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NOTE

UNDUE HARDSHIP AND THE PROBLEM OF HYPOTHETICAL COSTS

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In Groff v. DeJoy*, the Supreme Court rejected the long-standing "de minimis" standard governing Title VII's undue hardship defense to the duty to accommodate religion. To win on the undue hardship defense, employers must now show that an accommodation would cause "substantial increased costs in relation to the conduct of [their] particular business." At the same time, the Court instructed lower courts to apply the standard in a "commonsense manner." Yet some early post-*Groff *decisions have embraced the heightened standard while discounting employers' predicted costs as too "hypothetical."*

Treating hypothetical costs as categorically suspect misunderstands the function of the undue hardship defense. Employers typically must evaluate religious accommodation requests ex ante, before costs have materialized. Requiring proof of realized costs forces employers into a dilemma: deny the accommodation and risk liability, or grant it and wait for potentially severe harms to occur. This problem is especially acute in disputes involving COVID-19 vaccination mandates and name-and-pronoun policies, where the asserted costs often include

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reputational damage, mission derailment, or dignitary harm to coworkers and third parties.

This Note argues that courts must separate two distinct questions that are often collapsed into one: whether an asserted cost is sufficiently concrete to be credited at all, and whether that cost—once credited—qualifies as a "substantial increased cost." To guide the first inquiry, this Note proposes three commonsense guidelines for evaluating employer predictions.

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INTRODUCTION

Groff v. DeJoy "clarif[ied]" the requirements for Title VII's undue hardship defense to the duty to accommodate religion.[1] Rejecting the "more than a *de minimis* cost" standard from *Trans World Airlines, Inc.*

[1] Groff v. DeJoy, 143 S. Ct. 2279, 2286 (2023).

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v. Hardison, the Supreme Court held that undue hardship means "substantial increased costs in relation to the conduct of [the employer's] particular business."[2] At the same time, *Groff* instructed courts to conduct the inquiry "in [a] commonsense manner" that considers "all relevant factors."[3] Properly understood, *Groff* appears to make the inquiry more flexible, especially for costs that are difficult to price ex ante. Yet post-*Groff* decisions have largely embraced only half of *Groff*'s instruction. Some lower courts have latched onto the heightened standard but ignored the flexibility of the inquiry, demanding concrete proof of costs while rejecting or discounting those they consider "hypothetical."[4] That approach is in tension with *Groff* and the inherently predictive nature of the undue hardship inquiry.

Title VII requires an employer to "reasonably accommodate" an employee's religion unless doing so would cause an "undue hardship on the conduct of the employer's business."[5] The employer must decide, in many cases ex ante, whether granting an accommodation will generate costs and, if so, how much. When the requested accommodation has not been implemented, those costs, by definition, have not yet materialized—they are hypothetical. But when courts treat hypothetical costs as categorically suspect, employers face a dilemma: deny the accommodation based on a prediction that the costs would be too great to bear, risking liability for failure to accommodate religion; *or* grant the accommodation, eliminating the risk of liability for failure to accommodate religion but taking on risk in the form of the predicted costs. That dilemma may be tolerable when only modest financial costs are at stake. It is far less tolerable, however, when the predicted costs come in the form of reputational damage, mission derailment, or dignitary harm—costs that may be substantial if realized, yet difficult to prove without running the very experiment the employer seeks to avoid. Courts lack a framework for evaluating when hypothetical costs should be credited in the undue hardship inquiry. As a result, they may default

[2] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977); *Groff*, 143 S. Ct. at 2295.

[3] *Groff*, 143 S. Ct. at 2295–96.

[4] See, e.g., Kluge v. Brownsburg Cmty. Sch. Corp., 150 F.4th 792, 806 n.8 (7th Cir.), *reh'g and reh'g en banc denied*, No. 24-1942, 2025 WL 2848017, at *1 (7th Cir. Oct. 7, 2025); Naylor v. County of Muscatine, 151 F.4th 973, 976 (8th Cir. 2025) (per curiam) (quoting Brown v. Polk County, 61 F.3d 650, 655 (8th Cir. 1995)); Bellard v. Univ. of Tex. MD Anderson Cancer Ctr., 716 F. Supp. 3d 503, 515 (S.D. Tex. 2024).

[5] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j).

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to discounting those costs altogether—effectively narrowing the inquiry despite *Groff*'s instruction to apply a flexible, commonsense approach.[6]

This Note proceeds in three parts. Part I explains the duty to accommodate religion and the functions of the undue hardship defense. Part II examines the post-*Groff* accommodation disputes that expose the problem of hypothetical, noneconomic costs, focusing on vaccination mandates and name-and-pronoun policies. Part III offers a normative framework for evaluating such costs. Drawing from post-*Groff* case law, this Note identifies three guidelines for deciding whether to defer to employers' ex ante cost predictions before proceeding to *Groff*'s "substantial increased costs" inquiry.[7] Courts should begin by examining the employer's own conduct: a policy that is selectively enforced or casually suspended deserves little deference. Courts should then ask whether the employer's decision-making process was reasonable. Where uncertainty remains, courts should acknowledge that the prospect of harm being borne disproportionately by vulnerable third parties justifies more deference to the employer's prediction.

I. THE DUTY TO ACCOMMODATE RELIGION AND THE FUNCTIONS OF UNDUE HARDSHIP

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, and national origin.[8] In 1972, Congress amended the statute to define "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[9] Through this definition, Congress created a duty to accommodate religion, an affirmative duty that departs from Title VII's negative duty for other protected characteristics.[10]

[6] *Groff*, 143 S. Ct. at 2295–96.

[7] Id. at 2295 (citing *Hardison*, 432 U.S. at 83 n.14).

[8] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

[9] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103 (codified as amended at 42 U.S.C. § 2000e(j)).

[10] Title VII primarily imposes a negative duty (i.e., employers must not take protected characteristics into account when making employment decisions). But for religious accommodation, Title VII creates an affirmative duty (i.e., employers must take the religious practices of their employees into account). See George Rutherglen, Employment Discrimination Law: Visions of Equality in Theory and Doctrine 154 (5th ed. 2021)

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Unlike the Americans with Disabilities Act ("ADA"), which contains a detailed accommodation framework with definitions of key terms, Title VII does not define the terms "reasonable accommodation" and "undue hardship."[11] As a result, courts and the Equal Employment Opportunity Commission ("EEOC") have shaped the contours of the duty through judicial interpretation[12] and nonbinding guidance.[13]

The duty to accommodate religion reflects a compromise between two competing interests: an employee's right to practice their religion at work and an employer's interest in managing its business.[14] Title VII

(explaining that Title VII's treatment of religion "represents a step away from a 'religion blind' perspective"); see also Debbie N. Kaminer, When Religious Expression Creates a Hostile Work Environment: The Challenge of Balancing Competing Fundamental Rights, 4 N.Y.U. J. Legis. & Pub. Pol'y 81, 100 (2000) (noting that religious accommodation "can be viewed as a form of affirmative action which the Court is reluctant to endorse" (footnote omitted)).

[11] Compare 42 U.S.C. § 12111(8)–(10) (defining "[q]ualified individual," "[r]easonable accommodation," and "[u]ndue hardship"), with 42 U.S.C. § 2000e (providing no definitions of equivalent key terms).

[12] The U.S. Supreme Court has interpreted Title VII's religious accommodation duty in four principal cases, two of which dealt specifically with the definition of "undue hardship." See *Hardison*, 432 U.S. at 84 ("[T]o bear more than a *de minimis* cost . . . is an undue hardship."); Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68 (1986) (holding that a "reasonable accommodation" need not be the employee's preferred accommodation); EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 772 (2015) (holding that a job applicant need not show an employer has "actual knowledge" of the applicant's need for an accommodation in order to prove disparate treatment (internal quotation marks omitted)); *Groff*, 143 S. Ct. at 2295 (defining "undue hardship" as "substantial increased costs in relation to the conduct of [the employer's] particular business" (internal quotation marks omitted) (citation omitted)). See infra Section I.C for a detailed discussion of *Hardison* and *Groff*.

[13] The EEOC issues interpretative guidelines and statements of enforcement policy which do not have the force of law but receive some level of deference under *Skidmore v. Swift*. See Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141–42 (1976) (discussing the deference to be afforded to EEOC guidance). The EEOC has issued guidance on the meaning of "undue hardship" both before and after *Groff*, see, e.g., U.S. Equal Emp. Opportunity Comm'n, EEOC-CVG-2021-3, Compliance Manual Section 12: Religious Discrimination (2021) [hereinafter EEOC Compliance Manual on Religious Discrimination], https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination [https://perma.cc/J6UW-F6SZ]; U.S. Equal Emp. Opportunity Comm'n, EEOC-NVTA-0000-20, What You Should Know: Workplace Religious Accommodation (2014), https://www.eeoc.gov/laws/guidance/what-you-should-know-workplace-religious-accommodation [https://perma.cc/Y5AS-JMZ5]; U.S. Equal Emp. Opportunity Comm'n, Fact Sheet: Religious Accommodations in the Workplace, https://www.eeoc.gov/fact-sheet-religious-accommodations-workplace [https://perma.cc/NR97-CNHF] (last visited Sep. 13, 2026).

[14] See EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 313 (4th Cir. 2008) (explaining the two competing concerns); *Philbrook*, 479 U.S. at 70 ("Congress was understandably motivated by a desire to assure the individual additional opportunity to

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resolves that tension in favor of religion, at least up to a point; "Title VII requires otherwise-neutral policies to give way to the need for an accommodation" unless doing so would cause an undue hardship.[15] The risk of over-accommodation—imposing costs on employers that are too substantial to bear—is tempered by the undue hardship defense.[16] When an employer cannot "reasonably accommodate" an employee without "undue hardship," the employer has no duty to provide an accommodation.[17] The undue hardship defense therefore functions as a switch, determining who bears the costs of the religious practices of employees at work: if an employer can reasonably accommodate an employee without undue hardship, the employer bears the cost.

A. Favored Treatment as Nondiscrimination

Embedding the duty to accommodate religion into the definition of religion created an asymmetry within Title VII. Because "religion" is defined to include "observance and practice," Title VII protects more than religious identity alone; it also protects conduct.[18] By contrast, Title VII does not require employers to accommodate conduct that is "culturally or statistically associated with" race, color, or national origin.[19] As a result, religious employees may receive accommodations to engage in conduct that similarly situated secular employees may not.[20]

observe religious practices, but it did not impose a duty on the employer to accommodate at all costs.").

[15] *Abercrombie & Fitch Stores, Inc.*, 575 U.S. at 775.

[16] See EEOC v. Universal Mfg. Corp., 914 F.2d 71, 72–73 (5th Cir. 1990) (per curiam) (explaining that the "undue hardship" limitation "protects the employer"); see also Rutherglen, supra note 10, at 158 (recognizing that the "undue hardship" and "'reasonable' accommodation" limitations protect the employer).

[17] See 42 U.S.C. § 2000e(j); see also *Groff*, 143 S. Ct. at 2286 ("Title VII of the Civil Rights Act of 1964 requires employers to accommodate the religious practice of their employees unless doing so would impose an 'undue hardship on the conduct of the employer's business.'" (quoting 42 U.S.C. § 2000e(j))).

[18] 42 U.S.C. § 2000e(j).

[19] Kimberly A. Yuracko, Trait Discrimination as Race Discrimination: An Argument About Assimilation, 74 Geo. Wash. L. Rev. 365, 366 (2006).

[20] The EEOC takes the position that certain conduct associated with race or national origin may be protected by Title VII. Courts, however, have often declined to adopt the EEOC's view. See U.S. Equal Emp. Opportunity Comm'n, EEOC-CVG-2016-2, EEOC Enforcement Guidance on National Origin Discrimination (2016), https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination [https://perma.cc/LYV4-BCN8]. But see Dallan F. Flake, Valuing Worker Authenticity, 66 Wm. & Mary L. Rev. 1089, 1101

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Consider a workplace grooming policy that prohibits dreadlocks.[21] Two employees request an accommodation to wear dreadlocks. One request is rooted in the employee's desire to express a racial identity; the other is rooted in religious practice, such as Rastafarianism.[22] Although both employees have asked to engage in the same conduct, only the Rastafarian's request is within the scope of Title VII's duty to accommodate.[23] The Supreme Court has emphasized that this form of "favored treatment" for religion is a feature, not a bug, of the statutory design.[24] Nevertheless, some scholars have persuasively argued that the accommodation duty should be extended to protect trait-based expression associated with other protected characteristics.[25]

This asymmetry can produce several downstream effects. First, employees may be incentivized to frame accommodation requests in religious terms, increasing pressure on courts to determine whether beliefs are religious and sincerely held—both areas in which courts have traditionally stepped lightly.[26] Second, perceived favoritism toward religious employees may generate coworker resentment and operational

(2025) (explaining that courts generally reject the EEOC's position and instead rely on the distinction between mutable and immutable characteristics to deny protection to conduct associated with race, color, or national origin); see also EEOC v. Catastrophe Mgmt. Sols., 11 F. Supp. 3d 1139, 1143 (S.D. Ala. 2014) (holding that a hairstyle, even one closely associated with a racial group, is a mutable characteristic and therefore not protected by Title VII), *aff'd*, 852 F.3d 1018 (11th Cir. 2016).

[21] For a comprehensive discussion of a Title VII case involving similar facts, see Flake, supra note 20, at 1092–93, 1150–51 (explaining the facts of *EEOC v. Catastrophe Management Solutions* and considering how the case would be decided under *Groff*).

[22] EEOC guidance notes that the duty to accommodate religion may include accommodating hairstyles, "such as Rastafarian dreadlocks." See U.S. Equal Emp. Opportunity Comm'n, Religious Discrimination, https://www.eeoc.gov/religious-discrimination [https://perma.cc/VE6R-2RZJ] (last visited Sep. 13, 2026).

[23] The same practice may be religious for one employee but not for another, depending on the employee's motivation. See U.S. Equal Emp. Opportunity Comm'n, EEOC-NVTA-2008-2, Questions and Answers: Religious Discrimination in the Workplace (2008) [hereinafter EEOC's Questions and Answers: Religious Discrimination in the Workplace], https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace [https://perma.cc/WB7T-86T3].

[24] EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 775 (2015).

[25] See Flake, supra note 20, at 1105–08 (summarizing the various arguments).

[26] See James D. Nelson, Disestablishment at Work, 134 Yale L.J. 1890, 1932 (2025) (noting that employees who object to workplace vaccination mandates on health grounds may have incentives "to dress up those objections in religious language to increase their chances of successful accommodation"). For a discussion of the reluctance to scrutinize the religiosity and sincerity of beliefs, see infra notes 43–54 and accompanying text.

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friction.[27] Finally, preferential treatment for religion raises Establishment Clause concerns. Title VII's accommodation duty must operate within the space between the Free Exercise Clause and the Establishment Clause,[28] and it has not always withstood constitutional scrutiny.[29] Although it is currently settled that Title VII's duty to accommodate religion is constitutional, underlying concerns about preferential treatment have never fully disappeared.[30] Thus, another function of the undue hardship defense is to prevent the accommodation duty from becoming absolute.[31] A lower undue hardship standard reduces Establishment Clause concerns; a higher one raises them.[32]

[27] See Dallan F. Flake, Undue Hardship After *Groff*, 28 Emp. Rts. & Emp. Pol'y J. 1, 18 (2025) (using equity theory to explain how perceived inequity caused by granting religious requests while denying secular requests can reduce motivation).

[28] See Rutherglen, supra note 10, at 154–55 (explaining that the "dual nature" of the Establishment Clause and Free Exercise Clause leaves only "a narrow range left for the permissible operation of the legal prohibitions against religious discrimination").

[29] The EEOC first imposed a duty to accommodate religion by regulation in 1967, which was struck down on Establishment Clause grounds. See Dewey v. Reynolds Metals Co., 429 F.2d 324, 334 (6th Cir. 1970), *aff'd per curiam by an equally divided court*, 402 U.S. 689 (1971). Congress then codified the accommodation duty in 1972, and it was upheld against an Establishment Clause challenge. See Cummins v. Parker Seal Co., 516 F.2d 544, 554 (6th Cir. 1975), *aff'd per curiam by an equally divided court*, 429 U.S. 65 (1976).

[30] See Transcript of Oral Argument at 45, Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) (No. 75-1126) ("What's your answer to—what is the employer supposed to say to the—say ten people come in and say, 'We don't want to work on Saturday, we want to go to the football game and watch our children play, but we'll work on Sunday; and you let these religious practitioners off on Saturday, now let us off.' What is he supposed to say to them?"); Transcript of Oral Argument at 32–33, Groff v. DeJoy, 143 S. Ct. 2279 (2023) (No. 22-174) ("[T]here's [a] rural grocery store, let's say, and it has three employees, and it's important to the grocery store that it stay open on Sunday. And one of the employees says, no, I'm a Sabbath observer. But the other two employees are not thrilled about the idea of working on Sunday either. I mean, maybe they want to go to Little League games with their kids or maybe they want to go to church too, but they're not a Sabbath observer and can't ask for this sort of accommodation . . . .").

[31] See Est. of Thornton v. Caldor, Inc., 472 U.S. 703, 709–11 (1985) (finding a state statute providing an absolute right not to work on the Sabbath unconstitutional because it imposed an "absolute duty" on employers); see also id. at 711–12 (O'Connor, J., concurring) (distinguishing the unlawful state statute from Title VII's religious accommodation duty because Title VII does not demand "absolute accommodation").

[32] Sensitivity to Establishment Clause concerns may have led the Court in *Hardison* to adopt a narrow understanding of undue hardship. See Pamela S. Karlan & George Rutherglen, Disabilities, Discrimination, and Reasonable Accommodation, 46 Duke L.J. 1, 7 (1996) ("[T]o avoid constitutional questions under the Establishment Clause, the Supreme Court interpreted the duty of reasonable accommodation narrowly . . . ."); Nelson, supra note 26, at 1894 ("*Hardison* was highly sensitive to the Establishment Clause's concern for third parties . . . ."); see also *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting) (arguing that the

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B. The Litigation Framework

Title VII does not provide a litigation framework for failure-to-accommodate claims, and the Supreme Court has never formally endorsed one.[33] In practice, courts have imported the familiar burden-shifting framework from *McDonnell Douglas Corp. v. Green* and modified it for failure-to-accommodate claims.[34] *McDonnell Douglas* involved an allegation of disparate treatment (i.e., intentional discrimination).[35] The Supreme Court has since made clear that Title VII only prohibits two forms of discrimination, disparate treatment and disparate impact, so failure to accommodate religion is not a freestanding claim under Title VII.[36] It is puzzling to use a litigation framework developed for disparate treatment cases to resolve failure to accommodate religion cases. The prohibition of disparate treatment requires employers *not* to consider protected characteristics, whereas the duty to accommodate requires employers to do the opposite.[37] This contradiction has only sharpened with recent moves that have cast doubt on the constitutionality of disparate impact liability.[38] The duty to

majority's approach "has the singular advantage of making consideration of petitioners' constitutional challenge unnecessary").

