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PERCEPTION OVER REALITY: EXTENDING THE ADA’S CONCEPT OF “REGARDED AS” PROTECTION UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAW

CRAIG ROBERT SENN*

ABSTRACT

A head-scratching inconsistency currently exists in federal employment discrimination law. On the one hand, an employer is 100% liable under the Americans with Disabilities Act of 1990 (ADA) if it erroneously “regards” a person as having an actual “disability” and then discriminates based on this misperception.

On the other hand, many courts have held that this “regarded as” protection does not extend to other federal employment discrimination laws, such as Title VII of the Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act of 1967 (ADEA). In these jurisdictions, an employer is not liable at all under Title VII or the ADEA if it erroneously “regards” a person as (1) being of a certain race, color, religion, sex, or national origin or (2) being at least forty years old and then discriminates based on this misperception. According to these courts, this disparity in employee protection (and employer liability) is warranted because the ADA includes an express “regarded as” protection, while Title VII and the ADEA do not.

This Article proposes a wholesale judicial (and, if necessary, legislative) extension of the “regarded as” protection under federal employment discrimination law. This uniformity of employee protection (and employer liability) under the ADA, Title VII, and the ADEA is warranted for two reasons: (1) these other federal employment discrimination laws have long-shared with the ADA an identical congressional and judicial philosophy—namely, that employer perception or stereotype is an appropriate justification for imposing employment discrimination liability, even when that perception or stereotype is erroneous and inaccurate; and (2) the “regarded as” protection is necessary to capture an otherwise elusive subset of discriminating employers—the “erroneous discriminators”—and thus fully advance the comprehensive antidiscrimination purposes of these other laws.

Simply put, an employer that acts based on perception or stereotype regarding a person possessing a certain protected trait under Title VII or the ADEA is no less a “discriminator” just because its perception or applied stereotype was “wrong” rather than “right.” The ex-

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tension of the “regarded as” protection across the federal employment discrimination spectrum will bring needed uniformity of employee protection and treat these “erroneous discriminators” as harshly as any other discriminating employer.

I. INTRODUCTION

Consider the following five employment scenarios, and determine whether each person has a viable claim under federal employment discrimination law:

Scenario #1: Anna is interviewing for a job at Company XYZ. During the interview, the company supervisor notices that Anna has no hair, and he assumes that she has, or is recovering from, cancer and will not work as productively as one who is completely healthy. Although Anna is the most qualified applicant for the position, the supervisor refuses to select her solely because he perceives and regards her as having a disability. In fact, Anna does not have cancer or any other disabling condition.

Scenario #2: Bob is interviewing for a job at Company XYZ. During the interview, the company supervisor notices that Bob is completely gray-haired, and he assumes that he is at least fifty years old and will not work as productively as a thirty-five year old. Although Bob is the most qualified applicant for the position, the supervisor refuses to select him solely because he perceives and regards him as being over fifty. In fact, Bob is thirty-five years old.

Scenario #3: Catherine is interviewing for a job at Company XYZ. During the interview, the company supervisor notices
that Catherine has a relatively large abdominal area, and he assumes that she is pregnant and will not work as productively as one who is not pregnant. Although Catherine is the most qualified applicant for the position, the supervisor refuses to select her solely because he perceives and regards her as being pregnant. In fact, Catherine is not pregnant.

Scenario #4: Don is interviewing for a job at Company XYZ. During the interview, the company supervisor notices that Don has a Spanish accent, and he assumes that he is from Mexico and will not work as productively as a person from another country, such as the United States. Although Don is the most qualified applicant for the position, the supervisor refuses to select him solely because he perceives and regards him as being of Mexican lineage and national origin. In fact, Don and his family have no such lineage or origin.

Scenario #5: Ellen is interviewing for a job at Company XYZ. During the interview, the company supervisor notices that Ellen is wearing a Star of David necklace, and he assumes that she is Jewish and will not work as productively as one who is a member of another religion. Although Ellen is the most qualified applicant for the position, the supervisor refuses to select her solely because he perceives and regards her as being Jewish. In fact, Ellen is not Jewish.

Which persons have viable federal employment discrimination claims? All of them? None of them? Some of them?

At present, there is a peculiar inconsistency in federal employment discrimination law. On the one hand, the Americans with Disabilities Act of 1990 (ADA)1 includes express protection for an individual who, while lacking any actual “disability,”2 is erroneously “regarded” or perceived by an employer as having such a disability and then discriminated against on that basis.3 Because of the ADA’s express “regarded as” protection, Anna (in Scenario #1 above) has a vi-

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1. 42 U.S.C. §§ 12101-12213 (2006). The Americans with Disabilities Act of 1990 (ADA) prohibits employment-based discrimination against a “qualified individual with a disability because of the disability.” Id. § 12112(a)-(b); see also id. §12112(b) (defining “discriminate” as used in subsection (a)); id. § 12111(8) (defining “qualified individual with a disability”). The ADA also prohibits retaliatory discrimination against a person for having “opposed any act or practice made unlawful” by the ADA or having “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing” under the ADA. Id. § 12203(a).

2. The ADA defines the term “disability” to include a “physical or mental impairment that substantially limits one or more of the major life activities of such individual.” Id. § 12102(2)(A).

3. Id. § 12102(2)(C) (defining the term “disability” to include “being regarded as having such an impairment”); see infra Part II.A (discussing the provisions and meaning of the ADA’s “regarded as” protection).
able federal employment discrimination claim. On the other hand, in contrast to the ADA, none of the other primary federal employment discrimination laws—such as Title VII of the Civil Rights Act of 1964 (Title VII)\(^4\) or the Age Discrimination in Employment Act of 1967 (ADEA)\(^5\)—contain an explicit “regarded as” protection. The absence of this express protection has led many courts to conclude that no legal recourse exists for an individual who is erroneously “regarded” or perceived by an employer as falling within (1) a Title VII-protected category (i.e., race, color, religion, sex (including pregnancy)\(^6\), or national origin) or (2) the ADEA-protected category (i.e., age of forty years old or older) and then discriminated against on that basis.\(^7\)

Thus, despite being subjected to discriminatory conduct that is comparable to that directed at Anna and incurring wage-related and other losses that are comparable to those suffered by Anna, neither Bob, Catherine, Don, nor Ellen (in Scenarios #2, #3, #4, or #5 above, respectively) necessarily has a viable federal employment discrimination claim. Regrettably, Company XYZ—acting with an equally egregious intent in each of these four scenarios—would escape scot-free and without consequence under Title VII or the ADEA for its discrimination.

Part II of this Article begins by discussing the express provisions and meaning of the “regarded as” protection under the ADA. Importantly, it then identifies and explains that protection’s underlying congressional philosophy as well as its purpose. As to the former, the ADA’s “regarded as” protection reflects the central philosophy that employer perception or stereotype is an appropriate justification for imposing employment discrimination liability, even when that perception or stereotype is erroneous and inaccurate. As to the latter, the “regarded as” protection plays a necessary role in achieving the ADA’s goal of a comprehensive prohibition of disability-based employment discrimination.\(^8\)

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4. 42 U.S.C. §§ 2000e to 2000e-17 (2006). Title VII of the Civil Rights Act of 1964 prohibits employment-based discrimination against any person because of his or her race, color, religion, sex, or national origin. See id. § 2000e-2(a)(1). Title VII also contains an antiretaliation provision similar to that of the ADA. See id. § 2000e-3(a); supra note 1 (describing the ADA’s antiretaliation provision).

5. 29 U.S.C. §§ 621-634 (2006). The Age Discrimination in Employment Act of 1967 (ADEA) prohibits employment-based discrimination against a person because of his or her age (i.e., forty years old or older). See id. §§ 623(a), 631(a) (limiting the ADEA’s applicability to persons “at least 40 years of age”). The ADEA also contains an antiretaliation provision similar to those of the ADA and Title VII. See id. § 623(d); supra notes 1, 4 (describing the ADA’s and Title VII’s antiretaliation provisions, respectively).

6. See 42 U.S.C. § 2000e(k) (stating that “because of sex” includes “because of or on the basis of pregnancy, childbirth, or related medical conditions”).

7. See infra Part III.A (discussing judicial decisions which have rejected “regarded as” protections and claims under Title VII and/or the ADA).

8. See infra Part II.B (discussing the congressional philosophy and purpose behind the ADA’s “regarded as” protection).
Part III discusses judicial decisions that have addressed whether “regarded as” protection extends beyond the ADA to other federal employment discrimination laws. While some courts have recognized the viability of non-ADA “regarded as” claims, many have rejected these claims because of the absence of an express “regarded as” protection in these other laws.

Part IV then proposes an extension of “regarded as” protection to Title VII and the ADEA, and it defends that extension on two primary grounds. First, the above-referenced congressional philosophy reflected in the ADA’s “regarded as” protection is not within the exclusive domain of the ADA. Rather, when enacting the ADEA and the Title VII-amending Pregnancy Discrimination Act of 1978 (PDA), Congress embraced this same philosophy of targeting an employer’s erroneous perception over an employee’s reality for purposes of employment discrimination liability. Similarly, the Supreme Court has adopted this philosophy in its ADEA and Title VII decisions. This common and shared philosophy among these laws warrants common and shared protections (i.e., “regarded as” protection) across the federal employment discrimination law spectrum.

Second, this extension of “regarded as” protection is necessary to fully advance the comparable policies of each of the federal employment discrimination laws. With “regarded as” protection under an applicable law, that law’s underlying antidiscrimination policy and purposes are fully promoted, because all employers that manifest discriminatory intent (including the subset of “erroneous discriminators,” who discriminate based on perceptions or stereotypes that happen to be inaccurate) are held liable. But, without “regarded as” protection, that same law’s underlying antidiscrimination policy and purposes are frustrated because these “erroneous discriminators” are allowed to avoid liability. At present, the ADA falls into the former scenario, while Title VII and the ADEA regrettably fall into the latter scenario.

II. “REGARDED AS” PROTECTION UNDER THE ADA

Given its express “regarded as” protection, the ADA is the relevant starting point for evaluating whether that type of protection is

9. Pub. L. No. 95-555, § 1, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)). The Pregnancy Discrimination Act of 1978 (PDA) amended Title VII to clarify that, for purposes of unlawful discrimination, the term “because of sex” includes “because of or on the basis of pregnancy, childbirth, or related medical conditions.” Id.

warranted under other federal employment discrimination laws. Specifically, it is important to understand (1) the basic provisions and meaning of the ADA's “regarded as” protection, (2) the congressional philosophy reflected by this protection, and (3) the primary purpose or rationale for this protection.

