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Religiously Motivated Conduct and the Reasonable Accommodation Requirement Under Title VII: A New Framework for Analysis

Robin Knauer Maril

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2021]

RELIGIOUSLY MOTIVATED CONDUCT AND THE REASONABLE
ACCOMMODATION REQUIREMENT UNDER TITLE VII: A NEW
FRAMEWORK FOR ANALYSIS

ROBIN KNAUER MARIL*

ABSTRACT

The passage of the Affordable Care Act, nationwide marriage equality, and calls to expand the Civil Rights Act have thrust religious exemptions and accommodations increasingly to the front of public consciousness and before the courts. Photos of sympathetic plaintiffs and stakeholders on both sides fill news articles and advocacy websites. Their stories are often compelling, and their claims seemingly cannot be reconciled. However, in a pluralistic society guided by fundamental ideals of equality and liberty, they must. This Article explores the increasing tension between religious liberty claims and civil rights laws within the context of the religious accommodation requirement under Title VII of the Civil Rights Act of 1964 (Title VII). It proposes a framework for evaluating requests for religious accommodations that asks, as a threshold question, whether the religiously motivated action in question is “inward” or “outward” facing. This proposed framework represents a synthesis of decades of Title VII case law that has consistently held that inward-facing activities, such as those involving religious observance or co-religionists, warrant the greatest protection, whereas outward-facing activities, such as those involving third-parties or non-co-religionists, receive the least protection. The first Part of this Article explores the protection and regulation of religiously motivated conduct as seen through the lens of the inward/outward framework. The second Part charts the development of the reasonable accommodation requirement under Title VII, including the judicially imposed *de minimis* standard for undue hardship. The third Part discusses the application of the *de minimis* standard in both case law and agency guidance. The final Part illustrates the application of the inward/outward framework in the context of religious accommodations under Title VII through model scenarios and to the recent *EEOC v. Kroger* case. A brief conclusion notes that this framework not only furthers the purpose of the Civil Rights Act of 1964, but it is faithful to the Constitutional safeguards and limits that were artfully designed to balance rights and promote a just society.

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INTRODUCTION

THE passage of the Affordable Care Act,¹ nationwide marriage equality,² and calls to expand the Civil Rights Act³ have thrust religious exemptions and accommodations increasingly to the front of public consciousness and before the courts.⁴ Photos of sympathetic plaintiffs and stakeholders on both sides fill news articles and advocacy websites. Their stories are often compelling, and their claims seemingly cannot be reconciled. However, in a pluralistic society guided by fundamental ideals of equality and liberty, they must.

This Article explores the increasing tension between religious liberty claims and civil rights laws within the context of the religious accommodation requirement under Title VII of the Civil Rights Act of 1964 (Title VII).⁵ It proposes a framework for evaluating requests for religious accommodations that asks, as a threshold question, whether the religiously motivated action in question is “inward” or “outward” facing. This proposed framework represents a synthesis of decades of Title VII case law that has consistently held that inward-facing activities, such as those involving religious observance or co-religionists, warrant the greatest protection, whereas outward-facing activities, such as those involving third-parties or non-co-religionists, receive the least protection.⁶

Under Title VII, employers are required to offer religious employees a reasonable accommodation for their religious observance and practice

1. PATIENT PROTECTION AND AFFORDABLE CARE ACT, PUB. L. NO. 111-148, 124 STAT. 119 (2010); *see also* *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

2. *See, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 679–80 (2015). Justice Kennedy provided in his majority opinion:

[R]eligions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate.

Id.

3. Kelsey Dallas, *Congress Could Soon Get Serious About Balancing Religious Freedom and LGBTQ Rights*, DESERET NEWS (Dec. 11, 2020), <https://www.deseret.com/indepth/2020/12/11/22159778/equality-act-lgbtq-gay-rights-joe-biden-fairness-for-all-congress-religious-freedom> [perma.cc/8E73-C6PL].

4. *See, e.g.*, *Fulton v. City of Phila.*, 139 S. Ct. 49 (2021); *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 140 S. Ct. 2801 (2020); *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

5. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (2018).

6. This dynamic is reflected in existing case law and policy, but not expressly articulated. *See, e.g.*, *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004); *Chalmers v. Tulon Co.*, 101 F.3d 1012 (4th Cir. 1996).

provided the accommodation does not impose an undue hardship or more than a de minimis cost on the employer.⁷ The express application of an inward/outward framework would assist both employers and employees as they attempt to balance individual acts of conscience with the daily demands of business. The distinction between inward and outward facing actions represents a functional approach to Title VII accommodations that respects the contours and limits of religious liberty as cabined by the First Amendment and the realities of our pluralist society. Although this Article is focused primarily on developments in Title VII case law and interpretation, the inward/outward framework is applicable to all areas of religious exemption and accommodation law.⁸

The Equal Employment Opportunity Commission (EEOC) first introduced an explicit Title VII religious accommodation requirement through guidance in 1966.⁹ Six years later, Congress amended Title VII to require employers to provide a reasonable religious accommodation unless it would impose an “undue hardship” on the employer.¹⁰ In 1977, the Supreme Court of the United States interpreted the term “undue hardship” in *Trans World Airlines v. Hardison*¹¹ to mean anything that imposed “more than a de minimis cost” on the employer.¹² The standard created by the Court in *Hardison* has been widely criticized by religious liberty advocates, and clarified by the EEOC.¹³ The standard is critiqued as simultaneously vague for employers, while also overly restrictive of religious exercise.

In 2020, the Supreme Court considered the undue hardship standard in *Patterson v. Walgreen Co.*,¹⁴ a case that raised scheduling concerns for religious observances.¹⁵ Although the Court declined to grant certiorari, three Justices who concurred in the denial of certiorari specifically said that the Court should reconsider the de minimis standard from *Hardison*

7. Civil Rights Act, 42 U.S.C. § 2000e(j).

8. See Robin Maril, *From Piggie Park v. Newman to Masterpiece Cakeshop v. Colorado Civil Rights Commission: Application of the Outward Facing Actions Test to LGBTQ Nondiscrimination Provisions*, 20 RUTGERS J.L. & RELIGION 292 (2020). Addresses the role of government regulation of religiously based conduct through an historical lens applying the inward/outward framework in the context of federal civil rights provisions including Title II of the Civil Rights Act of 1964, particularly as articulated in the 1968 U.S. Supreme Court case *Piggie Park v. Newman*.

9. Guidelines on Discrimination Because of Religion, 31 FED. REG. 8370 (June 15, 1966) (codified as 29 C.F.R. § 1605.1(a)(2) (2017)).

10. Equal Employment Opportunities Act of 1972, Pub. L. No. 92-261, § 23, 86 Stat. 103 (codified as 42 U.S.C. § 2000e(j) (2017)).

11. 432 U.S. 63 (1977).

12. *Id.* at 84.

13. See, e.g., Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575 (2000); Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605 (1998).

14. 140 S. Ct. 685 (2020) (denying certiorari).

15. See *Patterson v. Walgreen Co.*, 727 F. App'x 581, 583 (11th Cir. 2018), *cert. denied*, 140 S. Ct. 685 (2020).

when it receives “a petition in an appropriate case[.]”¹⁶ In September 2020, the EEOC filed a complaint in the Eastern District of Arkansas raising this very question in a case involving a disagreement over perceived employer support for the LGBTQ community.¹⁷

As the courts stand poised to reconsider the meaning of undue hardship,¹⁸ this Article proposes a way to streamline the determination of what constitutes an undue hardship while remaining true to the existing religious liberty jurisprudence. This jurisprudence consistently offers the greatest level of protection for religious actions that impact members of a religious order or actions that are inward-facing. Conversely, religious conduct that involves third-party engagement, coercion, or hardship is subject to a more searching review. As the revered Second Circuit Judge Learned Hand articulated in 1953, “The First Amendment protects one against action by the government . . . but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities.”¹⁹

This Article urges courts, Congress, and the EEOC to explicitly incorporate an inward/outward framework within the threshold undue hardship analysis for requests for religious accommodations under Title VII. The application of the framework would resolve much of the uncertainty and ambiguity created by *Hardison*.²⁰ Under current case law, outward-facing actions are routinely found to impose an undue hardship precisely because of their effect on third parties.²¹ The framework places the emphasis squarely on the nature of the religiously motivated conduct and would eliminate the need for the highly fact-specific inquiry as to the nature of the employer’s business that is required under current law. This framework would not change the outcome of requests for accommodation, however it would conserve judicial resources and provide much needed clarity in the workplace.

The first Part of this Article explores the protection and regulation of religiously motivated conduct as seen through the lens of the inward/outward framework. The second Part charts the development of the reasonable accommodation requirement under Title VII, including the judicially imposed de minimis standard for undue hardship. The third Part discusses the application of the de minimis standard in both case law and agency guidance. The final Part illustrates the application of the inward/

16. *Patterson*, 140 S. Ct. at 686 (Alito, J., concurring in denial of certiorari).

17. Complaint at 1, EEOC v. Kroger Co., No. 4:20-cv-01099 (E.D. Ark. Sept. 14, 2020).

18. *Patterson*, 140 S. Ct. at 686.

19. *Otten v. Balt. & O. R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953).

20. 432 U.S. 63 (1977).

21. In *Hardison*, the Court held that interfering with a seniority system constituted an undue hardship. *Id.* at 84–85. The Court concluded, “In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.” *Id.* at 85.

outward framework in the context of religious accommodations under Title VII through model scenarios and to the recent *EEOC v. Kroger Co.*²² case. A brief conclusion notes that this framework not only furthers the purpose of the Civil Rights Act of 1964, but it is faithful to the Constitutional safeguards and limits that were artfully designed to balance rights and promote a just society.

