

A GOOD-FAITH ATTEMPT AT DEFINING REASONABLE ACCOMMODATIONS AFTER *GROFF* v. *DEJOY*

Abstract: The 1972 amendments to Title VII of the Civil Rights Act of 1964, which required employers to reasonably accommodate their employees' religious beliefs if doing so did not cause an undue burden, did not settle the ongoing debate about balancing an employee's right to practice their religion with an employer's right to run their business. One ongoing controversy involves whether an employer can accommodate their employee in such a way that the employee also must compromise on their sincerely-held religious belief. A recent Third Circuit case, *Groff* v. *DeJoy*, further added to the circuit split by holding that an employer cannot offer a reasonable accommodation that requires the employee to compromise on their belief—a circuit split which the Supreme Court has yet to resolve, even after it reversed the Third Circuit in *Groff*. The Third Circuit's reading of the statute is not in line with the plain meaning of the statute, nor the congressional intent behind such a statute. Instead, the courts should look with an eye toward the good-faith standard in labor law and hold that a reasonable accommodation is one offered by an employer in a good faith attempt to accommodate the employee.

INTRODUCTION

In November 2021, Ingo Rademacher, an actor on the long-running soap opera *General Hospital*, lost a role which he had played since 1996 when he refused to be vaccinated against the COVID-19 virus.¹ Rademacher sued ABC for failing to offer him a religious exemption against the vaccine, despite a failure to claim any affiliation with a religion forbidding the vaccine or anything more than a “moral belief” against it.² Although this may seem quixotic,

¹ See Eliza Thompson, ‘General Hospital’ Star Ingo Rademacher Fired for Refusing Vaccine, Faces Backlash for Transphobic Post, US WEEKLY (Nov. 8, 2021), <https://www.usmagazine.com/celebrity-news/news/general-hospitals-ingo-rademacher-fired-for-refusing-vaccine/> [<https://perma.cc/8H9U-F3FB>] (reporting Rademacher's firing from the long-running show General Hospital because of his failure to adhere to a vaccine mandate); Dan J. Kroll, Ingo Rademacher Fired from General Hospital, SOAP CENTRAL (May 20, 2011) <https://www.soapcentral.com/general-hospital/news/2011/0520-rademacher.php> [<https://perma.cc/P8KX-THUF>] (noting his debut on the show in 1996).

² See Gene Maddaus, Ingo Rademacher Sues ABC Over ‘General Hospital’ Vaccine Mandate, VARIETY (Dec. 13, 2021), <https://variety.com/2021/tv/news/ingo-rademacher-sues-abc-covid-vaccine-general-hospital-1235132554/> [<https://perma.cc/938N-QYVA>] (reporting that Rademacher had filed a complaint against ABC alleging religious discrimination and that he was entitled to an exemption because of a moral belief that God had endowed his body with the natural capability to prevent disease, which the vaccine would violate). The filing, which claimed that the COVID-19 pandemic caused the “greatest restrictions on liberty in American history,” was filed by Robert F. Kennedy Jr. among others, who is noted for his large stature in the anti-vaccine movement. See Complaint at 3,

Rademacher is hardly alone in filing such lawsuits: as of December 2023, there were over thirty-five hundred lawsuits challenging mandatory vaccine requirements.³ These lawsuits arose in response to the COVID-19 pandemic, as many employers instituted vaccine mandates for at least some of their employees.⁴ These vaccine mandates have proved highly controversial.⁵ Although many requests for religious exemptions from vaccines are specious, several religions oppose vaccines on theological grounds.⁶ This controversy demonstrates the necessity of determining when a person's religious liberty must be accommodated in the workplace, even if doing so could harm their employer or fellow workers.⁷

Rademacher v. ABC, No. 21STCV45383 (Cal. Super. Ct. Dec. 13, 2021) (reporting that Kennedy was representing Rademacher); Adam Nagourney, *A Kennedy's Crusade Against Covid Vaccines Anguishes Family and Friends*, N.Y. TIMES, <https://www.nytimes.com/2022/02/26/us/robert-kennedy-covid-vaccine.html> (Mar. 1, 2022) [<https://perma.cc/TEF8-6TJW>] (reporting that Kennedy is now a leading figure in the movement against the coronavirus vaccine).

³ See *Vaccine Mandate Litigation*, JACKSON LEWIS, <https://www.jacksonlewis.com/services/vaccine-mandate-litigation> [<https://perma.cc/C5K4-FYL3>] (describing total amount of vaccine mandate claims, including lawsuits against government actors). Of these, over 3,000 were against employers. *Id.*

⁴ See Lauren Hirsch, *Walmart and Disney Join a Growing Group of Businesses Requiring Vaccines*, N.Y. TIMES, <https://www.nytimes.com/2021/07/30/business/covid-vaccine-mandates-rto.html> (Sept. 10, 2021) [<https://perma.cc/JP47-A5NY>] (reporting that Walmart and Disney required certain employees to be vaccinated); Robert Iafolla, *Vaccine Mandates at Work Part of "New Normal," Employers Say*, BLOOMBERG L. (May 24, 2022), <https://news.bloomberglaw.com/daily-labor-report/vaccine-mandates-at-work-part-of-new-normal-employers-say> [<https://perma.cc/89BH-ZNNA>] (finding that four out of ten employers had some sort of vaccine mandate). This is compared to the less than one percent of firms that had such a mandate in February 2021. *Iafolla supra*.

⁵ See Jeffrey M. Jones & Sangeeta Agrawal, *Workers Have Strong Views on Vaccine Mandates; More in Favor*, GALLUP NEWS (Aug. 18, 2021), <https://news.gallup.com/poll/353825/workers-strong-views-vaccine-mandates-favor.aspx> [<https://perma.cc/56QS-5U4G>] (finding that two-thirds of American employees had strong views on vaccine mandates, almost evenly split between support and opposition). Opposition or support for vaccines is a highly partisan issue. See Philip Bump, *The Biggest Divide on Vaccination Isn't Race or Income, but Party—and the Divide Is Growing*, WASH. POST (Nov. 16, 2021), https://www.washingtonpost.com/politics/2021/11/16/party-divide-vaccination/?itid=lk_inline_manual_13 [<https://perma.cc/9FDL-UF9N>] (finding that unvaccinated Americans tended to be Republican by a three-to-one margin).

⁶ See Mark E. Wocjik, *Sincerely Held or Suddenly Held Religious Exemptions to Vaccination?*, HUM. RTS. (July 5, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/sincerely-held-or-suddenly-held/ [<https://perma.cc/9ZMQ-3F76>] (finding that only a few churches oppose vaccines on theological grounds, and even within these churches the opposition is not absolute). The Dutch Reformed Church, Christian Scientists, and certain churches that practice faith-healing all oppose the vaccine to some degree. *Id.*

⁷ See Lawrence O. Gostin, Opinion, *Vaccine Mandates Are Lawful, Effective and Based on Rock-Solid Science*, SCI. AM. (Aug. 5, 2021), <https://www.scientificamerican.com/article/vaccine-mandates-are-lawful-effective-and-based-on-rock-solid-science/> [<https://perma.cc/D9RG-FLGF>] (expressing the scientific consensus that vaccine mandates effectively increase rates of vaccination). Although the question of when to require religious accommodations has relevance for all Americans who hew to a religious faith, it has special relevance for members of minority religions, as American society has already evolved to accommodate some practices of majority religions. See Keith S. Blair, *Better Disa-*

In 2022, a man named Gerald Groff, an observer of the Sunday Sabbath, filed a religious discrimination lawsuit after being asked to work on the very day that his religion forbids.⁸ Similar to the vaccine mandate controversy, Groff's suit raises an important question: how far will the law go to compel employers to accept the religious obligations of their employees?⁹

bled Than Devout, 63 ARK. L. REV. 515, 554 (2010) (noting that employers have more difficulty accommodating the requests of employees who belong to minority religions). For example, the work calendar in the U.S. is based on the Christian religious calendar. See Bilal Zaheer, *Accommodating Minority Religions Under Title VII: How Muslims Make the Case for a New Interpretation of Section 701(j)*, 2007 U. ILL. L. REV. 497, 519 (noting that because of the Christian past of the United States, work calendars have developed to accommodate Christian religious holidays). As an example of an affected minority religion, only one-half of a percent of American adults belonged to the Seventh-Day Adventist Church in 2014. Michael Lipka, *A Closer Look at Seventh-Day Adventists in America*, PEW RSCH. CTR. (Nov. 3, 2015), <https://www.pewresearch.org/fact-tank/2015/11/03/a-closer-look-at-seventh-day-adventists-in-america/> [<https://perma.cc/LA9M-8NX3>]. In contrast, the largest Christian denomination in the United States—Catholicism—has almost 20% of Americans as members. David Masci & Gregory A. Smith, *7 Facts About American Catholics*, PEW RSCH. CTR. (Oct. 10, 2018), <https://www.pewresearch.org/fact-tank/2018/10/10/7-facts-about-american-catholics/> [<https://perma.cc/J55P-DFVR>]. Members of the Seventh-Day Adventist Church observe a policy of not working on the Sabbath, in contrast to most Christian denominations. See *What Adventists Believe About the Sabbath*, SEVENTH-DAY ADVENTIST CHURCH, <https://www.adventist.org/the-sabbath/> [<https://perma.cc/J2BT-XEHZ>] (requiring members of the Church to rest on the Sabbath and noting the importance of this belief to the Church, distinguishing it from mainline denominations). Although Sabbatarianism has a long history, in the U.S. it mainly comes from the descendants of English and Scottish Reformed churches who moved to America. *Sabbatarianism*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Sabbatarianism> [<https://perma.cc/HVL2-3V75>]. The Seventh-Day Adventist church, a large Sabbatarian group with a membership of over twenty-one million as of 2021, arose out of the period of religious revival in the United States known as the Second Great Awakening. See *Seventh-Day Adventist World Church Statistics 2021*, SEVENTH-DAY ADVENTIST CHURCH, <https://www.adventist.org/statistics/> [<https://perma.cc/8FYB-2BPQ>] (claiming a membership of 21,912,161); *A Historic Look at the Seventh-Day Adventist Church*, SEVENTH-DAY ADVENTIST CHURCH, <https://www.adventist.org/who-are-seventh-day-adventists/history-of-seventh-day-adventists/> [<https://perma.cc/9Z8C-Q9M2>] (noting the roots of the Church in the Second Great Awakening).

⁸ See *Groff v. DeJoy*, 35 F.4th 162 (3rd Cir. 2022), *rev'd*, 600 U.S. 447 (2023) (deciding Groff's lawsuit alleging religious discrimination, which includes the question of whether the accommodations offered to him were reasonable).

⁹ See *id.* at 162, 169 (presenting as a key issue of the case whether the accommodation offered to Groff was reasonable, which the court held it was not). The Constitution enshrines a respect for religious freedom in the Free Exercise Clause of the First Amendment along with a prohibition on government promotion of religion in the Establishment Clause of the First Amendment. See U.S. CONST. amend. I (forbidding laws “respecting an establishment of religion, or prohibiting the free exercise thereof”). Generally, these principles work in tandem, as preventing the government from promoting one religion ensures that others can practice their religion freely. See Blair, *supra* note 7, at 550 (stating that the intent behind the Establishment Clause was to protect religious freedom, though one could read a hostility to religion into its phrasing). When one person's religion requires them to take actions that affect others, however, these clauses can be in conflict. See *id.* at 548–49 (noting a paradox in American opinion about religion, in that Americans see religion as personally important but too predominant in the public sphere, and noting that this paradox shows the influence of the Free Exercise and Establishment Clauses). Employers must accommodate employees for other reasons than religion, such as disability, but there are no similar constitutional considerations for disability accommodations.

Although this case does not have the same tabloid appeal as Rade-macher's, it is only the latest addition to an ongoing circuit split which confronts how far an employer must accommodate its employees' religious beliefs.¹⁰ A majority of the circuits have decided that an employer must completely accommodate an employee's religious practices, unless doing so would force too high a burden on the employer.¹¹ A minority of the circuits, however, have allowed employers to force employees to compromise on their religious beliefs or accept adverse consequences at work.¹² The case of *Groff v. DeJoy* is only the latest addition to this ongoing and unsettled controversy.¹³ Although the Supreme Court took up *Groff*'s case, it did not resolve this circuit split.¹⁴

Part I of this Note looks at the federal courts' interpretation of the reasonable accommodation standard of Title VII, contrasting it to the reasonable accommodation standard in the Americans with Disabilities Act and the good-faith bargaining standard under American labor law, and sets out the background of *Groff v. DeJoy*.¹⁵ Part II elaborates on the circuit split regarding whether an accommodation must eliminate a conflict between religious practice and the requirements of an employer, describes criticisms of the pre-*Groff* Title VII reasonable accommodation standard, and then reviews the Supreme Court's decision in *Groff*.¹⁶ Finally, Part III of this Note proposes that the circuit split should be resolved by adopting the minority position, to be informed by the good-faith bargaining standard set out under the National Labor Relations Act.¹⁷

I. DETERMINING THE NATURE OF A REASONABLE ACCOMMODATION FOR RELIGIOUS DISCRIMINATION IN THE WORKPLACE UNDER TITLE VII

The Civil Rights Act of 1964, from its inception, included religion as a protected class.¹⁸ The statutory provision confirming that the law required em-

See id. at 549 (contrasting the Title VII accommodation requirements with the ADA accommodation regime, noting that disability is not a constitutionally-protected characteristic).

¹⁰ Compare *Groff*, 35 F.4th at 162, with *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 313 (4th Cir. 2008) (creating a split between the Third Circuit and the Fourth Circuit on whether a religious accommodation must eliminate the conflict posed by the employee's religion in the work environment).

¹¹ *See, e.g., Groff*, 35 F.4th at 169 (stating that an accommodation must eliminate the conflict arising from an employee's religious obligations and work obligations).

¹² *See, e.g., Firestone*, 515 F.3d at 313 (stating that an accommodation of an employee's religious beliefs does not need to eliminate the conflict arising from such religious beliefs and a work requirement).

¹³ *See Groff*, 35 F.4th at 170 (recounting the ongoing division between the circuits on this issue).

¹⁴ *See generally Groff v. DeJoy*, 600 U.S. 447 (2023) (containing no language as to the circuit split regarding the definition of a reasonable accommodation).

¹⁵ *See infra* notes 18–137 and accompanying text.

¹⁶ *See infra* notes 138–215 and accompanying text.

¹⁷ *See infra* notes 216–242 and accompanying text.

