers, but "technological platform[s] connecting drivers and passengers." *Id.* They consider their workers to be independent contractors rather than employees, which would put ride-sharing services outside of the purview of Title VII. *Id.* This categorization is highly contested and "is being fought out in courts and administrative agencies across the country . . ." *Id.*; see also *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1069 (N.D. Cal. 2015); *Zenelaj v. Handybook, Inc.*, 82 F. Supp. 3d 968, 970 (N.D. Cal. 2015). This categorical question, however, is its own area of extensive scholarship; therefore, this Note will assume that ride-sharing companies are employers for the purpose of Title VII analysis.

therefore, employment decisions premised on gender constitute a prima facie case of discrimination. Nonetheless, employers may rebut the charge by raising the affirmative defense of the BFOQ.⁹⁷

The BFOQ exception to Title VII provides that an employer may lawfully hire employees based on sex when sex is a BFOQ “reasonably necessary to the normal operation of that particular business or enterprise.”⁹⁸ The BFOQ has been interpreted narrowly;⁹⁹ however, employers are expressly permitted by the EEOC to practice sex-based hiring when it is necessary for the purpose of authenticity or genuineness—such as with actors or actresses.¹⁰⁰ Aside from actors and actresses, employers have been successful in establishing gender-BFOQs for Playboy Bunnies,¹⁰¹ female-only gyms,¹⁰² prison guards at correctional facilities,¹⁰³ psychiatric health care specialists,¹⁰⁴ locker room attendants,¹⁰⁵ and custodians for single-sex facilities.¹⁰⁶

97. 42 U.S.C. § 2000e-2(e).

98. *Id.* (“[I]t shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .”).

99. The EEOC issued guidelines in 1965 reflecting its position that the BFOQ based on gender should be construed narrowly, which has remained virtually unchanged since then. 29 C.F.R. § 1604.2(a). The EEOC has also advised that employers cannot justify a BFOQ defense due to a customer or client preference for a specific gender. 29 C.F.R. § 1604.2(a)(1)(iii). Courts have adopted the EEOC’s interpretation. *See Int’l Union v. Johnson Controls*, 499 U.S. 187, 206 n.4 (1991); *Dothard v. Rawlinson*, 433 U.S. 321, 332–37 (1977).

100. 29 C.F.R. § 1604.2(a)(2) (“Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.”).

101. *See Rachel L. Cantor, Consumer Preferences for Sex and Title VII: Employing Market Definition Analysis for Evaluating BFOQ Defenses*, 1999 U. CHI. LEGAL F. 493, 506 n.88 (“[B]eing female is a BFOQ for the position of Playboy Bunny . . .”); *Kimberly A. Yuracko, Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147, 158 n. 28 (2004) (referring to *St. Cross v. Playboy Club*, Case No. CFS 22618-70, Appeal No. 773 (N.Y. State Div. of Human Rights Dec. 17, 1971), and *Weber v. Playboy Club*, Case No. CFS 22619-70, Appeal No. 774 (N.Y. State Div. of Human Rights Dec. 17, 1971)).

102. *See LivingWell, Inc. v. Pa. Human Relations Comm’n*, 606 A.2d 1287, 1294 (Pa. Commw. Ct. 1992).

103. *See Dothard*, 433 U.S. at 336–37.

104. *See Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 134 (3d Cir. 1996).

105. *See Brooks v. ACF Indus.*, 537 F. Supp. 1122, 1134 (S.D. W. Va. 1982).

To prove the existence of a gender-BFOQ, employers must satisfy the court's test for analyzing BFOQ claims. Courts have utilized a number of tests,¹⁰⁷ but the one most widely used is the "essence of the business" test.¹⁰⁸ The "essence of the business" test states that "discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively."¹⁰⁹ Case law illustrates that when an employer's hiring practice is based on a consumer preference for same-sex employees, the employer must also provide one or more non-gender justifications to satisfy the "essence of the business" test.¹¹⁰ The supporting justification(s) must be strong enough that hiring employees of the opposite sex would result in a failure of that business or enterprise.¹¹¹ For example, the BFOQ defense would work in situations where specific-sex employees are necessary for the business to perform its primary function or service,¹¹² the safety of third parties is threatened by hiring employees of the opposite sex,¹¹³ or customer privacy is violated by the presence of an employee of the opposite gender.¹¹⁴

Under this framework, female-only ride-hailing services, Safr and SheRides, fall within the BFOQ exception because they satisfy the "essence of the business test." Their gender-specific hiring practices are based on the consumer preference for female drivers; however, this

106. See *Norwood v. Dale Maintenance Sys., Inc.*, 590 F. Supp. 1410, 1423 (N.D. Ill. 1984).

107. Other tests include the "all or substantially all" test, which states that in order to establish a gender-BFOQ, an employer has the burden of proving that the employer "had reasonable cause to believe . . . that all or substantially all [members of that gender] would be unable to perform safely and efficiently the duties of the job involved." *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969). Some courts also require that the defendant prove no reasonable alternatives exist to its gender-based hiring policy. See *Forts v. Ward*, 621 F.2d 1210, 1212 (2d Cir. 1980) ("Resolution of such cases requires a careful inquiry as to whether the competing interests can be satisfactorily accommodated before deciding whether one interest must be vindicated to the detriment of the other."); *Norwood*, 590 F. Supp. at 1415-16.

108. See *Dothard v. Rawlinson*, 433 U.S. 321, 333-34 (1997); *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 187-88 (1991); *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 418 (1985); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971).

109. *Diaz*, 442 F.2d at 388.

110. See *id.* at 388-89.

111. *Id.*

112. See *Yuracko*, *supra* note 101.

113. See *Dothard*, 433 U.S. at 333-35.

114. See *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 133-35 (3d Cir. 1996); *Torres v. Wis. Dep't of Health & Soc. Services*, 859 F.2d 1523, 1526-57 (7th Cir. 1988); *Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410, 1416 (N.D. Ill. 1984); *Brooks v. ACF Indus.*, 537 F. Supp. 1122, 1130-33 (S.D. W. Va. 1982); *LivingWell, Inc. v. Pa. Human Relations Comm'n.*, 606 A.2d 1287, 1294 (Pa. Commw. Ct. 1992).

consumer preference is supported by three non-gender justifications which provide strong bases—individually and more so combined—for finding that sex is a BFOQ for employment. Particularly, (i) gender is integral to the businesses; (ii) female passenger safety is jeopardized by men; and (iii) riders' privacy interests are implicated by the presence of male drivers. These factors provide support for finding that female-taxi services' hiring practices satisfy the central test for analyzing BFOQ claims, since a contrary holding would result in failure of these businesses.

1. Sex¹¹⁵ as the Essence of the Business

With respect to the first justification, Safr's and SheRides's employment practices are warranted because the gender of their employees is inseparable from the essence of the business, which is to provide safe, female-only transportation.¹¹⁶

This business justification stems from the EEOC's guidance expressly permitting the BFOQ defense when gender-based hiring is implemented for the purpose of authenticity or genuineness,¹¹⁷ which was adopted by the Supreme Court in *Phillips v. Martin Marietta Corporation*.¹¹⁸ Lower courts have interpreted this to mean that employers may raise the BFOQ defense when the position requires a specific sex.¹¹⁹ The clearest cases where this reasoning prevails involve the hiring of employees in the sex appeal and commercial sex industries. However, it is also available when the positions are for companies that are explicitly modeled as single-sex companies.

115. "Sex" and "gender" are used interchangeably throughout this Note.

116. SAFR, *supra* note 22 ("Built [and powered by women], Safr's goal is to provide safe transportation and job opportunities for women everywhere."); SHERIDES, *supra* note 21 ("SheRides: Women For Women").

