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# The Preferred Preferences in Employment Discrimination Law

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## THE PREFERRED PREFERENCES IN EMPLOYMENT DISCRIMINATION LAW\*

EMILY GOLD WALDMAN\*\*

*In theory, customer preferences cannot justify discriminatory treatment by employers. The reality is more complicated. Built into the structure of federal employment discrimination law are several openings for customer preferences to provide employer defenses to what would otherwise likely be actionable discrimination.*

*This Article explores when and which customer preferences can enter those openings. It focuses on what I deem the “preferred preferences”: the customer preferences that have formed the basis of successful employer defenses to discrimination claims. This Article identifies and evaluates six such preferences: (1) aesthetic appeal; (2) physical privacy from employees of the opposite sex; (3) psychological comfort/affinity with employees of the same sex; (4) an English-only environment; (5) avoidance of proselytization or judgment; and (6) convenience. This Article also analyzes a potential seventh preferred preference—diversity—that courts have yet to consider.*

*The Article shows that each individual preferred preference is not just a one-off exception to the supposed irrelevance of customer preferences but part of a collective body of doctrine that operates according to its own principles. Although courts are not explicit about this, these preferences intuitively strike courts as reasonable and natural, both because they do not seem invidiously discriminatory and because they align with ingrained social conventions and norms. As a result, courts (1) consider them weightier than “mere preferences” and/or (2) view*

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*compliance with them as imposing only a minor burden on employees. The more that these two factors are satisfied, the more preference deference we see.*

*But courts are not striking the right balance in their preference deference. This largely stems from the tension between the claim that customer preferences are irrelevant in antidiscrimination law and the reality that they sometimes do count. To reconcile this dissonance, courts elevate the preferred preferences into virtual needs or minimize how much they burden employees. In the process, biases and inconsistencies sneak in. This Article illuminates how this occurs and then argues that a reordering of the current preference hierarchy is in order.*

|  |     |
|--|-----|
| INTRODUCTION .....   | 93  |
| I. THE CUSTOMER PREFERENCE OPENINGS: AN OVERVIEW.....          | 97  |
| A. <i>The Disparate Treatment Openings: The BFOQ</i>           |     |
| <i>Defense and the Equal Burdens Doctrine</i> .....            | 97  |
| 1. The BFOQ Opening.....                                       | 98  |
| a. <i>Physical Privacy from the Opposite Sex</i> .....         | 101 |
| b. <i>Psychological Comfort with the Same Sex</i> .....        | 104 |
| 2. The Equal Burdens Opening.....                              | 105 |
| B. <i>The Disparate Impact Opening: The Business Necessity</i> |     |
| <i>Defense</i> .....   | 109 |
| 1. Aesthetic Appeal .....                                      | 111 |
| 2. English-Only Environment .....                              | 115 |
| C. <i>The Reasonable Accommodation Opening: The Undue</i>      |     |
| <i>Hardship Defense</i> .....                                  | 116 |
| 1. Aesthetic Appeal .....                                      | 117 |
| 2. Avoidance of Proselytization or Judgment .....              | 119 |
| 3. Convenience .....   | 123 |
| II. A TAXONOMY OF THE PREFERRED PREFERENCES .....              | 124 |
| A. <i>Aesthetic Appeal</i> .....                               | 125 |
| B. <i>Physical Privacy from the Opposite Sex</i> .....         | 130 |
| C. <i>Psychological Comfort with the Same Sex</i> .....        | 133 |
| D. <i>English-Only Environment</i> .....                       | 137 |
| E. <i>Avoidance of Proselytization or Judgment</i> .....       | 139 |
| F. <i>Convenience</i> .....                                    | 142 |
| G. <i>Diversity?</i> .....                                     | 143 |
| III. RETHINKING PREFERENCE DEFERENCE .....                     | 151 |

|       |  |     |
|-------|--|-----|
| 2018] | <i>PREFERRED PREFERENCES</i>                           | 93  |
|       | <i>A. Actual Performance of the Job</i> .....          | 154 |
|       | <i>B. Effect on Equal Employment Opportunity</i> ..... | 158 |
|       | CONCLUSION.....  | 160 |

## INTRODUCTION

A basic tenet of employment discrimination law is that customer preferences generally cannot justify discriminatory treatment by employers.<sup>1</sup> As one court recently put it, “[c]ourts have consistently held that, in the employment law context, client or consumer preference cannot cleanse an employer’s actions—even when the employer claims to have acted free of bias.”<sup>2</sup> Otherwise, the antidiscrimination mandates would lack any teeth.

Built into the structure of federal employment discrimination law, however, are several openings for customer preferences to provide employer defenses to what would otherwise likely be actionable discrimination. These include:

- The bona fide occupational qualification (“BFOQ”) defense to intentional discrimination based on sex, religion, national origin, and age;<sup>3</sup>
- The “business necessity” defense to disparate impact claims;<sup>4</sup> and

1. *Turner v. Parker Sec. & Investigative Servs., Inc.*, No. 1:13-CV-113(WLS), 2014 WL 5819929, at \*7 (M.D. Ga. Nov. 10, 2014) (“‘Customer preference’ is not a legitimate defense under Title VII.” (citing *Platner v. Cash & Thomas Contractors, Inc.*, 908 F.2d 902, 905 n.5 (11th Cir. 1990); and then citing *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388–89 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971))); *see also* *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977) (noting that “the federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes”); *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010) (“It is now widely accepted that a company’s desire to cater to the perceived racial preferences of its customers is not a defense under Title VII for treating employees differently based on race.” (internal citations omitted)); *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1181 (7th Cir. 1982) (“Customer preference has repeatedly been rejected as a justification for discrimination against women.” (citing *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276–77 (9th Cir. 1981))).

2. *Sparenberg v. Eagle All.*, Civil No. JFM-14-1667, 2015 WL 6122809, at \*6 (D. Md. Oct. 15, 2015) (internal citations omitted); *see also* *Chaney*, 612 F.3d at 913; *Rucker*, 669 F.2d at 1181; *cf. Dothard*, 433 U.S. at 333–34 (agreeing with the view that the BFOQ defense “provides only the narrowest of exceptions to the general rule requiring equality of employment opportunities”).

3. 29 U.S.C. § 623(f)(1) (2012); 42 U.S.C. § 2000e-2(e)(1) (2012).

4. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

- The requirement that employers accommodate the religious practices and disabilities of their employees only when the requested accommodations are “reasonable” and do not impose an “undue hardship.”<sup>5</sup>

This Article explores when and which customer preferences can successfully enter these openings. For example, in what circumstances can a customer preference for same-sex service create a BFOQ for a job? If an employer’s facially neutral appearance policy responds to a strong customer preference, is that enough to make it “consistent with business necessity,”<sup>6</sup> notwithstanding its disparate impact as to a protected characteristic like race? And if an accommodation for a religious employee will offend customers, does that count as imposing an undue hardship, thereby removing the employer’s obligation to provide it?

Although each customer preference opening has received much scholarly attention,<sup>7</sup> they are less often considered together. This

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5. For discrimination based on religion, this requirement stems from the combination of Title VII’s definition of “religion” 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,” *id.* § 2000e(j), and its provision that “[i]t shall be an unlawful employment practice for an employer 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 . . . religion,” *id.* § 2000e-2(a). For discrimination based on disability, this requirement stems from the Americans with Disabilities Act. See *id.* § 12112(b)(5)(A).

6. *Id.* § 2000e-2(k)(1)(A)(i).

7. On the BFOQ opening, see generally Michael L. Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025 (1977); Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147 (2004); Rachel L. Cantor, Comment, *Consumer Preferences for Sex and Title VII: Employing Market Definition Analysis for Evaluating BFOQ Defenses*, 1999 U. CHI. LEGAL F. 493 (1999). On the job-related and business necessity opening, see generally Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387 (1996); Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479 (1996). On the reasonable accommodation/undue hardship opening, see generally Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1 (1996); James M. Oleske, Jr., *Federalism, Free Exercise, and Title VII: Reconsidering Reasonable Accommodation*, 6 J. CONST. L. 525 (2004); Alan D. Schuchman, Note, *The Holy and the Handicapped: An Examination of the Different Applications of the Reasonable-Accommodation Clauses in Title VII and the ADA*, 73 IND. L.J. 745 (1998). For a recent article discussing the BFOQ and business necessity openings, see generally Dallan F. Flake, *Employer Liability for Non-Employee Discrimination*, 58 B.C. L. REV. 1169 (2017). Relatedly, for discussions concerning employers’ reliance on unfavorable customer feedback, see Dallan F. Flake, *When Should Employers Be Liable for Factoring*

Article provides that collective examination. It offers a descriptive and normative analysis of how customer preferences fit into employment discrimination law, focusing on what I deem the “preferred preferences.” These are the customer preferences that, notwithstanding the general presumption to the contrary, have successfully provided the basis of employer defenses to discrimination claims. This Article identifies six such preferred preferences: (1) aesthetic appeal; (2) physical privacy from employees of the opposite sex; (3) psychological comfort/affinity with employees of the same sex; (4) an English-only environment; (5) avoidance of proselytization or judgment; and (6) convenience. I also discuss a possible seventh preferred preference—diversity—which is being increasingly expressed by customers, but about which there is scant case law so far. As this Article will show, even though these preferences seem widely disparate, they are actually linked by some common threads that lead to their “preferred” status.

The Article proceeds in three parts. Part I of the Article canvasses employment discrimination law to describe the four key openings where customer preferences can be taken into account. This list includes the three explicit statutory defenses within which customer preferences can be considered, plus a more subtle way—the judicially created equal burdens doctrine—that such preferences can influence courts’ assessments of whether unlawful discrimination has occurred in the first place. For each opening, the Article discusses which specific preferences have successfully taken hold.

Part II then cuts across these different domains to provide an overarching taxonomy of the preferred preferences themselves. Although some of these preferences (like an English-only environment and the desire to avoid proselytization) only show up in a single opening, others (such as aesthetic appeal and convenience) appear in multiple openings. This Part evaluates the relative success of the preferred preferences, ranking them each as strongly, moderately, or weakly preferred. The strongly preferred preferences are those to which courts frequently defer; the moderately preferred preferences are those to which courts sometimes defer; and the weakly preferred preferences are those to which courts occasionally defer.

Moreover, this Part explores what is special about this collection of preferences—i.e., when and why they garner more deference. It argues that although courts are not explicit about this, these preferences intuitively strike courts as reasonable and natural, both because they do not seem invidiously discriminatory and because they align with ingrained social conventions and norms. As a result, courts (1) consider them weightier than “mere preferences” and/or (2) view compliance with them as imposing only a minor burden on employees. The more that these two factors are satisfied, the more preference deference we see.

Finally, Part III argues that courts are not striking the right balance in their preference deference. This largely stems from the tension between the claim that customer preferences are irrelevant in antidiscrimination law and the reality that they sometimes do count. In order to reconcile this dissonance, courts elevate the preferred preferences into virtual needs or minimize how much they burden employees. In the process, biases and inconsistencies sneak in. Courts should begin by acknowledging that all of these preferences are indeed preferences rather than virtual necessities. Moreover, courts should heighten their awareness of how policies responding to these preferences can impose differential burdens—particularly with respect to the protected characteristics of sex, race, national origin, and religion—on employees.

That does not mean, however, that all customer preferences should be held invalid in the context of antidiscrimination claims. On the contrary, I argue that it is still sometimes appropriate to take such preferences into account when considering whether actionable discrimination has occurred. But we need clearer standards for when to do so. Although the particular formulation will vary depending on the specific opening and preference, this Article proposes two important guideposts in analyzing these issues: (1) a context-specific look at whether the preference relates to the employee’s actual performance of the specific job and (2) a broad look at the extent to which the preference limits equal employment opportunity in the workplace. Applying these principles, I suggest a reordering of the current preference hierarchy is in order. In particular, the aesthetic appeal and English-speaking environment preferences receive too much deference, while the same-sex psychological comfort preference receives too little deference.