[33] See Charles A. Sullivan, Accommodating Religion After *Groff*, 77 SMU L. Rev. 655, 678 (2024).

[34] For the traditional burden-shifting framework, see McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). For the modified framework, see Tabura v. Kellogg USA, 880 F.3d 544, 549 (10th Cir. 2018) (explaining that "[a] version of the *McDonnell Douglas* burden-shifting analysis aids us in addressing" failure-to-accommodate claims (footnote omitted)); Davis v. Fort Bend County, 765 F.3d 480, 485 (5th Cir. 2014) ("This court analyzes a Title VII claim for a failure to accommodate religious observances under a burden-shifting framework akin to the [*McDonnell Douglas*] burden-shifting framework.").

[35] *McDonnell Douglas Corp.*, 411 U.S. at 797 (noting that plaintiff alleged a violation of § 703(a)(1)); see also Rutherglen, supra note 10, at 37 (explaining the difference between "disparate treatment" and "disparate impact").

[36] See EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 771, 774–75 (2015).

[37] Justice Thomas addressed this tension in his separate opinion in *EEOC v. Abercrombie & Fitch*, noting that an employer that denies an accommodation for *all* employees has treated all employees equally and therefore cannot be liable for disparate treatment. Id. at 781–84 (Thomas, J., concurring in part and dissenting in part); see also discussion infra Section III.A.

[38] See, e.g., Kim Bellware, What Trump's Order on 'Disparate Impact' Means for Civil Rights, Wash. Post (Apr. 24, 2025), https://www.washingtonpost.com/nation/2025/04/24/disparate-impact-liability-executive-order/ (discussing the executive order directing federal agencies to deprioritize enforcement of statutes and regulations that include disparate impact liability); Constitutionality of Disparate-Impact Liab. Under Title VII, 50 Op. O.L.C. (June 9, 2026) (slip op. at 13), https://www.justice.gov/olc/media/1444871/dl (concluding that Title VII's disparate-impact provisions are constitutional only insofar as they function as an

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accommodate religion is not "religion-blind," which fits awkwardly with the purportedly "colorblind" Constitution.[39]

Nonetheless, courts routinely use a modified *McDonnell Douglas* framework.[40] Under the modified approach, a plaintiff must show that "(1) she held a bona fide religious belief, (2) her belief conflicted with a requirement of her employment, (3) her employer was informed of her belief, and (4) she suffered an adverse employment action for failing to comply with the conflicting employment requirement."[41] Once the plaintiff makes this prima facie showing, the burden shifts to the employer to prove that it either offered a reasonable accommodation or could not reasonably accommodate the employee without undue hardship.[42] Either defense—reasonable accommodation or undue hardship—precludes liability.

For several related reasons, establishing a prima facie case is relatively simple. Traditionally, courts have been reluctant to scrutinize whether an employee's asserted religious beliefs are actually religious.[43] That is because defining "religion" is a "difficult and delicate task."[44] And doing so raises First Amendment concerns.[45] These concerns have

evidentiary tool for smoking out intentional discrimination); T. Elliot Gaiser & Josh Craddock, Opinion, Putting the Civil Rights Act Back on Track, Wash. Post (July 10, 2026), https://www.washingtonpost.com/opinions/2026/07/10/trump-doj-corrects-disparate-impact-record/ (arguing that after the OLC opinion, "[p]roperly understood, neutral policies are presumptively lawful" and "[e]mployers need only show that a challenged employment practice rationally serves a valid business purpose to avoid liability").

[39] Allen v. Milligan, No. 25A1314, slip op. at 1 (U.S. June 2, 2026) (per curiam) (characterizing the Constitution as "colorblind"); Johnson v. Transp. Agency, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting) (noting that Title VII was "designed to establish a color-blind and gender-blind workplace").

[40] See Sullivan, supra note 33, at 678–79 (identifying the modified *McDonnell Douglas* framework as "the litigation structure generally used by the lower courts").

[41] Tagore v. United States, 735 F.3d 324, 329 (5th Cir. 2013).

[42] See Davis v. Fort Bend County, 765 F.3d 480, 485 (5th Cir. 2014) (citing Antoine v. First Student, Inc., 713 F.3d 824, 831 (5th Cir. 2013)); Tabura v. Kellogg USA, 880 F.3d 544, 550 (10th Cir. 2018); Sullivan, supra note 33, at 679.

[43] See Andrew B. Rogers, Beyond Undue Hardship: Religion and Sincerity in a Post-*Groff* World, 62 U. Louisville L. Rev. 341, 341–42 (2024) (explaining that pre-*Groff* practice was to pay little attention to religiosity and sincerity and instead fight about costs); see also Gorski v. Ascension St. John Hosp., 725 F. Supp. 3d 718, 724–25 (E.D. Mich. 2024) ("[I]t is not within the court's purview . . . 'to say that plaintiffs' religious beliefs are mistaken or insubstantial.'" (quoting Fox v. Washington, 949 F.3d 270, 277 (6th Cir. 2020))).

[44] Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 714 (1981).

[45] See, e.g., Africa v. Pennsylvania, 662 F.2d 1025, 1031 (3d Cir. 1981) ("Few tasks that confront a court require more circumspection than that of determining whether a particular set of ideas constitutes a religion within the meaning of the first amendment."); United

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bled into the Title VII context.[46] EEOC guidance reflects this reluctance and provides a broad and inclusive definition of religion.[47] The sincerity requirement presents similar First Amendment concerns as well as practical, litigation-related difficulties.[48] First, because sincerity probes the employee's state of mind, it requires courts to conduct a subjective inquiry and make assessments of credibility.[49] Despite the difficulties associated with a subjective inquiry, courts routinely make assessments about sincerity when the substantive law requires it (e.g., in "[c]riminal law, tort, securities regulation, and professional responsibility rules").[50] Second, because sincerity is a fact-intensive inquiry, appellate review of

States v. Ballard, 322 U.S. 78, 87 (1944) (explaining that when the trier of fact undertakes the task of determining the truth or falsity of religious beliefs, "they enter a forbidden domain"); *Thomas*, 450 U.S. at 716 ("Courts are not arbiters of scriptural interpretation."); Fowler v. Rhode Island, 345 U.S. 67, 70 (1953) ("[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment.").

[46] See, e.g., Redmond v. GAF Corp., 574 F.2d 897, 900 (7th Cir. 1978) (explaining that requiring "courts to decide whether a particular practice is or is not required by the tenets of the religion" would be inappropriate in the Title VII context).

[47] According to the EEOC, religion includes not only organized religion, but also "religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others," and "non-theistic 'moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.'" See EEOC Compliance Manual on Religious Discrimination, supra note 13, § 12(I)(A)(1). The only limit that the EEOC places on the definition of "religion" is that "[s]ocial, political, or economic philosophies, as well as mere personal preferences, are not religious beliefs protected by Title VII." Id.; see also EEOC v. Unión Independiente de la Autoridad de Acueductos y Alcantarillados de P.R., 279 F.3d 49, 56 (1st Cir. 2002) (noting that because of "Title VII's capacious definition of 'religion,'" there is "little room for a party to challenge the religious nature of an employee's professed beliefs").

[48] See, e.g., Adeyeye v. Heartland Sweeteners, LLC, 721 F.3d 444, 452 (7th Cir. 2013) ("[T]he prospect that courts would begin to inquire into the personal reasons an individual has for holding a religious belief would create a slippery slope we have no desire to descend."); Davis v. Fort Bend County, 765 F.3d 480, 486 (5th Cir. 2014) ("This court has cautioned that judicial inquiry into the sincerity of a person's religious belief 'must be handled with a light touch, or judicial shyness.'" (quoting Tagore v. United States, 735 F.3d 324, 328 (5th Cir. 2013))).

[49] See, e.g., United States v. Seeger, 380 U.S. 163, 185 (1965) (defining religion based on the believer's own "scheme of things," underscoring the subjective nature of the inquiry); *Davis*, 765 F.3d at 485–86 (explaining that the inquiry is limited to "focusing upon the individual's motivation" and "is a question of fact unique to each case" and "largely a matter of individual credibility" (citing *Tagore*, 735 F.3d at 328)); see also Nathan S. Chapman, Adjudicating Religious Sincerity, 92 Wash. L. Rev. 1185, 1226 (2017) ("Sincerity depends on the statement's correspondence to the speaker's subjective belief.").

[50] See Chapman, supra note 49, at 1228 (footnotes omitted).

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lower court determinations of sincerity is limited.[51] And finally, for employers, questioning the sincerity of an employee's religious beliefs before litigation is risky, as persistent badgering may provide the hook for a discrimination claim,[52] and in any event is likely to damage workplace relationships.[53]

The upshot has been a relatively light prima facie burden for plaintiffs.[54] Thus, disputes in litigation are often funneled into questions of whether the employer offered a reasonable accommodation or whether the employer could not reasonably accommodate the plaintiff's religion without undue hardship.[55] After *Groff*, however, this dynamic may change.[56] By heightening the undue hardship standard, *Groff* made that defense more difficult for employers to establish, potentially

[51] See, e.g., EEOC v. Ilona of Hung., Inc., 108 F.3d 1569, 1575 (7th Cir. 1997) (noting that lower courts' findings on sincerity will depend on the employee's credibility, making it difficult for a reviewing court to disturb those findings as clearly erroneous); United States v. Quaintance, 608 F.3d 717, 721 (10th Cir. 2010) (explaining that on questions of sincerity, the appellate court defers to lower courts, reversing only if the finding is clearly erroneous).

[52] In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 19, 22 (1993), the Supreme Court recognized that Title VII prohibits discrimination based on sex that creates a hostile work environment. Federal courts have extended hostile work environment law to include harassment based on other protected characteristics. See Venters v. City of Delphi, 123 F.3d 956, 975 (7th Cir. 1997) (explaining how the sexual harassment framework has been extended to religion); see also EEOC v. Chipotle Servs., LLC, No. 23-cv-02439, 2024 WL 4948888, at *1, *3, *18 (D. Kan. Dec. 3, 2024) (denying summary judgment for employer where plaintiff's supervisor asked on numerous occasions to see plaintiff's hair which was covered by a hijab); EEOC's Questions and Answers: Religious Discrimination in the Workplace, supra note 23 (explaining that religious harassment can occur when employees are pressured "to abandon, alter, or adopt a religious practice as a condition of employment").

[53] See Rogers, supra note 43, at 341–42 (characterizing the lax sincerity inquiry as "mutually beneficial" because "[e]mployees avoided uncomfortable questions about the particulars of their beliefs, including whether they were genuinely religious" and employers "bypass[ed] these awkward topics and focus[ed] on the more objective subject of costs and burdens").

[54] See, e.g., *Tagore*, 735 F.3d at 328 (explaining that sincerity "is rarely challenged" and "claims of sincere religious belief in a particular practice have been accepted on little more than the plaintiff's credible assertions"); Bailey v. Metro Ambulance Servs., Inc., 992 F.3d 1265, 1275 (11th Cir. 2021) (per curiam) (explaining that "plaintiff's burden to establish a prima facie case 'is not onerous'" (quoting Walden v. CDC, 669 F.3d 1277, 1293 (11th Cir. 2012))).

[55] See, e.g., Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 132–33 (1st Cir. 2004) (noting that there was "no need" for the court to delve into the "thorny" question of religiosity and sincerity because the employer prevailed on the undue hardship defense).

[56] See Rogers, supra note 43, at 342 (predicting that after *Groff*, employers "will be more likely, and often compelled, to challenge the religiosity and sincerity of beliefs and practices").

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increasing incentives to attack the plaintiff's prima facie case. Early post-*Groff* cases suggest that this prediction may be correct, particularly in cases involving COVID-19 vaccination requirements, where some courts were willing to police the line between religious and nonreligious objections.[57] Some courts were willing to examine the same distinction before *Groff*.[58] Although this line of defense may remain important, it is unlikely to be a silver bullet for employers. Plaintiffs' lawyers may eventually develop foolproof strategies for coaching their clients to assert something that passes for sincerely held religious beliefs. And as politics and religion become increasingly intertwined, beliefs once classified as political may come to be regarded as religious.[59] Undue hardship is therefore likely to remain a central defense for employers.

C. Defining Undue Hardship Before and After Groff

Because Title VII does not define "undue hardship,"[60] the term has instead been given content through judicial interpretation. This began with the Supreme Court's 1977 decision in *Trans World Airlines, Inc. v.*

[57] See, e.g., DeVore v. Univ. of Ky. Bd. of Trs., 118 F.4th 839, 846–48 (6th Cir. 2024) (concluding that plaintiff failed to demonstrate a *religious* conflict between her beliefs and employer's COVID testing policy); Cagle v. Weill Cornell Med., 680 F. Supp. 3d 428, 435–36 (S.D.N.Y. 2023) (concluding that plaintiff's "[b]ald allegations" of a conflict between her religious beliefs and an employment requirement were insufficient to state a claim for religious discrimination under Title VII); see also Ellison v. Inova Health Care Servs., 692 F. Supp. 3d 548, 556 n.3, 557 (E.D. Va. 2023) (determining that *Groff* "does not have any bearing on the resolution of the instant motion" which was strictly focused on the religiosity inquiry).

[58] See, e.g., Fallon v. Mercy Cath. Med. Ctr. of Se. Pa., 877 F.3d 487, 492 (3d Cir. 2017) (concluding that plaintiff's objections to the flu vaccine were not religious and therefore not protected by Title VII); Mason v. Gen. Brown Cent. Sch. Dist., 851 F.2d 47, 51 (2d Cir. 1988) (affirming a district court ruling which held that plaintiffs' anti-vaccination beliefs were based not on religious grounds, but on scientific and secular grounds).

[59] See Sullivan, supra note 33, at 675 ("In a world in which much expression that is viewed as homophobic or transphobic is framed in religious terms, any such distinction [between political and religious beliefs] may be difficult to draw."); David E. Campbell, The Perils of Politicized Religion, 149 Daedalus, Summer 2020, at 87, 95 (arguing that "religion and partisan politics have become increasingly intertwined" and although this has long been the case, the difference about today's climate "is that the partisan differences are not between religious camps, but rather between religion and secularity"); Becka A. Alper, Pew Rsch. Ctr., What Political Issues Do Americans Hear About in Church? 3 (2026), http://pewresearch.org/religion/2026/05/27/what-political-issues-do-americans-hear-about-in-church/ [https://perma.cc/66FA-CNJP] (finding that two-thirds of U.S. adults who regularly attend religious services report hearing their clergy speak about at least one political issue in the past few months, with abortion, Israel, and homosexuality among the most commonly cited).

[60] Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e(j).

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Hardison.[61] In *Hardison*, Trans World Airlines ("TWA") operated a maintenance and overhaul base that remained open 24 hours per day, 365 days per year.[62] Shifts were assigned pursuant to a collectively bargained seniority system.[63] Larry Hardison, a recent convert to the Worldwide Church of God, sought an accommodation that would allow him to avoid Saturday work in order to observe the Sabbath.[64] But because Hardison ranked near the bottom of the seniority list, granting his request would have required subordinating the seniority rights of other employees.[65]

The Court held that TWA could not reasonably accommodate Hardison without incurring undue hardship.[66] The decision was motivated in part by concerns about fairness and preferential treatment for religious employees.[67] According to the Court, Title VII does not require an employer to "discriminate against some employees" to accommodate another employee's religion.[68] However, it is unclear exactly how broadly this language can be read because the Court partially rested its decision on a provision in Title VII that allows employers to apply "different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system."[69] Regardless, the decision is notable for finding undue hardship based in part on costs that were not directly financial.

The Court also considered and rejected alternative accommodations that would have imposed direct financial costs on the employer, such as leaving Hardison's position unfilled on Saturdays or paying overtime wages to other employees to cover the shift.[70] In doing so, the Court stated that an employer need not incur "more than a *de minimis* cost" to

[61] 432 U.S. 63 (1977).
[62] Id. at 66.
[63] Id. at 67.
[64] Id. at 67–68.
[65] Id. at 68; see Rutherglen, supra note 10, at 157.
[66] *Hardison*, 432 U.S. at 84.
[67] See id. at 84–85 (explaining that the additional costs incurred to give Hardison Saturdays off, which are not incurred to give secular employees their desired days off, "would involve unequal treatment of employees on the basis of their religion" and refusing to construe Title VII "to require an employer to discriminate against some employees in order to enable others to observe their Sabbath").
[68] Id. at 85.
[69] See Civil Rights Act of 1964 § 703(h), 42 U.S.C. § 2000e-2(h).
[70] *Hardison*, 432 U.S. at 76–77; see Rutherglen, supra note 10, at 157.

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accommodate an employee's religion.[71] Elsewhere in the opinion, in a footnote, the Court described undue hardship in terms of "substantial expenditures," "substantial additional costs," and "substantial costs."[72] Despite this inconsistency, the "more than a *de minimis* cost" formulation came to dominate lower court decisions for nearly fifty years.[73] And although scholars disagree about how employer-friendly the *Hardison* regime was in practice, it was, at minimum, a less demanding standard than *Groff*'s.[74]

In 2023, the Supreme Court revisited the meaning of undue hardship in *Groff v. DeJoy*.[75] The facts of *Groff* are closer to the traditional scheduling disputes than the culture war disputes that have become common today.[76] Gerald Groff, an Evangelical Christian who worked as a mail carrier for the U.S. Postal Service ("USPS"), believed for religious reasons that he could not work on Sundays.[77] At the time Groff accepted his position with USPS, Sunday work was not required, but that changed when USPS entered into an agreement with Amazon to begin making Sunday deliveries.[78] Groff refused to work on Sundays, so

[71] *Hardison*, 432 U.S. at 84.