I. PROTECTING AND REGULATING RELIGIOUSLY MOTIVATED CONDUCT: THE INWARD/OUTWARD FRAMEWORK

Title VII of the Civil Rights Act of 1964 includes religion alongside race, color, national origin, and sex as a protected category.²³ At the time of adoption, the broad statutory prohibition against discrimination on the basis of religion was non-controversial and received little floor time during debate.²⁴ It was consistent with the Constitutional free exercise protections under the First Amendment that began to take form in the 1930s and 1940s.²⁵ It also reflected a longstanding tradition of religious liberty and freedom originally embraced by the founders.²⁶

Shortly after the enactment of Title VII, however, it became apparent that a simple prohibition against discrimination on the basis of religion was insufficient.²⁷ Religion has an expressive element that extends beyond belief or status, setting it apart from other protected identity categories.²⁸ For example, the prohibition against discrimination in employment under Title VII would not protect an employee who insists on singing the national anthem of her country of origin each morning in the break room, but it should protect an employee who prays every morning before her shift. This expressive element is at the heart of the complex dynamic between religion and the government tasked with protecting and regulating religious belief, observance, and practice. In the 1940 case *Cantwell v. Connecticut*,²⁹ the Court articulated this dual nature of the First Amendment, and the inherent dichotomy between religious belief and action. In that case, the Court stated:

[T]he [First] Amendment embraces two concepts, — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must

22. No. 4:20-cv-01099 (E.D. Ark. Sept. 14, 2020).

23. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2018).

24. See generally Harry T. Edwards & Joel H. Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 MICH. L. REV. 599, 599–602 (1971) (citing H.R. REP. NO. 914, 88th Cong., 1st Sess. 18 (1963)).

25. See, e.g., *United States v. Ballard*, 322 U.S. 78 (1944).

26. See Edwards & Kaplan, *supra* note 24.

27. See Kaminer, *supra* note 13, at 581 nn.75–81 and accompanying text.

28. See *infra* note 32 and accompanying text.

29. 310 U.S. 296 (1940).

have appropriate definition to preserve the enforcement of that protection.³⁰

Courts have long struggled with this expressive feature of religious identity in the context of free exercise and establishment claims and more recently, with respect to Title VII.³¹ In order to determine the appropriate scope of protection for religiously motivated conduct, courts have adopted a number of multi-layered approaches. A review of the case law regarding religious conduct, however, reveals that most resolutions hinge on the distinction between whether the conduct in question is inward-facing (i.e., involving the individual or members of the individual's religious order) or outward-facing (i.e., involving third parties who have not agreed to be governed by the religious order in question).³² While not expressly articulating this inward/outward framework or template, courts consistently afford inward-facing actions wide deference and freedom from most state intrusion, whereas they rarely protect outward-facing religiously motivated actions.³³ Similar distinctions between inward- and outward-facing actions can be seen in the scope and terms of certain statutory and regulatory protections, including the current EEOC guidance on undue hardship.³⁴

This Part examines the inward/outward framework as it first emerged in the courts. Inward-facing actions, such as the right to worship, to live by personal codes of conduct, to ascribe to a religiously motivated diet or dress, or to refuse certain medical exams or procedures, have consistently been protected as outside the scope of government intrusion. This deference is founded on two assumptions: (1) the government does not have jurisdiction over theological conflicts,³⁵ and (2) the members of a religious order have consented and agreed to be governed by its religious codes in addition to secular laws.³⁶ However, courts have been similarly consistent in enforcing the inverse of this framework. Actions that are outward-facing, including proselytization, or the refusal to perform certain work duties³⁷ or serve certain populations, do not traditionally receive this

30. *Id.* at 303–04 (footnote omitted).

31. *See, e.g., id.*; EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 591 (6th Cir. 2018); Otten v. Balt. & O. R. Co., 205 F.2d 58, 61 (2d Cir. 1953).

32. This dynamic is reflected in existing case law and policy, but not expressly articulated. *See, e.g.,* Trans World Airlines v. Hardison, 432 U.S. 63, 84 (1977); Peterson v. Hewlett-Packard Co., 358 F.3d 599 (9th Cir. 2004); Chalmers v. Tulon Co., 101 F.3d 1012 (4th Cir. 1996).

33. *See infra* Section IA and accompanying notes.

34. *See* EEOC, COMPLIANCE MANUAL ON RELIGIOUS DISCRIMINATION, SECTION 12: RELIGIOUS DISCRIMINATION EX. 43 (2021).

35. *See* Watson v. Jones, 80 U.S. (1 Wall.) 679 (1872).

36. *See* Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 111–12 (1952).

37. *Ervington v. LTD Commodities*, 555 F. App'x 615, 616–18 (7th Cir. 2014) (holding an employer is not required to accommodate an employee's religious

seemingly unquestioned protection.³⁸ This distinction is due in large part to the impact of outward-facing actions on nonconsenting members of the public who have not agreed to be governed by the religious tenet in question. These actions require a third party, non-member to participate in the religious activity for the member to comply with the tenet.³⁹

A. *Personal Religious Observance and Practice: Inward-Facing Actions*

In 1872, the Supreme Court first affirmed the rights of religious organizations to conduct internal business free from government intrusion in *Watson v. Jones*.⁴⁰ The case arose between the General Assembly of the Presbyterian Church and some of its members over ownership of church property. The General Assembly supported the abolition of slavery on moral grounds, while some of its members argued that slavery was a “divine institution[.]”⁴¹ The General Assembly rejected all pro-slavery dissenters as members, including those who argued they owned the church building.⁴²

Although the issue before the Court involved property ownership, it was rooted in a theological disagreement.⁴³ While recognizing a legitimate state interest in resolving property disputes, the Court held that it did not have jurisdiction to rule on the validity of religious belief.⁴⁴ It ruled that it must rely on the internal structure of the Church to resolve the property dispute.⁴⁵ The Court determined that, while it could engage in civil matters regarding a church,

it is a very different thing where a subject-matter of dispute, [is] strictly and purely ecclesiastical in its character . . . a matter which concerns theological controversy, church discipline, eccle-

need to proselytize to co-workers by distributing religious pamphlets that were considered “offensive to other employees”).

38. See *infra* note 80 and accompanying text.

39. See Maril, *supra* note 8.

40. 80 U.S. (1 Wall) 679.

41. *Id.* at 691 (internal quotation marks omitted).

42. See *id.* at 692; see also *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 111–12 (1952):

In June 1867 the Presbyterian General Assembly for the United States declared the Presbytery and Synod recognized by the proslavery party were “in no sense a true and lawful Synod and Presbytery in connection with and under the care and authority of the General Assembly of the Presbyterian Church in the United States of America.” They were “permanently excluded from connection with or representation in the Assembly.” By the same resolution the Synod and Presbytery adhered to by those whom [the proslavery party] opposed were declared to be the true and lawful Presbytery of Louisville, and Synod of Kentucky.

Id. (citing *Watson*, 80 U.S. (1 Wall) at 692).

43. *Watson*, 80 U.S. (1 Wall) at 733.

44. *Id.* at 734–35.

45. *Id.* at 733–34.

siastical government, or the conformity of the members of the church to the standard of morals required of them⁴⁶

The Court concluded that if it were to assume jurisdiction over issues of doctrinal ideology and fundamental organization, it “would deprive [religious organizations] of the right of construing their own church laws[.]”⁴⁷ Perhaps surprisingly, the Court did not reference the Religion clauses of the First Amendment.⁴⁸ Instead, the *Watson* Court relied solely on common law theories to reach its decision, including a heavy reliance on principles developed by the Church of England and the Scotch Court of Session.⁴⁹

For nearly 150 years, courts have relied on and developed this doctrine of deference to internal operations and inward-facing decisions of religious organizations. The Supreme Court constitutionalized this doctrine in *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*.⁵⁰ This 1952 case relied on the *Watson* decision, proclaiming the freedom of religious organizations from state interference in internal matters relating to the church.⁵¹ In adopting a constitutional approach to disputes of church doctrine, the Court in *Kedroff* expanded the *Watson* analysis to recognize protection from government interference in internal affairs as a First Amendment right. Further, *Kedroff* affirmed the reasoning in *Watson* regarding individuals who join a religious organization, stating, “All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it.”⁵² The Court found that the individuals who were impacted by inward-facing decisions based on theology had entered into the community voluntarily and were thus bound by those decisions.⁵³

In the employment area, the Court has been clear that religious employers have strong constitutional and statutory protections regarding inward-facing actions.⁵⁴ The First Amendment protects a religious organization’s ability to hire ministerial positions without state interference.⁵⁵ In addition to this ministerial exception, Title VII contains a statutory exemption for religious organizations that allows expression of a

46. *Id.* at 733.

47. *Id.*

48. *Id.* at 737–45.

49. *Id.*

50. 344 U.S. 94 (1952).

51. *Id.* at 110–15.

52. *Id.* at 114.

53. *Id.* at 115.

54. *See, e.g., Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724 (1976) (concluding that the state cannot involve itself in the “internal discipline and government” of the Church when a bishop claimed to have been wrongfully removed from his role).

55. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2018).

religious preference in hiring.⁵⁶ Specifically, Title VII's exemption allows religious corporations, associations, or societies to limit employment to members of their own faith or co-religionists.⁵⁷ This narrow exemption extends to schools, colleges, and universities that are supported, owned, controlled, or managed by a religious organization.⁵⁸ Federal courts have found that this exemption covers many types of religious entities and is not restricted to houses of worship alone.⁵⁹ These exempted religious entities include:

- A tax-exempt, non-profit organization associated with the Latter-Day Saints Church;⁶⁰
- A retirement home operated by Presbyterian Ministries;⁶¹
- A newspaper published by the First Church of Christ, Scientist;⁶²
- Christian elementary schools and universities;⁶³ and
- A non-profit medical center operated by the Seventh-Day Adventist Church.⁶⁴

As discussed in greater detail below, the inward/outward framework is also clearly at play in Title VII reasonable accommodation case law, as well as regulatory guidance. It is important to note, however, that this reasonable accommodation requirement is not an exemption from civil rights laws, but rather a form of enhanced protection under Title VII.⁶⁵ Title VII religious accommodation provisions require employers to balance an employee's individual acts of conscience with daily business demands in order to comply with federal law. Not surprisingly, courts are more likely to determine that a religious accommodation is reasonable and that it presents a burden that the employer should shoulder if the activity is primarily inward-facing. As claims for religious accommodations move further from solely inward-facing activities and include actions that

56. *Id.* § 2000e-1(a).

