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Restoring Reasonableness to Workplace Religious Accommodations

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RESTORING REASONABLENESS TO WORKPLACE RELIGIOUS ACCOMMODATIONS

Dallan F. Flake*

Abstract: When Congress amended Title VII of the Civil Rights Act in 1972 to require employers to reasonably accommodate employees’ religious practices absent undue hardship to their business, it intended to protect employees from being forced to choose between their jobs and their religious beliefs. Yet in the decades since, courts have cut away at this right to the point it is practically nonexistent. Particularly concerning is the growing tendency of courts to read reasonableness out of the accommodation requirement, either by conflating reasonableness and undue hardship so that an accommodation’s reasonableness depends solely on whether it would cause the employer undue hardship, by setting the bar for reasonableness so low it is practically meaningless, or by ignoring the requirement altogether. Consequently, employers today have near carte blanche over whether and how to provide religious accommodations—a power imbalance that often forces employees into the precise dilemma from which Congress sought to protect them.

This Article argues for the restoration of employees’ right to reasonable religious accommodations. It does so by asserting that reasonableness under Title VII is a standalone requirement, separate and distinct from undue hardship, that must be evaluated from the employee’s perspective. An accommodation should be deemed reasonable to the employee only if it (1) fully eliminates the conflict between the employee’s job and religion, (2) does not cause the employee to suffer an adverse employment action, and (3) avoids unnecessarily disadvantaging the employee’s terms or conditions of employment. This conceptualization of reasonableness aligns with Congress’s intent and, if adopted, would help level the playing field between employers and employees in this increasingly critical area of law.

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INTRODUCTION

When Jerome Christmon asked B&B Airparts to accommodate his Hebrew Israelite faith by allowing him to work his mandatory overtime shifts on Sundays instead of Saturdays, his employer refused.¹ With no other option, Christmon stopped showing up for his Saturday shifts so he could observe his Sabbath.² Although B&B refrained from firing him for his absences, Christmon felt deeply dissatisfied with this arrangement because it caused him to miss out on lucrative overtime pay.³ He eventually filed suit, alleging B&B violated Title VII of the Civil Rights Act of 1964, which requires an employer to “reasonably accommodate to an employee’s or prospective employee’s religious observance or practice” unless doing so would cause “undue hardship on the conduct of the employer’s business.”⁴

Christmon did not fare well in litigation. The district court granted B&B summary judgment, which the Tenth Circuit affirmed.⁵ That B&B won and Christmon lost is hardly surprising: employee victories in religious accommodation cases tend to be few and far between.⁶

1. *Christmon v. B&B Airparts, Inc.*, 735 F. App’x 510, 512 (10th Cir. 2018).

2. *Id.*

3. *Id.*

4. 42 U.S.C. § 2000e(j).

5. *Christmon*, 735 F. App’x at 515.

6. See J.H. Verkerke, *Is the ADA Efficient?*, 50 UCLA L. REV. 903, 929 (2003) (explaining why it

Nevertheless, the case is alarming because of how the court reached its decision. The appellate court held that B&B's accommodation—refraining from firing Christmon for his Saturday absences—was reasonable because it allowed him to keep his job, no matter how it otherwise impacted his employment.⁷ The court's opinion is devoid of any analysis of how much overtime pay Christmon was unable to earn, whether his Saturday absences or inability to work overtime hindered his opportunities for promotion, or whether the accommodation adversely impacted some other term or condition of his employment. The court instead emphasized that “a reasonable accommodation does not necessarily spare an employee from any resulting cost” and that an “accommodation may be reasonable even though it is not the one that the employee prefers.”⁸ In essence, the court told Christmon to quit complaining—he was lucky to have kept his job.

The Tenth Circuit Court of Appeal's decision is symptomatic of a disconcerting trend whereby courts assess a religious accommodation's validity without duly considering how it impacts the employee's terms or conditions of employment. Despite Title VII's plain language requiring employers to provide reasonable accommodations,⁹ courts are effectively reading this requirement out of the statute by (1) conflating reasonableness and undue hardship so that an accommodation's reasonableness depends solely on whether it causes the employer undue hardship, (2) setting the bar for reasonableness so low it is practically meaningless, or (3) ignoring the requirement altogether.

This trend is made more egregious by the fact it is part of a longstanding judicial crusade to dilute Title VII's religious accommodation provision. More than four decades ago, the Supreme Court gutted the statute by construing “undue hardship” to mean anything more than a *de minimis* burden to the employer¹⁰—essentially giving employers the green light to

is easier for an employer to defeat a religious accommodation claim than a disability accommodation claim); Bilal Zaheer, Note, *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, 519–20 (arguing that plaintiffs face “an insurmountable burden” in proving religious accommodation claims).

7. *Christmon*, 735 F. App'x at 514 (concluding the accommodation was reasonable because it “allowed Mr. Christmon to avoid the conflict with his religious beliefs even if he lost the opportunity for overtime”).

8. *Id.*

9. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977) (“The intent and effect of [Title VII's reasonable accommodation provision] was to make it an unlawful employment practice . . . for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees.”).

10. *Id.* at 84.

deny religious accommodations in all but the narrowest circumstances.¹¹ But the courts did not stop there. They also have denied employees the right to select their preferred accommodation, have upheld accommodations that only partially resolve the conflict between an employee's job and religion, and have been reluctant to require employers to engage in the same interactive process with an employee seeking a religious accommodation as they must with an employee seeking a disability accommodation.¹² This judicial hostility toward religious accommodations has created a vast power imbalance between employers and religious-accommodation seekers. Employers wield virtual *carte blanche* over if, how, and when employees are accommodated, whereas employees have little, if any, say in such matters.

This Article argues for the restoration of employees' right to reasonable religious accommodations. It does so by first asserting that reasonableness under Title VII is a standalone requirement, separate and distinct from the statute's undue hardship provision. While undue hardship should be evaluated from the employer's perspective, reasonableness must be assessed from the employee's point of view. Decoupling these terms would force courts to consider an accommodation's impact on both the employer and the employee. The Article then proposes three requirements for an accommodation to be reasonable: (1) it must fully eliminate the conflict between the employee's job and religious beliefs, (2) it must not cause the employee to suffer an adverse employment action, and (3) it must not unnecessarily disadvantage the employee's terms or conditions of employment. This conceptualization of reasonableness comports with Congress's intent that when possible, employees should not be forced to choose between their jobs and their religious convictions.¹³

Had the Tenth Circuit applied this framework in *Christmon v. B&B Airparts, Inc.*,¹⁴ its analysis—and perhaps conclusion—would have been different. Instead of proclaiming the accommodation reasonable simply

11. See *infra* section I.B.1.

12. See *infra* section I.B.4.

13. See *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1120 (10th Cir. 2013) (explaining that Title VII was designed to protect employees from choosing “between their religious convictions and their job”), *rev'd on other grounds*, 575 U.S. 768 (2015); *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 136 (3d Cir. 1986) (quoting *United States v. McIntosh*, 283 U.S. 605, 634 (1931)) (noting that Title VII's accommodation requirement is “plainly intended to relieve individuals of the burden of choosing between their jobs and their religious convictions, where such relief will not unduly burden others”); Jamie Darin Prenekert & Julie Manning Magid, *A Hobson's Choice Model for Religious Accommodation*, 43 AM. BUS. L.J. 467, 475–76 (2006) (recounting that the lead sponsor of Title VII's religious accommodation bill believed it “would save employees the pain of having to choose between their religions and their jobs”).

14. 735 F. App'x 510 (10th Cir. 2018).

because it allowed Christmon to keep his job, the court would have considered whether B&B's decision to not fire Christmon for his Saturday absences was a reasonable accommodation from Christmon's point of view. Because the accommodation eliminated the conflict between Christmon's job and religion and did not constitute an adverse employment action, the court would have focused on the third element of reasonableness: whether the accommodation unnecessarily disadvantaged the terms or conditions of his employment. The accommodation disadvantaged Christmon by preventing him from earning overtime pay. Whether this disadvantage was "unnecessary" would depend on whether B&B, without undue hardship, could have accommodated Christmon in a manner less burdensome to his employment. The court would have probed the feasibility of B&B allowing Christmon to work his overtime on Sundays, as he requested, without suffering undue hardship to its business—a crucial question the Tenth Circuit ignored. If B&B could have accommodated Christmon in this manner (a very real possibility, given that it had allowed him to work on Sunday in at least one instance¹⁵), the company's decision to accommodate him by not firing him would have been unreasonable because it unnecessarily disadvantaged his employment.

The need for reasonable religious accommodations has never been greater. Religious discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) have doubled over the past two decades, from 1,709 or 2.1% of all charges in 1997 to 3,436 or 4.1% of all charges in 2017.¹⁶ The courts continue to whittle away at the right to religious accommodation at a time when they should be expanding it. Not only does the American workforce continue to grow more religiously diverse than ever,¹⁷ but employees are becoming increasingly

15. See Appellant's Opening Brief at 2, *Christmon*, 735 F. App'x 510 (No. 17-3209).

16. See *Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 19*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> [<https://perma.cc/8UT7-2SMX>].

17. See PAUL D. NUMRICH, *THE FAITH NEXT DOOR: AMERICAN CHRISTIANS AND THEIR NEW RELIGIOUS NEIGHBORS* 6 (2009) (arguing that even skeptics of religious-affiliation data "admit that the United States is more religiously diverse today than ever before and will likely continue to diversify in the future"); ROBERT P. JONES & DANIEL COX, *AMERICA'S CHANGING RELIGIOUS IDENTITY: FINDINGS FROM THE 2016 AMERICAN VALUES ATLAS 10* (2017), <https://www.prii.org/wp-content/uploads/2017/09/PRRI-Religion-Report.pdf> [<https://perma.cc/6U45-H8YG>] ("The American religious landscape has undergone dramatic changes in the last decade and is more diverse today than at any time since modern sociological measurements began."). Because immigration is largely driving the increase in religious diversification, both among and within religions, America's religious landscape should continue to diversify so long as immigration rates remain steady. See DIANA L. ECK, *A NEW RELIGIOUS AMERICA: HOW A "CHRISTIAN COUNTRY" HAS NOW BECOME THE WORLD'S*

intent on expressing their religious beliefs at work.¹⁸ Consequently, employers face tremendous pressure to accommodate a broader range of religious beliefs and behaviors with which they may have little or no familiarity,¹⁹ which can result in employers providing inadequate accommodations or, worse yet, no accommodation at all. If adopted, this Article's conceptualization of reasonableness could help defuse what is becoming an explosive situation by ensuring that when an employer can accommodate an employee without undue hardship, the accommodation provided is reasonable to the employee.

This Article proceeds in four Parts. Part I provides background on the genesis of the right to workplace religious accommodations. It also details the judicial efforts to diminish this right. Part II focuses on the growing tendency of courts to read the reasonableness requirement out of Title VII's religious accommodation provision. Part III explains why reasonableness and undue hardship are not two sides of the same coin but are in fact separate and distinct concepts that require analysis from different points of view. It draws upon Title VII's text, legislative history, EEOC guidance, Supreme Court jurisprudence, and other judicial decisions to demonstrate why an accommodation's reasonableness must be assessed from the employee's perspective. Part IV proposes a test for reasonableness centered on how an accommodation impacts an

MOST RELIGIOUSLY DIVERSE NATION 1–4 (2001) (explaining how immigration has contributed to greater internal diversity within established religious traditions); PEW RSCH. CTR., AMERICA'S CHANGING RELIGIOUS LANDSCAPE 53 (2015), <https://www.pewforum.org/wp-content/uploads/sites/7/2015/05/RLS-08-26-full-report.pdf> [<https://perma.cc/S58E-SEV6>] (noting that the vast majority of Hindus and Muslims in the United States are either immigrants or children of immigrants).

18. See Sonia Ghumman, Ann Marie Ryan, Lizabeth A. Barclay & Karen S. Markel, *Religious Discrimination in the Workplace: A Review and Examination of Current and Future Trends*, 28 J. BUS. & PSYCH. 439, 449 (2013) (citing studies in support of their conclusion that “[a]s American organizations increasingly promote diverse workplaces in the belief that diversity adds value for their organizations, the number of organizations allowing such workplace religious expression has expanded” and “the number of employees who wish to express their religion at work has increased”); see also Dallan F. Flake, *Image Is Everything: Corporate Branding and Religious Accommodation in the Workplace*, 163 U. PA. L. REV. 699, 706–08 (2015) (explaining that increased religious expression in the workplace is attributable to demographic factors such as the aging baby boomer generation, cultural factors such as workers' expectations of being able to express their whole selves in the workplace, religious factors such as increased public evangelism, and reimagined workplaces in which employees are free to express themselves).

19. See Ghumman et al., *supra* note 18, at 449 (“[A]lthough most American workplaces may be secular in nature, the majority of work policies and procedures favor Christian practices and observances (i.e., no work on Sundays, Christmas is considered a federal holiday) As religious diversity increases, some of the religions gaining increasing representation in America (i.e., Muslims, Sikhs) may have certain religious-based obligations requiring expression and requests for religious accommodations such as religious holidays during regular workdays, time off for prayer/rituals, religious attire, and grooming practices will also inevitably increase.”).

employee's ability to practice their religion and perform their job. It also explores the potential impact of adopting this conceptualization of reasonableness.

I. THE RIGHT TO RELIGIOUS ACCOMMODATION

This Part begins with background on how Title VII came to require accommodation of religious beliefs. Understanding the origins of the religious accommodation provision is key to why an accommodation's reasonableness must be evaluated from the employee's point of view. It then examines how the courts have cut away at the right to accommodation to the point it is practically nonexistent.

A. *Origins*

Enacted as part of the landmark Civil Rights Act of 1964, Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."²⁰ Title VII initially did not require employers to provide religious accommodations.²¹ This quickly became problematic because even though an employer could not terminate an employee because of their religion, the statute in no way limited the employer's ability to terminate an employee whose religious beliefs interfered with their job performance.²² Thus, it was illegal for an employer to terminate an

20. 42 U.S.C. § 2000e-2(a)(1). How religion came to be included as a protected class is something of a mystery, as the legislative history indicates Congress's near singular focus was on enacting legislation to eradicate racial discrimination in employment. See Julia Bruzina, Erickson v. Bartell: *The "Common Sense" Approach to Employer-Based Insurance for Women*, 47 ST. LOUIS U. L.J. 463, 474 (2003) (explaining how the legislative history of the Civil Rights Act of 1964 shows Congress's focus "was primarily, if not solely, on race"); Sabina F. Crocette, *Considering Hybrid Sex and Age Discrimination Claims by Women: Examining Approaches to Pleading and Analysis—A Pragmatic Model*, 28 GOLDEN GATE U. L. REV. 115, 122 (1998) ("When Congress enacted the Civil Rights Act in 1964, its central focus was to eradicate race discrimination against African-Americans and other minority groups."); James A. Sonne, *The Perils of Universal Accommodation: The Workplace Religious Freedom Act of 2003 and the Affirmative Action of 147,096,000 Souls*, 79 NOTRE DAME L. REV. 1023, 1034 (2004) ("[T]here is little in the way of legislative history to determine whether Congress considered religion an immutable characteristic, whether it was singled out for protection based on its historical importance in the constitutional context, or for some other reason."). At any rate, its inclusion in Title VII places religion on equal footing with race, color, sex, and national origin.

