ORDINARY CONSCIENCE AND PRETEND OFFENSES: PROTECTING THOSE LEFT OUT OF TITLE VII AFTER *GROFF*

Robin Fretwell Wilson & Michael J. Petersen *

INTRODUCTION

Most Americans spend more time at work than anywhere else, except their own home. Indeed, Americans work longer hours and more weeks in a year than workers in other developed nations,[1] placing a premium on being able to be respected in our "fundamental beliefs and needs" in "shared spaces" like the workplace.[2]

Governments are instituted to secure and protect "unalienable Rights," including "Life, Liberty and the pursuit of Happiness."[3] Since the Founding, Americans have cared deeply that government respects the rights and convictions of its citizens. Among the twenty-seven grievances the Signers of the Declaration of Independence leveled against King George was transporting colonists "beyond Seas to be

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1 G.E. Miller, *The U.S. Is the Most Overworked Developed Nation in the World*, 20SOMETHINGFINANCE (Feb. 28, 2024), https://20somethingfinance.com/american-hours-worked-productivity-vacation/#google_vignette [https://perma.cc/EDR3-LKG8] ("According to the latest OECD stats, U.S. workers work an average of 1,811 hours per year versus an OECD country average of 1,752.").

2 *See, e.g.*, Von G. Keetch, *Toward Collaboration: A Perspective from the Church of Jesus Christ of Latter-Day Saints*, *in* RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 179, 182 (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2018).

3 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

tried for pretended offenses."[4] The Signers believed government owes its citizens a special duty of transparency about the charges leveled against them and cannot deprive persons of liberty or livelihood without a meaningful chance to defend themselves in a fair trial by peers.

America's Founders also cared deeply about the ability to worship freely and to follow one's conscience. James Madison and Thomas Jefferson both envisioned protection of "conscience" alongside the Federal Constitution's guarantee of free exercise of religion.[5] In that mold, Utah's Constitution specifically provides that "rights of conscience shall never be infringed."[6]

Title VII of the Civil Rights Act of 1964 (Title VII)[7] protects precisely those fundamental rights that motivated the colonists to invoke rights antecedent to government and the Founders to secure rights of free exercise and due process.[8] In Title VII, Congress gave employees the ability to be authentically themselves in public, as well as in private, by requiring larger employers to accommodate employees' religious beliefs and practices if it could be done reasonably and without an "undue hardship."[9]

The promise of Title VII was that religious people need not check their consciences at the office door.[10] They could keep their jobs when they could not, consistent with their faith, perform certain tasks or they

4 *Id.* at para. 21.

5 *See infra* Part I.

6 UTAH CONST. art. I, § 4.

7 Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2018).

8 The Bill of Rights in the Constitution protects the rights of citizens to free expression, exercise of religion, assembly, petitions for redress (First), and due process (Fourth–Ninth). *See The Bill of Rights: What Does It Say?*, NAT'L ARCHIVES (Apr. 27, 2023), https://www.archives.gov/founding-docs/bill-of-rights/what-does-it-say [https://perma.cc/5T4T-KG5S]. The Fourteenth Amendment applies most but not all of these protections to the states. *See* Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963).

9 42 U.S.C. § 2000e(j) (2018).

10 The genesis of this phrase is unclear. *See Check Your Conscience at the Door*, WORDREFERENCE (Mar. 19, 2010), https://forum.wordreference.com/threads/check-your-conscience-at-the-door.1739549/ [https://perma.cc/G227-Y5AV]. It appears in movies, see, e.g., *Scream 2*, QUOTES.NET, https://www.quotes.net/mquote/83276 [https://perma.cc/DRB5-LYXN]; blogs, see, e.g., Maxwell A. Cameron, *Aspiring Politicos: Don't Check Your Conscience at the Door*, PRACTICAL WISDOM (Dec. 20, 2011), https://blogs.ubc.ca/cameron/2011/12/20/aspiring-politicos-don%E2%80%99t-check-your-conscience-at-the-door/ [https://perma.cc/74BT-NJT6]; and congressional debates, see, e.g., 163 CONG. REC. 11,125 (2017) (statement of Sen. Al Franken) ("[C]heck your conscience—not at the door, check it.").

required an accommodation for a religious observance when feasible for the employer.

Despite Title VII's clear textual protection for matters of faith, for nearly a half century employees struggled to make the needed showing.[11] This happened because a single line in a 1977 U.S. Supreme Court case, now understood as dicta, permitted employers to deny religious accommodations if the employer *or* a coworker would have to bear more than a "*de minimis*" cost.[12]

Under this feeble standard, employees with requests that barely registered an inconvenience would sometimes prevail, while many others did not. It is impossible to know how many employees folded in the face of this standard and simply resigned.

In a 9-0 decision in 2023, *Groff v. DeJoy*,[13] the U.S. Supreme Court undid its grievous error. The Court held that undue hardship under Title VII entails more than de minimis costs.[14] Reaching back to Title VII's literal requirements, employers must show a "'substantial' burden[]" given the overall context of the employer's business.[15]

But too many employees are still unprotected.

A significant swath of the American workforce works for employers that fall below Title VII's fifteen employee-size requirement.[16] Many also seek to step aside from a certain task or role, not for religious reasons but for deeply felt moral reasons.

People guided by "ordinary conscience"—as opposed to religious conviction—also deserve accommodation, when feasible, at times when they break with an employer's prevailing orthodoxy. Being asked to do something against one's conscience is worse when the government demands it.[17] Moral reasons of conscience are just as compelling as religious ones.

Of course, governments can and do speak to moral questions when they make laws. In a democratic republic, duly enacted and

11 The de minimis burden test is cited in 276 cases on Westlaw before *Groff v. DeJoy*, 143 S. Ct. 2279 (2023), with only a handful, seventeen, receiving negative treatment. *See* Cases Citing the "de minimis" West Headnote in *Trans World Airlines, Inc. v. Hardison*, WESTLAW, https://1.next.westlaw.com/ [https://perma.cc/KC6F-NXVL] (search "432 U.S. 63" in the search bar; then scroll to West Headnote 12 "Civil Rights"; then select "276 Cases that cite this headnote").

12 Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

13 143 S. Ct. 2279 (2023).

14 *Id.* at 2294.

15 *Id.* (quoting *Hardison*, 432 U.S. at 83 n.14).

16 *See* 42 U.S.C. § 2000e(b) (2018).

17 Virgil G. Hinshaw, Jr., *Einstein's Social Philosophy*, *in* 7 LIBRARY OF LIVING PHILOSOPHERS, ALBERT EINSTEIN: PHILOSOPHER-SCIENTIST 647, 653 (Paul Arthur Schilpp ed., 1970) ("Never do anything against conscience, even if the state demands it.").

promulgated laws ideally reflect the sensibility of a majority of the electorate but draw legitimacy from the processes that gave us those laws.[18]

Yet many clashes of conscience emerge when no law or regulation demands a specific course of action, and an employee respectfully requests not to go along with the employer's prevailing orthodoxy (often the view of a single supervisor). When a government employer refuses to permit an employee to step away from a specific task—whether the employee cannot perform it consistent with their faith *or* their moral commitments—it not only strips the employee of agency, it damns her for deeply felt views. It is improper when a government agent, without a democratic mandate, makes a unilateral decision to pick a side in the culture war.[19]

Part I reviews America's foundational commitment to fairness and transparency by government, as well as the deep respect the Founders believed should be accorded to conscience specifically.

Part II applauds the unanimous decision in *Groff* to walk back the Supreme Court's grievous error in *Trans World Airlines, Inc. v. Hardison*.[20] We canvas illustrative cases pre-*Groff* in which employees, notwithstanding *Hardison*'s "de minimis" burden standard, proceeded to trial, and instances in which employees did not. We also illustrate how, post-*Groff*, employees are, rightfully, having an easier time getting to trial.

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18 Of course, political capture by monied interests, gerrymandering, politicians maximizing their own interests, the sheer complexity of administering the government, and other phenomena often mean that laws sometimes do not enjoy widespread, let alone majority support by the public. *See, e.g.*, Michael Beckel, *What Is Political 'Dark Money'—and Is It Bad?*, CTR. FOR PUB. INTEGRITY (Jan. 20, 2016), https://publicintegrity.org/politics/what-is-political-dark-money-and-is-it-bad/ [https://perma.cc/SBG7-YS3M]; Brian J. Gaines & James H. Kuklinski, *To Gerrymander or Not: What Kind of Electoral Districts Does the Public Want?*, ILL. ISSUES, Sept. 2010 at 30. This is true for laws and policies that garner support on both the "left" and the "right." *Compare* Ashley Kirzinger, Isabelle Valdes, Alex Montero, Liz Hamel & Mollyann Brodie, *5 Charts About Public Opinion on the Affordable Care Act*, KFF (Feb 22, 2024), https://www.kff.org/affordable-care-act/poll-finding/5-charts-about-public-opinion-on-the-affordable-care-act/ [https://perma.cc/XD38-BKXJ], *with* Alison Spencer, Stephanie Ross & Alec Tyson, *How Americans View Electric Vehicles*, PEW RSCH. CTR. (July 13, 2023), https://www.pewresearch.org/short-reads/2023/07/13/how-americans-view-electric-vehicles/ [https://perma.cc/JW3E-RZHW].

19 We are cognizant that "courts increasingly permit government to control its employees' expression at work, characterizing this speech as the government's own for which it has paid with a salary." Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 2 (2009). It is precisely this fact that requires protection of ordinary conscience from unnecessary government encroachment, described *infra* in Part IV.

20 432 U.S. 63 (1977).

Even as *Groff* makes actual Title VII's accommodation of religion, a significant swath of the American workforce is left outside the benefits conferred by Congress. This is so not only for those working for small employers, but for those who seek not to perform a certain task for deeply felt moral reasons.

Part III takes up the plight of those left outside of Title VII. We put a human face on the need to protect people from ruination for pretend offenses at the hands of government employers. Not only have mundane requests to be staffed around been dismissed out-of-hand by government actors who could have easily accommodated them, but the government actors have pummeled employees publicly, causing further harm. Best practice, of course, is not to comment on ongoing employment disputes.

Part IV maps the special role of state governments in insulating people of ordinary conscience from loss of their livelihood for breaking with a government employer's prevailing orthodoxy. It describes the elements of legal protection for ordinary conscience, protection that is more capacious than Title VII. It examines the need to regulate what government employers—a party in interest—are permitted to say after an employee asks to be accommodated. The publicity, as much as the denial, wreaks significant harm on employees, as the government defends its decisions.

Ultimately, as the zone between our private and public lives shrinks, not having to check our consciences at the workplace door is more important than ever. While this may be a big ask of private employers, it should be a given when one works for the government.

I. GOVERNMENTS SHOULD BE HELD TO A HEIGHTENED DUTY TO TREAT ALL WITH RESPECT

From the beginning of the American project, the notion that governments should be for the people rather than against them has meant that we hold government to the highest standards. Governments owe notice. Governments owe due process. Governments owe an accused the ability to mount a meaningful defense.

This Part connects this foundational respect for citizens to one of our foundational civil-rights laws, Title VII, as well as to protections to not just religious exercise but conscience more generally.

A. *Pretended Offenses*

When the Continental Congress adopted the Declaration of Independence on July 4, 1776, the rights of the people to "Life, Liberty

and the pursuit of Happiness"[21] were at the forefront. The colonists voiced their outrage against the British Crown's tyrannical control in twenty-seven specific grievances against King George.[22]

The grievances charging acts of absolute tyranny, in direct violation of the colonists' unalienable rights, acted as catalysts for the colonists' fight for independence.[23]

The nineteenth grievance charged the British Crown with "transporting us beyond Seas to be tried for pretended offences."[24] The colonial government in the British Administration of Justice Act ("Act")[25]—one of the four Intolerable Acts—arrogated to itself the power to order a colonist to be taken to another colony or even to Great Britain for a trial, without notice of charges or ability to mount a meaningful defense. The Act effectively eliminated the right to a fair trial by one's peers, a foundational guarantee dating back to the Magna Carta.[26] For the Founding Fathers, pretend offenses amounted to retaliation against the colonists as they resisted British authority.[27]

While it appears no specific colonist was in fact dragged across the ocean to account for a pretend offense—because the Declaration of Independence followed the Intolerable Acts by just over two years—the very notion that government could do this to its citizens infuriated the nation's Founders.[28] Pretend offenses defied the very purpose of government itself: an institution to defend rights, "deriving [its] just powers from the consent of the governed."[29]

Many of the wrongs comprising pretend offenses ultimately receive specific protections against overreach by the federal government in the Bill of Rights, including rights of due process, trial by one's peers, and protections against self-incrimination. Included are rights that help each of us to be authentically ourselves, in public

21 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

22 *The Declaration of Independence: The Twenty-Seven Grievances*, J. AM. REVOLUTION (July 4, 2019) [hereinafter *Twenty-Seven Grievances*], https://allthingsliberty.com/2019/07/the-declaration-of-independence-the-twenty-seven-grievances/ [https://perma.cc/WFC3-H4Z6].