57. *Id.*

58. *See Killinger v. Samford Univ.*, 113 F.3d 196 (11th Cir. 1997).

59. *See id.*; *see also Feldstein v. Christian Sci. Monitor*, 555 F. Supp. 974 (D. Mass. 1983) (applying Title VII's religious exception to a church-controlled publication).

60. *See, e.g., Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

61. *See, e.g., EEOC v. Presbyterian Ministries, Inc.*, 788 F. Supp. 1154 (W.D. Wash. 1992).

62. *See, e.g., Feldstein*, 555 F. Supp. at 975.

63. *See, e.g., Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991).

64. *See, e.g., Young v. Shawnee Mission Med. Ctr.*, No. 88-2321-S, 1988 U.S. Dist. LEXIS 12248 (D. Kan. Oct. 21, 1988).

65. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (2018).

impact others or require their participation, the courts are less likely to find for the employee requesting the accommodation.⁶⁶

B. *Religious Observance and Practice Directed at Third Parties: Outward-Facing Actions*

Throughout civil rights jurisprudence, including cases interpreting Title VII, courts have consistently relied upon the *Watson* decision to conclude that only individuals who voluntarily join a religious organization consent to be governed by it.⁶⁷ Nonmembers who have not united “to such a body” have not provided their implied consent to its government and, therefore, are not bound by its laws or decisions.⁶⁸ The federal government has placed clear limits on protections for outward-facing activities in the context of civil rights laws.

One of the single greatest accomplishments of the Civil Rights Act of 1964 was the public accommodations provisions, Title II, which prohibited segregation in places of public accommodation and required business owners to admit members of the public regardless of race, color, religion, or national origin.⁶⁹ Prior to the passage of the Civil Rights Act of 1964, there had been significant pressure from southern congressmen and religious leaders to incorporate a blanket religious exemption that would place all religious employers and business owners beyond the reach of the landmark civil rights legislation.⁷⁰ Then-Attorney General Robert Kennedy responded to this pressure by explaining that, “the need for this country to live up to its ideals” clearly outweighed “the right of privately owned public service enterprises to insult large sections of their public by refusing to serve them, for no reason than the arbitrary and immoral logic of bigotry.”⁷¹ He concluded that when weighing conflicting rights when one is “plainly a right to commit wrong . . . [s]urely, in the balancing, there can be no question on which side the scales must fall.”⁷²

Even after enactment of the Civil Rights Act of 1964 some business owners refused to comply with the law, arguing that they were compelled to discriminate because of their religious belief in segregation. In the

66. Claims that are solely outward-facing, including religious proselytization and expression in the workplace or refusal to serve certain populations receive the least amounts of protection as courts determine these burdens the greatest.

67. *Watson v. Jones*, 80 U.S. (1 Wall.) 679, 729 (1872).

68. *Id.*

69. Civil Rights Act, 42 U.S.C. § 2000a.

70. *Civil Rights Commission: Hearing on S. 1117 and S. 1219 Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 88th Cong. 41–43 (1963) (statement of Sen. Sam J. Ervin, North Carolina); *Civil Rights: Hearing on H.R. 7152 as Amended by Subcomm. No. 5 Before the H. Comm. on the Judiciary*, 88th Cong. 2700 (1963) (statement of Robert F. Kennedy, Att’y Gen. of the United States).

71. *Civil Rights—Pub. Accommodations: Hearing on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 22 (1963) (statement of Robert F. Kennedy, Att’y Gen. of the United States).

72. *Id.*

1968 case of *Newman v. Piggie Park Enterprises*,⁷³ the Supreme Court flatly dismissed this defense. In *Piggie Park*, the owner of a chain of six popular barbecue restaurants in South Carolina, known as Piggie Park, refused to serve Black customers in his restaurants despite the command of Title II.⁷⁴ The owner argued that he maintained his policy of not serving Black people in his restaurants because of his sincerely held religious belief in racial segregation.⁷⁵ He asserted that he believed “as a matter of faith that racial intermixing or any contribution thereto contravenes the will of God.”⁷⁶ Accordingly, his attorneys argued that “[a]s applied to this Defendant, the instant action and the Act under which it is brought constitute State interference with the free practice of his religion, which violates The First Amendment of the United States Constitution.”⁷⁷

The lower court rejected this justification, as did the Supreme Court in a unanimous per curiam decision that characterized the religious liberty argument as “patently frivolous.”⁷⁸ The Court’s decision made it clear that religious belief cannot be used as a way to avoid obligations under the Civil Rights Act of 1964, and Piggie Park was therefore required to serve all customers equally, regardless of race.⁷⁹ The Justices found the case to be so clear that they included a footnote stating “this is not even a borderline case.”⁸⁰ Ultimately, the Court agreed with the district court’s decision, which acknowledged the distinction between inward-facing religious beliefs and outward-facing religiously motivated action. The lower court explained that although the restaurant owner “has a constitutional right to espouse the religious beliefs of his own choosing . . . he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens.”⁸¹ The *Piggie Park* decision has served as a useful guidepost for courts that are asked to resolve questions often characterized as conflicts between religious liberty and civil rights.

73. 390 U.S. 400 (1968).

74. Note, some Black customers were able to place orders at the kitchen windows and were not permitted to eat on the premises. *Newman v. Piggie Park Enters.*, 377 F.2d 433, 434 n.3 (4th Cir. 1967).

75. *Piggie Park*, 390 U.S. at 401–03; *Newman v. Piggie Park Enters.*, 256 F. Supp. 941, 944 (D.S.C. 1966).

76. Supreme Court Transcript of Record at App., § 9a, ¶ 2, *Piggie Park*, 390 U.S. 400 (reproducing Bessinger’s February 5, 1965, Answer to the Complaint).

77. *Id.*

78. *Piggie Park*, 390 U.S. at 402 n.5; *see also Piggie Park*, 256 F. Supp. at 945.

79. *Piggie Park*, 390 U.S. at 401–03.

80. *Id.* at 402 n.5.

81. *Piggie Park*, 256 F. Supp. at 945.

II. TITLE VII AND PROTECTION FROM DISCRIMINATION ON THE BASIS OF RELIGION

When President Lyndon Johnson signed the Civil Rights Act of 1964 into law, it included only narrow exemptions for religious employers and made no mention of religious accommodations for employees.⁸² Title VII was designed to promote equal employment opportunities and eliminate discrimination in the workplace on the basis of race, color, religion, sex, and national origin. Although Title VII included protections from religious discrimination, it did not explicitly address the scope of what constituted discrimination on the basis of religion.⁸³ The failure to define religious discrimination was not a Congressional oversight. The legislative and relevant social history leading up to the enactment of the 1964 Civil Rights Act reveal stark and well-established divides both in Congress and among the general public regarding how best to balance the preservation of religious liberty with the enforcement of new civil rights protections.⁸⁴ The final version of Title VII was the product of this great period of social and legislative deliberation. The provision incorporated only the narrowest of exemptions for employers and excluded language regarding the right to religious accommodations for employees.

This Part charts the development of the requirement under Title VII that employers provide a reasonable accommodation for an employee's religious observance provided the accommodation does not impose an undue hardship on the employer. At the outset, it is important to distinguish between religious exemptions and religious accommodations. As explained in the prior Part, Title VII has a limited religious exemption that allows certain religious organizations to discriminate in hiring on the basis of religion by expressing a preference for co-religionists.⁸⁵ This exemption for employers has been in place since enactment of the Civil Rights Act and is designed to protect the free exercise rights of religious organi-

82. Title VII of the Civil Rights Act of 1964, § 702(a), 42 U.S.C. § 2000e-1(a) (2018), provides: "This title shall not apply to . . . a religious corporation, association, educational institution, or society 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." *Id.*; see also E.W. Kenworthy, *President Signs Civil Rights Bill; Bids All Back It*, N.Y. TIMES (July 3, 1964), <https://archive.nytimes.com/www.nytimes.com/library/national/race/070364race-ra.html> [<https://perma.cc/UUT6-AS5B>].

83. See Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1).

84. The Civil Rights Act passed with a seventy-percent majority vote in the Senate after the longest filibuster in Senate history. See Maril, *supra* note 8, at 298–300. The vote, however, was startlingly drawn across regional, rather than party, lines. See *id.* In fact, ninety percent of lawmakers from states that were in the Union during the Civil War supported the bill compared with less than ten percent of lawmakers from states that were in the Confederacy. See *id.* Not a single southern Republican in the House or Senate voted in support of the bill. See *id.*

85. Civil Rights Act, § 702, 42 U.S.C. § 2000e-1(a); *Id.* §703(e)(2), 42 U.S.C. § 2000e-2(e)(2).

zations that are otherwise regulated under federal civil rights laws.⁸⁶ To the contrary, religious accommodations are designed to protect employees from discrimination on the basis of religion. The requirement that employers provide a certain level of accommodation for an employee's religious observance or practices recognizes that religious belief may translate into actions.⁸⁷ The inward/outward framework would provide much needed clarity for both employers and employees as they try to evaluate requests for accommodation.

