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Thinking Slow About Abercrombie & Fitch: Straightening Out The Judicial Confusion In The Lower Courts

Bruce N. Cameron* & Blaine L. Hutchison**

Abstract

In Abercrombie & Fitch, the U.S. Supreme Court fundamentally changed the way that Title VII religious accommodation cases are litigated and evaluated. This Article analyzes Abercrombie, explains how the Court eliminated religious accommodation as a freestanding cause of action, and suggests an altered proof framework for plaintiffs seeking an accommodation. The Article also explores the conflict between employee privacy rights and classic proof requirements for religious sincerity. The lower courts have largely failed to apprehend the change mandated by Abercrombie, with the result that their opinions are in disarray. The Article includes a chart organizing the diverse lower court opinions.

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I. INTRODUCTION

Scientific literature now confirms that Aesop was right—the slow-thinking tortoise often beats the fast thinking hare, albeit for different reasons. In Thinking Fast and Slow, Nobel Prize winner Daniel Kahneman’s immensely popular book, Kahneman provides a scientific account of human decision-making that demonstrates the importance of “slow thinking.”1 This Article utilizes Kahneman’s theory and attempts to provide a slow thinking, practical guide concerning the Supreme Court’s recent decision in Abercrombie & Fitch.

A. Thinking Fast & Slow

Kahneman’s research in Thinking Fast and Slow explains that the human brain has two systems for solving problems.2 The brain’s “System 1” approach is an automatic, “fast thinking” system, and it resolves most problems that arise during the day.3 This system resolves problems based on the way that we typically handle similar situations.4 “System 2,” on the other hand, is much rarer and is the brain’s method for resolving problems through careful logic and analysis—“slow thinking.”5 Both systems function constantly throughout the day and work in tandem with one another.6 System 1 continually “generates suggestions for System 2 . . . . When all goes smoothly, which is most of the time, System 2 adopts the suggestions of System 1.”7

System 2 is at a premium for cognitively busy individuals like judges and lawyers.8 In addition to time considerations that steer many people away from System 2 thinking, the simple truth is that “activities that impose high demands on System 2 require self-control, and the exertion of self-control is depleting and unpleasant.”9 When you add to the brain’s decision-making

2. See infra notes 3–7.
4. Id. at 24–25.
5. Id. at 21, 24–25.
6. Id. at 24–25.
7. Id. at 24.
8. See id. at 41–42, 86.
9. Id. at 42.
approach the rule of stare decisis, System 1 explains a great deal of judicial decision-making. Judges are not only supposed to resolve cases based on what has already been decided (typical System 1 thinking), but the innate tilt of the brain to avoid the hard work and time necessary to resolve new problems particularly explains the misunderstanding in lower courts regarding the prima facie elements of religious accommodation claims post *Abercrombie & Fitch*.11

**B. Abercrombie’s Alteration**

Prior to *Abercrombie & Fitch* in 2015, plaintiffs were required to establish three elements to prove a prima facie case for a failure to accommodate religion claim. Plaintiffs had to show: “(1) [they had] a bona fide religious belief that conflicts with an employment requirement; (2) [they] informed the employer of this belief; (3) [they were] disciplined for failure to comply with the conflicting employment requirement.” Courts almost uniformly treated claims for a failure to accommodate as a separate cause of action under Title VII, distinct from claims involving disparate treatment or disparate impact.12

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10. See id. at 24, 86–88.
11. See infra Part III.
13. Equal Emp’t Opportunity Comm’n v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2041 (2015) (Thomas, J., concurring in part and dissenting in part) (“[M]any lower courts, including the Tenth Circuit below, wrongly assumed that Title VII creates a freestanding failure-to-accommodate claim distinct from either disparate treatment or disparate impact.”). e.g., Porter, 700 F.3d at 951–56 (treating claims for disparate treatment and failure to accommodate as a separate claims); Reed v. Int’l
The Tenth Circuit decision in *Abercrombie & Fitch*, quoting the Equal Employment Opportunity Commission (EEOC) Compliance Manual, described the conventional understanding: “A religious accommodation claim is distinct from a disparate treatment claim, in which the question is whether employees are treated equally. An individual alleging denial of religious accommodation is seeking an adjustment to a neutral work rule that infringes on the employee’s ability to practice his religion.”

C. Central Contentions

This Article contends that the prior model under Title VII for religious accommodation was fundamentally altered by *Abercrombie & Fitch*. In *Abercrombie*, the Supreme Court eliminated a freestanding religious accommodation claim and altered the proof framework for plaintiffs alleging a failure to accommodate. *Abercrombie* establishes that only two causes of action presently exist under Title VII—disparate treatment and disparate impact—foreclosing a separate cause of action for religious accommodation. Thus, post *Abercrombie*, slow thinking plaintiffs should allege disparate treatment based on a failure to accommodate using the traditional *McDonnell Douglas* prima facie framework for disparate treatment claims. As a result of eliminating the freestanding religious accommodation claim, by logical implication, the old prima facie test for that claim has been abandoned. Consequently, *Abercrombie* effected a sea change in Title VII for claims involving religious

14. *Abercrombie & Fitch*, 731 F.3d at 1120 (quoting EQUAL EMP’T OPPORTUNITY COMM’N, COMPLIANCE MANUAL § 12-IV (2008)).
15. See infra Section II.B.
16. See infra Section II.B; infra Part IV.
17. See infra Section II.B.
accommodation. This change requires courts and counsel to presently abandon a fast thinking approach to religious accommodation claims.

Part II of this Article outlines the relevant statutory provisions from Title VII and analyzes the Supreme Court’s decision in *Abercrombie*. Specifically, this part demonstrates that the Supreme Court effectively rejected a bifurcated view of religion and read the definition of religion to include a duty to accommodate under the provision regarding disparate treatment.

Part III of this Article examines the prima facie elements identified by courts post *Abercrombie* for claims involving a failure to accommodate. Fundamentally, *Abercrombie* has gone almost entirely unnoticed. Since *Abercrombie*, two primary approaches have emerged in the lower courts regarding the prima facie elements for a claim involving religious accommodation. The first approach totally ignores or misapprehends *Abercrombie* and continues to blithely assert the old prima facie elements from a freestanding religious accommodation claim. The second approach recognizes that *Abercrombie* altered the framework for a claim involving religious accommodation but only eliminates the second element—the notice requirement—from the previous three elements required for a religious accommodation claim.

Part IV of this Article suggests a slow thinking approach to applying the new *Abercrombie* praxis to the proof and adjudication of cases involving the need for religious accommodations in the workplace.

To date, only one federal court has recognized the import of *Abercrombie* and its effect on religious accommodation. This Article is meant to call attention to the Supreme Court’s jurisprudential shift and to encourage slow thinking about *Abercrombie & Fitch* in an effort to clear up confusion among the lower courts.

18. *See infra* Part II.
19. *See infra* Part II.
20. *See infra* Part III.
21. *See infra* Part III; *infra* Section IV.A.
22. *See infra* Part III.
23. *See infra* Section III.A.
24. *See infra* Section III.B.
25. *See infra* Part IV.
26. *See infra* Section IV.A.
II. TITLE VII & THE SUPREME COURT SEA CHANGE

Religion has been especially protected and valued throughout American history.27 At the time of the founding, freedom of religion was universally considered a fundamental and unalienable right.28 Other rights commonly found in state bills of rights were often considered secondary rights derivative upon civil society, particularly when compared with religious freedom.29 James Madison encapsulated the historical, substantive understanding of religion when he wrote:

The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable . . . because what is here a right towards men, is a duty towards the Creator. . . . This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.

27. Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1455–56 (1990) (providing extensive analysis of the history and meaning of the Free Exercise Clause, which has been cited numerous times by the United States Supreme Court and various lower federal and state courts). “With the exception of Connecticut, every state, with or without an establishment, had a constitutional provision protecting religious freedom by 1789 . . . .” Id. at 1455, 1456–57 & nn.239–42.
28. Id. at 1456.
29. Id. at 1456 & n.238. Compare, e.g., N.H. Const. of 1784, art. I, §§ 4–5, reprinted in 4 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States 2454 (1909), https://lib.law.uw.edu/waconst/sources/Thorpe-vol4.pdf (“Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the RIGHTS OF CONSCIENCE. Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason . . . .”), with 1 Annals of Cong. 454 (1789) (Joseph Gales ed. 1834) (statement of James Madison), https://memory.loc.gov/cgi-bin/query?qId=llac&fileName=001/llac001.Dbt&recNum=228 (“Trial by jury cannot be considered as a natural right, but a right resulting from a social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.”), and James Madison, Property, Nat’l Gazette, Mar. 29, 1792, at 174, reprinted in 6 The Writing of James Madison 101–03 (Gaillard Hunt ed., 1906), https://babel.hathitrust.org/cgi/pt?id=osu.32435078658010;view=1up;seq=123 (treat[ing property as a right dependent, in part, on positive law inferior to freedom of religion), and Morton White, The Philosophy of the American Revolution 195–221 (1978) (examining unalienable and alienable rights, and placing “the right to worship” in the former category and property in the latter category, and also recounting Jefferson’s view that property should not be included in the Declaration of Independence).
Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe . . . We maintain therefore that . . . Religion is wholly exempt from [the] cognizance [of civil society].

This substantive understanding of religion has informed American law and government and undergirds Title VII.

A. Title VII: Disparate Treatment and Failure to Accommodate

Title VII of the Civil Rights Act of 1964, as amended, prohibits employers from impermissibly discriminating on the basis of religion. The Act provides in section 703(a) that it is unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

These two prohibitions are often “referred to as the ‘disparate treatment’ (or ‘intentional discrimination’) provision and the ‘disparate impact’ provision.”


However, Title VII goes beyond merely prohibiting religious discrimination and instead imposes an affirmative duty on employers to reasonably accommodate the religious practices of their employees.\(^{35}\) Prior to 1972, EEOC guidelines clarified that employers had a duty to accommodate employees’ religious needs under Title VII,\(^ {36}\) and in 1972, Congress amended Title VII to include its current definition of religion.\(^ {37}\) The definition provides that “[t]he term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”\(^ {38}\) Thus, the Supreme Court remarked that the duty to accommodate was, “somewhat awkwardly,” inserted into the statute in the definition of religion rather than under Title VII’s central provisions barring disparate treatment and disparate impact.\(^ {39}\)

The remarks by the Supreme Court following the amendment suggested that Title VII’s definitional section for religion created an independent duty.\(^ {40}\) Thereafter, lower courts regularly treated the failure to accommodate as a separate cause of action under Title VII.\(^ {41}\)

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\(^{36}\) 29 C.F.R. § 1605.1 (1967); 29 C.F.R. § 1605.1 (1968). The EEOC guidelines stated that an affirmative duty to accommodate employees’ religious needs existed under section 703(a)(1) of Title VII. 29 C.F.R. § 1605.1(b) (1968).


\(^{38}\) Id. at § 2000e(j). This section is also referred to as section 701(j) of Title VII. See source cited supra note 37.


\(^{40}\) Id.; see Equal Emp’t Opportunity Comm’n v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2041 (2015) (Thomas, J., concurring in part and dissenting in part) (“That assumption [that a failure to accommodate was a separate cause of action] appears to have grown out of statements in our cases suggesting that Title VII’s definitional provision concerning religion created an independent duty.”); see also Reed v. Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am., 569 F.3d 576, 579 (6th Cir. 2009) (“Title VII provides for religious accommodation claims in its definition of religion . . . .”); Equal Emp’t Opportunity Comm’n v. Univ. of Detroit, 904 F.2d 331, 334 (6th Cir. 1990) (noting that under section 701(j), the definition section, employers must reasonably accommodate the religious needs of employees).

\(^{41}\) See Reed, 569 F.3d at 584; cases cited supra notes 12–13.
1. Implications for Religion

This approach has serious, adverse consequences for religion. Because of the assumption that Title VII’s definitional section created an independent cause of action for the failure to accommodate, courts viewed disparate treatment as conceptually distinct from religious accommodation. The disparate treatment provision of Title VII ensured equal treatment for religion, but excluded religious practice and observance, while the definitional section for religion guaranteed accommodation for religious practice. As a necessary byproduct, courts implicitly subscribed to a bifurcated view of religion, separating belief from practice. Although religion was listed as a protected category from disparate treatment, that protection did not include religious observance and practice.

This bifurcated view of religion, compelled by a separate cause of action for religious accommodation, conflicts with the substantive understanding of religion as expressed by Madison and understood within numerous faith traditions, such as Christianity. When writing about religion, Madison used the terms exercise and duty, and referred to religious belief as inseparably related to action. “The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate,” because it “is a duty towards the Creator” that is “precedent, both in order of time and in degree of obligation, to the claims of Civil Society.” Similarly, dating back to the very beginning of Christianity, multiple, independent New Testament writers recount statements accorded to Jesus regarding the logically necessary relationship between belief and conduct. But this is hardly novel. The law regularly presumes this relationship

42. See supra notes 40–41 and accompanying text.

43. E.g., Equal Emp’t Opportunity Comm’n v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1120 (10th Cir. 2013) (differentiating a disparate treatment, which requires unequal treatment, from a religious accommodation claim requesting special treatment), rev’d and remanded, 135 S. Ct. 2028 (2015); Reed, 569 F.3d at 579 (differentiating a disparate treatment claim, where a plaintiff alleged unequal treatment, from a religious accommodation claim).


45. See Madison, supra note 30.

46. Id. (emphasis added).

between belief and conduct—conduct is evidence of belief and vice versa.\textsuperscript{48} It is frequently stated, for example, that a person necessarily intends the natural and probable consequences of his actions.\textsuperscript{49} That inference is as at least as compelling and necessary in the religious context.\textsuperscript{50}

The bifurcated view goes further, however, and impossibly splits individuals, as if a person could be an atheist for some purposes and a Muslim for others.\textsuperscript{51} The very nature of religion informs the conduct of an entire individual and cannot be divided by geography or activity. A person is either a Christian or is not. There is no logically possible middle ground. Thus, a distinct cause of action for religious accommodation, apart from disparate treatment or impact, necessarily compels a faulty philosophical understanding of religion that hopelessly and illogically attempts to distinguish religious believers from their religious observances and practices.

\textbf{B. Abercrombie \& Fitch: More Than a Hitch—the Supreme Court Sea Change}

\textit{Abercrombie \& Fitch} “put[,] to rest the notion that Title VII creates a free-standing religious-accommodation claim” and correspondingly rejected the bifurcated view of religion.\textsuperscript{52} The Court opened its opinion by plainly stating that Title VII only “prohibits two categories of employment practices,” which it followed by directly quoting section 703(a)(1) \& section 703(a)(2).\textsuperscript{53} Immediately after, the Court declared that “[t]hese two proscriptions, often referred to as the ‘disparate treatment’ (or ‘intentional discrimination’) provision and the ‘disparate impact’ provision, are the only causes of action under Title VII.”\textsuperscript{54}

\begin{itemize}
  \item \textsuperscript{48} See Sandstrom v. Montana, 442 U.S. 510, 522–23 (1979) (implying that while actions cannot give rise to a legal presumption of intent, they can support an inference of intent).
  \item \textsuperscript{49} See id.
  \item \textsuperscript{50} See Madison, supra note 30.
  \item \textsuperscript{51} Compare Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 281 \& n.12 (3d Cir. 2001) (reiterating that disparate treatment and failure to accommodate claims are separate causes of action), with Madison, supra note 30 (implying that religious belief and practice are inextricably linked).
  \item \textsuperscript{53} Id. at 2031–32.
  \item \textsuperscript{54} Id. at 2052.
\end{itemize}
The Court explained that disparate treatment comprises an individual’s religion and “includes his religious practice.” Accordingly, “religious practice is one of the protected characteristics that cannot be accorded disparate treatment and must be accommodated.” Congress defined religion, for purposes of Title VII, as “includ[ing] all aspects of religious observance and practice, as well as belief.” Therefore, the definition of religion in section 701(j) is baked into the protected class in section 703(a)(1), so that discriminating on the basis of religion includes an individual’s religious observances and practices.

In Abercrombie, a dispute arose over an applicant who applied to work at an Abercrombie store. The applicant was a practicing Muslim and had a sincere, religious belief that her religion required her to wear a headscarf. Under the company’s normal evaluation system, the applicant received a qualifying score to be hired. However, employees of the company were concerned that the applicant’s headscarf would conflict with the company’s “Look Policy,” which prohibited all headwear. After internal discussion, a district manager instructed an employee to not hire the applicant, because the applicant’s headscarf would violate the company’s Look Policy, regardless of the reason for wearing it. During the discussion over hiring the applicant, an employee reported that she thought that the applicant wore the headscarf because of the applicant’s religion, although the applicant never communicated that during her interview.