117. See 29 C.F.R. § 1604.2(a)(1)(ii) ("Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.")

118. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545-46 (1971) ("That exception has been construed by the Equal Employment Opportunity Commission, whose regulations are entitled to great deference, to be applicable only to job situations that require specific physical characteristics necessarily possessed by only one sex.") (citations omitted) (internal quotation marks omitted).

119. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971); *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 297, 301 (N.D. Tex. 1981) (citing *St. Cross v. Playboy Club*, Case No. CFS 22618-70, Appeal No. 773 (N.Y. State Div. of Human Rights Dec. 17, 1971), and *Weber v. Playboy Club*, Case No. CFS 22619-70, Appeal No. 774 (N.Y. State Div. of Human Rights Dec. 17, 1971)); *LivingWell*, 606 A.2d at 1287.

Regarding the former,¹²⁰ the germinal case involves the Playboy Club's hiring of Playboy Bunnies.¹²¹ The court found that the hiring of female-only employees was deemed a BFOQ for the position of a Playboy Bunny since the essence of sex-centered businesses was "forthrightly to titillate and entice male customers,"¹²² "which is triggered by the sex appeal of women."¹²³

In dicta, the court paralleled this reasoning with the EEOC's guideline adopted in *Phillips*.¹²⁴ The court stated that "[a]lthough the issue is not stressed, it is to be noted in passing that the restriction to females only of the eligibility for employment as a [Playboy] Bunny constitutes a [BFOQ] and . . . is somewhat similar to a juvenile part in a theatrical production."¹²⁵ Accordingly, the court reasoned that, as with actors and actresses, the primary function of a Playboy Bunny was to "fulfill the audience's expectation and desire for a particular role, characterized by particular physical or emotional traits."¹²⁶ This required that the employee titillate the customer through the use of her sex appeal, and since this could only be accomplished by her womanhood, the court found that gender was a BFOQ for employment.¹²⁷ To require that the Playboy Club hire male Playboy bunnies would undermine the enterprise due to the inextricably linked nature of the employee's sex and the primary function of the position, as well as the customer's expectation that he would be titillated by a female employee.¹²⁸

This reasoning pertains to female-only businesses as well. In *LivingWell v. Philadelphia Human Relations Commission*, the court

120. Note that there has not been case law regarding the hiring of strip club workers.

121. *Wilson*, 517 F. Supp. at 301 (citing *St. Cross*, Case No. CFS 22618-70; *Weber*, Case No. CFS 22619-70).

122. *Id.*

123. Katie Manley, *The BFOQ Defense: Title VII's Concession to Gender Discrimination*, 16 DUKE J. GENDER L. & POL'Y 169, 204 (2009).

124. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 & n.2 (1971).

125. *Guardian Capital Corp. v. N.Y. State Div. of Human Rights*, 46 A.D.2d 832, 833 (N.Y. App. Div. 1974) (Reynolds, J., concurring) (quoting *St. Cross*, Case No. CFS 22618-70; *Weber*, Case No. CFS 22619-70).

126. *Wilson*, 517 F. Supp. at 301.

127. *Id.* (citing *St. Cross*, Case No. CFS 22618-70).

128. Compare Southwest's female-only flight attendant policy, which was ultimately found to be a violation of Title VII. *Wilson*, 517 F. Supp. at 292, 304. Southwest argued that sex defined its business because "unabashed allusions to love and sex pervade[d] all aspects of Southwest's public image." *Id.* at 294 n.4. However, the court found that this was insufficient to amount to a determination that sex was Southwest's primary service provided. *Id.* at 302. It held that while "sex is merely useful for attracting customers . . . hiring both sexes will not alter or undermine the essential function of the employer's business," which was transporting customers safely. *Id.* at 304.

concluded that the female-only gym's single-sex hiring policy fell within the BFOQ exception because gender was integral to the essence of its business.¹²⁹ To arrive at its conclusion, the court implicitly determined that the essence of LivingWell's business was to provide "all-female [gym] facilities," since it defined and marketed itself as a gym that was "only open to women."¹³⁰ In turn, the primary function of its employees was to provide gym services with the condition that the individual be female; therefore, gender and the position were inseparable.

The court found that evidence of customers' expectations substantiated this categorization.¹³¹ For instance, LivingWell's customers testified that "the primary reason they chose LivingWell was that its facilities were for women only, and that they would cease coming to the particular facility if the club became co-ed."¹³² Moreover, LivingWell employees "testified that many women, upon joining the club, informed them that their primary reason for exercising at LivingWell, rather than other facilities, was because it was only open to women."¹³³ The court also considered evidence "that there would be a substantial loss of membership if LivingWell was required to accept men."¹³⁴ Ultimately, the court concluded that maintaining all-female facilities was fundamental to LivingWell's business.¹³⁵

a. Gender Is Integral to Female-Taxi Services

The case law thereby illustrates that when sex is integral to the business, it constitutes a basis for determining that gender is a BFOQ for employment—a justification which is applicable to female-only taxis.

Similar to *LivingWell*, the essence of female-taxi services is gender. *SheRides* and *Safr* drivers' primary function is to offer safe, *female-only* transportation, as evidenced through their company names and the

129. *LivingWell, Inc. v. Pa. Human Relations Comm'n*, 606 A.2d 1287, 1294 (Pa. Commw. Ct. 1992). *LivingWell* is the only reported case of all-female membership policies finding judicial justification. See generally Michael R. Evans, *The Case for All-Female Health Clubs: Creating a Compensatory Purpose Exception to State Public Accommodation Laws*, 11 YALE J.L. & FEM. 307, 315 (1999) (discussing the legality of female-only gyms). Although *LivingWell* was decided by Pennsylvania's high court and was brought under the Pennsylvania Human Relations Act ("PHRA"), the court determined that the test for whether a defense existed should be borrowed from the employment context of Title VII. 606 A.2d at 1290–91. This case is therefore relevant to the analysis of whether female-only taxis' employment practices are legal.

130. *LivingWell*, 606 A.2d at 1291.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 1291–92.

substance of their websites and marketing campaigns. Safr's homepage states that it is "[b]uilt with the needs of women in mind," [and its] goal is to provide safe transportation and job opportunities for women everywhere."¹³⁶ Similarly, SheRides' tagline is "SheRides: Women For Women."¹³⁷

Moreover, the aesthetics of the ridesharing-services' marketing materials are clearly intended to evoke a "women-only" feel. SheRides' website is accented in pink,¹³⁸ a traditionally feminine color,¹³⁹ which matches its "affiliated fleet" of sedans that are also painted the same distinctive shade of pink.¹⁴⁰ Its homepage features a background picture of a large group of only women wearing pink scarves and holding large, pink posters.¹⁴¹ Similarly, Safr's website features images of a number of faces, all of which belong to women.¹⁴² Accordingly, these factors support the justification that the essence of Safr and SheRides' businesses is gender, consequently creating a reasonable expectation for their customers that they will be served by female-only drivers.

This expectation is further corroborated by way of the origin of female taxis. Safr and SheRides were purposefully created as an alternative for women who did not feel comfortable riding in the presence of male drivers. For instance, Safr was launched "in response to instances of drivers for ride-hailing services charged with assaulting female passengers,"¹⁴³ while SheRides was formed as a space for women to be "free from harassment, leering, or inappropriate remarks or behavior" from men.¹⁴⁴ Accordingly, customers that choose Safr and SheRides for transportation specifically choose them so that they will be driven by female drivers—otherwise, they would have remained with Uber and Lyft.¹⁴⁵ As the *Playboy Bunnies* court reasoned, this desire, on account of the integral nature of gender and the service provided, must be satisfied by employing female-only drivers, or the essence of the

136. SAFR, *supra* note 22 (emphasis omitted).

137. *About Us*, SHERIDES, <http://sheridesnyc.com/aboutus.html> (last visited Jan. 17, 2018) [hereinafter *About Us*, SHERIDES].