A. *Administrative Guidance: The Introduction of the Reasonable Accommodation Requirement and Undue Hardship Limitation*

Within two years of passage of the Civil Rights Act of 1964, the EEOC published a guidance document addressing the scope of religious discrimination and employees' rights to religious accommodations ("1966 EEOC Guidance").⁸⁸ The 1966 EEOC Guidance explained that the EEOC had received multiple complaints and inquiries as to whether religious discrimination under Title VII included the termination or refusal to hire a worker whose religious observances would prevent them from working during the employer's "regular workweek."⁸⁹ The 1966 EEOC Guidance specifically identified employees who observe the Saturday Sabbath as uniquely impacted by a potential conflict between religious observance and an employer or prospective employer's operating hours.⁹⁰ It provided that the statute's prohibition of discrimination on the basis of religion imposed an obligation on employers to accommodate the "reasonable religious needs" of workers when the accommodation can be made "without serious inconvenience to the conduct of business."⁹¹

The following year, the EEOC issued additional guidance that revised the standard requiring religious accommodations ("1967 EEOC Guidance").⁹² The 1967 EEOC Guidance introduced the concept of undue hardship as a limitation on the reasonable accommodation requirement.⁹³ It removed the "serious inconvenience" language of the 1966 EEOC Guidance and instead provided that employers must reasonably accommodate the "religious needs" of workers unless the accommodation would impose an "undue hardship on the conduct of [the employer's] business."⁹⁴ The EEOC did not provide additional information or context

86. *Id.*

87. *Id.*

88. 29 C.F.R. § 1605.1 (1967).

89. Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1(a)(1) (2017).

90. *Id.*

91. *Id.* § 1605.1(a)(2).

92. 32 FED. REG. 10298 (July 13, 1967).

93. *Id.*

94. 29 C.F.R. § 1605.2(b) (citing *Trans World Airlines v. Hardison*, 432 U.S. 63, 74 (1977)).

regarding the language change. However, the 1967 EEOC Guidance continued to refer to observers of the Saturday Sabbath as the likely beneficiaries of these accommodations.⁹⁵

B. *The Equal Opportunity Act of 1972: Codifying the Reasonable Accommodation Requirement and the Undue Hardship Limitation*

In 1972, Congress amended Title VII, passing the Equal Employment Opportunity Act of 1972 (“1972 amendment”).⁹⁶ This amendment codified the 1967 EEOC guidance, expanding the definition of religion to include “all aspects of religious observance and practice.”⁹⁷ The definition expressly acknowledged that protection from discrimination based on religion may extend to certain religiously motivated actions. Most importantly, the Equal Employment Opportunity Act of 1972 incorporated the requirement from the 1967 EEOC Guidance that employers must provide accommodations for an employee’s religious observance or practice, unless the employer demonstrates that it is “unable to reasonably accommodate” the request “without undue hardship.”⁹⁸

The legislative history for the 1972 amendment, as well as an earlier unsuccessful bill that was introduced in 1971, provides insight regarding the intended scope and purpose of the 1972 amendment. Consistent with the rationale for both the 1966 and 1967 EEOC Guidance, the driving force behind the 1972 amendment was concern for observers of the Saturday Sabbath.⁹⁹ The sponsor of the 1972 amendment, Senator Jennings Randolph (WV-D), urged passage of the bill, stating that its reach would be narrow because it would not impact the bulk of workers.¹⁰⁰ Instead, he explained that the amendment would protect primarily Orthodox Jews, Seventh Day Adventists, and Seventh Day Baptists—all of whom observe the Saturday Sabbath.¹⁰¹ Although the religious accommodation provision has been used in a variety of circumstances, the largest category of cases continues to involve work schedules conflicting with the Saturday Sabbath as originally predicted in the 1960s and 1970s.

The legislative history also indicates that Congress purposefully embraced a level of ambiguity regarding what constituted “undue hardship” under the 1972 amendment and did not provide further definition of the level of hardship an employer is required to shoulder.¹⁰² Senator Randolph argued that the straightforward codification of the 1967 EEOC Gui-

95. *Id.*

96. Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e(j) (2018).

97. *Id.*

98. *Id.*

99. See Robert A. Caplen, Note, *A Struggle of Biblical Proportions: The Campaign to Enact the Workplace Religious Freedom Act of 2003*, 16 U. FLA. J.L. & PUB. POL’Y 579, 584–88.

100. 118 CONG. REC. 705 (1972).

101. *Id.*

102. *Id.* 705–06.

dance without further explanation would encourage judicial flexibility, which would ultimately resolve any “gray areas” in the text on a factual basis.¹⁰³ As a result, the scope of the protection against discrimination based on religion under Title VII has rested on what accommodation courts have determined to be “reasonable,” and what hardships “undue.”

C. *Trans World Airlines v. Hardison: Defining the Undue Hardship Limitation*

In 1977, the Supreme Court filled in some of these “gray areas” left by the 1972 amendment and attempted to quantify what constitutes an undue hardship.¹⁰⁴ In *Trans World Airlines v. Hardison*, the Court interpreted the statutory term “undue hardship” to mean anything that imposed more than a de minimis cost on the employer.¹⁰⁵ The de minimis standard created by the Court in *Hardison* has been roundly criticized and tested by religious liberty advocates and the EEOC.¹⁰⁶ Many have argued that lower courts following the limitation of the undue burden on employer liability as articulated by *Hardison* reflexively find for the employer.¹⁰⁷

Hardison presented a scheduling conflict consistent with the original purpose of the 1966 and 1967 EEOC Guidance and the 1972 amendment. A Trans World Airlines (“TWA”) employee requested a schedule that would allow him to observe the Saturday Sabbath as required by his religion.¹⁰⁸ Although initially TWA accommodated the request, the religious conflict resurfaced in the context of the seniority system incorporated into the union’s collective bargaining agreement.¹⁰⁹ Under the union agreement, worker seniority determined the choice of job and shift assignments, and junior employees were required to fill assignments depending on the airline’s staffing needs. Initially *Hardison*’s seniority allowed him to choose shifts that did not conflict with his Saturday Sabbath observance. However, after requesting a transfer to another job where he had lower seniority, he was no longer able to avoid Saturday shifts within the union system.¹¹⁰ TWA allowed the union to take steps to accommodate the shift assignments outside of the seniority system, but the union was unwilling to violate the system to accommodate *Hardison*.¹¹¹ TWA also rejected *Hardison*’s proposal that he work four days a week arguing that it would impair

103. *See id.* at 706.

104. *See* *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).

105. *Id.* at 84.

106. *See, e.g., supra* notes 14–17 and accompanying text.

107. *Id.*

108. *Hardison*, 432 U.S. at 67–68.

109. *Id.* The TWA department that *Hardison* worked in “must operate 24 hours per day, 365 days per year, and whenever an employee’s job in that department is not filled, an employee must be shifted from another department, or a supervisor must cover the job[.]” *Id.* at 66–67.

110. *Id.*

111. *Id.*

critical functioning of the airline. Unable to reach an agreement, TWA terminated Hardison who in turn filed a complaint of religious discrimination and failure to accommodate. Hardison's claim was initially denied by the district court, but then reversed by the Eighth Circuit Court of Appeals.¹¹²

In reversing the decision of the Eighth Circuit, the Supreme Court held that Title VII did not require TWA to tailor exceptions within the collective bargaining seniority system in order to accommodate the religious observances and practices of an employee.¹¹³ Further, the Court held that the scope of Title VII's religious accommodation requirement was limited not only by burdens imposed on the employer but also those imposed on other employees.¹¹⁴ The Court found that the majority of employees considered weekend shifts to be a burden regardless of their religious identity or affiliation.¹¹⁵ Indeed, guidelines for the fair and equitable allocation of these less desirable shifts were incorporated into the collective bargaining agreement.¹¹⁶ TWA adopted a neutral system of seniority to determine the allocation of these unpreferred shifts.¹¹⁷ If TWA had adopted a system that prioritized religious observance or belief, Hardison surely would have benefited from the preferential policy. However, the Court concluded that such an accommodation would come at the expense of other employees who would be given an inferior shift simply because they did not hold a religious belief against working on those particular days.¹¹⁸ The Court held that:

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, and such discrimination is proscribed when it is directed against majorities as well as minorities . . . [it] 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.¹¹⁹

The Court concluded that the prohibition against religious discrimination under Title VII did not require TWA to breach its collective bar-

112. *Hardison v. Trans World Airlines*, 375 F. Supp. 877, 883 (W.D. Mo. 1974), *rev'd*, 527 F.2d 33, 44 (8th Cir. 1975), *rev'd*, 423 U.S. 63, 85 (1977).

113. *Hardison*, 432 U.S. at 84.

114. *Id.* at 79, 81, 84.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 81.

gaining agreement, undermine the operations of one of its shops through understaffing, or pay other employees a premium to cover the shifts.¹²⁰ Each of these actions would impose more than a de minimis burden on the employer and, therefore, result in an undue hardship within the meaning of the statute. In the immediate years following *Hardison*, scholars and workers voiced strong opposition to the decision—arguing that the holding functionally muted the efficacy of the 1972 amendment by placing the bar too low for employers.¹²¹

D. EEOC Implementation and Criticism of *Hardison*

Within months of the *Hardison* decision, the EEOC began developing guidance to address how to implement the standard.¹²² By 1978, then-EEOC Commissioner Eleanor Holmes Norton held a series of informal hearings across the country inviting public comment and statements regarding the reaction to the *Hardison* decision, specifically the de minimis standard.¹²³ The EEOC explained that the *Hardison* decision “led to much confusion in the employment sector [and] left employers, employees and labor organizations unclear as to the extent of the statutory duty under Title VII to provide reasonable accommodation for the religious practices of an employee or prospective employee.”¹²⁴ During this period, the EEOC received in-person statements from over 150 individuals and representatives of businesses, religious organizations, and worker groups.¹²⁵ In addition to these in-person comments, the EEOC received 350 written public comment submissions over a ninety-day designated comment period.¹²⁶ Many of the respondents argued that *Hardison* had a “chilling effect” on requests for accommodation and empowered employers to deny the requests that were made.¹²⁷

As a result of the hearings, the EEOC concluded that the *Hardison* decision caused “widespread confusion” regarding when and to what extent accommodations were required under current law.¹²⁸ Further, the

120. *Id.*

121. See, e.g., Brendan M. Cournane, *Title VII and Religious Discrimination: Is Any Accommodation Reasonable Under the Constitution?*, 9 LOY. U. CHI. L.J. 413 (2015).

