BEYOND UNDUE HARDSHIP: RELIGION AND SINCERITY IN A POST-*GROFF* WORLD

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Abstract

Title VII of the Civil Rights Act of 1964 requires employers to reasonably accommodate the sincerely held religious beliefs, observances, and practices of their employees unless to do so would pose an undue hardship. In 1977, in Trans World Airlines, Inc. v. Hardison, the Supreme Court held that "undue hardship" meant more than a de minimis burden. Practically, this has allowed employers to reject religious accommodations that impose more than trivial costs or burdens. Subsequent federal statutes, including the Americans with Disabilities Act, also require employers to provide accommodations absent undue hardship, but they apply a much more stringent meaning to the term—only allowing employers to reject accommodations that would require "significant difficulty or expense."

Although justices, academics, political figures, and others criticized Hardison's gloss on "undue hardship" over the years, it endured for nearly a half century. However, in 2023, the Court returned to reconsider the matter in Groff v. DeJoy, ultimately clarifying that undue hardship means substantial costs or expenditures in the overall context of an employer's business. But fixing undue hardship is only the most glaring of the problems with religious accommodation in employment. Two other elements of such claims—that the belief or practice to be accommodated must be "religious" and "sincerely held"—also require comprehensive reexamination and revision. Groff's reinvention of Hardison leaves undisturbed these and other longstanding issues that impact Title VII religious accommodation litigation.

For decades, employees and employers frequently presumed that the beliefs and practices employees sought to have accommodated were both religious in nature and sincerely held. This approach was mutually beneficial in Hardison's de minimis paradigm. Employees avoided uncomfortable questions about the particulars of their beliefs, including whether they were genuinely religious—and not, for example, political or sociological—or whether the individual actually believed them. Likewise, employers were quick to bypass these awkward topics and focus on the more objective subject

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of costs and burdens. The low threshold of the de minimis analysis allowed them to reject many non-trivial accommodations. The federal reporters are rife with decades of decisions where religious beliefs or practices were accommodated or denied, based solely (or nearly so) on courts' assessment of accommodations' burdensomeness—regardless of whether the underlying beliefs and practices were, in fact, religious or sincerely held.

Groff did not address the current framework for analyzing whether a belief or practice is religious or sincerely held for purposes of Title VII. And, without the de minimis test, employers will not be able to rely upon it to the extent its low threshold allowed and encouraged. They will be more likely, and often compelled, to challenge the religiosity and sincerity of beliefs and practices—and, ultimately, accommodate more of them and, perhaps, to a greater extent under Groff. While this will aid employees' attempts to obtain accommodations, it also makes the road more uncomfortable for everyone. Plaintiffs will face increased scrutiny regarding whether proffered beliefs and practices are religious and held sincerely. In recent years, even before Groff, both employers and employees were increasingly litigating religiosity and sincerity, as demonstrated in COVID-19 vaccination litigation. In many of these cases, employers challenged the religious nature and sincerity of employees' anti-vaccination beliefs. The ugliness of some of these disputes reveals that the problems in Title VII religious accommodation cases extend beyond the meaning of undue hardship. It also portends that these problems remain even after the demise of de minimis.

This article delves into the religion and sincerity tests under Title VII. It proposes changes to resolve the shortcomings of both inquiries—problems that will become even more apparent after Groff. In Part I, the article outlines the constitutional foundation for Title VII's statutory framework: the Free Exercise Clause of the First Amendment. Part II traces the development of religious accommodation under Title VII, originating with the Equal Employment Opportunity Commission's (EEOC or Commission) regulations in 1966 and 1967 before being codified by Congress in 1972, to the Supreme Court's decision in Hardison and other cases, to how the lower courts applied the elements of religious accommodation cases, including religiosity and sincerity. Finally, Part III details new frameworks for courts and practitioners evaluating religiosity and sincerity in Title VII religious accommodation cases in the new Groff world.

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INTRODUCTION

When President Johnson signed the Civil Rights Act on July 2, 1964, it did not define religion or include a requirement that employers affirmatively accommodate the religious practices of their employees.[1] Congress added both in a single section in 1972.[2] Five years later, the Supreme Court interpreted that provision in *Trans World Airlines, Inc. v. Hardison*, stating that if a religious accommodation imposed more than a "*de minimis*" burden on an employer, it constituted an "undue hardship" and, therefore was not required by Title VII.[3] While this reading has received persistent criticism, replacing or improving *Hardison* proved elusive and the *de minimis* standard endured nearly 50 years. Finally, in 2023, the Court revisited *Hardison* in *Groff v. DeJoy*.[4] As expected, the Court abandoned its construction of undue hardship, replacing it with an inquiry gleaned from

[1] Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (1964).
[2] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103 (1972); 42 U.S.C. § 2000e(j).
[3] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).
[4] Groff v. DeJoy, 600 U.S. 447 (2023).

Hardison focused on "significant" "costs" or "expenditures" in the context of the employer's business.[5]

One might reasonably ask how the *de minimis* approach survived nearly a half century, much of it under a Supreme Court of textualists, if it was so facially deficient an interpretation of undue hardship. Although a variety of factors played a role, the *Hardison* framework appears to have lasted because it was functional and there was no obviously superior replacement that better balanced the various competing interests involved in accommodating employees' religious beliefs, practices, and observances in the workplace. In practice, the undue hardship analysis clearly benefited employers.[6] But it engendered the widespread presumption of other elements of a plaintiff's burden, the "religion" and "sincerity" requirements, in favor of religious employees.[7] In other words, this approach operated consistently to preserve a broader balance between the various elements of the inquiry . *Hardison* allowed minor accommodations across the board while sustaining most employer policies from disruptive seriatim exemptions. In essence, it was a compromise that avoided socially and politically contentious debates in every Title VII litigation.[8]

Equating undue hardship in section 2000e(j) with, at minimum, a *de minimis* burden proved controversial, but the debate regarding *Hardison* and *Groff* obscures the reality that *de minimis* was not—and is not—the only significant problem with religious accommodation under Title VII. This article focuses on two others: Title VII religious accommodation plaintiffs demonstrate that the belief, observance, or practice for which they seek

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[5] *Id*. at 469-70. Since *Hardison*, Congress has used the phrase "undue hardship" in other laws, including two employment antidiscrimination statutes. In 1990, Congress enacted the Americans with Disabilities Act (ADA), which requires employers to accommodate an employee's "known physical or mental limitations" unless such would impose an "undue hardship." *See* 42 U.S.C. § 12112(b)(5)(A). In 1994, the Uniformed Services Employment and Reemployment Rights Act (USERRA) mandated that employers place a returning servicemember in his or her former role unless to do so would impose an "undue hardship." *See* 38 U.S.C. §§ 4303(10), 4313(a)(1)(B), (a)(2)(B). In 2010, the Affordable Care Act (ACA) obligates employers to afford breaks to nursing mother employees unless doing so would be an "undue hardship." *See* 29 U.S.C. § 207(r)(3). In 2022, Congress enacted the Pregnant Workers Fairness Act (PWFA), which requires covered employers to accommodate the known limitations of pregnant workers absent "undue hardship on the operation of the business" of said employers. 42 U.S.C. § 2000gg-1. Yet in each statute, Congress defined "undue hardship" more robustly than the Court did in *Hardison*. *See* 42 U.S.C. § 12111(10)(A); 38 U.S.C. § 4303(15); 29 U.S.C. § 207(r)(3). While the phrase appears elsewhere in federal law, the *de minimis* interpretation of *Hardison* is unique to the religious accommodation provision of Title VII.

[6] *See infra* Section II.F.5.

[7] *See infra* Section II.F.5.

[8] While the chorus against *Hardison* was most recently loudest on the political right, the political left also has attacked its impact on religious workers. Indeed, both major parties have appeared on both sides of this debate in individual Free Exercise Clause cases depending on the specific religion and particular legal policies. Each has historically tended to advocate (or oppose) broad accommodation of religious practices depending on its views either of the religious belief or practice or of the legal requirement. Both the right and left generally tend to oppose religious accommodations when the countervailing legal requirements are those they favor. As a result, the political and legal discourse can be context-specific and results-driven.

accommodation be religious and held sincerely.[9] Both the religion and sincerity elements require the same degree of comprehensive reevaluation *Groff* applied to undue hardship to align the entire Title VII religious accommodation framework with the language of the statute and the historic purposes of religious accommodation.[10] Otherwise, applying the more stringent undue hardship standard of *Groff* on top of the other vestiges of the *Hardison* test may make statutory religious accommodation practically unworkable.[11] Such a unification of concepts is susceptible to widespread abuse, is ultimately unsustainable, and will likely undermine workers' religious protections in the long run.[12] If *Groff* and its progeny are to match the stability and longevity of *de minimis*, we must revisit the religion and sincerity elements under Title VII.[13]

This article begins with a brief history of the Religion Clauses of First Amendment in Part I.[14] Then, Part II outlines the history and development of the Title VII law surrounding religious accommodation.[15] Finally, regardless of what the Supreme Court does in *Groff*, Part III proposes a reexamination of the religion and sincerity elements of Title VII religious accommodations cases.[16]

Religious accommodation under Title VII is more complex than *Groff*—and others who focus solely on "undue hardship"—make it appear because it involves questions more personal, intricate, and controversial than the quantum of costs and burdens imposed on an employer. And like other areas of the law where statutory rights intersect with similar constitutional guarantees, the nuts and bolts of the law, standards, and rights tell only a part of the story. Switching out undue hardship standards under section 2000e(j) is only the first (and most obvious) of several critical course corrections. Without broader reconsideration of the elements of religious accommodation actions, *Groff* will fail to bring long term stability to this area of the law.

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[9] *See infra* Part III.

[10] *See infra* Sections II.F.6, Part III.

[11] *See infra* Part III.

[12] *See infra* Part III.

[13] *See infra* Part III. As religious accommodation requests increase in the wake of *Groff*, parties are less reluctant to litigate questions of sincerity and religion than in the past. These trends have been pronounced in COVID-19 vaccine litigation, but also have appeared in other types of Title VII religious disparate treatment cases. *See infra* Section III.A.3.

[14] *See infra* Part I.

[15] *See infra* Part II.

[16] *See infra* Part III.

I. THE FOUNDATION: RELIGION CLAUSES OF THE FIRST AMENDMENT TO THE CONSTITUTION

Any discussion of religious accommodation must begin, not with Title VII, but rather with the Free Exercise Clause of the First Amendment to the United States Constitution.

When originally enacted in 1964, Title VII prohibited unlawful employment actions based on religion, but the statute neither defined "religion" nor required accommodation of religious beliefs and practices.[17] To interpret "religion" the courts turned to First Amendment cases to fill the void.[18] Although the need to rely on free exercise jurisprudence lessened with the 1972 amendments to Title VII—which included a circular definition of religion imbued with an accommodation requirement codified in section 2000e(j)—Free Exercise cases continued to influence courts in the 1970s and 1980s as they navigated religious employment discrimination and accommodation.[19]

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[20] The Supreme Court has applied the Free Exercise Clause to the states through the Fourteenth Amendment.[21] "The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden."[22] Free exercise cases frequently arise in the context of laws that burden religious exercise, but the "First Amendment applies to exercises of executive authority no less than it does to the passage of legislation."[23] Any law or government action that targets religious conduct for distinctive treatment will be evaluated under the lens of

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[17] *See infra* Sections III.A, B.

[18] *See infra* Section III.A.1.

[19] *See infra* Sections III.A.1.a-b.; 42 U.S.C. § 2000e(j).

[20] U.S. CONST. amend. I.

[21] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). Although outside the scope of this article, the Supreme Court has also applied the Establishment Clause to the states. *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947). Yet the existence widespread state establishments through the mid-19th Century suggests that, whatever the merit of the Court's well established Establishment Clause jurisprudence, the authors of the Establishment Clause sought to proscribe not the entanglement of *all* government and religion, but rather only the *national* government and religion. *See, e.g.*, Elk Grove Unified School District v. Newdow, 542 U.S. 1, 45, 49 (2004) (Thomas, J., concurring in the judgment) ("The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments. Thus, unlike the Free Exercise Clause, which does protect an individual right, it makes little sense to incorporate the Establishment Clause."), *abrogated on other grounds by* Lexmark Intern., Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014).

[22] Hernandez v. Comm'r, 490 U.S. 680, 699 (1989).

[23] Shrum v. City of Coweta, 449 F.3d 1132, 1140 (10th Cir. 2006); *see also* Sause v. Bauer, 585 U.S. 957, 958-59 (2018) (police officers who ordered an individual to cease praying may have violated her free exercise rights).

strict scrutiny.[24] And courts will hold it invalid unless it is justified by a compelling government interest and narrowly tailored to advance that interest.[25] Only the most significant of government interests can outweigh "legitimate claims to the free exercise of religion."[26]

The Supreme Court has held, however, that the Free Exercise Clause does not exempt an individual from the obligation to comply with laws that place an incidental burden on religious exercise, so long as that law is facially neutral and generally applicable.[27] Laws that are generally applicable and facially neutral are not subject to strict scrutiny.[28] A law that is neutral and generally applicable is constitutional if it is rationally related to a legitimate government interest.[29] Nevertheless, the analysis does not end simply because the language of the statute is facially neutral.[30] "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality" as the "Free Exercise Clause protects against governmental hostility which is masked, as well as overt."[31] A law is not generally applicable if it "invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions" or "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."[32]

The courts built this framework upon a foundation of earlier cases that wrestled with more elemental questions: What is religion?[33] What makes a belief or practice religious?[34] How should, and may, courts evaluate which beliefs and practices receive constitutional protection?[35] These questions are as important to Title VII religious accommodation as they have been under the Free Exercise Clause, and the courts have struggled either to answer them clearly or provide meaningful standards to separate the religious from other strongly held beliefs.[36] And, as these cases continue to exert influence, if not control, they merit elucidation.

When confronted with the guarantees of the First Amendment's protection of religious exercise, courts had to identify what was, in fact,

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[24] *Lukumi*, 508 U.S. at 546.
[25] *Id.* at 533.
[26] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).
[27] Emp't Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 878-79 (1990).
[28] *Id.* at 886-87.
[29] *See* Fulton v. City of Philadelphia, 593 U.S. 522, 533 (2021).
[30] *Lukumi*, 508 U.S. at 534.
[31] *Id.*
[32] *Fulton*, 593 U.S. at 533, 534.
[33] *See supra* Section I, *infra* Sections II.F.2-3.
[34] *Id.*
[35] *Id.*
[36] *See infra* Section II.F.2.

religious, as distinguished from the philosophical, political, or other beliefs. They began with the purpose of the constitutional protection.[37] As Judge Kaufman put it, the "free exercise of religion promotes the inviolability of individual conscience and voluntarism, recognizing that private choice, not official coercion, should form the basis for religious conduct and belief. More importantly, voluntarism promotes pluralism of thought, a tonic necessary for a healthy, diverse society."[38] While some, such as Professor Tribe, have argued that these objectives favor treating any "arguably religious" belief as religious for constitutional purposes, early cases drew a distinction between belief and conduct or actions, as measured against Judeo-Christian theistic doctrines.[39] In the late nineteenth century, the Court saw religion as encompassing only beliefs, not conduct, and only those with respect to "one's views of his relations to his Creator."[40] Conduct, in contrast, was not protected from restriction by the civil or criminal law.[41]

By the 1950s, this objective approach to religious belief gave way to a more subjective definition of religion that "examines an individual's inward attitudes towards a particular belief system."[42] As a result of transitioning to a subjective approach, courts recognized that "the availability of a free exercise defense cannot depend on the objective truth or verity of a defendant's religious beliefs" nor be limited to beliefs concerning God.[43] Instead, in a case concerning the conscientious objector provisions of the Universal Military Training and Service Act, the Court described the test for identifying an individual's belief "in a relation to a 'Supreme Being'" is "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the [statutory conscientious objector] exemption."[44]

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[37] *See, e.g.*, Int'l Soc. For Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 438-42 (2d Cir. 1981) [hereinafter *Krishna*] (assessing an alleged violation of the free exercise of religion through an analysis of what constitutes a religion, a religious belief or practice and when those beliefs and practices may be constitutionally protected).

[38] *Id.* (citations omitted).

[39] *See* L. Tribe, AMERICAN CONSTITUTIONAL LAW, 812, 828 (1978); *see also* Reynolds v. United States, 98 U.S. 145, 164 (1878).

[40] Davis v. Beason, 133 U.S. 333, 342 (1890).

[41] *See id.* at 341-42 (upholding an Idaho statute prohibiting Mormon polygamists from voting and stating that "(t)o call their advocacy [of polygamy] a tenet of religion is to offend the common sense of mankind."); *see also* Cleveland v. United States, 329 U.S. 14, 17-20 (1946) (upholding Mann Act conviction of Mormon who crossed state lines with his wives); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) ("Conduct remains subject to regulation for the protection of society").

[42] *Krishna*, 650 F.2d at 439; Fowler v. Rhode Island, 345 U.S. 67, 70 (1953) ("(I)t is no business of courts to say . . . what is a religious practice or activity …").

[43] *Krishna*, 650 F.2d at 439; Torcaso v. Watkins, 367 U.S. 488, 495-96 (1961) (invalidating a provision of the Maryland Constitution requiring state officials to declare their belief in the existence of God, indicating that a religion need not be founded on a belief in God, referencing several non-theistic belief structures that are recognized in society as "religions," such as Buddhism, Taoism, and others).

[44] United States v. Seeger, 380 U.S. 163, 166 (1965) (citing with approval an approach that treats an individual's

As the Second Circuit noted in *Barber*, a belief "is more than intellectual when a believer would categorically 'disregard elementary self-interest in preference to transgressing its tenets.'"[45]

Courts eventually recognized, however, that free exercise claims often concerned *exercise* of religion, not simply belief. The question of whether a practice or observance is religious for purpose of the First Amendment saw courts evaluating "two factors: the sincerity of the devotees . . . and the centrality of this practice to the . . . religion."[46] They still do so today.[47]

Yet over time the broadening reach and increasing subjectivity of religious belief, observance, and practice began to collide with pragmatic and expanding limitations of civil society and the rule of law. As the Court noted, "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."[48] Otherwise, every strongly held belief would entitle the holder to act according to it at his or her own discretion, notwithstanding any conflicting law.[49] That has never been—and cannot practically be—the law.

In the 1960s and early 1970s, courts began to apply the new religious discrimination and accommodation requirements of Title VII based on this background. They focused on sincerity and evaluated religious beliefs and actions based on their subjective place in the life of, and value to, the individual in question.[50]

II. RELIGIOUS DISCRIMINATION AND ACCOMMODATION UNDER TITLE VII

A. Title VII Leaves Religion to the Commission

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ultimate concern, whatever that concern may be, as his religion. A concern is "ultimate" when it is more than intellectual); *see also* Welsh v. United States, 398 U.S. 333 (1970) (affirming *Seeger*'s discussion on sincere beliefs).

[45] *Krishna*, 650 F.2d at 440.

[46] *Id.* at 441 (citations omitted); *see* Moore-King v. County of Chesterfield, Va., 708 F.3d 560, 570-71 (4th Cir. 2013) ("To determine whether [the plaintiff's] set of beliefs deserves constitutional protection as a religion, we consider whether they are (1) sincerely held and (2) religious in nature under [the plaintiff's] 'scheme of things'", *abrogated on other grounds by* Nat'l Inst. of Family and Life Advocates v. Becerra, 585 U.S. 755 (2018)).

[47] *See Moore-King*, 708 F.3d at 571 ([Regarding the second prong] … "we ask whether her beliefs occupy a place in her life parallel to that filled by the orthodox belief in God. Although [the plaintiff's] beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection, they must nonetheless amount to a religious faith as opposed to a way of life") (citations omitted and cleaned up); *see also* Wisconsin v. *Yoder*, 406 U.S. 205, 216 (1972) (distinguishing between the religious beliefs of Old Order Amish and the philosophical and personal beliefs of Henry David Thoreau).

[48] *Yoder*, 406 U.S. at 215-16.

[49] *See id.*

[50] *Krishna*, 650 F.2d at 439 ("[C]ourts will investigate an adherent's sincerity and will then invoke free exercise analysis where a belief is asserted and acted upon in good faith.").

As originally enacted, Title VII of the Civil Rights Act of 1964 barred covered employers from refusing or failing to hire, discharging, or discriminating with respect to compensation, terms, conditions, or privileges of employment against "any individual, because of such individual's race, color, religion, sex, or national origin."[51] But, as noted above, Congress did not define the term "religion" and would not do so until the Equal Employment Opportunity Act of 1972.[52] In the meantime, while the courts borrowed from free exercise cases and confronted whether the prohibition of religious discrimination itself violated the First Amendment, the Equal Employment Opportunity Commission attempted to clarify the meaning and scope of religion for purposes of Title VII.

B. The Commission's First Attempt at Defining "Religion" – the 1966 Rule

With religious discrimination undefined, the newly created Commission moved to fill the void, issuing an interpretive rule without notice and comment.[53] Ostensibly relying on scant legislative history, the Commission effectively confined religion to observance of Sabbath and other holy days.[54] The definition incorporated an employer's "obligation to accommodate to [sic] the reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business."[55] This requirement did not limit the right of the employer to "establish a normal workweek (including paid holidays) generally applicable to all employees," recognizing that "this schedule may not operate with uniformity in its effect upon the religious observances of his employees."[56] For example, an employer regularly closed on Sundays would not discriminate by requiring employees to work on Saturdays.[57]

The Commission concluded that the reasonable accommodation required by Title VII would depend on the facts of each case.[58] Nevertheless, the rule offered general guidance. First, an employer might permit employees

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[51] Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (1964); 42 U.S.C. § 2000e-2(a)(1).

[52] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103 (1972); 42 U.S.C. § 2000e(j).

[53] *See* Guidelines on Discrimination Because of Religion, 31 Fed. Reg. 8370 (June 15, 1966).

[54] *Id.* (creating new Part 1605, comprising a single section entitled "Observance of Sabbath and religious holidays").

[55] *Id.*; 29 C.F.R. § 1605.1(a)(2) (1967).

[56] *Id.*; § 1605.1(a)(3).

[57] *Id.*

[58] *Id.* § 1605.1(b).

to be absent from work on religious holidays, with or without pay, but in doing so it must treat all religious "with substantial uniformity."[59] Second, employers should make a "reasonable accommodation" for the needs of employees and applicants to attend "special religious holiday observances," but only "to the extent" the employers "can do so without serious inconvenience to the conduct of his business."[60] Third, absent an intent to discriminate, if an employer sets a normal workweek and overtime expectations and a job applicant who accepts a position "knowing or having reason to believe that such requirements would conflict with his religious obligations," the applicant is not entitled to any alteration of such requirements.[61] Fourth, and finally, when an employee's schedule changes in such a way as to create a religious conflict, the employer "should attempt to achieve an accommodation," but is not required to do so "at the expense of serious inconvenience to the conduct of his business or disproportionate allocation of unfavorable work assignments to other employees."[62]

Writing on the clean slate of a new statute, the Commission's approach is surprisingly restrained from a modern perspective. While the Commission's objectives are beyond the scope of this article, the Supreme Court's similarly narrow reading and application of the Free Exercise Clause may have influenced the agency.[63] Although the Commission's construction had the benefit of *Sherbert v. Verner*, the broader backdrop of the legal protections for religious exercise focused on discrimination, not affirmative accommodation.[64] And of course, the Court had not yet decided other cases that might have supported a broader application.[65]

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[59] *Id.* § 1605.1(b)(1).

[60] *Id.* § 1605.1(b)(2).

[61] *Id.* § 1605.1(b)(3).

[62] *Id.* § 1605.1(b)(4).

[63] *See* Reynolds v. United States, 98 U.S. 145, 166-167 (1878) (rejecting free exercise challenge to polygamy laws, distinguishing between belief and actions, and noting "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices" and that allowing beliefs to trump the law "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself"); Davis v. Beason, 133 U.S. 333, 342-43 (1890) ("However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (incorporating Free Exercise clause, but noting that "[c]onduct remains subject to regulation for the protection of society").

[64] *See* Sherbert v. Verner, 374 U.S. 398 (1963); *see, e.g.*, Torcaso v. Watkins, 367 U.S. 488 (1961) (the government may not require an individual to affirm a religious belief); Fowler v. Rhode Island, 345 U.S. 67, 69-70 (1953) (an ordinance used to punish a minister of the Jehovah's Witnesses for preaching at a peaceful religious meeting in a public park was unconstitutional where other religious groups could conduct religious services in the park); United States v. Ballard, 322 U.S. 78, 86-88 (1944) (the government may not punish the expression of religious positions it considers false).

[65] *See, e.g.*, Presbyterian Church v. Hull Church, 393 U.S. 440 (1969); Wisconsin v. Yoder, 406 U.S. 205 (1972); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); McDaniel v. Paty, 435 U.S. 618 (1978); Larson v. Valente, 456 U.S. 228 (1982).

The Commission's modest approach also may have been motivated by a desire to avoid or minimize arguments—pressed and ultimately rejected in several early Title VII cases—that accommodation of religion constituted government-mandated favoritism of religion and, therefore, was constitutionally suspect. Regardless, the Commission made no effort to explain its position in the preamble to, or text of, its 1966 rule.[66] The failure to do so was a lost opportunity to shape the protection of religion in ways that extended beyond the scope of First Amendment protections at the time, especially against this backdrop.

C. The Commission Tries Again – the 1967 Rule

Only one year later, the Commission overhauled its initial construction in a second interpretative rule.[67] Like its predecessor, the 1967 rule was promulgated without notice and comment and did not include a preamble explaining the Commission's interpretation or reasoning.[68] The dearth of explanation is surprising given the extent of the changes to the Commission's articulation of employer's obligations to accommodate religion under the statute only a year earlier.[69]

The 1967 rule retained the original's case-by-case approach and general structure, articulating employers' obligations to accommodate religious practices solely in the context of Sabbath and religious holidays.[70] For the first time, the Commission identified that the source of employers' duties to accommodate religious practices was Title VII's general prohibition of intentional religious discrimination in section 703(a)(1).[71] Recasting the duty to accommodate the "reasonable religious needs of employees and, in some cases, prospective employees … without serious inconvenience to the conduct of the business," the Commission substituted a duty to "make reasonable accommodations to the religious needs of employees and prospective employees … without undue hardship on the conduct of the employer's business."[72] Also, it suggested that an undue hardship might exist where the employee's work "cannot be performed" by a similarly qualified employee during the "absence of the Sabbath observer," but did not offer examples of hardships it considered undue.[73] Finally, after withdrawing the examples of reasonable accommodations in the 1966 rule, the Commission

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[66] *See* Guidelines on Discrimination Because of Religion, 31 Fed. Reg. at 8370.
[67] *See* Guidelines on Discrimination Because of Religion, 32 Fed. Reg. 10298 (July 13, 1967).
[68] *See id.*
[69] *See supra* Section II.B.
[70] Guidelines on Discrimination Because of Religion, 32 Fed. Reg. at 10298.
[71] *Id.* 29 C.F.R. § 1605.1(a)(1) (1968).
[72] Guidelines on Discrimination Because of Religion, 32 Fed. Reg. at 10298; 29 C.F.R. § 1605.1(b) (1968).
[73] Guidelines on Discrimination Because of Religion, 32 Fed. Reg. at 10298.

placed the burden to demonstrate undue hardship on the employer, where it logically belongs.[74] It recognized the "particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs."[75] Like its predecessor, the successor rule lacked any explanation of the Commission's regulatory choices.

A cursory examination might suggest that the 1967 rule merely clarified and reorganized the 1966 rule, but the retention of operative terms obscures the significance and extent of the revisions. In the first, the Commission required employers to accommodate "reasonable religious needs."[76] But the second applied the same adjective, "reasonable," to a different noun, "accommodations."[77] In so doing, the Commission refocused the analysis on the actions of the employer rather than the specifics of the religious belief or practice and, within belief and practice, questions of religion, sincerity, and centrality.[78] Additionally, the Commission's second construction of undue hardship was more robust than its predecessor, requiring an employer seeking to avoid accommodating a religious belief or practice to demonstrate that to do so would be an "undue hardship on the conduct of the employer's business."[79] Of course, such a construction simply begs the question—what sort of hardship is undue? The Commission declined to give examples or answer this critical question other than to promise it would evaluate, and presumably explain it, on a case-by-case basis—the regulatory version of making it up as one goes along.[80]

Whatever its scope, the 1967 standard required the employer to show more than a *de minimis* burden[81] and remained focused on Sabbath accommodations.[82] And even as of 1978 "most of the reported cases discussing religious discrimination under Title VII involve situations where

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[74] *Id.*; 29 C.F.R. § 1605.2(d) (1968).

[75] Guidelines on Discrimination Because of Religion, 32 Fed. Reg. at 10298.

[76] Guidelines on Discrimination Because of Religion, 31 Fed. Reg. at 8370.

[77] Guidelines on Discrimination Because of Religion, 32 Fed. Reg. at 10298.

[78] *See infra* Section II.F.

[79] Five years later, Congress inserted this language into the statute. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103 (1972); 42 U.S.C. § 2000e(j).

[80] Guidelines on Discrimination Because of Religion, 32 Fed. Reg. at 10298.

[81] Guidelines on Discrimination Because of Religion, 32 Fed. Reg. at 10298. There are various iterations of the *de minimis* language relating to section 2000e(j). Most require an employer to show "more than a" *de minimis* burden. *See, e.g.*, *Hardison*, 432 U.S. at 84. This article references these various, such as "*de minimis*," "more than *de minimis*," and "more than a *de minimis*," interchangeably unless otherwise indicated.

[82] Guidelines on Discrimination Because of Religion, 32 Fed. Reg. 10298. If one confines religious accommodation to the observance of Sabbath and religious holidays, an iteration of the *de minimis* analysis is not facially or obviously unreasonable. For religious holidays, often held annually, the question is simply whether the employee can be off work for a day. Given the ubiquity of paid time off and leave, an employee's absence for a day known in advance is often a negligible burden on the employer. As Sabbath observances tend to occur weekly, accommodation becomes a persistent and recurring question of scheduling that are more likely to impose burdens on employers, especially those operating continually. As a result, it is hardly surprising that the vast majority of 20th Century Title VII religious accommodation cases concern Sabbath observances.

either Sabbatarianism or a practice specifically mandated or prohibited by a tenet of the plaintiff's religion," though the Seventh and other Circuits recognized the scope of the accommodation requirements extended to other practices:

> Most of the reported cases discussing "religious discrimination" under Title VII involve situations where either Sabbatarianism or a practice specifically mandated or prohibited by a tenet of the plaintiff's religion is involved. However … we do not feel the protection of Title VII is limited to these categories. First, we note that the very words of the statute … leave little room for such a limited interpretation. Secondly, we note that to restrict the act to those practices which are mandated or prohibited by a tenet of the religion, would involve the court in determining not only what are the tenets of a particular religion, which by itself perhaps would not be beyond the province of the court, but would frequently require the courts to decide whether a particular practice is or is not required by the tenets of the religion.[83]

D. Congress Defines Religion Under Title VII

In the Equal Employment Opportunity Act of 1972, Congress added to Title VII a formal definition of religion and, within that provision, explicitly required employers to accommodate certain religious practices of their employees.[84]

The peculiarities of codified section 2000e(j) were immediately apparent. Rather than clarifying Title VII's prohibition on religious disparate treatment in section 703(a)(1) and creating a separate stand-alone

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[83] Redmond v. GAF Corp., 574 F.2d 897, 900 & n.9 (7th Cir. 1978). *See generally* Jordan v. North Carolina Nat'l Bank, 565 F.2d 72 (4th Cir. 1977); Chrysler Corp. v. Mann, 561 F.2d 1282 (8th Cir. 1977); United States v. City of Albuquerque, 545 F.2d 110 (10th Cir. 1976); Williams v. S. Gas Co., 529 F.2d 483 (10th Cir. 1976); Draper v. United States Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1975); Reid v. Memphis Publ'g Co., 521 F.2d 512 (6th Cir. 1975); Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972). The *Redmond* Court also noted the evidence supporting a Sabbatarian purpose. *See Redmond*, 574 F.2d at 900 n.9 ("Support for the Sabbatarianism limitation can be found in the title given by the EEOC in its guidelines on the subject, 29 C.F.R. [§] 1605.1 (1975), 'Observation of Sabbath and other Religious Holidays.' Similarly, the legislative history reveals that the amendment was proposed to protect Saturday Sabbatarians. 118 Cong. Rec. 705. *But see Cooper*, 533 F.2d at 166, n. 9. Note also that the dissent in *Hardison*, 432 U.S. at 87, refers to the numerous cases involving Title VII religious discrimination as involving practices which are a religious commandment.") (cleaned up).

[84] Pub. L. 92-261, § 2(7), 86 Stat. 109; 42 U.S.C. § 2000e(j) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business").

accommodation requirement or cause of action, Congress imposed *in a definition* an additional duty to accommodate "all aspects of religious observance and practice" unless it demonstrates "undue hardship on the conduct of [its] business."[85] In so doing it inextricably tied the scope of Title VII's coverage of religion with fact-dependent and context-specific questions of accommodability.

The text of section 2000e(j) defines religion for all purposes of Title VII, including causes of action for disparate treatment (including accommodations) and disparate impact in section 2000e-2(a).[86] And the definition is broad, encompassing "all aspects" of "religious observance and practice" and "belief."[87] Title VII thus makes it an unlawful employment practice to "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" the employee's religious observances, religious practices, and religious beliefs.[88] Additionally, an employer may not "limit, segregate, or classify" employees that might "deprive or tend to deprive" them of "employment opportunities or otherwise adversely affect" their status as employees because of their religious observances, practices, and beliefs.[89]Employment agencies and labor organizations, too, are not permitted to discriminate on the basis of religious observance, practice, and belief.[90]

But what section 2000e(j) gives with one hand, it partially takes with the other. Immediately after encompassing "all aspects" of religious observance, practice, and belief, Title VII qualifies that statement—but only with respect to observances and practices. For Title VII purposes, "religion" only includes those religious *practices* or *observances* that an employer can "reasonably accommodate" "without undue hardship."[91] Put another way, if an employer demonstrates that it cannot reasonably accommodate a religious observance or practice without undue hardship, the religious observance or practice does not count as religion or religious for purposes of Title VII.[92]

The structure of the text is notable for two further reasons. First,

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[85] 42 U.S.C. § 2000e(j).

[86] *Id.*; *id.* § 2000e-2(a).

[87] *Id.* § 2000e(j).

[88] *Id.* § 2000e-2(a)(1). In 1991, Congress clarified that unlawful religious discrimination may be established by demonstrating religion was "a motivating factor" in the practice or action. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (1991), codified at 42 U.S.C. § 2000e-2(m).

[89] 42 U.S.C. § 2000e-2(a)(2).

[90] *Id.* § 2000e-2(b)-(c).

[91] *Id.* § 2000e(j).

[92] *Id.*; *see also* United States. v. Board of Educ. for School Dist. of Philadelphia, 911 F.2d 882, 886 (3d Cir. 1990). Conversely, an observance or practice does not become religion under Title VII simply because an employer may accommodate it reasonably and without undue hardship. The observance or practice must also be religious to be religion under the statute.

"religious belief" is excluded from section 2000e(j)'s accommodation language.[93] Though religion includes belief, the accommodation requirement encompasses only religious observances and practices.[94] However, with respect to other requirements of Title VII, religion includes beliefs.[95] For example, employers may not engage in unlawful employment practices predicated on an employee's religious beliefs or deploy facially neutral policies that adversely discriminate based on religious beliefs.[96] And this is so even if the employer demonstrates it could not reasonably accommodate said beliefs reasonably without undue hardship.[97] Second, the accommodation requirement itself does not apply to religious beliefs.[98] This implicitly recognizes numerous difficulties in obligating employers to accommodate each employee's religious beliefs.[99] As such, one can read the text as a residue of historic efforts to draw legal distinctions between beliefs and conduct.[100] Of course, religious belief, observance, and practice can elide; often it is difficult to draw clear lines between them. But these challenges do not negate the text nor compel the conclusion that such distinctions are irrelevant.[101]

Section 2000e(j)'s structure has further implications in accommodation cases. First, by including the qualifications of reasonable accommodation and undue hardship within the definition, Title VII compels courts to confront both at the beginning of its analysis rather than at a later stage.[102] Had Congress added the accommodation requirement to section 703, as one might have expected, parties would confront undue hardship at the pretext stage of a more conventional adaptation of the *McDonnell Douglas* burden shifting framework.[103] But by defining religion in part by the hardship its accommodation poses, the issue must be addressed earlier, almost as a threshold matter.[104] Second, any reasonable (or valid) interpretation of undue

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[93] 42 U.S.C. § 2000e(j) (noting that religion includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate the … religious observance or practice without undue hardship on the conduct of the employer's business") (emphasis added).

[94] *Id.*

[95] *Id.*

[96] *Id.* § 2000e-2.

[97] *Id.* § 2000e(j).

[98] *Id.*

[99] In a pluralistic society, no employer could possibly tailor its operations to align with every conflicting belief of every employee on every issue. Nor are employers required to confine themselves to operate only in areas of universal agreement.

[100] *See supra* text accompanying notes 39-41.

[101] The notion that Title VII does not require *accommodation* of religious beliefs, even if it prohibits *discrimination* on the basis of such beliefs is a bridge too far in light of half a century of contrary practice and understanding. As a result, this article will address the accommodation requirement as applying to beliefs, observances, and practices.

[102] 42 U.S.C. § 2000e(j).

[103] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801-07 (1973).

[104] Id.; 42 U.S.C. § 2000e(j).

hardship must be less stringent than "compelling state interest" under the First Amendment.[105] As a result, any religious beliefs, observances, and practices that may be accommodated by a government employer are necessarily protected by the Constitution.[106] Put another way, wherever a government employer violates Title VII by failing to accommodate religion—or cannot show that undue hardship—it necessarily has violated the First Amendment.[107]

Finally, for those who glean meaning, intent, or purpose from legislative history, there is evidence supporting the argument that the accommodation requirement was proposed simply to protect Saturday Sabbatarians in a nation where most citizens claimed religious affiliation with a Sunday Sabbath.[108] As a result, business and civil society had developed around the notion that to the extent any day was a day for personal or family activities—as opposed to work—that day was Sunday. Regardless of its intent, section 2000e(j) does not contain such a limitation and, as a result, encompasses far more.[109]

Notwithstanding Congress' intent or the above observations regarding the facial implications of the text, the legal landscape of 1972 was very different than today. In 1972 and 1973 the Court issued several significant and some watershed decisions.[110] Where individual statutory and constitutional rights were at issue, the Court continued to paint with a broad brush, preferring expansive pronouncements based on generalized notions of purpose, reminiscent of traditional common law courts. This was the landscape that confronted section 2000e(j) and the first accommodation provision in federal antidiscrimination employment law.

E. The Supreme Court Weighs In

1. *Hardison*

Given the Sabbatarian origins of the 1972 amendments, it was fitting that the landmark Title VII religious accommodation case concerned the

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[105] *See* United States v. Bd. of Educ. for School Dist. of Philadelphia, 911 F.2d 882, 890 (3d Cir. 1990).

[106] *See id.*

[107] *See, e.g.*, Brown v. Polk Cty., 61 F.3d 650, 654 (8th Cir. 1995).

[108] *See* 118 CONG. REC. 705 (1972); Observation of the Sabbath and Other Religious Holidays, 29 C.F.R. § 1605.1 (1967).

[109] 42 U.S.C. § 2000e(j).

[110] *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Wisconsin v. Yoder, 406 U.S. 205 (1972); NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272 (1972); Furman v. Georgia, 408 U.S. 238 (1972); Roe v. Wade, 410 U.S. 113 (1973); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); McDonnell Douglas v. Green, 411 U.S. 792 (1973); Miller v. California, 413 U.S. 15 (1973).

accommodation of an employee seeking not to work on a Saturday sabbath.[111] The Court held in favor of the airline and, as reinvented in *Groff*, *Hardison* remains the law.[112]

The employee, Larry G. Hardison, worked for Trans World Airlines at its maintenance and overhaul base in Kansas City, Missouri.[113] The base played a critical role in the airline's operation and so it ran continuously, operating 24 hours a day, 365 days per year.[114] Represented by a union, Hardison was subject to a seniority system set forth in a collective bargaining agreement (CBA).[115] Like many positions in airline operations, the various bargained seniority systems—not the airline—governed which employees worked which shift assignments.[116] The most senior employees chose shift assignments first and, if a shift needed coverage, the most junior workers were required to work as selected by the union steward.[117]

In 1968, Hardison had been on the job for a little less than a year when he began to "study the religion known as the Worldwide Church of God."[118] A tenet of that religion required adherents to "observe the Sabbath by refraining from performing any work from sunset on Friday until sunset on Saturday" as well as "certain specified religious holidays."[119] He informed a manager of his religious beliefs regarding the Sabbath and the conflict was resolved by assigning him to work the night shift.[120]

When his seniority permitted, Hardison bid for a job in a different building.[121] Although sufficient to attain the new position, his seniority could not ensure that he would never need to work Saturdays.[122] While the airline agreed to permit the union to seek a change of work assignments to accommodate him, the union unsurprisingly refused to violate the seniority provisions in the CBA.[123] The airline rejected a proposal to work a four-day week because Hardison's job was considered essential; on the weekends he was the only available person on his shift qualified to perform the work.[124]

The parties failed to resolve the conflict.[125] Hardison was assigned—

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[111] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).
[112] *Id.*; *see generally* Groff v. DeJoy, 600 U.S. 447 (2023).
[113] *Hardison*, 432 U.S. at 66.
[114] *Id.*
[115] *Id.* at 67.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.* at 67-68.
[121] *Id.* at 68.
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.* at 69.

and refused—to work shifts on Saturdays.[126] Consequently, he was terminated for insubordination and, after exhausting the administrative remedies required by Title VII, commenced an action in the United States District Court for the Western District of Missouri against both the airline and the union.[127] He alleged religious discrimination, relying on the 1967 Commission guidelines in effect at the time, which required employers "to make reasonable accommodations to the religious needs of employees."[128] While the case was pending in the district court, Congress enacted the 1972 amendments to Title VII.[129]

The District Court ruled in favor of both defendants.[130] The Eighth Circuit affirmed the judgment in favor of the union but reversed the judgment in favor of TWA, even though it agreed with the district court's constitutional analysis.[131] Each side petitioned for, and was granted, a writ of certiorari.[132]

Noting that neither Title VII nor the Commission's guidelines offered definitive assistance in resolving the critical question—the degree or extent of religious accommodation required of employers—the Court used the approaches taken by the district court and court of appeals as foils for its discussion.[133] The Court started by rejecting the notion that the airline had not engaged in reasonable efforts to accommodate the plaintiff.[134] TWA had

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[126] *Id.*

[127] *Id.*

[128] *Id.* (citing 29 C.F.R. § 1605.1 (1968)).

[129] *Id.*

[130] *See* Hardison v. Trans World Airlines, 375 F. Supp. 877 (W.D. Mo. 1974) (holding that the Commission's guidelines were applicable to unions; the union was not obligated to ignore the seniority system of the CBA; Title VII's religious accommodation requirement did not violate the Establishment Clause; and the airline satisfied its accommodation obligation because further efforts would have amounted to an undue hardship).

[131] *See* Hardison v. Trans World Airlines, 527 F.2d 33 (8th Cir. 1975).

[132] *Hardison*, 432 U.S. at 70.

[133] *Id.* at 75 (noting that "the employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship, is clear, but the reach of that obligation has never been spelled out by Congress or by EEOC guidelines"). As the facts giving rise to the case occurred in 1968, four years before Congress enacted section 2000e(j), Hardison's case rested on the Commission's 1967 interpretative regulation that construed Title VII to require employers to accommodate religious practices absent "undue hardship on the conduct of the employer's business." *Id.* at 72. By the time the Supreme Court decided *Hardison*, section 2000e(j) had been on the books for five years, having borrowed much of its operative terminology from the Commission's 1967 regulation. *See* 42 U.S.C. 2000e(j); Guidelines on Discrimination Because of Religion, 32 Fed. Reg. 10298 (July 13, 1967). However, by deciding *Hardison* under the regulation rather than the law, even though the latter used much of the same language, the Court avoided addressing whether section 2000e(j) applied retroactively. *Hardison*, 432 U.S. at 76 n.11 (stating that "an EEOC guideline is not entitled to great weight where, as here, it varies from prior EEOC policy," but that Congress had "ratified" the EEOC's interpretation (and language) "with positive legislation," then "the guideline is entitled to some deference, at least sufficient in this case to warrant our accepting the guideline as a defensible construction of the pre-1972 statute" and, thus, obviating the need to "consider" whether it could apply section 2000e(j) "retroactively to the facts of this litigation"). In other words, in *Hardison* the Court applied the Commission's 1967 regulation of which it was transparently skeptical, rather than the subsequent statute with identical terms, because (and, perhaps, only because) Congress had ratified the regulation by ensconcing it in Title VII. *See id.*

[134] *Id.* at 76-77.

held several meetings, accommodated plaintiff's special religious holidays, authorized the union to search for potential candidates for shift swaps, and worked to find the plaintiff another job.[135]The Court commended these efforts as reasonable and sufficient to fulfill its requirements under section 2000e(j) under the circumstances of the seniority system and collective bargaining agreement.[136]

The Court attributed the failure of defendants' efforts to the seniority system set forth in the collective bargaining agreement.[137] And between Title VII and national labor law, the Court concluded that section 2000e(j) did not require an employer to violate or alter a bona fide seniority system or a valid collective bargaining agreement to accommodate an employee's religious beliefs, customs, or practices.[138] The Court supported its construction by explaining:

- A bona fide seniority system, in and of itself, is a "significant accommodation" of the religious and secular needs of *all* employees.[139] Such systems are "a neutral way of minimizing the number of occasions when an employee must work on a day that he would prefer to have off."[140] Essentially, because the union negotiated the collective bargaining agreement on behalf of all members of the unit and was approved by a majority, it theoretically balanced religion with all other related and competing concerns.[141]
- Title VII's special treatment of bona fide seniority systems in section 703(h) supports the conclusion that employers are not required to violate or make exceptions to them to accommodate an individual's religious beliefs.[142]
- A collective bargaining agreement—which, in *Hardison*, included a seniority system—is a contract between employer and employees about work.[143] The CBA "lies at the core of … national labor policy, and

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[135] *Id.* at 77.
[136] *Id.*
[137] *Id.* at 78-83.
[138] *Id.*
[139] *Id.* at 78.
[140] *Id.*
[141] *See id* at 78-83. The Court implies this is so even if religion or religious accommodation were not part of CBA negotiations. *See id.*
[142] *Id.* at 81-82.
[143] *See id.* at 79-80.

seniority provisions are universally included in these contracts."[144] Here, they embodied the concurrence of both airline and union and spoke for its members: shifts were to be allocated among workers on the basis of seniority.[145] For Hardison, in his new shift where he had the least seniority, an accommodation would have required a more senior employee to be deprived of his rights under the contract.[146] After all, Hardison could have remained in his previous position until he attained seniority sufficient both to transfer and to ensure he would never work Saturdays. In essence, the Court prioritized the older National Labor Relations Act (NLRA), and its objectives of economic and labor peace, over the newer Title VII requirement, in a definition, to accommodate individual religious observances.[147]

- Turning Title VII's goal of equality of opportunity on its head, the Court concluded that requiring an employer to accommodate an individual employee's religious beliefs when to do so would violate a seniority system or collective bargaining agreement would result in unequal treatment of others—accommodating the religious "only at the expense of others who had strong, but perhaps non-religious, reasons for not working on weekends."[148] The Court's discussion revealed not only concern regarding inequality and fairness between religious and non-religious but also subtle distaste for the notion (at least with respect to seniority, CBAs, and labor policy) that the religious beliefs of one should outweigh the labor and contractual rights of other unit members.[149] It pointedly sought to avoid handing religious employees a device they could use to obtain individual exceptions

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[144] *Id.* at 79.

[145] *See id* at 78-83.

[146] *Id.* at 80.

[147] *Id.* ("Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances.").

[148] *Id.* at 81.

