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U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Re: National Right to Work Legal Defense Foundation, Inc.'s Comments Concerning the Proposed Updated Compliance Manual on Religious Discrimination

Dear Commissioners:

The National Right to Work Legal Defense Foundation, Inc. submits these comments supporting the Equal Employment Opportunity Commission's proposed updates to its Compliance Manual on Religious Discrimination, along with recommended modifications.

INTEREST OF THE NATIONAL RIGHT TO WORK FOUNDATION

Since 1968, the National Right to Work Legal Defense and Education Foundation, Inc. has been the Nation's leading advocate in the courts and administrative agencies for employee freedom from compelled unionism. To advance employee freedom, Foundation staff attorneys pioneered litigation protecting religious employees from the cruel choice between their faith and their job compulsory union fees impose on them. Foundation litigators have defended for free employees' political and religious autonomy in more than 3,000 cases before the United States Supreme Court, lower federal and state courts, and federal and state agencies.[1]

The Commission's proposed guidance is necessary. It clarifies many of the legal standards for religious discrimination claims. Unions and employers have made it necessary for many employees to seek Foundation legal aid to obtain reasonable religious accommodation and prevent religious discrimination. Unions and employers rarely take Title VII religious accommodation

[1] *E.g.*, *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018); *Harris v. Quinn*, 573 U.S. 616 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012); *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988); *Chi. Tchrs. Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Ry. Clerks*, 466 U.S. 435 (1984).

requirements seriously. Employers often avoid their duty to accommodate, leaving accommodation up to unions. And unions often misinform, refuse accommodation, harass, and retaliate against religious employees who seek accommodation.[2] The inquisition defense—in which unions interrogate religious employees, require them to prove their religious beliefs, and challenge those beliefs' logic and validity—is a common tactic.[3] And after unions force religious employees to run the gauntlet to establish their religious beliefs, unions sometimes make the accommodation process difficult, requiring them to obtain legal representation.

When unions accommodate religious employees who cannot in conscience financially support a union, they force religious objectors to pay for their accommodation by requiring them to pay money to charity.[4] This is unequal treatment. All other protected classes of persons are not forced to pay for nondiscrimination. But religious employees whose religious beliefs do not allow them to fund a labor union face a Hobson's choice: pay money to an outside organization—an organization that has nothing to do with their employment—or risk being fired because of their faith. And as a further penalty, unions force religious employees to pay a "faith tax" to avoid discharge. Unions insist that religious objectors pay the *full voluntary* dues amount to charity—even though *secular objectors* only pay *part* of the dues amount. Secular objectors to supporting unions pay a reduced amount that reflects full dues minus lawfully non-chargeable activity since unions cannot compel employees to fund political and non-chargeable activity.[5] Unions, however, force religious employees to pay the full dues amount, which includes the costs of political activity. Thus, unions require religious employees to pay a faith tax for accommodation—an amount no other objector pays—based on union political spending.

INTRODUCTION & SUMMARY

The Foundation submits these comments to highlight five issues:

I. The Commission should modify its guidance on accommodating employees that cannot fund or support a labor union because of their religious beliefs. Title VII does not require religious objectors to pay for non-discrimination, nor does it require them to pay a faith tax for accommodation. Thus, Title VII forbids unions and employers from forcing religious objectors to pay a dues equivalent or to pay any amount to charity.

II. The Commission should maintain its current position that failure to accommodate is actionable without further adverse action. Congress defined undue hardship as the exclusive

[2] *See* discussion *infra* Sections I., V.
[3] *See* discussion *infra* Section V.
[4] *See* discussion *infra* Section I.
[5] *E.g.*, *Janus*, 138 S. Ct. 2448 (public employees); *Harris*, 573 U.S. 616 (care providers receiving public funds); *Beck*, 487 U.S. 735 (private-sector employees under the National Labor Relations Act); *Machinists v. Street*, 367 U.S. 740 (1961) (railway and airline employees).

exception to accommodation, and it did not require further adverse action to trigger the duty to accommodate. Inserting it violates the Constitution's separation of powers and renders the duty to accommodate meaningless.

III. The Commission should define undue hardship because dicta in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), conflicts with the statute's plain meaning. *Hardison*'s definition of undue hardship conflicts with Title VII's text because no linguistic evidence shows that undue hardship meant greater than *de minimis*. Without sufficient guidance, courts have inconsistently applied undue hardship and wrongly permitted hostile employees' and customers' preferences to negate accommodation needed to protect religious employees.

IV. The Commission should modify its guidance on employment agreements and clarify that the duty to accommodate trumps otherwise neutral agreements. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015), held that refusing to accommodate by enforcing neutral rules is discriminatory and violates Title VII. The duty to accommodate trumps otherwise-neutral employment agreements.

V. The Commission should modify its guidance on employees' duty to cooperate that requires employees to disclose and prove their religious beliefs. The guidance conflicts with Title VII's text that requires accommodation and *Abercrombie & Fitch.* The guidance also conflicts with the first amendment's right to the privacy of belief and its Religion Clauses.

COMMENTS

I. The Commission Should Modify its Guidance on Accommodating Employees That Cannot Fund or Support a Labor Union Because of Their Religious Beliefs.

A. Requiring Religious Objectors to Pay a Dues Equivalent to Charity is Unlawful.

The Commission should modify its proposed guidance suggesting that religious objectors pay the equivalent of union dues (the "full dues amount") to charity because it is discriminatory and violates Title VII. Thus, it is not a reasonable accommodation.

- *Commission's Proposed Guidance*: "[A]n employee can be accommodated . . . by allowing the *equivalent of her union dues* (payments by union members) or agency fees (payments often required from non-union members in a unionized workplace) to be paid to a charity agreeable to the employee, the union, and the employer." (12-IV-C-5.)

Requiring religious objectors to pay the full dues amount to charity unlawfully discriminates based on religion. Under Title VII, secular objectors—individuals with nonreligious objections under *Communications Workers of America v. Beck*, 487 U.S. 735 (1988) or *Machinists v. Street*,

367 U.S. 740 (1961)—pay a reduced amount. The reduced amount reflects full dues minus political, ideological, and other nonchargeable activity. A secular objector, for example, might only pay 75% of the full dues amount. Forcing religious objectors to pay 100% of the full dues amount is discriminatory. The requirement forces religious objectors to pay the secular objector amount *plus* a penalty that secular objectors do not pay—a faith tax. This requirement penalizes religious objectors for their religious beliefs. Religious objectors must pay a faith tax to follow their faith *and* keep their job.

Secular objectors are the appropriate comparator. The regulations inject the idea that "dues" are the benchmark for the charity substitution payment. But the only individuals who pay the full dues amount are *voluntary members*. An employee who has sincere objections to supporting a labor union cannot be a voluntary member. Thus, religious objectors should therefore be compared with nonmembers—those who object to supporting a union. For these reasons, the secular objector agency fee amount is the appropriate benchmark.

What's more, the First Amendment prohibits unions from forcing employees to pay for union politics. The agency fee amount accordingly only includes collective bargaining costs. Yet the faith tax increases the amount that religious objectors must pay based on union political and ideological activity. Although a religious objector does not pay money to a union, the amount stems from union politics. And the union forces religious employees to pay that full dues amount to charity for nonchargeable activity—a charity which the union has a hand in choosing.

The faith tax therefore treats religious objectors worse than secular objectors. Religious objectors must pay more than secular objectors to keep their jobs. The argument that religious and secular objectors are different and therefore unions can treat them differently does not work and conflicts with Title VII. The salient difference between secular and religious objectors is that one objector is secular, and one is religious. Under Title VII, religion is a protected category, non-religion is not. The faith tax, however, treats the protected category worse. The union's pocketbook is the only other difference between the two groups. Secular objectors continue to fund the union that represents them while religious objectors that pay to charity do not. But absent undue hardship, an employer or union's bottom line is irrelevant to Title VII. The relevant statutory provision prohibits unions and employers from discriminating based on religion.

A union unlawfully harasses a religious employee by explicitly or implicitly pressuring him to abandon or alter a religious practice to receive a job benefit or avoid adverse action.[6] A union likewise unlawfully retaliates against a religious employee by taking actions against the employee because of her requested religious accommodation that might dissuade a reasonable worker from becoming a religious objector.[7] The faith tax *is intended* to discourage religious employees from

[6] 42 U.S.C. § 2000e-2(a)(1), (c)(1); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).
[7] 42 U.S.C. § 2000e-3(a); *see also Burlington N. v. Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

becoming religious objectors. It is thus unlawful religious discrimination, retaliation, and harassment to charge religious objectors more than secular objectors.