122. See, e.g., Guidelines on Discrimination Because of Religion, 45 FED. REG. 72,610 (Oct. 31, 1980) (codified as 29 C.F.R. § 1605 (2017)).

123. See *Hearing Before the U.S. Equal Emp’t Opportunity Comm’n on Religious Accommodation*, 95th Cong. 387 (1978).

124. Equal Employment Opportunity Comm’n *Guidelines on Discrimination Because of Religion*, 45 FED. REG. 72,610 (Oct. 31, 1980).

125. For a thorough review of the hearings and witnesses, see Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317 (1997).

126. See *id.*

127. See *Hearing Before the U.S. Equal Emp’t Opportunity Comm’n on Religious Accommodation*, 95th Cong. 387 (1978) (statement of Gordon Engen).

128. Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.2(1) app. A (2017).

EEOC reported that witness testimony from workers indicated that religious observances and practices were routinely not being accommodated by employers,¹²⁹ which included:

- Observance of the Sabbath or religious holidays;
- The need for a prayer break during working hours;
- Certain dietary requirements and restrictions;
- Not working during a mourning period for a deceased relative;
- Prohibition against medical examinations;
- Prohibition against membership in labor and other organizations; and
- Dress and other personal grooming habits.¹³⁰

The EEOC also noted that employers claimed that they were developing “alternative employment practices” to accommodate a religious employee that would also meet their business needs.¹³¹ However, the EEOC cautioned that “little evidence was submitted by employers that showed actual attempts to accommodate religious practices with resultant unfavorable consequences to the employer’s business.”¹³² It found that “[e]mployers appeared to have substantial anticipatory concerns but no, or very little, actual experience with the problems they theorized would emerge by providing reasonable accommodation for religious practices.”¹³³ Citing the absence of employers’ willingness to shoulder *any* burden to accommodate religious needs of employees and the persistent chilling effect and confusion caused by the *Hardison* decision, the EEOC published new guidance in 1980 (“1980 EEOC Guidance”).¹³⁴

The 1980 EEOC Guidance explicitly asserted that Title VII imposed an obligation on both employers and unions to reasonably accommodate a religious need unless it would result in an undue hardship.¹³⁵ In an attempt to clarify the term “undue hardship,” the EEOC created a rule that a “mere assumption” that other employees would request accommodations did not constitute an undue hardship.¹³⁶ Further, the EEOC stated that if there were multiple avenues to provide an accommodation that did not impose an undue hardship on the employer, the employer

129. *Id.* § 1605.2(2) app. A.

130. *Id.* § 1605.2(3) app. A.

131. *Id.* § 1605.2(4) app. A.

132. *Id.* § 1605.3(5) app. A.

133. *Id.*

134. *Id.* § 1605 app. A (1981) (codifying the 1980 Guidelines). The Commission also enumerated several employee religious practices that employers were not accommodating, including observance of the Sabbath or religious holidays, prayer breaks during working hours, certain dietary requirements, not working during a mourning period for a relative, and certain dress and personal grooming habits. *Id.*

135. *Id.*

136. *Id.* § 1605.2(c)(1).

was obligated to offer the “alternative which least disadvantages the individual.”¹³⁷ The EEOC included in the EEOC Guidance a list of examples for acceptable accommodations for employees.¹³⁸

The 1980 EEOC Guidance also addressed the controversial “de minimis” standard created by the *Hardison* Court. It concluded that *any* administrative cost—financial or otherwise—would be considered more than de minimis.¹³⁹ This interpretation shielded employers from costly accommodation requests including hiring additional workers or requiring other workers to perform additional, uncompensated duties. However, this broad language risks sanctioning the denial of requests that result in *any* cost, thereby rendering the accommodation functionally impotent in the context of most businesses’ daily practices.

III. THE DE MINIMIS STANDARD FOR THE UNDUE HARDSHIP LIMITATION

As discussed above, the religious accommodation standard was introduced and developed primarily in response to de facto discrimination against observers of a Saturday Sabbath—an inherently inward-facing activity.¹⁴⁰ Case law and accompanying EEOC guidance has broadened the scope of the standard to include other primarily inwardly focused actions, like dress or use of a break to pray or attend a religious service. However, protection from discrimination on the basis of religion in the context of scheduling continues to be a primary source of conflict between employers and religious employees. The outcome of these cases depends on an analysis of whether the accommodation requested would result in an undue hardship for the employer. Whether or not the hardship is found to be undue depends upon a myriad of factors including the size of the company or division,¹⁴¹ the role of collective bargaining units,¹⁴² and the fi-

137. *Id.* § 1605.2(c)(2)(ii). In 1986, the Supreme Court further narrowed the religious accommodation requirements by dismissing the requirement that an employer offer to an employee an accommodation that is most advantageous to the employee. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 75 (1986) (holding that an employer is obligated to offer only a reasonable accommodation even if an alternative proposal would be more advantageous for the employee).

138. *See* Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.2(d)(1). These examples reflect the understanding that the majority of accommodations necessary will be a result of scheduling conflicts with Sabbath or holiday observance. These examples included “Voluntary Substitutes and Swaps,” “Flexible Scheduling,” and “Lateral Transfer and Change of Job Assignments.” *Id.* § 1605.2(d)(1)(i)–(iii).

139. *See id.* § 1605.2(e)(1).

140. *See supra* notes 101–08 and accompanying text.

141. *See, e.g.*, *Brown v. Gen. Motors Corp.*, 601 F.2d 956 (8th Cir. 1979).

142. *See, e.g.*, *Stolley v. Lockheed Martin Aeronautics Co.*, 228 F. App’x 379 (5th Cir. 2007) (issuing summary judgment in favor of employer who denied an accommodation because shift changes were in violation of the collective bargaining agreement); *Virts v. Consol. Freightways Corp.*, 285 F.3d 508 (6th Cir. 2002) (holding that an employer is not required to accommodate a male truck driver’s request to be assigned only male driving partners due to his Christian belief requiring him to avoid the appearance of evil; requested accommodation would result in

nancial cost.¹⁴³ All of these factors are considered when determining whether the requested religious accommodation imposes more than a de minimis cost on the employer.

A review of the case law reveals that the impact of a requested accommodation on third parties can be a determinative factor in cases challenging an employer's denial of accommodation. For example, courts have determined that accommodations must be granted for an employee to attend a religious service unless it would result in a tangible cost to the employer. However, employers are rarely required to accommodate religious activities that impose a religious activity on a third-party including proselytization to co-workers or customers and other activities that impede customer service or messaging. While inward-facing activities require a fact-specific inquiry into the ability of the employer to accommodate the request, outward-facing activities are rarely, if ever, resolved by such an inquiry because the third-party impact requires the employer to choose between accommodating one employee at the expense of others.

A. *Personal Religious Observance and Practice: Saturday Sabbath, Grooming, and Attire*

Cases regarding scheduling accommodations involve a heavily fact-specific analysis of daily business realities in order to determine whether the requested accommodation presents an undue burden for the employer. For example, in *Brown v. General Motors Corp.*¹⁴⁴ the Eighth Circuit found that allowing a worker to leave work every Friday at sunset presented only a de minimis cost to the employer because there was a large pool of replacement workers.¹⁴⁵ *EEOC v. Arlington Transit Mix., Inc.*¹⁴⁶ presented the Sixth Circuit with a similar issue. There, the Sixth Circuit overturned the district court's dismissal of plaintiff's complaint of religious discrimination, determining that the employer had failed to attempt an accommodation.¹⁴⁷ However, the facts of the case and the language of the District Court is instructive. In *Arlington Transit*, plaintiff, who worked as a mechanic, requested an accommodation to attend a 7

violation of the seniority provisions of a collective bargaining agreement and would affect other workers' contractual rights); *Thomas v. Nat'l Ass'n. of Letter Carriers*, 225 F.3d 1149 (10th Cir. 2000) (finding request for all Saturdays off as a religious accommodation would violate collective bargaining agreement); *EEOC v. Dalfort Aerospace, L.P.*, No. 3:00-cv-0666-P, 2002 U.S. Dist. LEXIS 2771 (N.D. Tex. Feb. 19, 2002) (granting summary judgment in favor of the employer where certain job bidding procedures in a collective bargaining agreement did not allow the employer to accommodate the religious needs of Seventh Day Adventist).

143. See, e.g., *Beadle v. City of Tampa*, 42 F.3d 633 (11th Cir. 1995), cert. denied, 515 U.S. 1152 (1995); *Mann v. Frank*, 7 F.3d 1365, 1370 (8th Cir. 1993).

144. 601 F.2d 956.

145. *Id.* at 962.

146. 957 F.2d 219 (6th Cir. 1991).