[149] *Id.* at 85. At the time, similar notions of fairness seemed to motivate the Court in another Title VII context: pregnancy discrimination. In General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), the Court held that a disability plan did not violate Title VII by denying benefits for pregnancy-related disabilities because it paid benefits roughly equal to men and women, and because pregnancy was unique to women and often voluntarily undertaken; in other words, pregnancy discrimination was not sex discrimination for purposes of Title VII. Congress swiftly overrode this decision in the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2077 (1978), codified at 42 U.S.C. § 2000e(k). Yet Congress did not—and would not—counter *Hardison* with similar legislation.

> from negotiated seniority systems at the expense, and to the detriment, of others.[150]

Ultimately, *Hardison* rejected the notion that what the Court and others perceived as a minor definitional amendment to Title VII in fact imposed a religious accommodation requirement that was novel to federal antidiscrimination law; trumped the NLRA, Taft-Hartley Act, and other labor laws (not to mention other provisions of Title VII); and required employers to favor religious employees over others.[151]

Before turning to the *de minimis* test, it is worth highlighting the Court's seeming indifference to Hardison. As noted above, the Court recast Hardison's request for religious accommodation as an invitation (or, worse, a demand) for the employer or union to discriminate against other employees on the basis of religion.[152] Even if not religious discrimination, the plaintiff's arguments struck the Court as grossly unfair and unjust to other workers and their legitimate expectations.[153] And so the Court references "*denying* (a senior employee) his shift preference" which would have "*deprived* [him] of his contractual rights," "getting [Hardison] the *days off* necessary for *strict* observance" of his religion "at the *expense* of others who had strong, but perhaps non-religious, reasons" for likewise not wanting to work on weekends, and compelling the employer to "*deprive* another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath."[154] Leaving aside section 2000e(j), the Court noted that Congress's broader or overriding purpose in Title VII to eliminate discrimination did not "require an employer to discriminate against some employees in order to enable others to observe their Sabbath."[155] While not as overtly hostile to religious beliefs as it had been in *Davis*, *Hardison* barely concealed its disinterest for religious accommodation, equating it with mandated discrimination against non-religious workers.[156]

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[150] *Hardison*, 432 U.S. at 81. ("Title VII does not contemplate such unequal treatment. The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment … I would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.").

[151] *See generally id.*

[152] *Id.* at 85.

[153] *Id.*; *see also supra* note 149.

[154] *Hardison*, 432 U.S. at 80-81.

[155] *Id.* at 85.

[156] *See* Davis v. Beason, 133 U.S. 333, 341-42 (1890) (stating that "(t)o call their advocacy [of polygamy] a tenet of religion is to offend the common sense of mankind."). The opinions in *Hardison* reveal the justices' concerns about the intersection (and potential conflict) between Title VII's religious discrimination and accommodation provision and the First Amendment, specifically government showing favoritism to religion or religious people. *See, e.g.*, *Hardison*, 432 U.S. at 81; *id.* at 91 (Marshall, J., dissenting). To a judiciary focused on

At the conclusion of its opinion, the Court addressed the Eighth Circuit's suggestion that the employer could have allowed a four-day week for the Plaintiff and filled any staffing shortfall with "supervisory personnel or qualified personnel from other departments" or the "payment of premium wages."[157] The Court rejected the notion that Title VII requires employers to "incur" or "bear" costs "either in the form of lost efficiency in other jobs or higher wages."[158] The Court summarized: "[t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship."[159] Building upon the egalitarian thrust of its earlier discussion, the Court found that such accommodations would "in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs."[160] While this would have been advantageous to the plaintiff and other employees it "would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs."[161] Instead of attempting to quantify the nature or extent of a burden that was undue, either generally or with respect to the "conduct of the employer's business," the Court simply rejected the two examples before it—premium wages and shifting employees from other departments—because they would result in favorable treatment to religious workers.[162]

Courts have applied the *de minimis* test ever since, construing the Court's language as rejecting accommodation that causes more than minor inconvenience or cost.[163] And the Court's opinion invites such an application,

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fairness in the form of non-preferential treatment, the notion of legally compelled accommodation—what the Court would concede later in *Barnett* and *Abercrombie & Fitch* as favorable treatment—struck the justices as a potential constitutional problem. Nevertheless, courts spurned a series of constitutional challenges to Title VII generally and the courts of appeals likewise spurned similar attacks on the 1972 amendments. *See, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); EEOC v. Ithaca Industries, Inc., 849 F.2d 116 (4th Cir. 1988); McDaniel v. Essex Intern., Inc., 696 F.2d 34 (6th Cir. 1982); Tooley v. Martin-Marietta Corp., 648 F.2d 1239 (9th Cir. 1981).

[157] *Hardison,* 432 U.S. at 84.

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.* at 84-85.

[162] *Id.* at 72, 75.

[163] *See, e.g.*, Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004); Lowe v. Mills, 68 F.4th 706 (1st Cir. 2023); Baker v. Home Depot, 445 F.3d 541 (2d Cir. 2006); Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476 (2d Cir. 1985), affirmed and remanded by Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986); Webb v. City of Philadelphia, 562 F.3d 256 (3d Cir. 2009); Protas v. Volkswagen of Am., Inc., 797 F.2d 129 (3d Cir. 1986); EEOC v. GEO Group, Inc., 616 F.3d 265 (3d Cir. 2010); United States v. Bd. of Educ. Sch. Dist. of Phila., 911 F.2d 882 (3d Cir. 1990); Ward v. Allegheny Ludlum Steel Corp., 560 F.2d 579 (3d Cir. 1977); EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307 (4th Cir. 2008); EEOC v. Thompson Contracting, Grading, Paving, and Utilities, Inc., 499 F. App'x 275 (4th Cir. 2012); Turpen v. Mo.-Kan.-Tex. R. Co., 736 F.2d 1022 (5th Cir. 1984); Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141 (5th Cir. 1982); Weber v. Roadway Exp., Inc., 199 F.3d 270 (5th Cir. 2000); Davis v. Fort Bend Cty., 765 F.3d 480 (5th Cir. 2014); Goldmeier v. Allstate Ins. Co., 337 F.3d 629 (6th Cir. 2003); Cooper v. Oak Rubber, 15 F.3d 1375 (6th Cir. 1994); Virts v. Consol. Freightways Corp. of Del., 285 F.3d 508 (6th Cir. 2002); Small v. Memphis Light, Gas & Water, 952 F.3d 821 (6th Cir. 2020); Adeyeye v. Heartland Sweeteners, LLC, 721 F.3d 444 (7th Cir. 2013); EEOC v. Ilona of Hungary, Inc., 108 F.3d 1569 (7th

especially as clarified by the Court in 1986.[164] Seemingly lost in the debate, however, has been footnote 15, which tempers the stronger language of the opinion and implies that an important motivation of the Court's holding was scope.[165] There, the Court points out that the district court expressly found that "(b)oth of these solutions [the use of supervisors or premium pay] would have created an undue hardship on the conduct of TWA's business."[166] As it had on several other points, the Court credited the findings of the district court, noting "the likelihood that a company as large as TWA may have many employees whose religious observances, like Hardison's, prohibit them from working on Saturdays *or Sundays*."[167]

The footnote is short but revealing. By referencing a Sunday Sabbath, a religious belief or practice not at issue in the case, the Court tipped its hand to an unstated, and very practical, impetus for its holding.[168] For all the opinion's extolling of seniority systems, collective bargaining, and equality between the religious and non-religious and majorities and minorities, footnote 15 suggests that the Court's also was concerned with practical implications: manageability and fairness.[169] While Seventh Day Adventists account for approximately 0.5% of the population today, Catholic, Protestant, and other Christian denominations together cover more than 50%.[170] In the mid-1970s in the Midwest, likely an even greater percentage of the St. Louis workforce would have identified as Christians.[171] As a result, were the Court to have ruled in favor of the plaintiff, a majority of workers

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Cir. 1997); Baz v. Walters, 782 F.2d 701 (7th Cir. 1986); Nottelson v. Smith Steel Workers D.A.L.U. 19806, AFL-CIO, 643 F.2d 445 (7th Cir. 1981); Harrell v. Donahue, 638 F.3d 975 (8th Cir. 2011); Cook v. Chrysler Corp., 981 F.2d 336 (8th Cir. 1992); Brown v. Gen. Motors Corp., 601 F.2d 956 (8th Cir. 1979); Mann v. Frank, 7 F.3d 1365 (8th Cir. 1993); Brown v. Polk Cty., Iowa, 61 F.3d 650 (8th Cir. 1995); Balint v. Carson City, NV, 180 F.3d 1047 (9th Cir. 1999) (en banc); Heller v. EBB Auto Co., 8 F.3d 1433 (9th Cir. 1993); Tooley v. Martin-Marietta Corp., 648 F.2d 1239 (9th Cir. 1981); Opuku-Boateng v. California, 95 F.3d 1461 (9th Cir. 1996); Burns v. S. Pac. Transp. Co., 589 F.2d 403 (9th Cir. 1979); Tabura v. Kellogg USA, 880 F.3d 544 (10th Cir. 2018); Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481 (10th Cir. 1989); Lee v. ABF Freight System, Inc., 22 F.3d 1019 (10th Cir. 1994); Beadle v. Hillsborough County Sheriff's Dept., 29 F.3d 589, 592 (11th Cir. 1994); Lake v. B.F. Goodrich Co., 837 F.2d 449 (11th Cir. 1988); Gutherie v. Burger, No. 80-CIV-1802, 1980 WL 311 (D.D.C. Dec. 16, 1980); EEOC v. Rent-A-Center, Inc., 917 F. Supp. 2d 112 (D.D.C. 2013); Rashad v. WMATA, 945 F. Supp. 2d 152 (D.D.C. 2013).

[164] *See generally Ansonia*, 479 U.S. 60.

[165] *Hardison,* 432 U.S. at 84 n.15 (citing Hardison v. Trans World Airlines, 375 F. Supp. 877, 891 (W.D. Mo. 1974)).

[166] *Id.*

[167] *Id.* (emphasis added).

[168] *Id.*

[169] *Id.*

[170] Michael Lipka, *A Closer Look at Seventh-Day Adventists in America*, PEW RESEARCH CTR. (Nov. 3, 2015), https://www.pewresearch.org/short-reads/2015/11/03/a-closer-look-at-seventh-day-adventists-in-america/#:~:text=Since%20then%2C%20the%20church%20has,more%20mainstream%20evangelical%20Christian%20denomination.&text=Seventh%2Dday%20Adventists%20make%20up,changed%20from%202007%20(0.4%25).

[171] *How U.S. Religious Composition has Changed in Recent Decades*, PEW RESEARCH CTR. (Sept. 13, 2022), https://www.pewresearch.org/religion/2022/09/13/how-u-s-religious-composition-has-changed-in-recent-decades/#:~:text=In%201972%2C%20when%20the%20GSS,%2C%20reaching%209%25%20in%201993.

could have—and perhaps *would have* if doing so guaranteed a day off—asserted a statutory right not to work on Saturday or Sunday. If Title VII entitled each employee to an accommodation, it would have a considerable impact on the twenty-four-hour operation of employers, especially those with large and unionized workforces, other labor laws, and the rights of other employees. At a minimum, the cumulative burden of a rule granting Sabbath accommodations generally and based on individualized assessment of costs could have been crippling to certain employers, especially those like TWA.

To avoid these outcomes, the Court cut such inquiries off at the source—at least for large employers with complex seniority systems and large unionized workforces. *Hardison* made clear that Title VII does not require an employer to accommodate an employee's personal religious beliefs if doing so would require changing or violating a bona fide seniority system or collective bargaining agreement.[172] Similarly, other employers were not required to accommodate religious beliefs and practices if it required paying premium wages, transferring employees from other jobs or departments, or using supervisors to cover subordinates work where these costs (whether monetary or efficiency) would burden the operation of the employer.[173]

In the wake of *Hardison*, the courts of appeals could have given weight to footnote 15's correlation between the burden and the employer's operations. None did. Had they, the undue hardship test might have looked more like the Commission's test (focusing on the burden *to operations*) and, perhaps, been less employer-friendly.[174] Instead, the courts of appeals consistently read *Hardison* according to its blunt and sweeping language, holding that even the most minimal costs and burdens—those that have no measurable impact on operations, to say nothing of seniority systems and union contracts—excused employers from Title VII's obligation to provide religious accommodations.[175] Less than a decade later, the Court confirmed this approach.[176]

2. *Ansonia*

Nine years later, the Court confronted Title VII religious accommodation a second—and its decision in *Hardison* for the first—time in *Ansonia Board of Education v. Philbrook*.[177] The plaintiff was employed

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[172] *Hardison*, 432 U.S. at 85.
[173] *Id.*
[174] *See* 29 C.F.R. § 1630.1(c)(4), § 1630.2(p) .
[175] *See supra* note 163.
[176] Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986).
[177] *Id.*

as a schoolteacher pursuant to successive CBAs.[178] After being baptized into the Worldwide Church of God he sought not to work on designated holy days.[179] The case arose as a dispute regarding the use of leave for religious purposes.[180]

The CBAs afforded teachers 18 days of sick leave, which could be rolled over to a limit of 150 and later to 180 days.[181] In practice this sick leave was more akin to modern paid time off in that it could be used for specified purposes other than sickness—*e.g.*, bereavement, weddings, veterans' events, and others—within limits, all set forth in the contract.[182] With one exception, the CBAs provided "three days' annual leave for observance of mandatory religious holidays," again, as defined in the contract.[183] Unlike other types of leave, absences for religious holidays were not counted against a teacher's annual or accumulated leave.[184] In addition, teachers were permitted to use up to three days of accumulated leave each school year for "necessary personal business," which later contracts had restricted to uses that were "not otherwise specified" in the agreement.[185] Thus, for example, if an employee used his allotted three days of leave for religious holidays, he could not use his three additional necessary personal business days for additional religious holidays or other absences.[186]

The employee self-accommodated his religious obligations with a combination of authorized and unauthorized leave, the latter costing him compensation for lost work time.[187] To avoid the pecuniary repercussions, he began to schedule required hospital visits on holy days and worked on others.[188] This, too, proved undesirable and so the employee approached the board proposing two alternatives—either allow him to use his three days of personal business leave for religious observance or "pay the cost of a substitute and receive full pay for additional days off for religious observances."[189] The school rejected both.[190]

After exhausting his administrative remedies, the employee brought an action, losing in the district court.[191] However, the Second Circuit

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[178] *Id.* at 62.
[179] *Id.*
[180] *Id.* at 64.
[181] *Id.* at 63.
[182] *Id.*
[183] *Id.* at 63-64.
[184] *Id.* at 64.
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.* at 64-65.
[190] *Id.* at 65.
[191] *Id.*

reversed, outlining a prima facie case under *McDonnell Douglas* and holding that where "the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business."[192] The Supreme Court granted certiorari to consider first whether the plaintiff established a prima facie case of religious discrimination and, second, whether Title VII requires an employer to accept the employee's preferred or proposed accommodation absent proof of undue hardship.[193]

With respect to the first question, the Court observed that its holding that the proposed accommodations would have imposed an undue hardship foreclosed any opportunity to consider the elements or boundaries of a prima facie case of a religious accommodation claim.[194] Turning to the second question, the Court rejected the notion that an employer was bound to accept one or more accommodations proposed by an employee absent a demonstration of undue hardship or, if it offered an accommodation, defend its decision to reject different proposals advanced by the employee.[195] While the Court noted with approval appellate decisions explaining that "bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business,"[196] it ultimately concluded that "where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end."[197] In so doing, the Court expressly and unequivocally affirmed the *de minimis* construction of undue hardship that it announced and applied in *Hardison*.[198] The Court also confirmed that in *Ansonia*, "all conceivable accommodations would have resulted in undue hardship."[199] It also clarified that the extent of any "undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship."[200]

Although the Court refrained from deciding whether the school's leave policy was a reasonable accommodation, it indicated that policies requiring unpaid leave for a holy day religious observance generally were a

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[192] *Id.* at 66 (citation omitted).

[193] *Id.*

[194] *Id.* at 67-68. The Court did not then, as it would later, hold that Title VII does not contain an independent cause of action for religious accommodation. *See* EEOC v. Abercrombie & Fitch Stores, 575 U.S. 768 (2015).

[195] *Id.* at 68.

[196] *See id.* at 69 (citation omitted).

[197] *Id.* at 68.

[198] *Id.* at 67 (stating "In *Hardison* we determined that an accommodation causes 'undue hardship' whenever that accommodation results in 'more than a de minimis cost' to the employer") (citation omitted).

[199] *Id.*

[200] *Id.* at 68-69.

reasonable accommodation, even if that leave exceeded the number of days allowed by the collective bargaining agreement.[201] In the Court's view, unpaid leave eliminated the conflict between observing a holy day at the mere cost of a day's compensation because, while Congress intended to assure employees greater opportunities to engage in religious practices, it "did not impose a duty on the employer to accommodate at all costs."[202]

Ansonia confirmed *Hardison*.[203] The Court explicitly reiterated its holding and the *de minimis* test, removing any doubt that it meant what it said in *Hardison* when it laid the groundwork for the judicial application of the religious accommodation elements of Title VII.[204] And it continued to offer comments in dicta encouraging basic accommodations such as a day's unpaid leave that confined the impact of religious exceptions to the individual employee and the employer—and not other employees.[205]

3. The Evolution of Undue Hardship During 45 Years of De Minimis

Modern critics of the *de minimis* test articulated in *Hardison* and ratified in *Ansonia* often characterize it as an outlier and a *deviation* from later concepts of accommodation in employment law.[206] But in 1977 federal employment antidiscrimination law was limited to traditional notions of disparate treatment and disparate impact.[207] And courts were only familiar

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[201] *Id.* at 70.

[202] *Id.* ("The direct effect of [unpaid leave] is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either employment opportunities or job status") (citing and quoting Nashville Gas Co. v. Satty, 434 U.S. 136, 145 (1977)). This is a peculiar statement given the Court's affirmance of the *de minimis* standard. *See id.* at 67. After all, under *Hardison* and *Ansonia* not only is an employer not required to accommodate employees' religious beliefs and practices "at all costs," but it is not obligated to accommodate religion if such requires more than minimal or trivial—this is, virtually any—cost. *Id.* at 70; Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977). Such a line would be fitting in an opinion announcing an interpretation of "undue hardship" as an act that requires significant or substantial "difficulty or expense" under the circumstances of each case. It would clarify an important, if not foundational, point that "undue hardship" does not require employers to accommodate every religious belief, observance, or practice.

[203] *See supra* note 198. And like *Hardison*, *Ansonia* noted its dissatisfaction with the Commission's interpretations of Title VII's religious accommodation provisions. *Hardison*, 432 U.S. at 72; *Ansonia*, 479 U.S. at 69 n.6 (holding that to the extent that "the guideline … requires the employer to accept any alternative favored by the employee short of undue hardship, we find the guideline simply inconsistent with the plain meaning of the statute" and reiterating the fact that "EEOC guidelines are properly accorded less weight than administrative regulations declared by Congress to have the force of law") (citing *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976); *Hardison*, 432 U.S. at 76, n. 11).

[204] *See Ansonia*, 479 U.S. at 69 n.6. Although the Court's decision in *Hardison* applied the Commission's 1967, in *Ansonia* the Court interpreted section 2000e(j). *Hardison*, 432 U.S. at 72; *Ansonia*, 479 U.S. at 68-69. By affirming *Hardison*, the Court made clear that its construction of the Commission's 1967 regulation applied in all respects to section 2000e(j) itself. *Ansonia*, 479 U.S. at 70. As a result, ever since Courts have applied *Hardison* and *Ansonia* to Title VII religious discrimination cases alleging the failure to accommodate a religious practice.

[205] *See id. at 70-71.*

[206] *See, e.g.*, K. Allred, *Giving Hardison the Hook: Restoring Title VII's Undue Hardship Standards*, 36 B.Y.U. J. PUB. L. 263, 272 (2022) (collecting articles and noting the anomalous nature of Hardison's standard).

[207] *See supra* Section II.D.

with the general concepts of religious exemptions from free exercise cases.[208] The notion that a private employer was obligated affirmatively to act and grant exceptions from schedules, general rules, and operations to accommodate employees' religious beliefs, observances, and practices was new.[209] To the justices in 1977, the entire notion of religious accommodation must have seemed aberrational, if not outright discriminatory. It is one thing to require private employers not to discriminate on the basis of certain characteristics, but it is entirely different for the law to require that they take action to cater to the religious beliefs and practices of a subset of their employees. Indeed, *Hardison* expressed its incredulity at the notion that an antidiscrimination statute could require employers to do this—differentiate and grant preferential treatment to religious employees against, or at the expense of, other or non-religious employees.[210] Not only did such a requirement seem out of place as a question of workplace antidiscrimination law, but it also failed to resonate as a free exercise constitutional principle.

Naturally, *Hardison* resisted an expansive reading of Title VII that would legitimize, much less require, what the Court saw at best as compulsory employer religious favoritism and at worst outright discrimination.[211] Instead, it adopted a narrower construction.[212] The *de minimis* standard sought to avoid outcomes the Court considered discriminatory at the time.[213] These include situations where other workers, whether of different faiths or irreligious, were compelled to perform work or perform it at certain times when, but for the religious accommodation, they would not have had to do so.[214] The standard obviated perceived unfairness resulting from individual and cumulative exceptions benefiting religious workers, including in the form of business costs, inefficiency, workforce divisions, diminished seniority rights, bargaining agreement reliability, and others.[215] Practically, this left a universe of religious accommodations that were not onerous to the employer in terms of efficiency and expenditures, did not burden other workers, and did not violate a seniority/scheduling system or rights provided in a collective bargaining agreement. The more a putative accommodation fits this innocuous description, the more likely it passed muster under *Hardison*.

Some justices disagreed in 1977; others have since. Members of the Court have criticized *Hardison* for its gloss on "undue hardship," and urged

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[208] *See infra* Section II.F.2.
[209] *See infra* Section II.F.2.
[210] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*

the Court to reconsider its approach.[216] Other judges joined the chorus.[217]

Since *Hardison* and *Ansonia*, the broader concept of compelling employers to reasonably accommodate employees has become widely accepted. In 1990, Congress passed the ADA, significantly amended it 18 years later, and applied accommodation requirements to the known limitations of pregnant workers in 2022.[218] Title I of the ADA requires covered employers to afford qualified individuals with disabilities who work for them reasonable accommodations unless doing so would pose an undue hardship on the operation of the employer's business.[219] Unlike the *de minimis* gloss on undue hardship in Title VII, however, in the ADA Congress defined undue hardship as "significant difficulty or expense" and outlined a series of factors to guide that analysis.[220] As a result, many potential accommodations that qualify as undue in Title VII religion cases are not undue under the ADA. At least facially, the generalizable fairness concerns of *Hardison* with the concept of requiring employers to accommodate employees are no longer an obstacle.

Despite widespread acceptance of accommodation and its expansion with the Americans with Disabilities Act Amendments Act (ADAAA) in 2008,[221] the *de minimis* test remained the law under Title VII throughout these developments. Why? Notwithstanding justices' and judges' criticisms above,[222] ADA disability accommodations and Title VII religious accommodations are materially different. Under the ADA, accommodations

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[216] *See, e.g.*, Small v. Memphis Light, Gas & Water, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., joined by Alito, J., dissenting) (noting that in *Hardison*, "this Court dramatically revised—really, undid—Title VII's undue hardship test" and that "time" has not "been kind" to the case); Patterson v. Walgreen Co., 140 S. Ct. 685, 685 (2020) (Alito, J., joined by Thomas and Gorsuch, JJ., dissenting) ("…we should reconsider the proposition, endorsed by the opinion in [*Hardison*] that Title VII does not require an employer to make any accommodation for an employee's practice of religion if doing so would impose more than a *de minimis* burden"); EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 787 (2015) (Thomas, J., concurring in part and dissenting in part) (noting that in *Hardison* the Court did not apply the current form of Title VII, but instead an EEOC guideline defining the term "religion" that predated the 1972 amendments); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 88, 89, 93, n. 6 (1977) (Marshall, J., joined by Brennan, J., dissenting) (observing that the *de minimis* cost test cannot be reconciled with the "plain words" of Title VII, defies "simple English usage," and "effectively nullif[ies]" Title VII's promise).

[217] *See, e.g.*, Small v. Memphis Light, Gas and Water, 952 F.3d 821, 826 (6th Cir. 2020) (Thapur, J., joined by Kethledge, J., concurring).

[218] *See* Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990); Americans with Disabilities Act Amendments Act, Pub. L. No. 110-325, 122 Stat. 3553 (2008); Pregnant Workers Fairness Act, Consolidated Appropriations Act, 2023, Pub. L. No. 117-326, Division II, 136 Stat. 4459, 6084 (2022). In addition, USERRA requires employers to restore returning servicemembers to their previous positions under most circumstances. 38 U.S.C. § 4312.

[219] 42 U.S.C. § 12112.

[220] *Id.* § 12111(10).

[221] Congress enacted the ADAAA to reverse what it perceived to be unreasonably narrow judicial interpretations of the ADA. *See supra* note 218. The Act, and the Commission's implementing regulations, significantly expanded the ADA's coverage and made it easier for employees to obtain reasonable accommodations from employers. *See supra* note 133; *see also* 29 C.F.R. Part 1630; 76 Fed. Reg. 16978 (2008).

[222] *See supra* note 216 and accompanying text.

are designed and directed to facilitate an individual's performance of the essential functions of his or her job.[223] In other words, they make it possible for an individual *to work*.[224] Congress intended the ADA to eliminate barriers to individuals with disabilities that precluded them from productive participation in the workforce.[225] Employers' costs to reasonably accommodate individuals with disabilities are simultaneously investments in the individuals as well as boons to society at large. Moreover, many accommodations are comprised of devices or other equipment that provide specific benefits to the disabled individual and would not be helpful to other employees.[226] As a result, Congress set a higher bar for employers to decline accommodation, that is into a range where the costs are not aligned with the benefits or where the individual's disabilities fall outside the statute's protections for a particular job.[227]

In contrast, many religious accommodation requests seek leave *from work* or justifications *not to work*.[228] Whether the employee requests not to be scheduled on the Sabbath or during a religious ceremony, or seeks to avoid certain types of assignments or duties, or asks to be excused from working with particular clients or complying with other general employment rules, the result is the same: relief *from* work.[229] This distinction is important. One can see how the courts and broader society have accepted the moral and practical benefits of accommodating disabled individuals in joining the economy as productive workers. At least generally, those benefits justify laws compelling employers to adjust internal rules and spend money accommodating certain individuals so that they may work. But when private employers are compelled to bend internal rules and spend money to accommodate religious individuals—who may very well have reasonably foreseen conflicts between the job they accepted and their religious obligations—the issue becomes less about familiar Title VII principles of nondiscrimination and more about obligating employers to afford a generally welcome benefit (*i.e.*, time off) solely to religious workers. Framed in this way, disability accommodation under the ADA and religious accommodation under Title VII are less similar than they may appear.

To illustrate, take an accommodation that has been used in both

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[223] 42 U.S.C. § 12112.
[224] *Id.*
[225] 42 U.S.C. § 12101.
[226] 42 U.S.C. § 12112.
[227] *Id.*
[228] *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, COMPLIANCE MANUAL ON RELIGIOUS DISCRIMINATION, No. 915.063, § 12-A-IV (2021) [hereinafter EEOC COMPLIANCE MANUAL] ("A religious accommodation is an adjustment to the work environment that will allow the employee to comply with this or her religious beliefs").
[229] Depending upon the accommodation, those duties and responsibilities are either not performed, performed after a delay, or placed on other workers.

religious and disability cases: leave. Some resist the notion of leave as a disability accommodation, precisely because it is seen as an anomaly from the unifying commonality and purpose of ADA accommodations—providing individuals the means *to work*.[230] Generally, employers are not obligated to grant extensive leave beyond legal mandates because it does not, in fact, help individuals physically to perform their jobs in the way that traditional accommodations assist workers in performing certain tasks.[231] The rationale behind the objection is that employers should not have to fund an accommodation that does not produce the benefits promised of other ADA accommodations: productive work.[232] That position generates tension in Title VII religious accommodation cases. If a robust framework such as the ADA does not broadly require employers to afford leave, it is difficult to argue that a sentence in a Title VII definition suffices.

Since the ADA, society has increasingly embraced the notion that in certain circumstances, private employers must accommodate employees with disabilities in certain ways. While the very concept of accommodation necessarily entails *favorable* treatment, a concept that disturbed the Court in *Hardison*,[233] the ADA's requirements are detailed in the statute, tailored in application, and directed to facilitating productive work from disabled employees who would have not been hired in previous generations.[234] In that sense, *Hardison*'s cold reception to accommodations generally has been overtaken by Congress' persistence in requiring accommodations of individuals with disabilities, military servicemembers, and pregnant workers.[235] But Congress has not displayed the same magnanimity with religious accommodation in the workplace, declining to amend Title VII to address judicial reticence to construe section 2000e(j) broadly.[236] This is not

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[230] 42 U.S.C. § 12112.

[231] *Id.* However, the Commission has taken the position that leave may be a required accommodation under the ADA in certain circumstances. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EMPLOYER-PROVIDED LEAVE AND THE AMERICANS WITH DISABILITIES ACT, EEOC-NVTA-2016-1 (2016); *see generally* 29 C.F.R. Part 1630; 76 Fed. Reg. 16978 (2008).

[232] The principle has obvious limits. Leave—or time away from work—can significantly facilitate an employee's work, productivity, and morale. Vacation is one example. Many employers afford their employees the ability to take one or extended periods of time away from work each year. Time away allows workers mental and physical time to relax, recharge, and refocus. Employees may return with renewed energy, perspective, and creativity, having benefitted from quality time spent with family and friends. This helps employees better perform their work. Of course, vacations are different from time off for religious observances and practices, but they may provide employees—and, therefore, indirectly employers—with some of the same benefits.

[233] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

[234] 42 U.S.C. § 12112.

[235] *See supra* note 5.

[236] Some might argue that the Court should not be given credit for initially embracing accommodations under the ADA. Early decisions construed certain ADA's provisions narrowly. *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002). These and other cases led Congress to expand the protections afforded by the ADA and clarify the way it wanted the courts to interpret and apply its provisions.

for want of interest on religion generally. To the contrary, during the same period Congress buttressed religious rights in two other high-profile statutes, the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA).[237]

Ultimately, with Congress silent, the Court declined—until 2023—to reconsider *Hardison* and its gloss on religious accommodation under Title VII, leaving the courts of appeals to develop a body of law that, criticism notwithstanding, has been both stable and consistent, affording a pragmatic paradigm for government, businesses, and workers.[238]

4. *Groff*

On January 13, 2023, the Supreme Court agreed to reconsider the "more-than-de-minimis-cost test" announced in *Hardison* and clarify whether an employer may demonstrate undue hardship under Title VII by showing a proposed accommodation burdens the requesting employee's co-workers rather than the business.[239] In the wake of several high-profile decisions on constitutional questions the previous year[240] and a strong record of success for religious individuals and groups,[241] many expected the Court to overrule *Hardison* and craft a more robust structure around the phrase undue hardship based on the phrase's plain meaning.[242]

The petitioner, Gerald Groff, worked as a mail carrier for the United States Postal Service.[243] As an evangelical Christian, he believed that Sunday must be devoted to worship and rest, not "secular labor" or "transportation of worldly goods."[244] As the USPS historically did not deliver mail on Sundays,

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[237] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, codified at 42 U.S.C. § 2000bb *et seq.* (1993); Protection of Religious Exercise in Land Use and by Institutionalized Persons, Pub. L. No. 106-274, 114 Stat. 803, codified at 42 U.S.C. § 2000cc *et seq.* (2000).

[238] Section II.F *infra*, summarizes and analyzes this body of law. As a result, while I have attempted to avoid "the all-too-familiar mode" of legal writing—"plucking quotations from [judicial] opinions and stringing them together without analysis"—in some places I have supplemented my analysis with longer-than-usual collections of cases and parenthetical illustrating the ways in which the courts have addressed or discussed various points. *See* Oceana, Inc. v. Raimondo, 35 F.4th 904, 911 (D.C. Cir. 2022).

[239] Groff v. DeJoy, 34 F.4th 162 (3d Cir. 2022), *cert. granted*, 143 S. Ct. 646 (Jan. 13, 2023) (No. 22-174).

[240] *See, e.g.*, West Virginia v. Envtl. Protection Agency, 597 U.S. 697 (2022) (major questions doctrine); N.Y. State Rifle & Pistol Association Inc. v. Bruen, 597 U.S. 1 (2022) (Second Amendment); United States v. Zubaydah, 595 U.S. 195 (2022) (state secrets privilege); United States v. Tsarnaev, 595 U.S. 302 (death penalty).

[241] *See, e.g.*, Carson v. Makin, 596 U.S. 767 (2022); Fulton v. City of Philadelphia, 593 U.S. 522 (2021); Tandon v. Newsom, 593 U.S. 61 (2021); Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U.S. 14 (2020); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Masterpiece Cakeshop Std., v. Colo. Civil Rights Comm'n, 584 U.S. 617 (2018); Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).

[242] 42 U.S.C. § 12111.

[243] *Groff*, 600 U.S. at 454.

[244] *Id.*

his work obligations generally did not conflict with his religious beliefs and practices.[245] However, in 2013, the USPS and Amazon entered into an agreement to deliver certain packages on Sundays and holidays.[246] Although the parties disputed the particulars in the lower court, Groff did not work on Sundays, received discipline for doing so, and ultimately resigned.[247] Additionally, coworkers complained that Groff's absences for religious practices adversely impacted them.[248]

He timely filed suit in the Eastern District of Pennsylvania, alleging religious disparate treatment premised on a failure to accommodate his Sunday Sabbath practice, losing before both Judge Schmehl and the Third Circuit.[249] The latter found the *Hardison* minuscule undue hardship threshold easy to satisfy in this case, where the proposed accommodation had caused work to fall on other employees.[250] Undeterred, Groff appealed to the Supreme Court.[251]

At the outset, the Court noted that this case presented its "*first* opportunity in nearly 50 years" to explain and clarify "the contours of *Hardison*."[252] It began, therefore, with an abbreviated discussion of some of the ground covered above, including sections 703(a)(1) and 700(j), as well as both the Commission's regulations and the backdrop of *Hardison* that arose between the enactment of the Act and the 1972 amendments.[253] In short, while the backdrop and briefing[254] promised a watershed weighing of

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[245] *Id.*

[246] *Id.*

[247] *Id.* at 455.

[248] *See generally id.* at 454-55.

[249] *See* Groff v. DeJoy, 34 F.4th 162 (3d Cir. 2022); Groff v. DeJoy, No. 19-1879, 2021 WL 1264030 (E.D. Pa. Apr. 6, 2021).

[250] *Groff*, 600 U.S. at 456. The contexts of *Groff* and *Hardison* are similar in important respects, the most significant of which is the unionization of both workforces. *Id.* at 454; Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 67.The workforces of both employers were comprehensively unionized and had been for decades. In this respect postal employees—and other government workforces—are similar to public school teachers, steelworkers, electrical workers, airlines, and autoworkers in that much of their work, opportunities, and rights are governed by seniority provisions in collective bargaining agreements.

[251] *Id.*

[252] *Id.* at 456-457 (emphasis added). This is a confusing assertion. As discussed above, *Ansonia*—not *Groff*—was the Court's "first" opportunity to explain *Hardison*. *See supra* Section II.E.2. And the Court seized it, stating *explicitly* that "[i]n *Hardison*, we determined that an accommodation causes "undue hardship" whenever that accommodation results in "more than a *de minimis* cost" to the employer." *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986) (citing and quoting *Hardison*). Moreover, *Ansonia's* confirmation and explanation of *Hardison* is articulated as a general rule, not simply summarizing the particular facts of the case. *Id.* Curiously, neither opinion in *Groff* mentions *Ansonia*. *See generally Groff*, 600 U.S. 447. For its part, *Ansonia* omits any discussion of "substantial cost." *See generally Ansonia*, 479 U.S. 60.

[253] *Groff*, 600 U.S. at 457-58; *see supra* Sections II.A-D.

[254] In June 1971, the Court had affirmed (by an equally divided vote) a Sixth Circuit opinion that rejected the Commission's religion guidance on Establishment grounds. Dewey v, Reynolds Metal Co., 402 U.S. 628 (1971). Weeks later, it decided *Lemon v. Kurtzman*, which held that laws whose purpose or effect was to advance religion were unconstitutional. Lemon v. Kurtzman, 403 U.S. 602 (1971). Five years later, in the weeks before the Court granted review in *Hardison*, the Court again split 4-4 in another case challenging the 1972 amendments as

statutory civil rights and the Establishment Clause—or at the very least a sequel to *Lemon v. Kurtzman*—the Court delivered a comparatively mundane explication of national labor policy, concluding that protections for seniority systems in Title VII indicated Congress did not intend it generally to undercut labor law.[255]

Groff then turned to the "single, but oft-quoted, sentence [that], if taken literally, suggested that even a pittance might be too much for an employer to be forced to endure."[256] It recognized that "this line would later be viewed by many lower courts as the authoritative interpretation of the statutory term 'undue hardship,'" but criticized as "doubtful" lower courts' half-century notion that *Hardison* meant it to take on that role.[257] Continuing, it chastised lower courts that "latched" onto the *de minimis* language despite the fact that it was "undercut by conflicting language and was fleeting in comparison to its discussion of the 'principal issue' of seniority rights."[258] The Court pointed to its discussion in a footnote on the previous page of U.S. Reports in which it responded to Justice Marshall's dissent, "stating three times that an accommodation is not required when it entails 'substantial' 'costs' or 'expenditures'" as well as its rebuttal of Justice Marshall's estimate of the costs TWA would have incurred to accommodate Hardison.[259] Piling on, the Court pointed out that individual justices had "warned that, if the *de minimis* rule represents the holding of *Hardison*, the decision might have to be reconsidered," tacitly implying that *de minimis* might not, in fact, be the standard.[260] In essence, *Groff* concludes that for nearly 50 years, lower federal

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unconstitutional under the Establishment Clause. Parker Seal Co. v. Cummins, 429 U.S. 65 (1976) (per curiam). Altogether, *Groff* suggests that these events intimated that *Hardison* would address whether 1972 amendments to Title VII violated the Establishment Clause. *Groff*, 600 U.S. at 459-61. The briefing tracked those expectations. *Id.*

[255] *Id.* at 461-62. Weighing religious accommodation rights against seniority rights in a collective bargaining agreement, the Court held labor protections took precedence over religious protections in Title VII because other provisions of that statute afforded "special treatment" to seniority rights collectively bargained. *Id.* In other words, as there was no way to accommodate Hardison without undercutting the seniority rights of other employees, Title VII did not require TWA to accommodate his religious beliefs or practices. The bona fide seniority rights protected in a collective bargaining agreement took precedence, or at least were theoretically encompassed in the union's bargaining decisions. *See generally id.* at 462; *Hardison*, 432 U.S. at 68, 80.

[256] *Groff*, 600 U.S. at 464 ("To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship.") (citing *Hardison*, 432 U.S. at 84).

[257] *Id.*

[258] *Id.* at 465. *Groff's* placing of the blame for the *de minimis* test on lower courts' misreading *Hardison* may hold for decisions between 1977 and 1986. *See supra* Section II.E.2. But not after *Ansonia*. *See supra* Section II.E.2. Since then, lower courts' have applied the *de minimis* test because the Court squarely directed them to do so, confirming in *Ansonia* that such was its construction of "undue hardship" in, and the test required by, *Hardison*. *See supra* Section II.E.2.

[259] *Groff*, 600 U.S. at 464 (citation omitted).

[260] *Id.* at 467; *see also supra* note 216. This characterization is exceedingly generous. Neither Justice Gorsuch's dissent in *Small v. Memphis Light, Gas & Water* nor Justice Alito's concurrence in *Patterson v. Walgreen Co.* suggests—as the Court intimates—that the *de minimis* rule may not represent the holding of *Hardison*. Small v. Memphis Light, Gas & Water, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting); Patterson v. Walgreen Co., 140 S. Ct. 685, 685 (2020) (Alito, J., concurring). To the contrary, both Justices take aim at the *de minimis* standard.

courts and the Commission misinterpreted *Hardison*,[261] simply missing the correct interpretation of undue hardship in favor of a mistaken view of that decision, when the correct answer lay before them all along.[262]

Rather than razing the edifice of the much maligned *Hardison* as many amici urged, the Court renovated, remodeled, and restored it.[263] Applying traditional tools of statutory construction, the Court concluded that a proposed religious accommodation carries an undue hardship if the burden imposes substantial costs or expenditures in the "overall context of an employer's business," which is "something closer to *Hardison*'s references to 'substantial additional costs' or 'substantial expenditures'" than to more than *de minimis* cost.[264] The Court rejected constructions proposed by the parties and resisted suggested efforts to elaborate on the application of the new *Hardison*.[265] It did, however, explain that the clarification of the proper decision limits the extent to which employers can rely on the impact of accommodations on other workers as an undue hardship.[266] Only where such impact directly relates to the "conduct" of the employer's business is it relevant to the undue hardship analysis.[267] Simply because other employees—who may be biased or hostile to religion generally or to the employee's religion—complain does not amount to an undue hardship for

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Small, 141 S. Ct. at 1228; *Patterson*, 140 S. Ct. at 685. For example, Justice Gorsuch stated that in *Hardison* "this Court dramatically revised—really, undid—Title VII's undue hardship test." *Small*, 141 S. Ct. at 1228. And Justice Alito wrote that "…we should reconsider the proposition, endorsed by the opinion in [*Hardison*] that Title VII does not require an employer to make any accommodation for an employee's practice of religion if doing so would impose more than a *de minimis* burden"). *Patterson*, 140 S. Ct. at 685. Neither opinion lays blame on lower courts for misreading *Hardison* nor suggests that "substantial costs" is the appropriate standard.

[261] This defense of the lower courts is not to say that they never misread Supreme Court opinions. A contemporary illustration is *District of Columbia v. Heller*. District of Columbia v. Heller, 554 U.S. 570 (2008) (the Second Amendment protects a pre-existing individual right to keep and bear arms). There, the Court engaged in an exhaustive analysis of the Second Amendment and the rights it codified. *See id.* at 576-626. At the end, it offered a few paragraphs noting that it was not opening debate on the lawfulness of every firearm restriction. *Id.* at 626-27. And in response to Justice Breyer's dissent, the Court commented that the challenged law would be unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Id.* at 628–29. In response, nearly all the lower courts misconstrued these comparatively brief statements as the primary message and holding of *Heller*. They applied means-end (intermediate) scrutiny and dismissively spurned challenges to legal restrictions on the basis that they fit within "longstanding prohibitions." *See, e.g.*, Range v. Attorney General, 69 F.4th 96 (3d Cir. 2023) (en banc) (nothing that "[m]any courts around the country, including this one, overread that passing comment to require a two-step approach in Second Amendment cases, utilizing means-end scrutiny at the second step … and we continued down that road for over a decade") (collecting cases). In 2022, the Court corrected this common error. *See* N.Y. Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022). There are broad similarities between these cases. Unlike in the context of Title VII religious accommodation, however, in the context of the Second Amendment the Court did not issue a decision analogous to *Ansonia*, expressing endorsing means-end scrutiny.

[262] *Groff*, 600 U.S. at 472.

[263] *Id.* at 468-72.

[264] *Id.* at 468-69.

[265] *Id.* at 469-71.

[266] *Id.* at 472-73.

[267] *Id.* at 472.

purposes of Title VII.[268] *Groff* offered little guidance regarding what might pose an undue hardship on the conduct of an employer's business.

Time will reveal just how much more demanding the substantial cost standard is than *de minimis*. Suffice it to say, however, that *Groff* made it considerably more difficult for employers to defeat religious accommodation claims because they pose an undue hardship.[269] As fewer cases may be resolved on this ground, the religion and sincerity elements of such cases are less likely to be conceded by employers less confident they will prevail on undue hardship. And *Groff* did not discuss any other aspect of religious disparate treatment actions under Title VII, including the requirement that plaintiffs demonstrate a *religious* belief, observance, or practice that is *sincerely* held.[270] As a result, courts will be increasingly compelled to decide these difficult questions without the easy escape of *de minimis*.[271]

F. Title VII Religious Accommodation Cases

In *Groff*, the Court focused solely on the meaning "undue hardship" in Title VII religious accommodation cases. It did not address any other element or aspect of these cases, leaving much of the case law on these requirements undisturbed.

1. Prima Facie Showings and Burdens

a. Employees

For decades, the courts recognized a claim for failure to accommodate religion under Title VII that was distinct from a traditional claim for religious disparate treatment and the burden-shifting framework created in *McDonnell Douglas Corp. v. Green*.[272] But, in 2015, the Supreme Court clarified that Title VII prohibits two "categories" of employment practices—disparate treatment (or intentional discrimination) and disparate impact.[273] Since *EEOC v. Abercrombie & Fitch*, a Title VII action alleging religious disparate treatment generally proceeds as follows:

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[268] *Id.*

[269] *See id.*

[270] *See generally id.*

[271] Unless otherwise indicated, when this article's uses "Hardison," it refers to that decision as it was understood prior to the Court's decision in *Groff*. References to "Groff" encompass that decision as well as its reinvention and refurbishing of *Hardison*.

[272] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[273] EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 771, 773 (2015) (holding that Title VII does not contain a freestanding religion failure to accommodate cause of action, which is "disparate treatment claim[] based on a failure to accommodate a religious practice").

> [A] plaintiff must first set forth a prima facie case by showing that (1) his sincere and bona fide religious belief conflicted with an employment requirement, and (2) his employer took adverse employment action against him because of his inability to comply with the employment requirement or because of the employer's perceived need for his reasonable accommodation. Once a plaintiff makes out a prima facie case, the burden shifts to the employer to show that it either offered a reasonable accommodation or that it cannot reasonably accommodate the employee's religious practice without undue hardship on its business. If an employer establishes that it offered a reasonable accommodation for the employee's religious practice, it is entitled to judgment in its favor. The employer has no further obligation to offer an employee's preferred accommodation or to demonstrate that an employee's preferred accommodation would cause an undue hardship.[274]

Within the two elements of a plaintiff's prima facia case are several distinct components.

The first element contains three overlapping, but distinct, requirements. The plaintiff must allege a belief, observance, or practice that is, in fact, religious.[275] Also, the plaintiff must show that he sincerely holds the religious belief.[276] And, finally, the plaintiff must allege that the sincerely held religious beliefs conflict with an employment requirement.[277] In some courts the second element of the plaintiff's prima facie showing is an tangible adverse action by the employer in addition to and separate from the refusal or failure reasonably to accommodate the religious belief.[278] Each of these components is discussed in greater detail below.[279] Before turning to them, however, it is important to note that several circuits have added or incorporated certain practical requirements.

These additional showings are often subsumed within the standard elements of bona fide religious belief, sincerity, and adverse action. The most ubiquitous is notice. Most plaintiffs are required to put their employers on

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[274] Bailey v. Metro Ambulance Servs., Inc., 992 F.3d 1265, 1275 (11th Cir. 2021) (internal citations omitted).
[275] *Id.*
[276] *Id.*
[277] *Id.*
[278] *Id.*; *see infra* Section II.F.4.
[279] *See infra* Section II.F.1-5.

notice of their religious beliefs and the conflicting employer rule or policy.[280] Mere knowledge or awareness that an employee is an adherent of a certain religion is often insufficient, as such a requirement would invite the very employer inquiries most employees would find distasteful.[281] Like most employee notice requirements, there is no script or magic words required, and the burden is not onerous.[282]

The notice requirement performs at least three functions. First, it relieves employers of the obligation to know the religious beliefs of their workers and, therefore, the need to inquire and maintain records regarding each employee's religious beliefs and practices. Practically, as courts have noted, an individual's religious beliefs are not visually apparent, and certainly less so than race, color, or sex.[283] Wearing a cross implies the wearer is a Christian, but it does not reveal whether she is Presbyterian, Episcopalian, or Baptist, much less convey specifics about her beliefs.[284] Were employers responsible for knowing the religious beliefs of their employees, they not only would be compelled to engage with workers to learn their religious beliefs but also to follow up regularly to make sure the information remained accurate. Few employees would welcome such an invasive approach.[285].