23 THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776).

24 *Id.* at para. 21.

25 Administration of Justice Act 1774, 14 Geo. 3 c. 39, § 1 (Gr. Brit.).

26 Caroline Eisenhuth, *The Coercive (Intolerable) Acts of 1774*, GEO. WASH.'S MOUNT VERNON, https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/the-coercive-intolerable-acts-of-1774/ [https://perma.cc/666L-SYKH].

27 *The Declaration of Independence: What Were They Thinking?*, NAT'L PARK SERV. (June 30, 2021) [hereinafter *What Were They Thinking?*], https://www.nps.gov/fost/blogs/the-declaration-of-independence-what-were-they-thinking.htm [https://perma.cc/N8E4-MCMD].

28 *See Twenty-Seven Grievances*, *supra* note 22.

29 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

as well as in private, such as rights to free speech and free exercise of religion.

For several Founders, protections for conscience stood apart from religious observance and deserved protection independently. Thomas Jefferson said that the right to think, believe, and debate freely is the way to find truth, for

> [T]ruth is great and will prevail if left to herself; . . . she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.[30]

Jefferson posited a natural, inalienable right to freedom of conscience that is not, and could not be, "submitted" to government.[31] Conscience was antecedent to speech guarantees, which could only operate to constrain government if citizens could engage in free thought.

The text James Madison proposed for the Bill of Rights protected conscience separately: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[32]

Although most state constitutions link conscience to the free and unfettered exercise of religion,[33] Utah's Constitution gives explicit

30 THOMAS JEFFERSON, *A Bill for Establishing Religious Freedom* (1779), *in* WRITINGS 346, 347 (Merrill D. Peterson ed., 1984).

31 THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 166 (Boston, Lilly & Wait 1832) ("But our rulers can have no authority over such natural rights, only as we have submitted to them.—The rights of conscience we never submitted, we could not submit. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others."); *see also* Letter from Thomas Jefferson to James Madison (20 Dec. 1787), NAT'L ARCHIVES: FOUNDERSONLINE, https://founders.archives.gov/documents/Madison/01-10-02-0210 [https://perma.cc/94RG-Y956] ("Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, & what no just government should refuse, or rest on inference.").

32 1 ANNALS OF CONG. 434 (1789) (Joseph Gales ed., 1834).

33 For example, the Wisconsin Constitution in article I, section 18 connects conscience to religious observance: "The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed . . . ." WIS. CONST. art. I, § 18; *see also* MASS. CONST. pt. 1st, art. II; N.H. CONST. pt. 1st, art. 5; VA. CONST. art. I, § 16; CAL. CONST. art. I, § 4; CONN. CONST. art. 7th; DEL. CONST. art. I, § 1; N.C. CONST. art. I, § 13; N.J. CONST. art. I, § 3; N.Y. CONST. art. I, § 3; PA. CONST. art. I, § 3; R.I. CONST. art. I, § 3; WASH. CONST. art. I, § 11.

protection to conscience itself: "The rights of conscience shall never be infringed."[34]

B. *Title VII Extended Protections to Government Employees*

On many civil rights issues, government has led by demanding better treatment of persons in its own ranks before asking private actors to follow suit. As one example, in 1941, President Franklin D. Roosevelt signed Executive Order 8802, banning employment discrimination by the federal government and all contractors working on the war effort.[35] It would not be until 1964 that Congress would extend employment nondiscrimination protections more broadly to private employers over a certain size.[36] In 1991, Congress extended the protections of Title VII to government employees.[37]

Title VII[38] has helped Americans who are religiously observant to be authentically, fully themselves at work as well at home. It did this by requiring all covered employers to provide reasonable accommodations of an employee's religious practice or belief unless the employer will experience an undue hardship.[39]

II. *GROFF* REVERSES A GRIEVOUS ERROR

In *Trans World Airlines, Inc. v. Hardison*, the Supreme Court reduced the number of people who could claim protection for their religious practice or belief.[40] In that case, an employee, a member of the Worldwide Church of God, asked not to work between sunset on Friday and sunset on Saturday.[41] In finding against Hardison, the Court stated employers need not bear more than a "*de minimis*" cost when accommodating such requests.[42] Compounding matters, costs

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34 UTAH CONST. art. I, § 4 ("The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof.").

35 Exec. Order No. 8802, 3 C.F.R. 234 (1941 Supp.).

36 First twenty-five employees, *see* Civil Rights Act of 1964 § 701(b), Pub. L. No. 88-352, 78 Stat. 253, then fifteen, *see* Equal Employment Opportunity Act of 1972 § 2(b), Pub. L. No. 92-261, 86 Stat. 103.

37 *See* Civil Rights Act of 1991 § 321(a), Pub. L. No. 102-166, 105 Stat. 1097–98; Myrick v. Warren, No. 16-EEOC-0001, at 13 (Mar. 8, 2017).

38 42 U.S.C. §§ 2000e-2000e17 (2018).

39 § 2000e-2(a)(1); § 2000e(j).

40 432 U.S. 63 (1977).

41 *Id.* at 67–68.

42 *Id.* at 84.

to the employer itself *and* to coworkers both would count when evaluating such requests.[43]

Even though the words "de minimis" appear nowhere in the text of Title VII, the *Hardison* court's reading governed until *Groff*. *Hardison*'s thinned-out protection made it harder for employees to prevail when they did sue. Two hundred seventy-six cases on Westlaw cite the "de minimis" burden test, with only seventeen receiving negative treatment.[44] This suggests the hurdles erected by the de minimis standard proved insurmountable for hundreds, if not thousands of employees. Of course, this naked statistic cannot capture untold numbers of employees who never challenged an employer's denial of the accommodation once told it would exact more than a de minimis burden.[45]

In the four decades following *Hardison*, employees sometimes succeeded when the requested accommodation barely registered an inconvenience.[46] Employees also lost.[47] The ethos animating *Hardison*—that it is simply too much to ask of employers to accommodate religious beliefs and practices—disadvantaged employees who asked only that their religious beliefs and practices be respected when possible, without substantial cost to their employer.

Until *Groff*.

This Part first reviews the difficulties employees faced before *Groff*. It then explains how the clarification in *Groff*—that the employer must show a substantial burden in the overall context of the employer's business in order to deny an accommodation—resets the norm: employers must try to accommodate their employees. Plaintiffs in cases being reconsidered in light of *Groff* are finding greater success.[48]

Each case canvassed here involves a person in the government's employ. This is by design. While private employers face constraints that make accommodations seem burdensome or more of a hassle than it is worth, governments do not have bottom lines or duties to shareholders. Governments have the ability, and a special obligation, to be as capacious as possible with accommodations for their many citizen employees.

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43 *Id.* at 84–85.

44 *See supra* note 11.

45 It is impossible to know how many employees never even bothered making a claim in the face of *Hardison*—or were told by their lawyers they could not possibly prevail.

46 *See infra* subsection II.A.1.

47 *See infra* subsection II.A.2.

48 *See infra* Section II.C.

A. *Government Employees Prevailed, Sometimes, Before* Groff

Under *Hardison*'s anemic standard, employees with requests that barely registered an inconvenience would sometimes prevail. But others were categorically set outside of Title VII by one appellate court and may receive no relief from the Supreme Court's "clarification" in *Groff*. Three cases are illustrative.

1. Internal Revenue Service, *Haring*

In *Haring v. Blumenthal*, a Catholic IRS agent, Paul Byrne Haring, refused to process applications for tax exemption for groups that advocated for abortion, which he opposed on religious grounds.[49] Haring's supervisors had successfully staffed the work around his objection: the applications made up "less than 2%" of Haring's total workload.[50] Nonetheless, the IRS refused to promote Haring because he would not handle such "exemption[s]."[51] Haring sued under Title VII, claiming religious discrimination.[52]

In dismissing the government's motion for summary judgment under Title VII, the court found that Haring had made a prima facie case of religious discrimination, and could proceed to trial.[53] Assigning Haring's work to another agent could not be considered "undue hardship" on the IRS, even when other willing reviewers were absent, the Court concluded.[54]

Importantly, the Court noted that the IRS's accommodation would not "impair taxpayer confidence."[55] Quite the contrary, it is desirable for employees to "disclose . . . insuperable biases and prejudices and to disqualify" themselves:[56]

> Law and public policy encourage disclosure and disqualification, and public confidence in our institutions is strengthened when a decision-maker disqualifies himself on account of financial interest, insuperable bias, or the appearance of partiality. . . . [A] course [of disclosure and disqualification] may not be regarded as impairing the integrity of the IRS decision-making function.[57]

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49 *See* 471 F. Supp. 1172, 1174–75 (D.D.C. 1979).
50 *Id.* at 1180.
51 *Id.* at 1178.
52 *Id.* at 1174.
53 *See id.* at 1185.
54 *Id.* at 1180 & n.23.
55 *Id.* at 1183.
56 *Id.* at 1184.
57 *Id.* at 1183 (footnote omitted).

The *Haring* Court found *Hardison* "not illuminating," perhaps because the impact on the IRS was so negligible.[58] If processing such applications had comprised a greater fraction of Haring's workload, the burden under *Hardison* may have been considered too great.

What happened to Haring after this decision is unclear. We often lose track of suits after an employee is permitted to proceed to trial, presumably because they settle.

2. USPS Selective Service, *American Postal Workers Union*

Courts have taken a hard look at whether proffered accommodations impermissibly disadvantage employees.

Consider a 1980s-era dispute over Selective Service registrations, colloquially known as the draft, through the Post Office. Men between the ages of eighteen and twenty-five are required to register.[59] In 1980, the United States Postal Service (USPS) began accepting registrations at its offices.[60] Some clerks religiously opposed to war objected and would direct registrants to another window to avoid a conflict with their faith.[61] This work-around proceeded with little controversy until USPS promulgated new regulations that shut down the practice.[62] These regulations afforded transfer to a different job, but no other concession.[63]

Two Protestant USPS employees,[64] Alice Lindstrom and Robert Davis, alerted supervisors that religious convictions prevented them from processing draft registration forms.[65] Under protest, Lindstrom transferred to a different, less favorable, position to avoid being fired.[66] Davis stayed in his position and processed the draft registration forms under protest.[67]

58 *Id.* at 1181.

59 *See Register for Selective Service (the Draft)*, USA.GOV, https://www.usa.gov/register-selective-service [https://perma.cc/6YKM-3QAP].

60 Am. Postal Workers Union v. Postmaster Gen., 781 F.2d 772, 774 (9th Cir. 1986).

61 *Id.*

62 *Id.*

63 *Id.*

64 Am. Postal Workers Union v. Postmaster Gen., No. C 83-2880, 1984 WL 48892, at *1 n.6 (N.D. Cal. June 28, 1984) *rev'd*, 781 F.2d 772 (9th Cir. 1986).

65 *Am. Postal Workers*, 781 F.2d at 774.