147. *Id.* at 222.

p.m. worship service on Wednesday nights.¹⁴⁸ His employer granted the accommodation for two years.¹⁴⁹ The employer then instituted a policy requiring at least two mechanics to be present at all times for both safety and customer concerns.¹⁵⁰ As a result, plaintiff could no longer leave early without violating the two-worker policy.¹⁵¹ Plaintiff was terminated when he left the garage for the Wednesday night service, which resulted in only one mechanic present.¹⁵² The district court held that the employee's request would result in either a violation of the new safety and customer service policy or additional financial cost to find a second mechanic to cover the shift.¹⁵³ The district court deemed both would be an undue burden that was beyond de minimis.¹⁵⁴ Both *Arlington Transit* and *General Motors* involved long discussions regarding the nature of the employer's business and its ability to absorb the potential costs related to the requested accommodation.¹⁵⁵

Courts have also employed this fact specific approach to determine whether an accommodation is reasonable or if the hardship is undue in the context of grooming and dress codes. In 2012, the New York's Transit Authority (MTA) settled a case brought by Sikh and Muslim employees who were prohibited from wearing religious head wraps or turbans.¹⁵⁶ The MTA's proposed accommodation was to require religious employees to affix an MTA logo to any religious headwear.¹⁵⁷ This accommodation was rejected by the workers and their union, but the case eventually concluded with a settlement.¹⁵⁸ In contrast, a Massachusetts district court held in *Brown v. F.L. Roberts & Co.*¹⁵⁹ that Title VII did not require a garage to exempt a mechanic from the company grooming policy in order to accommodate a request to abstain from shaving his beard or cutting his hair in accordance with his religion.¹⁶⁰ Instead, the court found that relo-

148. *EEOC v. Arlington Transit Mix, Inc.*, 734 F. Supp. 804, 805 (E.D. Mich. 1990).

149. *Id.*

150. *Id.* at 805–06.

151. *Id.* at 806.

152. *Id.*

153. *Id.* at 809.

154. *Id.*

155. *Brown*, 601 F.2d 956.

156. See *United States v. N.Y.C. Transit Auth.*, No. 04-cv-4237, 2010 U.S. Dist. LEXIS 102704 (E.D.N.Y. Sept. 28, 2010); see also, Press Release, Dep't of Justice, *Justice Dep't Sues N.Y. Metro. Transp. Auth. And N.Y.C. Transit Auth. Alleging Religious Discrimination* (Sept. 30, 2004) (on file with Department of Justice).

157. See Editorial, *The M.T.A. and Fairness*, N.Y. TIMES (June 3, 2012), <https://www.nytimes.com/2012/06/04/opinion/the-mta-and-fairness.html> [https://perma.cc/BV4Z-ZZ9D].

158. See *Sikh Segregation Ends at MTA*, THE SIKH COAL., (June 1, 2012), <https://www.sikhcoalition.org/blog/2012/sikh-segregation-ends-at-mta/> [https://perma.cc/5YBW-YLXV].

159. 419 F. Supp. 2d 7 (D. Mass. 2006).

160. *Id.* at 9.

cating the employee to another station within the garage away from customer contact was a reasonable accommodation.¹⁶¹

B. *Religious Observance and Practice Directed at Third Parties*

The traditional cases involving the Saturday Sabbath observance or employer dress codes impact third parties indirectly, if at all.¹⁶² In evaluating these cases, courts weigh business realities and often determine that an accommodation is reasonable and does not pose an undue burden on the employer. Requests for accommodation for religiously motivated conduct that impacts third parties, however, are routinely held to be either unreasonable or to impose too great of a hardship on the employer. Examples of such third-party impact include receipt of a less favorable schedule by other workers as described in *Hardison*¹⁶³ and unwanted proselytization or religious-based harassment.¹⁶⁴

1. *Co-workers*

In *Chalmers v. Tulon Co.*,¹⁶⁵ an employee filed a discrimination complaint against her employer challenging her termination for mailing unwanted letters to her co-worker and supervisor at their private residences reprimanding them for engaging in immoral conduct and urging them to “‘get right’” with God.¹⁶⁶ The employee argued that the company should have accommodated her need to proselytize to her colleagues because her religious beliefs were well-known by the company and she was compelled by God to mail the letters.¹⁶⁷ The *Chalmers* court specifically addressed the divergence between traditional religious accommodation claims involving Sabbath observance or religious garb that “[a]n employer can often accommodate . . . without inconveniencing or unduly burdening other employees” and Chalmers’ accommodation request that “contends that she has a religious need to impose personally and directly on fellow employees, invading their privacy and criticizing their personal lives[.]”¹⁶⁸ Referencing a similar, earlier case involving religious expression at work, the *Chalmers* court provided that “Title VII does not require an employer to allow an employee to impose . . . religious views on others[.]”¹⁶⁹ The

161. *Id.* at 14–15.

162. For a discussion of the enforcement of dress codes under Title VII and religious accommodations, see Prerna Soni, Title VII Religious Discrimination and Contemporary Socio-Religious Issues in a Post-9/11 America: The Scope and Shortcomings of Religious Discrimination Protection Under Title VII, 16 U. PA. J. BUS. L. 599, 607 (2014).

163. *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977).

164. *See Wilson v. U.S. W. Commc’n*, 58 F.3d 1337 (8th Cir. 1995).

165. 101 F.3d 1012 (4th Cir. 1996).

166. *Id.* at 1015.

167. *Id.* at 1020.

168. *Id.* at 1021.

169. *Id.* (alteration in original) (citing *Wilson v. U.S. W. Commc’ns*, 58 F.3d 1337, 1342 (8th Cir. 1995)).

employer is only required to reasonably accommodate an employee's religious views.

Religiously motivated harassment or proselytization does not have to be targeted to specific co-workers in order to constitute an undue hardship for an employer. In the 2004 case *Peterson v. Hewlett-Packard Co.*,¹⁷⁰ the Ninth Circuit extended the *Chalmers* holding to broad workplace proselytization and religious expression.¹⁷¹ In *Hewlett-Packard*, the company launched a diversity program that included the posting of a number of signs that included a picture of a Hewlett-Packard employee above a caption that read, "Black, Blonde, Old, Gay, or Hispanic."¹⁷² Another set of posters included the same individuals but featured a caption with the employee's personal interests and the slogan "Diversity is Our Strength."¹⁷³ Peterson, a Hewlett-Packard employee, described himself as a devout Christian and believed that he could not allow the "Gay" poster to remain unchallenged.¹⁷⁴

Peterson affixed to the poster a series of Bible verses condemning LGBTQ people and same-sex activity, including the provocative verse from Leviticus that individuals engaging in same-sex activity should "be put to death; their blood shall be put upon them."¹⁷⁵ Peterson's supervisor removed the Bible verses and scheduled a series of meetings with Peterson to discuss his religious beliefs, the company's diversity policy and program, and potential ways to reconcile both in the workplace.¹⁷⁶ Peterson told his supervisors that he intended the passages to be hurtful in order to encourage his gay and lesbian co-workers to repent.¹⁷⁷ Peterson requested a religious accommodation that Hewlett-Packard either remove the poster altogether or allow Peterson to re-affix the Bible verses.¹⁷⁸ Hewlett-Packard refused to provide these accommodations arguing that they were unreasonable and posed an undue hardship to the company.¹⁷⁹ As a result, Peterson resigned and filed a suit challenging the company's actions as religious discrimination under Title VII.¹⁸⁰ Peterson stated that he felt the campaign personally targeted him as a devout Christian.¹⁸¹

The court agreed with Hewlett-Packard, finding that Peterson's proposal to attach Bible verses condemning same-sex activity was unreasonable because "an employer need not accommodate an employee's religious

170. 358 F.3d 599 (9th Cir. 2004).

171. *See id.*

172. *Id.* at 601 (internal quotation marks omitted).

173. *Id.* (internal quotation marks omitted).

174. *Id.*

175. *Id.* at 602.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

beliefs if doing so would result in discrimination against his co-workers or deprive them of contractual or other statutory rights.”¹⁸² The court concluded that Title VII did not require Hewlett-Packard to allow actions that are “designed to demean or degrade” other workers.¹⁸³ Similarly, the court concluded that Hewlett-Packard was not obligated to remove the “Gay” poster to accommodate Peterson’s religious beliefs.¹⁸⁴ To do so would have resulted in an undue hardship by infringing on “the company’s right to promote diversity and encourage tolerance and good will among its workforce.”¹⁸⁵ The court also recognized that diversity programs support company efforts to attract talented workers.¹⁸⁶ It found that to require Hewlett-Packard to exclude LGBTQ people from the program would result in an undue hardship.¹⁸⁷

2. *Customers and Clients*

Courts have also consistently held that businesses are not required to accommodate a religious belief that directly interferes with a worker’s ability to fully serve a customer or client. In *Walden v. Centers for Disease Control & Prevention*,¹⁸⁸ the Eleventh Circuit upheld the termination of a counselor who refused to provide services to a lesbian seeking counseling about her same-sex relationship.¹⁸⁹ In this case, the counselor worked for an employee assistance program offered by the Center for Disease Control and Prevention (CDC) that provided counseling services for CDC employees.¹⁹⁰ After the counselor denied services to a CDC employee based on the employee’s sexual orientation, the employee filed a complaint.¹⁹¹ In the complaint, she stated that she felt “judged and condemned” by the counselor.¹⁹² The counselor requested a religious accommodation under Title VII and “describe[d] herself as ‘a devout Christian who believes that it is immoral to engage in same-sex sexual relationships.’”¹⁹³ The CDC offered the counselor an opportunity to apply for another position but would not allow her to convey to prospective clients that she would not

182. *Id.* at 607 (first citing *Trans World Airlines v. Hardison*, 432 U.S. 63, 81 (1977); then citing *Opuku-Boateng v. California*, 95 F.3d 1461, 1468 (9th Cir. 1996)).

183. *Id.* at 608 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998)).

184. *Id.*

185. *Id.*

186. *See id.*

187. *Id.* (Hewlett-Packard has signed on to amicus briefs supporting the business case for diversity); *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

188. 669 F.3d 1277 (11th Cir. 2012).

189. *Id.* at 1280.

190. *Id.*

191. *Id.* at 1283.

192. *Id.* at 1281 (internal quotation marks omitted).

