OUT OF SIGHT, OUT OF LEGAL RECOURSE: INTERPRETING AND REVISING TITLE VII TO PROHIBIT WORKPLACE SEGREGATION BASED ON RELIGION

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I. INTRODUCTION

In May 2011, ABC News aired an investigative hidden-camera segment in which three job applicants—a Jewish man with a yarmulke, a Muslim woman with a hijab, and a Sikh man with a turban—were denied employment at a restaurant. The employer and the applicants were played by actors. In front of and within earshot of real-life customers, the employer rejected the applicants because their religious attire did not conform to the employer's dress code policy.[1] For example, the restaurant manager informed the Sikh applicant that he would not hire him "looking the way you look."[2] According to the employer, his turban could be "threatening to anyone sitting here eating."[3]

The purpose of the segment was to ascertain how unsuspecting members of the public would respond to blatant discrimination based on religious appearance. Some patrons objected to the restaurant manager for acting in a discriminatory, unfair fashion.[4] One African-American patron likened the employer's treatment of the Sikh applicant to discrimination on the basis of race. The patron wondered if the manager could "say it to me about my color or my religious beliefs. It's the same thing, right?"[5] Another troubled witness admonished the manager, "I'm just not sure you're aware of how illegal it is . . . . You're lucky there are no other lawyers around."[6]

As it turns out, the restaurant patrons' assumption that courts would find such conduct illegal is mistaken. For years, federal courts have enabled employers to engage in the behavior depicted in this broadcast. Where there is a conflict between an employee's appearance based on his or her religion and an

1. *See What Would You Do?* (ABC News television broadcast May 6, 2011), *available at* http://abc.go.com/watch/what-would-you-do/SH5555951/VD55125732/what-would-you-do-56.

2. *Id.*

3. *Id.*

4. In the case of the woman wearing a hijab, the patrons interviewed in the program exclusively expressed support for her against the potential employer. However, patrons expressed mixed support for the two male applicants. Some argued that the men should have to remove their religious attire if the employer had a conflicting dress code policy, or that they should "fit in" with America, which ostensibly means such religious attire is not acceptable or appropriate. *See id.*

5. *Id.*

6. *Id.*

employer's interest in avoiding negative customer reaction, federal courts allow employers to resolve this conflict by placing the religious employee in a position out of public view or by refusing to hire him or her altogether. According to the courts, Title VII of the Civil Rights Act of 1964 ("Title VII")[7]—which prohibits employment discrimination on the basis of several protected categories, including religion[8]—protects all aspects of religious observance and practice unless an employer cannot "reasonably accommodate" the practice or observance without "undue hardship."[9] Courts have ruled that it is a "reasonable accommodation" of the employee's religion to segregate an employee with religious attire—by, for example, placing him or her in the back room.[10] Courts have also held that hiring such an employee may result in economic costs that amount to an "undue hardship."[11]

The purpose of this article is to argue that the federal courts' prevailing interpretation of Title VII with respect to religious attire in the workplace is inconsistent with the law. I maintain that Title VII prohibits employers from either placing employees in the back or refusing to hire individuals with conspicuous articles of faith due to any actual or perceived social discomfort with the employee's religion-based appearance.[12] I am persuaded of this for two independent reasons. First, placing an employee out of public view does not constitute a "reasonable accommodation" under Title VII because the statute's general anti-discrimination provision expressly prohibits employers from "segregating" employees.[13] There is no basis for suspecting that this clear, broad restriction on employer conduct does not extend to employees whose appearance is dictated by their religious beliefs.[14] In line with this reading of Title VII, I

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7. 42 U.S.C. § 2000e to § 2000e-17 (2006).

8. *See id.* § 2000e-2(a)(1) (making it an "unlawful employment practice for an employer" to "fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's. . . religion").

9. *Id.* § 2000e(j).

10. For a representative example, *see infra* Part II.B.2 (discussing *Birdi v. United Airlines Corp.*, No. 99 C 5576, 2002 WL 471999 (N.D. Ill. Mar. 26, 2002).

11. For a representative example, *see infra* Part II.B.3 (discussing *EEOC v. Sambo's of Georgia, Inc.*, 530 F. Supp. 86 (N.D. Ga. 1981).

12. This article is about employer decisions based on concerns about customer responses to conspicuous articles of faith or a desire to maintain a certain public image. Accordingly, this article does not challenge employer decisions that are based on legitimate, non-religion-based considerations such as employee health or safety. See, for example, Bhatia v. Chevron U.S.A., Inc., which found that a Sikh employee with a beard would be exposed to toxic gas since his respirator would not be able to create a gas-tight seal; therefore, an exemption from the employer's shaving policy would represent an undue hardship. 734 F.2d 1382, 1383–84 (9th Cir. 1984).

13. 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer . . . (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.")

14. *See* infra Part III.A.

encourage a court sitting in review of a religion-based segregation case to analyze an employer's proffered "reasonable accommodation" in light of this general anti-discrimination provision. In doing so, the religious rights of employees would be maximized to their statutory limits. Second, an employer may not base its decision to segregate an individual with a religiously-mandated appearance on customers' possible or demonstrated discriminatory preferences.[15] Where courts enable employers to rely on such actual or perceived biases, they allow employers to give practical effect to those biases. In the civil rights era, courts did not permit customer bias to justify discrimination against African-Americans; by prohibiting customer bias from supporting the segregation described, courts would also clarify that religion-based appearance discrimination is on par with and deserves the same treatment as racial discrimination. While employers may contend that their practices reflect non-discriminatory corporate identities rather than customer stereotypes, in my estimation this sleight-of-hand falls flat—a corporate "brand" simply codifies and reflects consumer preferences, including stereotypes.[16]

This article does more than offer a legal argument for why federal courts must modify their existing interpretation of Title VII.[17] As federal courts have consistently read Title VII to permit such segregation despite the text and purpose of the statute—as well as applicable lessons from the nation's painful experience with racial discrimination—I also write in support of the pending Workplace Religious Freedom Act (WFRA) of 2010.[18] In part, this bill would prevent employers from using Title VII to justify an "out of sight, out of mind" model by amending the statute to explicitly prohibit the "segregation of an employee from customers or the general public."[19] This language, in effect, would ban employers from catering to public image concerns by removing individuals with religious attire from public view.

The term "segregation" is most commonly used in the context of race, and, accordingly, it triggers strong, visceral feelings. I acknowledge and appreciate these emotions, and I recognize that some readers may object to the use of the term "segregation" beyond the boundaries of race. With due consideration to this instinctive reaction, I believe "segregation" may be used judiciously and appropriately whenever individuals are separated from others solely because of some identifiable characteristic. The use of the term "segregation" in this article

15. *See* infra Part III.B.

16. *Id.*

17. The two independent reasons cited above are internal to Title VII. That is, I argue that Title VII on its own terms does not justify the segregation of individuals with conspicuous religious attire. For a recommendation that Title VII should import the heightened "undue hardship" standard from the Americans with Disabilities Act, see Sadia Aslam, Note, *Hijab in the Workplace: Why Title VII Does not Adequately Protect Employees from Discrimination on the Basis of Religious Dress and Appearance*, 80 UMKC L. REV. 221, 236 (2011).

18. S. 4046, 111th Cong. (2010).

19. *See id.* § (4)(a)(3).

does not intend to minimize its meaning in the context of race, but attempts to establish a bridge between our nation's history of racial intolerance and a modern iteration of segregation.

By placing employees with conspicuous religious appearances out of public view, or by not hiring such applicants, employers engage in a practice of segregation. This segregation takes two forms. Both lead to the physical separation and isolation that are the touchstones of the term. First, when an employer places an employee with religious attire in the back, out of public view, it designates two areas for employees: a distinct physical space to which an employee is restricted only because of his or her religious appearance, and a separate area where employees without this appearance are free to roam and associate. Second, when individuals are denied positions on account of their religious appearance, they are left outside of the workforce and removed from the spheres of human intercourse that are inherent in employment. In short, as used here, segregation occurs both within the workplace and from the workplace.

To prove why Title VII should not permit such religion-based segregation, Part II of this article provides an overview of Title VII's legal standards as they relate to discrimination on the basis of religion. In addition, I describe, for illustrative purposes, two decisions in which the federal courts held that Title VII does not prohibit the segregation of Sikh employees who wear turbans. Part III argues that such segregation is not permitted by Title VII, based on the text and purpose of Title VII, the effect of segregation in promoting majoritarian norms and perpetuating harmful stereotypes, and principles from other historical and civil rights contexts. Part IV discusses the implications of this argument by addressing its relationship to the Supreme Court's religious discrimination decisions in the constitutional context as well as the function of the courts in checking employer behavior.

Before proceeding further, it is important to set forth why this inquiry into appearance-based treatment of religious individuals is necessary. First, employment discrimination against individuals on the basis of appearance is pervasive. A 2005 survey by the Employment Law Alliance found that 16 percent of workers believed they had been subject to appearance-related discrimination."[20] This figure is comparable to the percentage of individuals who identify as victims of sex-based discrimination or racial discrimination.[21] Recent cases also exemplify the prevalence of appearance-based discrimination. In *Wal-Mart v. Dukes*, recently decided by the Supreme Court,[22] a former female Walmart employee alleged that she was told by a manager to "blow the cobwebs

20. Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1060 (2009).

21. *Id.* at 1060–61.

22. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011). The issue before the Court was not whether the employer was liable for discrimination on the merits, but rather whether the plaintiffs were sufficiently common such that class action certification is appropriate. The Court held that such certification was not consistent with the Federal Rules of Civil Procedure governing class action claims. *See id.*

off" her make-up and "doll up" in order to advance in the company.[23]

Second, if Title VII does not reject segregation of the sort addressed in this article, it calls into question the promise and effectiveness of a statute designed to safeguard employees from discrimination on the basis of religion.

Third, workplace segregation is not solely a provincial concern. It is not exclusively committed by small "Mom and Pop" employers or companies in rural settings. Large, national corporations—such as Subway, Alamo Rent-a-Car, and Jiffy Lube, among others—have allegedly engaged in workplace segregation on the basis of religion.[24] For example, a Sikh musician with a beard, long hair, and turban alleged that he was rejected for a position at Walt Disney World for not possessing the "Disney look."[25] Disney described the necessary look as "a fresh, clean and approachable look, ensuring that every guest feels comfortable with our entire cast."[26] If many large companies engage in such segregation, it is reasonable to believe that the universe of individuals potentially subject to workplace segregation is quite large.

Fourth, one can imagine that appearance-based discrimination would be roundly condemned if the individuals were segregated due to their race, gender, or ethnicity.[27] Discrimination against individuals with prescribed religious

23. Plaintiffs' Third Amended Complaint at ¶ 65, Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004), 2002 WL 33645690.

24. *See* Ali v. Alamo Rent-a-Car, 8 F. App'x 156 (4th Cir. 2001); EEOC v. Alamo Rent-a-Car, 432 F. Supp. 2d 1006 (D. Ariz. 2006); Brown v. F.L. Roberts & Co., 419 F. Supp. 2d 7 (D. Mass. 2006); *see also Subway Restaurant Owner Told Wearing Turban Violates Subway Policy*, SIKH COALITION, Apr. 2005, *available at* http://www.sikhcoalition.org/advisories/sldf0405.htm (discussing how a Subway franchise inspector told the Sikh owner of a California Subway franchise "that he would have to start wearing a Subway cap instead of his turban and reported to local headquarters that . . . [the franchise owner] was in violation of company policy because he was wearing a turban."); Marina Jimenez, *Second Manager Complains of Discrimination,* THE GLOBE AND MAIL, Dec. 26, 2003, A18 ("Another manager of a Subway Restaurants franchise in Edmonton has come forward with a complaint of religious discrimination, alleging an official of the sandwich chain refused to let him wear his turban while serving customers.").

25. *See* Scott Powers, *Sikh Musician Sues Disney World Over "Disney Look," Discrimination*, ORLANDO SENTINEL (June 16, 2008, 11:05 AM), http://blogs.orlandosentinel.com/business_tourism_aviation/2008/06/sikh-musician-s.html (explaining that while the applicant believes he was rejected because of his appearance, Disney maintains that the applicant was rejected because he did not reapply for the position).

26. Janna Oberdorf, *The Secret Behind the Magic of Disney*, NYULIVEWIRE, http://journalism.nyu.edu/publishing/archives/livewire/archived/the_secret_behind_the_magic_of (last visited Sept. 16, 2011).

27. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 304 (1964). To be sure, alleged appearance-based discrimination has been upheld where courts construe the element of appearance at issue (e.g., a hairstyle) as a personal preference and not an immutable extension or manifestation of racial identity. *See* Pitts v. Wild Adventures, Inc., No. 7:06-CV-62-HL, 2008 WL 1899306 at *6 (M. D. Ga. 2008); Rogers v. American Airlines, 527 F. Supp. 229, 232 (S.D.N.Y. 1981). *See also* Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 264 (S.D.N.Y. 2002) (rejecting the Title VII claim, but stating that "[i]t is not impossible to imagine a situation in which a frivolous appearance guideline so disparately impacts a protected class that a jury could infer from the existence of that situation alone that the employer adopted the guideline as a 'subterfuge for discrimination'"). I suggest, however, that mandated religious appearance is akin to an immutable trait, such as race

appearances should meet with the same reaction and receive the same protection. The United States is a nation built on the notion of religious freedom.[28] The outward representation of an individual's religious beliefs is in effect religion made tangible or observable. Protecting employers who discriminate on the basis of an individual's religious appearance signals the weakening of religious liberty, an otherwise first-order object of American law and society.

