

# INOCULATING TITLE VII: THE “UNDUE HARDSHIP” STANDARD AND EMPLOYER-MANDATED VACCINATION POLICIES

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*The widespread administration of a vaccine is essential to bringing an end to the COVID-19 pandemic. Employers can contribute to this goal by requiring employees to be vaccinated. The ability of employers to impose vaccine mandates is theoretically limited in part by Title VII of the Civil Rights Act of 1964, which requires employers to accommodate religious employees unless doing so would impose an “undue hardship” on the employer. Under the current interpretation of undue hardship, employers typically cannot face legal liability for denying accommodations to employees refusing to receive an employer-mandated vaccine on religious grounds, though some employers may provide accommodations voluntarily. However, there are calls to reinterpret this standard so that employers must absorb greater costs before they may deny religious accommodations. If such calls are heeded, it may impair the ability of employers to mandate vaccines and, in turn, negatively affect public health. This Note argues that employers will not be required to provide religious accommodations to employer-mandated vaccines, even under the most employee-friendly version of the standard proposed. Nevertheless, any change to the standard should address the issue of vaccine mandates specifically to encourage employers to adopt vaccine mandates without voluntarily providing religious accommodations.*

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#### INTRODUCTION

In the United States, COVID-19 has caused hundreds of thousands of deaths.<sup>1</sup> While precautionary measures, such as mask wearing and social distancing, can limit the further spread of COVID-19, vaccination of the majority of the population is the most effective way to end the pandemic and save potentially millions of lives.<sup>2</sup>

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1. *COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 18, 2021), [https://covid.cdc.gov/covid-data-tracker/#cases\\_casesper100klast7days](https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days) [<https://perma.cc/4EM7-NMN5>].

2. See Brian Dean Abramson, *Preparing Health Care Providers for a Covid-19 Vaccine*, J. HEALTH & LIFE SCI. L., June 2020, at 2, 2; Kwame Opam, *Americans Are More Willing to Take a Coronavirus Vaccine, Poll Suggests*, N.Y. TIMES (Nov. 17, 2020),

Nevertheless, immunization rates among Americans for other voluntary vaccinations remain low.<sup>3</sup> While a majority of Americans have indicated that they would take a COVID-19 vaccine, a significant portion of the population has suggested they would not.<sup>4</sup> A vaccination rate equivalent to the percentage of Americans who have indicated a willingness to be vaccinated would be insufficient for developing herd immunity and allowing removal of precautionary measures.<sup>5</sup>

Given the severity of COVID-19 and the difficulties of effectively distributing vaccines voluntarily, particularly among those who are vaccine-hesitant, mandatory vaccination policies may be the most effective way for achieving widespread vaccination.<sup>6</sup> Vaccine mandates may effectively ensure high levels of vaccination, but their efficacy is limited by the difficulty of implementing mandates and the number of exemptions provided.<sup>7</sup> While states and the federal government have some authority to impose mandatory vaccination policies, employers are better suited to encourage widespread

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<https://www.nytimes.com/2020/11/17/health/gallup-poll-coronavirus-vaccine.html> [<https://perma.cc/8VJR-U2QS>] (“[W]idespread inoculation against the virus is seen as essential before restrictions can be lifted and life can return to normal, or something close to it.”); Carl Zimmer, *2 Companies Say Their Vaccines Are 95% Effective. What Does That Mean?*, N.Y. TIMES (Dec. 4, 2020), <https://www.nytimes.com/2020/11/20/health/covid-vaccine-95-effective.html> [<https://perma.cc/DLV9-DWLH>] (noting that widespread distribution is necessary because “a vaccine with extremely high efficacy in clinical trials will have a small impact if only a few people end up getting it”).

3. Despite guidance from the Centers for Disease Control and Prevention recommending a yearly influenza (“flu”) vaccination, only 48.4 percent of adults received a flu vaccine during the 2019–20 flu season. *Flu Vaccination Coverage, United States, 2019–20 Influenza Season*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 1, 2020), <https://www.cdc.gov/flu/fluview/coverage-1920estimates.htm#methods> [<https://perma.cc/YF5B-JHWR>]. Flu vaccination rates vary significantly by age, ethnicity, and state. *Id.* COVID-19 vaccination rates should be higher than flu vaccination rates because the individual cost of declining a COVID-19 vaccine is greater than the cost of declining a flu vaccine since flu vaccines are typically only about 50 percent effective and the flu is less lethal than COVID-19. See Simon Kuper, *Never Mind What Antivaxers Say—Just Watch What They Do*, FIN. TIMES (Nov. 26, 2020), <https://www.ft.com/content/7ff00e10-c786-4ca0-842c-e7b52d2b237f> [<https://perma.cc/QX5Z-MCRX>]. The deadliness of COVID-19 and individuals’ strong desire to return to daily activities after months of restrictions may convince some of those who are typically vaccine-hesitant to take a COVID-19 vaccine regardless. *Id.* However, low flu vaccination rates demonstrate the difficulty of getting Americans to voluntarily be vaccinated, even when flu vaccines have been widely researched and recommended.

4. 65 percent of Americans indicated that they would get a COVID-19 vaccine. Lydia Saad, *U.S. Readiness to Get COVID-19 Vaccine Steadies at 65%*, GALLUP (Jan. 12, 2021), <https://news.gallup.com/poll/328415/readiness-covid-vaccine-steadies.aspx> [<https://perma.cc/Z734-DRWW>].

5. See Donald G. McNeil Jr., *How Much Herd Immunity Is Enough?*, N.Y. TIMES (Dec. 24, 2020), <https://www.nytimes.com/2020/12/24/health/herd-immunity-covid-coronavirus.html> [<https://perma.cc/HK23-5BPF>] (estimating that 70 to 90 percent of the population needs to obtain resistance to COVID-19 naturally or through vaccination in order to achieve herd immunity).

6. Abramson, *supra* note 2, at 3–4. Individuals refusing vaccination is one of the largest obstacles to widespread immunization. *Id.* at 4.

7. Kevin Hooker, *Exemptions to Vaccine Mandates: The Problem and Possible Remedies*, 14 HOUS. J. HEALTH L. & POL’Y 263, 263 (2014) (noting that the public health goal of preventing disease is threatened by the increasing number of exemptions to state-mandated vaccines).

vaccination among adults because they are largely free to impose vaccinations on their workers with few restrictions.<sup>8</sup> By making employees' jobs dependent on receiving a vaccination, employers provide a safer work environment and contribute to the societal goal of vaccinating those who would otherwise not vaccinate themselves voluntarily.<sup>9</sup> However, employers who chose to impose mandatory vaccination policies may have to accommodate employee requests for religious exemptions or face liability under Title VII of the Civil Rights Act of 1964<sup>10</sup> for religious discrimination.<sup>11</sup>

Title VII prohibits employers from discriminating against employees on the basis of "race, color, religion, sex, or national origin."<sup>12</sup> Employers cannot discriminate against employees by treating them differently, allowing them to be harassed, or retaliating against them on the basis of their membership in a protected class.<sup>13</sup> However, only religious employees can experience another basic form of discrimination—failure to reasonably accommodate employees' religious practices.<sup>14</sup> This is provided for in section 701(j), where the Equal Employment Opportunity Act of 1972<sup>15</sup> amended Title VII to state that

all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.<sup>16</sup>

In a religious accommodation case, whether an employer must provide an accommodation depends, in part, on what constitutes an "undue hardship." In *Trans World Airlines, Inc. v. Hardison*,<sup>17</sup> the U.S. Supreme Court interpreted "undue hardship" to mean anything that requires an employer "to bear more than a *de minimis* cost."<sup>18</sup> This employer-friendly standard has limited the ability of employees to get religious accommodations because employers must only satisfy a relatively small burden in order to deny an

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8. See, e.g., Teri Dobbins Baxter, *Employer-Mandated Vaccination Policies: Different Employers, New Vaccines, and Hidden Risks*, 2017 UTAH L. REV. 885, 888; Vimal Patel, *Employers Can Require Workers to Get Covid-19 Vaccine, U.S. Says*, N.Y. TIMES (Dec. 18, 2020), <https://www.nytimes.com/2020/12/18/us/eoc-employers-coronavirus-mandate.html> [<https://perma.cc/YFE4-898M>] (noting that public health experts believe that employers may play a key role in vaccinating enough of the population to achieve herd immunity).

9. Patel, *supra* note 8.

10. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

11. See, e.g., Baxter, *supra* note 8, at 893.

12. 42 U.S.C. § 2000e-2.

13. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL: SECTION 12 RELIGIOUS DISCRIMINATION 5-6 (2008), [https://www.eeoc.gov/sites/default/files/migrated\\_files/policy/docs/religion.pdf](https://www.eeoc.gov/sites/default/files/migrated_files/policy/docs/religion.pdf) [<https://perma.cc/CU3N-DYZ6>].

14. *Id.* at 1.

15. Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in scattered sections of 5 and 42 U.S.C.).

16. 42 U.S.C. § 2000e(j).

17. 432 U.S. 63 (1977).

18. *Id.* at 84.

accommodation.<sup>19</sup> This standard largely allows employers to impose a mandatory vaccination policy without providing religious exemptions and to discharge employees who refuse to comply with the policy.<sup>20</sup> However, since the *Hardison* decision, there have been extensive calls for this standard to be revised.<sup>21</sup> If the standard for undue hardship changes, it may affect the willingness of employers to impose mandatory vaccines, which could have important ramifications during a public health crisis.

This Note will explore how changing the interpretation of undue hardship could affect the ability of employers to mandate vaccinations and the implications this may have on the COVID-19 pandemic and future public health crises. Part I provides an overview of employer-mandated vaccination policies, the history and interpretation of Title VII's undue hardship provision, and how Title VII is applied in cases involving employer-mandated vaccines. Part II examines criticisms of the current interpretation of undue hardship, discusses proposals for raising this standard, and considers the possible consequences of doing so. Finally, Part III discusses how, even under the most expansive standard proposed, employers will still be able to require employees to be vaccinated without providing any accommodations.

#### I. EMPLOYER-MANDATED VACCINATION POLICIES AND TITLE VII

Vaccines are the most effective way of eradicating infectious diseases.<sup>22</sup> However, in order for a vaccine to slow the spread of an infectious disease to a rate sufficient to effectively eradicate it, the majority of the population must be vaccinated.<sup>23</sup> The higher the rate of immunization in a community, the lower the risk of disease for all individuals because of the principle of herd immunity.<sup>24</sup> Individuals refusing vaccination can slow herd immunity from being achieved.<sup>25</sup> Even if herd immunity is initially achieved, that initial immunity can be lost over time if individuals start to decline immunizations,

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19. See, e.g., Huma T. Yunus, Note, *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, 657–58 (2004) (suggesting employees are less likely to succeed on a religious discrimination claim because of *Hardison's* interpretation of undue hardship).

20. See *infra* Part I.C.

21. See *infra* Part I.B.2. Two petitions for certiorari requesting that the Court revisit the *Hardison* standard were recently denied. Petition for a Writ of Certiorari at 1, *Dalberiste v. GLE Assocs., Inc.*, No. 19-1461, 2021 WL 12490921 (U.S. Apr. 5, 2021) (mem.) [hereinafter *Dalberiste* Petition]; Petition for Writ of Certiorari at 1, *Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227 (2021) (No. 19-1388) [hereinafter *Memphis Light* Petition].

22. See Kevin M. Malone & Alan R. Hinman, *Vaccination Mandates: The Public Health Imperative and Individual Rights*, in *LAW IN PUBLIC HEALTH PRACTICE* 262, 265 (Richard A. Goodman et al. eds., 1st ed. 2003) (detailing the efficacy of vaccines to eradicate or significantly reduce the spread of numerous infectious diseases).

