NOTES

Delimiting Title VII: Reverse Religious Discrimination and Proxy Claims in Employment Discrimination Litigation

I. INTRODUCTION

In July 2012, Chick-fil-A President and Chief Operating Officer Dan Cathy remarked to a religious publication that he and his company supported the "biblical definition of the family unit."[1] Chick-fil-A is popularly known as a Christian company that promotes conservative, biblical values.[2] Mr. Cathy's statement was largely interpreted by the media as an "anti-gay" sentiment rooted in religious beliefs.[3] In response to Mr. Cathy's remark, government officials from Boston and Chicago refused to allow the restaurant chain to open new locations in their cities, citing the organization's official policy of "discrimination."[4]

The Chick-fil-A controversy demonstrates how the intersection of law, religion, and sexual orientation has come to the forefront of the public consciousness. Indeed, sexual orientation discrimination is the civil rights battleground of the modern era.[5] Public attitudes on gay

1. Alyssa Newcomb, *Chicago Politician Will Ban Chick-fil-A from Opening Restaurant After Anti-Gay Comments*, ABC NEWS (July 25, 2012), http://abcnews.go.com/Business/chick-fil-blocked-opening-chicago-store/story?id=16853890#.UFeDQJjd7dk.

2. *See* Chick-fil-A's corporate mission statement, which states its mission is to "glorify God." *Chick-fil-A: Who We Are*, CHICK-FIL-A (Aug. 15, 2012), http://www.chick-fil-a.com/Media/PDF/who-we-are.pdf. Chick-fil-A is the only national fast-food chain that closes on Sundays, and company meetings include prayer. *See id.*

3. For Chick-fil-A's response to the media's coverage, see Dan T. Cathy, *Dan Cathy, President and COO of Chick-fil-A, Clarifies Recent News Coverage*, PR NEWSWIRE (Jan. 29, 2011), http://www.prnewswire.com/news-releases/dan-cathy-president-and-coo-of-chick-fil-a-clarifies-recent-news-coverage-114872034.html (a public letter).

4. Newcomb, *supra* note 1.

5. *See* Jane S. Schacter, *Skepticism, Culture and the Gay Civil Rights Debate in a Post-Civil-Rights Era*, 110 HARV. L. REV. 684, 687 (1997) (reviewing two opposing descriptions of the goals and techniques of the modern gay-rights movement).

rights are evolving, and the legal landscape governing sexual orientation discrimination is only just beginning to develop.[6] No federal law prohibits sexual orientation discrimination, despite the repeated introduction of bills over the last twenty-five years.[7] States are roughly split on the appropriate response to sexual orientation discrimination; twenty-one states and the District of Columbia prohibit all employers from discriminating based on sexual orientation, while nineteen states provide no protection against it.[8] Nearly two hundred municipalities and local governments, like Boston and Chicago, have chosen to make sexual orientation discrimination illegal within their jurisdictions.[9] In short, legislatures, courts, organizations, and individuals around the nation are working to reconcile the important values implicated by sexual orientation discrimination.

In the many jurisdictions where sexual orientation discrimination is not illegal, a new litigation tactic has emerged: reverse religious discrimination claims. Essentially, a reverse religious discrimination claim allows "non-members of religious groups" to sue supervisors for discriminating against them because they do not share their supervisors' religious belief that being gay is wrong.[10] Reverse religious discrimination is a historically underused claim that is gaining traction as a method to remedy sexual orientation discrimination. Reverse religious discrimination claims can be brought in all jurisdictions under Title VII of the Civil Rights

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6. See particularly the Supreme Court's recent decisions regarding gay marriage and the civil rights of LGBT citizens in *United States v. Windsor*, 133 S. Ct. 2675 (2013) and *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

7. For a history of the effort to pass a federal nondiscrimination act covering sexual orientation, see Katrina C. Rose, *Where the Rubber Left the Road: The Use and Misuse of History in the Quest for the Federal Employment Non-Discrimination Act*, 18 TEMP. POL. & CIV. RTS. L. REV. 397, 397–98 (2009).

8. *See* JEROME HUNT, CTR. FOR AM. PROGRESS ACTION FUND, A STATE-BY-STATE EXAMINATION OF NONDISCRIMINATION LAWS AND POLICIES 3–4 (2012), *available at* http://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_non discrimination.pdf.

9. See, for example, Manny Fernandez, *San Antonio Passes Far-Reaching Antidiscrimination Measure*, N.Y. TIMES (Sept. 5, 2013), http://www.nytimes.com/2013/09/06/us/san-antonio-passes-far-reaching-antidiscrimination-measure.html?_r=0, for a discussion of the rise in local ordinances banning sexual orientation discrimination and the accompanying religious and social controversies.

10. See EMPLOYMENT DISCRIMINATION COORDINATOR: ANALYSIS OF FEDERAL LAW, §§ 7.1–7.13 (Thomas Reuters ed. 2013) and *Noyes v. Kelly Services*, 488 F.3d 1163 (9th Cir. 2007), for the basis of a reverse religious discrimination claim. Although not the first case to approve a reverse religious discrimination claim, *Noyes* is frequently regarded as the landmark case on these claims.

Act of 1964.[11] Accordingly, they have the potential to act as proxy claims[12] for litigants seeking compensation for sexual orientation discrimination in jurisdictions where the discrimination is not illegal.

Although no Chick-fil-A employee has filed an action in response to Mr. Cathy's statement, it may be vulnerable to a reverse religious discrimination claim. Under this claim, a homosexual or LGBT[13] employee who was fired by Chick-fil-A could seek reparations for wrongful termination, even in a jurisdiction where the state or local legislature has chosen not to prohibit sexual orientation discrimination. LGBT employees who are alleged victims of sexual orientation discrimination have already filed similar claims against their employers in several jurisdictions. Circuit courts are divided on how to treat reverse religious discrimination claims and the associated policy issues.

This Note attempts to explore the most challenging legal questions raised by reverse religious discrimination claims. What standard of review is most appropriate? Should courts provide effective protection against sexual orientation discrimination, even in jurisdictions where a legislature has chosen not to prohibit it? And finally, how should the legal system deal with the conflicting religious expression and equal protection issues implicated by reverse religious discrimination claims?

The primary goals of this Note are to analyze these new and controversial issues and to propose a pragmatic solution. Part II discusses the constitutional values implicated by reverse religious discrimination claims; the prima facie analysis for Title VII discrimination claims; federal, state, and local sexual orientation discrimination laws; and unsuccessful litigation strategies for sexual orientation discrimination. Part III discusses the emergence of the reverse religious discrimination claim as the newest, and perhaps most successful, litigation strategy for sexual orientation discrimination. This Part also reviews and compares the majority and minority approaches for establishing a prima facie case of reverse

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11. Title VII is a federal law prohibiting employment discrimination based on a limited number of classifications including race, color, religion, sex, or national origin. See *infra* Part II.B for a discussion of the elements of a Title VII discrimination claim.

12. In this Note, "reverse religious discrimination claims" and "proxy claims" will refer exclusively to the use of a reverse religious discrimination claim (a recognized Title VII claim) to seek redress for sexual orientation discrimination in jurisdictions where sexual orientation discrimination is *not* prohibited.

13. This Note may refer to homosexual or LGBT employees interchangeably. While these groups are not identical, either identifier may be used as needed to simplify analogies drawn between cases.

religious discrimination claims. Part III concludes by considering the social and legal merits of proxy claims.

In response to the division in the courts, Part IV suggests a new standard for adjudicating reverse religious discrimination claims. This Note proposes modifying the prima facie analysis set forth in the United States Supreme Court decision *McDonnell Douglas v. Green*. The first prong of the proposed test requires the court to explicitly examine whether the employer qualifies as a religious organization exempt from Title VII. The second and third prongs of the proposed test remain identical to the second and third prongs of the traditional prima facie test. Then, to prevent the use of reverse religious discrimination claims as proxies, the proposed test's fourth prong requires plaintiffs to show a "difference in religious beliefs" between their own beliefs and their employer's beliefs. Finally, the fifth prong requires additional evidence of the employer's discriminatory motive. This modified prima facie test conforms with employment discrimination law, balances employers' rights to religious expression and employees' rights to equal treatment, and represents a compromise between the majority and minority approaches.

II. ANTI-DISCRIMINATION LAW AND CONSTITUTIONAL VALUES

The possible link between sexual orientation discrimination and religious convictions exposes difficult tensions among American constitutional and legal values. Time-honored principles, including religious expression, privacy, and equality, are briefly explored in this Part to clarify the sometimes-competing interests in reverse religious discrimination claims. Second, this Part describes the legal landscape surrounding sexual orientation discrimination at the federal, state, and local level. By summarizing the varying levels of protection for sexual orientation discrimination across jurisdictions, this discussion illustrates the need for an alternative litigation strategy for sexual orientation discrimination. Since LGBT plaintiffs cannot sue an employer for sexual orientation discrimination in jurisdictions where it is not prohibited, and several different types of litigation strategies have failed, plaintiffs have been seeking another type of claim that can provide redress.