## I. THE CUSTOMER PREFERENCE OPENINGS: AN OVERVIEW

Federal employment antidiscrimination law includes three major statutes: Title VII of the Civil Rights Act (“Title VII”),<sup>8</sup> which addresses discrimination based on race, color, religion, sex, or national origin; the Age Discrimination in Employment Act (“ADEA”);<sup>9</sup> and the Americans with Disabilities Act (“ADA”).<sup>10</sup> Underlying these laws are three basic models of employment discrimination: disparate treatment, disparate impact, and failure to provide reasonable accommodation.<sup>11</sup> Within each of these laws, and within each of these models, are openings for customer preferences to enter the analysis. Specifically, as discussed below, there are two openings in the disparate treatment model (the BFOQ defense and the equal burdens doctrine),<sup>12</sup> one opening in the disparate impact model (the business necessity defense),<sup>13</sup> and one opening in the failure-to-accommodate model (the undue hardship defense).<sup>14</sup> This Article primarily focuses on Title VII, under which most of the customer preference cases arise.

A. *The Disparate Treatment Openings: The BFOQ Defense and the Equal Burdens Doctrine*

The first model of discrimination is known as disparate treatment—i.e., treating employees differently on the basis of a protected characteristic. The disparate treatment model is a central part of all three federal antidiscrimination statutes. Title VII explicitly prohibits such differential treatment when it is based on race, color, religion, sex, or national origin.<sup>15</sup> The ADEA prohibits differential treatment based on age, provided that the employee in question is at least forty.<sup>16</sup> Finally, the ADA prohibits differential treatment toward a “qualified individual on the basis of disability.”<sup>17</sup>

Within the disparate treatment model, there are two key openings through which customer preference can enter. First, Title

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8. 42 U.S.C. §§ 2000e to 2000e-17 (2012).

9. 29 U.S.C. §§ 621–634 (2012).

10. 42 U.S.C. §§ 12101–12213 (2012).

11. See, e.g., William L. Corbett, *Proving and Defending Employment Discrimination Claims*, 47 MONT. L. REV. 217, 218 (1986); Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 900 (2014).

12. See *infra* Section I.A.

13. See *infra* Section I.B.

14. See *infra* Section I.C.

15. 42 U.S.C. § 2000e-2(a) (2012).

16. 29 U.S.C. §§ 623(a), 631(a) (2012).

17. 42 U.S.C. § 12112(a) (2012).

VII and the ADEA both include an explicit BFOQ defense to disparate treatment. Title VII states that disparate treatment on the basis of religion, sex, or national origin is permissible “in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”<sup>18</sup> The ADEA includes a parallel BFOQ for age discrimination.<sup>19</sup> Thus, if a customer preference for employees of a certain religion, sex, national origin, or age rises to the level of a BFOQ, that preference can provide the basis for a successful employer defense.

Second, sometimes customer preferences play a role in determining whether something counts as disparate treatment at all. Here, technically speaking, the preferences do not serve as a defense but rather influence whether the court thinks actionable discrimination has occurred in the first place. The most explicit example of this phenomenon is the judicially created equal burdens doctrine for Title VII challenges to sex-differentiated appearance policies.<sup>20</sup>

Both of these openings are discussed in detail below.

### 1. The BFOQ Opening

The BFOQ defense is probably the clearest customer preference opening within employment discrimination law. In fact, although the legislative history on the BFOQ is sparse, it suggests that Congress indeed had customer preferences in mind when it enacted the BFOQ defense. Even before sex was added as a protected characteristic under Title VII, the BFOQ defense had already been included for religious and national origin discrimination, but not discrimination based on race or color.<sup>21</sup> Once Title VII’s list of protected characteristics was expanded to include sex during the House’s final stage of deliberations, Representative Charles Goodell proposed a parallel expansion of the BFOQ defense to include sex.<sup>22</sup> He framed his argument explicitly in terms of customer preferences, stating: “There are so many instances where the matter of sex is a bona fide

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18. *Id.* § 2000e-2(e)(1).

19. 29 U.S.C. § 623(f)(1) (2012).

20. *See infra* Section I.A.2.

21. *See* Sirota, *supra* note 7, at 1027–31 (providing a detailed history of the events leading up to the BFOQ’s inclusion in Title VII).

22. *Id.* at 1028; *see also* 110 CONG. REC. 2718 (1964).

occupational qualification. For instance, I think of the elderly woman who wants a female nurse.”<sup>23</sup>

Similarly, in the Senate, an interpretive memorandum described the BFOQ defense as authorizing “legitimate discrimination,”<sup>24</sup> such as “the preference of a business which seeks the patronage of . . . particular religious groups for a salesman of that religion.”<sup>25</sup> The clear implication was that customers of a particular religious group would prefer a salesperson of the same religion and that the employer should be free to satisfy that “legitimate” preference.

But courts have not interpreted the BFOQ opening for customer preferences to be as big as the legislative history might suggest. On the contrary, courts have repeatedly rejected the notion that most customer preferences for employees of a certain age, religion, national origin, or sex can give rise to valid BFOQs. This issue has arisen most frequently with sex discrimination claims, where courts have consistently rejected sex-based preferences that stem from stereotypical or chauvinistic conceptions of women.

In *Diaz v. Pan American World Airways, Inc.*,<sup>26</sup> for example, Pan American (“Pan Am”) argued that female sex was a BFOQ for being a flight attendant,<sup>27</sup> and the trial court found that “passengers overwhelmingly preferred to be served by female stewardesses.”<sup>28</sup> The Fifth Circuit rejected this argument, explaining that “it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the [Civil Rights Act of 1964] was meant to overcome.”<sup>29</sup> The court thus concluded that a successful BFOQ defense requires a showing that “the *essence* of the business operation would be undermined by not hiring members of one sex exclusively.”<sup>30</sup> Because the essence of Pan Am’s business was “to transport passengers safely from one point to another,” sex could not be considered a BFOQ.<sup>31</sup>

A subsequent district court decision rejected Southwest Airlines’ claim that, because it had branded itself as the “love” airline, the essence of its business operation would be undermined by hiring men

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23. 110 CONG. REC. 2718 (1964) (statement of Rep. Goodell).

24. 110 CONG. REC. 7213 (1964).

25. *Id.*

26. 442 F.2d 385 (5th Cir. 1971).

27. *See id.* at 386.

28. *Id.* at 387.

29. *Id.* at 389.

30. *Id.* at 388.

31. *See id.* at 388–89.

for ticket sales and flight attendant positions.<sup>32</sup> “[S]ex does not become a BFOQ merely because an employer chooses to exploit female sexuality as a marketing tool,”<sup>33</sup> the court explained, contrasting Southwest Airlines’ flight attendant positions to “jobs where sex or vicarious sexual recreation is the primary service provided, *e. g.* a social escort or topless dancer . . . [where] the employee’s sex and the service provided are inseparable.”<sup>34</sup>

Just as courts have held that chauvinistic customer preferences cannot give rise to BFOQs that favor women, they have also held that such preferences cannot establish BFOQs that exclude women. In *Fernandez v. Wynn Oil Co.*,<sup>35</sup> for example, the Ninth Circuit rejected the argument that being male was a BFOQ for a high-level corporate position because of the employer’s concern that Latin American clients would react negatively to a female vice president.<sup>36</sup> The court stated that “stereotypic impressions of male and female roles do not qualify gender as a BFOQ.”<sup>37</sup> Similarly, a Virginia district court explained that a sports club could not cater to customer preferences for a “male macho image” by only hiring men for its athletic director position.<sup>38</sup>

There are two customer preferences, however, that have repeatedly entered the BFOQ opening to create a sex-based BFOQ.<sup>39</sup>

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32. *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 294, 302 (N.D. Tex. 1981).

33. *Id.* at 303.

34. *Id.* at 301. Indeed, as Yuracko explains, courts generally distinguish between a business that “is selling sex only” and a business that “is selling something else plus sex.” Yuracko, *supra* note 7, at 212–13. These situations fall along a “sexual-titillation continuum”: the more that the job involves providing sexual gratification itself, such as being a prostitute, lap dancer, or nude centerfold model, the more likely sex—either male or female, as applicable—is held to be a BFOQ. *Id.* at 157. By contrast, when the employer sells something other than sex and simply uses sex appeal for marketing, courts generally reject the BFOQ argument. *Id.* at 158. Yuracko has also noted that the Hooters restaurant chain seems to be maintaining its policy of only hiring women as food servers by settling sex discrimination lawsuits rather than going to court. KIMBERLY A. YURACKO, GENDER NONCONFORMITY AND THE LAW 127 (2016). That said, sometimes particular sex appeal preferences, such as for female employees to present themselves in traditionally feminine ways as to their hair, makeup, and dress, end up taking hold through the equal burdens doctrine that is discussed below. *See infra* Section I.A.2.

35. 653 F.2d 1273 (9th Cir. 1981).

36. *See id.* at 1274, 1276.

37. *Id.* at 1276 (citing *City of Los Angeles Dept. of Water v. Manhart*, 435 U.S. 702, 707 (1978); and then citing *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980)).

38. *Morris v. Bianchini*, Civ. A. No. 86-0742-A, 1987 WL 11822, at \*7 (E.D. Va. Feb. 24, 1987), *aff’d*, 838 F.2d 467 (4th Cir. 1988) (unpublished table decision).

39. In saying that these preferences can successfully provide the basis for a sex BFOQ, I mean that, at a minimum, courts allow these preferences to be presented to juries as part of a BFOQ defense. In numerous cases discussed herein, courts went even

These preferences are sometimes referred to under the umbrella term of “privacy,” but they can be usefully divided into two categories: (1) a preference for same-sex service that stems from customers’ interest in *physical* privacy from employees of the opposite sex and (2) a preference for same-sex service that stems from customers’ sense of *psychological* comfort/affinity with employees of the same sex. These two interests are closely related—and can often be implicated in the same job—but they are distinct.

*a. Physical Privacy from the Opposite Sex*

Numerous courts have held that preferences related to physical privacy—specifically customers’ desires not to have their nude bodies seen and/or touched by the opposite sex—can justify a sex-based BFOQ.<sup>40</sup> Courts are most deferential when the job involves not just seeing customers’ naked bodies but actually touching them. As one court explained when holding that female sex was a BFOQ for nursing positions that involved intimate care to elderly women,<sup>41</sup> the job responsibilities involved “intimate personal care including dressing, bathing, toilet assistance, geriatric pad changes and catheter care. Each of these functions involves a personal touching as to which each guest is privileged by law to discriminate on any basis.”<sup>42</sup>

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further, granting summary judgment to the employer on grounds that it had indisputably made out the BFOQ defense. By contrast, the disfavored preferences get rejected at summary judgment.

40. See, e.g., *Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410, 1423 (N.D. Ill. 1984); *EEOC v. Mercy Health Ctr.*, No. Civ. 80-1374-W, 1982 WL 3108, at \*5 (W.D. Okla. Feb. 2, 1982); *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191, 1195–96 (E.D. Ark. 1981), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982); *Fesel v. Masonic Home of Del., Inc.*, 447 F. Supp. 1346, 1354 (D. Del. 1978), *aff’d*, 591 F.2d 1334 (3d Cir. 1979) (unpublished table decision).

41. *Fesel*, 447 F. Supp. at 1354.

42. *Id.* at 1352–53. Note that this reasoning could theoretically be extended to race as well. Title VII does not have a race-based BFOQ, however, and at least one court has held that it would violate Title VII for a hospital or other employer to comply with a patient request for only white nurses. See *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010). Kimani Paul-Emile has nonetheless noted that, in practice, requests for physicians of a particular race are sometimes made and accommodated, “most often . . . when made by racial minority patients.” Kimani Paul-Emile, *Patients’ Racial Preferences and the Medical Culture of Accommodation*, 60 UCLA L. REV. 462, 464, 500 (2012). Paul-Emile further argues in support of such accommodations, pointing to empirical data indicating “that permitting hospitals to accede to their patients’ racial preferences may not only alleviate race-based health disparities but also constitute a life-saving measure for many racial-minority patients.” *Id.* at 467. As Paul-Emile states, no courts have so ruled—which is why this preference is not included among the Article’s list of currently preferred preferences. See *id.* at 483.