¹⁸ *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 255 (1964) (outlawing discrimination based on religion in employment, along with other protected characteristics).

employers to reasonably accommodate a religious practice was only added in 1972, however, and issues including the nature of a reasonable accommodation, which remains undefined, persist.¹⁹

This Part examines the development of the law surrounding the reasonable accommodation standard in Title VII religious discrimination jurisprudence.²⁰ Section A summarizes the state of the law of religious accommodations, from the passage of the Civil Rights Act to the current Supreme Court jurisprudence on the issue.²¹ Section B compares the current ADA standard on reasonable accommodations to that of the Title VII standard.²² Section C introduces, for another perspective on accommodations in the workplace, the law surrounding the process of collective bargaining.²³ Section D recounts the factual and procedural history of *Groff v. DeJoy*.²⁴

A. The History and Background of Reasonable Accommodations in Title VII of the Civil Rights Act of 1964 and the ADA

1. The History and Passage of the Civil Rights Act of 1964

The Civil Rights Act of 1964 was a landmark act passed by Congress with the aim of ending discrimination based on race, color, religion, or national origin in several areas, including public accommodations and public education.²⁵ Congress passed the Act in response to the Civil Rights Movement's challenge to ongoing racial discrimination in public life.²⁶ The Act created a private right of action for victims of racial and other forms of discrimination.²⁷

¹⁹ See SUBCOMM. ON LAB., 92D CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 712 (Comm. Print 1972) [hereinafter LEGISLATIVE HISTORY] (introducing an amendment to make clear that Title VII imposes a duty on employers to reasonably accommodate the religious practice of their employees); *Groff*, 35 F.4th at 170–71 (noting that there are differences between the circuits on how to interpret the statutory provision for a reasonable accommodation, including whether a duty to compromise on religion can be imposed on an employee).

²⁰ See *infra* notes 25–137 and accompanying text.

²¹ See *infra* notes 25–73 and accompanying text.

²² See *infra* notes 74–90 and accompanying text.

²³ See *infra* notes 91–113 and accompanying text.

²⁴ See *infra* notes 114–137 and accompanying text.

²⁵ See Civil Rights Act of 1964, Pub. L. No. 88-352, § 201, 78 Stat. 241, 243 (1964) (outlawing discrimination in public accommodations based on race, color, religion, or national origin); *id.* at 246 (outlawing discrimination based on the same characteristics in public education). Anti-discrimination provisions based on sex are found only in Title VII of the Act. See *id.* at 255 (prohibiting discrimination based on sex in the workplace). The provisions forbidding discrimination on the basis of sex in Title VII were added by amendment on the last day of deliberation on the Act in the House of Representatives, perhaps as a ploy to block passage of the bill by inserting an unpopular amendment. See GILLIAN THOMAS, BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN'S LIVES AT WORK, 1–2 (2016).

²⁶ See John F. Kennedy, President of the United States, Televised Address to the Nation on Civil Rights (Jun. 11, 1963), <https://www.jfklibrary.org/learn/about-jfk/historic-speeches/televised-address-to-the-nation-on-civil-rights> [<https://perma.cc/XZG7-R67G>] (proposing that the United States Con-

Title VII of the Act specifically addresses discrimination in employment.²⁸ The Act makes it illegal for most employers to terminate or discriminate against a person in regards to payment or other terms and conditions of employment, on the basis of that person's race, color, religion, sex, or national origin.²⁹ The Act also created the Equal Opportunity Employment Commission, a federal agency charged with investigating unlawful employment practices and creating regulations for workplace behavior.³⁰

2. The Issue of Religious Accommodations and the 1972 Amendments to the Act

One issue left unresolved in the text of the Act was how to handle situations where an employee's religious beliefs conflict with work requirements.³¹

gress pass an anti-discrimination law in response to the discrimination against Americans of color in public accommodations and voting); 109 CONG. REC. 11174 (1963) (asking, in a speech by President Kennedy to Congress, to pass a Civil Rights Act in response to "the growing moral crisis in American race relations"). President Kennedy proposed the Civil Rights Act in 1963, informing the country through a televised address that he intended to pass such a bill. RAYMOND F. GREGORY, *THE CIVIL RIGHTS ACT AND THE BATTLE TO END WORKPLACE DISCRIMINATION* 7 (2014). The morning prior to Kennedy's speech, George Wallace, Governor of Alabama, had attempted to block two Black students from entering the University of Alabama. Karsonya Wise Whitehead, *AFTERWORD: Reframing the Historical Narrative: Using the Lens of the 1964 Civil Rights Act to Examine the Civil Rights Movement*, 76 BLACK HIST. BULL. 31, 31 (Summer/Fall 2013). Wallace only allowed the students to enter because Kennedy ordered the National Guard to mandate desegregation. *Id.*

²⁷ See e.g., Civil Rights Act of 1964 § 204, 78 Stat. at 244 (establishing a civil cause of action for injunctive relief to prevent discrimination in public accommodations).

²⁸ See *id.* § 703, 78 Stat. at 255 (making discrimination in the workplace unlawful).

²⁹ *Id.* The act also makes segregation in the workplace unlawful. *Id.* Similar provisions of the Act also apply to employment agencies and labor organizations. *Id.* An employer, as defined in the Act of 1964, included only employers with over twenty-five employees; that number is now fifteen. *Id.* § 701(b), 78 Stat. at 253; 42 U.S.C. § 2000e(b).

³⁰ See Civil Rights Act of 1964, § 705(a), 78 Stat. at 258 (creating the EEOC); *id.* § 706, 78 Stat. at 259 (empowering the EEOC to investigate illegal practices in employment); *id.* § 713, 78 Stat. at 265 (granting the EEOC authority to enact regulations to give effect to the provisions of Title VII). Congress has amended the Act several times, expanding the role of the EEOC and clarifying the requisite intent required to find an unlawful employment practice, among other changes. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, 105 (1972) (enabling the EEOC to file a civil lawsuit for violations of the Act); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1074 (1991) (clarifying the burden that plaintiff must prove in cases of disparate impact).

³¹ See 29 C.F.R. § 1605.1 (1968) (clarifying that Title VII "includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business"); *Dewey v. Reynolds Metal Co.*, 300 F. Supp. 709, 712 (W.D. Mich. 1969), *rev'd*, 429 F.2d 324 (6th Cir. 1970); *aff'd by an equally divided court*, 402 U.S. 689 (1971) (noting that there was no textual exemption that covered the issue of religious accommodations for conflicting policies). There are three general sorts of cases that have arisen regarding this issue: cases where an employee is asked to work on a holy day, cases where an employee's religious dress violates a policy, and cases where an employee's religion requires grooming practices against employer policy. Blair, *supra* note 7, at 517.

In 1967, the EEOC promulgated a regulation that required employers to provide accommodations to meet the religious requirements of employees, so long as these requirements did not impose an undue hardship on the employer.³²

In 1969, in *Dewey v. Reynolds Metal Co.*, the U.S. District Court for the Western District of Michigan addressed this question in the case of an employee discharged because he would not work on Sundays on account of his religious beliefs, contrary to company policy.³³ The court held that this was a violation of Title VII, applying the same test as the EEOC regulation.³⁴ The Sixth Circuit Court of Appeals disagreed, however, and found that this was not discrimination because the policy requiring mandatory overtime on Sundays was equally applied.³⁵ The judgment of the Sixth Circuit was upheld by an evenly divided Supreme Court in a per curiam opinion.³⁶

As part of the 1972 amendments to the Act, Congress added an amendment that codified similar language to the EEOC regulation.³⁷ Senator Jennings Randolph proposed the amendment on the floor of the Senate and the Senate adopted it.³⁸ In introducing the amendment, Senator Randolph stated that he was doing so to ensure that workers would be free from religious dis-

³² *Dewey v. Reynolds Metal Co.*, 429 F.2d. 324, 329 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971). An example of undue hardship, as suggested in the regulation, would be if no other employee who had similar qualifications could fill in for an employee who could not work a certain day. *Dewey*, 300 F. Supp. at 712.

³³ *Dewey*, 300 F. Supp. at 710–11. The plaintiff in this case was a die repairman at an aluminum plant. *Id.* at 710. Because of the volume of business at the plant, the work schedule was increased to a “six plus” day work schedule, which sometimes required work on Sundays. *Id.* There was a collective bargaining agreement that applied to the employee in this case which allowed for mandatory overtime to be scheduled on a Sunday. *Dewey v. Reynolds Metal Co.*, 291 F. Supp. 786, 787 (W.D. Mich. 1968). The employee first grieved the discharge according to the collective bargaining agreement and the arbitrator found against him. *Id.* The defendant moved to dismiss, alleging that the plaintiff was bound by his choice of forum, but the court allowed the case to proceed, deciding that the issues presented in this case were different than the issues in the arbitration hearing. *Id.* at 788–89.

³⁴ *Dewey*, 300 F. Supp. at 714–15.

³⁵ *Dewey*, 429 F.2d. at 330 (holding that the employee’s discharge was not because of religious discrimination, but because he would not follow a uniformly applied policy). The court declined to apply the EEOC regulation because it was promulgated after the employee’s discharge, but stated that even if it were in effect, offering the employee the chance to find his own replacements was a reasonable accommodation. *Id.* at 331.

³⁶ *Dewey v. Reynolds Metal Co.*, 402 U.S. 689 (1971).

³⁷ See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, 103 (1972) (mandating that religious belief must be accommodated unless it cannot be reasonably accommodated without undue hardship). This amendment was proposed by Jennings Randolph, Senator of West Virginia, a member of a church (Seventh Day Baptist) which requires rigid adherence to the Sabbath. See LEGISLATIVE HISTORY, *supra* note 19, at 711, 712 (statement by Sen. Randolph introducing the bill and identifying himself with the Seventh Day Baptists, mentioning their beliefs about the Sabbath).

³⁸ See LEGISLATIVE HISTORY, *supra* note 19, at 711, 777 (presenting the statement from Senator Randolph introducing the amendment and the adoption of the amendment by the Senate).

crimination in their employment.³⁹ He then noted that there are multiple religious bodies which did not have many members, but had strong beliefs against working on the Sabbath, including sects of Judaism and Christianity.⁴⁰ Randolph explained that employers would refuse to hire or terminate employees who profess these religions, because their religious obligations often put them in conflict with the requirements of their job, which caused membership of such groups to decline.⁴¹ After a brief discussion, the amendment was put to a vote and passed unanimously.⁴²

In discussing the amendment, several points were clarified, including that the amendment would apply to the Amish or other religious groups that profess beliefs different from the majority in American society.⁴³ The Senate then discussed how this amendment would affect industries where work on a certain day is mandatory; Senator Randolph stated his intention that such cases would fall under the “undue hardship” provision in the amendment.⁴⁴ The question of whether this amendment would violate the First Amendment was briefly raised, but no one challenged Randolph’s response that his amendment promoted the purposes of the First Amendment.⁴⁵

³⁹ See *id.* at 712 (stating that the Senator’s design in presenting this proposal was to enshrine protections against religious discrimination in employment). Senator Randolph appealed to the fundamental right of religious freedom that he claimed had existed in the country since the days of its founding as one of the justifications for his amendment. See *id.* (noting that since the time of the Founders, religious freedom has been considered a fundamental right of citizens of the United States).

⁴⁰ See *id.* (noting that there were several religious sects without many members, but with a “steadfast conviction” that the Sabbath be kept holy and free of work). At the time, Senator Randolph claimed that there were 750,000 Orthodox Jews and 425,000 Seventh-Day Adventists in the work force who held some sort of Sabbatarian beliefs. *Id.* This included the senator’s own religion, Seventh Day Baptist. *Id.*; see *Sabbath*, SEVENTH DAY BAPTIST, <https://www.seventhdaybaptist.org/sabbath/> [<https://perma.cc/8QRJ-KP9A>] (stating that it is the position of the Seventh Day Baptist faith that the Saturday Sabbath be kept).

⁴¹ See LEGISLATIVE HISTORY, *supra* note 19, at 712 (noting that employers will refuse to employ members of faiths that require rigid adherence to holy days during which they cannot work). Senator Randolph relied on the testimony of his own pastor that certain religious faiths were having difficulty attracting young people because of the conflicts between the requirements of these faiths and the mandates of employers. *Id.* at 713.

⁴² *Id.* at 777.

⁴³ See *id.* at 713 (stating that the amendment will apply to a “religious sect which has a different method of conducting their lives” than the average American).

⁴⁴ See *id.* at 714 (questioning whether a business that hires workers to work only on Saturday and Sunday can justifiably refuse to hire a person whose faith prevents them from working on one of those days under this amendment). The Senate also considered another hypothetical, whether an employee who works fifteen days on and fifteen days off would have to change their schedule to a standard five- or six-day work week because of this amendment. *Id.* at 713. It is not particularly clear from the Congressional Record whether this person is meant to be a religious employee or another employee in the unit. See *id.* (referring only to “a young man I just talked to”). Senator Randolph’s opinion was that under this sort of circumstances, there would be no undue hardship. *Id.* at 714.

⁴⁵ See *id.* at 715 (providing a statement of Senator Williams that this Act does not violate the First Amendment and instead actually promotes its principles, followed by Senator Randolph’s agreement).

As amended, the Act defined “religion” as encompassing all of religious practice *unless* an employer can show that she “is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”⁴⁶ Title VII does not define either “reasonable accommodation” or “undue hardship,” which has left room for the courts to gloss both.⁴⁷

3. Hardison to Philbrook: The Supreme Court Interprets the 1972 Amendments

When it came time for courts to interpret the religious accommodation and undue hardship provisions of both the EEOC regulation and the 1972 amendments, there was little consensus on how they should do so.⁴⁸ Additionally, in *Dewey* it had been suggested that the reasonable accommodation and undue hardship provisions may violate the Establishment Clause of the First Amendment.⁴⁹ In 1977, the Supreme Court first decided to address these issues in *Trans World Airlines, Inc. v. Hardison*.⁵⁰

In *Hardison*, the employer, TWA, had a seniority-based system for employees to select shifts, leaving low-seniority employees with only those remaining shifts.⁵¹ Hardison sought and was reassigned to a position with low seniority; he held religious beliefs prohibiting him from working on Saturday,

⁴⁶ 42 U.S.C. § 2000e(j).

⁴⁷ See Laurel A. Bedig, Comment, *The Supreme Court Narrows an Employer’s Duty to Accommodate an Employee’s Religious Practices Under Title VII*, 53 BROOK. L. REV. 245, 246 (1987) (noting that the “reasonable accommodation” and “undue hardship” provisos were not given a textual definition in the statute); James M. Hecker, *Accommodation of an Employee’s Religious Practices Under Title VII*, 1976 U. ILL. L.F. 867, 869 (noting that the language of the statute is broad and does not give much indication to the judiciary of how they are to rule).

⁴⁸ Compare *Williams v. S. Union Gas Co.*, 529 F.2d 483, 485–86 (10th Cir. 1976) (providing that employer acted reasonably by requiring an employee to work on one Saturday against his religion when an emergency situation arose that would cause harm to the public), with *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 519 (6th Cir. 1975) (holding that employer did not satisfy its burden to provide a reasonable accommodation by offering an employee a lower paying job that would not conflict with his Sabbath).

⁴⁹ *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 334–35 (6th Cir. 1970), *aff’d by an equally divided court* 402 U.S. 689 (1971). The concern of the *Dewey* court was that forcing an employer to accede to the religious beliefs of his employees was unconstitutional support for that religion. *Id.* The court was worried that in accommodating some religious beliefs, they would be promoting them. *Id.* The court saw that as a violation of the Establishment Clause, which provides that the government cannot favor any religion. *Id.*

⁵⁰ 432 U.S. 63 (1977); see Kenneth L. Karst, *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 267 (1977) (noting that the *Hardison* case was the Court’s first attempt to address the nature of the accommodation standard).