21. Marion K. McDonald, *Establishment Clause Challenge to Mandatory Religious Accommodation in the Workplace*, 36 HASTINGS L.J. 121, 136–37 (1984) ("When it was first enacted in 1964, title VII did not contain a religious accommodation provision.").

22. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 72 (1977) ("The prohibition against

employee for belonging to the Seventh Day Adventist faith, but the employer was well within its right to fire the employee if they were unable to work on Saturdays because of their religious beliefs. This loophole allowed employers to indirectly discriminate against employees because of their religious beliefs without running afoul of the statute.

Inundated with complaints from employees whose employers refused to allow them time off to observe their Sabbath or religious holidays,²³ the EEOC issued guidelines in 1966,²⁴ which it refined in 1967, suggesting employers bore an affirmative duty to “make reasonable accommodations to the religious needs of employees . . . where such accommodations can be made without undue hardship on the conduct of the employer’s business.”²⁵ This was a fairly radical proposition for its time. Up until then, antidiscrimination statutes were entirely proscriptive in the sense that they merely prohibited employers from taking discriminatory action. Not surprisingly, this guidance carried little weight with the courts. The Sixth Circuit Court of Appeals was particularly hostile to the notion of accommodation, holding in *Dewey v. Reynolds Metals Co.*²⁶ that the EEOC’s position was inconsistent with Title VII, as the legislative history did not reflect any “Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another.”²⁷

When the Supreme Court affirmed *Dewey* by an equally divided court in 1971,²⁸ West Virginia Senator Jennings Randolph, himself a Seventh Day Baptist, responded by leading a charge to amend Title VII to require religious accommodation.²⁹ Congress was more open to this idea than the courts had been, as Senator Randolph’s bill sailed through both chambers

religious discrimination soon raised the question of whether it was impermissible under [Title VII] to discharge or refuse to hire a person who for religious reasons refused to work during the employer’s normal workweek.”).

23. See Thomas D. Brierton, “Reasonable Accommodation” Under Title VII: Is It Reasonable to the Religious Employee?, 42 CATH. LAW. 165, 167 (2002) (recounting that the EEOC “raised the issue of reasonable accommodation two years after the law had gone into effect due to complaints from religious employees that employers were refusing to allow them to take time off during the regular work week in order to observe holy days”).

24. 31 Fed. Reg. 8370 (June 15, 1966) (to be codified at 29 C.F.R. pt. 1605).

25. 32 Fed. Reg. 10298 (July 13, 1967) (to be codified at 29 C.F.R. pt. 1605).

26. 429 F.2d 324 (6th Cir. 1970), *aff’d by an equally divided court*, 402 U.S. 689 (1971) (per curiam).

27. *Id.* at 334.

28. *Dewey v. Reynolds Metals Co.*, 402 U.S. 689, 689 (1971).

29. See Debbie N. Kaminer, *Title VII’s Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575, 584 (2000) (“The amendment was introduced by Senator Jennings Randolph, a Seventh-Day Baptist, with the express purpose of protecting Sabbatarians.”).

with almost no scrutiny.³⁰ Enacted just one year after *Dewey*, the amendment closely tracked the EEOC's guidelines by expanding the definition of "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."³¹ Although this language has remained unchanged in the decades since, how the courts have interpreted and applied it has evolved significantly.

B. *Erosion*

The amendment of Title VII did not end judicial skepticism of religious accommodations. Just five years later, the Supreme Court effectively gutted the amendment by setting the bar for undue hardship as low as possible.³² But instead of attempting to minimize the damage, subsequent courts piled on. They not only embraced the low standard for undue hardship but also found further ways to strip the religious accommodation provision of its force.

1. *Undue Hardship*

In *Trans World Airlines, Inc. v. Hardison*,³³ the Supreme Court considered the circumstances under which an employer could deny a religious accommodation because of undue hardship.³⁴ When Larry Hardison joined the Worldwide Church of God, he asked to be excused from Saturday shifts to observe his Sabbath.³⁵ TWA agreed to allow him to seek a change of work assignments to accommodate his religious needs, but the union that represented him refused because it would have violated the collective bargaining agreement.³⁶ TWA rejected a proposal that Hardison only work four days per week.³⁷ Leaving the position empty or filling it with an employee from another area would have impaired operations, and employing someone not regularly assigned to Saturday

30. See *Riley v. Bendix Corp.*, 464 F.2d 1113, 1117 (5th Cir. 1972) (observing that Title VII's religious accommodation measure "was passed by a unanimous vote in the Senate" and "similar approval by the House of Representatives").

31. 42 U.S.C. § 2000e(j).

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

33. 432 U.S. 63 (1977).

34. *Id.* at 84.

35. *Id.* at 67–68.

36. *Id.* at 68.

37. *Id.*

shifts would have required the company to pay overtime wages.³⁸ TWA ultimately concluded it could not accommodate Hardison without undue hardship, a determination Hardison challenged in subsequent litigation.³⁹ The district court sided with TWA, but the Eighth Circuit Court of Appeals reversed.⁴⁰ In overturning the appellate court, the Supreme Court famously declared that requiring an employer “to bear more than a de minimis cost” to accommodate an employee’s religious needs constitutes undue hardship.⁴¹ In doing so, the Court applied one of the lowest legal standards⁴² to a statutory phrase that ordinarily denotes more stringency.⁴³ Because accommodating Hardison would have imposed more than a de minimis cost to TWA, the company had no duty to accommodate him at all.⁴⁴

The *Hardison* decision drew immediate criticism, most notably from Justice Marshall, who, in his blistering dissent, lamented that the majority opinion “deal[t] a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices.”⁴⁵ He found the decision “deeply troubling” as a matter of social policy because it forced employees into “the cruel choice of surrendering their religion or their job” and “intolerable” as a matter of law because it “adopt[ed] the very position that Congress expressly rejected in 1972, as if we were free to disregard congressional choices that a majority of this Court

38. *Id.* at 68–69.

39. *Id.*

40. *Id.* at 69–70.

41. *Id.* at 84.

42. Translated from Latin, “de minimis” means “of the least.” *De minimis*, BLACK’S LAW DICTIONARY 524 (10th ed. 2014). *Black’s Law Dictionary* defines “de minimis” as “trifling,” “negligible,” and “so insignificant that a court may overlook it in deciding an issue or case.” *Id.* Courts have characterized the standard in a similar manner. *See, e.g., Hardison*, 432 U.S. at 87 (Marshall, J., dissenting) (interpreting the de minimis standard as so low that employers “need not grant even the most minor special privilege to religious observers to enable them to follow their faith”); *Faul v. Potter*, 355 F. App’x 527, 528 (2d Cir. 2009) (referring to the standard as “minimal”); *Beyer v. Cnty. of Nassau*, 524 F.3d 160, 163 (2d Cir. 2008) (explaining the standard is “neither onerous, nor intended to be rigid, mechanized or ritualistic” (citation omitted)); *Dupree v. UHAB-Sterling St. Hous. Dev. Fund Corp.*, No. 10-CV-1894, 2012 WL 3288234, at *4 (E.D.N.Y. Aug. 10, 2012) (stating the standard is “not a heavy burden”); *Franklin v. Astrue*, No. 11-615-MJP-MAT, 2012 WL 3059407, at *2 (W.D. Wash. July 25, 2012) (referring to the standard as “extremely low”).

43. *See Undue*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “undue” as “excessive or unwarranted”); *Hardship*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “hardship” as “privation; suffering or adversity”). The Court’s interpretation of “undue hardship” in Title VII stands in stark contrast to how Congress defined the term in the Americans with Disabilities Act of 1990. Similar to Title VII, it requires employers to reasonably accommodate employees with disabilities absent undue hardship, which the statute defines as “an action requiring significant difficulty or expense.” 42 U.S.C. § 12111(10)(A).

44. *Hardison*, 432 U.S. at 84–85.

45. *Id.* at 86 (Marshall, J., dissenting).

thinks unwise.”⁴⁶

Rather than question *Hardison*'s soundness, the lower courts have embraced it, routinely granting employers summary judgment if an accommodation would impose on the employer virtually any burden at all.⁴⁷ In fact, some courts have gone so far as to grant employers summary judgment, not because of any actual hardship, but because of the mere possibility of hardship in the future.⁴⁸

The courts' willingness to strike down many religious accommodation claims on undue hardship grounds has prompted litigants to petition the Supreme Court to overrule *Hardison*.⁴⁹ To date, the Court has declined to revisit the issue. Likewise, Congress has repeatedly considered amending Title VII to raise the undue hardship standard via the Workplace Religious Freedom Act (WRFA).⁵⁰ The most recent version of the legislation noted that *Hardison* had “narrowed the scope of protection of [T]itle VII against religious discrimination in employment, contrary to the intent of Congress,” and consequently, “discrimination against employees on the basis of religion in employment continues to be an unfortunate and unacceptable reality.”⁵¹ Despite bipartisan support,⁵² WRFA has never come particularly close to passing.⁵³

46. *Id.* at 87.

47. *See, e.g.*, *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 274 (5th Cir. 2000) (holding that the “mere possibility of an adverse impact” was enough to constitute undue hardship after *Hardison*).

48. *See, e.g.*, *Patterson v. Walgreen Co.*, 727 F. App'x 581, 588–89 (11th Cir. 2018) (holding that the employee's request for a scheduling accommodation “would produce undue hardship for Walgreens in the future” based on the possibility that the employer would have been required to reschedule certain training sessions); *Virts v. Consol. Freightways Corp.*, 285 F.3d 508, 519–20 (6th Cir. 2002) (approving and applying *Weber*'s “mere possibility” standard).

49. *See, e.g.*, Petition for a Writ of Certiorari at 28–34, *Patterson*, 727 F. App'x 581 (No. 18-349) (petitioning the Supreme Court to revisit *Hardison* on the ground the decision was poorly reasoned and runs contrary to congressional intent; petition denied).

50. *See* S. 3686, 112th Cong. (2012); S. 4046, 111th Cong. (2010); S. 3628, 110th Cong. (2008); H.R. 1431, 110th Cong. (2007); H.R. 1445, 109th Cong. (2005); S. 677, 109th Cong. (2005); S. 893, 108th Cong. (2003); S. 2572, 107th Cong. (2002); H.R. 4237, 106th Cong. (2000); S. 1668, 106th Cong. (1999); H.R. 2948, 105th Cong. (1997); S. 1124, 105th Cong. (1997); S. 92, 105th Cong. (1997); H.R. 4117, 104th Cong. (1996); S. 2071, 104th Cong. (1996); H.R. 5233, 103d Cong. (1994).

51. S. 3686, 112th Cong. § 2(3)–(4) (2012).

52. *See*, for example, H.R. 1431, 110th Cong. (2007), which was introduced by an equal number of Republican and Democratic Representatives. *See generally* LORRAINE C. MILLER, CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, OFFICIAL LIST OF MEMBERS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES AND THEIR PLACES OF RESIDENCE (2009) (showing the party affiliation of every member of the House of Representatives of the 110th Congress).

53. The legislation died in committee the last time it was proposed. *See* S. 3686 (112th): *Workplace Religious Freedom Act of 2013*, GOVTRACK, <https://www.govtrack.us/congress/bills/112/s3686#overview> [https://perma.cc/V964-DN69].

2. *Preferred Accommodation*

Nine years after *Hardison*, the Supreme Court dealt a second blow to religious accommodations by holding in *Ansonia Board of Education v. Philbrook*⁵⁴ that employees are not entitled to their preferred accommodation in a scenario where multiple accommodation options exist.⁵⁵ Ronald Philbrook was a high school teacher, who, like *Hardison*, belonged to the Worldwide Church of God.⁵⁶ His faith required him to refrain from performing secular work during designated holy days, which caused him to miss approximately six school days annually.⁵⁷ Under the applicable bargaining agreement, Philbrook could take up to three days of paid leave each year to observe mandatory religious holidays.⁵⁸ The contract also allowed teachers to use three additional days of accumulated leave each year for “necessary personal business” but limited such leave to uses not otherwise specified in the contract, including observance of religious holidays.⁵⁹ For years, Philbrook observed his religious holidays by using his three days of paid leave granted in the contract and then taking unpaid leave for the remaining religious holidays.⁶⁰ He eventually stopped this practice and instead opted to schedule medical appointments on the holy days, which allowed him to use his accumulated sick leave and therefore be paid for those absences.⁶¹ Philbrook grew dissatisfied with this arrangement and asked the school board to either allow him to use his personal business leave for religious observance, which was his preferred arrangement, or pay him his full wages less the cost of a substitute teacher for the additional days off.⁶² The board rejected both proposals, prompting Philbrook to file suit alleging the board failed to reasonably accommodate his religious needs.⁶³

The district court ruled for the school board, concluding Philbrook had not suffered religious discrimination because the board had not placed him in a position of violating his religion or losing his job.⁶⁴ The Second Circuit Court of Appeals reversed, holding that if an employer and an

54. 479 U.S. 60 (1986).

55. *Id.* at 68.

56. *Id.* at 62.

57. *Id.* at 62–63.

58. *Id.* at 63–64.

59. *Id.* at 64.

60. *Id.*

61. *Id.*

62. *Id.* at 64–65.

63. *Id.* at 65.

64. *Id.*

employee each propose an accommodation, the employer must accept the employee's preferred accommodation unless such accommodation would impose undue hardship.⁶⁵ The Supreme Court rejected the appellate court's rule, holding that once an employer offers any reasonable accommodation, it has fulfilled its duty and has no further obligation to consider other accommodations proposed by the employee, even if they, too, are reasonable and would not impose undue hardship.⁶⁶

As with *Hardison*, lower courts have embraced *Ansonia*.⁶⁷ This undoubtedly simplifies the judicial task in cases where multiple accommodations are possible. A court need only ask whether the employer provided a reasonable accommodation without having to further consider the availability of alternatives, whether such alternatives would have imposed undue hardship on the employer, or whether the employer was aware of such possibilities. But while ignoring the possibility of alternative accommodations is certainly easier for courts, this further shifts power from the employee to the employer to determine the appropriate accommodation. Consequently, employees have even less say over if or how they are accommodated.

3. *Partial Accommodation*

While some courts are adamant that an accommodation must eliminate the conflict between work and religion,⁶⁸ a growing number are taking the opposite view. For example, in *EEOC v. Thompson Contracting, Grading, Paving, & Utilities, Inc.*,⁶⁹ a dump truck driver requested Saturdays off for

65. *Id.* at 65–66.

66. *Id.* at 68. (“By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation Thus, where the employer has already reasonably accommodated the employee’s religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee’s alternative accommodations would result in undue hardship.”).

67. *See, e.g.*, *Newton v. Potter*, No. 9:05-3165-PMD, 2007 WL 1035002, at *4 (D.S.C. Mar. 29, 2007) (holding that because “an employee is not entitled to the accommodation of his or her preference,” the plaintiff had no ground for arguing the accommodation provided to her was unreasonable, even though it nearly tripled the length of her daily commute (quoting *Ansonia*, 479 U.S. at 70)).

