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## Faith in the Workplace: Striking a Balance Between Market Productivity and Modern Religiosity

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## Faith in the Workplace: Striking a Balance Between Market Productivity and Modern Religiosity

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Christopher M. Fournier

In June 2015, Charee Stanley, a flight attendant and recently converted Muslim, informed her employer that her faith prohibited her from serving alcoholic beverages.<sup>1</sup> The employer offered to accommodate Ms. Stanley's religious concern by simply having other flight attendants serve alcoholic beverages to the flight patrons.<sup>2</sup> However, in August of the same year, Ms. Stanley was suspended from the airline and placed on twelve month unpaid leave because Ms. Stanley failed to perform her job duties by not serving alcoholic beverages.<sup>3</sup>

Of all rights and freedoms provided in the Constitution, few are as deeply held by individuals and as hotly contested in the public sphere as the First Amendment's Freedom of Religion.<sup>4</sup> The United States is one of the most religious countries in the developed Western world.<sup>5</sup> Although religiousness plays a large role in American society, there are certain spheres of American life that are often placed in a tense relationship with American religiousness.<sup>6</sup> One of these spheres is the workplace.<sup>7</sup>

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<sup>1</sup> *Muslim Flight Attendant Suspended for Not Serving Alcohol*, THE EXAMINER (Sept. 17, 2015), <http://www.examiner.com/article/muslim-flight-attendant-suspended-for-not-serving-alcohol>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> James E. Wood, *The Relationship of Religious Liberty to Civil Liberty and Democratic State*, 1998 B.Y.U. L. Rev. 479, 489 (1998).

<sup>5</sup> Steve Crabtree, *Religiosity Highest in World's Poorest Nations*, GALLUP (Aug. 2010), <http://www.gallup.com/poll/142727/religiosity-highest-world-poorest-nations.aspx>.

<sup>6</sup> Dallan F. Flake, *Bearing Burdens: Religious Accommodations that Adversely Affect Coworker Morale*, 76 OHIO ST. L.J. 169, 215 (2015).

<sup>7</sup> *Id.* at 178.

Current American workplace accommodation laws are an example of well-intentioned laws, which over time have become vehicles for employers to apply inconsistent and unfair treatment on their employees. Workplace accommodation laws may also prevent employees from seeking legal avenues to live free of workplace discrimination. Between 2009 and 2012, only two percent of American employees identified as members of the Islamic Faith,<sup>8</sup> but they filed almost 25 percent of the religious workplace discrimination cases submitted to the Equal Employment Opportunity Commission (EEOC).<sup>9</sup> These numbers help to illustrate how religious minorities, especially Muslims, continue to be victims of discrimination in the workplace.<sup>10</sup>

Current workplace religious accommodation laws have fostered a jurisprudence scattered with inconsistent court results. These leave employees unsure of which situations and circumstances afford them rights under the law. This allows employers to inconsistently and arbitrarily discriminate against members of suspect faith groups who do not have proper protection from the state.<sup>11</sup> This article aims to strike an equitable balance between the interests of corporate employers and their religious employees through an examination of religious workplace accommodation laws. This article also advocates for a stricter, less ambiguous standard that employers would have to meet to reject a request for an employee's reasonable religious accommodation request. This stricter standard will address the issue of religious discrimination and prevent employers from taking advantage of lenient employment laws in order to discriminate against employees based on religion, especially employees who belong to

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<sup>8</sup> Anayat Durrani, *Working While Muslim: Religious Discrimination in the Workplace*, PLAINTIFF MAGAZINE 3 (Apr. 2012), [http://plaintiffmagazine.com/Apr12/Durrani\\_Working-while-Muslim\\_Religious-discrimination-in-the-workplace\\_Plaintiff-magazine.pdf](http://plaintiffmagazine.com/Apr12/Durrani_Working-while-Muslim_Religious-discrimination-in-the-workplace_Plaintiff-magazine.pdf).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Flake, *supra* note 6, at 169.

minority or stigmatized religious groups. Specifically, this article advocates that the federal agency charged with regulating discriminatory employment practices, the Equal Employment Opportunity Commission, create and promulgate a memorandum and regulatory materials. These materials would inform employees and employers that in order for an employer to deny a reasonable religious accommodation as a result of an undue hardship, the employer will have the burden of showing a substantial cost associated with the workplace accommodation. This new, stricter standard would be analogous to the current undue hardship standard called for under the Americans with Disabilities Act (ADA), which will be discussed later in the article.

To begin, Section I will examine the history of employment discrimination law and the relationship between discrimination law and issues of religiosity in the workplace in order to understand the current climate of religious accommodations in the workplace. Section II of the article will then focus on how imposing a stricter standard on employers seeking to deny a religious accommodation request can accomplish three important things. First, it would create a clearer, less ambiguous legal standard that both employer and employee can understand and operate under. Second, it would improve the employer/employee relations and the overall business climate. Third, this stricter standard would improve the national dialogue surrounding religion in this country. Finally, Section III of the article will address some of the potential drawbacks to the proposed stricter standard, including the risk of increased litigation and employer costs, the fundamental differences between religion and disability, and how ambiguity in defining religion and religiousness could lead to an inflated legal jurisprudence.

## I. BACKGROUND

Workplace accommodation law has been shaped by a number of different laws and legal decisions. There are three laws that are most relevant to the

proposal I intend to set forth in this article. The first law is Title VII of the Civil Rights Act of 1964, which governs religious accommodation law today.<sup>12</sup> The second law is the Americans with Disabilities Act, which governs workplace accommodation for persons with physical or mental disability and is the basis of the heightened standard advocated in this article.<sup>13</sup> Finally, the third law is the Constitution's First Amendment Freedom of Religion, which does not explicitly address workplace accommodations, but describes religious protections and burdens of the Federal government.<sup>14</sup>

*A. Title VII: Congress Moves to Prohibit Discrimination*

Congress enacted the Civil Rights Act of 1964 in order to prohibit discrimination against minority groups in the United States.<sup>15</sup> Specifically, Title VII of the Civil Rights Act prohibited employment discrimination on the basis of race, color, sex, national origin, or religion.<sup>16</sup> However, Title VII of the original Civil Rights Act did not include any affirmative duty for employers to make any accommodation to meet an employee's religious needs.<sup>17</sup> Two years after Title VII was passed in 1966, the EEOC issued its first guidelines concerning reasonable accommodation.<sup>18</sup> These guidelines emphasized neutrality and stated that employers were able to "establish a normal work week generally applicable to all employees."<sup>19</sup> These guidelines were amended in 1967 to require a workplace accommodation except where an undue hardship on the employer would result.<sup>20</sup> In these

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<sup>12</sup> 42 U.S.C. § 2000e-2(a) (1994).

<sup>13</sup> 42 U.S.C. § 12101.

<sup>14</sup> U.S. CONST. amend. I.

<sup>15</sup> 42 U.S.C. § 2000e-2(a).