⁵¹ *Hardison*, 429 U.S. at 67. It is not clear from the case why the employee sought a shift with low seniority or whether he was aware that he was giving up his seniority rights. See *id.* at 68 (mentioning only that plaintiff bid on a shift in a building with a different seniority system and was accepted).

but could not bid for shifts that would allow him not to work on that day.⁵² TWA allowed the employee's union to negotiate for different work assignments; however, the union refused.⁵³ TWA rejected a proposal that would allow Hardison to work a four-day work week, because he was needed for critical functions in the operation of the business.⁵⁴ Hardison then refused to work Saturdays and was discharged; he sued his employer under Title VII.⁵⁵

The Supreme Court held that TWA made reasonable offers of accommodations when it allowed the union steward to find someone to take plaintiff's shifts, and thus did not violate Title VII.⁵⁶ The Court found that the duty to provide for reasonable accommodations did not require an employer to violate a valid collective bargaining agreement containing a seniority agreement.⁵⁷ It also found that certain proposed accommodations within the seniority system burdened TWA with an undue hardship, as any hardship more than *de minimis* was undue.⁵⁸ The Court did not discuss whether the religious accommodations

⁵² *Id.* at 67–68. The plaintiff was a member of the Worldwide Church of God, a Sabbatarian church. *Id.* at 67. He only began to look into the beliefs of this church after he was hired. *Id.* The issue evidently was not raised as to whether the plaintiff's beliefs were genuine. *See id.* (no discussion of sincerity of religious belief).

⁵³ *Id.* at 68. The union did not want to negotiate for different work assignments for Hardison, the employee, because it did not want to abrogate the seniority provisions included in the collective bargaining agreement. *Id.* The court noted that the union had a "Relief Committee" to deal with emergencies that may befall members. *Id.* at n.3. This committee had arranged for agreements to adjust schedules temporarily, but had not allowed for a permanent arrangement in this manner. *Id.*

⁵⁴ *Id.* at 68. The department in which Hardison worked, the "Stores Department," operated at all hours of the day and all days of the year. *Id.* at 66. If an employee in this department was not present to perform the functions of their job, a supervisor or another employee from another department would have to do so even at the expense of other operations. *Id.* at 66–67. In Hardison's case, he was the only person available to perform his job on weekends. *Id.* at 68. Hence, the position could not be left vacant; if Hardison did not work, the only solution was to move another employee to his position, thus letting another facet of the business suffer, or require an employee who had Saturdays off to work that day, which would require the company to pay high wages. *Id.* at 68–69. This case was similar in facts to *Williams*; in both cases the employee's workplace operated on a 24/7 basis and the employee's attendance was critical. *See* 529 F.2d. at 485 (stating that the plaintiff in *Williams* was told all employees had to be available, as a matter of company policy, at all hours).

⁵⁵ *Hardison*, 429 U.S. at 63. The employee also sued the union under Title VII; the charge against the union was that it had religiously discriminated against him by failing to represent him in his grievance. *Id.* at 69. The district court held for the company, holding that it satisfied its religious accommodation requirements. *Id.* at 70. The court dismissed the company's contention that imposing a duty to make religious accommodations was a violation of the Establishment Clause. *Id.*

⁵⁶ *Id.* at 77.

⁵⁷ *Id.* at 79. The Court was concerned that if it required an employer to deviate from a collective bargaining agreement for the purposes of a religious accommodation, then it would deprive employees who were not Sabbatarians of their bargained-for rights on religious grounds, essentially causing the same discrimination that the Court would be attempting to avert. *Id.* at 81. The Court also emphasized that seniority agreements were explicitly mentioned in Title VII as not being per se violative. *Id.* at 81–82; *see also* 42 U.S.C. § 2000e-2(h) (clarifying that bona fide seniority systems are not unlawful).

⁵⁸ *Hardison*, 429 U.S. at 84. The proposals mentioned were to replace Hardison on a Saturday with another employee on site, or else to pay another employee higher wages to come in on a Saturday to work. *Id.* *See De Minimis*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "de minimis" as

provisions presented a constitutional issue, potentially assuming their constitutionality.⁵⁹

This decision was controversial, and there were attempts to overturn it legislatively.⁶⁰ The EEOC intervened in 1980 by issuing new guidelines, which incorporated the holding in *Hardison* but stated that an employer had to show in fact that each possible accommodation would result in an undue burden and that the potential that other employees would request accommodations was not an undue burden.⁶¹ It further required that if two accommodations would not unduly burden the employer, the employer should choose the accommodation most favorable to the employee.⁶² The result was that more accommodations would be required than under the *Hardison* scheme.⁶³ It was in this context that the Supreme Court took another look at the problem of religious accommodations in the 1986 case of *Ansonia Board of Education v. Philbrook*.⁶⁴

Philbrook dealt with an employee whose religion required him to miss around six days of work a year to observe holy days.⁶⁵ The employee's collective bargaining agreement granted him three days of leave which he could use for religious observance; the contract limited the use of further personal days for this purpose.⁶⁶ The employee proposed two alternatives: first, that he be al-

(1) trifling or negligible; and (2) relating to something "so insignificant that a court may overlook it in deciding an issue or case").

⁵⁹ See *Accommodation of Employees' Religious Beliefs*, 91 HARV. L. REV. 265, 270–71 (1977) (noting a lack of First Amendment discussion in the case).

⁶⁰ See Blair, *supra* note 7, at 525–26 (noting that members of Congress attempted to modify the "undue hardship" language in Title VII to read "severe material hardship"). Writing in 2007, one commentator noted that the Workplace Religious Freedom Act, which contained such language, had been introduced in every session of Congress since 1996 without success. See Zaheer, *supra* note 7, at 509 (pointing out that the WRFA had been introduced with regularity since 1996 in every session of Congress).

⁶¹ 29 C.F.R. § 1605.2(c)(1) (2023).

⁶² *Id.* § 1605(2)(c)(2)(ii).

⁶³ See Blair, *supra* note 7, at 526 (stating that the 1980 EEOC guidelines mandated a broader regime of accommodations than *Hardison*).

⁶⁴ 479 U.S. 60, 60 (1986).

⁶⁵ *Id.* at 62–63. The employee's church, the Worldwide Church of God, was the same church that the employee in *Hardison* belonged to. *Id.* at 62; *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 67 (1977). This church required the employee not to work on the following holy days: Passover, the Days of Unleavened Bread, the Days of Pentecost, the Feast of Trumpets, the Days of Atonement, and the Feast of Tabernacles. *Philbrook v. Ansonia Bd. of Educ.*, No. N 77-489, 1984 WL 49016, at *1 (D. Conn. May 18, 1984), *rev'd*, 757 F.2d 476 (2nd Cir. 1985), *aff'd*, *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986). These are Jewish holy days; the founder of the Worldwide Church of God believed in British Israelism, which is a belief that the Ten Lost Tribes of Israel are the ancestors of those deemed as having Anglo-Saxon heritage. J. Gordon Melton, *Worldwide Church of God*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Worldwide-Church-of-God> [<https://perma.cc/225E-DZ8E>]. As the Worldwide Church of God observed these days, they were not fixed from year to year, but would be set each year according to the Hebrew calendar. *Philbrook*, 1984 WL 49016, at *2.

⁶⁶ *Philbrook*, 479 U.S. at 64. In total, the contract granted eighteen days of annual leave. *Philbrook*, 1984 WL 49016, at *2. The contract listed limits for certain reasons for taking leave within those eighteen days: for example, only one day could be taken for a graduation or a wedding, whereas

lowed to use three more personal days to observe his holy days; or, if that could not be offered, that he could hire a substitute and be paid for those days.⁶⁷

The Court held first that an employer was not required to choose any particular reasonable accommodation for an employee's religious beliefs, so long as the beliefs were accommodated.⁶⁸ The Court then turned to the question of whether the school district's policy requiring the employee to take unpaid leave beyond his three paid days of leave for his holy days was reasonable.⁶⁹ The Court held that generally, unpaid leave is a reasonable accommodation for conflicting holy days.⁷⁰ The Court's reasoning was that unpaid leave "eliminate[d] the conflict" that existed between the mandates of the job and the religious beliefs of the employee, by empowering the employee to observe his religion without endangering his job.⁷¹

In a partial concurrence, Justice Marshall disagreed with the conclusion that unpaid leave would eliminate the employee's conflict between his work and religion.⁷² Justice Marshall would hold instead that if an employer's proposal does not fully resolve the conflict, the employer must consider further reasonable proposals from the employee.⁷³

B. A First Contrasting Perspective: Reasonable Accommodations in the Americans with Disabilities Act

Congress passed the Americans with Disabilities Act of 1990 (ADA) to forbid discrimination against Americans because of their disabilities, acknowl-

three days were allotted for personal business or religious observance. *Id.* The contract also required that the reason for leave be listed along with each application for leave. *Id.* at *3.

⁶⁷ *Philbrook*, 479 U.S. at 64–65. The employer would not agree to these alternatives and the employee sued. *Id.* at 65.

⁶⁸ *Id.* at 68. *But see* 29 C.F.R. § 1605.2(c)(2)(ii) (requiring, in EEOC regulations, employers to choose the accommodation with the most advantages to the employee).

⁶⁹ *Philbrook*, 479 U.S. at 70.

⁷⁰ *Id.* The Court ultimately remanded to determine if other employees were allowed to exceed the limitations on their personal leave for non-religious reasons; if they were, then that would be a discriminatory policy. *Id.* at 71.

⁷¹ *Id.* at 70; *see also* *Nashville Gas Co. v. Satty*, 434 U.S. 136, 144–45 (1977) (holding that a Title VII discrimination claim brought under Section 703(2) of the Act requires conduct that affects the employee's job status). In *Philbrook*, however, the Court found that there was not a sufficient factual record to determine if unpaid leave was reasonable in this instance. *See* 479 U.S. at 70 (reserving judgment because of a lack of development of the factual record as to the interpretation of the collective bargaining agreement). The Court stated that unpaid leave, while generally reasonable, would not be so if paid leave was provided for all non-religious requirements. *Id.* at 70–71. At that point, a policy of unpaid religious leave would constitute religious discrimination and be the "antithesis of reasonableness." *Id.* at 71. The Court stated that whether the unpaid leave in this case was reasonable was a factual determination, based on the past administration of the unpaid leave provision in the collective bargaining agreement. *Id.*

⁷² *See Philbrook*, 479 U.S. at 72 (Marshall, J., concurring) (arguing that whether the unpaid leave policy in the case was discriminatory, a conflict still existed).

⁷³ *Id.* at 73. Justice Marshall found support for his argument in the EEOC Guidelines of 1980. *Id.*

edging the historic discrimination faced by these individuals.⁷⁴ One of the areas where the ADA forbids discrimination against people with disabilities is in employment.⁷⁵

One form of discrimination against people with disabilities, forbidden in the employment context, is a failure to reasonably accommodate the limitations of an employee or job applicant with a disability who can perform their job with such an accommodation, unless doing so would cause an undue hardship.⁷⁶ Although the language of this statute sounds similar to the Title VII religious accommodation framework, the courts have interpreted the statutes differently.⁷⁷

The ADA defines “undue hardship” within the text of the Act as a cost imposing “significant difficulty or expense.”⁷⁸ The ADA lists several factors for analyzing if an accommodation presents an undue hardship, including the accommodation’s nature and cost, the business’s resources, the size of the business, and the nature of its operations.⁷⁹ The ADA also includes examples of several practices which may constitute a reasonable accommodation, including making job facilities more accessible, restructuring a job, or modifying work schedules.⁸⁰

In 2002, in *US Airways, Inc. v. Barnett*, the Supreme Court was presented with the question of whether an accommodation involving the transfer of work that interfered with a seniority system was a reasonable accommodation.⁸¹ The Court held that an accommodation denying requests of employees with higher seniority so that an employee with lower seniority could keep a job was gener-

⁷⁴ See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, 327 (1990) (enacting an act “to establish a clear and comprehensive prohibition of discrimination on the basis of disability”). The ADA, as currently enacted, defines disability as “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(1). This definition is intended to be interpreted as broadly as possible. See *id.* § 12102(4)(A) (mandating construction of the definition of disability to favor broad coverage).

⁷⁵ See *id.* § 12112(a) (forbidding discrimination on the basis of disability in a wide range of employment contexts).

⁷⁶ See *id.* § 12112(b)(5) (defining discrimination because of disability as including failure to accommodate an individual who would otherwise be qualified).

⁷⁷ See Blair, *supra* note 7, at 535 (noting that the understanding of reasonable accommodations and undue hardship is “vastly different” in ADA and Title VII jurisprudence).

⁷⁸ 42 U.S.C. § 12111(10)(A). The statute notes that the “difficulty or expense” is to be determined by considering the factors laid out in 10(B) of the statute. *Id.*

⁷⁹ See *id.* § 12111(10)(B) (listing “the nature and cost of the accommodation”; “the overall financial resources of the facility”; “the overall size of the business”; and “the type of operation or operations of the covered entity” as among the factors to consider when determining if an undue hardship exists).

⁸⁰ *Id.* § 12111(9).

⁸¹ 535 U.S. 391, 393–94 (2002). This case has been described as the seminal reasonable accommodation for disabilities case that the Supreme Court has heard. Blair, *supra* note 7, at 532.

ally not reasonable.⁸² In doing so, the Court looked at whether the accommodation would be reasonable in the ordinary run of cases.⁸³ The Court noted, however, that a reasonable accommodation does not need to be neutral in its application.⁸⁴ Instead, by its nature a reasonable accommodation of a person with a disability will almost always be preferential.⁸⁵

In 2009, in *Tobin v. Liberty Mutual Insurance Co.*, the U.S. Court of Appeals for the First Circuit showed how this standard could be applied.⁸⁶ This case involved a plaintiff who worked as a salesman and suffered from bipolar disorder, who had requested two accommodations to perform his job: providing him with more staff for support and transferring him to a certain type of account.⁸⁷ The defendant employer argued that transferring the plaintiff to this

⁸² *Barnett*, 535 U.S. at 403. An employee who suffered a back injury at work and thus asked to be transferred to a mailroom position brought this case. *Id.* at 394. The employer had a seniority system that allowed senior employees to bid for jobs. *Id.* When two senior employees bid for the mailroom job, the plaintiff asked to stay on as an accommodation for his disability and his request was denied. *Id.* This caused the plaintiff to lose his job. *Id.*

⁸³ *See id.* at 402–03 (noting that the weight of authority suggests that the test for reasonable accommodation is whether the accommodation was reasonable on its face); *see also* *Reed v. LaPage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001) (noting that plaintiff in a reasonable accommodation case must make a facial showing of feasibility).

⁸⁴ *See Barnett*, 535 U.S. at 397 (noting that neutral workplace rules often do not accommodate people with disabilities, and Congress made no indication that a neutral workplace rule should be exempt from the general rules requiring accommodations). The Court emphasized, however, that an accommodation that runs against a seniority system would be unreasonable in most cases. *See id.* at 403 (stating that ordinarily, an assignment running against a seniority system would not prevail). The Court noted the support in caselaw for the preeminence of seniority in labor relations. *See id.* (describing run of cases in which seniority was held to prevail over accommodation requests). The Court also emphasized that to impose a court-ordered doctrine of accommodation in place of a uniform seniority system would undermine the benefits of such systems, including job security and due process for employees. *See id.* at 404, 405 (describing the benefits of a usual seniority scheme, and finding no intent to displace these schemes in the ADA). Nonetheless, the Court noted that exceptions may be found if a seniority system was not uniformly enforced, for example. *See id.* at 405 (noting that an employer may be required to accommodate if they frequently make exceptions to the system).