A. The Express Provisions and Meaning of the “Regarded As” Protection

Congress explicitly incorporated the ADA’s “regarded as” protection and concept into various provisions. Most importantly, the ADA provides a multipronged definition for the term “disability,” so as to encompass disability-based discrimination that occurs because of actual or perceived “disability”:

(2) Disability. The term “disability” means, with respect to an individual—
(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment.11

As long as a person “meets any one of these three tests” or prongs, he or she is deemed covered and protected under the ADA.12

The ADA also incorporates the “regarded as” concept when addressing whether its employment discrimination protections apply to persons engaging in, or believed to be engaged in, illegal drug usage.13 Understandably, the ADA excludes from its protection an


12. H.R. Rep. No. 101-485(III), at 27; see also EEOC Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(g) app. (2008) (stating similarly that "[a]n individual must satisfy at least one of these [three] parts [of the “disability” definition] in order to be considered an individual with a disability" under the ADA).

individual “who is currently engaging in the illegal use of drugs” and then subjected to adverse employment action based on that usage.\textsuperscript{14} But, again using the “regarded as” concept, Congress made this exclusion inapplicable (and thus the ADA’s protections still fully apply) to a person who “is erroneously regarded as engaging in such use, but is not engaging in such use.”\textsuperscript{15}

The ADA’s legislative history, in addition to accompanying regulations from the Equal Employment Opportunity Commission (EEOC), the federal administrative agency that, in part, enforces the ADA, explains the basic meaning of this “regarded as” protection. When enacting the ADA, Congress acknowledged that the “regarded as” prong “applies whether or not a person has an impairment,” as this protection was solely “intended to cover persons who are treated . . . as having a physical or mental impairment that substantially limits a major life activity.”\textsuperscript{16} Consequently, the “regarded as” protection does not require an actual “disability” but also applies to the following two groups of individuals:

1. \textit{the non-disabled but actually impaired group}: those who “have an impairment which is not substantially limiting [as to a major life activity] but [are] perceived by the employer . . . [as having] a substantially limiting impairment”;\textsuperscript{17} and

2. \textit{the non-disabled and non-impaired group (i.e., the completely “healthy” group)}: those who “have no impairment at all” but are “regarded by the employer . . . as having a substantially limiting impairment.”\textsuperscript{18}

\begin{footnotesize}
\begin{enumerate}
\item Id. § 12114(a); see also id. § 12210(a) (describing the same exclusion among the ADA’s “Miscellaneous Provisions”).
\item Id. § 12114(b)(3); see also id. § 12210(b) (describing the same “regarded as” protection among the ADA’s “Miscellaneous Provisions”); H.R. Rep. No. 101-485(II), at 77, 80 (stating, respectively, that Congress did “not intend to affect [ADA] coverage for individuals who . . . are erroneously perceived as having a current drug problem” and that those “regarded as illegal drug users are protected against discrimination”).
\item EEOC Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(l) app. (noting also that the “regarded as” prong can be met in “different ways”); see also H.R. Rep. No. 101-485(II), at 53 (stating similarly that the “regarded as” protection extends to those “who ha[ve] [a] physical or mental impairment that does not substantially limit a major life activity” but who are “treated” by an employer as having such impairment).
\item EEOC Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(l) app. (stating similarly that the “regarded as” protection is applicable if the employer “erroneously believes the individual has a substantially limiting impairment that the individual actually does not have”); see also H.R. Rep. No. 101-485(II), at 53 (stating similarly that the “regarded as” protection extends to those who have “no physical or mental impairment” but who are “treated” by an employer as having such impairment).
\end{enumerate}
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In its ADA-implementing regulations, the EEOC provides insightful illustrations of persons who fall into these two distinct groups. This following example describes an employee who would receive “regarded as” protection as a member of the first group (the nondisabled but actually impaired group):

[S]uppose an employee [in fact] has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.19

Similarly, the EEOC gives this next example of an employee who would receive “regarded as” protection, even though he or she is a member of the second group (the nondisabled and nonimpaired group):

[Suppose] an employer discharged an employee in response to a rumor that the employee is infected with Human Immunodeficiency Virus (HIV). Even though the rumor is totally unfounded and the individual has no impairment at all, the individual is considered an individual with a disability because the employer perceived . . . this individual as being disabled. Thus, in this example, the employer, by discharging this employee, is discriminating on the basis of disability.20

Consequently, under the ADA’s “regarded as” concept, it is not necessary for an individual to have an actual or real disability in order to be protected from employment discrimination. Rather, in order to be ADA-protected, it is sufficient that a person be erroneously “regarded” or “perceived” by an employer as having that actual or real disability.21

In Sutton v. United Air Lines, Inc., the Supreme Court similarly described how the ADA’s “regarded as” protection primarily applies to these two groups or categories of people:

There are two apparent ways in which individuals may fall within [the “regarded as” prong of] this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual—it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.


20. Id. (emphasis added).

21. The “record of” prong of the ADA’s “disability” definition, see supra note 11 and accompanying text, has certain parallels to the “regarded as” prong, as both can serve to protect a person who no longer has, or never had, any actual “disability.” Specifically, when
B. The Underlying Philosophy and Purpose of the "Regarded As" Protection

Beyond understanding the basic provisions and meaning of the ADA’s “regarded as” protection, it is also important to recognize Congress’s mindset and motivation for granting protection to those who have either no impairment at all or, at most, a nondisabling impairment. In other words: (1) What was the central congressional philosophy behind providing discrimination protection to those who are not actually or in reality disabled and who thus otherwise would not possess the ADA’s protected trait? and (2) What was the primary purpose or rationale for providing such discrimination protection to those who are not actually or in reality disabled and who thus otherwise would not possess the ADA’s protected trait?

As to the first question, the ADA’s legislative history effectively illustrates the philosophical principle at the heart of the “regarded as” protection—that is, employer perception or stereotype is an appropriate justification for imposing employment discrimination liability, even when that perception or stereotype is erroneous and inaccurate. For example, the Committee on the Judiciary expressly stated that “[t]he perception of the [employer] is a key element” for imposing ADA-based employment discrimination liability. Illustrating this perception-based philosophy, the committee emphasized that “a person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered . . . , whether or not the person’s physical or mental condition would be considered a disability” under the ADA.

Similarly, the Committee on Education and Labor stressed this central philosophy of targeting an employer’s erroneous perception over an employee’s reality for purposes of employment discrimination liability:

enacting the ADA, Congress noted that the “record of” protection was designed to cover “those who have” (1) “a history of an impairment” that rises to the level of an actual “disability,” such as those who have “recovered” from that impairment, or (2) those who otherwise have “been misclassified as having an impairment,” such as those “who have been misclassified as mentally retarded.” H.R. REP. NO. 101-485(II), at 52-53; H.R. REP. NO. 101-485(III), at 29; see also EEOC Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(k) app. (explaining similarly that the “record of” prong is intended to protect individuals from discrimination (1) “because of a history of disability” or (2) “because they have been misclassified as disabled” or subject to “erroneous classification” as disabled).


23. Id.; see also id. at 45 (highlighting similarly that “person[s] . . . must not be excluded . . . based on stereotypes or fear” and that “[d]ecisions are not permitted to be based on generalizations” concerning the employee’s disability).
[Employers] are required to make employment decisions . . . not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do. The Act is premised on the obligation of employers to consider people with disabilities as individuals and to avoid prejudging what an applicant or employee can or cannot do on the basis of that individual's appearance or any other easily identifiable characteristic, or on a preconceived and often erroneous judgment about an individual's capabilities based on "labeling" of that person as having a particular kind of disability.24

As to the second question, the ADA and its legislative history also explain the "regarded as" protection's primary purpose or rationale. As an initial point, the overarching goals of Congress when enacting the ADA were to provide (1) a clear and comprehensive national mandate for the elimination of [disability-based] discrimination and (2) "clear, strong, consistent, enforceable standards addressing discrimination."25 According to Congress, this "clear and comprehensive" prohibition on disability-based discrimination was in response to a "compelling need."26

Having established this goal of an unequivocal and complete prohibition on disability discrimination, Congress used the "regarded as" protection to target one piece or part of the discrimination problem—namely, the subset of employers that engaged in perception-based or

24. H.R. REP. NO. 101-485(II), at 58 (stating also that "[i]t would also be a violation to deny employment to an applicant based on generalized fears about the safety of the applicant or higher rates of absenteeism" because "[o]ften, group-based fears are erroneous"); see also id. at 53 ("A person who is . . . discriminated against, because of [an employer's] negative attitudes toward that person's impairment is treated as having a disability. Thus, for example, if an employer refuses to hire someone . . . because of the employer's perception that the applicant has an impairment which prevents that person from working, that person is covered . . . "); id. at 72-73 ("In order to assure that misconceptions do not bias the employment selection process, the legislation sets forth a process which begins with a prohibition on pre-offer medical examinations or inquiries."); H.R. REP. NO. 101-485(III), at 42-43 ("In order to assure that misconceptions do not bias the employment selection process, this section sets up a process that begins with the prohibition of pre-employment medical examinations or inquiries."); EEOC Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(l) app. (2008) (stating that a person would be protected if an employer "made an employment decision because of a perception of disability based on 'myth, fear or stereotype'").

25. 42 U.S.C. § 12101(b)(1)-(2); see also id. § 12101(a)(2), (a)(8) (finding, respectively, that disability-based discrimination "continues to be a serious and pervasive social problem" and that the "Nation's proper goals . . . are to assure equality of opportunity" to those with disabilities); H.R. REP. NO. 101-485(II), at 22 (stating also that "[t]he purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities"); H.R. REP. NO. 101-485(III), at 23 (stating also that "[t]he purpose of the [ADA] is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities"); id. at 26 (stating that "[t]he ADA is a comprehensive piece of civil rights legislation which promises a new future: a future of inclusion and integration, and the end of exclusion and segregation").

stereotype-based discrimination. Specifically, Congress observantly recognized that perception-based or stereotype-based discrimination can, and does, occur. For example, the Committee on the Judiciary noted that “stereotypes and misconceptions about the abilities and inabilities of persons with disabilities continue to be pervasive. Discrimination occurs against persons with disabilities because of stereotypes, discomfort, misconceptions, and fears.” Continuing to emphasize this reality, the committee also stated that “many of the problems faced by disabled people are . . . the result of discriminatory policies based on unfounded, outmoded stereotypes and perceptions.”

