

# Pluralism at Work: Rethinking the Relationship Between Religious Liberty and LGBTQ Rights in the Workplace

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*A number of recent cases pit religious liberty interests against antidiscrimination rights. In the employment context, cases such as EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., pit the religious liberties of employers against the rights of LGBTQ employees to be free from discrimination. Under current law, it is unclear whether a religious employer can legally discriminate against an LGBTQ employee because the employee’s LGBTQ identity conflicts with the employer’s asserted religious beliefs. This Note argues that Title VII’s prohibition of religious discrimination may provide for such employees to make a religious discrimination claim against their employers. Grounded in “reverse religious discrimination”—discrimination based on “an employer’s preference for a particular religious group”—this Note develops a theory of “single-belief reverse religious discrimination,” in which an employer illegally discriminates against employees who do not share a particular religious belief of the employer. This Note also argues that the Religious Freedom Restoration Act should not be an obstacle to the enforcement of Title VII.*

*The purpose of Title VII’s prohibition of religious discrimination is to promote freedom of conscience and to prohibit workplace discrimination. Title VII must promote the freedom of conscience of all people, respect all religious beliefs including nonadherence to specific religious beliefs, and prohibit discrimination against anyone on the basis of sex or LGBTQ identity.*

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## I. INTRODUCTION

Imagine a fictional employer, Bonnie Business Owner. Bonnie is Christian, and she believes that homosexuality is a sin. She learns that one of her employees, Laura, is lesbian. Can Bonnie fire Laura because being lesbian is against Bonnie's religion? Bonnie also believes that sex is an immutable, God-given trait. She learns that one of her employees, Terrence, is transgender. Can she fire Terrence because being transgender is against her religion? Under current law, the answer to both of these questions is "maybe." Title VII of the Civil Rights Act of 1964 (Title VII) protects employees from discrimination on the basis of sex.<sup>1</sup> Although the Supreme Court has yet to rule on the issue,<sup>2</sup> many lower courts have held that sexual orientation and gender identity are inseparable from sex, such that Title VII's prohibition of discrimination on the basis of sex prohibits discrimination on the basis of sexual orientation or gender identity.<sup>3</sup> Yet even if Title VII prohibits discrimination against LGBTQ employees, employers may be exempt from Title VII compliance under the Religious Freedom Restoration Act of 1993 (RFRA).<sup>4</sup> If an employer can demonstrate that Title VII compliance constitutes a substantial burden on her religious exercise, RFRA allows her to

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<sup>1</sup> 42 U.S.C. § 2000e-2(a)(1) (2018) (prohibiting discrimination in employment based on race, color, religion, sex, and national origin).

<sup>2</sup> See *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1257 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557, 557 (2017) (holding discrimination based on sexual orientation not actionable under Title VII); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 131 (2d Cir. 2018) (holding discrimination based on sexual orientation actionable under Title VII), *petition for cert. filed* (U.S. May 29, 2018) (No. 17-1623).

<sup>3</sup> See *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 341 (7th Cir. 2017) ("[W]e conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination."); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (holding that Title VII prohibits discrimination against transgender individuals); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) ("'[S]ex' under Title VII encompasses both sex—that is, the biological differences between men and women—and gender.") (emphasis in original); *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 841 (W.D. Pa. 2016) ("[D]iscrimination on the basis of sexual orientation is, at its very core, sex stereotyping plain and simple . . ."); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1015 (D. Nev. 2016) (transgender plaintiff stated sex discrimination claim under Title VII); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016) ("[D]iscrimination on the basis of transgender identity is cognizable under Title VII."); *Isaacs v. Felder Services, LLC*, 143 F. Supp. 3d 1190, 1193 (M.D. Ala. 2015) (holding that claims of sexual orientation-based discrimination are cognizable under Title VII); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (sexual orientation discrimination claim is sex discrimination claim under Title VII); *Philpott v. N.Y.*, No. 16-6778, 2017 WL 1750398, at \*2 (S.D.N.Y. May 3, 2017) ("[P]laintiff's sexual orientation discrimination claim is cognizable under Title VII.").

<sup>4</sup> 42 U.S.C. § 2000bb-1 (2012).

appeal to her religious beliefs to evade Title VII requirements protecting her employees from discrimination.<sup>5</sup>

This tension is prominent in a number of recent cases that have pitted religious liberty interests against antidiscrimination rights. The Supreme Court's decision in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission* is the highest profile example, and circuit courts have also faced this conflict.<sup>6</sup> Last year, the Sixth Circuit heard a case against Kim Davis, a state clerk who declined on religious grounds to issue marriage licenses to same-sex couples<sup>7</sup> and another case in which a secular business claimed it could fire a transgender employee because being transgender is against the religion of the business' owner.<sup>8</sup>

In the employment context, the conflict is between employees' antidiscrimination rights (codified in Title VII) and employers' religious liberty rights (asserted under RFRA as a defense to Title VII enforcement). When the debate is framed in this way, religious interests lose when antidiscrimination interests win, and antidiscrimination interests lose when religious interests win. The goal of this Note is to disrupt that paradigm.

Part II develops a theory of religious discrimination under Title VII to protect LGBTQ employees. Regardless of whether Title VII's prohibition of discrimination on the basis of sex applies to LGBTQ employees, this Note argues that Title VII's prohibition of discrimination on the basis of religion protects LGBTQ employees from discrimination that is religiously motivated. This Note argues that employees who suffer adverse employment consequences because their LGBTQ identities conflict with the religious beliefs of their employers have a Title VII right to be free from religious discrimination and religious harassment based on such an identity. "Reverse religious discrimination" claims allow employees to challenge adverse actions based on their failure to conform to their employer's religion.<sup>9</sup> In what this Note calls "single-belief reverse religious discrimination" claims, employees can challenge discrimination based on their failure to conform to a particular religious belief of their employer. Under this theory, an LGBTQ employee has a religious discrimination claim against an employer who discriminates against an employee because that employee's LGBTQ identity conflicts with the employer's anti-LGBTQ beliefs.

Part III addresses two potential obstacles to this legal theory. First, it explains why these claims are distinguishable from sex discrimination claims such that they are properly characterized as religious discrimination claims. Second, it explains why RFRA is not an obstacle to Title VII en-

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<sup>5</sup> See *id.*

<sup>6</sup> 138 S. Ct. 1719, 1722 (2018).

<sup>7</sup> See *Ermold v. Davis*, 855 F.3d 715, 715 (6th Cir. 2017).

<sup>8</sup> See *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 567 (6th Cir. 2018), *cert. granted in part sub nom. R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107, 2019 WL 1756679 (U.S. Apr. 22, 2019).

<sup>9</sup> See *infra* Part II.A.i.

enforcement in this context. Under RFRA, if the equal rights of LGBTQ employees substantially burden an employer's religious beliefs, then the government cannot enforce Title VII antidiscrimination laws against that employer unless such enforcement is the least restrictive means of achieving a compelling government interest. This Part argues that Title VII is the least restrictive means of furthering a compelling government interest, and therefore RFRA should not be a valid defense to Title VII enforcement.

This Note does not seek to disparage or belittle religious beliefs. Rather, this Note seeks to acknowledge and respect all religious beliefs. It respects religious beliefs condemning homosexual or queer or transgender identities. But just as critically, it respects the rejection of these beliefs.<sup>10</sup> Religious pluralism requires the coexistence and mutual respect of those with different and contrasting religious beliefs. In a country with so much religious diversity,<sup>11</sup> antidiscrimination laws must work alongside religious liberty protections to acknowledge and support religious pluralism.

## II. RELIGIOUS DISCRIMINATION

This Part discusses employees' rights to be free from religious discrimination under Title VII, and how these rights should be balanced against the religious liberty interests of the employer. Title VII prohibits workplace discrimination on the basis of religion.<sup>12</sup> It is unlawful for an employer to make an adverse employment decision about an employee or to harass an employee "because of such individual's . . . religion . . . ."<sup>13</sup>

Section A discusses adverse employment actions, defined as "tangible changes in employment" such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits . . . ."<sup>14</sup> Section B discusses harassment claims. "[H]arassment . . . does not directly result in tangible changes in employment,"<sup>15</sup> but may be actionable under Title VII when it is so "severe and pervasive" that it "affects a 'term, condition, or privilege' of employment."<sup>16</sup>

This Note argues that an employer who takes an adverse employment action against or harasses an LGBTQ employee because the employee's

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<sup>10</sup> See *infra* notes 40–45 and accompanying text.

<sup>11</sup> See *Religious Landscape Study*, PEW RESEARCH CENTER, available at <http://www.pewforum.org/religious-landscape-study/>, archived at <https://perma.cc/XN3D-7SDE> (showing the breakdown of American religious beliefs).

<sup>12</sup> 42 U.S.C. § 2000e-2 (2018) (prohibiting discrimination on the basis of an "individual's race, color, religion, sex, or national origin").

<sup>13</sup> 42 U.S.C. § 2000e-2 (2018). Title VII prohibits an employer from considering the religious beliefs of an employee as a factor in employment decisions unless the employer is a religious organization. See 42 U.S.C. § 2000e-1(a) (2018).

<sup>14</sup> *Perez-Cordero v. Wal-Mart Puerto Rico, Inc.*, 656 F.3d 19, 29 (1st Cir. 2011) (quoting *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761 (1998)).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 69 (1986)).

LGBTQ identity conflicts with a religious belief of the employer violates Title VII's prohibition of religious discrimination.

### A. *Adverse Employment Actions*

Title VII makes it an unlawful employment practice “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . religion . . . .”<sup>17</sup> An employer who fires, refuses to hire, or fails to promote an employee because of that employee’s religion engages in illegal religious discrimination under Title VII.<sup>18</sup> Likewise, it is illegal for an employer to discriminate against employees because they do not adhere to the employer’s religion, regardless of the religion of the employee.<sup>19</sup> These protections should be more expansively interpreted to prohibit an employer from discriminating against employees who do not adhere to specific religious beliefs of the employer.