Adding to the Court’s explicit language rejecting a separate cause of

55. Id. at 2033–34.
56. Id. at 2033–34. As an alternative, the employer argued that a failure to accommodate should be raised as a disparate impact claim rather than disparate treatment claim. Id. at 2033. However, the Court explained that although that might have been accurate if Congress had only included religious belief in the definition of religion in Title VII, so that actions that impede religious practice would not be disparate treatment but might have a disparate impact, Congress’s definition includes more than belief. Id. at 2033–34.
57. Id. at 2033 (quoting 42 U.S.C. § 2000e(j) (2018)).
58. See id. at 2032.
59. Id. at 2031.
60. Id.
61. Id.
62. Id.
63. Id.
64. Id.
action, the Court analyzed the applicant’s claim involving a failure to accommodate under the disparate treatment provision of Title VII. In doing so, the Court held that an employer violates section 703(a)(1), the disparate treatment provision, when it: (1) impermissibly discriminates against an applicant or employee (2) because of (3) that individual’s religion, “which includes his religious practice.”

The employer argued at the Supreme Court that the company did not engage in disparate treatment, because it did not have “actual knowledge” concerning the need for a religious accommodation. But the Court disagreed, and instead held that an applicant is only required to show that the “need for an accommodation was a motivating factor in the employer’s decision.”

Significantly, the Court departed from the prima facie elements for a separate failure to accommodate claim. Previously notice was required, and under the former prima facie elements, the applicant would not have been able to meet her prima facie burden, since she failed to provide notice.

In contrast, the Tenth Circuit below treated a claim for religious accommodation as a separate cause of action. Relying on the EEOC, the lower court defined a religious accommodation claim and stated that it was “distinct from a disparate treatment claim, in which the question is whether employees are treated equally.” The court went on to note that a religious accommodation claim is different, because it involves an applicant or employee seeking an adjustment to a neutral rule or policy so that the applicant can practice her religion. Under a religious accommodation claim, the court recited the typical elements for a prima facie case: the employee must show that “(1) he or she had a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed his or her employer of this belief; and (3) he or she was fired [or not hired] for failure to comply with the conflicting

65. *Id.* at 2032–33.
66. *See id.* at 2032.
67. *Id.*
68. *Id.*
70. *Id.* (quoting Equal Emp’t Opportunity Comm’n, Compliance Manual § 12-IV (2008)).
71. *See id.*
employment requirement.\textsuperscript{72}

Given the Tenth Circuit's analysis and description of a failure to accommodate claim as a separate cause of action, distinct from a disparate treatment claim, the Supreme Court's opinion can only be read as a total departure from that view.\textsuperscript{73} In complete contrast, the Supreme Court analyzed the applicant's claim in \textit{Abercrombie} as a disparate treatment claim throughout its opinion,\textsuperscript{74} disregarded the former prima facie elements for a failure to accommodate claim, and unambiguously stated that only two causes of action exist under Title VII—disparate treatment and disparate impact.\textsuperscript{75} Moreover, the Court's opinion was unanimous that a failure to accommodate is not its own, distinct cause of action.\textsuperscript{76}

Justice Thomas was explicit in his concurring and dissenting opinion that the Court rejected a failure to accommodate as a separate cause of action.\textsuperscript{77} He began his opinion by writing: "I agree with the Court that there are two—and only two—causes of action under Title VII of the Civil Rights Act of 1964 as understood by our precedents: a disparate-treatment (or intentional-

\textsuperscript{72} \textit{Id.} at 1122 (quoting Thomas v. Nat'l Ass’n of Letter Carriers, 225 F.3d 1149, 1155 (10th Cir. 2000)).

\textsuperscript{73} See infra notes 74–76 and accompanying text. Although not relevant for the analysis here, it is worth noting that the Supreme Court explicitly stated that Title VII "does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers" to provide religious accommodations. See \textit{Equal Emp't Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc.}, 135 S. Ct. 2028, 2034 (2015). Therefore, "Title VII requires otherwise-neutral policies to give way to the need for an accommodation." \textit{Id.}

\textsuperscript{74} \textit{Abercrombie & Fitch}, 135 S. Ct. at 2032–34.

\textsuperscript{75} \textit{Id.} at 2031–32.

\textsuperscript{76} Justice Scalia wrote the majority opinion, which was joined by Justices Roberts, Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan. \textit{Id.} at 2030. Justice Alito filed a concurring opinion, and Justice Thomas filed an opinion concurring in part and dissenting in part. \textit{Id.} at 2034–42. While Justice Alito's concurring opinion is not as explicit as the majority or Justice Thomas's concurring and dissenting opinion, his opinion is inconsistent with the former prima facie requirements for an independent failure to accommodate claim. See \textit{Id.} at 2034–37 (Alito, J., concurring). Justice Alito stated in the last paragraph of his concurring opinion that a claimant must prove adverse action based on religion, mirroring the circumstantial proof test articulated in \textit{McDonnell Douglas}, rather than requiring a claimant to prove a sincere religious belief, notice, and an adverse action under the previous framework for a religious accommodation claim. See \textit{Id.}; infra note 82 and accompanying text.

\textsuperscript{77} \textit{Abercrombie & Fitch}, 135 S. Ct. at 2037 (Thomas, J., concurring in part and dissenting in part).
discrimination) claim and a disparate-impact claim.”78 If Justice Thomas was not already clear enough, he later stated that “many lower courts, including the Tenth Circuit below, wrongly assumed that Title VII creates a freestanding failure-to-accommodate claim distinct from either disparate treatment or disparate impact.”79

Accordingly, Abercrombie effectively created a sea change in Title VII and eliminated any freestanding religious accommodation claim apart from disparate treatment or disparate impact. The decision redefined prior claims involving a failure to accommodate as disparate treatment claims.80 As a consequence, the prima facie case for claims involving a failure to accommodate is controlled by the standard for disparate treatment claims established by the Supreme Court in McDonnell Douglas.81 To establish a prima facie case for disparate treatment claims involving a failure to accommodate under McDonnell Douglas, a plaintiff must prove: (1) that he is a member of a protected class; (2) that he was qualified for a position; (3) that despite his qualifications, he was rejected or suffered an adverse employment action; and (4) that after his rejection, the position was filled by someone with the same qualifications, or the position remains open and the employer seeks someone with the same qualifications.82

By eliminating the former religious accommodation claim, the Supreme Court ipso facto eliminated the prima facie elements for that claim. Because claims involving a failure to accommodate are now disparate treatment claims, the prima facie elements should be governed according to the prima facie test for disparate treatment claims. As a consequence, any opinion, post Abercrombie, that does not follow some version of the McDonnell Douglas test and continues to use the old three-element prima facie test for a failure to accommodate claim, effectively treats religious accommodation as a separate

78. Id.
79. Id. at 2041.
80. Abercrombie & Fitch, 135 S. Ct. at 2033.
82. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). McDonnell was a failure to hire case. Id. at 796. It notes that the specifications may vary with different facts. Id. at 802 n.13. The essence of the fourth element is that something adverse happened to the protected class member that did not happen to those outside of the protected class—hence, employees (when the claim involves religious accommodation) who do not share the protected religious belief or practice. See id. at 802.
cause of action with distinct prima facie elements and conflicts with the Supreme Court’s opinion in *Abercrombie*.  

III. FAST THINKING COURTS ARE NOT FARING WELL ON THE *ABERCROMBIE* SEA CHANGE

Despite the Supreme Court’s opinion in *Abercrombie & Fitch* eliminating a separate and distinct cause of action for a failure to accommodate, lower courts have continued to treat a failure to accommodate as a separate cause of action under Title VII with the same prima facie elements.  

Even though the Supreme Court overruled the Tenth Circuit and wholly rejected its analysis in *Abercrombie*, federal courts have continued to follow the approach of the Tenth Circuit.  

Post *Abercrombie*, two dominant approaches have emerged regarding religious discrimination claims involving a failure to accommodate.  

The first approach essentially disregards *Abercrombie* altogether and blindly recites the abrogated prima facie requirements from the former religious accommodation claim.  