Similarly, the Committee on Education and Labor recognized the existence of, and need to address, perception-based or stereotype-based discrimination. For example, the committee observed that “[d]iscrimination against people with disabilities . . . often results from false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies” as well as “stereotypical assumptions, fears and myths not truly indicative of the ability of such individuals.” Indeed, Congress expressly acknowledged the reality of perception-based or stereotype-based discrimination in the ADA itself, as the Act’s “Findings” section notes that disabled persons “have been faced with restrictions and limitations . . . [and] subjected to a history of purposeful unequal treatment, . . . resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals.”

In sum, via the ADA’s “regarded as” protection, an employer that perceives a person as having an actual disability and then discriminates based on that perception is not allowed to escape liability just because its perception was inaccurate and the employee’s “reality” was different. This protection reflects the central congressional philosophy that employer perception or stereotype is an appropriate justification for imposing employment discrimination liability, even when that perception or stereotype is erroneous or inaccurate. By ferreting out this subset of discriminators, it serves as a necessary

27. See Leonard v. Katsinas, No. 05-1069, 2007 WL 1106136, at *12 (C.D. Ill. Apr. 11, 2007) (“Providing protection to even those who are erroneously identified as disabled was apparently necessary, in Congress' vision, to achieve the ADA's stated purpose of [providing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities[,]”) (alteration in original).
31. Id. at 40; see also id. at 33 (stating that “the major categories of job discrimination faced by people with disabilities include: . . . refusal to hire based on presumptions, stereotypes and myths”).
III. VARYING JUDICIAL TREATMENT OF “REGARDED AS” CLAIMS UNDER OTHER FEDERAL EMPLOYMENT DISCRIMINATION LAWS

In contrast to the ADA, neither Title VII nor the ADEA contains any explicit language granting “regarded as” protection and coverage.33 This absence of an express “regarded as” protection has led courts to the proverbial “fork in the road” when addressing non-ADA employment discrimination claims based on an employer’s erroneous perception as to a plaintiff’s protected category or trait. A court can take the path to the left, rejecting these claims based on the lack of an explicit “regarded as” protection. Or, a court can take the path to the right, recognizing these claims notwithstanding this lack of an express “regarded as” protection.

A. Judicial Rejection of Non-ADA “Regarded As” Claims

Many courts have taken the path to the left. Such courts reject non-ADA “regarded as” claims and view plaintiffs who are erroneously perceived or stereotyped as (1) being of a certain race, color, religion, sex, or national origin or (2) being at least forty years old as not even meeting the “protected group, class or trait” element of a prima facie case for employment discrimination purposes.34

This path is nicely reflected in a recent New York federal district court’s decision in *Lewis v. North General Hospital*.35 In *Lewis*, the district court confronted a Title VII religious discrimination claim, in which the plaintiff who was “not Muslim”36 alleged that he had been erroneously “perceived to be a Muslim” by his employer and then “subjected to discrimination” because of that perceived religious affiliation.37 In support of his claim, the plaintiff—whose legal name during employment was “Serh Talmadge Farid Efe”38—asserted that his employer’s inaccurate perception was evidenced by a co-worker’s


34. In *McDonnell Douglas Corp. v. Green*, the Supreme Court, addressing a Title VII race discrimination claim, explained that a plaintiff establishes a prima facie case of racial employment discrimination by showing the following: (1) “he [or she] belongs to a racial minority”; (2) “he [or she] applied and was qualified for a job for which the employer was seeking applicants”; (3) “he [or she] was rejected”; and (4) after the rejection, “the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.” 411 U.S. 792, 802 (1973).


36. Id. at 392.

37. Id. at 394; see also id. at 401 (noting also the plaintiff’s testimony that he was “discriminated against because of . . . the Hospital’s ‘perception’ that he was Muslim”).

38. Id. at 393.
statement that “someone with the name ‘Talmadge’ had been affiliated with Malcolm X.” The employer subsequently moved for summary judgment as to the plaintiff’s claims.

The court granted summary judgment to the employer as to the plaintiff’s “perceived religion” claim under Title VII. Quickly concluding that such a claim “fails as a matter of law,” the court focused exclusively on the absence of any express “regarded as” protection within Title VII:

[T]he protections of Title VII do not extend to persons who are merely “perceived” to belong to a protected class. In the Americans with Disabilities Act, Congress provided for claims based on a “perceived” disability or being “regarded as” having a disability. If Congress had wanted to permit a similar cause of action under Title VII for “perceived religion” discrimination, it could have so provided. It did not.

Another example of a court taking this path is a Tennessee federal district court in *Butler v. Potter*. In *Butler*, the district court faced a Title VII race and national origin discrimination claim, in which the plaintiff who was “a white Caucasian” and “not of Arab, Indian, or Middle Eastern descent” asserted that he had been subjected to discrimination and a hostile work environment by his employer “on the basis of his [inaccurately] perceived race and/or national origin.” In support of his claims, the plaintiff alleged that his employer’s erroneous perception was evidenced by (1) one supervisor “accus[ing] him of being Indian or Middle Eastern,” (2) another supervisor indicating that “he also thought plaintiff was an Arab,” and (3) supervisors asking him “questions about his prominent nose.” At summary judgment, the employer argued that the plaintiff did not actually belong to a protected class for purposes of his Title VII claim.

39. Id. at 401.
40. Id. at 392.
41. Id. at 401.
42. Id. (citations omitted).
43. 345 F. Supp. 2d 844 (E.D. Tenn. 2004).
44. Id. at 846.
45. Id. at 850 (stating also that “[i]t is undisputed that plaintiff is neither of Indian nor Middle Eastern origin”).
46. Id.; see also id. at 847 (noting that the plaintiff had alleged “national origin (perceived as Arab or Indian) . . . as [one of the] bases of discrimination”); id. at 848 (noting that the plaintiff had claimed “race (presumed Arabic) [and] national origin (presumed Arabic) . . . as [two of] the bases of discrimination” and asserted “perceived race and/or national origin discrimination”).
47. Id. at 846.
48. Id. at 846 n.1.
49. Id. at 850.
50. See id.
The court granted summary judgment to the employer as to the plaintiff’s “perceived race and/or national origin” claims under Title VII.\(^\text{51}\) Like the Lewis court, the Butler court succinctly rejected such claims and solely based its decision on the absence of any explicit “perceived as” protection within Title VII:

Title VII protects those persons that belong to a protected class and says nothing about protection of persons who are perceived to belong to a protected class. ... Congress has shown, through the ... Americans with Disabilities Act, that it knows how to enact legislation that protects persons who are wrongly perceived to be in a protected class. Neither party has cited any controlling authority which would permit a claim for perceived race or national origin discrimination and this Court is unaware of any such precedent.\(^\text{52}\)

In addition to the Lewis and Butler courts, other federal district courts in Georgia,\(^\text{53}\) Illinois,\(^\text{54}\) and New York\(^\text{55}\) have rejected (or oth-

\(^{51}\) Id.

\(^{52}\) Id. (citation omitted).

\(^{53}\) See Uddin v. Univ. Avionics Sys. Corp., No. 1:05-CV-1115-TWT, 2006 WL 1835291, at *1, *6 (N.D. Ga. June 30, 2006). The Uddin case involved a Title VII claim where an Indian plaintiff alleged discrimination based on being erroneously “perceived [as of Middle Eastern] race, ethnicity, and/or national origin.” Id. at *6. The court rejected these claims, stating that “Title VII does not explicitly protect persons who are perceived to belong to a protected class. Additionally, Plaintiff has not cited any controlling authority which would permit a claim for perceived race or national origin discrimination, and this Court is unaware of any such precedent.” Id. While dismissing these perception-based claims, the court permitted the plaintiff’s Title VII color and religion discrimination claims, reasoning that he “in actuality has a dark complexion and is a Muslim.” Id. (emphasis added).

\(^{54}\) See McIntosh v. Ill. Dep’t of Employment Sec., No. 05-C-7044, 2007 WL 1958577, at *5 (N.D. Ill. July 2, 2007) (rejecting a Title VII claim where an African-American plaintiff alleged discrimination based on being erroneously perceived as of “Spanish” national origin and stating that (1) the “attributes” leading to the perception “must still correlate with a plaintiff’s [actual] country of origin or that of his or her ancestors” and (2) as a result, the plaintiff, as an African-American, could not rely upon her frequent “use of the Spanish language” as a “springboard for a claim that [the employer] took issue with her actual national origin” (emphasis added)); Leonard v. Katsinas, No. 05-1069, 2007 WL 1106136, at *1, *13 (C.D. Ill. Apr. 11, 2007) (involving a § 1981 claim where purported “Native American” plaintiffs alleged discrimination based on race and heritage, and stating that (1) “Plaintiffs will bear the burden of proving at trial . . . that they are members of the protected class” and “actually of Native American ancestry,” (2) “unlike with the ADA, there is no express protection in § 1981, or Title VII for that matter, for individuals ‘regarded as’ members of a protected class,” and (3) Congress’s failure to “amend Title VII or § 1981 to correspondingly widen the scope of statutory protection is some suggestion that it regards actual membership within a protected class a mandatory requirement to prevail under those statutes” (emphasis added)).

Interestingly, the Leonard court tried to compromise on the issue of non-ADA “regarded as” employment discrimination claims. As mentioned above, the court ultimately rejected such claims by requiring that the plaintiffs prove they were “actually of Native American ancestry” in order to prevail at the trial phase of their § 1981 claim. See id. at *1, *13 (emphasis added).

However, the court required no such showing in order to survive the summary judgment phase. Id. at *12. Stating that “a focus on the perceptions of the alleged discriminator is appropriate at this stage,” id. (emphasis added), the court allowed the plaintiffs to defeat summary judgment based solely on their showing that the employer “believed [them] to be
otherwise questioned) the viability of non-ADA employment discrimination claims that are based upon an employer’s erroneous perception or stereotype of a plaintiff’s protected category or trait.

B. Judicial Recognition of Non-ADA “Regarded As” Claims

In contrast, some jurisdictions have taken the path to the right at the fork in the road. Such courts recognize non-ADA “regarded as” claims and conclude that a plaintiff whom an employer erroneously perceives or stereotypes as falling within a particular protected group or class still satisfies the “protected group, class or trait” element of a prima facie case for employment discrimination purposes.

This path is perhaps best illustrated by an Ohio federal district court’s decision in Perkins v. Lake County Department of Utilities. In Perkins, the district court confronted a Title VII race and national origin claim, in which the plaintiff, a purported “American Indian,” asserted that his employer had discriminated against him based on that very “status as an American Indian.” Consequently, the plaintiff had not originally alleged any erroneous employer perception as the basis for his Title VII claim. However, in a motion for summary judgment, the employer made two arguments regarding the plaintiff’s failure to establish a prima facie case of employment discrimination: (1) he was “not, in fact, an American Indian” and thus “not . . .