68. *See, e.g.*, *Baker v. Home Depot*, 445 F.3d 541, 547–48 (2d Cir. 2006) (holding that the employer’s offer to accommodate the employee who was unable to work Sundays for religious reasons by giving him a Sunday shift that allowed him to attend his religious service “was no accommodation at all because . . . it would not permit him to observe his religious requirement to abstain from work totally on Sundays”); *EEOC v. Ilona of Hung., Inc.*, 108 F.3d 1569, 1576 (7th Cir. 1997) (en banc) (holding that the employer’s offer to give a Jewish worker who requested Yom Kippur off a different day off “cannot be considered reasonable . . . because it does not eliminate the conflict between the employment requirement and the religious practice”).

69. 793 F. Supp. 2d 738 (E.D.N.C. 2011), *aff’d*, 499 F. App’x 275 (4th Cir. 2012).

religious reasons.⁷⁰ The district court concluded the company satisfied its duty under Title VII by invoking its paid personal leave policy—even though the policy did not apply to the driver.⁷¹ The court reasoned that “[a]lthough as a 90-day probationary employee, [the driver] was not yet able to take advantage of this policy, this fact ‘does not negate the reasonableness of the accommodation.’”⁷² Thus, the court upheld as reasonable an accommodation that was unavailable to the employee and therefore did not eliminate the conflict between his job and religious beliefs.

In *George v. Home Depot, Inc.*,⁷³ a store greeter asked to not work Sundays, consistent with her Catholic faith. Home Depot responded by offering to schedule her Sunday shifts around her church services.⁷⁴ The district court concluded this constituted a reasonable accommodation even though it did not resolve the conflict between the employee’s job and religious beliefs.⁷⁵

Similarly, in *Henry v. Rexam Beverage Can of North America*,⁷⁶ a mechanic requested Saturdays off to observe his Sabbath. His employer initially allowed him to swap shifts with coworkers and to pay them \$100 out of his own pocket to give them the equivalent of “premium overtime pay.”⁷⁷ But when his employer later informed him that he had to cease this practice because the payments violated company policy, nobody would swap shifts with him.⁷⁸ Nevertheless, the district court held that the company reasonably accommodated the employee by allowing him to ask coworkers to trade shifts with him, even though none of them would do so.⁷⁹ In each of these cases, the courts held that the employer fulfilled its accommodation duty even though the employee was still faced with having to choose between his job and his religious beliefs.

4. *Interactive Process*

Courts further manifest their disdain for religious accommodations through their reluctance to require employers to engage in the same

70. *Id.* at 742–43.

71. *Id.* at 745.

72. *Id.*

73. No. 00-2616, 2001 WL 1558315, at *5, *8 (E.D. La. Dec. 6, 2001), *aff’d*, 51 F. App’x 482 (5th Cir. 2002).

74. *Id.* at *8.

75. *Id.* at *7–9.

76. No. 3:10-2800-MBS-SVH, 2012 WL 2501994, at *1 (D.S.C. Apr. 18, 2012).

77. *Id.* at *2.

78. *Id.*

79. *Id.* at *8.

interactive process with religious-accommodation seekers as they do with disability-accommodation seekers.⁸⁰ The interactive process generally requires an employer and an employee to work together in good faith to determine whether the employee can be reasonably accommodated, for the employer to give due consideration to the employee's preferred accommodation, and for the employer to ultimately select the accommodation most suitable for both parties.⁸¹ Neither Title VII nor the Americans with Disabilities Act of 1990 (ADA) references an interactive process, but the EEOC has nonetheless interpreted both statutes as requiring it.⁸² The courts uniformly follow the EEOC's guidance in requiring the interactive process for disability accommodations, yet they have been much slower to mandate it for religious accommodations.⁸³ This is puzzling, given the courts' own recognition that the ADA and Title VII should be interpreted consistently whenever possible.⁸⁴

80. See Dallan F. Flake, *Interactive Religious Accommodations*, 71 ALA. L. REV. 67, 86–89 (2019) (detailing how courts are hesitant to apply the interactive process requirement to religious accommodations claims and offering possible reasons why this might be the case).

81. See 29 C.F.R. app. § 1630.9 (2019).

82. See *id.* § 1630.2(o)(3) (“To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation.”); Flake, *supra* note 80, at 83–86 (detailing the EEOC's position that the interactive process applies to religious accommodations, as set forth in the Commission's Compliance Manual, press releases, legal briefs, administrative decisions, and consent decrees).

83. Compare *Brown v. Milwaukee Bd. of Sch. Dirs.*, 855 F.3d 818, 821 (7th Cir. 2017) (“Identifying reasonable accommodations for a disabled employee requires both employer and employee to engage in a flexible interactive process.”), and *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1137 (9th Cir. 2001) (“Once an employer becomes aware of the need for accommodation, that employer has a mandatory obligation under the ADA to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations.”), with *Miller v. Port Auth. of N.Y. & N.J.*, 351 F. Supp. 3d 762, 787 (D.N.J. 2018) (acknowledging courts “have not been consistent” in deciding whether the interactive process applies to religious accommodations), and *Bolden v. Caravan Facilities Mgmt., LLC*, 112 F. Supp. 3d 785, 791 (N.D. Ind. 2015) (noting the absence of authority suggesting the interactive process applies to religious accommodations), and *Dodd v. Se. Pa. Transp. Auth.*, No. 06-4213, 2008 WL 2902618, at *9 n.6 (E.D. Pa. July 24, 2008) (questioning whether the interactive process applies to religious accommodations where the plaintiff failed to “offer any legal authority for the proposition”).

84. See, e.g., *Garity v. APWU Nat'l Lab. Org.*, 828 F.3d 848, 858 n.9 (9th Cir. 2016) (explaining that “due to the similarities in language and purpose between the two statutes, courts around the country—unless they find a good reason to do otherwise—generally use Title VII precedent to interpret ADA claims”); *EEOC v. C.R. Eng., Inc.*, 644 F.3d 1028, 1038 n.11 (10th Cir. 2011) (“Due to the similarities between the ADA and Title VII, we generally interpret those statutes consistently.”); *Flowers v. S. Reg'l Physician Servs. Inc.*, 247 F.3d 229, 233 (5th Cir. 2001) (“We conclude that the language of Title VII and the ADA dictates a consistent reading of the two statutes.”); *Vetter v. Farmland Indus., Inc.*, No. C94-3008, 1996 WL 33423409, at *2 (N.D. Iowa Sept. 17, 1996) (relying on ADA case law, which the court characterized as “useful instruction,” to determine whether the failure to accommodate constitutes a form of intentional discrimination under

Requiring the interactive process for disability accommodations but not for religious accommodations means employees seeking a disability accommodation can rightfully expect employers to seek their input regarding potential accommodations and to duly consider their preferred accommodation, whereas employees seeking a religious accommodation cannot expect to have this same level of involvement. Reluctance to extend the interactive process requirement to religious accommodations constitutes a subtle, yet powerful, way in which courts continue to shift the power dynamic ever further in employers' favor.

II. READING OUT REASONABLENESS

In recent years, courts have employed a new tactic to further diminish Title VII's religious accommodation requirement. Despite the statute's clear mandate that employers must provide reasonable religious accommodations, courts are effectively reading this requirement out of the statute. Eliminating the reasonableness requirement further strips the statute of its force, as employers can offer whatever accommodation they want, regardless of how it might adversely affect the employee's terms or conditions of employment, so long as the employee is allowed to keep their job. This Part examines the various ways courts do this, including by conflating reasonableness and undue hardship, by setting the bar for reasonableness too low, and by ignoring the requirement altogether.

A. *Conflating Reasonableness and Undue Hardship*

One way courts are reading the reasonableness requirement out of Title VII is by conflating reasonableness with the statute's undue hardship provision. These courts consider reasonableness and undue hardship as two sides of the same coin: an accommodation is reasonable only if it does not cause the employer undue hardship. Equating reasonableness to undue hardship renders the reasonableness requirement superfluous and nonsensical, as the validity of an accommodation then turns on whether it would cause undue hardship to the employer. And yet, that is precisely

Title VII). The need for consistency between the ADA and Title VII is likewise expressed in the legislative history to the 1991 amendments to Title VII, wherein the Judiciary Committee made clear its "inten[t] that these other laws modeled after Title VII [including the ADA] be interpreted consistently in a manner consistent with Title VII as amended by this Act." JUDICIARY COMM., H.R. REP. NO. 102-40, pt. 2, at 4 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 694, 697. Theoretically, the discrepancy could be attributable to the fact that courts owe the EEOC's ADA guidelines *Chevron* deference but only need apply *Skidmore* deference to the Commission's religious accommodation guidance. *See* Flake, *supra* note 80, at 85. But even under *Skidmore*, there is no reason for a court to reject the EEOC's position, as there is nothing about its view that the interactive process applies to religious accommodations that seems "hasty, invalid, or inconsistent." *Id.* at 88.

what several courts have held.

In *EEOC v. Universal Manufacturing Co.*,⁸⁵ the Fifth Circuit expressed a view of reasonableness focused entirely on how the accommodation would impact the employer: “Reasonableness seems to focus more upon the cost to the employer, the extent of positive involvement which the employer must exercise, and the existence of overt discrimination by the employer.”⁸⁶ How the accommodation would impact the employee is wholly omitted from this court’s conceptualization of reasonableness.

Consistent with this position, the Fourth Circuit noted in *EEOC v. Firestone Fibers & Textile Co.*⁸⁷ that while reasonableness and undue hardship are “separate and distinct” inquiries, they are “interrelated” and “there is much overlap between the two.”⁸⁸ It explained that “‘reasonably accommodate’ in the religious context incorporates more than just whether the conflict between the employee’s beliefs and employer’s work requirements have been eliminated. Considering an accommodation’s impact on both the employer and coworkers, for example, is appropriate when determining its reasonableness.”⁸⁹ Here, the court expanded its consideration of reasonableness to include how an accommodation would affect coworkers, yet it continued to ignore how the accommodation would impact the accommodation seeker himself. In affirming summary judgment for Firestone, the court rejected the argument that the employer should have accommodated the plaintiff, who needed extra time off for religious observance, by making an exception to its sixty-hour cap on unpaid leave.⁹⁰ The court held that the accommodation was unreasonable—not that it would impose undue hardship—because of “the sheer number of hours a small group of coworkers would have been forced to cover,” which in turn risked “lowering morale by displaying favoritism, impinging on the shift rights of other employees, and violating the CBA and its seniority-based scheduling system.”⁹¹ The EEOC sharply criticized the court’s approach, explaining in its Compliance Manual that *Firestone* “conflicts with longstanding Commission and judicial precedent” because it “analyz[es] reasonableness of proposed accommodation based on facts typically considered as part of undue hardship analysis.”⁹²

85. 914 F.2d 71 (5th Cir. 1990).

86. *Id.* at 73 n.3.

87. 515 F.3d 307 (4th Cir. 2008).

88. *Id.* at 314.

89. *Id.*

90. *Id.* at 317.

91. *Id.* at 318–19.

92. U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC COMPLIANCE MANUAL NO. 915.003,

The tendency of courts to assess reasonableness from the employer's point of view is evident in a variety of other judicial opinions. In *Adeyeye v. Heartland Sweeteners, LLC*,⁹³ a case involving an employee's request for unpaid leave to return to Nigeria to lead his father's burial rights, the Seventh Circuit Court of Appeals observed that "[r]easonableness is assessed in context, of course, and this evaluation will turn in part on whether or not the employer can in fact continue to function absent undue hardship if the employee is permitted to take unpaid leave on the needed schedule."⁹⁴ In *Williams v. Harvey*,⁹⁵ the district court characterized *Hardison* as standing for the proposition that "[a]ccommodations are deemed unreasonable if they cause an employer undue hardship, that is, they result in 'more than a de minimis cost to the employer.'"⁹⁶ And in *Jiglov v. Hotel Peabody, G.P.*,⁹⁷ the district court considered the appropriateness of a scheduling accommodation that would have required a coworker to work nearly twenty-two hours in a thirty-two hour span.⁹⁸ It concluded "this scenario would have indeed created an undue hardship that would have rendered [the] request . . . unreasonable."⁹⁹ Thus, the court determined the reasonableness of the accommodation by whether it would cause the employer vis-à-vis a coworker undue hardship. Finally, it is telling that some courts have actually combined reasonableness and undue hardship into a single term: "unreasonable hardship."¹⁰⁰

B. Lowering the Reasonableness Bar

Even courts that acknowledge undue hardship and reasonableness as

SECTION 12: RELIGIOUS DISCRIMINATION § 12-IV(A)(3) n.130 (2008) [hereinafter COMPLIANCE MANUAL], https://www.eeoc.gov/policy/docs/religion.html#_ftn130 [<https://perma.cc/BGK4-VFMB>].

93. 721 F.3d 444 (7th Cir. 2013).

94. *Id.* at 447, 455.

95. No. 4:05-CV-161, 2006 WL 2456406 (E.D. Va. Aug. 21, 2006).

96. *Id.* at *11.

97. 719 F. Supp. 2d 918, 932 (W.D. Tenn. 2010).

98. *Id.* at 931–32.

99. *Id.* at 932.

100. *See, e.g.,* *Franks v. Nebraska*, No. 4:10-CV-3145, 2012 WL 71707, at *12 (D. Neb. Jan. 10, 2012) ("If the plaintiff establishes a prima facie case, the burden shifts to the employer to show either that it offered the plaintiff a reasonable accommodation or that doing so would cause the employer to suffer an unreasonable hardship."); *Adams v. Retail Ventures, Inc.*, No. 4:06-CV-120-SEB-WGH, 2008 WL 11452088, at *5 (S.D. Ind. Feb. 7, 2008) (holding that the proposed accommodation "would have resulted in an unreasonable hardship" to the employer); *Wilson v. Wal-Mart Stores, Inc.*, No. 3:04-CV-000206-WRW, 2006 WL 318828, at *4 (E.D. Ark. Feb. 9, 2006) ("An employer is required to reasonably accommodate the religious beliefs and practices of their employees unless such an accommodation would cause the employer unreasonable hardship.").

distinct concepts can nonetheless eviscerate the reasonableness requirement by setting the bar for what is reasonable so low it is virtually meaningless. Title VII does not define reasonableness, nor has the Supreme Court provided a definition. However, the Court provided important guidance on this issue in *Ansonia*. While the case is best known for its holding that employees are not entitled to their preferred accommodation, it is also noteworthy for its analysis of whether the accommodation the school board offered (unpaid leave for religious-based absences) was reasonable. The district court entered judgment for the board, concluding the accommodation was reasonable because it did not place Philbrook “in a position of violating his religion or losing his job” since he was able to miss work to observe his religious holidays and remain employed.¹⁰¹ The appellate court likewise assumed the leave policy constituted a reasonable accommodation, but it went on to hold that where an employer and an employee both propose a reasonable accommodation, the employer must accept the employee’s proposal absent undue hardship.¹⁰² While the appellate court’s approach commanded most of the Supreme Court’s attention, the Court addressed the reasonableness of the accommodation, explaining that “[b]ecause both the District Court and the Court of Appeals applied what we hold to be an erroneous view of the law, neither explicitly considered this question.”¹⁰³ Dissatisfied with the district court’s determination that an accommodation is per se reasonable so long as it permits an employee to practice his religion and keep his job, the Court engaged in a more nuanced analysis. It agreed “[t]he provision of unpaid leave eliminates the conflict between employment requirements and religious practices”—but its inquiry did not end there.¹⁰⁴ The Court went on to explain that not only did the accommodation eliminate the conflict, but it also merely caused him to lose income for the days he did not work.¹⁰⁵ “[S]uch an exclusion,” the Court noted, “has no direct effect upon either employment opportunities or job status.”¹⁰⁶ Crucially, the Court did not assess the accommodation’s reasonableness solely by whether it eliminated the conflict between

101. *Philbrook v. Ansonia Bd. of Educ.*, No. N 77-489, 1984 WL 49016, at *9 (D. Conn. May 18, 1984).