That said, a major new working paper from the National Bureau of Economic Research provides strong empirical evidence for the claim that African American male

Relatedly, courts are sympathetic to the emotional discomfort customers/patients may experience if their sense of physical privacy is infringed upon. For example, in the labor nurse context, one district court wrote:

[I]t is important that the birth experience not only be positive but also without stress. . . . [D]ue to the sensitive and intimate duties performed by staff nurses in this area, there is a factual basis for determining that the employment of male nurses in the labor and delivery area would cause medically undesired tension.<sup>43</sup>

More recently, a Tennessee district court relied on the BFOQ defense to uphold the Transportation Security Administration's ("TSA") policy of requiring at least 33% of its screeners to be women so that there would always be a same-sex screener to conduct pat-down searches at the airport.<sup>44</sup> Even the Supreme Court has nodded to the validity of the physical privacy BFOQ, although it has not explicitly addressed the issue.<sup>45</sup>

In the few physical privacy cases that have actually gone to trial, as opposed to being decided in the employer's favor on summary judgment, it was typically because there was a factual question about whether there were other ways for the employer to accommodate the physical privacy preference. But the basic validity of the preference itself is accepted as a given. In *Little Forest Medical Center of Akron*

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patients could have better medical outcomes when seen by African American male physicians, as opposed to when they are seen by male physicians of other ethnicities. See Marcella Alsan, Owen Garrick & Grant C. Graziani, *Does Diversity Matter for Health? Experimental Evidence from Oakland* 24 (Nat'l Bureau of Econ. Research, Working Paper No. 24787, 2018), <http://www.nber.org/papers/w24787> [<https://perma.cc/Q9HT-C54U>]. The researchers calculated that "black doctors would reduce mortality from cardiovascular disease by 16 deaths per 100,000 per year, accounting for 19% of the black-white gap in cardiovascular mortality." *Id.* at 6 (citations omitted). They did not attribute this result to discrimination but to better patient-doctor communication, explaining "subjects were 10 percentage points (29%) more likely to talk with black male doctors about other health problems. Black doctors were 11 percentage points (35%) more likely to write notes about black patients than non-black doctors." *Id.* at 4. If and when additional support for these results emerge, it is possible that there will be a judicial or legislative response that makes room for this preference within employment discrimination law.

43. *Mercy Health Ctr.*, 1982 WL 3108, at \*5; see also *Backus*, 510 F. Supp. at 1195–96 (holding that female sex is a BFOQ for being a labor nurse).

44. *Wade v. Napolitano*, No. 3-07-0892, 2009 WL 9071049, at \*9–10 (M.D. Tenn. Mar. 24, 2009).

45. See *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 206 n.4 (1991) (stating that "[n]othing in our discussion of the 'essence of the business test' . . . suggests that sex could not constitute a BFOQ when privacy interests are implicated" (citing *Backus*, 510 F. Supp. at 1195–96)).

*v. Ohio Civil Rights Commission*,<sup>46</sup> for instance, the court held that a trial was appropriate because, despite the defendant nursing home's argument that female sex was a BFOQ for nursing aide positions, it was possible that the nursing home could instead accommodate its residents' preferences by hiring both males and females for the positions and then "assigning male nurse's aides to male residents and non-objecting female residents and female nurse's aides to female and non-objecting male residents."<sup>47</sup>

Interestingly, some of the physical privacy cases implicate a supplementary customer preference as well: convenience. For example, in upholding the TSA's policy of requiring at least 33% of its screeners to be women, the *Wade* court indicated that it would not be feasible to have a more skewed ratio because that would result in unacceptable wait times.<sup>48</sup> Indeed, courts have indicated that convenience is also a legitimate preference that should enter the analysis—i.e., that employers should have room to accommodate customers' physical privacy preferences in ways that do not overly inconvenience customers.<sup>49</sup> This means that the convenience preference can end up working with the physical privacy preference to create a BFOQ because there are situations where the only way to simultaneously satisfy both preferences is to hire an employee of a particular sex for the position.

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46. 575 N.E.2d 1164 (Ohio 1991).

47. *Id.* at 1171. Similarly, in *EEOC v. Sedita*, 816 F. Supp. 1291 (N.D. Ill. 1993), the district court held that a jury trial was required as to whether female sex was a BFOQ for jobs in an all-female gym that would involve taking prospective members through tours of the locker room and taking their measurements. *Id.* at 1293 & n.2, 1296. The EEOC had pointed to alternatives like "allowing females to assist clients who object to being touched by males, posting a schedule to inform clients of when male employees would be on duty, or letting clients take themselves through the locker room." *Id.* at 1297. The court decided that more factual development was needed. *Id.* at 1297-98.

48. *Wade*, 2009 WL 9071049, at \*2 ("TSA determined that no less than 33% of screeners needed to be women to ensure the availability of same gender-searches without compromising security or *significantly increasing wait times at checkpoints*." (emphasis added) (citation omitted)).

49. For example, in ruling that a restroom attendant BFOQ case should go to trial, one district court stated that the evidence might demonstrate that it would be infeasible to schedule shifts whereby male custodians could enter women's restrooms. *See Hernandez v. Univ. of St. Thomas*, 793 F. Supp. 214, 217-18 (D. Minn. 1992). The court referred to affidavits indicating that, "when the male custodians worked in the [women's] dormitory, the closing of bathrooms led to inconveniences and embarrassing situations that infringed on [female students'] privacy," and implied that such evidence could support the argument that female sex was a BFOQ for the custodial position, on grounds that there was no other way to simultaneously accommodate both the physical privacy preference *and* the convenience preference. *Id.*

*b. Psychological Comfort with the Same Sex*

By contrast, in situations where the customer will not be seen naked—and the preference for same-gender care stems from a psychological, rather than physical, rationale—courts are much less deferential. There are indeed a few cases where courts have held that psychological comfort/affinity with the same sex can give rise to a BFOQ, hence its inclusion among this Article’s taxonomy of preferred preferences. But such rulings are rare. One example is *Healey v. Southwood Psychiatric Hospital*,<sup>50</sup> in which the defendant-employer was a residential hospital for emotionally disturbed and sexually abused children and adolescents.<sup>51</sup> There, the defendants argued that the hospital should be able to take sex into account when making hiring and scheduling decisions in order to ensure that there were enough male and female employees assigned to all shifts.<sup>52</sup> The Third Circuit agreed that the hospital had established that “the therapeutic aspects of the child care specialist job require the consideration of gender,” noting that adolescent patients were more comfortable discussing their sexuality concerns with staff members of the same sex and that “subtle interactions such as ‘role modeling’” were part of the job.<sup>53</sup>

More commonly, however, courts reject such arguments.<sup>54</sup> In *EEOC v. Hi 40 Corp.*,<sup>55</sup> for example, the district court rejected a weight loss center’s argument that female sex was a BFOQ for being

50. 78 F.3d 128 (3d Cir. 1996).

51. *Id.* at 130, 132.

52. *See id.*

53. *Id.* at 133–34; *cf.* *Henry v. Milwaukee County*, 539 F.3d 573, 584–85 (7th Cir. 2008) (accepting that the role-modeling/mentoring aspects of the counselor position for a juvenile detention facility pointed toward “the usefulness of mentors of the same sex” but rejecting the defendant’s contention that this was necessary even during the night shift because the juveniles were largely sleeping during that period). While physical privacy concerns were also in the mix since part of the job involved accompanying young patients to the bathroom and bathing them, the *Healey* court nonetheless focused on the psychological concerns. *See Healey*, 78 F.3d at 133–34.

54. *See Olsen v. Marriott Int’l, Inc.*, 75 F. Supp. 2d 1052, 1056, 1063–64, 1068–69 (D. Ariz. 1999) (rejecting Marriott’s argument that female sex was a BFOQ for massage therapists and explaining that, notwithstanding Marriott’s evidence that most of its customers—particularly women who had suffered some form of sexual abuse—preferred female masseuses, “the legitimate job duties of a massage therapist . . . do not include viewing or touching female clients’ breasts or either male or female clients’ genitalia”); *Jaczak v. Ochburg*, 540 F. Supp. 698, 701, 704–05 (E.D. Mich. 1982) (rejecting defense by workshop for mentally ill young adult males that male sex was a BFOQ to replace the departing male child care worker when the employer argued that “[i]t was necessary to have a male in the workshop at all times to provide counseling in advance to male patients on topics of sexuality and sexual development”).

55. 953 F. Supp. 301 (W.D. Mo. 1996).

a weight loss counselor.<sup>56</sup> The court acknowledged that the customer base was 95% women and that some women had objected to having their measurements taken by a man and indicated that they “would not feel comfortable discussing emotional and physiological issues associated with weight loss with a man.”<sup>57</sup> But the court dismissed this as a mere preference and fell back on the so-called rule that “preferences by customers have little, if any, legitimate role in making determinations of the legitimacy of discrimination.”<sup>58</sup>

## 2. The Equal Burdens Opening

The other customer preference opening within the disparate treatment framework is more subtle. It lies not in any statutory language, but in courts’ own assessment of what amounts to disparate treatment in the first place. Specifically, courts have held that sex-differentiated appearance requirements—which typically align with customers’ expressed or assumed aesthetic preferences—do not count as disparate treatment under Title VII unless they are unequally burdensome on male and female employees.<sup>59</sup> In other words, as long as the differentiated appearance requirements impose “equal burdens,” they do not constitute disparate treatment at all.<sup>60</sup>

This equal burdens doctrine creates an opening for customers’ aesthetic preferences in two ways. First, it explicitly permits such preferences to give rise to sex-differentiated appearance requirements—withstanding Title VII’s prohibition of disparate terms and conditions of employment based on sex—as long as the requirements are equally burdensome. Second, and even more significantly, courts have applied the equal burdens test very loosely, allowing employers to defer to customer preferences that are in reality more burdensome on females than males.<sup>61</sup>

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56. *Id.* at 305.

57. *Id.* at 302–03.

58. *Id.* at 305 (citing *Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795, 799 (8th Cir. 1993)).

59. *See, e.g.,* *Viscecchia v. Alrose Allegria LLC*, 117 F. Supp. 3d 243, 250–52 (E.D.N.Y. 2015) (summarizing the case law in this area).

60. *Frank v. United Airlines, Inc.*, 216 F.3d 845, 854 (9th Cir. 2000) (“An appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment.”).

61. *See, e.g.,* *Lanigan v. Bartlett & Co. Grain*, 466 F. Supp. 1388, 1390–92 (W.D. Mo. 1979) (“An employer is simply not required to account for personal preferences with respect to dress and grooming standards.”). For a wide-ranging analysis of other judicially created doctrines that favor employers in discrimination lawsuits, see generally SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA’S COURTS UNDERMINE DISCRIMINATION LAW* (2017).

A blatant example of this latter phenomenon is *Craft v. Metromedia, Inc.*,<sup>62</sup> a case involving a television reporter named Christine Craft.<sup>63</sup> Almost immediately after hiring Craft as a coanchor, her television station employer became concerned about her appearance (namely, her clothing and makeup).<sup>64</sup> Craft's superiors gave her a book on wardrobe and makeup, and even brought in a wardrobe consultant for advice.<sup>65</sup> After several focus groups indicated that viewer response to Craft's appearance was "overwhelmingly negative," the oversight intensified and Craft was put on a "clothing calendar."<sup>66</sup> The television station then conducted a follow-up telephone survey asking people to rank Craft specifically on her looks and image in comparison with other female coanchors.<sup>67</sup> After negative results came in, she was reassigned from coanchor to reporter.<sup>68</sup>

Craft sued under Title VII, alleging that the appearance standards were based on stereotypes and impermissible customer preferences and that they were applied to female employees "more constantly and vigorously than they were applied to men."<sup>69</sup> At the bench trial, the very consultant who had been brought in to dress Craft explicitly testified that "viewers—particularly other women—criticize women more severely than men for their appearance on camera and that women's dress is more complex and demanding because 'society has made it that way.'"<sup>70</sup> Even so, Craft lost at the trial level and the Eighth Circuit affirmed,<sup>71</sup> deferring to the district court's conclusion that the station was "equally concerned with the appearance of its male and female on-air personnel"<sup>72</sup> and "enforced its appearance standards equally as to males and females in response to individual problems."<sup>73</sup>

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62. 766 F.2d 1205 (8th Cir. 1985).