66 *Id.*

67 *Id.*

Lindstrom, Davis, and the American Postal Workers Union brought suit under Title VII.[68] Referrals to another clerk would not cause "undue hardship" to USPS, they contended.[69]

The District Court held that because the alternative proposed by Lindstrom and Davis, to revert to the prior system, was reasonable and would not have caused "undue hardship," USPS was bound by Title VII to accept the alternative accommodation.[70] The Court of Appeals reversed.[71]

The Ninth Circuit found Lindstrom and Davis had made a prima facie case of religious discrimination, shifting the burden to USPS to prove "good faith efforts" to accommodate the beliefs, up to an "undue hardship."[72]

Whatever accommodation USPS proposed, the accommodation must accomplish two things, the Ninth Circuit instructed: it had to eliminate the religious conflict *and* preserve the employee's employment status.[73] It remanded with instructions to consider whether proffered transfers would "reasonably preserve[] [the clerks'] employment status."[74]

3. Public Protectors, *Endres*

Other government employees lost pre-*Groff*, and likely would lose today. Consider *Endres v. Indiana State Police*.[75] Officer Benjamin Endres, a Baptist who believed gambling is a sin, refused to report for duty, and was fired by the Indiana State Police after it assigned him to work full time as a Gaming Commission agent inside a casino; Endres would have been tasked to test gaming devices and equipment, certify gambling revenue, investigate complaints, and otherwise ensure compliance with Gaming Commission regulations.[76] Endres believed being placed inside the casino would amount to facilitation of gambling in contravention of his religious convictions.[77]

68 *Id.* at 775.
69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.* at 775–76.
73 *See id.* at 776.
74 *Id.* at 776–77.
75 349 F.3d 922 (7th Cir. 2003).
76 *See id.* at 924; *Enforcement*, IND. GAMING COMM'N, https://www.in.gov/igc/gaming-agents/enforcement/#:~:text=Enforcement%20Agents%20monitor%20casino%20operations,other%20gaming%20equipment%20at%20casinos [https://perma.cc/6BMH-RFMC] (describing duties of Gaming Commission Enforcement Agents).
77 *See Endres*, 349 F.3d at 923–24.

Endres, who was selected by lot, said he would enforce general laws at casino properties but that this assignment was different: upholding Gaming Commissions rules facilitates gambling in a way that responding to an emergency in a casino would not.[78]

When he requested a different assignment, his supervisor asked if he would be willing to work in the casino's lobbies, lounges, or parking lots. Endres rejected this because the proximity to gambling also conflicted with his religious belief.[79] Given no other accommodation, Endres refused the casino assignment and was terminated for insubordination.[80]

Endres's request for accommodation was to not work as an "agent of the gaming commission," but not to abdicate his responsibility to protect the public's safety as a police officer.[81]

Endres sued. The State Police argued it "would be daunting to managers and difficult for other officers who would be called on to fill in for the objectors."[82] Although *Hardison* required Trans World Airlines to bear no more than a de minimis burden to accommodate religious observers,[83] the Seventh Circuit Court of Appeals decided Endres's case on wholly separate grounds. "Endres has made a demand that it would be unreasonable to require any police or fire department to tolerate,"[84] the majority held.

Writing for the majority, Judge Frank Easterbrook treated Endres's claim as if Endres was refusing to aid a member of the public who engaged in behavior disapproved of by Endres's church. Judge Easterbrook likened "Baptist policemen protect[ing] gamblers from theft and fraud"[85] to the requirement that:

> Jewish policemen protect neo-Nazi demonstrators, that Roman Catholic policemen protect abortion clinics, that Black Muslim policemen protect Christians and Jews, that fundamentalist Christian policemen protect noisy atheists and white-hating Rastafarians, that Mormon policemen protect Scientologists, and that Greek-Orthodox policemen of Serbian ethnicity protect Roman Catholic Croats.[86]

78 *See id.* at 924.

79 *See* Endres v. Ind. State Police, 794 N.E.2d 1089, 1092 (Ind. Ct. App. 2003), *aff'd in part and vacated in part,* 809 N.E.2d 320 (Ind. 2004).

80 *Endres*, 349 F.3d at 924.

81 *See id.*

82 *Id.* at 925.

83 *See* Trans World Airlines v. Hardison, 432 U.S. 63, 84 (1977).

84 *Endres*, 349 F.3d at 927.

85 *Id.*

86 *Id.* (quoting Rodriguez v. City of Chicago, 156 F.3d 771, 779 (7th Cir. 1998) (Posner, C.J., concurring)).

The panel upheld Endres's termination.[87]

In effect, Judge Easterbrook categorically wiped "public protectors" from the protection of Title VII,[88] even if it is possible to staff around the individual's religious beliefs.[89] Unlike emergencies requiring the force to scramble, assigning a gaming agent to a full-time position was predictable—another officer could have been assigned.

Because of the categorical treatment accorded to "public protectors" by the Seventh Circuit,[90] officers like Endres, who literally draw the short end of the stick, are likely to see no additional relief after *Groff*, just as another officer could have drawn the lot.

B. The Postal Service, Groff

Gerald Groff, an Evangelical Christian, believed Sundays, as the Lord's Day, should be reserved for rest and worship.[91] He resigned from USPS after it shut down efforts to staff around him, electing instead to progressively discipline him.[92]

Groff began as a Rural Carrier Associate (RCA) with USPS in 2012 before postal carriers were asked to work on Sundays.[93] In 2013, USPS partnered with Amazon, and in 2015 the Quarryville, Pennsylvania Post Office where Groff worked began delivering packages on Sunday.[94] During this time, the Postmaster could decide how to schedule Sunday work and assigned Groff on every day except Sunday, while others took Sunday.[95]

That worked until May 2016, when USPS entered a memorandum of understanding (MOU) with the National Rural Letter Carriers' Association that formalized the rules about Sunday work.[96] The MOU established tiers of employees for dividing up Sunday deliveries.[97] RCAs like Groff would have to work some Sundays, albeit fewer than those in other tiers.[98] Groff's options, the Quarryville Postmaster explained, were to work Sundays or resign.[99]

87 *Id.*
88 *See id.* at 926–27.
89 *See id.* at 927.
90 *See id.*
91 Groff v. DeJoy, 143 S. Ct. 2279, 2286 (2023).
92 *See id.* at 2286–87.
93 *Id.* at 2286.
94 Groff v. DeJoy, 35 F.4th 162, 165, 166 (3d Cir. 2022), *vacated*, 143 S. Ct. 2279 (2023).
95 *Id.*
96 *Id.* at 165.
97 *Id.*
98 *Id.*
99 *Id.* at 166.

Groff transferred instead to the Holtwood, Pennsylvania Post Office, which did not then offer Sunday deliveries.[100] Holtwood had just seven employees, including Groff.[101] In March 2017, Holtwood began Amazon deliveries, too.[102] Groff once again requested a religious accommodation, and his supervisors once again agreed to try.[103]

The Holtwood Postmaster first offered to schedule shifts so Groff could attend Sunday morning services.[104] This did not solve Groff's religious conflict, which forbade any work on the Sabbath.[105]

Through the 2017 and 2018 peak seasons, other post office employees, including the Postmaster, covered Groff's Sunday shifts.[106] During the nonpeak season, Groff's assignments were redistributed to the regional hub.[107] Groff wanted to transfer to another position without Sunday work but none existed.[108]

Covering for Groff was "time consuming, and . . . it added to [the Holtwood Postmaster's] workload and those of other postmasters."[109] Coworkers reported that accommodating Groff created a "tense atmosphere" and "resentment toward management": others worked more Sundays and RCAs outside the office had to fill in, too.[110]

By July 2018, USPS informed management that they should not "overschedule non volunteers to accommodate" Groff.[111]

On at least twenty-four subsequent Sundays, Groff could not find someone to cover, and he simply called out.[112] USPS disciplined Groff for his mounting absences.[113] He continued to request transfers to roles that did not require Sunday work, which were denied.[114] By 2019, USPS's "progressive discipline"[115] for Groff's continuing refusal to

100 *Id.*

101 One postmaster, three full-time carriers, and three RCAs worked in the Holtwood Post Office. *Id.*

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.* at 164, 166.

106 *Id.* at 166.

107 Groff v. DeJoy, 143 S. Ct. 2279, 2286 (2023).

108 *Groff*, 35 F.4th at 166.

109 *Id.*

110 *Id.* at 167.

111 *Id.*

112 *Id.* at 173.

113 *Id.*

114 *Id.* at 167.

115 Groff v. DeJoy, No. 19-1879, 2021 WL 1264030, at *4 (E.D. Pa. Apr. 6, 2021), *aff'd*, 35 F.4th 162 (3d Cir. 2022), *vacated*, 143 S. Ct. 2279 (2023). This included warning letters, meetings with supervisors, and seven- and fourteen-day suspensions. *Id.*

work on Sundays proved too much for Groff. He resigned in January 2019, saying that USPS did not provide an "accommodating employment atmosphere . . . that would honor [his] personal religious beliefs."[116]

Groff sued later that year under Title VII,[117] contending that USPS should have accommodated his religious practice—doing so would not have caused "undue hardship on the conduct of" USPS's business.[118] Bound by *Hardison,* the district court and court of appeals both found in favor of USPS; staffing around Groff had exacted more than a de minimis burden.[119]

The Supreme Court reversed, vacated the judgment, and remanded, in a 9-0 judgment.[120] The Court held that "undue hardship" under Title VII must mean "more than *de minimis.*"[121]

Even more important than an accurate shorthand for "undue hardship"[122] was the need to analyze the ability of the specific employer to accommodate the specific request, taking into account the nature, size, and operating costs of the employer.[123]

"'[U]ndue hardship' is shown when a burden is substantial in the overall context of an employer's business," a standard that better reflects Congress's meaning.[124] More specifically, the employer must show that "granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business."[125] Whether "a burden is substantial in the overall context of an employer's business," is a "fact-specific inquiry."[126]

As the Court observes, "[t]his formulation suggests that an employer may be required to bear costs and make expenditures that are not 'substantial,'" a "big difference" from costs "that are . . . so 'very small or trifling' that that [sic] they are not even worth

116 *Groff*, 35 F.4th at 167 (alteration in original).

117 Groff v. DeJoy, 143 S. Ct. 2279, 2287 (2023). Summary judgement was granted to USPS in 2021. *Groff*, 2021 WL 1264030, at *1.

118 *Groff*, 143 S. Ct. at 2287 (quoting 42 U.S.C. § 2000e(j)).

119 *See Groff*, 2021 WL 1264030, at *11; *Groff*, 35 F.4th at 174–75.

120 *Groff*, 143 S. Ct. at 2297.

121 *See id.* at 2284.

122 The Court disputed whether *Hardison* reduced its analysis to "that one phrase," noting that *Hardison* "referred repeatedly to 'substantial' burdens, and that formulation better explains the decision." *Id.*

123 *Id.* at 2295.

124 *See id.* at 2294, 2294–95.

125 *Id.* at 2295 (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 83 n.14 (1977)).

126 *Id.* at 2284.

noticing."[127] While the Court declined to bar consideration of impact on coworkers, which "may have ramifications for the conduct of the employer's business," "a coworker's dislike of 'religious practice and expression in the workplace' or 'the mere fact [of] an accommodation'" did not constitute undue hardship.[128]

Possible accommodations might include "incentive pay, or . . . coordination with other nearby stations with a broader set of employees."[129]

It is not clear whether a context-driven approach will vindicate *Groff*'s claim for accommodation; his suit has yet to run its course.

However, by "clarify[ing] what Title VII requires,"[130] the Court breathed new life into Title VII's original purpose and meaning, as decisions after *Groff* illustrate.

C. Groff *Turns the Tide*

Cases work through the courts slowly, but one early forerunner shows that *Groff* is turning the tide for employees who have requested accommodations for religious reasons.

Consider *Smith v. City of Mesa.*[131] There, Aaron Smith, a permit technician and Elder in the Jehovah's Witness faith, worked for the City of Mesa (City) for eleven months before he felt forced to quit on February 24, 2020.[132] Like many employees, Smith began on probation.[133] Before his initial probationary period ended, Smith took scheduled leave, sick leave, and unpaid leave, with some question about whether he had followed the right procedures for calling out.[134] There were other deficiencies in his work.[135] His direct supervisor, Heather Basford, sought to terminate Smith on February 3, 2020, for performance deficiencies.[136] Instead, the City's HR department

127 *Id.* at 2292 (quoting *De Minimis Non Curat Lex*, BLACK'S LAW DICTIONARY (5th ed. 1979)).

128 *Id.* at 2296 (alteration in original) (quoting Transcript of Oral Argument at 89–90, Groff v. DeJoy, 143 S. Ct. 2279 (2023) (No. 22-174)).

129 *Id.* at 2297.

130 *Id.* at 2286.

131 Smith v. City of Mesa (*Smith I*), No. CV-21-01012, 2023 WL 2463819 (D. Ariz. Mar. 10, 2023), *vacated in part*, 2023 WL 8373495 (D. Ariz. Dec. 3, 2023).

