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## *EEOC v. Abercrombie & Fitch: Mistakes, Same-Sex Marriage, and Unintended Consequences*

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# Texas Law Review

## *See Also*

Volume 94

### Essay

## *EEOC v. Abercrombie & Fitch Stores, Inc.:* Mistakes, Same-Sex Marriage, and Unintended Consequences

Jeffrey M. Hirsch\*

### I. Introduction

In *EEOC v. Abercrombie & Fitch Stores, Inc.*,<sup>1</sup> the Supreme Court examined the Civil Rights Act's prohibition against religious discrimination during the application phase of employment.<sup>2</sup> In particular, the Court considered whether a job applicant must tell the employer of a needed religious accommodation in order to bring a claim of religious discrimination under Title VII of the Civil Rights Act.<sup>3</sup> By answering that question in the negative, the decision has been heralded as a victory for religious employees and job applicants.<sup>4</sup> Although certainly true on one level, it is not clear that *Abercrombie* is always beneficial to religious employees. Indeed, the decision may have inadvertently penalized a certain class of religious job applicants.

Title VII's prohibition against religious discrimination is unusual on several different fronts. First, unlike Title VII's other protected classes,

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1. 135 S. Ct. 2028 (2015).

2. *Id.* at 2031; Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2(a)(1) (2012)). The other protected classes under Title VII are race, color, sex, and national origin. *See* 42 U.S.C. § 2000e-2(a)(1).

3. *Abercrombie*, 135 S. Ct. at 2032-34.

4. *See infra* note 55.

religion is arguably an immutable characteristic.<sup>5</sup> Second, even when employees have a fixed religious faith, it is not always discernable by others.<sup>6</sup> Third, religion is defined not just by followers' beliefs, but also by their practices.<sup>7</sup> Relatedly, religious employees enjoy a protection under Title VII that no other protected class under that statute enjoys: a right to reasonable accommodation of religious beliefs and practices.<sup>8</sup> As the Supreme Court emphasized in *Abercrombie*, this accommodation duty means that employers cannot hide behind facially neutral job rules, like the clothing policy at issue in the case.<sup>9</sup> Rather, the accommodation requirement requires employers at times to favor religious beliefs and practices.<sup>10</sup>

Finally, although individuals may care more about a given protected class, divisions on Title VII policy generally fall along pro-employer or pro-employee lines. But the fourth difference is that opinions about religious discrimination are far more complicated and frequently create odd bedfellows. Religious employees enjoy support from a variety of disparate groups, from liberal civil liberty proponents to conservative religious organizations.<sup>11</sup> Others' support seem tied more to the particular religious beliefs at issue. Thus, some supporters of the Muslim applicant in *Abercrombie* may be opposed to a conservative Christian seeking a religious accommodation to avoid same-sex marriage work.

Given the uniqueness and variety of interests implicated by religious discrimination law, it is no surprise that the Court's *Abercrombie* decision could result in countervailing effects. It is a decision that, on one level,

5. See Debbie N. Kaminer, *Religious Conduct and the Immutability Requirement: Title VII's Failure to Protect Religious Employees in the Workplace*, 17 VA. J. SOC. POL'Y & L. 453, 457–58 (2010) (discussing different views on whether religion is immutable). One limited exception is the ability of individuals to change their sex.

6. See *Reed v. Great Lakes Cos.*, 330 F.3d 931, 935–36 (7th Cir. 2003) (“A person’s religion is not like his sex or race—something obvious at a glance. Even if he wears a religious symbol, such as a cross or a yarmulka, this may not pinpoint his particular beliefs and observances . . .”). The other Title VII protected classes can raise this confusion issue, but to a less frequent extent than religion.

7. 42 U.S.C. § 2000e(j) (2012); see *infra* note 26 and accompanying text.

8. See *infra* note 49 and accompanying text (describing Title VII’s religious reasonable accommodation test). Although not present under Title VII, the Americans with Disabilities Act contains a reasonable accommodation duty, albeit one with a much narrower undue hardship defense for employers. See *infra* note 31.

9. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2034 (2015).