193. *Id.* at 1280 (quoting Document 1 of the Record at 1–2, *Walden*, 669 F.3d 1277).

work with them because of their sexual orientation.¹⁹⁴ The court found that Title VII did not require the CDC to subject employees seeking counseling to demeaning treatment because of their sexual orientation.¹⁹⁵

Similarly, in *Grant v. Fairview Hospital & Healthcare Services*,¹⁹⁶ an ultrasound technician opposed to abortion believed that it was his religious duty to dissuade women from having the procedure in the course of performing the ultrasound.¹⁹⁷ The hospital offered to accommodate the technician by excusing him from performing ultrasounds on women considering an abortion.¹⁹⁸ The hospital would not allow him to attempt to dissuade women from having the procedure or to provide pastoral counseling to them during the ultrasound.¹⁹⁹ The court concluded that the accommodation offered was reasonable, and the hospital was not obligated to allow the technician to intervene in individual patient care because of his religious belief.²⁰⁰

Courts have also held that employers can regulate customer-facing messaging or correspondence without violating Title VII. In *Johnson v. Halls Merchandising*,²⁰¹ the court held that an employer was not required to allow a retail employee to regularly state to customers, “in the name of Jesus Christ of Nazareth” because it offended customers, which in turn cost the company business.²⁰² Courts have similarly found that workers are not entitled to proselytize to customers or clients under Title VII.

C. Current EEOC Guidance and Examples

The current guidance provided by the EEOC lists several examples of common requests for accommodations.²⁰³ These include dress code requests to accommodate religious dress or garb, schedule accommodations to attend religious services, and requests to be relieved of certain duties because of religious belief. Only one example, a request from a pharmacist to be exempt from filling contraception prescriptions, entails a direct impact on a third party—the patient.²⁰⁴ Even with this example, however, the EEOC clearly provides that the employer can accommodate this belief by re-assigning the pharmacist to a position where the issue would not arise or by creating a system where the prescription is filled by a co-

194. *Id.*

195. *Id.* at 1293–95.

196. No. 02-4232 (JNE/JGL), 2004 U.S. Dist. LEXIS 2653 (D. Minn. Feb. 18, 2004).

197. *Id.* at *2.

198. *Id.* at *3–4.

199. *Id.*

200. *Id.* at *16.

201. No. 87-1042-cv-w-9, 1989 U.S. Dist. LEXIS 2623 (W.D. Mo. Jan. 17, 1989).

202. *Id.* at *2.

203. See EEOC, COMPLIANCE MANUAL ON RELIGIOUS DISCRIMINATION, SECTION 12: RELIGIOUS DISCRIMINATION EX. 43 (2021).

204. See *id.*

worker.²⁰⁵ The employer is not required to allow the pharmacist to remain in the position while denying to fill the prescription, which would result in the patient not being served.²⁰⁶ The EEOC also includes the impact on co-workers as an example of when a hardship would be undue.²⁰⁷ Here, the EEOC distinguishes between simple co-worker complaints and accommodations that would actually “infringe on the rights of coworkers or cause disruption of work.”²⁰⁸

These examples reflect a thoughtful rephrasing of reasonable accommodation case law. However, they fail to provide the public with the clear judicial narrative by explicitly recognizing the role of conduct and the demands placed on third parties in determining the reach of the religious accommodation standard. The public is left with guideposts or signals of the law but not the clear map that the courts have already created. As a result, courts are confronted with cases that demand time-intensive analysis but are destined to be dismissed when placed within the judicial narrative that the courts will inevitably apply.

IV. APPLYING THE INWARD/OUTWARD FRAMEWORK TO THE REASONABLE ACCOMMODATIONS STANDARD UNDER TITLE VII

As discussed above, courts have consistently applied the inward/outward framework when determining whether Title VII demands an employer provide a requested religious accommodation. Despite this clear subscription to the inward/outward standard encompassed by decades of civil rights jurisprudence, neither courts nor the EEOC have expressly articulated this framework. The express recognition and adoption of this framework would promote judicial economy and provide clarity for workers and their employers regarding their rights and obligations under Title VII. Most importantly, it would clarify the meaningful distinction between inward-facing religious observance and practice and religiously motivated actions that impact and compel action from others—specifically third parties who have not submitted to the governance of the religious code in question.

When an individual is discriminated against on the basis of their religious identity or status, it is arguably comparable to the discrimination experienced by someone on the basis of their racial or sexual identity. However, as the Supreme Court described in *Trinity Lutheran Church of Columbia v. Comer*,²⁰⁹ there is an important distinction between religious status and religious action.²¹⁰ The inward/outward framework acknowledges that religion includes some form of exercise, but it draws the line

205. *See id.*

206. *See id.*

207. *See id.* at Ex. 36.4.

208. *Id.*

209. 137 S. Ct. 2012 (2017).

210. *Id.*

when religious exercise impacts third parties. This Part demonstrates how the inward/outward framework would improve the evaluation of requests for religious accommodations. It offers new examples and scenarios that could be incorporated in agency guidance and applies the inward/outward framework to a 2020 case brought by the EEOC on behalf of Kroger grocery store employees.

A. *Refining Undue Burden*

Regardless of the conduct in question, an employee claiming religious discrimination and wrongful denial of an accommodation must establish 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; (3) he or she was disciplined for failure to comply with the conflicting employment requirement.”²¹¹ Once an employee establishes a prima facie case, the burden then shifts to the employer to show that it could not accommodate the plaintiff’s religious needs without undue hardship.²¹² The undue hardship standard is the element that three members of the Court flagged as warranting reconsideration in the denial of certiorari in *Patterson*.²¹³ This inquiry is highly fact-specific and requires the court to weigh a myriad of factors including workforce, business size, and ability to absorb an accommodation. However, incorporating an intentional, initial inquiry into the nature of the conduct—inward or outward facing—at this step could streamline the determination of whether the burden is undue. This would ensure consistency across jurisdictions by encouraging faithful adoption of well-settled case law.

Under current case law, outward-facing activities are found to impose an undue hardship precisely because of their effect on and demand for cooperation from third parties.²¹⁴ If the initial inquiry reveals that the requested accommodation involves an outward-facing observance or practice that impacts and demands compliance from third parties or non-co-religionists, the court would not be tasked with weighing other factors in order to conclude that the accommodation poses an undue hardship on the employer. In practice, this application would encourage courts and the EEOC to look to the nature of the conduct explicitly when determining whether the hardship is undue. An employer could meet the undue hardship standard by showing that the conduct is outward-facing as con-

211. *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985) (quoting *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984)).

212. *See id.*

213. *Patterson v. Walgreen Co.*, 140 S. Ct. 685, 686 (2020).

214. In *Hardison*, the Court held that interfering with a seniority system constituted an undue hardship. *See Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977). The Court concluded: “In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.” *Id.* at 85.

sistently articulated by case law. This would avoid additional and unnecessary fact-heavy litigation, which, based on precedent would result in a denial of accommodation if the conduct is outward-facing.

B. *New Examples for Moving Forward*

Below are several examples of religious accommodation requests that are wholly expressive and outward facing that would not require the court to look beyond the nature of the conduct in order to determine the accommodation undue:

1. An employee of a large health insurance company has a religious belief that requires that she oppose and publicly condemn same-sex marriage. She informs the company that she will not process any applications from covered individuals seeking to add a same-sex spouse to their plan or any claims made by any covered individual in a same-sex marriage. Although the company offers to allow her to send these claims to her co-worker who does not object, she argues that this would require her to recognize the marriage as valid. She offers to either ignore these inquiries by same-sex spouses or to provide them with a written statement articulating her Biblical views on marriage and urging them to repent.
2. A company launches a new recruitment program designed to attract veterans. A lifelong employee of the company is a conscientious objector and pacifist who believes that war is immoral and that his faith compels him to speak out against individuals who participate in it at every level. The employee believes that the new recruitment program glorifies war and forces him to personally condone it as a member of the staff. He demands that the company remove the recruitment materials from the website where his profile is also listed and include a disclaimer after every advertisement that the company's employees do not endorse the program.
3. An employee who abstains from alcohol and coffee is required to attend a retreat hosted by her company designed to encourage co-worker bonding and provide a time to collaborate on the strategic plan for the coming year. The employee is presenting several workshops about her team's programs. The employee learns that there will be coffee served during the work sessions and that alcohol will be offered at the mandatory dinners. She informs her employer that participating in events where coffee or alcohol are present is a violation of her faith. She requests that the organizers of the event prohibit both beverages throughout the weekend.

The above scenarios are informed by cases brought by workers that have tested the limits of the reasonable accommodation standard and the burden created by *Hardison*. Each worker in the scenarios has a bona fide religious belief that is in direct conflict with his or her ability to perform their duties. However, unlike traditional accommodation requests that impact the religious individual, each of these examples directly impacts the actions of third parties and requires their involvement within the individual's religious practice. In order for the workers to meet the demands of their faith, each example requires a third party who is not a member of their faith to cooperate—or at least accept the imposition of their beliefs on their actions.

The first scenario is similar to many cases regarding contraceptive prescriptions or abortion services.²¹⁵ Courts have consistently held that workers are not necessarily required to participate in these services if they violate their belief, but employers are not required to allow them to deny services to a patient or to create a hostile environment through proselytizing.²¹⁶ Both of the accommodations that the insurance company employee suggested would negatively impact the covered individual as well as the company's business function. Refusing to process these claims entirely and passively deleting the emails or filing them away interferes with the day-to-day operation of the company. Further, this action risks leaving individuals uncovered for unknown periods of time simply because of their sexual orientation. The employee's second suggested accommodation that she be allowed to provide a written statement condemning the covered individual's marriage prior to forwarding their case also fails on both counts.²¹⁷ This action would undercut the company's ability to serve its customers, undermine its culture of diversity and inclusion, and potentially lead to unfavorable publicity. Under the inward/outward framework, the employer could meet the undue burden standard by showing that the nature of the conduct was outward-facing and fell within previously judicially articulated standards. The mandate that unwilling non-members be involved within the religious practice is a sufficient burden to make the accommodation unreasonable.