63. *Id.* at 1207.

64. *Id.* at 1208. Ironically, Craft had specifically told the employer throughout the interview process that she was not interested in the position if a "makeover" of her appearance would be expected. *Id.*

65. *Id.* at 1208–09.

66. *Id.* at 1209 (quoting *Craft v. Metromedia, Inc.*, 572 F. Supp. 868, 873 (W.D. Mo. 1983), *aff'd in part, rev'd in part*, 766 F.2d 1205 (8th Cir. 1985)).

67. *Id.*

68. *Id.*

69. *Id.* at 1209–10.

70. *Id.* at 1214.

71. *Id.* at 1207–08.

72. *Id.* at 1217.

73. *Id.* at 1213.

*Craft* dates back to 1985, but its themes resonate in a more recent case, *Jespersen v. Harrah's Operating Co.*,<sup>74</sup> decided in 2006. There, plaintiff Darlene Jespersen, who worked as a bartender, brought a Title VII claim challenging new sex-based appearance standards that had been imposed by her employer, Harrah's.<sup>75</sup> Under those rules, known as the "Personal Best" program, both male and female employees were supposed to be "well groomed, appealing to the eye, [and] firm and body toned."<sup>76</sup> Additionally, men's hair could not extend below their shirt collar, while women were required to wear their hair teased, curled, or styled, and were also required to wear face powder, blush, mascara, and lip color.<sup>77</sup> Jespersen, who was uncomfortable wearing makeup, quit and then sued.<sup>78</sup> The Ninth Circuit ruled against her, invoking the equal burdens doctrine and concluding that Jespersen had not done enough to prove that it was more time consuming and expensive for women to comply with the daily makeup requirement than for men to comply with keeping their hair relatively short.<sup>79</sup>

Thus, in both *Craft* and *Jespersen*, customer preferences for aesthetic appeal—namely, for women to have a certain feminine look—drove the employer requirements. There was clear evidence of this: the television station in *Craft* had relied on viewer focus groups and surveys,<sup>80</sup> and Harrah's had specifically stated that its "Personal Best" policy stemmed from customer preferences, explaining when the policy was implemented that its "customers have said that when they go to a casino, they're looking for a night out and they want people to be well-groomed."<sup>81</sup> Moreover, as Judge Kozinski pointed out in his dissent, there is no "rational doubt" that requiring women to apply full facial makeup each day is more burdensome than requiring men to keep their hair short.<sup>82</sup> Yet each court declined to

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74. 444 F.3d 1104 (9th Cir. 2006) (en banc).

75. *Id.* at 1105.

76. *Id.* at 1107.

77. *Id.*

78. *Id.* at 1108.

79. *Id.* at 1108–11. The majority also disagreed that Harrah's had engaged in impermissible sex stereotyping under Title VII, stating that the policy "requires all of the bartenders to wear exactly the same uniforms" and "is for the most part unisex." *Id.* at 1111–12.

80. *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1209 (8th Cir. 1985).

81. Scott Mayerowitz, *Harrah's Draws Criticism; Employee Appearance Standards Go "Overboard,"* PROVIDENCE J., reprinted in HOTEL ONLINE (July 13, 2004), [https://www.hotel-online.com/News/PR2004\\_3rd/Jul04\\_HarrahsPolicies.html](https://www.hotel-online.com/News/PR2004_3rd/Jul04_HarrahsPolicies.html) [<https://perma.cc/BC46-EGU5>].

82. *Jespersen*, 444 F.3d at 1117 (Kozinski, J., dissenting).

grapple fully with these preferences' greater burdens on women. Instead, the courts insisted that the burdens seemed equal enough and ruled for the employer. As further discussed in Part II, because these customer preferences resonated with the judges' intuitive sense of natural, appropriate gender-based appearance conventions, the courts dismissed the differential burdens that they actually imposed as *de minimis*.

Although the equal burdens doctrine is an important customer preference opening, it is not unlimited. Courts have recognized that sex-differentiated appearance policies that are *facially* more burdensome on women than men amount to disparate treatment. For example, in *Frank v. United Airlines, Inc.*,<sup>83</sup> the Ninth Circuit struck down a policy whereby female employees had to meet the requirements of a medium body frame standard, while male employees only had to satisfy a large body frame standard.<sup>84</sup> Similarly, the Sixth Circuit recently held that sex-differentiated appearance codes may be unacceptably burdensome on transgender employees who are forced to follow the code for their assigned sex rather than the one for their gender identity.<sup>85</sup> This holding tracks Kimberly Yuracko's observation that "[t]ranssexuals are beginning to win because they are able to convince courts that, for them, sex-based grooming demands are painful. In contrast, non-transsexual gender benders [like Craft and Jespersen] lose precisely because courts view the burdensomeness for them of such conformity demands as

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83. 216 F.3d 845 (9th Cir. 2000).

84. *Id.* at 855. Similarly, the Ninth Circuit struck down a Continental Airlines policy that required "an exclusively female category of flight attendants, and no other employees," to comply with a weight restriction. *Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602, 610 (9th Cir. 1982).

85. See *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 576–77, 580 (6th Cir. 2018), *petition for cert. filed*, No. 18-107 (U.S. July 20, 2018). However, the court did not strike down the code itself but just indicated that the transitioning employee should be able to follow the code that comported with her gender identity. *Id.* at 573 ("We are not considering, in this case, whether the Funeral Home violated Title VII by requiring men to wear pant suits and women to wear skirt suits. Our question instead is whether the Funeral Home could legally terminate Stephens, notwithstanding that she fully intended to comply with the company's sex-specific dress code, simply because she refused to conform to the Funeral Home's notion of her sex."). Thus, the court apparently viewed the situation less as an unequal burdens case than as one about discrimination based on transgender/transitioning status and gender stereotypes. *Cf.* *Creed v. Family Express Corp.*, No. 3:06-CV-465RM, 2009 WL 35237, at \*6 (N.D. Ind. Jan. 5, 2009) (rejecting a transgender employee's claim that it was sex discrimination not to allow her to start following the dress code for female employees on grounds that the employer's "requirement that male and female employees adhere to grooming standards matching their [assigned] gender doesn't discriminate on the basis of sex").

trivial.”<sup>86</sup> Indeed, once the burden of a gender-based-appearance code is less facially apparent and measurable, customers’ stereotypical preferences about employees’ appearance have the opportunity to sneak back into the equal burdens opening, without being recognized as a form of discrimination at all.

*B. The Disparate Impact Opening: The Business Necessity Defense*

Like disparate treatment, the second model of discrimination, disparate impact, is addressed by all three federal antidiscrimination statutes.<sup>87</sup> Unlike disparate treatment liability, disparate impact liability covers situations where an employer has a facially neutral practice that nonetheless has a disparate impact as to a statutorily protected characteristic.<sup>88</sup> For example, a requirement that all employees be at least six feet tall would have a disparate impact as to sex, even though it would not constitute facially disparate treatment. Under Title VII, if a plaintiff-employee can identify such a practice and statistically prove its disparate impact, then the defendant-employer must defend itself by showing that the practice is “job related for the position in question and consistent with business necessity” and that an alternative practice would not suffice instead.<sup>89</sup> The ADEA also allows disparate impact claims, although the employer can defend against them simply by showing that the differentiation is “based on reasonable factors other than age.”<sup>90</sup> Finally, the ADA provides its own version of disparate impact liability, stating that it is impermissible to use

qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.<sup>91</sup>

Thus, in the disparate impact context, there is one key opening through which customer preferences can potentially enter: the “job

86. YURACKO, *supra* note 34, at 98.

87. See 29 U.S.C. § 623(a)(2) (2012); 42 U.S.C. §§ 2000e-2(k)(1)(A), 12112(b)(6) (2012).

88. George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1297 (1987).

89. 42 U.S.C. § 2000e-2(k)(1)(A)(i) to (ii), 2(k)(1)(C) (2012).

90. 29 U.S.C. § 623(f)(1) (2012).

91. § 12112(b)(6).

related . . . and consistent with business necessity” defense<sup>92</sup> (or, in the ADEA, the roughly analogous “reasonable factors other than age” defense,<sup>93</sup> which is even easier to satisfy).

This defense, like the BFOQ defense, is now statutory. But the defense—along with the very concept of disparate impact liability at all—originated with the Supreme Court. In 1971, just a few years after Title VII was enacted, the Supreme Court decided *Griggs v. Duke Power Co.*<sup>94</sup> Prior to Title VII’s passage, Duke Power had facially discriminated, only allowing African Americans to work in one of its five departments.<sup>95</sup> Once Title VII was passed, Duke Power adopted a facially neutral policy whereby only applicants with high school diplomas and passing scores on two aptitude tests could obtain positions in the four other, more desirable departments.<sup>96</sup>

At the time, Title VII only prohibited disparate treatment. But Duke Power’s policy had a clearly disparate impact as to race, and the Supreme Court unanimously ruled that such practices could also violate Title VII.<sup>97</sup> “The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation,” the Court explained.<sup>98</sup> “The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”<sup>99</sup> The Supreme Court later made this business necessity defense easier to satisfy, stating in its 1989 *Wards Cove Packing Co. v. Atonio*<sup>100</sup> decision that “the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. . . . [T]here is no requirement that the challenged practice be ‘essential’ or ‘indispensable’ to the employer’s business for it to pass muster . . . .”<sup>101</sup> *Wards Cove* further stated that, for this defense, the burden of persuasion always remained with the plaintiff.<sup>102</sup>

92. § 2000e-2(k)(1)(A)(i).

93. § 623(f)(1).

94. 401 U.S. 424 (1971).

95. *Id.* at 426–27.

96. *Id.* at 427–28.

97. *Id.* at 430–31 (“[P]ractices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”).

98. *Id.* at 431.

99. *Id.*

100. 490 U.S. 642 (1989).

101. *Id.* at 659 (internal citations omitted).

102. *Id.*

Congress, however, rejected *Wards Cove*'s softening of the standard. It passed the Civil Rights Act of 1991, which amended Title VII by, inter alia, codifying the disparate impact form of liability and a more stringent business necessity defense.<sup>103</sup> Accordingly, Title VII now states that once a disparate impact is shown, the *employer* bears the burden of proving that the “challenged practice is job related for the position in question and consistent with business necessity.”<sup>104</sup> The accompanying legislative history expressly states that Title VII was amended “to codify the concepts of ‘business necessity’ and ‘job related’ enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*.”<sup>105</sup>

Neither Title VII's text nor the above Supreme Court decisions, however, clarify whether a strong customer preference is enough to establish the defense by making a practice “job related . . . and consistent with business necessity.”<sup>106</sup> And as with the BFOQ defense, courts have allowed certain customer preferences into this opening. In particular, there are two customer preferences that have been fairly successful in forming the bases of successful business necessity defenses: aesthetic appeal and English-speaking environment. The aesthetic appeal preference is implicated in disparate impact challenges to appearance policies, while the English-speaking environment preference is implicated in disparate impact challenges to English-speaking-only workplace rules.

### 1. Aesthetic Appeal

The cases involving disparate impact challenges to customer preference-based appearance policies most often involve policies with disparate impacts as to race.<sup>107</sup> Of course, there are many appearance policies that implicate other protected characteristics, particularly sex and religion. But the sex-based appearance policies are usually not facially neutral—indeed, their whole point is to have different rules for males and females—so they generally trigger disparate treatment

103. 42 U.S.C. § 2000e-2(k)(1)(A)(i) to (ii) (2012).

104. *Id.* § 2000e-2(k)(1)(A)(i).

105. 137 CONG. REC. 28,622 (1991) (citations omitted).

106. § 2000e-2(k)(1)(A)(i). For further discussion of the lack of clarity in what an employer must show to prove business necessity, see, for example, *Lanning v. Southeastern Pennsylvania Transportation Authority*, 181 F.3d 478, 485–90 (3d Cir. 1999); Grover, *supra* note 7, at 391–93.