Native Americans.” Id. (stating also that it was “not necessary to determine” the plaintiffs’ Native American status “at this point so long as ‘there is some objective evidence reflective of a basis for’ [the employer’s] purported belief that the Plaintiffs’ [sic] are Native American” (quoting Perkins v. Lake County Dep’t of Utilities, 860 F. Supp. 1262, 1278 (N.D. Ohio 1994))). In support of this compromise for summary judgment purposes, the court emphasized federal antidiscrimination policy:

[If] there is evidence that an alleged discriminator believed the plaintiffs to be a [sic] members of a [protected] class—in this case, Native Americans—and discriminated against them based on this belief, should it even matter if the plaintiffs are actually members of that protected class or not? Anti-discrimination statutes like § 1981 were undoubtedly drafted to curb certain actions grounded in racial animus, and prohibited racial animus should arguably be no less actionable if carried out in a case of mistaken identity.

Id. at *9.

55. See Berrios v. Hampton Bay Union Free Sch. Dist., No. CV 02-3124, 2007 WL 778165, at *1 (E.D.N.Y. Mar. 12, 2007) (invoking a Title VII claim where a plaintiff alleged discrimination based on being erroneously “perceived to be a witch, that is, a person who practices the Wiccan religion” and stating that (1) “a claim based upon a ‘perceived’ religious belief may not state a viable claim under Title VII” because the Act “makes no specific provision including those who are ‘perceived to belong to a particular religion as falling within a protected class’ and (2) as a result, a jury finding in favor of the plaintiff on the “perceived religion claim . . . can be the subject of appeal”).

57. Id. at 1263.
58. See id.
a member of a class protected by Title VII; and (2) he was not a
member of a protected class by virtue of “his and his employer’s mist-
taken belief that he [was] an American Indian.”

The court denied summary judgment to the employer on the
plaintiff’s Title VII claim. While expressing uncertainty on the first
issue of whether the plaintiff was actually “American Indian,” the
court turned to the second question and clearly stated that “it is the
employer’s reasonable belief that a given employee is a member of a
protected class that controls this issue” for prima facie discrimination
claim purposes.

The court offered two reasons for its position. First, the court rec-
ognized the common and “important role” that employer perception
plays in employment discrimination, particularly in racial discrimi-
nation. Noting the inextricable relationship between an employer’s
perception and employment discrimination, the court explained:

It is the skin color leading to the perception that the person is “dif-
ferent” from the white majority that leads to discrimination.

. . . . [S]ubjective perception of an individual’s race clearly plays
an important role in racial classification where discrimination is
involved. This Court has never encountered an instance in which
an employer admittedly first checked the pedigree of an employee
before engaging in discriminatory conduct.

As a result, the Perkins court viewed “perception and appearance [as]
everything” for Title VII purposes and concluded that “[o]bjective
appearance and employer perception are the basis for discrimination
and . . . the key factors relevant to enforcing rights granted members
of a protected class.”

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59. Id. at 1264 (emphasis added). The employer submitted evidence “that neither
Plaintiff nor his immediate family are members of any tribe, live in an Indian community,
or participate in Indian cultural events.” Id. at 1276.
60. Id. at 1265 (emphasis added).
61. Id. at 1277-78.
62. Id. at 1265 (stating that “the present answer” on that issue is “an equivocal ‘maybe’ ”).
63. Id. at 1277 (stating also that the plaintiff’s protected class status “does not turn
upon [his] ability to prove lineage”). According to the court, there must be “some objective
basis” (such as “physical appearance, language, cultural activities, or associations”) that
“lead[s] the employer to believe that a given employee is a member of that protected class.”
Id. at 1278 (stating also that “for purposes of entitlement to relief under Title VII this
Court deems it unnecessary, and indeed inappropriate, to attempt to measure Plaintiff’s
percentage of Indian blood or to examine his documentable connection to recognized exist-
ing tribes”).
64. See id. at 1273.
65. Id.
66. Id. at 1277.
67. Id. at 1278; see also id. at 1277-78 (noting that “[a]s with the joy of beauty, the ug-
liness of bias can be in the eye of the beholder”).
Second, the court discussed Title VII’s antidiscrimination purpose and policy and alluded to the role that perception-based claims have in promoting that policy. Specifically, the court stated that Title VII’s purpose is “to equalize the position of all employees, be they Native American, African-American, Hispanic, Asian or white” by addressing “perceived differences which do not have a basis in fact between races and ethnic groups.”\(^68\) Implicitly questioning whether this purpose and policy would be furthered if misperception-based employment discrimination claims were rejected, the court asked:

Would it be a defense if an employer fired a plaintiff because the employer disliked African-Americans and believed the plaintiff, due to his dark skin, to be a member of that group, when, in fact, the plaintiff was a black Asian Indian, a group against which the employer did not intend to discriminate? . . . In that example the desire to engage in unlawful discrimination is present, but the prima facie case is riddled with holes if the employer’s perceptions in taking those steps is [sic] not considered to be a part of the discrimination equation.\(^69\)

Consequently, the court viewed its conclusion of recognizing erroneous perception-based employment discrimination claims as “logically follow[ing] . . . [from] Title VII’s attempt to equalize the footing of all employees without regard to the employer’s subjective perceptions and preconceived ideas.”\(^70\)

Having recognized the viability of “regarded as” claims under Title VII, the court concluded that the plaintiff had “demonstrated a genuine factual issue as to his membership in a protected class” for purposes of surviving summary judgment.\(^71\) Specifically, the court noted that “it appea[red] to be unquestioned that the Plaintiff’s physical appearance could be considered that of a Native American . . . and, most importantly, that he was considered by his employer and his co-workers to be Native American.”\(^72\)

In addition, the Ninth Circuit’s decision in *Estate of Amos v. City of Page*\(^73\) nicely reflects this path of recognizing “regarded as” discrimination claims, albeit not in a federal employment discrimination context. In *Estate of Amos*, the Ninth Circuit faced a § 1983 claim\(^74\)

\(^{68}\) Id. at 1276.

\(^{69}\) Id. at 1277 n.17.

\(^{70}\) Id. at 1278.

\(^{71}\) Id.

\(^{72}\) Id.

\(^{73}\) 257 F.3d 1086 (9th Cir. 2001).

\(^{74}\) 42 U.S.C. § 1983 (2006) (stating, in relevant part, that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress”).
alleging race discrimination in violation of Amos’s equal protection rights under the Fourteenth Amendment. Specifically, the trustee for Amos’s estate asserted that City police officers had “cut short” a post-car accident search for Amos (who was “white”) because they “mistakenly believed he was Native American.”

According to the claim, the City had a “discriminatory policy,” as allegedly “it [was] standard practice for the City . . . not to search for runaway drivers because the City believe[d] that most runaway drivers [were] Native Americans who bolt to the Navajo Reservation after an accident.” In its motion to dismiss this claim, the City argued that the trustee lacked standing to assert this race discrimination claim because Amos “was not a member” of the “protected class of persons” against whom the City’s policy purportedly discriminated.

The Ninth Circuit denied the City’s motion to dismiss the claim. Noting that Amos was allegedly “the direct target of discrimination based on mistaken racial identity,” the court concluded that “for purposes of standing, Amos should be viewed as [the] Trustee alleges the police officers viewed him: as a Native American.” In support of its recognition of this erroneous perception-based discrimination claim, the Ninth Circuit provided this succinct yet insightful comment regarding erroneous perception-based actors: “[A]lleged discrimination is no less malevolent because it was based upon an erroneous assumption.”

Beyond the Perkins court and the Ninth Circuit, other federal courts in North Carolina and Michigan—in addition to the EEOC as the federal administrative agency that, in part, enforces Title VII

75. Estate of Amos, 257 F.3d at 1089, 1093.
76. Id.
77. Id.; see also id. at 1090 (noting that the city attorney had allegedly stated that it was “standard practice for the police not to conduct thorough searches for runaway drivers because they suspect most are Native Americans”).
78. Id. at 1093.
79. See id. at 1094 (holding that Amos had standing to bring claim).
80. Id.
81. Id.
82. Id.
83. See Greene v. Swain County P’ship for Health, 342 F. Supp. 2d 442, 446-47, 451 (W.D.N.C. 2004). The Greene case involved a Title VII and § 1981 case where a purportedly Native American plaintiff alleged discrimination based on that very status. Id. at 446. The court followed Perkins, stating that (1) the plaintiff could prove “she was a member of a protected class” for prima facie case purposes solely by showing her employer “had a basis to reasonably believe” that she was Native American and (2) “the employer’s reasonable belief and knowledge that the employee is a member of a protected class is central to the employee’s claim.” Id. at 451.
84. See Eriksen v. Allied Waste Sys., Inc., No. 06-13549, 2007 WL 1003851, at *3, *6 (E.D. Mich. Apr. 2, 2007) (involving a Michigan Elliott-Larson Civil Rights Act (MELCRA) case where a purportedly Native American plaintiff alleged discrimination based on that very status, and allowing the plaintiff to survive summary judgment due to “sufficient evidence” that “she is or was perceived to be Native American” (emphasis added)).
and the ADEA—have recognized the viability of non-ADA employment discrimination claims based upon an employer’s erroneous perception or stereotype as to a plaintiff’s protected category or trait.

85. See, e.g., EEOC, Compliance Manual, § 15-II (2006), available at http://www.eeoc.gov/policy/docs/race-color.html (stating that “Title VII’s prohibition of race discrimination generally encompasses . . . [e]mployment discrimination against an individual based on a belief that the individual is a member of a particular racial group . . . . Discrimination against an individual based on a perception of his or her race violates Title VII even if that perception is wrong” (emphasis added)); EEOC, Compliance Manual, § 13-II.B (2002), available at http://www.eeoc.gov/policy/docs/national-origin.html (stating that “[e]mployment discrimination against a national origin group includes discrimination based on . . . the employer’s belief that [an individual] is a member of a particular national origin group, for example, discrimination against someone perceived as being Arab based on his speech, mannerisms, and appearance, regardless of . . . whether he is, in fact, of Arab ethnicity” (emphasis added)); id. § 13-II.C (discussing an example case where an Egyptian plaintiff “has been subjected to derogatory comments about Islam even though he has told his coworkers that he is Christian,” and stating that the plaintiff’s claim should assert “religious discrimination”); see also Charity Williams, Note, Misperceptions Matter: Title VII of the Civil Rights Act of 1964 Protects Employees from Discrimination Based on Misperceived Religious Status, 2008 Utah L. Rev. 357, 371 (discussing religion-based discrimination claims under Title VII and noting that “[t]he EEOC has provided clear guidance that employment discrimination based on the misperceptions of an employee’s race, national origin, or religion violates Title VII”).