102. *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 484 (2d Cir. 1985).

103. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986).

104. *Id.*

105. *Id.*

106. *Id.* at 71. The Court ultimately remanded the case because of a factual dispute as to whether the school board’s personal leave provision was applied in a discriminatory manner, i.e., that teachers could use it for secular reasons but not religious ones. *Id.* The Court held that if this were the case, the accommodation would not be reasonable. *Id.*

Philbrook's job and religion but also by how it might have otherwise impacted the terms and conditions of his employment.

Despite the Supreme Court's directive that reasonableness depends on whether the accommodation eliminates the conflict and how the accommodation otherwise affects the employee's employment, courts routinely cite *Ansonia* for the proposition that an accommodation is reasonable simply if it eliminates the conflict between the employee's job and religious beliefs.¹⁰⁷ This interpretation misconstrues *Ansonia* by omitting further inquiry into how an accommodation affects an employee's employment opportunities or job status. In essence, these courts approach reasonableness the same way the district court did in *Ansonia*—which the Supreme Court explicitly disapproved as “erroneous.”¹⁰⁸ Whether an accommodation eliminates the conflict between an employee's job and religion should be the starting point, not the deciding factor, for whether the accommodation is reasonable.

The practical consequence of this misreading of *Ansonia* is that courts often assess reasonableness solely by whether an accommodation eliminates the conflict between an employee's job and religion. In some cases, an accommodation is deemed reasonable even if it does not fully eliminate the conflict.¹⁰⁹ This undoubtedly simplifies the judicial task, as courts need only determine whether the accommodation allowed the employee to remain employed without having to consider how it might otherwise impact the employee. But this simplification comes at a cost: An accommodation that harms an employee in other ways is deemed reasonable as a matter of law simply because it allows the employee to keep their job and practice their religion. For example, in *Newton v. Potter*,¹¹⁰ a letter carrier requested to not work Saturdays in accordance with her religious beliefs.¹¹¹ The U.S. Postal Service transferred the employee to a post office that did not require Saturday work but lengthened her daily commute from twenty-two to sixty-six miles each way—an extra 440 miles per week.¹¹² The court granted the Postal Service

107. See, e.g., *Walker v. Indian River Transp. Co.*, 741 F. App'x 740, 746 (11th Cir. 2018) (noting that “the Supreme Court has explained that a reasonable accommodation is one that ‘eliminates the conflict between employment requirements and religious practices’”); *Sturgill v. UPS, Inc.*, 512 F.3d 1024, 1031 (8th Cir. 2008) (explaining that “an accommodation is reasonable as a matter of law if it eliminates a religious conflict”); *Noesen v. Med. Staffing Network, Inc.*, 232 F. App'x 581, 584 (7th Cir. 2007) (“A reasonable accommodation is one that eliminates the conflict between employment requirements and religious practices.” (internal quotation marks and citation omitted)).

108. *Philbrook*, 479 U.S. at 70.

109. See *supra* text accompanying notes 68–79.

110. No. 9:05-3165-PMD, 2007 WL 1035002 (D.S.C. Mar. 29, 2007).

111. *Id.* at *2.

112. *Id.* at *4 n.2.

summary judgment without even considering how this longer commute impacted the employee's employment.¹¹³ It deemed the accommodation reasonable as a matter of law because it allowed the employee to avoid Saturday work and keep her job.¹¹⁴

Similarly, in *Bruff v. North Mississippi Health Services, Inc.*,¹¹⁵ a hospital terminated a counselor who refused to counsel clients in ways that conflicted with her religious beliefs.¹¹⁶ In affirming summary judgment for the employer, the Fifth Circuit explained that the availability of lower-paying non-counselor positions would have constituted a reasonable accommodation because the employee could have remained employed while avoiding having to provide counseling that conflicted with her religious beliefs.¹¹⁷ It was unimportant to the court that these non-counselor positions would have required the employee to take a "significant" pay cut.¹¹⁸ The court explained that such a reduction in salary alone does not make an accommodation unreasonable.¹¹⁹

In *Smith v. Concentra, Inc.*,¹²⁰ a front office specialist sued her employer for failing to reasonably accommodate her Islamic beliefs, which required her to attend daily religious programs from 4 p.m. to 6 p.m.¹²¹ The employee was initially scheduled to work from 7 a.m. to 4 p.m., but her hours were later changed to 9 a.m. to 6 p.m.¹²² Concentra offered to accommodate the employee by allowing her to end her shift two hours early, but this arrangement shortened her workday by two hours and consequently diminished her earnings.¹²³ The employee requested to return to her 7 a.m. shift or, alternatively, to be transferred to a different position for which she was qualified that would have allowed her to work a full shift before 4 p.m.¹²⁴ The court did not consider the feasibility of the proposed alternatives, holding instead that Concentra reasonably accommodated the employee as a matter of law by allowing her to leave

113. *Id.* at *4.

114. *Id.*

115. 244 F.3d 495 (5th Cir. 2001).

116. *Id.* at 497–99.

117. *Id.* at 501–02.

118. *Id.* at 502 n.23.

119. *Id.*; see also *Vaughn v. Waffle House, Inc.*, 263 F. Supp. 2d 1075, 1083 (N.D. Tex. 2003) (holding that the employer's offer to transfer the plaintiff to a different position that would exempt him from Sabbath work was reasonable because it eliminated the conflict between the employee's job and religion, even though the new position paid \$10,000 less per year than his previous position).

120. 240 F. Supp. 3d 778 (N.D. Ill. 2017).

121. *Id.* at 781.

122. *Id.* at 781–82.

123. *Id.* at 785.

124. *Id.* at 785–86.

work two hours early, regardless of the effect on her pay.¹²⁵ The court explained that it was “aware of no authority requiring that reasonable accommodations permit an employee to work as many hours as they otherwise would be entitled to.”¹²⁶

In each of the foregoing cases, the courts held the accommodations were reasonable as a matter of law simply because they allowed the employees to keep their jobs and observe their religious beliefs. But while remaining employed is a necessary component of reasonableness, the Supreme Court made clear in *Ansonia* that it is not sufficient.¹²⁷ If the only criterion for reasonableness is that the accommodation allows the employee to keep her job, an employer could offer any accommodation it likes that fulfills this requirement, even if the accommodation so adversely affects the employee in other ways that it is effectively meaningless.

C. *Ignoring Reasonableness*

A final way courts nullify the reasonableness requirement is by ignoring it altogether. The Supreme Court may have intentionally or unintentionally endorsed this tactic in *EEOC v. Abercrombie & Fitch Stores, Inc.*,¹²⁸ its most recent foray into religious accommodation jurisprudence. The issue before the Court was whether Abercrombie could be liable for refusing to hire an applicant who it suspected, but did not know, would require a religious-based exemption from its dress code.¹²⁹ The bulk of the Court’s opinion focuses on whether Abercrombie’s actions were discriminatory, given the company’s lack of actual knowledge that the applicant would need an accommodation, and thus is not particularly illuminating as to the question of reasonableness.¹³⁰ But Justice Scalia, writing for the majority, dropped a footnote that could potentially impact how courts analyze this issue.¹³¹ In response to Justice Alito’s concurrence arguing the plaintiff does not bear the burden to prove failure to accommodate,¹³² Justice Scalia explained that if an employer “is willing to ‘accommodate’—which means nothing more than allowing the plaintiff to engage in her religious practice despite the employer’s normal

125. *Id.* at 785.

126. *Id.*

127. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70–71 (1986).

128. 575 U.S. ___, 135 S. Ct. 2028 (2015).

129. *Id.* at 2031.

130. *Id.* at 2032–34.

131. *Id.* at 2032 n.2.

132. *Id.* at 2036 (Alito, J., concurring).

rules to the contrary—adverse action ‘because of’ the religious practice is not shown.”¹³³ The statement is striking because it omits the reasonableness qualifier altogether and could be read as endorsing the district court’s approach in *Ansonia*,¹³⁴ which the Supreme Court rejected as “erroneous.”¹³⁵ It is possible Justice Scalia was merely defining the term in isolation, and that his omission of reasonableness was because the Court had not been called on to assess the reasonableness of the accommodation. But if accommodation really means “nothing more” than allowing an employee to practice her religion and keep her job, as a literal reading of the footnote suggests, this would obviate the need for courts to assess reasonableness beyond whether the accommodation enabled the employee to remain employed.¹³⁶

It is not uncommon for courts to determine an accommodation’s validity solely in terms of undue hardship.¹³⁷ On some level, this makes sense. Because the bar for undue hardship is so low, many accommodation claims fail at this stage, since by definition accommodation requires an employer to do something out of the ordinary.¹³⁸ There is no point in analyzing whether an accommodation is reasonable to the employee if the accommodation cannot clear the undue hardship bar in the first place. I am not suggesting courts should assess reasonableness in addition to or before addressing undue hardship. But rather than treat undue hardship as the only question, as is often the case,¹³⁹ courts should view it as the threshold question. Thus, in those

133. *Id.* at 2032 n.2 (majority opinion).

134. *See* *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 65 (1986).

135. *Id.* at 70.

136. *Abercrombie*, 135 S. Ct. at 2028 n.2. Given the recency of this decision, it is unclear what impact, if any, it will have on how courts evaluate reasonableness. To date, two circuit courts and one district court have cited *Abercrombie* for its definition of accommodation. *See* *Tabura v. Kellogg USA*, 880 F.3d 544, 550 (10th Cir. 2018); *Christmon v. B&B Airparts, Inc.*, 735 F. App’x 510, 514 (10th Cir. 2018); *United States v. Christie*, 825 F.3d 1048, 1064 (9th Cir. 2016); *Hittle v. City of Stockton*, No. 2:12-cv-00766-TLN-KJN, 2018 WL 1367451, at *13 (E.D. Cal. Mar. 16, 2018).

137. *See, e.g.,* *Bethea v. Access Bank*, No. 8:17CV135, 2018 WL3009114, at *8–9 (D. Neb. June 15, 2018) (granting summary judgment to the employer because accommodating the plaintiff’s request to not work Saturdays would have caused undue hardship, either by requiring the bank to hire additional workers or by forcing other employees to work additional shifts); *Hill v. Promise Hosp. of Phoenix, Inc.*, No. 09-cv-1958-PHX-JAT, 2010 WL 2812913, at *8 (D. Ariz. July 8, 2010) (granting employer’s motion to dismiss, in part because accommodating the plaintiff’s request to not disclose his social security number would have caused the employer undue hardship).

138. *See* *Christine Jolls, Accommodation Mandates*, 53 STAN. L. REV. 223, 231 (2000) (explaining that “[a]n ‘accommodation mandate’ is a requirement that employers take special steps in response to the distinctive needs of particular, identifiable demographic groups of workers”).

139. *See, e.g.,* *Baltgalvis v. Newport News Shipbuilding Inc.*, 132 F. Supp. 2d 414, 419–20 (E.D. Va. 2001) (granting summary judgment to the employer upon determination that the requested accommodation would impose undue hardship).

instances where an accommodation would not impose more than de minimis cost, the inquiry would not end there. Instead, a court would go on to consider whether the accommodation is reasonable from the employee's point of view.

III. REASONABLENESS FROM THE EMPLOYEE'S PERSPECTIVE

To restore employees' right to reasonable religious accommodations, the first task is to disentangle reasonableness from undue hardship. Unless the two are treated as separate and distinct concepts, there is no justification for considering how an accommodation impacts the employee; the focus would rest entirely on whether it would cause the employer undue hardship. This Part shows how the statutory text, legislative history, EEOC guidance, Supreme Court jurisprudence, and other judicial decisions support the proposition that reasonableness is a standalone concept that courts must evaluate from the employee's point of view.

A. *Title VII's Statutory Text*

It is impossible to discern from Title VII's text alone what Congress meant by "reasonably accommodate."¹⁴⁰ The phrasing of the accommodation provision is undoubtedly awkward, perhaps in part because of its placement in the statute's definition of religion rather than the more logical "unlawful employment practices" section.¹⁴¹ From a linguistic standpoint, the ambiguity stems from the location of the term in a phrase that references both the employer's duties and the employee's religious needs.¹⁴² It can be read as requiring an employer to provide an accommodation that is reasonable to the employer, meaning one that does not cause the employer undue hardship. Or it can be read as requiring an employer, in the absence of undue hardship, to provide an accommodation that is reasonable to the employee.

Title VII is not the first statute to contain ambiguous language, and courts have developed a number of strategies to discern congressional intent when a statute's language is unclear. One method is to look to the canons of statutory construction for assistance in ascertaining a statute's

140. 42 U.S.C. § 2000e(j).

141. *Id.* § 2000e-2.

142. *Id.* § 2000e(j) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.").

meaning.¹⁴³ At least one canon, that “a court should give effect, if possible, to every clause or word of a statute,”¹⁴⁴ is potentially instructive here. This canon “encourages courts to give meaning to every word used in a statute to realize congressional intent” based on the assumption “that Congress would not have included superfluous language.”¹⁴⁵ This canon cuts against the notion that reasonableness and undue hardship are a single concept. If they were two sides of the same coin, the reasonableness qualifier would be redundant and unnecessary since the employer’s accommodation duty is already limited by the undue hardship restriction. In essence, reasonableness could be removed from the statute without changing the employer’s accommodation duty in the slightest—it would still hinge on whether the accommodation imposed undue hardship. But because “it is a presumption of statutory construction that Congress intended every word to have independent meaning,”¹⁴⁶ reasonableness and undue hardship cannot mean the same thing. If reasonableness has any independent meaning, it must be that Congress intended for it to be determined from the employee’s point of view.¹⁴⁷

Another technique courts often apply in resolving statutory ambiguities is to “consider the interpretation of other statutory provisions that employ the same or similar language.”¹⁴⁸ The ADA is the most logical starting point, as courts have held that it and Title VII should be interpreted

143. See *People for Ethical Treatment of Animals, Inc. v. Mia. Seaquarium*, 879 F.3d 1142, 1147 (11th Cir. 2018) (“[O]ur authority to interpret statutory language is constrained by the plain meaning of the statutory language in the context of the entire statute, as assisted by the canons of statutory construction.”).

144. *Moskal v. United States*, 498 U.S. 103, 104 (1990).

145. *Nutraceutical Corp. v. Von Eschenbach*, 459 F.3d 1033, 1039 (10th Cir. 2006); see also *Bohner v. Burwell*, No. 15-4088, 2016 WL 8716339, at *6 (E.D. Pa. Dec. 2, 2016) (“The [r]ule against [s]urplusage, instructs the court to interpret a statute such that each word has meaning; nothing is redundant, inoperative, void, or superfluous.” (citing *Corley v. United States*, 556 U.S. 303, 314 (2009))).