107. See, e.g., *Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795, 796 (8th Cir. 1993) (discussing a no-beard policy challenged for its disparate impact on African American men).

challenges instead, as seen above in the equal burdens discussion.<sup>108</sup> Meanwhile, facially neutral appearance policies that have a disparate impact on religion, such as prohibitions on beards or head coverings, are usually challenged under a failure-to-accommodate theory, as discussed below.<sup>109</sup> For a facially neutral appearance policy that disproportionately affects a particular race, however, the disparate impact claim is key.

Most commonly, the appearance policy being challenged under a disparate impact theory involves one very specific aspect of appearance: hair, either on the face or the head. Citing customer preference, numerous employers have adopted policies prohibiting beards or certain types of hairstyles, like braids or dreadlocks.<sup>110</sup> The disparate impact challenges to no-beard policies (brought exclusively by men) have generally succeeded, but the challenges to hairstyle policies (usually, though not always, brought by women) have generally failed.

Employers' no-beard policies can have a disparate impact on African American men, a significant portion of whom have a skin condition called pseudofolliculitis barbae ("PFB"), which results in irritation—to the point of infection and scarring—from shaving.<sup>111</sup> For many, the only treatment for the condition is to grow a beard.<sup>112</sup> Courts have generally accepted the argument that, because African American men suffer from PFB at a much higher rate, no-beard policies have a disparate impact as to race.<sup>113</sup> Moreover, courts have held that customer preferences for clean-shaven employees are *not* enough to satisfy the business necessity defense to disparate impact

108. See *supra* Section I.A.2.

109. See *infra* Section I.C.

110. See, e.g., *Bradley*, 7 F.3d at 799 (citing a public opinion survey commissioned by the pizza chain to justify its no-beard policy). Some such policies are implemented for safety reasons instead of customer preferences, but those are beyond the scope of this Article. See, e.g., *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1114 (11th Cir. 1993) (addressing a no-beard policy for firefighters based on safety standards for the use of respirator masks).

111. See, e.g., Roopal V. Kundu & Stavonnie Patterson, *Dermatologic Conditions in Skin of Color: Part II. Disorders Occurring Predominantly in Skin of Color*, 87 AM. FAM. PHYSICIAN 859, 860 (2013); Gary J. Brauner, *Pseudofolliculitis Barbae*, SKIN OF COLOR SOC'Y, <http://skinofcolorsociety.org/dermatology-education/1408-2/> [<https://perma.cc/3YTC-48FB>].

112. See Kundu & Patterson, *supra* note 111, at 860.

113. See, e.g., *Richardson v. Quik Trip Corp.*, 591 F. Supp. 1151, 1155–56 (S.D. Iowa 1984); *EEOC v. Trailways, Inc.*, 530 F. Supp. 54, 59 (D. Colo. 1981). *But see* *EEOC v. Greyhound Lines, Inc.*, 635 F.2d 188, 194 (3d Cir. 1980) (holding that the EEOC failed to prove that Greyhound's no-beard policy had a disproportionate impact on African American employees).

claims. For example, in *Bradley v. Pizzaco of Nebraska, Inc.*,<sup>114</sup> Domino's Pizza tried to justify its no-beard policy on customer preference grounds, citing a public opinion survey indicating "that up to twenty percent of those surveyed would react negatively to a delivery man wearing a beard."<sup>115</sup> The Eighth Circuit flatly refused to allow this purported customer preference into the job-related/business necessity opening, explaining that "[e]ven if the survey results indicated a significant customer apprehension regarding beards, which they do not, the results would not constitute evidence of a sufficient business justification defense for Domino's strict no-beard policy."<sup>116</sup> Notably, the Eighth Circuit drew from two other customer preference openings to support its proposition that customer preferences should typically not be taken into account in discrimination cases.<sup>117</sup> Not only did the court cite the BFOQ cases' language about the usual irrelevance of customer preferences, but it also borrowed the "reasonable accommodation" terminology to explain why the PFB-suffering employees needed an exemption.<sup>118</sup>

African American women, however, have had a much harder time challenging employer policies—presumably based on aesthetic appeal preferences—that prohibit dreadlocks, braids, or other "natural hairstyle[s] . . . that [enable] black women to wear their hair down and long while retaining the natural structure and texture of their hair."<sup>119</sup> It seems obvious that such policies have a disparate impact on African American women, because, as Onwuachi-Willig explains:

[A] ban on natural hairstyles for black women leaves black women with far fewer choices in hair grooming than white women. Essentially, due to the biological nature of black women's hair, such policies currently leave black women with one of two choices if they wish to wear their hair long and hanging down: either (1) straighten their hair with a chemical relaxer or hot comb or (2) wear a weave or wig. Both choices

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114. 7 F.3d 795 (8th Cir. 1993).

115. *Id.* at 799.

116. *Id.*; see also *Richardson*, 591 F. Supp. at 1153 (refusing to admit into evidence a customer satisfaction survey regarding concern with employees' beards because "the survey was flawed in both scope and representativeness").

117. *Bradley*, 7 F.3d at 799.

118. *Id.* Indeed, Christine Jolls cited *Bradley* as an example of the overlapping nature of disparate impact liability and failure-to-accommodate liability. See Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 653–55 (2001).

119. Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1093 (2010).

require black women to either change the structure and texture of their natural hair or cover it up. . . . In this sense, many black women are not allowed to wear their natural hair exactly as it grows out of their heads as lengthily as white women are allowed to wear theirs.<sup>120</sup>

Wendy Greene has also noted the financial, emotional, and physical burden imposed by such policies.<sup>121</sup>

Even so, such challenges have generally been unsuccessful.<sup>122</sup> Often, the disparate impact argument gets largely overlooked, sometimes even by plaintiffs.<sup>123</sup> In a recent case, *EEOC v. Catastrophe Management Solutions*,<sup>124</sup> the EEOC brought suit on behalf of an African American job applicant whose job offer was rescinded by the employer when she declined to cut off her dreadlocks pursuant to its “race-neutral grooming policy.”<sup>125</sup> While the EEOC’s proposed amended complaint utilized “loose language” that seemed to support a disparate impact argument, the EEOC ultimately stated at oral argument that it was only pursuing a disparate treatment theory of liability.<sup>126</sup> The Eleventh Circuit ruled for the employer, stating that “Title VII protects persons in covered categories with respect to their immutable characteristics, but not their cultural practices.”<sup>127</sup> Other courts have similarly ruled that hairstyle policies do not trigger disparate impact (or treatment) liability.<sup>128</sup>

120. *Id.* at 1089–90.

121. D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit’s Take on Workplace Bans Against Black Women’s Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 U. MIAMI L. REV. 987, 1012–14 (2017).

122. *See, e.g.*, *Pitts v. Wild Adventures, Inc.*, Civil Action No. 7:06-CV-62-HL, 2008 WL 1899306, at \*6 (M.D. Ga. Apr. 25, 2008); *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 231–32 (S.D.N.Y. 1981).

123. *See generally Pitts*, 2008 WL 1899306 (bringing a disparate treatment challenge, but not a disparate impact challenge, to an employer’s policy of prohibiting dreadlocks, cornrows, beads, or shells that were not covered by a hat or visor).

124. 852 F.3d 1018 (11th Cir. 2016), *reh’g denied*, 876 F.3d 1273 (11th Cir. 2017).

125. *Id.* at 1020.

126. *Id.* at 1024. The decision did not explain why the EEOC dropped the disparate impact theory. *See generally id.* (noting that “the EEOC at times conflate[d] the two liability theories”).

127. *Id.* at 1030 (citing *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc); and then citing *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980)).

128. *See, e.g.*, *Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256, 259, 265–67 (S.D.N.Y. 2002) (ruling against male employee who challenged employer’s requirement that employees wear a hat over their dreadlocks, or other “‘unbusinesslike’ hairstyles,” on the grounds that the rule did not indicate racial animus and that the employee had not presented enough statistical evidence to make out a disparate impact claim).

The result is that preferences for compliance with “white and gendered norm[s]” about women’s hair, as Onwuachi-Willig puts it,<sup>129</sup> have crept into the openings within employment discrimination law. As with the preferences for a feminine look in *Craft* and *Jespersen*, courts have a hard time recognizing that these preferences are discriminatory at all.

## 2. English-Only Environment

The second big customer preference that has repeatedly entered the business necessity opening is the preference for an English-only speaking environment. In numerous cases citing customer preferences, employers have required employees to speak English whenever they are *near* customers, not just when they are actually talking to the customer.<sup>130</sup> In *EEOC v. Sephora USA, LLC*,<sup>131</sup> for example, the policy of Sephora cosmetic stores was that sales floor staff had to speak English—even to each other—whenever they were on the sales floor while clients were present.<sup>132</sup> Similarly, in *Pacheco v. New York Presbyterian Hospital*,<sup>133</sup> the hospital’s unofficial policy was that employees could speak only English when they were in the vicinity of patients.<sup>134</sup> In both cases, the employers justified their English-only policies by stating that when their employees conversed in Spanish, their customers/patients felt uncomfortable because they felt that they could not approach the employees<sup>135</sup> or that the employees might be mocking them.<sup>136</sup>

Employers in these sorts of cases have generally prevailed. In both *Sephora* and *Pacheco*, the courts assumed that these policies had disparate impacts as to national origin. But they still ultimately ruled that these purported customer preferences created a valid job-related/business necessity defense.<sup>137</sup> “[I]f a customer preference is sufficiently related to job performance then it qualifies as a ‘business necessity,’” the *Pacheco* court explained, ruling that patients’ discomfort with overhearing Spanish conversations that they thought

129. Onwuachi-Willig, *supra* note 119, at 1083.

130. Note, however, that such rules do not go as far as requiring employees to speak English in the workplace at all times. *See infra* note 255 and accompanying text.

131. 419 F. Supp. 2d 408 (S.D.N.Y. 2005).

132. *Id.* at 410–11.

133. 593 F. Supp. 2d 599 (S.D.N.Y. 2009).

134. *See id.* at 606–07.

135. *Sephora*, 419 F. Supp. 2d at 416–17.

136. *Pacheco*, 593 F. Supp. 2d at 614, 621–22.

137. *Id.* at 622–23; *Sephora*, 419 F. Supp. 2d at 414, 418.

might be about them was enough to qualify.<sup>138</sup> “[P]romoting politeness to customers is a valid business necessity for requiring sales employees to speak English in their presence,” the *Sephora* court similarly stated.<sup>139</sup> Both courts agreed that the employers did not even need to demonstrate that a particular percentage of customers felt this way.<sup>140</sup>

The same sort of language in the physical privacy BFOQ cases—that employers are not responding to a mere preference but something more legitimate and weighty—often appears in these English-language business necessity cases. As the *Sephora* court stated in describing why salespeople could not speak in Spanish even to each other while customers were present, “[w]hen salespeople speak in a language customers do not understand, the effects on helpfulness, politeness and approachability are *real* and are *not* a matter of *abstract preference*.”<sup>141</sup> As discussed further in Parts II and III, this often-facile distinction between mere preferences and something more is one of the keys to unlocking which preferences receive the most deference.

### C. *The Reasonable Accommodation Opening: The Undue Hardship Defense*

The last model of discrimination—the failure to provide reasonable accommodation—only appears in the context of religion and disability. For religion, this obligation appears in Title VII, which prohibits discrimination based on religion,<sup>142</sup> and defines religion as “all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate [the] religious observance or practice without undue hardship on the conduct of the employer’s business.”<sup>143</sup> For disability, this accommodation appears in the ADA, which similarly defines discrimination to include “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.”<sup>144</sup>

138. *Pacheco*, 593 F. Supp. 2d at 622 (quoting *Sephora*, 419 F. Supp. 2d at 416).

139. *Sephora*, 419 F. Supp. 2d at 417.

140. *Pacheco*, 593 F. Supp. 2d at 621–22; *Sephora*, 419 F. Supp. 2d at 417.

141. *Sephora*, 419 F. Supp. 2d at 417 (emphasis added).

142. 42 U.S.C. § 2000e-2(a)(1) (2012).