Finally, and most broadly, society's acceptance or intolerance of workplace segregation defines the type of community in which we live. It asks us to determine whether social space should be reserved exclusively for members of majority groups or whether we should include individuals of all backgrounds and beliefs. Unless the Court or Congress alters the current interpretation of Title VII, employers may continue to reinforce and perpetuate the notion that individuals who look "different" because of their religion—particularly those belonging to minority faiths—may permissibly be relegated to the "back rooms" or margins of American society. This article suggests that Title VII, properly interpreted, does not permit such social separation.

II.
TITLE VII AND WORKPLACE SEGREGATION OF INDIVIDUALS WITH CONSPICUOUS RELIGIOUS ATTIRE

A. The Applicable Legal Standards

1. The Statutory Framework: Title VII

Title VII is the federal statute governing discrimination in the employment context.[29] The statute prohibits certain conduct and imposes affirmative duties on employers. The statute makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment because of such individual's . . . religion,"[30] or "to

itself, and thus should be viewed and treated similarly to racial segregation.

28. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 413 (1963) (Stewart, J., concurring) ("I am convinced that no liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause of the First Amendment."); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 226 (1963) ("The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the . . . inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of the government to invade that citadel . . . .").

29. Title VII applies only to employers with at least fifteen employees. *See* 42 U.S.C. § 2000e(b) (2006) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees . . . ."). Title VII does not apply to certain educational institutions that are affiliated with religious institutions. 42 U.S.C. § 2000e-2(e)(2). Non-citizens employed abroad are also ineligible for Title VII protection. 42 U.S.C. § 2000e-1(a).

30. 42 U.S.C. § 2000e-2(a)(1).

limit, segregate, or classify his [or her] employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his [or her] status as an employee, because of such individual's . . . religion."[31] The term "religion" is quite broad, encompassing "all aspects of religious observance and practice, as well as belief. . ."[32] Title VII affirmatively obligates an employer to "reasonably accommodate" an individual's religious observance and practice.[33] But an employer need not offer a reasonable accommodation if doing so would impose an "undue hardship" on the employer.[34]

The Supreme Court has recognized two primary theories of liability under Title VII: disparate treatment and disparate impact. A disparate treatment claim is based on the proposition that the employer has "treat[ed] some people less favorably than others because of their race, color, religion, sex, or national origin."[35] Plaintiffs in disparate treatment cases must prove that the defendant employer "had a discriminatory intent or motive."[36] By contrast, a disparate impact claim challenges "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."[37] To prove a disparate impact claim, a plaintiff need not present "evidence of the employer's subjective intent to discriminate[, which] is required in a 'disparate treatment' case."[38]

Workplace segregation cases are characterized by a conflict between the appearance of the employee or applicant, which is dictated by his or her religious beliefs, and the employer's policies or corporate image standards, which are designed to make the employer attractive or otherwise acceptable to the public. Examples of such corporate policies include grooming requirements that prohibit beards or long hair, or rules banning employees from wearing hats. An individual whose religious appearance violates an employer's policies often seeks, and is generally entitled to, an accommodation on account of his or her religious beliefs. But these "religious accommodation" cases do not conform to

31. 42 U.S.C. §2000e-2(a)(2).

32. 42 U.S.C. §2000e(j).

33. *Id.*

34. *Id.*

35. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

36. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988). *See also* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)

37. *Teamsters*, 431 U.S. at 336 n.15. *See also* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (stating that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation").

38. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 646 (1989). For further analysis of the distinction between disparate impact and disparate treatment claims, *see* Martha Chamallas, *The Market Excuse*, 68 U. CHI. L. REV. 579, 599–600 (2001) ("The major conceptual distinction between the two theories is that disparate treatment requires proof of discriminatory intent or motivation, while disparate impact reaches unintentional discrimination that stems from neutral policies or practices that have a disproportionate adverse effect . . . .").

the disparate treatment and disparate impact categories described above.[39] They are subject to a distinct, judicially-created form of analysis.

2. The Plaintiff's Prima Facie Case

Courts in religious accommodation cases first require a plaintiff to present a prima facie case, which necessitates a showing that the plaintiff has: (1) a bona fide religious belief that conflicts with the employer's applicable policies or rules, (2) informed the employer of this belief, and (3) suffered an adverse employment action for failing to comply with the conflicting employer policy or rule.[40] An adverse employment action is broadly interpreted as any "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[41] An employee does not need to show he or she was subjected to an adverse employment action if the employee can prove that he or she acceded to the employment policy under a reasonable fear of being subjected to an adverse employment action.[42] As explained by the Ninth Circuit, "[A]lthough we have occasionally used language implying that the employer must *discharge* the employee because of the conflict, we have never in fact required that the employee's penalty for observing his or her faith be so drastic."[43]

Though the elements of a prima facie case are rarely litigated in religion-based appearance discrimination cases,[44] some plaintiffs have failed to make a

39. *See* EEOC v. United Parcel Serv., 94 F.3d 314, 317 n.3 (7th Cir. 1996) ("Where the issue is the incompatibility of a religious practice with a job requirement, religious discrimination claims do not fit comfortably into the ordinary Title VII dichotomy between 'disparate treatment' and 'disparate impact' theories of liability.").

40. Protos v. Volkswagen of Am., Inc., 797 F.2d 129, 133 (3d Cir. 1986) (quoting Turpen v. Mo.-Kan.-Tex. R.R. Co., 736 F.2d 1022, 1026 (5th Cir. 1984)).

41. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998). Such an action "might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Id.* (quoting Crady v. Liberty Nat. Bank & Trust Co. of Ind., 993 F.2d 132, 136 (7th Cir. 1993)). However, a "demotion without change in pay, benefits, duties, or prestige" or a "reassignment to [a] more inconvenient job" does not constitute an adverse employment action. *Id.* (citations omitted).

42. *See* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 614 n.5 (9th Cir. 1988) ("The *threat* of discharge (or of other adverse employment practices) is a sufficient penalty. An employee does not cease to be discriminated against because he temporarily gives up his religious practice and submits to the employment policy."). *See also* Rodriguez v. City of Chicago, No. 95-CV-5371, 1996 WL 22964, at *3 (N.D. Ill. Jan. 12, 1996) ("It is nonsensical to suggest that an employee who, when forced by his employer to choose between his job and his faith, elects to avoid potential financial and/or professional damage by acceding to his employer's religiously objectionable demands has not been the victim of religious discrimination.").

43. *See Townley*, 859 F.2d at 614 n.5 (emphasis in original).

44. *See* Keith S. Blair, *Better Disabled than Devout? Why Title VII Has Failed to Provide Adequate Accommodations Against Workplace Discrimination*, 63 ARK. L. REV. 515, 539 (2010) (noting that employees generally survive the *prima facie* step without difficulty and that it is the next step in which the heart of the legal dispute generally lies).

prima facie showing. In *Hussein v. Waldorf Astoria Hotel*, for example, a Muslim catering employee challenged the Waldorf-Astoria hotel's "no-beards" policy.[45] The Second Circuit held, however, that the employee, who one day came to work with a beard, lacked a bona fide religious belief, and thus failed to establish a prima facie case.[46] According to the court, the plaintiff "had never before, in his fourteen years of working at the Waldorf, worn a beard" and "he did not attempt to explain why this was so."[47] Further undercutting the plaintiff's case, he "shaved the beard off three months later."[48] Therefore, "a reasonable jury could not find that Hussein's religious assertion was bona fide."[49] In *Ali v. Alamo Rent-A-Car Inc.*, the Fourth Circuit decided that a Muslim employee failed to establish a prima facie case because she did not prove an adverse employment action.[50] Alamo had transferred the employee to a position with less customer contact because she wore a headscarf. The plaintiff conceded that the transfer did not constitute an "adverse employment action."[51] Therefore, the court held the employee failed to make out a prima facie case.[52]

A separate case invites the view that the decision may have been different had the plaintiff not conceded that she did not suffer an adverse employment action. In *Brown v. F.L. Roberts & Co., Inc.*, the United States District Court for the District of Massachusetts explained that the determination of whether an employment action is adverse is case-specific.[53] In assessing whether the responsibilities the plaintiff lost were significant enough to constitute an adverse employment action, the court reasoned that "it would be distasteful to suggest that employers can legally single out employees who assert inconvenient but bonafide religious beliefs and isolate them in unappealing work environments without 'adversely' affecting the conditions of their employment."[54] At the summary judgment stage, the court held that the employee's transfer could constitute an adverse employment action because a jury could find that "the responsibilities Plaintiff lost [in the transfer] were 'significant'" and not "merely 'minor changes.'"[55] Despite this, the court ultimately held that the plaintiff sought too much and that approving the requested "blanket exemption from the grooming policy . . . would constitute an undue hardship"; therefore, the court

45. Hussein v. Waldorf Astoria Hotel, 31 F. App'x 740, 741 (2d Cir. 2002).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. 8 F. App'x 156, 157 (4th Cir. 2001).

51. *Id.*

52. *Id.* at 159.

53. 419 F. Supp. 2d 7, 13 (D. Mass. 2006).

54. *Id.* at 13–14. *See id.* at 15 (ruling that plaintiff met *prima facie* case of discrimination where "Defendant's accommodation restricted Plaintiff to a cold, uncomfortable, isolated work site, with significantly diminished responsibilities, as the price of maintaining his bona fide religious practice").

55. *Id.* at 13.

found for the defendant at the summary judgment phase.[56]

3. The "Reasonable Accommodation" and "Undue Hardship" Tests

If a plaintiff establishes a prima facie case, the burden shifts to the defendant-employer[57] to show that either: (1) a reasonable accommodation was offered by the plaintiff (that is, the employer's affirmative duty under Title VII was satisfied), or (2) an undue hardship would have resulted had a reasonable accommodation been made (that is, that the statutory safe haven should shield the employer from liability).[58]

In the religious discrimination context, the Supreme Court holds that a "reasonable accommodation" is one that "eliminates the conflict between employment requirements and religious practices."[59] An acceptable "reasonable accommodation" must be the by-product of a good faith back-and-forth between the employer and the employee.[60] Speaking to this requirement, the United States District Court for the Southern District of New York held in *Hussein* that an employer is not required to accommodate an immediate, "on-the-spot" request by a religious employee who wants an exception to an appearance policy.[61] The nature of Hussein's last-minute request did not present an opportunity for the employer and employee to engage in a collaborative dialogue as to an appropriate accommodation. The United States District Court for the District of Arizona rejected an employer's proposed accommodation based, in part, on the same requirement. The accommodation proposed by the employer—that an employee remove a religious headscarf when working with clients—did

56. *Id.* at 17.

57. The burden of persuasion rests with the plaintiff at all times; however, the defendant possesses the burden of production in this shifting scheme. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989).

58. *See* Anderson v. U.S.F. Logistics (IMC), Inc., 274 F.3d 470, 475 (7th Cir. 2001) ("A plaintiff alleging religious discrimination under Title VII must first establish a prima facie case, after which the burden is on the employer to show that a reasonable accommodation of the religious practice was made or that any accommodation would result in undue hardship."). *See also* Trans World Airlines Inc. v. Hardison, 432 U.S. 63, 74 (1997) (a reasonable accommodation is not required if it poses an "undue hardship").

59. Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 70 (1986). In this sense, the term "reasonable" may be misleading, as an accommodation need only fulfill the objective of removing the conflict to be deemed "reasonable."

60. *See Philbrook*, 479 U.S. at 69 (stating that "bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business") (internal quotation marks and citations omitted). Although I argue that relegating an employee to the back is never a reasonable result of this back-and-forth negotiation, when an individual employee requests to be placed in the back, I would not consider the accommodation to be unreasonable under Title VII. *See* Lorenz v. Wal-Mart Stores, Inc., No. SA-05-CA-0319 OG (NN), 2006 WL 1562235, at *10 (W.D. Tex. May 24, 2006) (employee who wore a priest's shirt and collar, and other religious attire, proposed that Walmart "allow him to work his entire shift in the backroom of the store thereby removing him from the customers' view").