#### i. *Reverse Religious Discrimination*

Outside of narrow exceptions,<sup>20</sup> it is illegal for an employer to discriminate against employees of a certain religion. For example, our fictional employer Bonnie may not fire her employee Mark because he is Muslim.<sup>21</sup> Such a termination motivated by animus towards a particular religion would provide “direct evidence of unlawful discrimination.”<sup>22</sup> Now, imagine that Bonnie is Christian, and she employs William. She does not know William’s religion, but she learns he is not Christian, and she fires him for that reason. This termination is an example of a “reverse religious discrimination” claim.<sup>23</sup> “Reverse religious discrimination” refers to a “religious discrimina-

<sup>17</sup> 42 U.S.C. § 2000e-2(a)(1) (2018); *see also* EEOC v. Consol Energy, Inc., 860 F.3d 131, 141 (4th Cir. 2017), *cert. denied sub nom.* CONSOL Energy Inc. v. EEOC, 138 S. Ct. 976 (2018).

<sup>18</sup> *See* 42 U.S.C. § 2000e-2(a)(1) (2018).

<sup>19</sup> *See, e.g.*, Noyes v. Kelly Servs., 488 F.3d 1163, 1168 (9th Cir. 2007) (holding religious discrimination claim based not on plaintiff’s “adhere[nce] to a particular religion,” but on “her lack of adherence” to a particular religion).

<sup>20</sup> Section 702 of Title VII expressly excludes religious corporations, associations, educational institutions, and societies from Title VII’s prohibition against religious discrimination. 42 U.S.C. § 2000e-1 (2012).

<sup>21</sup> *See, e.g.*, Yazdian v. ConMed Endoscopic Techs., Inc., 793 F.3d 634, 655–56 (6th Cir. 2015) (holding that Muslim employee established prima facie case of religious discrimination in violation of Title VII since employee was qualified, discharged, and member of protected classes, and employer replaced employee with non-Muslim, non-Iranian man).

<sup>22</sup> Panchoosingh v. Gen. Labor Staffing Servs., Inc., No. 07-80818-CIV, 2009 WL 961148, at \*6 (S.D. Fla. Apr. 8, 2009) (“[I]n the context of religious discrimination, a statement like ‘I’m firing you because you’re . . . a Christian’ would be direct evidence of unlawful discrimination.”).

<sup>23</sup> Noyes, 488 F.3d at 1165, 1168; Shapolia v. Los Alamos National Laboratory, 992 F.2d 1033, 1038 (10th Cir. 1993) (“[I]t is the religious beliefs of the employer, and the fact that [the employee] does not share them, that constitute the basis of the [religious discrimination]

tion claim premised on an employer's preference for a particular religious group," and it is also prohibited under Title VII.<sup>24</sup>

The elements of a *prima facie* case vary slightly between plaintiffs claiming reverse religious discrimination and plaintiffs claiming straightforward religious discrimination. In a straightforward discrimination claim, a plaintiff establishes a *prima facie* case by showing "(1) she is a member of a protected class; (2) she was qualified for her job; (3) she suffered an adverse employment decision; and (4) she was replaced by a person outside the protected class or treated differently than similarly situated nonprotected employees."<sup>25</sup> In a reverse religious discrimination claim, a plaintiff need not show that she is a member of a protected class. "[U]se of the 'protected class' factor . . . suggests some identifiable characteristic of the plaintiff in order to give rise to Title VII protection."<sup>26</sup> Yet in a reverse religious discrimination claim, "it is the religious beliefs of the employer, and the fact that [the plaintiff] does not share them, that constitute the basis of the claim."<sup>27</sup> In a religious discrimination case brought by a non-Mormon former employee against a Mormon former employer,<sup>28</sup> the Tenth Circuit explained, "[t]he question for the trier of fact is . . . whether [the employee's] termination . . . [was] motivated by an animus directed against non-Mormons."<sup>29</sup> Title VII's prohibition on religious discrimination protects employees from discrimination because they do not share their employer's religion.<sup>30</sup>

In *Noyes v. Kelly Services*,<sup>31</sup> Lynn Noyes sued her employer alleging that she was denied a promotion because she did not adhere to her supervisor's religious beliefs.<sup>32</sup> Her supervisor was a member of a religious group called the Fellowship of Friends ("Fellowship"),<sup>33</sup> of which Noyes was not a member.<sup>34</sup> Noyes was considered for a promotion, but a Fellowship member

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claim."); *see also id.* at 1036 ("Title VII . . . protect[s] against requirements of religious conformity and as such protects those who refuse to hold, as well as those who hold, specific religious beliefs.").

<sup>24</sup> EEOC v. United Health Programs of Am., Inc., 213 F. Supp. 3d 377, 392 (E.D.N.Y. 2016) (citing *Noyes*, 488 F.3d at 1168–69; *Shapolia*, 992 F.2d at 1038).

<sup>25</sup> *See, e.g.,* Keys v. Humana, Inc., 684 F.3d 605, 608 (6th Cir. 2012) (citing *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 391 (6th Cir. 2008)).

<sup>26</sup> *Shapolia*, 992 F.2d at 1038.

<sup>27</sup> *Id.*

<sup>28</sup> Here, the plaintiff, a non-Mormon, alleged that his Mormon supervisor gave him a negative evaluation, which contributed to his eventual termination, because he did not share his supervisor's religious beliefs. *See Shapolia*, 992 F.2d at 1035.

<sup>29</sup> *Id.* at 1037.

<sup>30</sup> *See, e.g.,* Mandell v. County of Suffolk, 316 F.3d 368, 378 (2d Cir. 2003) ("An employer discriminating against any non-Catholic violates the anti-discrimination laws no less than an employer discriminating only against one discrete group, in this case, Jews."); *Campos v. City of Blue Springs*, 289 F.3d 546, 550–51 (8th Cir. 2002) (upholding jury verdict finding that employee was constructively discharged because she was not a Christian).

<sup>31</sup> 488 F.3d 1163, 1163 (9th Cir. 2007).

<sup>32</sup> *Id.* at 1165–66.

<sup>33</sup> *See id.* at 1165.

<sup>34</sup> *See id.* at 1166.

got the position instead.<sup>35</sup> Noyes claimed she was passed over for the promotion because her religious beliefs were different than her supervisor's.<sup>36</sup> Reversing the district court's grant of summary judgment for the employer, the Ninth Circuit held that Noyes established a prima facie case of reverse religious discrimination upon showing that "her lack of adherence to the religious beliefs promoted by [her employer] was the genesis of the discrimination."<sup>37</sup> Noyes' Title VII claim survived summary judgment, and she subsequently won a multi-million dollar jury verdict.<sup>38</sup>

Title VII's prohibition of religious discrimination "protects employees from discrimination because they do not share their employer's religious beliefs."<sup>39</sup> When an employer discriminates against employees who do not share her religious beliefs, her adverse employment actions are prohibited religious discrimination, regardless of whether these employees are a member of some other religion or they identify with no religion at all.<sup>40</sup> The key feature of these reverse religious discrimination claims is that the employee does not share the religious beliefs of the employer. If Bonnie fires William because William is not Christian, she has discriminated against him for not sharing her religion, and this termination would violate Title VII.

## *ii. Religious Discrimination and Lack of Religion*

The right to embrace religion includes the right to reject religion. While Title VII defines religion to include "all aspects of religious observance and practice, as well as belief,"<sup>41</sup> some courts have interpreted the law "to protect against requirements of religious conformity and as such [to protect] those who refuse to hold, as well as those who hold, specific religious beliefs."<sup>42</sup> The understanding that Title VII protects both religious beliefs and objections to religious beliefs reflects the understanding of religion advanced in First Amendment jurisprudence. Courts have long looked to First Amendment cases to clarify the meaning of "religion" for purposes of Title VII.<sup>43</sup>

<sup>35</sup> *See id.*

<sup>36</sup> *See id.*

<sup>37</sup> *Id.* at 1168.

<sup>38</sup> *Noyes v. Kelly Servs.*, 349 F. App'x 185, 187 (9th Cir. 2009).

<sup>39</sup> *EEOC v. United Health Programs of Am., Inc.*, 213 F. Supp. 3d 377, 392 (E.D.N.Y. 2016); *see also* *Mandell v. County of Suffolk*, 316 F.3d 368, 378 (2d Cir. 2003) ("An employer discriminating against any non-Catholic violates the anti-discrimination laws no less than an employer discriminating only against one discrete group . . .").

<sup>40</sup> *See Noyes v. Kelly Servs.*, 488 F.3d 1163, 1168 (9th Cir. 2007) (holding a plaintiff need not claim that "she adheres to a particular religion"; rather, her claim is based on "her lack of adherence" to particular religious beliefs).

<sup>41</sup> 42 U.S.C. § 2000e(j) (2018).

<sup>42</sup> *EEOC v. United Health Programs of Am., Inc.*, 213 F. Supp. 3d 377, 391 (E.D.N.Y. 2016).

<sup>43</sup> *See, e.g., EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1117 (10th Cir. 2013) (recognizing reliance placed on First Amendment cases in defining religion for purposes of Title VII), *rev'd on other grounds*, 135 S. Ct. 2028 (2015); *Reed v. Great Lakes Cos.*, 330 F.3d 931, 934 (7th Cir. 2003) (finding that antipathy toward atheists is prohibited by Title VII

Courts have appealed to free-exercise cases to support the proposition that in the Title VII context, “religious freedom includes the freedom to reject religion—‘religion’ includes antipathy to religion.”<sup>44</sup> Conceived this way, just as Bonnie has a right to practice Christianity, her employee William has an equal right to reject Christianity without adverse employment consequences.