⁸⁵ *See id.* at 397 (holding that any accommodation requires an employer to treat a worker in a different manner to accomplish the goals of the ADA).

⁸⁶ 553 F.3d 121, 125, 137 (1st Cir. 2009).

⁸⁷ *Id.* at 127. Bipolar disorder is a disorder of the brain which causes intense states of emotion, either manic or depressive. *What Are Bipolar Disorders?*, AM. PSYCHIATRIC ASS'N, <https://www.psychiatry.org/patients-families/bipolar-disorders/what-are-bipolar-disorders> [<https://perma.cc/Y3KD-Z3YT>]. What differentiates these mood changes from those experienced by a person without bipolar disorder is that a person with bipolar disorder can experience these heightened emotions for days, which can result in drastic changes in behavior. *Id.* In this case, the plaintiff's doctor diagnosed him as having bipolar disorder and stated that he "struggled to cope with work," which worsened the problem. *Tobin v. Liberty Mut. Ins. Co.*, No. Civ.A.01-11979, 2004 WL 1922133, at *3 (D. Mass. Aug. 30, 2004), *aff'd in part and vacated in part*, 433 F.3d 100 (1st Cir. 2005). The plaintiff was not able to meet the standards of performance expected by his company for a salesperson. *See id.* at *4 (noting that employee's supervisor warned him that his sales performance was lacking). The account type that the employee requested he be transferred to, Mass Marketing, was a highly sought after type of account because of the ease of accessing clients. *Id.*

account was unreasonable, in part because of the plaintiff's prior poor performance.⁸⁸ The First Circuit disagreed, emphasizing that an accommodation where an employee does not meet the standard qualifications for that accommodation is not unreasonable.⁸⁹ The court also found no undue hardship because the company could have replaced the plaintiff on the accounts if he did not satisfactorily perform his job without harming the defendant's relationship with the client.⁹⁰

C. A Second Contrasting Perspective: The Duty to Bargain in Good Faith Under the National Labor Relations Act

A further act that regulates the American workplace is the National Labor Relations Act (NLRA), which was passed by Congress in 1935.⁹¹ The NLRA sets out the United States' national labor policy, which is to encourage collective bargaining between employees and employers.⁹² Under the NLRA, employees have the liberty to choose their representatives and collectively bar-

⁸⁸ See *Tobin*, 553 F.3d at 137 (noting that Liberty Mutual argued that the plaintiff's request to be transferred to Mass Marketing accounts was unreasonable because of his poor performance, because these accounts were assigned according to merit).

⁸⁹ See *id.* (noting that such a requirement would "turn the ADA's accommodation requirement on its head").

⁹⁰ See *id.* at 140, 141 (noting that representatives assigned to an account had been replaced before if the representative did not work well with the client, and there had been no loss of business).

⁹¹ See 29 U.S.C. § 151 (setting out United States policy regarding collective bargaining). The National Labor Relations Act is also known as the Wagner Act, for Senator Robert F. Wagner, who introduced the bill. See Robert F. Wagner, *The Philosophy of the Wagner Act of 1935*, 32 ST. JOHN'S L. REV. 1, 5 (1957) (explaining that the NLRA is known by the name of the Wagner Act, and describing Senator Wagner's role in authoring the law). Senator Wagner based his act on the Railway Labor Act of 1926 and the National Industrial Recovery Act, part of which he had authored, and which was struck down by the Supreme Court. See *id.* at 4 (describing the sources of Senator Wagner's labor program). The Wagner Act was itself challenged, but was upheld in the Supreme Court on a five-to-four vote in which Justice Owen Roberts sided with the liberal wing of the Court. See Stephen O. Kline, *Revisiting FDR's Court Packing Plan: Are the Current Attacks on Judicial Independence So Bad?*, 30 MCGEORGE L. REV. 863, 939 (1999) (describing the Court's affirmance of the Wagner Act). Justice Roberts, who was appointed by President Hoover, was a swing vote on the Court. *Id.* at 872. His decision to side with the liberal justices on the validity of the NLRA and other New Deal reforms has gone down in history as the "switch in time that saved the nine," as President Roosevelt had been considering court-packing reforms which were forestalled by the court's shift toward a more pro-New Deal stance. See *id.* at 863, 940–41 (describing the "switch in time" and its effect on FDR's court-packing plan).

⁹² See 29 U.S.C. § 151 (declaring that "encouraging the practice and procedure of collective bargaining" is to be American policy). The Wagner Act was explicitly supportive of unions and the process of collective bargaining, which was a shift from the federal government's previous stance of neutrality. David Weinstein, *Reforming the National Labor Relations Act: A Cautionary Note*, 6 HOFSTRA LAB. L.J. 219, 219–20 (1989). In response to the perceived imbalance in favor of unions manifested in the Wagner Act, Congress enacted the Labor Management Relations Act of 1947, also known as the Taft-Hartley Act, which made the Act more employer-friendly. See *id.* at 220 (describing the Taft-Hartley Act as "purport[ing] to restore a balance between the rights of employers and unions to organize and the rights of employers to resist").

gain.⁹³ Employers have a duty to bargain with such representatives; for an employer to decline to collectively bargain is an unfair labor practice.⁹⁴

For an employer to collectively bargain, she must meet with the employees' representative at times which are reasonable and "confer in good faith with respect to wages, hours, and other terms and conditions of employment"⁹⁵ Thus there are two duties incumbent on an employer: First, to confer, and second, to do so in good faith.⁹⁶

"Good faith" does not have a clear definition in the caselaw.⁹⁷ The statute, however, does not require bargaining parties "to agree to a proposal or require the making of a concession."⁹⁸ Thus, the National Labor Relations Board does not assess collective bargaining agreements as to their substantive terms, but examines the parties' intent to discuss openly, with a mind toward agreement.⁹⁹

The Board engages in a totality of the circumstances analysis when reviewing parties' behavior, looking at the actions of parties when bargaining

⁹³ 29 U.S.C. § 157.

⁹⁴ *Id.* § 158(a)(5). The National Labor Relations Board is granted the authority to forestall unfair labor practices. *See id.* § 160(a). The Board may issue a complaint to a person and hold a hearing on unfair labor practice charges. *See id.* § 160(b). One commentator noted that employers have been attempting to avoid collective bargaining since the advent of the Wagner Act. Joseph A. Seiner, *Workplace Power*, 65 B.C. L. REV. 55, 91 (2024).

⁹⁵ 29 U.S.C. § 158(d). "[W]ages, hours, and other terms and conditions of employment" have been held to be the mandatory subjects of bargaining. *See NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) (limiting the duty to bargain to the enumerated subjects in the statute) (quoting 29 U.S.C. § 158(d)). As to these subjects, one party may go to impasse without violating their duty to bargain. *See id.* (stating that neither party must give in as to mandatory subjects of bargaining). It is a violation, however, to refuse to yield as to subjects that are permissive, or not mandatory, as doing so is refusing to bargain as to subjects that are mandatory. *Id.*

⁹⁶ *See* 29 U.S.C. § 158(d) (setting out duty to bargain and good faith requirement); Marc Mandelman & Kevin Manara, *Staying Above the Surface—Surface Bargaining Claims Under the National Labor Relations Act*, 24 HOFSTRA LAB. & EMP. L.J. 261, 262 (2007) (describing the duty to bargain and good faith as two separate constituent parts of collective bargaining).

⁹⁷ *See* Mandelman & Manara, *supra* note 96, at 263 ("There is no single established definition of good faith in the context of labor relations."); *see also Good Faith*, BLACK'S LAW DICTIONARY *supra* note 58 (defining "good faith" as "[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage").

⁹⁸ 29 U.S.C. § 158(d).

⁹⁹ *See NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952) (describing the limitations on the Board's role in reviewing collective bargaining agreements for good faith); *A-1 King-Sized Sandwiches, Inc.*, 265 N.L.R.B. 850, 858 (1982), *enforced*, 732 F.2d 872 (11th Cir. 1984) (describing the burden on the parties to negotiate with good-faith intent); *see also* Mandelman & Manara, *supra* note 96, at 266 ("[T]he Board strives to avoid making subjective judgments concerning the substance of proposals—whether they are acceptable or unacceptable—when determining a party's intent from the aggregate of its conduct."). The Supreme Court noted that in passing the Taft-Hartley amendments, Congress was concerned that the Board was overstepping its role by determining which concessions it was proper for employers to make. *Am. Nat'l Ins. Co.*, 343 U.S. at 404.

and otherwise.¹⁰⁰ Some conduct is per se bargaining in bad faith.¹⁰¹ Many cases, however, turn on the distinction between hard bargaining, which is permissible, and surface bargaining, which is not, a distinction which is not outwardly apparent from the conduct of the parties.¹⁰²

In both cases, the parties bargain and fail to come to agreement; the question is whether the employer was legitimately attempting to come to terms with the union, or whether bargaining was only a ruse.¹⁰³ Factors which may lead the Board to conclude that an employer was engaging in surface bargaining include “delaying tactics, unreasonable bargaining demands . . . failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meeting[s].”¹⁰⁴

For example, in 1997, in *ConAgra, Inc. v. NLRB*, a company proposed cutting wages substantially in bargaining.¹⁰⁵ The union asked for an increase of wages, and asked for information on the company’s finances.¹⁰⁶ The parties did not move from their positions.¹⁰⁷ The company, without having provided the requested information, declared that they were at an impasse and locked out the workers.¹⁰⁸ There was evidence in the record that the employer expected the union to reject the wage increase, and prepared for a lockout or strike.¹⁰⁹

¹⁰⁰ Mandelman & Manara, *supra* note 96, at 263.

¹⁰¹ See Douglas E. Ray, *Doing Well by Being Good: How U.S. Labor Law Encourages Employer Good Faith Behavior*, 14 INTERCULTURAL HUM. RTS. REV. 229, 236–38 (2019) (discussing conduct that per se falls afoul of the obligation to bargain in good faith, such as the employer’s duty to disclose relevant knowledge, or adjustments of mandatory subjects of bargaining prior to impasse); see also *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956) (holding that a company’s refusal to provide information backing up its claim that it could not pay higher wages could be bad faith); *NLRB v. Katz*, 369 U.S. 736, 743 (1962) (noting a refusal to consider a mandatory subject of bargaining presented by the other side is bad faith).

¹⁰² See Nicholas DiGiovanni, Jr., *Surface v. Hard Bargaining: Tilting Toward Nonintervention*, 2 LAB. LAW. 771, 772–73 (1986) (differentiating easier cases, such as the *per se* cases, from “those in which the external trappings of bargaining are present, but allegedly, the subjective good faith intent to arrive at an agreement is lacking”).

¹⁰³ See Mandelman & Manara, *supra* note 96, at 271 (describing the question in cases of surface bargaining as “whether . . . [the employer] went through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in good faith but was unable to arrive at an acceptable agreement with the union” (quoting *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953))).

¹⁰⁴ *Atlanta Hilton & Tower*, 271 N.L.R.B. 1600, 1603 (1984). Ultimately, however, the test is a totality of the circumstances test, and there is no combination of these factors that mandates a finding of surface bargaining. See Mandelman & Manara, *supra* note 96, at 274 (describing the lack of a bright-line rule as to surface bargaining).

¹⁰⁵ 117 F.3d 1435, 1437 (D.C. Cir. 1997). The company sought to reduce the hourly rate from \$17.84 to \$11.11. *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1437–38; see also *Lockout*, BLACK’S LAW DICTIONARY *supra* note 58 (defining a lockout, in the context of labor relations, as “[a]n employer’s withholding of work and closing of a business because of a labor dispute”). An employer is only allowed to lock out employees if they are doing so in support of a legitimate position in bargaining. Robert M. Schwartz, *Everything You Were Afraid to Ask*

The D.C. Circuit Court of Appeals held that this was not surface bargaining.¹¹⁰ Anticipating an impasse or strike was not the same as bargaining to cause one.¹¹¹ And although the employer's wage demands were a "hard sell", they were not unlawful, especially considering the employer proposed higher wages in the course of bargaining.¹¹² Finally, the court found that the parties had actually achieved impasse.¹¹³

D. The Factual Background of Groff v. DeJoy

Groff v. DeJoy arose under circumstances similar to other religious accommodation cases.¹¹⁴ Gerald Groff was employed by the U.S. Postal Service (USPS), working at a Lancaster County, Pennsylvania post office as a Rural Carrier Associate.¹¹⁵ This role required him to be available to work on holidays and weekends, as Rural Carrier Associates would be scheduled as required.¹¹⁶ In 2013, the USPS reached an agreement with Amazon to process packages ordered through Amazon, and thus the USPS placed a high importance on achieving Sunday Amazon deliveries.¹¹⁷

About Lockouts, LAB. NOTES (Apr. 17, 2012), <https://labornotes.org/2012/04/everything-you-were-afraid-ask-about-lockouts> [https://perma.cc/BN9D-FSZ9].

¹⁰⁹ *ConAgra*, 117 F.3d at 1444. The employer made improvements to security and arrangements to take on replacement workers. *Id.*

¹¹⁰ *Id.*

¹¹¹ *See id.* at 1444–45 (“[The employer] no doubt took these actions in ‘anticipation’ of a strike, but it does not follow that the actions constitute evidence that [the employer] intended to bring about the ‘anticipated’ strike.”) (internal citations omitted).

¹¹² *Id.* at 1445. Regarding the information requested by the union, the court held that the employer did not use the request for information to bring about impasse. *Id.*

¹¹³ *Id.* Black’s Law Dictionary defines “impasse” as “[a] point in negotiations at which agreement cannot be reached.” *Impasse*, BLACK’S LAW DICTIONARY *supra* note 58.

¹¹⁴ *See Groff v. DeJoy*, 35 F.4th 162, 164 (3rd Cir. 2022), *rev’d*, 600 U.S. 447 (2023) (noting Groff’s conflict with his work and his Sabbath observance); *see, e.g., Cooper v. Oak Rubber Co.*, 15 F.3d 1375 (6th Cir. 1994); *Opuku-Boateng v. California*, 95 F.3d 1461 (9th Cir. 1996).

¹¹⁵ *Groff v. DeJoy*, No. 19-1879, 2021 WL 1264030, at *1–2 (E.D. Pa. 2021), *aff’d*, 35 F.4th 162 (3rd Cir. 2022), *rev’d*, 600 U.S. 447 (2023). This is a part-time position that allows for eligibility for a full-time position after a year. Indeed Editorial Team, *What Is a Rural Carrier Associate? Definition and Requirements*, INDEED, <https://www.indeed.com/career-advice/finding-a-job/what-is-a-rural-carrier-associate> (June 24, 2022) [https://perma.cc/QC5C-V5XS]. The hours are variable and an employee in this role is expected to report to work on short notice. *Id.* A rural carrier can expect more consistent hours once they are hired as a full-time worker. *Id.*

¹¹⁶ *Groff*, 2021 WL 1264030, at *1.