While the EEOC’s Compliance Manual embraces “regarded as” protection for purposes of Title VII, the EEOC’s implementing regulations for Title VII are less clear on this issue. For example, these regulations, in part, state that “national origin discrimination” includes “denial of an equal employment opportunity [1] because of an individual’s, or his or her ancestors,’ place of origin; or [2] because an individual has the physical, cultural or linguistic characteristics of a national origin group.” 29 C.F.R. § 1606.1 (2008) (emphasis added). At an absolute minimum, this “characteristics” language would encompass discrimination where an employer’s perceptions regarding an employee’s national origin-based “characteristics” happen to match, or coincide with, his or her actual national origin. Indeed, many courts citing this regulatory language have addressed discrimination claims where the perceived “characteristics” matched the employee’s actual protected trait or status. See, e.g., Almendares v. Palmer, No. 3:00-CV-7524, 2002 WL 31730963, at *9-10 (N.D. Ohio Dec. 3, 2002) (involving a Title VII case alleging national origin-based discrimination, citing the EEOC’s regulatory language, and noting that the plaintiffs’ “linguistic characteristics” and “Spanish-speaking characteristics reflect their national origin”); Holness v. Penn State Univ., No. 98-2484, 1999 WL 270388, at *6 (E.D. Pa. May 5, 1999) (involving a Title VII case alleging national origin-based discrimination, citing the EEOC’s regulatory language, and noting that the plaintiff’s “characteristics” of being “raised in Israel,” “speak[ing] English with a discernible accent,” and “clearly identif[ying] with his Israeli culture” reflected his Israeli status).

But, the lingering question is: Does this regulatory “characteristics” language also encompass a true “regarded as” situation, where an employer’s perceptions regarding an employee’s national origin-based “characteristics” do not match or coincide with his or her actual national origin? Not necessarily. After all, unlike the EEOC’s Compliance Manual, the EEOC regulations are dead silent on the issue of employer perceptions (especially those that are mistaken or inaccurate) and thus give no insight or guidance as to the true “regarded as” situation. See also 29 C.F.R. § 1604.1 (2008) (containing regulatory language similarly silent on employer “perception” as to sex-based discrimination under Title VII); id. § 1605.1 (containing regulatory language similarly silent on employer “perception” as to religion-based discrimination under Title VII). Nonetheless, some courts have seized upon the regulatory “characteristics” language as support for recognizing non-ADA “regarded
IV. THE ARGUMENT FOR EXTENDING “REGARDED AS” PROTECTION UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAW

As evidenced by this varying treatment of non-ADA “regarded as” claims, there is no consistent judicial view regarding (1) the availability of protection for persons who are subject to erroneous perception-based or stereotype-based discrimination under Title VII or the ADEA and (2) the imposition of liability upon employers who engage in such conduct. While employees and applicants in Ohio, North Carolina, and Michigan (and perhaps even in the states comprising the Ninth Circuit) may receive “regarded as” protection (with employers being subject to “regarded as” liability) outside the ADA context, employees or applicants in Georgia, Illinois, New York, and Tennessee may be denied such protection (with employers avoiding such liability). And, as to the employees, applicants, and employers in the dozens of remaining states, they are—and will remain—in limbo status concerning “regarded as” protection and liability under Title VII and the ADEA until courts in those jurisdictions confront this issue.

The ADA’s concept of “regarded as” protection should be judicially (and, if necessary, legislatively) extended under federal employment

86. See Leonard v. Katsinas, No. 05-1069, 2007 WL 1106136, at *10 (C.D. Ill. Apr. 11, 2007) (recognizing that “[i]n some cases, a plaintiff’s . . . claims under other discrimination statutes have hinged on the defendant’s perception”); Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 170 (E.D.N.Y. 2002) (same); Andrew M. Carlon, Racial Adjudication, 2007 BYU L. REV. 1151, 1190 (discussing race-based discrimination claims under Title VII and recognizing that some courts have “consider[ed] the plaintiff’s ‘subjective’ race, in the eyes of his employer, not his ‘objective’ race, what he ‘really is’ ” when ascertaining an individual’s protected group or trait status); cf. EEOC v. Trans States Airlines, Inc., 462 F.3d 987, 989, 992 (8th Cir. 2006) (involving a Title VII case where an Indian and Fijian plaintiff alleged discrimination based on being erroneously stereotyped as “of Arabic descent,” “assuming arguendo that a non-Arab might have an actionable claim under Title VII based on race or national origin if his ‘objective appearance to others’ was as an Arab”); Afshar v. Pinkerton Acad., No. Civ. 03-137-JD, 2004 WL 1969873, at *1, *3 n.2, *4 (D.N.H. Sept. 7, 2004) (involving a Title VII case where a Bahai religion plaintiff alleged discrimination “based on a misperception that he was a Muslim,” noting that such claim was “indistinguishable from his claim of national origin discrimination,” for which the court concluded the plaintiff had satisfied “the requirements of a prima facie case”).

87. See supra Part III.B (discussing precedent and jurisdictions recognizing non-ADA “regarded as” claims). The Ninth Circuit is comprised of the following nine states: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

88. See supra Part III.A (discussing precedent and jurisdictions rejecting non-ADA “regarded as” claims).
discrimination law. The extension of this protection under Title VII and the ADEA is warranted for two primary reasons: (1) these other federal employment discrimination laws have long-shared with the ADA an identical congressional and judicial philosophy of imposing liability upon employers for erroneous perception-based or stereotype-based discrimination; and (2) the “regarded as” protection is necessary to capture an otherwise elusive subset of discriminating employers (i.e., the “erroneous discriminators”) and thus fully advance the comprehensive antidiscrimination purposes of these other laws.

A. Long-Shared Congressional and Judicial Philosophy of Imposing “Perception-Based” or “Stereotype-Based” Liability

As evidenced by the ADA’s legislative history, the “regarded as” protection reflects the central congressional philosophy that employer perception or stereotype is an appropriate justification for imposing employment discrimination liability, even when that perception or stereotype is erroneous and inaccurate. Labeling such employer perception as “a key element,” Congress openly targeted employment decisions that were based upon (1) “myths, fears and stereotypes,” (2) “generalizations,” (3) “presumptions as to what a class of individuals with disabilities can or cannot do,” (4) “prejudging” or other “preconceived and . . . erroneous judgment about an individual’s capabilities based on ‘labeling,’” (5) “negative attitudes,” or (6) “misconceptions.”

89. While this issue has surprisingly not been the subject of extensive scholarship, certain commentators have recommended applying the “regarded as” concept to particular Title VII traits, such as race or religion. See, e.g., Angela Onwuachi-Willig & Mario L. Barnes, By Any Other Name?: On Being “Regarded As” Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White, 2005 WIS. L. REV. 1283, 1334 (discussing race-based discrimination claims under Title VII and arguing that the “same factors and principles [embodied by the ADA’s ‘regarded as’ protection] can and should be transferred to an analysis of ‘regarded as’ in disparate treatment race discrimination”); Williams, supra note 85, at 358 (discussing religion-based discrimination claims under Title VII and arguing that “Title VII prohibits discrimination based on perceived religious status, whether or not the employer perceived the employee’s religion accurately”).

Of course, this Article argues for a much broader extension of “regarded as” protection (i.e., to all traits protected by Title VII and the ADEA).

90. See supra Part II.B (discussing the underlying philosophy of the ADA’s “regarded as” protection).
92. Id.
93. Id. at 45.
95. Id.
96. Id. at 53.
97. Id. at 72-73.
Importantly, this central philosophy—the targeting of an employer’s erroneous perception over an employee’s reality for purposes of imposing employment discrimination liability—is not only embodied in the ADA. Both the ADEA and Title VII share this identical philosophy, as reflected in relevant legislative materials and applicable Supreme Court precedent.88

1. The Philosophy Reflected in the ADEA

The ADEA’s language, its legislative history, and more recent congressional reports confirm the Act’s central philosophy of imposing liability upon employers for erroneous perception-based or stereotype-based discrimination.

As a starting point, in the ADEA’s “statement of findings and purpose,” Congress generally observed that “arbitrary age limits regardless of potential for job performance ha[d] become a common practice”99 and stated that one of the Act’s purposes was “to prohibit arbitrary age discrimination in employment.”100 Echoing these concerns and purposes, the Education and Labor Committee stated that the ADEA was designed to “dispel[] [age-based employment problems] which are illusory” and “to promote the employment of older workers based on their ability.”101

While such concerns about “arbitrary” age discrimination and “illusory” employment problems can be broadly viewed as including erroneous or inaccurate employer beliefs, more recent congressional reports further substantiate the ADEA’s same philosophy of targeting an employer’s erroneous perception over an employee’s reality for purposes of imposing employment discrimination liability. For example, in a recent 2004 legislative report (entitled “Developments in Aging: 2001 and 2002”), the Senate’s Special Committee on Aging discussed, in part, the status of age discrimination in the United States.102 Reiterating that “employment decisions regarding older persons should be based on individual assessments of each older worker’s potential or ability” rather than “arbitrary age limits,”103 Congress importantly highlighted, as the ADEA’s focus, the same erroneous perception-based or stereotype-based discrimination concerns that are at the heart of the ADA:

88. See infra Part IV.A.1-2 (discussing the legislative histories and Supreme Court precedent that reflect this central philosophy in the ADEA and Title VII).
100. Id. § 621(b).
103. Id. ch. 4.A.3(A).
Older workers continue to face numerous obstacles to employment, including negative stereotypes about aging and productivity.

... The pervasive belief that all abilities decline with age has fostered the myth that older workers are less efficient than younger workers. Because younger workers, rather than older workers, tend to receive the skills and training needed to keep up with technological changes, the myth continues.

Too often, employers wrongly assume that it is not financially advantageous to retrain an older worker because they believe that a younger employee will remain on the job longer. In fact, the mobility of today's work force does not support this perception.

[There is] the continuing belief that older workers are less productive.

Beyond these congressional materials, Supreme Court precedent also underscores the ADEA's identical underlying philosophy of imposing liability upon employers for erroneous perception-based or stereotype-based discrimination. For example, in *Hazen Paper Co. v. Biggins*, the Court addressed an ADEA claim, in which the plaintiff alleged that he had been subjected to age-based discrimination when he was discharged at sixty-two years old. At trial, the evidence suggested that the employer had "fired [the plaintiff] in order to prevent his pension benefits from vesting," as that "pension plan had a 10-year vesting period" that the plaintiff "would have reached . . . had he worked 'a few more weeks' after being fired." The jury returned a verdict in favor of the plaintiff on his ADEA claim.