<sup>16</sup> *Id.*

<sup>17</sup> 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, 580 (2000).

<sup>18</sup> 29 C.F.R. § 1605.1 (1967).

<sup>19</sup> *Id.*

<sup>20</sup> Kaminer, *supra* note 16, at 585.

guidelines, the concept of what is an undue hardship was balanced against a serious inconvenience to the employer.<sup>21</sup> However, these guidelines, promulgated by the EEOC, were not consistently utilized by courts in Title VII litigation, and a number of jurisdictions held that a failure to make any reasonable accommodation was not actionable discrimination.<sup>22</sup>

In 1972, as a response to numerous courts facing the issue of whether Title VII should include a duty to accommodate, Congress amended Title VII to include the affirmative duty of an employer to accommodate an employee on the basis of that employee's religious beliefs or practices.<sup>23</sup> Under Title VII, religion was defined as "all aspects of religious observance and practice, as well as belief."<sup>24</sup> A religious accommodation is required under Title VII as long as the religious accommodation is related to an employee's religious observance, practice, or belief, the accommodation is reasonable, and the accommodation does not impose an undue hardship on the conduct of the employer's business.<sup>25</sup> Senator Jennings Randolph, who introduced the Title VII Amendment, explained that one of its purposes was to protect both religious belief and conduct.<sup>26</sup> Senator Randolph's comments also show that Congress intended undue hardship to be a significant or meaningful expense.<sup>27</sup> He stated that only "in perhaps a very, very small percentage of cases" would a reasonable accommodation request amount to an undue hardship on an employer.<sup>28</sup>

The United States Supreme Court has struggled to find an adequate definition of undue hardship. The Supreme Court, in both *Trans World Airlines v. Hardison* and *Ansonia Board of Education v. Philbrook*, adopted

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<sup>21</sup> 29 C.F.R. § 1605.1.

<sup>22</sup> Kaminer, *supra* note 16, at 582.

<sup>23</sup> *Id.*

<sup>24</sup> 42 U.S.C. § 2000e(j) (1994).

<sup>25</sup> *Id.*

<sup>26</sup> Kaminer, *supra* note 16, at 584.

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

<sup>28</sup> 29 C.F.R. § 1605.1 (1967).

a broad reading of undue hardship, contrary to the likely intent of Congress, finding that an employer need merely show that a reasonable accommodation would create more than a *de minimus* cost to the employer in order for the employer to lawfully refuse to accommodate the employee's religious observance or practice.<sup>29</sup> A *de minimus* cost is a cost to the employer that imposes more than a minimal loss or burden on the employer in order to reasonably accommodate the religious accommodation request of the employee.<sup>30</sup> Courts have found a *de minimus* cost when the religious accommodation request imposes on the employer a minimal safety risk,<sup>31</sup> economic cost,<sup>32</sup> or burden on coworkers.<sup>33</sup> For example, courts have found a *de minimus* undue hardship in cases where the religious accommodation requests involved dress code exceptions,<sup>34</sup> unpaid leave,<sup>35</sup> activity absences,<sup>36</sup> or voluntary shift swaps.<sup>37</sup>

#### *B. Americans with Disabilities Act*

The ADA, which was signed into law in 1990, prohibits discrimination against otherwise qualified employees or potential employees who were temporally disabled, are currently disabled, or will become disabled.<sup>38</sup> The ADA also created the affirmative obligation of employers to reasonably accommodate an employee's disability.<sup>39</sup> Like Title VII, the ADA, does not require an employer to accommodate an employee's disability if that

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<sup>29</sup> See *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

<sup>30</sup> *Trans World Airlines*, 432 U.S. at 66.

<sup>31</sup> *EEOC v. Oak-Rite Mfg. Corp.*, 2001 WL 1168156, at \*12-13 (S.D. Ind. 2001).

<sup>32</sup> *DePriest v. Dep't of Human Servs.*, 1987 WL 44454, slip op. at \*3 (6th Cir. 1987).

<sup>33</sup> *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 274 (5th Cir. 2000).

<sup>34</sup> *EEOC v. GEO Grp., Inc.*, 616 F.3d 265, 274 (3d Cir. 2010).

<sup>35</sup> *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 319 (4th Cir. 2008).

<sup>36</sup> *Al-Jabery v. ConAgra Foods, Inc.*, 2007 WL 3124628, at \*6-7 (D. Neb. Oct. 24, 2007).

<sup>37</sup> *Eversley v. MBank Dall.*, 843 F.2d 172, 176 (5th Cir. 1988).

<sup>38</sup> 42 U.S.C. § 12101 et seq. (1999).

<sup>39</sup> 42 U.S.C. § 12112(b)(5) (1991).

disability would create an undue hardship for the employer.<sup>40</sup> Although the ADA uses the same term, “undue hardship,” as does Title VII, the term is defined and has been construed to require more effort on the part of the employer in order to not have to provide the employee with a reasonable accommodation.<sup>41</sup> The ADA defines an undue hardship as “an accommodation ‘requiring significant difficulty or expense.’”<sup>42</sup> Under the Title VII, an accommodation is reasonable only if the accommodation “remove[s] the conflict between employment requirements and the religious practice of the employee.”<sup>43</sup>

In determining whether the employer satisfies the significant difficulty or expense undue hardship requirement under the ADA, courts will examine a number of factors, which include:

(1) the nature and cost of the accommodation needed under this chapter; (2) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; (3) the number of persons employed at such facility; (4) and the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (5) the overall financial resources of the covered entity; (6) the overall size of the business of a covered entity with respect to the number of its employees; (7) the number, type, and location of its facilities; (8) the type of operation or operations of the covered entity; (9) the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.<sup>44</sup>

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<sup>40</sup> Jeffrey O. Cooper, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1424 (1991).

<sup>41</sup> *Id.* at 1442.

<sup>42</sup> Gregory M. Baxter, *Note, Employers Beware: The Workplace Religious Freedom Act of 2000*, 2 RUTGERS J. L. & RELIGION 6, 6 (2000).

<sup>43</sup> *Id.*

<sup>44</sup> 42 U.S.C. § 12111(10) (2009).



Under the stricter standard advocated in this article, courts would have to look to these set of factors in determining whether an accommodation presents the business with an undue hardship.

### *C. Constitutional Freedom of Religion*

The First Amendment of the United States Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>45</sup> The First Amendment Establishment Clause was later applied to the States through the Fourteenth Amendment in *Everson v. Board of Education*.<sup>46</sup> The two clauses in this portion of the First Amendment have been named the Establishment Clause and the Free Exercise Clause.<sup>47</sup> The Establishment Clause prevents the federal and state governments from declaring an official state religion and ensures that both state and federal governments are “neutral in [their] relations with groups of religious believers and non-believers.”<sup>48</sup> The Establishment Clause also prevents courts from deciding cases that require the court to settle or address issues of religious doctrine.<sup>49</sup>

The Free Exercise Clause protects an individual’s freedom to engage in religious practices.<sup>50</sup> Under the Free Exercise Clause, the law that burdens a particular religious practice must either (1) be neutral and generally applicable, or (2) serve a compelling governmental interest and be narrowly tailored to advance that compelling governmental interest.<sup>51</sup>

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<sup>45</sup> U.S. CONST. AMEND. I.