138. SHERIDES, *supra* note 21.

139. For a discussion on gender-color symbolism, see Natalie Wolchover, *Why Is Pink for Girls and Blue for Boys?*, LIVESCIENCE (Aug. 1, 2012, 2:06 PM), <http://www.livescience.com/22037-pink-girls-blue-boys.html>.

140. *Our Affiliated Fleet*, *supra* note 72.

141. SHERIDES, *supra* note 21.

142. SAFR, *supra* note 22.

143. Marcelo, *supra* note 6.

144. Yuliya Geikhman, *SheTaxi—SheRides: Woman-Only Taxis Coming to NYC*, ALL MEDIA NY (Sept. 12, 2015, 3:29 PM), <http://www.allmediany.com/articles/16161-shetaxi-sherides-woman-only-taxis-coming-to-nyc>.

145. See Geikhman, *supra* note 144; Yuracko, *supra* note 101, at 157.

business will be undermined. This justification, therefore, provides a sound basis for female-taxi services to establish a BFOQ defense to its same-sex hiring policies.¹⁴⁶

1. Safety Is a Valid Basis for Establishing a Gender-BFOQ

Next, SheRides and Safr's employment practices are also supported by safety justifications. The Supreme Court has outlined the relatively rare situations in which an employer can connect business safety to gender, which undoubtedly accounts for the paucity of case law regarding this interest; nevertheless, the case law that does exist demonstrates the courts' willingness to consider the idea one with merit.

The Supreme Court cases illustrate that safety may be a basis for establishing a gender-BFOQ when the employer can show that (i) the safety interests are based on those of third-parties;¹⁴⁷ (ii) providing safety is a primary function of the employee's position;¹⁴⁸ and (iii) the employee's gender interferes with the employee's ability to perform that function.¹⁴⁹

In *Dothard v. Rawlinson*, the Supreme Court found that these elements were satisfied.¹⁵⁰ The case involved the hiring of male-only guards in contact areas of maximum-security male penitentiaries.¹⁵¹ Specifically, the Court found that there was a need to protect the safety of inmates due to the "jungle atmosphere" and "rampant violence" that

146. As Rachel L. Cantor discusses in her article, *Consumer Preferences for Sex and Title VII: Employing Market Definition Analysis for Evaluating BFOQ Defenses*, this analysis may "undoubtedly disturb many Title VII supporters [because] [i]t appears to allow employers to make an end run around Title VII" since female-only businesses would always satisfy this analysis. Cantor, *supra* note 101, at 494 n.14. However, as she describes, "the purpose of Title VII is not to eliminate [sex-based companies], but to eliminate discrimination in employment. Title VII does not control what employers sell; rather, it controls what factors employers use to make employment decisions." *Id.* Also, this business justification is only one justification that supports female-taxis' gender-BFOQ. Safety and privacy interests are also strong bases that support Safr and SheRides' hiring practices. *Id.* at 504.

147. An employer's need to protect its own employee is insufficient to amount to a cognizable safety interest. See *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 206–07 (1991) (holding that employers could not restrict women from working in potentially hazardous positions if they so choose just because the job may be dangerous to women).

148. The Supreme Court in *International Union v. Johnson Controls* found that the safety interests of a pregnant employee's unborn baby was not enough to justify a safety-based BFOQ because the safety of the unborn child was not essential to the business which was making batteries. *Id.* at 203.

149. See *Dothard v. Rawlinson*, 433 U.S. 321, 336 (1977).

150. See *id.* at 334–37.

151. *Id.* at 325–26.

permeated throughout the prisons.¹⁵² It also determined that maintaining prison security was the essence of a correctional officer's job, which could be undermined if the guard was female.¹⁵³ The Court reasoned that "[a] woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary . . . could be directly reduced by her womanhood."¹⁵⁴ The Court noted that the nexus between being a woman and the inability to maintain prison safety was in part because female guards were more likely to be sexually assaulted by prisoners:

There is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison. There would also be a real risk that other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women . . . [and] there are few visible deterrents to inmate assaults on women custodians.¹⁵⁵

Then, in a separate case involving a BFOQ claim involving age, rather than gender, the United States Court of Appeals for the Fifth Circuit found that the employer bus company had also shown a valid safety justification to warrant its discriminatory employment policy.¹⁵⁶ In *Usery v. Tamiami Trail Tours, Inc.*, the United States Department of Labor brought an action against the common carrier pursuant to the Age Discrimination in Employment Act of 1967 (ADEA)¹⁵⁷ for requiring bus drivers to be younger than forty years old.¹⁵⁸ The court focused on the safety interests of the bus passengers and established that the central mission of the employer's business was to provide safe transportation.¹⁵⁹ The court then considered the "demanding and physically exhausting"¹⁶⁰ jobs of intercity bus drivers, the "physiological and psychological changes"¹⁶¹ of persons over age forty, and their ability to "safely perform the duties of a bus driver."¹⁶² It ultimately determined that the common carrier had established a factual basis to

152. *Id.* at 333–35.

153. *Id.* at 335.

154. *Id.*

155. *Id.* at 335–36.

156. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 238 (5th Cir. 1976).

157. *Id.* at 226–27; *see also* 29 U.S.C. §§ 621–634 (2012).

158. *Usery*, 531 F.2d at 226.

159. *Id.* at 236.

160. *Id.* at 231.

161. *Id.* at 238.

162. *Id.* at 228.

believe that age lessened a person's ability to safely drive a bus.¹⁶³ Therefore, the common carrier was able to justify the age-BFOQ for its bus drivers based on this safety interest.¹⁶⁴

a. Male Drivers Implicate Passengers' Safety

Similarly, female-taxis employment practices are supported by valid safety interests.¹⁶⁵ Safr and SheRides' safety justifications stem from the need to protect the safety of their passengers.¹⁶⁶ Similar to *Usery*, the primary function of their drivers is to provide riders with safe transportation;¹⁶⁷ however, the ability to provide safe transportation is jeopardized when the driver is a male.¹⁶⁸ This inverse relationship is substantiated by Uber and Lyft's extensive history of sexual violence allegations, as well as general rape and sexual assault statistics.¹⁶⁹

Looking to female-taxis' counterparts, men constitute the overwhelming majority of Uber and Lyft drivers—at 86% and 70%, respectively—and the staggering data demonstrates that these drivers have been the primary perpetrators of sexual violence.¹⁷⁰ Between December 2012 and August 2015, the number of Uber rides that led to sexual assault may have been between 170 and 6,160,¹⁷¹ and its internal database showed that a search for the words “sexual assault” pulled up 6,160 tickets, while a search for the word “rape” returned 5,827 tickets.¹⁷² The organization Who's Driving You's database lists more than one hundred documented instances of these allegations, which show that the sexual violence allegations have predominantly

163. *Id.* at 238.

164. *Id.*

165. *See* *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977).

166. SAFR, *supra* note 22 (“Safr is redefining ridesharing for women. Built with the needs of women in mind, Safr’s goal is to provide safe transportation and job opportunities for women everywhere.”); *About Us*, SHERIDES, *supra* note 137 (“SheRides priority is to offer safe, reliable, and trustworthy drivers . . .”).

167. *Usery*, 531 F.2d at 236; SAFR, *supra* note 22; *About Us*, SHERIDES, *supra* note 137.