61. *See* Hussein v. The Waldorf-Astoria, 134 F. Supp. 2d 591, 598–99 (S.D.N.Y. 2001).

not resolve the tension because it was not developed from a good faith, bilateral process.[62]

While an accommodation should result from employer-employee dialogue, an employee is not entitled to a range of possible accommodations from which to select.[63] Nor is an employee entitled to an optimal accommodation or to the accommodation he or she suggests or wants. As the Second Circuit notes, "to avoid Title VII liability, the employer need not offer the accommodation the employee prefers. Instead, when *any* reasonable accommodation is provided, the statutory inquiry ends."[64]

It is worth noting that this iterative process can yield satisfactory outcomes for both the employer and the employee. For example, in *EEOC v. Fed. Express Corp.*, through this process, the employer agreed to a religion-based exemption to its policy requiring all employees engaged in customer contact to be clean-shaven.[65]

Rather than offer an accommodation, an employer may contend that an accommodation would result in an "undue hardship." An "undue hardship" is any economic or non-economic cost that imposes more than a *de minimis* encumbrance on the employer.[66] For example, in *Trans World Airlines, Inc. v. Hardison*, the Supreme Court held that an airline was not required to allow a religious employee to miss work on the Sabbath because granting the employee's schedule request would disrupt the seniority system and finding other employees to take his place would result in "lost efficiency in other jobs or higher wages."[67] From *Hardison*, it is evident that an employer may show that it faces an undue hardship when a proposed accommodation imposes on other employees as well as when it burdens the employer itself.[68]

In the religious appearance context, courts have identified an undue

62. EEOC v. Alamo Rent-a-Car, 432 F. Supp. 2d 1006, 1013–14 (D. Ariz. 2006).

63. *See* Beadle v. Hillsborough Cnty. Sheriff's Dep't, 29 F.3d 589, 592 (11th Cir. 1994) ("[C]ompliance with Title VII does not require an employer to give an employee a choice among several accommodations. . . .").

64. Cosme v. Henderson, 287 F.3d 152, 158 (2d Cir. 2002) (emphasis added). *See also Philbrook*, 479 U.S. at 68 ("We find no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation. By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation."); *Beadle*, 29 F.3d at 592 (stating that "the inquiry ends when an employer shows that a reasonable accommodation was afforded the employee, regardless of whether that accommodation is one which the employee suggested").

65. EEOC v. Fed. Express Corp., No. CV100-50 (S.D. Ga. May 24, 2001) (consent decree) (in case brought by a Muslim employee, the employer agreed to a religion-based exemption to a policy requiring that employees engaged in customer contact had to be clean-shaven).

66. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (8th Cir. 1997) ("To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship.").

67. *Id.*

68. *See* Weber v. Roadway Express, Inc., 199 F.3d 270, 274 (5th Cir. 2000) (finding that the proposed accommodation was "more than a *de minimis* expense because [it] unduly burden[ed] his co-workers, with respect to compensation and 'time-off' concerns").

hardship under several circumstances. An undue hardship may be present when an employee demands a wholesale exception from the employer's appearance policies, and is unwilling to find a compromise solution.[69] For example, in *Cloutier v. Costco Wholesale Corp.*, the plaintiff, a follower of the Church of Body Modification, refused to cover her facial piercings with bandages, and insisted instead on an outright exemption to the no-piercings policy.[70] The First Circuit held that such exemption constituted an undue hardship because piercings "detract from the 'neat, clean and professional image' that [Costco] aims to cultivate."[71] Similarly, in *Daniels v. City of Arlington*, the Fifth Circuit held that the defendant employer faced an undue hardship when the plaintiff police officer insisted on wearing a gold cross pin on his uniform, in violation of the police department's no-pins policy. According to the court, the police department faced an undue hardship because "a police department cannot be forced to let individual officers add religious symbols to their official uniforms."[72]

An undue hardship also may exist when a compromise is "simply impossible": "[f]or example, there is no middle ground between a company's requirements that employees be clean-shaven and the employees' religious beliefs prohibiting shaving."[73] Courts have also recognized an undue hardship where exemptions would affect the employer's public image.[74] Undue hardship is perhaps most clearly present where an accommodation would endanger the health or safety of the employee, his or her co-workers, or the general public.[75]

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69. *See, e.g.*, Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 132 (1st Cir. 2004) ("We find dispositive that the only accommodation Cloutier considers reasonable, a blanket exemption from the no-facial-jewelry policy, would impose an undue hardship on Costco.") *Cf.* Dodd v. SEPTA, No. 06-4213, 2008 WL 2902618, at *10 (E.D. Pa. July 24, 2008) (rejecting, on summary judgment, defendant's argument that it suffered an undue hardship when the plaintiff "merely requested to wear his hair in any style that would allow him to keep it long, a minor deviation from the grooming policy that apparently was already practiced by several other officers").

70. *Cloutier*, 390 F.3d at 128–30.

71. *Id.* at 136.

72. Daniels v. City of Arlington, 246 F.3d 500, 506 (5th Cir. 2001). By eschewing other options, such as wearing the cross around his neck or wrist, the plaintiff also failed to "fulfill his duty of cooperation" under the reasonable accommodation prong. *Id.*

73. United States v. New York City Transit Auth., No. 04-CV-4237, 2010 WL 3855191, at *21 (E.D.N.Y. Sept. 28, 2010) (citing Fagan v. Nat'l Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973)).

74. *See, e.g.*, Brown v. F.L. Roberts & Co., 419 F. Supp. 2d 7, 16 (D. Mass. 2006) (holding that allowing the plaintiff to keep his hair and beard long, in violation of Jiffy Lube's grooming policy, would constitute "an undue hardship because it would adversely affect the employer's public image.") (quoting Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 136 (1st Cir. 2004), *cert. denied*, 545 U.S. 1131 (2005)).

75. *See, e.g.*, Bhatia v. Chevron 734 F.2d 1382, 1384 (9th Cir. 1984) (finding an undue hardship where Sikh plaintiff's failure to shave his beard would expose him to toxic gas). If "the proposed accommodation threatens to compromise safety in the workplace, the employer's burden of establishing an undue burden is light." Kalsi v. New York City Transit Auth., 62 F. Supp. 2d 745, 758 (E.D.N.Y. 1998). However, at least one court has questioned whether the employer possessed a legitimate health and safety justification for refusing an accommodation, or whether

For example, in *Kalsi v. New York City Transit Authority*, a Sikh employee sought an accommodation to the Transit Authority's requirement that all car inspectors wear a hard hat. The court, unsurprisingly, was unsympathetic. The court concluded that Kalsi's proposed request to not wear a hard hat posed safety risks to himself as well as insurance costs to the authority that the employer was not obligated under Title VII to shoulder.[76]

To be sure, under this category of undue hardship, courts have rejected employer attempts to invoke the undue hardship safe harbor where a proposed accommodation would not raise "safety concerns or other legitimate business concerns."[77] In *United States v. New York City Transit Authority*, for example, a group of Sikh employees brought a religious appearance claim against the transit authority for failing to allow an exemption from its policy requiring bus drivers to wear hats bearing the company's logo.[78] The court held that the employees' proposed compromise—that they wear a turban of a color that reflects the employer's uniform and place the company logo on a part of their uniform other than the turban—would not "adversely affect the TA's business in any way."[79] Courts have also been unreceptive to employers' attempts to demonstrate an undue hardship by claiming that a flood of similar requests for accommodations will follow if the court grants an exception in a particular case. "A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship."[80]

The bulk of litigation with respect to religious accommodation cases—of which workplace segregation cases are a subset—lies in this second part of the burden-shifting scheme: whether an employer has discharged its duty to offer a reasonable accommodation or whether an undue hardship justifies the employer refusing an accommodation.[81] If an employer fulfills either prong and rebuts the employee's prima facie case, the burden then shifts back to "the plaintiff, who has the ultimate burden of persuasion, [to] show that the employer's proffered

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the lack of an accommodation was a function of animus. *See Mohamed-Sheik*, 2006 WL 709573, at *5 (finding evidence that "safety concerns may not have been the exclusive, or even the primary factor behind the enforcement of the policy").

76. *Kalsi*, 62 F. Supp. 2d at 758–60 (E.D.N.Y. 1998).

77. *U.S. v. New York City Transit Auth.*, 2010 WL 3855191, at *21.

78. *Id.*

79. *Id.* at *22.

80. 29 C.F.R. § 1605.2(c)(1) (2010). *See also* EEOC v. Red Robin Gourmet Burgers, Inc., No. C04-1291JLR, 2005 WL 2090677, at *5 (W.D. Wash. Aug. 29, 2005) ("The court is unmoved by Red Robin's final, 'slippery slope' argument . . . . Determining whether an undue hardship exists depends on the facts of each case, and 'the mere possibility that there would be a [sic] unfulfillable number of additional requests for similar accommodations by others cannot constitute undue hardship.") (quoting Opuku-Boateng v. California, 95 F.3d 1468, 1474 (9th Cir. 1996)).

81. Donna D. Page, *Veganism and Sincerely Held "Religious" Beliefs in the Workplace: No Protection Without Definition*, 7 U. PA. J. LAB. & EMP. L. 363, 368 (2005) (stating that "when claims are brought on religious discrimination grounds, most of the litigation is centered on the issues of what is a 'reasonable accommodation' and what constitutes 'undue hardship'").

reasons for failure to accommodate are a pretext for discrimination."[82] The plaintiff may establish pretext by demonstrating "directly . . . that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[83]

4. The "Bona Fide Occupational Qualification" Affirmative Defense

Title VII also provides employers with an affirmative defense to claims of discrimination. Instead of proceeding down the "reasonable accommodation" or "undue hardship" route, an employer may concede that it is discriminating on the basis of religion, but argue that such discrimination is permissible because it is based on a "bona fide occupational qualification ['BFOQ'] reasonably necessary to the normal operation of that particular business or enterprise."[84] To properly invoke the BFOQ affirmative defense, an employer must prove that virtually all members of the plaintiff's class cannot perform the position in question[85] or that the employer's essential operations would be compromised were it not for the discrimination.[86]

An employer seeking to deny employment to a job applicant with conspicuous religious attire may, in principle, invoke the BFOQ affirmative defense. The BFOQ defense is "written narrowly" and the Supreme Court "has read it narrowly."[87] Indeed, it has been accepted only in several limited contexts.[88] For example, courts have recognized the defense when discriminatory hiring is necessary to protect the privacy interests of third parties, such as when a health care employer hires only female nurses to treat female patients, or when a restaurant hires only male attendants to service a men's bathroom.[89] Courts have also recognized a valid BFOQ defense when the

82. Baz v. Walters, 782 F.2d 701, 706 (7th Cir. 1986).

83. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981). For an example of the court finding pretext, *see* Mohamed-Sheik v. Golden Foods/Golden Brands LLC, No. Civ.A. 303CV737H, 2006 WL 709573, at *5 (W.D. Ky. Mar. 16, 2006) (denying defendant's summary judgment motion after finding evidence that "safety concerns may not have been the exclusive, or even the primary factor behind the enforcement of the policy").

84. 42 U.S.C. § 2000e-2(e)(1) (2006). This affirmative defense is not available in claims alleging discrimination on the basis of race. *See id.*

85. *See* Dothard v. Rawlinson, 433 U.S. 321, 333 (1977) (quoting Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969)).

86. *See id.* (quoting Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir. 1971)).

87. Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991).

88. *See* Ray v. Univ. of Ark., 868 F. Supp. 1104, 1126 (E.D. Ark. 1994) ("[I]n certain limited circumstances, courts are to recognize the bona fide occupational qualification (BFOQ) defense."); *see also* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Compliance Manual § 12II-D (2008) (Bona Fide Occupational Qualification), http://www.eeoc.gov/policy/docs/religion.html ("It is well settled that for employers that are not religious organizations and therefore seek to rely on the BFOQ defense to justify a religious preference, the defense is a narrow one and can rarely be successfully invoked.").

89. *See Int'l Union*, 499 U.S. at 206 n.4 (suggesting that the BFOQ defense could be available "when privacy interests are implicated"); Norwood v. Dale Maint. Sys., Inc., 590 F.

employment decision purportedly was made for safety reasons, such as when a prison hires only male guards to oversee the male section of a prison.[90] With respect to gender discrimination, employers may engage in discriminatory employment practices when "authenticity" or "genuineness" is at stake, such as when a theatre company refuses to hire a man to play a female role in a play.[91] In each of these circumstances, courts tend to tolerate discrimination because it is based on a qualification that affects an "individual's ability to perform the assigned tasks."[92]

B. Representative Cases of Workplace Segregation

1. Workplace Segregation and Sikhs

Multiple courts have found in favor of employers in religious accommodation cases brought by individuals alleging discrimination on the basis of their appearance. That said, two cases best exemplify courts' willingness to interpret Title VII to allow workplace segregation in the religious context. The courts in these cases address both aspects of the second, more contentious prong of the burden-shifting paradigm: whether the employer fulfilled its duty to offer a reasonable accommodation and whether the employer is relieved from having to offer a reasonable accommodation because doing so would impose an undue hardship. These cases also involve the two types of segregation referenced herein: segregation within the workplace (i.e., placing the employee out of public view once hired) and from the workplace (i.e., not hiring the candidate at all).

Because both cases involve plaintiffs who belong to the Sikh religion, it is relevant to first consider the inherent features of the Sikh religion that expose its followers to workplace segregation. Male Sikhs are required by their faith to wear a turban and to refrain from cutting their hair.[93] These requirements give Sikhs a distinct physical identity that directly conflicts with common employer policies, such as those that mandate employees be clean-shaven or that prohibit headgear of any sort in the workplace. When working for an employer with such policies, Sikhs are often forced to choose between complying with their faith and

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Supp. 1410, 1423 (N.D. Ill. 1984) (holding that using only female attendants in female restrooms is permissible when "a customer's fundamental privacy rights are implicated"); Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346, 1354 (D. Del. 1978) (holding that "employment of a male nurse's aide would directly undermine the essence of [defendant's] business operation" because female clients objected to seeing male nurses, and defendant was too small to hire enough aides so that at least one female nurse was on each shift).