23. See *id.* at 263.

24. See *id.* at 264. Herd immunity occurs when the vaccination of a sufficient number of individuals creates “a protective barrier against the likelihood of transmission of the disease in the community, thus indirectly protecting those who are not immunized and those who received vaccine but are not protected (vaccine failures).” *Id.* at 264.

25. See *id.* at 264–65.

leading to a loss of herd immunity entirely and contributing to further outbreaks.<sup>26</sup> Mandatory vaccine policies can mitigate against the threat unvaccinated individuals pose to the entire population.<sup>27</sup> Part I.A discusses the ability of employers to impose mandatory vaccination policies, as well as the benefits of doing so. Part I.B introduces one theoretical limit on employers' power to implement these policies—Title VII's requirement that employers reasonably accommodate religious employees unless doing so involves an undue hardship—and explores how the interpretation of undue hardship has evolved. Part I.C examines how this standard applies when a religious employee requests an accommodation to an employer-mandated vaccination policy.

A. *The Ability and Desirability of Employers to Mandate Vaccination of Employees*

Governments and employers are the most logical enforcers of vaccine mandates. In the United States, state governments can impose mandatory vaccination policies.<sup>28</sup> In *Jacobson v. Massachusetts*,<sup>29</sup> the Supreme Court ruled that it is within a state's police powers to require that citizens be vaccinated in order to protect public health and safety.<sup>30</sup> This precedent has been used to support the most widely adopted types of vaccine mandates—compulsory vaccination of children in schools and individuals working in health care facilities.<sup>31</sup> Vaccination among these key groups has limited the need for compulsory vaccination of all adults.<sup>32</sup> However, the severity of the COVID-19 pandemic may create a desire to mandate the vaccination of all adults. State legislatures could theoretically impose widespread vaccine mandates on adults under this precedent but doing so may be politically unpopular.<sup>33</sup> Instead, employers may be better suited to encourage vaccination among adults.

While imposing vaccine mandates provides benefits to many types of employers, the majority of employers who currently impose vaccine mandates operate in the health care industry.<sup>34</sup> However, given the severity and nature of COVID-19, more employers outside of the health care industry may also adopt vaccine mandates. Parts I.A.1 and I.A.2 discuss how and why all employers—within and beyond the health care industry—may utilize vaccine mandates.

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26. *See id.*

27. *See id.* at 263.

28. Baxter, *supra* note 8, at 900.

29. 197 U.S. 11 (1905).

30. *Id.* at 38–39.

31. *See* *Zucht v. King*, 260 U.S. 174, 177 (1922) (holding that a local ordinance prohibiting unvaccinated children from attending school was a valid use of the local government's police power); Baxter, *supra* note 8, at 905 (explaining that statutory vaccine mandates typically apply to children attending school and health care workers).

32. Baxter, *supra* note 8, at 905.

33. *Id.*

34. *Id.* at 914.

### 1. Mandatory Vaccination Policies in Health Care Workplaces

Health care providers are the most common type of employers that impose mandatory vaccinations.<sup>35</sup> These policies typically require employees to receive influenza or tetanus, diphtheria, and pertussis vaccines.<sup>36</sup> Health care providers have a strong incentive to mandate vaccinations, as they help prevent the spread of contagious, potentially deadly, disease between workers and vulnerable patients.<sup>37</sup> Despite these clear benefits, the voluntary influenza vaccination rate among health care workers has been lower than necessary to protect patients.<sup>38</sup> By mandating vaccines, instead of simply encouraging workers to be vaccinated, health care providers can more effectively ensure that the majority of workers receive immunizations.<sup>39</sup>

Some employers have created these policies to comply with state mandates requiring the immunization of health care workers.<sup>40</sup> In the last two decades, other health care providers have begun implementing private, internal policies absent a state mandate or in addition to what the state requires.<sup>41</sup> In 2005, the first hospitals independently implemented mandatory vaccination requirements.<sup>42</sup> Since then, many more health care providers have chosen to implement vaccine policies, but these “represent only a fraction of American healthcare facilities.”<sup>43</sup>

Some health care providers are reluctant to impose vaccination mandates because unionized employees may challenge the mandate or because “[t]here are no published cases of patients successfully suing a hospital because the patient contracted influenza from an unvaccinated healthcare worker,” making the risk of liability low.<sup>44</sup> However, if this risk of liability increases due to greater adoption of mandates or a successful patient suit, more health care providers may begin to impose mandates.<sup>45</sup>

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35. *Id.*

36. *Id.* at 906–07.

37. *Id.* at 905–06.

38. *See id.* at 907–08 (noting that in order to protect high-risk patients, it is essential that the majority of workers in a health care facility be vaccinated and that some workers remaining unvaccinated contributes to outbreaks).

39. *See* Dorit Rubinstein Reiss & V. B. Dubal, *Influenza Mandates and Religious Accommodation: Avoiding Legal Pitfalls*, 46 J.L. MED. & ETHICS 756, 756 (2018) (noting that health care providers with mandates have significantly higher flu vaccination rates than providers who make vaccination voluntary and that methods simply encouraging vaccination, such as education and improving vaccine accessibility, are not as effective as mandates).

40. *See* Brian Dean Abramson, *Vaccine Law in the Health Care Workplace*, J. HEALTH & LIFE SCI. L., June 2019, at 22, 25–27 (providing examples of different state mandates for health care worker vaccination).

41. *See id.* at 27 (“State and private mandates may coexist, as state mandates only set a floor, with private institutions generally being permitted to mandate vaccinations more broadly than those mandated by the state, absent state laws expressly limiting the ability of private institutions to impose vaccination requirements.”).

42. Baxter, *supra* note 8, at 908.

43. *Id.* at 909.

44. *Id.* at 913.

45. *Id.* at 914.

## 2. Mandatory Vaccination Policies in Non-Health Care Workplaces

While the majority of mandatory vaccination policies are implemented by health care providers, employers in other industries are also free to impose vaccines on their employees. These employers may choose to implement a vaccine mandate for various reasons. First, mandating vaccination may have economic benefits for businesses that experience financial losses due to seasonal illnesses, such as influenza.<sup>46</sup> By requiring vaccination, employers can mitigate against the decline in productivity and profits, as well as the rise in health care costs, caused by employees falling ill.<sup>47</sup> Next, non-health care employers may be motivated to mandate vaccinations in order to protect employees or customers.<sup>48</sup> Some employers may institute vaccine mandates because the nature of the business increases employees' risk of exposure to vaccine-preventable disease, such as flight attendants or contractors working aboard a U.S. navy vessel.<sup>49</sup> Other businesses that frequently serve vulnerable individuals, such as pregnant women, caretakers, or children, may also be inclined to protect their customers and employees from exposure to vaccine-preventable diseases.<sup>50</sup> While employers are unlikely to face legal liability if an unvaccinated worker infects another employee or customer, businesses may still be inclined to impose a vaccine mandate for public relations or economic reasons.<sup>51</sup>

While non-health care employers are legally permitted to implement vaccination mandates, few have chosen to do so because of potential opposition from unions and liability under Title VII or the Americans with Disabilities Act of 1990<sup>52</sup> (ADA). However, given the severity of COVID-19, more employers may be willing to implement COVID-19 vaccinations to curb the transmission of the disease and lessen economic consequences.<sup>53</sup>

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46. *See id.* at 919 (noting that the flu costs employers billions of dollars in productivity losses each year).

47. *Id.* at 920.

48. *Id.* at 918.

49. *See Baetge-Hall v. Am. Overseas Marine Corp.*, 624 F. Supp. 2d 148, 151–54 (D. Mass. 2009) (detailing the termination of an employee for refusing to comply with a mandatory smallpox and anthrax vaccination policy enforced by her employer, a privately owned contractor managing ships for the U.S. navy); *Skuse v. Pfizer, Inc.*, 236 A.3d 939, 945 (N.J. 2020) (detailing Pfizer's policy requiring all corporate flight attendants to receive a yellow fever vaccination).

50. *See Baxter, supra* note 8, at 922 (citing Motherhood Maternity, Disneyland, Babies 'R Us, and medical supply stores as examples of businesses that serve potentially vulnerable customers).

51. *Id.* at 923. However, employers may be less motivated to mandate vaccines, even during a major outbreak, if customers pose more of a risk for spreading the disease than employees. *See id.* at 923–24 (suggesting that after several Disney theme park employees were infected with measles during an outbreak in California, Disney did not mandate vaccines for all employees possibly "because other unvaccinated children are a significant risk factor and the park is unlikely to require all guests to be vaccinated").

52. Pub L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 and 47 U.S.C.); *Baxter, supra* note 8, at 919–20.

53. *See Baxter, supra* note 8, at 925 (noting that in the event of newly developed vaccines to address an outbreak of a disease, employers will decide whether to require vaccination based on the disease's severity and contagiousness, as well as the new vaccine's safety).



*B. The Development of Title VII's Undue Hardship Standard*

Private employers enforcing a mandatory vaccination policy can face liability under Title VII, which prohibits employers from discriminating against employees on the basis of “race, color, religion, sex, or national origin.”<sup>54</sup> When Title VII was originally enacted in 1964, the text of the statute did not explicitly require employers to provide accommodations for religious employees.<sup>55</sup> Instead, Title VII treated religion like other protected categories.<sup>56</sup> This led to confusion among the courts about whether employers had an affirmative duty to accommodate employees’ religious practices or just an obligation to avoid discriminating against employees based on religion.<sup>57</sup> To clarify this issue, Congress amended Title VII to include an affirmative duty to accommodate religious employees by promulgating section 701(j) in 1972.<sup>58</sup> According to the amendment, employers must “reasonably accommodate the religious practices and beliefs of employees unless doing so would be an undue hardship.”<sup>59</sup> By requiring employers to provide reasonable accommodations when doing so would not pose an undue hardship, section 701(j) allows an employee “to avoid choosing between his faith and his job.”<sup>60</sup> While the congressional record clearly suggests that Congress intended the amendment to provide greater protections for religious employees, the extent to which employers were required to provide accommodations remained unclear because undue hardship was left undefined.<sup>61</sup>

1. *Hardison*: Defining Undue Hardship as a More than “De Minimis Cost”

The Supreme Court was left to interpret undue hardship. In *Hardison*, the Supreme Court examined “the extent of the employer’s obligation under Title VII to accommodate an employee whose religious beliefs prohibit[ed] him from working on Saturdays.”<sup>62</sup> Trans World Airlines (TWA), the employer, ran a maintenance and overhaul base with various different departments.<sup>63</sup> TWA assigned employees at the base to shifts in accordance with a seniority system established by a collective bargaining agreement maintained with

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54. 42 U.S.C. § 2000e-2(a)(1).

55. Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575, 580 (2000).

56. *Id.*

57. *Id.*; see *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971) (per curiam).

58. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, sec. 2, § 701(j), 86 Stat. 103, 103 (codified at 42 U.S.C. § 2000e(j)) (amending section 701(j) of Title VII); Kaminer, *supra* note 55, at 580.

59. Christopher D. Jones, Note, *Redefining “Religious Beliefs” Under Title VII: The Conscience as the Gateway to Protection*, 72 A.F. L. REV. 1, 21 (2015).

60. *Id.*

61. Kaminer, *supra* note 55, at 584–85.

62. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 66 (1977).