¹¹⁷ *Id.* at *2. Prior to this agreement, the USPS did not make most deliveries on Sunday. *See Megan Garber, The Unlikely Alliance That Ended Sunday Mail Delivery . . . in 1912*, THE ATLANTIC (Nov. 12, 2013), <https://www.theatlantic.com/technology/archive/2013/11/the-unlikely-alliance-that-ended-sunday-mail-delivery-in-1912/281370/> [https://perma.cc/88C5-F4TM] (noting that the Amazon delivery agreement was the first time USPS had delivered Sunday mail, with a couple exceptions, in 100 years). In 1912, President Taft signed a law requiring the post offices to be closed on Sundays. *Id.* The impetus for this law came from labor organizations, which wanted a work week not more than six days, and religious organizations which wanted to end the practice of gathering at the post office on Sunday to socialize, drink, and gamble. *Id.*

In 2016, the National Rural Letter Carriers Union and the USPS entered into a Memorandum of Understanding which set out a procedure for assigning Sunday deliveries.¹¹⁸ First, full-time carriers would be assigned to work on Sundays; then volunteers; then, if there was still a need, the USPS would assign non-volunteer carriers.¹¹⁹

Gerald Groff is a Protestant Evangelical Christian.¹²⁰ As part of his religion, he observed a requirement not to work on the Sabbath.¹²¹ Prior to 2016, his supervisor accommodated his religious prohibition against Sunday work.¹²² After the USPS and the union executed the Memorandum of Understanding, however, Groff's supervisor could no longer make an exception for him and so Groff transferred to a post office which was not making Sunday deliveries, informing his new supervisor of his reason for doing so.¹²³ In 2017, this post office had to start making Amazon deliveries on Sunday.¹²⁴

¹¹⁸ *Groff*, 2021 WL 1264030, at *2. Prior to the Memorandum of Understanding, the postmaster had discretion to exempt employees from delivering on Sundays. *Id.*; see also *Letter of Intent*, BLACK'S LAW DICTIONARY *supra* note 58 (defining a letter of intent, also known as a memorandum of understanding, as "[a] written statement detailing the preliminary understanding of parties who plan to enter into a contract or some other agreement; a noncommittal writing preliminary to a contract"). In the labor context, a Memorandum of Understanding is to be distinguished from a collective bargaining agreement, as it does not have the same legal force. See Pa. Soc. Servs. Union, Local 688, SEIU v. Com., Dep't of Lab. & Indus., Bureau of Workers' Comp., 524 A.2d 1005, 1009 (Pa. Commw. Ct. 1987) (distinguishing between a Memorandum of Understanding and a labor contract).

¹¹⁹ *Groff*, 2021 WL 1264030, at *2. The memorandum applied to holidays and Sundays. *Id.* To determine coverage on any given day, management would have to determine the expected volume of mail on that day. *Id.*

¹²⁰ *Id.* at *1. One national study of religious discrimination in the workplace found that the only respondents who indicated that religious discrimination caused them to be fired or lack promotion were white evangelical men. Rachel C. Schneider, Deidra Carroll Coleman, Elaine Howard Ecklund & Denise Daniels, *How Religious Discrimination Is Perceived in the Workplace: Expanding the View*, SOCIUS (Jan. 24, 022), <https://journals.sagepub.com/doi/full/10.1177/23780231211070920> [<https://perma.cc/BL8E-YY58>]. A common feature in Evangelical Christians' narratives of discrimination were stories of adopting a moral stance against workplace behaviors which they viewed as unethical and against their faith. *Id.* The authors of this study suggested that white Evangelical men may benefit from other structural benefits, such as those provided by their race and gender, which allowed them to take such a stand. *Id.* These stories contrasted with more typical narratives from members of minority religions, who described downplaying or hiding their religion at work. *Id.*

¹²¹ See *Groff v. DeJoy*, 35 F.4th 162, 164 (3rd Cir. 2022), *rev'd*, 600 U.S. 447 (2023) (noting that Groff was an observer of the Sunday Sabbath, believing that Sunday is mandated for rest). Sabbatarianism is the term for beliefs, similar to Groff's, that work on the Sabbath is forbidden. *Sabbatarianism*, *supra* note 7. Although laws against working on Sundays date back to the Roman emperor Constantine I, modern Sabbatarianism comes from the English and Scottish Reformation. *Id.* From there, Presbyterians and Puritans brought the idea to the United States. *Id.*

¹²² *Groff*, 2021 WL 1264030, at *2.

¹²³ *Id.* Groff was never promised that the post office where he transferred would continue not to deliver on Sunday. *Id.*

¹²⁴ *Id.* One survey of USPS workers found results suggesting that the USPS prioritizes Amazon deliveries over other packages. Ina Steiner, *Survey Indicates USPS May Be Prioritizing Amazon Packages*, ECOMMERCEBYTES (May 14, 2022), <https://www.ecommercebytes.com/2022/05/14/survey-indicates-usps-may-be-prioritizing-amazon-packages/> [<https://perma.cc/8KL2-K4WA>].

The office placed Groff on the schedule for several Sundays in 2017 and 2018.¹²⁵ USPS suggested to Groff several accommodations, but these accommodations did not extend to allowing him never to be scheduled to miss Sunday work.¹²⁶ This situation caused some unrest in the office.¹²⁷ Nevertheless, there were twenty-four instances in which Groff was scheduled to work on a Sunday and did not show.¹²⁸

The USPS imposes progressive discipline on its employees with the aim of correcting the behavior of employees.¹²⁹ In accordance with this policy, USPS conducted disciplinary interviews and issued a written warning, followed by a seven-day suspension, then a fourteen-day suspension.¹³⁰ After the fourteen-day suspension, Groff resigned from his job.¹³¹

Groff then sued the USPS in the Eastern District of Pennsylvania, alleging two theories of religious discrimination: failure to accommodate and disparate impact.¹³² The district judge granted the USPS's motion for summary judgment and denied Groff's motion for summary judgment.¹³³ In doing so, the district judge held that an employer's accommodation can be reasonable even if it did not eliminate the conflict between an employee's religious practice and a job requirement.¹³⁴

¹²⁵ *Groff*, 2021 WL 1264030, at *3.

¹²⁶ *Id.* The accommodations offered included offering him another day off to worship; allowing him to arrive at work after church; allowing him to find someone to cover for his Sunday shifts; and attempting to find someone to cover for him. *Id.*

¹²⁷ *Id.* As a result of this arrangement, other carriers were given more Sunday shifts than otherwise. *Id.* Several complained against the perceived preferential treatment that Groff was receiving, and several employees left at least partly as a result of this arrangement. *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*; see Cassandra Williams, *Progressive Discipline: Steps for Creating Workplace Policy*, INDEED, <https://www.indeed.com/career-advice/career-development/progressive-discipline> (Feb. 3, 2023) [<https://perma.cc/N9W4-ZGXS>] (noting that the purpose of corrective discipline is "to help managers and supervisors enforce disciplinary action by offering employees an opportunity to correct issues before escalating punishment").

¹³⁰ *Groff*, 2021 WL 1264030, at *4. During one of the disciplinary interviews, the Station Master conducting the interview recommended that Groff pick another Sabbath day. *Id.* After receiving the letter of warning and after each suspension Groff complained to the EEOC. *Id.*

¹³¹ *Id.* at *1.

¹³² *Id.* A plaintiff seeking to show religious discrimination can also allege disparate impact; such a case is similar to a race or sex discrimination case. *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 281 (3rd Cir. 2001).

¹³³ *Groff*, 2021 WL 1264030, at *1.

¹³⁴ *See id.* at *10 (holding that "an employer does not need to wholly eliminate a conflict in order to offer an employee a reasonable accommodation"). The district court emphasized that an employer does not have to offer an employee the accommodation of their choice, only an accommodation that is reasonable. *Id.* The court thus found the shift-swapping arrangement offered to Groff to be a reasonable accommodation. *Id.* Though the question of religious discrimination was settled under the reasonable accommodation analysis, the district court briefly examined the undue hardship claim, finding that Groff's proposed accommodations would clearly impose more than a *de minimis* hardship. *See id.* at *12 (finding that defendant presented multiple burdens that would meet the *de minimis* standard).

Groff appealed the summary judgment to the U.S. Court of Appeals for the Third Circuit.¹³⁵ Although the Third Circuit disagreed with the lower court regarding the reasonable accommodation analysis, they ultimately upheld the summary judgment against Groff based on an undue hardship analysis.¹³⁶ Groff filed for certiorari, which the Supreme Court granted on January 13, 2023.¹³⁷

II. THE ONGOING CONTROVERSY REGARDING THE NATURE OF RELIGIOUS ACCOMMODATION

A question lying at the heart of the religious accommodation jurisprudence is how far an employee should be forced to compromise when asking for an accommodation for their religious practice.¹³⁸ The question remains whether the current interpretation of Title VII is in line with the intent of the drafters that both the employer and the employee make compromises in the process of accommodations.¹³⁹

Section A of this Part lays out the split in the circuits, contrasting the majority position—that an accommodation must entirely eliminate the conflict—to the minority position, that a reasonable accommodation may be one that does not fully eliminate the conflict.¹⁴⁰ Section B of this Part recounts some of the criticism against the Title VII doctrine leading up to *Groff v. DeJoy* and the heavy burden that it placed on the employee seeking an accommodation.¹⁴¹ Section C of this Part explicates the Supreme Court’s opinion in *Groff*.¹⁴²

A. A Split in the Circuits Regarding the Duty to Compromise

In *Philbrook*, the Supreme Court suggested that a religious accommodation must eliminate the conflict between religious and work requirements.¹⁴³ In

¹³⁵ *Groff v. DeJoy*, 35 F.4th 162, 168 (3rd Cir. 2022).

¹³⁶ *See id.* at 169, 175 (holding that an accommodation must eliminate the conflict, but finding that relieving Groff from work on Sunday would be an undue hardship). Judge Hardiman dissented; agreeing with the majority that the accommodation offered by the USPS was not reasonable, he additionally found that the USPS had not made a showing of undue hardship. *See id.* at 176, 177 (Hardiman, J., dissenting) (arguing that summary judgment in favor of USPS would be inappropriate because USPS had not developed a sufficient factual record to show undue hardship).

¹³⁷ *Groff v. DeJoy*, 600 U.S. 447 (2023) (mem.).

¹³⁸ *See Blair, supra* note 7, at 540 (noting that the view that the employee does not need to compromise on her religion is on all fours with the legislative intent of Title VII).

¹³⁹ *See id.* (noting that Congressional intent was for employers to compromise as well as employees).

¹⁴⁰ *See infra* notes 143–174 and accompanying text.

¹⁴¹ *See infra* notes 175–201 and accompanying text.

¹⁴² *See infra* notes 202–215 and accompanying text.

¹⁴³ *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986) (holding that an unpaid leave accommodation was reasonable because it eliminated the conflict). As Justice Marshall pointed out, however, whether the religious accommodation which the Court found acceptable actually eliminated the conflict was an open question. *See id.* at 74 (Marshall, J., concurring) (arguing that the accommo-

the wake of *Hardison* and *Philbrook*, a circuit split has arisen regarding whether a reasonable accommodation must eliminate the conflict, or whether an accommodation can require the employee to compromise on their religious beliefs.¹⁴⁴ The majority view, held by the Second, Third, Sixth, Seventh, Ninth, and Eleventh Circuits, is that a reasonable accommodation must eliminate the conflict between an employee's religious beliefs and an employer's requirements.¹⁴⁵ The minority of circuits—namely the Fourth, Eighth, and Tenth Circuits—are willing to find a reasonable accommodation even if the conflict is not entirely eliminated.¹⁴⁶

1. The Majority View: The Accommodation Must Eliminate the Conflict

In 1994, in *Cooper v. Oak Rubber Co.*, the Sixth Circuit Court of Appeals ruled on a case in which an employee resigned to avoid termination for refusing to perform her job on the Sabbath.¹⁴⁷ The inquiry focused on whether the employer's proposal, that the employee work nights to avoid missing church on Saturday morning and use accrued vacation time to avoid work on Saturday, was a reasonable accommodation.¹⁴⁸ When analyzing these proposals, the

dation in this case did not actually eliminate the conflict). The Third Circuit held previously that if an accommodation does not get rid of the conflict, then the question is whether the employer can show undue hardship. *See Getz v. Com. of Pa., Dept. of Pub. Welfare*, 802 F.2d 72, 73 (3rd Cir. 1986) (holding that once plaintiff makes a prima facie finding of religious discrimination, the employer has the burden to show good-faith accommodation attempts, and if the attempts are unsuccessful, that accommodation would bring undue hardship).

¹⁴⁴ *See infra* notes 147–174 and accompanying text.

¹⁴⁵ *See infra* notes 147–164 and accompanying text. The courts, in analyzing religious accommodation cases, apply a burden-shifting test. *See Groff v. DeJoy*, 35 F.4th 162, 168–69 (3rd Cir. 2022), *rev'd*, 600 U.S. 447 (2023) (describing the framework for analyzing a religious accommodation test, including when the employer is given the burden of proof). An employee must first show a prima facie case of religious discrimination by making the following findings: (1) the employee has a genuine religious belief that imposes some conflict with a requirement of the employee's job; (2) the employer was on notice of the conflict, and (3) the employee did not follow the job requirement because of the religious conflict, and was punished as a result. *See id.* at 168 (applying three-part test to conclude that plaintiff in this case presented a prima facie case). The burden is then imposed on the employer to show one of two things: either that the employer honestly attempted a reasonable accommodation for the employee's religious belief, or that such a reasonable accommodation would present an undue burden. *See id.* at 169 (describing burden placed on employer as part of religious accommodation framework).

¹⁴⁶ *See infra* notes 165–174 and accompanying text.

¹⁴⁷ 15 F.3d 1375, 1376 (6th Cir. 1994). The employer in this case, Oak Rubber, a producer of vinyl industrial gloves, operated six machines nonstop to produce gloves. *Id.* These machines had to be staffed with seven workers, one packer and six glove strippers. *Id.* If the employer had too few workers for one machine, that machine would have to shut down. *Id.* Evidently, this was a problem that the employer suffered frequently. *See id.* (noting the “serious absentee problem” that Oak was facing). As a result, the employer enacted a policy that assigned points to employees who missed work without an excused reason, with progressive discipline up to termination imposed. *Id.*

¹⁴⁸ *Id.* at 1377, 1379. The employee turned down this proposal because the Seventh-Day Adventist religion, of which the employee was an adherent, prohibits working on the Sabbath. *Id.* at 1377–78;

Sixth Circuit stated that the only acceptable accommodation would be one that got rid of any mandate that the employee work on the Sabbath.¹⁴⁹ Forcing the employee to work on the Sabbath, even a night shift after her church service, would not satisfy her primary issue with work on the Sabbath and so was not sufficient.¹⁵⁰ In 2006, in *Baker v. The Home Depot*, the Second Circuit ruled on a case with similar facts to *Cooper* and came to the same conclusion: that an accommodation that did not allow the employee not to work on the Sabbath was not reasonable.¹⁵¹

In 1996, in *Opuku-Boateng v. California*, the Ninth Circuit ruled similarly on another Sabbath case.¹⁵² In this case, the job required work on Saturdays.¹⁵³ The employee made several proposals of accommodations, but the employer would not accept them and informed the employee that he could not begin the job if he would not work on Saturdays.¹⁵⁴ The Ninth Circuit found that the employer made no proposal that would eliminate the conflict regarding the employee's religious needs, and so the court decided for the plaintiff on undue-hardship grounds.¹⁵⁵

see also What Adventists Believe About the Sabbath, *supra* note 7 (proclaiming that the Seventh-Day Adventist Church rests upon the Sabbath).