90. *Int'l Union*, 499 U.S. at 202 (citing Dothard v. Rawlinson, 433 U.S. 321 (1977)).

91. *See* 29 C.F.R. § 1604.2(a)(2) (2010).

92. *Int'l Union*, 499 U.S. at 203.

93. *See* Cheema v. Thompson, 67 F.3d 883, 884 (9th Cir. 1995) (enumerating the Sikh articles of faith); Neha Singh Gohil & Dawinder S. Sidhu, *The Sikh Turban: Post-9/11 Challenges to This Article of Faith*, 9 RUTGERS J. L. & RELIGION 10, 12 (2008) (explaining that Sikhs are required to wear five articles of faith, including unshorn hair, and that although the turban is not one of the five articles, it has been codified as part of a Sikh's required dress).

abiding by their employer's policies. A Sikh employee who decides to comply with the strictures of the Sikh religion may be relegated to a position outside of public view or denied the job opportunity from the outset.

It is next helpful to consider the practical realities of the Sikh experience in the United States. Sikhs are more likely to face discrimination, including workplace discrimination, because they are a relatively little-known religious community often mistaken for Muslims.[94] While Sikhism is the fifth largest religion in the world, with over 20 million adherents,[95] few are aware that Sikhism is a separate faith and as a consequence many Americans assume for purely optic reasons that Sikhs are members of the Muslim faith.[96] Due to this visual similarity and the highly charged atmosphere in the wake of the attacks of September 11, 2001 in which Muslims have been the targets of surveillance and discrimination, Sikhs as well have faced overwhelming discrimination in the past ten years.[97]

Because of this general public ignorance and because Sikhs remain a disfavored group, employers appear poised to cater to customer biases by placing Sikhs away from public view or by failing to hire Sikhs in the first instance. An example may help animate and give meaning to these observations.

Kevin Harrington is a Sikh train operator for the Metropolitan Transit Authority (MTA) in New York City. After 9/11, imagining that the public would not want to see a turbaned man at the helm of a commuter train in Manhattan, the MTA told Harrington that he could not wear his turban as a train operator. The MTA informed him that, if he wanted to wear his turban, he had to stop working as a rail conductor and accept a position in the rail yard, away from customers.[98] Harrington agreed to take the yard position because he was afraid that if he did not, he would lose his job altogether.[99] Harrington said the MTA's

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94. *See* Hon. Mary Murphy Schroeder, Guarding Against the Bigotry that Fuels Terrorism, 48-DEC Fed. Law. 26 (Nov./Dec. 2001) (commenting on the "blatant ignorance" with respect to Sikhs that permitted a Sikh to be murdered in a post-9/11 hate incident); *see generally* Dawinder S. Sidhu, *A Decade After 9/11, Ignorance Persists*, ALBUQUERQUE J., Dec. 16, 2011 (suggesting, against the backdrop of an unprovoked attack on a man perceived to be Muslim, that Muslims and those perceived to be Muslim "are not free from the ignorance and hatred that enable such senseless acts to take place.").

95. *See* Guru Nanak Sikh Society of Yuba City v. County of Sutter, 326 F. Supp. 2d 1128, 1130 n.1 (E.D. Cal. 2003) ("By the late 1990s, Sikhism was the world's fifth largest faith, with some 175,000 followers in the United States.") .

96. *See* Gohil & Sidhu, *supra* note 93, at 3 n.10.

97. *See* Bilal Zaheer, *Accommodating Minority Religions Under Title VII: How Muslims Make the Case for a New Interpretation of Section 701(j)*, 2007 U. ILL. L. REV. 497, 500 (2007). In March 2011, two turbaned Sikh men were shot in Elk Grove, California. The local police chief indicated that the men could have been confused for Muslims and thus targeted because of their appearance. *See* Robert Lewis, *Attack on Two Sikh Men Seen as Possible Hate Crime*, SACRAMENTO BEE, Mar. 6, 2011, http://www.sacbee.com/2011/03/06/3453199/attack-on-two-sikh-men-seen-as.html. Attacks against Sikh individuals highlight how customers—and, therefore, employers—may discriminate against Sikhs in the workplace.

98. *See* DAWINDER S. SIDHU, PLURALISM PROJECT, CASE STUDY 4: BRANDING A HERO (2010).

99. *See id.*

decision made him feel like "some sort of unique individual . . . who the public doesn't want to see because I inspire fear in them as though I'm some sort of terrorist."[100] His experience demonstrates that segregation of Sikh employees is not a mere theoretical possibility—turbaned Sikhs are segregated in the employment context due to the actual or invented customer aversion to Sikhs' religious identity.

As Harrington's legal case against the MTA is pending resolution and thus does not supply us with judicial conclusions that may be reviewed and evaluated, I turn to two other cases in which the federal courts considered whether an employer could segregate Sikh employees on the basis of their religious appearance. In both of these cases, the courts upheld the segregation of the Sikhs under Title VII.

2. Birdi v. United Airlines Corporation

In *Birdi v. United Airlines Corporation*,[101] the plaintiff, Sukhpreet S. Birdi, a turbaned Sikh, worked as a ticketing agent for United Airlines. United instituted a uniform policy that required employees to remove "all headgear . . . when indoors."[102] Birdi's turban violated this policy. In an effort to resolve the conflict, United offered to allow Birdi to wear his turban as long as he accepted one of six alternative positions. At least four of the six positions placed Birdi away from public view, and the remaining two were infeasible because of Birdi's schedule. The alternative positions were "radically different from the [customer service representative] job" that he held, and some paid significantly less. Believing that these options were inadequate to reasonably accommodate his religious beliefs, Birdi sued United Airlines under Title VII.[103]

In federal district court, Birdi presented his prima facie case. United then argued that it offered a reasonable accommodation because the six alternative positions would eliminate the conflict between its uniform policy and Birdi's religious requirements.[104] Birdi argued in response that these positions were insufficient because none involved customer contact. He had been a ticketing agent, and he wanted to maintain a position that had some customer interaction. Indeed, he "sought the [customer service representative] position specifically for [the face-to-face customer contact] aspect and hope[d] to cultivate a career involving this type of customer relations."[105]

The court rejected Birdi's argument, stating that a plaintiff is not entitled to

100. Robert Smith, *Sikhs Object to MTA Logo Requirement*, NAT'L PUBLIC RADIO (July 16, 2005), http://www.npr.org/templates/story/story.php?storyId=4757415.

101. No. 99 C 5576, 2002 WL 471999 (N.D. Ill. Mar. 26, 2002).

102. *Id.* at *1.

103. *Id.*

104. *Id.*

105. *See id.*

his preferred accommodation.[106] Rather, the court held, United was obligated only to provide *any* reasonable accommodation that would remove the conflict between the uniform policy and the employee's religiously-mandated appearance.[107] At least five of the six alternative positions presented by United were satisfactory under this standard.[108] According to the court, "Title VII does not require United to accommodate Birdi's need for face-to-face customer contact, and even if a conflict of schedule would render an accommodation unreasonable, United attempted to alleviate this problem by offering more positions."[109]

Birdi reflects the modest nature of the "reasonable accommodation" requirement under Title VII. More important for our purposes, the decision demonstrates courts' willingness to find a proposed accommodation involving segregation acceptable under Title VII.

3. EEOC v. Sambo's of Georgia, Inc.

In *EEOC v. Sambo's of Georgia, Inc.*,[110] the plaintiff, Mohan Singh Tucker, had applied for a managerial position with Sambo's Restaurants.[111] Tucker, an observant Sikh, wore a turban and had a beard.[112] Sambo's, however, had a longstanding grooming policy that was applicable at all of its 1,100 restaurants. The policy required all employees to be clean-shaven (although "neatly trimmed mustaches" were allowed), prevented employees from wearing headgear, and did not include any exception for employees based on their religious beliefs.[113] Sambo's rejected Tucker's employment application solely because he did not conform to the company's grooming policy.[114] The EEOC filed suit on Tucker's behalf under Title VII.[115]

In its decision, the court noted that "the wearing of a beard . . . or headwear does not comply with the public image that Sambo's has built up over the years." It found that similar grooming policies "are common in the restaurant industry," and that exceptions "would have an adverse effect on the Sambo's system as a whole . . . [which is why] Sambo's has never knowingly permitted any

106. *See id.* ("Title VII does not require the employer to provide the accommodation that the employee desires; *any* reasonable accommodation is sufficient.") (citing EEOC v. W.W. Grainger, Inc., No. 95 C 5610, 1997 WL 399635 (N.D. Ill. July 11, 1997)).

107. *Id.* at *2 (accepting at least five of the proposed accommodations as reasonable because they "offered the same benefits package and opportunity for advancement as was available to CSRs").

108. *See id.* (stating that "even if the 'dead end' position was unreasonable, at least one of the remaining five was reasonable").

109. *Id.*

110. 530 F. Supp. 86 (N.D. Ga. 1981).

111. *Id.* at 88.

112. *Id.*

113. *Id.* at 88–89.

114. *Id.* at 89.

115. *Id.*

exceptions." The court noted that Sambo's' facially neutral grooming policy is "based on management's perception and experience that a significant segment of the consuming public (in the market aimed at and served by Sambo's) prefer restaurants whose managers and employees are clean-shaven."[116] According to the court,

> adverse customer reaction in this market to beards arises from a simple aversion to, or discomfort in dealing with, bearded people; from a concern that beards are unsanitary or conducive to unsanitary conditions; or . . . from a concern that a restaurant operated by a bearded manager might be lax in maintaining its standards as to cleanliness and hygiene in other regards." Therefore "the requirement of clean-shavenness . . . is essential to attracting and holding customers in that market.[117]

As Sambo's did not offer a reasonable accommodation to Tucker and dismissed his employment application outright, Sambo's defended its actions under Title VII's undue hardship safe harbor and the BFOQ affirmative defense.[118] The court agreed with Sambo's that an undue hardship precluded the statutory obligation to provide an accommodation: according to the court, any "relaxation" of Sambo's grooming policy "would impose an undue hardship on Sambo's in that doing so would adversely affect Sambo's public image and the operation of the affected restaurant or restaurants as a consequence of offending certain customers and diminishing the 'clean cut' image of the restaurant and its personnel." The court also held that exemptions from the grooming policy would impose "a risk of noncompliance with sanitation regulations," and make it more difficult to enforce the grooming standards on other personnel.[119] The court concluded that these costs are "certainly more" than the *de minimis* threshold needed for an undue hardship to exist.[120]

The EEOC argued that a defendant employer could not use customer preference to support a finding of an undue hardship. According to the EEOC, Sambo's "attempt to justify [its] policy on the basis of customer preference . . . is an insufficient justification or defense as a matter of law."[121] The court was not convinced, holding that the "appearance of cleanliness in the retail food industry makes employee grooming standards that forbid facial hair a business necessity."[122]

The court did not rest there. Though the court relieved Sambo's from the requirement of providing an accommodation on undue hardship grounds, it went

116. *Id.*
117. *Id.*
118. *Id.* at 91.
119. *Id.* at 90.
120. *Id.* at 91.
121. *Id.* at 91.
122. *Id.*

on to rule in favor of Sambo's on the BFOQ affirmative defense as well. According to the court, "clean-shavenness is a bona fide occupational qualification for a manager of a restaurant, such as those operated by Sambo's, that relies upon and appeals to the family trade."[123]

The *Sambo's* court's decision shows an acute awareness of and sensitivity to employers' interests in placating customer preferences and maintaining their public image. It reflects the courts' understanding that a failure to cater to customer preferences can have a detrimental effect on employers' businesses.

III.
PROPERLY INTERPRETED, TITLE VII DOES NOT PERMIT WORKPLACE SEGREGATION ON THE BASIS OF RELIGION

In the remainder of this Article, I critically examine the arguments invoked by courts and commentators to justify the proposition that Title VII does not forbid workplace segregation of individuals with religiously-mandated appearances. I argue that the text and purpose of Title VII do not permit religion-based segregation as defined herein. This argument includes two subparts. First, an alternative that places a religious employee outside of public view does not constitute a "reasonable accommodation" under Title VII. In other words, employers may not eliminate a conflict between employees' religious identity and the employers' policies by segregating those employees whose appearance is dictated by their religious beliefs. Second, an employer may not use actual or perceived customer preferences as a basis for claiming it would face an "undue hardship" if it accommodated an individual with a religiously-mandated appearance. Relatedly, an employer may not rely on its corporate brand, which simply codifies and reflects customer preferences, to support an "undue hardship" claim.[124]

As the court's interpretation of the law currently stands, employers' statutory responsibilities under Title VII with respect to religious individuals are minimal. Though an employer has an affirmative obligation to provide a

123. *Id.* The purported effect that the customer perception of facial hair may have on sanitation appeared to offer additional support for the court's ruling in favor of Sambo's. *See id.* at 89–90. That aspect of the court's ruling is not challenged herein. *See supra* note 12.

