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Perceived-As Plaintiffs: Expanding Title VII Coverage to Discrimination Based on Erroneous Perception

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PERCEIVED-AS PLAINTIFFS:
EXPANDING TITLE VII COVERAGE TO
DISCRIMINATION BASED ON
ERRONEOUS PERCEPTION

“As with the joy of beauty, the ugliness of bias can be in the eye of the beholder.”¹

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INTRODUCTION

Robert Smith, a practicing Catholic, worked for Specialty Pool for a month when discrimination against his “perceived-as” Jewish identity began.² His manager erroneously believed Smith was a “Jew” and did not like him as result.³ Smith was referred to multiple times daily as “Hebrew,” “Jew Boy,” and “Kike.”⁴ The manager consistently raised a Nazi salute in front of him, once commenting that “Hitler did not do a good enough job” because Smith was still alive.⁵ On its face, this appears to be a straightforward example of illegal employment discrimination. However, depending on the court, the case could have been dismissed at the outset because Smith was not actually Jewish. That is, Smith was not discriminated against based on his actual religion. Rather, Smith was discriminated against because he was “perceived as” being Jewish.

This Note argues that Title VII of the Civil Rights Act of 1964 (Title VII) covers discrimination where an individual is perceived as being a certain race or ethnicity, whether or not that individual is actually a member of that class. Further, the courts that have allowed for such claims to proceed have more persuasive reasoning, given the statutory interpretation, congressional intent, and contemporary understanding of identity.

Part I briefly summarizes the background of Title VII and recent perceived-as cases that have surfaced. Part II explains why courts that confront such claims should not follow the reasoning of prior courts that have imposed an actuality requirement.

Part III will explore how perceived-as discrimination claims should be analyzed under Title VII. First, the Equal Employment Opportunity Commission (EEOC) has promulgated definitions and regulations that recognize perceived-as discrimination claims under Title VII. Next, this Note compares Title VII to the Americans with Disabilities Act (ADA) and explains why Title VII perception claims should be analyzed like disability-perception claims. Part IV argues that the inherent complexity and social construct of identity justifies a shift in Title VII analysis from an individual’s actual identity to a focus on the employer’s discriminatory actions. Finally, Part V recommends how to apply perceived-as analysis to future employment-discrimination claims.

2. *Smith v. Specialty Pool Contractors*, No. 02:07CV1464, 2008 WL 4410163, at *2 (W.D. Pa. Sept. 24, 2008).

3. *Id.* at *1.

4. *Id.*

5. *Id.*

I. BACKGROUND OF TITLE VII AND PERCEIVED-AS CLAIMS

Title VII was enacted to prohibit employment discrimination on the basis of “race, color, religion, sex, or national origin.”⁶ The purpose of Title VII is to eliminate these invidious forms of discrimination in the workplace and give redress to those who experience discrimination on the basis of their membership in those protected classes.⁷ Title VII protection often focuses on “perception and appearance” for employment-discrimination claims.⁸

A. *Background of Title VII Protection*

It is unlawful for an employer to refuse to hire or to discriminate against individuals on the basis of their protected class membership.⁹ Title VII prohibits employers from (1) discriminating against an individual (2) because of (3) such individuals’ religion, race, sex, national origin, or color.¹⁰ A prima facie disparate-treatment case first requires plaintiffs to demonstrate that they “belong to a protected class.”¹¹ Plaintiffs who prove that they are “member[s] of a protected class” also must prove that they were subject to discrimination *based* on their membership in the protected class.¹²

It is significant for the advancement of perceived-as claims that Title VII does not define the protected classes covered under the statute. One could conclude that Title VII’s protected classes are therefore static and universally have the same meaning, and thus do not need to be defined. However, an alternative possibility for the lack of a

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6. 42 U.S.C. § 2000e-2 (2012).
 7. *See Lightner v. City of Wilmington*, 545 F.3d 260, 264 (4th Cir. 2008). In this Note, “protected class” means the classifications protected under Title VII of race, color, national origin, and religion. “Protected class” will be used when the actual classification may be interchangeable.
 8. *Perkins v. Lake Cty. Dep’t of Util.*, 860 F. Supp. 1262, 1277 (N.D. Ohio 1994) (explaining that “consistent with the intent of Title VII, when racial discrimination is involved perception and appearance are everything”).
 9. 42 U.S.C. § 2000e-2 (2012).
 10. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015).
 11. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *see also Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982) (developing similar tests for proof of discrimination under Title VII, without direct evidence). The prima facie case for a disparate treatment discrimination claim under Title VII is: (1) the Plaintiff belongs to a protected class; (2) the Plaintiff applied for and was qualified for the job; (3) the Plaintiff was rejected; and (4) after rejection, the employer continued to seek applicants similarly situated to the Plaintiff. *McDonnell Douglas*, 411 U.S. at 802. There is disagreement as to how rigidly the *McDonnell Douglas* test should be applied to Title VII claims. *See infra* note 153 and accompanying text.
 12. *McDonnell Douglas*, 411 U.S. at 802.

definition could be that identities of protected classes are complex, and there is no need for a precise and codified legal definition. Nonetheless, issues of what races and national origins should be protected, what “color” means, and what religious practices are covered have arisen under Title VII.¹³

Unlike other federal antidiscrimination statutes,¹⁴ Title VII does not explicitly define the class of people protected.¹⁵ Since the statute lacks definitions, courts and litigants sometimes turn to other sources to determine applicability, such as agency regulations and definitions from similar laws.¹⁶ When controversies do arise regarding whether a plaintiff is a member of a protected class, courts generally apply inclusive definitions of race, national origin, color, and religion. For example, the Supreme Court held that white employees and applicants are protected under Title VII,¹⁷ arguably contrary to the legislative intent.¹⁸

Since defining a person’s race can be deceptively complex,¹⁹ it may be helpful to compare similar antidiscrimination statutes to determine the definition of race under federal law.²⁰ These statutes define race to include identities usually thought of as national origin, such as Hispanic, Indian, or Arab.²¹ The absence of a racial definition in Title

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13. *See, e.g.*, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (holding that Title VII protects white employees from discrimination on the basis of race).
 14. *E.g.*, 42 U.S.C. § 12102(2)(a) (2012) (prohibiting discrimination based on disability); 29 U.S.C. §§ 621–634 (2006) (prohibiting discrimination based on age).
 15. 42 U.S.C. § 2000(e).
 16. *See infra* notes 17–38 and accompanying text.
 17. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976).
 18. The most prominent matter of public concern was seemingly protection for African-Americans, as evidenced by President Lyndon B. Johnson’s remarks after signing the bill into law. *See* Radio and Television Remarks Upon Signing the Civil Rights Bill, II Pub. Papers 842 (July 2, 1964). (“[M]illions are being deprived [of liberty] . . . because of the color of their skin. . . . [The Act says] that . . . those who are equal before God shall now also be equal in the . . . factories . . . and other places that provide service to the public.”).
 19. *See infra* Part IV; *see also infra* notes 55–57 and accompanying text.
 20. *See, e.g.*, *Arsham v. Mayor & City Council of Balt.*, 85 F. Supp. 3d 841, 848 (D. Md. 2015) (citing to § 1981 and § 1983 cases in recognizing perceived-as discrimination under Title VII); *Perkins v. Lake Cty. Dep’t of Util.*, 860 F. Supp. 1262, 1272–73 (N.D. Ohio 1994) (same).
 21. *Perkins* cited to § 1981 cases that permitted a “race” claim for identities typically thought of as a national origin to show the difficulty of defining and distinguishing identities. *Id.* at 1273–74. *See also* *St. Francis College v. Al-Khazraji*, 481 U.S. 604, (1987) (holding that “Arab” is a race for § 1981

VII may demonstrate Congress's awareness of the difficulty of providing and distinguishing definitions of race and identity in statutory language for inclusive protection.²²

Color, another protected class under Title VII, is also not defined.²³ Color discrimination is not a common claim under Title VII.²⁴ However, color discrimination claims may be appropriate for Plaintiffs who have a "mixture of races and ancestral national origins."²⁵ Some courts go so far as to hold that color and race claims are indistinguishable because of the nuanced relationship between the two protected classes.²⁶

National origin also has no statutory definition under Title VII.²⁷ The Supreme Court has held that national origin refers to plaintiffs' or their ancestors' place of birth.²⁸ The EEOC considers national origin as covering places of origin, rather than countries of origin under Title VII.²⁹ This expands protection for individuals whose ethnic or national identity does not fit neatly into a country of origin. As a result, Title VII's national origin category includes identities not typically

purposes); *McClesky v. Kemp*, 481 U.S. 279, 316 n.39 (1987) (holding that "Hispanic" is a race for § 1981 purposes).

22. *See infra* Part IV.
23. 42 U.S.C. § 2000e (2012); *see Felix v. Marquez*, No. 78-2314, 1981 WL 275, n.11 (D.D.C. Mar. 26, 1981) ("[T]he legislative history of these acts is silent on the meaning of the term 'color,' and no definitive interpretation has been provided by the courts."). Color discrimination claims have been sustained on the basis of preference for light-skinned African-Americans over dark-skinned applicants. *See Walker v. Sec'y of Treasury*, 713 F. Supp. 403, 407-08 (N.D. Ga. 1990) (explaining that "it would take an ethnocentric and naive world view to suggest that we can divide caucasians into many sub-groups but some how all blacks are part of the same sub-group").
24. *See Charge Statistics FY 1997 Through FY 2015*, EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> [<https://perma.cc/FB5U-8P94>] (last visited Mar. 14, 2016) (in 2015, color discrimination claims accounted for only 3.2% of all employment discrimination claims.); *see also Felix*, 1981 WL 275, at *11 ("Color is a rare claim, but considering the mixture of races and ancestral national origins in Puerto Rico, it can be an appropriate claim for a Puerto Rican to present.").
25. *Id.* (holding that color discrimination is an "appropriate" claim for Puerto Rican plaintiffs).
26. *See supra* note 23 and accompanying text; Part IV.A.
27. *See* 42 U.S.C. § 2000e (2012).
28. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973). *Espinoza* was the first Supreme Court case to address national origin claims under Title VII. Notably, *Espinoza* also states that the EEOC guidelines are "no doubt entitled to great deference." *Id.* at 94. *See also infra* Part III.B.
29. 29 C.F.R. § 1606 (2015). *See infra* Part III.B.

considered “national,” such as Cajun, Gypsy, and Native American.³⁰ Title VII also prohibits discrimination for nonminority national origins, regardless of the historical discrimination or disadvantage of the group.³¹

The larger point is that courts interpret Title VII to broadly proscribes employment policies “which operate to disadvantage the employment opportunities of any group . . . including Caucasians.”³²

Religion is the only defined protected class under Title VII.³³ Religion includes “all aspects of religious observance and practice, as well as belief.”³⁴ This broad definition protects individuals belonging to uncommon religions, atheists, and practices not necessarily mandated by a religious authority.³⁵ There are two types of religious discrimination prohibited under Title VII.³⁶ First, it is unlawful for an employer to fail to reasonably accommodate a religious practice or belief.³⁷ Second, Title VII protects employees and applicants against discrimination based on