The second dominant approach merely modifies the prima facie requirements from the prior religious accommodation claim.  

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83. *See* Tabura v. Kellogg USA, 880 F.3d 544, 549 & n.3 (10th Cir. 2018).

84. *See supra* Sections II.A–B.

85. *See supra* Sections II.A–B.

86. *Compare* Mohamed v. 1st Class Staffing, LLC, 286 F. Supp. 3d 884, 901 (S.D. Ohio 2017) (applying the same prima facie elements as the former religious accommodation claim), *with* Abeles v. Metro. Wash. Airports Auth., 676 F. App’x 170, 176 (4th Cir. 2017) (modifying the same prima facie elements from the former accommodation claim).

87. *See* cases cited *infra* Appendix: Part I Cases: Applying the Same Prima Facie Elements as the Former Religious Accommodation Claim.

88. *See* cases cited *infra* Appendix: Part I Cases: Applying the Same Prima Facie Elements as the Former Religious Accommodation Claim.
A. The First Fast Thinking Approach: Applying the Same Prima Facie Elements from the Former Religious Accommodation Claim

Under the first approach, courts have either completely ignored or misunderstood the import of *Abercrombie*. To date, this is the dominant approach that has been followed by lower courts. Out of the thirty-five relevant lower court cases, twenty-one have continued to use the old prima facie elements for a failure to accommodate claim:89 “To establish a prima facie failure to accommodate claim, ‘the employee must show: (1) she holds a sincere religious belief that conflicts with a job requirement; (2) she informed her employer of the conflict; and (3) she was disciplined for failing to comply with the conflicting requirement.’”90 All of the cases under this approach adhere to the elements of a prima facie case taken from the former failure to accommodate claim.91

Out of this group, at least fifteen cases have explicitly treated the failure to accommodate as a separate cause of action from disparate treatment.92 For example, in *Mathis v. Christian Heating & Air Conditioning, Inc.*, the United States District Court for the Eastern District of Pennsylvania explicitly stated “employees may rely on two different theories to establish a claim for religious discrimination: ‘disparate treatment’ on account of religion, or ‘failure to accommodate’ religious beliefs.”93 In *Mathis*, the court cited *Abercrombie* five times, but it failed to meaningfully analyze *Abercrombie* or consider whether it altered the framework under Title VII.94 Similarly, the United

89. See cases cited infra Appendix: Part I Cases: Applying the Same Prima Facie Elements as the Former Religious Accommodation Claim.


91. See cases cited infra Appendix: Part I Cases: Applying the Same Prima Facie Elements as the Former Religious Accommodation Claim.

92. See cases cited infra Appendix: Part I Cases: Applying the Same Prima Facie Elements as the Former Religious Accommodation Claim.


94. *Id.*, at 329, 331–32 (citing *Abercrombie* once for the proposition that employers cannot discriminate against an employee on account of that employee’s religion; three times for the proposition that actual knowledge of the need for a religious accommodation is not required; and once for the proposition that an employer cannot terminate employment to avoid providing religious accommodation).
States District Court for the Southern District of Ohio in *Mohamed v. 1st Class Staffing, LLC*, stated that courts “have recognized, as a variant of a religious discrimination claim, a cause of action for an employer’s failure to reasonably accommodate an employee’s religious beliefs.”95

The Eleventh Circuit has also maintained this approach. In *Patterson v. Walgreen Co.*, decided on March 9, 2018, the Eleventh Circuit resolved a claim involving a failure to accommodate.96 In the opening lines of the opinion, the court defined the plaintiff’s claims as “claims for religious discrimination, failure to accommodate religious practices, and retaliation.”97 In the opinion itself, the court analyzed the religious accommodation claim apart from the religious discrimination claim.98 Although the court recognized that all of the plaintiff’s claims were based on the alleged failure to accommodate, the court treated disparate treatment (religious discrimination) and failure to accommodate as a separate causes of action and theories of relief under Title VII.99

Likewise, the United States District Court for the District of Utah, in *Tabura v. Kellogg USA, Inc.*, stated that “[c]ourts treat a claim for failure to accommodate like an independent cause of action even though the basis for the claim is found in the definition section of Title VII.”100 The Tenth Circuit reversed and remanded the district court’s decision and stated in a footnote that a “‘failure to accommodate’ claim is a claim for ‘disparate treatment’ and thus must ultimately satisfy the general elements of a ‘disparate treatment’ claim.”101 However, after acknowledging that *Abercrombie* eliminated a distinct religious accommodation claim, the Tenth Circuit went on to apply the same elements of a prima facie case as the old independent religious accommodation claim.102 The United States District Court for the Northern District of Alabama also appears to have espoused this approach, holding that a failure

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97. *Id.* at 583.
98. *See id.* at 585–90.
99. *Id.*
102. *Id.* at 549.
to accommodate is not a separate cause of action, but nonetheless applying the same prima facie elements.\textsuperscript{103}

This approach is almost certainly wrong. It acknowledges that \textit{Abercrombie} eliminated the former freestanding religious accommodation claim, but then uses the elements of that discarded claim for a supposedly different claim involving disparate treatment based on a failure to accommodate. Although the Tenth Circuit recognizes in theory that no separate religious accommodation claim exists, in practice there is no meaningful difference between treating a religious accommodation claim as a separate cause of action and as a disparate treatment claim, since the prima facie elements, according to the Tenth Circuit, are identical. Although \textit{McDonnell Douglas} stated that the prima facie elements of proof may vary for disparate treatment,\textsuperscript{104} the Tenth Circuit’s approach goes too far. Merely retiling the old, religious accommodation claim as a disparate treatment claim is inconsistent with the substantive change established by \textit{Abercrombie} and acknowledged by the Tenth Circuit itself. If \textit{Abercrombie} demands a change, it certainly demands more than this.

The remaining four opinions under this approach adhere to the old prima facie elements of a religious accommodation claim but are unclear as to whether each court views claims involving a failure to accommodate as a separate cause of action.\textsuperscript{105}


\textsuperscript{104} McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973).

B. The Second Fast Thinking Approach: Applying but Modifying the Same Prima Facie Elements from the Former Religious Accommodation Claim

The second dominant approach recognizes that Abercrombie altered the former religious accommodation claim but presumes that Abercrombie only modified the elements for a prima facie case. Eleven cases out of the thirty-five relevant cases since Abercrombie have employed this approach.106

Under this approach, courts have generally asserted that “a prima facie case of religious discrimination requires evidence (1) that the plaintiff had a sincere religious belief that conflicts with a job requirement, and (2) that the need for [a] religious-based accommodation motivated the employer’s adverse employment decision.”107 Cases under this approach generally presume that Abercrombie only eliminated the notice requirement from the former prima facie test for a religious accommodation claim, since Abercrombie held that an employee is not required to provide an employer with actual knowledge regarding the need for an accommodation.108

Like many of the cases in the first category, various cases here wholly failed to analyze Abercrombie.109 In Webster v. Dollar Gen., Inc., for example, the United States District Court of New Jersey cited Abercrombie once without any analysis following its recitation of the prima facie elements for a

106. See cases cited infra Appendix: Part II Cases: Modifying the Same Prima Facie Elements from the Former Religious Accommodation Claim.


108. E.g., Equal Emp’t Opportunity Comm’n v. Triangle Catering, LLC, No. 5:15-CV-00016-FL, 2017 WL 818261, at *7-8 (E.D.N.C. Mar. 1, 2017) (stating that a prima facie case for a failure to accommodate in accordance with Abercrombie does not require notice, reducing the former test to two elements: (1) bona fide religious belief and (2) adverse action); Summers v. Whitis, No. 4:15-cv-00093-RLY-DML, 2016 WL 7242483, at *4 (S.D. Ind. Dec. 15, 2016) (stating that Abercrombie reduced the prima facie case of religious discrimination based on an employer’s failure to provide reasonable accommodation to two elements); Schwingel v. Elite Prot. & Sec., Ltd., No. 11 C 8712, 2015 WL 7753064, at *5 (N.D. Ill. Dec. 2, 2015) (reasoning that Abercrombie only reduces the prima facie case to establish a claim for a failure to accommodate to two elements, eliminating the notice requirement); Equal Emp’t Opportunity Comm’n v. Jetstream Ground Servs., Inc., 134 F. Supp. 3d 1298, 1317–18 (D. Colo. 2015) (stating that Abercrombie abrogated the requirement that an employee provide an employer notice regarding her need for a religious accommodation, thereby altering the prima facie elements).