10. *Id.*

11. See *ACLU Defense of Religious Practice and Expression*, AM. C.L. UNION <https://www.aclu.org/aclu-defense-religious-practice-and-expression?redirect=defendingreligion> [<https://perma.cc/4GGV-7262>] (indicating an example of a liberal civil liberty proponent stating that it “vigorously defends the rights of all Americans to practice their religion”); *In the Public Arena*, LIBERTY INST., <https://www.libertyinstitute.org/pages/issues/in-the-public-arena> [<https://perma.cc/LK65-VMRZ>] (serving as an example of a conservative organization that defends and restores “religious speech in the work place with no retribution for employees, employers, customers and vendors”).

undeniably provides religious employees a victory. However, looking beneath the surface reveals a more complicated set of incentives that could harm some religious individuals—in particular, applicants who convey some signs of religious belief but do not need any accommodation of those beliefs.

## II. The *EEOC v. Abercrombie* Litigation: A Duty to Notify?

In *Abercrombie*, the Supreme Court returned, for the first time in decades,<sup>12</sup> to Title VII's religious accommodation requirement.<sup>13</sup> This time, the Court addressed whether a job applicant must notify an employer of any accommodation needs.<sup>14</sup> The Court's answer was a straightforward "no,"<sup>15</sup> but the potential effects of the decision are not so clear-cut.

*Abercrombie* involved a job applicant, Samantha Elauf, who wore a headscarf according to the tenets of her Muslim faith.<sup>16</sup> Elauf received a rating that qualified her to work for Abercrombie; however, she was ultimately rejected because a district manager determined that the headscarf would violate the company's "Look Policy," which forbids the wearing of a "cap."<sup>17</sup> The assistant manager who interviewed Elauf told the district manager that she thought Elauf wore the headscarf for religious reasons, but the company never confirmed that fact with Elauf, who was not made aware of the issue and did not volunteer an explanation.<sup>18</sup>

The Tenth Circuit ruled in favor of Abercrombie, holding that Title VII imposed a notification requirement on applicants who need religious accommodations.<sup>19</sup> In particular, the Tenth Circuit ruled that 1) an applicant must show that an employer possessed "actual knowledge" of a needed religious accommodation, and 2) that knowledge must result from the applicant's providing a direct and "explicit notice" of the need for an accommodation.<sup>20</sup> In other words, even if the employer knows that an applicant will need a religious accommodation, the claim would fail if that knowledge came from a source other than the applicant herself. The court

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12. The Court's previous examinations of the Title VII's religious accommodation provision occurred in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 66 (1977) and *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 67 (1986).

13. *Abercrombie*, 135 S. Ct. at 2031.

14. *Id.*

15. *Id.* at 2033. In announcing the decision, Justice Scalia even stated that the case was "really easy." See Robert Barnes, *Supreme Court Allows Suit by Muslim Woman Who Says Headscarf Cost Her a Job*, WASH. POST (June 1, 2015), [https://www.washingtonpost.com/national/supreme-court-allows-suit-by-muslim-woman-who-says-head-scarf-cost-her-a-job/2015/06/01/977293f0-088c-11e5-9e39-0db921c47b93\\_story.html](https://www.washingtonpost.com/national/supreme-court-allows-suit-by-muslim-woman-who-says-head-scarf-cost-her-a-job/2015/06/01/977293f0-088c-11e5-9e39-0db921c47b93_story.html) [<https://perma.cc/CP7C-JSX2>].

16. *Abercrombie*, 135 S. Ct. at 2031.

17. *Id.*

18. *Id.*

19. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1123 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015).

20. *Id.* at 1134, 1136.

based its holding of various grounds, including its interpretation of EEOC guidance,<sup>21</sup> the reality that religion is personal to individuals and therefore an employer cannot be sure that a seemingly religious act is actually rooted in religion,<sup>22</sup> and that the accommodation duty only arises when there is an actual conflict between an individual's religious beliefs or practices and company policy.<sup>23</sup>

The Supreme Court rejected the Tenth Circuit's holding, stressing the definition of "religion" under Title VII.<sup>24</sup> The primary antidiscrimination provision under Title VII—referred to as the "disparate treatment" prohibition—states that employers violate the statute when they discriminate against applicants or employees "because of" a protected class, which includes religion.<sup>25</sup> Section 2(a) of Title VII defines "religion" as including "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."<sup>26</sup> In other words, to make out a successful claim under Title VII, an applicant must demonstrate that she was denied employment "because of" her religious observation, practice, or belief.<sup>27</sup>

Abercrombie argued, as it had done successfully in the Tenth Circuit,<sup>28</sup> that an employer violates Title VII's disparate treatment prohibition<sup>29</sup> only if the applicant provided the employer with "actual knowledge" of the need for a religious accommodation and was rejected because the employer wanted to avoid the accommodation.<sup>30</sup> The Court countered this argument in part by drawing a distinction between the Americans with Disabilities Act, which requires reasonable accommodation of a "known" physical or mental

21. *Id.* at 1117–18, 1135–36.