168. *See* Charlie Warzel & Johana Bhuiyan, *Internal Data Offers Glimpse at Uber Sex Assault Complaints*, BUZZFEED NEWS (Mar. 6, 2016, 1:34 PM), https://www.buzzfeed.com/charliwarzel/internal-data-offers-glimpse-at-uber-sex-assault-complaints?utm_term=.ojoybvwynd8&utm_term=.xvjkDDXWQ#.kqLW5543k.

169. *Id.*

170. BENENSON STRATEGY GROUP, *THE DRIVER ROADMAP: WHERE UBER DRIVER-PARTNERS HAVE BEEN, AND WHERE THEY'RE GOING* (2015), https://newsroom.uber.com/wp-content/uploads/2015/01/BSG_Uber_Report.pdf; Huet, *supra* note 74.

171. *See* Caplan-Bricker, *supra* note 40. The exact number is unavailable because “most major urban police departments don’t track where sexual crimes occur” and Uber and Lyft have been secretive with their statistics. *Id.*

172. *See* Warzel, *supra* note 41.

been the result of actions by male drivers.¹⁷³ General sexual violence statistics mirror this finding. National data provides that the overwhelming number of sexual offense perpetrators are male,¹⁷⁴ while “91% of the victims of rape and sexual assault are female.”¹⁷⁵

Critics argue that excluding men from positions because they are men and more prone to commit sexual violence “presumes heterosexuality, male aggression, and female vulnerability”;¹⁷⁶ however, the figures corroborate the reality that rape, sexual assault, and harassment against women are more than stereotypical myths.¹⁷⁷ The clear prevalence of sexual violence, both in ride-sharing vehicles and in general, warrants finding that this safety interest is legitimate, and that hiring male drivers implicates passenger safety by increasing the risk of that violence occurring.¹⁷⁸ Undoubtedly, these realities are what drive courts, like the Supreme Court in *Dothard* and *Usery*, to find that safety should be a valid basis for establishing a gender-BFOQ.¹⁷⁹

b. Women-Only Transportation Is Flourishing Globally

Meanwhile, in the global arena, safety is a widely accepted justification for same-sex transportation.¹⁸⁰ While the desire to provide these safe-spaces is innovative in the U.S., since 1990, the use of women-only transportation has been recognized and praised in at least seventeen other countries, with safety and security as the primary reason for their existence.¹⁸¹

In 1990, Egypt designated sections of its subway cars in Cairo for women only to prevent sexual harassment by men on overcrowded public transportation.¹⁸² Even then, there was debate concerning

173. *Reported List of Incidents*, *supra* note 44.

174. *Myths and Facts About Sex Offenders*, CTR. FOR SEX OFFENDER MGMT. (Aug. 2000), <http://www.csom.org/pubs/mythsfacts.pdf>.

175. *See Statistics About Sexual Violence*, NAT'L SEXUAL VIOLENCE RESOURCE CTR. (2015), http://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media_packet_statistics-about-sexual-violence_0.pdf.

176. Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187, 1233 (2016).

177. *See supra* notes 174–75.

178. *See supra* notes 174–75.

179. *See, e.g.*, *Dothard v. Rawlinson*, 433 U.S. 321, 334–35 (1977) (finding “a basis in fact” that gender restrictions in prison guard employment fall inside the narrow BFOQ exception); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 238 (5th Cir. 1976).

180. *See infra* notes 182, 185–201 and accompanying text.

181. *See infra* notes 182, 185–201 and accompanying text.

182. Alan Cowell, *Cairo Journal; For Women Only: A Train Car Safe from Men*, N.Y. TIMES (Jan. 15, 1990), <http://www.nytimes.com/1990/01/15/world/cairo-journal-for-women-only-a-train-car-safe-from-men.html>.

whether this constituted discrimination, and “to what extent . . . women [should] be given greater rights than men to protect them[selves] from male misbehavior.”¹⁸³ More than two decades later, however, Egypt’s women-only cars still exist.¹⁸⁴ In 2005, Japan offered female-only carriages in major cities like Tokyo and Osaka in an effort to limit groping, which nearly sixty-four percent of Japanese women claimed to have experienced.¹⁸⁵ In 2009, Mexico launched a fleet of pink taxi cabs in the city of Puebla to curb sexual harassment.¹⁸⁶ In 2014, Thailand announced the introduction of female-only sleeper cars on overnight trains in four cities, after a thirteen-year-old girl was raped and murdered on an overnight train the previous year.¹⁸⁷ In 2016, Germany launched female-only train cars in response to mass reports of sexual assaults against women in Cologne.¹⁸⁸ Then notably, in 2017, India offered female-only spaces on its national carrier airplanes, due to a series of midflight sexual assault allegations.¹⁸⁹

Other countries that have also adopted women-only transportation include Russia (2007),¹⁹⁰ Bangladesh (2008),¹⁹¹ Indonesia (2010),¹⁹² Guatemala (2011),¹⁹³ the United Arab Emirates (2013),¹⁹⁴ Nepal

183. *Id.*

184. *Id.*

185. *Japan Tries Women-Only Train Cars to Stop Groping*, ABC NEWS (June 10, 2005), <http://abcnews.go.com/GMA/International/story?id=803965>.

186. Brian Kates, *Mexico Launches Fleet of Pink Cabs—Driven by Women, for Women Riders—to Curb Sexual Harassment*, DAILY NEWS (Oct. 20, 2009, 11:53 AM), <http://www.nydailynews.com/news/world/mexico-launches-fleet-pink-cabs-driven-women-women-riders-curb-sexual-harassment-article-1.385392>.

187. Alisa Tang, *Thailand Launches Women-Only Train Cars After Girl, 13, Raped and Murdered*, THOMSON REUTERS FOUND. NEWS (Aug. 1, 2014), <http://news.trust.org/item/20140801160819-50s83/?source=search>.

188. See Emma Anderson, *Is Germany Segregating Women on Trains? Not Quite*, LOCAL (Mar. 29, 2016, 12:41 PM), <https://www.thelocal.de/20160329/is-germany-introducing-sex-segregated-trains-not-quite>.

189. *Amid Reports of Passenger Groping, Air India Introduces Rows Just for Women*, FOX NEWS TRAVEL (Jan. 16, 2017), <http://www.foxnews.com/travel/2017/01/16/amid-reports-passenger-groping-air-india-introduces-women-only-rows.html>.

190. *Russia to Introduce Women-Only Train Compartments*, RADIO FREE EUROPE RADIO LIBERTY (Nov. 15, 2006, 10:42 GMT), <http://www.rferl.org/a/1072739.html>.

191. M. Shafiq-Ur Rahman, *Bus Service for ‘Women Only’ in Dhaka City: An Investigation*, 3 J. BANGLADESH INS. PLANNERS (Dec. 2010), http://www.bip.org.bd/SharingFiles/journal_book/20130722133425.pdf.

192. *Indonesia Introduces Women-Only Train Carriages*, NATIONAL (Aug. 20, 2010), <http://www.thenational.ae/news/world/asia-pacific/indonesia-introduces-women-only-train-carriages>.

193. Anastasia Moloney, *Guatemala’s Women-Only Buses a Hit*, THOMSON REUTERS FOUND. NEWS (Oct. 26, 2011, 11:41 AM), <http://news.trust.org/item/20111026114100-0jq3>.