124. For purposes of this Article, employer policies include employer-established brands or "corporate images," which merely reflect and are codifications of what the customers find appealing. *See* Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 13, 17 (2007) ("Using market surveys of consumer tastes and preferences, businesses look to customers for information about what attracts them to a particular product or service. Ultimately, businesses hope to develop a 'brand' that will draw and retain customers.") *See also id.* at 18 ("Customers who form an affective connection to a business's products and services develop loyalty and commitment to—even passion for—the brand. Consumers who feel passion for the brand typically also embrace brand ownership as a means of self-expression: Consumers choose brands in great part to tell the world and themselves who they are . . . . The consumer in effect believes, 'The only way I can be who I am is to have specific products or services.'") (select internal quotation marks omitted).

"reasonable accommodation," the employer is required to do nothing more than provide an accommodation that eliminates the tension between the employer's policies and the employee's religious requirements. This is a very limited duty.[125] Further, an employer need not bother to offer a reasonable accommodation where doing so would impose an "undue hardship" on an employer. The Third Circuit has described "the undue hardship test" as "not a difficult threshold to pass."[126] Under current precedent, therefore, employers who alter an individual's work conditions due to his or her religiously-mandated appearance are protected from liability by fulfilling the undemanding "reasonable accommodation" requirement—which seemingly approves of segregation—or by invoking the easily-triggered "undue hardship" statutory sanctuary, which may be based on argument or evidence that consumers prefer receiving service from majoritarian employees. These standards have not been appropriately analyzed by the courts, and they offer non-existent protection for individuals with religiously-mandated appearances.

A. The Text and Purpose of Title VII Support a Ban on Workplace Segregation of Individuals with Conspicuous Articles of Faith

It is inappropriate for courts to read the "reasonable accommodation" language in Title VII in isolation. When an employee is discriminated against at work because of his or her religiously-mandated appearance, the court should evaluate the "reasonable accommodation" proposed by the employer in light of the general anti-discrimination provision of Title VII.[127] This provision expressly makes it unlawful for an employer to "segregate . . . his [or her] employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his [or her] status as an employee, because of such individual's . . . religion."[128]

This provision clarifies and restricts what may constitute a "reasonable accommodation" or "undue hardship." The universe of what may be judicially recognized as a "reasonable accommodation" or "undue hardship" shrinks when this provision is added to the Title VII analysis. Accordingly, when an employer consigns an employee to a position outside of public view because of his or her

125. *See, e.g.*, Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 342 (2004) ("An employer's obligation to reasonably accommodate an employee's religious needs" has been "narrowly interpreted"); Huma T. Yunus, *Employment Law: Congress Giveth and the Supreme Court Taketh Away: Title VII's Prohibition of Religious Discrimination in the Workplace*, 57 OKLA. L. REV. 657, 662–63 (2004) ("As a practical matter, almost any type of employer accommodation is sufficient to uphold the employer's duty to reasonably accommodate under Title VII.").

126. Webb v. City of Phila., 562 F.3d 256, 260 (citing United States v. Bd. of Educ. for the Sch. Dist. of Phila., 911 F.2d 882, 890 (3d Cir. 1990)).

127. 42 U.S.C. §2000e–2(a)(2) (2006).

128. *Id.*

religious appearance, the employer is violating Title VII's prohibition against segregation if the alternative position limits an employee's opportunities or otherwise adversely affect the employee's status.

To place a religious individual outside of public view is to define the social space that he or she may occupy. Segregated positions isolate a person; limit that person's ability to interact with co-workers, customers, and the public at large; and validate public or employer bias as to who is worthy of represnting a company. Such positions deny cognizable opportunities and thus violate Title VII's general anti-discrimination provision. In other words, positions outside of public view are *de facto* unacceptable accommodations under the law.[129]

For similar reasons, an employer who refuses to hire an individual on the basis of his or her religious appearance is engaging in a form of segregation within the meaning of Title VII. Compared to the situation just described—in which an individual is employed, but hidden and confined to the back—an individual who is blocked from employment because of his or her religious appearance arguably has a stronger claim of segregation under Title VII. Indeed, a candidate who is denied a position remains outside of the workforce and is further isolated and marginalized from the social spaces that are inherent in employment. At least an employee who is relegated to the back areas is part of the employer; he or she is in the office or workplace, albeit in the shadows. An individual whose application is rejected, however, is completely severed from the employer, potential co-workers, and the public.

The practical consequences of segregation are important to consider. Unless the supplemental statutory limitation found in the general anti-discrimination provision is given effect, companies will continue to be allowed to place the Muslim with a hijab, the Sikh with a turban, and the Rastafarian with long hair out of public sight, while those with majoritarian appearances can represent the employer with customers in the front of the business. These appearance policies directly discriminate against the workers or job applicants and perpetuate the very stereotypes and fear that underlie the segregation of individuals with religiously-mandated appearances. If bearded Sikhs are never allowed to interact with customers, then customers will not overcome their "aversion to, or discomfort in dealing with, bearded people."[130] Courts should not read Title VII in a manner that strengthens discriminatory animus and thus enable this insidious spiral of discrimination to continue.

Although the legislative history of the Title VII provision that covers religious discrimination is quite limited,[131] there is reason to believe Congress did not intend to allow employers to segregate minority employees. Senator

129. The only exception to this principle is where the accommodation is the result of a bilateral process and the employee wants to move to such a position.

130. EEOC v. Sambo's of Ga., Inc., 530 F. Supp. 86, 89 (N.D. Ga. 1981).

131. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 ("The brief legislative history of s 701(j) is. . . of little assistance.").

Jennings Randolph, a major proponent of the religious accommodation provision, expressed "deep concern over employees being forced to choose between religion and their jobs." He instead "hoped to eliminate that difficult choice for employees by requiring employers to make reasonable accommodations for the religious needs of employees."[132]

As currently interpreted, however, Title VII does virtually nothing to eliminate this choice. An individual must either alter his or her appearance in violation of his or her religious beliefs or accept a position that restricts his or her employment opportunities, prevents him or her from interacting with customers, and effectively relegates him or her to second-tier status both in the specific sphere of employment and in the public more generally. There is no valid, fair choice in this scenario. The options are, at bottom, "to choose between a job and a deeply held religious practice."[133] Interpreting the "reasonable accommodation" standard in light of Title VII's general anti-discrimination provision will advance the purpose of Title VII by forcing employers to provide religious employees with an accommodation that prevents this unfair choice

The findings of the Equal Employment Opportunity Commission ("EEOC")[134] offer additional support for reinterpreting the statute to reject a "reasonable accommodation" that involves segregation. The EEOC reacted to the rising number of cases of post-9/11 employment discrimination against Sikh employees by releasing informal guidance on how to interpret Title VII in light of the special issues raised by appearance-based religious discrimination. The guidance indicated that giving effect to public discomfort of religious minorities by segregating employees is impermissible under Title VII. The guidance contained the following example:

> Susan is an experienced clerical worker who wears a hijab (head scarf) in conformance with her Muslim beliefs. XYZ Temps places Susan in a long-term assignment with one of its clients. The client contacts XYZ and requests that it notify Susan that she must remove her hijab while working at the front desk, or that XYZ assign another person to Susan's position. According to the client, Susan's religious attire violates its dress code and presents the "wrong image." Should XYZ comply with its client's request?
>
> XYZ Temps may not comply with this client request without violating Title VII. The client would also violate Title VII if it made Susan remove her hijab or changed her duties to keep her out of public view.[135]

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132. Zaheer, *supra* note 97, at 518 (discussing Senator Jennings Randolph's statement during debates over Title VII's reasonable accommodation provision).

133. Brown v. F.L. Roberts & Co., 419 F. Supp. 2d 7, 19 (D. Mass. 2006).

134. The EEOC is the federal agency charged with enforcing Title VII. 42 U.S.C. § 2000e-4.

135. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, QUESTIONS AND ANSWERS ABOUT EMPLOYER RESPONSIBILITIES CONCERNING THE EMPLOYMENT OF MUSLIMS, ARABS, SOUTH ASIANS,

This opinion is consistent with the argument contained in this article. The guidance possesses rather limited legal effect—according to the Supreme Court, such agency materials are "[e]ntitled to respect," only if they have the "power to persuade."[136] The EEOC's interpretation nonetheless buttresses the argument that such employer conduct violates Title VII.

Within this context, if we reconsider the *Birdi* case, it is clear that the plaintiff's litigation strategy was a losing one. Birdi contended that no accommodation offered by United would be reasonable unless it involved customer contact.[137] Framed in this light, the court ruled that a plaintiff in a religious accommodation case has no statutory right to the accommodation that she wants; the plaintiff's right, the court held, is tied to only that which will eliminate the employer-employee conflict.[138]

Under a proper reading of Title VII, however, Birdi could argue that the alternatives offered by United would have effectively segregated him from the public and placed him out of sight solely because of his religious appearance. In other words, he could argue that no accommodation is reasonable if it involves segregation that "deprive[s] . . . [him] of employment opportunities or otherwise adversely affect[s] his status as an employee."[139] Birdi's status was adversely affected: unlike employees without conspicuous religious attire, he could not work in public areas or interact with other co-workers and customers. Framed in this way, a court properly interpreting Title VII would hold the options presented by United inadequate, not because they are inconsistent with Birdi's preferences, but because of the segregation that would have resulted.

B. Customer Preference May Not Legitimate Otherwise Discriminatory Employment Actions

When examining whether to uphold an employer's appearance policy in light of an employee's incompatible religious appearance, courts, including the *Sambo's* court, have placed significant weight on evidence of customer reaction to the policy.[140] For instance, in *Fagan v. Nat'l Cash Register Co.*, the D.C. Circuit noted: "Perhaps no facet of business life is more important than a company's place in public estimation. That the image created by its employees

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AND SIKHS 2 (2005), *available at* http://www.eeoc.gov/facts/backlash-employer.html.

136. Christensen v. Harris County, 529 U.S. 576, 587 (2000); *see also* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("[T]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.").

137. Birdi v. UAL Corp., No. 99 C 5576, 2002 WL 471999, at *1 (N.D. Ill. Mar. 26, 2002).

138. *Id.*

139. 42 U.S.C. § 2000e-2(a)(2) (2006) (deeming unlawful those employment practices that "segregate" employees in any way that "would deprive . . . any individual of employment opportunities or otherwise adversely affect his [or her] status as an employee").

140. EEOC v. Sambo's of Ga., Inc., 530 F. Supp. 86, 89–90 (N.D. Ga. 1981).

dealing with the public . . . affects its relations is so well known that we may take judicial notice of an employer's proper desire to achieve favorable acceptance."[141]

It is no surprise that courts have upheld employer appearance standards under Title VII given their recognition of the relationship between employee appearance, customer reaction, and a company's success. The *Fagan* court found that an employer's grooming policies operate "in our highly competitive business environment" and that "[r]easonable requirements in furtherance of that policy are [therefore] an aspect of managerial responsibility."[142] Accordingly, as the First Circuit cautioned, if an employer were to make an exemption for a religious employee, the employer would "forfeit[] its ability to mandate compliance and thus lose[] control over its public image. That loss . . . would constitute an undue hardship."[143]

These courts have assumed that there is a sufficient nexus between employers' appearance policies generally and the preferences of their customer base. Other courts, however, have required a defendant employer to show that its specific appearance policy garners a positive reception from the public or that granting an exception to that policy will lead to a loss of business.[144] For example, in *EEOC v. Red Robin Gourmet Burgers, Inc.*, the United States District Court for the Western District of Washington rejected a restaurant's motion for summary judgment in a Title VII claim brought by an employee with tattoos acquired for religious reasons.[145] According to the court, while the employer may have wanted to maintain a "family-oriented and kid-friendly image," the employer "fail[ed] to present any evidence that visible tattoos are inconsistent with these goals generally, or that its customers specifically share this perception. Hypothetical hardships based on unproven assumptions typically fail to constitute undue hardship."[146]

I argue that it is irrelevant to the "undue hardship" analysis that an employer can prove its customers prefer employees who abide by the employers' appearance policies. To the extent that employers have evidence that the public

141. Fagan v. Nat'l Cash Register Co., 481 F.2d 1115, 1124–25 (D.C. Cir. 1973). Although *Fagan* was a sex discrimination case, the court's explanation of the importance of public image is relevant to religious appearance cases.

142. *Id.* at 1125.

143. Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 137 (1st Cir. 2004).

144. *See* Balint v. Carson City, 180 F.3d 1047, 1054 (9th Cir. 1999) (stating that "undue hardship must be determined within the particular factual context of each case"); Draper v. U.S. Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1975) (The court is "somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice").