[72] Id. at 83 n.14 ("We accept the District Court's findings that TWA had done all that it could do to accommodate Hardison's religious beliefs without either incurring substantial costs or violating the seniority rights of other employees.").

[73] See Natalie C. Rhoads, *Groff v. DeJoy* and Title VII's "Undue Hardship" Standard, 18 Liberty U. L. Rev. 533, 541 (2024) (explaining that the "de minimis" language "set the trajectory of Title VII jurisprudence for the next 50 years").

[74] See Sullivan, supra note 33, at 662; Rhoads, supra note 73, at 542; Nick Reaves, *Groff v. DeJoy*: *Hardison* Is Dead, Long Live *Hardison*!, Harv. J.L. & Pub. Pol'y Per Curiam, Fall 2023, at 1, 1; see also Brief of Asma T. Uddin et al. as Amici Curiae in Support of Petitioner at 14, Groff v. DeJoy, 143 S. Ct. 2279 (2023) (No. 22-174) (reporting that since *Hardison*, the U.S. Courts of Appeals have applied it in 114 cases and plaintiff-employees won accommodations in only 23 of those cases); Brief of Religious Liberty Scholars & Employment Law Scholars as Amici Curiae in Support of Petitioner at 9, *Groff*, 143 S. Ct. 2279 (No. 22-174) ("The EEOC receives thousands of religious discrimination complaints each year, some of which include requests for accommodation. Under *Hardison*'s permissive standard, all but a handful of these requests are dead on arrival." (citation omitted)). But see Nelson, supra note 26, at 1905 ("Although the phrase 'de minimis' sounds stingy toward religious employees, in practice their claims for accommodation garnered considerable solicitude. . . . [E]mployees routinely received accommodations that imposed reasonable costs on their employers and coworkers.").

[75] *Groff*, 143 S. Ct. 2279.

[76] See infra Part II (discussing the shift from traditional accommodation requests, such as scheduling changes to observe the Sabbath, toward modern requests to engage in politically divisive conduct at work, and the doctrinal issues this shift presents).

[77] *Groff*, 143 S. Ct. at 2286.

[78] Id.

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USPS initially adjusted by having other employees cover the Sunday deliveries that he would otherwise have made.[79] He received "progressive discipline" for his refusal to work on Sundays and eventually resigned.[80] Thereafter, he sued USPS for failure to accommodate his religion.[81] Using *Hardison*'s "more than a *de minimis* cost" standard, the district court granted summary judgment for USPS, and the Third Circuit affirmed.[82] The Supreme Court granted Groff's petition for a writ of certiorari to "explain the contours of *Hardison*."[83]

Without overruling *Hardison*, the Court held that undue hardship means "substantial increased costs in relation to the conduct of [the employer's] particular business."[84] Writing for the Court, Justice Alito explained that lower courts had misread *Hardison* by focusing too much on the "more than a *de minimis* cost" language and overlooking the opinion's reference—again, only in a footnote—to "substantial costs."[85] Instead, lower courts were instructed to apply the undue hardship standard in a "commonsense manner" that "takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, 'size and operating cost of [an] employer.'"[86]

The Court made two additional clarifications. First, much of the existing EEOC guidance on the duty to accommodate would remain "sensible" and, "in all likelihood, be unaffected" by the decision, though

[79] Id.
[80] Id. at 2286–87.
[81] Id. at 2287.
[82] Id. (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)).
[83] Id.
[84] Id. at 2295.
[85] Id. at 2293–94 ("Today, the Solicitor General disavows its prior position that *Hardison* should be overruled—but only on the understanding that *Hardison* does not compel courts to read the 'more than *de minimis*' standard 'literally' or in a manner that undermines *Hardison*'s references to 'substantial' cost. With the benefit of comprehensive briefing and oral argument, we agree." (citation omitted)). Some scholars have noted the oddity of Justice Alito's effort to characterize *Hardison* as *never* standing for the "de minimis" standard that it had long been understood to establish. See, e.g., Sullivan, supra note 33, at 662 ("Justice Alito's opinion is largely devoted to trying to explain how *Hardison* is properly read to reject the very *de minimis* test it articulated."); Fiona Carmichael, Note, *Groff v. DeJoy*: A Wrong Step in the Right Direction, 83 Md. L. Rev. Online 199, 210 (2024) (summarizing recent Supreme Court opinions embracing the idea that *Hardison* established the de minimis test).
[86] *Groff*, 143 S. Ct. at 2295–96 (alteration in original).

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it was not "ratif[ied] *in toto*."[87] Second, coworker animosity "to a particular religion, to religion in general, or to the very notion of accommodating religious practice" cannot itself constitute undue hardship.[88] The Court reasoned that allowing coworker animosity toward religion to defeat the duty to accommodate religion would render Title VII "at war with itself."[89] However, the Court explained that *other* impacts on coworkers may be considered if they affect the conduct of the employer's business.[90] Justice Sotomayor's concurrence emphasized the latter point, explaining that "[b]ecause the 'conduct of [a] business' plainly includes the management and performance of the business's employees, undue hardship on the conduct of a business may include undue hardship on the business's employees."[91]

After *Groff*, when an employer claims that an accommodation would negatively impact coworkers, courts must distinguish impermissible animus toward religion from cognizable coworker effects. This may be difficult in practice. In a strictly literal sense, any coworker objection to a religious accommodation *is* an objection to religion—a consequence of defining "religion" to include conduct.[92] Yet in many contemporary workplace disputes, particularly those involving pronoun usage or abortion-related expression, coworker objections are more likely to stem from disagreements about fairness, dignity, or morality than from hostility toward religion itself.[93] Thus, in most cases, the distinction may not be difficult to make. However, to the extent that it proves difficult, it

[87] Id. at 2296.

[88] Id.

[89] Id.

[90] Id. The distinction the Court appears to be drawing here is one of causation; an employer cannot merely rely on the *existence* of impacts on coworkers but must make the "further logical step" of showing that those impacts "have ramifications for the conduct of the employer's business." Id. For a comprehensive discussion of *Groff*'s "new evidentiary requirement," see Flake, supra note 27, at 32–35.

[91] *Groff*, 143 S. Ct. at 2298 (Sotomayor, J., concurring) (second alteration in original) (quoting 42 U.S.C. § 2000e(j)).

[92] See supra Section I.A.

[93] See Ann C. McGinley, Religious Accommodations in the *Dobbs* Era, 27 Emp. Rts. & Emp. Pol'y J. 276, 310 (2024) (explaining that people who identify as pro-choice "would likely say that it is a moral conviction"); Wilson v. U.S. W. Commc'ns, 58 F.3d 1337, 1339 (8th Cir. 1995) (describing coworkers' testimony that an anti-abortion button containing a photo of a fetus worn by a coworker was "offensive and disturbing" for reasons "unrelated to any stance on abortion or religion"); Nelson, supra note 26, at 1934 ("[W]hen employees claim a right to misgender their colleagues, they denigrate those colleagues and undermine their interests in social equality.").

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may prompt courts to proceed cautiously when employers assert coworker-based harms as undue hardship.

II. MODERN ACCOMMODATION DISPUTES ARE DIFFERENT

The thorniest post-*Groff* cases have not involved scheduling disputes like those in *Hardison* or *Groff*. Instead, they have involved religious objections to COVID-19 vaccination mandates and to name-and-pronoun policies. These disputes are not entirely new, but *Groff* "reinvigorate[d]" them.[94] Before *Groff*, employers defending failure-to-accommodate claims benefitted from *Hardison*'s "more than a *de minimis* cost" formulation, because they did not have to make precise predictions about the costs of an accommodation.[95] After *Groff*, employers who deny an accommodation request face a greater risk that a court will second-guess the denial—in effect assuming the role of a "super-personnel department."[96]

These cases are difficult at their core for reasons unrelated to the law. They involve issues about which people—both secular and religious—are deeply and persistently divided. Some religious employees view vaccination mandates or name-and-pronoun policies as compelling them

[94] See Nelson, supra note 26, at 1933 ("Although these sorts of cases have been around for years, the Court's decision in *Groff* will reinvigorate—and likely escalate—religious employees' requests to misgender their colleagues."); see also id. at 1895–96 (explaining that in the wake of *Groff*, "a vanishingly small percentage [of religious accommodation cases] involve long-familiar issues like days off for Sabbath observance or shift changes for religious holidays," and "those cases are vastly outnumbered by accommodation claims that sound in the culture wars").

[95] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977); see also supra note 74 and accompanying text. For cases demonstrating the employer-friendly nature of *Hardison*, see, e.g., Small v. Memphis Light, Gas & Water, 952 F.3d 821, 824–26 (6th Cir. 2020) (per curiam) (affirming summary judgment on undue hardship grounds where employee requested reassignment to a different position or to different shifts); El-Amin v. First Transit, Inc., No. 04-cv-00072, 2005 WL 1118175, at *8 (S.D. Ohio May 11, 2005) ("[A] proposed accommodation that requires the employer to pay another employee overtime is an undue hardship on the employer [as a matter of law]."); Cook v. Chrysler Corp., 981 F.2d 336, 339 (8th Cir. 1992) (affirming district court's finding that a scheduling accommodation that would have cost the Chrysler Corporation roughly $1,500 per year was an undue hardship); Brown v. F.L. Roberts & Co., 419 F. Supp. 2d 7, 15–19 (D. Mass. 2006) (relying in part on *Hardison* to find that exempting a Rastafarian employee from a grooming policy would impose an undue hardship because doing so might "adversely affect the employer's public image" (quoting Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 136 (1st Cir. 2004))).

[96] See Kluge v. Brownsburg Cmty. Sch. Corp., 150 F.4th 792, 814 (7th Cir. 2025) (Rovner, J., dissenting).

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to act contrary to deeply held beliefs.[97] Coworkers, by contrast, may view such policies as necessary to maintain safety, fairness, and mutual respect at work.[98] Employers, even those with no religious or political preference on the underlying issue, may simply view such policies as necessary to reduce friction among employees and keep the workplace conflict-free.

What matters doctrinally is that these disputes share a common structure. The asserted costs of accommodation are often (1) noneconomic—such as harms to the business's mission or reputation, workplace cohesion, or third-party dignity; and (2) hypothetical—in the sense that the costs have not yet materialized at the moment the employer must decide what to do.[99] That combination exposes a gap that *Groff* did not address: how to determine whether predicted harms are sufficiently likely to occur, such that they should count in the undue hardship inquiry.[100] To clarify the problem, it is helpful to think of the undue hardship inquiry as involving considerations that run along two axes: (1) economic versus noneconomic costs, and (2) concrete versus hypothetical costs. The first axis concerns *what kind* of harm the employer asserts; the second concerns *how certain* it is that the harm will occur. This Part uses that framework to explain why disputes involving noneconomic and hypothetical costs occupy the most difficult corner of the post-*Groff* landscape.

[97] See, e.g., Ringhofer v. Mayo Clinic, Ambulance, 102 F.4th 894, 901 (8th Cir. 2024) (taking the COVID-19 vaccination would conflict with employees' belief that their "bod[ies] [are] a temple"); Barnett v. Inova Health Care Servs., 125 F.4th 465, 468 (4th Cir. 2025) (receiving the vaccine would be sinning against employee's body, "which is a temple of God"); Kluge v. Brownsburg Cmty. Sch. Corp., 64 F.4th 861, 866, 875 (7th Cir.) (where employee argued that addressing transgender students by their chosen first names would be "encouraging them in sin," which conflicted with religious prohibition of "encouraging students to hell"), *vacated*, No. 21-2475, 2023 WL 4842324 (7th Cir. July 28, 2023).

[98] Professor Nelson explains this in terms of the "principle of reciprocity." See Nelson, supra note 26, at 1929 ("[C]oworkers might perceive vaccine objection as demonstrating a lack of adequate respect for their interests in health and safety. . . . Employees who are willing to propose and abide by fair cooperative terms should be willing to make some sacrifices when asking others to accommodate their religious exercise.").

[99] See infra Sections II.B and II.C.

[100] To be clear, the Court did provide instruction on how to apply the test generally, but not about how to resolve the question of hypothetical costs. See Groff v. DeJoy, 143 S. Ct. 2279, 2295–96 (2023).

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A. The Modern Disputes Are Doctrinally Difficult

Groff's "substantial increased costs" test has prompted some courts to require something closer to an accounting of costs as opposed to mere gesturing to costs that are "more than . . . *de minimis*."[101] By emphasizing that the standard is "fact-specific," *Groff* has likely made it more difficult for employers to win dismissals or summary judgment on undue hardship grounds.[102] This difficulty has been sharply exposed by the timing of the 2023 *Groff* decision. Many of the post-*Groff* cases have involved accommodation requests from COVID-19 vaccination

[101] *Groff*, 143 S. Ct. at 2295; Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977). For post-*Groff* opinions requiring something closer to an accounting of costs, see Locke v. Chi. Fam. Health Ctr., No. 23-cv-04650, 2026 WL 622655, at *9 (N.D. Ill. Mar. 5, 2026) (holding that a defendant does not meet the *Groff* standard by merely pointing to concerns about effectiveness without making the extra causal showing of how the plaintiff's accommodation would increase costs); Kutrzepa v. Am. Med. Ass'n, No. 24-cv-02313, 2026 WL 821942, at *6 (N.D. Ill. Mar. 25, 2026) (refusing to dismiss failure-to-accommodate claim that was "based solely upon Defendants' conclusory assertions about operational burdens and safety risks . . . without providing any concrete evidence of the actual risks or burden that accommodations might impose"); Smith v. City of Mesa, No. 21-cv-01012, 2023 WL 8373495, at *4 (D. Ariz. Dec. 3, 2023) (noting that "the City has not articulated any concrete financial harm" and distinguishing the case from *Bordeaux v. Lions Gate Entertainment, Inc.*, 703 F. Supp. 3d 1117, 1128 (C.D. Cal. 2023), *aff'd*, No. 23-4340, 2025 WL 655065 (9th Cir. Feb. 28, 2025), "where the employer showed it would potentially sustain $1,500,000.00–3,000,000.00 in additional costs"). For a post-*Groff* case taking the opposite view, see Oka v. United Airlines, Inc., No. 23-cv-15793, 2026 WL 810815, at *9 (N.D. Ill. Mar. 24, 2026) (granting summary judgment over the plaintiff's argument that the defendant had produced "no modeling, no quantified projections, no cost analysis, and no operational data" because there is no authority in the case law nor the text of Title VII requiring an employer to do so).

[102] *Groff*, 143 S. Ct. at 2294. For post-*Groff* cases supporting this prediction, see Bazinet v. Beth Israel Lahey Health, Inc., 113 F.4th 9, 18–19 (1st Cir. 2024) (noting that "[u]sually . . . it will not be possible to adjudicate the undue hardship defense at the pleading stage because the *Groff* test is fact-specific" (internal quotation marks omitted)); *Kutrzepa*, 2026 WL 821942, at *5–6 (noting that "questions of undue hardship require extensive factual development and thus cannot be resolved at the pleading stage"). For post-*Groff* cases undermining this prediction, see Colón v. City of Boston, No. 24-cv-12191, 2026 WL 617337, at *12 (D. Mass. Mar. 5, 2026) ("Even under the 'heightened standard' in *Groff* . . . [a] showing [of undue hardship] can, in certain circumstances, be made as a matter of law . . . ."); Savel v. MetroHealth Sys., No. 22-cv-02154, 2024 WL 4581542, at *11 (N.D. Ohio Oct. 25, 2024) ("A court is permitted [to] assess an employer's defense of undue hardship as a matter of law where the proposed accommodation would either cause or increase safety risks or the risk of legal liability."), *aff'd*, No. 24-4025, 2025 WL 1826674 (6th Cir. July 2, 2025). Another example is *Kluge v. Brownsburg Community School Corp.*, 150 F.4th 792, 813 (7th Cir. 2025), which reversed the district court's grant of summary judgment to the employer, citing undue hardship. See discussion infra Section III.D.

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mandates and name-and-pronoun policies.[103] Both kinds of accommodation requests involve costs that are uniquely difficult to quantify.

Consider the difference between a traditional case involving Sabbath observance and the more recent cases involving pronoun usage or vaccination. In a traditional case, where an employee requests a scheduling accommodation to observe their Sabbath, the employer can pay overtime wages to another employee to cover the shift. The *Groff* test would simply ask: Is the payment of overtime wages a substantial increased cost in the context of the employer's business? More recent disputes are ill-equipped for a parallel inquiry. If an employee receives an accommodation to a name-and-pronoun policy, the persons directly harmed are coworkers who may suffer dignitary harm or emotional distress caused by misgendering.[104] If an employee receives an accommodation to a vaccination policy, the persons directly harmed are coworkers who may get sick[105] or feel as though the unvaccinated coworker has not afforded them the respect they deserve.[106] In both situations, the employer may risk its reputation or have its mission undermined.[107] Of course, in either case, the employer may still be

[103] See supra note 94 and accompanying text.

[104] See *Kluge*, 150 F.4th at 797–98 (describing how a religious accommodation permitting a public school teacher to use students' last names rather than their chosen first names "harm[ed] students" and "made [them] feel incredibly uncomfortable"); Trueblood v. Valley Cities Counseling & Consult., 748 F. Supp. 3d 988, 995 (W.D. Wash. 2024) (noting that a mental health care provider adopted its "Pronoun Protocol" to align with research showing that misgendering causes harm and "increases rates of suicide").

[105] See, e.g., Baugh v. Austal USA, LLC, 762 F. Supp. 3d 1201, 1209 (S.D. Ala. 2025) (citing risk of unvaccinated employees "spreading COVID-19"), *reh'g denied*, No. 22-cv-00329, 2025 WL 394977 (S.D. Ala. Feb. 4, 2025); Varkonyi v. United Launch All., LLC, No. 23-cv-00359, 2024 WL 1677523, at *2 (C.D. Cal. Feb. 21, 2024) (citing "the need to ensure a healthy and safe workplace"); Cyr v. Bos. Med. Ctr., No. 22-cv-11930, 2025 WL 269239, at *5 (D. Mass. Jan. 22, 2025) (citing risk of "increase[d] . . . exposure to liability related to the risk of staff-to-patient COVID-19 transmission"); Brown v. MGM Grand Casino, No. 22-cv-12978, 2024 WL 4819575, at *2 (E.D. Mich. Nov. 18, 2024) (citing the need to "provide sufficient protection for employees, guests, and customers"); Maki v. Fed. Rsrv. Bank of Minneapolis, 784 F. Supp. 3d 1191, 1213 (D. Minn. 2025) (citing risk of "endanger[ing] individuals on the Bank's premises"); Welcome v. Amplity, Inc., No. 22-cv-00830, 2025 WL 1789892, at *11 (W.D. Mo. Jan. 3, 2025) (citing "increased safety risk of transmitting COVID-19 to employees, clients, healthcare workers, and patients").