<sup>46</sup> *Everson v. Board of Education*, 330 U.S. 1, 15 (1947).

<sup>47</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

<sup>48</sup> *Everson*, 330 U.S. at 17 (1947).

<sup>49</sup> *Presbyterian Church in US v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969).

<sup>50</sup> *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993).

<sup>51</sup> *Id.* at 521.

## II. PROPOSAL TO ALTER RELIGIOUS WORKPLACE ACCOMMODATIONS

This article asks that the EEOC adopt a new, stricter standard that employers have to meet in order to deny an employee's religious accommodation request. This new standard would raise the bar from the current minimal standard that courts have interpreted into Title VII of the Civil Rights Act to the significant difficulty or expense standard set forth in the ADA, with the ADA's accompanying factors used to add clarity to the standard. The goals of this standard are to provide a more consistent legal standard, to prevent religiously based employment discrimination, and provide both the employee and employer with a more productive work environment.

### *A. Discriminatory Inaction by an Employer*

As was discussed above, members of the discriminated and minority religious groups have historically been discriminated against and were forced to face barriers to activities in mainstream society.<sup>52</sup> These barriers commonly include denial of access to and discrimination within the workforce.<sup>53</sup> It was these barriers, as well as barriers created to discriminate against age, race, gender, and national origin, that inspired the passage of Title VII in order to ensure fair employment.<sup>54</sup> Today religious discrimination continues to occur in the workforce.<sup>55</sup>

For example, in 2010, Muslims made up less than two percent of the national workforce, but were victims of one quarter of the 3,386 religious workplace discrimination cases filed by the EEOC that year.<sup>56</sup> From 2001 to

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<sup>52</sup> Kaminer, *supra* note 17, at 582.

<sup>53</sup> *Id.* at 583.

<sup>54</sup> *See id.* at 580.

<sup>55</sup> *See id.* at 570.

<sup>56</sup> Douglas Goodwin et al., *Statistical Analysis of Religious Discrimination Complaints Through the Equal Employment Opportunity Commission*, 3 J. LEGAL ISSUES & CASES IN BUS. 1, 8 (2015), <http://www.aabri.com/manuscripts/131637.pdf>.

2010, the number of Muslim workplace discrimination cases rose from 330 to 880.<sup>57</sup> While instances of Muslims filing discrimination cases increased, most other religious workplace discrimination rates remained relatively constant.<sup>58</sup> It is likely that this trend occurred because the number of cases reported to the EEOC is smaller than the actual number of workplace discrimination incidents that occurred during that time period.<sup>59</sup>

Anti-Muslim sentiment in this country is also exemplified by Presidential candidate Donald Trump's proposal to ban Muslims from the United States. At the New Hampshire presidential primaries, two-thirds of Republican voters who participated in the exit poll supported Donald Trump's proposal to ban Muslims from the United States.<sup>60</sup> Although this is a small sample of New Hampshire Republicans who voted in the primary, this information is consistent with the rising trend of anti-Muslim sentiment across the United States.<sup>61</sup>

In order for the EEOC to meet its mandate of bringing down barriers to employment and ensuring that all people are given access to fair employment, it is critical that the EEOC take affirmative steps to protect members of the Islamic faith and ensure they can work in a fair environment. Under the current *de minimus* standard, the employer has the burden of proving that a religious workplace accommodation would create more than a minimal cost for the employer.<sup>62</sup> This lower undue hardship standard gives the employer more managerial discretion because it is easier for the employer to justify his or her inability to accommodate the employee. Because of the low burden, it is possible for an employer to decide which employees are granted or denied religious accommodations in a discriminatory fashion without violating the law. It is reasonable to

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<sup>57</sup> *Id.* at 3.

<sup>58</sup> *Id.* at 8.

<sup>59</sup> *Id.* at 9.

<sup>60</sup> *Id.*

<sup>61</sup> Goodwin et al., *supra* note 55, at 8.

<sup>62</sup> Kaminer, *supra* note 17, at 488.

foresee a circumstance where a Christian employer may be unconsciously more willing to allow a Protestant Christian employee to have unpaid leave to honor the Christian Sabbath, even if doing so may give some other employee overtime. However, the same employer would also deny a Muslim employee an accommodation to engage in prayer at work, although such an accommodation would add no more of a burden or cost than the overtime paid for the Christian employee. This hypothetical illustrates the very real tendency of individuals to better identify with individuals similar to themselves and also to be wary of individuals who belong to unfamiliar groups.<sup>63</sup>

The EEOC's adoption of the stricter ADA standard of undue hardship can help prevent biased inaction by an employer against any religious employee.

The proposed ADA standard aims to resolve the discrimination that arises from this tendency by encouraging an employer to grant religious workplace accommodation requests uniformly.

#### *B. Providing a More Consistent Legal Standard*

Adopting the stricter ADA standard of undue hardship to religious accommodation law will resolve both the ambiguity in the law and the inconsistency of its application that has pervaded employment litigation for decades.<sup>64</sup> Dallan Flake wrote in his article on workplace morale that

courts struggle to strike the proper balance between an employee's right to religious expression and an employer's right to control its image. Not only do outcomes vary from court to court, but perhaps more disconcertingly, the analysis and reasoning underlying these decisions is often inconsistent and, in some cases, contradictory.<sup>65</sup>

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<sup>63</sup> Donn Byrne, *The Attraction Paradigm* (New York: Academic Press 1971).

<sup>64</sup> Dallan F. Flake, *Image Is Everything: Corporate Branding and Religious Accommodation in the Workplace*, 163 U. PA. L. REV. 699, 702 (2015).

<sup>65</sup> *Id.* at 702.

Courts have inconsistently decided issues concerning the undue hardship standard, including whether an economic burden qualifies as a *de minimus* undue hardship. The Ninth Circuit, in *Tooley v. Martin-Marietta Corp.*, held that there was not a *de minimus* undue hardship to the employer and the employees union where the employee (a Seventh-Day Adventist) requested that he pay his union dues to a charity instead of the union due to his religious conviction, which prevented him from becoming a member of, or providing money to, a union.<sup>66</sup> In comparison, the Sixth Circuit in *DePriest v. Department of Human Services* held that providing one employee with overtime on a shift to accommodate a religious coworker's request for leave to travel to a onetime religious observance was a sufficient cost to justify the employer denying the request.<sup>67</sup> Courts will allow the permanent waiver of union dues, but have held the onetime cost of overtime for a coworker as being too high a cost to the employer; although presumably the permanent waiver of union dues and union waiver would be a higher economic cost than the onetime cost of overtime to one coworker.