132 *Id.* at *1–3.

133 *Id.* at *2.

134 *Id.*

135 *Id.*

136 *Id.*

extended Smith's probationary period and placed him on a corrective plan.[137]

On February 10, 2020, Smith requested four days of time off, from March 2 to 5, to attend a mandatory Jehovah's Witnesses Elder Training.[138] Smith had stockpiled 2.5 days of paid vacation time but needed 1.5 days of unpaid leave.[139] Basford granted Smith's request for 2.5 days off but denied his request to take unpaid leave.[140] After consulting HR, Basford concluded "there was no feasible, alternative" schedule that Smith could work.[141]

Smith went over Basford's head to her supervisor on February 24, 2020, asking to have the 1.5 days of unpaid leave approved.[142] Smith explained that others could cover for him: on the first day of unpaid leave, no other employee was scheduled off, and on the second day, only one other employee was scheduled to be out.[143] The supervisor would not overturn Ms. Basford's decision: "approval of voluntary unpaid leave time 'is in the sole discretion' of his supervisor."[144] At the end of that workday, Smith resigned, effective March 3, 2020, explaining that "[he] must resign . . . to attend [his] religious class."[145]

The following day, Basford pulled records of Smith's work showing only six tasks completed the day before.[146] She moved his workspace to a new location directly in her view "so that [she] could keep an eye on his activities."[147] She initially assigned Smith fifty tasks to complete that day but ultimately reduced that to thirty.[148] She also placed a "Do Not Disturb" sign at Smith's cubicle.[149]

Smith filed a workplace discrimination and harassment complaint that same day, alleging "(1) failure to accommodate [his] religious beliefs; (2) disparate treatment and constructive discharge based upon [his] religion; and (3) retaliation for [his] request for a religious accommodation."[150] He pointed to the refusal to approve his time-off

137 *Id.*
138 *Id.* at *1–2.
139 *Id.* at *2.
140 *Id.*
141 *Id.*
142 *Id.*
143 *Id.*
144 *Id.*
145 *Id.* (first and third alterations in original).
146 *Id.* at *3.
147 *Id.* (alteration in original).
148 *Id.*
149 *Id.*
150 *Id.*

request for Elders Training; "discriminatory animus"[151] following his request; and "increased [] scrutiny . . . , criticism of [his] work productivity, moving [him] to an undesirable work location, significantly increasing [his] workload, changing [his] work assignments to set him up for failure, and humiliating [him] by putting up a 'Do Not Disturb' sign at his cubicle"[152] as instances of retaliation.

The City contended that Smith had suffered no "adverse employment action and [had] voluntarily resigned,"[153] precluding liability.

Pre-*Groff*, on pretrial motions for summary judgment from Smith and the City, the district court dismissed Smith's claims for disparate treatment, constructive discharge, which failed "as a matter of law," and retaliation.[154] However, it allowed Smith's claim of religious discrimination for failure to accommodate to proceed to trial.[155] Smith had alleged the elements of a prima facie case:

> (1) . . . a bona fide religious belief, the practice of which conflicts with an employment duty; (2) he informed his employer of the belief and conflict; and (3) the employer discharged, threatened, or otherwise subjected him to an adverse employment action because of his inability to fulfill the job requirement.[156]

Smith would be allowed to present evidence at trial "as to whether the City initiated good faith efforts to accommodate [his] request for time off but could not reasonably do so without facing undue hardship."[157]

Following *Groff*, Smith filed a motion for reconsideration of the prior order.[158] Smith asserted that, after the Supreme Court's clarification, "no reasonable jury could find that accommodating him with 1.5 days of unpaid leave would result in undue hardship to the City."[159]

151 *Id.* at *4.

152 *Id.* (first alteration in original).

153 *Id.*

154 *Id.* at *13. On retaliation, Smith could not show he was "subject to adverse employment actions after requesting a religious accommodation," the City supplied "neutral, non-retaliatory reasons for its actions" such as "inadequate performance and productivity," and Smith produced no evidence of pretext. *Id.*

155 *See id.* at *9.

156 *Id.* at *5 (quoting Berry v. Dep't of Soc. Servs., 447 F.3d 642, 655 (9th Cir. 2006)).

157 *Id.* at *9.

158 Smith v. City of Mesa (*Smith II*), No. CV-21-01012, 2023 WL 8373495, at *1 (D. Ariz. Dec. 3, 2023).

159 *Id.* at *2.

In depositions, the City had alleged that accommodating Smith would impact other workers.[160] Importantly, the City had conceded that Smith's department needed to "regularly adapt to scheduling challenges."[161]

Relying on the pleadings and depositions, the district court agreed with Smith. It first cited *Groff*'s instruction that undue hardship means "substantial increased costs in relation to the conduct of its particular business."[162]

The City had failed to establish that accommodating 1.5 days of unpaid leave would have posed an undue hardship and failed to show how Smith's request for accommodations would have impacted the conduct of its business.[163] Allegations about impacting coworkers were "too vague to establish undue hardship"[164] and Smith's department was accustomed to managing staffing gaps.[165] Moreover, Smith's request would have been granted if it had been from paid time off.[166]

The Court ruled the City did not meet its burden, under *Groff,* to show that Smith's requested accommodation, or any alternative, would result in "substantial increased costs in relation to the conduct of its particular business."[167] Going forward, it precluded the City "from raising the undue hardship defense at trial."[168]

III. THOSE LEFT OUT OF PROTECTIONS FOR CONSCIENCE AFTER *GROFF*

Governments are the largest employers in America.[169] They inherently exercise coercive power over their employees, often beyond the sight of the public.

Many government employees receive no protection from Title VII. They may work for an employer that is too small[170] or incur

160 *See id.* at *4.

161 *Id.*

162 *Id.* at *2 (quoting Groff v. DeJoy, 143 S. Ct. 2279, 2295 (2023)).

163 *Id.* at *3–4.

164 *Id.* at *4.

165 *Id.*

166 *See id.*

167 *Id.* at *6 (citing *Groff,* 143 S. Ct. at 2295).

168 *Id.* at *7.

169 *See* Nancy Levin, *10 Largest Employers in the U.S.*, LARGEST.ORG (Jan. 28, 2019), https://largest.org/misc/employers-usa/ [https://perma.cc/8NHY-6ZJU]; *Total Number of Government Employees in the United States from 1982 to 2022*, STATISTA (Nov. 3, 2023), [hereinafter *Total Number of Government Employees*] https://www.statista.com/statistics/204535/number-of-governmental-employees-in-the-us/ [https://perma.cc/Y8MG-5G86].

170 As of 2022, there were 19.2 million state and local government employees. NICHOLAS SAXON, PAUL VILLENA, SEAN WILBURN, SARAH ANDERSEN, DYLAN MALONEY &

damages insufficient to get into federal court.[171] Or the convictions that place them at odds with their employer proceed not from their faith, but from deeply felt, but often inarticulatable, moral qualms. Or they have been placed categorically outside Title VII's protections, as in *Endres.*

As we show here, ordinary conscience compels employees to request accommodations that could easily be granted, but often are not out of narrow self-interest or the desire to virtue signal.

A. An Instance of Ordinary Conscience, Officer Eric Moutsos

In May of 2014—mere weeks before a federal appeals court would uphold a December 2013 district court decision striking Utah's ban on same-sex marriage[172]—a Salt Lake City motorcycle police officer, Eric Moutsos, asked not to be made a "spectacle" by performing "circles and maneuvers for entertainment" in a Pride parade.[173]

The Police Department had agreed to provide security, traffic control, and parade post for the 2014 Pride Parade for $900.[174] Five senior motorcycle officers, including Officer Moutsos, would form a wedge at the front of the parade, clearing the path.[175] This group would also perform "celebratory maneuvers in [their] police uniform[s] and on [their] police motorcycle[s]."[176]

ROSS JACOBSON, U.S. CENSUS BUREAU, CENSUS OF GOVERNMENTS, SURVEY OF PUBLIC EMPLOYMENT & PAYROLL SUMMARY REPORT: 2022, at 1 (2023). To our knowledge, there is no source that calculates the number of governmental employers employing fewer than fifteen employees.

171 To get into federal court, where his attorneys' fees might be paid if he prevailed, his damages would have to exceed $75,000. *See* 28 U.S.C. § 1332(a) (2018).

172 J. Stuart Adams, *Cultivating Common Ground: Lessons from Utah for Living with Our Differences*, *in* RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND, *supra* note 2, at 441, 446–47 (citing Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014)). On June 25, 2014, the Tenth Circuit upheld the decision in *Kitchen*, but stayed its ruling as the state filed a writ for certiorari. *See* Kitchen v. Herbert, 755 F.3d 1193, 1230 (10th Cir. 2014).

173 Telephone Interview with Eric Moutsos (Dec. 21, 2023) [hereinafter Moutsos Interview].

174 *Id.*; Valerie Richardson, *Utah Officer Punished for Resisting Performing in Gay-Pride Parade Speaks Out*, WASH. TIMES (Mar. 4, 2015), https://www.washingtontimes.com/news/2015/mar/4/utah-officer-punished-resisting-performing-gay-pri/ [https://perma.cc/QPJ2-BA8J] (reporting that the Police Department was "paid the standard $900 fee").

175 Email from John Beener (May 29, 2014, 6:01 PM) [hereinafter Beener 5/29 Email] (on file with authors).

176 Paul Rolly, *Utah Cop Who Refused Pride Parade Duty Finds a Home with Sutherland Institute*, SALT LAKE TRIB. (Apr. 28, 2015, 3:34 PM), https://archive.sltrib.com/article.php?id=2447050&itype=CMSID [https://perma.cc/MP7C-PAJC].

Officer Moutsos "secured a trade."[177] He took "issue about doing maneuvers; because it looks like we (and I) are in support."[178] "[D]oing maneuvers" at "this particular event" would make him a "spectacle," "on display."[179]

In a break with past practice, when officers could be excused with "pre-approv[al]," Sergeant Beener informed the motor pool that "unfortunately, no bumping or trading into or out of the Wedgie role will be permitted."[180] As department "representatives," they needed to practice to "ensure we display both a high level of proficiency and professionalism."[181]

Officer Moutsos implored Sergeant Beener to "work with me on this."[182] After all, Officer Moutsos noted, "[Y]ou agreed with me about the uncomfortableness about doing maneuvers at this particular event, and assured me we weren't doing maneuvers . . . ."[183]

Officer Moutsos drew a line between being part of the "maneuver show" and "working any other assignment on this day at the event; security, parade post, traffic, etc." about which he had no "uneasy feelings."[184] Across seven years as an officer, Officer Moutsos had provided protection at "multiple LGBT events."[185]

Allowing Officer Moutsos to swap with another officer, who would gladly do the maneuvers, would neither set a precedent for requests to *not* serve or protect, nor would it dictate department policy about assignments to secure general safety, Officer Moutsos noted.[186] "There is a giant difference between working a traffic post as police and being

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177 Email from Eric Moutsos to authors (Dec. 21, 2023, 4:08 PM) (on file with authors). Sergeant Beener, Officer Moutsos says, told Officer Moutsos that "if someone took my spot, it wouldn't be a problem me getting out of this; and I found a replacement right after." Email from Eric Moutsos to John Beener (May 31, 2014, 9:18 AM) [hereinafter Moutsos 5/31 Email] (on file with authors).

178 Moutsos 5/31 Email, *supra* note 177.

179 *Id.*

180 Beener 5/29 Email, *supra* note 175. The department had allowed swaps for an officer's "wedding proposal." Moutsos 5/31 Email, *supra* note 177.

181 Beener 5/29 Email, *supra* note 175.

182 Moutsos 5/31 Email, *supra* note 177.

183 *Id.*

184 *Id.*

185 Moutsos Interview, *supra* note 173. When security "detained and handcuffed" "two gay men . . . found kissing on [LDS] church property," "the first thing [Moutsos] did was take off those handcuffs." John M. Glionna, *Utah Officer Defends His Objections to Riding at Head of Gay Pride Parade*, L.A. TIMES (Feb. 26, 2015, 2:53 PM), https://www.latimes.com/nation/la-na-utah-officer-gay-pride-20150226-story.html [https://perma.cc/653K-4MN8].