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30. See *Roach v. Dresser Indus. Valve & Instrument Div.*, 494 F. Supp. 215, 218 (W.D. La. 1980) (holding plaintiff of Cajun descent was covered under national origin definition); *Janko v. Illinois State Toll Highway Auth.*, 704 F. Supp. 1531, 1532 (N.D. Ill. 1989) (holding that Gypsies are covered under national origin because Congress intended to protect these kinds of groups); *Perkins v. Lake Cty. Dep’t of Util.*, 860 F. Supp. 1262, 1278 (N.D. Ohio 1994) (recognizing protection for Native Americans, although it was a case based on mistaken identity).
31. See *EEOC v. Consol. Servs. Sys.*, 777 F. Supp. 599, 607 (N.D. Ill. 1991), *aff’d*, 989 F.2d 233 (7th Cir. 1993) (assuming the possibility of a Korean employer discriminating against non-Koreans). Even an “American” national origin is protected under Title VII. See *Fortino v. Quasar Co.*, 751 F. Supp. 1306, 1315 (N.D. Ill. 1990), *rev’d on other grounds*, 950 F.2d 389 (7th Cir. 1991).
32. *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273, 279–80 (citations omitted). See also *infra* Part IV.
33. 42 U.S.C. § 2000e(j) (2012).
34. *Id.*
35. See *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 453 (7th Cir. 2013) (explaining that “Title VII . . . do[es] not require perfect consistency . . . when determining if a belief system qualifies as a religion or whether a person’s belief is sincere”); *Young v. Sw. Sav. & Loan Ass’n*, 509 F.2d 140, 144 (5th Cir. 1975) (holding that an atheist established a prima facie case under Title VII); *Anderson v. USF Logistics Inc.*, 274 F.3d 470, 475 (7th Cir. 2001) (suggesting Title VII may cover more than what is necessarily mandated by religion).
36. See generally *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603–07 (9th Cir. 2004) (distinguishing between the two types of religious discrimination).
37. 42 U.S.C. § 2000e(j) (2012) (requiring an employer to make reasonable accommodations to “all aspects of [religion] unless an employer demonstrates that he is unable to reasonably accommodate to an observance or practice without undue hardship”).

a religious affiliation.³⁸ This second cause of action acknowledges that religion may sometimes be more than a practice or ritual, maybe playing a larger role for individuals, such as ethnic or otherwise fundamental identity.³⁹

B. Current Judicial Recognition of Perceived-as Claims

The Supreme Court and federal circuit courts of appeals have yet to answer whether a perceived-as discrimination claim is cognizable under Title VII.⁴⁰ However, the Ninth Circuit held that perceived-as claims are covered under another federal remedial statute, which also does not explicitly provide for these claims, because mistaken perception “does not make that discrimination or its resulting injury less direct.”⁴¹ Similarly, the Third Circuit assumed that a perceived-as plaintiff would be protected under Title VII.⁴²

In 1994, the first district court to consider a perceived-as claim held that perceived-as discrimination is prohibited under Title VII.⁴³ In 2004, another district court held that perceived-as claims are not cognizable under Title VII as a matter of law and dismissed the claim on summary judgment.⁴⁴ Some courts have cited to *Butler v. Potter*⁴⁵ for this same proposition.⁴⁶ However, many other district courts have found *Butler’s*

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38. This type of religious discrimination is analyzed the same as all other cases under Title VII. Charity Williams, Note, *Misperceptions Matter: Title VII of the Civil Rights Act of 1964 Protects Employees from Discrimination Based on Misperceived Religious Status*, 2008 UTAH L. REV. 357, 364–66 (2008) (explaining how to prove both types of claims).
39. See *supra* notes 34–35 and accompanying text.
40. *But see* Jones v. UPS Ground Freight, 683 F.3d 1283, 1299 (11th Cir. 2012) (“[A] harasser’s use of epithets associated with a different ethnic or racial minority than the plaintiff will not necessarily shield an employer from liability for a hostile work environment.”). See also *infra* Part IV.B.2.
41. Estate of Amos v. City of Page, 257 F.3d 1086, 1094 (9th Cir. 2001). See *supra* note 20.
42. Fogleman v. Mercy Hosp., 283 F.3d 561, 571 (3d Cir. 2002) (holding that plaintiff may bring a perceived-as retaliation claim under FLSA). See *infra* notes 71–76 and accompanying text.
43. Perkins v. Lake Cty. Dep’t of Util., 860 F. Supp. 1262, 1277–78 (N.D. Ohio 1994) (holding that Title VII protected plaintiff from discrimination based on employer’s mistaken belief that he was Native American).
44. Butler v. Potter, 345 F. Supp. 2d 844, 850 (E.D. Tenn. 2004).
45. 345 F. Supp. 2d 844 (E.D. Tenn. 2004).
46. El v. Max Daetwyler Corp., No. 3:09CV415, 2011 WL 1769805, at *5 (W.D.N.C. May 9, 2011), *aff’d*, 451 F. App’x 257 (4th Cir. 2011); Lewis v. North General Hosp., 502 F. Supp. 2d 390, 401 (S.D.N.Y. 2007) (holding that Title VII does not cover misperception of religion); Yousif v. Landers McClarty Olathe KS, LLC, No. 12-2788-CM, 2013 WL 5819703, at *3 (D. Kan. Oct. 29, 2013) (same); Burrage v. FedEx Freight, Inc., 4:10CV2755,

reasoning unpersuasive and held that Title VII does prohibit perceived-as discrimination.⁴⁷

1. Courts that Recognize Perceived-As Claims

Two recent district court cases that considered perceived-as claims held that Title VII prohibits this type of discrimination.⁴⁸ These cases, along with others, focus on the employer's actions rather than applying a strict actuality requirement for the plaintiff's identity.

*Perkins v. Lake County*⁴⁹ was the first federal case to address whether an employer may be liable for perceived-as discrimination.⁵⁰ Arthur Perkins brought a Title VII suit against his employer in the Northern District of Ohio, alleging that he was subjected to discrimination because of a Native American identity.⁵¹ To rebut this claim, the Defendant called an expert witness to trace Perkins's ancestry in order to prove that Perkins was not Native American.⁵² The expert "performed exhaustive research of said ancestry and racial composition through the U.S. census, birth and death records, Bureau of Indian

2012 WL 1068794, at *6 (N.D. Ohio Mar. 29, 2012) (holding that Title VII does not cover discrimination based on mistaken race); *Uddin v. Universal Avionics Sys.*, 1:05-CV-1115-TWT, 2006 WL 1835291, at *6 (N.D. Ga. 2006) (holding that Title VII does not cover religious misperception as matter of law); *Sears v. Jo-Ann Stores, Inc.*, No. 3:12-1322, 2014 WL 1665048, at *8 (M.D. Tenn. 2014) (holding that Title VII does not cover perception claims).

47. *Arsham v. Mayor & City Council of Balt.*, 85 F. Supp. 3d 841, 846 (D. Md. 2015) (holding that Title VII protected plaintiff who was misperceived to be a member of an ethnic class of India); *Kallabat v. Mich. Bell Tel. Co.*, Nos. 12-CV-15470, 2015 WL 5358093, at *6 (E.D. Mich. June 18, 2015) (holding that Title VII protected Iraqi plaintiff who was misperceived to be Muslim); *LaRocca v. Precision Motorcars, Inc.*, 45 F. Supp. 2d 762, 770 (D. Neb. 1999) (holding that Title VII protected Italian plaintiff who was misperceived to be Mexican); *Wood v. Freeman Decorating Servs.*, No. 3:08-CV-00375-LRH-RAM, 2010 WL 653764, at *4 (D. Nev. Feb. 19, 2010) (explaining that "even if Defendant's employees mistakenly believed that Plaintiff was American Indian, Defendant may nonetheless be liable for hostile work environment harassment"); *Zayadeen v. Abbott Molecular, Inc.*, No. 10-C-4621, 2013 WL 361726, at *8 (N.D. Ill. Jan. 30, 2013) (holding that Title VII protected Jordanian plaintiff who was misperceived to be Kazakhstani); *Boutros v. Avis Rent A Car System*, No. 10-C-8196, 2013 WL 3834405, at *7 (N.D. Ill. July 24, 2013) (holding that Title VII protected Assyrian plaintiff who was misperceived to be Arabic).

48. *Arsham*, 85 F. Supp. at 850; *Kallabat*, 2015 WL 5358093, at *4.

49. 860 F. Supp. 1262 (N.D. Ohio 1994).

50. D. Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87, 130 (2013).

51. *Perkins*, 860 F. Supp. at 1264.

52. *Id.* at 1266.

Affairs documentation, Smithsonian Institute documentation . . . and many other sources.”⁵³ The expert concluded that Perkin’s ancestry could not be traced back to any Native American ethnicities or tribes.⁵⁴ *Perkins* detailed the expert’s finding, while also discussing the troubling and complicated history of Native American identity and discrimination in the United States.⁵⁵ The court concluded that the “issue of membership in a given racial classification is deceptively complex.”⁵⁶ *Perkins* denied summary judgment for the defendant and held that an “employer’s reasonable belief that a[n] . . . employee is a member of a protected class . . . [is what] controls this issue.”⁵⁷ *Perkins* signified a shift from static definitions to the more modern, complex view of identity.

*Ashram v. Mayor & City Council of Baltimore*⁵⁸ is a recent District of Maryland case that recognized perceived-as discrimination claims under Title VII.⁵⁹ Elie Ashram was discriminated against by her employer because he mistakenly believed that she was a member of the “Parsee” class, which is a “low ethnic caste” in India.⁶⁰ Instead, Ashram was actually of Persian descent.⁶¹ Although Ashram was not “Parsee” as her employer believed she was, the court held that Ashram still had a cognizable claim for national origin discrimination.⁶²

Arsham noted that recognizing perceived-as claims is consistent with the congressional intent of broadly interpreting Title VII’s protections.⁶³ *Ashram* cites to the EEOC’s guidelines and regulations, including the EEOC’s definition of national origin discrimination “which protects plaintiffs who are discriminated against because of a stereotype of the protected class.”⁶⁴ *Ashram* further reasoned that by denying

53. *Id.*

54. *Id.* at 1269 (testifying that Plaintiff had no “provable ancestral ties” to any Native American ethnicities).

55. *Id.* at 1266–69.

56. *Id.* at 1271.

57. *Id.* at 1277.

58. 85 F. Supp. 3d 841 (D. Md. 2015).

59. *Id.* at 849.

60. *Id.* at 844.

61. *Id.*

62. *Id.*

63. *Id.* at 846.

64. *Id.* (explaining that Congress may have felt it unnecessary to revise Title VII to conform with the ADA because the EEOC had adapted a broad definition of national origin discrimination. The EEOC “defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual’s, or his or her

perceived-as claims, “[a] wrong guess, in other words, shields the employer from liability for discrimination that is no less injurious to the employee than if the employer guessed correctly regarding the employee’s national origin.”⁶⁵

Kallabat v. Michigan Bell Telephone,⁶⁶ another 2015 perceived-as case, also refused to grant the defendant’s motion for summary judgment.⁶⁷ The defendant argued that there was no Title VII violation because the Plaintiff was not actually Muslim, as the defendant mistakenly perceived.⁶⁸ Although there was no Sixth Circuit precedent, *Kallabat* held that a perceived-as claim at least passes muster against summary judgment because a “reasonable jury could find . . . evidence of discrimination based on the perception that Plaintiff was a Muslim.”⁶⁹

*Fogleman v. Mercy Hospital*⁷⁰ was a Third Circuit Court of Appeals case that addressed perceived-as retaliation discrimination under the Federal Labor Standards Act.⁷¹ The plaintiff in *Fogleman* argued that he was fired in retaliation when his father sued the employer for disability discrimination because the plaintiff was “perceived-as” helping his father in the litigation, a protected activity under the FLSA.⁷² The plaintiff was not involved at all in litigation; the employer only assumed he was.⁷³ Significantly, *Fogleman* analogized a perceived-as Title VII claim to the FLSA claim to illuminate the relevant aspect of employment discrimination, unfair treatment by the employer.⁷⁴ *Fogleman* illustrated:

Imagine a Title VII discrimination case in which an employer refuses to hire a prospective employee because he thinks that the

ancestor’s, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.”); see 29 C.F.R. § 1606.1 (2015) (“The [EEOC] defines national origin discrimination broadly.”); see also *infra* Part III.A.

65. *Arsham*, 85 F. Supp. 3d at 845. See also *infra* Part IV.B.

66. Nos. 12-CV-15470, 2015 WL 5358093 (E.D. Mich. June 18, 2015).

67. *Id.* at *4.