(2015),¹⁹⁵ Pakistan (2015),¹⁹⁶ Brazil (2016),¹⁹⁷ Iran (2016),¹⁹⁸ and Malaysia (2016).¹⁹⁹ Meanwhile, Australia is considering the implementation of “safe carriages” complete with distress buttons,²⁰⁰ while lawmakers in the United Kingdom and China are planning to offer female-only sections on public transportation.²⁰¹

In addition to these individual countries, the World Bank, an international financial institution that provides loans to developing countries for capital programs,²⁰² has also taken notice of the need to protect women’s safety.²⁰³ Historically, its development of transport infrastructure and services has been gender-blind; however, the Bank has vowed to be “[g]ender-blind no more.”²⁰⁴ According to Pierre Guislain, Senior Director of World Bank Transport:

194. Mohammed N. Al Khan, *Dubai Metro Reserves More Women-Only Seats*, NATIONAL (Aug. 27, 2013, 4:00 AM), <http://www.thenational.ae/news/uae-news/transport/dubai-metro-reserves-more-women-only-seats>.

195. Claire Cohen, *Women-Only Bus Service Launched to Combat Sexual Assaults in Nepal*, TELEGRAPH (Jan. 6, 2015, 11:04 AM), <http://www.telegraph.co.uk/women/womens-life/11327271/Nepal-Women-only-bus-service-launched-to-combat-sexual-assaults.html>.

196. *Women-Only ‘Pink Rickshaw’ Hits the Road in Lahore*, GUARDIAN (Apr. 10, 2015, 4:19 PM), <https://www.theguardian.com/world/2015/apr/10/women-only-rickshaw-hits-the-road-in-lahore>.

197. *Women-Only Train Cars in Brazil*, FEMINISTING (Apr. 27, 2006), http://feministing.com/2006/04/27/womenonly_train_cars_in_brazil.

198. *Iran is Launching ‘Women-Only’ Train Cars on Tehran-Mashhad Route*, REAL IRAN (Apr. 3, 2016, 11:46 PM), <http://realiran.org/iran-is-launching-women-only-train-cars-on-tehran-mashhad-route>.

199. Iylia Aziz, *We’re Seeing Pink with Malaysia’s First Women-Only Ride-Sharing Service*, VULCAN POST (Oct. 27, 2016, 12:03 AM), <https://vulcanpost.com/591730/riding-pink-ride-sharing-malaysia-women>.

200. Emma Reynolds, *Women-Only ‘Pink Carriages’ Idea for Aussie Trains Causes Controversy*, NEWS (Apr. 6, 2016, 12:56 PM), <http://www.news.com.au/travel/travel-updates/womenonly-pink-carriages-idea-for-aussie-trains-causes-controversy/news-story/8377482b8b705dd2854a51d0eb0b7847>.

201. Alyssa Abkowitz, *Beijing Considering Women-Only Subway Cars*, WALL ST. J. CHINA REAL TIME REPORT, (Jan. 28, 2015, 12:35 PM), <http://blogs.wsj.com/chinarealtime/2015/01/28/beijing-considering-women-only-subway-cars>; Oliver Wright, *‘Women Only’ Train Carriages: Jeremy Corbyn Unveils Radical Move to Tackle Public Harassment*, INDEPENDENT (Aug. 25, 2015, 11:00 PM), <http://www.independent.co.uk/news/uk/politics/jeremy-corbyn-labour-leadership-women-only-carriages-sexist-harassment-10471716.html>.

202. *What We Do*, THE WORLD BANK GROUP, <http://www.worldbank.org/en/about/what-we-do> (last visited Jan. 17, 2018).

203. *Preventing Violence Against Women in Transport Systems*, THE WORLD BANK GROUP (Mar. 8, 2016), <http://www.worldbank.org/en/news/feature/2016/03/08/preventing-violence-against-women-in-transport-systems>.

204. *Id.*

When you look at who takes public transport, women depend much more on public transport than men, relatively speaking[,] so ensuring their safety and security, their ability to get to their jobs, and to get their kids to school in a safe manner, is absolutely essential and [the World Bank] need[s] to focus on that.²⁰⁵

Women's safety has consequently become a priority for the World Bank, and the financial institution has designated resources in its transport portfolio, which constitutes nearly one-fifth of the Bank's total lending, to "collaborating across sectors to identify innovative, practical, and proven solutions that will enable women and girls to safely access services, markets and jobs."²⁰⁶ The Bank has explicitly supported women-only car initiatives in Mexico City²⁰⁷—which have been successful in decreasing instances of sexual assaults.²⁰⁸

Hence, the overwhelming acceptance of female-only transportation globally based on the safety interests of women suggests that U.S. companies like SheRides and Safr should also find acceptance. Unquestionably, there exists a social value of affording women greater protection from rape, sexual assault, and harassment, which merits judicial recognition of safety as a basis for Safr and SheRides to establish a successful BFOQ defense.

2. Passengers' Privacy Interests Justify Women-Only Drivers

The third justification that supports female-only taxis' hiring practices is passenger privacy interests, because the privacy of its passengers would be implicated if those passengers were driven by men. The law here, however, is distinguishable from the law regarding the previous two justifications, because the Supreme Court has explicitly left open the question of whether sex constitutes a BFOQ when privacy interests are implicated.²⁰⁹ Still, lower courts have held that it may.²¹⁰

205. *Id.*

206. *Id.*

207. *Id.*

208. Amy Dunckel-Graglia, *Women-Only Transportation: How "Pink" Public Transportation Changes Public Perception of Women's Mobility*, 16 J. OF PUB. TRANSP. 85, 92 (2013).

209. *See Int'l Union v. Johnson Controls*, 499 U.S. 187, 206 n.4 (1991).

210. *See Jordan v. Gardner*, 986 F.2d 1521, 1524 (9th Cir. 1993); *Rider v. Pennsylvania*, 850 F.2d 982, 988 (3d Cir. 1988); *Kent v. Johnson*, 821 F.2d 1220, 1226–27 (6th Cir. 1987); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1086 (8th Cir. 1980); *Local 567 Am. Fed. State, Cty., and Mun. Emps. v. Michigan Council 25*, 635 F.

For Safr and SheRides to establish a privacy-BFOQ for their gender-specific hiring, female taxis must show that the privacy interest is premised on evidence that female customers experience a psychological harm—such as heightened consciousness of their bodies or feelings of vulnerability—that result from exposure to a male employee.²¹¹ Courts mainly speak of exposure as exposure of intimate areas of the body;²¹² however, exposure has been recognized in situations where the consumer is fully clothed, but still experiences a psychological harm due to the presence of the employee.²¹³ Accordingly, exposure can be thought of as both a form of nudity, and being in the presence of the opposite sex.

With respect to the former, courts often recognize privacy-BFOQs in the medical field, where clients are touched or examined by employees while naked or in various forms of undress. Because of the uneasiness that customers feel when served by an employee of the opposite sex for these purposes, employers are permitted to hire discriminately when the position is for personal caregivers,²¹⁴ nurses' aides,²¹⁵ labor-room nurses,²¹⁶ and other types of hospital staff.²¹⁷ Courts also frequently recognize privacy interests where there is no physical contact, but the presence of an opposite-sex employee evokes analogous emotions due to the risk that the employee may see the customer naked or with her intimate areas exposed, such as in locker rooms or single-sex restrooms.²¹⁸

Where the physical exposure is understood as being "in the presence of the opposite sex," the psychological harm is similar to the previous

Supp. 1010, 1012–14 (E.D. Mich. 1986); *Fesel v. Masonic Home of Del., Inc.*, 447 F. Supp. 1346, 1354 (D. Del. 1978).

211. See Benjamin O. Hoerner, *The Role-Modeling BFOQ: Court Confusion and Educational Promise*, 16 U. PA. J. BUS. L. 1211, 1231 (2014) (discussing the logic in understanding privacy based on psychological harm).

212. See *Doe v. Luzerne Cty.*, 660 F.3d 169, 176–77 (3d Cir. 2011); *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963); *Carcano v. McCrory*, 203 F. Supp. 3d 615, 641 (M.D.N.C. 2016).