Similarly, other circuits have disagreed on this issue. The Seventh Circuit in *Adeyeye v. Heartland Sweeteners* found that it was not a *de minimus* undue hardship on an employer to allow an employee to take three weeks of unpaid leave to attend his father's burial in Nigeria, in accordance with the employee's religious beliefs.<sup>68</sup> However, the Fourth Circuit in *E.E.O.C v. Firestone Fibers & Textiles Co.* held that the request to take eight nonconsecutive days of unpaid leave in order to observe two religious holidays was more than a *de minimus* cost on the employer.<sup>69</sup> These cases illustrate the inconsistencies in the application of the *de minimus* undue hardship standard in religious workplace discrimination litigation by

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<sup>66</sup> See *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1246 (9th Cir. 1981).

<sup>67</sup> See *DePriest v. Dep't of Human Services of State of Tenn.*, No. 86-5920, 1987 WL 44454, at \*3 (6th Cir. 1987).

<sup>68</sup> *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 455-56 (7th Cir. 2013).

<sup>69</sup> See *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 319 (4th Cir. 2008).

showing how permitting employees to take 21 days of unpaid leave is not a *de minimus* cost to an employer, but eight days of unpaid leave is more than a *de minimus* cost.<sup>70</sup> Similar inconsistent circuit decisions have occurred over the issues of burdens placed on coworkers<sup>71</sup> and accommodation requests that requiring dress code exceptions.<sup>72</sup>

The EEOC can address these inconsistent and varied results by promulgating a set of advisory opinions. These opinions should require employers to make a reasonable accommodation to a religious request unless the accommodation would be a substantial cost to the employer. This EEOC action would substitute years of sporadic and inconsistent court decisions for a standard, modeled from the ADA standard. While Title VII's reasonable accommodation standard developed over a period of years, the ADA's reasonable accommodation standard was essentially already developed and in place when the Act was passed.<sup>73</sup> While Title VII's undue hardship requirement was crafted over years through sporadic and isolated case decisions decided by different courts dealing with different factual situations, the ADA's reasonable accommodation requirement was constructed through congressional hearings and drafting committees. These congressional drafting committees were better situated to determine and represent the will of the electorate and to construct the reasonable accommodation standard into a single, unified system to protect employees from suspect employment practices and biases.<sup>74</sup>

Using Title VII, Congress charged the EEOC with the authority and duty to ensure that workplace discrimination was addressed and that employers

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<sup>70</sup> See generally *id.*; Adeyeye, 721 F.3d 444.

<sup>71</sup> See *Crider v. Univ. of Tenn.*, Knoxville, 492 F. App'x 609, 614 (6th Cir. 2012); *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 274 (5th Cir. 2000).

<sup>72</sup> See *EEOC v. GEO Grp., Inc.*, 616 F.3d 265, 274 (3d Cir. 2010); *Wilson v. U.S. W. Commc'ns*, 58 F.3d 1337, 1341-42 (8th Cir. 1995).

<sup>73</sup> Alan D. Schuchman, *The Holy and the Handicapped: An Examination of the Different Applications of the Reasonable Accommodation Clauses in Title VII and the ADA*, 73 IND. L.J. 745, 754 (1998).

<sup>74</sup> *Id.* at 754.

will respect the rights of their employees.<sup>75</sup> In order for the EEOC and Title VII to live up to their mandate, it is critical that workplace discrimination be dealt with in a consistent and predictable manner. This will allow employees and employers to adequately predict and conform their behaviors to the standard of Title VII concerning religious workplace accommodations.

The history of Title VII religious accommodation law represents a level of ambiguity and inconsistency resulting from conflict between the EEOC and the courts, as well as within the courts themselves. The EEOC's consistent promulgation of different regulations places a burden on employers to attempt to figure out what that standard is, and that undefined standard has consistently been affirmed by the Supreme Court. In contrast, courts ruling on ADA reasonable accommodation cases often take into account the difficulty or expense requirements for proving an undue hardship under the ADA, which legislatures included in the official text of the act.

The promulgation of a substantial cost standard for religious workplace accommodation requests, modeled after the ADA standard, by the EEOC will provide both employers, employees, courts, and regulators with a more consistent, unambiguous standard, which will provide better clarity to all involved parties as to what each party's religious accommodation rights are, and when such rights or obligations may be triggered.

### *C. Improve the Business Environment and Relationship between Employer and Employee*

#### 1. Increased Retention Rates

The EEOC's promulgation of a new, stricter substantial cost standard modeled from the ADA standard will create substantial benefits for employers. One of these benefits may include a higher rate of employee

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<sup>75</sup> See 42 U.S.C. § 2000e-2(a) (1994).

retention and diminished costs associated with training new employees. Implementing the ADA's significant cost or burden test for undue hardship to religious workplace accommodation requests would improve the retention rates of the employer by making the employee feel more valued by the employer and by allowing the employer to feel fulfilled while at work.

Nearly 25 percent of businesses in the United States have employee turnover rates of at least 100 percent per year.<sup>76</sup> Companies with higher turnover rates also suffer from increased costs from training new hires, and lower overall productivity due to inefficient use of resources. In an article concerning the cost of low retention rates, the Economist reported that "most analysts reckon that the cost of losing an employee . . . is between half and one-and-a-half times his annual salary."<sup>77</sup> The article goes on to explain that even fast-food restaurants calculate the cost of replacing one employee at more than \$500. The cost of replacing an employee in more sophisticated and technical industries, such as software engineering, can exceed \$100,000.<sup>78</sup> Retaining employees is important for a company to minimize costs of training employees and increased profits in the long run by improving productivity and increasing loyalty towards the company.

In a 2008 report by the Society of Human Resource Management, a national survey of companies of various sizes found that 38 percent of employers perceived employee retention as the most impacted factor when employers make decisions concerning religious accommodations.<sup>79</sup> The report goes on to acknowledge that 45 percent of employees who stated

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<sup>76</sup> *Labours Lost*, THE ECONOMIST (July 13, 2000), <http://www.economist.com/node/5988>.

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

<sup>78</sup> *Id.*

<sup>79</sup> SOC'Y FOR HUMAN RES. MGMT, RELIGION AND CORPORATE CULTURE: ACCOMMODATING RELIGIOUS DIVERSITY IN THE WORKPLACE 12 (2008), <https://www.shrm.org/research/surveyfindings/articles/pages/religionandcorporateculture.aspx>.



they were the victims of workplace bias, of any kind, stated that they were considering leaving their current job where they experienced the bias.<sup>80</sup> Although there has not been a study conducted to show the exact impact that religious workplace discrimination plays in employee retention, research shows that employees who feel discriminated against are likely to consider leaving their jobs, and that employers perceive that how they handle a religious accommodation request will affect the retention of their employees.<sup>81</sup>

The EEOC implementation of the stricter standard will encourage and incentivize employers to grant more workplace accommodations to employees. When employees witness their employers going above and beyond to provide religious accommodations, those employees will feel more valued. The new EEOC opinion will also encourage more companies to develop formal policies for granting employee religious workplace accommodation requests. Thus, many companies will likely take precautions to resolve potential reasonable religious workplace accommodation requests internally through training and accommodation protocols that will ensure and HR departments and managers will know exactly what accommodations are required under law. Companies will also seek to satisfy the employee's religious accommodation requests to avoid litigation.