22. *Id.* at 1134–35.

23. *Id.* at 1142.

24. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015). The decision was authored by Justice Scalia, with a concurrence by Justice Alito and a dissent by Justice Thomas. *Id.* at 2031 (Scalia, J.); *id.* at 2034 (Alito, J., concurring); *id.* at 2037 (Thomas, J., dissenting).

25. Title VII of the Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. §2000e-2(a)(1) (2012). The Court also rejected Abercrombie's argument that such claims can only be brought under the disparate impact theory, which prohibits certain neutral employer policies that disparately impact members of a protected class. 135 S. Ct. at 2033–34 (holding that the inclusion of practices as part of the definition of religion means that an employer's rejection of an applicant based on a desire to avoid accommodating a religious practice is disparate treatment); *see also* 42 U.S.C. §2000e-2(a)(2), (k) (establishing disparate impact claim).

26. 42 U.S.C. § 2000e(j).

27. *Abercrombie*, 135 S. Ct. at 2032.

28. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1128 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015).

29. 42 U.S.C. § 2000e-2(a)(1).

30. *Abercrombie*, 135 S. Ct. at 2032.

limitation,<sup>31</sup> to Title VII's disparate treatment provision, which does not incorporate an express knowledge requirement.<sup>32</sup> As a result, under *Abercrombie*, courts must treat allegations that an employer rejected an applicant out of a desire to avoid religious accommodation like other Title VII disparate treatment claims, which do not include a notice duty.

As the Court noted, the disparate treatment framework under Title VII permits a plaintiff to prove discrimination by showing that unlawful discrimination was a “motivating factor” in the employer’s challenged decision.<sup>33</sup> For plaintiffs like Elauf, this means that an applicant can establish a Title VII violation by demonstrating that a motivating factor in the employer’s rejection of their application was a desire to avoid a religious accommodation.<sup>34</sup> An applicant’s notice to the employer of a need for religious accommodation can obviously help establish this motivation, but the Court stressed that notice is not required to prove that the employer was aware that there was a need for accommodation, which it wanted to avoid.<sup>35</sup> Moreover, whether or not the applicant notified the employer, she will generally need to show that the employer was either aware of her religious belief or practice, or at least suspected its existence.<sup>36</sup>

### III. The Unintended Consequences of *Abercrombie*

Although commentators have accurately described *Abercrombie* as a victory for religious applicants,<sup>37</sup> not all job seekers will benefit from the decision. Individuals like Samantha Elauf—with outward, clear signals that they need some form of religious accommodation—will generally fare better under the Supreme Court’s decision, especially in comparison to the Tenth

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31. *Id.* at 2032–33 (citing 42 U.S.C. § 12112(b)(5)(A) (2012) (stating that unlawful disability discrimination includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity”).

32. *Abercrombie*, 135 S. Ct. at 2033; 42 U.S.C. §2000e-2(a)(1).

33. *Abercrombie*, 135 S. Ct. at 2032 (citing 42 U.S.C. § 2000e-2(m) (“[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”)). The “motivating factor” analysis refers to the mixed-motive framework, which involves cases where more than one reason motivated the employer. In the alternative, Title VII also permits a plaintiff to prove discrimination by showing that the employer’s unlawful motivation was a “but-for” cause of the rejection or other adverse action. *See* PAUL M. SECUNDA & JEFFREY M. HIRSCH, *MASTERING EMPLOYMENT DISCRIMINATION LAW* 62, 66–68 (2010) (comparing but-for and motivating-factor causation).

34. 42 U.S.C. § 2000e-2(m); *Abercrombie*, 135 S. Ct. at 2033.

35. *Abercrombie*, 135 S. Ct. at 2033. This appeared to be the case in *Abercrombie*, where the employer suspected that she wore a headscarf for religious reasons. *Id.* at 2031.

36. *Id.* at 2033 n.3 (“While a knowledge requirement cannot be added to the motive requirement, it is arguable that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice . . .”).

37. *See infra* note 54.

Circuit's notice rule.<sup>38</sup> However, religious individuals who show less visible signs of faith may discover that *Abercrombie* has created an incentive system that makes it more difficult for them to find employment.