109. See, e.g., Webster, 197 F. Supp. 3d at 702.
claim involving a failure to accommodate.\textsuperscript{110}

Likewise, in \textit{Abeles v. Metropolitan Washington Airports Authority}, the Fourth Circuit only referenced \textit{Abercrombie} twice, and the court failed to appreciate the import of the passages that it cited.\textsuperscript{111} There, the court cited \textit{Abercrombie} to support the proposition that Title VII only provides two methods of establishing discrimination: (1) disparate treatment and (2) disparate impact.\textsuperscript{112} However, the court followed that proposition by contradictorily stating that religious accommodation is a separate theory for relief under Title VII, distinct from disparate treatment.\textsuperscript{113} The court wrote: “Unlike disparate treatment, under a failure-to-accommodate theory an employee can establish a claim even though she cannot show that other (unprotected) employees were treated more favorably or cannot rebut an employer’s legitimate, non-discriminatory reason for her discharge.”\textsuperscript{114} Subsequently, the court listed the modified prima facie elements of a religious accommodation claim, eliminating the notice requirement.\textsuperscript{115} The court then cited \textit{Abercrombie} and, in a parenthetical, quoted the Supreme Court, yet it failed to appreciate the Supreme Court’s description of the claim in the language that it quoted—“the rule for \textit{disparate-treatment claims} based on a failure to accommodate a religious practice.”\textsuperscript{116} Thus, \textit{Abercrombie}’s admonition that only two causes of action exist under Title VII seems to have been lost on the Fourth Circuit and other courts.

Under the second approach, six cases have overtly treated religious accommodation as a separate and distinct cause of action under Title VII.\textsuperscript{117}

\textsuperscript{110} \textit{Id.}

\textsuperscript{111} \textit{See} Abeles v. Metro. Wash. Airports Auth., 676 F. App’x 170, 174, 176 (4th Cir. 2017); \textit{infra} notes 112–16 and accompanying text.

\textsuperscript{112} \textit{Abeles}, 676 F. App’x at 174.

\textsuperscript{113} \textit{Id.} at 176.

\textsuperscript{114} \textit{Id.} (quoting Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1018 (4th Cir. 1996)).

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} \textit{Id.} (emphasis added) (quoting Equal Emp’t Opportunity Comm’n v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2033 (2015)).

\textsuperscript{117} \textit{Abeles}, 676 F. App’x at 176 (stating that disparate treatment and failure to accommodate are two separate theories under Title VII); Hittle v. City of Stockton, No. 2:12-cv-00766-TLN-KJN, 2018 WL 1367451, at *8–11 (E.D. Cal. Mar. 16, 2018) (referring to failure to accommodate and disparate treatment as separate theories under Title VII); Jackson v. NTN Driveshaft, Inc., No. 1:15-cv-01321-RLY-MPB, 2017 WL 1927694, at *1 (S.D. Ind. May 10, 2017) (referring to a failure to accommodate claim as a separate and distinct claim from religious discrimination); Equal Emp’t Opportunity
Three cases oppositely implied that Abercrombie eliminated a separate cause of action for a failure to accommodate; however, those cases all applied the two-element prima facie test from the former religious accommodation claim.\textsuperscript{118} Two other cases are unclear whether a separate cause of action exists.\textsuperscript{119}

IV. THINKING SLOW ABOUT ABERCROMBIE & FITCH: APPLYING MCDONNELL DOUGLAS

A. Courts that Have Applied the McDonnell Douglas Proof Standard

Only one federal district court has applied the disparate treatment McDonnell Douglas standard to a claim involving a failure to accommodate.\textsuperscript{120} While a second case also appears to affirm the application of McDonnell Douglas, upon closer inspection, the court does not actually apply the McDonnell Douglas standard to analyze the failure to accommodate issue.\textsuperscript{121} Thus, only a single district court to date has correctly interpreted and applied


\textsuperscript{119} Webster v. Dollar Gen., Inc., 197 F. Supp. 3d 692, 702 (D.N.J. 2016) (stating that a prima facie case of religious discrimination requires a sincere religious belief and an adverse employment action, following the modified, two-element approach). In the second case, the court referred to a claim both as a failure to accommodate claim and as a claim for religious discrimination based on failure to accommodate, but the court did not clearly state the prima facie requirements or directly follow the modified, two-element approach. Ross v. Rockwell Automation, No. 5:14-cv-1886, 2015 WL 3970128, at *2 (N.D. Ohio June 30, 2015), aff'd, No. 15-3827, 2017 WL 3185183 (6th Cir. May 3, 2017). The court only remarked that a prima facie case requires that a protected characteristic was a motivating factor in an adverse employment action. Id.


*Abercrombie* in a religious accommodation case.122

In *Equal Employment Opportunity Commission v. Jetstream Ground Services*, the District Court of Colorado upheld the application of the *McDonnell Douglas* standard in denying a motion to reconsider and discussed *McDonnell Douglas* in the general context of accommodation.123 However, in its original order granting summary judgment, the court only discussed *McDonnell Douglas* in the context of retaliation, and it treated religious accommodation as a separate cause of action.124 While the court, in its order denying reconsideration, recognized that a separate cause of action does not exist for religious accommodation,125 in its earlier order granting summary judgment, the court employed a modified version of the traditional prima facie framework for a religious accommodation claim.126 Therefore, when both orders are analyzed together, it is clear that the court misapprehended *Abercrombie.*127

The United States District Court of the Northern District of California is the only court that has grasped the meaning of *Abercrombie.* The court recognized that *Abercrombie* clarified that religious observance and practice are protected traits included under disparate treatment, which prohibits them disparate treatment and requires reasonable accommodation.128 Accordingly, the court analyzed the claim involving religious accommodation as a disparate treatment claim and stated that a plaintiff must first establish a prima facie case “by satisfying the four-part test set out in *McDonnell Douglas*, or by presenting direct or circumstantial evidence indicating that the challenged action was based on a protected trait.”129

122. This article analyzes all cases published prior to December 12, 2018.
123. See *Jetstream*, 2016 WL 879625, at *5.
125. See *Jetstream*, 2016 WL 879625, at *3.
127. Compare Schlitt v. Abercrombie & Fitch Stores, Inc., No. 15-cv-01369-WHO, 2016 WL 2902233, at *8 (N.D. Cal. May 13, 2016) (properly applying *Abercrombie* by analyzing a religious accommodation as a disparate treatment claim), with *Jetstream*, 134 F. Supp. 3d at 1318 (treatment retaliation and religious accommodation as distinct causes of action), and *Jetstream*, 2016 WL 879625, at *3 (recognizing that retaliation and religious accommodation are not separate causes of action but still failing to apply the *McDonnell Douglas* standard to the failure to accommodate issue).
129. Id. (footnote omitted) (citation omitted).
B. Further Reasons to Apply the McDonnell Douglas Proof Standard

The *McDonnell Douglas* approach to proof of a prima facie case is important for two reasons beyond those outlined in Part II.\(^{130}\) First, it is an effective tool for employees who are not privy, like the applicant in *Abercrombie*, to the reason why their employer (or union) rejected or otherwise discriminated against them.\(^{131}\) Courts that simply invoke the two remaining elements for the old, independent religious accommodation cause of action would require the plaintiff to prove a connection between the employee’s religious practice and the resulting adverse action. This deprives the employee of the advantage of the circumstantial proof approach endorsed by *McDonnell Douglas*.\(^{132}\)

Second, the *McDonnell Douglas* proof elements better accord with the First Amendment. The First Amendment’s right to privacy of belief, Establishment Clause, and Free Exercise Clause, at the very least, cast significant doubt upon the validity of the sincerity requirement for a prima facie case included in both the former three-element and modified two-element proof formulations based upon the pre-*Abercrombie* proof test.