A. A Crossroads of Constitutional Principles

1. Religious Expression

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . .*
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> —First Amendment to the U.S. Constitution[14]

The right to religious expression is outlined in the first clause of the First Amendment to the Constitution of the United States, signifying its prominent position among civil liberties.[15] The Free Exercise Clause recognizes the Founders' belief that religious practice carries unique importance in the health and preservation of American society. Indeed, Thomas Jefferson referred to freedom of religion as "the most inalienable and sacred of all human rights."[16] The public expression of privately held religious beliefs is essential to the functioning of a free and democratic society. Title VII of the Civil Rights Act of 1964 states that it is unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion."[17] According to George Dent, the very existence of religious discrimination provisions in Title VII acknowledges "our legal tradition's judgment that citizens legitimately carry their religious beliefs into the commercial marketplace and should be protected in doing so."[18]

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14. U.S. CONST. amend. I.

15. *Id.*

16. George W. Dent, Jr., *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, 95 KY. L.J. 553, 633 (2007).

17. 42 U.S.C. § 2000e-2(a)(1) (2012).

18. Dent, *supra* note 16, at 574 (quoting Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?*, 22 HARV. J.L. & PUB. POL'Y 959, 964 (1999)). However, extreme forms of public religious expression may not be protected in the workplace. An employer's repeated proselytization of its employees may violate Title VII. For example, in *Minnesota v. Sports & Health Club, Inc.*, employers were "born-again Christians" who refused to consider employment for anyone who lived in a way "antagonistic" to the teachings of the Bible, which in their view included homosexuals. 370 N.W.2d 844, 848 (Minn. 1985). This policy violated antidiscrimination laws. *Id.* at 853.

2. Privacy

> *At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. . . . Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.*
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> —Lawrence v. Texas[19]

In *Lawrence v. Texas*, the Supreme Court held that a statute criminalizing sexual intercourse between consenting, same-sex adults was unconstitutional.[20] The Court's reasoning rested largely on the proclamation that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expressions, and certain intimate conduct."[21] The right to privacy outlined in *Lawrence* may reasonably be applied to expand civil rights for homosexual individuals, though the contours of this "liberty" remain uncertain.[22] Reverse religious discrimination claims test the boundaries of the right to religious expression and force courts to evaluate the relative fundamentality of the right to privacy and the "autonomy of self." Courts must "weigh[ ] the relative merits of religious freedom and homosexual conduct" to achieve the proper balance between the interests of homosexual employees and the interests of employers.[23]

3. Equality

> *[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.*
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> —Fourteenth Amendment to the U.S. Constitution[24]

At the heart of American democracy is the ideal that every citizen is entitled to the same rights and opportunities. The Equal Protection Clause of the Fourteenth Amendment was added to the United States Constitution after the Civil War in order to achieve formal legal equality among *all* citizens. The Supreme Court has

19. Lawrence v. Texas, 539 U.S. 558, 574 (2003) (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)).

20. *See id.* at 578–79 (applying a substantive due process analysis to find a right to engage in homosexual conduct without "intervention of the government").

21. *Id.* at 562.

22. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 956–57 (Mass. 2003).

23. Dent, *supra* note 16, at 629.

24. U.S. CONST. amend. XIV.

repeatedly relied on principles of equality and justice to extend civil rights to minorities and other groups historically subject to discrimination.[25] Because sexual orientation discrimination is often premised on unfair stereotypes or animus, many courts have concluded that it "has no place in a just society."[26] Indeed, some courts have characterized such discrimination as "morally reprehensible"[27] and a "noxious practice" deserving of censure.[28]

B. Pursuing Equality: Title VII

> *[I]t shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin, or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.*
>
> —Title VII of the Civil Rights Act of 1964[29]

Title VII was enacted at the height of the American Civil Rights Movement as part of the omnibus bill known as the Civil Rights Act of 1964. The Act addressed a variety of issues including voting rights, discrimination in public accommodations, and desegregation of public schools.[30] Congress created Title VII in order to "assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority

25. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (overruling the separate but equal doctrine and desegregating public schools); Loving v. Virginia, 388 U.S. 1 (1967) (invalidating state laws prohibiting interracial marriage and recognizing marriage as a fundamental right); Nixon v. Herndon, 273 U.S. 536 (1927) (holding that the Fourteenth Amendment prohibits denial of the right to vote based on race).

26. Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 290 (3d Cir. 2009).

27. Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 265 (3d Cir. 2001) (quoting Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000)).

28. *Id.* at 265 (quoting Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999)).

29. 42 U.S.C. § 2000e-2(a)(1)–(2) (2012).

30. *Id.* §§ 1971(a), 2000a–2000d.

citizens."[31] However, the law was also broadly intended to eliminate "[d]iscriminatory preference for any group" within the workplace.[32] Title VII was meant to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of [an] impermissible classification."[33]

1. Traditional Title VII Claims

To succeed on a traditional Title VII discrimination claim, the plaintiff must either (1) demonstrate direct evidence of discrimination or (2) rely on the *McDonnell Douglas* burden-shifting analysis.[34] Because employers almost never announce their discriminatory purposes, most cases proceed under the *McDonnell Douglas* framework.[35] The *McDonnell Douglas* analysis allows a plaintiff to prove a discrimination claim through circumstantial evidence, including "common sense and social context."[36]

A plaintiff must first establish a prima facie case under the *McDonnell Douglas* analysis.[37] To do so, the plaintiff must show

1. the plaintiff belongs to a protected class (typically a minority group);[38]
2. the plaintiff was performing according to the employer's legitimate expectations;
3. the plaintiff suffered adverse employment action;[39] and
4. other employees with qualifications similar to the plaintiff were treated more favorably.[40]

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31. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (citing Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971)).

32. *Id.*

33. *Id.* at 801.

34. *See, e.g.*, Iadimarco v. Runyon, 190 F.3d 151, 157 (3d Cir. 1999) (explaining the process of a Title VII discrimination claim).

35. *See, e.g.*, *id.* (reviewing the prima facie standard for traditional discrimination claims).

36. *Id.*

37. As discussed in Part II.C, the elements of a prima facie case differ by claim asserted and by circuit.

38. The original *McDonnell Douglas* prima facie test required membership in a minority group explicitly. The first prong required the plaintiff to "show[ ] . . . that he belongs to a racial minority." *McDonnell Douglas*, 411 U.S. at 802.

39. In employment discrimination discussions, "adverse employment action" generally refers to the prohibited decisions mentioned in Title VII: discharge, termination, or negative alteration of the employee's compensation, employment terms, conditions or privileges. 42 U.S.C. § 2000e-2(a)(1) to -2(a)(2) (2012).

40. Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1220 (9th Cir. 1998). For a slightly different conception of the prima facie test, see also *McDonnell Douglas*, 411 U.S. at 802 (characterizing the test as applied to job seekers rather than to existing employees).

For a religious discrimination claim in particular, a plaintiff establishes a prima facie case when she demonstrates

1. she held a sincere religious belief (and thus is a member of a protected class);
2. she called her religious belief to the attention of the employer;
3. the religious belief or observance was the basis of her discharge or discriminatory treatment; and
4. she was performing according to her employer's legitimate expectations.[41]

If the plaintiff establishes a prima facie case, then the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for taking adverse employment action against the plaintiff.[42] If the defendant meets his burden by offering a legitimate rationale, then the burden shifts back to the plaintiff to show that the defendant's proffered reasons are merely a pretext for discrimination.[43] Establishing a prima facie case then creates a rebuttable presumption that the employer unlawfully discriminated against the employee.[44] The prima facie requirement under *McDonnell Douglas* serves an important screening role in employment discrimination litigation by "eliminat[ing] the most common nondiscriminatory reasons for the plaintiff's rejection."[45]

2. Reverse Discrimination Claims

Reverse discrimination has long been recognized as a legitimate Title VII claim.[46] The *McDonnell Douglas* burden-shifting

41. *See, e.g.*, Tepper v. Potter, 505 F.3d 508, 514 (6th Cir. 2007) (discussing the prima facie analysis for a religious accommodation case); Peterson v. Hewlett-Packard Co., 358 F.3d 599, 603–06 (9th Cir. 2004) (explaining the prima facie analyses for religious disparate treatment claims and failure-to-accommodate claims). The final criterion is not typically recited in courts' prima facie tests. However, plaintiffs practically must prove this element to demonstrate that the adverse employment action was not legitimate.

42. Iadimarco v. Runyon, 190 F.3d 151, 157 (3d Cir. 1999) (quoting *McDonnell Douglas*, 411 U.S. at 802).

43. *See* Noyes v. Kelly Servs., 488 F.3d 1163, 1168 (9th Cir. 2007) (citing Chuang v. Univ. of Cal. Davis, 225 F.3d 1115, 1124 (9th Cir. 2000)); Reverse Discrimination, [5 Empl. Practices] Empl. Coordinator (West) § 4:7.50 (Sept. 2013).

44. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

45. *Iadimarco*, 190 F.3d at 158 (quoting *Burdine*, 450 U.S. at 253–54).

46. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 295–96 (1976) (holding that Title VII prohibits racial discrimination in private employment against white persons as well as

analysis theoretically applies to both traditional and reverse discrimination claims;[47] however, courts have struggled with the latter.[48] Because the prima facie test was originally created for discrimination suits brought by members of a minority group, courts have been attempting to "cram the reverse discrimination cases into the *McDonnell Douglas* framework."[49] Several courts have modified the first prong of the prima facie framework in reverse discrimination claims to require the plaintiff to show "background circumstances" to prove that the defendant is an "unusual employer who discriminates against the majority."[50]

Conversely, some courts have criticized imposing higher burdens for reverse discrimination plaintiffs and have rejected both a protected-class and a background-circumstances showing.[51] The Third Circuit, for example, rejects the background-circumstances requirement for the first prong of the *McDonnell Douglas* prima facie test in reverse racial discrimination suits.[52] As an alternative, the Third Circuit requires a plaintiff to "present[ ] sufficient evidence to allow a reasonable fact finder to conclude (given the totality of the circumstances) that the defendant treated [the] plaintiff 'less favorably than others because of [his] race, color, religion, sex, or national origin.' "[53]

Reverse discrimination, however, may not even be properly conceived as a separate type of employment discrimination. The

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against nonwhites, thus recognizing "reverse" discrimination claims for Title VII protected classes).