[106] See supra note 98.

[107] See, e.g., Hall v. Sheppard Pratt Health Sys., Inc., 749 F. Supp. 3d 532, 546–47 (D. Md. 2024) (finding undue hardship because an unvaccinated employee might create "the appearance that [the employer] was not prioritizing the safety of its patients and staff" and "could have eroded public trust"), *aff'd*, 155 F.4th 747 (4th Cir. 2025); Cruz v. Bd. of

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harmed in other ways (e.g., workplace friction, decreased efficiency, an outbreak resulting in worker shortages or work stoppages, etc.), albeit in a less direct manner than the coworkers.[108] Like subordinating the seniority rights of coworkers in *Hardison*, employers cannot remove the harm to coworkers by spending their way out of these requests.[109] Thus, concerns about fairness, preferential treatment, and the Establishment Clause are heightened.[110]

When an employee seeks an accommodation to avoid work on the Sabbath, coworkers may be affected—for example, by being forced to cover an unwanted shift.[111] But employers can reduce or offset those

Regents of the Univ. of N.M., No. 23-cv-00986, 2024 WL 4680623, at *11–12 (D.N.M. Nov. 5, 2024) (granting summary judgment for employer, based on risk of unvaccinated employee to employer's "mission"); Bobnar v. AstraZeneca Pharms. LP, 758 F. Supp. 3d 690, 728 (N.D. Ohio 2024) (rejecting employer's argument that an unvaccinated "representative" of the pharmaceutical company would "risk[] significant damage to [its] reputation as a global pharmaceutical company that manufactures vaccines" (alterations in original)); *Trueblood*, 748 F. Supp. 3d at 1006 (agreeing with employer, a mental health care provider, that permitting employee to misgender colleagues and clients is "unquestionably an undue burden when looking at the context of [the employer's] mission and services" (internal quotation marks omitted)).

[108] See, e.g., Bordeaux v. Lions Gate Ent., Inc., No. 23-4340, 2025 WL 655065, at *2 (9th Cir. Feb. 28, 2025) (finding undue hardship based in part on risk of production shutdown due to COVID-19 infection); *Hall*, 749 F. Supp. 3d at 546–47 (finding undue hardship based in part on risk of outbreak to "staffing, new-patient admission, and resource allocation" and "disruptions in treatment and an inferior quality of care"); see also Flake, supra note 27, at 2–3 ("[H]arm to coworkers and harm to a business are so inextricably connected that they are one and the same.").

[109] Pre-*Groff* EEOC guidance recognized the potential spillover effect of religious accommodations on coworkers, noting that undue hardship may exist "where the accommodation . . . infringes on other employees' job rights or benefits, impairs workplace safety, or causes coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work." See EEOC Compliance Manual on Religious Discrimination, supra note 13, § 12(IV)(B)(2) (footnotes omitted).

[110] For a brief discussion of Establishment Clause concerns implicated by the duty to accommodate, see supra notes 28–32 and accompanying text.

[111] Cases involving Sabbath observance or days off for religious holidays could fill volumes. The two most impactful Supreme Court cases on the meaning of undue hardship have involved this familiar fact pattern. See, e.g., Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 83–84 (1977) (finding undue hardship where accommodation to observe a Saturday Sabbath would have required employer to violate a seniority system for assigning shifts); Groff v. DeJoy, 143 S. Ct. 2279, 2297 (2023) (refusing to find undue hardship where accommodation to avoid Sunday work would have required employer to redistribute Sunday work to other employees). In some of these cases before *Groff*, courts were willing to find undue hardship based in part on the effects on coworkers. See, e.g., Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 146–47 (5th Cir. 1982) (finding undue hardship where accommodating

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burdens through the payment of premium wages, mutually agreeable shift swaps, or other operational changes. Any remaining impact on coworkers in this scenario is likely of the "mere grumbling" variety and unlikely to rise to the level of substantial increased costs. Further, any "grumbling" in that context is in response to being forced to work an unwanted shift, not being subjected to dignitary harm or unsafe working conditions.[112]

For the disputes that this Note focuses on, some costs of accommodation inevitably spill over onto coworkers or third parties. This spillover feature explains why the asserted costs are often hypothetical. For example, an accommodation that allows one employee to misgender another may only cause dignitary harm if there are transgender coworkers or coworkers that are offended by the misgendering for political, moral, or fairness reasons. Moreover, even if some coworkers are offended, their job performance may not be substantially affected. The same is true for reputational harm to a business. The public must discover the accommodation for it to impact the employer's reputation.[113] Further, the public must find that the accommodation reflects poorly on the employer's reputation. These

plaintiff required other employees to trade shifts, disrupting routines and lowering morale, and rejecting a characterization of coworkers' objections as "mere grumbling").

[112] By contrast, in vaccine and pronoun disputes, the asserted harms often involve dignity, safety, or reputation—costs that may not be avoidable in any meaningful way through money or operational adjustments. See, e.g., Peterson v. Hewlett-Packard Co., 358 F.3d 599, 601–02 (9th Cir. 2004) (employee posted biblical passages in the office condemning his gay coworkers); Wilson v. U.S. W. Commc'ns, 58 F.3d 1337, 1340–42 (8th Cir. 1995) (finding that employer offered to reasonably accommodate employee who sought to wear an anti-abortion button with a color photograph of a fetus by permitting employee to "cover or replace the button or wear it only in her cubicle"); Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 136 (1st Cir. 2004) (finding undue hardship where exemption from grooming policy allowing employee to wear facial piercings at work "would adversely affect the employer's public image"); see also Mark A. Rothstein, Covid Vaccine Mandates and Religious Accommodation in Employment, 52 Hastings Ctr. Rep., Jan.–Feb. 2022, at 8, 9 (noting that "some employees will be difficult or impossible to accommodate without creating a direct threat to others").

[113] See Bobnar v. AstraZeneca Pharms. LP, 758 F. Supp. 3d 690, 728 (N.D. Ohio 2024) (rejecting reputation-based undue hardship argument where "nobody ever asked [the unvaccinated employee] about his vaccination status, and . . . even if a customer did, he would not have been required to disclose it"); see also Naylor v. County of Muscatine, 151 F.4th 973, 977 (8th Cir. 2025) (per curiam) (rejecting reputation-based undue hardship argument where "the only concern voiced by the public came from a single community member's email" and "from public officials or in news articles, whose reach or impact is unknown").

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risks are real, yet difficult to quantify without providing the accommodation and waiting to see what consequences follow.

B. Axis One: "Noneconomic" Costs

Accurately forecasting the costs of an accommodation is particularly difficult where the costs cannot be easily monetized—i.e., where they are "noneconomic." As a preliminary matter, "noneconomic" is a misnomer. The term "noneconomic costs" may simply be probing the directness of the costs on the employer rather than their form. Harm in the form of reduced morale, operational friction, and reputational damage may not register immediately in dollars and cents. It can, however, surface later as economic loss. For example, a medical facility that loses the public's trust after allowing unvaccinated employees to infect patients may lose patients and revenue as a result or face legal liability.[114] And, dignitary harm to coworkers could develop into workplace dysfunction that renders workers less efficient. These harms would eventually appear on the balance sheet. In that sense, harms that appear noneconomic initially can eventually become economic. Professor Dallan Flake has, for this reason, argued that courts should not require employers to prove, step by step, that reduced morale will eventually harm business performance.[115] According to Professor Flake, the social science on the link between morale and organizational outcomes is well established, and courts should take judicial notice of it, thereby obviating the need for employers to comply with *Groff*'s "new evidentiary requirement" of proving that impacts on coworkers affect the conduct of the employer's business.[116] Despite the problems with the "noneconomic" terminology, for consistency, this Note follows the courts that often use that label.[117]

[114] Cyr v. Bos. Med. Ctr., No. 22-cv-11930, 2025 WL 269239, at *5–6 (D. Mass. Jan. 22, 2025) (citing risks of "increase[d] . . . exposure to liability related to the risk of staff-to-patient" transmission and "jeopardiz[ing] its reputation of providing safe care to patients"); Hall v. Sheppard Pratt Health Sys., Inc., 749 F. Supp. 3d 532, 546 (D. Md. 2024) ("Moreover, the appearance that Sheppard Pratt was not prioritizing the safety of its patients and staff could have eroded public trust, an essential for any healthcare facility.").

[115] See Flake, supra note 27, at 20–32 (linking morale to business outcomes through empirical evidence).

[116] Id. at 40.

[117] See, e.g., EEOC v. GEO Grp., Inc., 616 F.3d 265, 273 (3d Cir. 2010); Smith v. Atlantic City, 138 F.4th 759, 774 (3d Cir. 2025); Krone v. Legacy Health, No. 22-cv-01986, 2025 WL 1582793, at *8 (D. Or. May 6, 2025), *adopted*, No. 22-cv-01986, 2025 WL 1581042

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Economic costs can easily be reduced to dollars and cents. Noneconomic costs cannot—at least not with precision at the time the employer must decide what to do. When the costs are purely economic, the undue hardship inquiry is relatively straightforward: courts compare the cost of the accommodation to the "nature, 'size and operating cost'" of the employer and determine whether the cost is substantial.[118] Outcomes will differ on a case-by-case basis depending on the nature, size, and operating cost of the employer, but there are reasons to prefer a flexible approach.[119] If the employer can afford to bear the cost of an accommodation without undue hardship, the employer should bear the cost.[120]

Noneconomic costs make the simple inquiry described above difficult. Once noneconomic costs are involved, both sides of the comparison (i.e., both the cost of the accommodation and the nature, size, and operating cost of the employer) get blurry. Think of the inquiry as a fraction: the numerator is the cost of granting the accommodation, while the denominator reflects the scale and nature of the employer's business against which that cost is measured. When costs are noneconomic, the numerator is not easily quantified, and the denominator may include mission-based terms, particularly for

(D. Or. June 3, 2025), *appeal dismissed*, No. 25-4132, 2025 WL 3906032 (9th Cir. Oct. 6, 2025); Snow v. Women's Healthcare Assocs., LLC, No. 23-cv-01393, 2024 WL 3640111, at *6 (D. Or. Aug. 2, 2024); Shields v. Main Line Hosps., Inc., 700 F. Supp. 3d 265, 274 (E.D. Pa. 2023).

[118] See Groff v. DeJoy, 143 S. Ct. 2279, 2295 (2023); see also Sara L. Silbiger, Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since *Trans World Airlines v. Hardison*, 53 Fordham L. Rev. 839, 858–59 (1985) (explaining the simple proportional comparison).

[119] See Silbiger, supra note 118, at 857 (describing the proportional comparison of religious interests to business interests as "true to the actual language of section 2000e(j)"); see also Hebrew v. Tex. Dep't of Crim. Just., 80 F.4th 717, 722 n.* (5th Cir. 2023) ("[*Groff*'s] reference to the 'size and operating cost' of the employer suggests that, all other things being equal, larger businesses and institutions must bear a heavier burden in proving undue hardship." (citation omitted)).

[120] This is required to protect the employee's interest in religious practice, one of the competing interests underlying Title VII's duty to accommodate. See Nelson, supra note 26, at 1892–93 (explaining that for the majority of Americans, their daily routines are determined by where they work, and because "these daily routines include religious practices, workplace rules and structures are of enormous consequence for the practical enjoyment of religious liberty"); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting) ("[A] society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job.").

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businesses with purposes other than, or in addition to, maximizing profits. Some courts have tried to resolve this issue by defining the "overall context of [the] employer's business" in mission-based terms.[121] Even then, however, the cost of the accommodation itself remains unclear, and the *Groff* question remains: How much mission derailment is enough?

Despite the terminological messiness and the difficulties it poses, courts widely recognize that noneconomic costs count in the undue hardship analysis.[122] The *Groff* Court said it was "clarif[ying]" the undue hardship standard, and not, as one court put it, "creating a new, strictly economic, one."[123] *Groff* also reaffirmed that coworker impacts matter—so long as the employer takes the "further logical step" of proving "ramifications for the conduct of the employer's business."[124] By prohibiting consideration of only *some* coworker effects, *Groff* implied that other coworker effects remain cognizable.[125] The Court also declined to overrule *Hardison*, which found undue hardship at least in part based on noneconomic costs.[126] The difficulty with noneconomic

[121] *Groff*, 143 S. Ct. at 2294; see, e.g., *Snow*, 2024 WL 3640111, at *8–9 (explaining that "[t]he 'overall context' of [the employer's] business was to provide women's health care" and finding undue hardship because of potential harm to employer's mission); Cruz v. Bd. of Regents of the Univ. of N.M., No. 23-cv-00986, 2024 WL 4680623, at *9 (D.N.M. Nov. 5, 2024) (reading "practical impact" in the *Groff* test to be equally important as "operating costs").

[122] See, e.g., Chavez v. S.F. Bay Area Rapid Transit Dist., 723 F. Supp. 3d 805, 821 (N.D. Cal. 2024); Hall v. Sheppard Pratt Health Sys., Inc., 749 F. Supp. 3d 532, 544 (D. Md. 2024); Welcome v. Amplity, Inc., No. 22-cv-00830, 2025 WL 1789892, at *11 (W.D. Mo. Jan. 3, 2025); Bushra v. Main Line Health, Inc., 709 F. Supp. 3d 164, 175 (E.D. Pa. 2023), *aff'd*, No. 24-1117, 2025 WL 1078135 (3d Cir. Apr. 10, 2025); Lavelle-Hayden v. Legacy Health, 744 F. Supp. 3d 1135, 1151–52 (D. Or. 2024); Gemmrig v. Asante Three Rivers Med. Ctr., LLC, Nos. 22-cv-01814, 23-cv-01389, 2025 WL 2555337, at *7 (D. Or. Sep. 5, 2025); Maki v. Fed. Rsrv. Bank of Minneapolis, 784 F. Supp. 3d 1191, 1212 (D. Minn. 2025) ("Economic expenses are prototypical costs. . . . But *Groff* does not limit substantial increased costs solely to financial burdens."); Benton v. BlueCross BlueShield of Tenn., Inc., 765 F. Supp. 3d 723, 736 (E.D. Tenn. 2025) (noting that *Groff*'s "increased costs are not limited to . . . economic costs" (internal quotation marks omitted)); Antredu v. Mass. Dep't of Youth Servs., 729 F. Supp. 3d 76, 84 (D. Mass. 2024) (explaining that the undue hardship inquiry takes into account more than just direct economic costs).

[123] *Cruz*, 2024 WL 4680623, at *9 (alteration in original) (quoting *Groff*, 143 S. Ct. at 2286).

[124] *Groff*, 143 S. Ct. at 2296.

[125] See *Cruz*, 2024 WL 4680623, at *9 ("[T]he Supreme Court implicitly acknowledged [that] practical impacts and relevant factors are not always monetary.").

[126] Id. (noting that "the Supreme Court declined to overrule *Hardison*," a case understood as finding undue hardship based on the imposition of "substantial *non-economic* costs").

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costs, then, is not doctrinal—the law clearly allows them to be considered—but practical; as noneconomic costs are harder to measure, courts may be prone to discount or ignore them.

*C. Axis Two: "Hypothetical" Costs and the Pre-*Groff *Tension*

The second axis concerns certainty. When the accommodation has not been implemented before litigation, analysis of the undue hardship defense requires prediction. In those situations, the predicted costs are unrealized, and in a broad sense may be considered hypothetical. But courts use the term "hypothetical" more narrowly in this context, to refer to a category of costs that will not be credited in the undue hardship analysis.[127]

Unlike the economic versus noneconomic distinction, the treatment of hypothetical costs was not fully settled before *Groff* and remains unsettled today. Since the religious accommodation duty was added to Title VII in 1972, courts have said two things at once: (1) employers cannot defeat accommodation requests with hypothetical costs, but (2) employers do not have to conduct dangerous or costly experiments to satisfy the undue hardship standard. Unfortunately, both principles fall under the "hypothetical costs" heading, and it is not always clear what courts mean when they invoke this language.

One line of cases emphasizes the first principle: "An employer cannot rely on speculative or hypothetical hardship when faced with an

[127] See, e.g., Bellard v. Univ. of Tex. MD Anderson Cancer Ctr., 716 F. Supp. 3d 503, 515 (S.D. Tex. 2024) ("[C]ourts are skeptical of hypothetical hardships."); Brown v. Polk County, 61 F.3d 650, 655 (8th Cir. 1995) ("Any hardship asserted . . . must be 'real' rather than . . . 'hypothetical.'" (citations omitted)); Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1243 (9th Cir. 1981) ("A claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships . . . ."); Anderson v. Gen. Dynamics Convair Aerospace Div., 589 F.2d 397, 402 (9th Cir. 1978) ("Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts."); see also Silbiger, supra note 118, at 857–59 (explaining that an employer cannot escape the duty to accommodate "by advancing merely speculative or hypothetical costs of accommodation"); 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, 611 (2000) (noting that courts "generally agree that hypothetical hardships cannot constitute undue hardship"); Rachel M. Birnbach, Note, Love Thy Neighbor: Should Religious Accommodations That Negatively Affect Coworkers' Shift Preferences Constitute an Undue Hardship on the Employer Under Title VII?, 78 Fordham L. Rev. 1331, 1346–47 (2009) ("[C]ourts typically hold that a hardship needs to be more than merely speculative to relieve the employer of its duty to accommodate.").