63. *Id.*

International Association of Machinists and Aerospace Workers (IAM), the workers' union.<sup>64</sup>

Hardison, a TWA employee, requested that he not be scheduled to work on the Sabbath in accordance with his beliefs as a member of the Worldwide Church of God.<sup>65</sup> Hardison's request was originally granted, but shortly after, Hardison bid for and was assigned to another building within TWA's base with a separate seniority list.<sup>66</sup> In the new building, Hardison was second from the bottom of the seniority list, giving him lesser priority when choosing shifts.<sup>67</sup> When Hardison was asked to work on Saturdays to fill in for another employee on vacation, "TWA agreed to permit the union to seek a change of work assignments for Hardison, but the union was not willing to violate the seniority provisions . . . , and Hardison had insufficient seniority to bid for a shift having Saturdays off."<sup>68</sup> TWA also denied the suggestion that Hardison work four days a week because his "job was essential and on weekends he was the only available person on his shift to perform it."<sup>69</sup> After failing to find a satisfactory accommodation for all parties, Hardison declined to go to work on Saturdays and was subsequently discharged for insubordination.<sup>70</sup>

Hardison brought suit against TWA and IAM, alleging that "his discharge by TWA constituted religious discrimination in violation of Title VII."<sup>71</sup> Hardison "also charged that the union had discriminated against him by failing to represent him adequately in his dispute with TWA and by depriving him of his right to exercise his religious beliefs."<sup>72</sup> While section 701(j) had not yet been formally enacted at the time of Hardison's discharge, Equal Employment Opportunity Commission (EEOC) guidelines from 1967 contained similar language requiring employers to provide reasonable accommodations for religious employees absent undue hardship.<sup>73</sup>

The district court found that neither TWA nor IAM violated Title VII by terminating Hardison and instead found that both parties satisfied the duty to accommodate Hardison's religious practice under Title VII.<sup>74</sup> The court held that IAM's duty to accommodate Hardison's religion "did not require the union to ignore its seniority system" and instead just required that they fairly represent Hardison.<sup>75</sup> Noting that "[t]he duty to accommodate does not

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64. *Id.* at 67. Under the seniority system, "[t]he most senior employees [had] first choice for job and shift assignments, and the most junior employees [were] required to" fill in on shifts and job assignments when other workers were unavailable. *Id.*

65. *Id.*

66. *Id.* at 68.

67. *Id.*

68. *Id.* (footnote omitted).

69. *Id.* at 68.

70. *Id.* at 69.

71. *Id.*

72. *Id.*

73. *See id.* at 66, 69 (recognizing that the 1967 EEOC guidelines and similar language subsequently adopted in section 701(j) formed the basis of Hardison's claim).

74. *Hardison v. Trans World Airlines*, 375 F. Supp. 877, 891 (W.D. Mo. 1974), *aff'd*, 527 F.2d 33 (8th Cir. 1975), *rev'd*, 432 U.S. 63 (1977).

75. *Id.* at 883.

require that an employer make every effort short of going out of business to permit his employees to say [sic] on the job and also to observe their religion,” the court found that TWA’s actions constituted a reasonable accommodation and “that any further action by TWA would have worked an undue hardship on the conduct of its business.”<sup>76</sup>

The Eighth Circuit affirmed the judgment against IAM and reversed and remanded the judgment against TWA.<sup>77</sup> The court found that TWA declined three reasonable accommodations proposed by Hardison, including allowing Hardison to work a four-day week, “fill[ing] Hardison’s Sabbath shift from other available personnel” and paying that individual overtime pay, or “swap[ping] between Hardison and another employee, either for another shift or for the Sabbath days.”<sup>78</sup> By declining these solutions, the court held that “TWA engaged in religious discrimination by breach of its duty to make a reasonable accommodation to the religious needs of Hardison through affirmative action.”<sup>79</sup>

The Supreme Court reversed the Eighth Circuit’s decision and found that TWA satisfied its statutory duty to accommodate Hardison’s request.<sup>80</sup> The Court acknowledged that under the text of section 701(j), “the employer’s statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship, is clear, but the reach of that obligation has never been spelled out by Congress or by EEOC guidelines.”<sup>81</sup> With this ambiguity in mind, the Court ruled that absent any “clear statutory language or legislative history to the contrary, [the Court] will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.”<sup>82</sup> Instead, the Court held that requiring TWA “to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship.”<sup>83</sup> The Court found that all of the accommodations proposed by the lower court would have imposed “more than a *de minimis* cost” on TWA.<sup>84</sup>

## 2. The Aftermath of *Hardison*: Attempts to Change the Interpretation of Undue Hardship

After the *Hardison* decision, the extent to which employers needed to provide accommodations for religious employees remained unclear, and various attempts were made to change the undue hardship standard.<sup>85</sup> Shortly after the *Hardison* decision, the House of Representatives introduced

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76. *Id.* at 889.

77. *Hardison*, 527 F.2d at 44 (8th Cir. 1975).

78. *Id.* at 39–41.

79. *Id.* at 44.

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

81. *Id.* at 75.

82. *Id.* at 85.

83. *Id.* at 84.

84. *Id.*

85. *See Kaminer, supra* note 55, at 590–91.

legislation to replace “undue hardship” with “severe material hardship,” but the proposal died in committee.<sup>86</sup> In 1978, the EEOC held hearings nationwide to discuss the meaning of the *Hardison* ruling.<sup>87</sup> As a result of these hearings, the EEOC attempted to clarify *Hardison*’s interpretation of the section 701(j) standard by issuing the Guidelines on Discrimination Because of Religion (“Guidelines on Discrimination”) in 1980.<sup>88</sup> In the Guidelines on Discrimination, the EEOC not only intended to clarify the standard but also attempted to expand the extent to which employers must accommodate employees farther than what was required in *Hardison*.<sup>89</sup>

However, the Guidelines on Discrimination failed to meaningfully change the interpretation of section 701(j). First, the Guidelines on Discrimination specified what type of “reasonable accommodation” an employer was required to provide,<sup>90</sup> but the Supreme Court expressly declined to follow these requirements in *Ansonia Board of Education v. Philbrook*.<sup>91</sup> Instead, the Court ruled that there was “no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation.”<sup>92</sup> Next, the Guidelines on Discrimination addressed *Hardison*’s interpretation of undue hardship by identifying factors that the EEOC would use to decide what constitutes an undue hardship<sup>93</sup> and provided examples of what would and would not constitute an undue hardship.<sup>94</sup> While these factors gave some guidance on what

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86. See H.R. 8670, 95th Cong. (1977); 123 CONG. REC. 25,965 (1977); Robert A. Caplen, Note, *A Struggle of Biblical Proportions: The Campaign to Enact the Workplace Religious Freedom Act of 2003*, 16 U. FLA. J.L. & PUB. POL’Y 579, 592 (2005).

87. See Caplen, *supra* note 86, at 593–94.

88. See Kaminer, *supra* note 55, at 590; see also Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605 (2020).

89. See Kaminer, *supra* note 55, at 591–92; see also Yunus, *supra* note 19, at 666–67.

90. Under the Guidelines on Discrimination, once an employee notifies the employer of a request for religious accommodation, the employer must attempt to provide the accommodation requested and can only deny the accommodation if every available alternative accommodation would impose an undue hardship. 29 C.F.R. § 1605.2(c)(1). In a case where “there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.” *Id.* § 1605.2(c)(2)(ii). This imposes a greater duty of accommodation than was suggested in *Hardison*, where the Court “merely required that the employer show any de minimis hypothetical hardship, which would constitute undue hardship [to] alleviate an employer’s duty to accommodate.” Yunus, *supra* note 19, at 666.

91. 479 U.S. 60 (1986).

92. *Id.* at 68.

93. The Guidelines on Discrimination provide that the EEOC “will determine what constitutes ‘more than a de minimis cost’ with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation.” 29 C.F.R. § 1605.2(e)(1) (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)).

94. The Guidelines on Discrimination provide examples of what would and would not constitute an undue hardship under those factors and *Hardison*. *Id.* § 1605.2(e)(1)–(2). If an employee needs time off for religious purposes, an accommodation imposing “costs similar to the regular payment of premium wages” to a substitute employee or requiring “variance from a bona fide seniority system” would impose an undue hardship. *Id.* However, infrequently paying a premium wage for a substitute, temporarily paying a premium wage “while a more

accommodations constitute an undue hardship, the Guidelines on Discrimination failed to strengthen protections for employees as intended because no specific analytical framework or detailed factors were provided to guide employers, employees, and judges on when an accommodation needs to be provided.<sup>95</sup> Given these challenges and the Court's express decision to not follow the Guidelines on Discrimination in *Philbrook*, the interpretation of section 701(j) remained unchanged by those guidelines.

Following *Hardison*, the Guidelines on Discrimination, and *Philbrook*, members of Congress have introduced various pieces of legislation attempting to raise the undue hardship standard and to require employers to provide greater religious accommodations. The Religious Accommodation Amendment,<sup>96</sup> which sought to amend section 701(j) to require employers to provide the reasonable accommodation that is least onerous on employees when multiple accommodations are possible, was introduced in the House in 1989 but died in subcommittee.<sup>97</sup>

The next significant attempt to redefine undue hardship began in 1994 with the introduction of the Workplace Religious Freedom Act (WRFA).<sup>98</sup> The WRFA has been introduced by members of both the House and Senate on multiple occasions from 1994 to 2012.<sup>99</sup> The key purpose of the proposed legislation was to explicitly overturn *Hardison* and *Philbrook* in order to provide for greater accommodations for religious employees.<sup>100</sup> In its initial iterations, the WRFA would have raised the *Hardison* standard by redefining undue hardship to mean a "significant difficulty or expense," just as the term is defined in the ADA.<sup>101</sup> However, concerns about the expansiveness of this provision led to the introduction of a more targeted version of the legislation in 2008 that would only provide this heightened standard to certain religious practices, including wearing religious hairstyles or clothing and taking time

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permanent accommodation is being sought," or making "[a]rrangements for voluntary substitutes and swaps . . . [that] do not violate a bona fide seniority system" would not impose an undue hardship. *Id.* Administrative costs to accommodate time off, such as "costs involved in rearranging schedules and recording substitutions for payroll purposes," also would not impose an undue hardship. *Id.* § 1605.2(e)(1).

95. See Yunus, *supra* note 19, at 667.

96. H.R. 2935, 101st Cong. (1989).

97. See *id.*; Laura E. Watson, Note, *(Un)reasonable Religious Accommodation: The Argument for an "Essential Functions" Provision Under Title VII*, 90 S. CAL. L. REV. 47, 59 (2016) (discussing the proposal of the Religious Accommodation Amendment and how it attempted to modify *Philbrook*).

98. H.R. 5233, 103rd Cong. (1994); see Caplen, *supra* note 86, at 600.

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

100. See Watson, *supra* note 97, at 59.

101. John H. Lawrence, Note, *Searching for Security: The Proposed Workplace Religious Freedom Act (WRFA) and Need for Heightened Protections for the Religious Expression of Prison Employees in the Work Environment*, 9 FIRST AMEND. L. REV. 749, 756 (2011).

off for a religious reason.<sup>102</sup> Despite bipartisan support and the addition of language intended to narrow the scope of the statute, the WRFA has failed to become law.<sup>103</sup>

Given the failed attempts to amend section 701(j), undue hardship and reasonable accommodation remain undefined. Instead, as established by *Hardison* and supplemented by *Philbrook*, the controlling interpretation of section 701(j) allows an employer to deny a religious accommodation if providing one would impose more than a de minimis cost.<sup>104</sup> This standard has been interpreted by lower courts to require employers to provide “only a minimal level of accommodation of religious employees.”<sup>105</sup> Accommodations requiring an employer to suffer financial costs, efficiency losses, or health and safety hazards or to violate a collective bargaining agreement have all been found to impose an undue hardship.<sup>106</sup> While whether an accommodation qualifies as an undue hardship is decided on a case-by-case basis, courts have interpreted the standard in a way that makes it difficult for employees to prevail on Title VII failure-to-accommodate claims.<sup>107</sup>

*C. The Application of the Hardison Standard to a Request for a Religious Exemption to Employer-Mandated Vaccination*

Under Title VII, employers with mandatory vaccination policies may be required to provide an accommodation to an employee who refuses to be vaccinated on religious grounds.<sup>108</sup> Some employers satisfy this by voluntarily offering religious or medical exemptions in their vaccination policies, but others without formal exemptions still must consider employees’ requests for an accommodation in accordance with Title VII.<sup>109</sup>

To establish a prima facie case of Title VII religious discrimination, an employee refusing vaccination must first show that “he held a sincere religious belief that conflicted with a job requirement” and that after he “informed his employer of the conflict,” he experienced an adverse employment action.<sup>110</sup> While the central authority figures of many major religions have expressed support of vaccines, some religions—such as the

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102. See S. 3686; S. 4046; S. 3628; Lawrence, *supra* note 101, at 756.