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[280] *See, e.g.*, Adeyeye v. Heartland Sweeteners, *LLC*, 721 F.3d 444, 450 (7th Cir. 2013) ("[A]n employee who wants to invoke an employer's duty to accommodate his religion under Title VII must give the employer fair notice of his need for an accommodation and the religious nature of the conflict"); Wilkerson v. New Media Technology Charter Sch. Inc., 522 F.3d 315, 319 (3d Cir. 2008) ("The employee must give the employer "fair warning" that a particular employment practice will interfere with that employee's religious beliefs. That is because "[a] person's religion is not like [her] sex or race[,]" that is, simply announcing one's belief in a certain religion, or even wearing a symbol of that religion (*i.e.*, a cross or Star of David) does not notify the employer of the particular beliefs and observances that the employee holds in connection with her religious affiliation. We do not charge employers with possessing knowledge about the particularized beliefs and observances of various religious sects"); *see also* EEOC COMPLIANCE MANUAL, *supra* note 228, at § 12.IV.A.1 (Jan. 15, 2021).

[281] Reed v. Great Lakes Companies, Inc., 330 F.3d 931, 936 (7th Cir. 2003). *See* Knight v. Connecticut Dept. of Pub. Health, 275 F.3d 156, 168 (2d Cir. 2001) ("Knowledge that [Plaintiffs] are born-again Christians is insufficient to put their employers on notice of their need to evangelize to clients. To hold otherwise would place a heavy burden on employers, making them responsible for being aware of every aspect of every employees' religion which could require an accommodation"); Heller v. EBB Auto Co., 8 F.3d 1433, 1439 (9th Cir. 1993) ("A sensible approach would require only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements").

[282] *Adeyeye*, 721 F.3d at 450; Brown v. Polk Cnty., Iowa, 61 F.3d 650, 654 (8th Cir. 1995) ("An employer need have "only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements"). *But see* EEOC v. North Mem'l Health Care, 908 F.3d 1098, 1103 (8th Cir. 2018) ("Whether an employee or job applicant must make a request for religious accommodation to maintain a Title VII claim for religious discrimination under 42 U.S.C. § 2000e-2(a) is an open question after *Abercrombie & Fitch*. Even if not required, we construe the express reference to religious accommodation in § 2000e(j) as evidencing Congress' intent to protect requests for religious accommodation").

[283] *Adeyeye*, 721 F.3d at 449, 50; *Wilkerson*, 522 F.3d at 319.

[284] *Wilkerson*, 522 F.3d at 319.

[285] Likewise, many employers would balk at an explicit or *de facto* obligation to learn, create and maintain records, and proactively engage employees regarding their religious beliefs and potential conflicts (and accommodations) with workplace rules. Against the broader backdrop of privacy laws and, for governments,

Even without the pressure to press employees regarding religious beliefs, just as in Free Exercise cases, where the Court recognized the unseemliness of governmental scrutiny of an individuals' religious beliefs, so too in Title VII religious cases have courts discouraged employers from engaging in similar inquiries.[286] Today, when it comes to power over individuals' day-to-day lives, some see little practical distinction between governments and corporations. And while legal differences are significant, for purposes of Title VII both employers and employees benefit when employees seeking a religious accommodation bear the burden to notify the employer of their beliefs and the way it conflicts with their job duties.

Second, the notice requirement frames the employer's accommodation obligation. After all, an employer cannot accommodate that which it does not know, nor does Title VII require the employer to be clairvoyant about the particulars of religious practices or beliefs.[287] And, as outlined above, employers are not required to understand—and should not presume—the particulars of an employee's beliefs.[288] For example, take an employee who informs his employer that an assigned training violates her religious beliefs. Perhaps she goes further to assert that LGBT elements of the training violate her Catholic religious beliefs. This employee has certainly notified the employer that she perceives a conflict between her religious beliefs and a work requirement. And many—religious and non-religious—might find this an obvious conflict and the information sufficient.[289] On a

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constitutional protections, much of the information collected would be needlessly intrusive—beliefs and practices that would never conflict with work requirements and, as a result, be unnecessarily invasive. Worse, in possession of wide-ranging information regarding each employee's religious and beliefs, employers would likely face additional claims of religious discrimination premised on allegations that adverse actions were motivated by detailed information regarding the employee's religious beliefs. Far more preferable to employers and employees is a framework where the former engage with those of the latter who approached them with concerns and potential conflicts between specifics beliefs and competing job requirements.

Most employees would find ongoing inquiries regarding the specifics of their religious beliefs, observances, and practices unreasonably invasive and uncomfortable. And the particulars of an individual's beliefs are often not indicative of accommodation requests. Some employees hold strong, fervent religious beliefs, but do not feel compelled to seek certain accommodations for them. A strict, conservative Muslim, for example, may personally condemn homosexual behavior, but nevertheless work side-by-side with LGBT colleagues on the job. A devout Christian may consistently take a Sabbath but recognize the rare need to work on Sundays due to unforeseen emergencies. Many would prefer to approach their employers regarding conflicts between their religious beliefs and work requirements if they arise.

[286] *Heller*, 8 F.3d at 1439 (internal citations omitted).

[287] Again, the deference incorporated into the Title VII analysis, borrowed from Free Exercise Clause jurisprudence, dictates the minimal burden on the employer. As noted below, the religious rights protected by Title VII are hyper-individualized. Therefore, even an employer well versed in the theology of common religions could not necessarily presume that an employee professing the same general faith adheres to the specific beliefs in questions or, even if they do, agree regarding potential conflicts with work requirements or reasonable accommodations.

[288] Reed v. Great Lakes Companies, Inc., 330 F.3d 931, 936 (7th Cir. 2003).

[289] The employee's religious beliefs likely concern a myriad of contentious social issues ranging from sexual mores to marriage, to transgender sport participation, to education, to harassment, to name a few. Additionally, the specifics of the training program are critical. Is it mandatory Title VII harassment training that makes clear that

basic, formal level it is. The employer has been placed on notice of a potential conflict and her desire for accommodation. Beyond the superficial, however, the employee has provided very little. The "obviousness" of this example stems from others' assumptions about the religion and the conflict. Instead of presuming, the employer ought to seek additional information from the employee about her belief and regarding the particulars of the training, rather than proceed on its presumptions. Only when the employer understands specifics about the conflict can it meaningfully identify the conflict between religion and policy and either prevent the conflict or accommodate the belief or practice.

Third, as the notice requirement essentially requires the plaintiff to preview much of a prima facie case, it compels the parties to communicate prior to filing a charge and, therefore, makes accommodation more likely. When employees and employers communicate in good faith regarding the employee's religious beliefs and practices, experience demonstrates that the parties are more likely to resolve their dispute without litigation.[290] In cases that proceed to court, the parties' communications frame the conflict, which aids the judicial process, and, in turn, benefits employees, employers, and the courts.

b. Employers

If the employee makes the prima facie showing above, the burden of

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legal prohibitions of sex discrimination include the bases of sexual orientation and transgender status? Or did the program attempt to modify, criticize, or pressure employees to change, their religious beliefs, observance or practice? The Commission has recognized that "the content of the training materials may be determinative in deciding whether it would pose an undue hardship to accommodate an employee by excusing him or her from the training or a portion thereof." EEOC COMPLIANCE MANUAL, *supra* note 228, at § 12.IV.C.7, Example 55 & n.315. "If the training required or encouraged employees to affirmatively support or agree with conduct that conflicts with the employee's religious beliefs, or signal their support of certain values that conflict with the employee's religious beliefs, it would be more difficult for an employer to establish that it would pose an undue hardship to accommodate an employee who objects to participating on religious grounds." *Id.*; *see also* Buonanno v. AT&T Broadband, LLC, 313 F. Supp. 2d 1069, 1081-83 (D. Colo. 2004) (holding that a company could require and instruct employees to treat coworkers with respect in accordance with corporate diversity policy, but that a violation of Title VII occurred where the company did not accommodate employee's refusal on religious grounds to sign diversity policy asking him to "value the differences among all of us," which he believed required him to ascribe worth to a certain behaviors or beliefs he believed were repudiated by Scripture rather than simply agree to treat his coworkers appropriately).

[290] *See* EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 228. Logically, communications between an employer and employee on the particulars of religious beliefs, potential accommodations, and employer hardships ensure that all parties possess the facts—and are not acting on assumptions, stereotypes, or a general lack of information. This makes accommodation more likely, which is why the Commission urges it. Moreover, courts have held that some employers who refuse to undertake such efforts lacked sufficient information to demonstrate that an accommodation would, in fact, pose an undue hardship. *See, e.g.*, EEOC v. Arlington Transit Mix, Inc., 957 F.2d 219 (6th Cir. 1991). Of course, after *Groff*, an employer arguing that a proposed accommodation would have posed an undue hardship must show substantial costs or expenditures in the "overall context of an employer's business." *Groff*, 600 U.S. at 468-69; see supra Section II.E.4.

production shifts to the employer, who must show that it could not accommodate the employees' religious beliefs without undue hardship.[291] Generally, this has been a two-prong inquiry. To satisfy its burden, the employer must demonstrate either (1) that it provided the plaintiff with a reasonable accommodation for his or her religious observances or (2) that such accommodation was not provided because it would have caused an undue hardship—that is, it would have resulted in "more than a *de minimis* cost" to the employer.[292]

As the Fourth Circuit explained:

> If an employer has provided a reasonable accommodation, we need not examine whether alternative accommodations not offered would have resulted in undue hardship. In fact, where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. This is because the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation. Moreover, the employer need not provide the employee with his or her preferred accommodation. Rather, so long as the employer has offered a reasonable accommodation, it has fulfilled its duty under Title VII.[293]

In addition, the Fifth Circuit has recognized:

> The range of acceptable accommodations under Title VII moderates the conflicting interests of both the employee and the employer: (1) it protects the employee by requiring that the accommodation offered be "reasonable;" and (2) it protects the employer by not requiring any accommodation which would impose an "undue hardship." Offered an accommodation falling within this range, the employee cannot insist upon a specific or more beneficial one. Nor must an employer offer one.[294]

As noted in this overview, the burden-shifting framework courts have applied

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[291] Knight v. Conn. Dept. of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001) (citations omitted).
[292] EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 312 (4th Cir. 2008) (citations omitted).
[293] *Id.* at 312-13 (internal punctuation and citations omitted).
[294] EEOC v. Universal Mfg. Corp., 914 F.2d 71, 72-73 (5th Cir. 1990) (citations omitted).

since *Abercrombie & Fitch* requires a series of overlapping elements.[295] Each circuit articulates a similar variation.[296] Some favor employees; others tend to help employers.[297] Each element is addressed in turn.

2. A Custom, Belief, or Practice that is Religious

What makes a belief *religious*? Like the Free Exercise Clause, Title VII protects only religious beliefs, observances, and practices. Neither encompasses a general right of conscience, thought, ideas, or opinion.[298] The philosophical, ethical, moral, political, or different way of life may enjoy other statutory or constitutional protections, but not from section 2000e(j).[299] However, identifying the types of beliefs that are *not* religious only begs the question, what *is* a religious belief under Title VII?

Unfortunately, Title VII is unhelpful. There, as discussed above, Congress defined religion to include "all aspects of religious observance and practice, as well as belief."[300] Hardly the work of a master philologist, the definition is circular; it uses religion as part of the definition of religion.[301] The provision suffers from another flaw. It conditions whether a practice or observance constitutes religion only in part on its content.[302] Even an undisputedly religious practice is not religion under Title VII if an employer may not reasonably accommodate it absent undue hardship.[303] Thus, the status of a religious practice or observance as religion under Title VII is determined on a case-by-case basis based on whether the employer in question can reasonably accommodate it without undue hardship—a legal conclusion that has nothing to do with the nature of the underlying belief.[304] Accordingly, a Seventh Day Adventist's bona fide belief in, and a lifetime's perfect practice of, a Saturday Sabbath is not, in fact, *religious* for Title VII accommodation purposes if his employer cannot afford him the day because, for example, it would violate a collective bargaining agreement.[305]

Likewise, by their terms, the Religion Clauses of the First

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[295] *See supra* text accompanying notes 274-78; Bailey v. Metro Ambulance Servs., Inc., 992 F.3d 1265, 1275 (11th Cir. 2021).

[296] *See supra* notes 281-82.

[297] *See supra* note 282.

[298] *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation … if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief"). *Compare* U.S. CONST. amend I *with* U.N. Universal Decl. of Hum. Rights, Art. 18, 19.

[299] *See Yoder*, 406 U.S. at 215.

[300] 42 U.S.C. § 2000e(j); *see supra* Section II.C.

[301] 42 U.S.C. § 2000e(j).

[302] *See supra* Section II.C.

[303] *See supra* Section II.C.

[304] *See supra* Section II.C.

[305] *See* Trans World Airlines, Inc., v. Hardison, 432 U.S. 63 (1977).

Amendment themselves do not specify what counts as religion or religious for their purposes.[306] However, in applying the Religion Clauses in contexts other than religious exemptions or accommodations, Supreme Court cases frame general principles that have informed how courts approach and answer these questions. One of the most widely known example is the ministerial exemption.[307] The Religion Clauses draw a line between civil and religious authorities, protecting each from the other. In the context of the ministerial exemption, they are protected from the former by ensuring that right and ability "to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone."[308] Practically, this protects the employment rights of religious organizations.[309] For immediate purposes, the primary principle is one of caution. As a part of the government, courts should proceed cautiously when delving into questions of religion.[310]

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[306] *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

[307] The Ministerial Exemption falls outside the scope of this article and, likewise, a parsing of recent, much less all, Supreme Court or appellate cases that touch upon religion or the Free Exercise Clause, including the application of free speech protections to religious activity. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022); Shurtleff v. City of Bos., 596 U.S. 243 (2022); Fulton v. City of Philadelphia, 593 U.S. 522 (2021); Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

[308] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 194-95 (2012) (quoting Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 119 (1952)).

[309] *See* Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020) ("Under this rule, courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions").

[310] *See* Demkovich v. St. Andrew the Apostle Parish, 3 F.4th 968, 975 (7th Cir. 2021) (en banc) ("Supreme Court precedent reflects repeated engagement with that boundary and teaches that avoidance, rather than intervention, should be a court's proper role when adjudicating disputes involving religious governance"); *see also* Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 886-87 (1990) ("It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims. … [I]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds. Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim"); Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich, 426 U.S. 696, 697-99, 724-25 (1976) (dispute over control of church property and appointment of bishops); *Kedroff*, 344 U.S. at 95-96, 120-21; Watson v. Jones, 13 Wall. 679, 713-15, 727-29 (1872); Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 132 (1st Cir. 2004) ("Determining whether a belief is religious is more often than not a difficult and delicate task, one to which the courts are ill-suited") (citations omitted); Int'l Soc. For Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 432-33 (2d Cir. 1981) ("Courts temporal are not ideally suited to resolve problems that originate in the spiritual realm. But [in some instances] a threshold inquiry into the "religious" aspect of particular beliefs and practices cannot be avoided. We recognize our limited expertise in this endeavor and proceed carefully to outline the relevant facts necessary for mediating the instant confrontation between the dictates of religious conscience and the pragmatic needs of the state") (citations omitted). *See generally* U.S. CONST. art. VI cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution; *but no religious Test shall ever be required as a Qualification* to any Office or public Trust under the

As disfavored as judicial scrutiny into religious beliefs may be, Title VII religious accommodation analysis requires a conflict between a religious belief or practice and a work requirement. Thus, in cases where the point is disputed, courts must evaluate whether a belief or practice is religious. The Supreme Court cases most frequently cited for authority on this question are *Seeger*, *Welsh*, and *Yoder*, though other cases from the Court and the courts of appeals also are illustrative.[311]

a. Supreme Court

1. *Seeger* and *Welsh*

Although the Supreme Court has never clearly defined what makes a belief religious, it has offered guideposts in the First Amendment context.[312] In two constitutional cases often cited as framing the test for what makes a belief or practice religious under Title VII, *Seeger* and *Welsh*, the Court interpreted a provision (the "religious training and belief clause") in a federal law providing an exemption from certain forms of military service to religious conscientious objectors.[313] The "task is to decide whether the

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United States") (emphasis added).

[311] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965).

[312] *See, e.g.*, *Yoder*, 406 U.S. 205; *Welsh*, 398 U.S. 333; *Seeger*, 380 U.S. 163; United States v. Ballard, 322 U.S. 78 (1944). Much of the inconsistency, tension, and general incoherence in the application of the Free Exercise Clause can be traced to the lack of a rule that clearly identifies religious from non-religious beliefs purposes of Title VII (or the First Amendment).

[313] *Seeger*, 380 U.S. at 179-71; Welsh, 398 U.S. at 336-37. Congress enacted military conscription statutes for World War I, World War II, and the conflict in Vietnam. Each contained a provision allowing religious conscientious objectors to avoid certain types of military service. The Selective Service Act of 1917 provided that its contents could not "be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations. Selective Service Act of 1917, Pub. L. No. 65-12, 40 Stat. 78.

Prior to the nation's entry into World War II, Congress passed the Selective Training and Service Act of 1940, also known as the Burke-Wadsworth Act. Selective Training and Service Act of 1940, Pub. L. No. 76-783, 54 Stat. 885. It included a similar religious exemption, which no longer required membership in a religious sect and extended the exemption to those opposing war based on personal belief. *See* 54 Stat. at 889 ("Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form"). Although the Supreme Court did not interpret the provision, both the Second Circuit and the Ninth Circuit concluded that whatever was included in the phrase "religious training and belief," beliefs that were political, social, or philosophical, or amounted merely to an individual moral code, were not included. *See* Berman v. United States, 156 F.2d 377 (9th Cir. 1946); United States v. Kauten, 133 F.2d 703 (2d Cir. 1943).

In the aftermath of World War II, Congress enacted the Selective Service Act of 1948, also called the Elston Act. Selective Service Act of 1948, Pub. L. No. 80-759, 62 Stat. 604. The statute provided mechanisms to achieve and maintain an armed service and reserve adequate to maintain and ensure the security of the United States. *Id.* Like its predecessors, it contained provisions for conscientious objectors. *See* 62 Stat. at 612 ("Nothing contained

beliefs at issue were (1) sincerely held and (2) religious in nature under the plaintiff's 'scheme of things.'"[314] For purposes of separating religious beliefs from other types, only the second element is relevant.[315] There, the Court explained that in referencing a plaintiff's "own scheme of things" it sought to clarify that the "central consideration in determining whether the [plaintiff's] beliefs are religious is whether these beliefs play the role of a religion and function as a religion in the [plaintiff's] life."[316] While the Court established this test applying the Free Exercise Clause to statutory exceptions to compulsory military service, lower courts have relied upon it to determine whether a belief or practice is religious in nature under Title VII.[317] Other judges and courts have also undertaken their own efforts to define what constitutes religion.[318]

In *Seeger*, the Court considered the convictions of three defendants

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in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form"). Congress also defined "religious training and belief" to mean "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code." *Id.* at 613; *see also* United States v. McIntosh, 283 U.S. 605, 633-4 (1931) (Hughes, C.J., dissenting) ("The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation"), overruled by Girouard v. United States, 328 U.S. 61 (1946). In *Seeger* and *Welsh*, the Court construed this version of the statute.

In 1967, after the Court decided *Seeger*, Congress amended the conscientious objector provision by removing the reference to a supreme being. *See* Military Selective Service Act of 1967, Pub. L. No. 90-40, 81 Stat. 100, 104 ("Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious, training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code.").

[314] *Welsh*, 398 U.S at 339 (citing *Seeger*, 380 U.S. at 185).

[315] *See* discussion *supra* Section II.D. The sincerity requirement in Title VII actions alleging disparate treatment premised on a failure to accommodate, aims to distill which religious beliefs merit constitutional protection from society's laws or an employer's requirements. *See supra* note 86 and accompanying text. However, it is immaterial to identifying what makes a belief religious. After all, one's sincerity—or fervency—in holding a belief does not transform that belief into a religious one. Many individuals hold all types of beliefs sincerely. These include political, philosophical, moral, social, and economic beliefs. Also, many have strong views on the ways one should live and prioritize their lives. To exclude such views is not to denigrate them, but simply to recognize that they are not *religious* under Title VII. While these beliefs enjoy other protections, including under other clauses of the First Amendment, they fall outside section 2000e(j).

[316] *Id.*

[317] *See, e.g.*, Fallon v. Mercy Catholic Med. Ctr. of Se. Pa., 877 F.3d 487 (3d Cir. 2017); Davis v. Fort Bend Cnty., 765 F.3d 480, 485 (5th Cir. 2014); Moore-King v. Cnty. of Chesterfield, Va., 708 F.3d 560 (4th Cir. 2013); Adeyeye v. Heartland Sweeteners, *LLC*, 721 F.3d 444, 451 (7th Cir. 2013).

[318] *See, e.g.*, *McIntosh*, 283 U.S. at 633-34 (Hughes, C.J., dissenting) ("The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation"); Davis v. Beason, 133 U.S. 333, 341 (1890) (religion referred "to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will"); United States v. Kauten, 133 F.2d 703, 708 (A. Hand, J.) ("It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets."). *See infra* Section II.F.2.b.

for refusing to submit to induction into the armed forces. In 1953, defendant Seeger was originally classified 1-A, that is available for military service, but in 1955 he obtained a student classification, through which he was exempted from military service until 1958, when he was reclassified as 1-A.[319] In 1957, he first claimed to be a conscientious objector, explaining his opposition to war on the relevant form and in a lengthy supporting memorandum.[320] As characterized by the Court, he declared that he was

> conscientiously opposed to participation in war in any form by reason of his "religious" belief; that he preferred to leave the question as to his belief in a Supreme Being open, "rather than answer 'yes' or 'no"'; that his "skepticism or disbelief in the existence of God" did "not necessarily mean lack of faith in anything whatsoever"; that his was a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."[321]

Seeger cited "Plato, Aristotle and Spinoza for support of his ethical belief in intellectual and moral integrity without belief in God, except in the remotest sense.'[322]

As noted above, the post-World War II conscription statute that applied to the defendants excused from military service any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."[323] For purposes of this provision "religious training and belief" meant "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."[324] The lower courts found that his "belief was sincere, honest, and made in good faith; and his conscientious objection to be based upon individual training and belief, both of which included research in religious and cultural fields."[325]

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[319] United States v. Seeger, 380 U.S. 163, 166 (1965).
[320] *Id.* at 166-68.
[321] *Id.* at 166.
[322] *Id.*
[323] Selective Service Act of 1948, Pub. L. No. 80-759, 62 Stat. 604, 612.
[324] *Id.* at 613.
[325] *Seeger*, 380 U.S. at 166-67. Defendant Jacobson was originally classified 1-A and obtained a student classification for several years before claiming to be a conscientious objector in 1958. *Id.* at 67 He claimed that he believed in "a 'Supreme Being' who was 'Creator of Man' in the sense of being 'ultimately responsible for the existence of' man and who was 'the Supreme Reality' of which 'the existence of man is the result.'" *Id.* at 167. Also, he stated, "that his religious and social thinking had developed after much meditation and thought" and "concluded that man must be 'partly spiritual' and, therefore, 'partly akin to the Supreme Reality'; and that his 'most important religious law' was that 'no man ought ever to wilfully [sic] sacrifice another man's life as a means

Based on the facts and the statute as presented in the opinion, the reader might very well conclude that the defendants did not qualify for the exemption. In reality, the religious beliefs articulated by those defendants more closely resemble personal convictions premised generally on philosophy and personal morality.[326] None of the defendants articulated a religious belief external to themselves, one that presented the defendants with a conflict between obeying its requirements or the government's draft summons.[327] But the Court took a different view.[328]

The Court focused on the statutory language "religious training and belief," which Congress defined as relating to "a Supreme Being."[329] Rather than identifying what Congress *included* in the definition—that is, what constituted religious training and belief—the justices began "by noting briefly those scruples expressly *excluded*."[330] Beliefs that war is wrong premised "on the basis of essentially political, sociological or economic consideration" are "reserved for the Government, and in matters which can be said to fall within these areas the conviction of the individual has never been permitted to override that of the state."[331] Similarly, opposition to war based on a "merely personal moral code" fell outside the universe of the

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to any other end.'" *Id.* at 167-8. Jacobson "felt that participation in any form of military service would involve him in 'too many situations and relationships that would be a strain on (his) conscience that (he felt he) must avoid'" and "submitted a long memorandum of 'notes on religion' in which he defined religion as the 'sum and essence of one's basic attitudes to the fundamental problems of human existence.'" *Id.* at 168. He said that he "believed in 'Godness' which was 'the Ultimate Cause for the fact of the Being of the Universe'; that to deny its existence would but deny the existence of the universe because 'anything that Is, has an Ultimate Cause for its Being.' … There was a relationship to Godness, he stated, in two directions, i.e., 'vertically, towards Godness directly,' and 'horizontally, towards Godness through Mankind and the World,'" and he accepted the latter. *Id.*

Defendant Peter claimed her was opposed to war, but "hedged the question as to his belief in a Supreme Being" and indicated that the answer "depended on the definition." *Id.* at 169. In a further statement, he claimed that "he felt it a violation of his moral code to take human life and that he considered this belief superior to his obligation to the state," and that it was religious in the sense that religion as "the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands … (; it) is the supreme expression of human nature; it is man thinking his highest, feeling his deepest, and living his best." *Id.* (citation omitted, cleaned up). Finally, he claimed his conviction was the result of "reading and meditation in our democratic American culture, with its values derived from the Western religious and philosophical tradition." *Id.* As to his belief in a Supreme Being, Peter stated that "you could call that a belief in the Supreme Being or God. These just do not happen to be the words I use." *Id.*

[326] *Id.*

[327] *Id.*

[328] *See id.*

[329] *Id.* at 173.

[330] *Id.* (emphasis added). The Court acknowledged the challenge in determining what is "religious" for purposes of the First Amendment against the deep religious diversity and history of the United States. *Id.* at 174 ("Few would quarrel, we think, with the proposition that in no field of human endeavor has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental questions of man's predicament in life, in death or in final judgment and retribution. This fact makes the task of discerning the intent of Congress in using the phrase 'Supreme Being' a complex one. Nor is it made the easier by the richness and variety of spiritual life in our country.").

[331] *Id.* at 173 (internal citations omitted).

religious for purposes of the conscientious objector provision.[332] The case did not raise a question of theistic versus atheistic belief, nor government efforts between monotheistic or polytheistic positions.[333] Instead, the narrow question presented was whether the statutory term "Supreme Being" meant the "orthodox God or the broader concept of a power or being, or a faith, to which all else is subordinate or upon which all else is ultimately dependent."[334]

Declining to exegete the term "Supreme Being," the Court again sought to define by contrast. Comparing the term with the previous version of the statute that used the term "God," the Court noted that Congress had intentionally reenacted the rest of the provision and, therefore, must have intended merely to broaden the scope of the beliefs.[335] Thus, the phrase encompassed "all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."[336] Put another way, it requires a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."[337] The test is "essentially an objective one."[338] And by adopting it, the Court claimed to avoid any implication that Congress attempted to distinguish between different *theistic* religious beliefs, selecting only some for protection.[339] Then the Court purported to apply its test and held that all the defendants satisfied the requirements of the conscientious objector provisions of the statute.[340]

Welsh went further. Reiterating the test and explanation above, the Court declared that *Seeger* was clear: "sincere and meaningful beliefs that prompt the registrant's objection to all wars need not be confined in either source or content to traditional or parochial concepts of religion."[341] Again, for purposes of the conscientious objector provision, to qualify as religious,

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[332] *Id.* at 173-174.
[333] *Id.*
[334] *Id.* at 174 (cleaned up).
[335] *Id.* at 175.
[336] *Id.* at 176.
[337] *Id.*
[338] *Id.* at 184.
[339] *Id.* at 176.
[340] *Id.* at 187-188. The Court approvingly cited a functional religious test that was advocated by Christian existentialist philosopher, religious socialist, and Lutheran Protestant theologian Paul Tillich. *See Seeger*, 380 U.S. at 187; *see also* PAUL TILLICH, DYNAMICS OF FAITH 1-2 (1958). The test applies a functional assessment of an individual's religion that does not require elements pertaining to God, gods, or theism generally. *Id.* The test treats an individual's "ultimate concern," whatever it may be, as that individual's religion in more than a functional way. *Id.* Such a concern must be more than "intellectual," a condition that Tillich considered satisfied when the individual would categorically "disregard elementary self-interest in preference ... in preference to transgressing its tenets." *See* Kauten, 133 F.2d at 708.
[341] Welsh v. United States, 398 U.S. 333, 339 (1970).

the "opposition to war [must] stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions."[342] The Court dismissed any notion that this would allow any non-religious objection to masquerade as religion, noting that if "an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by […] God' in traditionally religious persons."[343] Therefore, the Court rejected the idea that the statute's "exclusion of those persons with essentially political, sociological, or philosophical views or a merely personal moral code should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy."[344] As a result, the Court concluded that Welsh—who asserted that he believed taking life was morally wrong—was entitled to religious conscientious objector status.[345]

Even after divorcing the case from the broader Vietnam military draft context, *Welsh* left the already nebulous standard for determining what constitutes religion under the Free Exercise Clause even less clear than after *Seeger*. There is a fundamental disconnect between the Court's description of the legal standards regarding religion and its holdings in *Welsh* and *Seeger*. As noted above, in both cases the Court eschewed the opportunity squarely to define what religion *is* or *includes*.[346] Instead, it chose to illustrate religious beliefs by contrast, identifying for First Amendment purposes what religious *is not* or *excludes*.[347] Those matters, explained the Court, are "the conviction

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[342] *Id.* at 340.

[343] *Id.*

[344] *Id.* at 342.

[345] *Id.* The Court decided *Seeger* on March 8, 1965. *See Seeger*, 380 U.S. at 163. That same day, the United States landed approximately 3,500 marines near Da Nang, marking the beginning of the United States' ground war in Vietnam. *U.S. Marines in Vietnam: 1954-1975*, MARINE CORPS UNIV., https://www.usmcu.edu/Research/Marine-Corps-History-Division/Brief-Histories/Marines-in-Vietnam-1954-1975/#:~:text=In%20response%2C%20on%208%20March,and%20supply%20and%20logistics%20units. (last visited Fed. 22, 2024). At that time, public opinion strongly supported the deployment. William Lunch & Peter Sperlich, *American Public Opinion and the War in Vietnam*, 22 WESTERN POL. Q. 21, 22 (1979). The Court's cohesion, its holding, and the tone of its opinion reflect this broader support for military intervention. *See generally Seeger*, 380 U.S. 163. In contrast, *Welsh* was decided on June 15, 1970. *Welsh*, 398 U.S. at 333. At that time, the American people viewed the conflict in Vietnam very differently at home and abroad than five years earlier. Lunch & Sperlich, *infra* note 346. Imbued in the Court's brief opinion in *Welsh*, which tersely eviscerates (while purporting to apply) the limitations on what qualifies as religious for purposes of the conscientious objector exemption, one may glean the nation's frustration with, and anger toward, the conflict in Vietnam. *See generally Welsh*, 398 U.S. 333. The result was thinly veiled opposition to the government's efforts to conscript troops.

[346] *See supra* note 313.

[347] *See Seeger*, 380 U.S. at 173 (non-religious beliefs include those that are "essentially political, sociological or economic consideration" or that were based on, or constituted, a "merely personal moral code"); *see also Welsh*,

of the individual" that has "never been permitted to override that of the state."[348] But these types of beliefs are precisely what the Court held were religious in *Seeger*.[349]

Ultimately, *Seeger* and *Welsh* mark the boundaries of the Court's interpretation of religion for First Amendment purposes—an amorphous conception that verges on a general right of conscience.[350] To be sure, it incorporates "all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."[351] But the Court swept even more broadly beyond "parochial concepts of religion" to include that which the Court implicitly conceded was non-religious.[352] To achieve this, the Court construed the phrase "religious training and belief" to encompass just about any sincerely held belief—religious or not—that an individual alleges is important to him or her.[353] As a result, even though the Court claimed that the statutory religious exemption did not encompass personal moral codes or philosophies, those are precisely the beliefs the Court approved as religious in *Seeger* and *Welsh*.[354]

Having expanded the scope of what constitutes religion, the Court sought to impose limitations. To be religious, a belief may be "purely ethical

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398 U.S. at 342, (characterizing *Seeger* as excluding "essentially political, sociological, or philosophical views or a merely personal moral code").

[348] *Seeger*, 380 U.S. at 173.

[349] As outlined above, the Defendants Seeger and Peter described beliefs that resemble personal moral creeds or secular philosophies more than religions. *See supra* text accompanying notes 322-28. Defendant Seeger claimed a "belief in and devotion to *goodness and virtue for their own sakes*, and a religious faith in a *purely ethical creed*," citing to "*Plato, Aristotle and Spinoza*" to support "his *ethical belief in intellectual and moral integrity*." *Seeger*, 380 U.S. at 166 (emphasis added). Defendant Peter "felt it a violation of *his moral code* to take human life" and that he believed in "the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands … *it is man thinking his highest, feeling his deepest, and living his best*." *Id.* at 169 (emphasis added). He based these views on "*reading and meditation in our democratic American culture*, with its values derived from the Western religious and philosophical tradition." *Id.* (emphasis added). Finally, although Defendant Jakobson's beliefs may be slightly less personal and moral than those of the other defendants, his qualification for the exemption remains a close question given the Court's description of "*his* religious and social thinking" which he "developed after much meditation and thought." *Id.* at 167-68.

[350] The Court did not cite to dictionaries or similar aids to determine the meaning of "religious," "religion," or "religious training and belief." *See id.* at 173. *Seeger* and *Welsh* are far afield of any dictionary from the founding era (for purposes of the First Amendment), around the time of the original enactment of the conscientious objector clause, or even from any of the subsequent reenactments or military conscription legislation that any differences between dictionary entries of those times versus today, especially regarding such a commonly used word, pale in comparison.

[351] *Id.* at 176.

[352] *Welsh*, 398 U.S. at 339. The Court's very explanation of the statute's meaning implies as much. It dropped the adjective "religious" to cover any belief that is meaningful and held by the individual in a way that is similar or analogous to the way religious people hold religious beliefs. *Id.* at 339-40. By covering beliefs that are as important to their holders as religious beliefs are to religious individuals (those who "admittedly" qualify), the Court explicitly included non-religious beliefs within the religious exception. *Id.* at 40.

[353] *Id.* at 339.

[354] *See id.* at 343.

or moral in source and content"; should be sincerely held by and meaningful to the individual;[355] should "occup[y] … a place parallel[356] to that filled by the God of those" who, in fact, are "admittedly" religious or otherwise be "deeply and sincerely held";[357] and "impose a duty of conscience."[358] Although the Court labeled the inquiry "essentially … objective," this characterization strains credulity.[359] The Court suggested "a personal moral code" alone is not a religion, but a personal ethical belief that something is morally wrong is sufficient.[360] However, meaningful beliefs which occupy an important or central place in one's life, one "parallel to that filled by the God of those admittedly qualifying for the exemption," undoubtedly covers virtually any non-religious belief or personal moral code—likely too a significant swath of political, moral, social, economic, or philosophical

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[355] "Meaningful" is a term that is even more expansive than "religion," encompassing anything that is "significant," with a "serious, important, or recognizable quality or purpose," and that conveys "meaning." *Meaningful*, OXFORD ENGLISH DICTIONARY (2001). The open-endedness of the term is compounded by the fact that it is assessed subjectively, that is from the point of view of the plaintiff or individual seeking an accommodation.

[356] Some courts have used the term "central" to characterize the "place" in which an individual holds a belief. The concept conveyed appears to be one of relative importance, subjectively measured. At the outset, a "parallel place" concedes that the Court's construction of religion includes that which is not religion. And there are other shortcomings. Like sincerity, the place held by a belief has nothing to do with whether it is religious. Although one might argue normatively that *anything* that is important or central to a person's life is that person's *de facto* religion, placing such importance on the place of belief is perplexing. First, by centering on the place occupied by the belief, one fails to focus on the nature of the belief itself and reduces, or eliminates, its importance. The place itself becomes the characteristic that makes it religious—and the place is controlled by the plaintiff. As a result, a plaintiff may make virtually any sufficiently important belief religious because the plaintiff is the one who identifies, frames, and places (or defines the importance of) the belief within his or her own life. Indeed, the notion itself—as the centrality iteration makes explicit—presumes that all religious beliefs are equally important, or central, to the holder and that they are held as such constantly or even consistently. This is almost certainly not true, especially when it comes to religious practices and observances. Take a religious person. He or she likely holds many religious and non-religious beliefs. Together, those beliefs have shaped (and likely continue to shape) that individual. Nevertheless, it is difficult categorially to parse and rank each's importance, or even permanently to group important and less important in the abstract. Similarly, a religious observance or practice may be extremely important or central when it occurs—or when an employer's requirement interferes—but not to the same degree at every minute of every day. Regardless, any belief, observance, or practice subject to an accommodation request under Title VII is likely important enough to pass the low bar of *Seeger* and *Welsh* to be considered religious.

[357] Courts applying *Seeger* and *Welsh* in Title VII cases often do so when discussing the religious nature of the belief, observance, or practice at issue. As the Supreme Court's reimagining of religion in those cases incorporates sincerity as an element of what makes a belief religious, the plaintiff's credibility in asserting and describing the belief has further divorced this element from its moorings. *See Seeger*, 380 at 185; *Welsh*, 398 U.S. at 337. The honesty, credibility, effectiveness, truthfulness, or sincerity (or the lack thereof) does not to make a belief more (or less) religious in nature. Put another way, sincerity has nothing to do with the *religiousness* of a belief, observance, or practice. A credible plaintiff could no more transform secular philosophical or political beliefs into religion than an unpersuasive plaintiff could make even the most indisputably religious belief or practice non-religious. The infusion of sincerity into an inquiry of religiousness also invites courts to evaluate that credibility in part based on the believability of the substance of the belief in the eyes of the factfinder. Such considerations are improper in the context of sincerity, religion, or some combination of both.

[358] *See Seeger*, 380 U.S. at 176; *Welsh*, 398 U.S. at 339, 340.

[359] *Seeger*, 380 U.S. at 184. In fact, the broader framework is not objective. Much of the test is measured from the perspective of the individual.

[360] *See generally Welsh*, supra.

beliefs, especially when judged from the subjective vantage point of the individual.[361] Ultimately, the Court applied a predominantly individualized inquiry that encompasses within "religion" any beliefs an individual sincerely and credibly articulates as subjectively important to him or her.[362]

In fairness, the Court's primary objective (at least in *Seeger*) seemed to be religious neutrality.[363] It sought to avoid construing the conscientious objector provisions in a way that embraced only recognized, formal, established Western religions.[364] Additionally, within those, it was not limited to generally accepted or orthodox and excluded non-traditional beliefs that were not monotheistic—or even theistic.[365] Any doubt was removed in *Welsh*. There, the defendant believed simply that it was morally wrong to take a life.[366] Personal "moral, ethical, or religious beliefs about what is right and wrong" were enough, not because they were, in fact, religious, but rather because they were "held with the strength of traditional religious convictions."[367] As noted above, *Welsh* effectively allows any belief sincerely and strongly held to count as religious under the First Amendment.[368] This did not seem to concern the Court, which extended the religious exemption to those "who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy."[369] Whatever may be said of "strong beliefs" about "domestic and foreign affairs" that are "founded … upon considerations of public policy," they are not *religious* in any non-figurative way.[370]

The Court has not formally reconsidered *Welsh*.[371] But the challenges presented by its open-ended language, particularly in light of *Hardison*, may explain why few lower courts cite it exclusively in Title VII accommodation cases. Instead, courts prefer *Seeger* for its test on what constitutes a religious

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[361] *See id.* at 339.

[362] *Id.* at 342-43.

[363] As discussed at length above, religious neutrality figured largely in the Court's approach to religious accommodations in *Hardison*. *See supra* text accompanying notes 152-156.

[364] *See Seeger*, 380 U.S. at 175-76.

[365] *Id.* at 173-74.

[366] *Welsh*, 398 U.S. at 343. This is not to contend that a belief that killing is wrong, morally, or otherwise is not (or cannot be) religious in nature. It obviously can and often is. That is the point. Defendant Welsh did not attribute his belief to anything other than his personal moral, or as the Court concluded, "public policy" views. *Id.* Had his view, for example, been based in the Jewish Law, it undoubtedly would have been religious in nature.

[367] *Id.* at 340.

[368] *Id.*

[369] *Id.* at 342.

[370] *See id.* at 342-343.

[371] Given the broader context in which the case was decided, the Court could limit *Welsh* to its facts or characterize some of its broadest language as dicta, especially in light of later cases. Such a reading allows *Welsh* to fill the general role of confirming *Seeger* and providing some additional context regarding its application, without the broadest implications of its language. But until the Court takes this step, *Welsh* remains.

belief. But *Seeger* and *Welsh* are only part of the story.[372] Later Free Exercise cases have tempered its potential expansive application to section 2000e(j).[373]

2. *Yoder*

Two years after *Welsh*, the Supreme Court returned to the Religion Clauses in a different setting, exchanging compulsory military service in the jungles of Vietnam for obligatory school attendance beyond eighth grade in American public or private schools.[374] The Court further clarified what constituted protected religious belief and practice under the First Amendment, silently adjusting course from the balance struck in *Seeger* and *Welsh*.[375]

Like many states, Wisconsin required children to attend a certified public or private school until reaching a certain age.[376] At the time, that age was 16.[377] The respondents, however, were members of either the Old Order

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[372] To the Commission, however, they are the full story. The agency adopted, without independent analysis, the gloss of *Seeger* and *Welsh* on religion for Title VII purposes. 29 C.F.R. § 1605.1 (defining "religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views" and noting that the "fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious"). Commenters criticized the Commission's proposed definition as "too broad and vague" and noted that the Court's approach in "selective service" decisions was not appropriate for Title VII. *See* 45 F.R. at 72611. But the agency declined to respond to the commenters, finalized the proposed rule without substantive explanation, and merely noted its approach is based on Commission decisions that it neither named nor cited. *Id*.

[373] Decided one year after *Welsh* in the Term before *Yoder*, *Gillette v. United States* is also tangentially instructive here. Gillette v. United States, 401 U.S. 437 (1971). There, the Court confronted challenges to another part ("conscientiously opposed to participation in war in any form") of the conscientious objector provision. *Id.* at 441. The petitioners alleged that Congress' decision to excuse from military service conscientious objectors to all war, but not those opposed only to specific (*i.e.*, "unjust") wars, violated the Establishment and Free Exercise Clauses. *Id.* at 461. After clarifying that *Seeger* and *Welsh* were "not relevant" to the question before it, the Court held that the statutory provision was constitutional. *Id.* at 447, 460. Nevertheless, in the wake of *Welsh*, the Court's short-shrift dismissal of the free exercise arguments is noteworthy, as signals the Court would not broadly apply *Welsh*. *Id.* Applying the test from Sherbert v. Verner, the Court cursorily rejected the impact on religious objectors to "unjust" wars. *Id.* at 462. It explained that "the impact of conscription on objectors to particular wars is far from unjustified. *Id.* The conscription laws, applied to such persons as to others, are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position. The incidental burdens felt by persons in petitioners' position are strictly justified by substantial governmental interests that relate directly to the very impacts questioned," including the "Government's interest in procuring the manpower necessary for military purposes, pursuant to the constitutional grant of power to Congress to raise and support armies." *Id.* It is difficult to ignore the dissonance between the Court's summary dismissal of the religious objections of those who object to some wars in *Gillette* and its wholehearted embrace of the (arguably irreligious) claims before the Court in *Welsh*. To be sure, the provisions and arguments in these cases were different, but the Court's free exercise analysis in *Gillette* could just as readily be applied the petitioners in *Welsh*. That the Court took a harder line in the former, ostensibly apart from the latter, might be reasonably viewed as a hedge against *Welsh*'s broadest potential implications. Regardless of the reason, lower courts have favored *Seeger* to *Welsh* on the question of what constitutes a religious belief or practice.

[374] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[375] *Id.*

[376] *Id.* at 207.

[377] *Id.*

Amish religion or Conservative Amish Mennonite Church.[378] Members maintained that attendance at a public or private high school—in other words, conventional formal schooling—conflicted with their "religion and way of life" such that complying with the law would risk the censure of their church community and jeopardize the salvation of both the children and their parents.[379] As such, they declined to send their children to any public or private school after completing eighth grade, at which point most children were 14 or 15.[380] Yet the particulars of the Amish's objections presented a hurdle under *Seeger* and *Welsh*, however, because school attendance did not conflict so much with a religious belief *per se*, but rather the traditional Amish way of life.[381] After all, the Amish sent their children to schools through eighth grade "in order to read the Bible, to be good farmers and citizens, and to be able to deal with non-Amish people when necessary in the course of daily affairs."[382] The Court confronted the Amish's religious beliefs, their way of life, and how the two relate.

For the Amish, religious beliefs grounded in their interpretation of the Bible are inextricably intertwined with their way of life.[383] Those beliefs elevate the importance of, and are centered around, "life in a church community separate and apart from the world and worldly influence."[384] That community of believers is essential for individual salvation.[385] Each community is governed by the Ordnung, a written code of rules, which varies from community to community.[386] The content of these rules—from dress, to appearance, to the limited use of technologies, and general rejection of worldly things and connections—all focus each baptized adult member of the church on the community, modesty, and hard work.[387]

After completing their formal education in eighth grade, Amish children begin to work in either the home or the fields, where they:

> acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult

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[378] *Id.*

[379] *Id.* at 209. Wisconsin stipulated that the beliefs were sincerely held. *Id.* at 209.

[380] *Id.* at 207. Amish rejection of education beyond eighth grade is widespread and longstanding, even predating state compulsory education requirements and public schools themselves. *Id.* at 215 (noting the Amish practice extended "almost three centuries").

[381] *Id.* at 215-216.

[382] *Id.* at 212.

[383] *Id.* at 211. ("Broadly speaking, the Old Order Amish religion pervades and determines the entire mode of life of its adherents.").

[384] *Id.* at 210.

[385] *Id.* at 209.

[386] *Id.* at 210.

[387] *Id.* Modern tools and technologies facilitate independence and surplus production in ways that weaken dependence on others in the community and undermine simplicity, modesty, and hard work.

> role of an Amish farmer or housewife. They must learn to enjoy physical labor. Once a child has learned basic reading, writing, and elementary mathematics, these traits, skills, and attitudes admittedly fall within the category of those best learned through example and 'doing' rather than in a classroom. And, at this time in life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism.[388]

"Amish society emphasizes informal learning-through-doing; a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society."[389] At some point, usually before they turn twenty-one, Amish adolescents decide whether they will be baptized and, in so doing, "voluntarily undertake heavy obligations" as an adult member of their community.[390] These beliefs and practices have served as the foundation of Amish life, tracing back to the Swiss anabaptists of the 16th Century, changing very little, especially in comparison to the world around them.[391]

This detail is important because the Court had to consider whether the Amish way of life was, on the one hand, merely a personal preference, tradition, or custom, instead of, on the other hand, inseparable from religion.[392] Even though it concluded that Amish beliefs and their mode of life were inseparable, *Yoder* emphasized the importance of this distinction.[393] It explained that a "way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations."[394] Otherwise, any choice regarding the way an individual lives his life could trump contrary laws—effectively making each person a king and law only to himself.[395] As such, were an individual or community to assert the same objections as the Amish in *Yoder*,

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[388] *Id.* at 211.

[389] *Id.* at 201-11. In contrast, public and private high school—and higher education generally—in the United States is fundamentally contrary to these values. As the Court noted, a "high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students." *Id.* American high schools inculcate children with value that are "in marked variance with Amish values and the Amish way of life," an elevation of worldly culture of independence, self-accomplishment, and success. *Id.*

[390] *Id.* at 210.

[391] *Id.*

[392] *Id.* at 215.

[393] *Id.* at 216.

[394] *Id.* at 215.