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employee's religious objection but, rather, should rely on objective information."[128] The concern motivating this principle is that "any accommodation, however slight, would rise to the level of an undue hardship . . . if sufficiently magnified through predictions of the future behavior of the employee's co-workers."[129] The form of reasoning these cases reject is aggregation of costs—what this Note calls "stacking." Stacking occurs when an employer predicts that accommodating one employee will lead to a flood of similar requests and seeks to prove undue hardship based on the aggregate costs rather than the costs associated with the individual employee's request.[130] EEOC guidance adopts the same prohibition on stacking. It states that an employer cannot rely on a "mere assumption that many more people with the same religious practices as the individual being accommodated may also seek accommodation."[131]

Tooley v. Martin-Marietta Corp. illustrates this point. There, Seventh-day Adventist employees sought an accommodation to avoid joining a union and paying union dues, offering instead to pay an equivalent amount to charity.[132] The union refused this proposal and argued that the substituted charity accommodation would cause undue hardship by depriving the union of necessary funding.[133] The U.S. Court of Appeals for the Ninth Circuit concluded that accommodating a mere six

[128] U.S. Equal Emp. Opportunity Comm'n, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws § L.3 [hereinafter What You Should Know About COVID-19 and EEO Laws], https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws [https://perma.cc/6ULF-TEQM] (last updated May 15, 2023); see *Tooley*, 648 F.2d at 1243; *Anderson*, 589 F.2d at 402.

[129] Brown v. Gen. Motors Corp., 601 F.2d 956, 961 (8th Cir. 1979) (quoting Haring v. Blumenthal, 471 F. Supp. 1172, 1182 (D.D.C. 1979)).

[130] Consider the difference between the calculation methods used in *Baugh v. Austal, LLC* and *Varkonyi v. United Launch Alliance, LLC*. In *Baugh*, the employer calculated that it was facing an approximate cost of $1 million per year to perform biweekly testing for the nearly 160 employees who requested religious accommodations to the employer's vaccination policy. The court did not take issue with this calculation method. But in *Varkonyi*, the employer used cost figures reflecting the cost to implement a testing program nationwide for *all* its employees (not just those requesting religious accommodations). The court rejected this calculation method. See Baugh v. Austal USA, LLC, 762 F. Supp. 3d 1201, 1204–06 (S.D. Ala. 2025); Varkonyi v. United Launch All., LLC, No. 23-cv-00359, 2024 WL 1677523, at *5–6 (C.D. Cal. Feb. 21, 2024).

[131] EEOC Compliance Manual on Religious Discrimination, supra note 13, § 12(IV)(B)(1).

[132] *Tooley*, 648 F.2d at 1241.

[133] Id. at 1243.

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employees in that manner posed no such hardship, but noted that "a '*widespread* refusal to pay union dues' is sufficient to establish undue hardship."[134] That reasoning suggests that if enough other employees sought the same accommodation as the plaintiffs, at some point, the union would lose necessary funding, and that would be sufficient to establish undue hardship. But the union could not simply rely on stacking possible but unproven costs to get there.

Similar reasoning appears in *Haring v. Blumenthal*, where the IRS predicted that granting an accommodation to one employee would encourage others to make the same request.[135] The court rejected that argument, explaining that hardship must be measured by reference to the specific employee seeking relief, not by the "precedent-setting effect" of granting the accommodation "and the conceivable actions of others."[136] These cases clearly reject stacking. What remains less clear is whether the prohibition on hypothetical costs applies only to stacking or sweeps more broadly.

Notably, before *Groff* but during the COVID-19 pandemic, the EEOC issued guidance relaxing the prohibition on stacking. The EEOC stated that "[a]n employer cannot rely on speculative or hypothetical hardship when faced with an employee's religious objection," but a "relevant consideration is the number of employees who are seeking a similar accommodation, i.e., the cumulative cost or burden on the employer."[137] Some courts were willing to follow suit.[138] This guidance appears to suggest that the EEOC regards costs derived from stacking as distinct from hypothetical costs, or as a subset of the broader category of hypothetical costs.[139]

[134] Id. at 1243–44 (emphasis added) (quoting Burns v. S. Pac. Transp. Co., 589 F.2d 403, 407 (9th Cir. 1978)).

[135] 471 F. Supp. 1172, 1181–82 (D.D.C. 1979).

[136] Id.

[137] What You Should Know About COVID-19 and EEO Laws, supra note 128, § L.3.

[138] See, e.g., Gemmrig v. Asante Three Rivers Med. Ctr., LLC, Nos. 22-cv-01814, 23-cv-01389, 2025 WL 2555337, at *7 (D. Or. Sep. 5, 2025) (approving of consideration of "cumulative or aggregate effects of an accommodation requested by multiple, similarly situated employees"); Hassett v. United Airlines, Inc., No. 23-cv-14592, 2025 WL 3268667, at *4 (N.D. Ill. Nov. 24, 2025) (explaining that in some circumstances, "the analysis for undue hardship 'naturally include[s] the aggregate effects when multiple employees are granted the same accommodation'" (alteration in original)).

[139] This is because the EEOC guidance begins by stating a broad prohibition on "hypothetical hardship" but then notes that "cumulative cost" of granting accommodations to similarly situated employees can be considered. What You Should Know About COVID-19 and EEO Laws, supra note 128, § L.3.

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The second line of cases emphasizes the other principle: "hypothetical" is not a synonym for "unrealized."[140] As the Fourth Circuit put it in *EEOC v. Firestone Fibers & Textiles Co.*, "an employer is not required 'to wait until it [feels] the effects' of the proposed accommodation before determining its reasonableness[;] . . . employers must be given leeway to plan their business operations and possible accommodative options in advance, relying on an accommodation's predictable consequences along the way."[141] In *Draper v. U.S. Pipe & Foundry Co.*, despite expressing skepticism about "hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice," the Sixth Circuit recognized that "it is possible for an employer to prove undue hardship without actually having undertaken any of the possible accommodations."[142] This suggests that at least some hypothetical costs are not barred by the "prohibition" on hypothetical costs.

D. The Intersection of "Noneconomic" and "Hypothetical" Costs

Many of the modern disputes sit at the intersection of both axes: they involve noneconomic costs that are hypothetical. Underlying the axes are two separate questions in the undue hardship inquiry that are often inappropriately collapsed into one another. The first question is about *how much* cost is enough to constitute undue hardship. *Groff* answered that question. The second question—one that *Groff* did not answer—is antecedent: *how likely* is it that costs will materialize such that courts should credit them in the undue hardship analysis? This second question intertwines with and complicates the first. Courts need guidance for distinguishing between an employer that is reasonably forecasting costs and an employer that is unreasonably "cooking up" an undue hardship defense. Without guidance, courts may be tempted to systematically

[140] See EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 317 (4th Cir. 2008); Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 135 (1st Cir. 2004); see also Birnbach, supra note 127, at 1346–47 ("Some courts . . . hold that an employer is not required to endure the hardship to claim that it has been unduly burdened and instead can show evidence that such a hardship would in fact occur if the employer was required to accommodate the employee.").

[141] 515 F.3d at 317 (first alteration in original).

[142] 527 F.2d 515, 520 (6th Cir. 1975).

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discount noneconomic costs—not because they are illegitimate, but because they are hard to quantify.

The predictive nature of the inquiry often goes unnoticed. Consider a recent case in which an employer argued that allowing a single employee to forgo COVID-19 vaccination could trigger a ten-day production shutdown and $1.5 million in losses if she came in close contact with any person who tested positive.[143] On the *Groff* question, $1.5 million would likely qualify as substantial increased costs for most, if not all, employers.[144] Reaching the *Groff* question, however, depended on the court crediting an unsubstantiated chain of events: vaccination meaningfully reduced transmission; any infection could be attributed to the unvaccinated employee rather than outside exposure; an infection detected would trigger a shutdown; and so on. Many of the COVID-19 cases involved hypothetical hardship—costs that depended on a chain of unproven predictions rather than costs that had actually occurred. These cases show that courts do not always use this terminology the way it is ordinarily understood.[145]

Courts could address the antecedent inquiry by adopting a formal valuation method. For example, courts could take a merits-based approach: ignore hypothetical costs unless they are more likely than not

[143] See Bordeaux v. Lions Gate Ent., Inc., No. 23-4340, 2025 WL 655065, at *1–2, *1 n.3 (9th Cir. Feb. 28, 2025) (affirming summary judgment for the employer and concluding that "an employer need not establish that an adverse health or safety event is *certain* to result from an accommodation to establish undue hardship under Title VII").

[144] See, e.g., Cook v. Chrysler Corp., 981 F.2d 336, 339 (8th Cir. 1992) (a pre-*Groff* case in which a scheduling accommodation that would have cost Chrysler roughly $1,500 per year was an undue hardship); see also *Bordeaux*, 2025 WL 655065, at *1–2 (affirming summary judgment for employer where production shutdown would have cost $1.5–$3 million). But see Baugh v. Austal USA, LLC, 762 F. Supp. 3d 1201, 1212–13 (S.D. Ala. 2025) (refusing to find undue hardship as a matter of law where employer alleged $1 million per year in increased costs).

[145] See, e.g., Robinson v. Guilford Cnty. Sheriff's Off., No. 23-cv-00087, 2025 WL 3687789, at *9 (M.D.N.C. Dec. 19, 2025) (citing with approval the principle that "the possibility of an unvaccinated individual getting others sick [is] a *non-speculative* risk that a court may consider when performing an undue hardship analysis" (first alteration in original) (emphasis added) (quoting Dodson v. Lutheran Vill. at Millers Grant, Inc., No. 23-cv-00169, 2025 WL 1474319, at *7 (D. Md. May 22, 2025), *aff'd*, No. 25-1696, 2026 WL 579467 (4th Cir. Mar. 2, 2026))); see also O'Neal v. King County, No. 24-cv-00682, 2026 WL 860590, at *2–3 (W.D. Wash. Mar. 30, 2026) ("Even courts that deny motions for summary judgment on the issue recognize that accommodations which would increase the risk of COVID-19 infections pose an undue hardship: the sticking point in those cases is that defendants *had not established* as a matter of law that such risks would arise." (emphasis added)).

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to materialize. But that approach would force employers to absorb substantial risk in cases where the probability of the costs materializing is low, but the magnitude of the costs is high. It would also still require courts to determine the likelihood of the predicted costs materializing. Alternatively, courts could accept all hypothetical costs but discount their magnitude by the probability of them materializing. But this method, too, would require courts to determine the probability of the harm materializing. To be clear, courts in the undue hardship context do not describe their reasoning in these terms. But describing the possible methods underscores how the undue hardship inquiry inevitably involves difficult judgments about probability, and *Groff* did not instruct courts on how to make those judgments.

E. Legal Liability as a Special Case

Cases where granting an accommodation risks legal liability for the employer illustrate that certainty is often the determinative factor between finding undue hardship as a matter of law or not. When an employer argues that granting an accommodation would expose it to liability, the asserted cost may ultimately be economic (e.g., a monetary judgment or penalty). But whether that cost will materialize depends on the merits of the threatened claim.

Courts routinely hold that an employer need not grant an accommodation that would require it to break the law.[146] *Groff* did not unsettle that principle. The litigation over New York's COVID-19 vaccination mandate for healthcare workers shows how this played out post-*Groff*. New York's mandate applied to certain categories of healthcare workers and did not allow religious exemptions.[147] Violations of the mandate could trigger civil penalties for the employer.[148] When

[146] See, e.g., Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 830 (9th Cir. 1999) ("[C]ourts agree that an employer is not liable under Title VII when accommodating an employee's religious beliefs would require the employer to violate federal or state law."); Matthews v. Wal-Mart Stores, Inc., 417 F. App'x 552, 554 (7th Cir. 2011) (noting that Title VII does not require an employer to adopt an accommodation that would place it on the "razor's edge" of legal liability); see also Kaminer, supra note 10, at 97 (explaining that under *Hardison*, "lower courts have unanimously agreed that employers are not required to violate valid statutes in accommodating a religious employee").

[147] See N.Y. Comp. Codes R. & Regs. tit. 10, § 2.61(c)–(d) (2022) (repealed 2023) (providing that a medical exemption was the only exemption available from COVID-19 vaccination requirements).

[148] Id.

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employees refused the vaccine and sued their employers for failure to accommodate religion, courts routinely held that the potential legal violation itself constituted undue hardship.[149] In other states where similar mandates permitted religious exemptions under certain conditions, results were mixed.[150] The hinge point was the certainty of the legal violation.[151]

De Souza v. New York provides another illustration of the importance of demonstrating certainty.[152] Where *Hardison* held that violating a collective bargaining agreement's seniority system is undue hardship as a matter of law, *De Souza* shows that the same logic breaks down when the underlying violation is uncertain. The facts of *De Souza* are strikingly similar to the facts of *Hardison*.[153] Suzette De Souza, a Seventh-day Adventist, requested an accommodation for Saturdays off to observe her Sabbath.[154] Her employer denied the request, arguing that granting the accommodation would require it to violate a seniority

[149] See, e.g., Russo v. Patchogue-Medford Sch. Dist., 129 F.4th 182, 186–87 (2d Cir. 2025) (per curiam) (affirming summary judgment for employer where accommodation would have caused employer to violate New York's COVID-19 vaccination mandate); Brown v. S. Shore Univ. Hosp., 762 F. Supp. 3d 191, 210–11, 216 (E.D.N.Y. 2025) (granting employer's motion to dismiss for the same reason); Kauffman v. N.Y. Presbyterian Hosp., 762 F. Supp. 3d 309, 319–22 (S.D.N.Y. 2025) (same); Cagle v. Weill Cornell Med., 680 F. Supp. 3d 428, 436, 440 (S.D.N.Y. 2023) (same); Lake v. HealthAlliance Hosp. Broadway Campus, 738 F. Supp. 3d 208, 219–21 (N.D.N.Y. 2024) (granting employer's motion for summary judgment for the same reason).

[150] See, e.g., Bazinet v. Beth Israel Lahey Health, Inc., 113 F.4th 9, 19 (1st Cir. 2024) (vacating dismissal of Title VII religious discrimination claim where Massachusetts vaccine mandate permitted religious exemptions); Lee v. Seasons Hospice, 696 F. Supp. 3d 572, 579–80 (D. Minn. 2023) (denying employer's motion to dismiss Title VII religious accommodation claim because the applicable CMS rule not only allowed but *required* employers to offer religious exemptions, so employer could not establish undue hardship as a matter of law).

[151] Contrast Lowe v. Mills, 68 F.4th 706, 720–22 (1st Cir. 2023) (finding undue hardship where Maine vaccine mandate did not permit religious exemptions, and therefore it was *certain* that the employer would violate Maine law by granting the accommodation), with *Bazinet*, 113 F.4th at 19 (holding that the undue hardship issue required further factual development, and vacating dismissal by lower court, because "[u]nlike in *Lowe*, the Massachusetts vaccine mandate applicable to the Hospital does not bar religious exemptions"), and Lacy v. Christus St. Vincent Reg'l Med. Ctr., No. 25-cv-00118, 2026 WL 776442, at *12, *19 (D.N.M. Mar. 19, 2026) (refusing to find undue hardship as a matter of law in a pronoun dispute case where employer alleged potential legal liability, because the court concluded that the laws the employer pointed to did not compel the use of preferred pronouns).

[152] 824 F. Supp. 3d 336 (S.D.N.Y. 2026).

[153] See supra Section I.C.

[154] *De Souza*, 824 F. Supp. 3d at 350.

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system pursuant to a collectively bargained agreement with the union.[155] The district court recognized that "*Groff* does not disturb *Hardison*'s holding that it would constitute an undue hardship for an employer" to grant an accommodation "that would violate its obligations under the seniority provisions of a collective bargaining agreement."[156] However, unlike in *Hardison*, the court determined that it was uncertain whether granting the accommodation would violate the agreement, and thus, refused to find undue hardship as a matter of law.[157] Had violation of the seniority system been established with certainty, *Hardison* would have controlled the outcome.

This principle will prove important in the modern accommodation disputes. Accommodation requests can put an employer on the "razor's edge" of liability—where the choice between denying or granting an accommodation is a choice between violating one provision of Title VII or another, or between violating Title VII or another law.[158] For example, the relationship between Title VII's duty to accommodate and the prohibition of hostile work environments could present employers a choice of evils: violate one provision of Title VII or another. An employee can establish a hostile work environment by proving unwelcome harassment that is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[159] Employers can be liable for coworker harassment when they are negligent in allowing it to take place.[160] Requests for religious exemptions to pronoun policies squarely present this issue.[161] On one hand, repeated misgendering of a coworker could give rise to a hostile work environment claim,[162] so granting the

[155] Id. at 350–51.

[156] Id. at 357.

[157] Id. at 358–61.

[158] Matthews v. Wal-Mart Stores, Inc., 417 F. App'x 552, 554 (7th Cir. 2011).

[159] See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (alteration in original) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

[160] See Rutherglen, supra note 10, at 139.

[161] See Sullivan, supra note 33, at 695 ("After *Bostock v. Clayton County*, one worker's harassment based on sexual orientation or transgender status might be another's religious expression." (footnote omitted)); see also Kaminer, supra note 10, at 97 (explaining that Title VII "does not require an employer to accommodate a religious employee if such an accommodation would result in a hostile work environment" and the "prohibition of hostile work environment harassment trumps the statute's requirement of accommodation of religious employees").

[162] See, e.g., Copeland v. Ga. Dep't of Corrs., 97 F.4th 766, 780 (11th Cir. 2024) (presenting a hostile work environment claim based in part on repeated misgendering);

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accommodation could expose an employer to Title VII liability. On the other hand, denying the accommodation could give rise to Title VII liability for failure to accommodate religion.[163] Thus, potential liability for the employer sits on both sides of the ledger. The courts have not squarely decided how to resolve this tension in the failure-to-accommodate-religion context. Perhaps lower courts will follow the Supreme Court's approach from *Ricci v. DeStefano*, a case in which the employer argued that it was faced with a choice between disparate impact liability or disparate treatment liability.[164] The Court resolved

Lusardi v. McHugh, EEOC Appeal No. 0120133395, 2015 WL 1607756, at *11 (Apr. 1, 2015) ("Persistent failure to use the employee's correct name and pronoun may constitute unlawful, sex-based harassment if such conduct is either severe or pervasive enough to create a hostile work environment . . . .").