¹⁴⁹ *Cooper*, 15 F.3d. at 1379. On this ground, the court ruled that there was no accommodation that would not unduly burden the employer, because if the plaintiff was not working that shift the employer would have to hire another employee. *Id.* at 1380.

¹⁵⁰ *Id.* at 1379.

¹⁵¹ 445 F.3d 541, 547–48 (2nd Cir. 2006). In this case, an employee was scheduled to go into work on Sundays against his faith. *Id.* at 544–45. The employee was a member of the Gospel Fellowship Church: as the court put it, “strict observance of the Sabbath is the *sine qua non* of his faith.” *Id.* at 543–44. The store manager offered to schedule the employee on a later shift on Sunday so that he would not miss church. *Id.* at 545. The court held that this was not a sufficient accommodation because it did not allow the employee to fulfill his religious requirement not to work on the Sabbath; thus, it did not eliminate the conflict. *Id.* at 547–48. The court cited *Cooper* for its provision that an accommodation that only partially handles a religious conflict is insufficient. *Id.* at 547 (quoting *Cooper*, 15 F.3d at 1379).

¹⁵² 95 F.3d. 1461, 1467 (9th Cir. 1996). The plaintiff in this case was also a Seventh-Day Adventist; as the court noted, it is a doctrine of this church that violating the rule against work on the Sabbath puts one's soul in peril. *Id.* at 1464.

¹⁵³ *Id.* at 1465. The employee in this case worked as a Plant Inspector for the California Department of Food and Agriculture, inspecting vehicles for prohibited agricultural items. *See id.* at n.2 (describing Plant Inspector job duties as searching vehicles for agricultural contraband). The inspection station where the plaintiff was assigned worked 24/7. *Id.* at 1465. Department policy attempted to assign undesirable shifts equally among employees. *Id.* The reason for this, aside from ensuring an equitable distribution, is that the Department was concerned about collusion among inspectors and travelers being inspected, and wanted to expose inspectors to a wide variety of goods. *See id.* (noting that work assignments were to be made equitably).

¹⁵⁴ *Id.* at 1466. The proposals in this case were that the employee would work unwanted shifts, swap shifts with his fellow employees, or move to another role. *Id.* at 1465–66.

¹⁵⁵ *Id.* at 1469, 1475. Under the burden-shifting framework employed by the Ninth Circuit, when the plaintiff shows a prima facie discrimination case, the employer then bears the burden to show that it discussed with the employee regarding reasonable accommodations. *Id.* at 1467; *see also* EEOC v. Hacienda Hotel, 881 F.2d. 1504, 1513 (9th Cir. 1989) (holding an employer must show negotiation

The Seventh Circuit also endorsed the requirement that the conflict be eliminated in 1997 in *EEOC v. Ilona of Hungary, Inc.*, a scheduling case that involved two Jewish plaintiffs who did not work on Yom Kippur.¹⁵⁶ In *Ilona*, the employer offered the employees a day off that was not Yom Kippur; this was not considered a reasonable accommodation because it did not eliminate the conflict.¹⁵⁷

In 2007, in *Morrisette-Brown v. Mobile Infirmary Medical Center*, the Eleventh Circuit agreed with the majority viewpoint by stating that a reasonable accommodation must eliminate the conflict.¹⁵⁸ The Eleventh Circuit found, however, that the accommodations offered to the plaintiff in the case were reasonable.¹⁵⁹ In dicta, the court stated that when a company has a neutral policy for assigning shifts, allowing an employee to switch shifts likely eliminates the conflict even if the employer does not coordinate the switch.¹⁶⁰ In this case, however, the employee was unable to find covers for shifts that conflicted with her Friday Sabbath obligations.¹⁶¹

In contrast, in 2022, in *Groff v. DeJoy*, the Third Circuit held that a shift-swap agreement did not eliminate the conflict.¹⁶² In this case, the employer tried to find shift swaps for Sabbath days but was unable to do so on certain

with employee regarding accommodation). If the employer cannot show an offer of accommodations that would eliminate the conflict regarding the employee's religious needs, then it must adopt the employee's proposal unless that would cause undue hardship. *Opuku-Boateng*, 95 F.3d. at 1467.

¹⁵⁶ 108 F.3d. 1569, 1572 (7th Cir. 1997). The defendant employed the plaintiffs, one as a manicurist, one as an esthetician; both were Jewish. *Id.* at 1572–73. They each requested the day off on Yom Kippur and had their request denied. *Id.* at 1573. Both plaintiffs were already booked for appointments on that day. *Id.* According to Jewish law, Yom Kippur is a holy day on which work may not be performed. Daniel J. Wakin, *Off on Yom Kippur? It's Probably Time to Work a Holiday*, N.Y. TIMES (Dec. 22, 2003), <https://www.nytimes.com/2003/12/22/nyregion/off-on-yom-kippur-it-s-probably-time-to-work-a-holiday.html> [<https://perma.cc/D8A6-BXSD>].

¹⁵⁷ *Ilona of Hungary, Inc.*, 108 F.3d. at 1576. The court emphasized that the employer offered no accommodation that could actually address the conflict, such as offering part of the day off. *Id.* The court then proceeded to the question of whether an undue hardship could be found. *Id.* Applying the *Hardison de minimis* test, the court found that there was no undue hardship because the employer could have scheduled other employees to work that day. *Id.*

¹⁵⁸ 506 F.3d 1317, 1322 (11th Cir. 2007). This was another Sabbath case in which the employer offered the employee the ability to swap her shifts and granted each request to swap shifts. *Id.* at 1323. The plaintiff in this case was a unit secretary for a hospital; she took the job knowing it required weekend work, then subsequently became more committed to her church and started to rigidly observe the Sabbath. *Morrisette-Brown v. Mobile Infirmary Med. Ctr.*, No. 04-0069-CB-C, 2006 WL 1999133 at *1 (S.D. Ala. July 14, 2006), *aff'd*, 506 F.3d 1317 (11th Cir. 2007). After her employer offered her the ability to swap shifts, the plaintiff found a coworker to work on Saturdays but not Fridays and thus called out on Fridays. *Id.*

¹⁵⁹ *Morrisette-Brown*, 506 F.3d at 1323. In addition to the shift-swaps, the employer did not take disciplinary action against the employee when she missed shifts and tried to work with the employee to find her another position. *Id.* at 1324.

¹⁶⁰ *See id.* at 1323 (stating that if the company's only accommodation had been their shift-swap arrangement, this likely would have been sufficient to satisfy Title VII under *Hardison*).

¹⁶¹ *Morrisette-Brown*, 2006 WL 1999133, at *1.

¹⁶² 35 F.4th 162, 169 (3rd Cir. 2022), *rev'd*, 600 U.S. 447 (2023).

days.¹⁶³ Thus, this accommodation did not eliminate the conflict fully and was not sufficient.¹⁶⁴

2. The Minority View: The Accommodation Does Not Have to Eliminate the Conflict

A minority of circuits have held that an accommodation that does not fully eliminate the conflict may still be sufficient under Title VII.¹⁶⁵ In 2008, in *EEOC v. Firestone Fibers & Textiles Co.*, the Fourth Circuit heard a case with familiar factual circumstances: an employee could not work on the Sabbath and other religious holidays.¹⁶⁶ The employer concluded that it could not offer any more accommodations than those it already provided, which included eighteen days of paid leave and the ability to swap shifts and receive unpaid leave.¹⁶⁷ The employee exceeded this leave and was terminated for non-attendance.¹⁶⁸

The Fourth Circuit rejected the contention that an accommodation had to eliminate the conflict between work mandates and religious needs.¹⁶⁹ Instead, the court found that a reasonable accommodation does not require total accommodation, but that the court should balance the rights of the employee with

¹⁶³ *Id.* at 173.

¹⁶⁴ *Id.* The court did state that in certain circumstances, a shift-swap agreement could be sufficient to satisfy the reasonable-accommodation requirement of Title VII. *Id.*

¹⁶⁵ See *infra* notes 165–174 and accompanying text.

¹⁶⁶ 515 F.3d 307, 307, 309 (4th Cir. 2008). Firestone employed plaintiff at a factory where the United Steel Workers Union represented him. *EEOC v. Firestone Fibers & Textiles Co.*, No. 04-CV-00467, 2006 WL 2620314, at *1 (W.D. N.C. Sept. 13, 2006), *aff'd*, 515 F.3d 307 (4th Cir. 2008). As part of the collective bargaining agreement between Firestone and the union, a seniority agreement was implemented. *Id.* In this case, in addition to Saturdays, the employee's religion (the Living Church of God) required him to refrain from work on twenty holy days, fourteen of which were not Saturdays. *Firestone*, 515 F.3d at 309. Originally, the employee worked during the day shift which allowed him to keep the Sabbath and use his vacation days for any religious conflicts that arose. *Id.* When the company went through layoffs, however, the plaintiff lost his day-shift position to a more senior employee, according to the applicable collective bargaining agreement. *Id.* at 309–10. Instead, he was assigned to a different shift that would conflict with his obligations to keep the Sabbath every week. *Id.* at 310.

¹⁶⁷ *Firestone*, 515 F.3d at 310. The employer considered several options, such as transferring the employee and excusing the employee from Sabbath shifts, but found it was unable to implement these options because the employee did not have the requisite seniority to be transferred and job necessity did not allow the shift to be uncovered at that time. *Id.*

¹⁶⁸ *Id.* at 311. The Living Church of God observes different holy days from mainstream Christian practice. *The New Testament Church Kept the Holy Days of the Bible*, LIVING CHURCH OF GOD, <https://www.lcg.org/beliefs/new-testament-church-kept-holy-days-bible> [https://perma.cc/UD4V-979D]. To members of this church, observing these holidays is a commandment from God. *Id.* Failure to do as much, according to this faith, results in the soul's damnation in "the lake of fire." *Firestone*, 2006 WL 2620314, at *2.

¹⁶⁹ See *Firestone*, 515 F.3d at 313 (rejecting the argument that an employer must entirely accommodate the religious practices of an employee, if no undue hardship exists).

the rights of the other employees and the business needs of the employer.¹⁷⁰ In coming to this conclusion, the court interpreted the word “reasonable” in the phrase “reasonable accommodation” to conflict with the majority view that an accommodation must eliminate any conflict with religious needs.¹⁷¹

In 2008, in *Sturgill v. United Parcel Service*, the Eighth Circuit similarly held that a religious accommodation does not need to eliminate the conflict.¹⁷² The court emphasized that Title VII established a regime of “bilateral cooperation” that may require accommodation by the employee as well.¹⁷³ The Tenth Circuit has also held that there is no rule requiring that an accommodation completely eliminate the conflict to be reasonable.¹⁷⁴

B. Criticism of the Post-Hardison Title VII Religious Accommodation Doctrine

The standard imposed by Title VII upon employers following *Hardison* and *Philbrook* was criticized for not being expansive enough.¹⁷⁵ This standard was criticized for misinterpreting the text¹⁷⁶ and the legislative history¹⁷⁷ of Title VII, for being out of touch with other remedial statutes aiming to rectify similar cases of discrimination,¹⁷⁸ and for leading to unfavorable policy results.¹⁷⁹

¹⁷⁰ See *id.* (refusing to accept that Title VII calls for total accommodation and holding that the term “reasonable accommodation” was variable in recognition of the competing values of the legislation: keeping discrimination out of the workplace, while protecting business necessity and the rights of the rest of the workforce).

¹⁷¹ *Id.* The court considered this to be a plain-text interpretation of the statute, emphasizing the difference between the statute as drafted and potential constructions such as “total accommodation.” *Id.*

¹⁷² See 512 F.3d 1024, 1030 (8th Cir. 2008) (rejecting the proposition that an accommodation is only reasonable if it eliminates the conflict between the religious practices of the employee and the business requirements of the employer, in addition to allowing the employee to stay employed). The court instead stated that the question of reasonableness was a totality of the circumstances test and whether a conflict must be eliminated is a fact-specific question. See *id.* (holding that “[w]hat is reasonable depends on the totality of the circumstances and therefore might, or might not, require elimination of a particular, fact-specific conflict”).

¹⁷³ See *id.* at 1031 (noting that Title VII requires accommodations by both employer and employee). The court mentioned several accommodations by the employee which it considered acceptable, such as accepting a less appealing job or worse working conditions. *Id.*

¹⁷⁴ See *Tabura v. Kellogg USA*, 880 F.3d 544, 553 (10th Cir. 2018) (declining to interpret Title VII as imposing a per se total accommodation rule).

¹⁷⁵ See Blair, *supra* note 7, at 540 (noting that many commentators have “embraced the approach toward reasonable accommodations in Title II of the ADA” in regard to religious accommodations under Title VII).

¹⁷⁶ See *infra* notes 180–183 and accompanying text.

¹⁷⁷ See *infra* notes 184–188 and accompanying text.

¹⁷⁸ See *infra* notes 189–195 and accompanying text.

¹⁷⁹ See *infra* notes 196–201 and accompanying text.

1. Criticism on the Basis of Textual Interpretations of Title VII

Some have alleged that the interpretation of Title VII in *Hardison* and the cases following misinterpreted the statutory language, notably including Justice Marshall in his dissent to *Hardison*.¹⁸⁰ Furthermore, the use of the word “reasonable” before accommodation appears to imply that a balance should be struck between the competing interests of the employee and the employer.¹⁸¹ Instead, the standard following *Hardison* suggested that an employer need not accommodate when there is any cost to them, or when preferential treatment would result, which seemed misaligned with the statutory mandate for a “reasonable” accommodation.¹⁸² It has also been noted that Title VII is a remedial statute, and thus should be interpreted as providing the broadest possible coverage.¹⁸³

2. Criticism on the Basis of Interpretations of the Legislative History of the 1972 Amendments

Although the legislative history behind the religious accommodation provisions in Title VII is not voluminous, it seems clear that Congress intended that members of minority religions be accepted as full members of the work-

¹⁸⁰ See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 92 n.6 (1977) (Marshall, J., dissenting) (questioning whether “undue hardship,” according to ordinary English usage, can “mean more than *de minimis*”). Other commentators have agreed, arguing that the plain meaning of “undue hardship” is one of excessive harm. See Zaheer, *supra* note 7, at 515 (arguing that “the plain meaning of undue hardship is diametrically opposed to the plain meaning of *de minimis*”). This criticism was squarely addressed and resolved by the Supreme Court. See *Groff v. DeJoy*, 600 U.S. 447, 468 (2023) (“We hold that showing ‘more than a *de minimis* cost,’ as that phrase is used in common parlance, does not suffice to establish ‘undue hardship’ under Title VII.”); see also *Hardship*, BLACK’S LAW DICTIONARY *supra* note 58 (defining hardship as “[p]rivation; suffering or adversity”).

¹⁸¹ See Karst, *supra* note 50, at 272 (noting that there is an inherent recognition of interests in competition in the term “accommodation”). The interests of other employees must also be considered by the courts when reconciling the conflicting interests in a religious accommodation case. See *id.* (arguing that the word accommodation requires a “reconciliation of competing interests”). The argument goes that the courts should thus not assess whether an accommodation is reasonable by looking at whether the assessment gives an employee special treatment, but instead conduct a balancing test weighing the rights of the employee with the other employees and employer. See *id.* (arguing that religious accommodations require the courts to balance opposing interests, and that it is within the judgment of the courts to determine where the appropriate balance is).