[395] *See id.* at 215-16.

only based on "their subjective evaluation and rejection of the contemporary secular values accepted by the majority," their claims would fail.[396] The "very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."[397]

Having determined that the conflict between the Amish and state was religious, the Court turned to several arguments offered by the state. First, while conceding the Free Exercise Clause protected religious *belief*, the state urged the Court to hold that conduct, or action, was entitled to less protection, especially in areas where the state's police power is clear.[398] The Court side-stepped the invitation to draw such a line, instead recognizing that religious conduct, like most human endeavors, will often implicate legitimate exercise of state police power but nevertheless may fall within the protections of the First Amendment.[399] Second, the state maintained that its compulsory attendance law did not violate the First Amendment because it applied to all residents and was not facially discriminatory.[400] Not surprisingly, the Court noted that facially neutral law may be applied in constitutionally discriminatory ways that had long received the Court's exacting scrutiny.[401]

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[396] *Id.* at 216 ("[M]uch as Thoreau rejected the social values of his time and isolated himself at Walden Pond … [a] choice [that] was philosophical and personal rather than religious").

[397] *Id.* at 215-16; *see* Moore-King v. Cnty. of Chesterfield, Va., 708 F.3d 560, 571 (4th Cir. 2013) ("*Yoder* teaches that [the plaintiff] must offer some organizing principle or authority other than herself that prescribes her religious convictions, as to allow otherwise would threaten "the very concept of ordered liberty"). Education is undoubtedly one such interest. Even as it found in favor of the respondents, the Supreme Court unequivocally approved broad state authority to provide and require education for its citizens. *Yoder*, 406 U.S. at 213. In fact, it went so far to note that education was perhaps the most important state function. *Id.* (stating that providing and requiring education is "at the very apex" and a "paramount responsibility" of a state). Like all state power, however, the Court explained that even the most important state interests must yield where their application "impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children." *Id.* at 214 (citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925)).

[398] *Id.* at 247. At its core, this argument is premised in the belief/conduct distinction of the mid-nineteenth century that the Court had rejected long before *Yoder*. *See* Reynolds v. United States, 98 U.S. 145, 164 (1878); Davis v. Beason, 133 U.S. 333, 342 (1890) ("religion" is limited to "one's views of his relations to his Creator," not actions).

[399] *Yoder*, 406 U.S. at 219-20.

[400] *Id.* at 231.

[401] *Id.* at 220-21. Long before the Court signaled a shift in judicial focus from "economic" rights to protections in the Bills of Rights, the Supreme Court looked behind facially neutral laws to evaluate discriminatory effects from which an unlawful purpose—and, therefore, constitutional violation—could be found. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) ("Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution"); *see also* United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1944) (noting that ["[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting

Also, the state argued that its undisputed interest in compulsory education was so strong and compelling that it outweighed the Amish's First Amendment interest.[402] Specifically, it cited the necessity of education in preparing children to participate "effectively and intelligently" in national political life and preserve "freedom and independence."[403] It also argued that education prepared children to be "self-reliant and self-sufficient" adults.[404]

The Court accepted both propositions.[405] Nevertheless, it concluded they were inadequate to prevail over the Amish's rights under the Free Exercise Clause.[406] The conflict was not between Amish religious tenets and the state's interest in education *per se*, as the Court saw the matter.[407] Rather, the justices weighed "one or two years of formal high school" against Amish religious tenets and its society's "long-established program of informal vocational education."[408] With its interests reduced to the implicitly minute difference between the two, the Court concluded that Free Exercise rights prevailed.[409]

Yoder is perhaps most surprising because of the degree to which the Court appeared to rest its decision on practical economic considerations. Understandably skeptical that a year of public schooling designed to prepare children for life in American society was valuable for an agrarian life apart from that society, the Court nevertheless declined to extol the importance of religious freedom from state law.[410] Instead, it emphasized the minimal practical economic impact of its holding. It began by emphasizing that excusing Amish children from school would not cause them to become burdens to the state.[411] To the contrary, the Court rejected the notion that "the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today's society."[412] While the Court pointed out that the time Amish children spend away from school allows for "religious

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judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. *Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or racial minorities … whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry*.") (emphasis added and citations omitted).

[402] *Yoder*, 406 U.S. at 221.

[403] *Id.*

[404] *Id.*

[405] *Id.*

[406] *Id.* at 231-32.

[407] *Id.* at 231.

[408] *Id.* at 222.

[409] *Id.* at 220-21.

[410] *Id.* at 222.

[411] *Id.* (explaining that the "Amish community has been a highly successful social unit within our society" whose "members are productive and very law-abiding").

[412] *Id.* at 223-25.

development," the "religious" element seemed more an afterthought in comparison with the economic value of the "development" inherent in Amish "vocational training."[413]

The Court found further support for diminution of the state's asserted interest in this case from the historical origin of compulsory education laws as a supplemental tool to reduce child labor.[414] To the extent the state's interest was predicated on labor concerns, the Court deemed it less substantial as the law has long provided child labor exceptions for children working on their family farm under the supervision of their parents.[415] As Amish children sought to perform work on family farms long allowed by child labor laws, the state's related interests in enforcing its compulsory education requirements were reduced.[416]

Notwithstanding the secular practicalities supporting its reasoning, *Yoder* remains relevant for its distinctions between a bona fide religious belief or practice and a way of life.[417] In drawing this contrast, the Court tacitly walked back elements of *Seeger* that implied any sincerely held opinion could be protected by the Free Exercise Clause merely because it was subjectively important to the individual.[418] Specifically, *Yoder* limits individuals' ability to apply a religious label to their lives (and various political, economic, philosophical, social, and other components of them) and thereby excuses a lack of compliance with the law.[419] And yet, like *Hardison*, the Court opinion is surprisingly cold to *religious* beliefs and practice.[420] The Court's extensive discussion regarding the connection between Amish beliefs and their lifestyle provides little assurance to genuinely religious Americans most of whom could not show a similarly visible connection between their religion and way of life.[421] Likewise, the Court is virtually silent on the religious nature of the beliefs and practices or what attributes or characteristics qualify them for such a designation.[422] As a result, *Yoder* is another case in which the Court failed to define what makes a belief or practice *religious* for purposes of accommodations under the Constitution and, by later application, Title VII.[423]

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[413] *Id.* at 223-24.

[414] *Id.* at 228 (stating that requiring school is an "alternative to the equally undesirable consequence of unhealthful child labor displacing adult workers, or, on the other hand, forced idleness").

[415] *Id.* at 228-29; *see also* 29 U.S.C. § 213(c)(1)-(2).

[416] *Id.* at 228-29.

[417] *See id.* at 215-16.

[418] *See id.*; *Seeger*, 380 U.S. at 342-3.

[419] *See generally Yoder*, supra note 374.

[420] *See generally id.*

[421] *See generally id.*

[422] *See generally id.*

[423] Before turning to the courts of appeals treatment of the term *religion*, the Court's decision in Employment Division, Department of Human Resources of Oregon v. Smith requires brief discussion. Emp't Div., Dep't of

b. Courts of Appeals

In the absence of a general definition of religion from the Supreme Court, in the years following *Yoder* the courts of appeals stepped in to fill the void. The cases discussed below grapple with several of the more difficult elements that the Supreme Court did not address in the cases above.

1. Early Efforts: Brown, Barber, and Africa

In 1977 and 1981, three federal circuit courts answered the question of what makes a belief or practice religious.[424] These decisions built upon earlier Supreme Court case law and have provided greater practical direction

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Human Resources of Or. v. Smith, 494 U.S. 872 (1990). There, the Court held that an individual's religious beliefs do not excuse him or her from the obligation to comply with a validly enacted law prohibiting conduct that the state has the power to regulate. *Smith*, 494 U.S. at 878-79. It rejected the argument that the prohibition contained in the Free Exercise Clause includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). Drawing from history, the Court explained that a contrary ruling—consistently applied—would produce "anarchy," requiring religious exemptions for every civil and criminal law and regulations touching on every aspect of life. Laws relating to taxes, military service, health and safety, vaccination, drugs, traffic, social welfare/minimum wage, child labor, animal cruelty, environmental protection, civil rights, and others all would require religious exemptions. *Id.* at 888-89. While acknowledging that it had held that the Free Exercise prohibits application of general laws, the Court noted that in each of those cases the action in question concerned both religion and some other constitutionally protected right. *Id.* at 881. For a variety of reasons, the Court found the *Sherbert* test inadequate to govern religious exemptions. The Court noted it was created "in a context [*e.g.*, unemployment compensation] that lent itself to individualized governmental assessment of the reasons for the relevant conduct" where the application of its requirement of a compelling government interest worked to "ensure equality of treatment." *Id.* at 884-86. But to allow religious exemptions from general laws turns the interest requirement into a constitutional anomaly that affords individuals a personal veto over every law or regulation impacting religious belief or practice. *Id.* at 886. To allow such exceptions would either invite judicial scrutiny into religious beliefs, "water down" the compelling interest requirements, or render most laws *presumptively invalid* as applied to any religious objector. *Id.* at 886-88 (emphasis in original). The Court refused to take such a step. Of course, where government targets religious exercise with law or regulations, the Free Exercise Clause provides protection. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

The Court's refusal to provide a textual definition of religion or religious contributed to the problem in *Smith*. Since virtually any sincerely held belief qualifies as religious, and since courts are cautioned against scrutinizing such beliefs, the *Smith* Court was understandably reluctant to conclude that any individual could use the Free Exercise Clause as a sword against any law or regulation that touches on a religious belief or practice, fearing free reign to individuals to evade generally applicable laws that have nothing to do with religion. Had the Court instead confined religion to those that are established it may not have so quickly rejected exemptions to more generalized laws.

As noted above, Congress responded to *Smith* by enacting RFRA, but its impact has been limited and its requirements remain uncertain. *See supra* note 237 and accompanying text. Facially, few statutes sweep more broadly than RFRA and courts have been reluctant to confront that reach or its implications. *See* 42 U.S.C. §§ 2000bb *et seq*. For present purposes, RFRA was a missed opportunity to create a workable framework for religious accommodation claims from government laws, regulation, or action that engages with *Smith* and does more than simply reinstate the deficient test from *Sherbert*. In any event, whatever one's views of *Smith* or RFRA, the Free Exercise Clause (and Title VII) do not provide a path for any individual to escape general legal requirements by asserting a personal belief that conflicts with them.

[424] *See* Brown v. Dade Christian Schs., Inc., 556 F.2d 310 (5th Cir. 1977); Int'l Soc. For Krishna Consciousness, Inc. v. Barber, 650 F.2d 430 (2d Cir. 1981); Africa v. Pennsylvania, 662 F.2d 1025 (3d Cir. 1981).

to lower courts asked to determine whether a belief or practice is religious for purposes of Title VII accommodation cases.

In *Brown v. Dade Christian Schools, Inc.*, the en banc Fifth Circuit considered whether a private sectarian school could deny admission to black students pursuant to its policy of racial segregation that it claimed was adopted in the exercise of its religious beliefs.[425] The school in question was created and run commercially, albeit by a church.[426] Black plaintiffs applied and were rejected solely because of their race.[427] They brought an action under 42 U.S.C. § 1981.[428] A year before the Fifth Circuit's decision in *Brown*, the Supreme Court had held that section 1981 prohibits private, commercially operated schools from racial discrimination in admissions.[429] The school argued that its admissions policy was a religious belief and, therefore, that the application of section 1981 violated the school's free exercise rights.[430]

The district court granted summary judgment to the plaintiffs. It held that the policy was not religious, but rather a recent social policy or philosophy developed in response to the growing issue of segregation and integration.[431] As a result, the district court did not reach the constitutional questions.[432] On appeal, the Fifth Circuit agreed that the recent policy was not a religious belief.[433] First, it surveyed the church's list of nine tenets entitled "We believe," none of which concerned race, segregation, or integration.[434] While it emphasized that religious beliefs need not be "permanently recorded," the court found telling the absence of any beliefs on the subject in materials that the church widely distributed.[435] Second, the court reviewed testimony in the record that suggested the policy was "subject to change upon the direction of the congregation" by majority vote.[436] The Fifth Circuit cited testimony from leaders describing the position as a "policy," and "philosophy" that evolved over a few congregational

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[425] *Brown*, 556 F.2d at 310.
[426] *Id.* at 311.
[427] *Id.*
[428] *Id.*
[429] *See* Runyon v. McCrary, 427 U.S. 160 (1976).
[430] Although the Court did not discuss the particulars of the religious belief in depth, the various opinions suggest that segregation policy was based on "the overall concept of the teachings of the Scriptures" and the collective lesson stemming from God's dealing with the nation of Israel, the Tower of Babel, and the confusion of tongues in the Book of Acts, and certain statements of St. Paul. The church was concerned that integration would lead to socialization and racial intermarriage, which it believed sinful, albeit not mortally so. *Brown*, 556 F.2d at 320, 324-25 (citations removed and cleaned up).
[431] *Id.* at 311.
[432] *Id.* at 311-12.
[433] *Id.* at 312.
[434] *Id.*
[435] *Id.*
[436] *Id.*

meetings.[437] And although religious beliefs may be "of recent vintage" and need not be "institutionalized," the court shared the district court's suspicion that the fact school and congregational leaders were unaware of the proffered belief made it unlikely to be a genuine religious belief of the school.[438] The Fifth Circuit was understandably skeptical that bona fide religious beliefs are subject to adoption, revision, and revocation by majority vote.[439] It found such treatment was indicium of a policy or political position.[440] Finally, the Fifth Circuit rejected the argument that institutional actors do not have rights of religious free exercise independent from their members.[441] Here, the challenged action and policy were made by the school.[442] The court sought to avoid circumstances where institutions could "pick and choose which of its members' potentially conflicting beliefs it wished to assert at any given time."[443]

In the principle dissent, Judge Roney argued that the school's segregation policy qualified as a religious belief under the test he gleaned from existing case law, where the religious nature of a belief "depends on (1) whether the belief is based on a theory of man's nature or his place in the Universe, (2) which is not merely a personal preference but has an institutional quality about it, and (3) which is sincere."[444] He would have remanded the case to the district to fully develop the factual record on these points.[445]

In his special concurrence, Judge Goldberg generally agreed with Judge Roney's test, except with respect to its "institutional quality" component, although he arguably acquiesced to it because "in another part of his opinion Judge Roney makes clear his understanding with which I fully concur that discriminating among religions on the basis of their manner of deriving or expressing their views is unconstitutional, I believe Judge Roney's 'institutional quality' remark should be given an extremely broad

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[437] *Id.* at 312-13.
[438] *Id.* at 313, 317.
[439] *Id.* at 312.
[440] *Id.*
[441] *Id.* at 313.
[442] *Id.* at 313-14.
[443] *Id.* at 313. This would allow institutions to evade challenges regardless of the policies at issue. For example, "an avowedly secular school should not be permitted to interpose a free exercise defense to a section 1981 action merely because it can find some of its patrons who have a sincere religiously based belief in racial segregation. Conversely, a school or church which holds racial segregation as a religious tenet should not be barred from asserting a free exercise defense to a section 1981 claim merely because some of its patrons or members might individually believe racial segregation is morally wrong." *Id.* at 313-14 (cleaned up).
[444] *Id.* at 324 (citations and punctuation omitted).
[445] *Id*. at 320. Judge Coleman also dissented, arguing that the school at issue was not a commercial enterprise, but rather an "intimate adjunct" to the activities of the church conducted in the church. As a result, to preserve the separation of church and state, he found that no court should have the power to compel a church to admit any student to any non-commercial school it operates for religious reasons. *Id.* at 326.

reading."[446] Relying on "the fundamental precept of unswerving religious tolerance that underlies the Constitution's religion clauses," Judge Goldberg rejected the court's "constructive definition" as an "egregious departure" from that tradition, concluding that the school should have been able to assert a religious defense.[447] Judge Goldberg sidestepped the trickier opportunity to define the distinguishing characteristics of *religious* belief and practice.[448] Instead, he retreated to a broad reading ostensibly necessary as a prophylactic against repeating historic persecution of minority religions.[449] And ultimately disclaiming any "cosmic definition of religion," he found it "clear that God and the mundane combine in the religion of the church" sufficient for the church to have a "God-derived cosmos."[450]

Notwithstanding his conclusion that the church's belief was religious in nature, Judge Goldberg concluded that the government's interests overrode them. Acknowledging that such a result "would force the principal and at least some of the teachers, students and parents to be disobedient to God," he nevertheless explained that "moving toward" the "constitutional imperative to eliminate the badges of slavery has not dimmed in the 114 years since President Lincoln issued the Emancipation Proclamation."[451] Contained in the Thirteenth Amendment is a compelling government interest that "overrides appellant's interest in preserving a 'very minor' religious practice."[452] No other judge joined Judge Goldberg's opinion.[453]

A few years later, the Second Circuit confronted a constitutional free exercise challenge to a rule that solicitation activities at the New York State Fair had to be confined to booths leased to various groups and entities (the "booth rule").[454] A society of American devotees of Krishna Consciousness challenged the ban because it sought to perform the peripatetic ritual of sankirtan at the Fair.[455] In essence, sankirtan is proselytizing combined with direct solicitation of financial contributions.[456] The Society alleged that

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[446] *Id.* at 317-18.
[447] *Id.* at 314.
[448] *See id.* at 315.
[449] *Id.* at 318.
[450] *Id.*
[451] *Id.* at 324.
[452] *Id.* One strains to reconcile Judge Goldberg's rhetoric regarding the persecution of religious minorities and the contempt in which he held judicial efforts to identify (and limit) "religious" views with his ultimate judgment and conclusion that the religious belief in question was "very minor" and, therefore, could be ignored by the courts in favor of eliminating the effects of a prohibition contained in another constitutional amendment. Judge Goldberg did not explain how the district court should have balanced the application of the First and Thirteenth Amendment in this case or generally, including why a "badge" of the institution prohibited by the latter trumps (what he argues vehemently is) a right directly and squarely protected by the former.
[453] *Id.* at 314.
[454] Int'l Soc. For Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 434 (2d Cir. 1981).
[455] *Id.* at 432.
[456] *Id.*

confining its activities to a booth amounted to an unconstitutional limitation on the exercise of its religion.[457]

The district court dismissed the complaint, concluding that the rule at issue applied only to financial solicitation and, therefore, did not limit the plaintiff from distributing literature or discussing ideas.[458] The district court considered the practice at issue—the solicitation of financial gifts in sankirtan—as commercial speech subject to less protection than religious or political speech.[459] It upheld the booth rule as a reasonable regulation of such speech to prevent fraud based on a trial record that demonstrated that "the barber's scheme of accosting, deceit, and misrepresentation is systematic, symptomatic, and patternistic."[460] As a result, the Second Circuit first had to consider how properly to characterize the conduct at issue, recognizing that the very outcome of the case might turn on whether it was commercial speech or religious exercise.[461]

Before delving into whether the conduct at issue was religious for purposes of the First Amendment, the Second Circuit addressed the underlying purposes of the constitutional right to free religious exercise.[462] Relying on Justice Harlan's concurring opinion in *Walz*, the Court noted that the free exercise of religion "promotes the inviolability of individual conscience and voluntarism, recognizing that private choice, not official coercion, should form the basis for religious conduct and belief."[463] Moreover, "voluntarism promotes pluralism of thought, a tonic necessary for a healthy, diverse society."[464]

To best promote these objectives, the Second Circuit indicated any belief that is "arguably religious" should be considered religious for free exercise analysis purposes.[465] This was the result of the Supreme Court's abandonment of objective tests to identify religious beliefs in favor of subjective ones that allowed for religions that were not theistic.[466] Adopting the same methodology, the panel concluded that Krishna Consciousness was a religion for free exercise purposes.[467] Then, the Court turned to analyze whether solicitation itself was a "religious practice."[468] As courts often do,

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[457] *Id.*
[458] *Id.* at 437.
[459] *Id.* at 437-38.
[460] *Id.* at 438.
[461] *Id.*
[462] *Id.*
[463] *Id.* (citing Walz v. Tax Commission, 397 U.S. 664, 697 (1970)).
[464] *Id.*
[465] *Id.* at 439 (citation omitted).
[466] *Id.* at 440 (citing United States v. Seeger, 380 U.S. 163, 166 (1965), and the Court's approval of the functional, phenomenological test focusing on each individual's subjective "ultimate concern").
[467] *Id.*
[468] *Id.* at 441. In so doing, the Second Circuit implicitly recognized an important point: merely because an

the Second Circuit commenced its discussion by noting the institutional limitations of the judiciary delving into religious matters.[469]

The challenge, according to the court of appeals, was not so much the religious nature of the faith *per se*, but rather assessing the religious nature of unfamiliar faiths.[470] Yet it proceeded by focusing, not on the religion or truth of the belief or practice itself, but rather on the sincerity of the believers and the centrality of the practice in question to the religion.[471] Sincerity identifies the "subjective good faith" of the plaintiff by analyzing extrinsic evidence of his adherence to the beliefs or practices for which he seeks protection.[472] It is evaluated "in light of the religion's size and history"[473] with an eye to whether the plaintiff gains materially from "fraudulently hiding secular interests behind a veil of religious doctrine."[474] In turn, centrality turns on the "role that the rite or belief plays in the ritual and theology of the religion in question."[475] The Second Circuit gave "great weight" to so-called "sacramental practices" and "affirmative duty-creating commands," which it contrasted with other religious practices that were not tied to religious requirements, such as Jews working on Sundays or Mormons practicing polygamy.[476]

Dissecting sankirtan into broad and narrow components, the panel found that the evidence generally supported consonance between the conduct and belief at issue.[477] Yet it was the lack of individual material gain for individual participants that ultimately tipped the scales for the Second Circuit

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individual or institution is religious does not mean everything they believe, say, or do is religious beliefs, speech, or practice protected by the First Amendment or that must be accommodated under section 2000e(j). *See id.*

[469] *Id.*

[470] *Id.* (noting that "lay courts familiar with Western religious traditions characterized by sacramental rituals and structured theologies are ill-equipped to evaluate the relative significance of particular rites of an alien faith"). This statement carries significant implications. The Supreme Court's directives to lower courts regarding religious affairs are premised not only on constitutional limitations of the courts—as an organ of government—but also precisely on the inherent limits of the law (and legal reasoning) to resolve spiritual issues or conflicts with authority. In *Barber*, the Second Circuit's comments redirect the principle to apply only (or at least to a significantly greater degree) to religions that are alien, that is those distinct from major Western systematic religions. *Id.* at 447. While the Court's statement regarding "alien" religions may be correct as far as it goes, it applies to all bona fide religion. Courts must not tread lightly or move forward modestly because of judges' lack of familiarity with—or the size or nature of—the religion, but rather because lawyers and courts are ill-suited to interpret, apply, or resolve religious tenets or issues. *See id.*

[471] *Id.*

[472] *Id.*

[473] *Id.* The panel gleaned this element from *Yoder*.

[474] *Id.*

[475] *Id.* Nine years later in *Smith*, the Court noted the problems with the very sort of analysis that the Second Circuit applied. *See* Emp't Div. v. Smith, 494 U.S. 872, 879-80 (1990). For all its warnings about the dangers inherent with "alien" religions, the Second Circuit evaluated its tenets by analogy to Western religions and the various priorities of elements within them. *Barber*, 650 F.2d at 441-42.

[476] *Id.* at 441-42.

[477] *Id.* at 442.

to find the plaintiffs "sufficiently sincere" to turn to the centrality analysis.[478] The court concluded that the solicitation of contribution was significant because it could be "analogized to a sacramental ritual or an affirmative command of the religion's teachings."[479] After a few references to expert testimony in the record, the Second Circuit fell back on the practical necessity of fundraising in the United States to support its operations in the country, and the impossibility of separating proselytization from solicitation.[480] Because the State Fair's booth rule was a complete ban on what the panel found was a religious practice protected by the Free Exercise Clause, the Second Circuit concluded that it operated as a "substantial infringement" under *Sherbert v. Verner*, which it weighed against the state's legitimate and genuine interest in preventing fraud.[481] As the panel concluded that the "booth" rule was not the least restrictive way to achieve its end, it held the rule was unconstitutional as applied to the plaintiffs.[482]

Four months later, the Third Circuit handed down its opinion in *Africa v. Commonwealth of Pennsylvania*.[483] The plaintiff, a state prisoner named Frank Africa, sought an injunction compelling Pennsylvania to provide him food according to his religion, MOVE, of which he claimed to be a Naturalist Minister.[484] He asserted that he was required to "eat an all raw food diet" in accord with teachings and beliefs of MOVE's founder, John Africa.[485] MOVE sought to bring about "absolute peace," stop violence

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[478] *Id.*

[479] *Id.*

[480] *Id.* at 443.

[481] *Id.*; *See generally* Sherbert v. Verner, 374 U.S. 398, 406 (1963).

[482] *Barber*, 650 F.2d at 445-47. The Second Circuit also cited two noted cases out of the District of Columbia. *See* Founding Church of Scientology of Washington, DC v. United States, 409 F.2d 1146 (D.C. Cir. 1969) (concluding that the Church of Scientology was a religion for First Amendment purposes in light of incorporation, ministers allowed to perform weddings and burials, clear and written religious doctrines); United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968) (concluding the "Neo-American Church" is not a religion for purposes of the First Amendment and plaintiff failed to demonstrate that her beliefs required her to ingest marijuana and LSD).

[483] Africa v. Pennsylvania, 662 F.2d 1025 (3d Cir. 1981).

[484] *Id.* at 1025.

[485] *Id.* at 1026. The history of MOVE and related figures is essential to understanding Philadelphia in the 1970s and 1980s and the Third Circuit's evaluation of new religions.

MOVE was founded in the early 1970s by Vincent Leaphart, who changed his name to "John Africa" in homage to the continent where he believed life began. *Africa*, 662 F.2d at 1026; John L. Puckett & Devin DeSilvis, *MOVE in Powelton Village*, W. PHILA COLLABORATIVE HISTORY, https://collaborativehistory.gse.upenn.edu/stories/move-powelton-village (last visited Feb. 22, 2024) (Puckett & DeSilvis); Beverly Tomek, MOVE, ENCYCLOPEDIA OF GREATER PHILADELPHIA, https://philadelphiaencyclopedia.org/essays/move (last visited Feb 22, 2024) (Tomek); The Findings, Conclusions and Recommendations of the Philadelphia Special Investigative Commission, 59 TEMP. L. Q. 339, 345 (1986) (Special Investigative Commission Report). Originally styled the "Christian Movement for Life," MOVE was a predominantly black Philadelphia-based revolutionary organization. *See* Puckett & DeSilvis, *supra* note 485; Tomek, *supra* note 485. MOVE's members lived communally in a West Philadelphia home. Puckett & DeSilvis, *supra* note 485; Tomek, *supra* note 485. While styled in all-capital letters, MOVE was not an acronym, but rather a statement of purpose: that which all life does. Puckett & DeSilvis, *supra* note 485. The group primary adhered to anarcho-primitivism philosophies. Tomek, *supra* note 485. A combination of the racially revolutionary ideology

of the Black Panthers with radical green politics centered on animal rights, members wore their hair in dreadlocks and changed their surnames to "Africa," advocating returning to a hunter-gatherer society opposed to science, medicine, and technology. *See* Puckett & DeSilvis, *supra* note 485; Tomek, *supra* note 485. They believed that as all living beings are interdependent, all life is equally important. *Id.* Their protests, including profane tirades over bullhorns from their commune, drew the ire of neighbors and the attention of authorities. Puckett & DeSilvis, *supra* note 485. The organization continues to hold many of these views today. *See* MOVE website, ON A MOVE, https://onamove.com/about (last visited Feb. 22, 2024).

MOVE is perhaps best known for two violent conflicts with the Philadelphia Police Department, one of which occurred prior to the Third Circuit's decision in *Africa*. In 1978, in the process of enforcing a court order for MOVE to vacate the property in which members lived, a shootout ensued in which an officer was killed. Puckett & DeSilvis, *supra* note 485. After a standoff, MOVE members surrendered. *Id.* Nine ("the MOVE 9") were charged with collective responsibility for the officer's death and convicted; each was sentenced to 100 years in prison. Several died there. *Id.* The first was paroled in 2018; the last in 2020. Ed Pilkington, MOVE 9 Women Freed After 40 Years in Jail Over Philadelphia Police Siege (May 25, 2019), https://www.theguardian.com/us-news/2019/may/25/move-9-black-radicals-women-freed-philadelphia (last visited Feb. 22, 2024).

In 1982, the remaining members of MOVE moved to a new row house. Tomek, *supra* note 485; John L. Puckett, MOVE on Osage Avenue, W. PHILA COLLABORATIVE HISTORY, https://collaborativehistory.gse.upenn.edu/stories/move-osage-avenue (last visited Feb. 22, 2024) (Puckett). In 1985, after numerous complaints over three years, police obtained warrants and the City labeled MOVE a terrorist organization. *Id.* Police evacuated the area before attempting to enforce the warrants, which led to an armed standoff that escalated into a 90-minute gunfight. Puckett, *supra* note 485. The police fired more than 10,000 rounds of ammunition before dropping a bomb, an improvised combination of Tovex and C-4. *Id.*; Special Investigative Commission Report, 59 TEMP. L. Q. at 363, 367. The resulting fire killed eleven members in the house, including John Africa, before spreading to and destroying 61 neighboring properties. Puckett, *supra* note 485; Tomek, *supra* note 485; Special Investigative Commission Report, 59 TEMP. L. Q. at 369.. Former EEOC Chair William Brown chaired the official commission that investigated the raid; in 1986, it released a report rightly condemning the police actions as unconscionable. *See* Special Investigative Commission Report, 59 TEMP. L. Q. at 352, 353, 363, 366, 368. Nevertheless, no member of the police or city government was every charged. The only adult MOVE survivor was convicted of riot and conspiracy, for which she served seven years in prison. DECHERT LLP, FINAL REPORT OF THE INDEPENDENT INVESTIGATION INTO THE CITY OF PHILADELPHIA'S POSSESSION OF HUMAN REMAINS OF VICTIMS OF THE 1985 BOMBING OF THE MOVE ORGANIZATION 30 (2022), available at https://www.phila.gov/media/20220609141446/move-investigation-report-20220609.pdf (last visited Feb. 22, 2024), at 30.

John Africa—and his followers—were closely connected with Mumia Abu-Jamal (born Wesley Cook), who covered as a journalist the 1981 conflict between MOVE and Philadelphia Police. Abu-Jamal was a vocal supporter of Africa, the commune, and MOVE. *Id.* In 1982, Abu-Jamal was convicted and sentenced to death for murdering Philadelphia Police Officer Daniel Faulkner on December 9, 1981. Layla A. Jones, Mumia Abu-Jamal 101: How he ended up in prison, and why MOVE wants him freed (June 7, 2021), available at https://billypenn.com/2021/06/07/mumia-abu-jamal-explain-trial-prison-move-free-krasner/ (last visited Feb. 22, 2024). Before and during his 1982 trial, Abu-Jamal made repeated requests to be represented by John Africa, all of which were denied because he was not an attorney. *See* Abu-Jamal v. Horn, No. 99-5089, 2001 WL 1609690, *3, 60, 62, 63 (E.D. Pa. Dec. 18, 2001) (citations omitted), affirmed 520 F.3d 272, vacated on other grounds, Beard v. Abu-Jamal, 558 U.S. 1143 (2010). Abu-Jamal quoted Africa extensively in a prepared statement at the outset of his sentencing hearing. *See* Transcript of Sentencing Hearing at 10-26, Commonwealth v. Abu-Jamal (July 3, 1982), available at http://danielfaulkner.org/wp-content/uploads/2021/06/JULY-3RD-1982.pdf. The legal saga finally ended in 2021, after nearly 40 years, roughly where it began, with Abu-Jamal in prison for murder, now sentenced to life without parole. *See* Commonwealth v. Cook, 266 A.3d 656 (Table), 2021 WL 4958874 (Pa. Super. Oct. 26, 2021).

With respect to direct appeals see Commonwealth v. Abu-Jamal, 521 Pa. 188 (1989) (conviction and death sentence affirmed); Commonwealth v. Abu-Jamal, 524 Pa. 106 (1990) (rehearing denied); Abu-Jamal v. Pennsylvania, 498 U.S. 881 (1990) (cert denied); Abu-Jamal v. Pennsylvania, 498 U.S. 993 (1990) (leave to file for rehearing denied); Abu-Jamal v. Pennsylvania, 501 U.S. 1214 (1991) (second petition for rehearing denied). After Governor Ridge signed his death warrant in 1995, Abu-Jamal initiated state collateral proceedings. *See* Commonwealth v. Abu-Jamal, No. 1357, 30 Phila. 1, 1995 WL 1315980 (C.P. Ct. Phila. Cty. Sept. 15, 1995) (primary PCRA denial); Commonwealth v. Abu-Jamal, Crim. No. 1357 Jan. Term 1982 (C.P. Ct. Phila. Cty. Nov. 1, 1996) (Jones PRCA); Commonwealth v. Abu-Jamal, Crim. Nos. 1357-58 Jan. Term 1982 (C.P. Ct. Phila. Cty.

altogether, and to put a stop to all that is corrupt.[486] To do this, John Africa and his acolytes professed adherence to a "natural," "moving," "active," and "generating" way of life.[487] "MOVE endorses no existing regime or lifestyle; it yields to none in its uncompromising condemnation of a society that it views as 'impure,' 'unoriginal,' and 'blemished.'"[488]

Frank Africa claimed MOVE was a religion and he a minister of it, stating that "just as there is no comparison between the sun's perfection and the lightbulb's failure, there is no comparison between the absolute necessity of our belief and this system's interpretation of religion."[489] In a brief submitted to the court, Africa contended that MOVE's adherents must "live in harmony with what is natural, or untainted."[490] Africa argued that MOVE's religious diet was central to these beliefs.[491]

As Africa described it, the MOVE diet was "comprised largely of raw vegetables and fruits"—specifically, "(r)aw, uncut-unpeeled, unprocessed chemical free sweet potatoes, yams, white potatoes, turnip roots, all roots of organic eatable nature, wild rice organic, wild organic garlic,

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July 24, 1997) (Pa. Doc. No. 93) (Jenkins PRRA). The Pennsylvania Supreme Court affirmed. Commonwealth v. Abu-*Jamal*, 553 Pa. 485 (1998). The Supreme Court denied certiorari. Abu-Jamal v. Pennsylvania, 528 U.S. 810 (1999).

On federal habeas review, the district court upheld the conviction but vacated the death sentence, primarily because the "charge and verdict form created a reasonable likelihood that the jury believed it was precluded from considering any mitigating circumstance that had not been found unanimously to exist" and the Pennsylvania's denial of that claim was an unreasonable application of clearly established federal law. *See* Abu-Jamal v. Horn, No. 99-5089, 2001 WL 1609690, *126 (E.D. Pa. Dec. 18, 2001) (Yohn, J.). The Third Circuit affirmed, *see* Abu-Jamal v. Horn, 520 F.3d 272 (3d Cir. 2008), and the Supreme Court denied certiorari, *see* Abu-Jamal v. Beard, 556 U.S. 1168 (2009).

In 2010, the Supreme Court directed the Third Circuit to reconsider the above decision in light of the Court's decision in Smith v. Spisak, 558 U.S. 139 (2010). Beard v. Abu-Jamal, 558 U.S. 1143 (2010). The Third Circuit again affirmed. *See* Abu-Jamal v. Secretary, Pa. Dep't of Corrections, 643 F.3d 370 (3d Cir. 2011). The Supreme Court declined to hear the case. *See* Wetzel v. Abu-Jamal, 565 U.S. 943 (2011). On December 7, 2011, the District Attorney of Philadelphia announced it would no longer seek the death penalty. On remand, state courts sentenced Abu-Jamal to life in prison without the possibility of parole. This sentence was affirmed and a collateral attack upon it was rejected. *See* Commonwealth v. Abu-Jamal, 82 A.3d 1059, 2013 WL 11257188 (Pa. Super. July 9, 2013) (sentence affirmed); Commonwealth v. Cook, 266 A.3d 656 (Table), 2021 WL 4958874 (Pa. Super. Oct. 26, 2021) (rejection of PCRA relief).

For related civil litigation see In re City of Philadelphia Litigation, 849 F. Supp. 331 (E.D. Pa. 1994), affirmed in part, reversed in part, appeal dismissed in part by In re City of Philadelphia Litigation, 49 F.3d 945 (3d Cir. 1995). In a 2005 civil case presided over by Judge Newcomer a federal jury awarded residents displaced by the 1985 bombing of MOVE $12.83 million from the City of Philadelphia. Obituary: Hon. Clarence C. Newcomer (Apr. 24, 2005), https://lancasteronline.com/obituaries/hon-clarence-c-newcomer/article_46e0bd1a-38d5-5cac-920a-3bd6c74ec12d.html (last visited Feb. 22, 2024).

[486] *Africa*, 650 F.2d at 1026.

[487] *See id.*

[488] *Id.* at 1027.

[489] *Id.* at 1026.

[490] *Id.* at 1027 (quoting Africa's brief: "Water is raw, which makes it pure, which means it is innocent, trustworthy, and safe, which is the same as God.... Our religion is raw, our belief is pure as original, reliable as chemical free water, ... nourishing as the earth's soil that connects us to food, satisfying as the air that gives breath to all life").

[491] *Id.*

onions, peppers, tomatoes, corn, spinach, raw unopened unprocessed nuts, berries, melons, oranges, peaches, pears, grapes, bananas, apples, organic eggs, raw organic water meats, and some land meats."[492] Those who follow the diet refuse to eat any food that is processed or cooked.[493] Failure to adhere to the diet causes "deviation from the direct, straight, and true and results in confusion and disease."[494] Even though many MOVE followers did not adhere to the diet, and he could not point to religious consequences for failing to follow the diet, Africa contended he was obligated to adhere to it.[495]

The district court was not persuaded, concluding that Africa's diet and MOVE itself were not entitled to protection under the Religion Clauses of the First Amendment.[496] It found that MOVE, was a "quasi-back-to-nature social movement of limited proportion and with an admittedly revolutionary design."[497] It refused to enjoin his prison transfer or require the state to provide his requested diet.[498]

Compelled to confront whether MOVE and Africa's diet were "religious" for purposes of the First Amendment, the Third Circuit squarely addressed the "delicate" question in light of *Ballard* and *Seeger*.[499] The majority adopted and applied a test from a separate opinion in *Malnak v. Yogi*, a case in which the Third Circuit concluded that the Science of Creative Intelligence-Transcendental Meditation constituted a religion under the First Amendment using a "definition by analogy" process.[500] The test identified three useful indicia of protected religion:

> First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.[501]

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[492] *Id.* at 1027, n.2 (citation omitted).

[493] *Id.* at 1027-28.

[494] *Id.* at 1028 (cleaned up).

[495] *Id.* at n.3. The plaintiff claimed that to "take away our diet is to leave me to eat nothing, for I have no choice, because when given a choice between eating poison and eating nothing, I have no choice but to eat nothing, for I can't eat other than raw. This would be suicidal[,] and suicide is against life's ministry." *Id.* at 1028 (stating "[o]ur religious diet is work, hard work, simple consistent unmechanized unscientific self-dependent work" and concluding that "our religious diet is family, unity, consistency, (and) uncompromising togetherness.")

[496] *Id.* at 1029.

[497] *Id.*; *see* Africa v. Pennsylvania, 520 F. Supp. 967 (E.D. Pa. 1981).

[498] *Africa*, 662 F.2d at 1029.

[499] *Id.* at 1030-1031.

[500] Malnak v. Yogi, 592 F.2d 197, 207 (3d Cir. 1979) (Adams, J., concurring). The Third Circuit's opinion in *Africa* also was authored by Judge Adams. *Africa*, 662 F.2d at 1025.

[501] *Id.* at 1032.

Applying that framework, the panel concluded MOVE was not a religion under the First Amendment.[502]

With respect to the first indicium, the court explained that religions (as protected by the First Amendment) "consider and attempt to come to terms with what could best be described as 'ultimate' questions—questions having to do with, among other things, life and death, right and wrong, and good and evil."[503] Of course, the panel noted that every belief or tenet of the religion need not touch upon such issues, but the court found it difficult to conceive of any bona fide religion that does not address such concerns in some respect, what the D.C. Circuit had called "underlying theories of man's nature or his place in the Universe."[504]

Based on the record before it, the Court of Appeals found that, in the main, MOVE did not concern "ultimate ideas."[505] Although Africa's appointed counsel attempted to characterize MOVE as "pantheistic," the court concluded that MOVE's outlook was more akin to "secular philosophy than … religious orientation," with concerns that "appear personal … and social."[506] The panel appeared to find support in what it saw as similar distinctions made by the Supreme Court in *Yoder* and *Seeger*.[507] To the extent its emphasis on nature was an ultimate concern, the Third Circuit concluded that concern bore a closer resemblance to Thoreau on Walden Pond than to the Amish in Wisconsin.[508]

The second indicium requires religions to be comprehensive and cohesive, that is to consist of something more than a collection of isolated, unconnected ideas.[509] Religions, as least for First Amendment purposes, are not confined to a single idea or moral teaching, such as opposition to war, or the love of nature.[510] Rather, they address an "ultimate and comprehensive truth."[511] This does not require that the religion be focused on God, gods, or any deity. Nor does it look for extensive systematic structure or theology. The more singular the beliefs or ideas, the more it is likely to be political, philosophical, or merely a way of life.[512]

The Third Circuit concluded that MOVE was insufficiently

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[502] *Id.*
[503] *Id.* at 1033.
[504] *Id.* (citing Founding Church of Scientology v. United States, 409 F.2d 1146, 1160 (D.C. Cir. 1969)).
[505] *Id.*
[506] *Id.* at 1033-34 (citing Africa's focus on health, opposition to pollution, and MOVE's focus as a political and social revolutionary organization).
[507] *Id.* at 1034 (noting that the Free Exercise Clause "does not protect all deeply held beliefs, however "ultimate" their ends or all-consuming their means").
[508] *Id.* at 1035.
[509] *Id.*
[510] *Id.*
[511] *Id.*
[512] *Id.* at 1034-35.

comprehensive.[513] As described by the plaintiff, members shared a general idea of "philosophical naturalism."[514] But apart from this general desire to live a pure life, MOVE did not address much else.[515] Other courts had reached the same conclusion with respect to similar ideologies, including economic determinism, Social Darwinism, and vegetarianism.[516] Just as it did regarding the first indicium, the Third Circuit noted that one could characterize MOVE's focus on nature as comprehensive, especially by analogizing the place said beliefs hold for members to those in other religions.[517] However, the panel was ultimately dissuaded by Africa's testimony that *everything* members did was religious practice, including running, eating, and breathing.[518] The "notion that all of life's activities can be cloaked with religious significance is, of course, neither unique to MOVE nor foreign to more established religions."[519] But standing alone, the Third Circuit concluded that individuals could not transform the one-dimensional philosophy of MOVE into a religion.[520]

The distinction offers a potential solution to one of the challenges resulting from the Supreme Court's general guidance regarding the properties of religion for First Amendment purposes. After all, many religions (and followers) believe that "day-to-day living takes on added meaning and importance" because of their faith and beliefs.[521] It is a different matter, and a significant step further, to transform certain ideas, beliefs, credos, passions, views, or opinions into religions merely because "an individual alleges that his life is wholly governed by those ideas."[522] The Third Circuit recognized that such a step would allow the Religion Clauses to become self-defining and, therefore, essentially allow every individual to define his own sphere of exemption from society's laws—especially if that exemption covers every activity, action, and moment of daily life.[523] It declined to take that step.[524]

The final indicium looks at the putative religion's structural

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[513] *Id.* at 1035.
[514] *Id.*
[515] *See id.*
[516] *Id.*
[517] *See id.*
[518] *Id.*
[519] *Id.*
[520] *Id.*
[521] *Id.*
[522] *Id.*
[523] *See id.*
[524] *Id.* In drawing this line, the Third Circuit arguably narrowed the impact of the broadest readings of *Seeger* and, most certainly, *Welsh*. In those cases, the Supreme Court essentially allowed individuals to define their own religious belief vis a vis war, despite statements to the contrary. *See generally* United States v. Seeger, 380 U.S. 163 (1965); Welsh v. United States, 398 U.S. 333 (1970). Thus, the Third Circuit's test adheres to the line stated by the Court, even if it does not extend as far as a fair reading of the facts in *Seeger* and *Welsh* require. *Africa*, 662 F.2d at 1035.

characteristics.[525] Although not required, a court is more inclined to deem a belief religious if it is part of "any formal, external, or surface signs that may be analogized to accepted religions," such as "formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observance of holidays and other similar manifestations associated with the traditional religions."[526] Nothing in *Africa* suggests that these components or manifestations must look like (or even have) analogs in other religions or even serve analogous functions.[527] Rather, district courts applying the framework look for any religious observances and practices that suggested the purported religion was a religion, and not a political or social group less likely to have such accoutrements.[528]

MOVE lacked any structural characteristics. A creation of John Africa less than a decade previous as a revolutionary eco-political organization, MOVE itself disclaimed such elements.[529] The record in the case revealed no services, customs, or practices, or anything that might be described as such.[530] Although the plaintiff claimed to be an ordained minister, he could not identify what that meant.[531] But perhaps most importantly, the plaintiff could not produce—or describe—any written or formal oral distillation of guidelines, tenets, or beliefs.[532] At least as presented by the plaintiff, the Third Circuit held MOVE was not a religion for purposes of the First Amendment.[533]

While not the only judicial efforts in the wake of the Supreme Court's military draft cases, *Africa* and *Krishna* offer systematic ways to draw distinctions between bona fide religions and the sort of economic, philosophical, moral, social, sociological views, opinions, and beliefs, as well as any mere way of life that the Court held in *Yoder* fall outside the Religion Clauses. In particular, of all the attempts in the decades following *Seeger*, the *Africa* framework has proven almost as enduring as *Hardison*. Indeed, it (and other cases) continue to guide courts today, especially within the Third

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[525] *Id.*
[526] *Id.*
[527] *See id.* at 1036.
[528] *See, e.g.*, *id.*
[529] *E.g.*, *id.* at 1028. The Third Circuit also observed that MOVE lacked indicia of religion, such as ceremonies or rituals. *Id.* at 1027. Instead, Africa claimed "every act of life itself is invested with religious meaning and significance" such that the very act of living and breathing accord to religious belief. *Id.* "Our religion is constant. It is as constant as breathing ... Every time a MOVE person opens their mouth, according to the way we believe, according to the way we do things, we are holding church." *Id.* As such, "since no one day is any more special than another, for MOVE members every day of the year can be considered a religious 'holiday.'" *Id.* Skeptical, the Third Circuit noted that "[d]ietary considerations excepted, Africa shed little light upon what, if any, ethical commandments are part and parcel of the MOVE philosophy." *Id.* at 1028.
[530] *Id.* at 1035.
[531] *Id.* at 1036.
[532] *Id.*
[533] *Id.* at 1037.

Circuit.[534]

2. A Path of Less Resistance: Presume Religiosity

Outside the Second and Third Circuits, courts frequently look to *Seeger* and ask whether the belief, observance, or practice "for which protection is sought [is] religious in [the] person's own scheme of things."[535]

In many Title VII accommodation cases, the religious nature of the belief or practice is not contested. When it is, just as the Supreme Court did in *Seeger* and *Welsh*, courts often blend their analysis of the religious nature of the belief and the plaintiff's sincerity, which asks whether the belief is actually held by the plaintiff.[536] Where possible, courts will avoid delving directly into whether a belief is religious.[537] Instead, often courts will presume a belief is religious unless confronted with evidence to the contrary, or where it is clear the employer's actions were not because of, or motivated by, the employee's religious belief.[538] Two cases are illustrative of this approach.

Before the COVID-19 pandemic brought national attention to vaccine requirements, the Third Circuit heard a challenge to a hospital's policy requiring employees to obtain the influenza vaccine, which the plaintiff claimed conflicted with his religious beliefs.[539] Beginning in 1994, the plaintiff, Paul Fallon, was employed as a Psychiatric Crisis Intake Worker by the defendant, Mercy Hospital.[540] In 2012, the hospital began requiring employees to obtain an annual flu vaccine or submit an exemption form for a medical or religious exemption, whereupon the individual would be required to wear a mask as an accommodation.[541] Although the plaintiff did

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[534] *See, e.g.*, Fallon v. Mercy Cath. Med. Ctr. of Se. Pa., 877 F.3d 487, 491 (3d Cir. 2017) (explaining that a religion (1) addresses fundamental and ultimate questions having to do with deep and imponderable matters; (2) is comprehensive in nature in that it consists of a belief-system as opposed to an isolated teaching; and (3) often can be recognized by the presence of certain formal and external signs).