*iv. Single-Belief Reverse Religious Discrimination*

Consider that as part of Bonnie’s Christian religion, she believes that abortion is sinful. Her employee Chelsea does not share that belief. Bonnie sees a pro-choice bumper sticker on Chelsea’s car and fires her. Though this kind of claim has not yet been recognized in court, it follows from the reverse religious discrimination cases that Chelsea has a claim of religious discrimination under Title VII.

The reverse religious discrimination cases establish that an employer may not terminate an employee because that employee does not share the employer’s religious beliefs. Title VII should also be interpreted to prohibit discrimination against employees who do not share a particular religious belief of their employer. This Note calls this type of religious discrimination “single-belief reverse religious discrimination,” because it is discrimination based on a single religious belief of an employer, as opposed to discrimination against an employee for failure to adhere to the employer’s religious identity. In the above example, Bonnie engages in single-belief reverse religious discrimination by firing Chelsea because of Chelsea’s failure to adhere to Bonnie’s single belief that abortion is sinful.

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in part based on “analogy to cases under the free-exercise clause of the First Amendment”); *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de P.R.*, 279 F.3d 49, 56 (1st Cir. 2002) (relying on First Amendment jurisprudence in evaluating the breadth of religious protection afforded under Title VII); *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 478 (2d Cir. 1985), *aff’d and remanded*, 479 U.S. 60 (1986) (considering First Amendment principles in evaluating a religious discrimination claim under Title VII); *Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256, 268 (S.D.N.Y. 2002) (“A court’s limited role in determining whether a belief is ‘religious’ is the same under Title VII as it is under the Free Exercise Clause of the First Amendment.”) (internal citation omitted).

<sup>44</sup> *Reed v. Great Lakes Cos.*, 330 F.3d 931, 933–34 (7th Cir. 2003); *see also County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 590 (1989) (noting that the First Amendment “guarantee[s] religious liberty and equality to ‘the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.’”) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985)); *Wallace*, 472 U.S. at 53 (“[T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.”); *Books v. City of Elkhart*, 235 F.3d 292, 307 (7th Cir. 2000) (holding that Ten Commandments display violates establishment clause because it endorses Judeo-Christian faith, not inclusive of those who reject Judeo-Christian religions); *Warner v. Orange Cty. Dep’t of Probation*, 173 F.3d 120, 120–22 (2d Cir. 1999) (holding that terms of probation requiring atheist to attend local Alcoholics Anonymous meeting required him to participate in religious exercises in violation of First Amendment’s Establishment Clause); *Young v. Southwestern Savings & Loan Ass’n*, 509 F.2d 140, 144 (5th Cir. 1975) (holding that employer had obligation to accommodate religious beliefs and observances of atheist employee who objected to nondenominational, theological beginnings of required staff meetings).



While reverse religious discrimination “protects employees from discrimination because they do not share their employer’s religious beliefs”<sup>45</sup> as a whole, single-belief reverse religious discrimination protects employees from discrimination because they do not share one of their employer’s particular religious beliefs. In a single-belief reverse religious discrimination claim, the employer and the employee could even be members of the same religion, and there could still be a feasible claim. In this Note’s example, Chelsea and Bonnie may both be Christian. They could observe the same holidays, recite the same prayers, and go to the same church. Their beliefs could overlap entirely except for one point of difference: whether abortion is sinful. However, if that point of difference is the basis of an adverse employment action, then the employer has discriminated on the basis of religion in violation of Title VII. Alternatively, Chelsea could be Jewish, Scientologist, agnostic, or irreligious, and still have her Title VII rights violated in this case. As long as Bonnie fires Chelsea because Chelsea does not share Bonnie’s single religious belief that abortion is sinful, Bonnie has engaged in illegal religious discrimination.

It may be objected that single-belief reverse religious discrimination is too removed from religion such that there is not actually any religious discrimination. Chelsea’s support of women’s right to choose may have nothing to do with religion. Title VII prohibits adverse employment actions taken “because of such individual’s . . . religion.”<sup>46</sup> If Chelsea is fired based on one of her political beliefs, is she really fired because of her religion? The answer is “yes”, for two reasons.

First, Bonnie’s reason for firing Chelsea is based in religion: she fires Chelsea because Chelsea’s beliefs do not conform with Bonnie’s religious beliefs. This is particularly important in the RFRA context, where Bonnie can claim that the continued employment of Chelsea substantially burdens Bonnie’s religion.<sup>47</sup> If Bonnie asserts a RFRA defense to Title VII enforcement, then she is claiming that Chelsea’s rejection of one of Bonnie’s religious beliefs substantially burdens Bonnie’s religion. Bonnie would fire Chelsea not just because Chelsea holds a political belief but because of the way that belief allegedly burdens Bonnie’s religion.

Second, if Bonnie fires Chelsea because Chelsea’s pro-choice belief is contrary to Bonnie’s anti-abortion belief, then Bonnie fires Chelsea because of Chelsea’s failure to adhere to one of Bonnie’s religious beliefs. But the right to practice a religion includes the right to reject a religious practice.<sup>48</sup> Therefore, Bonnie’s right to hold her anti-abortion religious belief is equal to

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<sup>45</sup> EEOC v. United Health Programs of Am., Inc., 213 F. Supp. 3d 377, 392 (E.D.N.Y. 2016); *see also* Mandell v. County of Suffolk, 316 F.3d 368, 378 (2d Cir. 2003) (“An employer discriminating against any non-Catholic violates the anti-discrimination laws no less than an employer discriminating only against one discrete group . . .”).

<sup>46</sup> 42 U.S.C. § 2000e-2 (2018).

<sup>47</sup> *See* Part III *infra*.

<sup>48</sup> *See supra* notes 40–45 and accompanying text.

but not greater than Chelsea's right to reject that belief without adverse employment consequences.

*iv. Single-Belief Reverse Religious Discrimination and LGBTQ Employees*

Imagine that fictional employer Bonnie learns that her employee Laura is lesbian. Bonnie fires Laura because homosexuality is against Bonnie's religious beliefs. This Note argues Laura should have a single-belief reverse religious discrimination claim against Bonnie. LGBTQ employees facing adverse employment consequences because their employers object to their LGBTQ identities on religious grounds may have single-belief reverse religious discrimination claims under Title VII.

Over the past five years, many courts have held for the first time that discrimination because of one's sexuality is discrimination on the basis of sex in violation of Title VII.<sup>49</sup> This Note argues that if an employer justifies an adverse employment action by appealing to her religious beliefs, then the employee has a religious discrimination claim under Title VII in addition to a sex discrimination claim. In the case of Bonnie and Laura, Bonnie discriminated against Laura because Laura's sexuality is contrary to one of Bonnie's religious beliefs. This makes Bonnie's firing of Laura single-belief reverse religious discrimination.

The Sixth Circuit case, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*,<sup>50</sup> involved Title VII sex discrimination claims. This Note argues the plaintiff could have also alleged religious discrimination. In that case, the EEOC filed a Title VII claim on behalf of a former funeral home employee, Aimee Stephens.<sup>51</sup> Stephens worked as a funeral director at R.G. & G.R. Harris Funeral Homes, Inc., a closely held for-profit corporation owned and operated by Thomas Rost.<sup>52</sup> Stephens presented as a man when she began working for the Funeral Home in 2007. She then came out as a transgender woman.<sup>53</sup> In 2013, she wrote a letter informing Rost and her co-workers that she was undergoing a gender transition from male to female and intended to present as a woman at work.<sup>54</sup> Rost fired Stephens two weeks later because "he was no longer going to represent himself as a man."<sup>55</sup> Stephens filed a discrimination charge with the EEOC,<sup>56</sup> and the EEOC filed a civil action

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<sup>49</sup> See *supra* note 2.

<sup>50</sup> 201 F. Supp. 3d 837, 837 (E.D. Mich. 2016), *rev'd and remanded*, 884 F.3d 560 (6th Cir. 2018).

<sup>51</sup> R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d at 566.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> See *id.* at 566–67.

<sup>55</sup> This quote is from a deposition during which Rost was asked, on the record, why he fired Stephens. *Id.* at 569.

<sup>56</sup> *Id.*

alleging Stephens was wrongfully terminated based on sex stereotypes in violation of Title VII.<sup>57</sup>

Stephens did not allege religious discrimination, but she could have brought a claim alleging she was fired because she did not share her employer's religious belief about the immutability of sex. Rost explicitly disclosed that he fired Stephens because she "was no longer going to represent [herself] as a man[.]" and that this was a problem because Rost's religion teaches that sex is an immutable, God-given trait.<sup>58</sup> In other words, Rost fired Stephens because Stephens did not conform to one of Rost's religious beliefs.

This is religious discrimination prohibited by Title VII, regardless of Stephens' religious beliefs or lack thereof. Just as Title VII prohibits the termination of an employee because she does not observe the employer's religion, it also prohibits the termination of an employee because she does not adhere to the same religious beliefs as her employer. Whether the employer makes an employment decision because she disagrees with her employee in whole or in part, the employer is making an employment decision based on the employer's religious beliefs and whether the employee shares them. This is illegal religious discrimination.

### B. Religious Harassment Claims

In addition to prohibiting adverse employment action motivated by religious discrimination, Title VII also prevents workplace harassment motivated by religious discrimination.<sup>59</sup> "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."<sup>60</sup> Title VII permits employers and employees alike to discuss their religion, practice their religion, and comment on the religions of others, even negatively unless it amounts to harassment of another person in the workplace.<sup>61</sup> When religious exercise becomes harassment, it is no longer protected.

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<sup>57</sup> See *id.* The EEOC asserted a second Title VII claim, alleging that the Funeral Home engaged in an unlawful employment practice by providing work clothes to male but not female employees. *Id.* For the purposes of this Note, the author focuses on the wrongful termination claim.