68. *Id.*

69. *Id.*

70. 283 F.3d 561 (3rd Cir. 2002).

71. *Id.* at 570 (holding that “perception of retaliation” is covered under the National Labor Relations Act, whereby the Plaintiff did not engage in retaliation although the defendant mistakenly thought he did).

72. *Id.* at 564.

73. *Id.*

74. *Id.* at 571.

applicant is a Muslim. The employer is still discriminating on the basis of religion even if the applicant he refuses to hire is not in fact a Muslim. What is relevant is that the applicant, whether Muslim or not, was treated worse than he otherwise would have been for reasons prohibited by the statute.⁷⁵

Fogleman has been cited with approval for Title VII perceived-as claims, notably in *Kallabat* and *Ashram*, two of the most recent cases.⁷⁶

2. Courts that Do Not Recognize Perceived-As Claims

There are still numerous district courts that do not recognize perceived-as discrimination claims under Title VII.⁷⁷ In 2004, *Butler v. Potter* was the first case to hold that Title VII does not prohibit perceived-as national origin discrimination as a matter of law.⁷⁸ Other courts cited to *Butler* and dismissed perceived-as Title VII claims.⁷⁹

Jesse Butler worked as a mail carrier in Anderson County, Tennessee.⁸⁰ He was adversely affected at work by “a supervisor . . . [who] periodically screamed obscenities at him and accused him of being Indian or Middle Eastern.”⁸¹ *Butler* noted that it was “undisputed that [P]laintiff is neither of Indian nor Middle Eastern origin; he is a white Caucasian.”⁸² The court held that Butler did not

75. *Id.*

76. *Kallabat v. Mich. Bell Tel. Co.*, Nos. 12-CV-15470, 2015 WL 5358093, at *4 (E.D. Mich. June 18, 2015); *Arsham v. Mayor & City Council of Balt.*, 85 F. Supp. 3d 841, 848 (D. Md. 2015).

77. *See supra* notes 44–46.

78. *Id.* at 850.

79. *El v. Max Daetwyler Corp.*, No. 3:09CV415, 2011 WL 1769805, at *1 (W.D.N.C. May 9, 2011) *aff'd*, 451 F. App'x 257 (4th Cir. 2011); *Lewis v. North General Hosp.*, 502 F. Supp. 2d 390, 401 (S.D.N.Y. 2007); *Yousif v. Landers McClarty Olathe KS, LLC*, No. 12-2788-CM, 2013 WL 5819703, at *3 (D. Kan. Oct. 29, 2013); *Burrage v. FedEx Freight, Inc.*, No. 4:10CV2755, 2012 WL 1068794, at *5 (N.D. Ohio Mar. 29, 2012); *Uddin v. Universal Avionics Sys. Corp.*, Civil Action File No. 1:05-CV-1115-TWT, 2006 WL 1835291, at *6 (N.D. Ga. 2006). *See also* *Berrios v. Hampton Bays Union Free Sch. Dist.*, No. CV 02-3124, 2007 WL 778165, at *1 (E.D.N.Y. Mar. 12, 2007) (holding that a perceived-as claim under Title VII was not a likely cognizable theory, yet allowing jury instructions that may find for perceived-as or actual religious discrimination). *See generally* Williams, *supra* note 38, for a more thorough analysis of *Berrios*, and religion misperception under Title VII in general.

80. *Butler*, 345 F. Supp. 2d at 846.

81. *Id.*

82. *Id.*

have a Title VII claim since he was not discriminated against based on his *actual* national origin identity.⁸³

In *Uddin v. Universal Avionics System Corporation*, the court cited to *Butler* for the proposition that perceived-as claims fail as a matter of law, and must be dismissed.⁸⁴ Zaheer Uddin brought an employment discrimination claim for being perceived-as belonging to a particular national origin.⁸⁵ Uddin's claim failed because he was not actually Middle Eastern, as his employer erroneously perceived. However, *Uddin* held that "because Plaintiff in actuality has a dark complexion and is a Muslim, Plaintiff may pursue a claim for discriminatory termination based on his skin color and his religion."⁸⁶

In *Burrage v. FedEx Freight Inc.*,⁸⁷ a man of mixed race was discriminated against at his workplace based on the mistaken belief that he was of Mexican descent.⁸⁸ Nathaniel Burrage brought a Title VII claim and argued that the harassment, name calling, and racist epithets continued at FedEx for over three years and "increase[ed] in frequency over that period at a rate of anywhere from three times a week to once daily."⁸⁹ Regardless of the potentially severe discrimination that could have been shown at trial, the court granted FedEx's motion for summary judgment because Burrage's actual race was not the one for which he was discriminated.⁹⁰

Courts that do not recognize perceived-as claims under Title VII cite the lack of "regarded as" perception language that exists in other federal antidiscrimination statutes.⁹¹ Yet, the same courts fall short of

83. *Id.* at 850.

84. *Uddin*, 2006 WL 1835291, at *6.

85. *Id.* at *1.

86. *Id.* at *6. *See infra* notes 181–187 and accompanying text.

87. No. 4:10CV2755, 2012 WL 1068794 (N.D. Ohio Mar. 29, 2012).

88. *Id.* at *2.

89. *Id.*

90. *Id.* at *6.

91. *See* *Yousif v. Landers McClarty Olathe KS, LLC*, No. 12-2788-CM, 2013 WL 5819703, at *3 (D. Kan. Oct. 29, 2013) ("Unlike these other Acts, Title VII contains no language regarding the protection of those who are perceived to be members of a protected class."); *Lewis v. North General Hosp.*, 502 F. Supp. 2d 390, 401 (S.D.N.Y. 2007) ("If Congress had wanted to permit a similar cause of action under Title VII for 'perceived religion' discrimination, it could have so provided. It did not."); *Butler v. Potter*, 345 F. Supp. 2d 844, 850 (E.D. Tenn. 2004) (explaining that Congress "knows how to enact legislation that protects persons who are wrongly perceived to be in a protected class" but did not in Title VII); *Burrage*, 2012 WL 1068794, at *5 ("Title VII contains no provision for those wrongly perceived to be of a certain national origin.").

analyzing the similarities and differences between the language and history of Title VII and the other statutes.⁹²

II. LACKING PERSUASION: FUTURE PERCEIVED-AS CASES SHOULD NOT FOLLOW COURTS THAT IMPOSE AN ACTUALITY REQUIREMENT

Courts that currently do not recognize perceived-as claims under Title VII should not be given deference as persuasive authority. First, some of the perceived-as conclusions were reached in dicta. Second, in *Butler v. Potter*, the employer had actual knowledge of the Plaintiff's actual national origin, diminishing the need to hold the employer liable.

In *Yousif v. Landers*,⁹³ the Plaintiff's perceived-as claim failed because he did not "state in his complaint or the EEOC charge that he [was] Middle-Eastern—or, in the alternative—that he is not, and that defendants perceived him as such."⁹⁴ *Yousif* granted the defendant's motion for summary judgment, since the Plaintiff did not satisfy the EEOC requirements.⁹⁵ In dicta, however, *Yousif* also stated that "regardless" of the nature of the complaint form, Title VII does not recognize perceived-as claims as a matter of law, citing to *Butler*.⁹⁶ But because *Yousif* hinged on administrative requirements and not the Plaintiff's identity, this dicta should not be persuasive for future perceived-as claims.

Similarly, a North Carolina district court stated in dicta that perceived-as claims fail as a matter of law under Title VII.⁹⁷ *El v. Max Daetwyler Corporation*⁹⁸ granted the defendant's motion for summary judgment because there were no facts indicating that the Plaintiff, Darryl El, could have been objectively perceived-as being Muslim, as he alleged.⁹⁹ *Ashram v. Mayor & City Council of Baltimore*, also in the

92. *See Burrage*, 2012 WL 1068794, at *5 (comparing the language of Title VII and the ADA, with no mention of legislative history); *see also* Greene, *supra* note 50, at 116 (discussing how courts do not acknowledge the similarities of the "substantive provisions" of the ADA and Title VII); *infra* Part III.B.

93. No. 12-2788-CM, 2013 WL 5819703 (D. Kan. Oct. 29, 2013).

94. *Id.* at *3.

95. *Id.* *See also* *Ransom v. U.S. Postal Serv.*, 170 F. App'x 525, 527 (10th Cir. 2006) (holding that a plaintiff must exhaust EEOC administrative remedies before bringing a Title VII claim).

96. *Yousif*, 2013 WL 5819703, at *3.

97. *El v. Max Daetwyler Corp.*, No. 3:09CV415, 2011 WL 1769805, at *6 (W.D.N.C. May 9, 2011) *aff'd*, 451 F. App'x 257 (4th Cir. 2011).

98. No. 3:09CV415, 2011 WL 1769805 (W.D.N.C. May 9, 2011) *aff'd*, 451 F. App'x 257 (4th Cir. 2011).

99. *Id.* at *6. *See also infra* Part V.

Fourth Circuit, found the court's reasoning unpersuasive and declined to follow *El*.¹⁰⁰

Butler v. Potter is distinguishable from other perceived-as cases because the employer had actual knowledge that Butler was not a member of a protected class.¹⁰¹ Butler himself told his employer that he was "not of Arab, Indian, or Middle Eastern descent" when he was asked about the origin of his "prominent nose."¹⁰² Thus, *Butler* should not be persuasive because his employer had actual knowledge that Butler was not protected when Butler told him that he was not Arab or Middle Eastern.¹⁰³ Once Butler told his employer, the employer ceased to perceive him as such. Thus, the defendant had actual knowledge rather than a mistaken perception or an assumption, unlike many succeeding perceived-as cases.¹⁰⁴ It may be significant to note that *Butler* does not cite to *Perkins* or any other cases that come to the opposite conclusion, for persuasive authority.¹⁰⁵

III. PERCEIVED-AS CLAIMS UNDER EEOC GUIDANCE & ADA ANALYSIS

The statutory language of Title VII is silent on whether perceived-as claims are protected. However, the EEOC recognizes perceived-as discrimination claims under Title VII.¹⁰⁶ The EEOC is responsible for promulgating regulations and guidelines under Title VII, in addition to playing an influential role in employment discrimination claims and litigation.¹⁰⁷ Another federal antidiscrimination statute, the ADA, is

100. Although the Fourth Circuit affirmed *El*, it was an unpublished opinion and therefore not controlling. *See Arsham v. Mayor & City Council of Balt.*, 85 F. Supp. 3d 841, 849 (D. Md. 2015) (explaining that "[u]npublished opinions are not binding precedent") (citations omitted). *See also infra* notes 113–116 and accompanying text.

101. *Butler v. Potter*, 345 F. Supp. 2d 844, 850 (E.D. Tenn. 2004).

102. *Id.*

103. *Id.*

104. *See* Part IV.B.2.

105. *Butler*, 345 F. Supp. 2d at 850 (rationalizing that "[n]either party has cited any controlling authority which would permit a claim for perceived race or national origin discrimination and this Court is unaware of any such precedent").

106. *See supra* note 47 and accompanying text.

107. The agency plays an important role in employment discrimination litigation, as plaintiffs are first required to go through the agency's investigation and settlement procedures before a Title VII claim may be brought. The EEOC may also bring a claim on behalf of the government against the employer. *See* 42 U.S.C. § 2000e-4; *Authority and Role*, EEOC, <http://eeoc.gov/eeoc>

similar in purpose to Title VII and recognizes perceived-as discrimination claims. The EEOC's interpretations and the ADA's existing jurisprudence may serve as legal guidance for proceeding with perceived-as discrimination claims under Title VII.