104. *Id.* ch. 4.A.1; see also S. Rep. No. 102-28(I), at *91 (1991) (unavailable in U.S.C.C.A.N. but available at 1991 WL 52579 (Mar. 22, 1991)) (stating that "[f]or the most part, these obstacles [regarding 'negative stereotypes about aging and productivity'] have their roots in age discrimination").


106. *Id.* at 606.

107. *Id.* at 607.

108. *Id.* at 606.
On appeal, the First Circuit affirmed, based, in part, on the fact that the jury could have “reasonably found that age was inextricably intertwined with the decision to fire [the plaintiff].” 109 As a result, on certiorari, the Supreme Court was forced to answer the question of “whether an employer violates the ADEA by acting on the basis of a factor, such as an employee’s pension status or seniority, that is empirically correlated with age.” 110

Responding in the negative and then remanding the case to the court of appeals, a unanimous Supreme Court repeatedly highlighted (1) the ADEA’s emphasis on age-based perceptions and stereotypes by employers and (2) the importance of these employer-held beliefs in the age discrimination context. 111 For example, the Court acknowledged that “Congress’ promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes” 112 and that age discrimination “was ‘based in large part on stereotypes unsupported by objective fact.’ ” 113 As a result, the Court stated that “the very essence of age discrimination” is when an older employee is “fired because the employer believes that productivity and competence decline with old age.” 114

In addition, the Court extended its discussion of these erroneous perception or stereotype issues in the context of the above-referenced question regarding factors “correlated with age.” Specifically, it stated that “the problem of inaccurate and stigmatizing stereotypes disappears” when the “motivating factor” for an employment decision is merely “correlated with age, as pension status typically is.” 115 Similarly, in noting that the employer (Hazen Paper) would not have engaged in age-based disparate treatment if it had discharged the plaintiff “solely because he ha[d] nine-plus years of service and therefore [was] ‘close to vesting,’ ” the Court reasoned that “[t]he prohibited stereotype (‘Older employees are likely to be ___’) would not have figured in this decision, and the attendant stigma would not ensue. The decision would not be the result of an inaccurate and degrading generalization about age.” 116

110. Hazen Paper Co., 507 U.S. at 608.
111. See id. at 610-14.
112. Id. at 610.
113. Id. at 610-11 (emphasis added) (quoting EEOC v. Wyoming, 460 U.S. 226, 231 (1983)).
114. Id. at 610 (emphasis added).
115. Id. at 611.
116. Id. at 612 (emphasis added); see also id. at 611 (explaining similarly that “[b]ecause age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily ‘age based’”). For post-Hazen Paper Co. cases discussing the important role of perception and stereotype in ADEA discrimination cases, see Wexler v.
2. The Philosophy Reflected in Title VII

As with the ADEA, Title VII also shares the ADA’s central philosophy of targeting an employer’s erroneous perception over an employee’s reality for purposes of imposing employment discrimination liability. While Title VII’s concise language and legislative history do not expressly reference these concepts, Congress openly discussed these concerns when enacting the Title VII-amending Pregnancy Discrimination Act of 1978 (PDA).

The PDA amended Title VII to clarify that, for purposes of unlawful employment discrimination, the original term “because of sex” includes “because of or on the basis of pregnancy, childbirth, or related medical conditions.”118 Noting that the purpose of the PDA was “to ensure that working women are protected against all forms of employment discrimination based on sex,” Congress emphasized, as the Act’s focus, the same erroneous perception-based or stereotype-based concerns that would be at the center of the ADA only twelve years later:

[T]he assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead[-]end jobs.

... Women are still subject to the stereotype that all women are marginal workers. Until a woman passes the child-bearing age, she is viewed by employers as potentially pregnant. Therefore, the elimination of discrimination based on pregnancy in these employment practices ... will go a long way toward providing equal

White’s Fine Furniture, Inc., 317 F.3d 564, 572 (6th Cir. 2003), which discusses certain employer comments that may have “adhered to the stereotype that an older manager cannot perform in a high-stress management position” and states that “[t]he eradication of such stigmatizing beliefs is precisely what the ADEA was intended to target”; id. at 596 (Krupansky, J., dissenting), which states that “Congress’ exclusive, and commendable, purpose underlying the ADEA was to penalize, unfounded, irrational employment discrimination against persons which was animated purely by bias, prejudice, and ignorance”; Chapman v. AI Transport, 229 F.3d 1012, 1046 (11th Cir. 2000) (Birch, J., concurring in part and dissenting in part), which notes that the employer’s “proffered reasons correspond strongly with the very stereotypes that the ADEA was designed to combat,” such as “[a] stereotype of older persons ... not [being] ‘aggressive,’ such that employers frequently identify younger workers as ‘aggressive’ and, thus, more desirable than older workers”; Testerman v. EDS Technical Prod. Corp., 98 F.3d 297, 301 (7th Cir. 1996), which states that “the ADEA prohibits employment decisions based on ‘stigmatizing stereotypes,’ however benignly intended”; and EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1077 (7th Cir. 1994), which discusses Hazen Paper Co, and reiterates “the ADEA’s focus on eliminating decisions made based on stereotypes about age.”

employment opportunities for women, the goal of Title VII of the Civil Rights Act of 1964.120

Moreover, the legislative history of the PDA is not the only resource that confirms Title VII's identical underlying philosophy of imposing liability upon employers for erroneous perception-based or stereotype-based discrimination. The Supreme Court has underscored this same central philosophy in the Title VII context.

For example, in Price Waterhouse v. Hopkins,121 the Court addressed a Title VII claim, in which the female plaintiff alleged that she had been subjected to sex-based discrimination when she was not promoted to the status of partner at her accounting firm.122 At trial, the evidence suggested that some of the firm's partners "reacted negatively" to the plaintiff based on gender-based stereotypes, as their comments in the promotion process included: (1) she "overcompensated for being a woman"; (2) she should take "a course at charm school"; and (3) she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."123

The district court concluded that the firm had engaged in sex-based discrimination, because it gave effect to the "impermissibly cabined view of the proper behavior of women" as evidenced by "partners' comments that resulted from sex stereotyping."124 The D.C. Circuit affirmed.125

While the Supreme Court primarily addressed the then hotly debated issue of the requisite proof (and resulting degree of liability) in a "mixed motive" discrimination case126 and then remanded the case accordingly,127 it also provided substantial discussion regarding the relevance of employer-held perceptions or stereotypes in Title VII discrimination claims.128 Noting that Title VII reflected Congress's "momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees,"129 the plurality succinctly observed that "[i]n the specific

120. Id. at 3, 6-7.
121. 490 U.S. 228 (1989).
122. Id. at 231-32.
123. Id. at 235.
124. Id. at 236-37.
125. Id. at 237.
126. See generally id. at 237-96 (presenting the plurality, concurring, and dissenting opinions of the Court on the "mixed motive" issue). A "mixed-motive" discrimination case involves "no one 'true' motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate." Id. at 260 (White, J., concurring).
127. Id. at 258.
128. See id. at 250-51, 256-58.
129. Id. at 239 (stating similarly that "Title VII eliminates certain bases for distinguishing among employees"); see also id. at 240 (stating that "[w]e take [Title VII's] words to mean that gender must be irrelevant to employment decisions").
context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.\textsuperscript{130}

In addition, the plurality highlighted the significance of stereotyping in employment discrimination cases:

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."\textsuperscript{131}

. . . [S]tereotyped remarks can certainly be evidence that gender played a part [in the employment decision].\textsuperscript{131}

Finally, the plurality extended its discussion of these erroneous perception or stereotype concerns in the context of the plaintiff's sex discrimination claim. It candidly suggested that "[i]t takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school' "\textsuperscript{132} nor does it "require expertise in psychology to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex . . . that has drawn the criticism."\textsuperscript{133}

\textsuperscript{130}. \textsuperscript{Id. at 250} (emphasis added).
\textsuperscript{131}. \textsuperscript{Id. at 251} (first alteration in original) (citations omitted) (quoting Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).
\textsuperscript{132}. \textsuperscript{Id. at 256}.
\textsuperscript{133}. \textsuperscript{Id.} (stating also that some of the partners’ comments "were motivated by stereotypical notions about women's proper deportment"). For post-\textsuperscript{Price Waterhouse} cases discussing the important role of perception and stereotype in Title VII discrimination cases, see Miller v. City of New York, 177 Fed. App’x 195, 196-97 (2d Cir. 2006), which notes that "discrimination on the basis of a failure to conform to sex stereotypes can evidence the sort of difference in treatment of persons of different genders that is actionable" and that comments regarding the male plaintiff not being a "‘manly man’" or a "‘real man’" could lead a jury to conclude that "failure to conform to sex stereotypes was a reason for [the plaintiff] being discriminated against based on his gender"; Smith v. City of Salem, 378 F.3d 566, 572-75 (6th Cir. 2004), which notes that "[s]ex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination" and that comments regarding the male plaintiff’s "mannerisms and appearance" being "less masculine[] and more feminine" were sufficient to allege sex-based discrimination "based on his failure to conform to sex stereotypes"; Margolis v. Tektronix, Inc., 44 Fed. App’x 138, 141 (9th Cir. 2002), which notes that "[s]exual stereotyping . . . can serve as evidence that gender played a role in the employer’s decision" and that comments regarding the female plaintiff being "‘pushy’" or "‘aggressive’" could suggest sex-based discrimination; and Thomas v. Eastman Kodak Co., 183 F.3d 38, 42, 59 (1st Cir. 1999), which notes that "Title VII’s prohibition against ‘disparate treatment because of race’ extends . . . to employer decisions that are based on stereotyped thinking" and that "[s]tereotypes or cognitive biases based on race are as incompatible with Title VII’s mandate as stereotypes based on age or sex." See also Michael J. Zimmer, Charles A. Sullivan & Rebecca Hanner White, Cases and Materials on Employment Discrimination 82 n.9, 83 n.10 (6th ed. 2003) (noting, respectively, "the
Thus, the legislative histories of the ADEA and Title VII (including the Title VII-amending PDA) and applicable Supreme Court precedent evidence a striking similarity with the ADA as to terminology and concerns regarding erroneous perception-based or stereotype-based discrimination.