¹⁸² See *id.* (arguing that the Court’s holding that a religious accommodation should not prefer one group of religious employees over another is out of step with the definition of the term “accommodation”); see also *Accommodation*, BLACK’S LAW DICTIONARY *supra* note 58 (defining “accommodation” as “[t]he act or an instance of making a change or provision for someone or something; an adaptation or adjustment”).

¹⁸³ See Karst, *supra* note 50, at 274 (noting that the Court has taken “a narrow view of the broad remedial statute” which is not the correct statutory construction); SHAMBIE SINGER, 3 STATUTES AND STATUTORY CONSTRUCTION § 60.1 (8th ed. 2020) (noting that remedial statutes are supposed to be construed broadly so that they can effect the remedies that they were passed to fix).

place, knowing that would incur a cost.¹⁸⁴ Furthermore, the legislative history seems to suggest that the accommodation process would involve employers and employees working together to balance their interests and find a solution acceptable to both parties.¹⁸⁵ One commentator notes, however, that the duty to cooperate imposed by the statute has mostly fallen on the employee.¹⁸⁶ Under the post-*Hardison* framework, courts were often unwilling to invalidate facially neutral rules that disparately affected religious employees.¹⁸⁷ The same commentator has suggested that the minority view that an accommodation does not need to eliminate the conflict is similarly out of line with the legislative intent behind the religious accommodation provision.¹⁸⁸

3. Criticisms on the Basis of Similarity in Language and Social Context to the ADA

The differences in interpretation of Title VII and the ADA, despite similar statutory language, have been commented upon.¹⁸⁹ It has been noted that there

¹⁸⁴ See LEGISLATIVE HISTORY, *supra* note 19, at 713 (suggesting that the purpose of the Act is to allow workers of minority faiths to participate fully in the workforce and in their faith). In introducing the religious accommodation amendment to Title VII, Senator Randolph emphasized that religious organizations that imposed a requirement on their members not to work on certain days were seeing a diminution of membership because of employees' inability to provide for their commitments to their families. *See id.* at 712 (noting that some employers would not hire members of religions with rigid requirements who would not work on certain days). Senator Randolph further mentioned that his own pastor had made known his concern that such religions were having a difficult time retaining members because employers were unwilling to adjust their work schedules to meet the requirements of their religious workers. *See id.* (including Senator Randolph's reference to his pastor's concern that faiths were struggling as a result of the inability of employers to accommodate their religious calendar). In discussion of the amendment, Senator Randolph expressed his belief that in most of these situations, both employer and employee could be accommodated. *See id.* at 714–15 (expressing Senator Randolph's belief that both parties could be understanding of one another).

¹⁸⁵ *See Blair, supra* note 7, at 540 (noting that the legislative history, though slim, seemed to envision a regime of mutual cooperation). Senator Randolph mentioned in the discussion of the amendment that generally, the employee and employer placed in a situation where there is a religious conflict are of "an understanding frame of mind and heart" and that ideally both would have "a desire to achieve an adjustment." *See* LEGISLATIVE HISTORY, *supra* note 19, at 714–15 (stating that in many instances, employers and employees work together harmoniously to achieve a religious accommodation).

¹⁸⁶ *See Blair, supra* note 7, at 540 (noting that the religious employee "bears the greatest burden" in the accommodations process). An employee must attempt to cooperate with an employer in order to successfully bring a claim for religious discrimination down the line. *See id.* (noting that courts have imposed a duty to cooperate on an employee seeking a religious accommodation). This duty of cooperation is not equally binding on the employer. *See id.* at 542 (noting that employers would actually have to consider the needs of their employees if the duty of cooperation was placed on them).

¹⁸⁷ *See Karen Engle, The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 392 (1997) (noting that although by definition an accommodation results in preferential treatment, courts are unwilling to invalidate neutral restrictions and often find a challenge to a neutral rule to be undue hardship).

¹⁸⁸ *See Blair, supra* note 7, at 528 (arguing that the view that the employee does not need to compromise on her religion is in line with the legislative intent of Title VII).

¹⁸⁹ *See id.* at 529 (noting that several commentators have endorsed application of the ADA standard).

are similarities in the positions of workers with disabilities and workers who practice a minority religion.¹⁹⁰ Workers who practice a minority religion may sometimes require an accommodation, as do some workers with disabilities; however, an employee requires no accommodation for other classes protected under Title VII, such as race or gender.¹⁹¹ Generally, an employer will deny both religion or disability accommodation requests because of economic reasons or because the employer does not want to be seen giving preferential treatment to certain employees.¹⁹² Both statutes have the goal of giving certain members of society full access to society.¹⁹³ As a result, both statutes require that employers bear some burden of accommodating employees with these characteristics.¹⁹⁴ The reasonable accommodation provisions of the ADA, however, have been read more expansively than Title VII.¹⁹⁵

4. Criticisms on the Basis of Policy

Finally, the post-*Hardison* standard applied to requests for religious accommodations raised significant policy concerns.¹⁹⁶ One commentator raised

¹⁹⁰ See *id.* at 530–31 (stating that discrimination in both cases usually comes from the same root causes: economics and ensuring the harmony of the workplace). A contrasting view, however, is that some courts consider religion to be a mutable characteristic—one that can be changed—in contrast to a characteristic like a disability, which cannot be changed. Debbie N. Kaminer, *Religious Accommodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Employees*, 20 TEX. REV. L. & POL. 107, 115–16 (2015) (noting that some lower courts have adopted the view of religion as a mutable characteristic).

¹⁹¹ See Blair, *supra* note 7, at 531 (noting that discriminations on the basis of religion or disability are treated similarly under Title VII, whereas they are considered different from other types of discrimination, such as those against race and gender). One commentator, however, notes that Muslims in the U.S. today have been seen not as followers of a religion, but as members of a race and political ideology. Sanya Mansoor, *The Troubling Consequences of Seeing Muslims as a Racial Group*, TIME (Dec. 13, 2021), <https://time.com/6128060/the-racial-muslim-sahar-aziz/> [<https://perma.cc/8TSD-6XG4>].

¹⁹² See Blair, *supra* note 7, at 530 (noting that denials of religious accommodations are usually not made because of prejudice against an employee's religion, but for reasons of economics and maintaining the stability of the workplace). The Sabbath cases are a telling example of this: the employee's accommodation is generally denied because the employer does not want to suffer the monetary loss of not having an employee scheduled that day. *Id.*

¹⁹³ See *id.* at 531 (noting that Congress made the judgment that society would be better off if people with disabilities and members of minority religions could participate in employment, even if they would require an accommodation).

¹⁹⁴ See *id.* (noting that the purpose of both statutes is that employees would be protected even at the cost of the employer).

¹⁹⁵ *Id.* One possible explanation for this disparity is that some courts see religion as a personal choice not worthy of greater protection—a mutable, not immutable, characteristic of a person. See Kaminer, *supra* note 190, at 147 (suggesting that the decisions of some lower courts can be explained by a belief that religion is a personal matter not worthy of greater protection).

¹⁹⁶ See Mary-Lauren Miller, Note, *Inoculating Title VII: The “Undue Hardship” Standard and Employer-Mandated Vaccination Policies*, 89 FORDHAM L. REV. 2305, 2326 (2021) (noting that some commentators called for revising the *Hardison* standard out of policy concerns).

concerns about how the standard impacted American Muslims.¹⁹⁷ Although Muslims are likely to become the largest non-Christian religious group in the upcoming century, many Muslims feel marginalized in society.¹⁹⁸ Islam is a very practice-intensive religion, and many of the practices of the religion conflict with structures of employment created with Christian employees in mind.¹⁹⁹ Those who practice Christianity, especially attendees of a majority Christian church, are likely not to find it difficult to get an accommodation for their religion, even under the post-*Hardison* standard, because of how Christian practices are already taken into account by employers.²⁰⁰ Members of minority religions such as Islam would likely find it near-impossible to receive an accommodation for their practices, however, as accommodating these practices would almost certainly require more than a *de minimis* cost.²⁰¹

C. The Supreme Court Overturns the *De Minimis* Standard

On June 29, 2023, the Supreme Court vacated and remanded the Third Circuit's holding in *Groff v. DeJoy*.²⁰² In doing so, the Court clarified that *Hardison* should not be interpreted as exempting an employer from providing an accommodation if doing so would impose a more than *de minimis* cost.²⁰³ Justice Samuel Alito, writing for a unanimous Court, also opined on several other

¹⁹⁷ See Zaheer, *supra* note 7, at 499 (arguing that Section 701(j) should be reinterpreted in light of the experiences of American Muslims).

¹⁹⁸ See *id.* at 500 (noting that although Muslims in the U.S. are rapidly increasing in population, such that they will soon be the largest minority religion, many American Muslims report a lack of understanding between them and others in society); see also *Religious Landscape Study*, PEW RSCH. CTR, <https://www.pewresearch.org/religion/religious-landscape-study/> [<https://perma.cc/VG24-NPXE>] (finding that Muslims make up 0.9% of the population in the U.S. according to data from 2007–2014).

¹⁹⁹ See Zaheer, *supra* note 7, at 500–01 (noting that Islam is “practice-intensive” and that the practices of Islam have significant differences from mainstream religious practice in America). Previous cases brought by Muslims are generally regarding accommodations for prayer practices, which constitute a central tenet of the Islamic faith. *Id.* at 505. Prayer, or salat, is one of the pillars of Islam, or the duties required of any Muslim believer: the others are shahadah or the profession of the Muslim faith, zakat or almsgiving, sawm or fasting during Ramadan, and hajj or travelling to Mecca as a pilgrim. *Pillars of Islam*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Pillars-of-Islam> [<https://perma.cc/NX8B-GJ7H>]. Five daily prayers are made obligatory by Islamic law. Amjad M. Hussain, *Prayer in Islam*, BRITISH LIBR., <https://www.bl.uk/sacred-texts/articles/prayer-in-islam> [<https://perma.cc/6J97-P3QF>]. These prayers are to be performed at dawn, afternoon, late afternoon, after sunset, and at night. *Id.*

²⁰⁰ See Zaheer, *supra* note 7, at 519 (noting that most workplaces are well set up to handle Christian practices, by giving employees days off on Christian holidays, for example).

²⁰¹ See *id.* at 520 (arguing that the post-*Hardison* accommodation standard for members of minority religions such as Islam was an “insurmountable burden”).

²⁰² *Groff v. DeJoy*, 600 U.S. 447, 473 (2023).

²⁰³ *Id.* at 468 (“We hold that showing ‘more than a *de minimis* cost,’ as that phrase is used in common parlance, does not suffice to establish ‘undue hardship’ under Title VII.”).

issues involving the application of the reasonable accommodation framework which were not the main thrust of the opinion.²⁰⁴

Without overruling *Hardison*, Justice Alito rejected the *de minimis* test that heretofore had been the holding of the case.²⁰⁵ Instead, *Hardison* now stands for the proposition that “‘undue hardship’ is shown when a burden is substantial in the overall context of an employer’s business.”²⁰⁶ Justice Alito reached this conclusion through an analysis of the language of Title VII as well as the EEOC’s regulatory scheme prior to Title VII’s enactment.²⁰⁷

Justice Alito then turned to setting the new, clarified, standard, for undue hardship, which is “substantial increased costs in relation to the conduct of its particular business.”²⁰⁸ In doing so, the Court rejected both the proposition that all EEOC guidance would survive the clarification of the standard, as well as the proposition that courts should use ADA caselaw to interpret Title VII.²⁰⁹ Instead of relying on ADA caselaw, courts are instructed to conduct an undue hardship analysis “in the common-sense manner that [they] would use in applying any such test.”²¹⁰

In dicta, Justice Alito then stated that courts should only consider effects on coworkers when doing so would impact a business’s conduct.²¹¹ A coworker’s anti-religiosity or dislike of an accommodation are not valid for the undue

²⁰⁴ See *id.* at 471–73. Because the main issue in the case was the nature of the undue hardship standard, it would be fair to characterize Justice Alito’s additional remarks as dicta. See *id.* at 453 (summarizing opinion); *supra* note 160 (defining dicta).

²⁰⁵ *Groff*, 600 U.S. at 468.

²⁰⁶ *Id.*

²⁰⁷ See *id.* at 468–70 (conducting statutory interpretation analysis of relevant Title VII provisions).

²⁰⁸ See *id.* at 470–71 (discussing the differences between the parties on what the standard should be, and clarifying such). Justice Alito emphasized that what was most important in this standard was that “courts . . . apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of [an] employer.” *Id.* (quoting Brief for the Respondent at 39, *Groff v. DeJoy*, 600 U.S. 447 (2023) (No. 22-174) (internal quotation marks omitted)).

²⁰⁹ *Id.* at 471. One commentator had expressed skepticism of attempts to compare the ADA with Title VII. See Engle, *supra* note 187, at 430 (noting that application of the ADA accommodation standard to cases involving conduct caused by a disability has limited claims). She noted that the ADA also has its limitations, and has not often been successfully used to remedy discrimination based on conduct. See *id.* at 429–30 (noting that only the Second Circuit does not apply a distinction to discrimination based on disability as a person’s conduct, as opposed to their status).

²¹⁰ *Groff*, 600 U.S. at 471. One commentator noted that the court’s decision does not offer clear guidance for lower courts as to how the Title VII and ADA standards are related, following this case. See *Title VII—Religious Accommodations—Groff v. DeJoy*, 137 HARV. L. REV. 470, 475 (2023) (expressing surprise that the court did not discuss the relationship between these standards). This was especially surprising given the ongoing criticism on the disparity between Title VII and the ADA. See *id.* (situating the case amid the scholarly debate over the two standards); *supra* notes 189–195 and accompanying text (discussing the debate surrounding the two standards).

²¹¹ *Groff*, 600 U.S. at 472.

hardship test.²¹² Furthermore, also in dicta, Justice Alito stated that the requirement upon an employer was to offer reasonable accommodations to their religious employees, not that the employer consider whether a particular accommodation was reasonable.²¹³

In a concurrence, which Justice Ketanji Brown Jackson joined, Justice Sotomayor emphasized that *Hardison*'s holding, that an accommodation that denudes other workers of their rights under the seniority system is an undue hardship on the employer, is still good law.²¹⁴ Relatedly, Justice Sotomayor emphasized that "undue hardship on the conduct of a business may include undue hardship on the business's employees."²¹⁵

III. RESOLVING THE SPLIT: A REASONABLE ACCOMMODATION NEED NOT ELIMINATE THE CONFLICT

The division among the circuits on the nature of religious accommodation points to a greater concern: how to balance the economic needs of an employer with the religious requirements of an employee.²¹⁶ The courts should adopt a new framework for dealing with religious accommodation cases that grants employees more freedom to manifest their religious identity at work while also allowing for recognition of an employer's countervailing interests.²¹⁷

Section A of this Part suggests not just siding with the minority position in the circuit split, but doing so in a way that is informed by the good-faith bargaining standard under the National Labor Relations Act.²¹⁸ Section B of this Part offers justifications for this standard on the basis of textual fidelity and policy.²¹⁹

²¹² *Id.*

²¹³ *Id.* at 473. The court thus stated that the employer could not consider the accommodation of requiring other workers to work additional shifts, and then reject it. *Id.* Instead, the employer had to take other potential options, including non-mandatory shift-swapping, under consideration. *Id.*

²¹⁴ *See id.* at 474–76 (Sotomayor, J., concurring) (discussing *Hardison* and the Court's decision not to overturn it).