A. *No Doubt: The EEOC's Interpretation of Title VII is Entitled to Deference*

Analysis of the EEOC definitions of protected classes may be an essential step in determining the scope of perceived-as discrimination under Title VII.¹⁰⁸ The EEOC guidelines and regulations should be given deference for perceived-as claims because Title VII does not provide definitions for race, national origin and color.¹⁰⁹ The EEOC defines religion, color, race and national origin broadly.¹¹⁰ An EEOC regulation may be interpreted as including perceived-as claims.¹¹¹ Further, the EEOC guidelines expressly provide that perceived-as discrimination is prohibited under Title VII.¹¹²

Ashram v. City Council of Baltimore deferred to the EEOC's policy guidelines and regulations while recognizing a perceived-as national origin discrimination claim.¹¹³ The EEOC guidelines explicitly discuss "perception discrimination" claims under Title VII.¹¹⁴ The Guidelines state that Title VII prohibits "harassing or otherwise discriminating because of the *perception or belief* that a person is a member of a particular racial, national origin, or religious group whether or not that perception is correct."¹¹⁵ *Arsham* explained that recognizing perceived-as claims under Title VII is a "long standing interpretation" and thus, EEOC's interpretation should be given deference.¹¹⁶

The EEOC guidelines further explain that if an employer fails to hire a Hispanic person because the employer mistakenly thought he or

/index.cfm [https://perma.cc/W9FV-VCDQ] (last visited Feb. 29, 2016) (both explaining the duties of the EEOC under Title VII).

108. *Arsham v. Mayor & City Council of Balt.*, 85 F. Supp. 3d 841, 846 (D. Md. 2015).

109. 42 U.S.C. § 2000e-4.

110. *See supra* Part I.A.

111. *See infra* Part III.A.

112. *Id.*

113. *Arsham*, 85 F. Supp. at 846.

114. *Employment Discrimination Based on Religion, Ethnicity, or Country of Origin*, EEOC, http://www.eeoc.gov/laws/types/fs-relig_ethnic.cfm [https://perma.cc/6KNA-XMZQ] (last visited Mar. 14, 2016).

115. *Id.* (emphasis added).

116. *Id.*

she was Pakistani, the employer is still liable under Title VII.¹¹⁷ Another example of unlawful discrimination in the EEOC guidelines is a Sikh man who suffered adverse employment actions because he was mistakenly perceived-as Muslim because of his turban.¹¹⁸

Scholars and courts have argued that the EEOC guidelines should be given deference when interpreting perceived-as claims because they are persuasive and address gaps left by the statutory language.¹¹⁹ The EEOC guidelines are “entitled to respect . . . but only to the extent that those interpretations have the ‘power to persuade.’”¹²⁰ *Yousif v. Landers* held that the EEOC guidelines for perceived-as claims are not persuasive because of the “explicit language” of Title VII and “clear case law” pointing to the opposite reasoning.¹²¹ *Yousif’s* reason for disregarding the EEOC’s interpretation are unpersuasive because Title VII also lacks “explicit language” defining other categories such as national origin, race, or color; categories with a history of courts hearing perceived-as claims based on them.¹²² In addition, describing perceived-as claims as having been rejected by “clear case law” is at best an overstatement when one considers the number of district courts that have recognized such claims.¹²³

Although the EEOC guidelines do not constitute binding authority, they are persuasive guidance for recognizing perceived-as claims under Title VII. Specifically, the EEOC’s definition on national origin discrimination may be interpreted as covering perceived-as claims.¹²⁴ 29 C.F.R. § 1606.1 defines national origin discrimination as:

117. *Id.*

118. *Id.*

119. See Dallan F. Flake, *Religious Discrimination Based on Employer Misperception*, 2016 WIS. L. REV. 87, 106 (2016) (“The EEOC’s position on misperception discrimination is critical because, although nonbinding, courts often defer to the Commission on matters of Title VII interpretation.”); see also *Espinoza v. Farrah Manufacturing*, 414 U.S. 86, 94 (1973) (explaining that the EEOC is entitled to deference).

120. *Christensen v. Harris County*, 529 U.S. 576, 585 (holding that agency guidelines do not get as much deference as official agency rules because they are not subject to the notice and comment process). *But see Arsham v. Mayor & City Council of Balt.*, 85 F. Supp. 3d 841, 847 (D. Md. 2015) (“EEOC’s guidelines were adopted after promulgation of proposed, revised guidelines and receipt and incorporation of public comments.”).

121. *Yousif v. Landers McClarty Olathe KS, LLC*, 2013 WL 5819703, at *4 (D. Kan. Oct. 29, 2013).

122. See *supra* Part III.A.

123. See *supra* Part I.B.1.

124. See *supra* note 114 and accompanying text.

Including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a *national origin group*.¹²⁵

This definition may be interpreted to protect individuals who are discriminated against because of a stereotype of a national origin, even if the stereotype does not match their actual identity.¹²⁶ It is evident that the EEOC interprets § 1606.1 as protecting perceived-as claims under Title VII because of its subsequent clarifying guidelines.¹²⁷ Further, courts that recognize perceived-as claims cite to the EEOC guidelines and regulations for this proposition.¹²⁸

The EEOC has “a body of experience and informed judgment [of the pervasiveness and harm of employment discrimination] which courts and litigants may properly [defer to] for guidance.”¹²⁹ *Ashram* deferred to the EEOC's guidelines because the guidelines were revised after a public notice-and-comment opportunity, which “evidence[s] the thoroughness of EEOC's consideration.”¹³⁰

The EEOC received 46,800 claims of employment discrimination based on color, religion, national origin, and race in 2015.¹³¹ This expertise and exposure may demonstrate EEOC's awareness of Title VII's intent: to prohibit the unfavorable, discriminatory treatment an individual endured because of prejudiced behavior by their employer.¹³²

125. 29 C.F.R. § 1606.1 (2015). I emphasized “a national origin” in the EEOC definition to demonstrate that the discrimination may be based on any national origin characteristics that the plaintiff is believed to possess, regardless of whether that belief is mistaken.

126. *Arsham v. Mayor & City Council of Balt.*, 85 F. Supp. 3d 841, 846 (D. Md. 2015).

127. *Employment Discrimination*, *supra* note 114.

128. *Arsham*, 85 F. Supp. 3d at 846; *LaRocca v. Precision Motorcars, Inc.*, 45 F. Supp. 2d 762, 769 (D. Neb. 1999); *EEOC v. WC&M Enterprises, Inc.*, 496 F.3d 393, 401 (5th Cir. 2007); *Perkins v. Lake Cty. Dep't of Util.*, 860 F. Supp 1262, 1272 (N.D. Ohio 1994).

129. *Arsham*, 85 F. Supp. 3d at 847 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 165 (1944)).

130. *Id.* at 847.

131. *Charge Statistics FY 1997 Through FY 2015*, EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> [<https://perma.cc/FB5U-8P94>] (last visited Mar. 14, 2016).

132. *See Arsham*, 85 F. Supp. 3d at 846 (citing *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 177–79 (2011) (Ginsburg, J., concurring) (“EEOC's statements in its Compliance Manual merit judicial deference as to interpretation of language in Title VII.”)); *see also* Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *FORDHAM L. REV.* 1937, 1952 (explaining that through the 1972 amendment, Congress gave

Additionally, courts have recognized and cited to § 1606.1, demonstrating approval, or at least acquiescence to the EEOC's interpretation of national origin discrimination.¹³³

B. Striking Similarity: Title VII Compared to the ADA

The ADA is a federal statute, similar to Title VII in language and analysis, that prohibits employment discrimination based on disability.¹³⁴ ADA language, legislative history, and case law may be helpful methods in determining how to evaluate perceived-as claims under Title VII.

The ADA, as amended, defines disability as: “(A) a physical or mental impairment that substantially limits one or more major life activities of [an] individual; (B) a record of such an impairment; or (C) being *regarded as* having such an impairment.”¹³⁵ An individual is protected if they fit into this “qualified individual with a disability” definition.¹³⁶ The “regarded as” definition under the ADA protects individuals who are perceived to have a disability and are discriminated against based on that perception.¹³⁷

more responsibility to the EEOC, citing to the complexity of employment discrimination law); *supra* notes 114–115 and accompanying text.

133. *See Arsham*, 85 F. Supp. 3d at 846; *Eriksen v. Allied Waste Sys., Inc.*, No. 06-13549, 2007 WL 1003851, at *6 (E.D. Mich. Apr. 2, 2007) (using EEOC guidelines to explain that “proof of national origin discrimination is not based on the actual national origin of the plaintiff, but rather on the perceived characteristics of the plaintiff leading the alleged discriminator to treat the plaintiff differently”); *see also* Williams, *supra* note 38, at 372 (arguing that “[t]here is danger in assuming that the Uddin, Butler, Lewis and Berrios courts considered the EEOC’s guidance unpersuasive where the courts remain[ed] utterly silent in that regard”); *supra* note 113, 124 and accompanying text.

134. 42 U.S.C. § 12101 (2012). The ADA was lauded as the “emancipation proclamation” for over 40 million Americans with disabilities. Edmund Newton, *Disabled: The Battle Goes On*, L.A. TIMES (Aug. 16, 1990), http://articles.latimes.com/1990-08-16/news/vw-1210_1_civil-right [<https://perma.cc/TZY4-FPX4>]. *See also infra* notes 142–148. *See generally* Craig Robert Senn, *Perception Over Reality: Extending the ADA’s Concept of “Regarded As” Protection under Federal Employment Discrimination Law*, 36 FLA. ST. U. L. REV. 827 (2009) (arguing that the “regarded as” prong should extend to Title VII and the ADEA claims).

135. 42 U.S.C. § 12102(2) (2012) (emphasis added).

136. *See id.*

137. *Id.*

The “regarded as” prong under the ADA may be thought of as protecting two distinct classes of individuals.¹³⁸ First, the “regarded as” definition protects those who may have a non-limiting impairment that would otherwise not fit the definition of disability.¹³⁹ Second, individuals may bring a disability discrimination claim if they do not have any impairment, yet are regarded as such.¹⁴⁰ Individuals “regarded as” having disabilities are protected under the ADA because the discrimination “substantially limit[s] that person’s ability to work . . . because of the prejudiced attitudes or the ignorance of others.”¹⁴¹

The fundamental purpose of Title VII and the ADA are the same: to protect individuals from invidious discrimination in the workplace because of how they are perceived by their employers.¹⁴² The history of both statutes demonstrates a “striking similarity . . . as to terminology and concerns regarding erroneous perception-based or stereotype-based discrimination.”¹⁴³ For example, there are common terms used throughout the legislative histories of both the ADA and Title VII including

138. Dale Larson, *Unconsciously Regarded as Disabled: Implicit Bias and the Regarded-As Prong of the Americans With Disabilities Act*, 56 U.C.L.A. L. REV. 451, 485 (2009).

139. 42 U.S.C. § 12102(2) (2012). *See also* EEOC v. Resources for Human Dev., Inc., 827 F. Supp. 2d 688 (E.D. La. 2011) (ADA protects against discrimination based on obesity, because the Plaintiff’s obesity was regarded as having other substantial impairments that in fact, did not exist); *Mendoza v. City of Palacios*, 962 F. Supp. 2d 868, 873 (S.D. Tex. 2013) (ADA prohibits discrimination based on an employee being regarded as having high blood pressure); *Scott v. Presbyterian Hosp.*, No. 3:11CV383, 2012 WL 4846753, at *2 (W.D.N.C. Oct. 11, 2012) (holding “regarded as” ADA protects against discrimination for past drug abuse); Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1493–97 (explaining impairments which would now be covered under the ADA including cancer, diabetes, and learning disabilities).

140. 42 U.S.C. § 12102(2)(c) (2012); Larson, *supra* note 138, at 485.

141. *Nassau County v. Arline*, 480 U.S. 273, 278–85 (1987). Although the court applied this principle to Section 504, this is a milestone case for federal employment discrimination statutes because this is one of the first cases that focuses on the discriminatory treatment of the plaintiff, rather than the identity of the plaintiff. *See* Larson, *supra* note 138, at 458–59 (“Again, the focus here is on the actions—more specifically, on the ‘reflexive reactions’—of the employer when determining whether an employee is [covered].”). *See infra* Part V.