A sole district court held that a union could force religious objectors to pay a faith tax to receive accommodation. *Madsen v. Associated Chino Teachers*, 317 F. Supp. 2d 1175 (C.D. Cal. 2004). The court bristled at the notion that religious objectors could avoid paying any money to a union and its rationale openly displays religious hostility. The court gave five reasons for its decision. First, it argued that religious protections must be "narrowly drawn" to counteract religious employees' incentive to become religious objectors.[8] Intentionally discouraging religious employees from exercising their rights, however, violates Title VII. Second, the court argued that unions can force religious objectors to pay a faith tax because religious objectors differ from secular objectors—they have religious objections and do not pay any money to the union.[9] Both distinctions fail: the rationale is tautological and inconsistent with Title VII's pledge to accommodate religious beliefs. Third, the court reasoned that "discouraging free riders from selecting religious objector status" is reasonable to prevent free riders.[10] *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), however, destroys the free rider argument. Riders forced against their will are not free riders.

Fourth, the court remarkably argued that unions may penalize religious objectors: "[i]t is not discriminatory to attach a small, ancillary burden to the acceptance of [religious accommodation]."[11] This argument is astonishing. Unions and employers cannot force employees to pay for nondiscrimination benefits. For example, an employer cannot refuse to hire women because it would have to build additional bathrooms—and that would be expensive. It would be equally outrageous to argue that women should pay "a small, ancillary burden" to cover the cost of nondiscrimination that requires employers to hire them and build bathrooms. The court, though, thought unions could intentionally attach a burden to religious accommodation—the faith tax.

Fifth, the court asserted that allowing religious objectors to pay the same amount as secular objectors would be preferential treatment, and there is "*no support* under Title VII for [the plaintiff's] request for preferential treatment."[12] *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015), explicitly rejects this argument: "Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment."[13]

[8] *Madsen v. Associated Chino Teachers*, 317 F. Supp. 2d 1175, 1182 (C.D. Cal. 2004).
[9] *Id.* at 1183.
[10] *Id.* at 1183–84.
[11] *Id*. at 1184.
[12] *Id.* at 1183 (emphasis added).
[13] *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2034 (2015).

In sum, neither the free rider argument nor differences between secular and religious objectors justifies religious discrimination. Requiring religious employees to pay a faith tax to keep their job and practice their faith contradicts Title VII.

Suggested Modification:

- *Suggested Modification*: Employers and unions cannot force religious objectors to pay the full, voluntary dues amount to charity. Forcing religious objectors to pay more than other objectors violates Title VII and Supreme Court precedent holding that unions cannot force employees to pay for union politics.

B. Requiring Religious Objectors to Pay to Charity is Unlawful.

The Commission should modify its suggested guidance referencing payment to charity:

- *Commission's Proposed Guidance*: "Absent undue hardship, Title VII requires employers and unions to accommodate an employee who holds religious objections to joining or financially supporting a union. Such an employee can be accommodated . . . by allowing the equivalent of her union dues (payments by union members) or agency fees (payments often required from non-union members in a unionized workplace) to be paid to a charity agreeable to the employee, the union, and the employer." (12-IV-C-5.)

The charity payment stems from two general lines of thought. First, the union's pocketbook. The pocketbook defense, however, is irrelevant unless unions can prove undue hardship. Title VII does not textually provide unions an undue hardship defense.[14] Congress also excluded one when it addressed religious objections to union fees.[15] Although courts have recognized the defense, no court has ever found undue hardship in a union fee objection case. Thus, the pocketbook defense fails.

Second, and relatedly, unions argue that the charity payment is necessary to prevent free riders.[16] Under the free rider theory, unions have argued that religious objectors must pay to charity to appease other workers who would be upset if they had to pay union fees and religious objectors did not. Unions claim that the charity payment solves the free-rider problem since all employees pay for union representation. The argument, however, is flawed. Religious objectors do not pay for union representation. They pay money to a third party. It therefore makes no difference whether religious objectors pay something or nothing.[17]

[14] 42 U.S.C. § 2000e(j).
[15] 29 U.S.C. § 169.
[16] *E.g.*, *Yott v. N. Am. Rockwell Corp.*, 602 F.2d 904, 909 (9th Cir. 1979).
[17] *Nottelson v. Smith Steel Workers D.A.L.U. 19806, AFL-CIO*, 643 F.2d 445, 456 (7th Cir. 1981) (Pell, J., dissenting) (arguing that religious objectors who redirect their union fees to charity are free riders because they do not pay their unions for services).

Employee happiness—at the heart of the free rider argument—is not a legitimate consideration in religious accommodation cases. Undue hardship on the employer's business is the only legitimate consideration. The suggested guidance allowing employers and unions to force religious objectors to pay for nondiscrimination and accommodation conflicts with Title VII. Moreover, even if employee happiness were a proper reason to alter or deny religious accommodation, the Supreme Court held in *Janus* that union fears about labor peace based on free riders is unfounded.[18] Prior cases provide no support for the pandemonium that unions "imagined would result if agency fees were not allowed, and it is now clear that [those] fears were unfounded."[19]

In *Janus*, the Supreme Court killed the free-rider argument. The Court accepted the plaintiff nonmember's objection that he was "not a free rider on a bus headed for a destination that he wishes to reach." Instead, he is "more like a person shanghaied for an unwanted voyage."[20] The Court determined that "avoiding free riders is not a compelling interest" sufficient to override fundamental rights, and it concluded "that agency fees cannot be upheld on free-rider grounds."[21] The general public benefit does not sanction compelled support. Thus, the free-rider argument is dead. No legitimate reason therefore requires religious objectors to pay fees to charity. Nonpayment of union fees does not create significant workplace conflict, according to the Supreme Court, and it is unnecessary to require payment to achieve "labor peace."[22]

Indeed, requiring religious objectors to pay fees to charity to avoid discharge is itself discriminatory. It requires religious objectors to pay for charity, while several courts have held that unions cannot require secular objectors to pay the portion of union dues based on union charitable activity.[23]

Suggested Modification:

- *Suggested Modification*: Title VII does not require religious objectors to pay any money to charity.

[18] *Janus*, 138 S. Ct. at 2465–66.
[19] *Id.*
[20] *Id.* at 2466.
[21] *Id.* at 2466, 2469.
[22] *Id.* at 2465–66.
[23] *E.g.*, *NLRB v. Studio Transp. Drivers Local 399*, 525 F.3d 898, 902 (9th Cir. 2008); *Beck v. Commc'ns Workers*, 776 F.2d 1187, 1211 (1985), *aff'd en banc*, 800 F.2d 1280 (4th Cir. 1986), *aff'd*, 487 U.S. 735 (1988); *see also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 524 (1991) (a "contribution by a local union to its parent that is not part of the local's responsibilities as an affiliate but is in the nature of a charitable donation would not be chargeable to dissenters").

C. Payments to Charity Cannot Be Required when Employers and Unions Fail to Inform Potential Religious Objectors of Their Rights.

In footnote 292, the Commission references 29 U.S.C. § 169 and the possibility of a collective bargaining agreement mentioning specific charities. The Guidelines leave out a more immediate point. Whatever Title VII provides for religious accommodation, it prohibits employers and unions under the National Labor Relations Act from requiring a charity substitution payment—if the right to religious accommodation is not set forth in the collective agreement. Section 19 of the Act (29 U.S.C. § 169) only permits a charity substitution requirement when the CBA specifically informs religious objectors of their right to withhold union fees on religious grounds.[24] Most CBAs do not refer to religious accommodation. Thus, employers and unions have no possible undue hardship argument when they have failed to take the steps necessary to collect union fees from religious objectors.

Suggested Modification:

- *Suggested Addition*: Unless an employer and union include religious objectors' rights to reasonable accommodation in their CBA, they cannot compel charity payments and forfeit their undue hardship defense under Title VII.

II. The Commission Should Maintain its Current Position that Failure to Accommodate is Actionable Without Further Adverse Action.