The stricter substantial cost standard of undue hardship will allow employees to rectify their professional and personal lives by letting employees practice their religious beliefs in a way that does not conflict with their professional lives. This will lead to increased employee retention rates, which is cost-effective for the company. The substantial cost standard used under the ADA does not allow every possible accommodation to be fulfilled. As stated above, there are factors used in an ADA undue hardship

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

analysis, which allows an employer to deny a reasonable accommodation if the cost is substantially high or the accommodation would substantially affect the employer's ability to carry out its business. This new standard will still allow employers to profitably engage in business while ensuring that employees are not forced to decide between engaging in their religious beliefs and their career.

Under the current *de minimus* model, it is reasonable for an employee, upon being denied the ability to practice his or her religious beliefs due to an unaccommodated religious request, to seek employment opportunities that will allow the employee's professional life to be consistent with his or her spiritual life. As a result, the employer is likely to lose an employee. This will increase the employer's costs to find and train a new employee while the employer is simultaneously battling diminished productivity caused by losing an experienced employee.

## 2. Improved Employee Morale

Holding employers to the stricter undue hardship standard, instead of the current *de minimus* undue hardship standard, will lead to an increase in workplace morale of both religious and non-religious employees and work associates. Research regarding business efficiency and productivity has consistently found that a positive correlation exists between employee attitudes and the business's return on assets and earnings per share.<sup>82</sup> Besides experiencing higher financial returns, workplaces with positive employee morale also experience greater productivity, fewer absences, a less stressful work environment, fewer workplace accidents, and higher rates of employee retention.<sup>83</sup> Workplaces with higher rates of positive employee morale also report higher levels of customer satisfaction and customer loyalty towards the company.<sup>84</sup>

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<sup>82</sup> Flake, *supra* note 6, at 176.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

In the employment context, morale reflects how employees feel about their work and their work environment.<sup>85</sup> Employee morale is impacted by factors such as intrinsic motivation, job satisfaction, work meaningfulness, organizational commitment, and the pride an employee has in their work.<sup>86</sup> How an employee perceives fairness and equity is also a significant factor which affects the employee's morale.<sup>87</sup>

The EEOC's promulgation of the substantial cost or burden standard will increase overall employee morale by encouraging employers to foster a more diverse work environment. Promoting this standard not only increases employee retention rates but also permits more employees, especially those who are members of underrepresented and unpopular religious groups, to express their faith in a way that will allow coworkers to better understand and respect the faith of the employee. This increased level of understanding will lead to an "increased sense of connectedness and camaraderie [that will] reduce conflicts and increases satisfaction levels, which result in more effective and higher quality productivity."<sup>88</sup>

Higher rates of approved religious accommodations may increase employee morale in the workplace because these religious accommodations may likely increase employee motivation, satisfaction, and perception of fairness and equity. An employee will feel more motivated and satisfied in his work life because the religious accommodation will allow the employee to better rectify his private and spiritual life with his professional work life. Rather than feel like there is a conflict between the employee's professional self and his personal self, the employee will now feel like these two large pieces of his life now fit together more cohesively. Thus, the employee will

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<sup>85</sup> D. Harrison McKnight et al., *When Do Feedback, Incentive Control, and Autonomy Improve Morale? The Importance of Employee-Management Relationship Closeness*, 13 J. MANAGERIAL ISSUES 466, 471 (2001).

<sup>86</sup> *Id.* at 467.

<sup>87</sup> Flake, *supra* note 6, at 174.

<sup>88</sup> Daniela M. de la Piedra, *Diversity Initiatives in the Workplace: The Importance of Furthering Efforts of Title VII*, 4 MOD. AM. 43, 45 (2008).

feel more motivated in his professional life because he will no longer feel conflicted with these two elements of his life. An increase in the number of religious accommodations may also improve employee morale because employees will feel that the employer is committed to the employee's success and continued employment at the company.

The stricter standard and the increase in religious accommodations that follow may play a role in an employee's individual and collective perceptions of fairness and equity. For religious employees, it is more than likely that their conceptions of justice and fairness will be formed, or at least informed, by adherence to their religious faith. As a result, when an employer denies a religious employee a reasonable accommodation that is only a minimal cost to the employer, that religious employee is likely to feel the employer has acted unfairly because the religious belief was outweighed by a minimal cost to the employer. Therefore, any refusal to accommodate the religious employees' beliefs may violate the religious employees' sense of fairness.

Such a rejection may also affect other employees who may perceive the rejection as unfair and be subsequently deterred from requesting their own accommodations. Even an employee who may not profess any religious belief or allegiance could interpret a rejection of a reasonable accommodation as an unfair and unbalanced weighing of the scales in the employer's favor. Note that under the stricter substantial cost standard, the law would not unfairly favor the employee because the employer would still be protected from having to make an accommodation that imposes a substantial cost or burden.

Members of the legal and business communities have argued that the current state of religious accommodation law hurts the morale of the coworkers of employees seeking religious accommodations.<sup>89</sup> These members also argue that the best solution is to interpret the law in a way

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<sup>89</sup> See generally *Flake*, *supra* note 6, at 173.

that minimizes the number of religious accommodations made by employers in the workplace.<sup>90</sup> Currently, there is a circuit split over whether a decrease in coworker morale is a sufficient minimum cost or difficulty to permit denying a religious accommodation request to a religious employee.<sup>91</sup> Although some coworkers may be offended or dissatisfied with another employee receiving a religious accommodation, these potential costs will not outweigh the benefits that such accommodations will have on employee morale.

First of all, attempting to maximize employee morale by minimizing religious accommodations may leave religious employees feeling undervalued and mistreated. The increased possibility of employees feeling that they are treated unfairly will lead to increased turnover rates because of employees sharing their disgruntled feelings with other employees, increasing the tension within the company. As discussed above, the adoption of a preexisting undue hardship standard will cure such inconsistencies.

### 3. Addressing the Public Perception of Religious Rights

The idea that religion is under attack in America is a widespread belief throughout the United States.<sup>92</sup> A poll conducted by the Anti-Defamation League in 2005 found that 64 percent of the sample population believes that “religion is under attack.”<sup>93</sup> Another poll conducted in 2015 found that 56 percent of respondents believed that Christianity was under attack in the United States.<sup>94</sup> A similar sentiment is held by the Liberty Institute, a non-

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

<sup>91</sup> *See EEOC v. Rent-A-Center, Inc.*, F. Supp. 2d 112, 119 n.5 (D.D.C. 2013).