142. 42 U.S.C. § 2000e & § 12101 (2012). *See also* Craig Robert Senn, *Perception Over Reality: Extending the ADA’s Concept of “Regarded As” Protection under Federal Employment Discrimination Law*, 36 FLA. ST. U. L. REV. 827, 854–55 (2009) (arguing that “regarded as” analysis under the ADA should be applied to Title VII and the ADEA).

143. *See* Senn, *supra* note 142, at 854.

“assumption,” “view,” “stereotype,” and “belief.”¹⁴⁴ Congress compared Title VII to the ADA during the Title VII 1991 amendment hearings. Congress explained that discrimination based on race, sex, national origin, religion, or disability “has no place in employment decisions.”¹⁴⁵ This legislative history demonstrates that the purpose and intent of Title VII and the ADA are intertwined, and thus may be probative when comparing the two statutes.

The analysis of ADA claims is not which impairment should qualify as a disability, but rather the “substantive questions of discrimination” that the individual experienced.¹⁴⁶ The ADA focuses on “the external actions of the employer” and the 2008 amendment reinstated that “discrimination by an employer *is in itself* debilitating.”¹⁴⁷ Scholars have noted that the ADA and Title VII share an “identical congressional and judicial philosophy of imposing liability upon employers for erroneous perception-based or stereotype-based discrimination.”¹⁴⁸ The “regarded as” prong prohibits discrimination based on “myths, fears, and stereotypes associated with disability.”¹⁴⁹ Similarly, Title VII prohibits discrimination based on stereotypes or characteristics associated with a particular protected class.¹⁵⁰

144. *Id.*

145. H.R. REP. NO. 102-40(I), at 14 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549, 552 (Comm. on Education and Labor). *See also* Senn, *supra* note 142, at 856.

146. Hoffman, *supra* note 139, at 1500 (“The ADAAA will shift the analysis away from the disability question to more substantive questions of discrimination and spare plaintiffs the indignity of having their cases dismissed because courts do not deem them disabled enough to merit legal protection.”).

147. Larson, *supra* note 138, at 467 (emphasis added).

148. Senn, *supra* note 142, at 854 (“When enacting the ADA . . . Congress repeatedly referred to concerns about combating ‘myths, fears and stereotypes,’ ‘generalizations,’ ‘presumptions,’ ‘prejudging,’ ‘preconceived and . . . erroneous judgment . . . based on ‘labeling,’ ‘negative attitudes,’ ‘misconceptions,’ ‘unfounded, outmoded stereotypes and perceptions,’ ‘false presumptions, . . . misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies,’ and ‘stereotypical assumptions.’”). *See also* Greene, *supra* note 50, at 116–17 (explaining that “some courts have simply dismissed the fact that employers’ subjective perceptions, related animus, stigmatization, are the impetuses for resulting [discrimination]”); Williams, *supra* note 38, at 371 (“Allowing claims of discrimination rooted in an employer’s misperception is consistent with both the purpose and the logic of Title VII.”); Flake, *supra* note 119, at 106 (explaining the EEOC’s position that misperception discrimination constitutes discrimination under Title VII).

149. H.R. REP. NO. 101-485, pt. 3 at 30 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 453.

150. *See supra* notes 124–128 and accompanying text. *See also* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding discrimination based on gender

Courts that require an actuality requirement reason that Title VII does not cover perceived-as claims because Congress demonstrated that it is aware, through the ADA, “that it knows how to enact legislation that protects persons who are wrongly perceived to be in a protected class.”¹⁵¹ It follows that Congress intentionally excluded “regarded as” language for Title VII, and thus “the explicit language in Title VII . . . stand[s] for the opposite proposition [of including perceived-as claims].”¹⁵²

However, unlike the ADA, Title VII language is ambiguous on who it protects.¹⁵³ Although there is no explicit language for perceived-as discrimination, there are also no explicit definitions for any of the protected classes that Title VII covers.¹⁵⁴ Conversely, the ADA defines a clear class of individuals who are protected under the statute.¹⁵⁵ Title VII is also unclear on perceived-as coverage because it does not specify whether the prohibited religious discrimination is merely “because of”

stereotypes to be covered under Title VII). This Note does not discuss the potential for perceived-as sex discrimination claims. Such analysis may become necessary since as discrimination claims based on sexual orientation or gender identity arise. *See, e.g.,* *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (holding that Title VII covers discrimination for gender non-conforming behavior); *see also* Hoffman, *supra* note 139, at 1526–28 (explaining the recent advancements in transgender cases under Title VII). *See generally* Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 95–102 (2008) (analyzing transgender sex-stereotyping claims).

151. *Yousif v. Landers McClarty Olathe KS, LLC*, 2013 WL 5819703, at *4 (D. Kan. Oct. 29, 2013). Other courts that do not recognize perceived-as claims under Title VII used the same reasoning. *See* *El v. Max Daetwyler Corp.*, 2011 WL 1769805, at *7 (W.D. N.C. May 9, 2011) (“While a perception that a person is suffering from a disability is actionable under the Americans with Disabilities Act, it does not appear that Title VII recognizes such a claim.”); *Lewis v. North General Hosp.*, 502 F. Supp. 2d 390, 401 (S.D.N.Y.2007) (“[T]he protections of Title VII do not extend to persons who are merely “perceived” to belong to a protected class.”); *Burrage v. FedEx Freight, Inc.*, 2012 WL 1068794, at *9 (N.D. Ohio Mar. 29, 2012) (“It is true that Title VII protects only those who are actually in a protected class, and not those who are perceived to be in a protected class.”); *Butler v. Potter*, 345 F. Supp. 2d 844, 850 (E.D. Tenn. 2004) (“[Congress] knows how to enact legislation that protects persons who are wrongly perceived to be in a protected class.”).

152. *Yousif*, 2013 WL 5819703, at *4.

153. *Williams*, *supra* note 38, at 369 (explaining that since Title VII is ambiguous on its face on whether perceived as claims are prohibited, the next step to determine this answer is to go through the “purpose and logic” of the statute.).

154. *See supra* Part I.

155. *See supra* notes 135–137 and accompanying text.

a religion or “because of” the plaintiff’s actual religion.¹⁵⁶ Since there is ambiguity in Title VII that does not exist in the ADA, statutory language alone may be insufficient for determining whether perceived-as discrimination claims may be brought.¹⁵⁷

Although it may be argued by excluding “perceived-as” language was intentional, a strict textualist reading of Title VII may ignore broader Congressional objectives. Interpreting Title VII narrowly to exclude perceived-as claims also ignores the “duty of the courts” to ensure the protection under Title VII and that Congressional intent, “is not hampered by a combination of strict construction of the statute and a battle with semantics.”¹⁵⁸ Thus, it is vital for courts and litigants to also focus on the broader purpose of eradicating substantive workplace discrimination.

Moreover, sociological views of race and identity have changed since the most recent amendment of Title VII,¹⁵⁹ just like current views of disability changed from the enactment to the amendment of the ADA.¹⁶⁰ It is possible that Congress is unaware of the actuality requirement developed by some courts to narrow Title VII’s scope.¹⁶¹ To avoid

156. See Senn, *supra* note 134 at 860. See also EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032 (2015) (holding that the “because of” language does not require a plaintiff to prove the defendant’s actual knowledge); *infra* notes 235–241 and accompanying text.

157. See Williams, *supra* note 38, at 370 (explaining that “if the statute is ambiguous, the statute’s meaning is determined based on broader arguments of purpose and logic”) (citing Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)).

158. Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970). See Greene, *supra* note 50, at 122 (explaining that the “court’s ultimate denial . . . in misperception discrimination cases in no way constitutes an embrace of this judicial charge to interpret broadly Title VII in furtherance of the statute’s goals and meaning so that Title VII ‘works’”).

159. See *infra* Part IV.A.1.

160. Darlene D. Unger, *Employer’s Attitudes Towards Persons with Disabilities in the Workforce: Myths or Realities?*, 17 FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISABILITIES 1 (2002) (noting a societal trend of perceiving disability from a medical model to the “present emphasis on capabilities, choice, and workplace supports in maximizing the work potential of people with disabilities”); Cecilia Capuzzi Simon, *Disability Studies: A New Normal*, N.Y. TIMES (Nov. 1, 2013), <http://www.nytimes.com/2013/11/03/education/edlife/disability-studies-a-new-normal.html> [<https://perma.cc/CVW3-52XV>] (explaining that terminology and acceptance of disability is changing, partially because of the ADA, “that foreboding forecast is driving growth in disability studies, a field that didn’t even exist 20 years ago”).

161. See *infra* note 175 and accompanying text. Unlike the ADA, there are no Supreme Court cases demonstrating a need to amend Title VII in order to proscribe regarded-as discrimination. See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, sec. 2(a)(4) (2008) (the purpose of the

barring more valid employment discrimination claims until an amendment, Title VII should continue to be interpreted to prohibit perceived-as discrimination.¹⁶²

IV. DECEPTIVELY COMPLEX: WHY DISCRIMINATION BASED
ON APPEARANCE AND BIAS SHOULD BE PROTECTED
UNDER TITLE VII.

Employment “[d]iscrimination stems from a reliance on immaterial outward appearances that stereotype an individual with imagined, usually undesirable, characteristics thought to be common to members of the group that shares these superficial traits.”¹⁶³ This bias and discrimination based on appearance may cause a hostile work environment, regardless of if an individual is a member of the protected classes that is known for these stereotypical traits and appearance. For various individuals, it may be difficult for others, and even the individual herself, to define and prove their identity to a protected class. Recognizing perceived-as claims will refocus Title VII analysis from a rigid construction of identity to the actual, substantive discrimination faced in the workplace.¹⁶⁴

A. *The Difficulty of Defining and Proving Identity of a Protected Class*

Discrimination based on an individual’s appearance characteristics should be proscribed, regardless of whether those characteristics correctly or stereotypically correlate with a protected class under Title VII.

Protected classes under Title VII are generally based on specific immutable characteristics.¹⁶⁵ Traditionally, immutable characteristics are thought of as “accidents of birth,” such as skin color, race, face shape, some physical disabilities, gender, and any other physical trait that cannot be easily changed.¹⁶⁶ However, some courts have rejected

amendment is to respond to Supreme Court cases that “narrowed the broad scope of protection intended to be afforded by the ADA”); *see also* Greene, *supra* note 50.

162. *See supra* note 44 and accompanying text.

163. *Bennun v. Rutgers State Univ.*, 941 F.2d 154, 173 (3d Cir. 1991) (holding that Plaintiff was protected under Title VII, although he was Argentine and not ethnically Hispanic).

164. *See* Greene, *supra* note 50, at 130 (explaining the actuality requirement).

165. *Id.* at 120 (“[T]he legal construction of immutability and the protected class approach is entrenched in antidiscrimination law.”).

166. Hoffman, *supra* note 139, at 1511 (listing examples of immutable characteristics such as gender, mental disability, or age). Although immutable characteristics may include an unchangeable trait, visible or not, this Note focuses only on objectively noticeable traits. There are immutable, physical

this definition in favor of a more inclusive definition of immutable characteristics, as traits that are “beyond the power of an individual to change” or a trait that is so “fundamental to identity or conscious[ness] that it is effectively unalterable.”¹⁶⁷ Discrimination based on immutable traits that lead employers to mistakenly perceive an individual as a certain race, ethnicity, or religion should be unlawful under Title VII.