146. *First Shore Fed. Sav. & Loan Ass’n v. Hudson (In re Hudson)*, 352 B.R. 391, 393 (Bankr. D. Md. 2006).

147. See Andrew J. Hull, Note, *Complete or Partial Accommodation: An Analysis of the Federal Circuit Split Over the Duty of the Employer to Reasonably Accommodate the Religious Beliefs of the Employee*, 25 REGENT U. L. REV. 241, 259 (2012) (“While this interpretation [that reasonableness should be assessed from the employer’s perspective] is certainly a possible inference from the wording of the statute, it is not the most logical. Giving the employer protection in the employee’s only provision of protection (reasonable accommodation) is redundant when the employer already has its own provision of protection (undue hardship). If reasonableness is also the standard for protecting the employer, then it was unnecessary for Congress to include the ‘undue hardship’ provision. But the existence of the ‘undue hardship’ provision makes it far more likely that the protection of ‘reasonableness’ belongs solely to the employee. This is the position taken by the Supreme Court in [*Ansonia*]. The Supreme Court used the term ‘reasonable’ to determine whether the accommodation proposed by the employer subjected the employee to other discrimination.”).

148. *Flowers v. S. Reg’l Physician Servs. Inc.*, 247 F.3d 229, 233 n.4 (5th Cir. 2001).

consistently whenever possible.¹⁴⁹ Like Title VII, the ADA requires employers to provide reasonable accommodations in the absence of undue hardship,¹⁵⁰ and courts have interpreted the two provisions as “nearly identical.”¹⁵¹ Although the ADA’s phrasing is slightly different—requiring “reasonable accommodation . . . unless . . . the accommodation would impose an undue hardship on the operation of the business”¹⁵²—reasonableness is no clearer here than in Title VII, leading to judicial confusion over whether reasonableness under the ADA is determined from the employer’s or the employee’s perspective.¹⁵³

The Supreme Court addressed the meaning of reasonableness under the ADA’s accommodation provision in *US Airways, Inc. v. Barnett*.¹⁵⁴ When Robert Barnett, a cargo handler, injured his back, US Airways accommodated his disability by moving him to a less physically demanding position in the mailroom.¹⁵⁵ His new position later became open to seniority-based bidding, and employees senior to him planned on bidding for the position.¹⁵⁶ US Airways declined Barnett’s request to remain in the mailroom as an accommodation and subsequently terminated his employment.¹⁵⁷ In considering the relationship between reasonableness and undue hardship, the Court rejected the notion that the former is a “redundant mirror image” of the latter.¹⁵⁸ The Court likewise disagreed with Barnett’s claim that reasonableness only means the effectiveness of an accommodation in meeting an individual’s disability-based needs.¹⁵⁹ The Court explained, “[i]t is the word ‘accommodation,’ not the word ‘reasonable,’ that conveys the need for effectiveness. An

149. See cases cited *supra* note 84.

150. The ADA defines discrimination to include “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.” 42 U.S.C. § 12112(b)(5)(A).

151. *Nawrot v. CPC Int’l*, 259 F. Supp. 2d 716, 724 n.4 (N.D. Ill. 2003) (“ADA reasonable accommodation claims are nearly identical to the corresponding Title VII section.”); see also *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (explaining that “Title VII . . . imposes an identical obligation on employers with respect to accommodating religion” as the ADA does with accommodating disabilities).

152. 42 U.S.C. § 12112(b)(5)(A).

153. See Nicole Buonocore Porter, *A New Look at the ADA’s Undue Hardship Defense*, 84 MO. L. REV. 121, 158–64 (2019) (examining ADA cases where courts exhibit confusion over the relationship between reasonableness and undue hardship).

154. 535 U.S. 391 (2002).

155. *Id.* at 394.

156. *Id.*

157. *Id.*

158. *Id.* at 400.

159. *Id.*

ineffective ‘modification’ or ‘adjustment’ will not *accommodate* a disabled individual’s limitations.”¹⁶⁰ The Court went on to adopt a two-part test to determine whether a plaintiff is entitled to an accommodation under the ADA: the plaintiff must first demonstrate that an accommodation “seems reasonable on its face, *i.e.*, ordinarily or in the run of cases;” to counter this showing, the employer must then prove that despite its facial reasonableness, the accommodation would have caused it “undue hardship in the particular circumstances.”¹⁶¹

In terms of its potential application to religious accommodations, *Barnett* is a mixed bag. The questions of whether an accommodation must be reasonable to an employee, and if so, what that entails, was not squarely before the court. Nevertheless, *Barnett* does support the view that reasonableness and undue hardship are not one and the same.¹⁶² And yet, the test the Court endorsed considers reasonableness from the employer’s perspective, not the employee’s.¹⁶³ But this does not mean an accommodation’s impact on the employee plays no part in the inquiry. Regardless of what reasonableness means, an accommodation must nonetheless be “effective,” which, at least in the context of the ADA, means it must “enable . . . [the] employee to enjoy equal benefits and privileges of employment as are enjoyed by . . . other similarly situated employees without disabilities.”¹⁶⁴

Although the Supreme Court has never been called upon to decide whether *Barnett* is applicable to religious accommodations, it seems unlikely this would happen. Lower courts rarely reference *Barnett* in deciding religious accommodation cases, perhaps because, for all their similarities, religious and disability accommodations fundamentally differ in terms of what they seek to accomplish. A disability accommodation is intended to make a disabled worker the same as others in terms of ability to perform the job, whereas a religious accommodation is meant to make

160. *Id.* (emphasis in original).

161. *Id.* at 401–02 (emphasis in original).

162. Even following *Barnett*, scholars continue to debate the meaning of reasonableness and undue hardship in the ADA context. Mark Weber argues that “reasonable accommodation and undue hardship are a single concept. The words form parts of a statutory sentence that links them together into the same statutory term. The duty to make reasonable accommodations exists up to the limit of undue hardship. At the point of undue hardship, the accommodation is no longer reasonable.” Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1148 (2010). By contrast, Nicole Buonocore Porter counters that “there is *some* limitation to an employer’s obligation to provide a reasonable accommodation besides the undue hardship limit. . . . [S]ome accommodations are ‘unreasonable’ even though they do not cause an undue hardship to the employer.” Nicole Buonocore Porter, *Martinizing Title I of the Americans with Disability Act*, 47 GA. L. REV. 527, 544–46 (2013).

163. *Barnett*, 535 U.S. at 401–02.

164. 29 C.F.R. § 1630.2(o)(1)(iii) (2019).

a religious adherent different from other employees. Thus, an employer considering how to make a disabled worker the same as other employees does not have nearly the same motive to punish the accommodation seeker as does an employer considering how to make a religious worker different from other employees. For this reason, it is more necessary to assess how an accommodation affects a religious-accommodation seeker's terms and conditions of employment.

B. Title VII's Legislative History

Title VII's legislative history is not especially helpful in elucidating Congress's intent behind the statute's religious discrimination provisions. The record corresponding to the religious accommodation amendment is especially scant, spanning just two pages of the Congressional Record and consisting mostly of a floor debate in which Senator Randolph, the amendment's sponsor, expressed his views on the proposed legislation and answered four questions from two senators.¹⁶⁵ Nothing in the legislative history suggests Congress considered the meaning of reasonableness, as the term does not appear anywhere in the record.¹⁶⁶ But what is clear from the record is that Senator Randolph's singular focus in proposing the amendment was "to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law."¹⁶⁷ He explained how his concern stemmed from the refusal of employers to hire or retain workers whose religious beliefs, like his own, prohibited them from performing work on their Sabbath.¹⁶⁸ In his view, "the law flowing from the original Constitution of the United States should protect [workers'] religious freedom, and hopefully their opportunity to earn a livelihood within the American system . . ."¹⁶⁹ Senator Randolph was so focused on protecting workers that at no point during his speech did he even acknowledge the possibility that an accommodation could adversely affect an employer.¹⁷⁰ Given his zealous

165. 118 CONG. REC. 705-14 (1972); *see also* *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74-75 & n.9 (1977) (noting the "brief legislative history" of the 1972 Act, "consist[ing] chiefly of a brief floor debate in the Senate, contained in less than two pages of the Congressional Record and consisting principally of the views of . . . Senator Jennings Randolph," who "expressed his general desire 'to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law,' but . . . made no attempt to define the precise circumstances under which the 'reasonable accommodation' requirement would be applied").

166. 118 CONG. REC. 705-14 (1972).

167. *Id.* at 705.

168. *Id.* at 705-06.

169. *Id.* at 706.

170. *Id.* at 705-06.

advocacy for the religious rights of employees, it is logically consistent that by “reasonably accommodate,” Senator Randolph meant an accommodation’s reasonableness must be assessed from the employee’s point of view.

There is one other aspect of the legislative history that may shed light on what Congress meant by reasonable accommodation. At the conclusion of Senator Randolph’s remarks, a fellow senator posed this hypothetical: “A young man . . . works 15 days on and then is off 15 days. Would the amendment require an employer to change that kind of employment ratio around, so that he would have to work a customary 5- or 6-day week?”¹⁷¹ Senator Randolph replied, “I do not believe that an *undue hardship* would come to such an employer.”¹⁷² New Jersey Senator Harrison Williams likewise couched the employer’s accommodation duty in terms of undue hardship rather than reasonableness during the floor debate, posing the question to Senator Randolph:

[W]here the employment is such that the job has to be done on a day that a person under his faith would make his religious observations, it might be an undue hardship to close down the operation to accommodate that person. . . . Certainly the amendment would permit the employer not to hire a person who could not work on one of the 2 days of the employment; this would be an undue hardship, and the employer’s situation is protected under the amendment offered by the Senator from West Virginia, is it not?¹⁷³

Senator Randolph agreed this would constitute undue hardship.¹⁷⁴ What is noteworthy about his responses is that Senator Randolph did not assess the employer’s duty by whether the accommodation would be reasonable to the employer but instead by whether it would cause the employer undue hardship.¹⁷⁵ This further suggests Congress intended for an employer’s accommodation duty to be limited solely by undue hardship, not by whether the accommodation is reasonable to the employer.

C. *EEOC Guidance*

The statutory text and legislative history are somewhat nebulous regarding the meaning of reasonable accommodation, but the EEOC

171. *Id.* at 706.

172. *Id.* (emphasis added).

173. *Id.*

174. *Id.*

175. *Id.*

guidance is not. In the earliest versions of its federal regulations on religious accommodations, which preceded the amendment to Title VII, reasonableness seemed tied to the notion of undue hardship. The first version of the regulation required employers “to accommodate to the reasonable religious needs of employees . . . where such accommodation can be made without serious inconvenience to the conduct of the business.”¹⁷⁶ The placement of “reasonable” directly before “religious needs of employees” indicates the EEOC’s view early on was that an accommodation had to be reasonable to the employer, not the employee. Given that what the EEOC was proposing—an affirmative obligation to accommodate—was unprecedented and somewhat radical for its time, it is not surprising the agency would attempt to placate employers by assuring them they only had to accommodate employees’ religious needs that were reasonable.

The following year, the EEOC made significant changes to the wording of the guidelines. The new version explained that employers must “make reasonable accommodations to the religious needs of employees . . . where such accommodations can be made without undue hardship on the conduct of the employer’s business.”¹⁷⁷ The movement of “reasonable” to in front of “accommodations” instead of “religious needs” shifted the employer’s duty from one of accommodating “reasonable religious needs” to making “reasonable accommodations.” But this was likely a distinction without a difference, as the EEOC further explained that “the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.”¹⁷⁸ Once again, the concept of reasonableness is tied to undue hardship: a reasonable accommodation is one that does not cause undue hardship to the employer.

The EEOC’s view of reasonableness evolved after Congress amended Title VII in 1972. Revisions to the federal regulations in 1980 made clear the EEOC’s position that an accommodation’s reasonableness should be measured by how it impacts the employee.¹⁷⁹ The EEOC explained that in situations where multiple accommodations are available that would not cause undue hardship to the employer, “the Commission will determine whether the accommodation offered [was] reasonable” by considering:

- (i) The alternatives for accommodation considered by the employer or labor organization; and

176. 31 Fed. Reg. 8370 (June 15, 1966) (to be codified at 29 C.F.R. pt. 1605).

177. 32 Fed. Reg. 10,298 (July 13, 1967) (to be codified at 29 C.F.R. pt. 1605).

178. *Id.* at 10,298–99.

179. 29 C.F.R. § 1605.2(c)(2) (2019).

(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.¹⁸⁰

The EEOC's position is unequivocal: reasonableness depends on how an accommodation impacts the employee—not the employer. The regulation seems to acknowledge that an accommodation may be reasonable even if it negatively affects the employee's employment if it is the only accommodation available that would not cause the employer undue hardship. But where multiple accommodations are available, none of which would cause the employer undue hardship, the accommodation offered or provided is only reasonable if it is the one that least disadvantages the employee's employment opportunities. This obligates employers to not simply provide any accommodation they choose but to accommodate employees in the manner that least adversely affects their employment.

The Supreme Court has cast doubt on the EEOC's position, noting in *Ansonia* that “[t]o the extent that the guideline . . . requires the employer to accept any alternative favored by the employee short of undue hardship, we find the guideline simply inconsistent with the plain meaning of the statute.”¹⁸¹ But the Court's characterization of the guideline overlooks the nuance of the EEOC's position. Nowhere in the regulation does the EEOC claim employees are entitled to their preferred accommodation. In fact, the Commission has explicitly rejected this proposition elsewhere.¹⁸² The EEOC's view is that for an accommodation to be reasonable in the first

180. *Id.*

181. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 n.6 (1986).

182. See COMPLIANCE MANUAL, *supra* note 92, § 12-IV(A)(3) (“Where there is more than one reasonable accommodation that would not pose an undue hardship, the employer is not obliged to provide the accommodation preferred by the employee.”). The EEOC illustrates this position using the following example:

Tina, a newly hired part-time store cashier whose sincerely held religious belief is that she should refrain from work on Sunday as part of her Sabbath observance, asked her supervisor never to schedule her to work on Sundays. Tina specifically asked to be scheduled to work Saturdays instead. In response, her employer offered to allow her to work on Thursday, which she found inconvenient because she takes a college class on that day. Even if Tina preferred a different schedule, the employer is not required to grant Tina's preferred accommodation.

Id.

place, it must be less burdensome to the employee than any available alternative.¹⁸³ Thus, an employer's obligation to provide the least disadvantageous accommodation is not a matter of preference but of reasonableness.

Rather than alter its guidance in light of *Ansonia's* rebuke, the EEOC has doubled down, explaining in its Compliance Manual:

Although an employer never has to provide an accommodation that would pose an undue hardship, . . . the accommodation that is provided must be a reasonable one. An accommodation is not reasonable if it merely lessens rather than eliminates the conflict between religion and work, provided eliminating the conflict would not impose an undue hardship. Eliminating the conflict between a work rule and an employee's religious belief, practice, or observance means accommodating the employee without unnecessarily disadvantaging the employee's terms, conditions, or privileges of employment.