The Commission correctly interpreted Title VII's religious accommodation requirement. Employers and unions violate Title VII when they refuse to accommodate employees' sincere religious beliefs:

- *Commission's Proposed Guidance*: "The Commission's position is that the denial of reasonable religious accommodation absent undue hardship is actionable even if the employee has not separately suffered an independent adverse employment action, such as being disciplined demoted, or discharged as a consequence of being denied accommodation. This is because requiring him to work without religious accommodation where a work rule conflicts with his religious beliefs necessarily alters the terms and conditions of his employment for the worse." (12-IV-A.)

The Commission's position is sound. Congress provided a duty to accommodate and defined its limits: an employer or union violates the statute when it fails to accommodate unless

[24] *Scandia Log Homes*, 258 NLRB 716, 719 (1981) (holding that exception requiring charity payment only triggered by an explanation of accommodation in the CBA).

accommodation is impossible without undue hardship.[25] The contrary position—that failure to accommodate is not actionable unless *further* adverse action occurs adopted by *Reed v. UAW*, 569 F.3d 576 (6th Cir. 2009)—contradicts Title VII's text and purpose and reflects hostility toward religion inconsistent with our Nation's history and tradition.

A. Congress Defined Undue Hardship as the Exclusive Exception to Accommodation.

Title VII does not require an employee to suffer discipline or discharge to seek legal relief. It requires employers to accommodate an employee's religious beliefs absent "undue hardship on the conduct of the employer's business."[26] Failure to accommodate is the precise harm the statutory duty to accommodate prohibits. It requires accommodation, absent undue hardship.

The majority in *Reed* argued that a religious plaintiff must suffer adverse action—specifically discipline or discharge.[27] The term adverse action is not found in Title VII. It is a judicial creation. The statute prohibits discrimination that affects an individual's "terms, conditions, or privileges of employment" and that deprives or tends to "deprive any individual of employment opportunities or otherwise adversely affect his status as an employee."[28] Many courts have developed other inconsistent standards.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Supreme Court stated that a plaintiff must show that "despite his qualifications, he was rejected."[29] Lower courts that first applied this test substituted the challenged employment action for rejection. But courts eventually replaced the requirement with adverse action as a shorthand description. Some courts thus require Title VII plaintiffs to establish that they suffered an adverse action.[30]

Adverse action is senseless for religious accommodation. As a general concept, adverse action fits the statute. It clarifies when an employer unlawfully discriminated against an employee. Without adverse action, it is hard to determine when and how an employer or union unlawfully discriminated against an employee. But adverse action is senseless for religious accommodation. The statute requires accommodation. Thus, an employer violates the duty to accommodate when *it fails to accommodate*.

Congress amended Title VII after courts refused to interpret its religious nondiscrimination requirement to include a duty to accommodate.[31] Congress added an affirmative duty requiring

[25] 42 U.S.C. § 2000e(j).
[26] *Id.*
[27] *Reed v. UAW*, 569 F.3d 576, 580 (6th Cir. 2009).
[28] 42 U.S.C. §2000e-2(a)
[29] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).
[30] *E.g.*, *Reed*, 569 F.3d at 580.
[31] *See* discussion *infra* Section IV.A., B.

employers and unions to reasonably accommodate religious employees, absent undue hardship.[32] Thus, employers and unions must accommodate. When they refuse, they violate their duty. Congress defined the sole condition when employers and unions need not accommodate—it did not include a lack of independent harm as a non-accommodation permit. Undue hardship is the only exception Congress included in the statute to the otherwise absolute duty to accommodate. The *Reed* majority's further adverse action requirement therefore contradicts Title VII.

B. Congress Did Not Require Further Adverse Action to Trigger the Duty to Accommodate Inserting It Thus Violates the Constitution's Separation of Powers.

A plaintiff proves that a defendant facially violates Title VII by showing that the defendant failed to provide reasonable religious accommodation. Imposing a second requirement—that an employee must suffer *another* adverse action—beyond being denied reasonable accommodation, improperly amends Title VII. The law only includes the words that Congress adopted, and the President approved.[33] Congress made one exception in Title VII for undue hardship, but it chose not to include further adverse action as another exception to the duty to accommodate. When Congress includes an exception but excludes others, statutory interpretation canons require judges and agencies to presume that Congress acted intentionally.[34] Judicially inserting additional roadblocks for employees to exercise their faith is not judicial minimalism.[35] It prevents countless individuals from obtaining relief that Congress provided to protect their sincere religious beliefs.[36]

In *Abercrombie & Fitch*, the employer argued that the plaintiff failed to meet her prima facie burden because every circuit required religious objectors to provide notice.[37] Before *Abercrombie*, courts required religious objectors to show three elements to prove a prima facie case for failure to accommodate. Plaintiffs had to prove: (1) they had a bona fide religious belief that conflicts with an employment requirement; (2) they informed their employer; and (3) they suffered an adverse action.[38] Unlike the argument for further adverse action, the notice requirement is textually reasonable. An employer cannot accommodate an employee's religious beliefs unless it has some knowledge (or suspects) that an employee holds religious beliefs that require accommodation. No similar inference fits for the duty to accommodate. There is no reason to presume any further harm is needed. But despite the uniform prior caselaw and reasonable textual inference for notice, *Abercrombie* unanimously held that "[w]e construe Title VII's silence as exactly that: silence."[39]

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[32] 42 U.S.C. § 2000e(j).
[33] *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1738 (2020).
[34] *See Sebelius v. Cloer*, 569 U.S. 369, 378 (2013).
[35] *Cf. Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, 2020 WL 6948354, at *6 (U.S. Nov. 25, 2020)
[36] *Cf. Tanzin v. Tanvir*, No. 19-71, 2020 WL 7250100, at *2 (U.S. Dec. 10, 2020)
[37] *Abercrombie & Fitch*, 135 S. Ct. at 2032.
[38] *E.g.*, *Sanchez-Rodriguez v. AT & T Mobility P.R., Inc.*, 673 F.3d 1, 8 (1st Cir. 2012); *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 133 (3d Cir. 1986); *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985), *aff'd and remanded*, 479 U.S. 60 (1986).
[39] *Abercrombie & Fitch*, 135 S. Ct. at 2033.

Thus, an employee need not provide notice. Adding "words to the law to produce what is thought to be a desirable result. . . . is Congress's province," not the courts'.[40]

Courts that require further adverse action therefore violate the Constitution's separation of powers by adding words to the statute that Congress excluded. The statutory requirement is plain and unambiguous. Thus, the law does not permit judicial or agency deviation.

C. Requiring Further Adverse Action Renders the Duty to Accommodate Meaningless Because It Allows Employers and Unions to Refuse to Accommodate Forcing Employees to Choose between Their Religion and Employment.

English common law, dating to at least the eighteenth century, recognized the fundamental legal maxim that "where there is a legal right, there is also a legal remedy."[41] William Blackstone summarized the common law tradition by explaining that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."[42] This rule, "has long been one of the best accepted maxims of the law."[43] Requiring further adverse action renders the right to reasonable religious accommodation, absent undue hardship, a right without a remedy.

Indeed, requiring independent harm makes the duty to accommodate meaningless. The *Reed* majority argued that a defendant "has no duty to make any kind of accommodation" unless a plaintiff suffers "some independent harm caused by a conflict between his employment obligation and his religion."[44] Independent harm, however, provides a separate cause of action, making the failure to accommodate superfluous. If a legal duty to accommodate exists, there is no reason to require the violation of another provision or independent harm.

Requiring further adverse action also forces religious employees "to the 'cruel choice' between religion and employment."[45] Employees who observe their religion after their employers refuse accommodation live under continuous threat. For following their faith, they could lose their livelihood. To obtain legal relief, such a holding requires religious employees to be insubordinate or force the issue to suffer *another* adverse action. Congress, however, amended Title VII to prevent religious employees from facing this cruel choice.[46] The failure to accommodate—which

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[40] *Id.*

[41] 3 William Blackstone, *Commentaries* *29 n.8.

[42] *Id.* at *23.

[43] *Id.* at *29 n.8.

[44] *Reed*, 569 F.3d at 580.

[45] *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 290 (3d Cir. 2001) (Alito, J., concurring) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 616 (1961) (Stewart, J., dissenting)).

[46] *See* discussion *infra* Section IV.A., B.

demands a cruel choice between religion and employment—violates Title VII absent undue hardship.