145. No. C04-1291JLR, 2005 WL 2090677, at *1 (W.D. Wash. Aug. 29, 2005). The plaintiff practiced Kemetecism, "a religion with roots in Egypt." *Id.* He obtained his tattoos, which "represent his servitude to Ra, the Egyptian god of sun, and his commitment to his faith," at a religious ceremony. *Id.*

146. *Id.* at *5.

likes and expects employees to conform to a particular "look," the public's preferences may, at worst, be infected with animus and, at best, perpetuate and reinforce homogenous conceptions as to who should serve and interact with the public. Unfortunately, "people . . . are most comfortable interacting with those who are visibly similar to themselves."[147] It is axiomatic that people tend to have more contact with individuals who have shared characteristics, such as race and religion,[148] that people tend to "hold high opinions of groups to which they belong and low opinions of those to which they do not,"[149] and that people tend to trust "those who are most like . . . [us] physically and culturally" rather than those who "look different and follow different practices."[150] In fact, sociological evidence indicates that the preference to be around and to interact with those who look similar leads individuals to segregate themselves according to shared physical attributes, and exclude individuals not possessing those traits.[151] Such evidence supports the notion that employers are "motivated to pursue homogeneity," not just externally with the public, but also internally based on the perception that "homogeneous workplaces facilitate trust, loyalty, and cooperative behavior."[152]

Although most courts have ignored the reality of what customer preferences actually reflect, at least one court has recognized that a lenient interpretation of Title VII only perpetuates discriminatory views. The United States District Court for the District of Massachusetts in *Brown*, bound by precedent, approved an employer's appearance policy, but noted in *dicta* that "an excessive protection of an employer's 'image' predilection encourages an unfortunately (and unrealistically) homogeneous view of our richly varied nation."[153]

Yet again, the EEOC offers support for reinterpreting the statute to ignore

147. Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 431–32 (2008) Green also explains that, "conceptions of professionalism tend to overlap with white, male norms and severely restrict the extent to which individuals can signal membership in racial and gender identity categories." *Id.* at 433. It is no different with members of religious minorities.

148. *See* Ethan J. Leib, *Friendship and the Law*, 54 UCLA L. REV. 631, 670 (2007) (stating that friends tend "to have similar ethnic backgrounds and, where it is of social consequence, to belong to the same religion") (quoting GRAHAM A. ALLAN, FRIENDSHIP: DEVELOPING A SOCIOLOGICAL PERSPECTIVE 23 (1989)).

149. Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1531 (2005) (quoting James H. Kuklinski & Paul J. Quirk, *Reconsidering the Rational Public: Cognition, Heuristics, and Mass Opinion*, in ELEMENTS OF REASON 153, 164 (Arthur Lupia et al. eds., 2000)).

150. *Id.* (internal quotes and citation omitted).

151. *See* Seth P. Mackinnon, Christian H. Jordan & Anne E. Wilson, *Birds of a Feather Sit Together: Physical Similarity Predicts Seating Choice*, 37 PERSONALITY & SOCIAL PSYCHOLOGY BULLETIN 879 (2011).

152. Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1801–02 (2003).

153. Brown v. F.L. Roberts & Co., 419 F. Supp. 2d 7, 19 (D. Mass. 2006). *See also id.* ("Worse, it places persons whose work habits and commitment to their employers may be exemplary in the position of having to choose between a job and a deeply held religious practice.").

customer preferences in the "undue hardship" analysis. In two separate documents—the EEOC Title VII guidance and the EEOC current Compliance Manual on Religious Discrimination—the EEOC sets forth examples of employer behavior based on customer preferences and related to conspicuous religious attire that violates Title VII. The Title VII guidance presents the following example:

> Narinder, a South Asian man who wears a Sikh turban, applies for a position as a cashier at XYZ Discount Goods. XYZ fears Narinder's religious attire will make customers uncomfortable.
>
> What should XYZ do?
>
> XYZ should not deny Narinder the job due to notions of customer preferences about religious attire. That would be unlawful. It would be the same as refusing to hire Narinder *because* he is a Sikh.[154]

The EEOC's Current Compliance Manual on Religious Discrimination provides a similarly powerful example:

> Nasreen, a Muslim ticket agent for a commercial airline, wears a head scarf, or hijab, to work at the airport ticket counter. After September 11, 2001, her manager objected, telling Nasreen that the customers might think she was sympathetic to terrorist hijackers. Nasreen explains to her manager that wearing the hijab is her religious practice and continues to wear it. She is terminated for wearing it over her manager's objection. Customer fears or prejudices do not amount to undue hardship, and the refusal to accommodate her and the termination, therefore, violate Title VII. In addition, denying Nasreen the position due to perceptions of customer preferences about religious attire would be disparate treatment based on religion in violation of Title VII, because it would be the same as refusing to hire Nasreen because she is a Muslim.[155]

The EEOC explicitly states that "notions about customer preference real or perceived do not establish undue hardship."[156] By allowing employers to follow customer preference, "white, male norms" are approved for public presentation and consumption.[157] Unfamiliar religious appearances, particularly those belonging to minority faiths, are marginalized, either because the employer is uncomfortable with appearances outside the mainstream or because the employer believes it is respecting the public's apparent wishes.[158] As a consequence,

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154. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 135, at 1.

155. EEOC, Compliance Manual § 47 (religious garb) (citing to a resolution order in *EEOC v. American Airlines*, Civil Action No. 02-C-6172 (N.D. Ill. Sept. 3, 2002)).

156. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 135, at 2.

157. Green, *supra* note 147, at 433.

158. *See* Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2558 (1994) ("The problem [with the judicial treatment of workplace appearance issues] is that they rely on unexamined, culture-bound judgments that will tend to reinforce existing, hidden prejudices and stereotypes.

minority employees with visible representations of their faiths are compelled either to hide their differences in order to conform to majoritarian, accepted appearances,[159] or to maintain their distinct appearance at the risk of losing employment opportunities.[160]

When an employer endorses or validates the public's discriminatory attitudes, whether hidden or overt, it gives effect to those attitudes—whether or not the employer held those same views. As Judge Richard Posner writes:

> A person who serves as a conduit for another person's discrimination can . . . be guilty of intentional discrimination . . . . Suppose a merchant refuses to hire black workers not because he is racist but because he believes that his customers do not like blacks and will take their business elsewhere if he hires any. The refusal is nevertheless discrimination, because it is treating people differently on account of their race. It is intentional discrimination, because it necessarily is based on the merchant's awareness of racial difference and his decision to base employment decisions on that awareness. And it is actionable discrimination . . . notwithstanding the merchant's own freedom from racial animus.[161]

There is no reason to ignore Judge Posner's words even though they were made in the context of racial discrimination as opposed to religious appearance discrimination. Under this "conduit" theory, an employer may not insulate itself from claims of discrimination under Title VII by invoking the discriminatory views of its customer base, even when there is evidence of customer

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Such judgments reflect more about the high degree of societal consensus regarding dress and appearance expectations than about the value that individuals or businesses attach to dress and appearance.").

159. *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 837 (2002) ("[C]overing requires . . . that the individual modulate her conduct to make her difference easy for those around her to disattend her known stigmatized trait."). *See generally* Mark R. Bandsuch, *Dressing Up Title VII's Analysis of Workplace Appearance Policies*, 40 COLUM. HUM. RTS. L. REV. 287, 330 (2009) ("Businesses all too often defer to the preferences of customers, co-workers, and employers—often rooted in cognitive biases—while disregarding these policies' adverse impact upon employees."). According to Bandsuch, appearance policies that "promote a conservative and business-like image. . . cater[] to the exact stereotypes and prejudices that Title VII was meant to break down, since this conservative and business-like image often translates into the 'White Man's Wardrobe.'" *See* Bandsuch, at 330.

160. *See* Brown v. F.L. Roberts & Co., 419 F. Supp. 2d 7, 19 (D. Mass. 2006) (excessive deference to employer image concerns "places persons whose work habits and commitment to their employers may be exemplary in the position of having to choose between a job and a deeply held religious practice").

161. Vill, of Bellwood v. Dwivedi, 895 F.2d 1521, 1530–31 (7th Cir. 1990). *See also* Platner v. Cash & Thomas Contractors, Inc., 908 F.2d 902, 905 n.5 (11th Cir. 1990) ("An employer may not illegally discriminate simply because some third party urges or pressures him to do so."). While Judge Posner addressed the "conduit" theory in the context of race, in the next section, Part III.C., *infra*, it will be argued that race (and other protected traits) should be treated equally under Title VII.

preferences.[162]

Where employees with conspicuous religious appearances are confined to certain spaces, they lose the chance to interact with other colleagues and customers; they are forced to perform different tasks in a position outside of view, and in the most extreme cases, they are eliminated from the candidate pool entirely. These deficiencies render an accommodation that involves segregation inherently impermissible under Title VII no matter how persuasively an employer may claim its customers prefer individuals not bearing a conspicuous religious appearance. It is time to square this social and physical isolation, and its attendant stigmatization,[163] with Title VII's command to ensure that the religious rights of the individual are sufficiently protected.[164]

C. Other Contexts Support a Prohibition Against Segregation Premised on Religious Appearance

Unfortunately, it is not a new phenomenon for employers to segregate or refuse to hire individuals who look different because the employers believe these individuals will "put off" their customers. When employers tried to exclude African-Americans and women from jobs at their workplaces on these grounds, the courts stepped in to prohibit workplace segregation on the basis of race and gender. The courts' rejection of this employer behavior in other civil rights contexts is instructive and supports the doctrinal position that Title VII does not permit employers to hide—inside the workplace or from the workforce—religious employees with conspicuous articles of faith.

Congress responded to widespread racial discrimination in employment by enacting the Civil Rights Act of 1964.[165] The courts interpreted this legislation broadly to prevent discrimination based on consumer preference. As Professor Deborah Rhode notes, "Southern employers often argued that hiring blacks would be financially ruinous; white customers would go elsewhere. In rejecting such customer preference defenses, Congress and the courts recognized that the

162. *See* Bradley v. Pizzaco of Neb., Inc., 7 F.3d 795, 798–99 (8th Cir. 1993) (finding impermissible, in a race discrimination suit, an employer's "no beards" policy despite the fact that customer surveys showed preference for clean-shaven employees).

163. Harrington's comments speak to the dehumanization that such employer action provokes. *See* Robert Smith, *Sikhs Object to MTA Logo Requirement*, *supra* note 100. For insights into the stigmatization that occurs with respect to hair and racial identity, *see* D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?* 79 U. COLO. L. REV. 1355, 1388–92 (2008). Professor Greene's study is relevant to stigmatization that may take place with respect to physical appearance and religious identity.

164. *See* Connecticut v. Teal, 457 U.S. 440, 453–54 (1982) ("The principal focus of the statute is the protection of the individual employee[]."); Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978) ("The statute's focus on the individual is unambiguous.").

165. *See* Local 28 of Sheet Metal Workers' Intern. Ass'n v. EEOC, 478 U.S. 421, 448 (1986) ("Congress enacted Title VII based on its determination that racial minorities were subject to pervasive and systematic discrimination in employment."); *see also* United Steelworkers of America v. Weber, 443 U.S. 193, 202 (1979) (stating that a "goal[] of the Civil Rights Act . . . [was] the integration of blacks into the mainstream of American society").

most effective way of combating prejudice was to deprive people of the option to indulge it."[166] The Court explained in 1964, that "the fact that a 'member of the class which is regulated may suffer economic losses not shared by others . . . has never been a barrier' to [upholding the Civil Rights Act]."'[167]

These principles from the civil rights era on the use of customer preferences and the risk of financial loss parallel and apply to the modern religious context as well. It is difficult to square the Court's view on the role of customer preference based on race with the role of customer preference based on religious appearance.[168]

Courts have rejected similar employer arguments when used to justify requiring female employees to look or act a certain way because of customer expectations related to gender.[169] In *Diaz v. Pan Am. World Airways, Inc.*, for example, the Fifth Circuit refused to find a BFOQ affirmative defense simply because "Pan Am's passengers prefer female stewardesses." According to the court, "it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome."[170]

In perhaps the most comparable instance of customer preference influencing allegedly discriminatory employer behavior, a group of women, Latinos, Asian-Americans, and African-Americans brought a class action suit challenging the employment practices of Abercrombie & Fitch.[171] The plaintiffs, applicants to and employees of the popular American clothier, charged that they were either

166. Rhode, *supra* note 20, at 1065.

167. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 260 (1964) (quoting Bowles v. Willingham, 321 U.S. 503, 518 (1944) (adding that whether a defendant "may lose utility and depreciate in value as a consequence of regulation . . . . has never been a barrier to the exercise of the police power")).

168. *See* Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1181 (7th Cir. 1982) ("It is similarly not irrational, but it is clearly forbidden by Title VII, to refuse on racial grounds to hire someone because your customers or clientele do not like his race."); EEOC v. St. Anne's Hosp. of Chi., 664 F.2d 128, 133 (7th Cir. 1981) (discharge of employee due to racial animus of customer is presumptively unlawful); Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1123 (2010) ("Although employers certainly have the right to regulate employee appearance in presenting a preferred business image, they do not have a right to do so in a racially discriminatory way. Additionally, courts have consistently held that customer discrimination—customer desire—is not an acceptable reason to discriminate on the basis of race."). *See also* David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1625 (1990) ("[N]o one should be made worse off simply to satisfy someone else's racial animus.").