<sup>58</sup> *Id.* at 569; see *supra* note 55.

<sup>59</sup> See generally, *Huri v. Office of the Chief Judge of the Circuit Court of Cook Cty.*, 804 F.3d 826, 834 (7th Cir. 2015); *Ashraf-Hassan v. Embassy of France*, 695 F. App'x 579, 582 (D.C. Cir. 2017).

<sup>60</sup> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 69 (1986).

<sup>61</sup> See, e.g., *Alhallaq v. Radha Soami Trading, LLC*, 484 F. App'x 293, 296 (11th Cir. 2012) (playing Christian gospel music did not create hostile environment); *Rivera v. P.R. Aqueduct & Sewers Auth.*, 331 F.3d 183, 189–91 (1st Cir. 2003) (calling religious Christian employee "Mother Theresa," singing a Christmas carol to her, and giving her birthday card depicting a pig wearing a rosary, did not create a hostile work environment); *Lara v. Raytheon Tech. Serv. Co.*, 476 F. App'x 218, 221 (11th Cir. 2012) ("[U]nwarranted and derogatory comments about religion" did not create hostile environment.).

Mirroring the framework of sexual harassment, religious harassment can take two forms: quid pro quo harassment and hostile environment harassment.<sup>62</sup>

*i. Quid Pro Quo Religious Harassment*

Quid pro quo harassment—translated from Latin, “something for something”—occurs when tangible employment benefits are conditioned upon compliance with a harasser’s demands.<sup>63</sup> It is most commonly litigated in the sexual harassment context. Quid pro quo sexual harassment occurs when submission to “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature” is explicitly or implicitly a term or condition of employment, and submission to or rejection of such conduct is used as the basis for employment decisions.<sup>64</sup> For example, it is illegal sex discrimination and quid pro quo sexual harassment for an employer to threaten to retaliate against an employee if the employee refuses to engage in sexual activities with the employer.<sup>65</sup>

Though quid pro quo harassment “is more commonly associated with sexual harassment” than with religious harassment,<sup>66</sup> quid pro quo religious harassment is also actionable under Title VII. Quid pro quo religious harassment occurs “when an employer or supervisor explicitly or implicitly coerces an employee to abandon, alter, or adopt a religious practice as a condition of receiving a job benefit or avoiding an adverse action.”<sup>67</sup> For example, it would occur if an employer or supervisor threatens to fire an employee for not attending church, to withhold a promotion unless an employee renounces her Jewish beliefs, or to deny an employment benefit unless the employee becomes Mormon.

In an influential case, *Venters v. City of Delphi*,<sup>68</sup> the Seventh Circuit held that there were sufficient facts to support a quid pro quo religious harassment claim when an employer threatened to fire an employee because she did not conform to his religious beliefs.<sup>69</sup> Jennifer Venters worked as a radio

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<sup>62</sup> See *Venters v. City of Delphi*, 123 F.3d 956, 975 (7th Cir. 1997).

<sup>63</sup> See, e.g., *Bryson v. Chi. State Univ.*, 96 F.3d 912, 915 (7th Cir.1996) (allegation that university professor lost tangible employment benefits after refusing supervisor’s sexual advances supported claim for quid pro quo sexual harassment against university).

<sup>64</sup> 29 C.F.R. §1604.11(a) (1998).

<sup>65</sup> See, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751 (1998) (employee alleging tangible employment action after refusing to submit to supervisor’s sexual demands states actionable quid pro quo sexual harassment claim).

<sup>66</sup> Josh Schopf, *Religious Activity and Proselytization in the Workplace: The Murky Line Between Healthy Expression and Unlawful Harassment*, 31 COLUM. J.L. & SOC. PROBS. 39, 45 (1997).

<sup>67</sup> EEOC COMPLIANCE MANUAL, SECTION 12, “RELIGIOUS DISCRIMINATION” (2008), available at <https://www.eeoc.gov/policy/docs/religion.pdf>, archived at <https://perma.cc/V36Z-FE4G>.

<sup>68</sup> 123 F.3d 956 (7th Cir. 1997).

<sup>69</sup> *Id.* at 961.

dispatcher at a police station.<sup>70</sup> Her supervisor, Police Chief Larry Ives, was a born-again Christian.<sup>71</sup> He told Venters that he believed his decisions as police chief should be guided by the principles of his faith.<sup>72</sup> During work, Ives spoke to Venters repeatedly about her salvation, telling her that in order to be a good employee, she had to be spiritually whole, which required she be “saved.”<sup>73</sup> He told her that the police station was “God’s house,” and he threatened to “trade” her if she did not embrace “God’s way” over “Satan’s.”<sup>74</sup> During these conversations, Ives often referenced Venters’ status as an at-will employee who could be dismissed at any time.<sup>75</sup> He asked her questions about her personal life, claiming to assess her progress toward “salvation.”<sup>76</sup> Eventually, he told her that an “evil spirit has taken [her] soul,” and he would not allow that “evil spirit” to reside in the police department.<sup>77</sup> Based on this evidence, the Seventh Circuit held that “a jury could reasonably conclude that Ives made adherence to his set of religious values a requirement of continued employment in the police department.”<sup>78</sup> Ives’ case demonstrates that an employer who requires his employees to adhere to his religious values engages in illegal religious discrimination under Title VII.

An LGBTQ employee whose employer disapproves of her LGBTQ identity on religious grounds may have a similarly actionable religious harassment claim. Like in *Venters*, such an employer may be conditioning continued employment on the employee’s adherence to the employer’s religious values. To illustrate, consider the same set of facts as in *Venters* with the additional information that Venters is lesbian. In this hypothetical, Ives engages in the same behavior that constituted actionable religious harassment in *Venters*, with the only difference being that Ives’ evidence of Venters’ “evil spirit” and suggestions about her salvation are more specific: Ives points to Venters’ homosexuality as evidence of her “evil spirit,” and he continues to encourage Venters to embrace God’s way over Satan’s. In this hypothetical, to Ives, embracing God’s way includes the renunciation of homosexuality. Because Ives repeatedly encourages Venters to embrace his own view of God and salvation, “a jury could reasonably conclude that Ives made adherence to his set of religious values a requirement of continued employment in the police department.”<sup>79</sup> To harass an employee because she does not adhere to a specific religious belief of an employer—in this example, that homosexuality is sinful—is analytically indistinguishable from

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<sup>70</sup> *Id.* at 962.

<sup>71</sup> *See id.*

<sup>72</sup> *See id.*

<sup>73</sup> *See id.*

<sup>74</sup> *See id.* at 963.

<sup>75</sup> *See id.*

<sup>76</sup> *Id.* at 964.

<sup>77</sup> *Id.*

<sup>78</sup> *See id.* at 977.

<sup>79</sup> *Id.*

harassing an employee because she does not adhere to her employer's religious beliefs more broadly.

Discrimination is religious if it is motivated by the employer's religious beliefs. In *Venters*, Ives repeatedly encouraged Venters to attend church.<sup>80</sup> Venters did not tell Ives if or how often she attends church.<sup>81</sup> Whether she attended church, and her reasons for attending or not attending, do not affect the cognizability of her religious harassment claim. Ives religiously harassed her because he sought to impose his religious views onto her. In the hypothetical above, Venters is lesbian—an identity that is not based on religion. However, her employer's harassment of that identity may be based on religion. If Ives states that homosexuality is contrary to his religion and threatens adverse employment consequences unless Venters renounces her homosexuality, then he has threatened adverse employment consequences unless Venters adopts his religious belief. The employer is seeking to impose his religious beliefs onto the employee. For an employer to condition continued employment on the employee's adherence to the employer's religious beliefs is actionable religious harassment under Title VII.<sup>82</sup> An LGBTQ employee, therefore, has a religious harassment claim against an employer who threatens adverse employment action because the employee's LGBTQ identity does not conform to one of the employer's religious beliefs.

## ii. *Hostile Environment Religious Harassment*

Single-belief reverse religious discrimination against LGBTQ employees may also constitute hostile environment harassment. To be actionable under Title VII, the work environment must be “both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.”<sup>83</sup> Hostile environment religious harassment occurs when an employee is subjected to unwelcome religious statements or conduct so severe or pervasive that the individual being harassed reasonably finds the work environment to be hostile or abusive.<sup>84</sup> Religious harassment can create a hostile environment when an employer repeatedly pressures employees to conform to the employer's religious views.<sup>85</sup>

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<sup>80</sup> See *id.* at 963–64.

<sup>81</sup> See *id.* at 963 (“[S]he refrained from making her religious views known to Ives.”).

<sup>82</sup> See *id.* at 977.

<sup>83</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998).

<sup>84</sup> See *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 315 (4th Cir. 2008) (citing *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81–82 (1998)).

<sup>85</sup> See *Sattar v. Motorola, Inc.*, 138 F.3d 1164, 1167 (7th Cir. 1998) (employee harassed with a barrage of emails with dire warnings of the divine punishments that awaited those who refuse to follow Islam); *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 819 (S.D. Ind. 2002) (holding that Christian employers violated Title VII by repeatedly encouraging employee to convert to their brand of Christianity); *EEOC v. AKZ Mgmt., Inc.*, No. 07-8356 (S.D.N.Y. consent decree filed Sept. 26, 2007) (settlement of religious harassment and dispa-

An employer who evinces strong disapproval of an employee's LGBTQ identity may create a hostile environment. For example, in *Erdmann v. Tranquility Inc.*,<sup>86</sup> the Northern District of California held that a supervisor's characterization of an employee's homosexuality as sinful and the employer's urgings that the employee adopt her religion may have created a hostile work environment.<sup>87</sup> There, some of Del Erdmann's coworkers refused to work with him after learning that he was homosexual and told him that he should become heterosexual and Mormon to avoid hell.<sup>88</sup> Erdmann's employer responded in part by telling him that homosexuality is immoral.<sup>89</sup> The court denied the employer's motion for summary judgment, finding that the employer's strong religious disapproval of Erdmann's identity presented an actionable hostile environment claim.<sup>90</sup>

### C. Religious Accommodations

Bonnie believes that her employee Laura's homosexuality is sinful. Laura does not share that religious belief. Sections A and B above explain how Title VII would support a religious discrimination claim by Laura if Bonnie discriminates against Laura for her failure to conform to Bonnie's religious belief. This Section explains how Title VII provides a framework to respect Bonnie's religious belief while simultaneously respecting Laura's rejection of that belief.