103. See Lawrence, *supra* note 101, at 756–57.

104. See Kaminer, *supra* note 55, at 610; Andrew Little, *Title VII and Religious Accommodation: An Evidentiary Approach to the Undue Hardship Standard Under Trans World Airlines v. Hardison*, 21 S.L.J. 225, 229 (2011) (“Taken together, the *Hardison/Ansonia* formulation for undue hardship holds that an employer need only make an offer of accommodation that results in de minimis cost, and it need not make an offer of accommodation at all if all possible accommodations would require greater than de minimis cost.”).

105. Kaminer, *supra* note 55, at 610.

106. *Id.* at 610–11.

107. See, e.g., Yunus, *supra* note 19, at 657–58.

108. While this section discusses employers generally, existing precedent focuses almost exclusively on vaccine requirements of healthcare employers.

109. Reiss, *supra* note 39, at 758.

110. See *Fallon v. Mercy Cath. Med. Ctr. of Se. Pa.*, 877 F.3d 487, 490 (3d Cir. 2017).

Church of Christ, Scientist—require adherents to abstain from vaccination.<sup>111</sup> Even if an employee’s faith does not explicitly prohibit vaccinations, an employee may request a religious exemption based on personally held religious beliefs.<sup>112</sup> However, the court must find that the personal belief is both sincerely held and that the “opposition to vaccination is a religious belief.”<sup>113</sup> If the court finds that the employee did have a valid anti-vaccination belief based on religion, the court must next examine the actions of the employer.<sup>114</sup>

After the employee demonstrates a prima facie case, “the burden then shifts to the employer to show that it offered a reasonable accommodation or, if it did not offer an accommodation, that doing so would have resulted in undue hardship.”<sup>115</sup> The most commonly offered accommodations include requiring employees to wear a face mask or reassigning employees to roles with limited exposure to others.<sup>116</sup> Merely assisting an employee in finding another role is also sufficient to discharge the employer’s burden of

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111. See Abramson, *supra* note 40, at 31 (explaining that some leaders in every major world religion “have endorsed vaccination generally and deemed it to be consistent with the teachings of the religion”); Janet S. Kim, Note, *Masking Your Rights: Facemask Requirements Under Mandatory Influenza-Vaccination Policies Violate Privacy Rights of Health Care Workers*, 53 SAN DIEGO L. REV. 427, 436 (2016) (noting that Christian Science is one of the few “religions that opposes vaccinations outright as a part of its religious doctrine”).

112. Daria Koscielniak, Note, *Broadening Healthcare Personnel’s Exemptions to Vaccination: Will Patients Pay the Ultimate Price?*, 25 TEMP. POL. & C.R.L. REV. 171, 184 (2016).

113. *Fallon*, 877 F.3d at 490, 492 (holding that an employee’s beliefs that he should not harm his body and that vaccines are harmful were not religious beliefs warranting an exemption under Title VII because these beliefs did not “address fundamental and ultimate questions having to do with deep and imponderable matters, [and were not] comprehensive in nature,” and they were “not manifested in formal and external signs”); see also *Brown v. Child’s Hosp. of Phila.*, 794 F. App’x 226, 227 (3d Cir. 2020) (affirming dismissal of employee’s complaint because no evidence suggested that her opposition to receiving a flu vaccine was religious in nature and instead was a personal medical belief). Cf. *Chenzira v. Cincinnati Child’s Hosp. Med. Ctr.*, No. 11-CV-00917, 2012 WL 6721098, at \*4 (S.D. Ohio Dec. 27, 2012) (holding that a vegan employee declining a vaccine “could subscribe to veganism with a sincerity equating that of traditional religious views” in a manner sufficient for the employee to survive a motion to dismiss her religious discrimination claim).

114. See *Jenkins v. Mercy Hosp. Rogers*, No. 19-CV-05221, 2020 WL 1271371, at \*2 (W.D. Ark. Mar. 17, 2020) (finding that an employee, who “sincerely believed that requirements from various books of the Christian Old Testament—Leviticus and Deuteronomy are identified in the complaint—prohibit[ed] her from receiving an influenza vaccine,” would have had a valid Title VII claim after being discharged by her employer for refusing vaccination if her employer was not an exempted religious institution).

115. *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 133 (1st Cir. 2004); see also *Baxter*, *supra* note 8, at 894 (discussing the employer’s burden in a vaccine accommodation case).

116. See *Horvath v. City of Leander*, 946 F.3d 787, 789 (5th Cir. 2020) (explaining accommodations offered to a firefighter seeking a religious exemption to a vaccine included “transfer[ing] to a code enforcement job that did not require a vaccination, or wear[ing] a respirator mask during his shifts, keep[ing] a log of his temperature, and submit[ing] to additional medical testing”).

demonstrating an offer of reasonable accommodation.<sup>117</sup> If the employee declines to accept the employer's offered reasonable accommodation, the employee can be discharged.<sup>118</sup>

Employers, particularly in the health care field, can alternatively discharge their burden under Title VII without ever offering an accommodation by demonstrating that providing one would impose an undue hardship. Employers can typically satisfy this showing easily because the majority of available accommodations require employers to incur more than a de minimis cost.<sup>119</sup> First, simply allowing an employee to be exempt from a vaccine mandate with no mitigating provisions would certainly impose an undue hardship. For an employee working in a setting that involves exposure to vulnerable individuals, providing that employee with a religious exemption while allowing them to remain in that position would impose more than a de minimis cost.<sup>120</sup> For health care employers, in particular, allowing an individual to decline vaccination without mitigating provisions will certainly pose an undue hardship due to the risk of exposing vulnerable patients.<sup>121</sup> This is also likely true of non-health care employers, especially during a pandemic.<sup>122</sup>

Next, accommodations that involve some precautions to avoid unvaccinated individuals spreading disease, such as requiring employees to wear masks or reassigning them to different positions, also typically impose

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117. See *Robinson v. Child's Hosp. Bos.*, No. 14-10263, 2016 WL 1337255, at \*7 (D. Mass. Apr. 5, 2016) (finding that a hospital reasonably accommodated an employee seeking a religious exemption by granting her a "temporary medical exemption while it reviewed her medical records," arranging an interview for a nonpatient facing position that was exempt from the hospital's vaccine mandate, providing her with resources and paid leave to look for a job elsewhere, giving her two extra weeks of leave after she failed to accept another position, and classifying "her termination a voluntary resignation to preserve her ability to re-apply for other Hospital positions in the future").

118. See *Horvath*, 946 F.3d at 792 (holding that an employee was fairly discharged after refusing to comply with an employer's offered reasonable accommodations); *EEOC v. Baystate Med. Ctr., Inc.*, No. 16-cv-30086, 2017 WL 4883453, at \*2 (D. Mass. Oct. 30, 2017) (detailing the discharge of a hospital employee with no patient contact after she inconsistently complied with her employer's reasonable accommodation of wearing a mask at all times).

119. See *Reiss*, *supra* note 39, at 758 ("Despite a strong legal argument that health care institutions need not provide religious accommodations in this context, we found that ironically, all the health care institutions that faced Title VII litigation challenges did, in fact, provide a religious exemption.").

120. See *Robinson*, 2016 WL 1337255, at \*10 ("Had the Hospital permitted her to forgo the vaccine but keep her patient-care job, the Hospital could have put the health of vulnerable patients at risk . . . . [A]ccommodating Robinson's desire to be vaccine-free in her role would have been an undue hardship because it would have imposed more than a *de minimis* cost.").

121. See *Reiss*, *supra* note 39, at 758. Health care workers declining vaccination "increases the risk of influenza transmitted to fellow employees and patients," and "[t]he risk to life is not eliminated or curtailed because the employee's reason not to vaccinate is religious. Even when weighed against the iniquities of religious discrimination, the burden on the hospital—and its patients—likely constitutes an undue hardship." *Id.*

122. See *Baxter*, *supra* note 8, at 920–21 ("If the employer can demonstrate that its workforce is susceptible to an outbreak, that an outbreak among its employees would create a serious economic hardship, and that the required vaccine is safe, the employer will have a strong case for requiring employees to be vaccinated.").



more than a *de minimis* cost.<sup>123</sup> Requiring masks poses an undue hardship because the masks are not always effective at prohibiting the transmission of disease.<sup>124</sup> Further, in order for a mask to be most effective, it must be worn correctly, but enforcing correct and constant wear can be difficult.<sup>125</sup> Given the difficulty of enforcement and the mixed effectiveness of reducing transmission, mask wearing is an imperfect substitute for receiving a vaccination and thus an employer can demonstrate that allowing an employee to wear a mask would impose an undue hardship on the business.<sup>126</sup>

Reassigning an employee to another role that does not require vaccination would also impose an undue hardship. In the health care industry, moving an employee to a different role imposes more than a *de minimis* cost because “it can deprive the hospital of trained workers available to work with patients, leading to those areas being understaffed and patients being underserved,” and burden other employees “who will have to shoulder additional tasks because of reassignment, or [because] those without religious objections . . . will have to be reassigned in turn to make room for the objecting employee.”<sup>127</sup> While more pronounced in the health care industry, these same burdens would also likely apply to non-health care employers.

While the limited precedent available suggests that employers are unlikely to face liability under Title VII for enforcing a mandatory vaccination policy, the EEOC has expressed a preference for policies that merely encourage, rather than require, vaccines.<sup>128</sup> The EEOC has stated that employers may institute a mandatory COVID-19 vaccine requirement but noted that employers must provide a reasonable accommodation to employees requesting a religious exemption and can only lawfully exclude those employees if a reasonable accommodation is impossible.<sup>129</sup> While the EEOC

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123. See Rene F. Najera & Dorit R. Reiss, *First Do No Harm: Protecting Patients Through Immunizing Health Care Workers*, 26 HEALTH MATRIX: J. L.-MED. 363, 394 (2016) (“Even if we see wearing a mask or reassignment as potential reasonable accommodations, these accommodations impose an undue burden on employers and may create too high a risk for patients’ health and life.”).

124. See *id.* at 393 (noting that masks may not always effectively prevent transmission and that requiring hospitals to provide more effective N-95 masks “when they do not normally carry enough to cover constant use is more than a *de minimis* burden”).

125. See *id.* (“[A] mask is a continuous precaution, like washing hands. This kind of precaution is much more vulnerable to employees forgetting, neglecting, or otherwise ignoring the requirement to wear a mask. It’s much harder to enforce than a one-time precaution, like installing seatbelts or getting a shot.”).