<sup>92</sup> *See Poll: Americans Believe Religion is ‘Under Attack’ -- Majority Says Religion is ‘Losing Influence’ in American Life*, ANTI-DEFAMATION LEAGUE (Nov. 21, 2005), [http://archive.adl.org/presrele/relchstsep\\_90/4830\\_90.html#.VIT4ljhdHIU](http://archive.adl.org/presrele/relchstsep_90/4830_90.html#.VIT4ljhdHIU).

<sup>93</sup> *Id.*

<sup>94</sup> Dana Blanton, *Fox News Poll: Christians Feel Under Attack*, FOX NEWS (July 21, 2015), <http://www.foxnews.com/politics/2015/07/21/fox-news-poll-christians-feel-under-attack.html>.

profit legal advocacy group whose central mission is to “restore religious liberty in America in accordance with the principles of our Founding Fathers.”<sup>95</sup> Neal A. Maxwell, an ecclesiastical leader for the Church of Jesus Christ of Latter-Day Saints, stated in an address in 1978 that “a religious conviction is now a second-class conviction, expected to step deferentially to the back of the secular bus. This new irreligious imperialism seeks to disallow certain of people’s opinions simply because those opinions grow out of religious convictions.”<sup>96</sup> These examples are evidence of a prevalent narrative told and believed by many religious persons in the United States today.

This article does not claim that merely adopting this proposal will end any actual or perceived war on religion. However, one of the benefits of this proposal will be to address and change the rhetoric regarding religion and religiousness in the contemporary United States. Adoption of the ADA significant cost or burden undue hardship requirement for religious workplace accommodation requests would give employees more freedom to practice their religion while in the workplace, where presumably most people spend a great deal of their time. Thus, those employees would feel the government is actively protecting their way of life. In many situations, allowing a religious employee to practice according to their religion would not be an additional burden on coworkers, and Title VII has always placed limitations on practices such as proselyting at work.<sup>97</sup>

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<sup>95</sup> *Your Religious Rights Are Under Attack*, LIBERTY INST., <https://www.libertyinstitute.org/your-religious-rights-are-under-attack> (last visited Aug. 30, 2016).

<sup>96</sup> Neal A. Maxwell, President of the First Quorum of the Seventy of The Church of Jesus Christ of Latter-day Saints, Devotional Address at Brigham Young Univ.: *Meeting the Challenges of Today* (Oct. 10, 1978) (transcript available at [https://speeches.byu.edu/talks/neal-a-maxwell\\_meeting-challenges-today/](https://speeches.byu.edu/talks/neal-a-maxwell_meeting-challenges-today/)) (partially quoting M.J. Sorban, former columnist of the *National Review* periodical).

<sup>97</sup> ANTI-DEFAMATION LEAGUE, RELIGIOUS ACCOMMODATION IN THE WORKPLACE: YOUR RIGHTS AND OBLIGATIONS 7 (2012), <http://www.adl.org/assets/pdf/civil-rights/religiousfreedom/religfreeres/ReligAccommodWPlace-docx.pdf>.

Finally, this proposal will act as a victory for religious persons in the United States. The acceptance of this proposal will show religious persons who feel attacked that their rights to practice their religion or faith are protected and vindicated by the government.<sup>98</sup> Although it is only the first in many steps, this step is important because it will open up the conversation about religion and its interplay with rights and society to effectively bring about beneficial results.

### III. POTENTIAL DRAWBACKS

#### *A. Increase in Title VII Litigation*

The first argument against applying the ADA significant cost or burden standard of undue hardship to religious workplace accommodation requests is that the stricter standard will necessarily lead to an increase in Title VII failure to reasonably accommodate religious workplace accommodation request litigation between employers and employees. In 2014 the EEOC received 9,765 complaints alleging lack of reasonable ADA accommodation, compared to 1,541 complaints of disability discrimination for hiring and 14,736 complaints for discharge.<sup>99</sup> Religion was a far less active area, with 582 complaints for failure to extend accommodation, compared to 1,748 for discharge and 313 for hiring.<sup>100</sup> Religious discrimination filings have more than doubled from 1997 to 2014, and its share of the EEOC's docket nearly doubled from 2.1 to 4.0 percent in the same timeframe, with a particularly sharp increase from 2004 to 2008.<sup>101</sup>

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<sup>98</sup> PAUL TILLICH, DYNAMICS OF FAITH 122 (1958).

<sup>99</sup> See *Statutes by Issue FY 2010 - FY 2015*, EEOC, [https://www.eeoc.gov/eeoc/statistics/enforcement/statutes\\_by\\_issue.cfm](https://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm) (last visited Aug. 30, 2016).

<sup>100</sup> See *Bases by Issue FY 2010 - FY 2015*, EEOC, [https://www.eeoc.gov/eeoc/statistics/enforcement/bases\\_by\\_issue.cfm](https://www.eeoc.gov/eeoc/statistics/enforcement/bases_by_issue.cfm) (last visited date Aug. 30, 2016).

<sup>101</sup> See *Charge Statistics FY 1997 Through FY 2015*, EEOC, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Aug. 30, 2016).

Even though the number of religious accommodation cases has nearly doubled over the past 20 years, religious accommodation requests are equivalent to only six percent of the disability claims that allege the lack of a reasonable ADA accommodation.<sup>102</sup>

Opponents of expanding the ADA standard to religious workplace accommodations will interpret these numbers as support for their belief that applying the ADA standard to religious workplace accommodations will inevitably lead to a massive increase in litigation claims. However, these numbers tell a different story. The relatively small number of cases filed concerning the lack of reasonable religious accommodation suggests that only a small number of religious employees would pursue such a claim against their employer, thus defeating the claims of the opponents that the stricter standard would inevitably lead to more litigation.

Another interpretation that speaks to the necessity of providing a stricter undue hardship standard suggests that the increase in litigation may be caused by employers becoming more aware of the broad discretion they possess under the current standard. The awareness of this broad discretion could embolden employers to deny accommodations they would otherwise grant because they know that the employee will have a very small chance of proving discrimination has taken place.

These numbers suggest that few people fail to submit reasonable religious accommodation claims because they do not believe that Title VII will protect them from religious persecution. Therefore, by making the undue hardship standard stricter and weighted in favor of the employee, the legislature would be motivating individuals to utilize these anti-discriminatory laws instead of remaining passive to the situation. This standard would further ensure the purpose of these laws: to protect suspect groups from discrimination and underrepresentation, even though some

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<sup>102</sup> *Statutes by Issue FY 2010, supra* note 95.



increase in litigation may be a necessary evil to ensure adequate protection for these groups.