[535] Adeyeye v. Heartland Sweeteners, LLC, 721 F.3d 444, 451 (7th Cir. 2013) (citation omitted) (stating that "…only religious beliefs, observances, and practices must be accommodated. And it is not enough for the belief to be religious in nature, it must also be the employee's own religious belief").

[536] *See id.*

[537] *See, e.g.*, Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 132 (1st Cir. 2004) ("Determining whether a belief is religious is more often than not a difficult and delicate task, one to which the courts are ill-suited.") (citations omitted); Int'l Soc. For Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 432-33 (2d Cir. 1981) ("[America's religious] openness is legitimately restricted only when underlying motives of deception and fraud hide behind a facade of conscience and religious belief … Courts temporal are not ideally suited to resolve problems that originate in the spiritual realm … We recognize our limited expertise in this endeavor and proceed carefully to outline the relevant facts necessary for mediating the instant confrontation between the dictates of religious conscience and the pragmatic needs of the state.").

[538] *See discussion infra* notes 542-595 and accompanying text.

[539] Fallon v. Mercy Catholic Med. Ctr. of Se. Pa., 877 F.3d 487 (3d Cir. 2017).

[540] *Id.* at 489.

[541] *Id.*

not affiliate himself with any religious organization, he held strong personal beliefs opposing the flu vaccine.[542] Although the hospital granted a religious exemption to Fallon in 2012 and 2013, after revising its procedures in 2014 it denied an exemption.[543] The hospital explained that the plaintiff must obtain a letter from clergy, which the plaintiff could not provide.[544] Instead, he submitted a twenty-two-page essay in support of his request.[545] The plaintiff was suspended and later terminated.[546]

The principal question before the Third Circuit was whether the plaintiff's beliefs were religious.[547] The panel began with *Seeger* and *Welsh* before turning to the *Africa* factors.[548] The plaintiff cited a quotation attributed to the founder of Buddhism and claimed he believed that "one should not harm their [sic] own body and strongly believes that the flu vaccine may do more harm than good."[549] If he "yielded to coercion" by the hospital's policy, he would "violate his conscience as to what is right and wrong."[550]

The Third Circuit was not persuaded.[551] The panel distilled Fallon's objection to concerns about the "health effects of the flu vaccine," disagreement with medical assessments that it "is harmless to most people," and a general desire to avoid it.[552] Combining that assessment with a "general moral commandment" to conclude the vaccine is morally wrong failed to make his opposition religious.[553] The plaintiff failed all three *Africa* factors.[554] The panel concluded that the anti-vaccine command was an isolated view that did not concern "deep and imponderable matters" and bore none of the formal or external elements of a religious belief.[555] As a result, the plaintiff's belief was not religious for purposes of Title VII and the

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[542] *Id.*

[543] *Id.*

[544] *Id.*

[545] The hospital attached the essay to its reply brief in support of its motion to dismiss the plaintiff's Title VII complaint. *Id.* The district court held a hearing on the motion at which the plaintiff argued the court could not consider the essay because it had not been reproduced in full in the complaint. *Id.* However, the district court granted the motion to dismiss, in part based on the contents of the essay. *Id.* And because it considered any amendment would be futile, the district court's dismissal was with prejudice. *See generally id.* In his complaint, the plaintiff had quoted and relied upon parts of the essay in support of his arguments. *Id.*

[546] *Id.*

[547] *Id.* at 490.

[548] *See id.* at 490-91.

[549] *Id.* at 492 (citation omitted).

[550] *Id.*

[551] *See id.*

[552] *Id.* (stating that "the basis of his refusal of the flu vaccine—his concern that the flu vaccine may do more harm than good—is a medical belief, not a religious one").

[553] *Id.*

[554] *Id.*

[555] *Id.*

hospital was not obligated to accommodate it.[556] The Third Circuit enforced the line stated (if not followed) in *Seeger*, making clear that Title VII does not require employers to accommodate beliefs that are not rooted in some religion, even if not theistic or formal. Other courts have also drawn a similar line.[557] Three points bear note.

First, there is little to distinguish Fallon's arguments against the flu vaccine (the vaccine would "violate his conscience as to what is right and wrong") from those of Welsh against military service (it was morally wrong to take a life).[558] Both articulated strong personal *moral* objections.[559] In both cases, the identified moral directive was not to harm.[560] And neither based those morals on a belief in God, another deity, or any religion outside of himself.[561] Side-by-side, the Third Circuit's conclusions are more defensible than *Seeger*, even ignoring *Africa*. After all, Welsh's sincere opposition to military service was not connected to, much less derived from, any religion (theistic or otherwise) and was "essentially political, sociological, or philosophical."[562] Therefore, it would seem to fall short under the test as it was articulated, if not applied, in *Seeger*. The dissonance between these cases may be explained by a variety of factors, as illustrated above.[563] More importantly, *Fallon* confirms that, on a practical level, *Welsh* continues to stand for the proposition that protected religious beliefs need not be theological—that is, premised on a belief in God—but not for the notion that any moral belief is religious for purposes of the First Amendment and, by implication, Title VII.[564]

Second, the Third Circuit acknowledged that objections to vaccines

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[556] *Id.*

[557] The Third Circuit noted that its conclusion in *Fallon* accorded with the conclusions of other courts. *Id.* at 492 n.25 (citing Mason v. Gen. Brown Cent. Sch. Dist., 851 F.2d 47, 51 (2d Cir. 1988) (upholding as not clearly erroneous a district court finding that certain parents' opposition to vaccination was "based, not on religious grounds, but on scientific and secular theories"); Hanzel v. Arter, 625 F. Supp. 1259, 1260, 1265 (S.D. Ohio 1985) (describing a professed belief in "chiropractic ethics"—"a body of thought which teaches that injection of foreign substances into the body is of no benefit and can only be harmful"—as philosophical rather than religious); McCartney v. Austin, 31 A.D.2d 370, 298 N.Y.S.2d 26, 27 (1969) ("[A]ppellants' opposition [to vaccination]—whether or not predicated upon their personal moral scruples or upon medical concern—is not upon religious grounds ....")).

[558] *Fallon*, 877 F.3d at 492; Welsh v. United States, 398 U.S. 333, 343 (1970).

[559] *Fallon*, 877 F.3d at 492; *Welsh*, 398 U.S. at 343.

[560] *Fallon*, 877 F.3d at 492; *Welsh*, 398 U.S. at 343. The object of the moral command is different (for Welsh it was the lives of others, for Fallon his own life and body), but neither the Court in *Welsh* nor the Third Circuit in *Fallon* drew significance from the focus of the belief in question. Fallon, 877 F.3d at 492; *Welsh*, 398 U.S. at 343. Nor should they have done so. Religious accommodations focus on the *source* of the belief and its *conflict* with societal or employment requirements.

[561] *Fallon*, 877 F.3d at 492; *see also Welsh*, 398 U.S. at 343.

[562] *Welsh*, 398 U.S. at 342-43.

[563] *See supra* notes 547-550 and accompanying text.

[564] *See generally Fallon*, 877 F.3d at 491 ("Applying the same test later in *Welsh v. United States*, the Court made clear that belief in God or divine beings was not necessary….").

that are, in fact, premised on bona fide religious beliefs are covered by Title VII and may require accommodations.[565] In 2021 and 2022, the number of petitions for religious accommodations to COVID-19 vaccine requirements imposed by government and private employers skyrocketed.[566] In some cases, the content and circumstances of these claims suggested to many that they were not truly religious, but rather sincerely and strongly held political, theoretical, philosophical, or other disagreements with COVID-19 vaccines or the manner of their imposition.[567] To date, the Third Circuit has not applied *Africa* to COVID-19 vaccine cases brought under Title VII. *Africa* and *Fallon* suggest that private plaintiffs with consistent, credible, bona fide religious objections are more likely to prevail than those for whom employer vaccine requirements are wrong for other reasons.[568]

Third, the panel also commented on the employer's requirement that employees provide letters from religious leaders or authorities, albeit obliquely.[569] The employee argued that a letter from the clergy is not the only way to demonstrate a sincerely held religious belief.[570] The Third Circuit responded indirectly, by warning the hospital that its position on the issue was wrong.[571] Had the Third Circuit squarely addressed the point, it would all but certainly have held that the hospital's requirement of a letter from a member of the clergy (even assuming "clergy" means "a religious authority") violates Title VII.[572] Such a policy implies that only religions with clergy, or similar leadership, are entitled to accommodation.[573] *Seeger* and *Welsh* make clear that non-theistic, non-Western religious beliefs are also covered by the First Amendment and, by extension, Title VII.[574] Of course, if the policy required a letter from the clergy of one or any Christian church, it certainly violates Title VII effectively by categorically denying vaccine accommodations for all non-Christians.[575] In addition, even a general requirement for official endorsement or confirmation of the belief from a

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[565] *Id.* at 492-93 ("This is not to say that anti-vaccination beliefs cannot be part of a broader religious faith; in some circumstances, they can, and in those circumstances, they are protected.").

[566] *See* EEOC Religion-Based Charges, available at https://www.eeoc.gov/data/religion-based-charges-charges-filed-eeoc-fy-1997-fy-2022 (last visited Feb. 22, 2025) (13,814 charges in FY 2022, covering portions of calendar year 2021 and 2022, compared with 2,111 in FY2021, and 2,404 in FY2020); see also FY2022 note ("In FY 2022, there was a significant increase in vaccine-related charges filed on the basis of religion. As a result, FY 2022 data may vary compared to previous years.").

[567] *See id.*

[568] *See Fallon*, 877 F.3d at 490; *see also* Africa v. Pennsylvania, 662 F.2d 1025, 1036-1037 (3d Cir. 1981).

[569] *See Fallon*, 877 F.3d at 493 n.27.

[570] *Id.*

[571] *Id.* ("To the extent that Mercy Catholic may have believed that it could not be discriminating on the basis of religion if it fired an employee who could not produce a letter from a clergyperson, it was mistaken.")

[572] *See id.*

[573] *See id.*

[574] *See supra* text accompanying note 353.

[575] *See Fallon*, 877 F.3d at 493 n. 27.

religious figure is problematic; it suggests that to qualify for a religious accommodation under Title VII, one's religious beliefs must conform to those of a religion, established or otherwise.[576] While a letter from a religious authority might be evidence supporting a plaintiff's request for an accommodation if an employee chooses to submit one, a letter from a religious authority cannot be required by an employer or a court as an element of a Title VII religious accommodation claim.[577]

For an employer to violate Title VII for rejecting a request for a religious accommodation or discrimination on the basis of religion, it must understand that the request is based on a *religious* conflict with an employment requirement. The point is not always obvious, as demonstrated by *Reed v. The Great Lakes Companies, Inc*.[578] There a former hotel employee sued the owner of a hotel for religious disparate treatment and a failure to accommodate.[579] Hired as the executive housekeeper of a newly opened Holiday Inn in Milwaukee, one of his responsibilities was to ensure that a copy of the Bible provided (for free) by the Gideons was placed in every room.[580] The Gideons meet with management of newly opened hotels when they come to deliver Bibles.[581] The manager requested that the plaintiff attend the meeting, which, unbeknownst to the manager, included the Gideons reading the Bible and praying.[582] The plaintiff was offended and left mid-meeting.[583] Later, the employer confronted the plaintiff and the following exchange occurred:

> Manager: "Don't do that again, you embarrassed me."
> Plaintiff: "You can't compel me to a religious event."
> [Manager counters that the plaintiff would do what he was told to do]
> Plaintiff: "Oh, hell no, you won't, not when it comes to my spirituality."[584]

The manager terminated the plaintiff for insubordination.[585] In litigation, the plaintiff refused to indicate "what if any religious affiliation or beliefs (or

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[576] *See id.*
[577] *See id.*; *see also supra* text accompanying note 353.
[578] Reed v. Great Lakes Cos., 330 F.3d 931 (7th Cir. 2003).
[579] *Id.* at 922-933.
[580] *Id.* at 932.
[581] *Id.*
[582] *Id.* at 933. The record reflected that the manager had met with the Gideons before to accept Bibles for a hotel and that none of those prior meetings included prayer or reading the Bible. *Id.* at 934.
[583] *Reed*, 330 F.3d. at 933.
[584] *Id.*
[585] *Id.*

nonbelief) he has."[586]

The Seventh Circuit noted that nothing in the record suggested the plaintiff "was fired because of his religious beliefs, identity, or observances or because of his aversion to religion, to Christianity, or to the Gideons."[587] The record was bereft of any evidence that the manager was a Gideon, or even a Christian.[588] The event did not indicate any affiliation with the Gideons; as the court noted, the hotel "accepts Bibles from the Gideons because the Bibles are free, not because any of Great Lakes' owners or managers, including the manager [who fired the plaintiff']" share the Gideons' religion or wish to mandate it.[589] It concluded that the plaintiff did not state a prima facie case of discrimination.[590]

Likewise, the Seventh Circuit rejected the accommodation claim because, leaving aside the question of burden, an "employee is not permitted to redefine a purely personal preference or aversion as a religious belief."[591] Here, the accommodation—excusal from the meeting with the Gideons—was simple enough, but not sought.[592] And the panel drew an important line between an employee making such a request and the plaintiff, who asserted "an unqualified right to disobey orders that he deems inconsistent with his faith though he refuses to indicate at what points that faith intersects the requirements of his job."[593]

3. A Modern Framework: Consider Everything

One might criticize the appellate decisions above for oversimplifying a difficult question by applying too blunt a tool or simply conceding defeat. But these decisions provide the raw material for a workable framework. Some courts have built upon these and other cases, coming behind the Third Circuit in *Africa* and the Second Circuit in *Krishna*, to outline the characteristics of religions within the broad framework set by the Supreme

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[586] *Id.*

[587] *Id.* at 934.

[588] *Id.*

[589] *Id.*

[590] *Id.* (concluding that the "manager must have been indifferent to [the employee's] religious views, because [the employee] never expressed them to the manager; to this day we do not know what his religion is … It is difficult to see how an employer can be charged with discrimination on the basis of an employee's religion when he doesn't know the employee's religion (or lack thereof …)").

[591] *Id.* at 935.

[592] *Id.*

[593] *Id.* The Seventh is one of the circuits that includes employer notification in a plaintiff's prima facie burden. *See id.* (collecting circuit authority). As a result, plaintiffs like Reed are likely to fail to state a claim. But this issue also arises in circuits without such a requirement. There, courts confront essentially the same issue in deciding whether the plaintiff alleges a religious belief that conflicts with an employment requirement. Those courts would reach the same outcome as the Seventh Circuit in *Reed*, simply by concluding that the employee's belief is not, in fact, religious.

Court most clearly in *Seeger* and *Yoder*.

For example, the Tenth Circuit adopted an inclusive—if not svelte—framework in *United States v. Meyers*.[594] With only formatting adjustments, this is how the panel framed the criteria by which one might recognize a religion for purposes of the First Amendment:

> 1. Ultimate Ideas: Religious beliefs often address fundamental questions about life, purpose, and death. As one court has put it, "a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters." These matters may include existential matters, such as man's sense of being; teleological matters, such as man's purpose in life; and cosmological matters, such as man's place in the universe.
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> 2. Metaphysical Beliefs: Religious beliefs often are metaphysical, that is, they address a reality which transcends the physical and immediately apparent world. Adherents to many religions believe that there is another dimension, place, mode, or temporality, and they often believe that these places are inhabited by spirits, souls, forces, deities, and other sorts of inchoate or intangible entities.
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> 3. Moral or Ethical System: Religious beliefs often prescribe a particular manner of acting, or way of life, that is "moral" or "ethical." In other words, these beliefs often describe certain acts in normative terms, such as "right and wrong," "good and evil," or "just and unjust." The beliefs then proscribe those acts that are "wrong," "evil," or "unjust." A moral or ethical belief structure also may create duties—duties often imposed by some higher power, force, or spirit—that require the believer to abnegate elemental self-interest.
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> 4. Comprehensiveness of Beliefs: Another hallmark of "religious" ideas is that they are comprehensive. More often than not, such beliefs provide a telos, an overreaching array of beliefs that coalesce to provide the believer with answers to many, if not most, of the problems and concerns that confront humans. In other words, religious beliefs generally

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[594] United States v. Meyers, 95 F.3d 1475, 1483-84 (10th Cir. 1996) (concluding the "Church of Marijuana" was not a religion under the RFRA).

are not confined to one question or a single teaching.

5. Accoutrements of Religion: By analogy to many of the established or recognized religions, the presence of the following external signs may indicate that a particular set of beliefs is "religious":

    a. Founder, Prophet, or Teacher: Many religions have been wholly founded or significantly influenced by a deity, teacher, seer, or prophet who is considered to be divine, enlightened, gifted, or blessed.

    b. Important Writings: Most religions embrace seminal, elemental, fundamental, or sacred writings. These writings often include creeds, tenets, precepts, parables, commandments, prayers, scriptures, catechisms, chants, rites, or mantras.

    c. Gathering Places: Many religions designate particular structures or places as sacred, holy, or significant. These sites often serve as gathering places for believers. They include physical structures, such as churches, mosques, temples, pyramids, synagogues, or shrines; and natural places, such as springs, rivers, forests, plains, or mountains.

    d. Keepers of Knowledge: Most religions have clergy, ministers, priests, reverends, monks, shamans, teachers, or sages. By virtue of their enlightenment, experience, education, or training, these people are keepers and purveyors of religious knowledge.

    e. Ceremonies and Rituals: Most religions include some form of ceremony, ritual, liturgy, sacrament, or protocol. These acts, statements, and movements are prescribed by the religion and are imbued with transcendent significance.

    f. Structure or Organization: Many religions have a congregation or group of believers who are led, supervised, or counseled by a hierarchy of teachers,

clergy, sages, priests, etc.

g. Holidays: As is etymologically evident, many religions celebrate, observe, or mark "holy," sacred, or important days, weeks, or months.

h. Diet or Fasting: Religions often prescribe or prohibit the eating of certain foods and the drinking of certain liquids on particular days or during particular times.

i. Appearance and Clothing: Some religions prescribe the manner in which believers should maintain their physical appearance, and other religions prescribe the type of clothing that believers should wear.

j. Propagation: Most religious groups, thinking that they have something worthwhile or essential to offer non-believers, attempt to propagate their views and persuade others of their correctness. This is sometimes called "mission work," "witnessing," "converting," or proselytizing.[595]

Although the Tenth Circuit synthesized these criteria from the cases it cited, the influence of *Africa* is particularly noteworthy. In fact, the *Meyers* test is essentially the product, or perhaps evolution, of *Africa*. No one of the criteria is dispositive and the framework should be applied to favor the protection of religion if "minimally satisfied."[596] Nevertheless, the Tenth Circuit minded the Court's restrictions against cloaking the "purely personal, political, ideological, or secular" in religious protection.[597] And although it did not mention the Third Circuit's caution against the self-transformation of non-religious beliefs and practices into religion on account of an individual's

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[595] *Id.* (citing Africa v. Pennsylvania, 662 F.2d 1025 (3rd Cir. 1981); Malnak v. Yogi, 592 F.2d 197 (3rd Cir. 1979); United States v. Sun Myung Moon, 718 F.2d 1210 (2nd Cir. 1983); Founding Church of Scientology of Washington, D.C. v. United States, 409 F.2d 1146 (D.C. Cir. 1969); Washington Ethical Soc'y v. District of Columbia, 249 F.2d 127 (D.C. Cir. 1957); United States v. Kauten, 133 F.2d 703 (2nd Cir. 1943); Sherr v. Northport–E. Northport Union Free Sch. Dist., 672 F. Supp. 81 (E.D.N.Y. 1987); Jacques v. Hilton, 569 F. Supp. 730 (D. N.J. 1983); Church of the Chosen People v. United States, 548 F. Supp. 1247 (D. Minn. 1982); Womens Services, P.C. v. Thone, 483 F. Supp. 1022 (D. Neb. 1979); Stevens v. Berger, 428 F. Supp. 896 (E.D.N.Y. 1977); Remmers v. Brewer, 361 F. Supp. 537 (S.D. Iowa 1973); United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968); Fellowship of Humanity v. Alameda Cty., 153 Cal. App. 2d 673, 315 P.2d 394 (1957)).

[596] *Id.* at 1484.

[597] *Id.*

fervor, notions of centrality, or other subjective measures, these elements afford modern courts a decent roadmap when compelled to decide whether a belief, practice, or observance is religious for purposes of Title VII or the First Amendment.[598]

When deciding a Title VII religious disparate treatment case, many courts seek to avoid the controversial and weighty religion question. Not only is the subject difficult and sensitive, but it is also subjective, aspects of it are not readily amenable to legal analysis, and there is very little practical direction.[599] As a result, courts often cite to *Seeger* and presume a belief is religious, moving on to more objective elements.[600]

Ultimately, courts applying *Seeger* attempt to discern whether a plaintiff's belief is religious by asking if it is, "in his own scheme of things, religious."[601] A belief is religious if it is "sincere and meaningful" and "occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."[602] If the belief in question meets this standard and is not political, social, philosophical, a moral code or a way of life, it is religious for purposes of Title VII as well as the First Amendment.[603] Virtually any belief can be framed to satisfy this test.

3. Sincerity

To state a prima facie case in a Title VII action alleging religious disparate treatment due to a failure to accommodate, a plaintiff must not only identify a belief, practice, or observance that is religious, he must also show that he holds it sincerely.[604] Essentially, the sincerity inquiry is nothing more than a credibility assessment of the plaintiff with respect to his or her claims regarding the religious belief or practice at issue in a Title VII ligation.[605]

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[598] *See generally id.* at 1483-1484 (outlining the elements to decide whether belief or practice is religious).

[599] *See Barber*, 650 F.2d at 432-33 (explaining that "Courts temporal are not ideally suited to resolve problems that originate in the spiritual realm"); Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 132 (1st Cir. 2004) ("Determining whether a belief is religious is more often than not a difficult and delicate task, one to which the courts are ill-suited") (citations omitted).

[600] *See, e.g.*, Kravitz v. Purcell, 87 F.4th 111, 127 (2d Cir. 2023).

[601] *See* Nat'l Inst. of Family and Life Advocates v. Becerra, 585 U.S. 755 (2018); Moore-King v. County of Chesterfield, Va., 708 F.3d 560, 570-71 (4th Cir. 2013); Adeyeye v. Heartland Sweeteners, LLC, 721 F.3d 444, 451 (7th Cir. 2013) (also noting that "…only religious beliefs, observances, and practices must be accommodated. And it is not enough for the belief to be religious in nature, it must also be the employee's own religious belief."); *Seeger*, 380 U.S. at 185. As noted above, *Seeger* identifies a religious belief in part by the plaintiff's sincerity in holding it. *Id.* Although sincerity is an important element of an accommodation claim, it is properly considered a separate element simply because an individual's sincerity cannot affect the nature of the belief, nor make it any more or less religious.

[602] *Seeger*, 380 U.S. at 176; *see Moore-King*, 708 F.3d at 571.

[603] *Seeger*, 380 U.S. at 165.

[604] Bailey v. Metro Ambulance Servs., Inc., 992 F.3d 1265, 1275 (11th Cir. 2021).

[605] *See* EEOC v. Unión Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico, 279 F.3d 49, 56 (1st Cir. 2002) ("The finding on this issue generally will depend on the factfinder's assessment of the

Although in *Seeger* the Supreme Court used sincerity to help identify whether a belief is religious for Free Exercise purposes, it is analytically distinct from the nature or characteristics of the underlying belief.[606] Just as with questions regarding religion, Title VII sincerity analysis tracks the identical constitutional inquiry.[607] And while the meaning of "sincere" is clear in comparison to the term "religion," the inquiry is no less important or sensitive. Both the Supreme Court and courts of appeals have cautioned lower courts to proceed with similar caution and modesty when addressing sincerity as they do when evaluating whether a belief is religious.[608] Nevertheless, the sincerity and credibility analysis above is distinct from notions of liberal remedial construction of laws or statute-specific rules of interpretation.[609]

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employee's credibility. Credibility issues such as the sincerity of an employee's religious belief are quintessential fact questions") (citations omitted); Davis v. Fort Bend Cty., 765 F.3d 480, 485, 486 (5th Cir. 2014) (noting that the "sincerity of a person's religious belief is a question of fact unique to each case" and "claims of sincere religious belief in a particular practice have been accepted on little more than the plaintiff's credible assertions"); Tagore v. United States, 735 F.3d 324, 328 (5th Cir. 2013) (noting that "the plaintiff's "sincerity" in espousing that practice is largely a matter of individual credibility" and "claims of sincere religious belief in a particular practice have been accepted on little more than the plaintiff's credible assertions"); A.A. *ex rel.* Betenbaugh v. Needville Indep. Sch. Dist., 611 F.3d 248, 261 (5th Cir. 2010) (noting that "a complaining adherent [bears] the burden of demonstrating the honesty and accuracy of his contention that the religious practice at issue is important to the free exercise of his religion") (quotations, citations removed, and cleaned up).

[606] *See Seeger*, 380 U.S. at 185. Yet, as discussed below, the Supreme Court intentionally chose to incorporate sincerity into the religion analysis.

[607] Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476, 481-82 (2d Cir. 1985) ("We see no reason for not regarding the standard for sincerity under Title VII as that used in free exercise cases").

[608] *See, e.g.*, *Adeyeye*, 721 F.3d at 452 (noting that determining whether a belief qualifies as a religion or whether a person's belief is sincere "are matters of interpretation where the law must tread lightly … Courts are not arbiters of scriptural interpretation"); Moussazadeh v. Tex. Dept. of Criminal Justice, 703 F.3d 781, 792 (5th Cir. 2012) (noting the sincerity inquiry "must be handled with a light touch, or judicial shyness" so as not to "stray into the realm of religious inquiry, an area into which we are forbidden to tread"). This judicial modesty and related calls to refrain from inquiring into the credibility of religious adherents has historic and constitutional roots. As has been recounted at length and by many, a significant number of the Europeans who first came to our shores did so to escape religious persecution. And the United States has a long history of religion with familiar protections included in the First Amendment. Yet even more relevant here is Article VI of the Constitution, which requires federal legislators and executive and judicial officers to take an oath to uphold the Constitution, but also provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. CONST. art. VI cl. 3. Nevertheless, as has been demonstrated above, the foundation of the modern free exercise framework (*e.g.*, *Seeger* and *Welsh*) derives from cases arising in the context of religious exceptions to military conscription. In that context, plaintiffs had significant motivation and reasons falsely to claim religious exemptions. Indeed, the very purpose of military draft boards was to ferret out meritorious and unmeritorious claims, and objective evidence relevant to the credibility of the plaintiff was material to the proceedings. *See* Witmer v. United States, 348 U.S. 375, 381-82 (1955) (noting that "any fact which casts doubt on the veracity of the registrant is relevant"). As a result, it is not surprising that while courts outline their inquiries with gentle language, objective evidence of the plaintiff's sincerity (or lack thereof) always remains relevant.

[609] The presumption of sincerity is essentially a default credibility finding of fact—not a rule of statutory construction regarding section 2000e(j). It is an "oft-repeated and age-old formulation" that courts liberally construe remedial statutes. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 364 (2012) (citing Beley v. Naphtaly, 169 U.S. 353, 360 (1898); Chisholm v. Georgia, 2 Dall. 419, 476 (1793) (Jay, C.J.)). Practically, this formulation only performs work where a court's construction expands beyond the "just and ordinary sense of the terms" to add new content fashioned by the court

Sincerity is important because just as the Free Exercise Clause only protects *religious* exercise, section 2000e(j) of Title VII only requires employers to accommodate religious beliefs, observances, and practices that an employee actually and genuinely holds and practices—not political, economic, social, or philosophical beliefs, moral codes, or ways of life which may also be fervently held.[610] An employee is not entitled to accommodation of either non-religious beliefs or religious beliefs that he does not, in fact, hold.[611] And without the ability to evaluate sincerity, courts are powerless to identify and cull frivolous claims.

Although important, courts have recognized from time *in memoriam* that the greatest temptation and danger for a court evaluating a

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consonant with the remedial end that the court identified. *See id.* (citing 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 429, at 304 (2d ed. 1858)). Nevertheless, for centuries this persisted as a general guidepost of statutory interpretation, including within the sphere of federal employment laws. For example, courts frequently read Title VII's provisions broadly in furtherance of its policy objectives. *See* Furnco Constr. Co. v. Waters, 438 U.S. 567, 575-576 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Rowe v. Gen. Motors Corp., 457 F.2d 348 (5th Cir. 1972)). The principle applied twice over to the Fair Labor Standards Act, where courts not only construed the minimum wage and overtime provisions broadly, but also statutory exemptions narrowly. *See, e.g.*, A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945); Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944); WHD Op. Ltr. FLSA2021-3, 2021 WL 240824, at *3.

But the Supreme Court has increasingly rejected rules that artificially broaden or narrow statutory provisions based on "remedial" or similar characterizations. *See, e.g.*, Encino Motorcars, LLC v. Navarro, 584 U.S. 79, 90 (2018) (rejecting principle that "exemptions to the [Fair Labor Standards Act (FLSA)] … should be construed narrowly … Because the FLSA gives no 'textual indication' that its exemptions should be construed narrowly, "there is no reason to give [them] anything other than a fair (rather than a 'narrow') interpretation"). The Court has not confined to the FLSA its disdain for artificially broad or narrow construction but has increasingly rejected such rules outside employment law. *See, e.g.*, BP P.L.C. v. Mayor & City Council of Balt., 593 U.S. 230, 239 (2021) ("This Court has no license to give statutory exemptions anything but a fair reading.") (cleaned up); CTS Corp. v. Waldburger, 573 U.S. 1, 13 (2014) (the "proposition that remedial statutes should be interpreted in a liberal manner" cannot be a "substitute for a conclusion grounded in the statute's text and structure" because "almost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem. And even if the Court identified some subset of statutes as especially remedial ... no legislation pursues its purposes at all costs") (cleaned up). USERRA remains a potential exemption to this course correction. *See* B. Kelley, *For Whom the Leave Tolls: Short-Term Paid Military Leave and USERRA*, 127 PA. ST. L. REV. 57, 69 (2022). Of course, in this context the Supreme Court's instruction to construe its terms in favor of servicemembers derives from national security and policy concerns, not general principles regarding the statutory construction of remedial statutes. *See generally id.*; *see also* Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284 (1946).

[610] See Tagore v. United States, 735 F.3d 324, 328 (5th Cir. 2013) ("The sincerity of a plaintiff's belief in a particular religious practice is an essential part of the plaintiff's prima facie case under either Title VII" or the First Amendment); EEOC v. Unión Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico, 279 F.3d 49, 56 (1st Cir. 2002) ("The element of sincerity is fundamental, since if the religious beliefs that apparently prompted a request are not sincerely held, there has been no showing of a religious observance or practice that conflicts with an employment requirement") (citations and internal punctuation omitted); *Ansonia*, 757 F.2d at 481, 82 ("it is entirely appropriate, indeed necessary, for a court to engage in analysis of the sincerity—as opposed, of course, to the verity—of someone's religious beliefs in both the free exercise context and the Title VII context" and "a sincerity analysis is necessary in order to differentiat[e] between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud."); Int'l Soc. For Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (noting that the "goal, of course, is to protect only those beliefs which are held as a matter of conscience").

[611] *See Tagore*, 735 F.3d at 328-329.

plaintiff's sincerity is to allow its assessment of the substance of the belief to influence, let alone dictate, its finding of sincerity. In other words, the more unusual or fantastical the belief the more likely the court is to question and doubt the plaintiff's sincerity in believing it.[612] This is likely one reason the Court in *Seeger* placed the discussion of sincerity within the assessment of whether a belief is religious.[613] By combining the two, the *Seeger* Court attempted to focus courts on a simplified larger picture that minimized the likelihood that courts would delve too far into "evaluating the relative merits of differing religious claims … or the sincerity with which an asserted religious belief is held" and, therefore, improperly involve the courts in religious matters.[614]

To avoid these pitfalls wherever possible, courts often deem a plaintiff credible and, therefore, sincere, absent objective evidence to the contrary, financial or other obvious incentives to misrepresent or feign religious beliefs, or other indicia of fraud.[615] Courts look for extrinsic

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[612] *Barber*, 650 F.2d at 441 ("Human nature being what it is, however, it is frequently difficult to separate this inquiry from a forbidden one involving the verity of the underlying belief. People find it hard to conclude that a particularly fanciful or incredible belief can be sincerely held.") (citations omitted); *Ansonia*, 757 F.2d at 482 ("We must avoid any test that might turn on the factfinder's own idea of what a religion should resemble"). Yet, at the same time, if a plaintiff claims to adhere to a certain religion or specific belief, but nevertheless makes comprehensive changes and amendments that are suspicious, courts may question whether the religious claim is an ill-fitting cover or cloak for secular or other conduct. A survey of Title VII accommodation cases shows that the more a belief or practice is an objective requirement of a known religion—theistic or atheistic, Western or Eastern, traditional or nontraditional—that exists apart from the mind of the plaintiff, the more likely a court is to find the belief sincere. Conversely, where the asserted religion and beliefs are idiosyncratic to the plaintiff and objective evidence reveals a financial or other secular motive for the requested accommodation or exemption, courts are likely to find the plaintiff's assertion of religion is not credible. This is an admittedly difficult line to draw and apply.

[613] *See* United States v. Seeger, 380 U.S. 163, 184-185 (1965) ("'Religious experiences which are as real as life to some may be incomprehensible to others." Local boards and courts in this sense are not free to reject beliefs because they consider them "incomprehensible." Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.").

[614] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 771 (2014) (Ginsburg, J., dissenting) (citations omitted); *see also* EEOC v. Consol Energy, Inc., 860 F.3d 131, 142 (4th Cir. 2017) ("It is not [an employer's] place as an employer, nor ours as a court, to question the correctness or even the plausibility of [the plaintiff's] religious understandings"); Davis v. Fort Bend Cty., 765 F.3d at 486 (question regarding whether event attendance was a religious tenet "is not for federal courts, powerless as we are to evaluate the logic or validity of beliefs found religious and sincerely held") (citations omitted and cleaned up); *Adeyeye*, 721 F.3d at 452 ("We are not and should not be in the business of deciding whether a person holds religious beliefs for the "proper" reasons. We thus restrict our inquiry to whether or not the religious belief system is sincerely held; we do not review the motives or reasons for holding the belief in the first place"); A.A. *ex rel.* Betenbaugh v. Needville Indep. Sch. Dist., 611 F.3d 248, 261 (5th Cir. 2010) [hereinafter *Betenbaugh*] ("Intrafaith differences are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences. … Sincere religious belief cannot be subjected to a judicial sorting of the heretical from the mainstream—certainly not in discharge of duty to faithfully apply protections demanded by law") (quotations, citations removed; cleaned up).

[615] *See Betenbaugh*, 611 F.3d at 268 ("For government to prevail, then, it cannot rely on 'general platitudes,' but 'must show by specific evidence that [the adherent's] religious practices jeopardize its stated interests.'") For the oft-quoted language regarding "judicial shyness," light touch inquiries, or areas forbidden to tread, the evaluation of a party's (or any witness') credibility falls squarely within core functions of courts and the training and skills of lawyers in an adversarial system. *See, e.g.*, *id.* at 262. As long as courts do not base such findings on

evidence in the plaintiff's actions and speech to support (or undermine) his or her credibility.[616] In so doing, courts must be careful to focus on the specific belief in question but at the same time steer clear of directly assessing its merit or the plaintiff's understanding or application of it, sorting through intrafaith debates, or demanding perfection in adherence.[617]

In a variety of contexts beyond Title VII, courts have scrutinized assertions of religious belief and practice.[618] Where objective evidence revealed financial and secular motives or benefits to an accommodation or exemption, courts have rejected plaintiffs' religious claims.[619] Courts have

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their presumptions about the content or nature (the validity and verity) of the belief in question, courts should not hobble themselves from performing the basic judicial function of weighing and determining credibility merely because to do so might reveal a lack of credibility in many claims. Put another way, while courts claim that they may not or do not question a plaintiff's reason for believing what they claim, in a sense, the sincerity element (and the law) requires precisely that.

[616] *See Barber*, 650 F.2d at 441 ("this analysis is most useful where extrinsic evidence is evaluated. For example, an adherent's belief would not be 'sincere' if he acts in a manner inconsistent with that belief, or if there is evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine") (citations omitted).

[617] *See, e.g.*, *Davis*, 765 F.3d at 485-86 ("The specific religious practice must be examined rather than the general scope of applicable religious tenets, and the plaintiff's sincerity in espousing that practice is largely a matter of individual credibility") (citations omitted and cleaned up); *Adeyeye*, 721 F.3d at 452 ("A personal religious faith is entitled to as much protection as one espoused by an organized group. It is not within our province to evaluate whether particular religious practices or observances are necessarily orthodox or even mandated by an organized religious hierarchy. Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ. Title VII and courts also do not require perfect consistency in observance, practice, and interpretation when determining if a belief system qualifies as a religion or whether a person's belief is sincere … Courts are not arbiters of scriptural interpretation") (citations and punctuation omitted and cleaned up); *Moussazadeh*, 703 F.3d at 791 ("Individuals may practice their religion in any way they see fit, and it is not for the Court to say it is an unreasonable one. A showing of sincerity does not necessarily require strict doctrinal adherence to standards created by organized religious hierarchies. … A finding of sincerity does not require perfect adherence to beliefs expressed by the inmate, and even the most sincere practitioner may stray from time to time") (cleaned up); *Betenbaugh*, 611 F.3d at 261 (noting that the court "must refuse to dissect religious tenets just because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ" and that simply because the "[Plaintiff's] request for exemption and the [Employer's] requirements can be seen as shifting over time" was not indicative of a lack of sincerity because the court saw "no calculated gamesmanship by either of them because not surprisingly, the record ... was not made with an eye to the microscopic examination often exercised in appellate judicial review" and that an "adherent's religious beliefs are not rendered insincere merely because he articulates them differently in response to shifting objections. An applicant seeking religious exemption is not obliged to provide an accounting of his beliefs, warrant it as final, and then when subject to public disbelief, refrain from speaking up to clarify to others who do not share his faith," as the good faith "exchanges of the parties ultimately sharpened the intersection of regulation and belief") (quotations, citations removed; cleaned up).

[618] Most of these cases fall under RFRA or RLUIPA. *See, e.g.*, *Betenbaugh*, 611 F.3d at 270; *Moussazadeh*, 703 F.3d at 785.

[619] *See, e.g.*, *In re* Zarling, 70 B.R. 402, 405 (Bankr. E.D. Wis. 1987) (holding pre-bankruptcy petition transfer of real property to religious organization was fraudulent and void because religious organization was alter ego of petitioner); *see also* United States v. Manneh, 645 F. Supp. 2d 98, 113 (E.D.N.Y. 2008) (holding that defendant charged with importing parts of endangered African primate species without a permit *was* insincere in asserting the consumption of bushmeat was a sincere religious belief because her "invocation of religion … is purely pretextual [due to] … the alarming level of calculation and dissembling displayed by defendant on the witness stand, … [her] recalcitran[ce] when questioned about the video that had just been shown of a religious ritual at her

been particularly skeptical of religious claims when the objective is the business or consumption of drugs outside the context of longstanding established Native American traditions.[620] In each of these cases, courts determined that the party seeking a religious exemption or accommodation did so for reasons other than a sincere religious belief.[621]

In addition to financial or secular motivations, courts often examine an individual's consistency in practicing the claimed religious belief or practice. Recognizing that even the most faithful are far from perfect, and that faith (and conduct) may grow and mature over time, courts may consider where an individual does not "walk the walk" or "practice what he preaches" as objective evidence of insincerity.[622] For example, a district court held that certain leaders of the Fundamentalist Church of Jesus Christ of Latter-day Saints did not possess a sincere belief in the religion's law of consecration.[623] The Court found that the defendant was not required to use the storehouse to obtain his food, as were other members of the church, and that he used storehouse funds to purchase items—including a luxury vehicle—for his personal benefit.[624] He arranged for luxury foods to be acquired and prepared for him and his guests, and he was not required to endure the religious hardship required of others.[625] New clothing and three meals per day of the best food, including two meals of meat, contrasted with other church members who were not allowed meat for months at a time.[626] As a result, the Court concluded that the defendant did not have a sincere belief in the law of consecration since he persistently acted in an inconsistent manner and took advantage of others' adherence to it.[627] However, most courts will find sincerity even when the individual has been inconsistent, provided there is

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church, and [her inability] to say for certain whether bushmeat was in fact present in the filmed ritual. She also claimed initially not to know whether there were other types of wild animals in Africa, and was similarly evasive when questioned about antelope, warthog and cane rats, and even when shown the affidavit (from her congregation) bearing her signature. When defendant's cross-examination was resumed three months later, she claimed to have a limited memory and impaired cognitive capacity only when it served her"); *see* United States v. Winddancer, 435 F. Supp. 2d 687, 694-95 (M.D. Tenn. 2006) (holding that defendant's desire to possess eagle feathers arises from a sincere religious belief because his unsupported allegations that he was "a sincere adherent to a bona fide Native American religion," and that he "exercises that religion through sacred dances" were insufficient, and noting that he had Native American ancestry, but was not a member of either the Lakota or Cherokee tribes and did not claim to practice or follow the religions of those tribes).

[620] *See, e.g.*, United States v. Quaintance, 608 F.3d 717, 722-23 (10th Cir. 2010) (Gorsuch, J.) (describing extensive evidence that supported district court finding that defendants' marijuana dealings were motivated by secular and commercial goals rather than sincere religious conviction).

[621] *See, e.g., id.*

[622] *See Barber*, 650 F.2d at 441.

[623] *See* United States v. Jeffs, No. 2:16-CR-82 TS, 2016 WL 6745951 (D. Utah Nov. 15, 2016).

[624] *Id.* at 15.

[625] *Id.*

[626] *Id.* at 15-16.

[627] *Id.* at 16.

no objective evidence of dishonesty.[628]

Any modern discussion of sincerity must include the plethora of cases seeking religious accommodations from employers' COVID-19 vaccine requirements.[629] This wave of litigation does not—and did not—fit the traditional paradigm of Title VII religious accommodation litigation. It placed considerable pressure on a framework neither designed to withstand nor capable of bearing the strain. For example, rather than being presumed or accepted, sincerity often was hotly contested. Over the past few years, the number of religious accommodation requests has increased exponentially when compared to every accommodation metric.[630] The overwhelming majority of plaintiffs had never previously sought a religious accommodation from any work requirement, including those related to vaccines developed and tested using fetal stem cell lines.[631] For COVID-19, cottage industries on the internet offered religious scripts, phrases, and citations that found their way into accommodation requests and pleadings.[632] At Conway Regional Health System in 2021, employees who articulated religious objections to COVID-19 vaccines due to the use of stem cell lines originally derived from a handful of elective abortions in the 1960s during the vaccines development were asked to acknowledge that they would not use other products similarly

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[628] *See* Cooper v. Oak Rubber Co., 15 F.3d 1375, 1379 (6th Cir. 1994) ("In scrutinizing [the employee's] sincerity in objecting to Saturday work, the district court focused on the fact that [the employee] had worked the *Friday* night shift for approximately seven months after her baptism in 1984. However, seventeen months intervened before [the employee] was next required to work on a Saturday, and [the employee's] undisputed testimony was that her faith and commitment to her religion grew during this time. There was no evidence that [the employee's] activities on Saturdays were inconsistent with her religious beliefs or otherwise indicated that [the employee] did not genuinely and sincerely adhere to the tenets of her faith"). Courts appear significantly more willing to closely scrutinize sincerity and religiosity in the prison context in RLUIPA actions than in standard Title VII religious accommodation cases between employees and private employers. *See. e.g.*, Moussazadeh v. Tex. Dep't of Crim. Justice, 703 F.3d 781 (5th Cir. 2012).

[629] *See generally, e.g.*, Shane v. Bio-Techne Corp., No. 22-3039 (JWB/ECW), 2023 WL 3936638 (D. Minn. June 9, 2023) ("This case joins the growing collection of litigation over employment practices during the COVID-19 pandemic.") As with so many aspects of the recent pandemic, COVID-19 vaccine litigation is more an aberration than the norm. And, as a result, to afford those cases an outsized place in a broader discussion of *Hardison* would be misleading. While some have touted employees' victories over employer vaccine requirements, the objective evidence of claimants' conduct suggests widespread abuses—pretextual use of religion to mask political, medical, and other (very valid) opinions to evade vaccination—that will be detrimental to bona fide religious plaintiffs for years to come. Indeed, the sheer numbers of claims, the rhetoric and conduct of many plaintiffs suggesting political or medical motivations, and the broader political and societal climate have combined to make religious accommodations a mockery in the public eye. As a result, many in society now look at religious accommodations skeptically as mere tools to advance non-religious ends.

[630] *See generally id.*

[631] *See* Sambrano v. United Airlines, Inc., No. 21-11159, 2022 WL 486610, at *80 n.60 (5th Cir. Feb. 17, 2022) ("The plaintiffs object that a fetal stem-cell line was used to develop the coronavirus vaccines, but antibody tests were developed using the same stem-cell line. When confronted with that fact, both Sambrano and Kincannon admitted that they would not accept antibody testing as an accommodation.").

[632] *See, e.g.*, Brittany Schreiber, *Free Religious Exemption Letter Template For Covid Vaccine*, BRITTANY SCHREIBER BLOG (Aug. 9, 2021), https://www.brittanyschreiber.com/religious-exemption/.

tested.[633] For purposes of sincerity analysis, the geometric increase in the number of charges and cases as well as the incongruity between the statements and beliefs of some plaintiffs and their conduct raises difficult questions. At a minimum, these issues suggest that some plaintiffs were motivated not by religious conscience, but by medical, political, or other motives. And the sincerity of any particular plaintiff or group of plaintiffs aside, the public perception of such claims clouded more bona fide claims, such as those of plaintiffs with established records of similar prior accommodations of religious beliefs held and practiced for years and decades. Time will tell the impact. But widespread perceived abuse and misuse of religion to evade requirements undermine meritorious claims, whether for accommodation, the ministerial exception, or more traditional simple requests not to work on the Sabbath.[634]

4. Adverse Action

In each circuit, the standard description of a plaintiff's prima facie burden includes showing an adverse action in addition to the denial of an accommodation.[635] As most religious accommodation cases do not turn on this element, it has largely escaped extensive discussion in the courts of appeals in this context. Even so, this requirement makes little sense in a religious accommodation action and appears to result from unintentional judicial importation from other Title VII prima facie frameworks. Moreover, the text of Title VII's disparate treatment provision makes clear that a tangible adverse action such as termination, demotion, refusal to hire, or discipline must not be required to state a prima facie claim of unlawful religious disparate treatment, much less accommodation.[636] In addition to adverse tangible actions, Title VII also compels employers not to "otherwise discriminate" against an individual regarding his or her "compensation,

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[633] *See* Andrea Hsu & Shannon Bond, *Getting a Religious Exemption to a Vaccine Mandate May Not be Easy. Here's Why*, NPR (Sept. 28, 2021),https://www.npr.org/2021/09/28/1041017591/getting-a-religious-exemption-to-a-vaccine-mandate-may-not-be-easy-heres-whyf (agreement not to use more than 25 products and vaccines, including Tylenol, Ibuprofen, Benadryl, Claritin, Pepto Bismol, Maalox, Sudafed, Zoloft, Aspirin, Simvastatin, Albuterol, Tums, Ex-Lax, Preparation H, Prilosec OTC, Lipitor, Zocor, MMR Vaccine, Motrin, Acetaminophen, and Tylenol Cold and Flu).

[634] One such concern is a replacement for *Hardison* that construes undue hardship in a manner similar to the ADA and does not modify the *Seeger* framework for addressing whether the belief in question is religious or sincerely held, such that both will be presumed in most cases. The result of such a test would be widespread *de facto* accommodations of beliefs merely because an individual claimed it was religious to them. If employees took advantage of such a system in a similar manner to abusive plaintiffs seeking exemptions from COVID-19 vaccine requirements, Congress may be moved to overhaul Title VII's treatment of religious discrimination and accommodations in ways that would not benefit employees in this country who genuinely seek accommodation of bona fide religious beliefs and practices.

[635] Mahran v. Advocate Christ Med. Ctr., 12 F.4th 708, 712 (7th Cir. 2021); *see infra* note 641.