#### i. Accommodating Religious Objections

In 1972, Congress amended Title VII to add that employers have a duty to reasonably accommodate the religious practices of employees, to the extent that they can do so without undue hardship.<sup>91</sup> This amendment, distinct from the duty not to discriminate, created an affirmative statutory obligation for employers to accommodate the religious beliefs and religious objections of employees.<sup>92</sup> An employer has a "statutory obligation to make reasonable

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rate treatment claims on behalf of employees who were pressured by management to practice or conform to Scientology).

<sup>86</sup> 155 F. Supp. 2d 1152 (N.D. Cal. 2001).

<sup>87</sup> See *id.* at 1163.

<sup>88</sup> See *id.* at 1156–58.

<sup>89</sup> See *id.* at 1156.

<sup>90</sup> See *id.* at 1163.

<sup>91</sup> See 29 C.F.R. § 1605.2 (2019) (declaring that it is an "unlawful employment practice under section 703(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business"); see also *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977). For further discussion of "undue hardship," see *infra* notes 108–18 and accompanying text.

<sup>92</sup> Interpreting this amendment, courts have "taken seriously the attempt by Congress to impose upon employers an affirmative duty to accommodate the religious practices of employees which is in addition to, and distinct from, the obligation not to discriminate against an employee on the basis of religion." Andrew M. Campbell, Annotation, *What Constitutes Em-*

accommodation for the religious observances of its employees, short of incurring an undue hardship[.]”<sup>93</sup> Some courts have interpreted this duty to also protect employees from being forced to participate in or conform to religious practices.

In *EEOC v. Townley Engineering & Manufacturing Co.*,<sup>94</sup> the Ninth Circuit held that Title VII prohibits employers from requiring employees—over those employees’ objections—to attend devotional services during the workday.<sup>95</sup> Townley, a manufacturer of mining equipment, hired Louis Pelvas to work as a machinist in 1979.<sup>96</sup> In 1982, Townley amended its employee handbook to require “[a]ll employees . . . to attend the non-denominational devotional services each Tuesday.”<sup>97</sup> Pelvas, an atheist, “asked to be excused from the services.”<sup>98</sup> His supervisor told him that the services were mandatory.<sup>99</sup> Pelvas filed a religious discrimination claim with the EEOC, and the EEOC claimed Townley violated Title VII by failing to accommodate Pelvas’s objection to attending religious services.<sup>100</sup> The Ninth Circuit sided with the EEOC, holding that Townley should have accommodated Pelvas’s religious objections to the devotional services by excusing him from attendance.<sup>101</sup>

The Ninth Circuit explained that both parties have religious liberty interests: “Both the Townleys and Pelvas seek to pursue a religious practice.”<sup>102</sup> The Townleys seek to pursue a religious practice by holding devotional services, and Pelvas seeks to pursue a religious practice by avoiding the services.<sup>103</sup> To the court, Pelvas’s atheism and his corresponding aversion to religious services are just as religious in nature as the Townley’s Christian devotional services. “Where the religious practices of employers, such as the Townleys, and employees conflict, Title VII does not, and could not, require individual employers to abandon their religion. Rather, Title VII attempts to reach a mutual accommodation of the conflicting religious practices.”<sup>104</sup>

The “undue burden” standard achieves this mutual accommodation. In *Townley*, the court held that requiring the Townleys to excuse employees

*ployer’s Reasonable Accommodation of Employee’s Religious Preferences Under Title VII of Civil Rights Act of 1964*, 134 A.L.R. Fed. 1 (1996).

<sup>93</sup> *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977); see also 42 U.S.C. § 2000e(j) (defining “religion” to include “all aspects of religious observance and practice, as well as belief,” unless employer can show that accommodation of employee’s religion would impose an “undue hardship on the . . . employer’s business”).

<sup>94</sup> 859 F.2d 610 (9th Cir. 1988).

<sup>95</sup> See *id.* at 613.

<sup>96</sup> *Id.* at 612.

<sup>97</sup> *Id.*

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

<sup>100</sup> See *id.*

<sup>101</sup> See *id.* at 615–16.

<sup>102</sup> *Id.* at 621.

<sup>103</sup> See *id.*

<sup>104</sup> *Id.*



with religious objections from attending devotional services did not unduly burden the Townleys' free exercise rights to hold those devotional services.<sup>105</sup> The Townleys were still permitted to hold the services and could even make them mandatory to those without religious objections.<sup>106</sup> But requiring the Townleys to excuse employees with religious objections strikes a balance by "ensuring religious freedom in a society with many different religions and religious groups."<sup>107</sup> Employers must accommodate employees' different religious beliefs, "unless an employer demonstrates that he [or she] is unable to reasonably accommodate an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business."<sup>108</sup> An accommodation is an undue hardship when it poses a "non-trivial cost upon the employer or upon other employees."<sup>109</sup> The hardship must be "actual . . . [not] merely conceivable or hypothetical[.]"<sup>110</sup>

Further, the alleged hardship must be hardship to the *business*. In *Townley*, the employers argued that excusing Pervas from devotional services would have constituted a spiritual hardship.<sup>111</sup> While acknowledging that spiritual costs exist, the Ninth Circuit rejected this argument, insisting that Title VII's language limiting undue hardship to those "on the conduct of the employer's business"<sup>112</sup> evinces Congressional intent to measure undue hardship in terms of its effect on the "operation of . . . business activities."<sup>113</sup> An employer could argue that a religious practice is central to the business and that accommodating an employee who objects to that practice is a hardship to business operations. Title VII provides exceptions for such hardships.<sup>114</sup> If religion is truly central to the business, then the employer will be exempt from Title VII under either Title VII's religious organization exception, which allows religious organizations to give employment preference to members of their own religion,<sup>115</sup> or under the free exercise ministerial exception, which largely prohibits the government from interfering with employment decisions regarding employees who perform essentially religious

<sup>105</sup> *See id.*

<sup>106</sup> *See id.*

<sup>107</sup> *See id.*

<sup>108</sup> 42 U.S.C. § 2000e(j).

<sup>109</sup> *See* Campbell, *supra* note 92 (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977)). For example, in *EEOC v. Abercrombie & Fitch Stores, Inc.*, Abercrombie and Fitch argued that granting an accommodation to an employee who wanted to wear a head scarf in violation of the employer's appearance policy "would negatively impact the brand, sales and compliance." 798 F. Supp. 2d 1272, 1287 (N.D. Okla. 2011). The district court rejected this argument as "too speculative." *Id.*

<sup>110</sup> *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989).

<sup>111</sup> *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 615 (9th Cir. 1988).

<sup>112</sup> *Id.* at 614 (quoting 42 U.S.C. § 2000e(j)).

<sup>113</sup> *Id.* at 615.

<sup>114</sup> *See, e.g., Hardison*, 432 U.S. at 79 (altering job or shift of employee whose religious beliefs prohibited him from working on Saturdays was undue hardship where union and employer had agreed to seniority system and changes would constitute breach of collective bargaining agreement).

<sup>115</sup> 42 U.S.C. §§ 2000e-1(a), 702(a).

functions.<sup>116</sup> Unless an accommodation would be an undue hardship to the conduct of the business operations, it must be granted.

Religious accommodations seek not to hinder anyone's practice of religion, but to eliminate the conflict between an employee's religious practice and an employer's policy.<sup>117</sup> The accommodation requirement is "plainly intended to relieve individuals of the burden of choosing between their jobs and their religious convictions where such relief will not unduly burden others."<sup>118</sup> In a pluralistic society, granting religious accommodations where feasible allows people with different or contrasting religious beliefs to work together without sacrificing their beliefs.

### *ii. Religious Accommodation Claims by LGBTQ Employees*

Returning to *Harris Funeral Homes*, this understanding of religious protections should support a religious accommodation claim by Stephens, the employee fired because her transgender identity was contrary to the funeral home owner's religious belief about sex as a God-given, immutable trait.<sup>119</sup> Courts analyze Title VII religious accommodations claims through a burden-shifting framework akin to the burden-shifting framework established in the context of racial discrimination cases.<sup>120</sup> The employee has the initial burden of establishing a prima facie case of religious discrimination by first asserting she holds a protected belief.<sup>121</sup> As advanced in Section II.A.ii, Stephens' rejection of Rost's religious belief that sex is immutable and God-given should be a protected belief under Title VII. Second, Stephens must prove that Rost knew of her belief and that her belief conflicted

<sup>116</sup> See, e.g., *Geary v. Visitation of Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 325 (3d Cir. 1993) (allowing religious motivations in hiring decisions by religious employers). The ministerial exception is applicable "in cases involving religiously affiliated entit[ies], whose mission[s] are marked by clear or obvious religious characteristics." *Penn. v. New York Methodist Hosp.*, 884 F.3d 416, 424 (2d Cir. 2018) (citations and internal quotation marks omitted); see also *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 581 (6th Cir. 2018) (funeral home not religious institution despite alleged religious purpose, and, thus, ministerial exception did not apply because funeral home did not purport or seek to establish and advance any Christian values, it was not affiliated with any church, its articles of incorporation did not avow any religious purpose, its employees were not required to hold any particular religious views, and it employed and served individuals of all religions).