186 Officer Moutsos noted that colleagues who "don't like [his] faith," claimed that "if you let me get out of doing maneuvers then they shouldn't have to do GC traffic." Moutsos 5/31 Email, *supra* note 177.

in a parade on display."[187] What the swap would have done is placed him "outside the parade entirely, working traffic control."[188]

Officer Moutsos was not asking the department to scrap doing maneuvers, even though it had in past years when "many motor[] [officers] felt uncomfortable."[189]

But Officer Moutsos criticized the department for allowing itself to be "used" this way, pointing out that it would have no basis for refusing future requests:

> What if a group like the Westboro Baptist Church or the KKK wanted to put on a free speech parade and paid the Salt Lake Police to do circles in the front of their movement? How would that look? Can we deny these groups our maneuver show after saying yes to this . . . ?[190]

Officer Moutsos made clear he "would have these same feelings" about a pro-choice parade, "even though it's legal . . . I would feel extremely uncomfortable being a spectacle."[191] And neither was his concern about the people in the movement: "To be clear . . . I do not hate gay people. I love them like I love humanity."[192]

Officer Moutsos did not invoke a religious belief.[193] In an interview with us, he said that "forc[ing]" a person "into a celebration of any kind of advocacy" they do not freely support is "wrong": "It is a universal spiritual eternal law that you don't force on people any view of things."[194] Making him do maneuvers would go "against [his] soul."[195]

Two days later, on June 2, 2014, Officer Moutsos would be "devastated" by a head-spinning turn of events.[196] He was pulled into the Deputy Chief's office, relieved of his badge and gun "for

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187 *Id.*

188 Moutsos Interview, *supra* note 173.

189 Moutsos 5/31 Email, *supra* note 177.

190 *Id.* ("I don't think it's a good idea they use our police agency to do this.").

191 *Id.*

192 *Id.*

193 The only reference to religion in the exchange with Sergeant Beener is to his colleagues "mak[ing] fun of [him] and [his] religion at work." *Id.*

194 Moutsos Interview, *supra* note 173. This is true, Officer Moutsos contends, even when "the thing being forced is good, like vitamins." *Id.*

195 *Id.*

196 Pat Reavy, *SLC Officer in Parade Controversy Speaks Out on Religious Liberty*, KSL.COM (Feb. 24, 2015, 10:16 PM), https://www.ksl.com/article/33605041/slc-officer-in-parade-controversy-speaks-out-on-religious-liberty [https://perma.cc/E995-GJSY] ("I was devastated . . . .").

discrimination"[197] and told he "could not perform as a police officer."[198] His direct superior drove him home.[199] The department placed him on administrative leave, with pay.[200]

Surreal as this was,[201] a "media outlet reported—incorrectly, he says—that [an unnamed officer] had refused to work traffic control at the parade."[202] That set in motion the public smearing of Officer Moutsos's reputation.

Department Chief Chris Burbank stated publicly "that bias and bigotry will not be tolerated."[203] He told one of Utah's largest newspapers[204] that he placed the officer on "'paid leave because I needed to make sure he could be an effective officer' without biases getting in the way."[205] The unnamed officer, Chief Burbank suggested, could not "set [his] personal feelings aside" and "do [his] job."[206] The officer refused to do his "duties as assigned."[207]

When asked for comment, Chief Burbank told one news outlet that "he stands by his decision."[208] Officers must set aside their feelings, he said: "In order to equally distribute law enforcement and good will from the police department no matter where you are in this country, to every individual regardless of their religion, their race, their creeds, what gender they are or what sexual orientation they might be."[209]

Chief Burbank painted the request not to do maneuvers as "outwardly express[ing] bias towards an individual or group"; the

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197 *Id.* ("Two days later I was brought into one of the commander's offices. They took my badge and my gun for discrimination."); *see also* Email from Eric Moutsos to authors (Jan. 12, 2024, 5:15 PM) (on file with authors).

198 Reavy, *supra* note 196.

199 *Id.*

200 *Id.*

201 *Id.* ("I thought I was in a dream. I was devastated . . . .").

202 Richardson, *supra* note 174.

203 *Id.*

204 *Top 10 Utah Newspapers by Circulation*, AGILITY PR SOLS., https://www.agilitypr.com/resources/top-media-outlets/top-10-utah-daily-newspapers-circulation/ [https://perma.cc/2H8R-JNE2].

205 Rolly, *supra* note 176.

206 Brady McCombs, *Officer in Gay Pride Parade Incident Speaks Out*, POLICE1 (February 25, 2015, 5:49 PM), https://www.police1.com/patrol-issues/articles/officer-in-gay-pride-parade-incident-speaks-out-4TOAmqowaPrqBx55/ [https://perma.cc/7CES-UWAV].

207 Richardson, *supra* note 174. Chief Burbank said, "In order to be a police officer, you are to do the duties as assigned. And those duties cover a broad range of activities." *Id.*

208 *Id.*

209 *Id.*

department had "to limit the liability and the exposure . . . [for] plain bias."[210]

Anonymity did little to protect Officer Moutsos: "Everybody knew it was me."[211]

At the June 8 parade, five motorcycle officers performed maneuvers—the department in fact staffed around Officer Moutsos.[212]

Chief Burbank and "the entire admin" donned rainbow kerchiefs over their uniforms, a signal that put "pressure on other officers."[213] Figure 1 shows Chief Burbank at the 2015 Pride Parade. Uniformed officers draped in LGBT regalia relayed the unmistakable impression that participants endorsed the parade's message.

FIGURE 1: CHIEF BURBANK HANDS OUT RAINBOW STICKERS AT THE PRIDE PARADE IN DOWNTOWN SALT LAKE CITY, SUNDAY, JUNE 7, 2015

By June 10, Officer Moutsos resigned rather than face a long, humiliating employment battle.[214]

The department announced the resignation of "the officer under internal investigation related to an assignment at last weekend's Pride

210 Reavy, *supra* note 196. Chief Burbank expressed this as a spill-over effect. "How can they ever say, 'No, I never let it come into play when it came into play in other aspects of their job?'" *Id.*

211 Moutsos Interview, *supra* note 173.

212 *Id.*; *see also* Whitney Evans, *Pride Weekend in Salt Lake City Has Changed Over the Years*, DESERET NEWS (June 6, 2014, 8:15 PM), https://www.deseret.com/2014/6/6/20542889/pride-weekend-in-salt-lake-city-has-changed-over-the-years [https://perma.cc/6HDC-J24Y]. It should not be surprising that the department could staff around Officer Moutsos. The motor squad consisted of sixteen officers and two sergeants.

213 Email from Eric Moutsos to authors (Jan. 4, 2024, 4:24 PM) (on file with authors). Figure 1, from 2015, shows how the police officers would have looked in 2014.

214 Press Release, Salt Lake City Police Department, Officer Resignation Confirmed Internal Case Now Closed (June 10, 2014), https://slcpd.com/2014/06/10/officer-resignation-confirmed-internal-case-now-closed/ [https://perma.cc/LCG7-Z8N6].

Parade," closing the "internal case."[215] They gave "no further comment" "[i]n light of pending litigation,"[216] which never materialized.

Officer Moutsos never received a written explanation for being placed on leave and investigated.[217] Instead, Chief Burbank aired all this on the news, intimating that Officer Moutsos was punished for "[b]igotry, bias and hatred."[218]

The next spring, as the Utah Legislature crafted legislation to meld LGBT nondiscrimination protections with religious liberty protections,[219] KSL-TV independently verified Officer Moutsos's identity.[220] Chief Burbank again weighed in publicly:

> It has nothing to do with religious freedom, that has to do with the hatred of those individuals and what the parade stands for, which is about unity and coming together. How can I then send that officer out to a family fight that involves a gay couple or a lesbian walking down the street?[221]

Taken together, Chief Burbank's comments strongly implied that the officer refused to protect gay people *because of* hatred toward LGBT persons.[222]

It is unclear whether Chief Burbank understood the nature of the request not to perform in the parade before he made these statements. "All I heard," he said, "was he didn't want to ride because of the gay people."[223]

Commentators on the left and the right came to Officer Moutsos's defense. A reporter for the progressive, left-leaning *Salon* magazine[224] observed:

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215 *Id.*

216 *Id.*

217 Moutsos Interview, *supra* note 173.

218 *Id.*

219 For more on this landmark nondiscrimination legislation, see generally Adams, *supra* note 172; and Robin Fretwell Wilson, *Common Ground Lawmaking: Lessons for Peaceful Coexistence from* Masterpiece Cakeshop *and the Utah Compromise*, 51 CONN. L. REV. 483 (2019).

220 Reavy, *supra* note 196.

221 Mary Elizabeth Williams, *Should a Cop Be Made to Participate in a Gay Pride Parade*, SALON (Feb. 26, 2015, 7:01 PM), https://www.salon.com/2015/02/26/should_a_cop_be_made_to_participate_in_a_gay_pride_parade/ [https://perma.cc/A62P-B5ZF].

222 Moutsos Interview, *supra* note 173. Some charged that Moutsos's "[d]isagree[ing] with this lifestyle was the same as being a racist." *Id.*

223 Rolly, *supra* note 176.

224 *See Salon*, ALLSIDES, https://www.allsides.com/news-source/salon [https://perma.cc/5FB8-T3JS].

> I do know that's what you're trained to do in a service career. If I can believe my friends can do their jobs without bias, how can I not—even as I disagree strongly with his personal beliefs—think that Moutsos could do his? And I don't understand how could trying to make someone ride in a parade he doesn't want to be in is any kind of progress for tolerance.[225]

Officer Moutsos was reticent to sue. He "had bad PTSD and did not want the media all over me."[226] It would have been difficult to go up against the "city with their deep pockets."[227] His own attorney told him he would "would have to go raise some money" if he wanted to sue.[228]

Had Officer Moutsos articulated his unease in religious terms,[229] Title VII may have insulated him, even in the pre-*Groff* era.[230]

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225 Williams, *supra* note 221. Rod Dreher, a conservative Christian commentator, *see Rod Dreher*, AM. CONSERVATIVE, https://www.theamericanconservative.com/author/rod-dreher/ [https://perma.cc/G6KA-CLG2], saw Officer Moutsos's treatment as a harbinger. Rod Dreher, *The Prophetic Eric Moutsos*, AM. CONSERVATIVE (Feb. 26, 2015, 10:42 AM), https://www.theamericanconservative.com/the-prophetic-eric-moutsos/ [https://perma.cc/M966-F2AS] ("What Moutsos is learning—what all traditional Christians will soon learn—is that there is no accommodation to be made. You are the Enemy, and must be crushed. You will be forced to advocate for things that violate your conscience, and if you refuse, it doesn't matter how far you are willing to go to be accommodating: you will be branded a hater, and forced out of your job.").

226 Moutsos Interview, *supra* note 173.

227 *Id.*

228 *Id.*

229 *See, e.g.*, Keetch, *supra* note 2, at 179 (In some faith traditions, "[f]reedom of conscience . . . [is] a basic doctrinal principle" because it "ensures that people can exercise their God-given agency in matters of faith."); *see also* ANTHONY J. MARINELLI, CONSCIENCE AND CATHOLIC FAITH: LOVE AND FIDELITY 4 (1991) ("Conscience . . . is . . . a unique faculty or characteristic of human persons," which seeks "the good" and anchors "the impulse of the heart toward God."); D.M. Nisanka Madhubhashini Jayarathna, *The Connection Between Human Rights Law and Buddhism on Freedom of Thoughts, Conscience and Religion: An Analysis*, *in* 5TH INTERNATIONAL BUDDHIST CONFERENCE 27 (2019).

230 In 2014, after the legalization of same-sex marriage in North Carolina, Sandra Myrick, a magistrate, resigned midterm when no "concession" was made to her religious conviction that she could not solemnize such marriages. Myrick v. Warren, No. 16-EEOC-0001, at 13 (Mar. 8, 2017). Her employer explored a scheduling "work around," but ultimately concluded that guidance tied their hands. *Id.* at 19. Myrick ultimately prevailed on her Title VII complaint. *Id.* at 24. "[B]ut for" the change in the law, Myrick had no reason to resign. *Id.* at 17. Her employer bore the burden to show an "undue burden." *Id.* at 20. Their lack of inquiry into possibilities and testimony from the senior magistrate who suggested a scheduling "work around" meant North Carolina had failed in its duty to provide reasonable accommodation. *Id.* at 19, 19–21. Myrick received back pay and attorney's fees, along with reinstatement. *Id.* at 25–28.