*Abercrombie*'s most obvious effect is on job seekers whose religious affiliation, beliefs, or needs for accommodation are conspicuously revealed by their dress or grooming. For these applicants, *Abercrombie* provides an attainable framework for challenging an employer's refusal to hire. Success is by no means guaranteed, as applicants must still provide evidence demonstrating that the employer's decision was based on an unlawful motivation, a notoriously difficult task for Title VII refusal-to-hire claims.<sup>39</sup> But *Abercrombie*'s elimination of the Tenth Circuit's notice requirement unquestionably eases the burden for applicants whose religious beliefs or practices conflict with work rules. Moreover, by refusing to require applicants to raise the need for religious accommodations, *Abercrombie* upholds EEOC policies that seek to shield individuals from religious discrimination during the application process.<sup>40</sup> It also gives applicants the opportunity to put off discussing needed religious accommodations until after they are hired, when employers are likely more amenable to finding a resolution than they would be during the hiring phase.<sup>41</sup> Thus, for applicants with obvious religious accommodation needs, *Abercrombie* is a clear victory.

But what of other applicants, such as those with more subtle religious garb or grooming? Given the focus on job seekers with obvious religious accommodation needs—understandable given the facts of *Abercrombie*—advocates for both employers and employees have seemed to ignore applicants who exhibit less conspicuous signs of faith. This is unfortunate because *Abercrombie* will likely have an incongruous effect on these

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38. *But see infra* notes 54–57 and accompanying text.

39. *See supra* notes 33–36 and accompanying text; *see also* Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 887 (2008) (describing hurdles to bringing Title VII claims); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 555 (2001).

40. The EEOC cautions employers that they cannot lawfully ask applicants directly about their religious beliefs and practices, but should instead advise applicants of work rules and inquire whether applicants can comply with them. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, No. 915.003, EEOC COMPLIANCE MANUAL §§ 12-IV(A)(2) (Examples 30 and 31), 12-I(A)(3) (2008), <http://www.eeoc.gov/policy/docs/religion.html> [<http://perma.cc/7JWG-D226>]; *Pre-Employment Inquiries and Religious Affiliation or Beliefs*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, [http://www.eeoc.gov/laws/practices/inquiries\\_religious.cfm](http://www.eeoc.gov/laws/practices/inquiries_religious.cfm) [<http://perma.cc/55PC-RT5E>]; *Best Practices for Eradicating Religious Discrimination in the Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION [http://www.eeoc.gov/policy/docs/best\\_practices\\_religion.html](http://www.eeoc.gov/policy/docs/best_practices_religion.html) [<http://perma.cc/U73H-698S>]; U.S. EQUAL EMP'T OPPORTUNITY COMM'N, No. 915.003, EEOC COMPLIANCE MANUAL § 12-IV(A) (2008).

41. This tendency results from the fact that it is harder to win refusal-to-hire cases than termination cases, which makes it more risky for an employer to deny an accommodation to an incumbent employee. *See infra* note 50 and accompanying text. Moreover—although there will certainly be exceptions—employers will likely exhibit more flexibility with employees they know, rather than applicants they have just met.

individuals. Indeed, the decision could affirmatively harm applicants who display their religiosity in a way that leaves open the question whether they will seek accommodations.

Especially as compared to the Tenth Circuit's notice rule, *Abercrombie* may have unintentionally created an incentive for employers not to hire applicants who raise even a risk of needing religious accommodations. As a result, the decision might decrease the employment opportunities of all applicants who display subtle signs of religion, even if they have no intention of ever seeking accommodations.

To see how this consequence may arise, take Kim Davis, the Rowan County, Kentucky magistrate who refused to issue same-sex marriage certificates on religious grounds.<sup>42</sup> As an elected government official and head of her office, Davis' case does not fit well under the Title VII framework, but her stand is one that many employees or applicants may share—particularly following the Supreme Court's decision in *Obergefell*<sup>43</sup> upholding a constitutional right to such marriages.<sup>44</sup> Consider then, a hypothetical situation in which Davis applies to a bakery and is rejected, allegedly because of the bakery's belief that she will seek a religious accommodation allowing her to refuse to work on orders for same-sex weddings.