The second example also requires that the company cease the recruitment program or undermine it with a disclaimer in order for the employee to practice his religious belief against war. Similar to the Ninth

215. See *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 226 (3d Cir. 2000) (holding that employer's offer to transfer nurse laterally to newborn intensive care unit was a reasonable accommodation for her religious beliefs because it restricted her participation in abortions); see also *Rodriguez v. City of Chicago*, 156 F.3d 771, 774 (7th Cir. 1998) (holding that the city provided a reasonable accommodation to an officer whose religious belief prevented him from guarding abortion clinics by allowing a transfer to a district without such facilities); *Wright v. Runyon*, 2 F.3d 214, 217 (7th Cir. 1993).

216. See *Noesen v. Med. Staffing Network*, 232 F. App'x 581, 584–85 (7th Cir. 2007).

217. See *supra* note 195 and accompanying text.

Circuit's analysis in *Hewlett-Packard*, there is no question that the employee's beliefs are bona fide and sincere and that he informed the employer of his religious needs.²¹⁸ However, in order to accommodate the employee, the company would have to forfeit the tangible benefits of recruiting veterans and the public goodwill it anticipates to result from the program.²¹⁹ Additionally, the inclusion of a disclaimer on materials would send a message to current veteran employees that the company disrespected their service to their country. This would undoubtedly undermine morale and force the company to espouse a belief that it did not share or intend. Here, the employee is demanding that the employer actively participate in his religious beliefs against war and veterans in order to comply with his personal religious tenets. This scenario would surely fail in court.

Finally, the third scenario provides a valuable illustration of an employee seeking to control the behavior of other workers in order to exercise her own religious faith and live up to its tenets. Although the right to drink alcohol or coffee is far from fundamental, the majority of employees may view drinking a morning cup of coffee as essential for morale and productivity. Here, the employee is requesting that the company completely prohibit other workers from bringing coffee into the retreat—not just that the employer not provide it.

In each of these scenarios, a review of the case law indicates that a court would most likely conclude that the accommodations requested by the employees are unreasonable and would present an undue hardship to the employer because of the impact on and compelled engagement of third parties.²²⁰ Under the current analysis, however, courts and the EEOC lack explicit direction regarding the consistent impact of third-party coercion or impact on the outcome of the undue hardship question. As a result, both parties are required to undergo extensive procedural and fact-specific litigation just to have the accommodation request denied. In each of the above scenarios, we can assume that the beliefs are sincere and that to proceed without the accommodation would directly conflict with them. Each worker has informed their employer, who likely must deny the accommodation because of the third-party burden in order to safeguard the rights of their customers or other workers. The inward/outward framework adds an additional inquiry immediately following establishment of a prima facie case: is the religiously motivated conduct inward- or outward-facing?

218. See *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004).

219. As the *Hewlett-Packard* court concluded, a company has a right “to promote diversity and encourage tolerance and good will among its workforce.” *Id.* at 608.

220. See *Mial v. Foxhoven*, 305 F. Supp. 3d 984 (N.D. Iowa 2018); see also EEOC, COMPLIANCE MANUAL ON RELIGIOUS DISCRIMINATION, SECTION 12: RELIGIOUS DISCRIMINATION PROVISION (C)(6) (2021).

To determine whether the conduct is outward-facing, courts and the EEOC would first ask whether the employee request for accommodation requires compliance by nonconsenting third parties in order to be fulfilled. This threshold question would allow courts and the EEOC to identify cases where the reasonable accommodation standard and Title VII are inappropriate sources for remedy. Allowing these cases to proceed beyond this initial stage burdens the judicial system and results in unnecessary and expensive litigation for both the employer and the employee with little hope of resolution for the employee.

C. EEOC v. Kroger: A *Timely Application*

In September 2020, the EEOC filed a complaint against the Kroger Company for failing to provide a religious accommodation requested by two grocery store employees in Conway, Arkansas.²²¹ In April 2019, the grocery store chain introduced a new uniform apron that included a multi-colored heart patch affixed to the front.²²² The two employees who had worked for Kroger respectively for eight and thirteen years submitted a letter to the store supervisor detailing that they have “sincerely held religious belief” that homosexuality is a sin.²²³ The pair further argued that the heart patch was a symbol of LGBTQ pride and promoted same-sex sexual activity and rights.²²⁴ Kroger has stated that the patch was designed to promote the company’s commitment to diversity generally, and it was not designed to specifically address LGBTQ rights or employees at all.²²⁵ In fact, the patch did not contain the colors or design traditionally associated with the LGBTQ pride flag.²²⁶ In their letter, the employees argued that they should not be required to wear the patch, because to do so would promote LGBTQ pride. They offered to wear an old apron or to conceal the patch with another Kroger button or name tag. However, Kroger refused the employees’ requests for a wardrobe accommodation and eventually terminated both employees.²²⁷

The pair reported these actions to the EEOC, which filed a complaint in the Eastern District of Arkansas charging that Kroger violated Title VII

221. See Complaint, *supra* note 17.

222. *Id.* at ¶ 13(c).

223. Joseph Flaherty, *Kroger Sued by U.S. After 2 Firings Linked to Gay Emblem*, ARK. DEMOCRAT GAZETTE (Sept. 15, 2020), <https://www.arkansasonline.com/news/2020/sep/15/kroger-sued-by-us-after-2-firings-linked-to-gay/> [https://perma.cc/Y232-DJ82].

224. *Id.*

225. See Alexis Shanes, *Kroger Says Apron Symbol for Workers Isn’t LGBTQ-Related*, LAW360 (Nov. 24, 2020), <https://www.law360.com/articles/1332175/kroger-says-apron-symbol-for-workers-isn-t-lgbtq-related> [https://perma.cc/9ELD-3UM6].

226. See Adrian Garcia, *Trump Admin Falsely Claims Kroger Forced Christian Employees to Wear ‘Gay’ Tri-Colored Hearts*, THE DAILY GRIND (Sept. 16, 2020), <https://thegailygrind.com/2020/09/16/trump-admin-eecogay-hearts/> [https://perma.cc/3SVZ-853Z].

227. See Complaint, *supra* note 17.

by failing to consider the proposed religious accommodation for the employees.²²⁸ Applying the above inward/outward framework, the initial threshold inquiry would look to the nature of the employees' conduct prior to beginning the fact-heavy analysis involving the additional burden of the accommodation on the employer. Here, the employees requested an accommodation to modify their uniform to avoid compliance with a company-wide marketing program designed to communicate "Kroger's commitment to friendly and caring service[,] . . . Kroger's commitment to providing fresh goods to customers[,] . . . Kroger's commitment to uplift in every way[,] . . . [and] Kroger's commitment to improving every day."²²⁹ Kroger specifically denies that the patch is related to LGBTQ pride and asserts instead that the company has a separate and unique "pride" patch it offers employees. Kroger also has adopted a separate diversity and inclusion program designed to foster "an environment of inclusion where diversity of all kinds is valued and appreciated."²³⁰

Courts and the EEOC have recognized that modifications to nondiscriminatory dress codes on the basis of religious belief may present an undue burden on the employer.²³¹ Here, if the former employees establish a prima facie case for discrimination, the burden will shift to Kroger to show that accommodating the removal or concealment of the patch posed an undue hardship. Kroger could apply the inward/outward framework as an initial response to this inquiry. The impact on third parties of the requested conduct is two-fold. First, the employees seek an exemption from a company-wide uniform, which undercuts customer-facing messages that Kroger deemed worthy of undergoing a redesign of every apron of every employee. Second, although as Kroger and others have provided, the patch is not associated with LGBTQ people, the request for accommodation is tied directly to hostility towards this marginalized community. Allowing workers to opt out of these uniform programs by citing a religious belief that "homosexuality is a sin" communicates that the company sanctions or condones this message. It could reasonably be argued that this conduct would, at a minimum, undermine Kroger's efforts to create a fair and healthy environment for every employee, but could also result in a claim of a hostile or discriminatory work environment brought by other minority employees. Current case law does not mandate that Kroger forfeit the benefits of a nondiscriminatory uniform policy or accept the liability of sanctioning individual employee opt-outs under the Title VII reasonable accommodation standard.

228. *See id.*

229. Answer to Plaintiff's Complaint at 4, *Kroger*, No. 4:20-cv-01099.

230. KROGER ENVIRONMENTAL, SOCIAL AND GOVERNANCE REPORT (2020).

231. *See, e.g., Webb v. City of Phila.*, 562 F.3d 256, 260–62 (3d Cir. 2009).

CONCLUSION

Title VII of the 1964 Civil Rights Act provides strong protections for workers traditionally excluded from or discriminated against in the workplace. The inclusion of religious identity alongside race, color, national origin, and sex attests to our nation's continued commitment of equal opportunity for religious individuals and the demand to safeguard free exercise of religion. Courts have consistently held that discrimination on the basis of religious belief in the context of employment, government funding, or education is repugnant to the values and ideals of our founding. Simultaneously, however, courts have also held that religiously motivated conduct that intrudes on the rights of nonmembers or demands unwilling involvement by nonmembers does not receive the same treasured protections. Courts and the EEOC have been clear—the right to free exercise of religion in the workplace is not limitless and employers cannot be required to accommodate all religious conduct in order to comply with the principles of Title VII.

This inward/outward distinction is consistently upheld across areas of law, including Title VII jurisprudence. Intentional, explicit incorporation of this framework by courts evaluating charges of unlawful denials of Title VII requests for religious accommodation would ensure uniform implementation of this consistent distinction, provide increased clarity for both workers and employers, and prevent unnecessary and costly continued litigation that would undoubtedly result in a denial of accommodation for outward-facing religious conduct.