There is no parallel among other protected categories. If an employer or union discriminates against an employee because of race, sex, national origin, or color, the employee cannot avoid discrimination by sacrificing the protected category. Religious discrimination uniquely forces employees to face the cruel choice between their religion and employment.

D. Refusal to Accommodate Shows Hostility Toward Religion and Is Inconsistent with our Nation's Tradition of Religious Accommodation.

The Commission's proposed guidance aptly highlights the need for religious accommodation to protect religion and reflects our Nation's history and tradition. Refusing to adequately protect religion while protecting other characteristics is religious hostility.

Title VII's religious accommodation protection is part of our culture's heritage of religious freedom. Civil freedoms historically arose through religious freedom. Since the fourth century, Western governments presupposed independent temporal and spiritual spheres of authority.[47] Dual spheres evolved from Imperial Rome in 313 A.D. after the Edict of Milan legalized the Christian church.[48] In later centuries, power struggles between popes and kings crystallized these separate spheres and inculcated the principle that secular, temporal authorities should not interfere with sacred, spiritual duties to God.

The conflict between church and state ultimately led to dual jurisdictions that "profoundly influenced the development of Western constitutionalism."[49] The spiritual sphere—ruled on earth by the church—forced the state to accept that civil power is limited and is not self-defined.[50] Recognizing an independent spiritual sphere imparted that individuals possess fundamental rights given by God. The government, therefore, must protect and preserve these rights. Thus, as Lord Acton wrote, "we owe the rise of civil liberty" to church-state conflict, which gave us limited government.[51]

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[47] Carl H. Esbeck, Dissent, and Disestablishment*: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385, 1392 (2004).

[48] *Id.* at 1391.

[49] Brian Tierney, *The Crisis of Church and State: 1050–1300*, at 2 (1964). *See also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1513 (1990).

[50] Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1561 (1989). Abraham Kuyper later called this concept "sphere sovereignty." Paul Horwitz, *Churches as First Amendment Institutions: of Sovereignty and Spheres*, 44 Harv. C.R.-C.L. L. Rev. 79, 83 (2009).

[51] McConnell, *Origins*, *supra*, at 1513.

The Founders inherited these ideas.[52] They recognized the existence of independent spheres and limited government accordingly. Jefferson encapsulated the Founders' worldview in the Declaration of independence. He wrote that God created all individuals with unalienable rights and declared that governments exist to protect these rights: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men."

Because separate spheres exist, the Founders recognized dual loyalties—loyalty to God and loyalty to government. When conflict occurred between temporal and spiritual spheres, the Founders solved it through accommodation.[53] The Founders specially protected religion because they considered religious freedom an unalienable right given by God.[54] James Madison articulated the Founders' understanding of religion in his famous Memorial and Remonstrance Against Religious Assessments. In it, he presented the principal founding era argument for religious freedom: conscience is inviolable.[55] He explained:

> It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.[56]

Madison therefore declared that the freedom of religion is "in its nature an unalienable right"—because it "is a duty towards the Creator."[57] The Founders thus considered accommodation the

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[52] Adams & Emmerich, *supra*, at 1561. *See also Van Orden v. Perry*, 545 U.S. 677, 683 (2005) ("It is true that religion has been closely identified with our history and government. The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.").

[53] McConnell, *Origins*, *supra*, at 1466.

[54] Two years before the ratification of the Federal Bill of Rights, every state, except Connecticut, adopted a constitutional provision protecting religious liberty. Four states—New Hampshire, Pennsylvania, North Carolina, and Delaware—for example, expressly affirmed that liberty of conscience was an "unalienable right." New York, Virginia, Rhode Island, and North Carolina made similar declarations when they ratified the federal Constitution and proposed a bill of rights. Their proposal included a provision protecting the "free exercise of religion, according to the dictates of conscience" as an "unalienable right." *Id.* at 1455–56, 1480–81, 1517 n.242, n.360.

[55] Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 Wm. & Mary L. Rev. 819, 823 (1998).

[56] *Id.* at 823–24.

[57] *Id.* at 824.

appropriate solution when temporal and spiritual duties conflict. Title VII's religious accommodation provision reflects the Founders' understanding of religion and our culture's longstanding tradition.

Religious freedom reduces human suffering—it liberates individuals from the cruel choice between incurring punishment and surrendering their identity.[58] The Founders recognized that dual loyalties impose that cruel choice, and they sought to alleviate the burden wherever possible. Thus, when temporal and spiritual duties conflicted at the founding, the Founders invariably solved the conflict by accommodating religion.[59]

Religious beliefs are fundamental to believers—important enough to suffer and die for.[60] When governments and employers punish believers because of their religion, they produce conflict and human suffering. Religious freedom reduces conflict, eliminates burdens on believers, and allows people with different religious viewpoints to peacefully live together.

Title VII's accommodation protection eliminates unnecessary suffering and allows religious individuals to participate in the workforce like other individuals. As the United States explained in an amicus brief earlier this year and in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), the accommodation protection "removes an artificial barrier to equal employment opportunity * * * except to the limited extent that a person's religious practice *significantly and demonstrably affects* the employer's business."[61] Religious protection requires accommodation. The right to believe is hollow without the right to practice—it subjects believers to persecution for following their faith.[62]

General policies, especially those that promote collectives, tend to ban individual religious practices and bar believers from the workplace.[63] In amending Title VII in 1972, Congress recognized that general workplace rules often discriminate against religious conduct and exclude religious minorities from the workforce.[64] Unlike other protected characteristics, conduct is connected to religion. For religious individuals who observe the Sabbath, it makes no difference whether workplace rules prohibit employment of Sabbatarians or require employees to work on the Sabbath. It likewise does not matter whether an employer bans Muslims and Jews or merely forbids head coverings and beards. Many Sabbatarians, Muslims, and Jews cannot work under such conditions. Banning religious practices bans believers. Accommodation is therefore necessary to adequately protect religious individuals.

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[58] Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 842 (2014).
[59] McConnell, *Origins*, *supra*, at 1466.
[60] Douglas Laycock, *Religious Liberty As Liberty*, 7 J. Contemp. Legal Issues 313, 317 (1996).
[61] U.S. Amicus Br. at 21, *Patterson v. Walgreen Co.*, 140 S. Ct. 685 (2020) (No. 18-349) (quoting U.S. Amicus Br. at 20, *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (No. 75-1126)).
[62] Douglas Laycock, *The Religious Exemption Debate*, 11 Rutgers J. L. & Religion 139, 176 (2009).
[63] Douglas Laycock, *Exemption Debate*, *supra*, at 150.
[64] *See* discussion *infra* Section IV.A., B.

The knowing refusal to accommodate, absent undue hardship, shows religious hostility and contradicts our heritage of religious freedom. The Commission's position that failure to accommodate is itself actionable follows Title VII's text, purpose, and participation in our culture's time-honored tradition of religious accommodation.

III. The Commission Should Define Undue Hardship Because Dicta in *Hardison* Conflicts with the Statute's Plain Meaning.

The following proposed guidance explains the Supreme Court's interpretation of the undue hardship defense found in the pre-amendment EEOC guidelines. Because the Supreme Court's dicta defining undue hardship contradict the statute, the Commission should independently examine and define the term.

- *Commission's Proposed Guidance*: "'Undue hardship' under Title VII is not defined in the statute but has been defined by the Supreme Court as 'more than a *de minimis* cost'—a lower standard for employers to satisfy than the 'undue hardship' defense under the Americans with Disabilities Act, which is defined by statute as 'significant difficulty or expense.'" (Section 12-Overview.)

Congress did not define undue hardship in Title VII. But the majority in *Hardison* defined it as "more than a *de minimis* cost." *Hardison*'s definition, however, is dicta. As Justice Thomas explained: "Because the employee's termination had occurred before the 1972 amendment to Title VII's definition of religion, *Hardison* applied the then-existing EEOC guideline—which also contained an 'undue hardship' defense—not the amended statutory definition."[65] Four Justices, along with the United States as amicus, have suggested that *Hardison*'s nonbinding definition of undue hardship is wrong and requires reconsideration.[66] The Commission should therefore offer a definition to resolve the problem the Justices highlighted and to remedy lower courts' inconsistent application of *Hardison*'s dicta.