By requiring a “sincere” religious belief, rather than simply accepting proof that a belief or practice is religious, courts and defendants often cross the line of what the First Amendment permits.\(^{133}\) The Supreme Court has affirmed that “courts may not inquire into the truth, validity, or reasonableness of a claimant’s religious beliefs,”\(^{134}\) and it is irrelevant whether the belief is

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130. *See supra* Part II.
131. *See* Equal Emp’t Opportunity Comm’n v. Abercrombie & Fitch Stores, Inc., 798 F. Supp. 2d 1272, 1277 (N.D. Okla. 2011) (finding that (1) the applicant, Elauf, was unaware that Abercrombie had a “Look Policy”; (2) the policy was never mentioned during the interview; and (3) Elauf was never told that “Abercrombie would not permit models to wear head scarves or to wear black clothing”), *rev’d and remanded*, 731 F.3d 1106 (10th Cir. 2013), *rev’d and remanded*, 135 S. Ct. 2028 (2015).
132. *See supra* note 82 and accompanying text (discussing the four *McDonnell* elements for a prima facie discrimination claim, which essentially requires proof that a qualified member of a protected class suffered an adverse employment decision that did not occur to someone outside of the protected class); *see also* Tristin K. Green, *Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CALIF. L. REV. 983, 997–98 (1999) (explaining how “facially discriminatory policies or otherwise ‘smoking gun’ evidence . . . became more scarce as employers became savvy with respect to Title VII and how, without such direct evidence, it is difficult to prove discrimination”).
133. *See infra* notes 134–97 and accompanying text.
“derived from revelation, study, upbringing, gradual evolution, or some source that appears entirely incomprehensible.” The experience of the authors of this article is that defendants have often used the sincerity requirement to turn litigation into a religious examination.

In one case involving an employee’s religious objections to supporting a labor union, a union lawyer attempted to undermine an employee’s religious beliefs by questioning if he had ever viewed pornography or if he had ever, since becoming a Christian, looked at a *Playboy* magazine. A similar ploy

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United States v. Ballard, 322 U.S. 78, 87 (1944); see also Ballard, 322 U.S. at 86–87 (holding that the Free Exercise Clause protects an individual’s “chosen form of religion” and prohibits courts from inquiring into the validity or rationality of an individual’s religious belief).

135. *Hobble*, 480 U.S. at 144 n.9 (quoting Callahan v. Woods, 658 F.2d 679, 687 (9th Cir. 1981)).

136. Professor Bruce N. Cameron has served as a litigator in this specialized area of the law for over forty-two years, and in his experience, the “inquisition defense strategy” is one of the most common tactics employed by defendants, subjecting plaintiffs to rigorous scrutiny of their religious beliefs. *E.g.* Camara v. Epps Air Serv., Inc., 292 F. Supp. 3d 1314, 1321 n.4 (N.D. Ga. 2017) (deciding to exclude proposed facts involving past religious conformity challenging the sincerity of a plaintiff’s religious beliefs); *Equal Emp’t Opportunity Comm’n v. Triangle Catering*, LLC, No. 5:15-CV-00016-FL, 2017 WL 818261, at *8–10 (E.D.N.C. Mar. 1, 2017) (denying summary judgment for the defendant, but stating that substantial questions exist regarding the sincerity of a plaintiff’s religious beliefs, and that defendants will “[n]o doubt . . . offer evidence of inconsistencies, together with [the plaintiff’s] reputation for untruthfulness,” at trial to refute the sincerity of the plaintiff’s religious belief, concluding that “evidence of non-observance is relevant on the question of sincerity” (alteration in original) (quoting *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988))); *Equal Opportunity Emp’t Comm’n v. United Health Programs of Am., Inc.*, 213 F. Supp. 3d 377, 392–94, 398 (E.D.N.Y. 2016) (addressing defendants’ argument that the plaintiffs did not possess a sincere religious belief and noting the difficulty in defining and analyzing both sincerity and religious beliefs. Sincerity “is inherently fact-intensive. . . . [and] [s]incerity analysis is exceedingly amorphous, requiring the factfinder to delve into the claimant’s most veiled motivations and vigorously separate the issue of sincerity from the factfinder’s perception of the religious nature of the claimant’s beliefs. This need to discern is most acute where unorthodox beliefs are implicated.” (alteration in original) (citation omitted) (quoting *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984)); *Mindrup v. Goodman Networks, Inc.*, No. 2:14-CV-157, 2015 WL 5996362, at *5–6 (E.D. Tex. Oct. 14, 2015) (involving an argument by a defendant challenging a plaintiff’s bona fide religious belief); *Zamora v. Gainesville City Sch. Dist.*, No. 2:14-CV-00021-WCO-JCF, 2015 WL 12852321, at *2 (N.D. Ga. Aug. 26, 2015) (analyzing the defendant’s argument that the plaintiff did not demonstrate that she had a bona fide religious belief because she could not prove she was required to attend particular events and reserving the issue for the factfinder).

used by defendants in religious accommodation cases is to ask the employee if he patronizes any commercial establishment that is involved in "sinful" activity. 138 For instance, if the employee patronizes a grocery store or gas station that sells alcohol, tobacco, or magazines with nudity, and the employee considers these activities sinful, defendants argue that the employee does not have a sincere religious belief, and is therefore precluded from having a sincere religious objection to, for example, supporting a labor union because of its perceived sinful activities.139

The theoretical underpinnings of the sincerity requirement are at odds with the First Amendment’s right to privacy of belief. The Supreme Court has “repeatedly” stated that the First Amendment guarantees both “privacy of association and belief.”140 In Abbood v. Detroit Board of Education, the Court held that an employee cannot be required to forego the right to privacy of personal beliefs as a condition of withholding support from a labor union.141 Thus, in Abbood, the Court held that each employee was not required to disclose which union expenditures he specifically opposed, beyond generally objecting to any unnecessary ideological union expenditure, since individuals are entitled to the “freedom to maintain [their] own beliefs without public disclosure.”142

In numerous contexts, the Supreme Court has recognized the importance of protecting the privacy of personal beliefs.143 The Court has noted that public disclosure may subject employees to “economic reprisal, . . . threat of

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138. Professor Cameron has repeatedly observed this tactic. See, e.g., Equal Emp’t Opportunity Comm’n v. Univ. of Detroit, 701 F. Supp. 1326, 1330–31 (E.D. Mich. 1988) (discussing an argument by the union that a plaintiff’s religious belief opposing abortion was not sincere because he merely looked for jobs in a state that had tax-payer financed abortions), rev’d, 904 F.2d 331 (6th Cir. 1990).

139. See, e.g., Int’l Soc’y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981) (citing examples of courts determining sincerity by considering whether external acts adhere to the claimed beliefs).


142. Id. (alteration in original).

143. Id. at 241 n.42 (listing cases involving compelled disclosure of political campaign contributions, giving and spending money, joining organizations, and disclosing causes an employee opposes).
physical coercion, and other manifestations of public hostility,” which might dissuade individuals from exercising their rights “because of fear of exposure of their beliefs . . . and [because] of the consequences of this exposure.” Accordingly, subjecting plaintiffs to examination of their religious beliefs and faithfulness in order to receive accommodation is at odds with the right to maintain personal “beliefs without public disclosure.”

The sincerity requirement also conflicts with the First Amendment’s Establishment Clause by impermissibly entangling courts in sensitive religious inquiries and impermissibly discriminating between different religious beliefs. The Supreme Court and other courts have been careful to note that it is not only the conclusions reached by a government entity that may infringe upon the rights guaranteed by both Religion Clauses, “but also the very process of inquiry leading to findings and conclusions.” In NLRB v. Catholic Bishop of Chicago, the Supreme Court held that NLRB jurisdiction over religious schools would lead to impermissible entanglement because jurisdiction would necessarily require resolving theological issues whenever a school maintained that its challenged actions were religiously mandated. Hence, the Court denied jurisdiction because the very process of “inquiry into the good faith of the position asserted by the clergy-administrators” impinged upon “rights guaranteed by the Religion Clauses.”