213. See Hoerner, *supra* note 211.

214. *Fesel*, 447 F. Supp. at 1353.

215. *Id.*

216. *Backus v. Baptist Medical Center*, 510 F. Supp. 1191, 1193–95 (E.D. Ark. 1981).

217. See *Jennings v. N.Y. State Office of Mental Health*, 786 F. Supp. 376, 387 (S.D.N.Y. 1992); *Brooks v. ACF Industries, Inc.*, 537 F. Supp. 1122, 1132–33 (S.D. W. Va. 1982).

218. See *Norwood v. Dale Maint. Sys. Inc.*, 590 F. Supp. 1410, 1416–17 (N.D. Ill. 1984); *Brooks*, 537 F. Supp. at 1132; *Fesel*, 447 F. Supp. at 1353. See generally Yuracko, *supra* note 101, at 156–58 (discussing that the privacy cases dealing with exposure of intimate areas can be "thought of as falling along a continuum measured by degrees of physical and visual contact").

cases involving nudity, to the extent that the harm is a type of heightened consciousness of one's body.²¹⁹ Consider women-only gyms, which were previously discussed in the context of gender as the essence of the business.²²⁰ In the *LivingWell* decision, the court read the privacy precedents in employment cases broadly—as applying not only to the exposure of intimate body parts, but to all “situations where the customers . . . find it uncomfortable to have the opposite sex present because of the physical condition in which they find themselves.”²²¹ The court considered the nature of the gym and the privacy interests implicated by virtue of the activities female gym members engaged in, as well as testimony that they would experience feelings of modesty, embarrassment, and “a painful level of self-awareness . . . in the sense that one is exposed and vulnerable,” if forced to work out with male employees nearby.²²² Based on these factors, the court concluded that a valid privacy interest existed to justify *LivingWell*'s all-female policy.²²³

The Commission, which brought the suit, attempted to argue that the emotions female gym members would allegedly experience were insufficient to amount to a valid privacy interest because they were not commonly held by society.²²⁴ In other words, the Commission claimed that the female gym patrons did not have a “reasonable basis to feel embarrassed because society as a whole would not find it objectionable to exercise with the opposite sex.”²²⁵ However, the court soundly rejected this argument and set forth a standard for determining whether a psychological harm is substantial enough to implicate a privacy interest:

The problem in determining what is “protected” is that societal conduct in this area is not consistent or rational. What we believe is private, humiliates us or makes us uncomfortable comes from societal norms and standards of conduct. What is “acceptable” in that context is based on time, place and circumstances

. . . .

219. GREGORY NIXON, *THE SAGE ENCYCLOPEDIA OF THEORY IN PSYCHOLOGY* 409 (Harold L. Miller, Jr. ed., 2016) (defining heightened consciousness as “a state of increased alertness, as when one feels endangered”).

220. See *supra* text accompanying notes 129–35.

221. *LivingWell, Inc. v. Pa. Human Relations Comm'n*, 606 A.2d 1287, 1290 (Pa. Commw. Ct. 1992).

222. *Id.* at 1293.

223. *Id.* at 1293–94.

224. *Id.* at 1293.

225. *Id.*

What is determinative is whether a reasonable person would find that person's claimed privacy interest legitimate and sincere, even though not commonly held. Nothing in the record supports nor does the Commission seriously challenge that these women do not sincerely hold these beliefs or that a reasonable person would not find these beliefs legitimate.²²⁶

The court also rejected the Commission's argument that recognizing a privacy interest would patronize women by reinforcing negative stereotypes.²²⁷ It stated:

The argument . . . is both illogical and demeaning. It is illogical because at the base of that view is an ossified and stereotypical view that men do not share similar privacy interests—a view not warranted. It is also demeaning to those women who desire to exercise separately because they are somehow “weak” because they have developed a different sense of modesty than held by others. It infers that there is only one acceptable standard of behavior and any variation should not be tolerated or respected.²²⁸

Thus, the *LivingWell* court was clear that the standard for recognizing a privacy interest “is not limited to protecting one where there is an exposure of an ‘intimate area,’”²²⁹ and may be available where a genuinely-held psychological harm exists.

a. Female Riders Experience a Psychological Harm That Results from the Presence of Male Drivers

In the context of *Safr* and *SheRides*, that psychological harm is a heightened consciousness of one's body and the need to protect it, as well as feelings of vulnerability which result from the unique space that female-riders are in and the intrusive questioning they often experience. As evident in the previous cases involving exposure of both types, these feelings are sufficient to find that female passengers have a valid privacy interest, which “is legitimate and sincere, even though not commonly held.”²³⁰ Consequently, *Safr* and *SheRides*' protection of this liberty is a basis for finding a gender-BFOQ.

226. *Id.* at 1292–93 (emphasis added).

227. *Id.* at 1293–94.

228. *Id.*

229. *Id.* at 1293.

230. *Id.*

This psychological harm results from the unique physical condition in which passengers find themselves and the reality that many female riders have experienced unwanted sexual advances by male drivers.²³¹ An Uber or Lyft ride is fundamentally different from other spaces because a rider is confined to a close space in a private, moving vehicle with a complete stranger. Unlike a bathroom or gym where customers may protect their privacy by either dressing themselves, closing a door, or leaving the premises altogether, a passenger is essentially captive in the vehicle until reaching the point of destination. The rider must linger in her feelings of apprehension and vulnerability because she is forced to sit intimately close to an unknown man for an extended period of time, which coerces the female-passenger to become painfully aware of her body and the need to protect it from him. The psychological harm is intensified by the knowledge that Uber and Lyft have been plagued by numerous reports of drivers committing acts of sexual violence during transport, and have failed to prevent or otherwise address these increasingly frequent occurrences.²³²

Likewise, feelings of vulnerability and openness are further exacerbated by the intimate and intrusive questioning that women commonly experience during the course of their journey. Data by the National Bureau of Economic Research shows that female riders are taken on rides that are five percent longer than average, due to a “combination of profiteering and flirting to a captive audience.”²³³ Passengers often complain that they are subjected to incessant personal questioning by their drivers, such as their age, relationship status, and sexual history.²³⁴ Female riders are also inappropriately propositioned for personal phone numbers,²³⁵ sexual acts,²³⁶ and sex.²³⁷ The extent to which this exists has forced Uber to remind drivers in its Community Guidelines to not flirt with their passengers or ask their passengers for sex.²³⁸

Uber’s “slap on the wrist” approach, however, is insufficient to afford female riders peace of mind that their drivers will follow these

231. See *supra* notes 27–28.

232. See *supra* Section II.A.1.

233. Ge et al., *supra* note 51, at 18.

234. See Nuzzi, *supra* note 54; *Reported List of Incidents*, *supra* note 44.

235. See *UBERPEOPLE*, *supra* note 55.

236. *Va. Police*, *supra* note 56.

237. *Mesa PD*, *supra* note 57.

238. See *Uber Community Guidelines*, *supra* note 58 (“We all value our personal space and privacy. It’s OK to chat with other people in the car. But please don’t comment on someone’s appearance or ask whether they are single. . . . And don’t touch or flirt with other people in the car. As a reminder, Uber has a no sex rule. That’s no sexual conduct between drivers and riders, no matter what.”); Schmidt, *supra* note 58.

guidelines since history has shown that attempts to stop intrusive questioning or unwanted advances have proven futile.²³⁹ Women are therefore left with choosing to (i) answer intimate and intrusive questions in order to be safely transported to their destination; (ii) decline to answer and potentially be subject to negative reactions from their drivers; or (iii) forfeit the ride and find alternative means of transportation, which would defeat the purpose of using the service in the first place. Consequently, female passengers experience emotions of vulnerability and heightened consciousness of their bodies on account of the physical situation they are in, which is only increased by the likelihood of pervasive dialogue between themselves and their drivers.