Where there is more than one reasonable accommodation that would not pose an undue hardship, the employer is not obliged to provide the accommodation preferred by the employee. However, an employer's proposed accommodation will not be reasonable if a more favorable accommodation is provided to other employees for non-religious purposes, or, for example, if it requires the employee to accept a reduction in pay rate or some other loss of a benefit or privilege of employment and there is an alternative accommodation that does not do so.

Ultimately, reasonableness is a fact-specific determination. The reasonableness of an employer's attempt at accommodation cannot be determined in a vacuum. Instead, it must be determined on a case-by-case basis; what may be a reasonable accommodation for one employee may not be reasonable for another The term reasonable accommodation is a relative term and cannot be given a hard and fast meaning; each case . . . necessarily depends upon its own facts and circumstances, and comes down to a determination of reasonableness under the unique circumstances of the individual employer-employee relationship.¹⁸⁴

To the EEOC, reasonableness and undue hardship are separate inquiries, with the former being assessed from the employee's perspective and the latter from the employer's point of view. The EEOC's current stance, which has evolved significantly from its initial position, is that an

183. 29 C.F.R. § 1605.2(c)(2).

184. *Id.* (internal quotations marks and citations omitted).

accommodation is reasonable only if it fully eliminates the conflict between the employee's job and religious beliefs and is the least burdensome option available to the employee.

D. Supreme Court Jurisprudence

Although the Supreme Court has never directly addressed if and how reasonableness differs from undue hardship in the religious accommodation context, its jurisprudence supports the notion that these terms have distinct and independent meanings. While *Hardison* is best known for its definition of undue hardship, it also offers a glimpse into the Supreme Court's understanding of the relationship between reasonableness and undue hardship.¹⁸⁵ The Court explained that Title VII requires "an employer, short of 'undue hardship,' to make 'reasonable accommodations' to the religious needs of its employees."¹⁸⁶ This suggests the Court saw reasonableness and undue hardship as distinct concepts since it recognized an employer must make a reasonable accommodation when undue hardship is not present. Because the Court found that accommodating *Hardison* would cause TWA undue hardship,¹⁸⁷ it did not expound on what makes an accommodation reasonable, nor did it offer any guidance as to whether reasonableness should be evaluated from the perspective of the employer or the employee. Justice Marshall hinted in his dissent that reasonableness differs from undue hardship and should be evaluated from the employee's perspective.¹⁸⁸ He explained that certain accommodations *Hardison* proposed "would have disadvantaged [him] to some extent, but since he suggested both options" it was unnecessary to "consider whether an employer would satisfy his duty to accommodate by offering these choices to an unwilling employee."¹⁸⁹ Thus, Justice Marshall was not only concerned by how an accommodation would affect the employer but also by how it would impact the employee. Although the facts of the case did not allow him to fully explore this question, he seemed to be setting the stage for another day.

Ansonia provided the Supreme Court the opportunity to address the reasonableness question that eluded it in *Hardison*.¹⁹⁰ As previously discussed, the Court rejected the notion an accommodation is per se

185. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

186. *Id.* at 66.

187. *Id.* at 77.

188. *Id.* at 96 n.12 (Marshall, J., dissenting).

189. *Id.*

190. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

reasonable if it allows the employer to keep his job and practice his faith.¹⁹¹ Remaining employed is necessary but insufficient for an accommodation to be reasonable. The Court explained that aside from the fact that the school board's unpaid leave policy eliminated the conflict between Philbrook's job and his religious beliefs, the accommodation was reasonable because it had "no direct effect upon either employment opportunities or job status," as it appeared he would not be compensated for just three of his absences each year.¹⁹² This indicates that if the accommodation had affected Philbrook's employment opportunities or job status, it may not have been reasonable.

Ansonia provided Justice Marshall the opportunity to expound further on the concept of reasonableness. He agreed with the majority that if an employer offers an accommodation that "fully resolves the conflict between" the employee's job and religion, it normally has no duty to consider the employee's preferred accommodation.¹⁹³ But if the employer's proposed accommodation fails to fully resolve the conflict, he argued, the employer must consider whatever reasonable proposal the employee submits.¹⁹⁴ Justice Marshall disagreed that the school board's policy fully resolved the conflict between Philbrook's job and religion.¹⁹⁵ Although it allowed him to keep his job despite missing work for religious holidays, Philbrook nonetheless was "force[d] . . . to choose between following his religious precepts with a partial forfeiture of salary and violating these precepts for work with full pay."¹⁹⁶ Because "[a] forced reduction in compensation based on an employee's religious beliefs can be . . . a violation of Title VII," Justice Marshall reasoned, Philbrook was entitled "to further accommodation, if reasonably possible without undue hardship to the school board's educational program."¹⁹⁷ He further explained that although "unpaid leave will generally amount to a reasonable accommodation, . . . this does not mean that unpaid leave will always be *the* reasonable accommodation which *best* resolves the conflict between the needs of the employer and employee."¹⁹⁸ In his view, if an employee offers another reasonable proposal that results in a more effective resolution for the employee without causing undue hardship to

191. *See supra* section II.B.

192. *Ansonia*, 479 U.S. at 60.

193. *Id.* at 72–73 (Marshall, J., concurring in part and dissenting in part) (emphasis omitted).

194. *Id.* at 73.

195. *Id.* at 74.

196. *Id.*

197. *Id.*

198. *Id.* (emphasis in original).

the employer, the employer should be required to implement it.¹⁹⁹ Justice Marshall thus would have remanded the case for factual findings on “the reasonableness and expected hardship of Philbrook’s proposals.”²⁰⁰

Taken together, *Hardison* and *Ansonia* support the view that reasonableness and undue hardship are analytically distinct. In *Hardison*, the Court focused on how the proposed accommodations would have impacted the employer.²⁰¹ It rightly couched its analysis in terms of undue hardship because its concern centered on the burden the employer would have suffered if required to accommodate the employee.²⁰² The Court did not address the question of reasonableness, not because the presence of undue hardship rendered the accommodations unreasonable but because the accommodations failed to clear this first hurdle. Whether the accommodations were reasonable to *Hardison* was of no import because each would have imposed undue hardship on the employer. By contrast, *Ansonia* makes almost no mention of undue hardship; the Court’s focus was not on how the school board would have been affected through the proposed accommodations but on how Philbrook would be impacted by the board’s offer of unpaid leave.²⁰³ Thus, the Court appropriately centered its analysis on the question of reasonableness rather than undue hardship. If reasonableness and undue hardship were two sides of the same coin, the *Ansonia* Court would have had no need to consider how the accommodation impacted Philbrook. It would have instead focused on whether the accommodation would cause the school board undue hardship. The fact that it considered the accommodation’s impact on Philbrook—with no mention of undue hardship—supports the view that reasonableness and undue hardship are distinct concepts requiring distinct analyses.

E. Lower Court Decisions

A number of appellate courts have acknowledged the need to evaluate an accommodation from the employee’s perspective. The Ninth Circuit Court of Appeals was the first to take this position. In *American Postal Workers Union, San Francisco Local v. Postmaster General*,²⁰⁴ two postal service window clerks who objected on religious grounds to processing draft registration forms sued the U.S. Postal Service (USPS) for failing to

199. *Id.*

200. *Id.* at 60 (majority opinion).

201. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 77–85 (1977).

202. *Id.*

203. *Ansonia*, 479 U.S. at 70.

204. 781 F.2d 772 (9th Cir. 1986).

accommodate their request to refer draft registrants to another window clerk.²⁰⁵ USPS only offered to allow the clerks to transfer to a different position that did not require them to process registration forms.²⁰⁶ This frustrated the clerks because they felt a transfer “would place them in a less attractive employment status.”²⁰⁷ The district court concluded the transfer offer removed the religious conflict facing the clerks but did not consider how it would impact their employment beyond that.²⁰⁸ The Ninth Circuit held this was an error, explaining that Title VII “requires an employer to accommodate the religious beliefs of an employee in a manner which will reasonably preserve that employee’s employment status, *i.e.*, compensation, terms, conditions, or privileges of employment.”²⁰⁹ The court viewed the reasonableness inquiry as two-pronged: first, the accommodation must eliminate the religious conflict; and second, it must reasonably preserve the affected employee’s employment status.²¹⁰ The court remanded the case “to determine whether the accommodation proposed by the Postal Service reasonably preserved the employment status” of the clerks.²¹¹

The Sixth Circuit followed the Ninth Circuit’s lead. In *Cooper v. Oak Rubber Co.*,²¹² the court held that a scheduling accommodation that would have required the employee to use all of her vacation days was not a reasonable accommodation even though it technically would have eliminated the conflict between her job and her religion.²¹³ The court acknowledged that requiring an employee to use a portion of her vacation entitlement “may be reasonable” under appropriate circumstances.²¹⁴ But forcing the employee to use all of her vacation leave was unreasonable because the “employee stands to lose a benefit, vacation time, enjoyed by

205. *Id.* at 774.

206. *Id.*

207. *Id.* at 776.

208. *Id.* at 777.

209. *Id.* at 776 (emphasis added).

210. *Id.* at 776–77 (“Where an employer proposes an accommodation which effectively eliminates the religious conflict faced by a particular employee, however, the inquiry under Title VII reduces to whether the accommodation reasonably preserves the affected employee’s employment status.”). The Ninth Circuit applied this same test in *Kelly v. County of Orange*, where it concluded a job transfer eliminated the conflict between the employee’s job and religion and reasonably preserved the terms and conditions of her employment because she retained her job title, received a pay increase, requested and received a decrease in hours, and “her new job was appropriate for a nurse with some degree of experience and training.” 101 F. App’x 206, 207 (9th Cir. 2004).

211. *APWU*, 781 F.2d at 777.

212. 15 F.3d 1375 (6th Cir. 1994).

213. *Id.* at 1379.

214. *Id.*

all other employees who do not share the same religious conflict, and is thus discriminated against with respect to a privilege of employment.”²¹⁵

In *Cosme v. Henderson*,²¹⁶ the Second Circuit assessed the reasonableness of USPS’s offers to accommodate a letter carrier who could not work Saturdays for religious reasons by allowing him to remain an “unassigned regular” employee or to transfer to any of three different Manhattan locations where he would not have to work Saturdays.²¹⁷ Citing to *Ansonia*, the court explained that even though these offers eliminated the conflict between the employee’s work and religion, the proposed accommodation “might still have been unreasonable if it caused Cosme to suffer an inexplicable diminution in his employee status or benefits. In other words, an accommodation might be unreasonable if it imposes a significant work-related burden on the employee without justification”²¹⁸ The court concluded that the accommodations offered were reasonable because the employee had not proven he would suffer any prejudice if he remained an unassigned regular: he would be assigned tasks appropriate for a letter carrier, his pay rate would remain the same, and although he would have temporarily lost his seniority for ninety days had he transferred locations, there was no evidence this would have adversely affected his employment.²¹⁹

The Seventh Circuit has likewise recognized that an accommodation’s reasonableness depends on how it affects the employee. In *Porter v. City of Chicago*,²²⁰ an employee requested Sundays off to attend morning church services.²²¹ The Seventh Circuit rejected the employee’s claim that her employer’s offer to allow her to switch to a later shift on Sundays was an unreasonable accommodation, citing one of its prior decisions for the proposition that “it is a reasonable accommodation to permit an employee to exercise the right to seek job transfers or shift changes, particularly when such changes do not reduce pay or cause loss of benefits.”²²² The court concluded that because the employee’s objection to the shift change was not based on any decrease in her pay or benefits but was instead simply a matter of preference, the accommodation was reasonable.²²³ Had the accommodation resulted in a pay decrease, the outcome may have

215. *Id.*

216. 287 F.3d 152 (2d Cir. 2002).

217. *Id.* at 155.

218. *Id.* at 159–60 (citation omitted).

219. *Id.* at 159–61.

220. 700 F.3d 944 (7th Cir. 2012).

221. *Id.* at 949.

222. *Id.* at 952 (quoting *Rodriguez v. City of Chi.*, 156 F.3d 771, 776 (7th Cir. 1998)).

223. *Id.*

been different. The court warned that “[h]ad changing watch groups affected Porter’s pay or other benefits, a much more rigorous inquiry would be required,” but it did not explain what such inquiry would entail.²²⁴

Several district courts have followed these appellate courts’ lead in evaluating reasonableness from the employee’s perspective.²²⁵ For example, in *O’Barr v. UPS, Inc.*,²²⁶ UPS offered a mechanic who requested Saturdays off a part-time position as a preloader that would have eliminated the conflict with his observance of the Sabbath.²²⁷ This was an entry-level position that did not involve use of his mechanic skills, which meant a loss of seniority, a reduction in benefits, and a pay decrease from \$30.25 per hour to \$9.50 per hour.²²⁸ The court denied UPS summary judgment, explaining that “[t]he focus of the inquiry as to what type of accommodation is ‘reasonable’ is on whether the accommodation preserves the employee’s terms, conditions, and privileges of employment, once the employer has eliminated the religious conflict with the employee’s requirements.”²²⁹ Because the part-time position would have resulted in a loss of pay and reduction in other benefits, a factual dispute remained as to whether the accommodation was reasonable under

224. *Id.*

225. *See, e.g.,* *Farah v. A-1 Careers*, No. 12-2692-SAC, 2013 WL 6095118, at *6 (D. Kan. Nov. 20, 2013) (“Eliminating the conflict between a work rule and an employee’s religious belief, practice, or observance means accommodating the employee without unnecessarily disadvantaging the employee’s terms, conditions, or privileges of employment.” (quoting COMPLIANCE MANUAL, *supra* note 92, § 12-IV)); *Marmulsteyn v. Napolitano*, No. 08-CV-4094 (DLI)(LB), 2012 WL 3645776, at *7 (E.D.N.Y. Aug. 22, 2012) (acknowledging that “an accommodation could be unreasonable if it would cause an ‘inexplicable diminution’ in an employee’s status or benefits,” but holding the plaintiff could not establish such a diminution based on his conclusory assertions that the accommodation would affect how his employer perceived him); *Tomasino v. St. John’s Univ.*, No. 08-CV-2059 (JG)(ALC), 2010 WL 3721047, at *9 (E.D.N.Y. Sept. 23, 2010) (holding that the employer’s accommodation of the employee’s request to participate in noontime mass by requiring her to take her paid lunch break at 11:15 a.m. was reasonable as a matter of law because such arrangement had no direct effect upon either her employment opportunities or job status); *Winbush v. Kaplan Higher Educ. Corp.*, No. 4:06-cv-00525, 2008 WL 11422562, at *7 (S.D. Iowa Aug. 29, 2008) (granting the employer summary judgment where accommodating the employee’s request to attend religious classes by allowing her to take unpaid time off for approximately three hours per week did not adversely affect her employment opportunities or job status); *Reed v. UAW*, 523 F. Supp. 2d 592, 600–01 (E.D. Mich. 2007) (holding that the employer’s offer to accommodate an employee who objected to paying union dues on religious grounds by allowing him to pay an equivalent amount to a charity was reasonable as a matter of law because it did not result in the loss of any employment benefits).

226. No. 3:11-CV-177, 2013 WL 2243004 (E.D. Tenn. May 21, 2013).

227. *Id.* at *1–3.

228. *Id.* at *5.