Unless the bakery admitted the allegation, the most obvious challenge for Davis in this hypothetical would be proving that the bakery was motivated by a desire to avoid a religious accommodation. Unlike Elauf's

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42. See Sarah Kaplan & James Higdon, *The Defiant Kim Davis, the Ky. Clerk who Refuses to Issue Gay Marriage Licenses*, WASH. POST (Sept. 2, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/09/02/meet-kim-davis-the-ky-clerk-who-defying-the-supreme-court-refuses-to-issue-gay-marriage-licenses/> [http://perma.cc/4KKL-2FN6].

43. 135 S. Ct. 2584 (2015).

44. See *id.* at 2590–91. Even prior to *Obergefell*, employees have sought religious accommodations based on disapproval of gay individuals or same-sex unions. See, e.g., *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277, 1294–95 (11th Cir. 2012) (holding that employer reasonably accommodated counselor who refused to work with same-sex couples by trying to assist her gaining new employment within company); *Matthews v. Wal-Mart Stores, Inc.*, 417 F. App'x 552, 554 (7th Cir. 2011) (holding that employer lawfully terminated Apostolic Christian employee rather than accommodate her religious beliefs through allowing her to admonish gay coworkers); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 608 (9th Cir. 2004) (holding that employer lawfully terminated employee rather than accommodate his religious beliefs through allowing him to admonish gay coworkers and remove sexual orientation from its workplace diversity program); *Somers v. EEOC*, No. 6:13-00257, 2014 WL 1268582, at \*1 (D.S.C. Mar. 26, 2014), *aff'd*, 589 F. App'x 178 (4th Cir. 2015) (dismissing employee's claim that his employer—the EEOC—unlawfully refused to accommodate his religious objection to homosexuality by allowing him not to work on sexual orientation discrimination cases); *Slater v. Douglas Cty.*, 743 F. Supp. 2d 1188, 1192 (D. Or. 2010) (denying summary judgment to both parties in Title VII case involving county clerk's refusal to accommodate employee's religious objection to homosexuality by excusing her from all work related to domestic partnership registrations based on her belief); *cf. Craig v. Masterpiece Cakeshop, Inc.*, No. 14CA1351, 2015 WL 4760453, at \*1 (Colo. App. Aug. 13, 2015) (holding that a cake shop violated state public accommodation statute by refusing to sell wedding cake to same-sex couple).

headscarf in *Abercrombie*, an applicant's religious belief about same-sex marriage will often not be discernable. But there may be some signs. Davis, for example, is an Apostolic Christian—a faith in which female followers typically wear long, modest dresses; do not cut their hair; and do not wear makeup.<sup>45</sup> Much like an applicant wearing a headscarf, if Davis appeared for a job interview, an employer that was aware of the religious motivations for these garb and grooming choices would suspect that she is a member of a conservative Christian faith that typically opposes same-sex marriage.<sup>46</sup> But what if instead of Davis, the applicant was a conservative Christian who also has religious objections to same-sex marriage, but displays fewer signs of her faith? For instance, the applicant may wear only a cross on a necklace or note church service on her resume.<sup>47</sup> From the employer's point of view, the cross and church reference could indicate a religious objection to same-sex marriage, but they could also simply be an indication that the individual is a Christian, many of whom support same-sex marriage.<sup>48</sup> In short, applicants with subtle signs of religious belief send a signal to employers that there is a chance that accommodation will be requested; however, without further information, it is very difficult for employers to accurately distinguish applicants with accommodation needs from those without.

This uncertainty becomes a problem for religious job seekers who apply to employers that want to avoid making religious accommodations—a normal stance for most businesses, which care more about serving customers than catering to employees' religious beliefs and practices.<sup>49</sup> For these “accommodation-avoiding employers,” the best outcome is to avoid hiring anyone who will raise religious accommodation issues. To be sure, the religious accommodation analysis under Title VII is stacked in employers'

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45. See Kaplan & Higdon, *supra* note 42.

46. See *Support for Same-Sex Marriage at Record High, but Key Segments Remain Opposed*, PEW RES. CTR. (June 8, 2015) [hereinafter Pew Research Center], <http://www.people-press.org/2015/06/08/section-1-changing-views-of-same-sex-marriage/> [<http://perma.cc/8NH5-HYD3>] (finding that only 27% of white evangelical Protestants support same-sex marriage). Other religions require visible signs of faith. See, e.g., *Kalsi v. N.Y.C. Transit Auth.*, 62 F. Supp. 2d 745, 761 (E.D.N.Y. 1998), *aff'd*, 189 F.3d 461 (2d Cir. 1999) (granting summary judgment to employer that refused to accommodate Sikh employee who refused to wear hard hat because his religion requires wearing a turban); Brief of Religious Organizations as Amici Curiae Supporting Petitioner at 7–9, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015) (No. 14-86), 2014 WL 4253038, at \*7–9 [hereinafter Brief of Religious Organizations] (discussing garb and grooming practices of certain Muslim, Sikh, Christian, and Jewish followers).