[163] See, e.g., Letter from E. Cliff Martin, Senior Couns., First Liberty Inst., to Andrea Lucas, Comm'r, U.S. Equal Emp. Opportunity Comm'n, Charge of Discrimination and Statement in Support of Charge of Jocelyn Boden Against Bath & Body Works, LLC 3 (June 30, 2025), https://firstliberty.org/wp-content/uploads/2025/07/25-06-30-EEOC-Comm-w-Charge-CM_Redacted.pdf [https://perma.cc/T85E-X7SL] (alleging that religious employee was fired for her refusal to use coworkers' preferred pronouns); Zachary Freeman, IFI Takes Action—Christian Employee Fired by IKEA Over "They/Them" Pronouns, Ind. Fam. Inst. (July 18, 2025), https://hoosierfamily.org/news/ifi-takes-action-christian-employee-fired-by-ikea-over-they-them-pronouns-20250718/ [https://perma.cc/3MXF-4ZCF] (reporting on charge filed with EEOC alleging that employee was terminated by IKEA after refusing to use they/them pronouns). The EEOC has also issued some guidance potentially supportive of plaintiffs' positions in these cases. See U.S. Equal Emp. Opportunity Comm'n, What To Do If You Experience Discrimination Related to DEI at Work, https://www.eeoc.gov/what-do-if-you-experience-discrimination-related-dei-work [https://perma.cc/CU7N-T4VK] (last visited Sep. 13, 2026); U.S. Equal Emp. Opportunity Comm'n, What You Should Know About DEI-Related Discrimination at Work, https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work [https://perma.cc/J6LW-MBMM] (last visited Sep. 13, 2026).

[164] Although *Ricci* did not involve religious accommodations, the Court's reasoning could be imported into the religious accommodation context. In *Ricci*, the New Haven fire department administered two tests for determining eligibility for promotion, but the test results indicated potential disparate impact, as only six Black employees of the nineteen who applied passed, compared to twenty-five white applicants of the forty-three who applied. When the results were discovered, public debate ensued, with some firefighters who scored poorly on the tests arguing that the results should be discarded because of their disparate impact, and other firefighters who scored well on the tests arguing that they were fair. Both sides threatened discrimination lawsuits. Concerned that following the test results might expose the department to disparate impact liability, the city discarded the results. Subsequently, white and Hispanic employees whose test scores would have made them eligible for promotion sued the city, alleging disparate treatment. The Supreme Court held that the city could invoke fear of disparate impact liability as a defense to a Title VII disparate treatment claim only if it had a "strong basis in evidence" that using the tests would have resulted in unlawful disparate impact. Ricci v. DeStefano, 557 U.S. 557, 562–63, 566–67 (2009); see also United States v. Brennan, 650 F.3d 65, 95 n.37 (2d Cir. 2011)

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that dilemma by holding that an employer may not treat exposure to disparate impact liability as license to engage in disparate treatment unless it has a "strong basis in evidence" that adhering to the neutral practice would have produced an unlawful disparate impact.[165]

Several clarifications are important regarding how hostile work environment doctrine would apply to the religious accommodation context.[166] First, the accommodated employee's belief that his motives are benign does not control; hostile work environment doctrine assesses harassment by "adopt[ing] the recipient's perspective."[167] Employees cannot defeat a hostile environment claim simply by arguing they acted with good intentions in accord with their religious beliefs. Second, the possibility of liability does not address the thornier question of degree. How strong must the evidence be that an accommodation would create a hostile work environment before it can be considered undue hardship? If *Ricci*'s logic applies here, courts might require something like a "strong basis in evidence" that the accommodation would generate actionable harassment.[168]

Related "razor's edge" problems can arise from the interaction of Title VII and other federal statutes. In *Kluge v. Brownsburg Community School Corp.*, a public school teacher initially received a religious accommodation exempting him from a policy which required teachers to call all students by their chosen first names, as they appeared in the school's database.[169] After the accommodation was rescinded for being disruptive, Kluge sued for failure to accommodate under Title VII.[170] In defense, the school argued that Kluge's accommodation, which allowed him to address all students by their last names only, exposed the school

(extending the "strong-basis-in-evidence" defense from *Ricci* to sex discrimination cases). For a recent elaboration of this "double bind" logic—and an argument that disparate impact liability, as currently interpreted by the EEOC, pressures employers toward status-conscious decision-making—see Constitutionality of Disparate-Impact Liab. Under Title VII, 50 Op. O.L.C. (June 9, 2026) (slip op. at 8–10) (discussing *Ricci* and Justice Scalia's concurrence).

[165] *Ricci*, 557 U.S. at 563.

[166] For a more comprehensive discussion of the overlap between the duty to accommodate religion and the prohibition of hostile work environment harassment, see Kaminer, supra note 10, at 97–102.

[167] See Nelson, supra note 26, at 1914–15.

[168] See *Ricci*, 557 U.S. at 562–63.

[169] 150 F.4th 792, 795–96 (7th Cir. 2025). The *Kluge* saga is discussed in more detail infra Section III.D.

[170] Id. at 796.

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to an unreasonable risk of Title IX liability, thus constituting undue hardship under Title VII.[171] Upon review, the Seventh Circuit concluded that Kluge's accommodation did not put the school at risk of violating Title IX because Title IX liability requires differential treatment, and Kluge's accommodation treated all students the same.[172] Although here the school's asserted costs were therefore too hypothetical to establish undue hardship, the *Kluge* court's reasoning suggests that, where the facts indicate an accommodation would result in a legitimate Title IX violation, employers can use Title IX liability risk to establish undue hardship under Title VII.[173]

III. CALIBRATING JUDICIAL DEFERENCE TO EMPLOYER COST PREDICTIONS

This Part offers a normative approach for how courts should analyze undue hardship when the asserted costs are noneconomic and hypothetical. The proposals below operate as guidelines—rules of thumb that implement *Groff*'s instruction to apply a "commonsense" analysis that considers "all relevant factors."[174] Without guidance, courts applying a heightened undue hardship standard may gravitate toward crediting costs that are easier to prove and discounting costs that are harder to quantify—precisely the costs that *Groff* confirmed remain relevant.[175]

Critical to this analysis is separating two questions that courts often collapse. *Groff* answered the ultimate question: the employer must prove

[171] Id. at 804.

[172] Id. at 810–11.

[173] The Supreme Court's recent decision in *West Virginia v. B.P.J.* did not resolve the specific Title IX question *Kluge* confronted. The Court held only that Title IX permits schools receiving federal funds to "determine eligibility for women's and girls' sports based on biological sex," relying on the Javits Amendment and its implementing regulations, which authorize "separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." West Virginia v. B.P.J., No. 24-43, slip op. at 2–3, 8–9 (U.S. June 30, 2026). By relying on a regulatory carveout that allows schools to separate students by sex in athletics, the decision likely does not reach differential treatment of students in matters of address.

[174] Groff v. DeJoy, 143 S. Ct. 2279, 2295–96 (2023).

[175] *Groff* confirmed that noneconomic costs remain relevant by explaining that only *some* coworker impacts cannot be considered. By negative implication, other noneconomic costs can still be considered. And *Groff* said nothing about "hypothetical" costs, implying that the law in that area was unchanged. For the Court's discussion of coworker impacts, see id. at 2296–97.

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"substantial increased costs" to establish undue hardship.[176] Before a court can weigh costs using the *Groff* standard, it must determine which costs belong on the scale, and which predicted costs should be excluded as too "hypothetical." Post-*Groff* decisions do not articulate a comprehensive test for that antecedent inquiry.[177] But the post-*Groff* cases do reveal recurring methods to deal with the issue—some sensible, some less so. This Part identifies those methods and distills them into three guidelines that each point toward or against deference to an employer's prediction.

A. Consistency and the Anti-Pretext Function

Courts should begin with a simple question: Has the employer acted as if the workplace policy matters? A policy that management has enforced consistently—across employees and time—suggests that the employer subjectively views noncompliance with the policy as costly. By contrast, selective enforcement or casual suspension of a policy provides reason to doubt that deviation from it will impose substantial increased costs.

A consistency check also serves an anti-pretext function—to "smoke out" evidence of intentional discrimination, so to speak.[178] When an employer treats religious accommodation requests less favorably than comparable secular requests, there is reason to suspect intentional discrimination. This idea tracks the concerns voiced by Justice Thomas in *EEOC v. Abercrombie & Fitch*.[179] Abercrombie had a "Look Policy" which prohibited employees from wearing "caps."[180] Samantha Elauf, a practicing Muslim, wore a headscarf to her interview for a position at an Abercrombie store.[181] The store refused to hire her, based on management's belief that her headscarf would violate the company's policy.[182] In Justice Thomas's view, Abercrombie's refusal to exempt Ms. Elauf from its neutral no-caps policy "did not treat religious

[176] Id. at 2295.

[177] See supra Section II.C.

[178] Ricci v. DeStefano, 557 U.S. 557, 595 (2009) (Scalia, J., concurring) (noting that it might be possible to defend disparate impact liability as "an evidentiary tool" to "smoke out" intentional discrimination).

[179] See EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 787–89 (2015) (Thomas, J., concurring in part and dissenting in part).

[180] Id. at 770 (majority opinion).

[181] Id.

[182] Id.

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practices less favorably than similar secular practices, but instead remained neutral with regard to religious practices."[183] The EEOC alleged that Abercrombie engaged in disparate treatment (i.e., intentional discrimination), and according to Justice Thomas, "equal treatment is not disparate treatment."[184] To drive the point home, he provided the following example:

> Suppose an employer with a neutral grooming policy forbidding facial hair refuses to hire a Muslim who wears a beard for religious reasons. Assuming the employer applied the neutral grooming policy to all applicants, the motivation behind the refusal to hire the Muslim applicant would not be the religious nature of his beard, but its existence.[185]

A corollary of Justice Thomas's point is that inconsistent treatment of identical accommodation requests made by similarly situated religious and secular employees can indicate that enforcement of the workplace policy simply provides cover for hostility toward religion.[186] A similar principle was embraced by a majority of the Court in *Ansonia Board of Education v. Philbrook*.[187]

Several clarifications are important. First, a consistency check is probative but not dispositive. Rigid enforcement of a workplace policy does not automatically justify deference, because rigid enforcement can sometimes be motivated by a desire to discriminate against religious practice—for example, if the evidence suggested that Abercrombie adopted the no-caps policy to intentionally exclude Muslim women from its workforce.[188] Second, inconsistent treatment of medical and

[183] Id. at 782 (Thomas, J., concurring in part and dissenting in part).

[184] Id. at 785.

[185] Id. at 783.

[186] Justice Thomas recognized this in *Abercrombie*:

> I do not dispute that a refusal to accommodate can, in some circumstances, constitute intentional discrimination. If an employer declines to accommodate a particular religious practice, yet accommodates a similar secular (or other denominational) practice, then that may be proof that he has "treated a particular person less favorably than others because of [a religious practice]."

Id. at 785 (alteration in original) (quoting Ricci v. DeStefano, 557 U.S. 557, 577 (2009)).

[187] See 479 U.S. 60, 71 (1986) (explaining that "unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones" because "[s]uch an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness").

[188] This is simply an application of Title VII's "pretext" doctrine to the failure-to-accommodate setting. Under *McDonnell Douglas Corp. v. Green*, after the plaintiff makes

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religious accommodations is not dispositive on its own, because the ADA and Title VII have different undue hardship standards.[189] Thus, it is theoretically possible for a religious accommodation to cause undue hardship under Title VII but an identical medical accommodation not to cause undue hardship under the ADA. In practice, however, the two standards are close enough that an accommodation unlikely to constitute undue hardship under one is unlikely to constitute undue hardship under the other—which is why an employer's willingness to grant a medical accommodation while denying an equivalent religious one is still meaningful evidence.[190] Third, if courts treat the consistency check as talismanic, employers may be incentivized to adopt blanket no- or yes-accommodation positions, either denying or granting all requests without individualized assessment. But that risk has a countervailing benefit: it forces employers to consider the reasons for a workplace policy and determine whether it is truly indispensable to the business's operation. If a business cannot afford even modest deviations from a policy, the employer should be able to articulate why not.

Many of the recent COVID-19 vaccination cases applied some form of a consistency check.[191] During the COVID-19 pandemic, employees

their prima facie showing, the employer has the chance to offer a "legitimate, nondiscriminatory reason," but the plaintiff can still prevail by showing that the offered reason is a pretext for discrimination. See 411 U.S. 792, 802–05 (1973); see also *Abercrombie*, 575 U.S. at 772 (holding that an employee "need only show that his need for an accommodation was a motivating factor in the employer's decision," meaning that even rigid enforcement of a workplace policy operating as a reason for an adverse employment action can violate Title VII if operating alongside the employee's perceived need for a religious accommodation as a reason).

[189] See Hall v. Sheppard Pratt Health Sys., Inc., 155 F.4th 747, 754 (4th Cir. 2025) (noting that the different standards for undue hardship under Title VII and the ADA explain "why an employer . . . may deny a religious accommodation request even if the employer has a history of granting that same request as a medical accommodation").

[190] Compare 42 U.S.C. § 12111(10)(A) (defining "undue hardship" under the ADA as "an action requiring significant difficulty or expense"), with Groff v. DeJoy, 143 S. Ct. 2279, 2294 (2023) (holding that, under Title VII, undue hardship "is shown when a burden is substantial in the overall context of an employer's business").

[191] See, e.g., Gorski v. Ascension St. John Hosp., 725 F. Supp. 3d 718, 725 (E.D. Mich. 2024) (explaining that evidence employer had granted some exemption requests, including religious exemptions, for similarly situated coworkers, supported a reasonable inference that employer did not need to deny plaintiff's request at all); Baugh v. Austal USA, LLC, 762 F. Supp. 3d 1201, 1212 (S.D. Ala. 2025) (discussing plaintiff's argument that summary judgment for the employer on undue hardship was improper because employer denied all religious exemptions but granted some medical exemptions which required the same cost to implement); Shields v. Main Line Hosps., Inc., 700 F. Supp. 3d 265, 275 (E.D. Pa. 2023) (noting that there was no record evidence to support the employee's claim that non-Catholics

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sought exemptions not only for religious reasons but also for health- or disability-related reasons under the ADA.[192] Sometimes, a single employee sought an accommodation under both Title VII and the ADA.[193] If an employer granted the disability-based accommodation requests but denied the religion-based ones, this could provide evidence that some noncompliance with the rule was not substantially costly.[194] Similarly, when an employer grants accommodations for adherents of one religion but denies similar accommodations for adherents of another, the disparity begins to resemble intentional discrimination. In *Gorski v. Ascension St. John Hospital*, for example, a hospital allegedly granted some religious exemptions from its COVID-19 vaccination policy but denied the plaintiff an identical exemption.[195] The court treated the lack of evenhandedness as evidence that the hospital "did not need to deny [the plaintiff's] request at all."[196]

Finally, prior tolerance for deviations from a policy is especially probative because litigants can point to actual experience and realized costs. In *Sughrim v. New York*, New York's prison system defended a no-beard policy for prison guards on safety grounds, arguing that beards could be grabbed in a fight, interfere with the proper fit of gas masks,

were treated more favorably than Catholics in the exemption request process); Nadler v. TriHealth, Inc., No. 23-cv-00358, 2026 WL 860728, at *8 (S.D. Ohio Mar. 30, 2026) (concluding that a jury could question the employer's undue hardship defense given its inconsistent treatment of plaintiff's flu and COVID-19 vaccine exemption requests, and noting that the employer's approval of a religious exemption for another employee in plaintiff's department with *more contact* with vulnerable patients further undermined that defense).

[192] See, e.g., Tarquinio v. Johns Hopkins Univ. Applied Physics Lab, 141 F.4th 568, 571 (4th Cir. 2025) (requesting an accommodation from vaccination policy because of Lyme disease diagnosis and fear of autoimmune effects), *cert. denied*, 146 S. Ct. 367 (2025) (mem.); Pastrana v. N.Y.C. Fire Dep't, No. 24-cv-07348, 2025 WL 2200387, at *1–2 (E.D.N.Y. Aug. 1, 2025) (requesting an accommodation from vaccination policy because of adverse reaction experienced after first dose).

[193] See, e.g., Swanson v. Lilly USA, LLC, No. 23-cv-00831, 2024 WL 4815867, at *4–6 (S.D. Ind. Nov. 15, 2024); Menk v. MITRE Corp., 713 F. Supp. 3d 113, 131–32 (D. Md. 2024).

[194] See, e.g., Gray v. Main Line Hosps., Inc., 717 F. Supp. 3d 437, 449 (E.D. Pa. 2024) (refusing to find undue hardship where employer had granted other employees' exemption requests for medical reasons, but denied plaintiff's identical request for religious reasons); cf. Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999) (concluding, in a free exercise First Amendment case, that "the Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny").

[195] *Gorski*, 725 F. Supp. 3d at 725.

[196] Id.

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and be used to smuggle contraband.[197] But the employer had temporarily relaxed the policy for "No-Shave November" and later as part of a vaccination incentive program.[198] During both suspension periods, employees were permitted to sport beards up to one inch in length.[199] And while the policy was suspended, no increased costs materialized from allowing one-inch beards.[200] The court therefore had little difficulty rejecting the State's undue hardship defense for plaintiffs seeking to wear one-inch beards.[201] However, for a plaintiff seeking to wear a longer beard—an exception the employer had never tolerated—the court denied summary judgment for the employee.[202] That approach is sensible. When an employer has already tolerated the same deviation from a workplace policy without incurring increased costs, courts should be reluctant to credit a later prediction of *substantial* increased costs. This is a corollary to the principle that "[t]he employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted."[203]

B. Reasonableness of the Decision-Making Process

Next, courts should consider the information the employer relied on at two points in time: first, when the employer adopted the workplace policy at issue, and second, when the employer denied the requested accommodation. This should not be confused with a license for courts to substitute their own judgment for an employer's. Instead, it is simply a process check: Did the employer reach its decisions—creating the workplace policy and denying an exemption from that policy—through a reasonable decision-making process?

This guideline is sensible for at least three reasons. First, where the accommodation has never been put in place, the employer's assessment of whether the requested accommodation is a "reasonable" one "must be evaluated based on the knowledge and information available to the

[197] 690 F. Supp. 3d 355, 364 (S.D.N.Y. 2023).

[198] Id. at 370. Note that during both suspension periods, the no-beard policy remained in effect for security staff in positions that might have required use of a respirator. Id.

[199] Id.

[200] Id. at 380.

[201] Id. at 380, 382.

[202] Id. at 382–83.

[203] Draper v. U.S. Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1975).