169. *See, e.g.*, Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602, 609 (9th Cir. 1982) (finding unpersuasive employer's justification for female-only appearance standards to compete and cater to client preferences and expectations); *but see* Jespersen v. Harrah's Operating Co., 443 F.3d 1104 (9th Cir. 2006) (en banc) (rejecting Title VII claim brought by female employee who objected to make-up component of employer's overall grooming policies).

170. *See* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (1971).

171. Steven Greenhouse, *Abercrombie & Fitch Bias Case Is Settled*, N.Y. TIMES, Nov. 17, 2004, at A16.

not hired or "were steered not to sales positions out front, but to low-visibility, back-of-the-store jobs, stocking and cleaning up"[172] because they did not conform to Abercrombie's corporate image, specifically a "classic American," or White look.[173] The parties settled, with Abercrombie agreeing to pay the plaintiffs approximately $40 million and to engage in more diverse employment activities, among other things.[174]

It is incongruous to recognize the impermissibility of converting customer predispositions into a valid basis for employer decisionmaking when it is "because of" race, gender, and ethnicity, but not when it is "because of" religion or religious appearance—even though all four categories are protected by Title VII. Reading Title VII to prohibit such employer action, when it implicates distinct appearance caused by race, gender, ethnicity, *or* religion, would give full effect to Title VII's broad mandate and resolve an imbalance which, at present, renders Title VII a limited safeguard for employees with conspicuous religious appearances when compared to other protected groups.

To be sure, one may argue that religion is unlike these other contexts for two distinct reasons. First, racial and gender-specific appearances are said to be immutable, whereas an individual's religious appearance is technically alterable. To this, I point to Sikhism as an example of how this potential objection can be countered. A Sikh's turban and unshorn hair are not an option, but rather an integral, mandatory part of Sikh identity. As a major Sikh civil rights organization explains: "When a Sikh man or woman dons a turban, the turban ceases to be just a piece of cloth and becomes one and the same with the Sikh's head."[175] In this example, overt religious identity is an inextricable part of the self and is therefore akin to race or gender.

Second, one may contend that customer preference for a particular racial or gender-specific appearance directly reflects customers' discriminatory animus against a particular race or gender, whereas customer preferences in the religion context are qualitatively different in that they may be neutral. For example, customers may find a person with a clean-shaven look more appealing—say, because he looks more hygienic—regardless of whether that person maintains a beard for religious or non-religious reasons. To this, I respond that Title VII does not require a customer to know that the beard has religious significance. As long

172. *Id.*

173. *See* Elizabeth Kelly, *Claims Against Abercrombie Detailed*, L.A. TIMES, June 18, 2003, at C2.

174. *See* Gonzalez v. Abercrombie & Fitch, Nos. 03-2817 SI, 04-4730 and 04-4731 (N. D. Cal. Apr. 14, 2005) (consent decree). Abercrombie was also sued in the United Kingdom by a disabled employee who alleged that, because of her prosthetic arm, she was relegated to the stockroom for failing to meet the company's "look policy." *Woman Wins Clothes Store Tribunal*, BBC NEWS (Aug. 13, 2009), http://news.bbc.co.uk/2/hi/8200140.stm. The plaintiff prevailed in a U.K. employment tribunal, which found that the plaintiff was mistreated because she breached this "look policy." *Id.*

175. *Why Sikhs Wear a Turban*, Sikh Coalition, *available at* http://www.sikhcoalition.org/Sikhism11.asp.

as the employer makes a decision based on an actual or perceived preference for a certain appearance that is part of an employee or applicant's religious practices, the employer is making a decision "because of" religion. Therefore, it falls within the bounds of Title VII.[176] Furthermore, as Professor Rhode argues, a preference for certain traits may not by itself be discriminatory, but the preference may not be wholly free of bias either.[177] Professor Rhode specifically objects to grooming codes not because they prescribe certain neutral traits, but because they reinforce stereotypical notions as to who embodies those traits.[178] Similarly, individuals who adopt religious-based appearances are not, as a monolithic class, less likely to possess certain traits. But allowing employers to justify the exclusion of such individuals from the workplace or in the workplace based on actual or perceived consumer preferences about apparently neutral traits ultimately codifies, reinforces, and validates stereotypes that these individuals are categorically without such favored qualities or characteristics. Accordingly, these stereotypes, though adopted under the guise or cover of grooming policies, should be seen as inconsistent with Title VII.

D. Sufficient Solutions Are Needed to Ensure Title VII is Read to Ban Religion-Based Workplace Segregation

Employers will only be prohibited from discriminating against employees with conspicuous religious appearances if courts engage in a more integrated reading of the text and purpose of Title VII, consider the harms of giving effect to discriminatory customer preferences, and remember the lessons learned from other contexts. Rather than wait for the courts, Congress should take action to clarify Title VII and restore its full meaning as it relates to discrimination based on religion.

The Workplace Religious Freedom Act (WRFA) offers an opportunity for Congress to strengthen Title VII in principled ways.[179] According to the Act, its purpose is "to address the history and widespread pattern of discrimination by private sector employers and Federal, State, and local government employers in unreasonably denying religious accommodations in employment, specifically in the areas of garb, grooming, and scheduling."[180] Senator Kerry, the sponsor of the bill, rose to declare that Congress should change Title VII to make clear that it does not tolerate an employee being forced to make the choice between the employee's religion and his or her job. Senator Kerry said: "In a Nation founded on freedom of religion, no American should ever have to choose between

176. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 135, at 2 (failing to consider the reason why customers prefer a certain appearance when preventing employers from discriminating against religious individuals based on customer preferences).

177. Rhode, *supra* note 20, at 1066.

178. *See id.*

179. Workplace Religious Freedom Act, S. 4046, 111th Cong. § 4(a)(2)(C) (2010).

180. *Id.* § 3(1)

keeping a job and keeping faith with their cherished religious beliefs and traditions." According to Senator Kerry, the bill "protects the wearing of yarmulkes, hijabs, turbans and Mormon garments—all the distinctive marks of religious practices, all the things that people of faith should never be forced to hide."[181] In relevant part, the proposed WRFA declares that, under Title VII, it "shall not be considered to be a reasonable accommodation if the accommodation requires segregation of an employee from customers or the general public."[182]

The benefit of pursuing a legislative approach is that it requires no judicial reinterpretation. The body that passed Title VII would clarify to the courts that placing employees with distinct religious identities in the back in order to resolve the conflict between the employer's policies and the employee's religion is impermissible under Title VII. If passed, WRFA would leave little question that the employer's proposed accommodations in *Birdi* were insufficient under Title VII.

Yet WRFA, even if passed, would not fully address the problems with the courts' current interpretation of Title VII, as described herein. Specifically, WRFA does not explicitly prohibit employers from considering customer preference under the statute's "undue hardship" analysis for religious discrimination claims. The proposed Act would require the "undue hardship" safe harbor under Title VII to be read consistently with the stricter "undue hardship" definition found in the ADA. But it is not certain that this more heightened standard would prohibit employers from invoking customer preferences as a means to avoid Title VII liability.[183] Therefore, the bill would seemingly fail to stand in the way of a court ruling the same way as the *Sambo's* court.[184] To more fully protect individuals with conspicuous articles of faith, Congress should amend the bill to state that the actual or perceived loss of

181. 156 CONG. REC. S10517 (daily ed. Dec. 17, 2010) (statement of Sen. John Kerry).

182. S. 4046 § 4(a)(3)(2)(C).

183. The Act does state, however, that an employer can show "undue hardship on the conduct of the employer's business only if the accommodation imposes a significant difficulty or expense on the conduct of the employer's business when considered in light of relevant factors set forth in section 101(10)(B) of the Americans with Disabilities Act of 1990." *Id.* § 4(a)(3)(2)(B). The factors under the Americans with Disabilities Act are: "(i) the nature and cost of the accommodation needed . . . (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity." Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(10)(B) (2008).

184. *See infra* Part II.B.3 (discussing *EEOC v. Sambo's of Ga., Inc.*, 530 F. Supp. 86 (N.D. Ga. 1981)).

business or decline in corporate image stemming from negative customer reactions to individuals with conspicuous religious appearances cannot form the basis, in part or in whole, for a finding of an "undue hardship" under Title VII.

A final note in this section is appropriate before turning to other matters. While WRFA theoretically would represent an important, though partial, improvement of Title VII, I acknowledge that Congress has considered—and failed to pass—previous versions of WRFA for over a decade.[185] One civil rights advocate who read a draft of this article expressed his view in private that Senator Kerry's introduction of WRFA is more a symbolic message of the Senator's personal convictions regarding religious discrimination in employment rather than a genuine attempt to put forth legislation that has a chance of amending Title VII.[186] Therefore, my purpose here is not tied specifically to WRFA or any particular legislation. It is directed at shifting ideas and attitudes with respect to religious discrimination such that reform efforts made in this area possess a plausible doctrinal foundation in addition to the necessary political will.

IV.
THE CONSTITUTIONAL AND JUDICIAL IMPLICATIONS OF BANNING WORKPLACE SEGREGATION

A. The Constitution and Workplace Segregation

Religious discrimination in employment relates not only to the statutory commands of Title VII, but also to the constitutional protections of the First Amendment's Free Exercise Clause.[187] In particular, plaintiffs with religiously-mandated appearances may also seek religious exemptions to neutral, generally applicable government laws or policies under the First Amendment. Plaintiffs pursuing constitutional challenges to government laws or policies in the employment context face an evolving patchwork of standards on the federal and state levels. As a historical matter, the Free Exercise Clause was read to require an exemption to generally applicable government policies only if the statute or

185. *See, e.g.*, H.R. 1431, 110th Cong. (2007); H.R. 4237, 106th Cong. (2000) (House Version); S. 1668, 106th Cong. (1999) (Senate Counterpart); H.R. 2948, 105th Cong. (1997); S. 1124, 105th Cong. (1997); S. 92, 105th Cong. (1997); H.R. 4117 104th Cong. (1996); S. 2071 104th Cong. (1996); H.R. 5233 103d Cong. (1994).

186. There may be some truth to this more realist assessment. *See* 156 CONG. REC. S10517 (daily ed. Dec. 17, 2010) (statement of Sen. John Kerry) (expressing hope that the bill "serves as the beginning of a new discussion" on employment discrimination on the basis of religion).

187. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."). As the focus of this Article is Title VII, it is beyond the scope of this Article to assess the constitutionality of employer policies as they may abridge the rights of individuals with conspicuous religious appearances. However, it is important to consider the Supreme Court's analysis to compare it to the Title VII context.

policy expressly provided for one.[188] In 1963, however, the Supreme Court issued *Sherbert v. Verner*, a landmark Free Exercise ruling in which the Court held that a sincere religious objector[189] is entitled to an exemption from a generally applicable law that imposes a substantial burden on the individual's exercise of his or her religion, unless the law in question survives strict scrutiny.[190] A substantial burden is generally defined as either compelling an individual to do that which violates her religious beliefs or prohibiting an individual from that which is mandated by his or her religious beliefs.[191]

In 1990, the Court in *Employment Division v. Smith* reversed course, eliminating the presumptive constitutional model and reverting back to the default rule in which an exemption to generally applicable, facially neutral laws or policies for religious reasons was required only when the statute itself carved out an exemption.[192] In 1993, in response to this ruling, Congress passed the Religious Freedom Restoration Act ("RFRA"),[193] which adopted the 1963 Court's standard and sought to restore the presumptive exemption model.[194] In 1997, the Court concluded that RFRA is unconstitutional as applied to the states, leaving it effective only with respect to the federal government and the territories.[195]

The Court in the seminal *Smith* case was concerned about the ramifications of ceding to religious exemptions to generally applicable laws in such a diverse society.[196] If strict scrutiny is to be applied to one group seeking a religious

188. *See* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1473 (1999) ("When should such exemptions be granted, and who should decide when they should be granted? Until 1963, the general answer seemed to be that the matter was up to the legislature . . . . ").

189. The beliefs need not be longstanding, central to the claimant's religious beliefs, internally consistent, consistent with any written scripture, or reasonable from the judge's perspective. They need only be sincere. *See* Thomas v. Review Bd. of Indiana Emp't Sec. Div., 450 U.S. 707, 716 (1981) ("it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."); Baker v. The Home Depot, 445 F.3d 541, 547 (2d Cir. 2006) ("[T]he question of the sincerity of an individual's religious beliefs is inherently within that individual's unique purview.").

190. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

191. *Id.* at 404.

192. 494 U.S. 872, 876–82 (1990).

193. 42 U.S.C. § 2000bb to § 2000bb-4 (2006).

194. *Id.* at § 2000bb(b)(1).

195. City of Boerne v. Flores, 521 U.S. 507 (1997). *See* Cutter v. Wilkinson, 544 U.S. 709, 715 n.2 (2005) ("RFRA, Courts of Appeals have held, remains operative as to the Federal Government and federal territories and possessions.").