When enacting the ADA (which expressly includes the “regarded as” protection), Congress repeatedly referred to concerns about combating “myths, fears and stereotypes,” “generalizations,” “presumptions,” “prejudging,” “preconceived and . . . erroneous judgment . . . based on ‘labeling,’ ” “negative attitudes,” “misconceptions,” “unfounded, outmoded stereotypes and perceptions,” “false presumptions, . . . misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies,” and “stereotypical assumptions.”

Such terminology and concerns similarly appear in the ADEA and Title VII contexts. Indeed, as to the ADEA, the terminology and age discrimination-related concerns discussed by both Congress (e.g., “negative stereotypes,” “pervasive belief,” “myth,” “wrong[] assum[ptions],” and “perception”) and the Supreme Court (e.g., “inaccurate and stigmatizing stereotypes,” “stereotypes unsupported by objective fact,” “stigma,” and “inaccurate and denigrating generalization”) are virtually identical to, and interchangeable with, the terminology and concerns referenced by Congress when discussing the ADA and the “regarded as” protection. Similarly, the Title VII terminology and discrimination-related concerns highlighted by both Congress (e.g., “assumption,” “view,” and “stereotype”) and the Supreme Court (e.g., “stereotyping” (or “stereotype”) and “belief”) also parallel the congressional terminology and concerns reflected in the ADA’s enactment.

The critical point, of course, is that these interchangeable terms and concerns (among the ADA, the ADEA, and Title VII) evidence an underlying central philosophy that is common to all of them—namely, that employer perception or stereotype is an appropriate justification for imposing employment discrimination liability, even when that perception or stereotype is erroneous and inaccurate. It is this common and shared philosophy that warrants common and shared protections (such as the “regarded as” protection) across the phenomenon of stereotyping individual members of a group because of the characteristics (or the perceived characteristics) of the group as a whole and that “stereotyping is a key problem in the employment area because much discrimination stems from employer perceptions about the abilities of various groups (racial, ethnic, or gender) in society”).

134. See supra part IL.B (discussing the ADA legislative reports that referenced these terms and concerns).
135. See supra notes 100-04 and accompanying text.
136. See supra notes 105-16 and accompanying text.
137. See supra notes 117-20 and accompanying text.
138. See supra notes 121-33 and accompanying text.
federal employment discrimination law spectrum. Simply put: If each of these laws reflects an identical central philosophy of targeting an employer’s erroneous perception over an employee’s reality for purposes of imposing employment discrimination liability, then why should only one of them provide “regarded as” protection as the keystone to attacking that employer perception? Comparable perception-based philosophies should translate to comparable perception-based protections.

B. Fully Advancing Federal Employment Discrimination Policy and Purpose

Beyond being justified from an underlying philosophical standpoint, an extension of the ADA’s “regarded as” protection to Title VII and the ADEA is warranted from a policy perspective. This protection is necessary to advance fully the crucial antidiscrimination policies and purposes of these other laws.

Beyond sharing certain underlying philosophies, the ADA, Title VII, and the ADEA also share equally comprehensive goals and purposes. When enacting the ADA, Congress aimed for the stratosphere. It stated that the ADA’s goal and purpose was to create (1) “a clear and comprehensive national mandate” against disability-based discrimination and (2) “clear, strong, consistent, enforceable standards” to battle that discrimination.139

Congress aimed equally as high when enacting Title VII and the ADEA. As to Title VII, Congress expansively sought to “meet a national need” by (1) “eradicating significant areas of discrimination on a nationwide basis”140 and (2) broadly “eliminat[ing] discriminatory employment practices by business.”141 When Congress amended Title VII almost twenty years ago by passing the Civil Rights Act of 1991,142 it reiterated that “Congress made clear [by enacting Title VII] that it intended to prohibit all invidious consideration of sex, race, color, religion, or national origin in employment decisions.”143 In fact, akin to its description of the goal and purpose of the ADA, Con-

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141. Id., as reprinted in 1964 U.S.C.C.A.N. 2391, 2391; see also id., as reprinted in 1964 U.S.C.C.A.N. 2391, 2401 (stating that “[t]he purpose of [Title VII] is to eliminate . . . discrimination in employment based on race, color, religion, or national origin”).
gress broadly characterized Title VII as a “mandate that discrimination on the basis of race, gender, national origin, or religion has no place in employment decisions.”

As to the ADEA, Congress stated the comparably comprehensive goal and purpose of “outlin[ing] a national policy against discrimination in employment on account of age.” Reiterating its aim in the “statement of findings and purpose” within the ADEA itself, Congress expansively declared that one of the Act’s purposes was “to prohibit arbitrary age discrimination in employment.”

While the ADA, Title VII, and the ADEA each manifest these equally broad antidiscrimination policies, the policies of Title VII and the ADEA are frustrated and compromised if “regarded as” protection does not extend to them. The reason is straight-forward: “regarded as” protection allows a federal antidiscrimination law to ferret out and capture an otherwise elusive subset of discriminating employers. One can best understand the impact of the “regarded as” protection by categorizing the entire group of discriminating employers into two distinct subsets: (1) the “accurate discriminators”: those who correctly perceive or determine a person to be within a certain protected group or class and then discriminate (due to actual animus or otherwise) based on that trait; and (2) the “erroneous discriminators”: those who incorrectly perceive or determine a person to be within a certain protected group or class and then discriminate (due to actual animus or otherwise) based on that trait.

Initially, it is important to note that employers who fall into either subset are identical in discriminatory intent and action. An “accurate discriminator” and an “erroneous discriminator” are each motivated to act based on a protected trait, and each actually manifests that intent in the form of a tangible, adverse employment action. Of course, the difference between these employers is the accuracy of the perception of protected status—one subset’s employers happened to be “right,” while the other subset’s employers happened to be “wrong.” But, the “erroneous discriminators” are—to be blunt—still discriminators. Recognizing this reality, the Perkins court noted that “the desire to engage in unlawful discrimination is [still] present” in these employers, and the Ninth Circuit in Estate of Amos similarly reite-

rated that “alleged discrimination is no less malevolent because it was based upon an erroneous assumption.”

Turning to the policy perspective, a federal employment discrimination law that lacks—or is viewed as lacking—“regarded as” protection identifies and holds accountable only the first subset of discriminating employers (the “accurate discriminators”). The second subset (the “erroneous discriminators”) escapes liability and is in no way deterred from discriminating again (and again and again), thereby substantially compromising that law’s comprehensive antidiscrimination policy and purpose. Under this scenario, the employer in Part I of this Article (Company XYZ)—which harbored, and acted upon, discriminatory intent based on age, pregnancy, lineage and national origin, and religion—avoids liability as to Bob, Catherine, Don, and Ellen, respectively, and is “free to discriminate another day.”

In contrast, a federal employment discrimination law that contains—or is viewed as containing—this “regarded as” protection captures and holds responsible both subsets of discriminating employers. The “erroneous discriminators” do not get off scot-free and are thus deterred from discriminating again, which fully advances that law’s comprehensive antidiscrimination policy and purpose. Under this scenario, Company XYZ would be liable to Bob, Catherine, Don, and Ellen (due to its discriminatory intent and action) and dissuaded from discriminating “another day.”

Thus, it is important to understand that the impact of the “regarded as” protection is much broader than any one particular plaintiff, such as Bob, Catherine, Don, or Ellen. While the protection would guard the interests of each of these four particular plaintiffs whom Company XYZ mistakenly perceived as possessing the respective protected traits, it goes much further than each of them. This

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148. Estate of Amos v. City of Page, 257 F.3d 1086, 1094 (9th Cir. 2001); see also Leonard v. Katsinas, No. 05-1069, 2007 WL 1106136, at *9 (C.D. Ill. Apr. 11, 2007) (“[If there is evidence that an alleged discriminator believed the [employee or job applicant] plaintiffs to be a [sic] members of a [protected] class . . . and discriminated against them based on this belief, should it even matter if the plaintiffs are actually members of that protected class or not? Anti-discrimination statutes . . . were undoubtedly drafted to curb certain actions grounded in racial animus, and prohibited racial animus should arguably be no less actionable if carried out in a case of mistaken identity.”).

149. See also Onwuachi-Willig & Barnes, supra note 89, at 1289 (discussing race-based discrimination claims under Title VII and stating that “to redress discrimination in the workplace, courts must recognize employment discrimination claims where one is, for example, ‘regarded as’ black, with all of the socially ascribed negative stereotypes of the group”); Ken Nakasu Davison, Comment, The Mixed-Race Experience: Treatment of Racially Mischcategorized Individuals Under Title VII, 12 ASIAN L.J. 161, 165, 186 (2005) (discussing race-based discrimination claims under Title VII and arguing that an “intent-based model”—one that “focuses on the intent of the discriminator, rather than whether the [plaintiff] . . . falls into the required immutable category”—would “best carry[y] out Title VII’s mandate to prevent the harmful effects of discrimination” and be “superior in carrying out the directive of Title VII to remedy discrimination in the workplace”).
“regarded as” protection also guards the interests of the subsequent multitudes of prospective plaintiffs whom Company XYZ will accurately perceive as possessing those respective traits.

By ferreting out this otherwise overlooked subset of employment discriminators, the “regarded as” protection can be fairly characterized as an indispensable tool in achieving the expansive antidiscrimination policies and purposes shared by the ADA, Title VII, and the ADEA. Indeed, when enacting the ADA, Congress viewed the “regarded as” protection as “necessary . . . to achieve the ADA’s stated purpose” of creating a “‘clear and comprehensive national mandate.’”150 In other words, Congress considered the “regarded as” protection as targeting a piece of the discrimination problem (the subset of “erroneous discriminators”) that would otherwise be neglected.

So, the begged question is: Given that each of these laws shares the same lofty goal of comprehensive employment discrimination prohibition, then why should only one of them provide the very “regarded as” protection that Congress views as “necessary” to addressing a key piece of that discrimination problem? It is not as if Congress aimed for only the ADA to constitute a “comprehensive” antidiscrimination mandate and opted to seek a mere “partial” mandate via Title VII and the ADEA. And, the “regarded as” protection is no less “necessary” outside the ADA context, as that same piece of the discrimination problem (the subset of “erroneous discriminators”) can—and does—exist under Title VII and the ADEA. Consequently, comparable policies against discrimination should translate to comparable protections against discrimination.151

As a concluding but important point, the regrettable (and somewhat ironic) consequence of a failure (or refusal) to extend the “regarded as” protection to Title VII and the ADEA is an “inequality” (or “disparate treatment”) of the federal antidiscrimination laws and their respective policies. Specifically, depending upon whether the necessary “regarded as” protection is available to capture the otherwise elusive subset of “erroneous discriminators,” a federal employment discrimination law holds one of two positions on the proverbial totem pole: (1) A “superior” or “preferred” position, with its antidiscrimination policy and purpose being fully advanced, by the targeting of these otherwise overlooked “erroneous discriminators;” or (2)

151. See Onwuachi-Willig & Barnes, supra note 89, at 1332-33 (discussing race-based discrimination claims under Title VII and stating that (1) the ADA “does not differ from Title VII in its purpose of stamping out employment decisions based purely on the social meanings attached to membership in a marginalized group” and (2) thus “it makes sense that antidiscrimination law concerning race discrimination, like that concerning disability discrimination, should include a means of evaluating claims where a person is ‘regarded as’ being black or as belonging to any particular race”).
An “inferior” or “non-preferred” position, with its antidiscrimination policy and purpose being partially compromised, by allowing these “erroneous discriminators” to escape liability.