A. Hardison's Definition of Undue Hardship Conflicts with Title VII's Text Because No Evidence Shows That Undue Hardship Meant Greater than *De Minimis*.

The Court in *Hardison* gave no justification for its unusual *de minimis* standard, and no party endorsed it.[67] To the contrary, although the briefs in *Hardison* did not address the issue, the

[65] *Abercrombie & Fitch*, 135 S. Ct. at 2040 (Thomas, J., concurring and dissenting).
[66] *See Kennedy v. Bremerton Sch. Dist*., 139 S. Ct. 634, 637 (2019) (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., concurring in denial of certiorari); *Patterson*, 140 S. Ct. at 686 (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in denial of certiorari); U.S. Amicus Br. at 19–22, *Patterson*, *supra*, (No. 18-349).
[67] Pet. Br. at 41, 47, *Hardison*, *supra*, (No. 75-1126); Resp't Br. at 8, 21, *Hardison*, *supra*, (No. 75-1126); U.S. Amicus Br. at 20, *Hardison*, *supra*, (No. 75-1126).

parties—and the United States as amicus—all acknowledged that the standard for undue hardship was far higher than the Court's eventual interpretation.

When interpreting a statute, as the Supreme Court recently explained, a court must construe it "in accord with the ordinary public meaning of its terms at the time of its enactment."[68] This is because "only the words on the page constitute the law adopted by Congress and approved by the President."[69] Judges therefore usurp the legislative process and destroy the ability to rely on the law when they deviate from a statutory term's original public meaning. Because Congress here did not define the term undue hardship, it must be interpreted according to its ordinary meaning in 1972—when Congress amended Title VII.

Hardison's interpretation of undue hardship, as Justice Alito has noted, "does not represent the most likely interpretation of the statutory term."[70] Indeed, it defies plain English. No pre-*Hardison* dictionary defines undue hardship as merely "more than *de minimis*." And for good reason: a *de minimis* burden—one that is "very small or trifling," comparable to "a fractional part of a penny"—is no hardship.[71]

When Congress enacted the amendment, dictionaries defined hardship as "a condition that is difficult to endure; suffering; deprivation; oppression."[72] Undue mainly meant "unwarranted" or "excessive."[73] Thus, the ordinary meaning of the term undue hardship entails "a condition that is difficult to endure" and that is serious enough for a person to consider it undue—"excessive" or "inappropriate."

It is impossible to reconcile *Hardison*'s interpretation of undue hardship—as "[anything] more than a *de minimis* cost"—with the term's original public meaning. Many costs are neither hardships—difficult to endure—nor undue—"excessive" or "inappropriate." But they qualify as *de minimis* under *Hardison*. Based on these concerns, Justices Alito, Thomas, Gorsuch, and the United States recently confirmed that the Court should reconsider *Hardison*.[74]

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[68] *Bostock*, 140 S. Ct. at 1738.
[69] *Id.*
[70] *Patterson*, 140 S. Ct. at 686 (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in denial of certiorari).
[71] *Black's Law Dictionary* 482 (4th ed. 1968).
[72] *Random House Dictionary* 646 (1973). *Webster's* and *Black's* law dictionaries agree. *Webster's New American Dictionary* 379 (1965) (defining hardship as "something that causes or entails suffering or privation"); *Black's Law Dictionary* 646 (5th ed. 1979) (defining hardship as "privation, suffering, adversity").
[73] *Random House Dictionary*, *supra*, at 1433. *See also Webster's New American Dictionary*, *supra*, at 968 (defining undue as "not due," as "inappropriate" or "unsuitable," and as "exceeding or violating propriety or fitness."); *Black's Law Dictionary*, *supra*, at 1370 (defining undue as "[m]ore than necessary; not proper; illegal"); *Black's Law Dictionary* 1697 (4th ed. 1968) (same).
[74] *Patterson*, 140 S. Ct. at 686; U.S. Amicus Br. at 19–22, *Patterson*, *supra*, (No. 18-349).

The Commission should reject *Hardison*'s dicta, which violates the statute. Given the mounting push to examine undue hardship and conflicting cases interpreting its limits, guidance is needed. The Commission should clarify the term's proper definition and limitation.

Suggested Modification:

- *Suggested Modification*: Undue hardship requires a cost or burden for employers that is excessive under the circumstances. Absent an excessive burden, Title VII affirmatively requires employers and unions to accommodate employees' sincere religious beliefs.

B. Without Sufficient Guidance, Courts have Inconsistently Applied Undue Hardship and Wrongly Permitted Hostile Employees' and Customers' Preferences to Negate Accommodation Needed to Protect Religious Employees.

Without guidance, courts have inconsistently applied undue hardship. Because a *de minimis* standard renders many simple accommodations undue hardships, courts have developed differing standards. The Commission's conflicting guidance on how accommodation affects customers and other employees shows the confusion.

- *Commission's Proposed Guidance*: "Although infringing on co-workers' abilities to perform their duties or subjecting co-workers to a hostile work environment will generally constitute undue hardship, the general disgruntlement, resentment, or jealousy of co-workers will not. Undue hardship requires more than proof that some co-workers complained or are offended by an unpopular religious view; a showing of undue hardship based on co-worker interests generally requires evidence that the accommodation would actually infringe on the rights of co-workers or cause disruption of work." (12-IV-B-4.)

- *Commission's Proposed Guidance*: A manager subjects an employee "to unlawful religious discrimination by taking an adverse action based on customers' [religious] preferences." Adverse action based on customer preference and lost business violates Title VII. (12-II-B.)

- *Commission's Proposed Guidance*: Yet "it would be an undue hardship for an employer to accommodate proselytizing by an employee if the proselytizing had adverse effects on *employee morale or workplace productivity*." (12-III-C.)

- *Commission's Proposed Guidance*: Yet "one court found that it was a reasonable accommodation to allow an employee to use the general religious greeting 'Have a Blessed Day' with co-workers and with customers who had not objected, rather than using it with everyone, including a customer who objected. However, other courts have

found undue hardship where religiously oriented expression was used in the context of a regular business interaction with a client." (12-IV-C-6-b.)

The Commission correctly states that customers' and employees' discriminatory preferences are unlawful reasons to discriminate against religious employees and refuse to accommodate. In other examples, however, the Commission notes that an accommodation that offends other employees' religious preferences and affects their morale and productivity can be an undue hardship. The Commission also cited two examples in which employers could not use generic religious language with customers and employees who object.

The Commission should jettison guidance based on neutral policies and employee and customer preferences. This approach conflicts with Title VII. It ignores the needs of religious minorities and employers' efforts to accommodate individual employees. Congress required accommodation unless it unduly burdens "*the employer's business*."[75] It did not include co-workers' preferences or the reasonableness of an employer's general policy as an exception to the duty to accommodate. It made the opposite determination: employer policies and general employee and customer interests are *unreasonable* if they exclude religious individuals by refusing accommodation.

A rule that allows employee and customer preferences to dictate accommodation conditions protection for religious minorities on majority preferences and popularity. This undermines Title VII's goal to eradicate discrimination. Freedom from discrimination based on race, color, sex, or national origin does not depend on majority will; nor should freedom from religious discrimination. No doubt, when Congress passed Title VII, some employees might have thought it prejudiced them by altering general workplace rules. But that is no defense. Non-acceptance of racial minorities is odious. The same is true for religious minorities. Permitting religious minorities' rights to depend on others' acceptance creates a religious defense and a heckler's veto. The Commission should reject customer and co-worker preferences as grounds for undue hardship.

Suggested Modification:

- *Suggested Modification*: Title VII requires religious accommodation unless it unduly burdens an employer's business. Title VII does not protect general employee happiness or create a heckler's veto. The negative reaction of co-workers to a religious accommodation does not diminish the duty to accommodate.

[75] 42 U.S.C. § 2000e(j) (emphasis added).

IV. The Commission Should Modify Its Guidance on Employment Agreements and Clarify that the Duty to Accommodate Trumps Otherwise Neutral Agreements.

The following proposed guidance on collective bargaining and employment agreements conflicts with Title VII and the Supreme Court's current religious accommodation precedent:

- *Commission's Proposed Guidance*: "A proposed religious accommodation poses an undue hardship if it would deprive another employee of a job preference or other benefit guaranteed by a bona fide seniority system or collective bargaining agreement (CBA)." (12-IV-B-3.)