229. *Id.* (quoting *Reed*, 523 F. Supp. 2d at 599).

the circumstances of the case.²³⁰

Similarly, in *Sanchez-Rodriguez v. AT&T Wireless*,²³¹ an installation technician who converted to the Seventh Day Adventist faith sued his employer for failing to accommodate his request for Saturdays off.²³² AT&T offered to allow him to transfer to a sales position or, alternatively, to ask other technicians to voluntarily swap shifts with him.²³³ In considering the reasonableness of these accommodations, the court was sensitive to how they would impact the employee's employment. Citing *American Postal Workers Union* and *Cosme*, it acknowledged "a reasonable accommodation may require that a company 'reasonably preserve that employee's employment status,'" and further noted that "[b]ased on its independent review of Title VII's statutory provisions and existing case law, . . . reasonable preservation of compensation . . . [is] a significant aspect of a reasonable accommodation."²³⁴ The court concluded there was an issue of fact as to whether the job transfer constituted a reasonable accommodation because it would have reduced the plaintiff's annual earnings from approximately \$38,000 to \$23,000.²³⁵ The court nonetheless granted AT&T summary judgment because it determined the company's offer to allow the employee to swap shifts with coworkers, coupled with its willingness to provide him with their work schedules and to advertise his need, constituted a reasonable accommodation.²³⁶

These cases make clear there is judicial support for the notion that reasonableness is a separate requirement from undue hardship, and that it should be assessed from the employee's perspective. If an accommodation only had to be reasonable to the employer, these courts would have had no reason to consider the impact of an accommodation on an employee's wages, vacation benefits, or any other term or condition of employment. Instead, they would have only assessed whether the accommodation would cause undue hardship to the employer. That each of these courts evaluated reasonableness separate and apart from undue hardship, by considering how the accommodation would affect the employee's employment opportunities or job status, indicates at least some courts consider this a necessary factor in determining whether an employer has satisfied its duty to accommodate.

230. *Id.* at *6.

231. 728 F. Supp. 2d 31 (D.P.R. 2010).

232. *Id.* at 31–32.

233. *Id.* at 36–37.

234. *Id.* at 41 (citations omitted).

235. *Id.*

236. *Id.* at 41–42.

In sum, the proposition that a religious accommodation must be reasonable to the employee finds support in several diverse sources. From a textual standpoint, including both reasonableness and undue hardship limitations in Title VII's religious accommodation provision would be redundant if both were to be assessed solely from the employer's perspective. The legislative history likewise supports this position, as it reflects an unequivocal intent by Congress to protect employees from suffering adverse employment consequences because of their religious beliefs and exclusively couches the employer's burden in terms of undue hardship rather than unreasonableness. The EEOC has long interpreted reasonableness as distinct from undue hardship and has explained that reasonableness is dependent on how an accommodation impacts the employee. The Supreme Court has signaled its agreement with this position, holding in *Ansonia* that the accommodation was reasonable because it both eliminated the conflict and had no direct effect on the employee's employment opportunities or job status. Several lower courts, including four federal courts of appeals and numerous district courts, have acknowledged the need to assess how an accommodation would impact the employee, independent from its effect on the employer.

IV. RECONCEPTUALIZING REASONABLENESS

Having made the case that reasonableness is distinct from undue hardship and must be evaluated from the employee's perspective, this Part turns to the question of how to determine whether an accommodation would be reasonable to the employee. It proposes three requirements: (1) the accommodation must fully eliminate the conflict between the employee's job and religious beliefs, (2) the accommodation cannot cause the employee to suffer an adverse employment action, and (3) the accommodation must not unnecessarily disadvantage the employee's terms or conditions of employment. This Part also considers how religious accommodations would be impacted if this conceptualization of reasonableness is adopted.

A. *A Reasonable Accommodation Must Eliminate the Employee's Work-Religion Conflict*

A threshold requirement for any accommodation to be reasonable is that it must fully eliminate the conflict between the employee's job and religious beliefs.²³⁷ This means the employer must accommodate the

237. See Zaheer, *supra* note 6, at 513 (arguing that "[a]n employer can easily devise any number

employee in a way that allows the employee to fully observe his religious convictions without losing his job. For example, if a Latter-day Saint employee believes it is a sin to work on Sundays, a reasonable accommodation would require the employer to give the employee the entire day off. Scheduling the employee for a later shift so he can attend morning church services or allowing him to work from home would be unreasonable because the employee would still be forced to work on Sundays in violation of his religious convictions.

Full accommodation does not require the employer to guarantee that there will never be a conflict between an employee's job and religion. It simply requires the employer to ensure that the employee will not face such a conflict in situations where it can accommodate the employee without undue hardship. In the case of the employee who believes it is a sin to work on Sundays, full accommodation would not require the employer to ensure the employee will never have to work a Sunday but only that the employee will not have to work those Sundays when his absence would not cause the employer undue hardship. For example, if Super Bowl Sunday is the busiest day of the year for the business, such that all employees are required to work, the employer would have no duty to accommodate the employee that day. Thus, an employer's duty to accommodate is always limited by whether the accommodation would cause the employer undue hardship—an inquiry an employer does not make just once but may revisit as circumstances change. Full accommodation does not mean insulating an employee from religious conflict in every conceivable scenario but only in those instances where the employer could accommodate the employee without undue hardship.

Likewise, full accommodation does not mean an employee will not suffer any adverse consequence as a result of the accommodation. As the next two sections discuss, limited adverse consequences may be permissible. However, any consequences must be work-based rather than religious, for "once a court holds that an accommodation is reasonable even if it requires an employee to compromise on his religious beliefs, that court is in fact stating that religion is a mutable characteristic that an individual can choose to follow or dismiss at will."²³⁸ Thus, an employee

of 'accommodations' that at least superficially eliminate the employee's religious conflict but in actuality still leave the employee with a difficult choice between religious duty and work obligations," and that "[u]ntil an accommodation 'fully resolves the conflict between the employee's work and religious requirements' or at least *mostly* resolves the conflict, the accommodation is of little use to an employee" (quoting *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 72–73 (1986) (Marshall, J., concurring in part and dissenting in part) (emphasis in original)).

238. Debbie N. Kaminer, *Religious Conduct and the Immutability Requirement: Title VII's Failure to Protect Religious Employees in the Workplace*, 17 VA. J. SOC. POL'Y & L. 453, 464 (2010) (arguing

may, within reason, experience limited adverse consequences such as reduced wages as a result of an accommodation, but the employee cannot be required to compromise his religious beliefs.

Returning to the employee who believes it is a sin to work on Sundays, fully accommodating him does not require the employer to pay him for time not worked so he avoids any adverse consequence of the accommodation. Assuming the employer is unable to allow the employee to make up the lost time by working an extra shift, giving the employee the day off without pay would likely constitute a full accommodation because the consequence he suffers—not receiving wages for time not worked—affects his work, not his religion. By contrast, if the employer attempted to accommodate the employee by switching him to a later shift on Sundays, this would only be a partial, and thus unreasonable, accommodation because the consequence of the accommodation would be religious rather than work-based since he would be forced to compromise his religious beliefs by still having to work on Sundays.

The requirement of full accommodation finds support in the definition of accommodation itself. *Black's Law Dictionary* defines accommodation as “[t]he act or an instance of making a change or provision for someone or something; an adaptation or adjustment.”²³⁹ “Adapt” means “to make fit . . . often by modification,”²⁴⁰ and “adjust” means “to bring to a more satisfactory state: (1) settle, resolve, (2) rectify, to make correspondent or conformable.”²⁴¹ Kurtz and Sleeper argue

[t]hese definitions lead to the conclusion that the statute’s use of “accommodate” obliges employers to meet the needs of the employees’ religious convictions. The plain meaning of the phrases, and synonyms used in the definitions . . . all indicate that the accommodation must eliminate the conflict between work and religion.²⁴²

Moreover, in *Ansonia*, the Supreme Court equated the term “reasonable accommodation” with the “acceptable reconciliation of the needs of the

that the accommodation in *Ansonia* was reasonable because Philbrook was not forced to compromise his religious beliefs, “[r]ather, the compromise he was required to make was purely secular—lost pay”).

239. *Accommodation*, BLACK’S LAW DICTIONARY 6–7 (11th ed. 2019).

240. *Adapt*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/adapt> [<https://perma.cc/R29M-S6NJ>].

241. *Adjust*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/adjust> [<https://perma.cc/UF4T-WGC7>].

242. Janell M. Kurtz & Bradley J. Sleeper, *Religion vs. Work: Can Accommodation Fail to Accommodate?*, 23 *MIDWEST L.J.* 75, 89 (2009).

employee's religion and the exigencies of the employer's business."²⁴³ Thus, "[b]y definition, any arrangement that does not allow *both* parties to achieve their basic objectives—the employee's desire to fulfill his religious duty and the employer's desire to accomplish the work he needs to get done—does not successfully 'reconcile' these competing objectives or values."²⁴⁴

The requirement of full accommodation is also consistent with legislative intent, as well as both the Supreme Court's and EEOC's interpretations of the Title VII's religious accommodation provision. Senator Randolph proposed the legislation primarily to protect Sabbatarians like himself from being forced to work on their day of rest.²⁴⁵ The only way to accomplish this is by fully exempting an employee from work. Partial accommodation would not suffice because the employee would still be compelled to choose between their job and their religious beliefs. The Supreme Court reached this same conclusion in *Ansonia*, explaining that the accommodation was reasonable, in part, because it "eliminate[d] the conflict between employment requirements and religious practices by allowing the individual to observe *fully* religious holy days and require[d] him only to give up compensation for a day that he did not in fact work."²⁴⁶ The EEOC has taken an even more aggressive stance, proclaiming that "[a]n accommodation is not 'reasonable' if it merely lessens rather than eliminates the conflict between religion and work, provided eliminating the conflict would not impose an undue hardship."²⁴⁷

In short, reasonable accommodation requires, at a minimum, that the employer accommodate the employee in a way that fully eliminates the conflict between the employee's job and religious beliefs. Full accommodation does not mean permanent accommodation—an employer is free to revisit whether an accommodation would impose undue hardship whenever circumstances change. Nor does full accommodation require an employer to insulate the employee from any adverse effect, so long as the consequence is work-based rather than religious. While more should be required to make an accommodation reasonable, as the next two sections explain, fully eliminating the conflict between an employee's job and religion is an important starting point.

243. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986) (quoting *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 145–46 (5th Cir. 1982)).

244. Opening Brief of Plaintiff-Appellants at 37, *Tabura v. Kellogg USA*, 880 F.3d 544 (10th Cir. 2018) (No. 16-4135), 2016 WL 6092230 (emphasis in original).

245. See Kaminer, *supra* note 29, at 584.

246. *Ansonia*, 479 U.S. at 70 (emphasis added).

247. COMPLIANCE MANUAL, *supra* note 92, § 12-IV(A)(3).

B. A Reasonable Accommodation Must Not Result in an Adverse Employment Action

A second requirement for an accommodation to be reasonable is that it must not cause the employee to suffer an adverse employment action. Only discrimination that results in an adverse employment action is actionable under Title VII.²⁴⁸ The statute does not define “adverse employment action,” and there is some disagreement among the courts as to the types of actions that qualify.²⁴⁹ The Fifth and Eighth Circuits have adopted the most restrictive test, holding that only “ultimate employment actions” such as hiring, firing, demoting, and promoting constitute adverse employment actions.²⁵⁰ The First, Seventh, Ninth, Tenth, and Eleventh Circuits take a more expansive view, recognizing actions such as unwarranted negative performance evaluations, taking away lunch breaks, and moving an employee to a less desirable workspace as adverse employment actions.²⁵¹ The Second and Third Circuits take an intermediate position, holding that an adverse action is something that materially affects the terms and conditions of employment.²⁵²

Regardless of how the term is defined, an accommodation that causes an employee to suffer an adverse employment action cannot be reasonable for the simple reason that such an accommodation would itself constitute

248. See *Braxton v. Nortek Air Sols., LLC*, 769 F. App'x 600, 603 (10th Cir. 2019) (noting that a Title VII plaintiff must prove he suffered an adverse employment action); *Clayton v. Rumsfeld*, 106 F. App'x 268, 270 (5th Cir. 2004) (“A title VII plaintiff may recover only if the challenged employment decision rises to the level of an ‘adverse employment action’” (quoting *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997))).

249. See *Ray v. Henderson*, 217 F.3d 1234, 1240–42 (9th Cir. 2000) (discussing circuit split on what constitutes an adverse employment action).

250. *Morris v. Baton Rouge City Constable's Off.*, 761 F. App'x 433, 436 (5th Cir. 2019) (“For purposes of a Title VII discrimination claim, ‘[a]dverse employment actions include only ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating.’” (quoting *McCoy v. City of Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007) (per curiam))); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (rejecting Title VII claim because “[w]hile the action complained of may have had a tangential effect on [the plaintiff's] employment, it did not rise to the level of an ultimate employment decision intended to be actionable under Title VII”).

251. See *Ray*, 217 F.3d at 1242 (first citing *Wyatt v. City of Bos.*, 35 F.3d 13 (1st Cir. 1994); then citing *Knox v. Indiana*, 93 F.3d 1327 (7th Cir. 1996); then citing *Comeveaux v. CUNA Mut. Ins. Grp.*, 76 F.3d 1498 (10th Cir. 1996); then citing *Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996); then citing *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453 (11th Cir. 1998); and then citing *Passer v. Am. Chem. Soc'y*, 935 F.2d 322 (D.C. Cir. 1991)).

252. See *Rodriguez-Coss v. Barr*, 776 F. App'x 717, 718 (2d Cir. 2019) (explaining that a Title VII plaintiff must show she “suffered an adverse employment action, defined as a ‘materially adverse change in the terms and conditions of employment’” (quoting *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 85 (2d Cir. 2015))); *Paradisis v. Englewood Hosp. Med. Ctr.*, 680 F. App'x 131, 136 (3d Cir. 2017) (holding that the plaintiff did not suffer an adverse employment action because the employer's action “had no impact on the terms of [the plaintiff's] employment”).

impermissible discrimination because the employer would be taking such action because of religion—a violation of Title VII in and of itself.²⁵³ Suppose a grocery store clerk requests for religious reasons to be excused from selling pornographic magazines to customers, and the employer responds by demoting the employee to a custodial position that pays one-third of the employee’s hourly rate. Despite technically eliminating the conflict between the employee’s job and religious convictions, the accommodation would be unreasonable because it would cause the employee to suffer an adverse employment action. Although the employee triggered the discrimination and therefore brought it upon herself by requesting an accommodation, this does not change the fact she suffered an adverse employment action because of her religion.

By contrast, an accommodation that negatively impacts the terms or conditions of an employee’s employment but does not rise to the level of an adverse employment action could potentially constitute a reasonable accommodation. Suppose a customer service representative asserts a religious objection to her employer’s requirement that she receive a flu shot. Requiring the worker to wear a paper mask over her face may amount to a reasonable accommodation, both because it would eliminate the conflict by allowing the employee to keep her job and practice her religion, and because the consequence the employee would experience, though perhaps unpleasant, would not rise to the level of an adverse employment action.²⁵⁴ Similarly, an accommodation that requires an employee like Philbrook to take unpaid leave to observe holy days would ordinarily be reasonable even though the employee receives a smaller paycheck because, as the Supreme Court pointed out, the employee is merely not being paid for time not worked.²⁵⁵

The requirement that an accommodation not cause an adverse employment action may seem so obvious it is unnecessary to include it as a component of reasonable accommodation. But in reality, most courts have not recognized this requirement, at least explicitly, and without it an employer would be free to fashion any accommodation it wishes no matter how onerous the consequences, so long as the employee remains employed. Ensuring an employee does not suffer an adverse employment action in the course of accommodation is thus essential to the concept

253. 42 U.S.C. § 2000e-2(a)(1) (prohibiting an employer from “discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . religion.”).