143. *Id.* § 2000e(j).

144. *Id.* § 12112(b)(5)(A).

In both statutes, the key opening through which customer preferences can enter is the undue hardship defense, which is closely related to the question of whether an accommodation is reasonable in the first place. This opening, however, is much wider in the religion context than the disability context because of the varying meaning of “undue hardship.” While Title VII provides no definition of “undue hardship,”<sup>145</sup> the Supreme Court interpreted it in 1977 to mean anything “more than a *de minimis* cost.”<sup>146</sup> By contrast, the ADA defines “undue hardship” as “an action requiring significant difficulty or expense.”<sup>147</sup>

Title VII’s low threshold for what counts as an undue hardship—i.e., anything imposing more than a *de minimis* cost—has created a big opening through which customer preferences can enter. Indeed, in the religion context, three main customer preferences can provide the basis for successful employer defenses: aesthetic appeal, the desire to avoid an employee’s proselytization or judgment, and convenience.

### 1. Aesthetic Appeal

Typically, the aesthetic appeal preference comes up in the religious accommodation context when there is a conflict between an employer’s general appearance policy (most often relating to head coverings, clean-shavenness, or body piercings) and a particular employee’s religious practice. The EEOC’s guidance states that, “[i]n *most* instances, employers are required by federal law to make exceptions to their usual rules or preferences to permit applicants and employees to observe religious dress and grooming practices.”<sup>148</sup> Indeed, there are numerous EEOC consent decrees and judicial decisions along those lines.<sup>149</sup>

145. *See id.* § 2000e (mentioning “undue hardship” under “religion” but providing no explanation of the term’s meaning).

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

147. 42 U.S.C. § 12111(10)(A) (2012).

148. *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, [https://www.eeoc.gov/eeoc/publications/qa\\_religious\\_garb\\_grooming.cfm](https://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm) [<https://perma.cc/N4TC-UAWF>] (emphasis added).

149. *See, e.g.*, *Muhammad v. N.Y.C. Transit Auth.*, 52 F. Supp. 3d 468, 474, 484 (E.D.N.Y. 2014) (holding that an employee could go to trial on her claim that the New York City Transit Authority, in transferring her from a customer-contact position after she refused to remove or cover her khimar, failed to accommodate her practice of Islam); *Dodd v. SEPTA*, Civil Action No. 06-4213, 2008 WL 2902618, at \*7–10 (E.D. Pa. July 24, 2008) (holding that an employee could go to trial on his claim that his employer, in requiring him to cut his hair, failed to reasonably accommodate his Rastafarian beliefs); *EEOC v. Red Robin Gourmet Burgers, Inc.*, No. C04-1291JLR, 2005 WL 2090677, at \*1, \*5 (W.D. Wash. Aug. 29, 2005) (holding that an employee could go to trial on his claim

But *most* does not mean *all*. In several cases, parting with the EEOC's interpretation, courts have ruled that employers could make out the undue hardship defense to religious accommodation claims by relying on appearance policies stemming from expressed or assumed customer preferences.

A good example here is *Cloutier v. Costco Wholesale Corp.*,<sup>150</sup> a First Circuit case involving the "no facial jewelry," other than earrings, provision of Costco's dress code.<sup>151</sup> Costco's employee handbook justified its dress code as follows: "Appearance and perception play a key role in member service. . . . All Costco employees must practice good grooming and personal hygiene to convey a neat, clean and professional image."<sup>152</sup> Pursuant to this policy, Costco asked a cashier with an eyebrow piercing to remove it, replace it with a clear retainer, or cover it.<sup>153</sup> She refused, stating that she was a member of the Church of Body Modification (which had about 1000 members) and felt compelled to display her piercings at all times.<sup>154</sup> Costco terminated her and she sued.<sup>155</sup> Although the EEOC concluded that she had a valid religious discrimination claim and that the employer could not satisfy the undue hardship defense, the district court granted summary judgment to Costco and the First Circuit affirmed.<sup>156</sup> The First Circuit stated that employees who regularly interact with customers "reflect on their employers," that Costco had determined that facial piercings "detract from the 'neat, clean and professional image' that it aims to cultivate," and that this was a business decision within Costco's discretion.<sup>157</sup>

Interestingly, the *Cloutier* court fully acknowledged that this was just a question of customer preference, rather than elevating it to something weightier (as the courts in the physical privacy BFOQ and English-language business necessity cases tend to do). "[I]t is not the law that customer preference is an insufficient justification as a matter

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that his employer, in refusing to allow him to show his religious tattoos, failed to reasonably accommodate his practice of Kemetecism); Consent Decree at 1, *EEOC v. Family Foods, Inc.*, No. 5:11-cv-00394-FL (E.D.N.C. Apr. 30, 2012) (on file with the North Carolina Law Review) (settling case alleging failure to accommodate long hair worn pursuant to employee's Nazirite religious beliefs).

150. 390 F.3d 126 (1st Cir. 2004).

151. *Id.* at 128–29.

152. *Id.* at 135.

153. *Id.* at 128.

154. *Id.* at 129.

155. *Id.* at 130.

156. *Id.* at 128, 130.

157. *Id.* at 135–36.

of law,” the court observed.<sup>158</sup> Shortly thereafter, a district court within the First Circuit followed *Cloutier* to rule against a Rastafarian employee’s challenge to a clean-shavenness policy imposed by Jiffy Lube,<sup>159</sup> while warning that “[i]f *Cloutier’s* language approving employer prerogatives regarding ‘public image’ is read broadly, the implications for persons asserting claims for religious discrimination in the workplace may be grave.”<sup>160</sup>

That warning was prescient. Recently, in *Camara v. Epps Air Service, Inc.*,<sup>161</sup> a magistrate judge rejected the discrimination claim of a Muslim employee who was told that she could not work as a customer service representative at an airport terminal while wearing a hijab<sup>162</sup> because “[t]he perception that customers have of a business is critical to its success,”<sup>163</sup> and some “[c]ustomers might have a problem” seeing an employee wearing a hijab in addition to her uniform.<sup>164</sup> The *Camara* court went on to suggest that the employee should just accept a transfer to a non-customer-facing position<sup>165</sup>—a view that conflicts with the EEOC’s guidance on the topic.<sup>166</sup>

## 2. Avoidance of Proselytization or Judgment

Unlike aesthetic appeal, the second big customer preference here is specific only to religion cases: the preference not to feel proselytized to or judged. This preference comes up when religious employees request an accommodation that allows them to (a) convey a religious message or (b) overtly decline to perform certain aspects

158. *Id.* at 136 (quoting *EEOC v. Sambo’s of Ga., Inc.*, 530 F. Supp. 86, 91 (N.D. Ga. 1981)).

159. *Brown v. F.L. Roberts & Co.*, 419 F. Supp. 2d 7, 9, 11–12 (D. Mass. 2006).

160. *Id.* at 17.

161. 292 F. Supp. 3d 1314 (N.D. Ga. 2017).

162. *Id.* at 1319.

163. *Id.* at 1318.

164. *Id.* at 1322.

165. *Id.* at 1330 (stating that the employee’s refusal to accept the transfer was unreasonable and that she left the employer “no choice but to terminate her employment”).

166. See *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, *supra* note 148 (“May an employer assign an employee to a non-customer contact position because of customer preference? No. Assigning applicants or employees to a non-customer contact position because of actual or feared customer preference violates Title VII’s prohibition on limiting, segregating, or classifying employees based on religion. Even if the employer is following its uniformly applied employee policy or practice, it is not permitted to segregate an employee due to fear that customers will have a biased response to religious garb or grooming. . . . [C]ustomer preference is not undue hardship.”). Federal courts, however, are not bound by EEOC guidance; rather, it is only binding to the extent that the courts find it persuasive. See, e.g., *Townsend v. Benjamin Enters.*, 679 F.3d 41, 53 (2d Cir. 2012).

of the job, and the employer refuses on grounds that this accommodation will offend customers, rendering it unreasonable and/or an undue hardship. Courts have been quite receptive to these arguments. Indeed, as discussed in Part II, this is one of the most preferred preferences.

In cases involving employees' challenges to their employers' refusal to let them convey religious messages to customers, employers generally win. In *Anderson v. U.S.F. Logistics (IMC), Inc.*,<sup>167</sup> for instance, an employer told an employee that she had to stop saying "Have a Blessed Day" when speaking or writing to customers, though they let her keep using the phrase with co-workers.<sup>168</sup> The Seventh Circuit rejected her religious discrimination claim, holding that the employer had done enough to accommodate her.<sup>169</sup> The religious speech was more extreme in *Peterson v. Hewlett-Packard Co.*,<sup>170</sup> where an employee sought to post in his cubicle anti-gay Biblical quotes that would be visible to both colleagues and customers,<sup>171</sup> and in *Knight v. Connecticut Department of Public Health*,<sup>172</sup> where a nurse consultant and sign language interpreter argued that they had a Title VII right to proselytize to clients about topics including homosexuality and church attendance.<sup>173</sup> Both the Ninth Circuit and Second Circuit, respectively, held that Title VII's religious accommodation requirements did not require their employers to allow this speech, apparently because the speech was so likely to offend others.<sup>174</sup>

Not only are courts sympathetic to employers' desire not to offend customers, but they also often note that *allowing* such speech could expose the employer to liability. For example, the *Peterson* court, noting that the employee's anti-gay speech might make his colleagues feel harassed, stated that "an employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his co-workers or deprive them of

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167. 274 F.3d 470 (7th Cir. 2001).

168. *Id.* at 473–74.

169. *Id.* at 476–77.

170. 358 F.3d 599 (9th Cir. 2004).

171. *Id.* at 601.

172. 275 F.3d 156 (2d Cir. 2001).

173. *Id.* at 160–62.

174. *Peterson*, 358 F.3d at 607–08 (noting the effect on colleagues); *Knight*, 275 F.3d at 168 (focusing on the effect on clients).

contractual or other statutory rights.”<sup>175</sup> Similarly, the *Knight* court pointed out that the Connecticut Department of Health was a government entity and that “[p]ermitting appellants to evangelize while providing services to clients would jeopardize the state’s ability to provide services in a religion-neutral matter.”<sup>176</sup>

The case law is slightly more mixed about the role of customer preferences when a religious employee’s requested accommodation involves being excused from certain aspects of the job. Often, courts do not even delve into the likely customer response, because they rule for the employer on grounds that the particular accommodation would impose an undue hardship by requiring the employer to disproportionately burden current employees or hire a new employee, thereby imposing more than de minimis costs.<sup>177</sup>

To the extent that the analysis does take potential customer response into account, the issue seems to be whether the employee’s opt-out would be actually visible to customers and upset them. In *Bruff v. North Mississippi Health Services, Inc.*,<sup>178</sup> for example, a religious employee stated that she was willing to counsel gay clients, but was not willing to counsel them about their romantic/sexual relationships. She therefore sought to be allowed to refer them to other counselors when those matters came up.<sup>179</sup> The Fifth Circuit held that this requested accommodation would indeed impose an

175. *Peterson*, 358 F.3d at 607 (citing *Hardison v. Trans World Airlines, Inc.*, 432 U.S. 63, 81 (1977); and then citing *Opuku-Boateng v. California*, 95 F.3d 1461, 1468 (9th Cir. 1996)).

176. *Knight*, 275 F.3d at 168 (citing *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1020 (4th Cir. 1996); and then citing *Wilson v. U.S. W. Commc’ns*, 58 F.3d 1337, 1341–42 (8th Cir. 1995)).