1. What is Identity? The Social Construct of Race, Color, Religion, and National Origin

Perceived-as discrimination should be prohibited under Title VII because it encompasses the real-life difficulty of defining and explaining identities such as race, religion, national origin, and color.¹⁶⁸ An actuality requirement ignores the well-accepted theory of identity as a social construct.¹⁶⁹

Social construction theories acknowledge that genetics alone do not determine racial or ethnic identity. Rather, race and other protected identities are socially constructed from stereotypes, bias, experience, and presentment.¹⁷⁰ If the definition of race were merely the color of skin, the origin of the individual, or a genetic formula, it would be superfluous for Title VII to prohibit discrimination based on race and color.¹⁷¹ *Perkins v. Lake County* noted that it originally assumed the question of whether Perkins was Native American would have a “simple . . . straightforward answer.”¹⁷² Instead, *Perkins* concluded that it is much too difficult to “categoriz[e] individuals with varied and/or

traits that are not usually associated with discrimination, such as height, eye color, blood type, and lefthandedness. These traits are not relevant for Title VII analysis because they do not typically carry prejudice or stereotypes that employers use to discriminate in the workplace. *Id.* at 1522–37.

167. *Id.* at 1517. Courts have always struggled with distinguishing between immutable characteristics and what is a personal choice. *Id.* at 1524. See also, Pattison et al., *The Squiggly Line: When Should Individual Choices be Protected from Employment Discrimination?*, 24 S. L.J. 29, 29 (2014) (explaining the public policy issues of protecting traits that appear to be more of a personal choice).

168. *Perkins v. Lake Cty. Dep’t of Util.*, 860 F. Supp. 1262, 1271 (N.D. Ohio 1994).

169. Alicia Fedelina Chávez & Florence Guido-DiBrito, *Racial and Ethnic Identity and Development*, 84 NEW DIRECTIONS FOR ADULT AND CONTINUING EDUCATION 39, 40 (1999).

170. *Id.* (“[S]ocial construction . . . ‘refers to a sense of group or collective identity based on one’s perception that he or she shares a common heritage with a particular racial group.’” (quoting Janet E. Helms, *Introduction: Review of Racial Identity Terminology*, in BLACK, WHITE RACIAL IDENTITY: THEORY, RESEARCH, AND PRACTICE 3 (Janet E. Helms, ed., 1990))).

171. See 42 U.S.C. § 2000e-2 (2012).

172. *Perkins*, 860 F. Supp. at 1271 (N.D. Ohio 1994).

unclear ancestry within a particular racial grouping,” especially because Perkins and his family self-identified, and objectively appeared, as Native American.¹⁷³ Race and ethnicity are “hierarchical system[s]” that classify “based on four or five visible characteristics—such as skin color and hair texture—in order to [form bias, and] discriminate.”¹⁷⁴ Race and ethnicity may be framed as “biological, morphological *concepts* and discrimination as a reaction to a set of biologically fixed *traits*.”¹⁷⁵

While identity as a social construct may be widespread in “literary and theoretical”¹⁷⁶ spheres, courts may still look at race and ethnicity as static and fixed identities that fit neatly into particular classifications.¹⁷⁷ It is for this complex reason that, “government or courts [should not be] in the business of ‘certifying’ bloodlines and races[.]”¹⁷⁸ Thus, distinguishing and defining race, ethnicity, and color is such a difficult, malleable, and fundamentally individualized concept that courts should refrain from enacting rigid and binary definitions.¹⁷⁹

Certain immutable characteristics may trigger schemas that cause an observer to associate that visible trait with a certain race, ethnicity, or religion.¹⁸⁰ Because everyone, consciously or not, associates

173. *Id.* (explaining that “the issue of membership in a given racial classification is deceptively complex . . . by the amorphous definition of the term ‘race’”).

174. Tia Ghose, *The Science of Race: Why Rachel Dolezal Can’t Choose to Be Black*, LIVE SCIENCE (June 17, 2015), <http://www.livescience.com/51245-what-is-ethnicity-racial-identity.html> [<https://perma.cc/TJ77-J3W5>].

175. Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1134 (2004) (emphasis added). Race as social construct is a relatively new concept. See Chávez & Guido-DiBrito, *supra* note 169, at 41 (explaining that the accepted identity theories and models “trace their roots” to work done in the 1960–80s); see Priscilla Frank, *‘Black’ Artist Dresses Up As Her ‘White’ Ancestors, Revealing The Complexity Of Multiracial Identity*, HUFFINGTON POST (April 14, 2015), http://www.huffingtonpost.com/2015/04/14/stacey-tyrell-backra-bluid_n_7057086.html [<https://perma.cc/3U8L-A65C>] (interviewing artist Stacey Tyrell, of mixed-race descent, who creates works that demonstrate complexity of race explains that “the binaries that [categories create] do not create space for the nuanced relationship that lies between them”).

176. Chávez & Guido-DiBrito, *supra* note 169, at 40.

177. Greene, *supra* note 50, at 135 (“[A] lawyer or judge might outright disbelieve that a plaintiff’s race could be mistaken, based on her own preset conceptualizations of race and sex as fixed, indisputable constructs.”).

178. *Ortiz v. Bank of America*, 547 F. Supp. 550, 559 n.16 (E.D. Cal. 1982).

179. See *id.* at 559–60 (emphasizing the court’s desire to not define national origin).

180. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1201–02 (1995). See also Chávez & Guido-DiBrito, *supra* note 169, at 40.

characteristics with a certain identity, it is “essentially impossible for any one person to escape being perceived” as a member of one, or many, various groups.¹⁸¹ When an individual experiences perception discrimination, the bias from the observation is present, whether or not the association was wrongful. Since individuals cannot alter how their immutable traits are observed, they should be protected if their employer acts adversely based on their observations, whether the employer was mistaken about their identity or not.

For example, hair and skin color are two objective traits that may lead an observer to conclude an individual is a member of a certain protected class. The plaintiff in *Burrage v. Fed-Ex* argued that he was perceived-as Mexican because of his mixed-race skin color.¹⁸² The court responded that the evidence of discrimination was not of “color-related character or purpose,” so Burrage could not prove color discrimination.¹⁸³ Burrage was required to produce evidence that his skin, rather than his overall appearance, caused the discriminatory comments.¹⁸⁴ A flaw with *Burrage’s* logic is that one stray comment based on his skin color would “magically transform non-cognizable claims” in to discrimination prohibited under Title VII.¹⁸⁵ For example, what if the plaintiff later on discovered that he “was actually of Mexican descent?”¹⁸⁶ *Burrage* also ignores the inherent role that skin color plays in bias and assumption of identity.¹⁸⁷ Anne Sears lost her Title VII claim at summary judgment because she “merely allege[d] that [she has] curly

181. Greene, *supra* note 50, at 128.

182. *Burrage v. FedEx Freight, Inc.*, No. 4:10CV2755, 2012 WL 1068794, at *4 (N.D. Ohio Mar. 29, 2012) (Burrage alleges in support that “[o]ver the past three years he was called, in a derogatory and pervasive manner, the term ‘Mexican’ by virtue of his brown skin and black hair”).

183. *Id.* at *5–7.

184. *Id.* at *8.

185. Greene, *supra* note 50, at 113.

186. *Id.* at 112. *But see* Afshar v. Pinkerton Acad., No. Civ. 03-137-JD, 2004 WL 1969873, at *3 n.2 (D. N.H. Sept. 7, 2004) (noting Afshar’s religious misperception claim, but concluding that “[f]or purposes of summary judgment, that part of Afshar’s claim is indistinguishable from his claim of national origin discrimination and is not discussed separately”).

187. Skin color has always played an (arguably obvious) role in racial identity and discrimination. *Id.* *See also* Uddin v. Universal Avionics Sys. Corp., No. 1:05-CV-1115-TWT, 2006 WL 1835291, at *1 (N.D. Ga. 2006) (holding that plaintiff “with a dark complexion and a beard” has a national origin claim); LaRocca v. Precision Motorcars, Inc., 45 F.Supp.2d 762, 770 (D. Neb. 1999) (explaining that “the most important characteristic of the plaintiff’s Italian descent is his dark brown skin”); Perkins v. Lake Cty. Dep’t of Util., 860 F. Supp. 1262, 1273 (N.D. Ohio 1994) (holding that “[i]t is the skin color leading to the perception that the person is ‘different’ from the white majority that leads to discrimination”).

hair and has been asked numerous times what her ethnic background was.”¹⁸⁸ However, by dismissing her claim at the outset, *Sears* disregarded the importance of hairstyle and texture in race and ethnicity classification, bias, and discrimination.¹⁸⁹

Individuals may attempt to identify and present themselves as belonging to a certain group, although transracial theories of identity have raised controversy and concern in sociological and racial identity politics.¹⁹⁰ One reason why transracial theories are controversial is because it may be argued that those who present themselves as belonging to a certain race appropriate the culture, and ignore the historical barriers that the race has and is continuing to overcome.¹⁹¹ A recent example of a white woman identifying as black has brought up national debates on transracial theories, and why self-proclamation of race is complex and potentially problematic. Rachel Dolezal is an author, a former instructor in African-American Studies, a civil rights activist, and a former president of a local NAACP branch.¹⁹² In 2015, Dolezal resigned from her position with the NAACP and lost her job at the university because she was discovered to be white, unlike the black identity she presented herself as.¹⁹³ After she was revealed to be white,

188. *Sears v. Jo-Ann Stores, Inc.*, No. 3:12-1322, 2014 WL 1665048, at *7 (M.D. Tenn. 2014).

189. *Id.* (The plaintiff alleges that she “has very curly hair and has been asked numerous times what her ethnic back ground was [and that] [o]ne customer described [her] hair as ‘nappy.’”). See Greene, *supra* note 50, at 1365–70 (explaining race as a social construct, particularly the history of hair texture and style as a basis of racism and bias contemporarily).

190. See notes 187–189 and accompanying text.

191. Jelani Cob, *Black Like Her: Rachel Dolezal and Our Lies About Race*, *The New Yorker* (June 15, 2015), <http://www.newyorker.com/news/daily-comment/rachel-dolezal-black-like-her> [<https://perma.cc/W2T9-ACNV>].

192. Jessica Elgot, *Civil Rights Activist Rachel Dolezal Misrepresented Herself as Black, Claim Parents*, *The Guardian* (June 12, 2015), <https://www.theguardian.com/world/2015/jun/12/civil-rights-activist-rachel-dolezal-misrepresented-herself-as-black-claim-parents> [<https://perma.cc/NAT7-FF47>].

193. See Kirk Johnson, Richard Pérez-Peña & John Eligon, *Rachel Dolezal, in Center of Storm, Is Defiant: ‘I Identify as Black,’* *N.Y. TIMES* (June 16, 2015), http://www.nytimes.com/2015/06/17/us/rachel-dolezal-nbc-today-show.html?_r=0 [<https://perma.cc/5P9P-RLWX>]; see also Chris McGreal, *Rachel Dolezal: ‘I Wasn’t Identifying as Black to Upset People. I Was Being Me,’* *THE GUARDIAN* (Dec. 13, 2015), <http://www.theguardian.com/us-news/2015/dec/13/rachel-dolezal-i-wasnt-identifying-as-black-to-upset-people-i-was-being-me> [<https://perma.cc/UVM7-KU73>] (Dolezal’s interview about four months after the discovery of her white race, where she explains her idea of identity as socially constructed, and that she did not intend to deceive others).

she received harsh criticism, and her work in the African-American community was disregarded as disingenuous.¹⁹⁴

There is disagreement on whether her self-presentment was a deceptive act of cultural appropriation, or a “legitimate transracialism” identity that challenges the social construct of race.¹⁹⁵ This deception is more problematic for perceived-as discrimination because most people cannot choose their race or ethnicity, yet Dolezal can “become black” and can “hide her whiteness at any moment if she wants to.”¹⁹⁶ Transracial identity theories provide a troublesome issue for perceived-as claims: although the individual was actually discriminated against, should they still be provided a windfall when the individual themselves deceived the employer?¹⁹⁷ For this reason, it is most likely necessary for a case-by-case analysis of all perceived-as claims, taking into account all evidence of purposeful deception when determining discrimination liability.