47. *Iadimarco*, 190 F.3d at 158 (citing *Sante Fe Trail*, 427 U.S. at 278–80).

48. *See, e.g.*, *Iadimarco*, 190 F.3d at 158–60 (acknowledging that no universal standard for reverse discrimination claims has emerged).

49. *Id.* at 158 (internal quotation marks omitted).

50. *See, e.g.*, Parker v. Balt. & Ohio R.R. Co., 652 F.2d 1012, 1017 (D.C. Cir. 1981) (modifying the first prong of the *McDonnell Douglas* prima facie framework for reverse racial discrimination claims because "it defies common sense to suggest that the promotion of a black employee justifies an inference of prejudice against white coworkers in our present society").

51. *See* Noyes v. Kelly Servs., 488 F.3d 1163, 1168–69 (9th Cir. 2007) (rejecting the protected-class requirement for a prima facie case, but also not requiring a showing of background circumstances); *see also Iadimarco*, 190 F.3d at 160 (rejecting the background-circumstances requirement for the first prong of a prima facie test); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) ("The prima facie case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.' " (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978))).

52. *Iadimarco*, 190 F.3d at 160–61 (stating that the central focus of every discrimination claim inquiry should be whether an employer is treating an employee less favorably because of a protected characteristic).

53. *Id.* at 163 (second alteration in original) (quoting *Furnco*, 438 U.S. at 577).

Eleventh Circuit has rejected the "reverse discrimination" label for claims brought by nonminorities.[54] The court stated that the term was inappropriate because "[d]iscrimination is discrimination no matter what the race, color, religion, sex, or national origin of the victim."[55]

3. Reverse Religious Discrimination Claims

Under Title VII, religion is defined to include "all aspects of religious observance and practice, as well as belief."[56] Employers are required to accommodate an employee's religious beliefs, unless the employer "demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business."[57] Traditional religious discrimination claims under Title VII involve an allegation that an employer discriminated against an employee because of the *employee's* religious beliefs.[58] In contrast, reverse religious discrimination claims involve an allegation that an employer discriminated against an employee because he did not share the *employer's* religious beliefs.[59]

Reverse religious discrimination claims are analogous in many ways to affirmative action and other reverse discrimination cases.[60] Undoubtedly, Title VII protects atheists, nonbelievers, and unaffiliated religious persons, all of whom may be considered "religious minorities."[61] However, reverse religious discrimination cases are different from other types of reverse discrimination claims because they are not premised on the minority discriminating against the majority.[62] For example, reverse racial discrimination occurs when a

54. *See* Bass v. Bd. of Cnty. Comm'rs, 256 F.3d 1095, 1103 (11th Cir. 2001) (describing the scope of Title VII in adjudicating discrimination claims brought by members of a traditional "majority" group).

55. *Id.* (citing McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976)).

56. 42 U.S.C. § 2000e(j) (2012).

57. *Id.*

58. Harold M. Brody & Catherine Brito, *Reversing Claims of Reverse Religious Discrimination*, 34 EMP. REL. TODAY 77, 77 (2007), *available at* http://onlinelibrary.wiley.com/doi/10.1002/ert.20167/abstract.

59. *Id.*

60. *See* Shapolia v. Los Alamos Nat'l Lab., 992 F.2d 1033, 1038 (10th Cir. 1993) (explaining that the plaintiff's reverse religious discrimination claim resembled other reverse discrimination cases to which the court had applied a modified *McDonnell Douglas* test).

61. *See, e.g.*, Young v. Sw. Sav. & Loan Ass'n, 509 F.2d 140, 141 (5th Cir. 1975) (holding that Title VII prohibited the defendant-employer from requiring the plaintiff, an atheist, to attend monthly staff meetings involving short devotionals and prayers).

62. *See, e.g.*, McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273, 295–96 (1976) (holding that Title VII is not limited to discrimination against minority persons, but also addresses discriminatory actions against majority persons).

minority (e.g., an African American) supervisor terminates a member of a majority race (e.g., a Caucasian) based on his race. But reverse religious discrimination could occur when a Christian (a member of a majority religious group) fires an employee for not sharing his religious beliefs.

C. The Next Frontier: Sexual Orientation Discrimination

Sexual orientation was not listed as a protected class in the Civil Rights Act of 1964. Over the last fifty years, however, a growing number of jurisdictions have acted to prohibit sexual orientation discrimination in employment. This Part explores the developing legal landscape at the federal, state, and local levels.

1. The Federal Response to Sexual Orientation Discrimination

Although Congress has considered legislation that would amend Title VII to prohibit employment discrimination based on sexual orientation every year since 1975, no federal law prohibiting sexual orientation discrimination has been enacted.[63] As an employer, however, the federal government prohibits sexual orientation discrimination.[64] The Civil Service Reform Act of 1978 bans federal employees from discriminating against applicants and employees based on conduct which does not adversely affect their performance.[65] The United States Office of Special Counsel and other executive offices have interpreted this provision to include discrimination based on

63. *See* Employment Non-Discrimination Act of 2013 ("ENDA"), H.R. 1755, 113th Cong. (2013); ROBERT BELTON ET AL., EMPLOYMENT DISCRIMINATION LAW 555 (7th ed. 2004) (observing that some federal courts have viewed Congress's failure to enact ENDA as evidence that Congress did not intend "sex," as used in Title VII, to include sexual orientation). However, federal reform on sexual orientation discrimination may be forthcoming. In his 2013 Inaugural Address, President Obama stated, "Our journey is not complete until our gay brothers and sisters are treated like everyone else under the law . . . for if we are truly created equal, then surely the love we commit to one another must be equal as well." The President's statement marked the first mention on gay rights in an inauguration speech and may indicate that the Obama Administration will pursue the enactment of ENDA in the President's second term. Barack Obama, Presidential Inaugural Address (Jan. 21, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama.

64. *See* Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5 U.S.C.); Exec. Order No. 13,087, 3 C.F.R. 191 (1998) (prohibiting sexual orientation discrimination in the employment of federal civilian workers).

65. 5 U.S.C. § 2302(b)(10).

sexual orientation.[66] Additionally, the federal government has protected civilian employees in the Executive Branch from discrimination based on sexual orientation since 1998.[67]

2. State and Local Responses to Sexual Orientation Discrimination

Twenty-one states and the District of Columbia prohibit sexual orientation discrimination by all employers—public and private.[68] An additional ten states have enacted laws that prohibit sexual orientation discrimination when the state is an employer.[69]

State laws proscribing sexual orientation discrimination are generally alike in their construction and content. A majority of state laws define "sexual orientation" to mean "heterosexuality, homosexuality, and bisexuality . . . includ[ing] people who are perceived by others to be . . . a specific orientation."[70] All state statutes that prohibit sexual orientation discrimination by public and private employers provide a private right of action, allowing employees to seek redress in local courts after exhausting administrative remedies.[71] Like many federal anti-discrimination laws, state laws typically exempt sufficiently small businesses, though eight states and the District of Columbia apply the prohibition to all employers.[72] The highest minimum threshold required to trigger anti-sexual orientation

66. *See, e.g.*, Press Release, U.S. Office of Special Counsel, Results of Legal Review of Discrimination Statute (Apr. 8, 2004), *available at* http://www.osc.gov/documents/press/2004/pr04_03.htm.

67. *See* 3 C.F.R. § 191 (1998) (adding sexual orientation discrimination to a list of already-protected classes).

68. The same jurisdictions provide a private right of action: California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. *See* Jerome Hunt, *A State-by-State Examination of Nondiscrimination Laws and Policies*, CTR. FOR AM. PROGRESS ACTION FUND 3–4 (2012), http://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrim ination.pdf.

69. Ten (10) states prohibit sexual orientation discrimination by the state government as an employer: Alaska, Arizona, Indiana, Kansas, Kentucky, Michigan, Missouri (Executive Branch employees only), Montana, Ohio, and Pennsylvania. This policy choice is equivalent to the federal government's decision to prohibit sexual orientation discrimination as an employer. *See id.*

70. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-135R, SEXUAL ORIENTATION AND GENDER IDENTITY EMPLOYMENT DISCRIMINATION: OVERVIEW OF STATE STATUTES AND COMPLAINT DATA 2 (2009).

71. *See* Hunt, *supra* note 68, at 3–4 (listing the states which prohibit sexual orientation and gender identity discrimination).

72. Colorado, the District of Columbia, Hawaii, Maine, Minnesota, New Jersey, Oregon, Vermont, and Wisconsin require only a single employee to trigger application of the state nondiscrimination statute. *See* Hunt, *supra* note 68, at 26–80.

discrimination laws across all states is fifteen employees.[73] Notably, all state anti-discrimination statutes offer at least a limited exemption for religious organizations.[74] The exemption allows religious organizations to prefer applicants who share their religious beliefs.[75]

However, the most significant legislation on sexual orientation discrimination originates in local governments. More than 180 cities, counties, and municipalities prohibit sexual orientation discrimination in at least some workplaces.[76] Many local ordinances are similar to the City of Chicago's Human Rights Ordinance. Like the majority of state laws, this ordinance defines sexual orientation as "the actual or perceived state of heterosexuality, homosexuality or bisexuality."[77]

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73. *Id.*

74. *Id.* at 3–4.