177. *See, e.g.*, *Noesen v. Med. Staffing Network, Inc.*, 232 F. App’x 581, 584–85 (7th Cir. 2007) (finding that a pharmacist’s request to be relieved of all counter and telephone duties to avoid participating in the distribution of birth control would “require[] other employees to assume a disproportionate workload” (citing *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 501 (5th Cir. 2001)); *Endres v. Ind. State Police*, 349 F.3d 922, 923, 925–26 (7th Cir. 2003) (holding that Title VII does not require police department to accommodate officer who refused to work at a casino for religious reasons in part because “[e]xcusing officers from the risk of unpopular assignments would create substantial costs for fellow officers who must step in, as well as the police force as an entity”); *cf. Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359, 1364–66 (S.D. Fla. 1999) (stating that “[c]ase law supports the Defendant’s argument that having to hire an additional employee in the pharmacy department to work alongside the Plaintiff to ensure that the Plaintiff would never have to sell condoms is more than a de minimis cost,” but noting that there might be other reasonable accommodations that would not impose an undue hardship (citing *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982); and then citing *Lee v. ABF Freight Sys., Inc.*, 22 F.3d 1019, 1023 (10th Cir. 1994)).

178. 244 F.3d 495 (5th Cir. 2001).

179. *Id.* at 497.

undue hardship on the employer.<sup>180</sup> Although the court primarily focused on the burden that this would impose on her fellow counselors, the court also mentioned the discomfort that an abrupt referral would cause her clients, noting that psychological counseling involves “trust relationships developed over time.”<sup>181</sup> The court further stated that, while the “logistical and economic impact” on the employer and other employees alone was enough to constitute an undue hardship, the “potential negative impact” on customers added weight to its decision.<sup>182</sup>

By contrast, in *Hellinger v. Eckerd Corp.*,<sup>183</sup> a federal district court allowed to proceed the religious discrimination claim of an Orthodox Jewish job applicant who was not hired by Eckerd for a pharmacist position because of his refusal to sell condoms.<sup>184</sup> Eckerd had a policy of letting customers purchase over-the-counter items at the pharmacy counter, and there were times when the pharmacist might be the only employee at the counter.<sup>185</sup> Eckerd argued that the only options for accommodating the plaintiff’s religious practice would be to hire an additional pharmacist to work side-by-side with the plaintiff, allow the plaintiff to refuse to sell condoms to customers, or request that the customers take condom purchases to another register.<sup>186</sup> It further argued that all three options would impose undue hardships by cutting into profits and/or violating Eckerd’s customer service policy.<sup>187</sup> The plaintiff responded by suggesting other accommodations, such as being scheduled to work during hours in which a clerk or pharmacy technician was also on duty at the

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180. *Id.* at 503.

181. *Id.* at 501.

182. *Id.* at 501 n.15.

183. 67 F. Supp. 2d 1359 (S.D. Fla. 1999).

184. *Id.* at 1360–61. Note that numerous states have “conscience clauses” or “refusal laws” that give certain employees, particularly those providing healthcare services, the right to refuse to perform services relating to abortion or contraception. For a detailed chart of such laws, see *Conscience and Refusal Clauses*, REWIRE.NEWS (Jan. 17, 2018), <https://rewire.news/legislative-tracker/law-topic/conscience-and-refusal-clauses/> [https://perma.cc/469X-CHGH]. While these laws provide employees with certain state law protections or rights, they do not bear on whether such an employee can win a *federal* religious discrimination lawsuit under Title VII against an employer who declines to accommodate such practices. For a discussion of conscience clauses in the context of a pharmacist’s right to refuse to fill birth control prescriptions, see generally Karissa Eide, Comment, *Can a Pharmacist Refuse to Fill Birth Control Prescriptions on Moral or Religious Grounds?*, 42 CAL. W. L. REV. 121 (2005).

185. *Hellinger*, 67 F. Supp. 2d at 1361 (“Even in some stores that employ drug clerks and pharmacy technicians, there are times when the pharmacist may work alone.”).

186. *Id.* at 1364.

187. *Id.*

pharmacy counter to ring up sales.<sup>188</sup> The court ruled that because there were still genuine disputes of material fact, summary judgment should be denied.<sup>189</sup> Thus, the *Hellinger* court left open precisely what role potential customer offense should play in the analysis. It did somewhat minimize the concerns about customer offense by describing them as speculative, but it also emphasized the plaintiff's evidence that there were ways to accommodate him that might be altogether invisible to the customer.<sup>190</sup>

### 3. Convenience

The last preference that appears in the reasonable accommodation/undue hardship opening, albeit rarely, is the convenience preference. As with the BFOQ opening, convenience tends to be a supporting, rather than primary, preference. Recall that in the BFOQ context, courts have been receptive to the idea that same-sex service can become a BFOQ when the alternatives—such as having all females leave the restroom when a male custodian comes in, or having very long airport security screening lines to ensure that all pat-downs are performed by an employee of the same sex—will unacceptably inconvenience customers.<sup>191</sup>

Similarly, employees' refusal to perform certain aspects of a job for religious reasons may not only offend customers but also inconvenience them by forcing them to wait for or find another employee who can complete the task.<sup>192</sup> Thus, just as the convenience preference can help create a BFOQ, so too can the convenience preference support the nonproselytization/judgment preference. In the latter context, the two preferences work together to yield the

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188. *Id.* at 1366.

189. *Id.*

190. *Id.*

191. *See supra* Section I.A.1.

192. One recent news story documented the ordeal of a woman who, after being diagnosed with an unviable pregnancy, faced a Walgreens pharmacist who refused to fill her prescription for medication that would induce a miscarriage. *See* Louis Lucero II, *Walgreens Pharmacist Denies Woman with Unviable Pregnancy the Medication Needed to End It*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/us/walgreens-pharmacist-pregnancy-miscarriage.html> [<https://perma.cc/9G58-XN4L> (dark archive)]. Her Facebook post, which went viral, described not only the logistics of having to go to another Walgreens the next morning for the prescription but also the sadness and offense she felt: "I left Walgreens in tears, ashamed and feeling humiliated by a man who knows nothing of my struggles but feels it is his right to deny medication prescribed to me by my doctor." Nicole Mone, FACEBOOK (June 22, 2018), <https://www.facebook.com/nicole.arteagal?lst=1188816819%3A1599340517%3A1529802886> [<https://perma.cc/Q8J4-QT5R> (staff-uploaded archive)].

conclusion that a requested accommodation is unreasonable and/or will impose an undue hardship.<sup>193</sup>

The reasonable accommodation/undue hardship defense also appears in the ADA.<sup>194</sup> Unlike religious discrimination cases, however, customer preferences are generally absent from employer defenses to claims of disability discrimination. This absence stems from the ADA's stringent definition of undue hardship to mean "action requiring significant difficulty or expense,"<sup>195</sup> as well as its parallel provision that reasonable accommodations can indeed include numerous forms of job modifications.<sup>196</sup> Of course, there is still the *potential* for customer preferences to provide the basis of a successful employer defense here. For example, a disabled employee's requested accommodation could theoretically be so upsetting to customers that it would impose significant difficulty on an employer, thus removing the obligation to provide it. But it is difficult to imagine such a situation. After all, accommodations for disabled employees are unlikely to offend customers in the way that certain religious accommodations, such as allowing proselytization, might. Furthermore, the customer inconveniences that might result from accommodations for disabled employees, while perhaps imposing more than a *de minimis* cost, are unlikely to reach the level of imposing a significant expense. Thus, it is unsurprising that so far there have been no cases along these lines.

## II. A TAXONOMY OF THE PREFERRED PREFERENCES

In the above discussion, six preferred preferences came to the fore: aesthetic appeal (in various forms), physical privacy from the opposite sex, psychological comfort with the same sex, an English-speaking environment, avoidance of proselytization or judgment, and convenience. Each of these preferences has, at least occasionally,

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193. For example, in *Noesen v. Medical Staffing Network, Inc.*, 232 F. App'x 581 (7th Cir. 2007), the Seventh Circuit ruled against a pharmacist, who was terminated after he placed customers on indefinite holds when they sought to fill birth control prescriptions, because the accommodation he requested (refusing to interact in any way with customers seeking birth control) imposed an undue hardship since the only alternatives were keeping customers waiting or forcing other employees to assume a disproportionate workload. *Id.* at 583–85. Thus, the convenience preference—both for customers and for colleagues—was likely relevant in the analysis.

194. See 42 U.S.C. §§ 12112(b)(5)(A), 12113(a) (2012).

195. *Id.* § 12111(10)(A).

196. *Id.* § 12111(9) (including, as examples of reasonable accommodations, "job restructuring, part-time or modified work schedules, reassignment to a vacant position . . . and other similar accommodations").

formed the basis of a successful employer defense to what would otherwise seem like actionable discrimination.

This Part hones in on each preference, looking across the different statutes and models of discrimination to evaluate the preference's overall status as either strongly, moderately, or weakly preferred. The strongly preferred preferences are those to which courts frequently defer; the moderately preferred preferences are those to which courts sometimes defer; and the weakly preferred preferences are those to which courts occasionally defer. This Article's examination of the case law indicates the strongly preferred preferences are physical privacy from the opposite sex, an English-speaking environment, and avoidance of proselytization/judgment; the moderately preferred preferences are aesthetic appeal and convenience; and the weakly preferred preference is psychological comfort with the same sex.

But why does the hierarchy shake out this way? This Article's collective look at the preferred preferences illuminates a larger theme. Although courts do not explicitly say this, there are several interconnected reasons why these preferences are preferred, perhaps unconsciously so. As a threshold matter, the preferences intuitively strike courts as reasonable and natural, both because they do not seem invidiously discriminatory and because they align with ingrained social conventions and norms. Once that threshold is met, courts then (1) consider the preference much weightier than a mere preference and/or (2) view compliance with the preference as imposing only a minor burden on employees. Judicial deference to the preference, as this Article will show, varies according to the extent to which they find the above factors satisfied.

This Part also considers a seventh possible preferred preference that is likely to come before courts soon: the customer preference for diversity, which large corporations are increasingly expressing in terms of, for instance, law firms' staffing of their matters.<sup>197</sup> Under the current approach, this is likely to become at most a *weakly preferred* preference, meaning that it will only rarely provide the basis for a successful employer defense.

#### A. *Aesthetic Appeal*

The aesthetic appeal preference appears frequently. It enters through three different customer preference openings: (1) the equal burdens doctrine for measuring whether disparate treatment has

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197. See *infra* Section II.G.

occurred; (2) the job-related and consistent with business necessity defense to disparate impact claims; and (3) the reasonable accommodation/undue hardship limitation on employers' obligation to accommodate their employees' religious practices.

Differential treatment based on appearance is a widely examined phenomenon in both law and social science. Indeed, a related debate in employment law is whether antidiscrimination laws should explicitly add appearance *itself*—whether limited to immutable physical attributes or also including choices like hairstyle, dress, body piercings, and makeup—as a protected characteristic.<sup>198</sup> Some, though not many, state and local jurisdictions have adopted laws prohibiting some forms of appearance discrimination.<sup>199</sup> For this Article's purposes, however, the issue is narrower: whether customers' expressed or assumed preferences relating to employee appearance can justify policies that adversely affect employees on the basis of *already*-protected characteristics under federal law like sex, race, and religion. Here, the challenged policies typically involve mutable aspects of appearance.

For all three of the customer preference openings, we have seen that the aesthetic appeal preference can justify such policies—up to a point. Indeed, the status of the aesthetic appeal preference is quite consistent across the three different openings. Regardless of the domain, courts generally recognize that aesthetic appeal preferences—for things like fully made-up faces, clean-shavenness, no dreadlocks, no body piercings, and/or adherence to other appearance

198. See, e.g., DEBORAH L. RHODE, *THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW* 142–43, 154–55 (2010); Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 7–8, 30–31 (2000); Jennifer Bennett Shinall, *Distaste or Disability? Evaluating the Legal Framework for Protecting Obese Workers*, 37 BERKELEY J. EMP. & LAB. L. 101, 121–22, 135–37 (2016); Enbar Toledano, *The Looking-Glass Ceiling: Appearance-Based Discrimination in the Workplace*, 19 CARDOZO J.L. & GENDER 683, 685–86, 704–14 (2013).