Individuals differ on whether religion is immutable, or unchangeable, usually based on their own belief.¹⁹⁸ For example, “[a] secularist might deem religion to be alterable, but it is immutable in the worldview of many devout individuals because it is fundamental to their conscience or identity.”¹⁹⁹ The belief of whether religion is immutable or may be freely changed is “based on [different people’s] world view and identity.”²⁰⁰ Religious identity may evolve or change throughout an individual’s life, but this should not have any bearing on the fundamental or immutable value of religion or religious sincerity.²⁰¹ Although a hijab, a last name, or a necklace with a religious symbol may not be viewed as an immutable characteristic by some, discrimination based on outward appearance or stereotypes may be

194. *Id.*

195. Cob, *supra* note 191.

196. See Ghose, *supra* note 174. Professor David Freud explained that “Dolezal is probably benefiting from her African American identity without having experienced a lifetime of racism, and she can shed her black persona if it becomes inconvenient.” *Id.*

197. This is a complicated and evolving issue in social construct identity theory. For this reason, the “solution” to purposeful deception in Title VII claims is out of the scope of this Note.

198. Hoffman, *supra* note 139, at 1516–17.

199. *Id.* at 1517.

200. *Id.* at 1513.

201. *Id.* at 1516 (“Title VII’s prohibition of religious discrimination makes no distinction between individuals who never altered their religious affiliation and those who have.”).

proven by shifting the focus of Title VII analysis to the employer's belief.²⁰²

2. How to Prove Identity

Considering the difficulty of defining identity, it may be too burdensome for plaintiffs to be required to proffer evidence of their "actual identity" during Title VII litigation. In *Perkins v. Lake County*, the defendant hired an expert witness, and the court concluded that, even after all of the research and resources spent, determining national origin was not that simple.²⁰³ For every perceived-as case, would either party have to hire expert witnesses to go through family history and genealogical makeup?²⁰⁴ Using ancestry or genetic testing may also be an incomplete analysis of race or ethnicity because many other factors and traits play a role in the construct of identity.

In most Title VII cases, proving identity is not an issue because both parties concede that the plaintiff is protected.²⁰⁵ However, difficulty arises when a plaintiff's identity is contested.²⁰⁶ The simplest method to assert national origin is a birth certificate or a parent's birth certificate of their national origin. However, proof by birth certificate leaves a gap for many national origin discrimination claims because Title VII does not require that an individual be directly from a different country or have a direct familial connection to a certain nationality to be covered.²⁰⁷

It may also be difficult to prove religion for a discrimination claim based on identity, rather than a religious accommodation claim.²⁰⁸ An

202. Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, And Why Title VII Should Apply Even If Lakisha and Jamal are White* 7 (UC Davis Legal Studies Research Paper Series., Paper No. 67, 2005) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=870048 [<https://perma.cc/E4SQ-NGUN>] (arguing that the ADA "regarded as" analysis should apply to Title VII claims for proxy discrimination based on a name).

203. *Perkins v. Lake Cty. Dep't of Util.*, 860 F. Supp. 1262, 1273–75 (N.D. Ohio 1994). *See also supra* notes 51–57 and accompanying text.

204. *Id.* at 1269–70.

205. *See Greene, supra* note 50, at 118 ("[A] plaintiff may satisfy an initial prima facie element by demonstrating that she is a member of a protected class, which generally amounts to a simple attestation by the plaintiff of her relevant identity.").

206. *Id.*

207. *See supra* notes 125–133, 150 and accompanying text.

208. *See infra* Part IV.B.2. Although this was a religious accommodation case, *A & F* is distinguishable from other religious accommodation cases because the plaintiff did not seek an accommodation. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015). The need for accommodation was just assumed, so *A & F* could possibly have categorized as discrimination

individual does not have to prove strict compliance with every tenet in the religion to be covered under Title VII.²⁰⁹ For example, the Supreme Court stated the irrelevancy of knowing a Mosque's address, praying five times a day, or even every day, in a religious discrimination claim analysis.²¹⁰

In an analogous example, how would a Jewish person, discriminated against because of their identity, prove that they belong to the Jewish faith? Be able to recite some fundamental prayers? Know the local rabbi? What if an individual had dark, curly hair, a prominent nose, and the last name "Friedman"? All of those characteristics may stereotypically describe a Jewish person. But what if that individual was, in fact, not Jewish?

This same analysis would be relevant for other religious identities because there have always been stereotypes of how members of a certain religion should appear.²¹¹ Particularly in a post 9/11 era, society has, "lumped together" different religions and national origins by the stigmas and stereotypes associated with their appearances.²¹² To further add to the confusion, some religions identify as an ethnicity, as well as a religion.²¹³

based on religious identity, rather than accommodation. *See id.* For a religious accommodation claim to be required, the practice has to be sincere.

209. *See supra* notes 33–38 and accompanying text.

210. *See* EEOC. v. Abercrombie & Fitch Stores, Inc., 798 F. Supp. 2d 1272, 1284 (N.D. Okla. 2011), *rev'd and remanded*, 731 F.3d 1106 (10th Cir. 2013), *rev'd and remanded*, 135 S. Ct. 2028 (2015).

211. *See* Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of the Arab American Identity*, 69 N.Y.U. ANN. SURV. OF AM. L. 29 (2013) (demonstrating the history of conflation of Arab and Muslim identity and how constructed by United States law); Emma Green, *The Trouble with Wearing Turbans in America*, THE ATLANTIC, (Jan. 27, 2015), <http://www.theatlantic.com/politics/archive/2015/01/the-trouble-with-wearing-turbans-in-america/384832/> [<https://perma.cc/Q6T5-EASJ>] ("Although the faith was founded in India and almost all Sikhs are of Indian descent, between 20 and 28 percent of respondents mistakenly labeled images of four differently dressed Sikhs as Middle Eastern.").

212. Simran Jeet Singh, *9/11-era Ignorance of Islam is Infecting the Age of Isis: We Should Know Better*, THE GUARDIAN (Sept. 9, 2014), <http://www.theguardian.com/commentisfree/2014/sep/09/ignorance-islam-isis-hate-crimes> [<https://perma.cc/LWY9-S38A>] ("[Society's] ignorance leads us to lump together people from entirely different parts of the world (South Asia, the Middle East) and people who practice entirely different religions (Islam, Sikhism).").

213. *See, e.g.*, Valeriy Chervyakov et al., *Religion and Ethnicity: Judaism in the Ethnic Consciousness of Contemporary Russian Jews*, 20 ETHNIC AND RACIAL STUDIES 280, 285 (1997) (explaining that Jews in the Soviet Union were considered "member[s] of an ethnic group . . . established exclusively by descent"). Soviet Jews were required to have "Jewish" as their nationality in the Soviet Union's internal passport registration. Because of this focus of

This standard of proving race, national origin, color, or religion “fails to acknowledge” that the stereotypes “an observer uses to assign a racial or ethnic identity . . . are experientially shaped by broader social forces . . . personal encounters with racial, ethnic, and color classification, and the contexts in which such classifications are made.”²¹⁴ Prohibiting perceived-as discrimination limits Title VII analysis to the objective belief and actions of employers, rather than delving into complex analysis of identity.

B. Recognizing Perceived-As Claims Ensures that Employers who Engage in Unlawful Discrimination Will Not Be Shielded From Liability

Interpreting Title VII to prohibit perceived-as discrimination achieves the broader goal of eradicating discrimination in the workplace by focusing on the discriminatory actions of the employer, rather than the complex issue of identity.²¹⁵ Discrimination based on “external observations . . . and . . . categorizations are beyond an individual’s control” and are the “central basis for pervasive, systematic, and purposeful exclusion of individuals . . . in the American workforce.”²¹⁶

1. “Wrong” Discrimination Prohibited under Title VII

Title VII prohibits employers from discriminating against an individual because of their membership to a protected class, sometimes demonstrated from stereotypes based on outward appearance. However, the discrimination does not always correlate with an individual’s actual identity.²¹⁷ Courts should not reward the “erroneous discriminator,” who makes the wrong stereotypical assumption while holding the “accurate discriminator” liable for the same conduct and basis of discrimination.²¹⁸

Judaism as an ethnicity, rather than a religion, “one could be fully Jewish by Soviet lights without having any attachment at all to Judaism.” *Id.* This ethnic identity is also recognized in U.S. law and Title VII. *See* *Sears v. Jo-Ann Stores, Inc.*, No. 3:12-1322, 2014 WL 1665048, at * 7–8 (M.D. Tenn. 2014) (holding that, while not cognizable in this case, individuals may bring a claim for being discriminated against for being an ethnic Jew).

214. *Id.* *See also* Greene, *supra* note 50, at 124.

215. Larson, *supra* note 138, at 468–75 (explaining that implicit bias is a “valuable jurisprudential corrective”); Greene, *supra* note 50, at 129. *See infra* notes 228–230 and accompanying text.

216. Greene, *supra* note 50, at 129.

217. *See supra* Part I.B.

218. Larson, *supra* note 138, at 856. (“The difference between these employers is the accuracy of the perception of protected status—one subset’s employers happened to be ‘right,’ while the other subset’s employers happened to be ‘wrong.’”).

Perceived-as claims may not be uniformly recognized because courts may believe that stereotypes and discrimination based on a misperception are less harmful than discrimination based on an individual's actual identity.²¹⁹ Yet, discrimination based on a wrongful misperception may still create a hostile work environment sufficient to warrant protection under Title VII.²²⁰

The employer in *Burrage v. Fed-Ex* knew of the derogatory name-calling and the hostile work environment that was so severe, that Burrage's work performance was adversely affected.²²¹ Burrage alleged that he experienced discrimination for approximately three years, including offensive acts such as refusing to greet him because of his Mexican perception, yelling "Andale, Andale" and "Arriba" to him, and vulgar graffiti about Mexicans that was directed to him.²²² Nonetheless, while recognizing the presence of discrimination, the court held that Burrage was not entitled to relief because he was not actually Mexican.²²³ This is precisely the type of conduct Title VII was designed to protect against.

Burrage v. Fed-Ex observed that the discrimination Burrage faced was "[an] unfortunate employment of offensive stereotypes of Hispanics," yet failed to allow him to proceed on the merits of his case.²²⁴ Burrage would have been protected by Title VII if his "employer uncovered his mixed-race heritage" and discriminated against him on that basis, rather than the mistaken belief that he was Mexican.²²⁵ This type of outcome is unfaithful to the intent of Title VII; that employers "may be poor anthropologists" should not determine whether a plaintiff's discrimination claim can be heard.²²⁶ It should be irrelevant whether an employer *correctly* stereotyped.²²⁷

219. Greene, *supra* note 50, at 136–37.

220. *See supra* notes 41–48.

221. *Burrage v. FedEx Freight, Inc.*, 4:10CV2755, 2012 WL 1068794, at *2 (N.D. Ohio Mar. 29, 2012)

222. *Id.*

223. *Id.* at *6.

224. *Id.*

225. *See id.* *See also* Greene, *supra* note 50, at 11; *supra* notes 182–187 and accompanying text.

226. *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979) (holding that Mexican identity may qualify as race for § 1981 purposes).

227. *See, e.g., LaRocca v. Precision Motorcars, Inc.*, 45 F. Supp. 2d 762, 770 (D. Neb. 1999) ("The fact that [co-worker] ignorantly used the wrong derogatory ethnic remark toward the plaintiff is inconsequential."); *Wood v. Freeman Decorating Servs., Inc.*, No. 3:08-CV-00375-LRH-RAM, 2010 WL 653764, at *4 (D. Nev. Feb. 19, 2010) ("More importantly, even if Defendant's employees mistakenly believed that Plaintiff was American Indian, Defendant may

Discrimination is not a precise practice, where an employer first determines the exact origin of the disfavored characteristics of an individual, such as their skin color, hair type, or facial structure, and then decides to discriminate based on those identified characteristics.²²⁸ Instead, racial and ethnic bias “occurs when a subject interprets another person’s visible, physical features to correlate with a set of features she identifies with a certain race or ethnic group.”²²⁹ Focusing only on an individual’s “actual identity” for a Title VII claim may disregard the employer’s unlawful action.²³⁰

2. No More Than an Unsubstantiated Suspicion: *EEOC v. A & F*

*EEOC v. Abercrombie & Fitch*²³¹ is a 2015 Title VII case that appeared in front of the Supreme Court, which demonstrates a gradual shift in analysis from a plaintiff’s “actual identity” towards the discriminatory treatment by the employer.²³² Although described as a “really easy” case by Justice Antonin Scalia,²³³ *EEOC v. A & F*’s holding may be probative for the more elusive perceived-as claims.²³⁴

In 2007, Samantha Elauf, a 17-year old, applied for a sales associate position at Abercrombie & Fitch (A & F), a clothing store that describes its brand as “preppy”²³⁵ and representing a “classic east coast collegiate style.”²³⁶ Elauf did not get the position at A & F because she

nonetheless be liable for hostile work environment harassment.”); *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1299 (11th Cir. 2012).