A decade later, Officer Moutsos still feels the reverberations. "I feel like I am always defending myself."[231]

B. An Instance of Pretend Offense, Professor Mark McPhail

Just as the police department labelled Officer Moutsos a bigot for asking to swap duties with another officer, government employers have destroyed employees for criticizing their commitment to progressive values.

Consider the still-unfolding saga of Mark McPhail, a Black, tenured communications professor at Indiana University Northwest (IUN), a public university, who criticized his own institution for not doing enough for racial minorities.[232] In 2021, he was suspended from teaching and had his salary reduced by seventy-five percent.[233] Although he lived hundreds of miles away in Wisconsin, IUN police officers appeared at Professor McPhail's home and "delivered a trespass notice threatening arrest if he entered university property."[234] The stated reasons IUN barred him from campus included his "inadequate" teaching evaluations and unprofessional behavior.[235] The university accused Professor McPhail of saying something to the effect that we should "kill all the white people," a claim the AAUP would later find not credible.[236]

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231 Moutsos Interview, *supra* note 173.

232 AM. ASS'N OF UNIV. PROFESSORS, ACADEMIC FREEDOM AND TENURE: INDIANA UNIVERSITY NORTHWEST, 3 (2023) [hereinafter AAUP REPORT].

233 *Id.* at 12.

234 Ryan Quinn, *In Black Professor's Firing, AAUP Finds "Racist Tropes,"* INSIDE HIGHER ED. (Jan. 29, 2023), https://www.insidehighered.com/news/2023/01/30/racism-alleged-ius-nw-campus-firing-black-professor [https://perma.cc/PYH9-XTFX].

235 AAUP REPORT, *supra* note 232, at 4, 3–4. In his May 20 letter of resignation, addressed to Chancellor Lowe, McPhail recounts the conversation:

> You informed me that several faculty members had complained about my behavior, alleging that I was 'heavy handed,' 'quick to anger,' and 'impatient,' and that they were 'scared of me,' that I 'did not listen,' and that I had spoken ill of other individuals at IUN in their absence. You noted that you had also observed these behaviors and that you considered them unprofessional and admonished me from engaging in any behavior in the future that could be interpreted in this manner.

Id. at 3. McPhail alleges that the reasons given for the actions taken against him were pretextual; instead "the real basis for these actions was retaliation for intramural speech that should have been protected under principles of academic freedom. In the absence of an appropriate proceeding, these highly credible claims remain unrebutted," the AAUP observed. *Id.* at 17.

236 *Id.* at 13. The AAUP gave weight to the fact that the IUN did not arrest McPhail, which they would have done if McPhail had made a specific threat. *Id.* at 14.

All of these actions were undertaken without a hearing.[237]

Matters spiraled from there. After IUN police left, Professor McPhail reached out to a colleague at Indiana University Bloomington.[238] IUN police later said the call "violated the trespass notice."[239] When Professor McPhail asked IUN "'[W]hat have I done? What is my crime?' They simply said, 'If you don't like it, you can appeal.'"[240]

The actions taken against Professor McPhail constitute a modern-day "pretend offense." Professor McPhail was persecuted, lost his job and livelihood (at least for now), and was isolated from peers, without notice or any idea of what he is supposed to have done.

Together, Officer Moutsos's and Professor McPhail's experiences illustrate that employees who break with the prevailing orthodoxy risk losing their livelihoods and their reputations.

IV. States Have a Special Role in Protecting Conscience

Most of us work in settings where our religious or moral convictions may brush up against our employer's personal views and commitments. Title VII tests the assertion that an employer cannot afford to make a concession that allows a religious employee to be fully herself. We believe governments should make a parallel showing for employees who are guided by moral convictions.

States are charged with the protection of citizens' general welfare. States and their subdivisions employ far more people than the federal government.[241] While private employers face constraints that make additional accommodations difficult, governments do not have the same profit motive or duty to shareholders. Governments have the ability—and a special obligation—to be as capacious as possible with accommodations for all their many citizen-employees.

237 *Id.* at 14.

238 *Id.* at 5.

239 *Id.*

240 *Id.* at 11.

241 As of 2022, there were 19.23 million state and local government employees and 2.87 million federal government employees in the U.S. *Total Number of Government Employees*, *supra* note 169.

A. *Why Ordinary Conscience?*

The number of Americans who identify with organized religion has steadily dropped for decades.[242] But many Americans believe in some kind of higher power or report that they are guided by "choos[ing] the right thing."[243] Just as Title VII allows persons of faith to be fully themselves at work, the ability to abide by the demands of conscience is a requisite for some workers to be authentically themselves.

There has never been a more important time to protect conscience. Political elections are decided by razor-thin margins.[244] Half the country despises the other half.[245] Employers have extraordinary power over their employees' fortunes.[246]

Protections for conscience can pay dividends when a person breaks with prevailing orthodoxy. Importantly, the prevailing orthodoxy changes from place to place and with time.[247] Patently, a

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242 *See* PEW RSCH. CTR., MODELING THE FUTURE OF RELIGION IN AMERICA 6 (2022). These "nones" self-describe as atheist, agnostic, or "nothing in particular." *Id.*

243 *Id.* at 17–18; *Religious "Nones" in America: Who They Are and What They Believe*, PEW RSCH. CTR. (Jan. 24, 2024) https://www.pewresearch.org/religion/2024/01/24/religious-nones-in-america-who-they-are-and-what-they-believe/ [https://perma.cc/49PK-WL5S] (reporting that 75 percent of all U.S. adults say that "feel[ing] good when they choose the right thing" is "extremely or very important" to them "when making decisions between right and wrong").

244 *See, e.g.*, *Winning Margins in the Electoral and Popular Votes in United States Presidential Elections from 1789 to 2020*, STATISTA, https://www.statista.com/statistics/1035992/winning-margins-us-presidential-elections-since-1789/ [https://perma.cc/VQ3V-2SU5] (giving margins in US Presidential elections); Benjamin Swasey & Connie Hanzhang Jin, *Narrow Wins in These Key States Powered Biden to the Presidency*, NPR (Dec. 2, 2020, 5:00 AM), https://www.npr.org/2020/12/02/940689086/narrow-wins-in-these-key-states-powered-biden-to-the-presidency [https://perma.cc/MAZ3-BWER] (showing narrow margins for President Biden in three states in 2020 Presidential election).

245 *See* William A. Galston, *America Is Desperate for a New Beginning*, WALL ST. J. (Sept. 26, 2023, 1:45 PM), https://www.wsj.com/articles/america-desperate-new-beginning-2024-election-voter-sentiment-polls-gop-primary-biden-trump-3fde70cd [https://perma.cc/8HH3-KBN9].

246 *See, e.g.*, Rodger Dean Duncan, *How Covid Changed the Workplace: It's a Whole New World Out There*, FORBES (July 28, 2023, 3:18 PM), https://www.forbes.com/sites/rodgerdeanduncan/2023/07/28/how-covid-changed-the-workplace-its-a-whole-new-world-out-there/?sh=79dbdec85f93 [https://perma.cc/Y7UH-VBG8]. The power dynamics between employer and employee have slowly returned to pre-COVID patterns. *See, e.g.*, Diane Winiarski, *Returning Workers and Improving Employee Well-Being Post-Pandemic*, FORBES (Jan 3, 2023, 10:00 AM), https://www.forbes.com/sites/dianewiniarski/2023/01/03/returning-workers-and-improving-employee-well-being-post-pandemic/?sh=1f9321eb6bfd [https://perma.cc/9PWJ-GPBY].

247 *See, e.g.*, Keetch, *supra* note 2, at 182 ("If we view the contest between rights of conscience and sexual rights as a zero-sum game, then those with more power will always

person who agrees with an employer's philosophy and priorities does not need protection. Moreover, clashes of convictions often happen at times of seismic shifts in social matters, when views that once commanded widespread support become disfavored, at least by some or in some quarters. The clash over celebratory maneuvers in the 2014 Pride Parade happened as the country was gripped by unfolding, and conflicting, court decisions about same-sex marriage, a scant year before *Obergefell v. Hodges*.[248] There was no LGBT public accommodations nondiscrimination law in Salt Lake City or Utah.[249]

The power of civil servants like Chief Burbank comes from the governed. In the absence of law, supervisors should not be empowered to skewer employees for not sharing the supervisor's preferred view. In this sense, conscience protections for government employees act as checks on government. Government exists to serve the people, not to be above and superior to them. And certainly not to destroy them for "pretend offenses."

At a time when many wonder what is so special about religious belief that we accord it protection,[250] we believe the right response is to equalize up, not down.

Jealously protecting the prerogatives of conscience has long been a liberal value.[251] Moreover, testing the government's need to force an employee with a sincerely held conscience concern to heel or be fired is inherently minoritarian. As noted above, such protections are needed only when an employee breaks with the prevailing orthodoxy, not when she follows it. Of course, an employee in an ideological

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seek to annihilate the rights of those with less power. We are then left only with a question of who wields the bigger 'hammer,' recognizing full well that hammers change in size and force depending on the political cycle and the location.").

248 The US Supreme Court agreed to hear *Obergefell v. Hodges* approximately six months after Moutsos's objection. *See* Order Granting Writ of Certiorari, Obergefell v. Hodges, 574 U.S. 1118 (2015) (No. 14–556).

249 *See Local Nondiscrimination Ordinances*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_ordinances [https://perma.cc/2VP6-UALH].

250 *See generally* Christopher C. Lund, *Religion is Special Enough*, 103 VA. L. REV. 481 (2017).

251 *See generally*, T.R.S. Allan, *Citizenship and Obligation: Civil Disobedience and Civil Dissent*, 55 CAMBRIDGE L.J. 89, 97 (1996) ("It is not part of the ideal of the rule of law, however, that the citizen's deference to authority should be unqualified; such unqualified deference would clearly violate the principle of moral responsibility at the heart of that ideal. While governments may often claim unlimited authority, it does not follow that their subjects should accept it. The moral authority which the citizen accords even the legitimate government of a constitutional regime cannot be unlimited: he does not assent, if he is truly conscientious, to whatever government ordains, regardless of the moral character of its demands." (emphasis omitted)).

minority may be more likely to break with the employer's or supervisor's prevailing orthodoxy.

Take Utah as an example. Although early in Utah's founding members of the Church of Jesus Christ of Latter-day Saints or "Mormon" faith comprised a majority of the population, they have not in recent years.[252] Yet Utahns who do not identify with a religious tradition are in the distinct minority (twenty-two percent).[253] Utah's nonreligious citizens are as deserving of protection for conscience as those whose convictions rest on a belief in God.

Further, a religious employee may desire an accommodation but not express their unease in religious terms, or an employee simply may not want to "out" her religious affiliation or beliefs in order to obtain an accommodation.

Thus, for example, one could easily imagine a Muslim employee who drives a delivery truck and who asks not to make alcohol deliveries.[254] The employee would easily be staffed around if such deliveries comprise a small fraction of all deliveries, and if other employees are available.[255] The Muslim driver could claim protection under Title VII if they work for a large enough employer. But imagine that the driver is instead a child of an alcoholic, who had a ringside seat to the devastation that addiction can wreak in a person's and family's life. The latter's request, premised on a moral concern, should receive the same solicitude as the request premised on faith.

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252 A 2023 survey of Utah adults found that "42% consider themselves members of the state's predominant faith—a whopping 22 percentage points lower than the 64.3% the church reports on its membership rolls." Tamarra Kemsley, *How Many Utahns Identify as Latter-Day Saints? Fewer Than You Think*, SALT LAKE TRIB. (December 29, 2023, 8:05 AM), https://www.sltrib.com/religion/2023/12/28/turns-out-latter-day-saints-are/ [https://perma.cc/R8QT-8LGK].

253 *Religious Landscape Study: Adults in Utah*, PEW RSCH. CTR., https://www.pewresearch.org/religion/religious-landscape-study/state/utah/ [https://perma.cc/A3G3-XK4H].