47. Cf. *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359, 1361, 1366 (S.D. Fla. 1999) (denying employer summary judgment in case involving pharmacist applicant who refused to sell condoms because of his religious belief; employer only learned of issue from a job reference).

48. See Pew Research Center, *supra* note 46 (finding that support for same-sex marriage was 62% among white mainline Protestants; 56% among Catholics; 33% among black Protestants; and 27% among white evangelical Protestants).

49. There are obvious exceptions. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (holding that a private-sector employer with religious objection to abortion rights does not have to provide health-insurance coverage for abortion-related medical expenses).

favor because they are permitted to deny any reasonable accommodation request that creates more than a *de minimis* cost.<sup>50</sup> But even engaging in the accommodation process involves costs and risks that these employers would prefer to avoid. As a result, most accommodation-avoiding employers would prefer not to hire applicants who present a mere risk that they will seek religious accommodations.

*Abercrombie*, of course, makes clear that refusing to hire applicants because of a desire to avoid religious accommodation is unlawful.<sup>51</sup> But refusal-to-hire cases are extremely hard to prove because of the secrecy and myriad factors involved in employers' hiring decisions.<sup>52</sup> As a result, employers will often be able to reject applicants because of an accommodation risk without ever being held to account. However, employers are better able to engage in this behavior when faced with applicants with only subtle religious symbols, such as a cross, rather than those with more conspicuous signs. The garb and grooming of certain Muslim, Christian, and other faiths with clear displays of religiosity<sup>53</sup> make it more difficult for employers to deny knowledge of applicants' religious beliefs and thereby improve the chances of any subsequent refusal-to-hire claims. This reality means that accommodation-avoiding employers may be more willing to hire applicants with obvious signs of religion than applicants with more subtle displays. The irony is that the Supreme Court's decision in *Abercrombie* may enhance this tendency.

Consider the incentives created by both the Tenth Circuit's holding in *Abercrombie* and the Supreme Court's. The Tenth Circuit's notice rule would have sent a message to applicants that they should explicitly raise any needed religious accommodations during the application phase. As a result, it is likely that something of a norm would have developed in which applicants give employers notice of their religious accommodation concerns.<sup>54</sup> In contrast, the Supreme Court's *Abercrombie* decision sends

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50. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) ("To require [the employer] to bear more than a *de minimis* cost in order to give [the employee] Saturdays off is an undue hardship."); *accord* *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986).

51. See *Abercrombie*, 135 S. Ct. 2028, 2033 (2015) ("If the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII.>").

52. See Michael C. Duff, *Union Salts as Administrative Private Attorneys General*, 32 BERKELEY J. EMP. & LAB. L. 1, 3 (2011) (noting that unlawful refusals to hire are "a notoriously difficult violation of law to police") (citing Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs*, 26 U. MICH. J.L. REFORM 403, 409 (1993)).

53. See Brief of Religious Organizations, *supra* note 46, at 7–9.

54. There are limits to how widespread such a norm would become. For instance, employees are notoriously unaware of most employment law rules. See Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 133–46 (1997) (summarizing results of a study showing that the vast majority of employees had incorrect views about their rights against termination). However, the

applicants the opposite signal: do not worry about informing employers of any religious needs.<sup>55</sup>

Compare the effects of these two decisions. The Supreme Court's rule is beneficial to applicants with obvious religious accommodation issues, such as Davis and Elauf, because it removes the Tenth Circuit's notification hurdle. This, in turn, makes it more difficult for accommodation-avoiding employers to reject job seekers like Davis and Elauf. However, for applicants with more subtle signs of religion, the incentives are quite different.

Under the Tenth Circuit's rule, a notification norm is likely to prompt all applicants with religious accommodation concerns—even those wearing only a cross or showing other subtle signs of religion—to notify employers, while those without such concerns will not. This provides valuable information for accommodation-avoiding employers that are unsure about applicants' accommodation needs. With a notification norm, these employers will have more certainty about whether an applicant poses a risk of accommodation: such applicants will likely state their needs. The converse is also true because applicants' failure to raise an accommodation issue will inform employers that those applicants likely do not pose an accommodation risk. As a result, under a notification norm, accommodation-avoiding employers will be more willing to hire applicants who exhibit subtle signs of religious belief but do not state a need for religious accommodation.