126. See *id.* at 392 (“But, if the mask does not prevent infection, the goal of the policy—to prevent infecting patients—will not be achieved. An accommodation that undermines the goal of the rule is not an accommodation an employer is reasonably required to offer.”); Reiss, *supra* note 39, at 757 (“The potential costs of preventable influenza cases include missed workdays and sick or dead patients—both significant burdens for hospital employers.”).

127. Najera & Reiss, *supra* note 123, at 393.

128. See *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Mar. 21, 2020), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> [<https://perma.cc/X7DD-QKP4>]; see also Baxter, *supra* note 8, at 920–21 (discussing the EEOC’s position on mandatory vaccinations).

129. See *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Dec. 16, 2020),

has acknowledged the legality of enforcing mandatory vaccination policies, the agency has intervened in situations “to counter employer vaccination mandates that the agency believes fail to accommodate religious beliefs pursuant to Title VII.”<sup>130</sup>

While the EEOC has successfully settled cases in which an employer declined to accommodate an employee, the current undue hardship standard allows employers to almost always impose a vaccine mandate without providing any religious accommodation. Since there are no perfect substitutes for receiving a vaccine, the burden created by allowing some employees to go unvaccinated is almost always more than a de minimis cost, especially if the employee works in the health care industry. However, as discussed in Part II of this Note, the undue hardship standard has frequently been questioned and some have called for the standard to be heightened.

## II. RAISING THE *HARDISON* STANDARD: SHOULD EMPLOYERS BE REQUIRED TO PROVIDE GREATER ACCOMMODATIONS FOR RELIGIOUS EMPLOYEES?

Title VII’s undue hardship provision, as defined in *Hardison*, makes it difficult for employees to get accommodations for their religious practices. Under the current definition of undue hardship, employers must provide an accommodation in limited circumstances, and religious employees denied an accommodation must comply with their job requirements or be discharged. This standard has long been debated and various parties have called for *Hardison* to be revisited.<sup>131</sup> The question of whether or not to revise the *Hardison* standard is now particularly salient because the COVID-19 pandemic presents an unprecedented set of challenges for the American workplace. COVID-19 has changed the way many Americans work and has added new pressures on employers to ensure the safety of their workers and customers, all while dealing with the economic fallout created by the pandemic. Any changes to the current undue hardship standard made by the Court or congressional action may affect the ability or willingness of employers to implement a mandatory vaccination policy.

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<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> [<https://perma.cc/M4HH-NA7G>].

130. Abramson, *supra* note 40, at 31; see *Memorial Healthcare to Pay \$74,418 to Settle EEOC Religious Discrimination Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (June 25, 2019), <https://www.eeoc.gov/newsroom/memorial-healthcare-pay-74418-settle-eeoc-religious-discrimination-lawsuit> [<https://perma.cc/H4AT-8VKM>] (announcing a settlement in a suit where the EEOC alleged that a hospital refused to hire a medical transcriptionist who requested a religious exemption to a flu vaccine based on her Christian beliefs and declined to allow her to wear a mask, despite allowing those with medical exemptions to wear a mask as an accommodation); *Mission Hospital Agrees to Pay \$89,000 to Settle EEOC Religious Discrimination Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Jan. 12, 2018), <https://www.eeoc.gov/newsroom/mission-hospital-agrees-pay-89000-settle-eeoc-religious-discrimination-lawsuit> [<https://perma.cc/HUW4-4Y74>] (announcing settlement of suit where the EEOC charged a hospital for refusing to accommodate and subsequently terminating employees who requested a religious exemption to the hospital’s flu vaccine mandate for not requesting the exemption by a specified date).

131. See *supra* Part I.B.2.

The question of whether to revise the *Hardison* standard is further relevant because several Justices have indicated a desire to revisit the case.<sup>132</sup> In February 2020, the Supreme Court evaluated a petition for a writ of certiorari in *Patterson v. Walgreen Co.*,<sup>133</sup> which requested, in part, that the Court revisit *Hardison*'s interpretation of undue hardship.<sup>134</sup> While the Court denied certiorari, Justice Alito indicated that the Court "should reconsider the proposition, endorsed by the opinion in [*Hardison*], that Title VII does not require an employer to make any accommodation for an employee's practice of religion if doing so would impose more than a *de minimis* burden."<sup>135</sup> According to Alito, the Court should "grant review in an appropriate case to consider whether *Hardison*'s interpretation should be overruled."<sup>136</sup> In April 2020, Justice Alito reiterated this desire by joining Justice Gorsuch's dissent to the Court's denial of certiorari in *Small v. Memphis Light, Gas & Water*,<sup>137</sup> another case presenting the opportunity to reconsider *Hardison*.<sup>138</sup> In his dissent, Gorsuch asserted that *Hardison*'s interpretation of undue hardship was a "mistake" and that "it is past time for the Court to correct it."<sup>139</sup>

Given these calls to revisit *Hardison* and the potential ramifications changing the standard could have on the American workplace in light of the COVID-19 pandemic, the question of what to do with the *Hardison* standard is particularly important. Part II.A will introduce arguments in favor of changing the current interpretation of undue hardship as a matter of statutory interpretation and policy. Part II.B will present different proposals for how the *Hardison* standard could be raised. Finally, Part II.C will present various counterarguments to raising the *Hardison* standard.

#### A. *Justifications for Revising Hardison's Interpretation of Undue Hardship*

A consensus of Justices, members of Congress, scholars, and interest groups believe that *Hardison*'s definition of undue hardship is incorrect and have made various proposals for how it should be revised.<sup>140</sup> Of those who disagree with *Hardison*, some argue that the interpretation of undue hardship as imposing anything more than a *de minimis* cost is incorrect as a matter of statutory interpretation.<sup>141</sup> Some also argue that the standard should be

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132. See *Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1227–29 (2021) (Gorsuch, J., dissenting); *Patterson v. Walgreen Co.*, 140 S. Ct. 685, 685 (2020) (Alito, J., concurring).

133. 140 S. Ct. 685 (2020).

134. Petition for a Writ of Certiorari at 28, *Patterson*, 140 S. Ct. 685 (No. 18-349).

135. *Patterson*, 140 S. Ct. at 685 (Alito, J., concurring) (citing 42 U.S.C. § 2000e-2(a)(1)–(2)).

136. *Id.* at 686.

137. 141 S. Ct. 1227 (2021).

138. *Id.* at 1227–29 (Gorsuch, J., dissenting).

139. *Id.* at 1229.

140. See, e.g., *Patterson*, 140 S. Ct. at 686 (Alito, J., concurring); *Dalberiste* Petition, *supra* note 21, at 20; *Memphis Light* Petition, *supra* note 21, at 17; Keith S. Blair, *Better Disabled Than Devout?: Why Title VII Has Failed to Provide Adequate Accommodations Against Workplace Religious Discrimination*, 63 ARK. L. REV. 515, 525–27 (2010); 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, 514–19.

141. See *infra* Part II.B.1.

revised because *Hardison*'s definition has negative consequences from a policy standpoint.<sup>142</sup> Those in favor of changing the standard have made various proposals for how undue hardship should be redefined to correct for the errors allegedly made by *Hardison*.

### 1. The *Hardison* Standard Is Allegedly Incorrect as a Matter of Statutory Interpretation

Some have criticized *Hardison*'s definition of undue hardship for being incorrect as a matter of statutory interpretation. Assuming that *Hardison* is appropriately interpreting section 701(j),<sup>143</sup> some argue that *Hardison*'s interpretation of Title VII is inconsistent with the plain meaning of the text, the use of undue hardship in other statutes, and the legislative history accompanying section 701(j).

First, some argue that *Hardison*'s interpretation of section 701(j) is inconsistent with the plain meaning of undue hardship, including Justice Thurgood Marshall, who argued this in his *Hardison* dissent.<sup>144</sup> When interpreting a statute, the plain meaning of the text controls, unless that interpretation conflicts with congressional intent.<sup>145</sup> Dictionary definitions and canons of statutory interpretation are often used to determine the plain meaning of legislative text.<sup>146</sup> Dictionaries from around the time of section 701(j)'s enactment did not define undue as *de minimis*.<sup>147</sup> Instead, undue

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142. See *infra* Part II.B.2.

143. Some argue that *Hardison* is incorrect as a matter of statutory interpretation because the Court in *Hardison* was not technically interpreting Title VII. When *Hardison* was discharged, Title VII had not yet been amended to include the undue hardship language in section 701(j). See *Trans World Airlines v. Hardison*, 432 U.S. 63, 69 (1974). Instead, the 1967 EEOC guidelines provided that employers must “make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer’s business.” 29 C.F.R. § 1605.1 (2020). Title VII was subsequently amended to include similar language and the *Hardison* Court considered both the guidelines and the statute in its ruling. Given that section 701(j) was technically not controlling, some argue that *Hardison*'s definition of undue hardship is merely dicta. See *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 787 n.\* (2015) (Thomas, J., concurring in part and dissenting in part) (“[T]he relevant language in *Hardison* is dictum. Because the employee’s termination had occurred before the 1972 amendment to Title VII’s definition of religion, *Hardison* applied the then-existing EEOC guideline—which also contained an ‘undue hardship’ defense—not the amended statutory definition.”). However, the Supreme Court and lower courts have widely accepted *Hardison* as interpreting Title VII. See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67–68 (1986) (recognizing that *Hardison* interpreted section 701(j)); *Petition for a Writ of Certiorari*, *supra* note 134, at 28 (noting that all lower courts have understood *Hardison* as interpreting Title VII); see also *Dalberiste* Petition, *supra* note 21, at 18 (same).

144. See *Hardison*, 432 U.S. at 92 n.6 (Marshall, J., dissenting) (“As a matter of law, I seriously question whether simple English usage permits ‘undue hardship’ to be interpreted to mean ‘more than *de minimis* cost[]’ . . .”).

145. See Zaheer, *supra* note 140, at 514.

146. *Id.*

147. See *Dalberiste* Petition, *supra* note 21, at 19 (“No pre-*Hardison* dictionaries that *Dalberiste* has found had ever defined ‘undue’ as merely ‘more than *de minimis*.’”).

was defined as “unwarranted” or “excessive.”<sup>148</sup> This insinuates that “suffering ‘undue hardship’ involves experiencing not just *some* difficulty, but *excessive* difficulty,” suggesting that for an employer to deny a workplace accommodation “it must impose at least ‘significant costs’ on the employer.”<sup>149</sup> A de minimis burden, on the other hand, “was and is defined as one that is ‘trifling,’ ‘minimal,’ or ‘so insignificant that a court may overlook [it] in deciding an issue or case.’”<sup>150</sup> By allowing undue to mean effectively any small cost, *Hardison* allegedly reads undue out of the statute, in violation of the canon of statutory interpretation that words in a statute should not be read to be meaningless.<sup>151</sup> Given that the dictionary definitions of undue and de minimis are incompatible and that equating them would violate a canon of statutory interpretation, those in favor of replacing the *Hardison* standard argue that the Court’s interpretation is inconsistent with the plain meaning of the statute.

Next, those in favor of revising the *Hardison* standard suggest that *Hardison*’s definition of undue hardship is inconsistent with other uses of undue hardship by the EEOC and Congress. In its 1967 guidelines on religious accommodations, the EEOC defined undue hardship to encompass scenarios “‘where the employee’s needed work *cannot be performed* by another employee of substantially similar qualifications during the period of absence of the Sabbath observer’—a standard obviously more than de minimis.”<sup>152</sup> Under the ADA, employers cannot deny a reasonable accommodation for an employee’s physical or mental disability unless the employer shows that providing the accommodation would “impose an undue hardship on the operation of the business.”<sup>153</sup> When defining undue hardship in the ADA, Congress specifically chose not to apply the *Hardison* standard.<sup>154</sup> Instead, Congress defined undue hardship as “an action requiring significant difficulty or expense, when considered in light of” specific factors provided in the statute.<sup>155</sup> Other statutes have also defined

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148. *Id.* at 20 (noting that the 1968 edition of *Random House Dictionary of the English Language, College Edition* defined “undue” as “unwarranted” or “excessive”); *Memphis Light Petition*, *supra* note 21, at 17 (noting that the 1969 edition of *The American Heritage Dictionary of the English Language* defined “undue” as “excessive”).