Likewise, in University of Great Falls v. NLRB, the Court of Appeals for the District of Columbia referred to religious examination and inquiry by courts and government entities as “offensive,” quoting a plurality opinion by the Supreme Court that rejected “inquiry into . . . religious views.” The court stated that it was “well established” that “courts should refrain from

144. NAACP v. Alabama, ex rel. Patterson, 357 U.S. 449, 463 (1958) (alteration in original); see also Abood, 431 U.S. at 241 n.42 (noting the chilling effect and consequences of public disclosure).
145. Abood, 431 U.S. at 241 (“To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure.”).
147. See id.
148. Id.
149. Id.
150. Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1341 (D.C. Cir. 2002).
151. Id. (quoting Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion)).
trolling through a person’s or institution’s religious beliefs.”\textsuperscript{152} That court rejected the NLRB’s “substantial religious character” test for jurisdiction because the very inquiry into an institution’s religious character, mission, and primary purpose implicated First Amendment concerns.\textsuperscript{153} “[J]udging the centrality of different religious practices is akin to the unacceptable ‘business of evaluating the relative merits of differing religious claims.’”\textsuperscript{154}

The sincerity prong requires a direct inquiry into the religious faith and practices of religious employees, and into the good faith position asserted by such individuals. This practice not only requires judging the centrality of different religious practices, but also requires a minimal basis in religious faithfulness, determined by courts, to establish a prima facie case. This type of government requirement is at odds with the Establishment and Free Exercise Clauses.\textsuperscript{155} As every circuit,\textsuperscript{156} including the Supreme Court, has recognized in the ministerial context,\textsuperscript{157} “the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content.”\textsuperscript{158} Likewise, the government is not constitutionally permitted to require a minimum basis of religious faithfulness in order to establish a sincere religious belief.\textsuperscript{159} The very inquiry is offensive to the First Amendment and irredeemably entangles courts with religion.

Furthermore, the sincerity requirement impermissibly discriminates against different theological beliefs and practices by discriminating between individual requirement and commitment. The Supreme Court has declared that “[t]he clearest command of the Establishment Clause is that one religious denomination [or kind of religion] cannot be officially preferred over

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\textsuperscript{152} \textit{Id.} at 1341–42 (quoting \textit{Mitchell}, 530 U.S. at 828).
\textsuperscript{153} \textit{See id.} at 1340.
\textsuperscript{154} \textit{Id.} at 1343 (quoting Emp’t Div., Dep’t of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990)).
\textsuperscript{155} W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, [or] religion.” (alteration in original)).
\textsuperscript{156} Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp’t Opportunity Comm’n, 565 U.S. 171, 188 & n.2 (2012) (listing circuit court cases that agree).
\textsuperscript{157} \textit{Id.} at 188.
\textsuperscript{158} Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985).
\textsuperscript{159} \textit{Barnette}, 319 U.S. at 642.

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another."\textsuperscript{160} Therefore, it is constitutionally improper to discriminate between those who take a lax approach and those who take a rigorous approach to their religious faith.\textsuperscript{161}

Finally, the sincerity requirement violates the Free Exercise Clause, which, \textit{inter alia}, "protects a religious [individual's] right to shape [his] own faith."\textsuperscript{162} No government official, "high or petty," is constitutionally permitted to declare what is or should be an "orthodox" religious belief.\textsuperscript{163} The sincerity prong directly installs a test for religious orthodoxy, in contravention of the First Amendment, by requiring sufficient, orthodox sincerity in order to establish a \textit{real} religious belief. Under the Free Exercise Clause, the Supreme Court has unambiguously stated that the determination whether an individual possesses a religious belief "is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."\textsuperscript{164} Rather, the First Amendment "safeguards the free exercise of [an individual's] chosen form of religion."\textsuperscript{165} "Courts are not arbiters of scriptural interpretation" or entitled to decide whether an individual has "correctly perceived" or sincerely followed the "commands of [his] . . . faith."\textsuperscript{166} Mandating sufficient, judicially determined religious sincerity is at odds with the right to freely exercise one's faith.\textsuperscript{167} Therefore, because the

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\textsuperscript{160} Larson v. Valente, 456 U.S. 228, 244 (1982) (alteration in original).
\textsuperscript{161} Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1342 (D.C. Cir. 2002).
\textsuperscript{162} Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 188 (2012) (alteration in original).
\textsuperscript{163} Barnette, 319 U.S. at 642.
\textsuperscript{165} United States v. Ballard, 322 U.S. 78, 86 (1944) (alteration in original) (quoting Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).
\textsuperscript{166} Thomas, 450 U.S. at 716 (alteration in original).
\textsuperscript{167} Regardless of whether courts are careful or allow a jury, through the coercive power of the court, to determine orthodox, religious sincerity, the result is equally offensive to the First Amendment. \textit{See} Thomas, 450 U.S. at 715–16; Ballard, 322 U.S. at 86–88. The First Amendment forbids a court or jury from considering all questions related to the validity of an individual's religious belief, which should equally include whether an individual's religious beliefs count under the law. Ballard, 322 U.S. at 86–88. Otherwise, courts and juries could run an end-around the First Amendment and exclude religious beliefs by labeling them as insincere. \textit{See id.} at 86 ("Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."). The First Amendment erects a firm barrier that prohibits the government from requiring religious individuals to prove their religious beliefs. \textit{Id.}
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**McDonnell Douglas** approach focuses more on the protected class than the sincerity of the religious belief; it better accords with the First Amendment and is the proper test that should be applied by courts.

**C. Applying the McDonnell Douglas Proof Standard**

How, as a practical matter, should the *McDonnell Douglas* shifting elements of proof apply to religious disparate treatment claims? Using the facts from *Abercrombie*,

1.68 courts should apply the following analysis:

1. **Employee is a member of a protected class:**

   The protected class for Samantha Elauf, the plaintiff in *Abercrombie*, is a Muslim who believes that she must wear a headscarf.

2. Including the employee’s religious practice is essential to correctly identifying the protected class.

3. There is no indication that the employer had any other applicants like Ms. Elauf; therefore she would be the only one in the protected class.

2. **Employee is qualified for the position:** There was no debate that Ms. Elauf was considered to be qualified for the open position.

3. If she were an existing employee seeking a religious accommodation, to satisfy this element, she would need to prove that she has been satisfactorily performing her job.

4. Notice that being qualified for the job cannot include the job requirement that conflicts with the employee’s religious beliefs.

5. In Ms. Elauf’s case, a court

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169. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (first element); supra note 82 and accompanying text.
171. *Id.* at 2031–32 (“The parties concede that . . . Elauf’s wearing of a headscarf is . . . a ‘religious practice.’”).
172. See id.
173. McDonnell, 411 U.S. at 802 (second element); supra note 82 and accompanying text.
174. *Abercrombie*, 135 S. Ct. at 2031 (“Cooke gave Elauf a rating that qualified her to be hired.”).
175. Peterson v. Hewlett-Packard Co., 358 F.3d 599, 603 (9th Cir. 2004).
could not hold, consistent with Ms. Elauf’s accommodation rights, that she failed to prove this element because her religious beliefs required her to wear a headscarf. 177 As the Supreme Court held, employers “may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.” 178

(3) Employee, despite qualifications, was rejected or suffered an adverse employment action: 179 Ms. Elauf was not hired, which satisfies this element. 180 Had she been discriminated against or suffered some other adverse action for any other reason connected with her religious belief or practice, she would present that discrimination here. 181