[636] 42 U.S.C. § 2000e-2.

terms, conditions, or privileges of employment" because of the individual's religion.[637] Additionally, it has long been the position of the Commission[638] and of the Department of Justice under the current and previous administrations that a plaintiff properly states a claim of religious disparate treatment by showing the denial of a reasonable accommodation, even if the plaintiff suffered no other tangible employment action.[639]

Nevertheless, *Ansonia* declined an invitation to spell out a variation of the *McDonnell Douglas* framework specific to religious accommodation cases.[640] Since then, each circuit court of appeals has attempted to fill the void, borrowing familiar language and elements from race discrimination cases, and tweaking them in line with *Hardison*. As a result, the courts of appeals have incorporated an independent adverse action requirement on top of a failure or refusal to accommodate.[641] In other words, to state a claim, a

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[637] *Id.*

[638] The Commission's longstanding position is that "the denial of reasonable religious accommodation absent undue hardship is actionable even if the employee has not separately suffered an independent adverse employment action, such as being disciplined, demoted, or discharged as a consequence of being denied accommodation." *See* EEOC COMPLIANCE MANUAL, *supra* note 288, at § 12-IV(A) (noting that requiring an employee "to work without religious accommodation where a work rule conflicts with his religious beliefs necessarily alters the terms and conditions of his employment for the worse"). Thus, an employer violates Title VII by failing to accommodate an employee's religious practices even when "to avoid adverse consequences, an employee continues to work after his or her accommodation request is denied." *Id.* § 12-IV.A.3. Merely because "an employee acquiesces to the employer's work rule, continuing to work without an accommodation after the employer has denied the request, should not defeat the employee's legal claim." *Id.*

[639] Requiring a tangible adverse action in addition the failure to accommodate cannot be the rule because it would allow employers to write the accommodation requirement out of the statute simply by rejecting a reasonable accommodation that would not pose undue hardship and refraining from acting against an employee until the limitations period, or sufficient time to evade a retaliation claim, expired.

[640] *See* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 67-68 (1986).

[641] Every circuit has required some variation of this requirement. *See* Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 131 (1st Cir. 2004) (requiring plaintiffs "to show that (1) a bona fide religious practice conflicted with an employment requirement, (2) she brought the practice to [the employer's] attention, and (3) the religious practice was the basis for the termination."); Baker v. Home Depot, 445 F.3d 541, 546 (2d Cir. 2006) (confirming that all religious discrimination plaintiffs must show that "(1) they held a bona fide religious belief conflicting with an employment requirement; (2) they informed their employers of this belief; and (3) they were disciplined for failure to comply with the conflicting employment requirement."); Wilkerson v. New Media Tech. Charter Sch. Inc., 522 F.3d 315, 319 (3d Cir. 2008) ("To establish a prima facie case of a failure to accommodate claim, the employee must show: (1) she has a sincere religious belief that conflicts with a job requirement; (2) she told the employer about the conflict; and (3) she was disciplined for failing to comply with the conflicting requirement."); EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 312-13 (4th Cir. 2008) ("A plaintiff must first establish a prima facie claim by showing that "(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; [and] (3) he or she was disciplined for failure to comply with the conflicting employment requirement."); Turpen v. Missouri-Kansas-Texas R.R. Co., 736 F.2d 1022, 1026 (5th Cir. 1984) ("A plaintiff in a section 701(j) case makes out a prima facie case of religious discrimination by proving: (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement."); Smith v. Pyro Min. Co., 827 F.2d 1081, 1085-86 (6th Cir. 1987) ("The analysis of any religious accommodation case begins with the … prima facie case of religious discrimination. Such a case is established when an employee shows that: (1) he holds a sincere religious belief that conflicts with an employment requirement; (2) he has informed the employer about the conflicts; and (3) he was discharged or disciplined for failing to comply with the conflicting employment requirement."); Adeyeye v. Heartland

plaintiff must show, not only that the employer failed reasonably to accommodate a bona fide religious practice or observance, but also that the plaintiff suffered an additional adverse employment action beyond the denial of an accommodation.[642] This compels plaintiffs alleging the failure to accommodate a religious observance or practice to follow the framework of *McDonnell Douglas* traveled by every disparate treatment plaintiff alleging violation of section 2000e-2(a)(1).[643]

It is 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 …"[644] And, as noted above, Congress defined the word "religion" to encompass "all aspects of religious observance and practice, as well as belief," that is, "unless an employer demonstrates that he is unable to reasonably accommodate" the "religious observance or practice … without undue hardship …"[645] By its terms, section 2000e-2(a)(1) expressly prohibits employers from failing or

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Sweeteners, LLC, 721 F.3d 444, 449 (7th Cir. 2013) ("To prove a Title VII claim for failure to accommodate religion, an employee must prove three things: (1) 'the observance or practice conflicting with an employment requirement is religious in nature;' (2) the employee 'called the religious observance or practice to [the] employer's attention;' and (3) 'the religious observance or practice was the basis for [the employee's] discharge or other discriminatory treatment.'"); Brown v. Gen. Motors Corp., 601 F.2d 956, 959 (8th Cir. 1979) ("[T]o establish a prima facie case of religious discrimination under ss 2000e-2(a)(1) & (j), a plaintiff must plead and prove that (1) he has a bona fide belief that compliance with an employment requirement is contrary to his religious faith; (2) he informed his employer about the conflict; and (3) he was discharged because of his refusal to comply with the employment requirement."); Tiano v. Dillard Dep't Stores, Inc., 139 F.3d 679, 681 (9th Cir. 1998) (noting that the "employee must establish a prima facie case by proving that (1) she had a bona fide religious belief, the practice of which conflicted with an employment duty; (2) she informed her employer of the belief and conflict; and (3) the employer threatened her or subjected her to discriminatory treatment, including discharge, because of her inability to fulfill the job requirements"); Tabura v. Kellogg USA, 880 F.3d 544, 549 (10th Cir. 2018) (stating that "it is the employee's burden to establish a prima facie claim by showing that 1) the employee has a bona fide religious belief that conflicts with a job requirement, 2) the employee informed the employer of this conflict; and 3) the employer fired the employee for failing to comply with the job requirement."); Bailey v. Metro Ambulance Servs., Inc., 992 F.3d 1265, 1275 (11th Cir. 2021) ("To establish a reasonable-accommodation claim of religious disparate treatment, a plaintiff must first set forth a prima facie case by showing that (1) his sincere and bona fide religious belief conflicted with an employment requirement, and (2) his employer took adverse employment action against him because of his inability to comply with the employment requirement or because of the employer's perceived need for his reasonable accommodation"). While the D.C. Circuit has not taken a position in a published opinion, federal district courts in the District of Columbia have followed the course above. *See, e.g.*, Isse v. Am. Univ., 540 F. Supp. 2d 9, 29 (D.D.C. 2008) ("To state a prima facie claim, [a p]laintiff must show that '(1) [he] held a bona fide religious belief conflicting with an employment requirement; (2) [he] informed [his] employers of [his] belief; and (3) [he was] disciplined for failure to comply with the conflicting employment requirement'") (citing Lemmons v. Georgetown Univ. Hosp., 431 F. Supp. 2d 76, 95 (D.D.C. 2006) (citing cases from other circuits)); *see also* Taub v. FDIC, No. 96–5139, 1997 WL 195521, at *1 (D.C. Cir. Mar. 31, 1997) (citing similar prima facie requirements articulated by the Second Circuit).

[642] *See infra* note 643.

[643] *See* EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 771 (2015) (stating that "[t]hese two proscriptions, often referred to as the 'disparate treatment' (or 'intentional discrimination') provision and the 'disparate impact' provision, are the only causes of action under Title VII").

[644] 42 U.S.C. § 2000e-2(a)(1).

[645] *Id.* § 2000e(j).

refusing to hire, terminating, disciplining—or taking any other tangible adverse action against—an employee for his or her religious beliefs, observances, or practices.[646] But these sorts of tangible actions are not the only practices proscribed by section 2000e-2(a)(1). Just as clearly and explicitly, employers may not "*otherwise* [] *discriminate* against any individual with respect to his compensation, terms, conditions, or privileged of employment because of [the individual's] . . . religion."[647]

The use of the term "otherwise" specifies that discrimination with respect to terms, conditions, and privileges of employment is another way an employer violates Title VII.[648] The Supreme Court has explained that, by declining to define the phrase "terms, conditions, or privileges of employment," Congress "evince[ed] a[n] ... intent to strike at the entire spectrum of disparate treatment of men and women," not simply economic or tangible discrimination.[649] Although the language is not unlimited, the phrase covers more than terms and conditions in the "narrow contractual sense."[650] Many aspects of employment such as compensation, schedules, time off, and conditions, as well as "environment, duration of work, work rules, job assignments, duties, and job advancement" all fall squarely within section 703(a)(1).[651] Accommodations of religious beliefs, observances, and practices often impact many of these aspects of employment and, therefore, fall within the ambit of "terms, conditions, and privileges."[652] The denial of a reasonable accommodation "necessarily alters the terms and conditions of [an employee's] employment for the worse," because "[i]ntentionally pressuring a person to choose between faith and career . . . has a . . . direct effect on the conditions of employment."[653]

Therefore, Title VII's prohibition of disparate treatment encompasses employer actions that otherwise discriminate on prohibited bases with respect to the terms, conditions, and privileges of employment—even in the absence of a refusal to hire, termination, demotion, discipline, or some other adverse action.[654] As section 703(a)(1) proscribes discrimination that does not produce these tangible or economic harms, a plaintiff should not be required to show such an injury to state a claim of religious disparate

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[646] 42 U.S.C. § 2000e-2(a)(1).

[647] *Id.* (emphasis added).

[648] *Id. See Otherwise*, OXFORD ENGLISH DICTIONARY (2004).

[649] Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (internal quotation marks omitted); *see also* Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

[650] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998).

[651] *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, CM-613.1, TERMS, CONDITIONS, AND PRIVILEGES OF EMPLOYMENT, EEOC-CVG-1982-2 (1982).

[652] EEOC COMPLIANCE MANUAL, *supra* note 228, at § 12-IV(A).

[653] *Id.*; *see also* Abramson v. William Patterson Coll., 260 F.3d 265, 290 (3d Cir. 2001) (Alito, J., concurring).

[654] EEOC COMPLIANCE MANUAL, *supra* note 228, at § 12-II.A.

treatment based on a failure to reasonably accommodate a religious observance or practice.[655] The failure to reasonably accommodate alone should be sufficient at the prima facie stage. Two courts of appeals have recently reached similar conclusions in the context of discriminatory lateral transfers, rejecting arguments that such plaintiffs were required to identify an "objective tangible harm" or similar injury in order to state a claim of disparate treatment.[656] In addition, both the Commission and the Department of Justice have articulated a similar position in amicus briefs submitted to various courts of appeals.[657]

This is not to suggest that courts have ignored this issue in the religious accommodation context, where its application is even more strained. Several courts of appeals have applied this element of the prima facie burden practically. For example, some courts of appeals have found that plaintiffs satisfied the adverse action element by showing the denial of an accommodation alone or the mere threat of discipline or discharge, notwithstanding the general framework of the circuit.[658] Nevertheless, appellate and district courts continue to list the adverse action requirement as an element of the plaintiff's prima facie case.[659]

One might suggest that the Supreme Court's decision in *Abercrombie* forecloses the argument that a plaintiff states a claim without

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[655] *See id.* Discriminating as to certain terms, conditions, and privileges of employment does not necessarily involve tangible economic harms. *See* 42 U.S.C. § 2000e-2(a)(1) (in addition to discrimination beyond failing or refusing to hire or discharge, prohibiting employer actions that "otherwise discriminate" as to the "terms, conditions, and privileges of employment"); *see also* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68 (1986) ("The employer violates the statute unless it demonstrates that [it] is unable to reasonably accommodate … an employee's … religious observance or practice without undue hardship … ")

[656] *See* Hamilton v. Dallas Cty., 79 F4th 494 (5th Cir. 2023) ("Nowhere does Title VII say, explicitly or implicitly, that employment discrimination is lawful if limited to non-ultimate employment decisions. To be sure, the statute prohibits discrimination in ultimate employment decisions—hiring, refusing to hire, discharging, and compensation—but it also makes it unlawful for an employer otherwise to discriminate against an employee with respect to her terms, conditions, or privileges of employment") (punctuation and citations omitted and cleaned up); Chambers v. District of Columbia, 34 F.4th 870, 874-75 (D.C. Cir. 2022) (en banc) ("Once it has been established that an employer has discriminated against an employee with respect to that employee's 'terms, conditions, or privileges of employment' because of a protected characteristic, the analysis is complete"); Threat v. City of Cleveland, 6 F.4th 672, 679 (6th Cir. 2021) (Title VII's requirement of a materially adverse action is "shorthand for the operative words in the statute," and merely requires that the plaintiff suffer more than a *de minimis* harm).

[657] *See, e.g.*, En Banc Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellants and Urging Reversal, Hamilton v. Dall. Cnty., 79 F.4th 494 (5th Cir. 2023) (No. 21-10133); Brief of the EEOC as Amicus Curiae in Support of Plaintiff/Appellant and in Favor of Reversal, Mahran v. Advocate Christ Medical Center, 12 F.4th 708 (7th Cir. 2020) (No. 19-2911).

[658] *See, e.g.*, Berry v. Dep't of Soc. Servs., 447 F.3d 642, 655 (9th Cir. 2006) (stating that the adverse action element is satisfied if "the employer, at least implicitly, threatened some adverse action" by directing the employee to comply with the job requirement); Storey v. Burns Intern. Sec. Servs., 390 F.3d 760, 764 (3d Cir. 2004) ("An employer's failure to reasonably accommodate an employee's sincerely held religious belief that conflicts with a job requirement can also amount to an adverse employment action...."); EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 614 n.5 (9th Cir. 1988) ("An employee does not cease to be discriminated against because he temporarily gives up his religious practice and submits to the employment policy").

[659] *See supra* note 643-44 and accompanying text.

alleging an adverse action other than the employer's failure to accommodate.[660] However, this question was not presented in *Abercrombie*, and nothing in the Court's opinion forecloses such a reading of the statute's plain terms.[661] In that case, the Commission brought an action against the clothing business alleging religious disparate treatment premised on a refusal to hire a Muslim applicant who donned a headscarf during her interview.[662] Although neither the applicant nor the interviewer discussed the scarf during her interview, the interviewer reported it and the company assumed it was a religious practice.[663] As head coverings allegedly violated company policy, such that employing the applicant would necessitate a religious accommodation, the company chose instead to avoid the obligation and denied her application.[664] The Commission prevailed in the district court, but the Tenth Circuit reversed, holding that the employer could not be held liable under Title VII absent actual knowledge of the applicant's need for an accommodation.[665]

The Supreme Court rejected the Tenth Circuit's precondition of actual knowledge. The Court began by reiterating that Title VII created only two causes of action for discrimination based on protected characteristics and that actions alleging a failure to accommodate a religious practice must be litigated as disparate treatment or disparate impact claims.[666] However, in making this point the Court did not delve into the elements of the plaintiff's prima facie case.[667] Nor did it hold that a plaintiff alleging religious disparate treatment based on a failure to accommodate must show an independent

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[660] *See generally* EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768 (2015).

[661] *See generally id.*

[662] *See id.* at 770-71.

[663] *Id.* at 770.

[664] *Id.*

[665] *Id.* at 771.

[666] *Id.* The Court has long maintained that Title VII creates these causes of action for the two categories of status based discrimination, but that is not foreclosing other causes of action for different unlawful employment practices. *See* Univ. of Tex. Sw. Med. Center v. Nassar,, 570 U.S. 338, 342 (2013) (stating that "status-based discrimination" refers to Title VII's "basic workplace protection such as prohibitions against employer discrimination on the basis of race, color, religion, sex, or national origin, in hiring, firing, salary structure, promotion and the like" under section 2000e-2(a) and distinguishing it from "retaliation" claims under section 2000e-3(a)); Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 62-64 (2006) (contrasting the retaliation and disparate treatment provisions of Title VII); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (explaining difference between disparate treatment and disparate impact); ABIGAIL COOLEY MODJESKA, EMPLOYMENT DISCRIMINATION LAW (3rd ed. 2004) § 1.1 (stating that Title VII "established two separate analytical frameworks," collectively referred to as "disparate treatment" and "disparate impact"). Conceptually, a retaliation claim targets an employer action taken in response to the protected activity of the employee, not necessarily because of the retaliation plaintiff's race, color, sex, national origin, or religion. That said, the Court has not always been preserved the distinction in other contexts. *See, e.g.*, Jackson v. Birmingham Bd. of Educ, 544 U.S. 167 (2005) (holding that retaliation against an individual who complained of sex discrimination is a form of intentional sex discrimination for purposes of Title IX's private cause of action).

[667] *See Abercrombie*, 575 U.S. at 771.

adverse action under section 2000e-2(a)(1).[668] Then, turning to the Tenth Circuit's actual knowledge requirement, the Court explained that section 2000e-2(a)(1) prohibits certain motives, but does not contain such a prerequisite.[669] Motive and knowledge are separate concepts.[670] In the failure to hire religious disparate treatment case before it, the proper question was not what an employer knew about the applicant's religious beliefs or practices, but rather what motivated the employer's decision to reject her.[671] Because the decision not to hire the applicant was *motivated* by the desire to avoid accommodating a religious practice of wearing a head scarf, Abercrombie & Fitch violated Title VII even though it lacked actual knowledge that the headscarf was a religious observance or practice.[672]

Nothing in *Abercrombie* alters the elements of a plaintiff's prima facie case in a religious disparate treatment action premised on a failure to accommodate. While the Court illustrates the distinction between knowledge and motive, each of the examples provided is set in the same refusal to hire context as *Abercrombie*.[673] Simply because the Court clarified the way in which a failure to hire religious disparate treatment accommodation claim should proceed does not mean it imposed such requirements for religious disparate treatment claims in every context.[674] The Court has long made clear that the *McDonnell Douglas* burden-shifting framework is both a light burden and flexible, such that it may be readily applied to different cases and contexts.[675]

Ultimately, section 2000e-2(a)(1) does not require a religious accommodation plaintiff to show an adverse action separate and apart from the denial of the accommodation, provided the denial implicated the

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[668] *See id.*

[669] *Id.* at 773.

[670] *See id.*

[671] *Id.*

[672] *Id.* at 773-74 (stating that an "employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions" such that if an applicant actually requires an accommodation of a religious practice suspected, but not known for certain, by the employer and "the employer's desire to avoid the prospective accommodation is a motivating factor" in its decision not to hire the applicant, said "employer violates Title VII").

[673] *See id.* at 773-74.

[674] *See, e.g.*, Tabura v. Kellogg USA, 880 F.3d 544, 551 (10th Cir. 2018) (noting that the Court's statement in *Ansonia* that a religious accommodation which completely resolves a conflict between the employee's religious beliefs and the employer's requirement is reasonable does not mean that an "accommodation could never be reasonable if it failed totally and under every conceivable fact scenario to eliminate every conflict or all tension between reasonable work requirements and religious observation").

[675] *See, e.g.*, Tex. Dep't. of Cmty Affairs v. Burdine, 450 U.S. 248, 253 & n.6 (1981) ("The burden of establishing a prima facie case of disparate treatment is not onerous"); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977) (noting that *McDonnell Douglas* "did not purport to create an inflexible formulation"); McDonnell Douglas v. Green, 411 U.S. 792, 802 n.13 (1973) (stating "(t)he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from (a plaintiff) is not necessarily applicable in every respect to differing factual situations").

plaintiff's "terms, conditions, and privileges" of employment.[676] Where adverse action requirements remain, they should be construed and applied narrowly in religious accommodation cases to allow plaintiffs to proceed where discipline or other adverse actions were threatened or reasonably likely if the employee disregarded an employment requirement.[677]

5. Reasonableness of the Accommodation and Undue Hardship

One could credibly construe the *de minimis* test as a unified standard such that reasonable accommodations are those that resolve the employee's religious conflict without imposing an undue hardship on the employer. But the better view assigns both phrases their own role to play, even if those roles are complementary.[678]

a. Reasonableness and Accommodations

Reasonableness is most often cited with respect to two distinct, yet related, elements of religious accommodations. First, courts have pointed to this language to support their urging both employees and employers to

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[676] 42 U.S.C. § 2000e-2(a)(1).

[677] Plaintiffs are also free to bring retaliation claims under Title VII. 42 U.S.C. § 2000e-3(a). Title VII prohibits employers from discriminating against any employee "because he has opposed any practice made an unlawful employment practice" by the statute. Id. Title VII's prohibitions of discrimination on account of a protected characteristic and retaliation are set forth separately. *Compare id.* 2000e-3(a) *with id.* § 2000e-2(a). Both are articulated in terms of discrimination, *see id.*, proceed under the McDonnell Douglas framework, and share some of the same terminology. *See, e.g.*, Carr v. New York City Transit Authority, 76 F.4th 172, 180 (2d Cir. 2023) (framing "adverse action" requirement of retaliation prima facie case as "retaliatory action" that is "materially adverse"); Saketkoo v. Administrators of Tulane Educational Fund, 31 F.4th 990 (5th Cir. 2022) (noting the prima facie cases of sex discrimination and retaliation under Title both require "adverse employment action" and proceed under McDonnell Douglas). But they are not the same. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006) ("Title VII's substantive provision and its anti-retaliation provision are not coterminous," "the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm."). Not every employer act that might be deemed "retaliatory" violates Title VII; the action must be material in that it causes injury or harm. *Id.* at 67. A materially adverse action is one that "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination" that is engaging in the types of activity that are protected by Title VII. *Id.* at 68 (cleaned up). The broader scope of adversity for a Title VII retaliation claim might assist religious accommodation plaintiffs in courts that apply a separate adverse action requirement.

[678] *See* Biden v. Texas, 597 U.S. 785, 799 (2022) (rejecting a construction of statute that failed to give effect to every clause and word) (citation omitted); Advocate Health Care Network v. Stapleton, 581 U.S. 468, 478 (2017) ("Our practice, however, is to give effect, if possible, to every clause and word of a statute") (quoting and citing Williams v. Taylor, 529 U.S. 362, 404 (2000); EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 314-15 (4th Cir. 2008) ("Although … the 'reasonably accommodate' and 'undue hardship' inquiries [are …] separate and distinct, this does not mean they are not interrelated. Certainly there is much overlap between the two. For instance, an accommodation that results in undue hardship almost certainly would not be viewed as one that would be reasonable. Likewise, the failure to consider alternative accommodations that pose no undue hardship may, generally speaking, influence the determination of whether an employer's offered accommodation was reasonable. Taken together, these standards ensure that while an employer must actively attempt to accommodate an employee's religious expression or conduct, it is not required to do so at all costs") (citations omitted and cleaned up).

behave in a reasonable way, that is to work together cooperatively and flexibly to identify religious accommodations that both can accept.[679] Second, at least one court of appeals traces to *reasonable* its interpretation requiring accommodations completely to resolve, or eliminate, the conflict between a religious belief or practice and work requirement.[680] While there is merit to the former, comprehensiveness is a concept that strains the term "reasonableness" beyond its plain meaning as well as what it may credibly bear, as a majority of the courts of appeals have held.

1. The parties must behave reasonably

When adjudicating religious accommodations claims, courts often evaluate the reasonableness of the parties within the statutory framework. Drawn from the adjective "reasonable" that modifies "accommodation" in section 2000e(j), courts have applied it broadly to govern the process to identify the religious accommodation as well as its contents.[681] And since Congress enacted the ADA and the Family and Medical Leave Act (FMLA) in the early 1990s, employers and employees have become more familiar with the interactive practice that often achieves satisfactory results without litigation. Employees that impose unreasonable demands or refuse to cooperate with their employer are more likely to lose in court, as are employers who make little effort to accommodate or who rely on specious assertions of hardship.[682]

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[679] *See infra* note 682.

[680] *See infra* note 682.

[681] 42 U.S.C. § 2000e(j).

[682] *See, e.g.*, Porter v. City of Chicago, 700 F.3d 944, 953 (7th Cir. 2012) ("In requiring employers to offer reasonable accommodations, we have encouraged bilateral cooperation between the employee and employer and recognized that employers must engage in a dialogue with an employee seeking an accommodation"); Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 132 (1st Cir. 2004) (rejecting plaintiff's position that the only reasonable accommodation was a "blanket exception" from a no-facial-jewelry policy); Reed v. Great Lakes Cos., 330 F.3d 931, 935 (7th Cir. 2003) ("Title VII requires an employer to try to accommodate the religious needs of its employees, that is, to *try* to adjust the requirements of the job so that the employee can remain employed without giving up the practice of his religion, provided the adjustment would not work an undue hardship on the employer") (emphasis added); Cosme v. Henderson, 287 F.3d 152, 158 (2d Cir. 2002) ("In formulating … an accommodation, both the employer and employee should remain flexible, with an eye toward achieving a mutually acceptable adjustment"); Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 168 (2d Cir. 2001) (holding that a state reasonably accommodated plaintiffs' religious beliefs requiring them to evangelize by prohibiting the practice only while working with clients on state business; plaintiffs' argument for no restrictions was unreasonable); Bruff v. North Mississippi Health Services, Inc., 244 F.3d 495, 503 (5th Cir. 2001) ("An employee has a duty to cooperate in achieving accommodation of his or her religious beliefs, and must be flexible in achieving that end."); EEOC v. Universal Mfg. Corp., 914 F.2d 71, 74 (5th Cir. 1990) ("The *Ansonia* Court did not leave the employer free to choose an unreasonable form of accommodation over a reasonable one. Nor did the Court license or condone an employer's entire lack of effort to accommodate a given conflict…") (cleaned up); Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 145-46 (5th Cir. 1982) ("These cases confirm what the statute's use of the term 'reasonable' suggests: bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business. Although the statutory burden to accommodate

Since the enactment of the ADA and FMLA, cooperation between employer and employee has become a hallmark of accommodations under federal employment antidiscrimination law. For example, employees and employers engage in a functionally similar exchange when requesting, showing a need for, and certifying family or medical leave.[683] Employees who seek an accommodation of a physical or mental disability under the ADA usually engage in an informal interactive process—a back-and-forth—with their employer to identify a reasonable accommodation.[684] Under the FMLA and ADA, the discussion between employee and employer functionally increases the likelihood of a satisfactory outcome that obviates the need for litigation; when a lawsuit proceeds, it narrows the dispute.[685]

While pragmatic, collegiality has limits. For example, despite aversions to categorial demands, an employee's belief that he may not perform work on the Sabbath is not necessarily unreasonable or inflexible simply because it applies to every Sabbath.[686] Similarly, cooperation and

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rests with the employer, the employee has a correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer. A reasonable accommodation need not be on the employee's terms only."); Chrysler Corp. v. Mann, 561 F.2d 1282, 1285 (8th Cir. 1977) ("The present case illustrates the impasse which can result from an employee's failure to try to accommodate his own religious beliefs or to cooperate with the accommodation efforts of his employer"). Courts generally reject as unreasonable employees' categorical demands for blanket exemptions from workplace rules and policies or unlimited approval to exercise religious beliefs at the workplace however the employee desires. *See, e.g.*, Cloutier, 390 F.3d at 132 (1st Cir. 2004).

[683] *See, e.g.*, 29 C.F.R. § 825.301(a) ("In any circumstance where the employer does not have sufficient information about the reason for an employee's use of leave, the employer should inquire further of the employee or the spokesperson to ascertain whether leave is potentially FMLA-qualifying"); *Id.* § 825.301(b) ("An employee giving notice of the need for FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine whether the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied").

[684] *See* 29 C.F.R. Part 1630 App'x ("Once an individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the individual with a disability."). The interactive process is not an independent, freestanding requirement of the ADA. It facilitates the identification of reasonable accommodations through a dialogue and, as necessary, the exchange of information to enable to employer to make a decision regarding the accommodation request. The Commission has taken the position that in many cases the nature of the disability and a reasonable accommodation of that disability are sufficiently clear that an interactive process is not necessary. *See* EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA, EEOC-CVG-2003-1, question 5 (2002) ("The employer and the individual with a disability should engage in an informal process to clarify what the individual needs and identify the appropriate reasonable accommodation … The exact nature of the dialogue will vary. In many instances, both the disability and the type of accommodation required will be obvious, and thus there may be little or no need to engage in any discussion.")

[685] While engaging in any interactive process, employers must mind a wide range of federal laws. Communications with employees might reveal information relevant not only under Title VII, but also under the ADA, Genetic Information Nondiscrimination Act, Age Discrimination Employment Act, FMLA, USERRA, and NLRA.

[686] *See* EEOC v. Ithaca Indus., Inc., 849 F.2d 116, 119 n.3 (4th Cir. 1988) (en banc) ("To the narrow extent that [a previous case] can be read to say that an absolute refusal to work on the Sabbath is beyond accommodation, it is expressly overruled"); *see also* Smith v. Pyro Min. Co., 827 F.2d 1081, 1088 (6th Cir. 1987) ("where an employee sincerely believes that working on Sunday is morally wrong and that it is a sin to try to induce another

reasonable conduct does not include requirements that employers take extraordinary measures to extract from non-responsive employees the information necessary to propose a reasonable accommodation.[687]

Nevertheless, interaction between employer and employees serves similar practical objectives in Title VII religious accommodation cases, though judicial gloss on other elements of the cause of action undermines its effectiveness in achieving similar results. While an employer may request documentation or other evidence to support a leave or disability claim, an employer may not make similar documentation requests in religious cases.[688] Likewise, employers have few practical avenues to dispute the religious nature of asserted beliefs or an individual's sincerity.[689] Reasonable behavior by both employees and employers is productive for both, and it allows employers to extend existing frameworks of interactive processes under the ADA to religious accommodations.

2. The accommodation must reasonably, but not necessarily totally, resolve the conflict

Some cases, including several in the Seventh Circuit, suggest that a

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to work in his stead, then an employer's attempt at accommodation that requires the employee to seek his own replacement is not reasonable").

[687] *See, e.g.*, *Porter*, F.3d at 953 (noting that the court of appeals had "not demanded the handholding [Plaintiff] argues was lacking" in order for an offer of accommodation to be sufficient under Title VII); *Reed*, 330 F.3d at 935 (affirming summary judgment in favor of employer where employee refused to identify—to the employer or at any time in litigation—religious beliefs, observances, or practices that were the subject of Title VII action).

[688] As an individual's religious beliefs need not be orthodox to qualify for protection under Title VII or the First Amendment, an employer cannot require documentation from religious figures for those purposes. *See* Adeyeye v. Heartland Sweeteners, 721 F.3d 444, 452 ("Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation"). Of course, an employee may elect to submit such a letter in support of a request for an accommodation as evidence of the religious nature of the belief or practice, or the individual's sincerity.

[689] While certain advocates are quick to deny the prevalence of fraudulent requests, they strongly resist the most basic objective evidence challenging sincerity. For example, when employees sought religious exemptions from COVID-19 vaccine requirements ostensibly out of objection to the use of stem cell lines originally sourced from elective abortions performed in the mid-20th century, employers were criticized when they pointed out that many of these individuals had, for decades, used countless medical and other products that also were developed using those stem cell lines. These include Tylenol, Ibuprofen, Benadryl, Claritin, Pepto Bismol, Maalox, Sudafed, Zoloft, Aspirin, Simvastatin, Albuterol, Suphedrine, Tums, Ex-Lax, Preparation H, Prilosec OTC, Lipitor, Zocor, Enbrel, Azithromycin, Senokot, Zostavax, Varilrix, Motrin, Tylenol Cold/Flu, Acetaminophen, and Havrix. *See, e.g.*, *Religious Exemption Attestation for COVID-19 Vaccine*, PULASKI MEM'L HOSP., http://www.pmhnet.com/media/site/pmh-religious-attestation-v3.pdf (last visited Feb. 22, 2024). Ubiquitous vaccines for chicken pox, measles, mumps, rubella, and shingles used fetal cells in their development, testing, or production processes. *Immunize BC*, PUB. HEALTH ASS'N OF B.C., https://immunizebc.ca/ask-us/questions/are-human-fetal-cells-used-make-vaccines-0 (last updated Feb. 1, 2022). At a minimum, evidence that an employee regularly consumes such products is *probative* of sincerity—that the individual, in fact, does not object to the requirement on the religious ground, does not care about the proffered belief to guide their use of medical products, or adheres to the belief generally, let alone consistently.

religious accommodation is not reasonable unless it "totally" or "completely" resolves or eliminates the conflict between the religious belief and the employer's requirement.[690] This language stems from *Ansonia*, where the Court noted that the school policy before it, which allowed employees to take unpaid leave to attend religious obligations, was "generally … reasonable" because the practice "eliminate[d] the conflict between employment requirements and religious practices."[691] Section 2000e(j) embodied Congress' motivation to "assure the individual additional opportunities to observe religious practices," but not at all costs.[692]

This is, of course, true. If an accommodation eliminates a conflict between a religious belief and a workplace requirement it is, at a minimum, generally reasonable for purposes of section 2000e(j).[693] As noted above, employers are not obligated to provide the accommodation proposed or favored by the employee, the one that least burdens the employee, or the one that "best" accommodates the worker.[694] In fact, in *Ansonia*, the Court approved unpaid leave as an accommodation.[695] The loss of a day's wage for a day not working and participating in religious exercise seemed a reasonable bargain for all involved.[696] While one might conceive of a hypothetical accommodation that eliminates a conflict and is, nevertheless, not reasonable, the Court merely confirmed that an accommodation that resolves a conflict is generally reasonable.[697] But the Court did not say that in order to be reasonable an accommodation must eliminate a conflict between religious belief or practice and work requirement nor that anything less than comprehensive accommodation is *per se* unreasonable.[698] The statute's use of the adverb "reasonably" to modify "accommodate" implies that less-than-comprehensive accommodations may be appropriate absent undue hardship.[699] To require complete accommodation reads "reasonably" out of

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[690] *See, e.g.*, *Porter*, 700 F.3d at 952 ("…a reasonable accommodation of an employee's religious practices is one that eliminates the conflict between employment requirements and religious practices"); Rodriguez v. City of Chicago, 156 F.3d 771, 775 (7th Cir. 1998) (same); Anderson v. U.S.F. Logistics (IMC), Inc., 274 F.3d 470, 475 (7th Cir. 2001) ("[I]t is well settled that Title VII requires only reasonable accommodation, not satisfaction of an employee's every desire"); Baker v. Home Depot, 445 F.3d 541, 547-48 (2d Cir. 2006) (holding that an offer to schedule employee to work in the afternoon or evening on a sabbath so as to allow an employee to attend a religious service is not a reasonable accommodation under Title VII); Cooper v. Oak Rubber Co., 15 F.3d 1375, 1379 (6th Cir. 1994); *Smith*, 827 F.2d at 1088; Cosme v. Henderson, 287 F.3d 152, 159 (2d Cir. 2002).

[691] Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 70 (1986).

[692] *Id.*

[693] *Id.*

[694] *Id.* at 74.

[695] *Id.*

[696] *Id.*

[697] *Id.* at 72-73.

[698] *See id.*

[699] *See* Tabura v. Kellogg USA, 880 F.3d 544, 551-52 (10th Cir. 2018) ("The Court, however, in *Ansonia* did not hold the reciprocal, that an accommodation could never be reasonable if it failed totally and under every conceivable fact scenario to eliminate every conflict or all tension between reasonable work requirements and

Title VII.[700]

In *Firestone*, the Fourth Circuit considered the claims of the Commission on behalf of an employee terminated after the defendant failed to reasonably accommodate his weekly Sabbath.[701] For years, the employee's position allowed him to work shifts that never conflicted with the Sabbath.[702] However, eventually layoffs and restructuring resulted in another worker with greater seniority bumping him to a role where his shift conflicted with his Sabbath.[703] Without sufficient leave to resolve the conflict on his own, the employee approached his supervisor.[704] A variety of alternatives were explored—shift transfer, different positions, alternative work arrangements—but all either violated safety parameters or the seniority-based scheduling rights of other workers ensconced in the collective bargaining agreement.[705] Eventually, the employee did not report to work on his Sabbath and was terminated.[706]

The court of appeals rejected the Commission's argument that total accommodation was required absent undue hardship.[707] It explained that section 2000e(j) makes clear that "this is not an area for absolutes. Religion does not exist in a vacuum in the workplace.[708] Rather, it coexists, both with intensely secular arrangements such as collective bargaining agreements and with the intensely secular pressures of the marketplace."[709] The Fourth Circuit found that Title VII's use of variable terms such as "reasonably" and "undue hardship" showed that religious accommodation in the workplace is "a field of degrees, not a matter for extremes."[710] Congress chose flexible, not total, accommodation as the best way to accomplish the principal goal of Title VII "to eliminate discrimination in employment" in light of competing concerns such as business necessity and the legitimate rights of other employees, some of which Congress protected in other labor and

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religious observation. In fact, few things in life can be conflict-free and Title VII requires only a reasonable accommodation between religion and employment obligations"); *see also* EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 313-14 (4th Cir. 2008) [hereinafter *Firestone*] ("[the] 'total' accommodation interpretation … ignores the plain text of the statute, namely the inclusion of the word 'reasonably' as a modifier of 'accommodate.' If Congress had wanted to require employers to provide complete accommodation absent undue hardship, it could easily have done so … Rather, Congress included the term reasonably, expressly declaring that an employer's obligation is to 'reasonably accommodate' absent undue hardship—not to totally do so.").

[700] *See infra* note 701.

[701] *Firestone,* 515 F.3d at 311-12.

[702] *Id.* at 309.

[703] *Id.* at 309-10.

[704] *Id.* at 310.

[705] *Id.*

[706] *See generally id.* at 311.

[707] *Id.* at 319.

[708] *Id.* at 313.

[709] *Id.*

[710] *Id.*

employment statutes.[711] As a result, the court of appeals explained that the employer's Title VII obligation to reasonably accommodate religious practice absent undue hardship "cannot be read as an invariable to eliminate the conflict between workplace rules and religious practice."[712]

In *Tabura*, the Tenth Circuit canvassed the application of *Ansonia's* total elimination idea by circuit courts.[713] It noted that many circuits used the language in cases where the employee articulated two or more religious practices that conflicted with job requirements and the employer attempted to accommodate only one such practice.[714] Such language makes more sense than those cases that reference an employer's failure to reasonably accommodate—and, in many cases, even address—all of the religious practices or observances of an employee at issue.[715] The language of totality is a requirement not regarding the extent of a particular accommodation but rather clarifying that an employer must reasonably accommodate (absent undue hardship) *all* bona fide religious practices and observances of an employee.[716] An employer does not satisfy section 2000e(j) by reasonably—even totally—accommodating one (or a subset) of an employee's religious practices that it has chosen if, in doing so, it ignores others.[717]

Like the Fourth Circuit in *Firestone*, the Tenth Circuit in *Tabura* declined to adopt a *per se* rule that in order for a religious accommodation to be reasonable it must "eliminate, or totally eliminate, or completely eliminate, any conflict" between an employee's religious practices and an employer's workplace requirements.[718] This reading more closely tracks the statute and *Ansonia*, and harmonizes much of the modern circuit caselaw on this issue, particularly outside the Seventh Circuit.[719]

b. De Minimis and Undue Hardship – General Rules and Points of Application

Unlike the ADA, Title VII does not define either "reasonable accommodation" or "undue hardship."[720] So, in the four decades between

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[711] *Id.*
[712] *Id.* at 314.
[713] Tabura v. Kellogg USA, 880 F.3d 544, 551 (10th Cir. 2018).
[714] *Id.* at 552.
[715] *Id.* at 551.
[716] *Id.* at 553-54.
[717] Of course, an employer may nevertheless prevail if, for example, there was no way for it to reasonably accommodate the other religious practice or practices without undue hardship.
[718] *Tabura*, 880 F.3d at 553.
[719] *Id.*
[720] Perhaps seeking to avoid some of the confusion in Title VII religious accommodation cases, Congress defined both terms in the ADA. *See* 42 U.S.C. § 12111(9) (defining "reasonable accommodation"); *Id.* § 12111(10) (defining "undue hardship"). Yet when it passed the ADA in 1990, Congress did not simultaneously amend Title

Hardison and *Groff*, the courts have coalesced around certain general rules with respect to the application of these terms and religious accommodations under Title VII. These are the general outcomes that courts were likely to include in broad legal discussions of applicable standards under *Hardison* as it was applied before, and in several respects is likely to continue after, *Groff*.

Section 2000e(j) requires employers to offer employees an accommodation that reasonably purports to address, ameliorate, or resolve a conflict between the latter's religious beliefs, observances, or practices and the formers' work requirements.[721] The employer chooses the accommodation.[722] And an employer is not required to offer a particular accommodation, any suggested or preferred by the employee, nor the most favorable or reasonable to—or that imposes the least cost or burden upon—the employee.[723] Once an employer offers what is, in fact, a reasonable accommodation, its statutory obligation is satisfied, even if the employee rejects the offer.[724] The employer need not further show that each of the employee's alternative accommodations would result in undue hardship.[725] While courts encourage (and usually require) cooperation between employees and employers, and the latter often rely on the former to propose potential accommodations, Title VII does not require the employer to identify, consider, and reject every conceivable potential accommodation.[726] Moreover, an employer's "rejection of an employee's proposed accommodation for religious practices does not give rise to a continuing

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VII with similar definitions. Nor did Congress take such action the following year when it passed the Civil Rights Act of 1991. More than two decades later, Congress has yet to amend section 2000e(j) of Title VII.

[721] 42 U.S.C. §§ 2000e(j), 2000e-2(a)(1).

[722] *See, e.g.*, Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68 (1986); EEOC v. Universal Mfg. Corp., 914 F.2d 71, 73-74 (5th Cir. 1990) ("The employee, for example, cannot have his cake and eat it too. … Generally accepting either solution as reasonable, the Court [in *Ansonia*] merely relegated the choice between alternative forms of reasonable accommodation to the employer rather than to the employee") (cleaned up).

[723] *See, e.g.*, *Tabura*, 880 F.3d at 551 ("nor is [the employer] required to provide an accommodation that spares the employee any cost whatsoever … [A]ny reasonable accommodation by the employer is sufficient to meet its accommodation obligation." An employee is not entitled to the accommodation of his choice") (cleaned up); Elmenayer v. ABF Freight Sys., Inc., 318 F.3d 130, 134-5 (2d Cir. 2003) (noting that the Title VII accommodation analysis focuses on the actions of the employer, not the effect on the employee); Cosme v. Henderson, 287 F.3d 152, 158 (2d Cir. 2002).

[724] *See, e.g.*, *Ansonia*, 479 U.S. at 68; *Cosme*, 287 F.3d at 158.

[725] *See, e.g.*, *Ansonia*, 479 U.S. at 68; *Tabura*, 880 F.3d at 551 ("Once the employer has provided a reasonable accommodation, it need not further show that each of the employee's alternative accommodations would result in undue hardship"); Shelton v. Univ. of Med. & Dentistry of N.J., 223 F.3d 220, 225 (3d Cir. 2000) (stating that "a sufficient religious accommodation need not be the 'most' reasonable one (in the employee's view), it need not be the one the employee suggests or prefers, and it need not be the one that least burdens the employee. In short, the employer satisfies its Title VII religious accommodation obligation when it offers any reasonable accommodation").

[726] *See* Porter v. City of Chicago, 700 F.3d 944, 953 (7th Cir. 2012); Thomas v. Nat'l Ass'n of Letter Carriers, 225 F.3d 1149, 1156 (10th Cir. 2000) ("Although an employer has a duty reasonably to accommodate an employee's religious beliefs or to show that reasonable accommodation cannot be made without undue hardship, this duty does not obligate the employer to consider and preclude an infinite number of possible accommodations.").

violation."[727]

Before 2023, an accommodation constituted an undue hardship if it imposed—or would impose—more than a *de minimis* cost on the employer; since *Groff* the burden of an accommodation is not undue unless it imposes substantial costs or expenditures in the "overall context of an employer's business."[728] *Hardison* itself "strongly suggests that the undue hardship test is not a difficult test to pass."[729] When evaluating the reasonableness or hardship imposed by an accommodation, courts looked to both economic and non-economic costs.[730] At least one court of appeals recognized that spiritual costs—those that cannot be measured in dollars—must also be considered, although the court found it "very doubtful" that they could impose on a corporate employer the "required level of hardship."[731] No court of appeals has held that such costs imposed undue hardship on a corporate employer, even under the *de minimis* standard.

Title VII does not require employers to implement a religious accommodation and suffer a foreseeable undue hardship before it may refuse such a request or prevail in a Title VII action.[732] However, employers may not establish undue hardship based on mere speculation. An employer's argument that a proposed accommodation constitutes an undue hardship should be supported by identifiable or defined costs.[733]

Courts consistently held that, before *Groff,* an accommodation posed an undue hardship when it required—or would require—the employer to take certain actions or risk certain consequences.[734] It was an undue hardship under Title VII to violate the terms of a valid collective bargaining agreement.[735] In *Hardison*, the Court found support for its reading in other

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[727] Elmenayer v. ABF Freight Sys., Inc., 318 F.3d 130, 134 (2d Cir. 2003).

[728] TWA v. Hardison, 432 U.S. 63, 84 (1977); Groff v. DeJoy, 600 U.S 447, 468-69 (2023).

[729] *See, e.g.*, EEOC v. GEO Group, Inc., 616 F.3d 265, 273 (3d Cir. 2010).

[730] *See, e.g.*, Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 134 (1st Cir. 2004) ("This calculus applies both to economic costs, such as lost business or having to hire additional employees to accommodate a Sabbath observer, and to non-economic costs, such as compromising the integrity of a seniority system"); *GEO Group*, 616 F.3d at 273; United States v. Bd. of Educ. for Sch. Dist. of Phila., 911 F.2d 882, 890 (3d Cir. 1990).

[731] EEOC v. Townley Engineering & Mfg. Co., 859 F2d. 610, 615 (9th Cir. 1988).

[732] *See, e.g.*, *Cloutier*, 390 F.3d at 135 ("Nevertheless, it is possible for an employer to prove undue hardship without actually having undertaken any of the possible accommodations .... by examining the specific hardships imposed by specific accommodation proposals.") (citations omitted); Virts v. Consol. Freightways Corp. of Del., 285 F.3d 508, 519 (6th Cir. 2002).

[733] *See, e.g.*, Brown v. Polk Cty., 61 F.3d 650, 655 (8th Cir. 1996) ("Any hardship asserted, furthermore, must be "real" rather than 'speculative.' An employer stands on weak ground when advancing hypothetical hardships in a factual vacuum. Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts") (cleaned up); Cook v. Chrysler Corp., 981 F.2d 336, 339 (8th Cir. 1992) (rejecting argument that "additional costs" of an accommodation must be "quantifiable" or identified "with exactitude," provided they are "present and real") (citations omitted).

[734] Trans World Airlines v. Hardison, 432 U.S. 63, 75-76 (1977).

[735] *Hardison*, 432 U.S. at 80 (holding that while a collective bargaining agreement may not be applied to violate Title VII, an employer is not required to violate the terms of an otherwise valid agreement to accommodate a

provisions of Title VII that afforded special protection to bona fide seniority systems.[736] Similarly, accommodations that violated a bona fide seniority system or other similar employee rights and privileges, even when they were not established or set forth in a formal collective bargaining agreement, were virtually always held to pose an undue hardship.[737] Where an employee sought an exception to the terms of a valid collective bargaining agreement, or other seniority system, courts have virtually always held the accommodation presented an undue hardship as a matter of law.[738] Likewise, an accommodation that would require the employer to hire additional workers, compel another employee or other employees to work, or require payment of overtime or other premium wages was an undue hardship.[739] Nor, as noted above, was an employer conversely required to suffer a loss of production by operating shorthanded or with fewer workers, even when such losses do not implicate safety concerns.[740]

Accommodations that impacted the delivery of an employer's goods and services to customers or which include the right to proselytize to other workers or customers often constitutes an undue hardship. For example, in *Cloutier*, the employee professed membership in the Church of Body Modification and sought a religious accommodation for her eyebrow ring

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worker's religion); *Cloutier*, 390 F.3d at 134 (noting that "compromising the integrity of a seniority system" is a "non-economic cost" that poses an undue hardship under *Hardison*) (citations omitted); *Board of Educ. for School Dist. of Philadelphia*, 911 F.2d at 887 (same) (citations omitted).