149. *Memphis Light Petition*, *supra* note 21, at 17.

150. Petition for a Writ of Certiorari, *supra* note 134, at 28 (alteration in original) (quoting BLACK’S LAW DICTIONARY (5th ed. 1977)).

151. *Dalberiste Petition*, *supra* note 21, at 20–21 (quoting *United States v. Butler*, 297 U.S. 1, 65 (1936)).

152. Petition for a Writ of Certiorari, *supra* note 134, at 29 (quoting 29 C.F.R. § 1605.1 (1968)).

153. 42 U.S.C. § 12112(b)(5)(A).

154. S. REP. NO. 101-116, at 36 (1989) (“The Committee wishes to make it clear that the principles enunciated by the Supreme Court in [*Hardison*] are not applicable to this legislation.”).

155. 42 U.S.C. § 12111(10)(A); *see also id.* § 12111(10)(B) (listing factors used to determine whether an accommodation imposes a significant difficulty or expense, such as the nature of the accommodation, the cost of the accommodation, the size of the employer, the employer’s financial resources, and more).

undue hardship as “significant difficulty or expense.”<sup>156</sup> Additionally, in statutes where Congress left undue hardship undefined, courts have interpreted undue hardship as requiring more than a *de minimis* burden, unlike the *Hardison* Court.<sup>157</sup>

Finally, many have argued that the *Hardison* standard should be revised as a matter of statutory interpretation because the legislative history demonstrates that the standard is inconsistent with Title VII’s purpose. Originally, Title VII did not affirmatively require that employers provide accommodations for employees’ religious practices.<sup>158</sup> The legislative history suggests that the purpose of adding section 701(j) “was to negate the need of employees to choose between their jobs and the exercise of their faith” by requiring employers to provide religious accommodations.<sup>159</sup> By effectively allowing any burden to excuse an employer from providing an accommodation, those in favor of raising the standard argue that *Hardison* goes against this purpose.<sup>160</sup>

## 2. The *Hardison* Standard Should Be Revised as a Matter of Policy

Some also advocate for changing the *Hardison* standard because of the policy implications of defining undue hardship as anything more than a *de minimis* cost. In the last twenty years, charges of religious discrimination filed with the EEOC increased significantly.<sup>161</sup> However, those in favor of

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156. 29 U.S.C. § 207(r)(3) (Fair Labor Standards); 38 U.S.C. § 4303(15) (Veterans’ Benefits); *see also* *Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting (noting that courts “are far more demanding” when applying post-*Hardison* civil rights laws that define undue hardship as “significant difficulty or expense”); *Memphis Light* Petition, *supra* note 21, at 18 (discussing the definition of undue hardship as consistent with the ADA in other statutes).

157. *Memphis Light* Petition, *supra* note 21, at 18–19 (noting that the Fifth Circuit interpreted “undue hardship” in the U.S. Bankruptcy Code to mean more than a minimal burden).

158. *See supra* note 55 and accompanying text.

159. Blair, *supra* note 140, at 528; *see* 118 CONG. REC. 705 (1972) (suggesting that section 701(j) was needed because employers were refusing to hire or terminating religious employees whose religious practices conflicted with workplace requirements, forcing employees to choose between their religions and their jobs).

160. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 89 (1977) (Marshall, J., dissenting) (arguing that by “rejecting any accommodation that involves preferential treatment, [the Court] follows the *Dewey* decision in direct contravention of congressional intent” and that the Court’s interpretation “effectively nullif[ied]” section 701(j)); *Dalberiste* Petition, *supra* note 21, at 24 (“Rather than accepting the value Congress and the EEOC placed on protecting religious workers, *Hardison* concluded that anything more than a *de minimis* burden on an employer outweighs the freedom to practice one’s faith. Thus, far from correcting the erroneous decisions interpreting Title VII before the 1972 Amendment, *Hardison* has perpetuated—and in some cases even increased—those harms.” (footnote omitted)).

161. New religion-based charges filed with the EEOC increased, from 1811 in 1999 to 2725 in 2019. *Religion-Based Charges (Charges Filed with EEOC FY 1997–FY 2019)*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/statistics/religion-based-charges-charges-filed-eeoc-fy-1997-fy-2019> [<https://perma.cc/TM3U-DEBS>] (last visited Mar. 16, 2021). While religious discrimination charges have increased in the last two decades, they decreased in the last ten years, from 3386 claims in 2009 to 2725 in 2019. *Id.* In 2019, 564

raising the standard argue that these numbers do not accurately reflect the number of employees experiencing religious discrimination in violation of Title VII, particularly in cases of reasonable accommodation.<sup>162</sup> Instead, they argue that the current interpretation of undue hardship fails to adequately protect employees seeking a religious accommodation, preventing many employees from even trying to hold their employers liable for denying an accommodation.<sup>163</sup>

The purpose of section 701(j) was to assist employees in obtaining accommodations for religious practices, but by setting the standard for when an employer can deny an accommodation so low, *Hardison* effectively prohibits many employees from using Title VII as a tool to vindicate their rights. Instead, the *Hardison* standard has allowed employers to frequently succeed in denying accommodations.<sup>164</sup> By reading the statute to contain such a low standard, employers have little legal obligation to provide accommodations to religious employees.<sup>165</sup> Without a clear legal obligation, Title VII fails to provide employees the leverage they need against their employers to obtain an accommodation and to encourage cooperation between employers and employees.<sup>166</sup>

While the alleged ineffectiveness of section 701(j) negatively affects all religious employees, some argue that the standard should be revised because it is particularly inadequate at protecting the rights of employees belonging

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charges of religious discrimination involving reasonable accommodation requests were filed. *Bases by Issue (Charges Filed with EEOC) FY 2010–FY 2019*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/statistics/bases-issue-charges-filed-eeoc-fy-2010-fy-2019> [<https://perma.cc/2SG4-Z74Q>] (last visited Mar. 16, 2021).

162. See, e.g., *Memphis Light* Petition, *supra* note 21, at 22–23.

163. See, e.g., *id.* at 23.

164. See Petition for a Writ of Certiorari, *supra* note 134, at 31 (“[I]n cases where a district or circuit court has addressed an undue hardship defense, the employer has prevailed in obtaining summary judgment on that issue far more frequently than the employee—more than twice as often in the district courts and infinitely more often on appeal, where employees have never won summary judgment on that defense. That disparity is almost certainly attributable to *Hardison*’s employer-friendly ‘de minimis’ standard.” (citation omitted)). *But see Dalberiste* Petition, *supra* note 21, at 28 n.16 (noting that employers prevail on appeal in religious accommodation cases at roughly the same rate as in other Title VII employment discrimination cases).

165. See *Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting) (“Alone among comparable statutorily protected civil rights, an employer may dispense with [an employee’s Title VII right to religious accommodation] nearly at whim.”); *Memphis Light* Petition, *supra* note 21, at 23–24 (noting that “employers routinely win as a matter of law simply by saying they would have to do more than lift a finger” and that employees have only been successful in cases where the employer does not even attempt to accommodate the employee).

166. See *Dalberiste* Petition, *supra* note 21, at 26–27 (suggesting that *Hardison* practically eliminates Title VII’s reasonable accommodation requirement because the standard signals to employers that they will face no legal obligation for denying an accommodation as long as it would cause, or even potentially cause, more than a de minimis harm, removing any incentive for employers to cooperate with religious employees to find a mutually agreeable accommodation as imagined by *Ansonia*); Petition for a Writ of Certiorari, *supra* note 134, at 31 (same).

to a minority religion.<sup>167</sup> The majority of the United States's population identifies as Christian, but an increasing number of Americans belong to non-Christian religions.<sup>168</sup> The practices of most American workplaces have not evolved to reflect this increased diversity. Instead, many common workplace policies inherently accommodate Christian practices, such as being closed on Sunday, Easter, and Christmas.<sup>169</sup> This allows Christian employees to “find it relatively easy to practice their religion, as most of the necessary holidays are already built into the employer’s work calendar and impose no additional costs on the employer.”<sup>170</sup> Given that religious minorities do not get the benefit of these ingrained practices, non-Christian employees must formally request accommodations for their religious practices.<sup>171</sup> Under the current standard, these requests can easily be denied. Given this phenomenon, members of minority religions are more likely to bring a case of religious discrimination involving accommodations and therefore incur the most harm under the current interpretation of undue hardship.<sup>172</sup>

Some argue that the ease of denying religious accommodations to religious minorities not only harms the individual employees seeking accommodations but also has negative consequences on society as a whole. Some suggest the low standard promotes hostility toward religion and sends the message that religion should not be respected in the workplace.<sup>173</sup> The low burden of undue hardship can also reinforce existing cultural norms and perpetuate

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167. See, e.g., *Dalberiste* Petition, *supra* note 21, at 25–31; *Memphis Light* Petition, *supra* note 21, at 25–26.

168. See *America’s Changing Religious Landscape*, PEW RSCH. CTR. (May 12, 2015), <https://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/> [<https://perma.cc/VNE6-FRRA>] (finding that 5.9 percent of Americans belonged to non-Christian faiths in 2014, up from 4.7 percent in 2007, and with growth particularly strong among Muslims and Hindus).

169. Zaheer, *supra* note 140, at 519.

170. *Id.*

171. See *Memphis Light* Petition, *supra* note 21, at 22 (noting that many commonly requested accommodations include members of minority religions requesting time off for religious holidays or practices that are not covered by mainstream Christian practices—such as Muslims requesting to participate in daily prayers or requests to observe the Sabbath). See generally Brief of Amici Curiae Christian Legal Society et al. in Support of the Petition at 1a–11a, *Patterson v. Walgreen Co.*, 140 S. Ct. 685 (2020) (No. 18-349) (sorting undue hardship cases decided on summary judgment from 2000 to 2018 by the religion of the employee requesting the accommodation).

172. See Brief of Amici Curiae Christian Legal Society et al. in Support of the Petition, *supra* note 171, at 23–25 (reporting that of 102 undue hardship cases decided on summary judgment from 2000 to 2018, 62 percent involved non-Christians or Christians belonging to minority sects that follow Saturday Sabbath observance); *Dalberiste* Petition, *supra* note 21, at 28–29 (reporting that members of minority religions, including non-Christians and members of minority Christian sects, such as Jehovah’s Witnesses and Seventh Day Adventists, were involved in 43 percent of religious accommodation cases on appeal from 2000 to 2020, despite only making up 15 percent of the population).