These feelings are also justified as valid privacy interests because they are reasonable, sincere, and commonly held, evidenced by the actions from legislatures and regulators who agree that this liberty interest should be protected.²⁴⁰ Consider the growing number of state bills that have been proposed throughout the country.²⁴¹ California's anticipated legislation requires that Uber and Lyft "increase the depth of [their driver] background" checks through heightened security measures, such as fingerprinting.²⁴² State representatives in California, as well as New York, New Jersey, and Maryland have stated that the change in policy was necessary to address the increasing instances of sexual assault in cities such as San Francisco, Chicago, Boston, Los Angeles and Washington, D.C.²⁴³ Other proposed legislation includes bills, like in New York City, that compel Uber and Lyft to provide sexual assault training to their drivers.²⁴⁴

Implicit in this legislation is the acknowledgment that a pressing need exists to protect not only the safety of female passengers, but also their privacy.²⁴⁵ Representatives agree that their privacy should be

239. See, e.g., Anthony Kurzweil, 'Dude, Can You Stop?' Asks Passenger Whose Washington DC Lyft Driver Refuses to Let Her Out, KTLA5 (Mar. 1, 2016, 12:11 PM), <http://ktla.com/2016/03/01/video-shows-unwilling-trapped-lyft-passenger-being-taken-on-15-minute-ride>.

240. See *LivingWell, Inc. v. Pa. Human Relations Comm'n*, 606 A.2d 1287, 1294 (Pa. Commw. Ct. 1992).

241. See Alex Wilhelm & Cat Zakrzewski, *Congress Presses Uber and Lyft on Driver Background Checks*, TECH CRUNCH (Mar. 10, 2015), <https://techcrunch.com/2015/03/10/congress-presses-uber-and-lyft-on-driver-background-checks>.

242. *Id.*

243. *Id.*; Katz, *supra* note 65; Susan K. Livio, *Uber, Lyft Drivers Must Pass Background Checks After Christi Oks New Law*, NJ.COM (Feb. 13, 2017), http://www.nj.com/politics/index.ssf/2017/02/nj_now_regulates_uber_lyft_and_other_ride-sharing.html.

244. Katz, *supra* note 65.

245. See *id.*

protected, and have attempted to address this through their proposed legislation.²⁴⁶ Presumably, the representatives believe that fingerprinting and anti-sexual assault training would provide women with peace of mind that they can enter these vehicles without feeling the need to protect their bodies from unwanted advances, or experiencing heightened vulnerability from intimate and intrusive questioning—because their drivers have been vetted and informed on respecting passenger privacy.²⁴⁷ Similar to *LivingWell*, reasonable people—in fact, government officials—believe that the claimed privacy interest is legitimate, sincere, and commonly held.²⁴⁸

Therefore, female passengers have a valid privacy interest that is implicated by the presence of male drivers.²⁴⁹ The psychological harm results from the unique, ride-sharing space and dialogue that commonly forms between female riders and their male drivers, and this genuinely-held privacy interest provides another strong basis for female-taxis to establish a BFOQ defense.²⁵⁰

b. Privacy Interests Should Be Recognized and Construed Broadly

To the extent that the Supreme Court has left open the door regarding privacy as a valid justification for a BFOQ defense, the Court should recognize it as a legitimate gender-BFOQ interest, and interpret it broadly to encompass the psychological harms experienced by customers, not only in situations where their intimate areas are exposed, but also to instances where the presence of an employee of the opposite sex gives rise to a heightened consciousness of one's body and feelings of vulnerability. Current events demonstrate that this matter is ripe for resolution.

First, the tension between new ridesharing models and traditional ones with regard to privacy protection justifies the consideration of the Court. As aforementioned, Uber and Lyft implicate female-passengers' privacy rights and have refused to adopt procedures which might afford women some peace of mind, such as subjecting potential drivers to fingerprinting.²⁵¹ Although Uber and Lyft have supported legislation

246. Wilhelm & Zakrzewski, *supra* note 241.

247. Katz, *supra* note 65.

248. See *LivingWell, Inc. v. Pa. Human Relations Comm'n*, 606 A.2d 1287, 1294 (Pa. Commw. Ct. 1992).

249. *Id.*

250. See *id.*

251. Editorial Board, *supra* note 64.

requiring drivers to undergo sexual assault training,²⁵² research shows that training has reverse effects, and makes men less capable of perceiving inappropriate behavior and more likely to blame victims.²⁵³ Thus, Uber and Lyft fail to address their female passengers' privacy concerns or provide some form of relief.

In contrast, Safr and SheRides protect women's privacy by offering them comfort that they can enter a car without needing to feel protective over their physical space.²⁵⁴ As stated by Safr's CEO:

We believe that giving women and their loved ones peace of mind is not only a public policy imperative but serves an essential social interest. Our service is intended to protect these fundamental liberties.²⁵⁵ . . . Our drivers are personally vetted, and undergo comprehensive background checks in criminal and motor vehicle history . . .²⁵⁶ [W]e look forward to ending the inequality of security that currently afflicts drivers and riders on the basis of gender.²⁵⁷

Therefore, recognizing privacy as a valid basis for asserting a gender-BFOQ defense allows female-only companies to address the rights which traditional ride-sharing services fail to protect.

Second, although this understanding of privacy is broader than lower courts' decisions which have typically focused on privacy rights as exposure of intimate areas, the Court should construe women's privacy interests broadly. The Pennsylvania Commonwealth Court provides a sound legal basis for the Court to find likewise, and the actions of state legislatures lend further support. These states, which include Colorado,²⁵⁸ Hawaii,²⁵⁹ Illinois,²⁶⁰ Massachusetts,²⁶¹ New Jersey,²⁶² and

252. Katz, *supra* note 65.

253. See generally Shereen G. Bingham & Lisa L. Scherer, *The Unexpected Effects of a Sexual Harassment Educational Program*, J. APPLIED BEHAV. SCI. 125 (2001). One researcher suggests that sexual harassment training is really offered to protect employers from liability, rather than actually reduce instances of sexual assault. See also Sam Levin, *Sexual Harassment Training May Have Reverse Effect, Research Suggests*, GUARDIAN (May 2, 2016, 1:00 PM), <https://www.theguardian.com/us-news/2016/may/02/sexual-harassment-training-failing-women>.

254. See Trisha Thadani, *Ex-Uber Driver Creates Ride-Sharing Service for Women*, USA TODAY (Apr. 4, 2016, 4:48 PM), <http://www.usatoday.com/story/news/nation/2016/04/02/ex-uber-driver-creates-ride-sharing-service-women/82557796>.

255. *Id.*

256. SAFR, *supra* note 22.

257. Thadani, *supra* note 254.

258. COLO. REV. STAT. § 24-34-601(3) (2008).

259. HAW. REV. STAT. § 489-4 (2005).

260. 775 ILL. COMP. STAT. 5/5-103 (2011).

Tennessee,²⁶³ provide special exemptions for female-only gyms from anti-discrimination statutes on the basis of privacy; therefore, the legislation suggests that there is public significance in interpreting the privacy interest broadly.

Lastly, society has become more attuned to breaches of women's privacy interests in light of the current political climate, which confirms the need for stronger protection. Consider public response after a tape emerged during the 2016 United States Presidential Election of President Donald Trump bragging about sexually assaulting women.²⁶⁴ Trump "not only retaliated against and threatened his accusers, but did not appear to suffer any serious penalty stemming from the accusations."²⁶⁵ His comments were dismissed as mere "locker room talk,"²⁶⁶ which implies that this behavior is acceptable and that women's privacy concerns are unimportant.