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employer at the time the accommodation decision was made."[204] This is a recognition of the obvious: employers are not omniscient. Especially in the religious accommodation context, they must often act based on predictions. Second, drafting workplace policies can be costly and tedious.[205] Employers who invest substantial resources to thoroughly consider a workplace policy may be more likely to (correctly) believe the adopted policy will yield necessary benefits. When an employer adopts boilerplate or off-the-shelf policies, or has no written policies at all, the policy it seeks to enforce is unlikely to have been thoroughly considered and, in turn, less likely to be mission-critical. Third, employers are typically better positioned than courts to evaluate risk in their own operational context. To be effective, management must understand its workers, customers, and the operational challenges of the business. This is particularly true in niche or technical settings. Employers in these settings often rely on guidance from public health and occupational safety agencies, which Congress has implicitly recognized as best positioned to understand the safety risks involved in certain industries.[206] Where employers rely on evidence from trusted

[204] O'Neal v. King County, No. 24-cv-00682, 2026 WL 860590, at *2 (W.D. Wash. Mar. 30, 2026) (first citing Efimoff v. Port of Seattle, No. 23-cv-01307, 2024 WL 4765161, at *13 (W.D. Wash. Nov. 13, 2024); and then citing Lavelle-Hayden v. Legacy Health, 744 F. Supp. 3d 1135, 1150, 1152, 1158 (D. Or. 2024)); see also EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 317 (4th Cir. 2008) ("[A]n employer is not required to wait until it [feels] the effects of the proposed accommodation before determining its reasonableness." (second alteration in original) (internal quotation marks omitted)).

[205] Eleanor Kirk, Law and Legalities at Work: HR Practitioners as Quasi-Legal Professionals, 50 Indus. L.J. 583, 595 (2021) (quoting an interviewee from the study, an HR employee, reporting that drafting workplace policies is "quite a tedious, long process" involving "a lot of toing and froing"); id. at 591–92 (noting demands on HR employees to continually update policies to maintain compliance with changing legal frameworks).

[206] See Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 153 (1991) ("Because historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court, we presume here that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes." (citations omitted)); see also S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (explaining that state officials acting "in areas fraught with medical and scientific uncertainties" are entitled to "especially broad" latitude (quoting Marshall v. United States, 414 U.S. 417, 427 (1974))); EEOC v. Oak-Rite Mfg. Corp., No. 99-cv-01962, 2001 WL 1168156, at *5, *12, *14, *15 (S.D. Ind. Aug. 27, 2001) (finding undue hardship in Title VII case where factory refused to waive policy requiring employees to wear long pants, which had been in place for around forty years and was adopted following a workplace-hazard assessment consistent with OSHA regulations); Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 665–66

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public authorities, that reliance should count in favor of deference, and courts should hesitate to substitute their judgment for the experts' judgment.

This guideline was applied in some COVID-19 cases, where courts credited cost predictions made by employers that relied on guidance from public authorities when adopting and applying the workplace policy at issue.[207] Many employers who prevailed in these cases grounded their decision-making in guidance from the CDC or state public health authorities.[208] During the pandemic, the EEOC expressly identified CDC guidance as "an important source of current medical knowledge about COVID-19" and instructed employers to consult such guidance.[209] In *Rodrique v. Hearst Communications, Inc.*, for example, reliance on credible evidence effectively converted predicted costs into costs sufficiently concrete to credit. In *Rodrique*, the plaintiff argued that his employer could not prove that vaccination reduced transmission—something that was hotly debated during the pandemic—and thus could not show that allowing him to remain unvaccinated would impose undue hardship.[210] The First Circuit rejected that argument, emphasizing that the employer "relied on objective medical evidence, including public health guidance from the federal government and the Commonwealth of Massachusetts, when it set its vaccine policy."[211]

(2022) (holding that OSHA may issue targeted regulations to combat COVID-19 "[w]here the virus poses a special danger because of the particular features of an employee's job or workplace," including in "particularly crowded or cramped environments"). For cases suggesting that courts should defer to employer's risk assessments based on CDC guidance, see infra note 207.

[207] See, e.g., Pound v. Benton Cnty. Health Dep't, No. 23-cv-01670, 2025 WL 2689927, at *3–5 (D. Or. Sep. 19, 2025) (finding undue hardship in COVID-19 vaccination case where employer relied on EEOC guidance); Gemmrig v. Asante Three Rivers Med. Ctr., LLC, No. 22-cv-01814, 2025 WL 2555337, at *1, *7–8 (D. Or. Sep. 5, 2025) (same); Cline v. PeaceHealth, No. 23-cv-01985, 2025 WL 295113, at *1, *9–10 (D. Or. Jan. 24, 2025) (finding undue hardship in COVID-19 vaccination case where employer relied on guidance from the CDC and the Oregon Health Authority); Richardson v. Nat'l Basketball Ass'n, No. 23-cv-06926, 2025 WL 2774059, at *1 (S.D.N.Y. Sep. 29, 2025) (affirming finding of undue hardship where employer relied on undisputed advice from NBA medical advisors and public health authorities about the comparative efficacy of vaccination versus testing).

[208] See supra note 207.

[209] What You Should Know About COVID-19 and EEO Laws, supra note 128, § K.5.

[210] Rodrique v. Hearst Commc'ns, Inc., 126 F.4th 85, 87 (1st Cir. 2025).

[211] Id. at 92.

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Not all courts have been entirely deferential to the experts.[212] In *Bellard v. University of Texas MD Anderson Cancer Center*, for instance, a cancer hospital relied on an interim final rule by the Centers for Medicare and Medicaid Services that mandated COVID-19 vaccinations for medical-facility staff "unless exempt for medical or religious reasons."[213] The hospital argued that granting religious exemptions would "force patients to bear the risk of infection" and place "immunocompromised cancer patients in jeopardy."[214] Seemingly invoking the prohibition on stacking, the court acknowledged that "[a]t a macro-level," the hardship of allowing employees to remain unvaccinated was "evident, not hypothetical or speculative," but "at an individual level, the inquiry is more difficult."[215] The court declined to "substitute its own opinion for those of physicians and epidemiologists"—but ultimately did exactly that by refusing to defer to the employer's judgment despite referring to it as "a world leader in cancer treatment."[216] The court in *Bellard* appears to have collapsed the antecedent probability inquiry into the ultimate *Groff* inquiry, effectively treating the hypothetical nature of the costs as disqualifying.

[212] See Hamood v. Arab Cmty. Ctr. for Econ. & Soc. Servs., No. 23-cv-10270, 2026 WL 221382, at *2 (E.D. Mich. Jan. 28, 2026) (rejecting a per se rule that reliance on CDC guidance when creating COVID-19 vaccination policy prohibits courts from second-guessing the employer's decision); Nadler v. TriHealth, Inc., No. 23-cv-00358, 2026 WL 860728, at *8 (S.D. Ohio Mar. 30, 2026) ("TriHealth does not cite, and the Court is unaware of, any authority standing for the proposition that an unvaccinated healthcare worker's interaction with vulnerable patients constitutes a per se imposition of undue hardship in all contexts.").

[213] 716 F. Supp. 3d 503, 506 (S.D. Tex. 2024).

[214] Id. at 514 (internal quotation marks omitted).

[215] Id. at 515–16. The court also appeared to apply a consistency check, similar to those discussed supra Section III.A. It noted that "MD Anderson *did* grant 310 requests for religious accommodations, and indicated they could have granted even more" and "[i]n the eyes of the plaintiffs, if MD Anderson could stomach the risk of 310 unvaccinated staffers, what is the harm of three more?" Id. at 515. Then the court offered the following illustration:

> Suppose . . . that MD Anderson granted each of the 590 religious-accommodation requests it received in November of 2021, but then rejected the 591st request purely on undue-hardship grounds. It would be difficult for MD Anderson to establish that this single incremental request altered the risk of infection such that the hardship, which they previously found acceptable, now became too much to bear.

Id. at 515–16 (footnote omitted) (citation omitted).

[216] Id. at 506, 516.

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This guideline can also prove useful in evaluating cases involving potential legal liability as undue hardship.[217] In *Petersen v. Snohomish Regional Fire & Rescue*, a fire department argued that granting a vaccine exemption for one of its firefighters jeopardized a lucrative contract and exposed it to potential liability.[218] It could bring the receipts as to liability: the employer's insurance policy excluded coverage for claims caused by communicable disease, and the employer had received written confirmation from its insurer that "if any patient sued [the employer] and alleged that an unvaccinated employee gave them COVID-19, the insurance pool would not defend or indemnify [the employer]."[219] Note that this only settled one component of the prediction, as no lawsuit had actually been brought against the department. Nonetheless, the Ninth Circuit affirmed summary judgment for the employer, emphasizing that it "[did] not understand 'undue hardship' to mean 'realized hardships,'" and that "undue hardship may include an evaluation of the risk of hardship, not just an accounting of damages actually suffered."[220] Although the costs had not yet materialized, the evidence from the employer's insurer was sufficient to convert the predicted costs into costs concrete enough for the court to credit.

Naylor v. County of Muscatine presents another useful illustration. There, a jail administrator's online posts, which contained anti-Muslim statements, were discovered by a journalist and subsequently reported in an Iowa newspaper.[221] After the newspaper article was published, Muscatine County put Naylor on administrative leave and later fired him, and Naylor sued the county alleging that he was fired because of his religion.[222] In defense, the County argued it would suffer undue hardship if it continued to employ Naylor because "the publicity surrounding his online commentary . . . had harmed its public image,"

[217] See Petersen v. Snohomish Reg'l Fire & Rescue, 150 F.4th 1211, 1221–22 (9th Cir. 2025), *cert. denied*, No. 25-1210, 2026 WL 2976608 (U.S. Oct. 5, 2026) (mem.); see also Cyr v. Bos. Med. Ctr., No. 22-cv-11930, 2025 WL 269239, at *5–6 (D. Mass. Jan. 22, 2025) (finding undue hardship based on potential liability related to staff-to-patient COVID-19 transmission and employer's reliance on past experience and CDC recommendations).

[218] *Petersen*, 150 F.4th at 1221.

[219] Id.

[220] Id. at 1221–22.

[221] Naylor v. County of Muscatine, 151 F.4th 973, 974 (8th Cir. 2025) (per curiam).

[222] Id. at 975.

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and retaining Naylor "would imperil its business relationships."[223] The newspaper article prompted inquiries from two of the jail's contracting partners about whether they would continue to house their overflow detainees at the jail in light of Naylor's comments.[224] According to the plaintiff's own testimony, the two contracting partners were the jail's biggest clients, and the jail faced a potentially large financial loss if those relationships were terminated.[225] Yet the Eighth Circuit deemed the loss too "speculative" to credit because the contracting partners merely had conversations with the County "about *whether*" to terminate their contracts, but had not expressed their intention to do so.[226] Notably, the court went on to consider the *Groff* inquiry and determined that the employer had not provided sufficient evidence to warrant summary judgment on the ground that loss of the contracts would pose an undue hardship.[227] Although the plaintiff had testified that the jail could lose "millions of dollars from the loss of its overflow contracts," the court declined to fully credit his testimony because his financial estimates were "inexact," based on projections that were several years old, and not limited to the specific *overflow* contracts at issue.[228]

C. Threats to Vulnerable Populations and the Distribution of Harm

A related but distinct question is who will bear the cost of the accommodation if the employer's prediction turns out to be right. As discussed in Section II.A, employers can sometimes absorb the cost of accommodation themselves. In many recent disputes, however, the cost directly falls on coworkers or third parties. Professor James Nelson's "proportionality principle" captures this thinking: "when a small subset of employees is forced to bear the costs of workplace religion, those employees have a stronger claim to be the victims of religious imposition" than in cases where the costs are spread more evenly, where the "subsidy would be better characterized as the ordinary cost of rights,

[223] Id. at 976–77.
[224] Id. at 974–75.
[225] Id. at 978. Note that *Naylor* also includes an interesting discussion of whether alleged reputational harm constituted undue hardship. See id. at 976–77, 976 n.7.
[226] Id. at 978.
[227] Id. at 977–78.
[228] Id.

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including rights of religious accommodation in the workplace."[229] Recent accommodation disputes increasingly place the costs of accommodating religion onto "small and socially vulnerable population[s]," rather than the employer itself.[230] When the cost of an accommodation is likely to fall on vulnerable third parties who may be unable to bear the burden—e.g., immunocompromised patients, transgender youth, incarcerated persons—courts should be more willing to treat an employer's forecast as sufficiently concrete. The potential costs may be so great that a relaxation of the normal skepticism toward hypothetical costs is warranted.

Post-*Groff* COVID-19-era decisions often follow this thinking in the willingness to credit hypothetical costs where vulnerable patient populations were put at increased risk by an accommodation.[231] EEOC guidance issued during the pandemic (but pre-*Groff*) instructed employers to consider the effect of an accommodation on "vulnerable individuals."[232] As mentioned before, *Groff* explained that much of the EEOC guidance on the issue of undue hardship remained "sensible."[233] Accordingly, some courts relied on the EEOC guidance to find undue hardship when vulnerable patients were involved.[234] In *Hall v. Sheppard*

[229] See Nelson, supra note 26, at 1927.

[230] See id. at 1938 ("According to the principle of proportionality, courts should be especially concerned about placing the costs of religious accommodation on coworkers who can least afford to bear them.").

[231] See, e.g., Bushra v. Main Line Health, Inc., 709 F. Supp. 3d 164, 175–76 (E.D. Pa. 2023) (concluding, on summary judgment, that employer would suffer undue hardship in part because unvaccinated plaintiff would have caused health risks to vulnerable patients); MacDonald v. Or. Health & Sci. Univ., No. 22-cv-01942, 2024 WL 3316199, at *12 (D. Or. July 5, 2024) (concluding, on summary judgment, that employer would suffer undue hardship in part because an unvaccinated nurse in the "Mother Baby Unit" would put a vulnerable patient population at risk); Snow v. Women's Healthcare Assocs., LLC, No. 23-cv-01393, 2024 WL 3640111, at *9 (D. Or. Aug. 2, 2024) (finding undue hardship where allowing an in-person receptionist to refuse vaccination would compromise the employer's mission to provide safe and effective women's healthcare).

[232] See What You Should Know About COVID-19 and EEO Laws, supra note 128, § L.3.

[233] Groff v. DeJoy, 143 S. Ct. 2279, 2296 (2023).

[234] See, e.g., Combs v. PeaceHealth, No. 23-cv-01673, 2025 WL 92836, at *3 (D. Or. Jan. 14, 2025) (granting summary judgment for employer and relying in part on pre-*Groff* EEOC guidance instructing courts to consider whether the employee "has close contact with other employees or members of the public (especially medically vulnerable individuals)"), *aff'd*, No. 25-969, 2026 WL 1978066 (9th Cir. July 8, 2026); Cline v. PeaceHealth, No. 23-cv-01985, 2025 WL 295113, at *7 (D. Or. Jan. 24, 2025) (same); Cyr v. Bos. Med. Ctr., No. 22-cv-11930, 2025 WL 269239, at *5 n.4, *6 (D. Mass. Jan. 22, 2025) (finding undue hardship in part based on risk to "reputation of providing safe care to patients—vulnerable newborn babies" and citing EEOC guidance); Pound v. Benton Cnty. Health Dep't, No. 23-cv-01670,

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Pratt Health System, for example, the Fourth Circuit affirmed summary judgment for a hospital that treated patients with eating disorders, in light of the district court's finding that allowing a patient intake coordinator to work unvaccinated would create "substantial" patient, employee, public-safety, and reputational risks that "easily satisf[ied]" *Groff*.[235] Other courts in the COVID-19 context explicitly noted that the risk to vulnerable populations, or its absence, was the determinative factor between finding undue hardship as a matter of law or not.[236]

Similar reasoning was applied in *Trueblood v. Valley Cities Counseling & Consultation*. Dorothy Trueblood worked as a mental health counselor for a nonprofit behavioral healthcare provider that treated children receiving gender-affirming care, among other patients.[237] Trueblood was assigned to work with several youth clients who were transgender or "gender nonconforming" and used "they/them" pronouns.[238] The employer had already adopted a name-and-pronoun policy when Trueblood requested a religious accommodation to avoid using clients' preferred pronouns.[239] After Trueblood and management failed to reach an agreement, she was terminated for failing to comply with the employer's policies.[240] The court found undue hardship as a matter of law "because the [d]isputed [a]ccommodations would sanction discrimination against [the employer's] clients and staff and, at the very least, create a danger of violating federal and state law."[241] Further, allowing a mental health counselor to refuse to use clients' preferred

2025 WL 2689927, at *3–5 (D. Or. Sep. 19, 2025) (noting that pre-*Groff* EEOC guidance on undue hardship remains "instructive," citing the EEOC COVID-19 guidance referencing "vulnerable individuals" and finding undue hardship based in part on health risks to clients and coworkers).

[235] 749 F. Supp. 3d 532, 547 (D. Md. 2024), *aff'd*, 155 F.4th 747 (4th Cir. 2025).

[236] See, e.g., DeMaria v. N.Y. State Unified Ct. Sys., No. 23-cv-03627, 2025 WL 2298452, at *11–12 (S.D.N.Y. Aug. 8, 2025) (distinguishing the present case involving a court clerk from cases where the employee worked "directly with highly vulnerable populations" and granting summary judgment for employee); Brown v. MGM Grand Casino, No. 22-cv-12978, 2024 WL 4819575, at *9 n.16 (E.D. Mich. Nov. 18, 2024) ("The Court finds distinguishable the cases Defendant cites in support. Two of the cases it cites involve medical professionals who refused to be vaccinated, posing special risks of exposure and danger to vulnerable patient populations not present in this case . . . .").

[237] Trueblood v. Valley Cities Counseling & Consult., 748 F. Supp. 3d 988, 992–93 (W.D. Wash. 2024).

[238] Id. at 996.

[239] Id. at 997.

[240] Id. at 999–1000.

[241] Id. at 1006, 1012.

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pronouns would "inflict the very harm [the employer] aims to remedy," which "is nothing short of antithetical to [the employer's] 'particular business' as a matter of common sense."[242] The court emphasized that part of the employer's mission was to serve "vulnerable" clients.[243]

One complication created by this guideline is that courts must determine who counts as a vulnerable population. This inquiry should be handled with care to avoid inflicting additional dignitary harm by labeling persons as "vulnerable."