254. See Rene F. Najera & Dorit R. Reiss, *First Do No Harm: Protecting Patients Through Immunizing Health Care Workers*, 26 HEALTH MATRIX 363, 387 (2016) (suggesting that requiring an employee to wear a mask would be a reasonable accommodation).

255. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986).

of reasonableness.

C. *A Reasonable Accommodation Must Not Unnecessarily Disadvantage the Employee*

The final requirement for an accommodation to be reasonable is that it must not unnecessarily disadvantage the employee's terms or conditions of employment. This means the employer must select the method of accommodation that least burdens the employee's employment without causing the employer undue hardship. Suppose a restaurant server requests to no longer work evening shifts so she can attend religious services. The employer has openings on its morning and afternoon shifts and could move the server to either shift without undue hardship. The employee requests the morning shift because the tip amounts she would earn in the mornings would be comparable to what she earned in the evenings, whereas she would earn considerably fewer tips on the afternoon shift. If the employer transfers the employee to the afternoon shift, when it could have moved her to the morning shift without undue hardship, the accommodation would be unreasonable because it would unnecessarily disadvantage the employee's employment by causing a reduction in her wages that was avoidable.

This requirement is consistent with the EEOC's interpretation of reasonable accommodation. When the EEOC updated the federal regulations in 1980, it included a provision asserting that it would determine the reasonableness of an accommodation by considering the alternatives for accommodation considered by the employer and offered to the employee.²⁵⁶ Recognizing that "[s]ome alternatives . . . might disadvantage the individual with respect to his or her employment opportunities," the EEOC explained that "when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities."²⁵⁷ The EEOC reaffirmed this position in its Compliance Manual, explaining that reasonable accommodation "means accommodating the employee without unnecessarily disadvantaging the employee's terms, conditions, or privileges of employment," and warning that "an employer's proposed accommodation will not be 'reasonable' . . . if it requires the employee to accept a reduction in pay rate or some other loss of a benefit or privilege of employment and there

256. 29 C.F.R. § 1605.2(c)(2)(ii) (2019).

257. *Id.*

is an alternative accommodation that does not do so.”²⁵⁸

Requiring an employer to not unnecessarily disadvantage an accommodation seeker is not the same as mandating that an employer provide the accommodation seeker’s preferred accommodation. The Supreme Court explicitly rejected the latter in *Ansonia*, and in doing so noted that “[t]o the extent that the [EEOC] guideline . . . requires the employer to accept any alternative favored by the employee short of undue hardship, we find the guideline simply inconsistent with the plain meaning of the statute.”²⁵⁹ This does not mean the Supreme Court opposed the EEOC’s view that a reasonable accommodation must not unnecessarily disadvantage the employee. The EEOC has since explained that “[t]he Commission’s guidelines do not require an employer to accept any alternative favored by the employee, and, thus, are not inconsistent with *Ansonia*.”²⁶⁰ The Commission has further noted that “the Court in *Ansonia* recognized that the limitation in the Commission’s guidelines—that alternatives must be considered if they will not ‘disadvantage an individual’s employment opportunities’—distinguished the Commission’s position from the position of the Second Circuit that was rejected in *Ansonia*.”²⁶¹ While it is true that in most cases employees will prefer the accommodation option that least disadvantages their employment, the concepts of unnecessary disadvantage and preference are analytically distinct. The reasonableness inquiry focuses on how an accommodation affects an employee’s employment relative to the alternatives—not the employee’s preference.

Requiring employers to provide the least burdensome accommodation would extend meaningful protection to accommodation seekers at little or no cost to employers. Because an employer never has to provide an accommodation that would cause it more than a de minimis burden, requiring the employer to provide one type of accommodation that essentially costs it nothing instead of another accommodation that would likewise cost it nothing should make little, if any, difference to the employer. Either way, the employer is protected from incurring virtually any hardship. While this would result in employers sometimes having less say over how employees are accommodated because they would be required to select the least disadvantageous accommodation, the deck remains stacked so heavily in favor of employers that even with this added requirement they would continue to wield significant control over the

258. COMPLIANCE MANUAL, *supra* note 92, § 12-IV.A.3.

259. *Ansonia*, 479 U.S. at 69 n.6.

260. COMPLIANCE MANUAL, *supra* note 92, § 12-IV.A.3 n.133.

261. *Id.*

religious accommodation process.

D. Potential Implications

This Article argues for the restoration of reasonableness to workplace religious accommodations. The goal is to realign religious accommodation jurisprudence with congressional intent that in the absence of undue hardship, employers should provide employees with accommodations that protect them from having to make the “cruel choice” between their jobs and their religious convictions.²⁶² Accommodations that merely allow employees to keep their jobs but adversely impact their employment in other ways may force employees into the precise dilemma Congress sought to prevent. Requiring accommodations that fully eliminate the work-religion conflict, do not result in adverse employment action, and do not unnecessarily disadvantage the accommodation seeker’s terms or conditions of employment is a potentially powerful way to ensure employees are not needlessly forced to choose between their jobs and their religious beliefs.

Accommodation seekers certainly stand to benefit the most from this proposal. The likelihood of receiving an accommodation probably would not increase, since employers would still hold the ultimate trump card—undue hardship—allowing them to continue denying most accommodation requests. Yet the quality of accommodations would improve in many instances. This proposal would end the practice of partial accommodation, as employers could no longer offer accommodations that do not fully eliminate the conflict between an employee’s job and religious beliefs. It would likewise guarantee an employee would not suffer an adverse employment action, such as a demotion or substantial pay decrease, because of an accommodation. And although employees would not be entitled to their preferred accommodations, they could rest assured that employers that can accommodate them without undue hardship must provide accommodations that do not unnecessarily disadvantage their terms or conditions of employment. Taken together, these requirements would offer meaningful protection to accommodation seekers that would allow them to adhere to their religious beliefs while reasonably preserving their employment status.

As beneficial as this proposal may be for employees, there is some risk it might actually result in fewer accommodations. By raising the bar for reasonableness, it may become even easier for an employer to claim undue hardship. For instance, an employer may not be able to give an employee who believes it is a sin to work on Sundays the entire day off without

262. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting).

undue hardship but may be able to allow the employee to work a shorter shift in order to at least attend church services on Sunday mornings. Under this proposal, the accommodation the employer could offer would only partially eliminate the work-religion conflict and therefore would not be reasonable. Because the employer could not provide an accommodation that meets this heightened standard for reasonableness without suffering undue hardship itself, it may choose instead not to offer any accommodation at all, arguably leaving the employee worse off because he would not even get Sunday mornings off.

There are at least three responses to this concern. First, for many religious workers, adherence to their beliefs is an all-or-nothing proposition, not a matter of compromise.²⁶³ It might not be any consolation for the employee opposed to working on Sundays to be offered part of the day off to attend church, or for an employee who is required to pray five times a day to be permitted to pray three times. Thus, it is not necessarily true that an employee would be worse off by receiving no accommodation than by receiving an unreasonable accommodation: In both instances the employee is being forced to violate his religion. Second, if raising the bar for reasonableness were to result in fewer accommodations, the fault would lie with how undue hardship, not reasonableness, is defined. The obvious solution would be to raise the undue hardship standard instead of lowering the reasonableness requirement. If this proposal were to result in fewer accommodations, perhaps this would generate the pressure necessary for Congress to finally pass the Workplace Religious Freedom Act or other legislation heightening the undue hardship standard. Third, in the absence of legislative action, courts could incentivize employers to offer employees the most effective accommodation they can without suffering undue hardship, even if the accommodation does not meet the new standard for reasonableness. Acceptance of such an accommodation by an employee would constitute waiver of any potential claim against the employer for failure to accommodate. The carrot of immunity could incentivize many employers to offer the best accommodation possible, thus allowing employees to choose for themselves whether some accommodation is better than none.

One strength of this proposal is that it would benefit employees without any real cost to employers. As long as the undue hardship standard remains in place, employers would continue to be able to deny any

263. See Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RESRV. L. REV. 55, 86 (2006) (“Religious belief systems are rigid, all or nothing, frameworks. All religious obligations must be obeyed, and they can only be satisfied through literal compliance with the tenets of one’s faith.”).

accommodation that is even minimally burdensome. Thus, the net burden of accommodation on employers would remain virtually unchanged. Under this proposal, an employer might have to provide an accommodation that is different from the one it prefers. But because neither accommodation would impose more than a de minimis burden, the difference between what the employer prefers and what is required would be negligible.²⁶⁴ Moreover, any cost the employer would incur through this proposal would easily be offset by two benefits they would potentially reap because of it. First, employees accommodated in accordance with this proposal would be less likely to bring religious discrimination claims against their employers.²⁶⁵ Even if they did file suit, employers would be better positioned to defend themselves by showing they considered options for accommodation not only from their own perspective but also from the employee's.²⁶⁶ And second, more employee-friendly accommodations would likely boost employee morale, leading to greater productivity, creativity, loyalty, and profitability.²⁶⁷

264. In the case of the restaurant server who requests to be accommodated by transferring to the morning shift instead of the afternoon shift (so she could earn comparable wages), the employer would have to make this accommodation even though it prefers to move her to the afternoon shift, if transferring her to the afternoon shift would be unnecessarily disadvantageous to the employee. *See supra* section IV.C. But if placing the server on the morning shift instead of the afternoon shift would be even minimally burdensome to the employer, it would have no obligation to do so.

265. *See* Marianne C. DePo, *Never on Sunday: Workplace Religious Freedom in the New Millennium*, 51 ME. L. REV. 341, 357 (1999) (arguing that “the number of lawsuits will likely decrease as employers grow ever more accommodating of employee beliefs and practices”).

266. *See* Flake, *supra* note 80, at 70 (arguing that employers that solicit an accommodation seeker’s input and give due consideration to the employee’s preferred accommodation will be better positioned to defend themselves in the event of litigation).

267. *See* JOB ACCOMMODATION NETWORK, *WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT 2–4* (2019), <https://askjan.org/publications/TopicDownloads.cfm?pubid=962628&action=download&pubtype=pdf> [<https://perma.cc/5DP3-UBSV>] (study of nearly 2,400 employers found that providing accommodations to disabled employees resulted in retention of valuable employees, improved productivity and morale, a reduction in workers’ compensation and training costs, and improved company diversity); DAVID BOWLES & CARY COOPER, *EMPLOYEE MORALE: DRIVING PERFORMANCE IN CHALLENGING TIMES 9* (2009) (explaining that an employee’s perception of fairness and equity factors heavily into employee morale); Dallan F. Flake, *Bearing Burdens: Religious Accommodations that Adversely Affect Coworker Morale*, 76 OHIO ST. L.J. 169, 176–77 (2015) (reviewing the literature on how high-morale workplaces enjoy stronger financial performance, greater productivity, better attendance, less stress, lower accident rates, and greater employee retention); Jean-Claude Garcia-Zamor, *Workplace Spirituality and Organizational Performance*, 63 PUB. ADMIN. REV. 355, 361–62 (2003) (concluding that spirituality in the workplace allows businesses to meet their profit-making goals by helping employees feel happier, more creative, and more connected to the work community); Fahri Karakas, *Spirituality and Performance in Organizations: A Literature Review*, 94 J. BUS. ETHICS 89, 94–97 (2010) (“There is growing evidence in spirituality research that workplace spirituality programs result in positive individual level outcomes for employees such as increased joy, serenity, job satisfaction, and commitment. There is also evidence that these programs improve organizational productivity and reduce absenteeism and turnover.” (citations omitted)).

This proposal would also bring clarity to an area of law riddled with inconsistencies and contradictions. Confusion over whether reasonableness should be assessed from the employer's or the employee's perspective would be eliminated, as would questions about whether Title VII requires full or partial accommodation, or whether an accommodation can be reasonable even if it results in an adverse employment action. And while courts would have the added task in some cases of determining whether an accommodation unnecessarily disadvantages the employee's employment, this inquiry would be limited to the relatively few cases where multiple accommodations are available. Even then, determining whether one accommodation would be more disadvantageous to the employee than another does not seem an especially difficult or time-consuming undertaking.

Beyond these benefits, reconceptualizing reasonableness would be normatively consequential. Because law has both instrumental and symbolic value,²⁶⁸ "how it is implemented send[s] messages about who counts as equal members of the political community and what fundamental moral principles define that community."²⁶⁹ In this case, Congress long ago made a value judgment that when possible, employees should be protected from having to choose between their jobs and their religious beliefs. While religious accommodation jurisprudence has stripped the law of much of its force,²⁷⁰ this conceptualization of reasonableness would go far in signaling that religious freedom remains a value worth protecting.

CONCLUSION

Despite Title VII's plain language—and equally clear legislative intent—that an employee is entitled to a reasonable religious accommodation in the absence of undue hardship to the employer, courts have whittled away at this right to the point it is practically nonexistent.

268. See generally KENNETH L. KARST, *LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION* (1993) (arguing that law has both instrumental and symbolic value); see also Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 398 (1997) ("[L]aw also expresses normative principles and symbolizes societal values, and these moralizing features may affect behavior.").

269. Andrew E. Taslitz, *The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado's Rotten Social Background*, 2 ALA. C.R. & C.L. REV. 79, 93 (2011).

270. See Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 862 n.7 (2004) (observing that "Title VII's religious accommodation requirement is generally viewed as fairly toothless"); J.H. Verkerke, *Disaggregating Antidiscrimination and Accommodation*, 44 WM. & MARY L. REV. 1385, 1399–400 (2003) ("Unlike the toothless duty to accommodate employees' religious practices that is contained in Title VII, [the ADA's disability accommodation] provision has real bite.").

Employees today have little say over if or how they are accommodated, as courts have made this almost exclusively the employer's domain. To combat this trend and restore some semblance of balance, this Article proposes a reconceptualization of reasonableness that has the potential to strengthen the quality of religious accommodations for employees without unduly burdening employers in the process. Decoupling reasonableness from undue hardship would allow courts to assess an accommodation's reasonableness from the employee's point of view. No longer could an employer offer an accommodation without regard for how it might otherwise impact the employee's employment. Instead, the employer would be required to provide an accommodations that fully eliminates the work-religion conflict, does not cause the employee to suffer an adverse employment action, and avoid unnecessarily disadvantaging the employee's terms or conditions of employment. This would benefit employees by giving them access to accommodations that would enable them to perform their jobs without having to compromise their religious beliefs. Moreover, because an employer never has to provide a religious accommodation that would cause it more than a *de minimis* burden, this proposal would have virtually no adverse impact on employers. If anything, employers stand to benefit from it. With much to gain and little to lose, restoring reasonableness to workplace religious accommodations is a change worth making.