In contrast, the Supreme Court's *Abercrombie* decision creates the opposite effect. By diminishing the notification norm, accommodation-avoiding employers lack the information available under the Tenth Circuit's

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existence of a notification rule would filter down to some number of applicants. The establishment of a notice norm would also be hampered by applicants who may prefer to hide their accommodation needs in the hopes of avoiding rejection by an accommodation-avoiding employer. But the benefit of that strategy is undermined by the likelihood that an accommodation-avoiding employer will reject applicants with even subtle signs of religious needs. Applicants with religious accommodation needs could still simply eliminate all signs of their religious belief, but individuals with strong enough beliefs to seek an accommodation are unlikely to remove all outward signs of their faith. Given all of these uncertainties, it is hard to predict exactly what would have happened had the Tenth Circuit's rule survived, but it appears likely that the rule would have caused some increase in the number of applicants who notify employers of religious accommodation needs.

55. The actual message of *Abercrombie*, of course, is more complex than this simple message. For instance, the Court recognized that employer knowledge of an applicant's religious beliefs will be helpful to an applicant's claim of discrimination. *See supra* note 36. However, because of media coverage of the case, it appears that the overarching message to applicants is that no notice is required and may, in fact, invite discrimination. *See, e.g.*, Irin Carmon, *Abercrombie & Fitch Loses Headscarf Case at Supreme Court*, MSNBC (June 5, 2015), <http://www.msnbc.com/msnbc/abercrombie-fitch-loses-headscarf-case-supreme-court> [<http://perma.cc/699Q-RBP7>] (describing the *Abercrombie* decision: "The mall retailer had claimed it was only applying its supposedly neutral 'Look Policy' prohibiting caps, and that its conduct was legal because the job applicant, Samantha Elauf, didn't explicitly ask for an accommodation. But the court found that under Title VII of the Civil Rights Act, the burden is on the employer not to discriminate in hiring.").

rule. Without notification, applicants displaying only crosses or other subtle religious symbols simply do not give employers much information about the risk that an accommodation request will come in the future. Thus, risk-averse employers will be less likely to hire any applicant with subtle signs of religious belief, even those who do not actually have any accommodation needs.<sup>56</sup> It is true that, despite the lack of notice, *Abercrombie* provides these applicants an opportunity to show that an employer was motivated by a mistaken desire to avoid a religious accommodation request.<sup>57</sup> But given the general difficulty in bringing refusal-to-hire claims, especially in cases involving only subtle signs of religiosity, that may not be a large benefit. And whatever value *Abercrombie* provides is likely outweighed by the fact that the applicant needs help at all; it would be far better for the applicant to be hired than to have a slightly easier path to challenge a rejection caused by an employer's misplaced desire to avoid a religious accommodation.

In sum, *Abercrombie* may decrease the employment prospects of applicants with subtle displays of religious belief—even those without actual accommodation needs—by making them more risky to employers. Applicants could mute this effect by concealing all signs of their faith, although most religious advocates would not favor that outcome. Thus, for supporters of individuals with less conspicuous signs of religious belief, a notification norm may be preferable to a rule that decreases employers' ability to weigh the risk of future accommodation issues.

*Abercrombie* might also create a similarly harmful incentive on applicants. Although the decision unequivocally assists the legal claims of job seekers who do not explicitly raise accommodation needs, that may come at the cost of lulling some into avoiding self-help. Applicants are faced with the choice of either affirmatively raising their religious accommodation needs during the hiring process<sup>58</sup> or keeping quiet and mentioning the issue once employed. *Abercrombie* sends the signal that the latter strategy—no pre-hire notification—is preferred. But perhaps nudging applicants to raise accommodation issues earlier makes more sense.<sup>59</sup> Most employers can

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56. See *Abercrombie*, 135 S. Ct. at 2033 (“[A]n employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed.”); Dallon F. Flake, *After Abercrombie: Religious Discrimination Based on Employer Misperception*, 2016 WIS. L. REV. (forthcoming 2016) (arguing that *Abercrombie* suggests that plaintiffs can successfully bring Title VII cases challenging employer discrimination based on misperception of employees' religious beliefs and practices).