75. A religious organization receives an exemption from compliance with Title VII and most state sexual orientation nondiscrimination laws. *See infra* Part III.B.

76. Municipalities and counties in states with sexual orientation nondiscrimination policies have also enacted their own nondiscrimination laws. Several municipalities in New York State including Albany, Buffalo, Hampton, Ithaca, New York City, Rochester, and Syracuse have adopted sexual orientation nondiscrimination laws. Albany, Nassau, Onondaga, Tompkins, and Westchester Counties have also adopted sexual orientation nondiscrimination laws. Often, local statutes may be more favorable to employees than statewide laws. For example, the New York state law does not provide for attorneys' fees or punitive damages, but the New York City municipal law does. *See, e.g.*, Lee F. Brantle, *The Emerging Field of Equal Rights for Gay and Lesbian Employees*, BANTLE & LEVY, LLP, http://civilrightsfirm.com/article4.html (last visited Sept. 10, 2013) (listing the municipalities and counties in New York State with antidiscrimination laws).

Municipalities and counties in states without sexual orientation nondiscrimination policies also enact nondiscrimination laws. See sexual orientation nondiscrimination laws in Allegheny County, Philadelphia, York, Scranton, Allentown, Easton, Lansdowne, Swarthmore, West Chester, Erie County, and New Hope. Pennsylvania only prohibits sexual orientation discrimination by the state government. Notably, Allegheny County adopted the law after serious opposition from religious groups who claimed the bill infringed on their religious freedom. The bill passed after a religious exemption provision was added to excuse religious organizations from liability under the bill. *See* Mark T. Phillis & Shannon H. Pallotta, *Local Ordinance Prohibits Discrimination on the Basis of Sexual Orientation and Gender Identity with Some Employers Exempted*, LITTLER (July 9, 2009), http://www.littler.com/publication-press/publication/local-ordinance-prohibits-discrimination-basis-sexual-orientation-and-
(describing the passage of a local ordinance in Allegheny County which prohibited discrimination based on sexual orientation or gender identity).

Discrete cities may be the only location in an entire state that prohibits sexual orientation discrimination. For example, Omaha prohibits sexual orientation discrimination, but no other city or county in the state of Nebraska prohibits sexual orientation discrimination. *See* Richard B. Cohen, *Nebraska Attorney General Rules that Omaha Had No Right to Prohibit Employment Discrimination Based on Sexual Orientation or Gender Identity*, FOX ROTHSCHILD, LLP (May 6, 2012), http://employmentdiscrimination.foxrothschild.com/2012/05/articles/gender-identity-or-expression/nebraska-attorney-general-rules-that-omaha-had-no-right-to-prohibit-employment-discrimination-based-on-sexual-orientation-or-gender-identity/ (describing Omaha's antidiscrimination law and its unique status in Nebraska).

77. CHICAGO, ILL., CHICAGO HUMAN RIGHTS ORDINANCE § 2-160-020(*l*) (2005) ("Sexual orientation").

Chicago's ordinance prohibits "directly or indirectly discriminat[ing] against any individual in . . . employment because of the individual's . . . sexual orientation . . . ."[78]

In addition to governmental prohibitions, some private employers have voluntarily chosen to prohibit sexual orientation discrimination. Of the current Fortune 500 Companies, 484 have included sexual orientation in their nondiscrimination policies.[79] By comparison, in 2004, only 323 of Fortune 500 companies had sexual orientation nondiscrimination policies.[80]

Despite the growing number of federal regulations, state and local statutes, and private company policies, many Americans work in environments where discriminating against employees because of their sexual orientation is not illegal. In nineteen states, employment discrimination based on sexual orientation is legal for all public and private employers.[81] An employer may make any employment decision based only on the employee's identification (or perceived identification) as gay, lesbian, transgender, or bisexual. Even among the ten states that protect *public* employees from sexual orientation discrimination, those workers are typically limited to administrative remedies and cannot bring a private action for compensation or reinstatement.[82] In these twenty-nine uncovered or partially covered states, employees and their lawyers have been exploring proxy claims to redress sexual orientation discrimination.

D. Unsuccessful Proxy Claims for Sexual Orientation Discrimination

Over the past four decades, litigants have unsuccessfully attempted to redress sexual orientation discrimination through two types of proxy claims: (1) constitutional claims and (2) Title VII sex discrimination claims. This Section discusses the shortcomings of these legal theories.

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78. *Id.* § 2-160-030.

79. *Fortune 500 Non-Discrimination Project*, EQUALITY F., http://www.equalityforum.com/fortune500 (last visited Oct. 3, 2013).

80. *Id.*

81. Nineteen (19) states do *not* prohibit sexual orientation discrimination by either public or private employers: Alabama, Arkansas, Florida, Georgia, Idaho, Louisiana, Mississippi, Nebraska, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. *See* Hunt, *supra* note 68, at 3–4 (listing states which do not prohibit discrimination based on sexual orientation).

82. Arizona does not allow public employees to bring a private action for sexual orientation discrimination; they can only pursue administrative remedies. *See* Exec. Order No. 2003-22 (Ariz. 2003), *available at* http://www.azsos.gov/aar/2003/37/governor.pdf (directing that no state agency, board, or commission shall discriminate in employment solely on the basis of an individual's sexual orientation, but not requiring employment goals based on sexual orientation).

1. Constitutional Claims

LGBT employees have unsuccessfully brought three types of constitutional proxy claims to redress alleged sexual orientation discrimination: (a) Equal Protection claims, (b) First Amendment claims, and (c) Due Process claims. In many ways, homosexuality "straddles the line between conduct and status in ways that make it hard to apply conventional constitutional doctrine."[83]

a. Equal Protection Theory

The Equal Protection Clause of the Fourteenth Amendment is the primary vehicle for challenging sexual orientation discrimination in the workplace on constitutional grounds.[84] The Clause provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[85] However, equal protection represents a limited vehicle for challenging sexual orientation discrimination because the Clause only applies to public employers. Moreover, courts have applied rational basis review to state and federal laws prohibiting homosexual conduct.[86] The Supreme Court's consistent application of rational basis review[87] in cases involving homosexual activity makes it unlikely that the Court will make sexual orientation

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83. Pamela S. Karlan, *Loving* Lawrence, 102 MICH. L. REV. 1447, 1457 (2004).

84. THOMAS R. HAGGARD, UNDERSTANDING EMPLOYMENT DISCRIMINATION 19–20 (2d ed. 2008)

85. U.S. CONST. amend. XIV, § 1.

86. HAGGARD, *supra* note 84. For example, in *High Tech Gays v. Defense Industry Security Clearance Office*, the Ninth Circuit applied a rational relationship test, rather than strict scrutiny, to the Department of Defense's discriminatory policy regarding gay applicants for security clearance. 895 F.2d 563, 571 (9th Cir. 1990) (applying rational basis review and holding that homosexuals do not constitute a suspect or "quasi-suspect" class under equal protection analysis).

The Supreme Court has applied strict scrutiny to race and national origin. Classifications based on sex receive only intermediate scrutiny. Particularly given the Court's application of rational basis review in *Romer v. Evans*, and its reluctance to review a case involving the issue of whether sexual orientation is a suspect class, it seems unlikely that a Court will decide to provide strict scrutiny for classifications based on sexual orientation. Andrea M. Kimball, Note, Romer v. Evans *and Colorado's Amendment 2: The Gay Movement's Symbolic Victory in the Battle for Civil Rights,* 28 U. TOL. L. REV. 219, 242 n.245 (1996).

87. In constitutional inquiries, courts generally apply three levels of review: *rational basis*, which requires that a government regulation be rationally related to a legitimate government interest; *intermediate scrutiny*, which requires that a government regulation be substantially related to an important government interest; and *strict scrutiny*, which requires that a government regulation be narrowly tailored to promote a compelling government interest. R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 228 (2002).

a suspect class worthy of heightened scrutiny.[88] In *Romer v. Evans*, the majority applied only rational basis review to Colorado's constitutional amendment prohibiting protection for sexual orientation discrimination.[89]

b. First Amendment Theory

Courts have generally dismissed *speech*-based First Amendment challenges arising from homosexual *conduct*. For example, the Seventh Circuit upheld Don't Ask Don't Tell, a now-defunct Army regulation requiring the discharge of any member who admitted to being homosexual.[90] Although the court recognized that self-classification as homosexual was in "some sense speech,"[91] it also held that being a homosexual implies sexual conduct that the military could constitutionally prohibit.[92] Thus, the court concluded that the military regulation affected speech only "incidentally," and the regulation was justified because it supported other sufficiently important governmental goals.[93] Similarly, taking adverse employment action[94] against an employee because he *advocates* for homosexuality violates the Free Speech Clause of the First Amendment, but adverse employment action motivated by the employee's homosexual *behavior* has not been held unconstitutional.[95]

88. *See* Bowers v. Hardwick, 478 U.S. 186, 190–91 (1986) (holding that engaging in homosexual activity was not a fundamental right and applying rational basis review); *see also* Lawrence v. Texas, 539 U.S. 558, 579–80 (2003) (overruling *Bowers*, concluding that consenting adults were free to engage in private, homosexual conduct, but applying rational basis review); Romer v. Evans, 517 U.S. 620, 631–32 (1996) (imposing the rational basis level of scrutiny).