196. *Smith*, 494 U.S. at 888. An early form of this concern was expressed by then-Associate Justice William H. Rehnquist. *See* Sugarman v. Dougall, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting) ("Our society, consisting of over 200 million individuals of multitudinous origins, customs, tongues, beliefs, and cultures is, to say the least, diverse. It would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road."). *See also* Maureen E. Markey, *The Price of Landlord's "Free" Exercise of Religion: Tenant's Right to Discriminate – Free Housing and Privacy*, 22 FORDHAM URB. L.J. 699, 809

exemption, the Court noted, "then it must be applied across the board, to all actions thought to be religiously commanded."[197] Given the searching review demanded by strict scrutiny and the potential for it to be invoked by many groups, "many laws will not meet the test."[198] Importantly, the Court added, "[a]ny society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs."[199] Our society is "a cosmopolitan nation made up of people of almost every conceivable religious preference."[200] To endorse strict scrutiny in this context "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[201] In other words, it would "make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself."[202]

In light of *Smith*, it is necessary to respond to the Court's explicit concerns about the slippery slope of granting religious exemptions in such a diverse society, even though *Smith* does not apply to claims pursuant to Title VII. As arms of the government may contend that they will be unable to implement necessary laws effectively if they are expected to accommodate every religious individual in need of an exemption, employers may argue that they cannot accommodate any and all employees or applicants who possess some religious belief that is expressed through appearance. The employers may say that the cost of exempting countless religious employees from general employment policies will amount to anarchy or the inability to effectively manage the workplace.

At least four responses are appropriate here. First, *Smith*'s view that expanding the right of individuals to a reasonable accommodation would result in administrative chaos is completely unfounded. *Smith* involved a claim for a religious exemption to laws banning the use of peyote.[203] As Justice Blackmun noted in his dissent, "the State's apprehension of a flood of other religious claims is purely speculative. Almost half the States, and the Federal Government, have maintained an exemption for religious peyote use for many years, and apparently have not found themselves overwhelmed by claims to other religious exemptions."[204] As one scholar pointed out, the *Smith* Court's concern about the floodgates opening "only makes sense if lots of religious groups use outlawed drugs, which they do not."[205] Accordingly, on its own

n.517 (1995) (listing cases commenting on the extensive religious diversity in our society).

197. *Smith*, 494 U.S. at 888.

198. *Id.*

199. *Id.*

200. *Id.* (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1981))

201. *Id.*

202. *Id.* at 872.

203. Employment Div. v. Smith. 494 U.S. 872, 874 (1990).

204. *Id.* at 917 (Blackmun, J., dissenting).

205. Mark S. Kende, *Free Exercise of Religion: A Pragmatic and Comparative Perspective,*

terms, *Smith's* concerns about anarchy are without merit.

Second, a mere year before it decided *Smith*, the Supreme Court rejected a similar slippery slope argument in *Frazee v. Illinois Department of Employment Security*.[206] In *Frazee*, the Court confronted the question of whether it was appropriate to deny unemployment benefits to an individual who refused to take a temporary position because it required that he work on Sundays, in violation of his religious beliefs.[207] A lower court reasoned that, were this individual required to be accommodated, it would result in the general collapse of activities held on or reserved for Sundays.[208] The Court, however, was "unpersuaded . . . that there will be a mass movement away from Sunday employ" if the defendants granted the plaintiff's accommodation. According to the Court, there was "nothing . . . to suggest that Sunday shopping, or Sunday sporting, for that matter, will grind to a halt as a result of our decision[.]"[209] It is difficult to square the Court's skepticism of a slippery slope with a contention that reading Title VII to prevent discrimination against individuals who wear conspicuous articles of faith would automatically result in chaos.

Relatedly, under Title VII, the floodgates will not open unless lots of religious groups require an exemption based on appearance. Although some religious individuals may require an accommodation to maintain their religiously-mandated appearances, the vast majority of individuals will not require any accommodation. History supports this. There is no evidence, as a historical matter, that the strict scrutiny standard, which was the operative standard following *Sherbert*, led to any identifiable "anarchy" in religious accommodations.[210]

Third, the *Smith* decision made it qualitatively more difficult for followers of minority religions to obtain relief through law, an effect that should not be replicated in the Title VII context. As Professor Michael McConnell argues, in *Smith*, the Court "upheld majoritarian values and preserved the ability of the government to ensure that governmental policy is enforced without the irritant of minority religious interests."[211] If the Court reads Title VII narrowly to prevent

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55 S.D. L. REV. 412, 416 (2010).

206. 489 U.S. 829 (1989).

207. *Frazee v. Illinois Dep't of Emp't Sec.*, 489 U.S. 829 (1989).

208. *Frazee* was appealed from the Illinois Appellate Court. The Illinois court stated in its decision: "What would Sunday be today if professional football, baseball, basketball, and tennis were barred. Today Sunday is not only a day for religion, but for recreation and labor. Today the supermarkets are open, service stations dispense fuel, utilities continue to serve the people and factories continue to belch smoke and tangible products." The court also found that "[i]f all Americans were to abstain from working on Sunday, chaos would result." *Frazee v. Dep't of Emp't Sec.*, 159 Ill. App. 3d 474, 478 (Ill. App. Ct. 1987).

209. *Frazee v. Illinois Dep't of Emp't Sec.*, 489 U.S. 829, 835 (1989)

210. *See* James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 102–03 (1991).

211. Michael W. McConnell, *Religious Freedom, Separation of Powers, and the Reversal of Roles*, 2001 B.Y.U. L. REV. 611, 613 (2001).

religious individuals from receiving appearance-based accommodations, members of minority religions may be left without recourse.

The level of possible comfort with an individual's religious appearance, or with the religion itself, should not determine who is protected by Title VII. In other words, an employee with relatively familiar religious practices should not be entitled to civil rights safeguards while those with relatively foreign or exotic religious practices are left outside of the universe of groups that may have enforceable protections under Title VII. An opposite view would make a religious community's civil rights protection contingent or dependent on the degree to which the people are aware or comfortable with that community.

Fourth, the religious diversity concern raised in *Smith* suggests a problem related to framing. Discrimination statutes are construed by some as embodying distinctions because the statutes offer protection to individuals and groups who are distinct in some way from the general public. One may be less inclined to legitimize a grievance if it is seen as an outsider's attempt to receive special recognition or protection. As such, a court may be troubled by the countless number of distinctions that may follow and chisel away at a more established, unified order.

If, however, advocates and plaintiffs frame their arguments as abridgments of universally held rights or principles, the courts and the public may view employers' attempts to restrict religion-based appearances as breaching shared rights that impact everyone, including the right to practice the religion of her choosing and adhere to accordingly the religion's requirements. Advocates and plaintiffs should therefore consider reframing civil rights claims, including those made pursuant to Title VII, as claims protecting shared human rights so "that infringements of anyone's rights necessarily may be seen to affect the rights of everyone else."[212] The *Smith* court's decision was based on the concern that too many outsider groups can invoke protective legislation, rather than on the values of equality and religious freedom that lie at the heart of civil rights statutes, including Title VII.

B. Judicial Review and Workplace Segregation

Courts also have reasoned that they should not be in the business of assessing an employer's neutral, generally applicable business decisions.[213] This

212. Dawinder S. Sidhu, *The Future of the U.S. Commission on Civil Rights*, 159 U. PA. L. REV. PENNUMBRA 127, 135–37 (2010).

213. *See, e.g.*, Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1361 (11th Cir. 1999) ("We are not in the business of adjudging whether employment decisions are prudent or fair. Instead, our sole concern is whether unlawful discriminatory animus motivates a challenged employment decision."); Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991) ("No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers," the court does not get involved unless its behavior was discriminatory.); Dale v. Chi. Tribune Co., 797 F.2d 458, 464 (7th Cir. 1986) (stating "this Court does not sit as a super-personnel department that reexamines an entity's business decisions").

argument suggests that employers should have free reign to determine how to run their businesses as long as their decisions are not made to purposefully inhibit religious minorities. This line of thinking would likely include decisions based on an employer's consideration of customer choice, as every business needs to cater to its client base. Although I have argued in Part II that customer preference should never justify employment actions that deny religious rights to an individual, further comment may be in order.

I do not quarrel with the proposition that business decisions should generally rest with the employer. Title VII, however, vests courts with the limited, though critical, responsibility to ensure that businesses, however they are run, do not discriminate illegally. As the Eighth Circuit noted, "employers are free to make their own business decisions, even inefficient ones, so long as they do not discriminate unlawfully."[214] That is, courts are to assess the legality, not the propriety, of employer behavior.

When Title VII was first enacted, some courts were hesitant to intervene in disputes over generally applicable policies related to appearance. [215] Title VII, they said, prohibits discrimination "because of" an individual's religion; generally applicable policies are not motivated by or directed towards religion.[216] The Supreme Court, however, has made clear on numerous occasions that Title VII applies to laws that are facially neutral and generally applicable. The Court, in its own words, "has repeatedly held that a prima facie

214. Hanebrink v. Brown Shoe Co., 110 F.3d 644, 646 (8th Cir. 1997). *See also* Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984) ("[An] employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason.").

215. This is not to suggest that generally applicable employer policies are categorically or inherently suspect. Rather, my argument is that, in the process to determine whether accommodation of religious clothing from a generally applicable policy is warranted, a reasonable accommodation may not be one that segregates, and an undue hardship is not found simply on the basis of suspected or proven customer discomfort with religious attire. In short, my argument relates to improving that process, not blanket or presumptive illegality of generally neutral policies.

216. *See* E. Greyhound Lines Div. of Greyhound Lines, Inc. v. N.Y. State Div. of Human Rights, 265 N.E.2d 745, 746–47 (N.Y. 1970) (ruling, based on state employment discrimination statute emulating Title VII, that employer was not required to accommodate bearded Muslim employee subject to appearance policy, as the policy applied generally and the employer employed numerous Muslims). Many courts came to similar conclusions in the race and sex discrimination contexts. *See, e.g.*, Brown v. D.C. Transit Sys., Inc., 523 F.2d 725, 728 (D.C. Cir. 1975) ("Of course individual citizens have a constitutional right to wear beards, sideburns and mustaches in any form and to any length they may choose. But that is not a right protected by the Federal Government, by statute or otherwise, in a situation where a private employer has prescribed regulations governing the grooming of its employees while in that employer's service. The wearing of a uniform, the type of uniform, the requirement of hirsute conformity applicable to whites and blacks alike, are simply non-discriminatory conditions of employment falling within the ambit of managerial decision to promote the best interests of its business."); Baker v. Cal. Land Title Co., 507 F.2d 895, 896–97 (9th Cir. 1974) (stating that Title VII is aimed to eliminate discrimination on the basis of classification, not "regulations by employers of dress or cosmetic or grooming practices which an employer might think his particular business required").

Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group."[217] Accordingly, employer policies governing appearance that impact religious individuals fall within Title VII's commands and are thus subject to judicial review notwithstanding the fact that the policies may be neutral or generally applicable. Therefore, courts presented with workplace segregation cases are to perform their routine judicial function by ensuring that employers do not discriminate on the basis of religion, even when the employer policies in question are non-discriminatory on their face.

V.
CONCLUSION

This Article explores employers' attempts to respond to actual or perceived customer preferences by placing employees with conspicuous religious appearances in areas out of public view or by rejecting applicants with conspicuous religious appearances altogether. This Article challenges these practices, and the court decisions that uphold them, as inconsistent with Title VII.

There are two primary bases for this opposition. The first speaks to effects. These practices reinforce majoritarian norms, marginalize individuals who follow their religious tenets, establish defined social spaces to which these individuals are restricted, and deny religious individuals meaningful employment opportunities. Put differently, these practices effectively inform individuals with conspicuous religious appearances that they are categorically unsuitable for certain professional and social interactions solely because of their appearances. Meanwhile, applicants without a religious appearance are accepted as presumptively fit to associate with co-workers and the employer's customer base.

The second basis is the law. These practices cannot be squared with various legal sources, including the text and purpose of Title VII, federal case law, and lessons from related contexts. These sources all support the view that the law does not permit employers to segregate individuals with obvious religious identities, either in the workplace or from the workforce, based on customer preferences or image-based reasons. Specifically, such segregation cannot constitute a "reasonable accommodation" under Title VII. And negative customer reactions or a potential decline in business from accommodating the employees or applicants cannot give rise to the statute's "undue hardship" safe harbor.

In addition, this Article argues in support of legislation that would make clear that the segregation of individuals with such identities, even if based on customer preferences, violates Title VII. Without the clarification offered in this

217. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 349 (1977) (citations omitted).

Article or legislation that reinforces the strictures of Title VII, courts may continue to enable employers to perpetuate stereotypical notions regarding the proper physical and social areas to which the overtly religious belong.

It may be the case that individuals with conspicuous religious appearances, either as a class or particular individuals within the group, are not accepted by society as deserving of certain positions or interactions. Such social calculations, infected as they may be by bias and majoritarian preferences, will, when left alone, direct the roles and places of religious minorities. The law, however, commands and compels otherwise unrestrained social behavior to conform to specific rules and principles. In this instance and as this Article argues, the law requires that individuals with visible religious identities shall be free to occupy the same positions available to everyone else and interact with the public notwithstanding the individuals' religious appearances or any social aversion thereto.