173. See Thomas D. Brierton, “Reasonable Accommodation” Under Title VII: Is It Reasonable to the Religious Employee?, 42 CATH. LAW. 165, 192 (2002) (“Allowing employers to rigidly enforce workplace rules irrespective of religious practices denigrates the free exercise of religion and can create hostility toward religion. The de minimis standard sends the implicit message that religious beliefs and practices are of minimal value to the workplace.”).



discriminatory attitudes toward religious minorities, such as by forcing religious minorities to adhere to mainstream grooming or dress practices or risk losing their jobs.<sup>174</sup> Not accommodating the beliefs and practices of religious minorities in the workplace legitimizes their marginalization and works against the maintenance of a diverse, pluralistic society.<sup>175</sup>

### B. Proposals for Revising the Hardison Standard

To correct for *Hardison*'s alleged wrongs as a matter of statutory interpretation and policy, various proposals have been made for revising the standard. The most prominent proposal suggests that—either by congressional action, a shift in judicial interpretation, or through new EEOC guidelines—undue hardship should be redefined to mean a “significant difficulty or expense,” just as it is used in the ADA.<sup>176</sup> Multiple iterations of the WRFA suggest a similar approach.<sup>177</sup>

If Title VII's use of undue hardship was made consistent with the ADA's use of the term, employers would be required to provide a reasonable accommodation for their employees' religious practices unless doing so would impose a significant difficulty or expense. Under this standard, an employer would not be able to succeed in a religious accommodation suit by merely showing that providing an accommodation would impose a de minimis cost and, instead, “more is required of the employer than just presenting evidence that there would be a cost to accommodate the employee.”<sup>178</sup> This heightened standard would impose greater costs on

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174. See Kiran Preet Dhillon, Note, *Covering Turbans and Beards: Title VII's Role in Legitimizing Religious Discrimination Against Sikhs*, 21 S. CAL. INTERDISC. L.J. 215, 217 (2011) (arguing that by allowing employers to easily deny religious minorities' requests for exemptions from workplace grooming policies, “Title VII case law legitimizes mainstream cultural norms of the majority and the discrimination these norms perpetuate against religious minorities such as Sikhs”).

175. See Blair, *supra* note 140, at 554–55 (“If Americans truly believe in cultural and religious diversity, then ensuring that minority religions are able to resolve conflicts between religious practice and workplace rules is a necessity. If religious minorities are marginalized in the workplace, they will be marginalized in the rest of society.”).

176. 42 U.S.C. § 12111(10)(A); see Blair, *supra* note 140, at 556 (arguing that Congress should redefine undue hardship to be consistent with the ADA); Christopher M. Fournier, *Faith in the Workplace: Striking A Balance Between Market Productivity and Modern Religiosity*, 15 SEATTLE J. FOR SOC. JUST. 229, 237 (2016) (arguing that the EEOC should adopt a standard consistent with the ADA); Kaminer, *supra* note 55, at 629 (arguing that Congress should redefine undue hardship to be consistent with the ADA); 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, 238 (2011) (arguing that courts should apply the ADA standard in Title VII reasonable accommodation cases to motivate Congress to define undue hardship and reasonable accommodation in Title VII).

177. Blair, *supra* note 140, at 530 n.112. Versions of the WRFA proposed since 2008 only apply the ADA's significant difficulty or expense standard to requests for accommodations related to grooming, garb, and scheduling, while previous versions applied the ADA standard to any type of request. See *supra* notes 99–103 and accompanying text (discussing the history and various versions of the WRFA). This Note presumes that any change to the *Hardison* standard would apply to all types of accommodations.

178. Blair, *supra* note 140, at 535.

employers, but the burden would allegedly be “outweighed by the benefits of employees being able to practice their faith without the threat of losing their jobs because of a conflict with employment requirements.”<sup>179</sup> Proponents of this approach also note that it would not be difficult from a practical standpoint to adopt the ADA’s definition of undue hardship because courts could simply apply existing ADA case law in the religious accommodation context.<sup>180</sup>

While few proposals have gained as much support as redefining undue hardship in Title VII to be consistent with the ADA, others have proposed alternative ways in which the *Hardison* standard could be raised in order to achieve many of the same goals. One proposal suggests that courts should interpret undue hardship to mean a significant hardship but limit the scenarios in which an employer must provide an accommodation to those where the accommodation is essential to the employee’s faith.<sup>181</sup> According to this proposal, courts should interpret section 701(j) to “require employers to accommodate all religious practices deemed ‘central’ to the employee’s faith, unless accommodation of those practices would result in an undue (i.e., significant) hardship to the employer.”<sup>182</sup> The cost that an employer would be required to incur in order to avoid providing an accommodation would vary depending on the centrality of the belief or practice to the employee.<sup>183</sup> Imposing a centrality requirement could achieve many of the same benefits of the ADA approach, such as increasing access to religious accommodations, particularly for members of minority religions, while also accommodating the business needs of employers.<sup>184</sup> By limiting the extent to which employers must provide an accommodation, a centrality requirement could possibly protect against Establishment Clause and Free Exercise concerns by requiring employers to provide accommodations to all practices.<sup>185</sup>

Given that Congress and the Supreme Court have failed to change the *Hardison* standard since the 1977 ruling, another proposal suggests that it is unlikely that the *Hardison* standard will ever be formally raised.<sup>186</sup> Instead, the proposal suggests that the EEOC and U.S. Department of Justice (DOJ)

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179. *Id.* at 556.

180. *See, e.g.,* Aslam, *supra* note 176, at 236–37.

181. Zaheer, *supra* note 140, at 522.

182. *Id.*

183. *See id.* (“[I]f a given practice is a religious preference as opposed to a religious mandate, then employers would not be required to incur more than a de minimis cost to accommodate this preference. If, however, an employee demonstrates that a given practice is central to his faith, then an employer would be required to accommodate this practice, unless it could not do so without incurring *significant* expense.” (footnote omitted)).

184. *See id.* at 522–24.

185. *See id.* at 528 (suggesting that the WRFA raises constitutional issues by too broadly expanding an employer’s duty to accommodate and arguing that a centrality requirement, whether explicitly adopted by Congress or read in by the Supreme Court, could bolster an amended section 701(j)’s constitutionality by limiting the scenarios in which an employer must provide an accommodation).

186. Matthew P. Mooney, Note, *Between A Stone and A Hard Place: How the Hajj Can Restore the Spirit of Reasonable Accommodation to Title VII*, 62 DUKE L.J. 1029, 1068 (2013).

should utilize their congressional mandate to enforce Title VII to slowly raise the standard over time.<sup>187</sup> Under this approach, the EEOC and DOJ would pursue specific types of litigation in order to address *Hardison* issues and improve access to religious accommodations for employees while working within the existing language of section 701(j).<sup>188</sup>

*C. Practical and Constitutional Considerations of a Revised Hardison Standard*

While raising the undue hardship standard through any of these proposals would benefit religious employees, many have expressed concerns about the consequences of doing so. First, some argue that there is no reason to raise the *Hardison* standard because the existing standard is an acceptable interpretation of section 701(j). Those who support the existing *Hardison* standard reject the arguments that the standard has had unacceptable effects on the ability of employees to successfully use Title VII to hold employers accountable.<sup>189</sup> Additionally, proponents argue that Congress has de facto agreed that the *Hardison* standard is correct because the WRFA and other proposed bills have not been passed.<sup>190</sup>

Next, some argue that regardless of whether the *Hardison* standard is correct, revising the standard to be consistent with the ADA would have unacceptable practical consequences, would conflict with the legislative history of Title VII, and may be unconstitutional. First, from a practical standpoint, the ADA was designed to cover a minority of American workers, while Title VII applies to virtually every employee in the United States.<sup>191</sup> Broadly expanding Title VII's religious accommodation provision using the ADA's definition would provide greater protections to employees' religious practices but would be accompanied by greater, more frequent costs for employers.<sup>192</sup> These alleged increased costs would include financial costs, as well as costs associated with changing workplace practices to facilitate religious accommodations, such as switching shifts, providing breaks, changing job positions, or revising safety policies.<sup>193</sup> By expanding access to religious accommodations, changing the *Hardison* standard to an ADA

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187. *Id.*

188. *See id.* (suggesting that the pursuit of Hajj accommodation cases could lead to courts reinterpreting the undue hardship standard to be in line with congressional intent and the plain language of the statute, among other benefits).

189. *See* Brief in Opposition at 25–26, *Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227 (2021) (No. 19-1388) (arguing that case law does not show courts excusing employers from providing accommodations just by showing that the accommodation would impose a trivial cost and that *Hardison* has not prevented employees from bringing religious accommodation claims).

190. *Id.* at 17–18.

191. *See* James A. Sonne, *The Perils of Universal Accommodation: The Workplace Religious Freedom Act of 2003 and the Affirmative Action of 147,096,000 Souls*, 79 NOTRE DAME L. REV. 1023, 1024 (2004) (noting that the ADA applies to approximately forty-three million workers, while Title VII applies to approximately 147 million).

192. *Id.* at 1024–25.

193. *See id.* at 1055–56 (discussing the increased financial and nonfinancial costs that employers would need to sustain under an ADA model).

model could also result in increased costs in the form of more frequent litigation.<sup>194</sup>

Next, in addition to the practical consequences of raising the *Hardison* standard, some argue that doing so conflicts with Title VII's legislative history and purpose. Title VII was enacted in order to prohibit discrimination on the basis of race, color, religion, sex, or national origin.<sup>195</sup> These categories were all intended to be protected from discrimination, but section 701(j) provides additional benefits to religion in the form of reasonable accommodations.<sup>196</sup> By raising *Hardison*'s definition of undue hardship to mean a "significant difficulty or expense," an ADA model may provide more benefits to religious employees, even though Title VII was passed in order to ensure equal treatment for all workers.<sup>197</sup>

The unequal treatment of religious and secular employees that could potentially result from changing the *Hardison* standard raises constitutional concerns.<sup>198</sup> It has been suggested that the Supreme Court specifically interpreted undue hardship in *Hardison* to mean a more than de minimis cost in order to avoid an Establishment Clause issue.<sup>199</sup> The Establishment Clause states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>200</sup> Under the Establishment Clause, the federal government, as well as state governments, cannot establish an official religion and must treat believers and nonbelievers neutrally.<sup>201</sup> Courts are also prohibited from "deciding cases that require the court to settle or address issues of religious doctrine" under the Establishment Clause.<sup>202</sup>

Raising the *Hardison* standard using an ADA model could create Establishment Clause issues if the statute resulted in the government

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194. See Fournier, *supra* note 176, at 250–52 (discussing and responding to concerns that an ADA model would lead to an increase in Title VII litigation).

195. 42 U.S.C. § 2000e-2.

196. Sonne, *supra* note 191, at 1059.

197. See *id.* at 1063 (arguing that the de minimis standard is more in line with the purpose of Title VII to ensure equal, neutral treatment for all).

198. See Brief in Opposition, *supra* note 189, at 28; Stephen Gee, Note, *The "Moral Hazards" of Title VII's Religious Accommodation Doctrine*, 89 CHI.-KENT L. REV. 1131, 1159 (2014) (citing Establishment Clause concerns as the largest obstacle to a heightened *Hardison* standard).

199. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 88–89 (1977) (Marshall, J., dissenting) (acknowledging that the majority's interpretation of "undue hardship" had the "singular advantage of making" it unnecessary to address the Establishment Clause issue but arguing that if the statute was read to require employers to incur significant costs to accommodate religious employees, it would not necessarily violate the Establishment Clause); Gee, *supra* note 198, at 1156 ("With so little to go on, the Court was walking a 'tightrope' in interpreting the 1972 amendment out of fear that Establishment Clause issues might arise if a worker's accommodation would require the violation of a strictly enforced neutral rule of general applicability in the form of a collectively bargained seniority system.").