*B. Increased Cost to Employers*

Opponents of a stricter standard to increase what an employer is required to show to prove an employee's religious accommodation request rises to the level of an undue hardship also point to the increased costs employers should endure in meeting a presumably larger number of religious workplace accommodations.<sup>103</sup> Unlike Title VII's original intent, "the ADA necessarily contemplates an 'extra cost' for disabled employees."<sup>104</sup> Sonne continues:

under the ADA, the hiring of a "reader" to assist an employee with a vision disability may be a "reasonable accommodation" without "undue hardship" for a larger employer, even though this could cost thousands of dollars (i.e., something which would certainly be higher than "*de minimis*"). Similarly, private parking for a walking impaired employee at a cost of about \$400 per month, and a text telephone for a hearing impaired employee at a cost of several hundred dollars (both of which are more than "*de minimis*" amounts), have been posited as "reasonable accommodations" for relevant nonprofit employers. Even Hardison would almost certainly come out differently under the Act's standard. As Justice Marshall noted in dissent, the accommodation sought there involved, at most, additional overtime for another at "\$150 for three months, at which time [Hardison] would have been eligible to transfer back" to a non-conflicting shift. Given that various members of the Court disagreed on whether this cost would even be "*de minimis*," one can deduce that a majority would most likely consider it less than "significant."<sup>105</sup>

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<sup>103</sup> 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, 1054-55 (2004).

<sup>104</sup> *Id.* at 1054.

<sup>105</sup> *Id.* at 1054.

The ADA standard of undue hardship and the courts that have applied the standard have held employers accountable for accommodations that impose a greater cost than the cost imposed on employers under the *de minimus* standard.<sup>106</sup> The increased cost on employers is even more likely to be a legitimate concern when viewing the number of religious workplaces cases where courts are split on whether an accommodation meets the *de minimus* standard.<sup>107</sup> Under the proposed stricter ADA standard of undue hardship, these cases that fall within the gray area of the *de minimus* standard would be found insignificantly costly or burdensome.<sup>108</sup> Additionally, employer costs would increase because the proposal would permit 147 million people to request a religious workplace accommodation that would have to be challenged with the stricter ADA standard.<sup>109</sup>

The costs of providing more workplace religious accommodations will be at least partially offset by the economic benefits the employer will experience as a result of the heightened undue hardship standard. As was discussed earlier in this article, the stricter undue hardship standard will lead to higher retention rates, better employer morale, more workplace diversity, and innovation in the workplace. These consequences will have positive impacts on productivity, customer satisfaction, and the overall quality of the business, thus leading to better returns and profit margins.

Also, there is a fundamental difference between most religious accommodation requests and requests made to accommodate an individual's disability. Accommodations required under the ADA to disabled persons often require alterations to job duties and/or the work area that may be structural in nature or require the employer to obtain and retain special equipment or materials in order to provide the disabled individual

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<sup>106</sup> Schuchman, *supra* note 74, at 745.

<sup>107</sup> See generally *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1246 (9th Cir. 1981); *DePriest v. Dep't of Human Servs.*, No. 86-5920, 1987 WL 44454, at \*3 (6th Cir. Oct. 1, 1987); *Crider v. Univ. of Tenn., Knoxville*, 492 F. Appx. 609, 614 (6th Cir. 2012).

<sup>108</sup> See *Sonne*, *supra* note 99, at 1051.

<sup>109</sup> See *id.* at 1024-25.

with an opportunity to fulfill their job duties and to be put in an equitable position with their nondisabled counterparts.<sup>110</sup>

Employee costs manifest differently in the context of religious accommodations. Religious accommodations, in contrast to disability accommodations, do not often require the employer to make structural changes or obtain and retain special materials and equipment in order to accommodate the religious employee's accommodation request. Rather, religious workplace accommodation requests often involve the employee requesting that the employer allow him to engage in otherwise prohibited conduct (e.g. dress code exceptions, extra breaks to engage in prayer, unpaid leave to honor a religious observance).<sup>111</sup> Under certain circumstances, the employee may request that the employer actually change the work space or official policies of the company (e.g. requesting a designated prayer spot in an office or requesting a change to a company meal policy).<sup>112</sup> In both of these situations, the nature of the religious accommodation request is fundamentally different from a disability workplace accommodation request. This difference necessarily suggests that the nature of a religious accommodation request will usually be less costly to an employer than a request related to accommodating a disabled individual.

### *C. Defining Religious Belief*

Opponents to the adoption of the stricter ADA undue hardship to religious workplace accommodation law may also object to the stricter standard on the grounds that the definitions of religion and belief are overly ambiguous when compared to the ADA definition of disability.

Under the ADA, an individual with a disability "has a physical or mental impairment that substantially limits one or more major life activity. This

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<sup>110</sup> See *id.* at 1046.

<sup>111</sup> See *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2034 (2015).

<sup>112</sup> See, e.g., *Kumar v. Gate Gourmet, Inc.*, 180 Wash.2d 481, 506 (2014).

includes people who have a record of such an impairment, even if they do not currently have a disability.”<sup>113</sup> By contrast, Title VII of the Civil Rights Act defines religion as “all aspects of religious observance and practice, as well as belief.”<sup>114</sup> According to the EEOC, “the law protects not only people who belong to traditional, organized religions, such as Buddhism, Christianity, Hinduism, Islam, and Judaism, but also others who have sincerely held religious, ethical or moral beliefs.”<sup>115</sup> The ADA disability definition includes that the accommodation is only required if the employee has a disability that is qualified as substantially limiting one or more major life activity.

This definition does not allow every disability to be protected under the ADA, but requires that the disability be substantial enough to affect the life of the disabled individual.<sup>116</sup> The act further clarifies that the impairment must affect a major life activity.<sup>117</sup> Because of these qualifiers, the ADA definition of disability sets a clear standard as to what disabilities may or may not be covered under the act. In contrast, the definitions and guidance utilized by Title VII for defining religion do not include the same restricting qualifiers, but rather includes the phrase “all aspects of religious observance.”<sup>118</sup> This leads to a much broader and more ambiguous definition of what activities and beliefs are covered under Title VII of the Civil Rights Act. Courts, throughout the history of Title VII religious accommodation case law, have construed the definition of religion broadly.<sup>119</sup>

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<sup>113</sup> *What Is the Definition of Disability Under the ADA?*, ADA NATIONAL NETWORK, <http://adata.org/faq/what-definition-disability-under-ada> (last visited Aug. 30, 2016).

<sup>114</sup> 42 U.S.C. § 2000e(j) (1994).

<sup>115</sup> *Religious Discrimination*, EEOC, <http://www.eeoc.gov/laws/types/religion.cfm> (last visited Aug. 30, 2016).

<sup>116</sup> 42 U.S.C. § 2000e(j) (1994).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *See* Van Koten v. Family Health Mgmt., Inc., 955 F. Supp. 898, 902 (N.D. Ill. 1997).