[736] *Hardison*, 432 U.S. at 81-82.

[737] *See, e.g.*, Harrell v. Donahue, 638 F.3d 975, 982 (8th Cir. 2011) ("The Court in *Hardison* was concerned with the unequal treatment that would arise from violating a seniority system to accommodate the religious beliefs of one employee and unequivocally concluded that 'Title VII does not contemplate such unequal treatment.' Such unequal treatment can arise irrespective of whether the seniority system was established under a collective bargaining agreement or whether it was unilaterally imposed by an employer" and noting that "nothing in the language of section 703(h) limits its application to only those "bona fide seniority or merit system[s]" that are created pursuant to a collective bargaining agreement").

[738] *Id.*

[739] *See, e.g.*, EEOC v. Walmart Stores E., L.P., 992 F.3d 656, 659 (7th Cir. 2021) ("One would have been to give him that job and let him trade shifts with other assistant managers. But that would not be an accommodation *by the employer*, as Title VII contemplates. This proposal would thrust on *other workers* the need to accommodate [the employee]'s religious beliefs. That's not what the statute requires. *Hardison* addressed and rejected the sort of shift-trading system that the EEOC now proposes. The Supreme Court held that Title VII does not require an employer to offer an accommodation that comes at the expense of other workers") (emphasis in original); *Cloutier*, 390 F.3d at 134 (noting that "having to hire additional employees to accommodate a Sabbath observer" is an "economic cost" that poses an undue hardship under *Hardison*) (citations omitted); Brown v. Polk Cty., Iowa, 61 F.3d 650, 655 (8th Cir. 1995) ("The cost of hiring an additional worker or the loss of production that results from not replacing a worker who is unavailable due to a religious conflict can amount to undue hardship"); Cooper v. Oak Rubber Co., 15 F.3d 1375, 1380 (6th Cir. 1994) ("Either alternative available to [the employer], the hiring of an additional worker or risking the loss of production, would have entailed more than a *de minimis* cost, relieving [the employer] of the obligation to accommodate"); Turpen v. Mo.-Kan.-Tex. R.R. Co., 736 F.2d 1022, 1028 (5th Cir. 1984) (upholding "finding that to require the [employer] to hire an overtime employee and bill [Plaintiff] for the additional wages would have necessitated a greater than *de minimis* cost and … would thus have been an undue hardship").

[740] *See infra* note 741.

from a policy that prohibited facial jewelry other than earrings in cashiers.[741] The First Circuit agreed that such an accommodation posed an undue hardship because, in the employer's estimation, it detracted from the professional public image it sought to convey in customer-facing employees.[742] Similarly, courts rejected proposed accommodations where the employee sought to engage with and criticize the lives and perceived deficiencies of coworkers.[743] Not surprisingly, Title VII does not require such accommodations.[744]

Finally, employers were not required to accommodate employees where such actions would violate federal law or potentially create an unsafe work environment.[745] Although every court of appeals to consider the question reached this conclusion, they offered different rationales. Some held that the requirements or obligations contained in federal statutes are not employment requirements for purposes of a plaintiff's prima facie case.[746] Other courts of appeals have held that violating federal statutes impose an undue hardship as a matter of law.[747] As the Sixth Circuit noted, these "dual rationales arrive at the same, sensible conclusion: [a]n employer is not liable under Title VII when accommodating an employee's religious beliefs would require the employer to violate federal ... law."[748] Such a conclusion is "consistent with Title VII's text, which says nothing that might license an employer to disregard other federal statutes in the name of reasonably accommodating an employee's religious practices."[749] No court has suggested that *Groff* requires religious accommodations that cause employers to violate the law.

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[741] *Cloutier*, 390 F.3d at 126-30.

[742] *Id.* at 135 ("it is axiomatic that, for better or for worse, employees reflect on their employers. This is particularly true of employees who regularly interact with customers" and that the plaintiff's "facial jewelry influenced Costco's public image and, in Costco's calculation, detracted from its professionalism").

[743] Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1021 (4th Cir. 1996) ("Typically, religious accommodation suits involve religious conduct, such as observing the Sabbath, wearing religious garb, etc., that result in indirect and minimal burdens, if any, on other employees. An employer can often accommodate such needs without inconveniencing or unduly burdening other employees. In a case like the one at hand, however, where an employee contends that she has a religious need to impose personally and directly on fellow employees, invading their privacy and criticizing their personal lives, the employer is placed between a rock and a hard place.").

[744] *See* 42 U.S.C. § 2000e(j).

[745] *Id.*

[746] *See, e.g.*, Baltgalvis v. Newport News Shipbuilding Inc., 132 F. Supp. 2d 414, 418 (E.D. Va. 2001), *aff'd*, 15 F. App'x. 172 (4th Cir. 2001); Seaworth v. Pearson, 203 F.3d 1056, 1057 (8th Cir. 2000).

[747] *See, e.g.*, Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 830-31 (9th Cir. 1999); Weber v. Leaseway Dedicated Logistics, Inc., 166 F.3d 1223 (10th Cir. 1999).

[748] Yeager v. FirstEnergy Generation Corp., 777 F.3d 362, 363 (6th Cir. 2015).

[749] *Id.*; *see also* Tagore v. United States, 735 F.3d 324, 330 (5th Cir. 2013) (holding that IRS employee's proposed accommodations of wearing a dulled [religious] kirpan [knife] blade in a federal building posed an undue hardship because it would violate a federal law banning dangerous weapons from federal facilities); EEOC v. GEO Group, Inc., 616 F.3d 265, 273 (3d Cir. 2010) ("A religious accommodation that creates a genuine safety or security risk can undoubtedly constitute an undue hardship for an employer-prison.").

6. *Groff* Requires Reevaluation of Other Elemental Components of Title VII Religious Accommodation Cases

Hardison and *Ansonia* reduced most Title VII religious accommodation claims to a single question: does the accommodation pose more than a *de minimis* cost or burden on the employer?[750] Answering that question regularly involved presuming—or at least not contesting—the remaining elements of a plaintiff's claim. However, *Groff* eliminated this simplification and replaced it with a standard that makes litigation more contentious and uncertain for employees and employers.[751] Prospectively, parties will litigate whether proposed accommodations imposed, or would have, substantial increased costs or expenditures in the context of the employer's business.[752] Practically, this will require employers to accommodate more religious beliefs, observances, and practices under Title VII, a swath of beliefs and practices imposing burdens that do not impose costs and expenditures that are substantial in light of the employer's business. No longer assured to prevail on undue hardship, employers are less likely to concede—and more likely to contest—the two aspects of religious accommodation cases historically presumed in favor of employees: sincerity and religiosity.[753] The law regarding each is anemic and inadequate for the task of regular litigation. Much as the Supreme Court reevaluated undue hardship in *Groff*, so too lower courts must adjust their approach to questions of religion and sincerity in Title VII accommodation cases.

III. DETERMINING "RELIGION" AND "SINCERITY" AFTER *GROFF*

In *Groff*, the Supreme Court redefined the phrase "undue hardship" in section 2000e(j) to mean substantial costs or expenditures in the overall context of an employer's business.[754] But in the wake of this more exacting standard, the sincerity and religiosity elements pose challenges that are likely to be exacerbated in the wake of *Groff*. And *Groff* neither considered nor addressed how these components of a Title VII religious accommodation claim should apply under the revised understanding of *Hardison*. Part III takes these challenges, proposing adjustments and clarifications to the

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[750] *See* Trans World Airlines v. Hardison, 432 U.S. 63, 84 (1977); *see also* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 67 (1986).

[751] See Groff v. DeJoy, 600 U.S. 447, 468 (2023).

[752] *See supra* Section II.E.4.

[753] *See supra* Sections II.F.2-3.

[754] This article does not address the various proposed constructions of undue hardship either generally or that were before the Court in *Groff*.

religion and sincerity inquiries that, together with *Groff's* more textual approach to undue hardship, might make the second iteration of *Hardison* more enduring than the first.[755]

As discussed above, *de minimis* has vindicated employer interests in section 2000e(j).[756] In contrast, the religion and sincerity elements have been construed broadly, and often presumed, to the benefit of the employee. For decades these one-sided elements have effectively balanced each other. Not after *Groff*. Applying its new, more robust, version of undue hardship without adjusting other elements may swing Title VII accommodation cases to favor plaintiffs in unworkable ways. Such a result would be novel in federal employment antidiscrimination law, unsustainable, and susceptible to abuse.

Under *de minimis*, as discussed at length above, judicial analysis of Title VII religious accommodation cases practically begin and end with the question of undue hardship.[757] As a result, courts tended to presume that plaintiffs sought accommodation for a *religious* belief or practice that they *sincerely* held.[758] While the Court articulated limits in *Seeger*, *Welsh*, and *Yoder*, it largely ignored those parameters in those cases and others since.[759] Lower federal courts have done the same.[760] Indeed, virtually any personal belief or credo can be religious in some sense.[761] The same is true with sincerity; it is often presumed, absent smoking gun evidence of fraud.[762] Although the primary business of the courts requires determinations of truthfulness, historical sensitivity regarding government inquiry into religious beliefs dating back to the founding and earlier British history discourage courts from scrutinizing plaintiffs' statements regarding their beliefs.[763] As a result, even claims of dubious sincerity may advance.[764]

Courts could readily dodge these difficult issues because the *de minimis* standard reliably provided an easier way out. A judge confronting claims of doubtful sincerity or religiosity could simply deny the claim—and, thus, reach the correct outcome—by accentuating the more objective burdens of any accommodation on the employer. It is easier for a court to expound on the costs, burdens, and hardships of a potential accommodation and explain that they are more than *de minimis* than scrutinize a belief and hold either that it is not religious or is not sincerely held. This approach worked as a rampart

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[755] *See supra* Part III.
[756] *See supra* Part III.
[757] *See supra* Section II.E.1.
[758] *See supra* Section II.E.1.
[759] *See supra* Section II.F.2.a; *see also* United States v. Meyers, 95 F.3d 1475, 1482 (10th Cir. 1996).
[760] *See Meyers*, 95 F.3d at 1482.
[761] *See, e.g.*, *id.* at 1483-84 ("Church of Marijuana").
[762] *Id.* at 1484.
[763] *Id.* at 1482.
[764] *Id.*

against fraud and practical compromise.[765] Warts and all, *Hardison* survived in its original form to 2023 because it was functional or, at the very least, more so than other options. After *Groff*, section 2000e(j) requires a new path forward for its religion and sincerity elements.

Against the backdrop of constitutional religious protections, Title VII protects bona fide religious beliefs, customs, and practices that are sincerely held when they conflict with work rule requirements, provided any observance or practice can reasonably be accommodated without undue hardship.[766] Each of these elements must be applied in a manner that is faithful to its purpose and meaning. *Groff* applied textual analysis to correct an errant interpretation of undue hardship, leaving undisturbed religion and sincerity.[767] This Part takes the baton and proposes revisions to both inquiries after addressing the bridge between religion under the Free Exercise Clause and Title VII.

A. The Court should redefine religion for purposes of Title VII accommodation requirements.

Section 2000e(j) requires covered employers to accommodate religious beliefs, as well as observances and practices, within certain limitations.[768] As discussed at length above, the circular nature of section 2000e(j) only begs the question: what is religious and, therefore, covered by the statute?[769] As discussed above, the Court has answered that question under Title VII by borrowing from its Free Exercise Clause cases.[770] But it never explained why it did so or held that the "religion" under Title VII must mean the same as "religion" under the Free Exercise Clause. That both use the same word might suffice to explain overlap between two statutes in the

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[765] Although its pronounced atextuality condemned the *de minimis* misinterpretation of *Hardison*, there are benefits to it as a policy. As discussed above, *de minimis* has worked in many ways. *See supra* Part II.E.3. Recent deluges of COVID-19 litigation notwithstanding, the test has created an enduring and stable body of law that roughly hews a balance—perhaps not the one Congress chose, but a balance nonetheless—between religious practice and employer interests. For nearly a half century, employers have rarely needed to challenge the sincerity or religious nature of their beliefs and practices, relying on more objective assessments of burdens. *See supra* Part II.E.3. While perhaps sufficient to prevail in more traditional cases concerning Sabbath observance, the presumption of these points has facilitated plaintiffs' efforts to seek exceptions to work requirements with which they disagree, dressing up non-religious reasons in individualistic spiritual language. Thousands of COVID-19 vaccine cases brought some of these issues to a head, revealing the inadequacy of the religion and sincerity frameworks, even under *Hardison*, to say nothing of *Groff's* more exacting standard. After *Groff*, courts will need to clarify how sincerity, religiosity, and other elements apply prospectively in Title VII religious accommodation cases.

[766] 42 U.S.C. § 2000e(j).

[767] Groff v. DeJoy, 600 U.S. 447, 468-70 (2023).

[768] 42 U.S.C. § 2000e(j).

[769] *See infra* Section III.A.1.

[770] See supra Section II.F.2.

same area of law or same general era.[771] But it is less apparent when the comparison is between the Constitution and a statute passed nearly two centuries later. Religion need not—and practically should not—mean precisely the same thing in Free Exercise Clause and Title VII contexts.

This does not require the Court to reconsider or change any aspect of its construction of application of Religion Clauses, including *Seeger*, *Welsh*, and *Yoder*, as constitutional authority. Instead, the Court should decouple its Free Exercise jurisprudence from similar inquiries under Title VII, as it has done in other areas in employment law, most notably affirmative action.[772] Then, within the sphere of Title VII, the Court should clarify that employers must, subject to section 2000e(j), accommodate employees' religion where the belief, practice, or observance is part of and from a comprehensive spiritual system or framework recognized as religious, and is identifiable, definable, understandable, and exists as such outside of, and distinct from, the subjective beliefs of the individual employee. Such beliefs may not be derived from moral, ethical, political, philosophical, economic, or sociological sources, nor may they be a lifestyle, nor a mere interest or activity.

Such a framework better aligns the religion element of Title VII cases to its function: to prevent and alleviate a genuine conflict between the bona fide commands of religion and the legitimate work rules or policies of an employer.[773] Title VII accommodations are not designed to harmonize every incongruity between the beliefs, opinions, practices, and behaviors created by each individual where they may conflict with job requirements.[774] This approach may derail claims brought by individuals who cloak non-religious objections in religious language to use Title VII as a sword. By focusing section 2000e(j) on religions that impose requirements on adherents, the Court could reset this element of Title VII religious accommodation cases so that, like in *Groff*, the inquiry more closely tracks the text of the statute.

1. Religion Under the Accommodation Provisions of Section 2000e(j) Can Be Both Broader and Narrower Than Under the First Amendment

Section 2000e(j) and the Free Exercise Clause of the First Amendment differ textually, as well as with respect to purpose, operation,

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[771] Ironically, the Court's refusal to align the term "undue hardship" between Title VII and the ADA—two modern complementary federal antidiscrimination statutes enforced by the EEOC—has created the disconnect that the Court appears intent to confront in *Groff*. *See Groff*, 600 U.S. at 468-69, 471.

[772] *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); *see also infra* III.A.1.d.

[773] *See supra* Section II.F.1.

[774] *See* 42 U.S.C. § 2000e(j).

application, and scope.[775] As a result, religion need not—and should not—have the same meaning. Cases like *Seeger*, *Welsh*, and *Yoder* address society-wide religious freedoms protected from government infringement by the Free Exercise Clause, usually in the form of exceptions to otherwise valid legal requirements.[776] While certainly instructive, their contexts make them ill-suited to be the first and the last word when it comes to defining private employers' greater statutory obligations to provide religious accommodation in certain circumstances. The Court should clarify that religion under the First Amendment and the accommodation requirement of Title VII are not coterminous. Following the *Seeger* Court's example in contrast (at least at this point), religion does not include beliefs derived from moral, ethical, political, philosophical, economic, or sociological sources, nor general lifestyles, interests, or activities—even if the individual holds to them passionately or deeply, or if they are central to the individual's personality or identity.[777]

a. Textual distinctions between the Free Exercise Clause and Section 2000e(j) indicate that the shared term "religion" carry different meanings

Textual differences between the First Amendment and Title VII support divergence between the Free Exercise Clause and Title VII.[778] The Establishment Clause prohibits Congress from making any law "respecting an establishment of religion."[779] One might argue that this limitation does not expressly prohibit establishing a religion, merely laws *respecting* an establishment, but the broader reading better accounts for the indefinite article.[780] Thus, the Establishment Clause bars establishing not merely a specific religion as the official faith of the United States, but one or more religions generally.[781] Enacted against a backdrop of established state churches that continued well into the 1830s, the Establishment Clause also prohibits corollary legislation relating to any existing establishment.[782] Necessarily, it also proscribes government action that unreasonably favors

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[775] This section is not intended to break new ground regarding, nor exhaustively outline, the social, legal, or political history of the First Amendment or Title VII. As a result, historical points are not extensively footnoted.

[776] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965); United States v. Ballard, 322 U.S. 78 (1944).

[777] *See Seeger*, 380 U.S. at 173-74.

[778] The purpose of this discussion is not to exegete the First Amendment from first principles or retread extensive political and legal history, but rather merely to note facial differences within the First Amendment and vis a vis Title VII that suggest different meanings of the word religion.

[779] U.S. CONST. amend I.

[780] *See id.*

[781] *Id.* (The Establishment Clause refers to an establishment *of* religion not *of a* religion).

[782] *See id.*

one religion or denomination over another, as well as religion over non-religion or the opposite.[783]

In contrast, the Free Exercise Clause bars Congress from enacting legislation "prohibiting" the "free exercise" of "religion."[784] But in this clause the word "religion" must have a different meaning.[785] One does not *exercise* a religious *establishment*. Moreover, as it would be nonsensical for a government to outlaw the exercise of its religious establishment, the religion of the Free Exercise Clause must refer to the methods, forms, practices, observances, and rituals of religious worship.[786] Establishments notwithstanding, the text of the Free Exercise Clause prohibits Congress from legislating to prohibit—and presumably regulate—the ways in which individual (or groups of) citizens practice their religions or worship God.[787] Together, the Religion Clauses bar the national government from creating official national religions or controlling the religious practices and worship of its people.[788] Like other constitutional rights, they are a floor, not a ceiling; Congress and the states may create statutory rights that provide greater protections.[789]

Section 2000e(j) is different from both religious clauses of the First Amendment. It requires covered employers actively to allow or facilitate the religious observances and practices (and, perhaps, beliefs) of their employees when they conflict with work requirements but only in ways that are reasonable and do not present undue hardship.[790] By connecting the religiosity of a practice with the impact of its accommodation on an employer, the application of section 2000e(j) is *situational*.[791] For example, an orthodox Jew's worship in a synagogue is undoubtedly religion for purposes of the First Amendment. The government could not establish a form of orthodox Judaism (or any kind of Judaism) as the official religion of the United States.[792] Likewise, the government could not proscribe, or purport to regulate, Jewish rites and worship.[793] In some instances, employer

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[783] *See id.* Over the last seven decades, the federal courts have wrestled with the extent to which the government may support and work with religions. Those questions are not as issue here.

[784] *Id.*

[785] *Id.*

[786] *See id.*

[787] *Id.* Like other constitutional rights, this is not absolute. Presumably, federal and state laws against murder and abuse could be constitutional when applied, for example, to prohibit religious human sacrifice.

[788] *Id.*

[789] *See* Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227, 228 (2008) ("One of the most widely accepted notions in American constitutional law is that the federal Constitution and interpretations of that Constitution by the Supreme Court of the United States set a "floor" for personal liberties.").

[790] *See supra* Section II.F.5.

[791] *See supra* Section II.F.5.

[792] *See* U.S. CONST. amend. I.

[793] *See id.*

accommodation of such worship is required by section 2000e(j); in others, it is not.[794] For while the worship in question is undoubtedly religious, time off to engage in it must be reasonable and not cause undue hardship to the employer.[795] This will be the case for some employers and not for others. Thus, section 2000e(j) can be both broader and narrower with respect to religion than either the Establishment or Free Exercise Clauses of the First Amendment. Accordingly, religion cannot mean the same thing in all instances under these provisions.

b. The Free Exercise Clause and section 2000e(j) serve different purposes and operate through different mechanisms

The Free Exercise Clause and section 2000e(j) point to and accomplish different objectives. During the ratification of the proposed republic crafted in Philadelphia during the summer of 1787, the Anti-Federalists objected to the lack of explicit protections for citizens' political and other rights from the new national government.[796] To secure ratification, Federalists committed to amending the Constitution to add a list of political rights and freedoms.[797] They fulfilled this promise during the First Congress by proposing twelve amendments, of which ten were ratified by the states, collectively becoming the Bill of Rights.[798]

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[794] *See supra* Section II.F.5.

[795] *See supra* Section II.F.5.

[796] Even before the Constitutional Convention adjourned with a draft signed by representatives of the ten participating states, George Mason proposed the addition of a bill of rights to facilitate ratification. *See* II FERRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 587 (1911). Similar proposals for a bill of rights were made by others individually and in other state ratifying conventions. *See, e.g.*, XIII RICHARD HENRY LEE'S AMENDMENTS, THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, COMMENTARIES ON THE CONSTITUTION 238-40 (1787); ROBERT WHITEHILL'S PROPOSED AMENDMENTS, THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, RATIFICATION BY THE STATES, VOLUME II: PENNSYLVANIA 597-99 (1787); DISSENT OF THE MINORITY OF THE CONVENTION, THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, RATIFICATION BY THE STATES, VOLUME II: PENNSYLVANIA 617-40 (1787); MASSACHUSETTS RECOMMENDED AMENDMENTS, THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, RATIFICATION BY THE STATES, VOLUME VI: MASSACHUSETTS 1477-78 (1788); NEW HAMPSHIRE CONVENTION RECOMMENDED AMENDMENTS, THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, COMMENTARIES ON THE CONSTITUTION, VOLUME XVIII: NEW HAMPSHIRE 186-89 (1788); GEORGE WYTHE'S CMTE. REPORT OF 40 RECOMMENDED AMENDMENTS, THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, RATIFICATION BY THE STATES, VOLUME IX: VIRGINIA 1551-56 (1988); NEW YORK RECOMMENDED AMENDMENTS AND BILL OF RIGHTS, DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, RATIFICATION BY THE STATES, VOLUME XXIII: NEW YORK 2305-08 (1788); RHODE ISLAND CONVENTION: BILL OF RIGHTS AND PROPOSED AMENDMENTS, DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, RATIFICATION BY THE STATES, VOLUME XXVI: RHODE ISLAND 976-81, 989-90 (1790).

[797] Today, we often colloquially refer to our political, social, and economic rights and freedoms as "civil rights," but that is not how the Federalists and Anti-Federalists understood that term. They would have considered the Bill of Rights to encompass natural and political rights. In contrast, civil rights were those that did not involve the establishment, support, limitation, or management of the government.

[798] One of the two proposed amendments that was not ratified in the 18th Century concerned the compensation

The First Amendment protected the people from federal government attempts to create, approve, control, or persecute religion and religious practice much as England and other nations in Europe had with the Puritans, Quakers, Baptists, Catholics, and others.[799] Predominantly different denominations of Christianity, these groups had emigrated to America to escape the religious regulation and harassment prevalent in England and on the continent.[800] As noted above, the First Amendment bars the federal government from creating an official, or established, church (like the Church of England) or religion or from enacting legislation that would, directly or indirectly, harass religious rites and worship.[801] The Supreme Court has explained that the religious rights protected by the First Amendment are fundamental.[802] Whenever a law, regulation, order, or other government action impacts such rights, to withstand judicial review it must serve a compelling government interest and be narrowly tailored to achieve that interest.[803]

The constitutional limitation of government power to control religion stands in stark contrast to the statutory accommodation provision that Congress added to Title VII in 1972. In section 2000e(j) Congress sought not to limit the government's authority to act, but rather to obligate covered private employers to facilitate the religious practices of their employees, qualified by reasonableness and burden concerns.[804] Far from fundamental, Title VII's accommodation requirement is qualified and balanced by questions of reasonableness and cost that are unrelated to the religious nature or importance of the practice at issue.[805] Only those practices and observances that may be accommodated without significant expense or burden fall within

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for members of Congress. Specifically, it provided that no increase in Congress' pay could take effect until after the next Congressional election. Madison, and other proponents believed that Congress should not be able to increase its own compensation without affording the voters an opportunity to lodge their objections at the ballot box. Unlike some modern proposed amendments that impose a limited period for ratification (usually seven years), no such limit was applied by the First Congress when it submitted the first twelve proposed amendments to the states for ratification. More than two centuries later, on May 7, 1992, Michigan became the 38th state to ratify the amendment. After the Office of the Federal Register verified that it had received ratification from the requisite number of states, the Archivist of the United States declared the amendment ratified.

[799] *See* Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 HARV. L. REV. 1410, 1420-30 (1990).

[800] *See id.*

[801] *See supra* Section III.A.1.a.

[802] As noted above, it was not until many decades later that the Supreme Court applied the provisions of the First Amendment to the states through the Due Process Clause of the Fourteenth Amendment. *See* Everson v. Board of Education, 330 U.S. 1 (1947) (Establishment Clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise Clause). Even into the 1830s, several states (including New Hampshire, Connecticut, and Massachusetts) maintained established churches.

[803] *E.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2414 (2022); Fulton v. City of Phila., 141 S. Ct. 1868, 1881 (2021).

[804] *See supra* Section II.F.5.

[805] *See supra* Section II.F.5.

Title VII's definition of religion.[806] After all, the Civil Rights Act was not enacted pursuant to Congress' authority under section 5 of the Fourteenth Amendment, but rather the Commerce Clause.[807] Strict scrutiny does not apply to the religious rights that it protects.[808]

The Free Exercise Clause and section 2000e(j) likewise are applied through different mechanisms. *Seeger*, *Welsh*, and *Yoder* illustrate that the Free Exercise Clause frequently operates through an affirmative defense to government civil or criminal enforcement.[809] Like other protections of the First Amendment, and the Bill of Rights generally, the Free Exercise Clause is a negative right: a freedom *from* government action within a certain sphere, or regarding certain matters.[810] The limitation protects people from government regulation or persecution in that sphere.[811] In contrast, Title VII's religious accommodation cases involve statutory rights that employees invoke to compel their employers affirmatively to facilitate their religious practices and observances.[812] Put another way, the accommodation provisions of section 2000e(j) function as a qualified type of positive right.[813] It enables employees to participate in religious observances and practices, provided they are reasonable and do not unreasonably burden employers.[814]

c. The First Amendment and Section 2000e(j) have different scopes

The distinctions above, together with their respective statuses as statutory and constitutional rights, also counsel in favor of overlapping, but not necessarily identical, constructions of religion.

As a constitutional provision, the First Amendment shields from government action all citizens, but the Free Exercise Clause's most visible work takes place in the courts.[815] There, between the lines of factual findings

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[806] *See supra* Section II.F.5.

[807] Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

[808] *See Heart of Atlanta Motel*, 379 U.S. at 258; *Katzenbach*, 379 U.S. at 304.

[809] *See* United States v. Seeger, 380 U.S. 163, 165, 187 (1965); Welsh v. United States, 389 U.S. 333 (1970), 370; Wisconsin v. Yoder, 406 U.S. 205, 207 (1972). Of course, the Free Exercise Clause operates prophylactically as well. Congress and state legislatures recognize that direct regulation of religious practices is likely to fail a judicial challenge.

[810] *See, e.g.*, Bowen v. Roy, 476 U.S. 693, 700 (1986) ("[The] Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).

[811] *Id.*

[812] *See supra* Section II.F.5.

[813] *See supra* Section II.F.5.

[814] *See supra* Section II.F.5.

[815] *See supra* Section II.F.2. Like all constitutional rights, the Free Exercise Clause works inherently wherever it causes government officials to act in ways that would violate its guarantees. See U.S. CONST. amend I. That scores of millions (or more) of Americans engage in religious activities every day without government harassment is a testament to the strength of the First Amendment. However, the details of the case law develop in close cases, where political or other pressures, competing objectives, or even anti-religious motivations result in government

and legal analysis, rules of precedent and history, courts interpret the First Amendment while considering an implicit practical question : should (or can) the relief being sought in the case before the court be provided to all similarly situated individuals throughout the country?[816] Whether such a question actually shapes results in any one case is a separate question, but our system of precedent may significantly extend the outcome in any one case to others. As a result, what counts as religion for purposes of the Free Exercise Clause may apply to similar adherents across the country, as illustrated by *Seeger* and *Welsh*, effectively creating exceptions to generally applicable laws (sometimes squarely within a government's authority) that may extend society wide.

This countenances against a constitutional construction of religion so broad that it sweeps in beliefs that are idiosyncratic or personal creations. Moral, ethical, philosophical, economic, sociological, lifestyle, interest-based beliefs, and activities amalgamated or created by an individual do not present the dilemma between obeying the outward commands and requirements of the state and religious authority. The Free Exercise Clause does not exist to protect individuals when the state and an individual's personal views do not coincide. Such disagreements abound. The content and reach of valid federal and state law and regulations touch nearly every aspect of personal and professional life. Every person in the country could identify government-imposed burdens that conflict with strongly held personal views, political positions, and beliefs of all types, as well as daily activities and interests.[817] The number and severity of these conflicts may wax and wane

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action which prompts citizens to seek relief in the courts.

[816] This poses an interesting question in cases like *Welsh*. No doubt many Americans could honestly step into his shoes and claim a personal belief—divorced from any external religious source—that it is morally wrong to take a life. *See* Welsh v. United States, 389 U.S. 333, 336. If, as the Court held, personal "moral" or "ethical" beliefs "about what is right and wrong" are enough to merit protection by the Free Exercise Clause, if they are merely "held with the strength of traditional religious convictions," most Americans could obtain religious exemptions from mandatory military service. *Id.* at 340. The lack of mandatory military service has allowed the implications of *Welsh* largely to remain untested. But the volume of recent claims regarding COVID-19 vaccines suggest that future military conscription efforts may uncover millions of people like Welsh, who claim religious exemptions for general personal beliefs. *See supra* text accompanying notes 568-69.

[817] Courts have entertained requests for religious exemptions that extend to personal interests and activities gussied upon with accoutrements to appear "religious." *See, e.g.*, United States v. Quaintance, 523 F.3d 1144 (10th Cir. 2008) (Church of Cognizance); Lauren Hill, *New Development: The First Church of Cannabis and Its Questionable Claim for Religious Freedom*, 19 RUTGERS J. L. & RELIGION 100 (2017) (discussing claims of the First Church of Cannabis, which was founded in Indiana in direct response to the Religious Freedom Restoration Act and for the express purpose—according to its founder and leader—of testing the legislation). Of course, merely inserting "church of" in front of a social group or expressing bona fide deep personal, or even mystical meaning, to one's favorite activities should not bring them within the scope of the Free Exercise Clause. One could conceive a myriad of activities and interests so beloved that they occupy a place of highest or central importance—including some implicating other constitutional rights. Reading, writing, dancing, music, study, traveling, shopping, exercising, meditation, gardening, hiking and enjoying nature and the outdoors, collecting, gaming, painting and drawing, baking and cooking, crafts, shooting, hunting, climbing, photography, skiing and surfing, and engaging in or following sports broadly defined (playing, watching, and following professional, collegiate, high school, and

over time,[818] or they may remain central to an individual's identity and life. The Supreme Court has recognized this, confirming that the Free Exercise Clause does not protect personal non-religious beliefs because it would effectively make each individual his or her own sovereign, able to avoid compliance with law with which he or she disagreed.[819] The specific dilemma for which the Free Exercise Clause was designed to provide relief is appropriately narrow: conflicts between the laws and requirements of the divine and those of the state.[820]

Title VII applies on a different level. The statutory accommodation of a religious belief, observation, or practice is context specific.[821]An employee's duties and responsibilities, the reasonableness of an accommodation in specific worksites and conditions, and costs and other burdens on the employer collectively govern whether Title VII requires a religious accommodation.[822] Thus, the exact same employee seeking the same accommodation of the same bona fide religious belief, practice, or observance, may be entitled to it from one employer, but not another.[823] Even with respect to the same employer, an employee may be entitled to such an accommodation at some times and in some circumstances, or in some positions, but not others.[824] As a result, the implications of judicial decisions requiring religious accommodations are limited to the similar circumstances regarding other workers and employers.

One might argue that the textual limitations on the accommodation provisions of section 2000e(j) allow or justify concomitant flexibility on the breadth of religion such that it might incorporate a wider circle of beliefs. But the text discourages both artificially broad and narrow constructions.[825] A fair reading requires that covered beliefs, observances, and practices be *religious*—so neither significantly moral, ethical, philosophical, economic, nor sociological, nor a lifestyle, interest, or activity.[826] The variation in scope rests entirely with the reasonableness and undue hardship requirements.[827] That part of section 2000e(j) injects practical outcome flexibility, but does

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other levels), are a few examples. For many, such activities and interests take on a religious-like importance—lending bona fide meaning, fulfilment, enjoyment, and more. But that does not make them religion for purposes of the Free Exercise Clause.

[818] For certain political, sociological, economics, and other beliefs, opposition and claims of interference tend to correlate directly with political ideological alignment to those in power or behind the policy.

[819] *See* Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972).

[820] *See* discussion *supra* Part I.

[821] *See* discussion *infra* Section III.A.1.d.

[822] *See* discussion *infra* Section III.A.1.d.

[823] *See* discussion *infra* Section III.A.1.d.

[824] *See* discussion *infra* Section III.A.1.d.

[825] *See* 42 U.S.C. § 2000e(j).

[826] *See supra* Part II.

[827] *See supra* Part II.

not justify taking similar utilitarian liberties with other elements of the statute. Section 2000e(j) is analogous to the Free Exercise Clause in that it relieves employees from conflicts between authorities spiritual and temporal, only on the statutory plane the conflicting authority is an employer's requirements, not those of the state.[828] While religious adverse action and discrimination is less detrimental than the loss of life or liberty at the hand of the state, in 1972 Congress determined that employees nevertheless should not have to choose between following employing and divine authorities even though an at-will employee always retains the freedom to quit and the employer's obligation to accommodate is qualified.[829]

Ultimately, these distinctions between the First Amendment and the accommodation provisions of Title VII support divergence regarding the meaning of religion. After *Groff* it is even more important for courts to clarify the meaning of religion for purposes of Title VII.[830] For purposes of employment discrimination, the Court should return to a more textual construction of religion, which would better facilitate bona fide religious practice and observance within its sphere—not an amorphous catch all trump card allowing individuals to avoid requirements with which they disagree by articulating objections that sound religious. Ultimately, the outcomes of Title VII and Free Exercise cases will continue to diverge due to delimiters of cost and burden, but by level-setting religion at the statutory level the Court might affect a course correction that resettles this area of law without impacting constitutional rights.

d. The Court has applied different standards to similar issues when they arise in distinct constitutional and statutory contexts

Consistency in the meaning of legal terms is a worthy objective of judicial construction. The Court commences statutory interpretation with the text and gives words their ordinary meaning at the time they were used as informed by their context in the statute.[831] Courts grappling with section 2000e(j) borrowed from First Amendment cases like *Seeger*, *Welsh*, and

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[828] *See supra* Part II.

[829] *See* 42 U.S.C. § 2000e.

[830] Even starting from the same meaning of religion and underlying facts, outcomes in Free Exercise and Title VII religious accommodation cases will differ because of the modifying clauses of §2000e(j) that are not present in the First Amendment. *Compare* 42 U.S.C. §2000e(j) *with* U.S. CONST. amend. I. These differences are not a reason to preserve the link between Constitution and statute regarding the meaning of religion. Clarifying the meaning of religion for Title VII accommodation purposes will in some cases broaden, and in others limit, §2000e(j) in comparison to the Free Exercise Clause.

[831] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 69 (2013); *see also* BP P.L.C. v. Mayor & City Council of Balt., 593 U.S. 230, 237 (2021) ("When called on to interpret a statute, this Court generally seeks to discern and apply the ordinary meaning of its terms at the time of their adoption") (citation omitted).

Yoder. Some of the most persistent criticisms of *Hardison* were premised on the notion that the *de minimis* standard was an unreasonable gloss on "undue hardship" as that term is used in other statutes.[832] Yet statutory analysis may reveal that words or terms in one place mean something different than the same words or terms in another—sometimes even within the same statute.[833] The prospect of asymmetry in the construction of "religion" between the First Amendment and Title VII would not be the first or the only significant deviation between the Constitution and Title VII. Affirmative action has long been another example. For decades, the Court has analyzed what is conceptually a similar practice in two distinct lines of cases: one under the Equal Protection Clause and Title VI, and the other under Title VII.[834]

The first line of cases broadly addresses affirmative action programs in public education. With roots in *Brown v. Board of Education*, the Court first confronted an equal protection and Title VI challenge to an affirmative action program that set aside for minority applicants a certain number of slots in a medical school class in *Regents of the University of California v. Bakke*.[835] A fractured Supreme Court ruled that education diversity in public higher education is a compelling state interest and that affirmative action in some circumstances is constitutional, such that public universities can consider race as a factor in admissions, but that the program before the Court was unlawful.[836] The Supreme Court later adopted Justice Powell's opinion, confirming that public universities may consider race as an element of a

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[832] *See* Trans World Airlines v. Hardison, 432 U.S. 63 (1977).

[833] *See, e.g.*, Yates v. United States, 528 U.S. 528, 537 (2015) ("Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words. Rather, the plainness or ambiguity of statutory language is determined not only by reference to the language itself, but as well by the specific context in which that language is used, and the broader context of the statute as a whole. Ordinarily, a word's usage accords with its dictionary definition. In law as in life, however, the same words, placed in different contexts, sometimes mean different things. We have several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute") (citations and punctuation omitted and cleaned up); Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 595 (2004) (stating that the word "age" in the ADEA does not have the same meaning every time it is used in the statute and stating that presumption that a word means the same thing when used in a statute "is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent").

[834] *See* discussion *infra* Section III.A.1.d.

[835] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); *see* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[836] *Bakke*, 438 U.S. at 319-20. Justice Powell announced the judgment of the Court, though five other justices also authored opinions. *Id.* at 269, 324. Portions of Justice Powell's opinion were joined by different groupings of the remaining eight justices. *Id.* at 324. Generally, Justices Brennan, White, Marshall, and Blackmun concluded that affirmative action was constitutional and that government may take race into account "not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice." *Bakke*, 438 U.S. at 325. These justices suggested that public university admissions programs intending to remedy past race discrimination were generally constitutional. *Id.* at 328. The other four justices—Chief Justice Burger, and Justices Stewart, Stevens, and Rehnquist—concluded that it was unnecessary to craft a broad rule regarding affirmative action, concluding that the school had discriminated against the petitioner in violation of Title VI. *Id.* at 409-411.

holistic, nonremedial admissions system, but that the Fourteenth Amendment and Title VI bar racial quotas and balancing, and that approved uses of race were limited in time.[837] The Supreme Court has since dramatically limited use of race under the Equal Protection Clause and Title VI.[838]

The Court and the Commission addressed affirmative action programs in employment under Title VII separate from the constitutional framework in public university admissions. Title VII contains several prohibitions that are difficult to square with intentional consideration of race and other protected characteristics in an affirmative action plan.[839] Nevertheless, in January 1979, the Commission issued regulations outlining certain circumstances in which affirmative action was appropriate under Title VII.[840] Five months later, the Court decided *United Steelworkers of America v. Weber*, holding that Title VII allows temporary affirmative action plans to correct a racial imbalance in an employer's broader workforce.[841] The Court acknowledged Title VII's prohibitions but observed that "Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with the plight" of African Americans.[842] In light of the general statutory purpose gleaned from the legislative history, the Court considered that it would be ironic if it were to construe that same law to prohibit "all voluntary, private, race-conscious efforts to abolish

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[837] *See generally* Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003).

[838] *See, e.g.*, Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023); Fisher v. Univ. of Tex., 579 U.S. 365 (2016); Fisher v. Univ. of Tex. at Austin, 570 U.S. 297 (2013).

[839] 42 U.S.C. § 2000e-2(a) (a covered employer may not discriminate "because of" an employee's or applicant's "race, color, religion, sex, or national origin" nor may an employer "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin"); *id.* § 2000e-2(l) (a covered employer may not use test scores in a discriminatory manner, that is "in connection with the selection or referral of applicants or candidates for employment or promotion, . . . adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin"); *id.* § 2000e-2(j) (the title is "Preferential treatment not to be granted on account of existing number or percentage imbalance" and it provides that a covered employer is not required to "grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group" due to any workforce imbalance concerning the numbers of employees in the relevant protected class or classes). *But see id.* § 2000e-2(i) (allowing preference for "Indians"); *id.* § 2000e-3(b) (prohibiting "any notice or advertisement relating to employment . . . indicating any preference. . . or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference . . . or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment"). Finally, Title VII also prohibits employers from discriminatory practices where a protected characteristic was a "motivating factor," even if it was not a but for cause. *See id.* § 2000e-2(m) ("an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice").

[840] *See* 29 C.F.R. § 1608.

[841] United Steelworkers v. Weber, 443 U.S. 193 (1979).

[842] *Id.* at 202 (citations omitted).

traditional patterns of racial segregation and hierarchy."[843] And yet the Court declined to outline specific limitations and requirements for lawful affirmative action plans under Title VII, noting only a few factors significant to its conclusion regarding the plan at issue.[844]

In these lines of cases, the Court developed different parameters and particulars regarding affirmative action that were justified by differences in the applicable legal sources and their objectives, and the contexts in which they arise. Similar differences regarding religion under the First Amendment and Title VII attend religious accommodation and, likewise, favor different approaches. And any separation between religion under the Free Exercise Clause and section 2000e(j) would be much less extensive than the separation between the Equal Protection Clause and Title VII on the question of affirmative action.

2. Threshold Obstacles Affirmatively to Defining "Religion" Under Section 2000e(j)

As American courts have experienced throughout history, it is one thing to say what religion is not, but it is quite another to state what it is. Before attempting positively to define the beliefs, observances, and practices that are religion for purposes of section 2000e(j), one must confront several challenges to the effort.

First, the English word "religion" carries a wide variety of office meanings.[845] And people have their own definitions, understandings, and colloquial senses as to what is religion. Not only do individuals have widely varying personal understandings , they also use "religion" to describe or refer to that which they would not include in their own definition of religion in different situations. Context is critical. As a result, an excessively rigid or specific construction of religion for purposes of Title VII and its

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[843] *Id.* at 204.

[844] *Id.* at 208-09; *see also* Ricci v. DeStefano, 557 U.S. 557 (2009); Johnson v. Transp. Agency, 480 U.S. 616 (1987). The Court noted that the "purposes of the plan mirror those of the statute," to "break down old patterns of racial segregation and hierarchy" and "open employment opportunities for Negroes in occupations which have been traditionally closed to them." *Weber*, 443 U.S. at 208 (citing 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey)). Also important, the plan did not "unnecessarily trammel the interests of the white employees," "require the discharge of white workers to be 'replace[d] with new black hires,'" or "create an absolute bar to the advancement of white employees." *Id.* Finally, the Court noted with approval that the plan at issue was "a temporary measure" that was not "intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." *Id.*

[845] The Oxford English Dictionary entry for "religion" offers 7 definitions with a total of 14 subparts. It defines "religion" as "a particular system of faith and worship," "a state of life bound by religious vows; the condition of belonging to a religious order," and a "belief in or acknowledgement of some superhuman power or powers (esp. a god or gods) which is typically manifested in obedience, reverence, and worship; such a belief as part of a system defining a code of living, esp. as a means of achieving spiritual or material improvement." *Religion*, OXFORD ENGLISH DICTIONARY (2022).

accommodation provisions risks provoking normative opposition as over- or underinclusive. Additionally, in the courts, it might devolve into extended debate on definition details.[846] Such a definition would apply widely across all types of religions—large and small, Eastern and Western, traditional and nontraditional—as well as a wide range of accommodations. But it must not be so broad that it encompasses every individual's personal belief, transforming religion into a freedom of thought or conscience. In addition, the framework must not be too unwieldy with too many components to balance such that virtually anything could be deemed religious or nonreligious.

Second, a bona fide belief might be (or might be traced to) religious or non-religious sources (*e.g.*, moral, ethical, philosophical, economic, sociological, lifestyle) or both.[847] For beliefs that may be traced to, or held for, both religious and non-religious reasons, how should the accommodation provisions of section 2000e(j) be applied?[848] On the one hand, simply because one *could* articulate a religious case for a certain belief should not allow a person to obtain an accommodation for what is, in fact, a non-religious analog to which the person actually subscribes. On the other hand, Title VII should not allow an employer to refuse accommodation of bona fide religious belief

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[846] Statutory construction can proliferate litigation on definitional issues. The residual clause of the Armed Career Criminal Act is a recent example where, after multiple failed attempts to define the statutory provision, the Supreme Court eventually threw up its hands and held the statute void on vagueness grounds. *See* Johnson v. United States, 576 U.S. 591 (2015) (holding the residual clause invalid on vagueness grounds). On four prior occasions the Court had attempted to define the residual clause, ultimately without success. *See* Sykes v. United States, 564 U.S. 1 (2011); Chambers v. United States, 555 U.S. 122 (2009); Begay v. United States, 553 U.S. 137 (2008); James v. United States, 550 U.S. 192 (2007).

[847] Beliefs, views, and opinions about military service, abortion, alcohol, vaccines, nature, crime and punishment, and many others—both generally and with respect to particular government policies—fit this description. The facts of *Seeger* and *Welsh* illustrate this distinction with respect to war. *See generally* United States v. Seeger, 380 U.S. 163 (1965); Welsh v. United States, 398 U.S. 333 (1970). For example, in popular conception opposition to abortion is often predicated on religious beliefs, but a significant portion of vocal opponents to abortion are neither religious nor politically conservative. *See* SECULAR PRO-LIFE, https://secularprolife.org (last visited Feb. 22, 2023). Passionate opponents of alcohol consumption can be found among Baptists and religious communities of the Midwest as well as those who disfavor the public health and societal repercussions of its excess independent of religion. Indeed, it was the combination of religious and secular forces that secured the 18th Amendment and Prohibition. *See* D. Okrent, LAST CALL: THE RISE AND FALL OF PROHIBITION (2010). Long before COVID-19, religious and non-religious opponents to vaccines have passionately defended their views on a variety of different vaccines. *See* Richard M. Carpiano et al., *Confronting the Evolution and Expansion of Anti-Vaccine Activism in the US in the COVID-19 Era*, 401 LANCET 967 (2023). The same is true of widely held notions of humans' place and interaction with nature and the environment, the causes and response to crime, and the value of certain methods of punishment. On these and countless other topics people may hold potentially identical beliefs, opinions, and views on various sides of any issue both for religious and or non-religious reasons. Subject to limitations that take an employer's legitimate business interests into account, section 2000e(j) only requires accommodation of that which is religious to reduce circumstances in which an individual must choose between adhering to the law of his god and that of his employer.

[848] As noted above, one textual answer is that the accommodation provisions of section 2000e(j) do not protect religious beliefs—only observances and practices. *See supra* text accompanying notes 91-101. Given the difficulty of maintaining a distinction between beliefs and practices implementing those beliefs, the Court is unlikely to draw or hold this line.

merely because a credible non-religious source or justification exists and is known to the decisionmaker or the employer. Nevertheless, for purposes of section 2000e(j), either the court or jury must determine whether the belief is, in fact, primarily religious for a plaintiff.[849] As discussed at length above, Title VII does not require employers to accommodate the political, economic, philosophical, or moral beliefs, opinions, views, or interests of its employees, even if dressed up to appear central, important, or similar to bona fide religious views of others.[850]

Third, the construction of religion must be amenable to judicial application without violating constitutional and longstanding requirements that minimize unnecessary government inquiry, interpretation, declaration, or intervention in religious doctrine. For example, although used in the past, concepts such as centrality (*e.g.*, where the court asks whether the belief, observance, or practice, is central to an individual's religion) are now rightly considered improper, as should be judicial assessments of "parallel" places and whether a belief is "meaningful."[851] These analyses are precisely the sort of inquiry that should be avoided as they inevitably place courts in the business of assessing religious tenets.[852]

3. "Religion" Under Section 2000e(j) Should be Defined According to its Purposes.