89. *Romer*, 517 U.S. at 631–32 (holding that Colorado's amendment failed the rational basis test because it "imposed a broad and undifferentiated disability on a single named group" and was so broad that it could only be motivated by animus).

90. Ben-Shalom v. Marsh, 881 F.2d 454, 466 (7th Cir. 1989). However, the court suggested it applied a more deferential standard in reviewing military regulations than it would in reviewing regulations on civilian society. *See id.* at 459–60 (acknowledging that military institutions require different standards than civilian life).

91. *Id.* at 462.

92. *See id.* at 459–63 (clarifying that a sergeant's First Amendment rights were not violated by her disqualification for service based on her homosexuality). However, these narrow views about speech and homosexuality in the military may be changing in the wake of the repeal of the "Don't Ask, Don't Tell" Policy. *See* U.S. DEP'T OF DEFENSE, REPEAL OF "DON'T ASK, DON'T TELL" (DADT): QUICK REFERENCE GUIDE (2011), *available at* http://www.defense.gov/home/features/2010/0610_dadt/Quick_Reference_Guide_Repeal_of_DADT_APPROVED.pdf. Free speech challenges in the private workplace may still be difficult for LGBT employees.

93. *Id.*

94. *See supra* note 39.

95. *See* Nat'l Gay Task Force v. Bd. of Educ., 729 F.2d 1270, 1273–75 (10th Cir. 1984), *aff'd*, 470 U.S. 903 (1985) (holding that firing a public employee for engaging in public homosexual

c. Due Process Theory

Litigants have also challenged sexual orientation discrimination under the Due Process Clause of the Fourteenth Amendment, specifically invoking the right to privacy.[96] In *Lawrence v. Texas*, the Supreme Court stated that "individual decisions" about "the intimacies of [a] physical relationship . . . are a form of 'liberty' protected by the . . . Fourteenth Amendment."[97] While the *Lawrence* decision clarified that homosexual activity cannot be *criminalized*, it did not clearly speak to the *employment* context. Previously, the Tenth Circuit had held that terminating a teacher for practicing homosexuality would not violate the constitutional right to privacy.[98] In *National Gay Task Force*, the Court of Appeals concluded that the constitutional right to engage in homosexual activity *in private* did not apply to employment actions motivated by an employee's *public* display of homosexuality.[99]

2. Sex Discrimination Claims

Although same-sex harassment[100] falls within the scope of conduct prohibited by Title VII, discrimination based on an employee's sexual preference or orientation remains formally outside of Title VII's protection.[101] Plaintiffs have unsuccessfully advanced several theories for demonstrating that sexual orientation discrimination is discrimination based on *sex*—an existing Title VII protected class. For example, LGBT plaintiffs have argued the following: if a woman were male instead of female, she would not be discriminated against for her sexual association with another female; she would simply be a male

activity was constitutional, and that sexual orientation was not subject to strict scrutiny analysis under the Equal Protection Clause).

96. HAGGARD, *supra* note 84, at 20. *See also* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (overruling Texas's criminal sodomy statute based on the substantive due process right of privacy).

97. *Lawrence*, 539 U.S. at 578 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

98. *Nat'l Gay Task Force*, 729 F.2d at 1273.

99. *Id.*

100. Same-sex harassment refers to the sexual harassment of an individual by a person who is of the same sex as the victim.

101. This technical and formal approach adopted by courts illustrates the need for plaintiffs to seek compensation for sexual orientation discrimination through *recognized* and *existing* Title VII claims—like reverse religious discrimination. *See* HAGGARD, *supra* note 84, at 132–33 (discussing the various theories plaintiffs have advanced for sexual orientation discrimination relief).

engaging in heterosexual behavior.[102] Courts have generally rejected this theory, however, citing Congress's narrow intent to protect against traditional sex discrimination.[103] In *Hamm v. Weyauwega Milk Products, Inc.*, the Seventh Circuit dismissed a plaintiff's sex discrimination claim because his evidence of sexual harassment related, at best, to his perceived sexual orientation, not his gender.[104]

LGBT plaintiffs have also attempted to characterize discrimination against homosexuals as a form of illegal gender stereotyping.[105] Typically, sexual stereotyping cases point to an employer's discrimination against an employee because the employee lacked the typical mannerisms, appearance, or characteristics expected of the specific gender.[106] For example, in *Prowel v. Wise Business Forms*, an effeminate gay man claimed he was discriminated against because he did not conform to a typical male stereotype.[107] The Third Circuit allowed the sexual stereotype case to proceed under a Title VII analysis but cautioned that the critical question was "whether the harassment [Prowel] suffered . . . was because of his homosexuality, his effeminacy, or both."[108] The court noted that while it was probable that Prowel was discriminated against because of his sexual orientation, it was also possible that he was harassed for his "failure to conform to gender stereotypes."[109] This distinction is difficult to identify but conceptually important because it limits the scope of Title VII to the classes and characteristics Congress intended to protect.

Prowel marks an unusual acceptance of alternative theories advanced by LGBT plaintiffs. However, the Third Circuit was careful to note the distinction between sexual orientation discrimination and gender stereotype discrimination. This demarcation indicates that the

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102. HAGGARD, *supra* note 84, at 132.

103. *Id.*

104. *See* Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1062–63 (7th Cir. 2003) (discussing the necessary separation between discrimination based on an employee's "sex" and discrimination based on perceived or actual sexual orientation).

105. *Id.*; *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1985) (recognizing that a plaintiff may bring a Title VII sex discrimination claim for gender stereotyping).

106. *See, e.g.*, *Price Waterhouse*, 490 U.S. at 250–52 (stating where an employer assumes certain characteristics about an employee based on the employee's gender, the employer has engaged in "sex stereotyping").

107. Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 291–92 (3d Cir. 2009).

108. *Id.* at 291.

109. *Id.* at 291–92. Notably, Prowel brought a Title VII gender stereotyping and religious harassment claim in Pennsylvania, which only prohibits sexual orientation discrimination by the government. Both claims were arguably a proxy claim for sexual orientation discrimination. As discussed in Part V, the Third Circuit dismissed Prowel's religious harassment claim because it was "based entirely on his status as a gay man." *Id.* at 292–93.

Third Circuit was unwilling to allow gender stereotyping to serve as a proxy for sexual orientation discrimination and would police the boundaries between the two different types of claims.[110]

Moreover, courts outside the Third Circuit have consistently rejected these alternative Title VII theories that use sex discrimination as a proxy for sexual orientation discrimination.[111] In rejecting these proxy claims, courts have largely relied on Congress's intent not to protect sexual orientation from employment discrimination. Article III courts and administrative law courts like the Equal Employment Opportunity Commission often cite Congress's failure to explicitly list sexual orientation discrimination as a Title VII category.[112] Courts interpret this inaction as indicating that Congress intended "sex" to refer to gender, not sexual affiliations.[113]

The collective failure of alternative litigation strategies under the Constitution and Title VII has incentivized plaintiffs to turn to reverse religious discrimination claims as a legal remedy for sexual orientation discrimination.

III. THE NEWEST PROXY FOR SEXUAL ORIENTATION DISCRIMINATION: REVERSE RELIGIOUS DISCRIMINATION

Over the past ten years, complaints of religious discrimination in the workplace have increased eighty-seven percent—far more than any other type of workplace complaint.[114] Not surprisingly, reverse religious discrimination claims have also increased as a method to

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110. *Id.* at 291–93.

111. *See* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001) (stating a plaintiff employee who failed to show he was discriminated against because he was a man failed to bring a valid Title VII claim); Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1209 (9th Cir. 2001) (stating discrimination based on characteristics other than race, color, sex, or national origin was not prohibited by Title VII); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 704 (7th Cir. 2000) (interpreting Title VII to not cover discrimination based on sexuality or sexual orientation); Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 751–52 (4th Cir. 1996) ("Title VII does not reach discrimination based on other reasons, such as the employee's sexual behavior, prudery, or vulnerability."); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329–30 (9th Cir. 1979) (dismissing male and female homosexuals' claims that discrimination based on sexual orientation fell within Title VII's "sex" protected class).

112. *Bibby*, 260 F.3d at 261 ("It is clear, however, that Title VII does not prohibit discrimination based on sexual orientation. Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation." (internal citations omitted)).

113. *See, e.g.*, Simonton v. Runyon, 232 F.3d 33, 35–36 (2d Cir. 2000) (quoting DeCintio v. Westchester Cnty. Med. Ctr., 807 F.2d 304, 306–07 (2d Cir. 1986)) (discussing why "sex" refers exclusively to membership in a class "delineated by gender").

114. Courtney Rubin, *Religious Discrimination Complaints on the Rise at Work*, INC. (Oct. 20, 2010), http://www.inc.com/news/articles/2010/10/complaints-of-religious-discrimination-on-the-rise.html.

circumvent Title VII's lack of protection against sexual orientation discrimination.[115] Even in the twenty-two states where sexual orientation discrimination is already prohibited, more than eight thousand complaints of sexual orientation discrimination were filed between 2005 and 2010.[116] Together, these statistics suggest that LGBT employees in *all* jurisdictions perceive themselves as victims of sexual orientation discrimination and are increasingly seeking legal recourse.