<sup>117</sup> See 42 U.S.C. § 2000e; see also *Muhammad v. N.Y.C. Transit Auth.*, 52 F. Supp. 3d 468, 479 (E.D.N.Y. 2014).

<sup>118</sup> *Nottelson v. Smith Steel Workers D.A.L.U.* 19806, 643 F.2d 445, 454 (7th Cir. 1981).

<sup>119</sup> *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, 846–47 (E.D. Mich. 2016).

<sup>120</sup> See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (once employee establishes prima facie case of discrimination, burden shifts to employer to articulate "some legitimate, nondiscriminatory reason" for the adverse employment action).

<sup>121</sup> See, e.g., *Davis v. Fort Bend County*, 765 F.3d 480, 485 (5th Cir. 2014) ("To establish a prima facie case of religious discrimination under Title VII, the plaintiff must present evidence that (1) she held a bona fide religious belief, (2) her belief conflicted with a requirement of her employment, (3) her employer was informed of her belief, and (4) she suffered an adverse employment action for failing to comply with the conflicting employment requirement.") (internal citations omitted).

with an employment requirement.<sup>122</sup> When Stephens told Rost that she was transitioning from male to female,<sup>123</sup> she communicated that she believes gender identity is personal, not God-given and immutable. This communication “provided [her] employer with sufficient information to put [him] on notice” that she did not share Rost’s religious beliefs.<sup>124</sup> Stephens’ rejection of Rost’s belief conflicted with an employment requirement because, unless she continued to present as male, she could not keep her job. Adherence to Rost’s belief, in violation of Stephens’ religious liberty, was an effective requirement of employment.

It could be argued that Stephens’ belief did not conflict with an employment requirement, but rather, her *manifestation* of that belief conflicted with an employment requirement. But this argument fails because religious accommodation law is intended to accommodate religious beliefs by allowing employees to practice those beliefs. This is clear in the long history of Title VII cases that, for example, require employers to accommodate employees who believe they should observe the Sabbath by allowing them to in practice observe the Sabbath.<sup>125</sup> Similarly, Title VII requires employers to accommodate the religious beliefs of LGBTQ employees, which include their rejection of those religious beliefs holding that LGBTQ identities are sinful.

### III. OBSTACLES

#### A. “*Repackaged Claims*”

This Note argues that LGBTQ employers who suffer adverse employment consequences because their employers have religious objections to their LGBTQ identities have a religious discrimination claim against their employers. One obstacle to the realization of this legal theory is the possibility that courts will decline to see LGBTQ discrimination as religious discrimination. If Bonnie fires Laura because Laura is lesbian, is Bonnie firing Laura because of religion or because of Laura’s sexual orientation? This Note argues that if Bonnie fires Laura because Laura’s homosexuality is inconsistent with Bonnie’s religion, then Bonnie is discriminating on the basis of both sex and religion.

In *Prowel v. Wise Business Forms*,<sup>126</sup> the Third Circuit rejected this theory. There, the court rejected a gay employee’s religious discrimination claim, finding the claim “was a repackaged claim for sexual orientation dis-

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<sup>122</sup> *See id.*

<sup>123</sup> *See Harris*, 201 F. Supp. 3d at 844–45.

<sup>124</sup> *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 401 n.3 (9th Cir. 1978).

<sup>125</sup> *See, e.g., EEOC v. Ithaca Indus., Inc.*, 849 F.2d 116, 118 (4th Cir. 1988); *Yoselovsky v. Associated Press*, 917 F. Supp. 2d 262, 275 (S.D.N.Y. 2013); *EEOC v. Picoma Indus., Inc.*, 495 F. Supp. 1, 3 (S.D. Ohio 1978).

<sup>126</sup> 579 F.3d 285 (3d Cir. 2009).

crimination—which is not cognizable under Title VII . . . .”<sup>127</sup> Brian Prowel alleged that his co-workers at Wise Business Forms mistreated him for being gay, refused to work with him, and brought religious pamphlets to work.<sup>128</sup> Following his dismissal, Prowel sued his employer alleging both sex and religious discrimination.<sup>129</sup> The Third Circuit permitted Prowel’s sex discrimination claim to go to the jury, but affirmed summary judgment for the employer on the religious discrimination claim because “Prowel’s identification of this single ‘religious’ belief leads ineluctably to the conclusion that he was harassed not ‘because of religion,’ but because of his sexual orientation.”<sup>130</sup>

This holding is flawed. Of course, the claim concerns Prowel’s sexual orientation, but it concerns religion too. Not every instance of sexual orientation discrimination implicates religion. For example, an employer could terminate a homosexual employee because she believes that homosexuality is wrong without appealing to religion. If this termination is not motivated by the religious beliefs of the employer, it is sex discrimination but not religious discrimination. But if an employer justifies the discrimination by appealing to her religious objections to homosexuality, then the employer is making employment decisions based on her religious beliefs. In such a case, homosexuality becomes a basis for discrimination because of the employer’s religious beliefs. When religion is the basis for discrimination, then the discrimination is religious.

A 1997 case in the Northern District of West Virginia illustrates the notion that discrimination rooted in an employer’s religious objections to an employee’s conduct is religious discrimination. In *Henegar v. Sears Roebuck and Co.*,<sup>131</sup> Jo A. Henegar was a Sears employee in the process of divorcing her husband when she began dating and then moved in with a coworker.<sup>132</sup> This relationship offended Henegar’s supervisor because it violated the supervisor’s religious beliefs, and Henegar faced adverse employment consequences as a result.<sup>133</sup> Henegar sued Sears under Title VII for religious discrimination. The court denied Sears’ motion to dismiss Henegar’s religious harassment claim, finding her complaint sufficiently alleged, “that plaintiff suffered an adverse hiring decision because her prior conduct had offended her former supervisor’s religious beliefs.”<sup>134</sup>

The reasoning of the *Prowel* court would support a finding that Henegar’s religious discrimination claim was a “repackaged” claim for discrimination against those who have relationships with co-workers while going through a divorce. But as the *Henegar* court recognized, when Henegar’s

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<sup>127</sup> *Id.* at 293.

<sup>128</sup> *See id.* at 288.

<sup>129</sup> *See id.* at 286.

<sup>130</sup> *Id.*

<sup>131</sup> 956 F. Supp. 833 (N.D. W.Va. 1997)

<sup>132</sup> *Id.* at 834.

<sup>133</sup> *Id.* at 834–35.

<sup>134</sup> *Id.* at 838.

employer discriminated against her because of her relationship, he was acting on his religious beliefs. Henegar's employer punished her because her actions conflicted with his religious beliefs about divorce. In the same way, Prowel's employers mistreated him because his actions conflicted with religious beliefs about homosexuality. Title VII's prohibition of religious discrimination protects employees from this "forced religious conformity,"<sup>135</sup> and these protections rightly extend to LGBTQ employees. When LGBTQ employees are the targets of discrimination because their LGBTQ identities do not conform to the religious beliefs of the employer, they are targets of religious discrimination, distinct from discrimination on the basis of sex.

### B. *Religious Freedom Restoration Act*

A second threat to religious discrimination claims by LGBTQ employees is that employers could assert the Religious Freedom Restoration Act of 1993 (RFRA)<sup>136</sup> as a defense to Title VII enforcement. RFRA prohibits the government<sup>137</sup> from enforcing a religiously neutral law that substantially burdens a person's exercise of religion unless the government meets its burden of showing that the application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.<sup>138</sup> If a party asserts a RFRA defense to the enforcement of a generally applicable law such as Title VII, the first question is whether such enforcement would substantially burden that party's religious exercise. If it does, then the burden shifts to the government to prove the enforcement is the least restrictive means of furthering a compelling government interest. Only if the government meets this burden may the law be applied against the complaining party.

This Note argues that employers who discriminate against LGBTQ employees cannot fulfill the RFRA requirements because Title VII is the least restrictive means of furthering a compelling government interest.

#### i. *Substantial Burden*

There are no clear guidelines concerning how courts should determine whether a party's religion is substantially burdened for RFRA purposes. In *Harris Funeral Homes, Inc.*,<sup>139</sup> the Eastern District of Michigan and the

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<sup>135</sup> Prowel v. Wise Business Forms, 579 F.3d 285, 292 (3d Cir. 2009) (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 20 (1993)).

<sup>136</sup> 42 U.S.C. §§ 2000bb *et seq.* (2018).

<sup>137</sup> RFRA cannot be asserted as a defense to private causes of action, but it may be asserted in cases brought by the EEOC on behalf of individuals. *See, e.g.*, EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018).

<sup>138</sup> Religious Freedom Restoration Act of 1993 § 5(1), 42 U.S.C. § 2000bb-1(b) (2018).

<sup>139</sup> 201 F. Supp. 3d 837 (E.D. Mich. 2016), *rev'd and remanded*, 884 F.3d 560 (6th Cir. 2018).

Sixth Circuit disagreed about whether the continued employment of Aimee Stephens constituted a substantial burden on her employer's religious beliefs.