200. U.S. CONST. amend. I.

201. Fournier, *supra* note 176, at 236.

202. *Id.*

effectively promoting or regulating religion.<sup>203</sup> If the new standard allowed religious employees to get an accommodation to avoid following a neutral workplace policy, the standard could violate the Establishment Clause by providing preferential treatment to religious workers.<sup>204</sup>

Any attempt to narrow the scope of who could receive a reasonable accommodation under a heightened standard could also pose an Establishment Clause issue.<sup>205</sup> Religious minorities stand to benefit the most from a heightened standard.<sup>206</sup> However, a heightened standard cannot be tailored to protect the minority religions that are most harmed by the current standard and do not benefit from traditional workplace practices that reflect Judeo-Christian practices because “the promotion of specific religions renders the legislation per se invalid under the Establishment Clause.”<sup>207</sup>

Since the scope cannot be limited, some argue that raising the standard may cause members of majority religions to exploit the statute to impose their views on other employees, causing workplace conflicts.<sup>208</sup> A heightened standard could also motivate some employees to “adopt” a religion solely to receive favorable accommodations, such as additional days off.<sup>209</sup> To prevent employees from taking advantage of a heightened standard, courts

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203. See *Gee*, *supra* note 198, at 1162 (arguing that the WRFA, in adopting the ADA standard, would likely violate the Establishment Clause because it “would allow plaintiffs to trump strictly enforced neutral rules of general applicability,” which “raise[s] extreme questions of whether it has the effect of the government promoting religion”).

204. See *id.* at 1162–63 (suggesting that under a heightened standard, an employer with a strict uniform policy could reprimand a secular employee for wearing a pro-choice button but would have to accommodate a Catholic employee wearing a pro-life button, and this represents an inappropriate entanglement of the government with religion).

205. Some may argue to narrow the scope of Title VII under a heightened standard because Title VII’s definition of religion is broad, unlike the ADA’s definition of disability. The ADA applies to a limited number of individuals who have a physical or mental impairment that is “substantial enough to affect the life of the disabled individual.” *Fournier*, *supra* note 176, at 255. Title VII, on the other hand, defines religion broadly to include “all aspects of religious observance and practice, as well as belief.” 42 U.S.C. § 2000e(j). Given that the ADA provides qualifying factors that limit who can receive a disability-based accommodation, while Title VII broadly defines religion, some argue that Title VII’s definition of religion is too ambiguous and could be used by too many individuals. See, e.g., *Fournier*, *supra* note 176, at 255.

206. See Brief of Amici Curiae Christian Legal Society et al. in Support of the Petition, *supra* note 171, at 23 (“Because facially or formally neutral workplace policies by nature reflect the perspective of the cultural majority, they will disproportionately come into conflict with the practices of religious minorities. Therefore, a meaningful requirement of religious accommodation disproportionately protects religious minorities.”).

207. *Gee*, *supra* note 198, at 1158.

208. See *id.* (suggesting that members of majority faiths could theoretically take advantage of the heightened standard, causing workplace unrest and having a greater “outward appearance of preferential treatment for those faiths” than “under the current standard”).

209. See *id.* at 1158–59 (arguing that under a heightened standard, employees “could potentially pick and choose certain faiths with the knowledge that they can take certain days off, wear piercings to work with no worry of an employer’s policy trumping, and as a pharmacist, ignore anyone who looks like they might inquire about contraceptives among other practices”).

would need to conduct more detailed inquiries into whether an employee's belief is genuine, which would raise additional legal questions.<sup>210</sup>

Currently, courts avoid Establishment Clause issues by focusing their inquiry in Title VII religious accommodation cases on the reasonableness of an accommodation, rather than on "the validity of a plaintiff's alleged religious bona fide belief or practice."<sup>211</sup> Some argue that a heightened standard would require a more intrusive inquiry into what constitutes a bona fide religious belief than what is currently conducted.<sup>212</sup> Whether an individual's belief is genuine is not an objective inquiry like under the ADA and instead requires an analysis of subjective beliefs.<sup>213</sup> This could raise Establishment Clause issues because of the potential for "inconsistent court rulings between majority and minority religion plaintiffs" and the fact that by conducting a more in-depth inquiry, the government would be "integrating itself into each religion by inquiring into and deciding which beliefs or practices of a religion are bona fide."<sup>214</sup> This additional inquiry could also raise constitutional issues under the Free Exercise Clause because "questions of governmental interference would likely arise since every denial of a plaintiff's religious belief or practice as being bona fide could restrict a person's right to later assert that belief is worthy of constitutional protection outside of work."<sup>215</sup> Any action taken to raise the *Hardison* standard must consider these practical and constitutional issues, as well as the potential effects that a heightened standard would have on the ability of employers to deny requests for religious exemptions to employer-mandated vaccines.

### III. RAISING THE UNDUE HARDSHIP STANDARD WITHOUT CHANGING EMPLOYERS' ABILITY TO MANDATE VACCINES

Congress or the Court could revise the *Hardison* standard by amending Title VII or reconsidering the existing text of the statute, respectively.<sup>216</sup> Part III considers the effects of any potential action on the ability of employers to impose vaccine mandates without facing legal liability for declining religious accommodations. Part III.A finds that the benefits provided by a heightened undue hardship standard would not come at the cost of requiring employers to provide religious exemptions to vaccine mandates, even under the most employee-friendly standard proposed. Part III.B suggests that even though

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210. *See id.* at 1159 (suggesting that raising the standard may require courts to conduct a more in-depth analysis of what constitutes a bona fide religious belief, which could create legal and political issues absent a clear standard).

211. *Id.* at 1161.

212. *Id.*

213. *Id.* at 1159.

214. *Id.* at 1161.

215. *Id.* at 1163.

216. The EEOC could also effectively raise the *Hardison* standard by issuing guidelines commenting on the proper interpretation of undue hardship, as it has done in the past, or by pursuing specific types of religious accommodation cases. *See* Fournier, *supra* note 176, at 237; Mooney, *supra* note 186, at 1068; *supra* notes 88–95 and accompanying text. However, since action taken by Congress or the Court is more controlling, this Note focuses on the potential revision of *Hardison* by those bodies.

employers would legally be able to decline accommodations, any new interpretation of undue hardship should consider including language that discourages employers from voluntarily offering accommodations because of the consequences during a public health crisis.

*A. Addressing Mandatory Vaccination Under a Heightened Standard*

If Congress or the Supreme Court choose to reinterpret the *Hardison* standard, any change raising the standard could provide benefits for religious workers and have positive effects on society as a whole. The current undue hardship standard has left many religious workers unable to receive accommodations for their religious practices.<sup>217</sup> The low standard has had particularly negative effects on employees belonging to minority religions, many of whom already face discrimination and harassment.<sup>218</sup> The *Hardison* standard perpetuates that discrimination by allowing employers to refuse to accommodate the religious practices of their employees, even if doing so would only impose a small cost.<sup>219</sup> This legitimizes the social stigma that many members of minority religions already experience.<sup>220</sup> Raising the standard could benefit individual employees by providing them with accommodations in more circumstances, while also fostering a more inclusive, pluralistic society by sending the message to all workers that religious practices should be respected.<sup>221</sup>

If Congress or the Court choose to act, the benefits of raising the *Hardison* standard must be weighed against the practical and constitutional concerns of requiring employers to provide religious accommodations more frequently.<sup>222</sup> While the protection of employees' religious practices is ethically and legally important, it is also paramount that employers are able to ensure the health and safety of their workplaces, particularly amidst a public health crisis like COVID-19. Raising the *Hardison* standard introduces legitimate concerns about the ability of employers to enforce a mandatory vaccination policy on workers who decline to be vaccinated for religious reasons.

Under the current standard, an employer with a mandatory vaccination policy can almost always discharge or refuse to hire an employee who declines to receive a vaccine because providing an accommodation, such as mask wearing or reassignment, imposes more than a de minimis cost on the employer.<sup>223</sup> The most expansive version of a heightened undue hardship standard suggested would require an employer to provide an accommodation unless the accommodation imposes a "significant difficulty or expense."<sup>224</sup> A highly infectious disease, like COVID-19, would almost certainly qualify

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217. *See supra* notes 164–67 and accompanying text.

218. *See supra* notes 172–74 and accompanying text.

219. *See supra* notes 173–76 and accompanying text.

220. *See supra* note 173 and accompanying text.

221. *See supra* note 175 and accompanying text.

222. *See supra* Part II.C.

223. *See supra* Part I.C.

224. *See supra* Part II.B.

as a safety hazard that is great enough to overcome the significant difficulty or expense standard.

Mask wearing cannot fully protect against the transmission of viruses.<sup>225</sup> Preventing the spread of COVID-19 or similarly transmitted diseases through mask wearing also requires all parties in a given space to consistently and correctly wear masks, which is difficult to enforce and may even be impossible in some workplaces.<sup>226</sup> Reassigning an employee to another role where there is less exposure to vulnerable populations or other workers would also impose a “significant difficulty or expense” because the infectiousness of COVID-19 would put any customers or fellow employees at risk from being in proximity to an unvaccinated individual.<sup>227</sup> Allowing an employee to work from home is the only way to protect fellow workers and patrons from an employee who refuses vaccination. However, remote work is not possible for many jobs, and changing the nature of an employee’s role to accommodate them working from home would certainly impose a significant difficulty or expense. Losses in business efficiency and effects on other coworkers who may be forced to fill in for an employee allowed to telecommute as an accommodation could also qualify as a significant difficulty or expense.<sup>228</sup>

#### *B. Discouraging Employers from Offering Voluntary Accommodations*

While employers would be able to deny religious exemptions to vaccinations without legal liability even under the most expansive version of the undue hardship standard proposed, a heightened standard could affect employers who choose to provide religious exemptions voluntarily. Under the current standard, many employers voluntarily offer accommodations to employees requesting a religious exemption.<sup>229</sup> A heightened standard may encourage employers to continue offering voluntary accommodations.

In order to eradicate COVID-19, it is essential that a majority of the population is vaccinated.<sup>230</sup> Voluntary exemptions work against this goal because the cumulative effect of allowing some individuals to forgo vaccination on religious grounds could prevent herd immunity from being achieved and contribute to further outbreaks of COVID-19.<sup>231</sup> In order to discourage employers from voluntarily offering exemptions, any heightened version of section 701(j) could include specific language stating that employers do not have to provide accommodations involving job requirements that relate to the health and safety of the workplace.<sup>232</sup>

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225. *See supra* note 124 and accompanying text.

226. *See supra* notes 125–27 and accompanying text.

227. *See supra* note 127 and accompanying text.

228. *See supra* note 127 and accompanying text.

229. *See supra* note 119 and accompanying text.

230. *See supra* notes 22–23 and accompanying text.

231. *See supra* notes 24–26 and accompanying text.

232. This language could be similar to the ADA’s “direct threat” provision, which allows employers to require, as a disability-neutral qualification standard, “that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.” 42 U.S.C.



Congress could do so by including specific language in an amendment to section 701(j) stating that religious practices that present serious safety hazards do not have to be accommodated. If the Supreme Court chooses to revisit *Hardison*, the Court could speak to this issue and influence employer practice indirectly by providing guidance or examples of certain situations where it would be improper or unnecessary for an employer to provide an accommodation. Regardless of the methodology, any reinterpretation of the *Hardison* standard should consider including a specific exception that encourages employers to refrain from offering imperfect substitutes for vaccinations.

#### CONCLUSION

The ability to freely practice one's religion is a fundamental belief in American society. Religious practices must be respected and accommodated in the workplace. However, this reverence must be balanced with the need to protect the health of all individuals, particularly amidst a public health crisis.

A heightened undue hardship standard may provide more frequent workplace accommodations for religious individuals and would not prevent employers from requiring their employees to be vaccinated. However, any reinterpretation of the *Hardison* standard should discourage providing voluntary accommodations for religious employees by speaking specifically to the need for employers to deny accommodations involving public health concerns.

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§ 12113(b). An employee or prospective employee's disability constitutes a direct threat if it poses "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* § 12111(3); *see also* 29 C.F.R. § 1630.2(r) (2020) (expanding on the definition of direct threat). If the individual is found to pose a direct threat and no accommodation is possible, the employer is permitted to discharge or refuse to hire that individual. 42 U.S.C. § 12113(a).