- *Commission's Proposed Guidance*: "Courts have found undue hardship where the accommodation diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, . . . or causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work." (12-IV-B-2.)

Under the proposed guidance, otherwise-neutral majoritarian employment agreements displace religious minorities' right to reasonable religious accommodation. That guidance flouts the statute and Supreme Court precedent. Although the *Hardison* majority mistakenly thought that the accommodation at issue imposed an undue burden because it conflicted with a seniority agreement, the Supreme Court in *Abercrombie* corrected *Hardison*'s error. Otherwise-neutral employment agreements must give way to religious accommodation.[76] The proposed guidance based on *Hardison* conflicts with Title VII's text, purpose, and Supreme Court precedent.

The *Hardison* majority cited Section 703(h) for the proposition that a seniority maintenance provision that has a *discriminatory impact* does not violate Title VII absent discriminatory intent. But Section 703(h) does not establish that seniority maintenance provisions or contractual bargaining agreements override the duty to accommodate. The provision is not a safe harbor for duties required elsewhere in Title VII. As the Supreme Court carefully explained, the provision does not "modify or restrict relief otherwise appropriate once an illegal discriminatory practice . . . is proved."[77] And even if it did, Section 703(h) only protects employers and unions from disparate impact claims.[78] According to the Supreme Court's decision in *Abercrombie*, refusal to accommodate is not a disparate impact claim. Failure to accommodate is a *disparate treatment* claim based on a refusal to accommodate.[79] And it is an illegal, discriminatory practice. Thus, neither a seniority provision nor a contractual bargaining agreement can alter the duty to accommodate.

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[76] *Abercrombie & Fitch*, 135 S. Ct. at 2034.
[77] *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 761 (1976).
[78] *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 75–76 (1982) (Section 703(h) "immunizes *all* bona fide seniority systems . . . [from] discriminatory impact.").
[79] *Abercrombie & Fitch*, 135 S. Ct. at 2033.

The duty to accommodate—like the duty to avoid discriminating based on race, color, sex, or national origin—trumps employment agreements. The Commission has the relationship precisely backwards. The error stems from *Hardison*'s invalid commitment to formal neutrality. Congress amended Title VII to protect religious employees by requiring accommodation. Yet the *Hardison* majority replaced accommodation with formal neutrality, "adopt[ing] the very position that Congress expressly rejected in 1972" when it amended Title VII.[80] The Commission should avoid this error. The proposed guidance on majoritarian employment agreements and workers' general preferences reflects a commitment to formal neutrality that Congress rejected when it amended Title VII and required religious accommodation.

A. Pre-Amendment Interpretations of Title VII Based on Formal Neutrality Rejected Accommodation.

The Commission first interpreted Title VII's religious protection through the lens of formal (category) neutrality—a rule is formally neutral if it applies equally to protected categories, regardless of outcome. But the Commission aptly changed course a year later and in its 1967 Guidelines adopted an accommodation approach. Those Guidelines stated that the duty not to discriminate under Title VII includes an obligation to accommodate religious needs, absent "undue hardship on the conduct of the employer's business."[81] The 1967 Guidelines removed earlier language that subordinated religious practice to formally neutral employment rules. Many courts ignored the 1967 EEOC Guidelines and continued to apply formal neutrality instead of accommodation. Two cases in particular motivated Congress to amend Title VII: *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), and *Riley v. Bendix Corp.*, 330 F. Supp. 583 (M.D. Fla. 1971).

In *Dewey* and *Riley*, employers fired the plaintiffs for religious practices that conflicted with neutral employment requirements. Both courts presupposed formal neutrality—they defined discrimination as a departure from category neutrality.[82] They accordingly held that the employers did not discriminate against the plaintiffs because the policies applied equally to all employees. Even though the policies only harmed religious employees, the disparate outcome was irrelevant because the rules were category neutral.

By adopting formal neutrality, the courts presumed that Title VII only protects status—work rules only need to be category neutral. *Riley* emphasized that employees of faith with conflicting religious practices must either conform to the workplace or "seek other employment."[83] Neutral

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[80] *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting).

[81] *Riley v. Bendix Corp.*, 330 F. Supp. 583, 591 (M.D. Fla. 1971) (providing the 1966 and 1967 EEOC Guidelines in Appendix A and B), *rev'd,* 464 F.2d 1113 (5th Cir. 1972).

[82] Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 Tex. L. Rev. 317, 364 (1997).

[83] 330 F. Supp. at 590.

rules therefore trump religious practices. *Dewey* explained that Title VII protected religious belief (status), but not religious practice.[84]

Dewey denied accommodation because the court thought it would be discriminatory. Because the court assumed that Title VII required formal neutrality, it objected that accommodation was not category neutral. *Dewey* reasoned that accommodating the plaintiff would "discriminate against . . . other employees" and "constitute unequal administration of the collective bargaining agreement."[85]

B. Congress Amended Title VII to Require Religious Accommodation and Reject Pre-Amendment Formal Neutrality.

Congress rejected *Dewey* and *Riley*. In response to employers' refusals to accommodate religious employees and repeated failures by courts—particularly in *Dewey* and *Riley*—to require accommodation under Title VII, Senator Jennings Randolph encouraged Congress to amend Title VII.[86] Senator Randolph argued that *Dewey* and *Riley* had "clouded" the meaning of religious discrimination.[87] He therefore proposed an amendment to clarify "that Title VII requires religious accommodation, *even though unequal treatment would result*."[88] The Senate unanimously passed his proposed amendment and the House similarly approved.

Senator Randolph explained that the amendment "assure[s] that freedom from religious discrimination in the employment of workers is for all time guaranteed by law."[89] His amendment requires an accommodation in most cases and only permits non-accommodation in "a very, very small percentage of cases."[90] As a guidepost to interpret the duty to accommodate, Congress included in the record copies of the *Dewey* and *Riley* opinions that motivated amendment. Those decisions thus represent interpretations that Congress foreclosed by its amendment.

C. *Abercrombie* Fixed *Hardison*'s Errors and Held that Refusing to Accommodate by Enforcing Neutral Rules is Discriminatory and Violates Title VII.

Despite the Congressional amendment rejecting *Dewey* and *Riley*, *Hardison*—shortly after Congress had acted—embraced those decisions' logic and analysis. Although the Court acknowledged that a duty to accommodate exists, it instead applied formal neutrality.[91] The Court

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[84] 429 F.2d at 331.
[85] *Id.* at 330.
[86] 118 Cong. Rec. 705 (1972).
[87] *Id.* at 706.
[88] *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting) (emphasis added).
[89] 118 Cong. Rec. 705 (1972).
[90] *Id.* at 706.
[91] *Hardison*, 432 U.S. at 85.

ignored whether the employer accommodated the individual employee. It instead held that no discrimination occurred because the employer treated all protected groups equally. The Court even described the contractual bargaining agreement policy that caused the plaintiff to lose his job as "a significant accommodation," because it equally applied to all protected groups.[92]

The Court buttressed its decision by arguing that accommodation conflicts with other non-protected characteristics, including contract rights under a collective bargaining agreement. The majority reasoned that deviation from a majoritarian collective bargaining agreement is an undue hardship.[93] But resorting to group rights that dispense with individual employee rights exacerbates the problem. Congress required accommodation to protect individuals from groups. Only minorities who cannot enact policies to protect their beliefs require accommodation. Adding another collective—a union that has eliminated a plaintiff's right to negotiate his own working conditions with his employer and that by law represents majority interests at the expense of minority interests—increases, not decreases, the need for accommodation.

Using "language striking[ly] similar" to *Dewey*, the *Hardison* majority rejected accommodation because it reasoned that accommodation requires unequal treatment.[94] But the Court never defined neutrality. Unequal could have meant either that accommodation treats religion better than non-protected characteristics (such as contract rights) or better than other protected characteristics (such as race). But the first benchmark would nullify protecting religion or any other characteristic—all protected characteristics are treated better than non-protected characteristics. And the second benchmark conflicts with Congress's 1972 amendment. Congress required accommodation to *adequately* prohibit religious discrimination—as the statute equally bans discrimination based on other protected characteristics. Non-accommodation fails to protect employees of faith from discrimination. Majoritarian systems discriminate and exclude religious employees—often religious minorities. The practical result is not neutral.