A. Methods of Analysis for Reverse Religious Discrimination Claims

United States Courts of Appeals are split on the appropriate treatment of reverse religious discrimination claims as proxies for sexual orientation discrimination. A minority of courts have explicitly refused to allow reverse religious discrimination claims, while the majority have adopted a more permissive approach by lowering the prima facie standard. Allowing a proxy claim to proceed could hold an employer civilly liable for expressing a personal belief that homosexual conduct is morally unacceptable. Refusing to allow the proxy claim to proceed could threaten homosexual employees' rights to privacy and autonomy. But more broadly, circuit courts are divided on the appropriate burden of proof for establishing a prima facie case in a reverse religious discrimination case. This Section outlines the majority and minority approaches to prima facie cases of reverse religious discrimination and then compares their strengths and weaknesses.

1. Minority Approach: Traditional Prima Facie Test

The Third and Sixth Circuits have chosen to balance the values of religious expression and nondiscrimination by applying the traditional prima facie test for reverse religious discrimination claims. Both circuits implicitly require plaintiffs to satisfy the first prong of the *McDonnell Douglas* prima facie standard; that is, plaintiffs must demonstrate that they are members of a Title VII protected class. In

115. In 1996, reverse religious discrimination claims were specifically suggested as an alternative route to relief from sexual orientation discrimination in jurisdictions without protection for homosexual employees. *See* Kimball, *supra* note 86, at 242–45 (offering the reverse religious discrimination claim as an alternative theory for gay rights cases when an employer's religious intolerance creates prejudice); *see also* RAYMOND F. GREGORY, ENCOUNTERING RELIGION IN THE WORKPLACE 236–37 (2011) (discussing plaintiffs' incentives to fit sexual orientation discrimination into an existing Title VII protected class).

116. *See* HUNT, *supra* note 8, at 18 (aggregating the number of sexual orientation discrimination complaints by state from 2005 to 2010).

particular, plaintiffs must show that their homosexuality is derived from their *religious* beliefs.[117]

In *Pedreira v. Kentucky Baptist Homes for Children, Inc.*, the Sixth Circuit refused to allow a reverse religious discrimination claim to serve as a proxy for sexual orientation discrimination.[118] The plaintiff, Alice Pedreira, worked at a children's home owned and operated by the defendant, Kentucky Baptist Homes for Children (KBHC).[119] Her employers were unaware that she was homosexual when she was hired.[120] When KBHC learned of Pedreira's sexual orientation, she was terminated because her lifestyle was "contrary to Kentucky Baptist Homes for Children core values."[121] Pedreira brought a Title VII action challenging her termination and KBHC's anti-homosexual policies, claiming that the policies exhibited religious discrimination.[122] Pedreira argued that KBHC fired her because "she [did] not hold KBHC's religious belief that homosexuality is sinful."[123]

Pedreira's reverse religious discrimination claim failed because she did not allege that her homosexual lifestyle was religious in nature. The court noted that "[i]t is undisputed that KBHC fired Pedreira on account of her sexuality. However, Pedreira has not explained how this constitutes discrimination based on *religion*."[124] Pedreira did not offer any evidence as to her personal religious beliefs, so she was unable to claim that KBHC policies regarding homosexuality violated them.[125] The court reasoned, "To show that the termination was based on her religion, [the plaintiff] must show that it was the *religious* aspect of her [conduct] that motivated her employer's actions."[126] Presumably, even a showing that the plaintiff's religion approved of homosexuality would not suffice. In other words, to succeed on a reverse religious discrimination claim in the Sixth

117. While the Sixth Circuit insisted it was not ruling on the prima facie standard for reverse religious discrimination claims, it dismissed Pedreira's claim essentially for failing to demonstrate that she was discriminated against based on her religion. *See* Pedreira v. Ken. Baptist Homes for Children, Inc., 579 F.3d 722, 728 (6th Cir. 2009) (affirming dismissal for failure to state a claim).

118. *Id.* at 725, 728.

119. *Id.* at 725–26.

120. *Id.*

121. *Id.* at 725.

122. *Id.* at 725–27.

123. *Id.* at 727–28.

124. *Id.* at 728.

125. GREGORY, *supra* note 115, at 236–37.

126. *Pedreira*, 579 F.3d at 728 (citing Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 627 (6th Cir. 2000)).

Circuit, a plaintiff must allege that her sexual orientation is derived from personal religious beliefs.

Similarly, the Third Circuit explicitly dismissed a reverse religious discrimination claim as a proxy for sexual orientation discrimination.[127] In *Prowel v. Wise Business Forms*, a gay man claimed that he was fired because his homosexual conduct did not conform to the company's religious beliefs. Prowel offered evidence that his coworkers left prayers, religious tracts, and notes condemning his lifestyle on his property.[128] Ultimately, Prowel asserted that he failed to conform to his co-workers' religious beliefs because he was a gay man, which his co-workers "considered to be contrary to being a good Christian."[129]

The plaintiff's identification of the single religious belief that "a man should not lay with another man" did not overcome the Third Circuit's "conclusion that he was harassed not 'because of religion,' but because of his sexual orientation."[130] The Third Circuit noted that an employee's failure to comply with an employer's singular religious belief that homosexuality is wrong was not sufficient to state a claim of reverse religious discrimination.[131] The Third Circuit contrasted Prowel's claim against the plaintiff's claim in *Erdmann v. Tranquility Inc.*[132] In *Erdmann*, a homosexual employee claimed religious discrimination because his employer insisted that he become heterosexual.[133] Unlike Prowel, Erdmann claimed that he had suffered from reverse religious discrimination because his employer repeatedly demanded that Erdmann convert to the employer's faith and lead the company's daily prayer service.[134] Prowel had not cited any similar facts suggesting that he had suffered religious coercion at his workplace.[135] Through this comparison, the Third Circuit suggested that a plaintiff must satisfy the first prong of the *McDonnell Douglas* prima facie standard by demonstrating that he was discriminated against based on the difference between his personal religious beliefs

127. Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 292–93 (3d Cir. 2009).

128. *Id.* at 287–88.

129. *Id.* at 293.

130. *Id.* at 292–93.

131. *Id.*

132. *See* Erdmann v. Tranquility Inc., 155 F. Supp. 2d 1152, 1160–61 (N.D. Cal. 2001) (evaluating a homosexual employee's claim of reverse religious discrimination because his employer required him to participate in daily prayers at work and repeatedly told him that he would go to hell if he did not "give up his homosexuality and become a Mormon").

133. *Id.* at 1156.

134. *Id.* at 1160–62.

135. *Prowel*, 579 F.3d at 288.

and those of his employer, and not merely the absence of a single religious belief regarding homosexuality.

2. Majority Approach: Reduced Prima Facie Test

At least three circuit courts agree that it should be easier for plaintiffs to make a prima facie case when an employee claims he was discharged because he did not hold the same religious views as his supervisor (as opposed to claiming that he was fired because of his own religious beliefs).[136] In *Shapolia v. Los Alamos National Laboratories*, the Tenth Circuit announced a new standard for establishing a prima facie case in a reverse religious discrimination case.[137] In *Shapolia*, the plaintiff alleged that he was terminated not because of his own religious beliefs, but because he did not share his employer's religious faith (Mormonism).[138] While the Tenth Circuit considered this class of cases to be analogous to affirmative action or other "reverse discrimination" cases, it modified only the prima facie standard for reverse religious discrimination cases.[139]

Under the *Shapolia* standard, a plaintiff is not required to demonstrate that he is a member of a protected class to make a prima facie case. The Tenth Circuit stated that the protected-class factor was inappropriate "[w]here discrimination is not targeted against a particular religion, but against those who do not share a particular religious belief."[140] Under the *Shapolia* test, the plaintiff must only show

1. he was subjected to some adverse employment action;
2. his job performance was satisfactory at the time the employment action was taken; and
3. some additional evidence supports the inference that the employment actions were taken because of a discriminatory

136. *See* Noyes v. Kelly Servs., 488 F.3d 1163, 1168–69 (9th Cir. 2007) (holding that a reverse religious discrimination plaintiff is not required to establish membership in a protected class); Venters v. City of Delphi, 123 F.3d 956, 976–77 (7th Cir. 1997) (summary judgment inappropriate where there is a material question of fact whether employer required employees adhere to his own religious beliefs); Shapolia v. Los Alamos Nat'l Lab., 992 F.2d 1033, 1038 (10th Cir. 1993) (traditional test for establishing traditional race or sex discrimination claim inapplicable where employee claims he was terminated for not holding same religious beliefs as employer).

137. *Shapolia*, 992 F.2d at 1038–39.

138. *Id.* at 1035.

139. *Id.* at 1038 & n.6.

140. *Id.* at 1038.

> motive based upon the employee's failure to hold or follow his employer's religious beliefs.[141]

In *Shapolia*, the plaintiff's allegations were most likely not enough to affirmatively meet his prima facie burden[142] because he alleged only that one Mormon supervisor reviewed another Mormon supervisor's appraisal of a non-Mormon employee.[143] This single instance of alleged bias was not enough to support the inference of a discriminatory motive.[144]

The Seventh Circuit also agreed in *Venters v. City of Delphi* that a plaintiff could establish a prima facie reverse religious discrimination case without demonstrating that she belonged to a protected class.[145] As always, the plaintiff could establish a prima facie case by providing direct evidence of the employer's animus against his religion.[146] Alternatively, the Seventh Circuit stated that a plaintiff could provide indirect evidence reflecting the supervisor's propensity to evaluate employees based on illegal criteria.[147] Furthermore, the court suggested that an employee does not need to specify or "label" her own religious beliefs.[148]

In *Venters*, the plaintiff offered *direct* evidence of the alleged reverse religious discrimination.[149] Venters, a public employee working for a police department, provided evidence that her employer described the police station as "God's house," threatened to fire her if she did not "choose God's way," and stated that her job required her to "be saved."[150] In light of these repeated attempts to convert Venters, the court found that the employer's remarks created an inference that religion played a role in Venters's discharge.