254 "The Qur'an explicitly forbids drinking and a reliable *hadith* forbids even indirect association with alcohol; working from these principles, muftis have no choice but to tell some questioners that they must quit their jobs although they do not have to divorce their spouses or shun family members who drink." Laurence Michalak, Karen Trocki & Kimberly Katz, *"I Am a Muslim and My Dad Is an Alcoholic – What Should I Do?": Internet-Based Advice for Muslims About Alcohol*, 4 J MUSLIM MENTAL HEALTH 47, 60 (2009).

The hadith is a "corpus of the sayings or traditions of the Prophet Muhammad, revered by Muslims as a major source of religious law and moral guidance. . . . For Muslims, hadiths are among the sources through which they come to understand the practice of Muhammad and his Muslim community (*ummah*)." Asma Sayeed, *Hadith*, BRITANNICA (Apr. 2, 2024), https://www.britannica.com/topic/Hadith [https://perma.cc/S2FG-XSJY].

255 *See* Memorandum Presented for Debates on Utah House and Senate Floors Summarizing H.B. 460, 65th Leg., Gen. Sess. (Utah 2024), (February 26, 2024) [hereinafter *Memorandum Presented for Debates*] (on file with the *Notre Dame Law Review*).

Until now, under Utah law, employees had no recourse unless they expressed their deep-seated unease in specifically religious terms.

Likewise, a pro-life employee who processes building licenses might request to not process a hospice center license at which life-saving care will *not* be rendered. That request could be premised upon faith or upon a moral belief that all life should be accorded respect. However grounded, if the employee is one of many clerks and processing the application is one of many tasks, staffing around the conscientious objection likely involves little hardship for the governmental employer.[256]

B. Why a New Statute?

It is true that courts sometimes read protections in federal law for religious belief to encompass "worldviews" to avoid impermissible establishment of religion. In *United States v. Seeger*, [257] the Supreme Court allowed a war objector to step aside from combat, and serve in another role—a concession given in Section 6(j) of the Universal Military Training and Service Act to those "opposed to participation in war" "by reason of [their] religious training and belief"[258]—when the objection was grounded in belief in a "Supreme Being."[259] *Seeger* was unwilling, however, to protect objections based on a "'merely personal' moral code."[260]

In a later military conscientious objection case, the Supreme Court gave credence to an individual's "duty of conscience to refrain from participating in any war at any time, [because] those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by . . . God' in traditionally religious persons."[261] While courts have extended the reach of statutory protections to nonreligious belief

256 *Id.*
257 380 U.S. 163 (1965).
258 50 U.S.C. app. § 456(j) (1958) (current version at 50 U.S.C. § 3806(j) (2018)); *see Seeger*, 380 U.S. at 188.
259 *Seeger*, 380 U.S. at 166.
260 *Id.* at 186.
261 Welsh v. United States, 398 U.S. 333, 340 (1970) (plurality opinion).

systems,[262] constitutional litigation is expensive and risks failure.[263] Furthermore, many tasks that employees want to step aside from are one-offs. They are not all-encompassing convictions about matters of life and death so much as they are beliefs that facilitating a particular task or function would "just be wrong."

While it is also true that the EEOC's Title VII guidelines extend Title VII's protections to employees who hold "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views,"[264] Congress gave the EEOC no rulemaking authority under Title VII, unlike other civil rights statutes.[265]

Critics of extending protection for ordinary conscience urged that there is no need for statutory protection, presumably relying on the

262 The kinds of claims that have been protected amount to a belief system, as opposed to a strongly held moral conviction about a single task one is asked to do. For example, Wiccans have been protected as well as those who believe in the power of dreams based in "traditional religious convictions of [the plaintiff's] African origin." Toronka v. Cont'l Airlines, Inc., 649 F. Supp. 2d 608, 612 (S.D. Tex. 2009). Such belief systems permeate a believer's life in the way religion does, unlike the conscientious objections to specific tasks or functions that receive statutory protection in Utah House Bill 460. *See* H.B. 460, 65th Leg., Gen. Sess. (Utah 2024).

263 Query, as one risk, whether Establishment Clause claims would receive the same hearing in today's Supreme Court as they did in 1965 and 1970. *See generally* David Schultz, *The Roberts Court Takes Aim at the Establishment Clause*, THE HILL (May 31, 2023, 11:00 AM), https://thehill.com/opinion/judiciary/4026628-the-roberts-court-takes-aim-at-the-establishment-clause/#:~:text=Under%20Chief%20Justice%20John%20Roberts,a%20minority%20upon%20an%20emerging [https://perma.cc/V5NG-4PZA].

264 EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (2023) ("In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970).").

265 While the EEOC has the ability to issue "legislative regulations" under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 (2018), Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12111–17 (2018), and Title II of the Genetic Information Nondiscrimination Act (GINA), 42 U.S.C. §§ 2000ff–2000ff-11 (2018), "[u]nder Title VII of the Civil Rights Act, EEOC's authority to issue legislative regulations is limited to procedural, record keeping, and reporting matters. Regulations issued by EEOC without explicit authority from Congress, called 'interpretive regulations,' do not create any new legal rights or obligations, and are followed by courts only to the extent they find EEOC's positions to be persuasive." *What You Should Know: EEOC Regulations, Subregulatory Guidance and Other Resource Documents*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-regulations-subregulatory-guidance-and-other-resource [https://perma.cc/4G8V-QKD2].

EEOC's regulation.[266] However, courts are not required to enforce those guidelines.[267] Equally concerning, it is not clear that the EEOC under certain administrations would make a full-throated defense of employees stepping aside from things at the epicenter of America's culture wars, whether LBGT rights as with Officer Moutsos, the racial inclusiveness of public universities as with Professor McPhail, or animal rights, or the unshelving of library books, both of which were raised in hearings on Utah House Bill 460, as discussed below. In fact, our predictive judgment is that some of these would receive strong support in one administration but not another.[268] Clear guidance in the new law gives certainty to those who have to decide whether to fight or walk away.

C. Elements to Protecting Ordinary Conscience

Those who break with prevailing orthodoxy not only need a substantive right to step aside from a particular task when it collides with a moral commitment, they also need the ability to prosecute that right. In addition, they need protections against public comment by governmental employers to avoid reputational harms.

A Utah statute sponsored by one of us and recently signed into law, House Bill 460, Government Employee Conscience Protection Amendments, marries these protections.[269] Like Title VII itself, House Bill 460 encompasses only *reasonable* requests by an employee to step away from a task that would conflict with her "sincerely held religious beliefs or conscience" when doing so would *not* cause an undue hardship to the governmental entity.[270] Patterned after *Groff*'s clarification, undue hardship considers, among many factors, whether an accommodation would substantially increase the unit's cost of doing business.[271]

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266 *Government Employee Conscience Protection Amendments: Hearing on H.B. 460 Before the H. Pol. Subdivisions Standing Comm.*, 65th Leg., Gen. Sess., at 1:17:00 (Utah 2024) [hereinafter *Feb. 23, 2024, Hearing on H.B. 460*], https://le.utah.gov/MtgMinutes/publicMeetingMinutes.jsp?Com=HSTPOL&meetingId=19210 [https://perma.cc/8KNJ-8S77] (statement of Jared Tingey, Legal Director, Utah League of Cities and Towns).

267 *See supra* note 265.

268 Put differently, any federal regulatory protection of ordinary conscience under Title VII would be subject to changing political winds. *See generally* Tanner J. Bean & Robin Fretwell Wilson, *The Administrative State as a New Front in the Culture War:* Little Sisters of the Poor v. Pennsylvania, 2020 CATO SUP. CT. REV. 229.

269 H.B. 460, 65th Leg., Gen. Sess. (Utah 2024) (as signed by Governor, March 21, 2024, effective May 1, 2024).

270 *Id.* at ll. 232–38.

271 *Id.* at ll. 220–31.

Just as important, under House Bill 460, employers should not be forced into the uncomfortable position of choosing between an employee and accomplishing their missions, even as we ensure that employees are not needlessly forced to choose between their conscience and their livelihood. House Bill 460 accomplishes both of these objectives.

House Bill 460 was thoroughly vetted in two House Political Subdivisions Committee hearings, as well as two discussions on the House and Senate floors.[272] It evolved through three substitutes and other amendments,[273] and passed by overwhelming margins with bipartisan support.[274]

House Bill 460 applies only to government employers.[275] It establishes a norm that governmental units try to accommodate employees' conscience-based concerns to avoid the loss of the employee's livelihood. It creates an opportunity for a governmental unit and an employee to arrive at a solution collaboratively without a firing, or the employee having to quit.[276] It protects government employees from public comments about the request by making the request confidential while being worked out,[277] and it allows for an award of attorney's fees if the employee prevails in court.[278] Attorney's fees matter greatly. Without the ability of employees to act as private attorneys general for their own protection, any substantive right given is, in fact, illusory.[279]

House Bill 460's protections pay dividends in both directions—they do not lean "left" or "right." For example, House Bill 460 would protect an employee who, as a vegan and animal rights advocate, prefers to not facilitate a circus coming to town and asks if another

272 *See H.B. 460 Government Employee Conscience Protection Amendments*, UTAH STATE LEG., https://le.utah.gov/~2024/bills/static/HB0460.html [https://perma.cc/4LZC-TPT9] (click "Hearings/Debate"; then scroll down to select links to audio under "Committee Hearings" and "Floor Debates" labels).

273 *See id.* (click "Status").

274 Vote counts: House 60-7-8 (aye, nay, absent); Senate 21-5-3. *See id.* (click "Status").

275 H.B. 460, at ll. 232–33. The statute was thoroughly vetted in two hearings and two discussions on the Utah House and Senate floors. *See supra* note 272.

276 *See* H.B. 460, at ll. 267–70.

277 *See id.* at ll. 137, 186–88, 324–25.

278 *Id.* at ll. 315–23.

279 *See id.*

worker can process the needed permit.[280] It would protect a librarian who asks not to remove banned books from the library shelves.[281]

These are real requests raised during hearings and discussions of House Bill 460. Teachers are increasingly in the crosshairs as schools become the leading edge for many culture war issues.[282] Schoolteachers in large public school districts report having to violate their consciences and keep quiet to keep their jobs and careers. In testimony, people asked not to be put in the position of having to "talk and walk one way but then . . . do other things just for the sake of [their] employment."[283] The constituency inquiry that sparked House Bill 460 came from an employee tasked with marketing and communications requests who sought not to make a specific poster for a drag queen story hour that others could have easily made.[284]

House Bill 460 builds on Utah's track record of protecting people, whatever their conviction (for example, whether one supports same-sex marriage or is against it). Protecting "both sides" is part of the legislative fabric in Utah. Utah's landmark nondiscrimination laws combining protections for people of faith with protections for the LGBT community included many "parity" protections.[285]

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280 Interview with Ryan Loose, City Att'y, S. Jordan, Utah (Feb. 23, 2024); *cf.* Taylor Stevens, *A Circus Show in Utah Won't Feature Exotic Animals for the First Time*, SALT LAKE TRIB. (Jan. 28, 2020, 11:42 AM), https://www.sltrib.com/news/politics/2020/01/28/circus-show-south-jordan/ [https://perma.cc/849W-8AAP].

281 Representative Paul Cutler raised this fact pattern at the February twenty-first hearing of the Political Subdivisions Committee of the Utah House of Representatives. *Feb. 23, 2024, Hearing on H.B. 460*, *supra* note 266 at 13:45 (statement of Rep. Paul A. Cutler, Member, H. Pol. Subdivisions Standing Comm.); *cf.* Martha Harris, *Utah Authors, Librarians and Teachers Call for More Open Minds Rather Than More Banned Books*, KUER90.1 (Sept. 19, 2022, 6:49 PM), https://www.kuer.org/education/2022-09-19/utah-authors-librarians-and-teachers-call-for-more-open-minds-rather-than-more-banned-books [https://perma.cc/YX3E-XW55]; *Government Employee Conscience Protection Amendments: Hearing on H.. 460 Before the H. Pol. Subdivisions Standing Comm.*, 65th Leg., Gen. Sess., at 23:12 (Utah 2024) [hereinafter *Feb. 21, 2024, Hearing on H.B. 460*], https://le.utah.gov/MtgMinutes/publicMeetingMinutes.jsp?Com=HSTPOL&meetingId=19212 [https://perma.cc/MB5F-3F4M] (transcript on file with the *Notre Dame Law Review*) (statement of Rep. James Cobb, Member, H. Pol. Subdivisions Standing Comm.).