57. See Flake, *supra* note 56.

58. Admittedly, this might short-circuit applicants' chances of getting hired, but that is less likely to be true for applicants with obvious signs of religion, who will face the risk of discrimination no matter what they say.

59. Indeed, before the Tenth Circuit, the EEOC argued that some notice of the need for religious accommodation was required—either from the applicant or from some other source. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1123 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015).

come up with legitimate rationales for rejecting applicants; however, that strategy is more difficult when there has been explicit notice or other obvious signs of an accommodation need.<sup>60</sup> In other words, *Abercrombie* sends a signal to applicants with subtle signs of religiosity that they should not express their religious accommodation concerns when, in practice, they might be better off doing so.<sup>61</sup>

The incentives of both employers and employees under a no-notification scheme show that *Abercrombie*'s effects will not always be clear. In contrast to the view that *Abercrombie* is a clear victory for all religious individuals, the decision could end up harming applicants that display subtle signs of faith, whether or not they actually need accommodations. That is not to say that the Court erred in its analysis of the question in *Abercrombie*—it did not—yet advocates, policymakers, and courts should be more concerned with the possible unintended consequences of their decisions. It remains to be seen whether individuals with subtle signs of religiosity will suffer in any measurable degree due to *Abercrombie*. We will never know, however, unless we remain attuned to the possibility.

#### IV. Conclusion

The discussion of *Abercrombie*'s possible harms is not intended as a criticism of the Supreme Court's decision, which was on sounder legal footing than the Tenth Circuit's. The Court's decision also had the benefit of mitigating some of the costs that would have occurred under Tenth Circuit's notice rule, such as the penalty imposed on religious applicants who are unaware of the employers' policies and therefore do not know that there is a religious accommodation issue.<sup>62</sup> Similarly, the Court cannot be faulted for failing to consider issues beyond those presented in the case. But policymakers and advocates should be more inquisitive about how legal rules affect incentives, particularly within a broader legal scheme like Title VII.

For instance, recent legislation to narrow the scope of employers' undue hardship defense is intended to provide greater opportunities for workplace religious accommodations.<sup>63</sup> However, if Congress enacted such a measure, one possible effect is that employers will be more resistant to hiring

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60. For this reason, the incentive effect of *Abercrombie* on applicants with obvious signs of religion would be negligible, as employers will generally already be aware that those individuals have accommodation needs.

61. On the other hand, there is a risk that providing express notice of an accommodation need will increase the chance that an employer will reject the applicant.

62. See Brief of Petitioner at 28, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015) (No. 14-86), 2014 WL 6845691, at \*28.

63. See Workplace Religious Freedom Act of 2013, S. 3686, 112th Cong. § 4(a)(3) (2013) (changing Title VII's definition of undue hardship to "a significant difficulty or expense on the conduct of the employer's business"); see also *supra* note 50 and accompanying text (describing the reasonable religious accommodation duty and undue hardship defense).

applicants who appear to need religious accommodation or even provide a risk of such need. This does not mean that policymakers who want to enhance protection for religious employees should not pursue reforms of the undue hardship test. But the possible negative effect on the employment of religious individuals might change the cost-benefit calculus of a particular proposal. Even if it does not have that effect, some policymakers who consider these consequences might be prompted to address other shortcomings in antidiscrimination law, such as the difficulties in litigating refusal-to-hire claims and low-wage employees' inability to enforce their workplace rights.<sup>64</sup>

The possible unintended consequences of *Abercrombie*, like the undue hardship proposal, serves as a reminder that attempts to sway policy in a certain direction must account for outcomes that could undermine the reformers' goals. It is always difficult to engage in this type of inquiry, especially with statutes as complicated as Title VII, and the task is even more challenging with polarized topics such as religion. Yet, if Title VII and other legal schemes have any hope at achieving their aims, it is imperative that advocates, policymakers, and—when appropriate—judges attempt to overcome these hurdles and explore the less obvious consequences of their actions.

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64. See Samuel Estreicher & Jeffrey M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C. L. REV. 343, 458–60 (2014) (discussing studies on win rates in employment cases, which show lower rates for low-wage plaintiffs) (citing, among other studies, Theodore Eisenberg & Elizabeth Hill, *Employment Arbitration and Litigation: An Empirical Comparison* (N.Y. Univ. Sch. Of Law, Public Law and Legal Theory Paper Series, Research Paper No. 65, 2003)); Duff, *supra* note 52, at 3.