The Seventh Circuit also recognized the tension between the employee's right to protection from discrimination and the employer's

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141. *Id.*

142. While the court noted that it was not deciding "whether Shapolia met his prima facie burden," it expressed doubt that the facts Shapolia alleged were sufficient to carry his initial burden. *Id.* at 1039.

143. *Id.*

144. *Id.*

145. *See* Venters v. City of Delphi, 123 F.3d 956, 971–73 (7th Cir. 1997) (evaluating the appropriate standard for a prima facie case in a reverse religious discrimination claim).

146. *Id.* at 972–73.

147. *Id.*

148. *Id.* at 972.

149. *Id.* at 973. The plaintiff's introduction of direct evidence took the court's analysis out of the *McDonnell Douglas* prima facie standard, but the court articulated its position nevertheless.

150. *Venters*, 123 F.3d at 973–74.

right to First Amendment religious expression.[151] However, the court held that the employer's religious remarks went beyond creating "mere discomfort" for Venters; the remarks were used to "impose [the employer's] religious views on Venters as his subordinate."[152]

The Ninth Circuit has taken an even more permissive approach to prima facie standards for reverse religious discrimination claims. In *Noyes v. Kelly Services*, the Ninth Circuit affirmed *Shapolia*'s reasoning that a reverse religious discrimination claim does not require the plaintiff to demonstrate membership in a protected class because it is the "religious beliefs of the employer, and the fact that [the employee] does not share them, that constitute the basis of the [religious discrimination] claim."[153] However, unlike the Tenth Circuit in *Shapolia*, the Ninth Circuit did not replace the protected-class requirement with a background-circumstances requirement.[154] In other words, reverse religious discrimination plaintiffs in the Ninth Circuit establish their prima facie case simply by alleging that they were subject to adverse employment action at a time when their performance was satisfactory.[155]

The Ninth Circuit requires no formal showing of religious differences between the employer and employee. In *Noyes*, the plaintiff was not a member of the Fellowship, her supervisor's chosen religious group.[156] Noyes applied for a promotion and was competing against another candidate who was a member of the Fellowship.[157] The Court of Appeals did not require Noyes to demonstrate her own religious beliefs (or lack thereof).[158] Even without a formal pleading of the differences between the employer's and employee's religious beliefs, the Ninth Circuit found that Noyes had established a prima facie case.[159]

B. Comparing the Minority and Majority Approaches

While the Sixth Circuit declined to definitively rule on whether the protected-class element was required to establish a prima facie

151. *See id.* at 977 (discussing the supervisor's own First Amendment rights to free expression in the workplace, even as a public employee).

152. *Id.*

153. Noyes v. Kelly Servs., 488 F.3d 1163, 1168–69 (9th Cir. 2007).

154. *Id.*

155. *Id.*

156. *Id.* at 1166.

157. *Id.*

158. *Id.* at 1168–69 (discussing briefly Noyes's prima facie case, and noting only that "Noyes does not claim she was part of a protected class, i.e., that she adheres to a particular religion").

159. *Id.* at 1169.

case of discrimination, the court's analysis implied that it was.[160] The court required the employee in *Pedreira* to demonstrate that her sexuality was linked to her *religious* beliefs (which may include a lack of religious faith). The court's insistence on this requirement likely stems from its overarching concern about the potential use of reverse religious discrimination claims as proxy claims.[161] Since Pedreira could not connect her homosexuality to her religious beliefs, the court dismissed the claim because it *really* sought redress for sexual orientation discrimination.[162] This minority approach makes it unlikely that any LGBT plaintiff could succeed on a reverse religious discrimination claim because few individuals derive their sexual orientation from their religious beliefs. While this result respects local legislative judgments, it also imposes a burden on plaintiffs seeking compensation for discrimination based on their nonassociation with their supervisor's religious group.

Although demonstrating membership in a protected class is difficult for traditional reverse discrimination plaintiffs, the hurdle is not nearly as burdensome for plaintiffs alleging reverse religious discrimination. For example, it is difficult for a white male to demonstrate that he is a member of a protected class (i.e., a racial minority group) when he brings a reverse racial discrimination suit. However, religious discrimination does not hinge on the same majority/minority classifications as racial discrimination. Plaintiffs in reverse religious discrimination cases can easily demonstrate membership in a protected class by showing that they hold *some* beliefs about religion (e.g., "I am a member of the Mormon/Catholic/Hindu faith," "I am agnostic," "I am atheist").

However, the Ninth Circuit's failure to require any showing of differences between the religious beliefs of the employer and employee defeats the purpose of a prima facie analysis. Without formally demonstrating that the employer and employee have religious differences, the prima facie test does not eliminate nondiscriminatory reasons for the adverse action. Similarly, *Shapolia*'s broad background-circumstances requirement opens the door to impingement on employers' First Amendment right to religious expression. By allowing an employer's unexpressed private beliefs and non-work related statements and activities to serve as background circumstances, an employer's personal religious associations may be

160. *See supra* Part III.A.

161. Pedreira v. Ky. Baptist Homes for Children, Inc., 579 F.3d 722, 727–28 (6th Cir. 2009).

162. *See id.* at 728 (discussing the status of sexual orientation discrimination in Kentucky and the Sixth Circuit).

unfairly used to find the employer liable for employment discrimination.

As originally conceived, Title VII was meant to provide protection only for members of a protected class that has traditionally been subject to discrimination.[163] Under the majority approach, however, reverse religious discrimination moves from discrimination against a "majority" to discrimination against all "non-members," which significantly expands the scope of liability for employers.[164]

The prima facie standard is particularly important for determining the viability of using reverse religious discrimination as a proxy claim for sexual orientation discrimination. If a court follows the majority approach and adopts a more lenient standard for prima facie cases, then it would likely accept reverse religious discrimination claims as proxy claims.[165]

C. Considering Proxy Claims

Proxy claims allow plaintiffs to seek protection for discrimination that the local or national legislature has not addressed. Courts typically avoid making such difficult policy decisions, since the politically accountable branches of government seem to be a more legitimate source of new law in the United States.[166] However, particularly with civil rights, courts have been important forerunners in extending protection for minority groups.[167] A modern society may value the courts' activism in protecting the rights of minorities and ensuring public equality. Conversely, society may also value judicial restraint. Will courts again be the forum that advocates for expanded minority rights—this time by allowing proxy claims for sexual orientation to proceed?

The United States Supreme Court's recent precedent suggests that the answer is no. The Roberts Court has been particularly focused on ensuring that it has jurisdiction to hear the cases before it.[168] The requirement that a plaintiff bring a legally cognizable claim

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163. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (establishing a prima facie framework for Title VII discrimination claims).

164. For an analysis of the majority approach, see *infra* Part III.B.

165. See Noyes v. Kelly Servs., 488 F.3d 1163, 1168–69 (9th Cir. 2007) and the Ninth Circuit's jurisprudence on reverse religious discrimination claims.

166. Hollingsworth v. Perry, 133 S. Ct. 2652, 2659 (2013).

167. *See supra* note 25.

168. *See* United States v. Windsor, 133 S. Ct. 2675, 2685–86 (2013) (considering the Article III standing requirements to determine whether judicial consideration is appropriate); *Hollingsworth*, 133 S. Ct. at 2668 (analyzing the Article III "case or controversy" requirement to decide the appropriate degree of judicial restraint).

(as opposed to a proxy claim) serves a similar limiting function. These procedural limits ensure that courts "act *as judges*, and do not engage in policymaking properly left to elected representatives."[169] Lower courts have also formally adopted this attitude in determining the scope of Title VII.[170] Even when discrimination based on sexual orientation may offend values of equality and justice, some courts have "decline[d] to adopt a reading of Title VII that would . . . 'achieve by judicial construction what Congress did not do and has consistently refused to do on many occasions.' "[171] In other words, lower courts are understandably refusing to accept proxy claims because doing so is consistent with recent Supreme Court precedents in this area. Thus, a careful approach to Title VII proxy claims is needed to respect Supreme Court precedent, individual liberty, and religious expression.

IV. ALIGNING LAW AND VALUES: PROPOSED TREATMENT OF REVERSE RELIGIOUS DISCRIMINATION CLAIMS UNDER A MODIFIED *MCDONNELL DOUGLAS* PRIMA FACIE TEST

This Note proposes a modified five-part *McDonnell Douglas* prima facie test. The Supreme Court acknowledged that modifications to the original *McDonnell Douglas* standard would be required to adapt it from traditional Title VII claims to other employment contexts.[172] The standard proposed here makes several substantive changes to the traditional prima facie test outlined in *McDonnell Douglas* but accommodates both the existing majority and minority approaches. This modified standard accounts for the important role of prima facie cases in employment discrimination litigation and attempts to balance the sometimes-conflicting values of religious expression and nondiscrimination. Significantly, this standard also respects legislative judgments on sexual orientation discrimination and limits the use of reverse religious discrimination claims as proxy claims. Of course, plaintiffs are always able to make a prima facie case for reverse religious discrimination by providing *direct* proof of religious discrimination. The plaintiff in *Venters* provided this sort of proof by demonstrating that the employer considered religious criteria

169. *Hollingsworth*, 133 S. Ct. at 2659.