In *Abercrombie & Fitch*, the Supreme Court corrected *Hardison*'s errors based on formal neutrality. The *Abercrombie* Court, which was virtually unanimous, recognized that deliberately refusing to accommodate by enforcing neutral rules is discriminatory.[95] There, the Court held that the employer violated Title VII because it refused to hire a prospective employee to avoid accommodation. The Court reasoned that acting to avoid accommodation—or refusing to accommodate—violates Title VII.[96]

Title VII, according to *Abercrombie*, requires more than formal neutrality. *Abercrombie* explained: "Title VII does not demand mere neutrality with regard to religious practices—that they

[92] *Id.* at 78.
[93] *Id.* at 83.
[94] *Id.* at 89 (Marshall, J., dissenting).
[95] *Abercrombie & Fitch*, 135 S. Ct. at 2033.
[96] *Id.*

be treated no worse than other practices. Rather, it gives them favored treatment."[97] Employers may adopt neutral policies. But when an employee requires a religious accommodation "it is no response that the subsequent 'fail[ure] . . . to hire' was due to an otherwise neutral policy. Title VII requires otherwise neutral policies to give way to the need for an accommodation."[98]

The Commission's reliance on formally neutral rules and *Hardison*'s reasoning is therefore misplaced. Title VII alters neutral employment rules and requires religious accommodation. While accommodation and non-discrimination may be unpopular to some or inconvenient, Congress democratically decided the appropriate balance. Absent undue hardship, employers and unions are required to make exceptions to otherwise neutral policies to accommodate employees' sincere religious beliefs.

V. The Commission Should Modify Its Guidance on Employees' Duty to Cooperate that Requires Employees to Disclose and Prove Their Religious Beliefs.

The following proposed guidance conflicts with Title VII's text, the Supreme Court's decision in *Abercrombie*, and the First Amendment's right to the privacy of belief and its Religion Clauses:

- *Commission's Proposed Guidance*: "In addition to placing the employer on notice of the need for accommodation, the employee should cooperate with the employer's efforts to determine whether a reasonable accommodation can be granted." (12-IV-A-2.)

- *Commission's Proposed Guidance*: "Where the accommodation request itself does not provide enough information to enable the employer to make a determination, and the employer has a bona fide doubt as to the basis for the accommodation request, it is entitled to make a limited inquiry into the facts and circumstances of the employee's claim that the belief or practice at issue is religious and sincerely held, and that the belief or practice gives rise to the need for the accommodation." (12-IV-A-2.)

- *Commission's Proposed Guidance*: "If the employer requests additional information reasonably needed to evaluate the request, the employee should provide it." (12-IV-A2.)

- *Commission's Proposed Guidance*: "When an employer requests additional information, employees should provide information that addresses the employer's reasonable doubts. . . . [W]ritten materials or the employee's own first-hand explanation may be sufficient to alleviate *the employer's doubts about the sincerity or religious nature of the employee's professed belief*." (12-IV-A-2.)

[97] *Id.* at 2034.
[98] *Id.*

- *Commission's Proposed Guidance*: "An employee who fails to cooperate with an employer's reasonable request for verification of the sincerity or religious nature of a professed belief risks losing any subsequent claim that the employer improperly denied an accommodation." (12-IV-A-2.)

The proposed guidance conflicts with *Abercrombie*'s ruling on notice and requires employees to disclose and prove the nature and sincerity of their religious beliefs to their employer or union's satisfaction to receive accommodation. The Commission's citation to *Bushouse v. Local Union 2209*, 164 F. Supp. 2d 1066 (N.D. Ind. 2001), is telling. The Commission approvingly notes that a union's refusal to provide accommodation in that case unless an employee produced *independent corroboration* to prove the sincerity of his religious beliefs did not violate Title VII.

Although the proposed guidance states that employers and unions are only "entitled to make a limited inquiry into the facts and circumstances of the employee's claim," the caveat is hollow. The broader guidance requires employees to disclose and satisfy their union or "employer's doubts." If an employee fails to sufficiently disclose or prove her religious beliefs to her union or employer, the guidance suggests that no duty to accommodate may exist because the employee failed "to cooperate." It explains that an "employee who fails to cooperate with an employer's reasonable request for verification of the sincerity or religious nature of a professed belief risks losing any subsequent claim that the employer improperly denied an accommodation."

The guidance crucially fails to define reasonable employer and union requests for information. And it sets employer and union subjective doubts as the standard religious employees must meet. Thus, it creates a burden for religious employees to disclose and prove their religious beliefs to their employer or union. If they do not, the guidance creates a safe harbor for an employer or a union's refusal to accommodate.

A. The Guidance Conflicts with Title VII's Text That Requires Accommodation and *Abercrombie & Fitch*.

The guidance conflicts with the statute's text that requires employers and unions to accommodate employees' religious beliefs. Although employers and unions may ask basic, limited questions, the guidance goes too far. It reverses the burden and imposes a duty on religious employees found nowhere in Title VII. The guidance requires religious employees to prove that they deserve religious accommodation to their employer or union. Congress, however, solely created a duty for employers and unions to accommodate. It did not create a duty for religious employees to submit to a "hearing" before they file with the EEOC—which itself creates no hearing requirement. And for good reason: accommodation often depends on employers and unions—employees can rarely accommodate themselves. Absent undue hardship, Title VII

requires employers and unions to accommodate employees' sincere religious beliefs. An employee's failure to satisfy an employer or union's doubt is not a statutory exception to the requirement.

The Supreme Court has also clarified that employees do not have to satisfy their employer's requirements for accommodation. In *Abercrombie*, the Supreme Court held an employee or prospective employee need not satisfy any condition precedent to merit accommodation.[99] Although the employer argued that the prospective employee was not entitled to an accommodation because she did not explain her religious beliefs to it, the Court disagreed. It held that the prospective employee was entitled to a religious accommodation and her employer violated Title VII by refusing to accommodate her. Title VII requires employers and unions to accommodate all employees' and prospective employees' sincere religious beliefs, absent undue hardship. A union's or employer's belief that an employee needs religious accommodation triggers its duty to accommodate.[100] Thus, at most, an employee should notify her employer and union that she needs accommodation when they cannot tacitly infer that religious accommodation is required. An employee does not need to prove to an employer that he merits accommodation.

In *Abercrombie*, moreover, the Supreme Court altered the framework for religious accommodation claims.[101] Before *Abercrombie*, courts considered failure to accommodate as distinct from disparate treatment, which requires discriminatory, unfavorable treatment.[102] They did not consider the refusal to accommodate by enforcing otherwise-neutral rules as disparate treatment. But *Abercrombie* clarified that failure to accommodate claims *are* disparate treatment claims, thereby recognizing that employers and unions do discriminate against religious employees when they enforce otherwise neutral rules that exclude religious minorities from the workplace.

Abercombie altered the proof framework for accommodation cases. The Commission's proposed guidance recognizes that failure to accommodate is now a disparate treatment claim. But the Commission does not explain the change's effect. Nearly every federal court has continued to apply the old framework for distinct religious accommodation claims.[103] The Commission should thus clarify that *McDonnell Douglas*—the traditional standard for disparate treatment claims—is now the appropriate standard for disparate treatment claims based on a failure to accommodate.[104]

The practical result is that the Commission should stop requiring plaintiffs to *prove* that they have a bona fide or sincere religious belief—especially to unions and employers. The former,

[99] *Id.* at 2033.
[100] *Id.*
[101] *Id.* at 2032–33.
[102] Bruce N. Cameron & Blaine L. Hutchison, *Thinking Slow About Abercrombie & Fitch: Straightening Out the Judicial Confusion in the Lower Courts*, 46 Pepp. L. Rev. 471, 474 (2019).
[103] *Id.* at 486 (analyzing post-*Abercrombie* cases).
[104] *Id.* at 481–86.

distinct religious accommodation theory required plaintiffs to prove that they had a bona fide or sincere religious belief as part of their prima facie case. Under the traditional *McDonnell Douglas* framework for disparate treatment claims, plaintiffs no longer must prove that their religious beliefs are bona fide or sincere. The protected class for an employee who seeks accommodation is a religious employee who holds beliefs that require accommodation—a Muslim, for example, who must wear a headscarf. Refusal to accommodate is disparate treatment.[105]

B. The Guidance Conflicts with the First Amendment's Right to the Privacy of Belief and Its Religion Clauses.

The Commission's guidance requiring employees to prove the nature and sincerity of their religious beliefs often turns litigation into a religious inquisition.[106] Unions often subject employees seeking religious accommodation to rigorous scrutiny of their religious beliefs. The inquisition defense strategy is a common tactic. The Commission's guidance encourages it.