282 *Feb. 21, 2024, Hearing on H.B. 460*, *supra* note 281, at 37:17 (statement of Gail Ruzicka, President, Utah Eagle Forum). Eagle Forum is a recognized leader for conservative principles. *About Utah Eagle Forum*, UTAH EAGLE F., https://www.utaheagleforum.org/about-uef.html#/ [https://perma.cc/QAK4-E5EN].

283 *Feb. 21, 2024, Hearing on H.B. 460*, *supra* note 281, at 35:58 (statement of Mary Ann Christensen, Executive Director, Utah Legislative Watch); *id.* at 37:17 (statement of Gail Ruzicka, President, Utah Eagle Forum).

284 *Id.* at 37:17 (statement of Gail Ruzicka, President, Utah Eagle Forum).

285 Wilson, *supra* note 219, at 527–30.

D. Limits on Ordinary Conscience—What Utah's New Law Does Not Do

It is important to note what House Bill 460 does not do. It does not open a can of worms—precisely because it is limited and tailored to meet the valid concerns raised by lawmakers in hearings on House Bill 460. First, it gives relief only from a task or function, not from training or safety requirements.[286]

Second, it does not erect a roadblock to services. The undue-hardship test takes into account the government's ability to get needed work done and accomplish its mission.[287] Whether an accommodation would prevent the governmental unit from fulfilling existing legal obligations of the governmental unit is considered as part of the undue hardship test.[288] Third, first responders expressly cannot ask to be exempted from any task related to protecting the public.[289] Note that neither Officers Moutsos nor Officer Endres balked at protecting the public in an emergency. Both would be able to claim protection under House Bill 460 if all other conditions are met. That is, accommodations would generally be granted when it would not disrupt normal workflow and the employee could be staffed around.[290]

Fourth, no signal is given to the public that any group is less important than another.[291] Instead, the employee and government

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286 H.B. 460, 65th Leg., Gen. Sess., at ll. 239–42 (Utah 2024).

287 *See id.* at ll. 220–31, 237–38. Undue hardship, in this context, means a substantial burden on a governmental entity from granting a request, and takes account of "all relevant factors" including: practical impact on the governmental unit in light of their nature, size, and operating cost; disruption to their operations; and the nature of the employee's duties, number of times the employee has made requests during the prior year, and the type of workplace. *Id.* at ll. 222, 220–31.

288 *Id.* at ll. 245–47.

289 *Id.* at ll. 197–204, 239–40, 248–50. *See Feb. 21, 2024, Hearing on H.B. 460* at 16:32 ("I don't see where . . . actually providing protection for someone, for a police officer is that exempted in this statute?") (statement of Rep. Judkins); *id.* at 18:17 ("[What if] we have officers that are on the scene and they have a problem with their conscience dealing with this call that they're on and they can't be relieved or they shouldn't be relieved. How . . . do we go about that in those situations?") (statement of Rep. Gwynn).

290 Notice that in Moutsos's case, the parade proceeded with officers doing the maneuvers—the maneuvers were celebratory and symbolic, rather than necessary to protecting the public. These valid concerns led to the condition that protecting the public's safety precludes protection in these instances.

291 Importantly, it is not necessary to publicize the face that any employee has been accommodated. It is never good for an employee and the public to square off across a counter, both standing on their rights. *See* Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1507 (2012) ("Four concrete commitments would limit the possibility of dignitary harm to same-sex couples [from allowing marriage license clerks to be staffed around and to retain their jobs] and should guide the staffing arrangement . . .

employer begin a confidential dialogue about possible arrangements that both satisfies the employee's conscience concern and allows the employer to fulfill its mission. Allowing Officer Moutsos to trade off assignments would have remained outside public view, just as Haring's recusal did. Officer Moutsos's request to step aside from doing maneuvers at the head of the Pride parade reverberated across the nation only because of the department's and Chief Burbank's statements. As *Haring* noted, sound public policy supports, rather than punishes, recusal.[292]

Fifth, employees will not be able to strategically game the system to do less work for the position they hold. In an era of "quiet quitting," policymakers rightly worry about impacting productivity.[293] House Bill 460 accounts for concerns about strategic behavior in several ways. It tests the sincerity of objections by requiring a written explanation.[294] The employee and employer may then meet.[295] The employer can consider the number of prior requests when evaluating undue hardship.[296] The employer may consider whether an accommodation would leave the employee with less work (for example, they do not have enough other work for the position they hold)[297] and whether a request is made for an improper purpose (if, for instance, a leave request for New Year's Day is denied but then resubmitted as an objection to working on "Festivus," coincidentally on January 1).[298]

(3) Any scheme to staff around an objector should be invisible to same-sex couples."). For an example of such an arrangement being made *ex ante*, without dignitary harm to the public, see Adams, *supra* note 172 at 453 ("We avoided the unseemliness of clerks turning away gay couples, too. SB 297 creates, for the first time in Utah, a legal duty for someone to provide solemnization services for every couple with the legal right to marry. But we provided a mechanism that avoids needless clashes over conscience. The innovation: the county clerk's office can designate any willing celebrant, whether a worker in the office or someone in the community authorized and willing to perform marriages for all who ask. Offices might select someone in the community for a variety of reasons, including scheduling and a staff working at capacity. Should no one be willing, the county clerk is required to perform marriages." (footnotes omitted))..

292 Haring v. Blumenthal, 471 F. Supp. 1172, 1183 (D.D.C. 1979).

293 Greg Daugherty, *What Is Quiet Quitting—and Is It a Real Trend?*, INVESTOPEDIA (Mar. 8, 2024), https://www.investopedia.com/what-is-quiet-quitting-6743910 [https://perma.cc/LWL2-SF5N].

294 H.B. 460, 65th Leg., Gen. Sess., at ll. 253–58 (Utah 2024).

295 *Id.* at ll. 262–63 ("[P]rovide the governmental entity with a reasonable opportunity to grant the employee's request or otherwise address the employee's concerns."); *id.* at ll. 288–90 (providing the employer an opportunity to explain any denial and requiring a written explanation).

296 This happens as part of the undue hardship analysis. *See id.* at ll. 220–31, 237.

297 *Id.* at ll. 243–44.

298 *Id.* at ll. 251–52.

Sixth, and perhaps most importantly, employees cannot dictate *how* they are accommodated. The precise accommodation emerges from a dialogue between the government unit and the employee requesting accommodation.

Seventh, the law, as enacted, includes devices to avoid unnecessary litigation.[299] Utah House Political Subdivisions Committee Chairman James Dunnigan rightly probed whether an early version of House Bill 460 would drive up the cost of government through litigation.[300] As enacted, under House Bill 460, a government entity may refuse a request when the request is not reasonable[301] and causes an undue

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299 As a summary of House Bill 460 presented during discussions on the floor of the House of Representatives and the Senate notes, the analysis for each claim for accommodation is fulsome:

- Is the request a sincerely held belief about right and wrong?
- Does this request implicate public safety? If so, the request can be denied.
- Is the request reasonable? If not, the request can be denied. For example:
    - Is the department large enough that another person can do the task?
    - Does the requestor have other work?
    - Will the request leave a deficit in the requestor's compensated work?
- Will there be an undue hardship, measured by a substantial burden from granting the request, taking into account:
    - the practical impact on the governmental unit considering their nature, size and operating cost,
    - disruption to the governmental unit's operations,
    - the type of workplace;
    - the nature of the employee's duties; and
    - number of times the employees has made request during the prior year.
- Does staffing around the employee create a conflict with an existing legal obligation of the governmental entity, which cannot be avoided?

See Memorandum Presented for Debates, *supra* note 255 at 2. This analysis in the summary of House Bill 460 forms part of the legislative history of this statute. Utah courts use legislative history when evaluating statutes. *See, e.g.*, Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints, 164 P.3d 384, 396 (Utah 2007) ("[I]f the language is ambiguous, the court may look beyond the statute to legislative history . . . to ascertain the statute's intent."); State v. Watkins, 309 P.3d 209, 215–16 (Utah 2013). The Utah Legislature's website collects relevant legislative history documents. *Legislative History Resources*, UTAH STATE LEG.: OFF. OF LEG. RSCH. & GEN. COUNS., https://le.utah.gov/lrgc/legislativehistoryresources.htm [https://perma.cc/T7CX-782B].

300 *Feb. 23, 2024, Hearing on H.B. 460*, *supra* note 266 at 24:48.

301 *See* H.B. 460, at ll. 232–33. As one example of when a request for accommodation may go from being reasonable to unreasonable, consider a person who cannot be in proximity to dead bodies for reasons of faith, as is true for some members of the Jewish faith who are descended from a line of priests (cohens). *Cohen*, BRITANNICA, https://www.britannica.com/topic/cohen [https://perma.cc/86RS-FJ7Z] ("A cohen must also preserve his ritual purity by avoiding contact with the dead and hence may not attend funerals, except those of close relatives. . . . Rules and privileges pertaining to cohanim are disregarded by Reform Judaism."). If an accountant subscribes to this view and works for an accounting department that is spread across three buildings, and if that accountant is

hardship.[302] Employees must comply in good faith with collaborative efforts to resolve concerns.[303] Employees must comply with policies adopted by the governmental unit.[304] Employees must exhaust internal remedies.[305]

Further, employees must prove that the governmental entity would not have experienced an undue hardship.[306] There is no incentive to sue. Employees recover no damages if they prevail in a lawsuit. The court can only make the government unit relieve the employee of the task or reinstate the employee to the position with back pay when the employee brings a meritorious claim.[307] The court may, but is not required to, award reasonable attorney fees and court costs.[308]

All the nuances in House Bill 460 culminated in the overwhelming support it received and, ultimately, to its ability to protect the integrity of persons.[309]

CONCLUSION

Since our country's founding, Americans have rankled at the idea that the government could force a citizen to account for an alleged wrong, far away from where it occurred, without notice, without a fair hearing in front of one's peers, and without the ability to mount a defense and confront witnesses.

In 2023, the U.S. Supreme Court in *Groff v. DeJoy* clarified the meaning and intent of Congress' promise in Title VII that employees

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assigned to a building containing a temporary mortuary and requests to be placed instead in one of the other two buildings, this is a reasonable request. If, however, there is only one building that houses all accountants, it may be an unreasonable request to be assigned physical space elsewhere. Reasonability will depend on many factors, such as how important proximity to others is, and whether accountants work in teams, placing a premium on physical proximity.

302 H.B. 460, at ll. 220–31, 237.

303 *Id.* at l. 304.

304 *Id.* at ll. 305–06.

305 *Id.* at ll. 275–76.

306 *Id.* at ll. 309–10.

The veracity of the claim would be evaluated by the court, which has considerable expertise is weighing credibility. *See Feb. 21, 2024, Hearing on H.B. 460*, *supra* note 281, at 23:12 ("Who would actually evaluate the veracity of an employee's claim that a task conflicts with their conscience?") (statement of Rep. James Cobb).

307 H.B. 460, at ll. 315–23.

308 *Id.*

309 Statement of Rep. Neil Walters, Feb. 28, 2024 (Rep. Walters voted no in committee, but spoke in favor during floor discussion, citing extensive revisions to meet concerns expressed in Committee hearings).

should be respected in their religious practices and beliefs when it is possible to do so. Many employees are now proceeding to trial when their requests for accommodation would have fallen on deaf ears—and they would have had no other recourse.

Today, governments are our biggest employers. Some governments have needlessly subjected their employees to public skewering for "pretend offences" when employees have acted consonant with their *moral* convictions, as opposed to their religious beliefs. It appears that in the midst of culture wars, some supervisors have lost sight of the humanity of those who make government work.

In early March 2024, we texted the officer who lost his livelihood honoring his conscience—a man who easily could have been staffed around—to notify him that House Bill 460 passed the Utah Senate and was on its way to Governor Spencer Cox's desk. He replied: "[I]t would have been nice [to have that law in place in 2014], my whole life would have been different."[310]

Forcing people to act against their conscience is the antithesis of the freedoms underpinning America. To the greatest degree possible, governments should leave space for their employees to be authentically themselves. As Officer Moutsos observed: "If you cannot live consistently with your conscience, why is America even here?"[311]

310 Text message from Eric Moutsos to authors (Mar. 1, 2024) (on file with authors).

311 Moutsos Interview, *supra* note 173.