Accordingly, the Court should rebut this societal attitude by clearly recognizing privacy interests as a valid basis for establishing a BFOQ. In the rhetoric of *kairos*,²⁶⁷ this is the opportune moment in time for the Supreme Court to set forth that authority and grant women greater protection by interpreting the BFOQ to encompass the psychological harm evident in traditional ridesharing services and exacerbated by current events.

B. Additional Justifications Support *SheRides* and *Safr's* Legality

In all, female-taxis' employment practices are legal under Title VII because they satisfy the courts' "essence of the business" test for analyzing BFOQ claims.²⁶⁸ As fully discussed above, female-taxis' gender-based hiring policies are based on the consumer preference for a specific-gendered employee, and are supported by three factors which—separately and more so combined—provide a strong case for the BFOQ

261. MASS. GEN. LAWS ch. 272 § 92A (2010).

262. N.J. STAT. ANN. § 10:1-3 (West 2015).

263. TENN. CODE ANN. § 4-21-503 (2005).

264. See Jessica Taylor, 'You Can Do Anything': In 2005 Tape, Trump Brags About Groping, Kissing Women, NPR (Oct. 7, 2016, 6:05 PM), <http://www.npr.org/2016/10/07/497087141/donald-trump-caught-on-tape-making-vulgar-remarks-about-women>.

265. Clare Foran, *Trump's Victory Sends a Disturbing Message About Sexual Assault*, ATLANTIC (Nov. 9, 2016), <https://www.theatlantic.com/politics/archive/2016/11/election-trump-vote/507140>.

266. *Id.*

267. See Ruth Anne Robbins, *Three 3Ls, Kairos, and the Civil Right to Counsel in Domestic Violence Cases*, 2015 MICH. ST. L. REV. 1359, 1359–63.

268. See *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971); *Int'l Union v. Johnson Controls*, 499 U.S. 187, 187 (1991); *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 407 (1985); *Dothard v. Rawlinson*, 433 U.S. 321, 332–37 (1977).

defense. These factors include gender as the essence of the enterprises, safety concerns, and privacy interests, which, if left unaddressed, would result in failure of the businesses. However, in addition to satisfying the legal test for determining that gender is a BFOQ for employment, the legality and necessity of Safr and SheRides' business models are also supported by economic justifications and the legislative history of federal anti-discrimination statutes.

Take Title VII's counterpart—Title IX—which exempts women's only colleges from its anti-discrimination mandate.²⁶⁹ Title IX addresses employment in the context of educational institutions such as colleges, universities, and elementary and secondary schools.²⁷⁰ Congress consciously modeled Title IX on Title VII, and courts have generally held that the substantive standards and policies developed under Title VII to define discriminatory employment conduct apply with equal force to employment actions brought under Title IX.²⁷¹ The Title IX common rule acknowledges and incorporates the BFOQ exception.²⁷²

In 1972, when Congress was deliberating Title IX legislation, elite schools like Harvard, Dartmouth, and Smith lobbied for and won an exemption for single-sex undergraduate admissions.²⁷³ Accordingly, Title IX explicitly exempts public institutions of undergraduate higher education “that traditionally and continually from their establishment have had a policy of admitting only students of one sex.”²⁷⁴ “Title IX [also] does not cover the single-sex admissions policies of elementary,

269. 20 U.S.C. § 1681(a)(5) (2012).

270. 20 U.S.C. § 1681(a) (2012) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .”).

271. See *Johnson v. Baptist Med. Ctr.*, 97 F.3d 1070, 1072 (8th Cir. 1996); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 469 (8th Cir. 1996); *Brine v. Univ. of Iowa*, 90 F.3d 271, 276 (8th Cir. 1996); *Doe v. Oyster River Coop. Sch. Dist.*, 992 F. Supp. 467, 474 (D.N.H. 1997).

272. *Title IX Legal Manual*, U.S. DEPT OF JUST., <https://www.justice.gov/crt/title-ix> (last visited Jan 17, 2018) (“A recipient may take action otherwise prohibited . . . provided it is shown that sex is a bona fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section that is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students or other persons, but nothing contained in this section shall prevent a recipient from considering an employee[']s sex in relation to employment in a locker room or toilet facility used only by members of one sex.”).

273. Kiera Feldman, *Who Are Women's Colleges For?*, N.Y. TIMES (May 24, 2014), <https://www.nytimes.com/2014/05/25/opinion/sunday/who-are-womens-colleges-for.html?mcubz=0>.

274. *Title IX Legal Manual*, *supra* note 272.

secondary, . . . or private undergraduate schools.”²⁷⁵ Therefore, the legislative history of Title IX and the resulting exemption for women-only educational facilities demonstrate the importance of permitting single-sex businesses to maintain their gender-based criteria.

The BFOQ for female taxis is strengthened by economic justifications, as well. Courts regularly consider the effect that a discriminatory employment practice has on the discriminated party, and balance the harm against the social benefit of permitting the company to continue its female-only hiring practice.²⁷⁶ If the harm to the discriminated party is minimal, then employers are more likely to be successful in raising the affirmative defense.²⁷⁷ For example, in *LivingWell*, the court determined that:

The only harm. . . advance[d] [was] that the men [would] not be allowed to exercise at certain LivingWell locations. However, the Commission [admitted] that there are other facilities just as convenient where men can exercise in a coed environment. . . . [N]o harm exists to any male by being excluded from LivingWell’s facilities.²⁷⁸

Similarly, with female-taxi services, the harm to men, if any, is minimal. Male drivers excluded from employment at Safr and SheRides can still drive for Uber or Lyft, where they have historically dominated, both in representation and compensation.²⁷⁹ Female-taxi services merely afford women the opportunity to compete with men in the ridesharing industry, which aligns with the purpose of Title VII.²⁸⁰ Thus, any tangential harm to men is minimal, especially when balanced with the benefits that female taxis provide.

275. *Id.*

276. See *Baker v. Welch*, 2003 U.S. Dist. LEXIS 22059, at *46–47 (S.D.N.Y. Dec. 10, 2003); *Johnson v. Phelan*, 69 F.3d 144, 146–47 (7th Cir. 1995); *Canedy v. Boardman*, 16 F.3d 183, 185–87 (7th Cir. 1994); *Forts v. Ward*, 621 F.2d 1210, 1211, 1216–17 (2d Cir. 1980); *LivingWell, Inc. v. Pa. Human Relations Comm’n*, 606 A.2d 1287, 1294 (Pa. Commw. Ct. 1992).

277. See *LivingWell*, 606 A.2d at 264.

278. *LivingWell*, 606 A.2d at 1293. Note that because this case was advanced in the public accommodation context, which prohibits discrimination against consumers, the harm described was the harm experienced by excluded consumers, rather than employees. However, as discussed *supra* note 130, the *LivingWell* court analyzed the defense under Title VII, and its use of the balancing test proves useful here.

279. See *supra* Section II.A.1.b.

280. See *supra* note 93 and accompanying text.

IV. CONCLUSION

Accordingly, female-only taxis like SheRides and Safr are legal under Title VII because their same-sex employment practices fall within the BFOQ exception. Gender is a BFOQ for employment because the essence of the business operation would be undermined by not hiring members of one sex exclusively, in light of three non-gender considerations that necessitate the hiring of female-only drivers. These considerations include the inseparable nature of gender and the essence of the enterprises, the safety interests of their riders, and the privacy interests that are implicated by the presence of male employees. Gender as a BFOQ for female-taxis is also supported by economic justifications and the legislative history of anti-discrimination statutes, and is compelled by current events. Thus, women-only ridesharing services should be successful in defending their same-sex hiring policies under Title VII.