The proposed guidance requires religious employees to disclose and prove their private beliefs to receive accommodation. This guidance conflicts with the First Amendment's right to privacy of belief. The Supreme Court has "repeatedly" held that the First Amendment guarantees both "privacy of association and belief."[107] In *Abood v. Detroit Board of Education*, the Court held that a union could not force an employee to forego the right to privacy of belief as a condition to

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[105] *Id.* at 500 ("The protected class for Samantha Elauf, the plaintiff in Abercrombie, is a Muslim who believes that she must wear a headscarf.").

[106] *E.g. Camara v. Epps Air Serv., Inc.*, 292 F. Supp. 3d 1314, 1321 n.4 (N.D. Ga. 2017) (deciding to exclude proposed facts involving past religious conformity challenging the sincerity of a plaintiff's religious beliefs); *EEOC v. Triangle Catering, LLC*, No. 5:15-CV-00016-FL, 2017 WL 818261, at *8–10 (E.D.N.C. Mar. 1, 2017) (denying summary judgment for the defendant but stating that substantial questions exist about the sincerity of a plaintiff's religious beliefs, and that defendants will "[n]o doubt . . . offer evidence of inconsistencies, together with [the plaintiff's] reputation for untruthfulness" at trial to refute the sincerity of the plaintiff's religious belief, concluding that "evidence of non-observance is relevant on the question of sincerity" (alteration in original) (quoting *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988))); *EEOC v. United Health Programs of Am., Inc.*, 213 F. Supp. 3d 377, 392–94, 398 (E.D.N.Y. 2016) (addressing defendants' argument that the plaintiffs did not possess a sincere religious belief and noting the difficulty defining and analyzing both sincerity and religious beliefs. Sincerity "is inherently fact-intensive. . . . [and] '[s]incerity analysis is exceedingly amorphous, requiring the factfinder to delve into the claimant's most veiled motivations and vigilantly separate the issue of sincerity from the factfinder's perception of the religious nature of the claimant's beliefs. This need to dissever is most acute where unorthodox beliefs are implicated.'" (alteration in original) (citation omitted) (quoting *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984))); *Mindrup v. Goodman Networks, Inc.*, No. 4:14-CV-157, 2015 WL 5996362, at *5–6 (E.D. Tex. Oct. 14, 2015) (involving an argument by a defendant challenging a plaintiff's bona fide religious belief); *Zamora v. Gainesville City Sch. Dist.*, No. 2:14-CV-00021-WCO-JCF, 2015 WL 12852321, at *2 (N.D. Ga. Aug. 26, 2015) (analyzing the defendant's argument that the plaintiff did not show that she had a bona fide religious belief because she could not prove she needed to attend particular events and reserving the issue for the factfinder).

[107] *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (listing cases that agree), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81, *as recognized in McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003).

withhold union support.[108] Thus, in *Abood*, the Court ruled that employees need not disclose the specific union expenditures they oppose. A general objection is constitutionally sufficient because individuals are entitled to the "freedom to maintain [their] own beliefs without public disclosure."[109]

In many contexts, the Supreme Court has recognized the importance of protecting the privacy of belief. The Court has noted that public disclosure may subject employees to "economic reprisal, . . . threat of physical coercion, and other manifestations of public hostility" that might dissuade individuals from exercising their rights "because of fear of exposure of their beliefs . . . and [because] of the consequences of this exposure."[110] The proposed guidance subjects employees to the examination of their conduct and religious beliefs to receive accommodation. Thus, it contradicts the right to maintain personal "beliefs without public disclosure."[111]

The guidance also conflicts with the First Amendment's Religion Clauses. The Supreme Court and other courts have been careful to note that it is not only the conclusions reached by a government entity that may infringe on the rights guaranteed by both Religion Clauses, "but also the very process of inquiry leading to findings and conclusions."[112] In *NLRB v. Catholic Bishop of Chicago*, the Supreme Court held that NLRB jurisdiction over religious schools would lead to impermissible entanglement because exercising jurisdiction would require resolving theological issues whenever a school offered a religious reason for challenged conduct.[113] As a result, the Court denied jurisdiction because the very process of "inquiry into the good faith of the position asserted by the clergy-administrators"[114] impinged upon "rights guaranteed by the Religion Clauses."[115]

Likewise, in *University of Great Falls v. NLRB*, the District of Columbia Circuit referred to religious examination and inquiry by courts and government entities as "offensive,"[116] quoting a plurality opinion by the Supreme Court that rejected "inquiry into . . . religious views."[117] The court held that it is "well established" that "courts should refrain from trolling through a person's

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[108] *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 241 (1977), *overruled on other grounds by Janus*, 138 S. Ct. 2448.
[109] *Id.* (alteration in original).
[110] *NAACP v. Alabama*, 357 U.S. 449, 463 (1958) (alteration in original); *see also Abood*, 431 U.S. at 241 n.42 (noting the chilling effect and consequences of public disclosure).
[111]. *Abood*, 431 U.S. at 241 ("To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure.").
[112] *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979).
[113] *See id.*
[114] *Id.*
[115] *Id.*
[116] *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002).
[117] *Id.* (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion)).

or institution's religious beliefs."[118] The court rejected the NLRB's "substantial religious character" test for jurisdiction because inquiry into an institution's religious character, mission, and primary purpose implicates First Amendment concerns.[119] "[J]udging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'"[120]

The guidance invites a direct inquiry into employees' religious faith and practice. It not only allows unions, employers, and government officials to judge the centrality of different religious practices, but it requires them to discriminate based on the beliefs they find orthodox and sincere. If the judiciary is incompetent to judge the merit of religious beliefs, self-interested employers and unions are even less competent.

The Free Exercise Clause "protects a religious [individual's] right to shape [his] own faith."[121] No government official, "high or petty," is constitutionally permitted to declare what is or should be an "orthodox" religious belief.[122] Yet the guidance invites employers, unions, and government officials to determine which religious beliefs count and which individuals are faithful adherents. It is constitutionally improper, however, to discriminate between those who take a lax approach and those who take a rigorous approach to their religious faith.[123] The government may not determine religious orthodoxy or require a minimum degree of religious faithfulness. The proposed guidance is flawed because it encourages unions, employers, and government officials to award or deny accommodation based on these impermissible inquiries and reasons.

Suggested Modification:

- *Suggested Modification*: An employee's request for religious accommodation is presumptively sincere. The determination whether an individual possesses a religious belief "is not to turn upon a . . . perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[124] The First Amendment "safeguards the free exercise of [an individual's] chosen form of religion."[125] Employers, unions, and

[118] *Id.* at 1341–42 (quoting *Mitchell*, 530 U.S. at 828).
[119] *See id.* at 1340.
[120] *Id.* at 1343 (quoting *Emp. Div. v. Smith*, 494 U.S. 872, 887 (1990)).
[121] *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012) (alteration in original).
[122] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).
[123] *Great Falls*, 278 F.3d at 1342; *Barnette*, 319 U.S. at 642.
[124] *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981).
[125] *United States v. Ballard*, 322 U.S. 78, 86 (1944) (alteration in original) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)).

government officials are not entitled to decide whether an individual has "correctly perceived" or followed the "commands of [his] . . . faith."[126]

- *Suggested Modification*: An employee need not prove his religious beliefs or religious faithfulness to his union and employer. An employee's notice to his union or employer or an employer's or union's suspicion that an employee needs accommodation triggers the duty to accommodate. Unions and employers violate their duty to accommodate by refusing accommodation based on their perceptions of an employee's religious orthodoxy.

CONCLUSION

For these reasons, the Commission should update its proposed guidance. The Commission should modify its guidance on accommodating employees that cannot fund or support a labor union because of their religious beliefs. It should maintain its current position that failure to accommodate is actionable without further adverse action. It should define undue hardship. It should modify its guidance on employment agreements. And it should revise its guidance on employees' duty to cooperate.

Respectfully submitted,

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[126] *Thomas*, 450 U.S. at 716 (alteration in original).