From a policy perspective, those courts which recognize non-ADA “regarded as” protection equally elevate all of the federal employment discrimination laws (including Title VII and the ADEA) to this “superior” or “preferred” position. In contrast, jurisdictions that refuse to recognize this protection outside the ADA context (1) elevate only the ADA to the “superior” or “preferred” position and (2) relegate Title VII and the ADEA to the “inferior” or “non-preferred” position. Congress intended no such inferior position for these laws and their respective antidiscrimination policy and purpose.

Finally, one could reasonably argue that “regarded as” protection should not extend beyond the ADA because of the absence of this protection from the express statutory language of Title VII or the ADEA. Indeed, certain courts have embraced this view and thus rejected non-ADA “regarded as” claims. For example, the Lewis court highlighted Congress’s explicit inclusion of this protection in the ADA and then reasoned that “[i]f Congress had wanted to permit a similar cause of action under Title VII . . . , it could have so provided.” The Butler court employed similar reasoning, stating that “Title VII . . . says nothing about protection of persons who are perceived to belong to a protected class” and observing that “Congress has shown, through the . . . [ADA], that it knows how to enact legislation that protects persons who are wrongly perceived to be in a protected class.”

While this view may seem appealing on the surface, it is flawed for three reasons. First, this view overlooks the inherent ambiguity in the language of Title VII and the ADEA by focusing only upon what each of those laws does not say, rather than considering what each actually does say. When looking at the latter, the language of these other federal employment discrimination laws can, at best, be viewed as “ambiguous as to whether the discrimination is permitted when it is based on an employer’s misperception of the employee’s actual [protected trait or class].”

For example, Title VII prohibits employment-based discrimination against a person “because of such individual’s race, color, religion,
sex, or national origin,”156 while the ADEA prohibits such discrimination against a person “because of such individual’s age.”157 Yet, as one commentator has observed in the Title VII context of religious discrimination, this “because of” language “does not provide clarity” on the “regarded as” issue, because “[o]n its face, the language does not indicate if the prohibition occurs [1] simply because the discrimination is based on religion or . . . [2] because the discrimination is based on the employee’s actual religion.”158 By concentrating only upon the “absent” language in Title VII and the ADEA, the Lewis-type or Butler-type argument fails to see the “present” language that, due to its ambiguity, can accommodate “regarded as” protection.

Second, this view flatly ignores the above-referenced central philosophy that is common to the ADA, Title VII, and the ADEA—namely, that employer perception or stereotype is an appropriate justification for imposing employment discrimination liability, even when that perception or stereotype is erroneous and inaccurate.159 As evidenced by the legislative histories of the ADEA and Title VII (in-

158. Williams, supra note 85, at 370 (emphasis added) (citation omitted) (noting also that “some courts interpret this [‘because of’] phrase to mean that the discrimination simply must be rooted in a religious bias” while “other courts interpret this phrase to mean that the employee must be a member of a protected class or group, which is defined by the employee’s actual religious beliefs”); see also Stephen M. Cutler, Note, A Trait-Based Approach to National Origin Claims Under Title VII, 94 YALE L.J. 1164, 1164, 1169 (1985) (discussing national origin-based discrimination claims under Title VII and noting that judicial recognition of claims based on “cultural characteristics or traits” is “consistent with the language and purpose of Title VII . . . . [b]ecause the basic prohibitory provisions of the statute are cast in general terms and do not provide a precise definition of national origin discrimination”).

Interestingly, however, the ADEA not only includes this general language of “because of such individual’s age,” 29 U.S.C. § 623(a)(1)-(2), but also expressly specifies that its “prohibitions . . . shall be limited to individuals who are at least 40 years of age.” Id. § 631(a). Thus, one could argue that this additional language is further evidence of Congress’s intent to not extend ADEA-related protection to a person who falls below the age threshold despite being “regarded as” at least forty years old.

This argument is credible. Yet, on one level, this additional language is still openly silent on the “regarded as” concept and could potentially be viewed as comparably ambiguous. After all, this language might be interpreted as applying to (i) only the narrow group of persons who are, in reality, “at least 40 years of age” or (ii) the broader groups of persons who are, in reality or perception by the employer, “at least 40 years of age.” See 29 U.S.C. § 631(a). While the ADEA’s additional language would definitively exclude from protection any individual who was actually, and perceived as being, below forty years old, it does not expressly address what happens when reality and perception diverge.

On a more persuasive level, however, even if this additional ADEA language renders it less ambiguous on the “regarded as” issue, any resulting judicial refusal to recognize “regarded as” protection under the ADEA remains problematic because it (1) ignores the ADEA’s underlying philosophy of targeting employers who engage in perception-based or stereotype-based discrimination and (2) significantly frustrates the ADEA’s national antidiscrimination policy. See supra Part IV.A.1 and B (respectively).

159. See supra Part IV.A (discussing this underlying philosophy shared by the ADA, the ADEA, and Title VII).
including the PDA), Congress made the philosophical choice to combat erroneous and unfounded perceptions or stereotypes that are held by employers as to the protected traits of race, color, religion, sex, national origin, and age.160 The Supreme Court also has made this philosophical choice, as it has opted to place the proverbial target on the backs of employers who act based upon such inaccurate perceptions or stereotypes as to such protected traits.161

Unfortunately, the Lewis-type or Butler-type argument never digs—even superficially—beyond the language of Title VII or the ADEA to uncover and deduce this central philosophy of targeting an employer’s erroneous perception over an employee’s reality for purposes of imposing employment discrimination liability. Instead, it engages in a statutory language-based “rush to judgment” that, by ultimately snubbing non-ADA “regarded as” claims, rejects the philosophical thread that is common across the federal employment discrimination law spectrum.

Finally, this view perpetuates federal employment discrimination and thus significantly frustrates applicable antidiscrimination policy and purpose. As acknowledged by Congress, the “regarded as” protection is a necessary tool for identifying, and holding accountable, a sizeable piece of the discrimination problem—the subset of “erroneous discriminators.”162

Regrettably, the Lewis-type or Butler-type view fails to see the “big picture” involving these “erroneous discriminators.” As mentioned above, if an “erroneous discriminator” is allowed to escape liability simply because its perception or stereotype did not “match” an employee’s actual or “real” trait or status, the discrimination is not going to end there. Instead, that same employer will continue to harbor that same discriminatory intent and to engage in the same pattern of discrimination. And, this subsequent discrimination will affect not only the particular individuals who happen to be erroneously labeled as having a certain protected trait but also the many others who happen to be accurately labeled as having that trait.

Thus, the Lewis-type or Butler-type argument ignores two related facts: (1) the “erroneous discriminator” does not confine its discrimination to those who actually lack the perceived protected trait; but rather (2) that employer will eventually “get it right” and be correct in its perception or stereotype. Stated differently, this view fails to see the broad impact of the “regarded as” protection—as guarding

160. See supra Parts IV.A.1-2 (discussing, respectively, the legislative histories of the ADEA and Title VII, including the PDA).
161. See supra Parts IV.A.1-2 (discussing, respectively, the applicable Supreme Court precedent under the ADEA and Title VII).
162. See supra Part IV.B (discussing the importance of the “regarded as” protection to full advancement of federal employment discrimination policy and purpose).
not only the interests of one particular plaintiff as to whom an employer had erroneous perceptions but also the interests of all subsequent prospective plaintiffs as to whom that employer will have accurate perceptions. Thus, instead of achieving any “comprehensive” prohibition against federal employment discrimination under Title VII or the ADEA, this view represents, at best, a “partial” promotion of national antidiscrimination policy and purpose.163

V. CONCLUSION

This Article has proposed an extension of the “regarded as” protection under federal employment discrimination law. This uniformity of employee protection (and employer liability) under the ADA, Title VII, and the ADEA is warranted for two reasons. First, these other federal employment discrimination laws share with the ADA a central congressional and judicial philosophy—the targeting of an employer’s erroneous perception over an employee’s reality for purposes of imposing employment discrimination liability. And, second, the “regarded as” protection is necessary to capture that otherwise elusive subset of “erroneous discriminators” and thus fully advance the comprehensive antidiscrimination policies and purposes of these other laws.

Simply put, is an employer any less a “discriminator” when it acts based on a perception or stereotype regarding a person possessing a certain protected trait under Title VII or the ADEA that happens to be “wrong” rather than “right”? The discriminatory intent is the same. The discriminatory action is the same. The harms and losses to the victim of the discrimination are the same. An extension of the “regarded as” protection across the federal employment discrimina-

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163. This Article has argued that the “regarded as” protection should apply to those traits or classes that are protected under Title VII (e.g., race, color, religion, sex, and national origin) and the ADEA (e.g., forty years old or older), so that an employer would be liable for engaging in erroneous perception-based or stereotype-based discrimination. Interestingly, however, the ADA, Title VII, and the ADEA not only protect traits or classes but also certain employee activities in response to purportedly unlawful employer conduct. Specifically, each of these laws contains an antiretaliatiion provision, which generally prohibits an employer from retaliating against an individual for having “opposed any act or practice made unlawful” by that law or having “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing” under that law. See 29 U.S.C. § 623(d) (containing the ADEA’s antiretaliation provision); 42 U.S.C. § 2000e-3(a) (2006) (containing Title VII’s antiretaliation provision); 42 U.S.C. § 12203(a) (2006) (containing the ADA’s antiretaliation provision).

Thus, the similar question arises: Should an employer be subject to liability for retaliation if it erroneously believes that an employee has engaged in such protected activities and then retaliates against him or her on that basis? While beyond the scope of this Article, one could credibly argue that the reasons and justifications which support an extension of the “regarded as” protection to the traits or classes enumerated in Title VII and the ADEA also warrant its extension to the activities specified in these antiretaliation provisions.
tion spectrum will bring needed uniformity of employee protection and treat the “erroneous discriminators” as harshly as any other discriminating employer.