The Eastern District of Michigan granted summary judgment for the Funeral Home, finding that the funeral home director was entitled to a RFRA exemption from Title VII enforcement.<sup>140</sup> The court explained that, under *Hobby Lobby*, “the ‘question that RFRA presents’ is whether the law at issue ‘imposes a substantial burden on the *ability of the objecting parties to conduct business in accordance with their religious beliefs.*’”<sup>141</sup> The district court concluded that the continued employment of Stephens would substantially burden the ability of the funeral home director, Rost, to conduct business in accordance with his religious beliefs because he “believes that the Bible teaches that a person’s sex is an immutable God-given gift and that people should not deny or attempt to change their sex.”<sup>142</sup> Rost believed permitting one of his employees “to deny their sex while acting as a representative of [the Funeral Home]” would require Rost to “violate God’s commands” because Rost “would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift.”<sup>143</sup> Because Stephens’ continued employment would require Rost to “support the idea that sex is a changeable social construct,” the district court held “that enforcement of Title VII . . . would impose a substantial burden on the ability of the Funeral Home to conduct business in accordance with its sincerely-held religious beliefs.”<sup>144</sup>

The Sixth Circuit reversed, rejecting the argument that the continued employment of Stephens would substantially burden Rost’s religion.<sup>145</sup> The court first explained that “RFRA protects religious exercise, not religious beliefs.”<sup>146</sup> Rost argued that “the very operation of [the Funeral Home] constitutes protected religious exercise because Rost feels compelled by his faith to serve grieving people through the funeral home.”<sup>147</sup> The key question was “whether the Funeral Home has identified any way in which continuing to employ Stephens would substantially burden Rost’s ability to serve mourners.”<sup>148</sup> Rost argued that Stephens’ continued employment would

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<sup>140</sup> See *id.* at 840, 863.

<sup>141</sup> *Id.* at 855 (quoting *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2778 (2014) (emphasis in original)).

<sup>142</sup> *Id.* at 856 (internal citations omitted).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 857.

<sup>145</sup> *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 588 (6th Cir. 2018).

<sup>146</sup> *Id.* at 585 (internal quotations omitted); see also 42 U.S.C. § 2000bb-1(a) (holding that government may not substantially burden “a person’s exercise of religion”); *Wilson v. James*, 139 F. Supp. 3d 410, 424 (D.D.C. 2015) (“A substantial burden on one’s religious beliefs—as distinct from such a burden on one’s *exercise* of religious beliefs—does not violate RFRA.”) (emphasis in original). The exercise of religion “necessarily involves an action or practice.” *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) (holding that collection of DNA evidence from inmate did not burden his religious exercise).

<sup>147</sup> *Harris Funeral Homes, Inc.*, 884 F.3d at 588 (internal quotations omitted).

<sup>148</sup> *Id.* at 586.

substantially burden his ability to serve mourners because “it would often create distractions for the deceased’s loved ones and thereby hinder their healing process.”<sup>149</sup> The court rejected this argument because it relied on customers’ presumed biases.<sup>150</sup> Rost then argued that Stephens’ continued employment would substantially burden his ability to serve mourners because Title VII enforcement would compel Rost to choose between supporting Stephens’ transgender identity or leaving the funeral home business.<sup>151</sup> The court held that as a matter of law, Title VII enforcement would not require Rost to support Stephens’ transgender identity:

Rost may sincerely believe that, by retaining Stephens as an employee, he is supporting and endorsing Stephens’s views regarding the mutability of sex. But as a matter of law, bare compliance with Title VII—without actually assisting or facilitating Stephens’s transition efforts—does not amount to an endorsement of Stephens’s views.<sup>152</sup>

The Sixth Circuit concluded that Title VII enforcement would not substantially burden Rost’s religious practice, so he could not maintain his RFRA defense.<sup>153</sup>

The disagreement between the district court and Sixth Circuit is essentially a disagreement about whether tolerating an LGBTQ employee’s identity is the same as supporting the employee’s LGBTQ identity. The district court said that it is, and this is a burden to the religious practice of an employer who believes LGBTQ identities are contrary to religious teachings. The district court position is more respectful of religious beliefs and practices by deferring to an individual’s own assessment of what does and does not burden her religion. In *Burwell v. Hobby Lobby*,<sup>154</sup> the Supreme Court suggested that courts should refrain from second-guessing a person’s assessment of what kinds of actions are inconsistent with her religious beliefs.<sup>155</sup> There, the Court explained that where defendants sincerely believe that some action is inconsistent with their religious beliefs, “it is not for [the Court] to say that their religious beliefs are mistaken or insubstantial.”<sup>156</sup> “Instead, [the Court’s] narrow function . . . is to determine whether the line drawn reflects an honest conviction.”<sup>157</sup> Following *Hobby Lobby*, a court should not challenge Rost’s belief that the continued employment of Stephen’s would require him to act inconsistently with his religion beliefs.

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 589.

<sup>153</sup> *Id.* at 589–90.

<sup>154</sup> 573 U.S. 682 (2014).

<sup>155</sup> *Id.* at 725.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* (internal quotation omitted).

The Sixth Circuit accepts that Rost's belief in this regard is an "honest conviction," but holds that "as a matter of law, tolerating [an LGBTQ employee's understanding of their sex or gender identity] is not tantamount to supporting it."<sup>158</sup> "[A] party can sincerely believe that he is being coerced into engaging in conduct that violates his religious convictions without actually, as a matter of law, being so engaged."<sup>159</sup>

The Sixth Circuit's rule is more compatible with religious pluralism. Taken to the extreme, the district court's rule could support an employer's claim that hiring employees of different religions supports religious teaching contrary to her own and therefore burdens her religion. A rule like this could lead to RFRA immunity for employers who only hire those who share their religious beliefs. However, the district court has the better legal argument. A fair reading of *Hobby Lobby* supports the proposition that one who sincerely believes that she is coerced into engaging in conduct that violates her religious convictions is actually being so coerced. This reading is also more respectful of religious beliefs, and ultimately, it supports the coexistence of religious liberty and antidiscrimination rights. When courts protect antidiscrimination rights by denying the significance of an alleged religious burden, they feed the harmful and false narrative that antidiscrimination rights are antagonistic to religious interests.

In Title VII cases, courts need not decide whether Title VII enforcement constitutes a substantial burden on an employer's religious beliefs because even if a court defers to people's own assessment of what substantially burdens their religious beliefs, Title VII enforcement will always be the least restrictive means of furthering a compelling government interest. An employer who alleges the enforcement of Title VII significantly burdens her religion does not qualify for Title VII exemption unless she also proves that the enforcement of Title VII is *not* the least restrictive means of furthering a compelling government interest.

Courts and plaintiffs should focus on the second of the two RFRA requirements because it emphasizes the importance of antidiscrimination interests while the first requirement unnecessarily pits religious liberty interests against antidiscrimination interests. By focusing the inquiry on the least restrictive means analysis, courts and plaintiffs can concede both that religious beliefs may be substantially burdened *and* that antidiscrimination laws must be enforced.

## ii. *Title VII and RFRA*

Under RFRA, laws that substantially burden a person's exercise of religion are not enforceable against that person unless the application of the law to that person is the least restrictive means of furthering a compelling

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<sup>158</sup> *Harris Funeral Homes, Inc.*, 884 F.3d at 588.

<sup>159</sup> *Id.*



governmental interest.<sup>160</sup> Title VII serves a compelling government interest: eradication of discrimination “plainly serves compelling state interests of the highest order.”<sup>161</sup> Because most American adults need a job to support themselves and spend most of their waking hours at that job, the eradication of workplace discrimination is central to the eradication of discrimination. The question, therefore, is whether the enforcement of Title VII is the least restrictive means of furthering that interest.

The least-restrictive-means standard requires that where an alternative option furthers the government’s interest “equally well,”<sup>162</sup> the government “must use it.”<sup>163</sup> In its district court briefing, Harris Funeral Home proposed three alternatives to the enforcement of Title VII against the Funeral Home, alleging that all would be a less restrictive way to achieve the compelling interest: the government could hire Stephens; the government could pay Stephens a full salary and benefits until she secures comparable employment; or the government could provide incentives to other employers to hire Stephens.<sup>164</sup>

These alternatives fail for two reasons. First, these alternatives impose a substantial burden on the government, which is “an important factor in the least-restrictive-means analysis[.]”<sup>165</sup> Second and most crucially, these proposals do not achieve the government’s compelling interest “equally well.”<sup>166</sup> The government’s interest is not in finding someplace suitable for Stephens to work but in preventing workplace discrimination on the basis of sex, and accordingly, “in ensuring that the Funeral Home does not discriminate against its employees on the basis of their sex.”<sup>167</sup> The government has a compelling interest in the eradication of all discrimination. This includes discrimination by the Funeral Home. An alternative rule would allow some employers to discriminate as long as others do not, excluding members of protected classes from components of the labor market. The only way to achieve the full eradication of discrimination in the workplace is the enforcement of Title VII’s prohibition of discrimination in all workplaces. And because robust enforcement of Title VII is the least restrictive means to achieve a compelling government interest, RFRA should not allow an exemption to the enforcement of Title VII.

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<sup>160</sup> Religious Freedom Restoration Act of 1993 § 5(1), 42 U.S.C. § 2000bb-1(b)(2) (2018).

<sup>161</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984).

<sup>162</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 731 (2014).

<sup>163</sup> *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015) (quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 815 (2000)).

<sup>164</sup> See Defendant R.G. & G.R. Harris Funeral Homes, Inc.’s Reply Memorandum of Law in Support of Defendant’s Motion for Summary Judgment at 17–18, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837 (E.D. Mich. 2016) (No. 2:14-cv-13710), 2016 WL 3098148.

<sup>165</sup> *Hobby Lobby*, 573 U.S. at 730.

<sup>166</sup> *Id.* at 731.

<sup>167</sup> *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 594 (6th Cir. 2018).