170. *See, e.g.*, Simonton v. Runyon, 232 F.3d 33, 37 (2d Cir. 2000) (declining to provide protection against sexual orientation discrimination under Title VII); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329–30 (9th Cir. 1979) (dismissing a discrimination claim reasoning that sexual orientation did not fall within Title VII's protected classes).

171. *Simonton*, 232 F.3d at 37 (quoting *DeSantis*, 608 F.2d at 330).

172. *See McDonnell Douglas*, 411 U.S. at 802; Parker v. Balt. & Ohio R.R. Co., 652 F.2d 1012, 1017 (D.C. Cir. 1981).

when making employment decisions.[173] This Note proposes a standard for prima facie cases made through *indirect* proof of reverse religious discrimination.

Specifically, the proposed five-part modified *McDonnell Douglas* prima facie analysis for reverse religious discrimination claims consists of the following parts:

1. Is the employer a religious organization under Title VII?
2. Was the employee subjected to an adverse employment action[174]?
3. At the time the adverse employment action was taken, was the employee's job performance satisfactory?
4. Has the employee alleged that his or her *religious* beliefs differ from his or her employer's religious beliefs?
5. Has the employee provided evidence that the employment action was motivated by the employee's failure to conform to the employer's religious views?

To explicitly acknowledge the protected status of religious organizations and their internal decisions, the court should first engage in a threshold inquiry as to whether the defendant qualifies as a religious organization under Title VII.[175] Religious organizations are defined as institutions whose "purpose and character are primarily religious."[176] Title VII provides an explicit and complete exception "with respect to the employment of individuals of a particular religion or to perform work connected with the carrying on by such corporation."[177]

The second and third prongs of the modified *McDonnell Douglas* standard reflect the basic evidentiary requirements of the second and third prongs of the original *McDonnell Douglas* standard, and the first and second prongs of the *Shapolia* prima facie

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173. *See supra* notes 145–52 and accompanying text.

174. *See supra* note 39.

175. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 698 (2012) (holding that employment discrimination laws, like Title VII, do not apply to religious organizations' decisions on leaders under the First Amendment Religion Clauses).

176. *See, e.g.*, Hall v. Baptist Mem. Health Care Corp., 215 F.3d 618, 624–25 (6th Cir. 2000) (holding that a college of health sciences qualified as a religious institution under Title VII because it was affiliated with a church hospital, had a direct relationship with the Baptist church, and was "permeated with religious overtones"); EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 618 (9th Cir. 1988) (holding that the purpose and character of a for-profit manufacturing company were not primarily religious despite the Christian beliefs espoused by the owners of the corporation).

177. 42 U.S.C. § 2000e-1(a) (2012).

standard.[178] Prongs two and three of the modified standard proposed here are not substantive changes to the original *McDonnell Douglas* prima facie standard.

The fourth prong of the modified test addresses the protected-class requirement of the first prong in the original *McDonnell Douglas* prima facie standard. To balance the constitutional values of religious expression and equality, the first prong of the *McDonnell Douglas* prima facie should be modified for reverse religious discrimination claims. In these cases, plaintiffs should provide specific evidence as to the *difference* between their own religious beliefs (or lack thereof) and their employer's religious beliefs. This approach removes the difficulty of classifying certain religious beliefs as majority or minority views, while still addressing the possibility that an employee is being discriminated against because he does not share his employer's religious beliefs. Given some courts' doubt about the separateness of reverse discrimination, and Title VII's limited scope, a more traditional prima facie standard is particularly appropriate for reverse religious discrimination claims.[179]

Contrary to the Third Circuit's criticism of the background-circumstances requirement, this modified prong does not place a higher burden on reverse religious discrimination plaintiffs than traditional Title VII plaintiffs. A traditional Title VII plaintiff must demonstrate his membership in a protected class. Similarly, under the modified fourth prong, a reverse religious discrimination plaintiff must demonstrate that he has specific religious beliefs and that those beliefs differ from his employer's beliefs.[180] As applied to reverse religious discrimination claims, the modified fourth prong prevents plaintiffs from receiving protection from sexual orientation discrimination in jurisdictions where legislatures have chosen not to prohibit it. In other words, plaintiffs must show that the alleged discrimination was motivated by the employee's *religious beliefs* on homosexuality, not merely their homosexual conduct or lifestyle.

Finally, the fifth prong embraces the commonsense notion of the prima facie standard and incorporates a version of *Shapolia*'s background-circumstances requirement and *Iadiamarco*'s totality-of-

178. *See supra* Part II.A.

179. *See supra* note 54–55 and accompanying text.

180. This approach draws on the Northern District of Indiana's interpretation of the *Shapolia* standard in *McIntire v. Keystone RV Co.*, No. 3:10-CV-508, 2011 WL 5434242 (N.D. Ind. 2011), but does require a specification of the plaintiff's religious beliefs (or lack thereof).

the-circumstances approach.[181] In reverse religious discrimination cases alleging disparate treatment, the fifth prong should be interpreted in light of the high evidentiary requirement articulated in *Venters, Prowel,* and *Erdmann.*[182] To succeed on this prong, plaintiffs should present evidence of the employer's behavior indicating that he sought to impose his religious views on his subordinate.[183] *Venters*, *Prowel*, and *Erdmann* demonstrate that true reverse religious discrimination usually occurs when there is repeated proselytization, rather than an implicit accusation of noncompliance with a single religious belief of the employer.[184] By requiring evidence that the employer engaged in attempted conversion, religious coercion, or other similar behavior, courts can simultaneously remedy reverse religious discrimination and protect employers' First Amendment rights to self-expression. This prong makes the most significant change to the original *McDonnell Douglas* framework, but it is most important in addressing the conflicting values inherent in a reverse religious discrimination claim.

If courts adopt the majority approach to the background-circumstances requirement as articulated in *Shapolia*, it is unclear what kind of facts will suffice to "support the inference that the employment actions were taken because of a discriminatory motive."[185] Is it enough that the employee has knowledge of the employer's private religious beliefs, even though the employer never expressed them in the workplace? It will be difficult for lower courts to administer this element without encroaching on employers' constitutional rights to religious association and expression. The revised evidentiary requirement in prong five of the modified standard provides a more workable threshold that requires evidence of the employer's coercive behavior or discriminatory animus.

A modified *McDonnell Douglas* prima facie standard for reverse religious discrimination claims protects constitutional freedoms and preserves the original scope of Title VII. By requiring

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181. *See* Iadimarco v. Runyon, 190 F.3d 151, 161 (3d Cir. 1999):

> [A]ll that should be required to establish a prima facie case in the context of "reverse discrimination" is for the plaintiff to present sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others *based upon a trait that is protected* under Title VII.

(emphasis added).

182. *See supra* notes 127–35, 145–52, and accompanying text.

183. *See* Venters v. City of Delphi, 123 F.3d 956, 977 (7th Cir. 1997) (reviewing the line between an employer's First Amendment rights to religious expression in the workplace and the employee's right to be free from the imposition of religious beliefs).

184. *See supra* note 182.

185. Shapolia v. Los Alamos Nat'l Lab., 992 F.2d 1033, 1038 (10th Cir. 1993).

plaintiffs to demonstrate the link between their sexuality and religious beliefs, courts avoid undemocratically extending protection for sexual orientation discrimination in jurisdictions where it is not prohibited. This result encourages democratic accountability by requiring legislatures, rather than courts, to prohibit sexual orientation discrimination if the electorate demands it. Most importantly, reducing the use of reverse religious discrimination claims as proxy claims for sexual orientation discrimination preserves the integrity of federal common law and the scope of First Amendment religious expression rights.

V. CONCLUSION

Reverse religious discrimination claims are an increasingly popular method for redressing sexual orientation discrimination in jurisdictions where such discrimination is not prohibited. The history of sexual orientation discrimination law and the failure of various proxy claims demonstrate the need for litigants to seek alternative methods for redressing sexual orientation discrimination. In response to the newest proxy claim—reverse religious discrimination—circuit courts have adopted two contrasting standards for what constitutes a prima facie case.

The minority approach, adopted by the Sixth and Third Circuits, utilizes a traditional *McDonnell Douglas* prima facie standard. This standard requires reverse religious discrimination plaintiffs to demonstrate that they are part of a protected Title VII class. More specifically, plaintiffs must show that their homosexual conduct is derived from their own specific *religious* beliefs. In contrast, the Seventh, Ninth, and Tenth Circuits have adopted a lower evidentiary burden that replaces the protected-class requirement with a background-circumstances prong to support an inference of discrimination.

In response, this Note proposes the application of a modified, five-part *McDonnell Douglas* prima facie standard to reverse religious discrimination claims. This proposed modification requires plaintiffs to demonstrate the link between their sexual orientation and religious beliefs and to provide evidence of religious coercion by their employer, which strikes the appropriate balance between religious expression and nondiscrimination. This test also reduces the availability of reverse religious discrimination claims as proxy claims for sexual orientation discrimination. Adopting a uniform standard for reverse religious discrimination claims avoids manipulation of courts through

proxy claims, encourages legislatures to act in response to societal demands, and protects citizens' constitutional right to religious expression.

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