228. *Bennun v. Rutgers State Univ.*, 941 F.2d 154, 173 (3d Cir. 1991).
229. Greene, *supra* note 50, at 126. *See also* Larson, *supra* note 138, at 469–72 (explaining a cognitive bias approach of employment discrimination where an employer’s implicit bias will be used to judge subsequent behavior). This may explain why the EEOC deemed it important to protect stereotypical characteristics of a national origin that may cause implicit bias. *See* 29 C.F.R. § 1601 EEOC. *See also* notes 179–187 and accompanying text.
230. Greene, *supra* note 50, at 110.
231. 135 S. Ct. 2028 (2015).
232. *See generally* Flake, *supra* note 119 (examining religious discrimination).
233. The Editorial Board, *Headscarves Before the Supreme Court*, N.Y. TIMES (June 2, 2015), http://www.nytimes.com/2015/06/03/opinion/head-scarves-before-the-supreme-court.html?ref=topics&_r=0 [<https://perma.cc/4DL5-8CBW>].
234. *See* Flake, *supra* note 119, at 128 (“After [*EEOC v. A & F*], it would be improper for a court to dismiss a religious discrimination claim based on an employer’s misperception of an employee’s religion, when the Supreme Court has declared that an employer’s motive—not its knowledge—determines liability.”).
235. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1111 (10th Cir. 2013), *rev’d and remanded*, 135 S. Ct. 2028 (2015).
236. *See* The Editorial Board, *supra* note 233.

wore a black scarf around her head at the interview.²³⁷ A & F's management assumed she was Muslim and that the company would have to permit an accommodation to its "Look Policy," which forbids sales associates to wear the color black and head coverings.²³⁸

Subsequently, the EEOC brought a Title VII religious discrimination claim against A & F, on behalf of Elauf, and was granted summary judgment on liability.²³⁹ However, on appeal, A & F successfully argued that it had no liability because the management did not have actual knowledge that Elauf was Muslim.²⁴⁰ In June 2015, the Supreme Court reversed the Tenth Circuit's actuality requirement and held that "an applicant need only show that [the] need for an accommodation was a motivating factor in the employer's decision."²⁴¹

EEOC v. A & F held that even if an employer "has no more than an *unsubstantiated suspicion*" that an accommodation would be needed, and refuses to hire based on that suspicion, the employer is liable under Title VII.²⁴² If an employer does not know whether a certain action or objective appearance constitutes a religious practice, the employer may unknowingly still violate Title VII, which may raise fairness concerns for employers.²⁴³

EEOC v. A & F applied the "motivating factor" provision of Title VII to determine A & F's liability.²⁴⁴ This provision prohibits adverse employment action, even if the basis of discrimination was only a motivating factor of the adverse action.²⁴⁵ The "motivating factor" provision

237. *A & F*, 798 F. Supp. at 1277.

238. *Id.* at 1277.

239. *A & F*, 135 S. Ct. 2028, 2031 (2015).

240. *Id.* at 2030.

241. *Id.* at 2032 (emphasis added).

242. *Id.* at 2033 (emphasis added). The Court, however, also noted that the perceived-as question will not be answered because neither party raised it. *See id.* at 2032 n.3 (2015) ("[I]t is arguable that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice.").

243. *See id.* (Alito, J., concurrence). Justice Alito argued in his concurrence that he believed the Court's holding would hold employers unfairly liable for practices that they did not know were religious practices because there is no requirement for knowledge of even the practice. *Id.* The majority responded that although "certainty that the practice exists may make it easier to infer motive . . . [it] is not a necessary condition of liability." *Id.* at 2033.

244. *Id.* *See also* 42 U.S.C. § 2000e-2(m) (2012) ("Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

245. 42 U.S.C. § 2000e-2(m) (2012).

emphasizes the importance of investigating the employer's action, not merely the Plaintiff's actual identity.²⁴⁶ As applied in *A & F*, the "motivating factor" is relevant, whether or not the employer has knowledge of the need for an accommodation.²⁴⁷ This same reasoning should apply to discriminatory actions, whether or not the employer has knowledge of an individual's actual identity.²⁴⁸

V. APPLICATION OF PERCEIVED-AS DISCRIMINATION CLAIMS

Recognizing perceived-as claims under Title VII would eliminate the plaintiff's burden of proving their membership in a protected class.²⁴⁹ However, the same limitations that apply to "actual" discrimination cases under Title VII should also be applicable to perceived-as discrimination claims.²⁵⁰ An employer is liable under Title VII if they had a "reasonable belief that given employee is a member of a protected class."²⁵¹

Perceived-as plaintiffs under Title VII would have the same burden as "regarded as" plaintiffs under the ADA: to prove that their employer mistakenly perceived them to be a member of a protected class.²⁵² For a perceived-as discrimination claim to pass summary judgment, there

246. *Id.*

247. *A & F*, 135 S. Ct. at 2032 ("Title VII relaxes this standard, however, to prohibit even making a protected characteristic a "motivating factor" in an employment decision." (citing 42 U.S.C. § 2000e-2(m) (2012))).

248. *See generally* Flake, *supra* note 119 at 131 ("[*EEOC v. A & F*]'s reach is not limited only to misperception-based religious discrimination. Misperception discrimination based on race, color, sex, and national origin is likewise prohibited.").

249. *See supra* Part IV.

250. If not, there would be risk of overbroad covering of personal choices and identification, which Title VII was not intended to protect. *See Hoffman, supra* note 139, at 1524. *See also* Pattison et al., *supra* note 167, at 30 (explaining that personal preferences are not protected by Title VII).

251. *Perkins v. Lake Cty. Dep't of Util.*, 860 F. Supp 1262, 1277 (N.D. Ohio 1994). *See also* *Bennun v. Rutgers State Univ.*, 941 F.2d 154, 173 (3d Cir. 1991) (explaining that "unlawful discrimination must be based on [the Plaintiff's] objective appearance to others").

252. *McNally v. Aztar Indiana Gaming Co., LLC*, No. 3:12-CV-00063-TWP-WGH, 2014 WL 300433, at *2 (S.D. Ind. Jan. 28, 2014) (holding that there is "no evidence . . . to support" regarded as disability discrimination); *Spurling v. C & M Fine Pack, Inc.*, No. 1:11 CV 39, 2013 WL 655136, at *4 (N.D. Ind. Feb. 21, 2013) (explaining that no regarded as disability discrimination occurred when there was evidence of plaintiff getting safety warnings while falling asleep and one doctors note).

should be either direct evidence of the perception,²⁵³ or some evidence that makes it reasonable to infer that the employer perceived the plaintiff as a member of a protected class.²⁵⁴

For example, if a plaintiff were to claim national origin discrimination based on an accent, the accent should actually be noticeable enough that it is reasonable to infer a perception.²⁵⁵ Similarly, it may not be reasonable to infer perceived-as national origin discrimination based solely on a foreign language skill on an applicant's résumé.²⁵⁶ A perceived-as claim based on name alone would most likely survive summary judgment because name association discrimination questions are "inherently fact-based."²⁵⁷

Another question of fact for perceived-as discrimination could be whether an employer knows a certain practice is religious in nature, such as a scarf or a request to take days off that are widely known to

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253. *Cf.* EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2031 (2015) (explaining that the manager "believed Elauf wore her headscarf because of her faith"); Perkins v. Lake Cty. Dep't of Util., 860 F. Supp. 1262, 1270 (N.D. Ohio 1994) (showing that employers and co-workers agree that Plaintiff "appears to be an American Indian"); Smith v. Specialty Pool Contractors, No. 02:07CV1464, 2008 WL 4410163, at *6 (W.D. Penn. Sept. 24, 2008) ("a reasonable jury could find" that the defendant believed Plaintiff was Jewish, "even though Plaintiff told him otherwise").
254. *See supra* note 253. *See also* Scott v. Presbyterian Hosp., No. 3:11-CV-383, 2012 WL 4846753, at *2 (W.D.N.C. Oct. 11, 2012) (explaining that under the ADA regarded-as prong, "[a]n employee may prove that she was discriminated against because of an actual or perceived impairment either by direct evidence or by the burden-shifting framework of *McDonnell Douglas Corp. v. Green.*"). *See supra* note 11 and accompanying text.
255. Nieves v. Metropolitan Dade Cty., 598 F. Supp. 955, 961 (S.D. Fla. 1984) (noting that, "neither from observing the Plaintiff nor from listening to his speech patterns, mannerisms and pronunciation of the English language was it apparent that Plaintiff was Hispanic").
256. *See* Mohammad v. J.P. Morgan Chase Nat'l Corp. Servs., Inc., 2013 WL 5786016, at *7 (S.D. Ohio 2013) (holding that not enough evidence to show belief about national origin based on her resume or appearance).
257. *See* DePriest v. Seaway Food Town, Inc., 543 F. Supp. 1355, 1357 (E.D. Mich. 1982) (denying defendants summary judgment because there is a factual dispute on whether Plaintiff's name made defendant aware of national origin); *Mohammad*, 2013 WL 5786016, at *7; Onwauchi-Willing & Barnes, *supra* note 202, at 7. *But see* EEOC v. Trans States Airlines, 462 F.3d 987, 992 (8th Cir. 2006) (holding that name alone is not sufficient to prove national origin discrimination); Samorn Selim, *What Does Your Name Say About You: The Eighth Circuit Undercuts Name Association in EEOC v. National Trans States Airlines*, 28 BERKELEY J. EMP. & LAB. L. 607, 611-12 (2007) (analyzing *Trans States Airlines* as barring more potential claims because name association discrimination is "inherently fact based questions").

be religious holidays.²⁵⁸ Recognizing perceived-as claims reduces the risk of dismissing legitimate claims of employment discrimination under Title VII.²⁵⁹

CONCLUSION

This Note recommends that courts consider perceived-as discrimination claims on the merits, rather than deny them as a matter of law. There are many reasons for adopting this recommendation. Title VII's similarity to the ADA, the Act's legislative history, and the EEOC's interpretation, all uniformly point in the direction of allowing plaintiffs to present perceived-as claims. Alone, any of those these reasons is compelling; taken together, they form a powerful argument in favor of allowing plaintiffs like Nathaniel Burrage, Anne Sears, and Hubert Yousif to make their case for relief under Title VII.

Courts that continue to deny perceived-as claims perpetuate the problem of a federal law applying differently based solely on where a plaintiff brings her suit. More importantly, dismissing perceived-as claims of discrimination leads to an anomalous result. It vests in an employer who discriminates the power to determine whether a plaintiff may present her case in court. Under that reasoning, a defendant who discriminates on the basis of a misperception avoids liability for their misconduct solely because of their mistake. But a person's right to be free from workplace discrimination should not be contingent on such distinctions. And there certainly is no policy reason to reward a defendant who practices workplace discrimination in the first place.

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258. *See supra* notes 235–238 and accompanying text.

259. *See* Stephen F. Befort, *An Empirical Examination of Case Outcomes Under The ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2062 (2013) (explaining that the “regarded as” expansion of the ADA amendments have more claims that survive the summary judgment stage).

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