Although opponents of the stricter standard proposal may see this broad definition of religion as being a drawback of the proposal, the broad definition of religion is vital to the act in order to fulfill its purpose of protecting individuals from religiously based discrimination. The broad definition of religion is important in order for the act to not run amuck of the Constitutional Establishment Clause. In order to remain in accordance with the Establishment Clause, Title VII must have a broad definition of religion. This ensures that the government does not purposefully or inadvertently recognize one religion or faith above another religion or faith. Because anti-discrimination law aims to relieve burdens placed on discriminated and underrepresented groups, it is likely that the smaller, less established groups will more likely be victims of discrimination against individuals who are members of larger, majoritarian groups.<sup>120</sup> Therefore, the broad definition of religion ensures that even religious groups that may not be formally recognized will still be covered and protected by the anti-discrimination laws.

#### *D. Immutability of Religion*

Some employers may argue that an individual's religious affiliation is fundamentally different from any physical, mental, or sensory disability that an employee may have. These employers reason that because affiliation with a religion is an individual's choice, it is unlike a disability where the employee likely did not choose to have a disability.<sup>121</sup> Due to this difference, any accommodation made to a religious employee may be viewed as an affirmative act by the employer to put the religious employee in a more positive position than their non-religious co-workers. Accommodations for employees with disabilities do not put the disabled

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<sup>120</sup> See generally *id.*

<sup>121</sup> See Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 727-28 (1996); *Garcia v. Gloor*, 618 F.2d 264, 270-71 (5th Cir. 1980).

employees in a better position than their non-disabled coworkers, but rather assist the disabled employees by putting them in an equal and equitable position with their non-disabled coworkers.<sup>122</sup>

Although it may be true that someone's religious identity is partially dissimilar to a person's physical, mental, or sensory disability in that a person's religious identity may be considered volitional, the differences are minimal and do not outweigh the potential benefits of adopting the stricter ADA undue hardship standard for a number of major reasons. First of all, religious belief and practice is a personal trait that is deeply held to the point of blurring the line between volitional and involuntary. Religious belief may be considered as fundamental to the "basic autonomy of identity and self-creation" of a person, as either a citizen or an employee.<sup>123</sup> Religion and belief are fundamental to how people perceive themselves and their surroundings and are also key components that religious persons utilize in developing their moral compass and applying that moral compass in their lives.<sup>124</sup> As a result, religious persons may not likely perceive their own religiousness as a *post priori* choice that they make, but rather an *a priori* part of them, which guides and motivates the decisions they do make on a daily basis.

Furthermore, the line of thought that suggests that the level of protection that the government should provide to individuals should be based upon the volitional nature of the characterizing trait is potentially dangerous to individuals who suffer from self-imposed disability, such as those disabilities that result from an accident or mistake where the individual willingly and voluntarily chose to take on the risk that such injury would

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<sup>122</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31 (1971).

<sup>123</sup> Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 95 (1990).

<sup>124</sup> See Nicholas C. DiDonato, *Religious Beliefs Shape Perception of Stimuli*, PATHEOS (June 25, 2012), <http://www.patheos.com/blogs/scienceonreligion/2012/06/religious-beliefs-shape-perception-of-stimuli/>.

occur. This type of thinking in the area of disability would clearly be erroneous, as it would require both employers and officers of the law to determine which disabilities were the result of volitional choice and which were the result of involuntary circumstance. The same flaw exists in thinking about religious accommodation—even if religious belief may be considered a volitional choice, that assumption does not justify a lower standard of undue hardship. Anti-discrimination law focuses on protecting individuals based on characterizing traits that have traditionally been suspect to discrimination or underrepresentation. Therefore, the crux of determining the standard for undue hardship should not be how individuals become a part of the suspect group that is being protected, but rather if the group as a whole should receive anti-discriminatory protection to ensure and offset discrimination that would be otherwise likely to occur. In this sense, religious accommodations should receive the same undue hardship standard as the ADA standard.

Many religious followers do not perceive their religious belief as a voluntary choice, but rather as a fundamental element of their lives that informs their volitional decisions.<sup>125</sup> Therefore, the argument that religion should be treated differently than other suspect classes in and of itself undermines the perceptions of religious believers and acts to place individuals who see their religious belief as inferior to a more secular perception that religiosity is volitional. It is also important that the Supreme Court has held that the federal and state governments cannot infringe upon an individual's freedom to engage in religious practice unless the government can meet a strict scrutiny review, the highest level of constitutional review the Supreme Court utilizes.<sup>126</sup> Although there is no doubt this level of scrutiny is the result of religion being protected in the Constitution, this level of scrutiny also gives support to the notion that

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<sup>125</sup> *Id.*

<sup>126</sup> *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 441 (1969).

religiousness are deeply held beliefs of a person that go beyond a mere voluntary choice or decision.

### 1. Healthcare Industry Concerns

There could arise an issue in the health care industry where religious individuals may request accommodations on the basis of their religion not to dispense certain medications or perform certain procedures as a result of their religious beliefs. Examples of this could include doctors refusing to perform abortions or, as has already occurred, pharmacists refusing to fill birth control prescriptions or give contraceptives to women.<sup>127</sup> In these situations, the stricter ADA undue hardship rule can and should be applied as if the situation were any other: if the employer can have another employee prescribe the medication or perform the operation without a significant burden or cost resulting, then the employer should be expected to do so. The current Title VII standard for undue hardship has already held that it is appropriate to compel an employer to make such an accommodation in several jurisdictions.<sup>128</sup> However, it would likely be a significant burden for an employer at a reproductive health clinic to continue to employ a doctor who refuses to perform abortions when abortions make up a substantial percentage of the practice. Having someone remain on the payroll and receive a wage while unable to perform their entire, or nearly entire, job description is a significant burden on and cost to the employer, and the employer would have the right, under the stricter ADA standard, to act accordingly.

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<sup>127</sup> See *Religious Refusals and Reproductive Rights: Accessing Birth Control at the Pharmacy*, ACLU 1 (2007), [https://www.aclu.org/files/images/asset\\_upload\\_file119\\_29548.pdf](https://www.aclu.org/files/images/asset_upload_file119_29548.pdf).

<sup>128</sup> *Id.* at 2.



#### IV. CONCLUSION

Religion and faith play a major role in the lives of many people in this nation, and they all are affected by the influence religion has on our country both historically and contemporarily. This high level of religiosity does come into contact with the professional lives of both employees and employers. In order to strike a balance between the business interests of employers and the religious belief of employees, this article advocates for a stricter undue hardship standard which will better protect the interests of employees in the workplace while providing both employees and employers with a clearer legal standard, a more productive and efficient business environment, and a better dialogue about religion in this country.

The stricter significant difficulty or expense standard will lead to more employers accommodating the reasonable religious requests whereas under the current standard, employers could refuse such a reasonable accommodation under a minimal standard that can be easily manipulated by employers to discriminate against religious employees, especially employees that are members of minority or discriminated against religious groups. To ensure Title VII's mandate, which is to prevent workplace discrimination, it is imperative that the EEOC impose and promulgate a newer, stricter standard, which would prevent employers from using wide discretion to circumvent government protections to ensure that members of religious groups, especially minority religious groups, have access to the same protections in practice that are guaranteed under Title VII of the Civil Rights Act of 1964.