²¹⁵ *Id.* at 475.

²¹⁶ *See Blair, supra* note 7, at 538 (stating that "[t]he amendments to Title VII that added religion as a protected category were enacted to ensure that employees with religious and workplace conflicts would be able to resolve the conflicts in a way that would enable the employees to meet both sets of obligations"). The concern regarding balance was raised in the Senate debate over the amendment, in which Senator Dominick asked whether the religious accommodation amendment would provide the EEOC with discretion as to whether a particular religious group's activities were unfairly infringed upon. *See LEGISLATIVE HISTORY, supra* note 19, at 714 (asking whether the amendment provides flexibility in EEOC investigations).

²¹⁷ *See Blair, supra* note 7, at 518–19 (arguing that religious accommodation law should be viewed through the perspective of the employee, not the employer's burden).

²¹⁸ *See infra* notes 220–225 and accompanying text.

²¹⁹ *See infra* notes 227–242 and accompanying text.

A. Resolving the Circuit Split Through a New, Good-Faith Framework

The legislative history of Title VII indicates that Congress intended there to be mutual cooperation between employer and employee as to how to accommodate an employee's religious practice.²²⁰ Up to this moment, however, the courts have not focused on the process of negotiation between employee and employer, but on the substantive outcome of negotiations—that is, whether the proffered accommodation eliminated the conflict.²²¹ This disconnect should be resolved by adopting the minority position in the circuit split regarding the definition of reasonable accommodation, while also turning to labor law to fill in that definition.²²²

A reasonable accommodation should be defined as an accommodation offered by an employer in a good faith effort to accommodate fully an employee's religious practice.²²³ Thus, the court would not judge whether an accommodation was reasonable by the effectiveness of the final accommodation offered, but whether the offer was a subjective good-faith attempt to allow an

²²⁰ See Blair, *supra* note 7, at 540 (noting that the legislative history of the religious accommodation provision seemed to suggest a scheme in which employers and employees cooperated to balance religious and business needs). Senator Dominick, in discussing the religious accommodation amendment in the Senate, asked if the amendment provided flexibility for the EEOC to make a determination of whether a conflict interfered with a religious group's practice beyond reason. See LEGISLATIVE HISTORY, *supra* note 19, at 714 (stating Senator Dominick's query whether the amendment would give discretion to the EEOC). Senator Randolph, the author of the amendment, stated that the amendment encompassed an understanding approach. See *id.* (stating Senator Randolph's belief that an understanding approach would result from the adoption of the amendment). Senator Williams then began discussing the amendment with Senator Randolph, mentioning that he was an employer who accommodated the requests of his employees to observe certain days for their religion. See *id.* (including discussion between Senators Williams and Randolph, including Senator Williams' description of his employment practices). Senator Randolph agreed that in many instances, these conflicts could be resolved amicably, as both employee and employer are understanding of one another. See *id.* at 714–15 (noting the belief of Senator Randolph that many religious conflicts could be resolved without abrasiveness).

²²¹ See, e.g., *Groff v. DeJoy*, 35 F.4th 162, 169 (2022), *rev'd*, 600 U.S. 447 (discussing “whether an offered accommodation must eliminate the conflict between a job requirement and the religious practice”).

²²² See *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 314 (2008) (“A duty of ‘reasonableness’ cannot be read as an invariable duty to eliminate the conflict between workplace rules and religious practice.”).

²²³ See *supra* note 97 (setting out a definition of good faith). In many ways, the standard set out in *Firestone* is already a good-faith standard, though this is not stated explicitly. See *Firestone*, 515 F.3d at 314–16 (describing the extent of the employer's duties under the reasonable accommodation standard, and applying that standard). The court in *Firestone* included the effort made by the employer to accommodate as a factor to be used in determining reasonableness. *Id.* at 314. In finding that the employer offered a reasonable accommodation, the court noted that it “sought to assist” the employee. *Id.* at 315. The court noted the pre-existing accommodations that the employee could take advantage of, as well as additional leave granted to the employee, which “demonstrates the willingness of [the employer] to tolerate some variance from the CBA when it felt it was possible and appropriate.” *Id.* at 316. The court also emphasized that the supervisor engaged in a weekly schedule review to alter the employee's shift if he could, showing action on the employer's part to accommodate. *Id.*

employee's full expression of her religion.²²⁴ It is likely that, similar to the good-faith standard under labor law, this would be a totality of the circumstances test.²²⁵

B. Justifications for the Good-Faith Framework

There are several reasons why courts should pivot away from a focus on the effect of the accommodation and toward the reasonableness of the parties' behavior.²²⁶ The minority position in the circuit allows for a closer adherence to the plain meaning of the statute.²²⁷ Additionally, the minority position allows for more flexibility in the standard that will lead to superior policy outcomes.²²⁸

1. Plain Meaning

The plain meaning of the statute lends support to a definition of reasonableness that focuses on the conduct of the employer; as the Fourth Circuit stated in *Firestone*, a reasonable accommodation is only reasonable, not total.²²⁹ The word reasonable suggests that there should be some negotiation over the accommodation and that the employer may require the employee to compromise.²³⁰ For example, certain religious beliefs may be less strongly held than others, and a reasoned compromise may leave both parties more satisfied than an all-or-nothing approach that leaves the employer resorting to the undue hardship cudgel to get out of providing any accommodation.²³¹ The word reasonable,

²²⁴ Cf. *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952) ("[T]he [NLRB] may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.").

²²⁵ See *supra* note 100 (discussing the totality-of-the-circumstances test for good faith under labor law). Factors that weigh against a finding of good faith may include refusing to timely meet with the employee, refusing to moderate one's bargaining position, or recanting previously agreed-upon agreements. Cf. *Atlanta Hilton & Tower*, 271 N.L.R.B. 1600, 1603 (1984) (setting out similar factors for the good-faith test under labor law).

²²⁶ See *infra* notes 229–242 and accompanying text.

²²⁷ See *infra* notes 229–232 and accompanying text.

²²⁸ See *infra* notes 233–242 and accompanying text.

²²⁹ See 515 F.3d 307, 313 (2008) (contrasting the majority view of complete accommodation with the court's view, which is that the modifier *reasonable* conveys a lesser degree of accommodation required).

²³⁰ See *id.* (suggesting that an accommodation should depend on the significance of an employee's obligations to her religion, in addition to the work requirements of her employer).

²³¹ See *id.* (noting that religious accommodation jurisprudence is a "field of degrees, not a matter for extremes"). As opposed to other characteristics protected by Title VII, religion is mutable in that it is not an unchangeable trait such as one's race. See Blair, *supra* note 7, at 546–47 (contrasting religion with physical traits protected by Title VII). There are some similarities between religion and national origin, another trait protected by Title VII, in that a person is born with either of those traits without any physical indications of such. See *id.* (noting similarities in both religion and national origin, in that both can attach at birth). The major factor that differentiates religion from other protected characteristics, however, is that religion is ultimately a question of belief. See *id.* at 547 (noting that religion is

however, also implies that the employer deal with the employee fairly and make an honest effort to accommodate him, in line with a good-faith standard.²³²

2. Policy Considerations Justify Adoption of the Minority Rule

Moving toward a reasonable accommodation standard that does not require total elimination of the conflict, and instead focuses on the conduct of the employer, also has a positive policy effect: it better allows for the consideration of the other employees in the workplace, as part of the totality of the circumstances considered in the good-faith analysis, as opposed to a consideration only of the employer's needs.²³³ This allows for a worthy counterbalance to the undue hardship standard post-*Groff*, which clearly now only looks at the impact to the employer.²³⁴

COVID-19 vaccine exemptions show the importance of considering the cost to other employees in the reasonable accommodation analysis, especially as another pandemic may arrive soon.²³⁵ In the aggregate, COVID-19's cost to employers from lost productivity has been significant.²³⁶ Applying an undue

much more likely to involve an initial choice than the other protected categories under Title VII). Although some courts are unwilling to require a religious accommodation out of a fear of endorsing a religious belief, it should be noted that once a person makes a choice to follow a religious faith, the beliefs and tenets of that religion can become "all-encompassing" and there is no real choice for the employee at all. *See id.* (noting that after the initial choice to follow a religion, there is no further choice whether or not to follow a religious belief, lest the religion become meaningless).

²³² *See Reasonable*, BLACK'S LAW DICTIONARY *supra* note 58 (defining "reasonable" as "[f]air, proper, or moderate under the circumstances; sensible"). One could suggest that given the similarity in language between Title VII and the ADA, a plain language analysis would call for the Supreme Court's holding in *Barnett* to control the approach to Title VII. *See* *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002) (holding that a reasonable accommodation under the ADA is one that is facially feasible). There are advantages to this position, in that analyzing what is reasonable ordinarily is likely a less intensive test than the necessarily subjective good-faith test. *See id.* (holding that a reasonable accommodation is facially reasonable). But the Supreme Court appears to view the use of the ADA standard in Title VII cases with disfavor. *See Groff v. DeJoy*, 600 U.S. 447, 471 (2023) (rejecting suggestion that the lower courts rely on ADA precedent to interpret Title VII).

²³³ *See Blair, supra* note 7, at 538 (noting that the current focus of the reasonable accommodation analysis is on how to minimize the cost incurred by an employer, not how to protect the rights of an employee). This focus on the employer's hardship seems to be contravened by the statute, which seems to define accommodation in broad terms. *Id.*

²³⁴ *See Groff*, 600 U.S. at 472 (emphasizing that hardships on coworkers are only pertinent for the undue hardship question if they affect the business). Necessarily, the undue hardship analysis is focused on the needs of the employer, not the needs of employees. *See Blair, supra* note 7, at 518 (noting that the burden test focuses the court's analysis "through the lens of the employer").

²³⁵ *See* Kristen Rogers, *There Will Be Another Pandemic, Infectious Disease Experts Say. Here Are Six Ways We Can Prepare for It*, CNN, <https://www.cnn.com/2022/06/01/health/prepare-for-next-pandemic-life-itself-wellness/index.html> (June 1, 2022) [<https://perma.cc/8TAW-GS4H>] (expressing opinion of an infectious disease expert that we "live in an age of pandemics").

²³⁶ *See COVID-19 Costing U.S. Employers Billions*, CBIA (Jan. 19, 2022), <https://www.cbia.com/news/hr-safety/covid-19-costing-employers-billions/> [<https://perma.cc/TS53-W28L>] (finding that COVID-19 has cost U.S. employers \$78.4 billion over the first 22 months of the pandemic).

hardship test similar to the ADA's, however, a court could find that a vaccine mandate would not present an undue burden, depending on such factors as the size and nature of the business.²³⁷ Nowhere in this analysis is the cost on another employee mentioned, even though another employee stands to lose the most if a vaccine mandate is not implemented during a pandemic.²³⁸ In contrast, under the good faith test, an employer must make a good faith effort to accommodate the anti-vaccination employee—perhaps by offering them a work from home position—but is not forced to choose between exempting the employee from the vaccine mandate (and therefore eliminating the conflict) or seeking an undue hardship.²³⁹

This approach also has the benefit of offering the most protection to practice-intensive religions, which the Act was likely intended to give priority to.²⁴⁰ One commentator argues that the best way to protect such religions is to replace the reasonable accommodation test with a centrality test, requiring employers to accommodate central religious practices.²⁴¹ But focusing on the rea-

²³⁷ See 42 U.S.C. § 12111(10)(B) (listing several factors to consider in an ADA hardship analysis, including the operations and size of a business).

²³⁸ See *id.* (stating ADA standards focusing on the effect of the business, not on the other employees); see also *Groff v. DeJoy*, 35 F.4th 162, 176 (3rd Cir. 2022) (Hardiman, J., dissenting) (noting that neither the Supreme Court nor the Third Circuit had ruled that an undue hardship could be found when the factual record showed only an impact on fellow coworkers).

²³⁹ See *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 315–16 (2008) (describing good-faith attempts to accommodate employee, that nevertheless did not eliminate the conflict).

²⁴⁰ See LEGISLATIVE HISTORY, *supra* note 19, at 713 (specially referring to religious groups that impose rigid requirements on their members). One could argue that Senator Randolph was principally thinking of Judeo-Christian religions such as the church he was a part of, which are in a sense majority religious in that they belong to a majority tradition, because he mentions no other faith tradition. See *id.* at 712–13 (calling attention to the challenges faced by Orthodox Jews and Sunday Sabbatarians). Randolph was clear, however, that he was looking to protect members of religious organizations who would be forced to choose between their work and their faith. See *id.* at 712 (noting that the religious organizations which he mentioned previously are facing reduced membership because of the financial pressures put on their members).

²⁴¹ See Zaheer, *supra* note 7, at 522 (arguing for a centrality standard instead of a reasonable accommodation standard). This test would “require employers to accommodate all religious practices deemed ‘central’ to the employee’s faith, unless accommodation of those practices would result in an undue (i.e., significant) hardship to the employer.” *Id.* Essentially, the courts would engage in a balancing test of centrality of the practice to the employee’s religion and the burden placed on the employer. See *id.* (proposing a test that requires accommodation of central practices unless hardship as found). If the religious practice is less central to the employee’s religion, then the employer would not be required to shoulder as costly of a burden to accommodate the practice. *Id.* Zaheer distinguishes in this argument between a less-central religious preference, for which an employer would only have to incur a *de minimis* cost, and a more-central religious mandate, which an employer would have to accommodate absent “significant expense.” *Id.* A practice is central if an employee’s faith is “substantially undermined” without it. *Id.* The initial burden would be on the employee to ask for an accommodation, show centrality of the practice to their faith, prove sincerity to that faith and come up with a reasonable accommodation. *Id.* If the employee met these elements, a presumption would attach that the proposed accommodation was reasonable unless the employer could show that the accommodation would bring an undue hardship, such as safety risks or legal liability. See *id.* at 522–23 (proposing a

sonable accommodation standard has the additional benefit of allowing employers to put more emphasis on the requests of employees from practice-intensive religions, making it more likely that they will be granted.²⁴²

CONCLUSION

Title VII of the Civil Rights Act of 1964 and its amendments were passed with admirable motives: to allow everyone to participate fully in society, no matter their innate characteristics. Unfortunately, the jurisprudence regarding religious accommodations has failed to live up to this ideal. The standard has proved too strict on employees, who under the previous *de minimis* standard were often robbed of any real chance of an accommodation. But it has also failed to fully address the question of how to balance the competing rights of a religious employee, her employer, and her coworkers against each other.

The circuit split regarding whether an accommodation must always eliminate the conflict between an employee's religious practice and the business needs of her employer should be resolved in favor of the minority opinion, which allows for an accommodation not to eliminate the conflict and still be reasonable. The good-faith bargaining framework under the NLRA provides a helpful guide for future development of this framework. The minority position is more in line with the plain meaning and the legislative intent of the statute. Additionally, adopting such a position will lead to more just outcomes.

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requirement that employers show evidence of undue hardship, such as the threat of civil liability if an employee claims that racial discrimination is central to their faith).

²⁴² See *Firestone*, 515 F.3d at 313 (noting that what is reasonable should depend, in part, on the strength of an employee's religious convictions).