Although there is no perfect, general, universally accepted definition of religion under the accommodation provisions of Title VII, just as the Court was quick to identify that which it deemed clearly *excluded*, so too one can call out that which is *included*.[853] At a minimum religion surely includes cohesive systems of faith and worship, such as Islam, Judaism, Christianity, Buddhism, Hinduism, and Sikhism, as well as formal or informal denominations or sects of these religions.[854] It must also include smaller, non-systematic religions as well, such as those practiced by some Native

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[849] *See supra* Section II.F.2.

[850] *See supra* Section II.F.2.

[851] *See, e.g.*, Emp't Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872 (1990); Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich, 426 U.S. 696 (1976); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94 (1952); Watson v. Jones, 13 Wall. 679 (1872).

[852] *See infra* note 854.

[853] *See supra* Part II.

[854] For example, Islam certainly includes Sunni, Shi'a, Ahmadiyya, Ibadi, and Sufism sects; Judaism encompasses the Haredi, Dati, Masorti, and Hiloni; Christianity broadly covers Catholicism, Eastern Orthodox, and Protestantism, as well as numerous subdivisions of each. Take the broader Protestant Church, which broadly describes Baptists, Methodists, Congregationalists, Episcopalians, Lutherans, Presbyterians, Anabaptists, Adventists, and various further denominations. Buddhism covers Theravada Buddhism and Mahayana Buddhism, and their main subdivisions, and Hinduism encompasses sects such as Saivism, Shaktism, Vaishnavism, and Smartism, and others. Finally, Sikhism includes sects such as the Khālsā, Nāmdhari, and Nirankāri. There are many others.

American tribes and peoples in North America. Constitutional limits on government foreclose an official comprehensive list identifying qualifying religions, sects, and their adherents or members, but many more than mentioned here are religions.[855]

The courts should construe "religion" in section 2000e(j) according to the primary function of that provision, that is to address and resolve circumstances where employees must choose between obeying a tenet of their religions or a conflicting valid rule of their employers. Therefore, for purposes of the accommodation provisions of section 2000e(j), a court should hold that a belief, observance, or practice is religious if it possesses each of the following attributes:

- The belief, practice, or observance held by the employee must be part of, and have as its source, a comprehensive spiritual system or framework widely and generally known and recognized as religious.

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[855] Protections against compilation or acquisition of lists of members of private groups developed throughout the mid-20th Century. In the 1950s and 1960s, the Court rejected efforts of southern states to quell the activities of the National Association for the Advancement of Colored People by compelling it to disclose its membership lists. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958) (recognizing "the vital relationship between freedom to associate and privacy in one's associations"); Bates v. City of Little Rock, 361 U.S. 516 (1960); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961); *see also* Shelton v. Tucker, 364 U.S. 479 (1960) (rejecting requirement of public school teachers to disclose membership in all groups). Ostensibly sought for banal reasons, the Court recognized sinister ulterior motives and held that government-compelled disclosure of membership lists of private groups may expose those on the lists to threats, harassment, harm, or economic retribution, chilling others from joining said groups. *Patterson*, 357 U.S. at 462-3; *see also* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2382 (2021) (noting the state's efforts were "part of an effort to oust the organization from the State"). To obtain such lists, the government usually must assert a compelling state reason, which the Court has recognized in regard to the Communist Party, see Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 4 (1961), and concerning political financial contributions. *See* Buckley v. Valeo, 424 U.S. 1, 65-66 (1976) (per curiam), superseded by statute, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81; *see also* Barenblatt v. United States, 360 U.S. 109 (1959); *Ams. for Prosperity Found*, 141 S. Ct. 2373. The religion clauses offer further protections for religious groups. *See In re* Deliverance Christian Church, No. 11-62306, 2011 WL 6019359 (Bankr. N.D. Ohio Dec. 1, 2011); Johnson v. Washington Times Corp., 208 F.R.D. 16, 17 (D.D.C.2002); United States v. Citizens State Bank, 612 F.2d 1091, 1093-95 (8th Cir. 1980). Again, however, this does not prevent the government from investigating improper activities of religious institutions. *See, e.g.*, St. German of Ala. E. Orthodox Catholic Church v. United States, 840 F.2d 1087 (2d Cir. 1988).

During this period, there was debate regarding whether the United States Census should include one or more questions on religion. Some of the strongest opponents were religious groups who articulated concerns regarding government tracking, including Jewish groups. *See Jews Oppose Inclusion of Question on Religion in 1960 U.S. Census,* JEWISH TELEGRAPHIC AGENCY (Sep. 30, 1957), https://www.jta.org/archive/jews-oppose-inclusion-of-question-on-religion-in-1960-u-s-census. Ultimately, Congress resolved this debate by forbidding the Census Bureau from asking about "religious beliefs" or "membership in a religious body" on the decennial census form, which citizens are legally required to complete. *See* Pub. L. No. 94-521, 90 Stat. 2459 (1976).

Finally, in the wake of Watergate, Congress required government agencies to disclose, limit, and justify information they collected regarding the people of the United States. *See* Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896, 5 U.S.C. § 552a (governing the collection, maintenance, use, and dissemination of personally identifiable information regarding Americans maintained by federal agencies in their systems of records).

- Both the belief and its larger framework must be identifiable and definable, and exist as such outside of, and distinct from, the subjective thoughts, feelings, and beliefs of the individual employee.

- As held by the employee, neither the belief nor its broader source may be primarily or significantly moral, ethical, political, philosophical, economic, sociological, a lifestyle, or a mere interest or activity.

Beliefs that do not meet these requirements are not religion or religious for purposes of Title VII's religious accommodation requirements because they are unlikely to present the dilemma for which the provision was designed—the choice and consequences between obeying divine law and human requirements.[856] Beliefs that are merely creations or extensions of the individual, even those that are central, strongly held, metaphysical, involve deep and impenetrable matters, occupy some space deemed religious, or are idiosyncratic constructions, are not the type addressed by this exemption and that may require accommodation under Title VII.[857] Such beliefs do not present the same dilemmas as religious beliefs. Instead, these non-religious beliefs present dilemmas more akin to those faced by people disagreeing, albeit strongly, with a legal requirement.[858]

Even though the elements above are broad, for Title VII accommodation purposes, they are narrower than *Welsh* and its gloss on *Seeger*.[859] Extensions of an individual's preferences do not present the sort of conflict between authorities temporal and spiritual that Title VII's

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[856] *See supra* Section III.A.1.

[857] *See supra* Section III.A.1.

[858] A religion, or religious belief, under this framework is part of some system of faith, usually (but not always) involving belief in and obedience to a superhuman entity or power that governs aspects of an individual's life. While this includes formal Western religions, contrary to the fears of the *Seeger* Court it does not exclude Native American or other smaller non-Western religions, or those that are not traditionally theistic. However, it does exclude beliefs that are not derived from, elements of, or compelled by a religious system. Personal beliefs, individual spirituality, or philosophical, political, economic, social (or sociological), or an individual's way of life are either secular systems or mere extensions of an individual. And while one might hold such beliefs zealously, adhere to them scrupulously, and consider them centrally in his or her—even as a religious individual holds religious tenets—such beliefs do not become *religious* or a *religion* for purposes of the statute or First Amendment. To conclude otherwise elevates figurative definitions and concedes anything and everything is a religion if an individual claims it to be. And if that is true than nothing is religious. Ultimately, the *Seeger* Court correctly identified religious beliefs as what remains when political, philosophical, social, and economic beliefs, or individual's ways of life. *See generally* Seeger v. United States, 380 U.S. 163 (1965). However, it chose a different conclusion to achieve equality. *Id.*

[859] *See supra* Section II.F.2.a.1.

accommodation provisions are designed to relieve.[860] An individual employee is not entitled to use federal antidiscrimination law to compel his employer to align with everything he may profess as his religion or conscience, even if it is strongly held in a parallel place to religious beliefs in others.[861] An employee cannot create, or obtain accommodation for, a religion by affixing religious language (*e.g.*, "the church of …"), trappings (*e.g.*, priests, ceremonies, holy days), and other accoutrements to his interests, hobbies, or lifestyle.[862] Similarly, religion is not primarily an economic, political, or social movement, with their focus on human or worldly affairs, even when they adopt religious overtones.[863]

Employers are not obligated to accommodate sects that are criminal enterprises, are covers or fronts for such enterprises, or that exist to foster and insulate criminal abuse and activity.[864] Additionally, in most cases, this framework does not encompass an individual's personal amalgamation of isolated beliefs drawn from a variety of religions, as these are merely extensions of his or her preferences. Finally, an employer is not obligated to accommodate nebulous spiritual questing, or vague, general, or freestanding concepts such as peace, love, harmony, nature, community, and the like.[865] Each of these do not present a conflict between differing commands of religion and secular employers of the sort addressed by Title VII, but rather clashes between work rule and personal beliefs, views, opinions, and preferences. The latter are important, but not properly covered by section 2000e(j).[866]

In a modern society, an individual remains subject to laws, regulations, requirements, rules, responsibilities, and societal burdens with which they disagree to varying degrees. Given the dizzying myriad of federal, state, and local laws; similarly voluminous regulations and subregulatory guidance at all levels; and judicial opinions from more than 90 district courts, 13 circuits, and the Supreme Court, an individual need not look far to identify legal requirements that clash with his or her personal opinions and beliefs.

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[860] *See supra* Part II.

[861] *See supra* Part II.

[862] S*ee* United States v. Meyers, 95 F.3d 1475, 1483-84 (10th Cir. 1996). Religious accommodations under Title VII are for bona fide religions. They are not for personal beliefs designed to conflict with, and thus evade, requirements they dislike. *Id.* at 1504. Section 2000e(j) does not obligate employers to accommodate employees' personal engagement in common activities such as smoking, drinking, drug use, tattoos, firearms, hunting, or activities connected with personal subjective passions such as peace, love, harmony, justice, nature, the environment. *See, e.g.*, *id.* at 1509.

[863] *See* Africa v. Pennsylvania, 662 F.2d 1025, 1034-35 (3d Cir. 1981) (discussing MOVE).

[864] *Meyers*, 95 F.3d at 1480-81.

[865] *See id.* at 1484. Of course, many bona fide religions incorporate some of these values. And Title VII's accommodation provision encompasses them when they are part of a religious system or framework and are identifiable and definable distinct from the subjective views of the individual. 42 U.S.C. § 2000e(j).

[866] 42 U.S.C. § 2000e(j); *see supra* Part II.

The same could be said of the contents of many employee contracts, as well as corporate handbooks, guidelines, and policies. But despite their ubiquity, most of these conflicts fall outside the realm of the religious accommodation provisions of Title VII. Section 2000e(j) neither crowns each person a king or queen subject only to his or her own law nor affords all a get-out-of-jail-free card to anyone who refuses to comply with work rules because they disagree with them.[867]

Although the proposed test above deviates from the familiar phrases of *Seeger*, *Welsh*, and *Yoder*, it embodies many of the core concepts articulated (though not necessarily applied) in those cases. It reestablishes, for Title VII accommodation purposes, *Seeger*'s line between beliefs that are genuinely religious and those that, while just as important, passionately held, and central to an employee's life, are nevertheless primarily political, economic, philosophical, personal, or something else.[868] Section 2000e(j) facilitates the accommodation of only genuine religious beliefs and practices within its specified limits.[869]

In the United States, an individual's beliefs are a natural, inherent, and constitutionally protected right and freedom. Often, they are highly personal, passionately held, and profoundly important to the holder. They may be religious, familial, economic, sociological, scientific, political, or philosophical; they may extend to hobbies, pursuits, activities, or interests. For many, they may be an amalgamation of these, or simply the result of personal experiences. The reasonableness, merit, or truthfulness—generally or as a matter of orthodoxy within a larger framework—of these beliefs are none of the government's or, with certain qualifications,[870] an employer's business. Likewise, beliefs, views, opinions, analyses, and conclusions need not be rational, consistent, agreeable, nice, provable, or coherent in the eyes of public officials or corner office occupants. Nothing can control that which an individual holds true in her heart or head—and other constitutional or statutory rights may protect them.

But holding such a belief is very different from legally compelling an employer to take action to accommodate that belief. Just as the Free Exercise Clause does not excuse an individual from complying with every valid law, regulation, policy, or government requirement with which he disagrees or that violates his personal beliefs, so too Title VII does not

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[867] 42 U.S.C. § 2000e(j); *see supra* Part II.

[868] United States v. Seeger, 380 U.S. 163, 165-66 (1965).

[869] *See* 42 U.S.C. § 2000e(j); *see also supra* Part II.

[870] One significant exemption is religious employers, who are exempted from Title VII's prohibition of religious discrimination. 42 U.S.C. § 2000e-1(a) ("This subchapter shall not apply to an employer with respect to … the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities").

compel employers to excuse employees from complying with work requirements for similar reasons.[871] Religion is a unique subset of beliefs, and is specially protected as such, precisely because a religious/employer conflict constitutes a clash of authorities that the United States has historically recognized and respected broadly.[872]

Personal non-religious beliefs often conflict with employment requirements, but not in the same way. As noted above, non-religious and religious beliefs may be identical in many respects important to accommodation analysis.[873] They may reach the same result or conclusion. But, at their core, non-religious beliefs are merely an extension of the individual.[874] They have no authority that is separate and independent from the individual; they may be created, modified, selectively applied, or discarded whenever they no longer suit her.

Title VII's inclusion of religious accommodation recognizes these distinctions. Unlike national origin, color, race, and sex, which are the immutable results of genetics and the location of one's birth, religion historically has been recognized (and protected) as unique.[875] Nevertheless, Title VII's inclusion of religion in a list of attributes outside one's control recognizes that if a person embraces a religion outside himself, he submits to its authority.[876] Put another way, for an individual, religion may become an integral part of life much as race, color, sex, age, national origin, disability, and genetics.

After *Groff* courts will be compelled more frequently to confront whether a belief is, in fact, religious.[877] The standard above derives from the word "religion," its primary historical use, and the broader longstanding role

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[871] *See supra* notes 27-29 and text accompanying; *see also supra* Part II.

[872] *See supra* Section II.F.2.a.1. This is not to say other countries refuse to respect or give special treatment to specific religions. After all, Iran is a religious state, but it favors the religion of its rulers. Favoritism of the state's religion when combined with proscription and punishment for others is not genuine religious freedom from the perspective of liberal democratic nations.

[873] *See supra* note 850 and accompanying text.

[874] One might reject this distinction, arguing that both religious and non-religious beliefs alike are selected, accepted, and adopted by the individual. In one sense, this is undoubtedly true. No one is born with beliefs; even those of childhood are ultimately adopted and embraced or rejected and set aside. But religion for Title VII purposes is unique because it entails an individual embracing and submitting to an external authority over her life independent from her creation and control. In this respect, religion is similar to the state. In contrast, non-religious beliefs, views, and opinions are fundamentally different. Adopted, created, or modified based on each individual's preferences, experiences, and reason, they are merely extensions of the individual who holds them. As a result, when they conflict with whatever the individual values more, they are modified, subjugated to other priorities, or simply abandoned. An individual does not submit to his non-religious beliefs, they submit to him. Thus, a non-religious belief to its holder exerts as much control as the law to a divine-right monarch. Like the Lord Chancellor of Gilbert and Sullivan said, the "law is the true embodiment of everything that's excellent. It has no kind of fault or flaw. And I, my Lords, embody the law." W.S. GILBERT, IOLANTHE, act 1 (1882).

[875] *See supra* Section II.F.2.a.1.

[876] *See infra* note 877 and accompanying text.

[877] *See supra* Section II.E.4.

of free exercise and religious accommodations already discussed at length: relieving employees of choosing between obeying (and violating) the requirements of either their religion or their employer.[878] Additionally, this approach makes clear that, for purposes of the accommodation provisions of Title VII, religion does not encompass anything and everything declared as such by the individual in question. Merely because an individual credibly asserts or alleges a belief that ticks off the magic phrases of *Seeger* and *Welsh*—a "sincere and meaningful belief" that may relate to what morally is right and wrong, is "held with the strength of traditional religious convictions," and occupies a "place parallel" to religious beliefs in others—does not make a belief religious under Title VII.[879] Otherwise, a plaintiff employee in his own Title VII action may define anything view or belief as a personal religion.[880] Of course, if the existing case law bears any indication, in most cases belief and religion will continue to be clear and uncontested.[881] Only where an individual asserts an idiosyncratic belief will this question arise.[882]

This approach not only better implements the plain meaning and function of the text, but also provides an easier, less invasive, objective standard that minimizes the need for courts to probe deeply into an individual's religious beliefs. As noted above, to qualify as religious for purposes of the accommodation provisions of Title VII, a plaintiff employee need only identify the religious belief (already required as the subject of accommodation) and the religious source of the conflicting obligation.[883] A court need not evaluate whether the belief is moral or meaningful, whether it is strongly held, or whether it occupies a place in the plaintiff's life that is central or parallel to that of religious beliefs in others.[884]

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[878] *See supra* Part I; *see also supra* Section III.A.

[879] United States v. Seeger, 380 U.S. 163, 176 (1965); Welsh v. United States, 398 U.S. 333, 339-40 (1970).

[880] *See Seeger*, 380 U.S. at 176; *Welsh*, 398 U.S. at 339-40. This issue, which also arises under *Hardison*, tends to be resolved by avoiding the question. *See* Trans World Airlines v. Hardison, 432 U.S. 63, 72 n.7. Instead, courts and juries allow assessments of sincerity, reasonableness, and undue hardship to obviate the need to assess whether a practice or belief is religious for purposes of the accommodation provisions of Title VII. Of course, none of these elements have anything to do with whether a belief is genuinely (as opposed to formally or technically) religious. Both religious and non-religious beliefs may be deemed credible or incredible, require reasonable or unreasonable accommodations, or pose a wide range of hardship to employers. The proposed test will avoid these issues by clearly establishing coverage in most cases.

[881] *See generally Hardison*, 432 U.S. 63. As a normative matter, individuals may believe whatever they wish (no matter the contents). They may claim an absolute right of conscience, and truthfully define any belief, practice, or other aspect of life, as religious or their religion. But just like the ADA does not cover every disability claimed or labeled by a plaintiff, so too an individual Title VII religious accommodation plaintiff may not define religion however he wishes and, thereby, unlock a statutory right to compel an employer to accommodate that belief. *See Seeger*, 380 U.S. at 176; *Welsh*, 398 U.S. at 339-40.

[882] *See, e.g.*, Africa v. Pennsylvania, 662 F.2d 1025 (3d Cir. 2981).

[883] *Compare with supra* notes 356-63 and text accompanying.

[884] *Compare with supra* notes 356-63 and text accompanying.

Some may argue that this approach requires too much of individuals. To the contrary, it does not require employees to articulate detailed theological arguments, exegete religious texts, defend the merits of beliefs, engage in apologetics, or cite authority—the usual concerns with employee burdens in religious discrimination and accommodation cases. Letters or testimony from religious leaders either confirming the belief is religious, a part of the religion, or the plaintiff's religiosity are not—and may not be—required.[885] Identifying oneself as a member of a religion (*e.g.*, Muslim, Jew, Hindu, Christian, Buddhist, Sikh etc.), describing the practice or observance (*e.g.*, Eid al-Fitr, Shemini Atzeret, Krishna Janmashtami, Easter, Magha Puja Day, Baisakhi, etc.), and indicating the accommodation needed (*e.g.*, a scheduling shift one afternoon) is hardly onerous and will suffice for identifying the belief or practice as a religious one in the run of cases to commence discussions with an employer. This approach should reduce the need for more extensive employer or judicial inquiry due to the clear line that it draws. Fewer cases will see the need to inquire or analyze an individual's belief against the amorphous and comparative phrasing of *Seeger* and *Welsh*, as noted above.[886] Questions of whether a belief is moral or meaningful, occupies a parallel place, or is strongly held are no longer necessary.[887] Moreover, as courts have made clear that employers are not obligated to familiarize themselves with religions generally or those of their employees—and to require employer familiarity would incentivize the very sort of intrusive questions and information collections test—this approach also obviates any general need to collect and maintain information regarding employees' religious beliefs.[888]

Others may condemn this approach as susceptible to manipulation. The large increase in religious exemption requests from COVID-19 vaccine requirements has placed a spotlight on these types of concerns.[889] They may argue that it is not difficult to research and submit pre-drafted scripts or similar materials that will satisfy this test. Many individuals who had never requested religious accommodations for other vaccine requirements claimed or sought religious exemptions from COVID-19 vaccine requirements, supporting them with scripts, cites, and other materials garnered from the internet.[890] Such concerns are primarily concerned with credibility and must be addressed as part of the sincerity inquiry, which is discussed in greater detail below. But research is a two-way street. Nothing prevents an employer

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[885] *See* Fallon v. Mercy Cath. Ctr. of Se. Pa., 877 F.3d 487, 493 n.27; *see also supra* notes 571-79.
[886] *See supra* notes 356-63 and text accompanying.
[887] *See supra* notes 356-63 and text accompanying.
[888] *See supra* Section II.F.1.
[889] *See supra* notes 545-46 and accompanying text.
[890] *See supra* notes 607-08 and accompanying text.

from canvassing public resources and rejecting a disingenuous request for accommodation in part because, after reviewing all relevant information, the religious belief identified matches word-for-word those purchased or lifted from internet resources.[891] Ultimately, however, disagreement and litigation concerning this issue is misplaced at this stage. Even if plagiarized, the belief identified is likely to be religious. But just because the belief identified is religious does not mean it is sincerely and truly held by the individual offering it. Employers and courts lose nothing by finding the belief is religious and addressing credibility as part of the sincerity element.

Although the gravamen of this approach is the line between externally and internally created religious beliefs, two further aspects are also important. First, the belief or practice must be part of a comprehensive system recognized as a religion in the context at issue.[892] Second, neither the belief nor its source may be primarily moral, ethical, philosophical, political, economic, sociological, a lifestyle, or a mere interest or activity. These elements often will overlap. And again, they tend to arise only in those few cases where an individual seeks accommodation for a religious belief ostensibly created by, or known only to, the individual. A religion confined to a single belief or concept, especially an amorphous one (*e.g.*, nature, peace, love, harmony, etc.), without more, is more likely an internal belief or personal credo. The same is true for beliefs that are part of a broader structure that is not religious, or at least not religious with respect to the particulars of an accommodation request. As noted above, under this approach one cannot simply dress up common hobbies, activities, and interests with religious language and ritual, and declare it a religion.[893] For example, a small group of those who love bourbon are not entitled to use Title VII to compel their employer to accommodate its consumption, even if they formally establish a church of whiskey; create elaborate core documents, beliefs, and requirements; hold rituals to corn, grain, and malted barley; appoint leaders; and confirm to the beliefs religiously or as a religion. These elements are not designed to be independent requirements but rather focus the inquiry on the primary distinction being drawn between religious beliefs and practices by

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[891] Just because an individual offers such materials does not automatically make the request disingenuous or justify rejection of an accommodation request. Recognizing that explaining and announcing religious beliefs may be difficult; an employee may transparently and in good faith offer another's articulation of the belief or practice. When submitted in good faith, such materials often provide further clarity regarding the belief and potential accommodations.

[892] A "comprehensive system recognized as a religion in the context" does not impose size or formality requirements. This language focuses on an isolated belief being proffered as a religion. The language does not exclude small, minor, or non-Western religions, such as those that have been practices by Native American tribes for centuries.

[893] *See supra* note 864 and accompanying text.

identifying common beliefs and structures that are not religion for purposes of the accommodation provisions of Title VII.

Even accepting the foregoing, some might question how this structure treats unorthodox—or theologically incorrect or unofficial—religious beliefs. Both the First Amendment and Title VII are not confined to orthodoxy; this proposed framework does not provide otherwise.[894] One might easily conceive a situation where an individual professes a belief that deviates in some way from the religion's orthodox theology on a point. This approach accepts an individual's imperfect application and execution as well as unorthodox variations of beliefs where they retain the characteristics of an external religious requirement. In contrast, where an individual seeks accommodation for what is nothing more than a personally created belief, the individual does not satisfy the religion requirement by labeling it an unorthodox variation of a similar or related religious belief. An example in a familiar context may illustrate.

Take a religion that provides a sabbath requiring rest from work. Regardless of the theological elements set by religious leaders regarding rest and work, an individual might adopt a more lenient or stricter interpretation. For one employee, rest from work might require refraining only from the work of their occupation, but nevertheless fill their Sabbath with hobbies, recreational activities, family, and fun. A different employee may construe the same requirement more literally to encompass all labor from taking out the trash to cleaning the house, cooking food, doing laundry, driving, talking on the phone, using a computer, writing emails, and the like. Even if this religion's official elements of a sabbath rest lie somewhere between these two, both individuals' unorthodox beliefs and applications are covered. In contrast, a third employee interprets the Sabbath to require only that he not perform work that is not stressful and, therefore, inconsistent with an obligation to rest. As a result, on the Sabbath, this individual comes to work and informs his employer—assignment by assignment or task by task—whether his religion allows him to perform it that day. This is not a protected religious belief because it is, in fact, a personal preference created and applied by, and existing in, the employee's head, even if the employee can analogize to a religion.[895]

Finally, just as under the original *Hardison* framework, the religion analysis above does not incorporate various inquiries that are either part of

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[894] *See* U.S. CONST. amend. I; *see also* 42 U.S.C. § 2000e(j).

[895] This does not necessarily mean that the third employee is not a member of the religion claimed or is not entitled under Title VII to the reasonable accommodation of other beliefs, observances, and practices of that faith sincerely held. Likewise, an employee claiming to be Presbyterian could not claim that his personal interpretation or understanding of the Bible or other teachings requires a Wednesday Sabbath.

other elements of the cause of action or are immaterial.[896] First, the truth—or logic, merit, reasonableness, correctness, rationality—of the belief is not relevant to whether the belief is religious, under any standard. Second, the meaningfulness of the belief generally (or to the employee or others) as well as its importance within the religion or relative to other beliefs are likewise irrelevant to this inquiry. Third, certain inquiries regarding the relationship between the employee and the belief are also immaterial. These include the intensity, strength, or passion of the belief; its centrality or place in the employee's life; and comparisons or analogies to different religious beliefs held by different religious people. Fourth, and finally, sincerity—whether the belief is truly held by the individual—does not make a belief any more or less religious. That is not to say sincerity is irrelevant; to the contrary, it is addressed at length in a separate element of the cause of action addressed in the following section.[897]

B. Sincerity is a question of credibility regarding whether the employee holds the belief as a religious belief, and it should be treated as such and evaluated objectively.

Although the truth of a religious belief is an improper consideration for an employer or court, whether the belief is truly held is a critical component of any religious accommodation claim.[898] The necessity and importance of this requirement is obvious: Title VII's religious accommodation requirement only applies to the bona fide religious beliefs of an individual that he or she actually holds as such.[899]

Under *Hardison*, sincerity was frequently presumed absent clear evidence of dishonesty.[900] Longstanding historic disquiet regarding courts' exacting judicial scrutiny of an individual's belief and both discomfort and legal risks of employers doing so in the workplace have caused the Court to direct that this inquiry be conducted with a light touch or judicial modesty.[901] Under *Hardison*, employers often conceded plaintiffs' beliefs were sincerely held.[902] After *Groff*, however, it is less likely that sincerity will continue to be presumed in plaintiffs' favor, at least with the same frequency.[903] Instead, like religion, sincerity will be contested in more cases where the facts do not

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[896] *See* Trans World Airlines v. Hardison, 432 U.S. 63, 73-74 (1977).
[897] *See also supra* Section II.F.3.
[898] United States v. Seeger, 380 U.S. 163, 185 (1965).
[899] *See supra* Section II.F.3.
[900] *See supra* notes 759-66 and accompanying text.
[901] Moussazadeh v. Tex. Dep't of Crim. Justice, 703 F.3d 781, 792 (5th Cir. 2012).
[902] *See supra* notes 759-66 and accompanying text.
[903] *Compare with* notes 759-66 and accompanying text.

clearly pose undue hardship.[904] As a result, the Court should clarify how employers and courts confront and evaluate this question.

At its core, the sincerity inquiry is a credibility assessment on the question of whether the religious belief to be accommodated is, in fact, the bona fide religious belief of the employee. Judges and juries routinely make similar credibility assessments of plaintiffs, defendants, and witnesses every day in both civil and criminal proceedings.[905] These assessments may implicate matters of life and death, as well as events and matters that are personal, emotional, and even traumatizing. While exacting scrutiny about an individual's beliefs may be historically disfavored, Title VII religious accommodation plaintiffs are entitled neither to a special or unique presumption of credibility nor immunity from questions or scrutiny as to whether the beliefs alleged are, in fact, held as religious beliefs.[906] A plaintiff cannot invoke the civil courts to compel an employer to accommodate a religious belief without allowing the employer to challenge the allegations and contentions under the Federal Rules.[907]

The Court should clarify the following parameters attending the sincerity analysis in a religious disparate treatment action alleging a failure to accommodate the employee's religious beliefs:

- Consistent with the Federal Rules of Civil Procedure and the Federal Rules of Evidence, employers may challenge a plaintiff's credibility generally or specific allegations that the religious belief, observance, or practice at issue is, in fact, held by the plaintiff *as a religious* belief, observance, or practice.[908] In other words, a plaintiff cannot, and does not, establish sincerity by demonstrating that he holds a belief that can be framed or described as religious, but is not, or that matches (or can be analogized to) a religious belief in others. Instead,

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[904] *See supra* Section III.A.

[905] *See* EEOC v. Union Independiente De La Autoridad De Acueductos Y Alcantarillados De P.R., 279 F.3d 49, 56 (1st Cir. 2002).

[906] Title VII plaintiffs are bound by the Federal Rules like all other plaintiffs in federal court. FED. R. CIV. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts"). As such, they must plead and prove the elements of their claims, satisfying burdens of production and persuasion, with credibility. *See, e.g.*, Groff v. DeJoy, 600 U.S. 447 (2023); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Davis v. Fort Bend Cty., 765 F.3d 480, 485-86 (5th Cir. 2014) ("The sincerity of a person's religious belief is a question of fact unique to each case. The specific religious practice must be examined rather than the general scope of applicable religious tenets, and the plaintiff's 'sincerity' in espousing that practice is largely a matter of individual credibility.")

[907] *See supra* Section II.F.1.

[908] *See supra* Section III.A.3.

the plaintiff must prove that, in fact, he or she holds the religious belief as a religious belief.

- The truth, believability, merit, provability, credibility, or orthodoxy of the religious belief, observance, or practice is immaterial. A plaintiff is no more or less sincere (or credible) based on the fact finder's normative assessment of the religious belief, observance, or practice, or the broader religion from which it derives.

- Objective evidence is favored. The employee's past conduct is material, consistent with the Federal Rules of Evidence, to suggest that the belief, observance, or practice is—or is not—held by the individual either at all or as a religious belief.[909] As courts have long recognized, where a plaintiff's conduct is inconsistent with alleged beliefs, the finder of fact may find the plaintiff insincere. In response, the employee may argue that changes in behavior are the results of a religious conversion, new understanding, and spiritual growth. It is for the factfinder to resolve such conflicts.[910]

- Neither an employer nor a court may require certification or evidence from a religious authority that the plaintiff sincerely holds the belief at issue.[911] If a plaintiff chooses to provide such evidence, the employer is entitled to challenge it like any other piece of evidence, consistent with the Federal Rules of Evidence.[912]

Ultimately, section 2000e(j) is not an all-purpose sword that empowers employees to carve out exemptions from workplace requirements that are inconsistent with strongly held views and opinions, merely because the employee may credibly characterize the belief as religious to the employee or point to a religion or religious belief with which it overlaps or

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[909] *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981) ("[T]his analysis is most useful where extrinsic evidence is evaluated. For example, an adherent's belief would not be "sincere" if he acts in a manner inconsistent with that belief or if there is evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine.").

[910] This legal inquiry cannot require perfection nor near perfection. *See supra* at Section II.F.3.

[911] *See supra* Section II.F.2.b.2.

[912] *See supra* Section II.F.2.b.2.

aligns. To the contrary, section 2000e(j) serves a specific and narrow purpose to protect bona fide religious beliefs and practices amenable to reasonable accommodation where they conflict with valid workplace rules and policies.

These considerations are framed in the adversarial context of litigation. While the same limitations attend an employer's initial evaluation of an employee's request for religious accommodation, the dialogue of that process takes on an added dimension: the risk of conventional religious disparate treatment. Where an employer's response to a request for accommodation is aggressive and hostile, not only might it provoke a disparate treatment claim alleging failure to accommodate, but it might also provide evidence to support a claim of traditional religious disparate treatment under Title VII.[913] Unwarranted hostility, aggression, demands, and inquiries are rarely necessary. Many published cases since *Hardison* concerned requests and religions that did not raise bona fide disputes regarding sincerity.[914] Employers that approach religious accommodation requests with needless antagonism may exacerbate, rather than ameliorate, the potential for meritorious claims. As under the FMLA, the ADA, and other antidiscrimination statutes, an employer should proceed in a measured, reasonable manner.[915]

Even if an employer initially adopts a flexible, measured, and conciliatory approach to a potential accommodation, after an employee submits a charge of discrimination or brings an action in federal court the employer is entitled to defend its actions and positions with the same zeal as any litigant. This includes challenging whether the plaintiff, in fact, holds the religious belief, observance, or practice.[916] Properly understood, the sincerity analysis incorporates two related aspects, as explained above. First, the familiar question: does the employee, in fact—that is to say, genuinely—believe or hold the belief in question? Second, does the employee hold the belief *as a religious belief*? If the credible answer to both questions is yes, the employee likely has satisfied the sincerity requirement.

The framework of the first question has long been required under Title VII.[917] It is familiar, and its import is apparent. Within the framework

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[913] The most sophisticated employers publish policies, forms, and practices specific to religions accommodations, much as they do under the ADA. They train workers, supervisors, management, and human resource personnel regarding all stages of the religious accommodation process.

[914] *See supra* Section II.F.3.

[915] *See supra* Section II.F.5.a.1.

[916] As noted above, an employee is not entitled to compel an employer to accommodate non-religious beliefs. *See supra* text accompanying notes 612-13. And the religiosity of a belief does not come from the strength with which the belief is held, the place it occupies (or its "centrality"), the "importance" of the merits, or any other element or aspect that is internal to, or defined by, the employee. *See supra* text accompanying notes 598-600. Instead, the religious belief must come from a source outside the employee that is a religion and can be identified and understood based on objective sources. *See supra* text accompanying notes 503, 515-22.

[917] *See* 42 U.S.C. § 2000e(j).

of section 2000e(j), employees may be entitled to reasonable accommodations of their religious beliefs, observances, or practices where they conflict with an employer's valid rule or requirement.[918] An employee is not entitled to accommodations for religious beliefs not held because such an employee does not face a bona fide conflict between religious and employing authorities. These core principles support corollaries that are relevant to the sincerity analysis.

An employee's assertion that she is Muslim, Jewish, Sikh, Christian—or a member of any other religion—does not implicitly make a request to accommodate any or all religious beliefs that may be traced to the identified religion.[919] Nor are employers required to evaluate or approve omnibus requests to accommodate the beliefs, tenets, and practices of an employee's religion *en masse*.[920] Each belief, practice, or observance is analyzed and evaluated under the framework in connection with the conflicting employment requirement at issue and the accommodation requested.[921] There are no limits to the number of bona fide requests or accommodations that may be made by an employee or required by Title VII. Simply because the employer has granted or denied prior accommodations is not in itself grounds to grant or deny a separate request from the same (or a different) employee.[922] At the same time, an employer is not required to ignore context and history or any other relevant information when evaluating an accommodation request or defending against an action in court.[923]

An employee Is not entitled to an accommodation of a non-religious belief simply because it mirrors an analogous religious belief.[924] In certain respects, a religious belief and a non-religious belief may appear to be substantively similar. Objections to COVID-19 vaccine requirements are illustrative. Many opposed vaccines and related requirements for a wide variety of religious and non-religious reasons.[925] For example, some opposed the vaccine because the lack of extended testing and evaluations left questions regarding long-term effects.[926] Those who were severely allergic to

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[918] *See id.*

[919] To avoid incentivizing—if not *practically* requiring—employers to collect information regarding the religions and beliefs of their workers, employers are not even expected to know and understand the doctrines, components, and practices of religions generally. This is true of both common and known faiths as well as rare and obscure religions. As a result, an employer is entitled to ask an employee clarifying questions about the religious belief at issue and the accommodation sought.

[920] *See supra* Section III.A.1.a.

[921] *See supra* Section III.A.1.a.

[922] *See supra* Section III.A.1.c.

[923] *See, e.g.*, Tabura v. Kellogg USA, 880 F.3d 544, 558 (10th Cir. 2018) (noting an employer's undue hardship defense turns on the particular factual context of each case) (citations omitted).

[924] *See supra* Section III.A.2.

[925] *See supra* note 849.

[926] Li Ping Wong et al., *COVID-19 Anti-Vaccine Sentiments: Analyses of Comments from Social Media*, 9 HEALTHCARE(BASEL) 1530 (2021).

the vaccine or its components refused for medical reasons.[927] Others rejected the vaccine for political reasons.[928] Still others refused on religious grounds, frequently because the development and testing of the COVID-19 vaccines involved the use of fetal stem cells originally sourced from aborted human fetuses.[929] Others refused to obtain the vaccine due to confusion regarding its purpose and efficacy, and the distrust that confusion bred.[930] Some who survived a COVID-19 infection concluded that they did not need the vaccine.[931] Others simply accepted the risk of infection, confident that their age or health made serious illness or death unlikely.[932] Still others refused vaccines for different reasons and the objective and subjective merit of these beliefs continues to provoke passionate debate.[933] Although historically the relative paucity of religious accommodation claims disincentivized overly-aggressive pre-claim inquisition by employers, the exponential increase in COVID-19 vaccine claims previewed a less friendly response from employers.[934] Nevertheless, for present purposes, the point is a simple one:

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[927] *Id.*

[928] Political beliefs motivating opposition to the vaccine themselves varied widely. Some rejected the vaccine because of its initial development under President Trump. Others because it was rolled out and staunchly advocated by President Biden. Still others rejected the vaccine because of government persistence in pressuring the public through various legal requirements, including regulations, Executive Orders, and other means, together with other requirements perceived as excessive, heavy-handed, and unnecessary—if not initially, then by continued imposition over time. Others still had different politically motivated or influenced reactions to vaccines.

[929] *See* Richard K. Zimmerman, *Helping Patients with Ethical Concerns about COVID-19 Vaccines in Light of Fetal Cell Lines Used in Some COVID-19 Vaccines*, 39 VACCINE 4242 (2021).

[930] Wong, *supra* note 929. There was confusion regarding the original purpose and efficacy of the vaccine. Early notions that vaccines would entirely prevent a COVID-19 infection—like traditional vaccines—led to public confusion and distrust as the vaccinated were infected by later strains. *See, e.g.*, Kaylee McGhee White, *COVID Vaccines Aren't Working the Way We Were Told They Would*, WASHINGTON EXAMINER (Dec. 27, 2021), https://www.washingtonexaminer.com/opinion/174654/covid-vaccines-arent-working-the-way-we-were-told-they-would/?utm_source=google&utm_medium=cpc&utm_campaign=WE_DSA_New-Targeting_2024&gad_source=1&gclid=Cj0KCQiA5rGuBhCnARIsAN11vgROxHGr2U7t9DsjUPur7IKPlkmxsykaOS3tV8ATCbKDIatNb2gwmYkaAlWlEALw_wcB. Clarification of the vaccine as a layer of protection against serious infection (not all infection) came too late and portions of the public, already frustrated by ongoing restrictions, increasingly characterized changing health recommendations as evidence of inconsistency, incompetence, or dishonesty. Some of these people concluded that post-vaccine infection demonstrated that the vaccines were ineffective and, therefore, not worth getting. Similar suspicion arose regarding the need for repeated boosters.

[931] Jana Fieselmann et al., *What are the Reasons for Refusing a COVID-19 Vaccine? A Qualitative Analysis of Social Media in Germany*, 22 BMC PUB. HEALTH 846 (2022).

[932] Page Leggett, *7 Reasons People Don't Get Vaccinated Against COVID-19*, NOVANT HEALTH (Jan. 13, 2022), https://www.novanthealth.org/healthy-headlines/7-reasons-people-dont-get-vaccinated-against-covid-19.

[933] *See id.*

[934] In litigating religious challenges to employer COVID-19 vaccine requirements, some employers adopted antagonistic and hostile postures rarely seen, at least to the same degree, in reported Title VII religious accommodation cases. In some respects, employers' suspicions were understandable and reasonable. They suspected widespread fraud given the geometric increase in the number of accommodation requests, use of religious scripts and materials gleaned from the internet with which employees had little familiarity, and other evidence that non-religious beliefs and motives more likely motivated claims. However, the existence of frivolous claims does not excuse categorical hostility or rejection of an entire category of claims. Few would argue that receipt of fraudulent requests for a type of ADA accommodation from several employees would justify an

the very same belief—here, opposition to the COVID-19 vaccines—can be premised on, or result from, both religious and non-religious grounds. An employee who sincerely and passionately opposes the vaccine for non-religious reasons could not (and cannot) properly compel accommodation of that belief under section 2000e(j) simply because there exists a religious iteration of his non-religious belief.[935] Not only is the belief not, in fact, religious, the claim that it is also fails sincerity.

If available, the best evidence for employees and employers is objective and centers on past behaviors (rather than litigating positions) that tend to support or undermine the plaintiff's religious assertions. Employees should strive to introduce such objective evidence of pre-claim conduct that tends to show that they hold the religious belief at issue as a religious belief before litigating. Such evidence is often persuasive and is less amenable to attack and doubt than the plaintiff's post-claim testimony. Employers also are more likely to benefit from introducing objective evidence of the employee's past and present words and deeds that call into doubt the plaintiff's sincerity. By displaying the plaintiff acting and speaking in ways that undermine his stated religious beliefs, employers may undermine plaintiff's claims, if not demonstrate a lack of sincerity, without high-risk confrontations in court that may cause a jury to sympathize with the employee. Not only is objective evidence of past conduct generally credible, but it also reduces the need for courts and employers to engage in the sort of government oral examination of an individual's religious beliefs that has long been disfavored.[936]

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employer's categorical rejection of all such accommodations. Employers must properly review and evaluate religious accommodation requests without engaging in the very sorts of discrimination proscribed by Title VII. In so doing they may pose questions to gather information relevant to the belief and employer rule at issue, and the particulars of potential accommodations. Where such efforts reveal disingenuous requests, the employer may deny them.

[935] This is not to say that religious beliefs are static, frozen, or immutable. Like many aspects of life, individuals mature in their religious beliefs, observances, and practices. A Seventh Day Adventist who has worked for years on the weekend may sincerely determine to begin keeping the sabbath. Simply because she has not previously done so is not a basis for an employer to determine that her request for accommodation of that practice and belief is insincere. An employer may raise other questions or evidence that undermines the employee's claim that her recent intent to begin keeping the sabbath is religious, but a mere deviation from past practice, by itself, is insufficient to undermine a plaintiff's sincerity or credibility.

[936] Parties are not required to produce such evidence and may not call attention to its absence as indicia of insincerity. *See supra* Section II.F.3. Moreover, Title VII protects religious beliefs regardless of the length of time sincerely held by the plaintiff. Individuals who may have recently converted to a religion, rediscovered or renewed beliefs, or grew and matured beliefs and practices, are less likely to have objective evidence of past conduct or speech supporting their current religious beliefs. In some cases, available evidence of past statements and conduct may conflict with current beliefs. Although employers may introduce such evidence and argue it demonstrates a lack of sincerity due to inconsistency with the plaintiff's later beliefs, the plaintiff may introduce evidence or testify to the change or evolution of his religious beliefs and practices. Then the jury or court will weigh the evidence and decide.

Courts must continue to be mindful that evidence of the truth or merit of the substance of the religious belief is immaterial. Arguments that a plaintiff lacks sincerity because the factfinder—or anybody else—may find a particular belief ridiculous, irrational, illogical, incredible, old-fashioned, or even reprehensible remain improper. The same is usually true of arguments concerning a lack of sincerity because beliefs are not orthodox.[937] As a result, neither employers nor courts may demand that an employee or plaintiff produce a letter from a religious leader or other expert vouching for the religiousness of the belief or the sincerity of its holder.[938] A plaintiff is no more or less sincere (or credible) based on the fact finder's normative assessment of the religious belief, observance, or practice, or the broader religion from which it derives. Nevertheless, an employee may choose to offer such evidence to his employer or the court.[939] Questions that probe why a plaintiff holds a belief or that demand proof or theological exegesis—or efforts to belittle, harass, or mock—are improper, and likely counterproductive.[940]

Prudent employers will proceed respectfully, especially when engaging in day-to-day communications with potential plaintiffs. Under *Hardison*, and likely continuing after *Groff*, most requests for religious accommodation are resolved without charges of discrimination or federal litigation.[941] Such an approach is less likely to provoke other Title VII claims or become evidence of unlawful motives in other litigation. Good faith communications are more likely to result in reasonable accommodations than employer responses revealing disrespectful hostility. Ultimately, however, once a dispute moves to litigation, an employer is entitled to litigate its interests within the bounds of the law just as any other party.

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[937] Courts have long held that, simply because the belief at issue does not align with a religion's orthodox theology, does not, in and of itself, mean the plaintiff is insincere. At some point, however, an asserted belief may become so distinct from, or contrary to, the alleged orthodox belief that, for Title VII purposes, it cannot reasonably be called an unorthodox variation of a religious belief, and instead is a personal, political, or other belief. For example, a jury reasonably could find a plaintiff insincere for claiming that Satanic worship practices were merely an "unorthodox" variation of Christian beliefs. Otherwise, any belief whatsoever could be labeled as unorthodox.

[938] *See* Fallon v. Mercy Cath. Ctr. of Se. Pa., 877 F.3d 487, 493 n.27; *see also supra* notes 571-79. An employer or court may not consider the absence of a letter as evidence of insincerity.

[939] *See* Fallon, 877 F.3d at 493 n.27; *see also supra* notes 571-79. Neither an employer, a court, nor a jury is required to credit a letter or similar evidence or treat it with any more or less respect than any other piece of evidence.

[940] As noted above, courts have long made clear that the judicial process is ill-equipped to resolve spiritual and theological matters. *See, e.g.*, A.A. *ex rel.* Betenbaugh v. Needville Indep. Sch. Dist., 611 F.3d 248, 261 (5th Cir. 2010) ("Intrafaith differences are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences. … Sincere religious belief cannot be subjected to a judicial sorting of the heretical from the mainstream—certainly not in discharge of duty to faithfully apply protections demanded by law") (quotations, citations removed; cleaned up).The First Amendment itself limits the sort of judicial inquiry into the merits of religious beliefs and, therefore, the propriety of holding them. *See* U.S. CONST. amend. I. The proposed revisions to the sincerity inquiry do not veer into this territory.

[941] *See supra* Section II.F.5.a.1.

CONCLUSION

For nearly 45 years, the *de minimis* test has governed Title VII religious disparate treatment cases alleging the failure to accommodate.[942] Employees frequently received the benefit of the doubt regarding the religiosity and sincerity of the beliefs, observances, and practices for which they sought accommodation.[943] In turn, employers have benefited from the Court's employer-friendly interpretation of undue hardship, which did not require them to afford religious accommodations to employees if doing so imposes anything more than a *de minimis*, or negligible, burden.[944] While atextual and ahistorical, this approach nonetheless proved practical and workable.[945] *Groff* corrected "undue hardship," but did not address—much less correct—"religion" and "sincerity," leaving a partially modified and unbalanced framework that swings the other way and may favor employees to the point of becoming unworkable.[946]

The above proposed changes to the religion and sincerity elements of a Title VII disparate treatment action complements the Court's unanimous work in *Groff*.[947] These proposed changes adjust the religion and sincerity inquiries to more closely track the text and history of section 2000e(j).[948] Altogether, they are intended to ensure the framework of the new *Hardison* is similarly effective, workable, and enduring, but that does a better job protecting and providing bona fide religious accommodations claims.

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[942] *See generally* Trans World Airlines v. Hardison, 432 U.S. 63 (1977).
[943] *See supra* Section II.F.5.
[944] *See supra* Section II.F.5.
[945] *See supra* Section II.E.3.
[946] *See supra* Section II.F.6.
[947] *See supra* Part III.
[948] *See supra* Part III.