D. Applying the Guidelines to Kluge v. Brownsburg Community School Corp.

These guidelines are designed to be applied *before* the *Groff* inquiry. Requiring courts to first consider whether—and to what extent—to defer to an employer's cost prediction may yield benefits simply by clarifying that two distinct questions are involved. The *Kluge v. Brownsburg Community School Corp.* saga illustrates how courts can collapse those inquiries in practice.[244] Although the Seventh Circuit emphasized *Groff*'s heightened undue hardship standard, it gave comparatively less weight to *Groff*'s instruction that undue hardship be assessed in a "commonsense manner."[245]

Recall that *Kluge* involved a high school orchestra teacher who, on religious grounds, objected to using transgender students' chosen first names.[246] The school had adopted a policy requiring teachers to use students' first names as they were listed in its database (names were modifiable only with parental consent and medical documentation) as part of a broader effort to address "the needs of transgender students."[247] Kluge, citing his belief that "God created mankind as either male or female" with a gender that "cannot be changed," explained to management that affirming transgender identities would violate his religious obligation to not affirm "untrue and sinful" ideas.[248] The

[242] Id. at 1011 (citing Groff v. DeJoy, 143 S. Ct. 2279, 2295–96 (2023)).
[243] Id. at 992, 1010.
[244] The Kluge litigation produced four reported decisions, all titled *Kluge v. Brownsburg Community School Corp.*, that are discussed throughout this Section. For ease of reference, this Section cites them as *Kluge I* (S.D. Ind. 2021), *Kluge II* (7th Cir. 2023), *Kluge III* (S.D. Ind. 2024), and *Kluge IV* (7th Cir. 2025).
[245] *Groff*, 143 S. Ct. at 2296.
[246] See *Kluge IV*, 150 F.4th 792, 796–97 (7th Cir. 2025).
[247] *Kluge I*, 548 F. Supp. 3d 814, 821–22 (S.D. Ind. 2021).
[248] Id. at 821.

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school initially permitted a compromise: Kluge would address all students—transgender and non-transgender—by last names only ("similar to a sports coach") and avoid using gendered honorifics or pronouns.[249]

That compromise, however, generated numerous complaints. Mr. Lee, a teacher who served as the faculty advisor to the "Equality Alliance," notified the school principal that two transgender students in the Alliance had discussed the last-name-only practice at one of their meetings and found it to be "insulting and disrespectful."[250] Further, Mr. Lee noted that a non-LGBTQ student reported that "all the students knew why Mr. Kluge had switched to using last names" and that it made the transgender students in the class "stand out."[251] An assistant superintendent of the school corporation attended an Equality Alliance meeting and observed that the last-name-only practice was a topic of discussion.[252] The school principal had also received complaints from students and teachers regarding Kluge's behavior and notified the school corporation's human resources director.[253]

In litigation, two transgender students in Kluge's class described more specific harms. One student reported that Kluge sometimes avoided using his name at all—gesturing at him instead—and in contrast, with non-transgender students, Kluge occasionally used gendered honorifics or their first names.[254] The student felt "dehumanized," believed that other students in the class were aware that he was being treated differently, and ultimately felt compelled to out himself as transgender to another classmate.[255] When Kluge resigned, other students suggested that he was responsible for Kluge's resignation.[256] The student eventually quit orchestra and later withdrew from the school altogether.[257] The second student, who had publicly transitioned to using a masculine name and pronouns before formally changing his name in the school's database, reported that Kluge referred to him on several occasions using feminine honorifics (e.g., "Miss"),

[249] Id. at 823.
[250] Id. at 823–24.
[251] Id. at 825.
[252] Id. at 820, 825.
[253] Id.
[254] Id. at 826.
[255] Id.
[256] Id.
[257] Id.

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which created confusion for his classmates.[258] Kluge provided a different account, stating that he had not deviated from the accommodation.[259]

After monitoring the accommodation for almost a full school year, school administrators concluded that the accommodation could not continue beyond the 2017–2018 school year.[260] In a series of meetings with Kluge, school administrators conveyed their concerns, but Kluge was not deterred.[261] Instead, Kluge perceived the complaints as "a sign that [his] faith . . . was not coming back void, but was being effective."[262] And when the principal suggested that Kluge should consider resigning at the end of the school year, Kluge responded that he "was now encouraged all the more to stay."[263] Eventually, the school corporation's human resources director met with Kluge and gave him a choice: follow the name policy and continue his employment, resign, or be terminated.[264] Kluge resigned at the end of the school year and then brought a Title VII failure-to-accommodate claim against the school corporation.[265]

The posture of the case presented an opportunity to see how, if at all, *Groff*'s heightened standard had changed the undue hardship inquiry. Kluge's complaint was filed in 2019, and decided in 2021, under the *Hardison* standard. Relying on the *Hardison* standard, the district court granted summary judgment to the school, finding undue hardship on two grounds.[266] First, the accommodation interfered with the school's mission "to provide an education" and "a safe and supportive environment for all students."[267] The school "was not required to allow an accommodation that unduly burdened its 'business' in this manner."[268] Second, the accommodation exposed the school to a risk of liability under Title IX.[269] The court noted that it need not determine whether such a lawsuit would ultimately succeed, because an "increased

[258] Id.
[259] Id. at 827.
[260] Id. at 828–29.
[261] Id. at 827–28.
[262] Id. at 827.
[263] Id. at 828.
[264] Id. at 820, 829.
[265] Id. at 829–32.
[266] Id. at 845–46.
[267] Id. at 844.
[268] Id.
[269] Id. at 845–46.

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risk of liability . . . constitutes an undue hardship that Title VII does not require [the employer] to bear."[270] The Seventh Circuit affirmed in a thoughtful opinion by Judge Ilana Rovner, but vacated and remanded after *Groff* clarified the undue hardship standard.[271]

On remand, now using the *Groff* standard, the district court again granted summary judgment for the employer.[272] Faithfully applying *Groff*'s instructions, the court explained that it would analyze the nature of the school's business in mission-based terms.[273] The overall context of the school's business was not about "maximizing shareholder value," but rather "providing a supportive environment for students and respecting the legitimate expectations of their parents and medical providers."[274] Then, for largely the same reasons detailed in its earlier opinion, the court found undue hardship on both the mission-based theory and the liability-based theory.[275]

This time on appeal, however, the Seventh Circuit reversed.[276] The court's reasoning warrants careful scrutiny. Judge Michael Brennan began by accepting, at least for purposes of appellate review, the school's stated mission.[277] He emphasized that the employer still bore the burden, under *Groff*, of proving not only the existence of hardship abstractly, but also that the requested accommodation caused that hardship.[278] This causation requirement did substantial work in the court's analysis. According to Judge Brennan, summary judgment was inappropriate on the asserted mission-based harms because the record contained conflicting evidence as to whether the accommodation *itself* caused the alleged emotional harm to students.[279] In particular, Judge Brennan pointed to disputed evidence about whether Kluge deviated from the accommodation (e.g., by selectively using gendered honorifics,

[270] Id. at 846 (emphasis added).

[271] *Kluge II*, 64 F.4th 861, 894 (7th Cir.), *vacated*, No. 21-2475, 2023 WL 4842324 (7th Cir. July 28, 2023).

[272] *Kluge III*, 732 F. Supp. 3d 943, 971 (S.D. Ind. 2024).

[273] Id. at 964 ("Even as the Supreme Court undid the *de minimis* standard, it left untouched the long line of Seventh Circuit authority squarely holding that an employer can define its own legitimate mission, and that contradictions to its legitimate mission are relevant to analyzing undue hardship.").

[274] Id.

[275] Id. at 967–68, 970.

[276] See *Kluge IV*, 150 F.4th 792, 796 (7th Cir. 2025).

[277] Id. at 805.

[278] Id. at 806.

[279] Id.

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pronouns, or first names), and reasoned that the alleged emotional harm could be attributed to those deviations rather than the accommodation itself.[280]

The court imposed an additional requirement: "[E]ven if the students suffered subjective emotional injury, those injuries must be objectively reasonable to rise to the level of undue hardship."[281] According to Judge Brennan, as many other areas of education and employment law, including Title VII, "routinely require some form of objective harm," "it follows that religious-accommodation cases require an employer to demonstrate an objective undue hardship on its business, not one just subjectively perceived."[282] To support this requirement, he cited *Rodrique v. Hearst Communications, Inc.*, providing the following explanatory parenthetical: "employer proved undue hardship when it relied on 'objective, scientific information.'"[283]

Judge Brennan's addition of an "objective" requirement raises more questions than it answers. What does "objective undue hardship" mean in this context? Does "objective" mean not "hypothetical"? Does "objective" mean economic? And objective from whose perspective? From the school's perspective, were the numerous complaints and firsthand observations by the assistant superintendent not indicia of objective undue hardship? Later in the opinion, Judge Brennan correctly pointed out that where an employer alleges emotional impacts on coworkers or customers, there will often be "further objective consequences" like "customers or coworkers walk[ing] away from the business."[284] What should be made of the fact that one transgender student decided not to re-enroll in orchestra and later withdrew from the school—comparable to a customer or coworker walking away from a business? In a footnote, however, Judge Brennan explained that the

[280] Id.

[281] Id. at 807.

[282] Id. at 807–08.

[283] Id. at 808. The portion of the *Rodrique* opinion that Judge Brennan cited to states: "Because the record demonstrates that Hearst relied 'on the objective, scientific information available to [it],' with particular attention to 'the views of public health authorities,' we hold that it acted reasonably when it determined that vaccinated employees are less likely to transmit COVID-19 than unvaccinated employees." Rodrique v. Hearst Commc'ns, Inc., 126 F.4th 85, 91 (1st Cir. 2025) (alteration in original) (quoting Bragdon v. Abbott, 524 U.S. 624, 649–50 (1998)). This statement is about the quality of the evidence the employer relied on when making its decision, not about the form of the harm.

[284] *Kluge IV*, 150 F.4th at 808 (alteration in original) (internal quotation marks omitted).

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student took these actions *after* Kluge had resigned.[285] True, but so what? The student claimed that his decision to withdraw from the school was caused in part by incidents connected to Kluge's last-name-only practice.[286]

Moreover, can the meaning of "objective undue hardship" be gleaned from Judge Brennan's reliance on *Rodrique*?[287] As mentioned before, *Rodrique* was a COVID-19 vaccination case where the employer denied the plaintiff's exemption request based on its prediction that allowing employees to remain unvaccinated "create[d] significant risk of substantial harm to the health or safety of [its] workplace and employees."[288] Thus, *Rodrique* did not involve strictly objective harm where "objective" means realized. Instead, the *Rodrique* court pointed to the objective nature of the information the employer relied on when crafting its workplace policy.[289] Perhaps Judge Brennan was suggesting that the school should have done the same thing. But then why overlook the school's lengthy process for determining its name policy and the requirement for medical documentation and parental consent to approve a name change? The decision to invoke the "objective hardship" language in this context, while citing *Rodrique* for support, is likely to compound the confusion that already exists in the undue hardship inquiry.[290]

The comparison to *Rodrique* is also worth examining because the Seventh Circuit in *Kluge* ignored a key difference between the two cases. In *Kluge*, the school put the accommodation into practice and experienced the harm that followed. In *Rodrique*, the employer never put the accommodation into practice—it had rejected the employee's accommodation request and then terminated the employee for refusing to get vaccinated. Arguably then, and consistent with pre-*Groff* precedent, *Kluge* presents a stronger case for deferring to the employer because "[t]he employer is on stronger ground when he has attempted

[285] Id. at 808 n.12.

[286] *Kluge I*, 548 F. Supp. 3d 814, 826 (S.D. Ind. 2021).

[287] For a discussion of *Rodrique*, see supra notes 210–11 and accompanying text.

[288] *Rodrique*, 126 F.4th at 89 (alterations in original).

[289] See id. at 91.

[290] At least one court has already invoked Judge Brennan's "objective undue hardship" language from *Kluge IV*. See Oka v. United Airlines, Inc., No. 23-cv-15793, 2026 WL 810815, at *5 (N.D. Ill. Mar. 24, 2026) ("The Seventh Circuit has clarified that an employer must 'demonstrate an objective undue hardship on its business, not one just subjectively perceived.'" (quoting *Kluge IV*, 150 F.4th at 808)).

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various methods of accommodation and can point to hardships that actually resulted."[291] Under those circumstances, skepticism toward hypothetical costs should be reduced, not raised.

The Seventh Circuit disposed of the potential liability argument by acknowledging that "an employer is not obligated to accommodate an employee if doing so would place it on the razor's edge of legal liability,"[292] but concluding that a Title IX claim against the school would be weak on the merits, and therefore, the accommodation did not place the school on the razor's edge.[293]

After the Seventh Circuit's decision, the school corporation settled the case, agreeing to pay Kluge $650,000.[294] In a press release announcing the settlement, Kluge's lawyer stated that "common sense has prevailed at Brownsburg."[295] This Note disagrees. Applying the proposed guidelines to *Kluge* suggests that the school's predictions of its harms warranted more deference than the Seventh Circuit afforded them.

Start with consistency. The school's name policy applied uniformly to all staff, and Kluge appears to have been the only employee to formally seek an exemption.[296] Unlike cases where employers tolerate secular deviations from workplace policies, there was no evidence of selective enforcement.[297] Although students alleged that Kluge deviated from the accommodation on occasion, these were deviations from the *accommodation* not from the *policy*. And the school did not endorse those deviations.

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[291] See Draper v. U.S. Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1975); Brown v. Gen. Motors Corp., 601 F.2d 956, 960 (8th Cir. 1979) (quoting *Draper* with approval); Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1490 (10th Cir. 1989) (same); EEOC v. IBP, Inc., 824 F. Supp. 147, 154 (C.D. Ill. 1993) (same); EEOC v. JBS USA, LLC, 115 F. Supp. 3d 1203, 1233 (D. Colo. 2015) (same); see also Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 135 (1st Cir. 2004) ("Courts are 'somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice.'" (quoting *Draper*, 527 F.2d at 520)).

[292] *Kluge IV*, 150 F.4th at 810 (internal quotation marks omitted).

[293] Id. at 811.

[294] Indiana School District Pays Former Music Teacher $650,000 to Settle Religious Discrimination Case, All. Defending Freedom (Mar. 3, 2026), https://adfmedia.org/case/kluge-v-brownsburg-community-school-corporation/ [https://perma.cc/Y597-GVGG].

[295] Id.

[296] *Kluge I*, 548 F. Supp. 3d 814, 822 (S.D. Ind. 2021) ("The three other teachers who initially expressed objections to 'promot[ing] transgenderism' accepted the Name Policy, while Mr. Kluge did not." (alteration in original)).

[297] See supra Section III.A for a discussion of such cases.

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Next, consider the employer's decision-making process. The school developed its policy through faculty discussions and in response to operational needs (e.g., school staff approached the principal "seeking direction about how to address transgender students").[298] The policy that was ultimately adopted was narrow (and hardly an endorsement of transgenderism), permitting a name change only upon receipt of written parental consent and a written statement of necessity from a medical professional.[299] After granting Kluge's accommodation, administrators monitored its effects, received direct complaints, observed student reactions firsthand, and relied on that evidence in reevaluating the accommodation.[300] This is precisely the kind of evidence-based decision-making that should merit deference under a commonsense application of *Groff*.

Finally, consider cost distribution. The costs of the accommodation fell primarily on transgender students in Kluge's class—not on Kluge himself and not directly on the school corporation. Kluge's request was not for a simple scheduling accommodation, but rather was closer to what Professor Nelson describes as a request to use religious expression to impose one's faith on coworkers.[301] Requiring the school to continue the accommodation until the costs became entirely "objective" would effectively force those students to bear the burden of experimentation—a burden Kluge appears to have welcomed as a way of making his views felt.

The Seventh Circuit's approach in *Kluge* illustrates the risks of leaving terms like "hypothetical" and "objective" ill-defined. Without clear content, those labels can become vehicles for courts to substitute their policy judgments for an employer's. That, in turn, creates a dilemma for employers: deny the accommodation based on predicted costs, and a court may later deem those costs too hypothetical; *or* grant the accommodation and rescind it after observing real costs, and a court may still find the showing of undue hardship insufficient. Judge Rovner's dissent in *Kluge* highlights the institutional concern underlying

[298] *Kluge I*, 548 F. Supp. 3d at 821.

[299] Id. at 822.

[300] See supra notes 250–60 and accompanying text.

[301] Nelson, supra note 26, at 1933–39 (developing this distinction under the heading of "nondisparagement" and applying it to *Kluge*).

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this dilemma.[302] By permitting courts to determine whether an employer's judgment was *correct* rather than whether it was *reasonable*, courts may become "super-personnel department[s]."[303]

CONCLUSION

Groff instructed courts to apply the undue hardship standard in a "commonsense manner," but it supplied no framework for evaluating costs that are hypothetical.[304] In that gap, some courts have relied on the "no hypothetical costs" principle to discount harms that are real but not yet realized (often the noneconomic costs that dominate modern accommodation disputes). Applied too rigidly, however, that principle threatens the interests of employees and employers alike.

If courts give little weight to reasonable predictions of harm, and attempting accommodation earns an employer little deference, employers may rationally conclude that the safest course is to deny accommodation requests outright. Repeated across enough workplaces, this dynamic could discourage good-faith efforts to accommodate religious employees and push more disputes into litigation. And, for employers who reach the opposite conclusion—that providing an accommodation is the safest course—they may be forced to expose coworkers and third parties to serious dignitary harm or harassment.

Both failures stem in part from the same defect—no consistent guidelines for determining when courts should defer to an employer's predictions. This Note proposes such guidelines. First, courts should look to the employer's own conduct: when an employer has enforced a policy selectively or already tolerated deviations from it without incurring cost, an employer's prediction of substantial increased costs deserves little deference. Second, courts should ask whether the employer's decision-making process was reasonable—an employer that relies on objective evidence, both in crafting the policy and in denying

[302] Judge Rovner's dissent in *Kluge IV* adopted an approach that incorporates several of the guidelines proposed in this Note. Judge Rovner cited scientific literature showing that LGBTQ+ youth experience mental health problems at significantly higher rates than their peers and relied in part on Professor Nelson's work to explain that misgendering by a teacher—especially in front of classmates—can compound harm because "[m]isgendering begets misgendering." See *Kluge IV*, 150 F.4th 792, 825–27 (7th Cir. 2025) (Rovner, J., dissenting) (quoting Nelson, supra note 26, at 1938).

[303] Id. at 814.

[304] Groff v. DeJoy, 143 S. Ct. 2279, 2296 (2023).

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the accommodation, deserves greater deference. And, where uncertainty remains, courts should recognize that the risk of disproportionate harm to vulnerable third parties justifies relaxing the bar on hypothetical costs. In so doing, courts can avoid the error of neglecting hypothetical costs that may very well come to cause undue hardship.