In *Hobby Lobby*, the Supreme Court seemed to agree that RFRA does not provide a defense for employers seeking to engage in illegal and discriminatory hiring practices.<sup>168</sup> Writing in dissent, Justice Ginsburg questioned whether RFRA could serve to exempt people from complying with antidiscrimination laws that conflict with their religious beliefs. She questioned whether the Court's holding would allow, for example, restaurant owners to refuse to serve black patrons based on religious beliefs opposing racial integration;<sup>169</sup> or business owners appealing to the Bible to refuse to hire any person "antagonistic to the Bible," including "fornicators and homosexuals."<sup>170</sup> The majority responded directly:

The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.<sup>171</sup>

The Court did not deny that the employment of a black individual could constitute a substantial burden on an employer's religious beliefs. An employer could make such a claim.<sup>172</sup> However, Title VII would prohibit the employer from discriminating against the black individual on the basis of his race. RFRA would not exempt the employer from Title VII because Title VII is "precisely tailored to achieve" the "critical goal" of "providing an equal opportunity to participate in the workforce"<sup>173</sup> without discriminating on the basis of an "individual's race, color, religion, sex, or national origin."<sup>174</sup> This dicta from *Hobby Lobby* supports the conclusion that "enforcement actions brought under Title VII . . . will necessarily defeat RFRA defenses to discrimination made illegal by Title VII."<sup>175</sup>

True, the *Hobby Lobby* dicta refers only to racial discrimination and does not mention religious or sex discrimination. But if "prohibitions on racial discrimination are precisely tailored to achieve that critical goal" of "providing an equal opportunity to participate in the workforce without re-

<sup>168</sup> 573 U.S. at 686 (holding that RFRA may not be used to "cloak illegal discrimination as a religious practice.").

<sup>169</sup> See *id.* at 768–70 (Ginsburg, J., dissenting) (citing *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966)).

<sup>170</sup> *Id.* at 770 (Ginsburg, J., dissenting) (quoting *In re Minnesota ex rel. McClure*, 370 N.W.2d 844, 847 (Minn. 1985)).

<sup>171</sup> *Id.* at 733.

<sup>172</sup> See, e.g., Tisa Wenger, *Discrimination in the Name of Religion? Segregationists and Slaveholders Did It, Too.*, WASH. POST. (Dec. 5, 2017), available at <https://www.washingtonpost.com/news/made-by-history/wp/2017/12/05/discriminating-in-the-name-of-religion-segregationists-and-slaveholders-did-it-too/>, archived at <https://perma.cc/LZ6H-BWS8>.

<sup>173</sup> *Hobby Lobby*, 573 U.S. at 733.

<sup>174</sup> 42 U.S.C. § 2000e-2 (2018).

<sup>175</sup> *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 595 (6th Cir. 2018).

gard to race,<sup>176</sup> then wouldn't prohibitions on sex discrimination be precisely tailored to achieve the critical goal of providing an equal opportunity to participate in the workforce without regard to sex? Wouldn't prohibitions on religious discrimination be precisely tailored to achieve the critical goal of providing an equal opportunity to participate in the workforce without regard to religion? The prohibition of some undesirable event is precisely tailored to prevent that undesirable event. And if the prevention is compelling—such as the prevention of discrimination—then the prohibition is the least restrictive means of achieving a compelling government interest.

I do not mean to imply that RFRA defenses are never viable. RFRA may be an important means to protect religious liberty interests against the enforcement of laws that lack a compelling purpose or are not narrowly tailored.<sup>177</sup> But *Hobby Lobby* supports the proposition that antidiscrimination law is unique, especially in the employment context. And because Title VII is the least restrictive means of achieving a compelling government interest,<sup>178</sup> Title VII may be enforced even against those to whom such enforcement constitutes a substantial burden. Therefore, an employer cannot assert a RFRA defense to defeat a valid Title VII claim.

#### IV. CONCLUSION

Though recent cases pit religious liberty interests against antidiscrimination rights, these cases tend to represent one view of religious liberty: a narrow view of Christian religious liberty.<sup>179</sup> The Alliance Defending Freedom is the non-profit organization that defended Rost in *Harris Funeral Homes*,<sup>180</sup> the bakery owner in *Masterpiece Cakeshop*,<sup>181</sup> and one of the de-

<sup>176</sup> *Hobby Lobby*, 573 U.S. at 733.

<sup>177</sup> See generally Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209 (1994); Scott W. Gaylord, *RFRA Rights Revisited: Substantial Burdens, Judicial Competence, and the Religious Nonprofit Cases*, 81 MO. L. REV. 655 (2016).

<sup>178</sup> See *Redhead v. Conf. of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 222 (E.D.N.Y. 2006) (holding that “the Title VII framework is the least restrictive means of furthering” the government’s interest in avoiding discrimination), *adhered to on reconsideration*, 566 F. Supp. 2d 125 (E.D.N.Y. 2008); *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 810–11 (S.D. Ind. 2002) (“[I]n addition to finding that the EEOC’s intrusion into [the defendant’s] religious practices is pursuant to a compelling government interest [in the eradication of employment discrimination based on the criteria identified in Title VII], we also find that the intrusion is the least restrictive means that Congress could have used to effectuate its purpose.”).

<sup>179</sup> See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1722 (2018); *Hobby Lobby*, 573 U.S. at 700–01; *Ermold v. Davis*, 855 F.3d 715, 718 (6th Cir. 2017).

<sup>180</sup> See Daniel Wiessner, *U.S. Judge Says Funeral Home Had Religious Right to Fire Transgender Worker*, REUTERS (Aug. 28, 2016), available at <https://www.reuters.com/article/us-michigan-lgbt-lawsuit-idUSKCN10T2EI>, archived at <https://perma.cc/V5EA-3B3J>.

<sup>181</sup> See *US Supreme Court to Weigh in on Whether EEOC, Courts Can Redefine ‘Sex’ Without Congress*, ALLIANCE DEFENDING FREEDOM (Apr. 22, 2019), available at <https://www.adflegal.org/detailspages/press-release-details/us-supreme-court-to-weigh-in-on-whether-eooc-courts-can-redefine-sex-without-congress>, archived at <https://perma.cc/VRA9-7PLL>; *US Supreme Court Rules in Favor of Colorado Cake Artist*, ALLIANCE DEFENDING FREEDOM (Jun. 4,

endants in *Hobby Lobby*.<sup>182</sup> It has played a significant role in forming the national narrative that LGBTQ rights are a threat to religious liberty interests. According to its website, and as its name suggests, its stated purpose is to “defend religious freedom.”<sup>183</sup> But it is explicitly a Christian organization, seeking to represent the “Christian community.”<sup>184</sup> These cases indicate that the Alliance Defending Freedom’s Christian community is opposed to transgender rights, gay marriage, and contraception. These views do not represent the entire Christian community, and they certainly do not represent American religious liberty.<sup>185</sup> The above cases—which frame religious liberty as antagonistic to LGBTQ rights—do not seek religious freedom, but rather, the freedom to assert certain religious views above others. Legal protections for religious liberty must not prioritize some religious beliefs over others. Such prioritization is not compatible with American religious pluralism.

American religious pluralism celebrates and welcomes diversity. It believes that diverse beliefs and practices can coexist, and even thrive. So, Bonnie Business Owner can believe homosexuality is a sin, and some of her employees can be gay. Others can be Muslim, or transgender, or African American, or Canadian, and they can all work together. They can respect each other without harassment, coercion, or exclusion, and they can accommodate their differences to the extent business operations allow. They all have religious interests—whether adherence to or rejection of any religious beliefs, and these diverse religious interests can be respected and accommodated to the fullest extent practicable. Unless it either infringes on the religious liberty interests of others or undermines the operations of the business, plurality has a place in the workforce.

The purpose of Title VII’s prohibition of religious discrimination is to promote freedom of conscience and to prohibit discrimination in the workplace.<sup>186</sup> Accordingly, Title VII must be invoked to promote the freedom of conscience of all people and to prohibit discrimination against anyone on the

2018), available at <http://www.adflegal.org/detailspages/press-release-details/us-supreme-court-rules-in-favor-of-colorado-cake-artist>, archived at <https://perma.cc/23FH-PAQ9>; *The Case for Conscience: Conestoga and Hobby Lobby Accepted by the Supreme Court*, ALLIANCE DEFENDING FREEDOM (Nov. 27, 2013), available at <https://www.adflegal.org/detailspages/blog-details/allianceedge/2017/10/18/the-case-for-conscience-conestoga-and-hobby-lobby-accepted-by-the-supreme-court>, archived at <https://perma.cc/TH72-J29E>.

<sup>182</sup> See Suzanna Cassidy, *Meet the Major Legal Players in the Conestoga Wood Specialties Supreme Court Case*, LANCASTER ONLINE (Mar. 25, 2014), available at [https://lancasteronline.com/news/local/meet-the-major-legal-players-in-the-conestoga-wood-specialties/article\\_302bc8e2-b379-11e3-b669-001a4bcf6878.html](https://lancasteronline.com/news/local/meet-the-major-legal-players-in-the-conestoga-wood-specialties/article_302bc8e2-b379-11e3-b669-001a4bcf6878.html), archived at <https://perma.cc/CBY5-VDA9>.

<sup>183</sup> See *Who We Are*, ALLIANCE DEFENDING FREEDOM (last visited Apr. 13, 2019), available at <https://www.adflegal.org/about-us>, archived at <https://perma.cc/88FK-LSVV>.

<sup>184</sup> *Id.*

<sup>185</sup> For example, 70% of American Catholics and 36% of Evangelical Protestants think homosexuality should be accepted. RELIGIOUS LANDSCAPE STUDY: VIEWS ABOUT HOMOSEXUALITY BY RELIGIOUS GROUP, PEW RESEARCH CENTER (2015), available at <http://www.pewforum.org/religious-landscape-study/views-about-homosexuality/>, archived at <https://perma.cc/4R8B-R8Q3>.

<sup>186</sup> See *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 135 (3d Cir. 1986).

basis of “race, color, religion, sex, or national origin.”<sup>187</sup> Through the enforcement of Title VII, we can approach the realization of a workplace and a country where there is room for everyone.

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<sup>187</sup> 42 U.S.C. § 2000e-2 (2018).