177. See Abercrombie, 135 S. Ct. at 2033.
178. Id. at 2033.
179. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (third element); supra note 82 and accompanying text.
180. Abercrombie, 135 S. Ct. at 2031.
181. Because accommodation is required by law, failure to accommodate is itself an adverse action in contravention of Title VII. See 42 U.S.C. §§ 2000e(j), 2000e-2(a)(1) (2018). Congress unambiguously included a statutory duty for employers to reasonably accommodate religious employees, absent undue hardship. 42 U.S.C. § 2000e(j). Imposing a further requirement that an employee must suffer another adverse action, beyond being denied reasonable accommodation, improperly adds words to Title VII. See Abercrombie, 135 S. Ct. at 2033–34 (emphasizing that “religion” was defined to include religious practice and that, therefore, “religious practice is one of the protected characteristics that cannot be accorded disparate treatment and must be accommodated”). And as the Supreme Court has expressly stated, “add[ing] words to the law to produce what is thought to be a desirable result...is Congress’s province,” not the courts. Id. at 2033 (alteration in original). Unlike other forms of discrimination where it is reasonable to require a sufficiently adverse action, here, Congress has already decided that failing to accommodate is itself an action that violates Title VII, and hence must be sufficiently adverse. 42 U.S.C. §§ 2000e(j), 2000e-2(a)(1). A statute is rendered meaningless if its direct violation is not enough to merit relief under that very statute. See Abercrombie, 135 S. Ct. at 2033–34. Employers and unions have an obligation under Title VII to reasonably accommodate religious employees, absent undue hardship. 42 U.S.C. § 2000e(j). Demonstrating that an employer has failed to provide reasonable accommodation is all that is required to show that an employer has facially violated its duty. 42 U.S.C. §§ 2000e(j), 2000e-2(a)(1); see Abercrombie, 135 S. Ct. at 2033–34. A contrary holding is at odds with the plain duty imposed by Congress and violates essential principles of federalism by invading the province of Congress to add a further adverse action requirement. See Abercrombie, 135 S. Ct. at 2033. Such a holding would require religious employees to be insubordinate and force the issue in order to suffer another adverse action to be entitled to the relief necessary to exercise their faith. See id. at 2033–34. “Title VII does not permit an employer to...force an employee to the ‘cruel choice’ between religion and employment.” Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 290 (3d Cir. 2001) (Alito, J., concurring) (quoting Braunfeld v. Brown, 366 U.S. 599, 616 (1961) (Stewart, J., dissenting)). Failing to accommodate and forcing an employee to choose between faith and career itself satisfies the adverse action standard. See id. Thus, requiring
(4) After rejection, the position was filled by someone with the same qualifications, or the position remained open and the employer sought someone with the same qualifications. 182 This prong refers to the position being filled by someone outside the protected class or in some other way being treated more favorably. 183 Because of the clarified definition of the protected class for employees of faith in Abercrombie, the protected class here is a Muslim who believes that she must wear a headscarf. 184 As is obvious, using the clarified definition of a protected class makes it very unlikely that Ms. Elauf could fail to satisfy this element. 185 In other situations, like a Sabbath work problem, showing that an employee who was not a Sabbatarian was hired (or not fired or otherwise discriminated against) or the position was left open for someone who did not have Sabbatharian beliefs would satisfy this element. 186

Following these traditional McDonnell Douglas elements squares with the Abercrombie holding that “an applicant need only show that his need for an accommodation was a motivating factor in the employer’s decision.” 187 These elements are circumstantial proof of the basis for the employer’s decision. 188 Using the traditional McDonnell Douglas proof elements makes it as easy for an employee of faith as it is for an employee in any other protected class to prove a Title VII violation. 189 The victim of discrimination is not

a second, additional adverse action beyond a failure to accommodate is useless, since failing to accommodate forces individuals into the “‘cruel choice’ between religion and employment,” which satisfies the adverse action requirement. See id.

182. McDonnell, 411 U.S. at 802 (fourth element); supra note 82 and accompanying text.

183. Peterson v. Hewlett-Packard Co., 358 F.3d 599, 603 (9th Cir. 2004) (phrasing the fourth element as requiring proof that “similarly situated individuals outside his protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination”).

184. Abercrombie, 135 S. Ct. at 2031.

185. Id. at 2032; supra note 128 and accompanying text.

186. See Abramson, 260 F.3d at 269–73, 282 (noting that in a case revolving around the Saturday and Jewish holiday observance of an Orthodox Jew, this element was satisfied by showing that the plaintiff “was terminated while other non-Orthodox Jewish professors were retained”).


188. Green, supra note 132, at 986 (“The Supreme Court in McDonnell Douglas Corp. v. Green laid out a tripartite framework for the order and allocation of proof in Title VII individual disparate treatment cases based on circumstantial evidence.” (footnote omitted)).

189. See supra notes 130–32 and accompanying text; see also Ruth I. Major, McDonnell Douglas: The Oft-Misunderstood Method of Proof, Fed. Law., May 2012, at 14, 16 ("[A]pplying the McDonnell Douglas method allows the plaintiff to proceed with an action with bare bones information and to
required to know (and prove at this stage of litigation) information that is likely known only to the employer (or labor union) to allege a prima facie case.\textsuperscript{190}

After proof of these elements, the \textit{McDonnell Douglas} shifting proof approach traditionally requires the employer to carry the burden of the production of evidence to articulate some legitimate, non-discriminatory reason for rejecting the employee or to challenge the prima facie proof of the employee.\textsuperscript{191} This non-discriminatory reason cannot, based on the expanded understanding of the protected class, be the challenged policy.\textsuperscript{192} For example, the employer in \textit{Abercrombie} could not present evidence of its “Look” policy as the non-discriminatory reason for its conduct.\textsuperscript{193} It is that policy that discriminates against the protected class of Muslims whose belief requires wearing a headscarf.\textsuperscript{194} However, the employer could present evidence of any other non-discriminatory reason for its challenged actions.\textsuperscript{195}

The employer’s defensive options do not end with attacking the elements of a prima facie case or presenting a non-discriminatory reason for its actions. Section 701(j) provides employers with an undue hardship defense.\textsuperscript{196} Unlike the mere burden of production of evidence in support of a nondiscriminatory reason for its actions, undue hardship requires the employer to carry the burden of proof and persuasion of incurring an undue business hardship in

\begin{thebibliography}
\item\textsuperscript{190} See Major, \textit{supra} note 189 (“For many plaintiffs—especially those far removed from the decision-makers, who often have little inside information—this method gives them entry into the courthouse . . . .”); \textit{supra} notes 130–32 and accompanying text.
\item\textsuperscript{191} McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (explaining how the burden of proof shifts to the employer after the employee makes a prima facie case).
\item\textsuperscript{192} See \textit{Abercrombie}, 135 S. Ct. at 2034 (rejecting an employer’s argument that there was no disparate treatment because the allegedly discriminatory reason for refusing to hire was a religiously neutral dress policy).
\item\textsuperscript{193} \textit{Id.}
\item\textsuperscript{194} See \textit{id.} at 2031.
\item\textsuperscript{195} McDonnell, 411 U.S. at 802; see \textit{Abercrombie}, 135 S. Ct. at 2033 (“An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his motive.”).
\item\textsuperscript{196} 42 U.S.C. § 2000e(j) (2018). The statute makes this defense available only when an employee is seeking an exception from an existing rule. § 2000e(j) (removing from the definition of “religion” any religious observance or practice, an accommodation for which the employer demonstrates would impose an “undue hardship on the conduct of the employer’s business”).
\end{thebibliography}
affording the accommodation.197

McDonnell Douglas allows the employee to prove that the employer’s asserted non-discriminatory reasons are a pretext, but never removes the ultimate burden of proof placed on the employee.198 In future cases following the McDonnell Douglas praxis, the burden of proof of discrimination falls on the employee of faith,199 and the burden of proof of undue hardship falls on the employer (or union).

V. CONCLUSION

Post Abercrombie, it is apparent that few, if any, courts have thought slowly about Abercrombie. Only one court has considered whether Abercrombie entirely eliminated a freestanding religious accommodation claim and its corresponding prima facie elements. This result is alarming and should cause courts to slowly and carefully reconsider Abercrombie. This Article is a call for greater consideration of the sea change created by the Supreme Court, and a plea that lower courts think slowly about their application of Abercrombie.

197. See id.; Hardison v. Trans World Airlines, Inc., 527 F.2d 33, 38-39 (8th Cir. 1975) ("The burden of demonstrating its inability to reasonably accommodate falls upon the employer."), rev’d on other grounds, 432 U.S. 63 (1977). Although Hardison is currently controlling precedent, four justices have indicated a willingness to “revisit” the decision. Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (“In Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990), the Court drastically cut back on the protection provided by the Free Exercise Clause, and in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), the Court opined that Title VII’s prohibition of discrimination on the basis of religion does not require an employer to make any accommodation that imposes more than a de minimis burden. In this case, however, we have not been asked to revisit those decisions.").


199. See id. at 802.
APPENDIX

PART I CASES: APPLYING THE SAME PRIMA FACIE ELEMENTS AS THE FORMER RELIGIOUS ACCOMMODATION CLAIM

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<td>Passmore v. 21st Century Oncology, LLC, No. 3:16-cv-1094-J-34PDB, 2018 WL 1738715, at *3 (M.D. Fla. Apr. 11, 2018)</td>
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200. This article analyzes all cases published prior to December 12, 2018.
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<td><em>Equal Opportunity Emp’t Comm’n v. United Health Programs of Am., Inc.</em>, 213 F. Supp.</td>
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<td><em>Nunn v. City of Huntsville Ala.</em>, No. 5:14-CV-2488-MHH, 2018 WL 1509375, at *7 (N.D. Ala. Mar. 27, 2018).</td>
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## Unclear Cases

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<td>Unclear—at least knowledge prong gone post <em>Abercrombie</em></td>
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