199. D.C. CODE § 2-1401.01 (2018) (prohibiting discrimination based on physical appearance); MICH. COMP. LAWS § 37.2102(1) (1976) (prohibiting discrimination based on height and weight); S.F., CAL., POLICE CODE art. 33, § 3301 (2018) (prohibiting discrimination based on height or weight); SANTA CRUZ, CAL., MUNICIPAL CODE § 9.83.010 (2017) (prohibiting discrimination based on “physical characteristics”); URBANA, ILL., CODE OF ORDINANCES art. III, div. 1, § 12-39 (1975) (prohibiting discrimination based on personal appearance, defined as “weight, height, facial features, or other aspects of appearance”); HOWARD COUNTY, MD., CODE §§ 12.200(II), 12.201(XV) (2008) (prohibiting discrimination based on personal appearance); BINGHAMTON, N.Y., CODE OF ORDINANCES § 45-2 (2008) (prohibiting discrimination based on height or weight); MADISON, WIS., CODE OF ORDINANCES § 39.03(1) (2018) (prohibiting discrimination based on physical appearance).

conventions—are indeed preferences, not necessities. But courts are still fairly deferential to many iterations of the aesthetic appeal preference, because they view the preferences as natural and reasonable, and do not consider it particularly burdensome for employees to comply. The limit only comes when an aesthetic appeal preference imposes such an obvious, differential burden in connection with a protected characteristic that courts cannot ignore it.

The view of conventional aesthetic appeal preferences as natural and reasonable permeates the case law. In *Craft*, for instance, the Eighth Circuit deferred to the district court's conclusion that “any extra attention to Craft was the gradual result of her indifference to the station's *legitimate* need that she maintain a *professional businesslike image* appropriate to Kansas City.”<sup>200</sup> Similarly, in *Jespersen*, the Ninth Circuit explicitly justified its ruling in favor of the employer by stating that for “grooming standards, the touch-stone is *reasonableness*.”<sup>201</sup> As Robert Post has observed, courts seem to follow “the conviction that employers reasonably may impose sex-based stereotypes in matters of grooming, so long as these stereotypes conform to traditional gender conventions.”<sup>202</sup>

This attitude toward aesthetic appeal preferences is not limited to gender conventions. As discussed above, in *Cloutier*, the First Circuit viewed as reasonable Costco's concern that a cashier with an eyebrow piercing would bother customers, explaining that it was within Costco's discretion to promote a “neat, clean and professional image.”<sup>203</sup> Similarly, in *Camara*, a magistrate judge ruled against a Muslim employee who sought to wear a hijab with her uniform,<sup>204</sup> noting that the employer's denial of her request stemmed from its “policy requiring its employees to present a neat, professional appearance.”<sup>205</sup>

Because these preferences align with courts' views about what it means to be “professional,” they sometimes fail to recognize or acknowledge that the preferences can be burdensome on some employees in ways that directly implicate their sex, race, or religion. Both the *Craft* and *Jespersen* courts explicitly minimized the differential burdens that the hair and makeup expectations had on

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200. *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1217 (8th Cir. 1985) (emphasis added).

201. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1113 (9th Cir. 2006) (en banc) (emphasis added).

202. Post, *supra* note 198, at 34.

203. *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 136 (1st Cir. 2004).

204. *Camara v. Epps Air Serv., Inc.*, 292 F. Supp. 3d 1314, 1319 (N.D. Ga. 2017).

205. *Id.* at 1318.

female employees, insisting that they were roughly equal to those imposed on male employees, despite significant evidence to the contrary. Similarly, in *Catastrophe Management Solutions*, the Eleventh Circuit acknowledged that “dreadlocks are a ‘natural outgrowth’ of the texture of black hair” but then immediately added that they were still “not . . . an immutable characteristic of race.”<sup>206</sup> The court later described the plaintiff’s refusal to cut her dreadlocks as a “personal decision.”<sup>207</sup> The court thus implied that because dreadlocks were not literally immutable, it would not significantly burden African American female employees to comply with a no-dreadlocks rule.<sup>208</sup>

A variant of this nonburdensome rationale also appeared in *Camara*, where the court suggested that the Muslim employee’s need to wear a hijab had been reasonably accommodated by offering to transfer her to a position where customers could not see her.<sup>209</sup> “If she wanted to wear a hijab at work, plaintiff had a duty to accept the transfer offer, but she did not,” the court reasoned.<sup>210</sup> This is analogous to other courts’ apparent view that the plaintiff-employees could have simply worn more makeup or taken out their dreadlocks; if they chose not to do so, they had to live with the result.

An interesting thought experiment is whether courts would be so deferential to an aesthetic requirement that *deviated* from convention. Angela Onwuachi-Willig has sketched out such a scenario, asking readers to consider what would happen if an employer required a white woman to wear her hair in cornrows, dreadlocks, or twists.<sup>211</sup> She predicts that “[m]any courts (and many people) in our society would find the notion of forcing white women to abide by a grooming policy that does not acknowledge or recognize the structure and

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206. *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1030 (11th Cir. 2016), *reh’g denied*, 876 F.3d 1273 (11th Cir. 2017).

207. *Id.* at 1035.

208. *See id.* at 1030 (differentiating “discrimination on the basis of black hair texture (an immutable characteristic)” with discrimination “on the basis of black hairstyle (a mutable choice)”). Significantly, the court reached this conclusion notwithstanding the EEOC’s and scholar’s briefing about the financial, psychological, and physical burdens imposed by the rule. *See Greene, supra* note 121, at 1011–14.

209. *Camara*, 292 F. Supp. 3d at 1327–28.

210. *Id.* at 1330. Not all courts have followed this approach. *See, e.g., Muhammad v. N.Y.C. Transit Auth.*, 52 F. Supp. 3d 468, 473, 484 (E.D.N.Y. 2014) (holding that an employee could go to trial on her claim that the New York City Transit Authority, in transferring her from a customer-contact position after she refused to remove or cover her khimar, failed to accommodate her practice of Islam).

211. Onwuachi-Willig, *supra* note 119, at 1080–82.

texture of their hair ludicrous.”<sup>212</sup> Similarly, Robert Post writes that it is only those employers whose requirements track gender-appearance conventions who tend to be “regarded as enforcing a ‘neutral’ baseline.”<sup>213</sup>

As noted above, deference to the aesthetic appeal preference is not unlimited. When an employee can prove that such a preference imposes a significant, objectively measurable burden in connection with a protected characteristic, courts close the door to the relevant doctrinal opening through which the preference can enter. The cases rejecting nonanalogous body mass limits for male and female employees (e.g., large frame for men; medium frame for women) exemplify this limit, as does the developing solicitude for the burden placed on transgender employees forced to comply with requirements at odds with their gender identity. So does courts’ differential treatment of no-beard policies stemming from assumed customer preferences for clean-shavenness. Men have been successful in obtaining outright exemptions when they cannot shave because of an objective medical condition,<sup>214</sup> but fare less well in court when they wear beards for religious reasons.<sup>215</sup> In the latter context, the possibility of an outright exemption is not discussed; instead, the only judicial analysis is of whether the religious plaintiffs were entitled to be transferred to a non-customer-contact position.<sup>216</sup>

One possible explanation for the differential treatment is that the two no-beard situations implicate two different customer preference openings: respectively, the business necessity opening within disparate impact liability versus the reasonable accommodation/undue hardship opening within religious

212. *Id.* at 1082.

213. Post, *supra* note 198, at 29.

214. See, e.g., *Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795, 799 (8th Cir. 1993); *Johnson v. Memphis Police Dep’t*, 713 F. Supp. 244, 247–48 (W.D. Tenn. 1989); *Richardson v. Quik Trip Corp.*, 591 F. Supp. 1151, 1156 (S.D. Iowa 1984).

215. See, e.g., *EEOC v. United Parcel Serv.*, 94 F.3d 314, 315 & n.1, 320–21 (7th Cir. 1996) (remanding case for trial on the question of whether UPS had, in fact, offered to a religious, beard-wearing employee the reasonable accommodation of a comparable non-public-contact position); *Brown v. F.L. Roberts & Co.*, 419 F. Supp. 2d 7, 14–15, 17 (D. Mass. 2006) (suggesting that if the employer offered a bearded employee a transfer to a comparable position, that would have been a reasonable accommodation, and ultimately concluding that the employer made out its undue hardship defense anyway); *EEOC v. Sambo’s of Ga., Inc.*, 530 F. Supp. 86, 89–92 (N.D. Ga. 1981) (rejecting claim of Sikh restaurant employee who wore a beard for religious reasons on the grounds that customers viewed beards as unsanitary and “that no reasonable accommodation can be made without undue hardship”). As noted above, this is an area where the courts and the EEOC sometimes part company.

216. *United Parcel Serv.*, 94 F.3d at 319–20.

discrimination liability. It is notable, however, that the identical language about the need for reasonable accommodations for bearded men has been used by courts in *both* contexts. Indeed, the Eighth Circuit specifically borrowed the reasonable accommodation standard to explain in *Bradley* why Domino’s deliverymen suffering from PFB deserved outright exemptions from the beard ban.<sup>217</sup>

Thus, the key factor for whether courts defer to an aesthetic preference seems not to be the doctrinal opening in which it appears: equal burdens; business necessity; or reasonable accommodation/undue hardship. Rather, the outcome-determinative question is how compelling the court finds the burden imposed on the employee. Courts tend to be more moved by the plight of men who cannot shave for medical reasons than of those who wear beards for religious reasons, just as they are more moved by the burden that sex-based appearance codes place on transgender employees than on cisgender employees.<sup>218</sup>

Because courts defer to the aesthetic appeal preference somewhat frequently—at least absent relatively extreme circumstances—this Article classifies it as *moderately preferred*.

#### B. *Physical Privacy from the Opposite Sex*

The physical privacy preference is, in some ways, related to the aesthetic appeal preference. Both preferences involve *bodies*: the aesthetic appeal preference involves the employee’s body, while the physical privacy preference involves the customer’s nude body (and sometimes its tactile interaction with the employee’s body). Moreover, both preferences often implicate aspects of body stereotyping—what Noa Ben-Asher describes as “stereotyping along the male/female binary for a range of regulatory purposes.”<sup>219</sup> As Ben-Asher explains, although sex discrimination based on division-of-labor stereotyping is typically unlawful, sex discrimination based on body stereotyping is often permissible.<sup>220</sup> Both the aesthetic appeal

217. *Bradley*, 7 F.3d at 799 (importing the “reasonable accommodation” language from the context of religious accommodation into the context of disparate impact by stating “we hold only that *reasonable accommodation* must be made for members of the protected class who suffer from PFB” (emphasis added)).

218. See YURACKO, *supra* note 34, at 98.

219. Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187, 1191 (2016).

220. *Id.* at 1192 (“[T]hree types of reasoning have supported the permissible branch of sex-stereotyping law. The first type is reasoning from cultural or community norms. A prominent contemporary example of this is the validation of sex-based appearance codes . . . . The second type of reasoning when validating body stereotyping is from ‘real’

preference and the physical privacy preference fall into the body-stereotyping category, connecting up with traditional gender-based conventions about appearance, modesty, and heterosexual desire.

The physical privacy preference, however, has a narrower and deeper bite than the aesthetic appeal preference. It shows up in only one opening—the BFOQ defense to intentional sex discrimination—and receives great deference there. And, of course, this is true even though the preference implicates a protected characteristic right on its face. Why does this preference carry so much weight? I suggest that it is because it scores very highly on the considerations listed above: privacy for one’s nude body from the opposite sex is very ingrained in our society, so much so that courts view it more as a *need* than a *preference*. Additionally, while the burden factor might seem to cut the other way—a real burden is certainly imposed on a job applicant who is not hired because of his or her sex—the preference does not necessarily favor either sex in the aggregate.

Yuracko has insightfully dissected why the physical privacy preference is so strongly preferred.<sup>221</sup> “The idea that individuals’ associational preferences have different degrees of legitimacy and should be given different degrees of social respect is not new,” she argues.<sup>222</sup> Physical privacy preferences sit at the top of the hierarchy because they are so closely tied to one’s “sense of self.”<sup>223</sup> Courts are quite explicit about this view: in one of the early BFOQ labor nurse cases, for example, the court wrote that “the body involves the most sacred and meaningful of all privacy rights,”<sup>224</sup> adding that the desire for physical modesty “is impelled by elementary self-respect and personal dignity.”<sup>225</sup> Indeed, courts often assert that these desires are *more* than preferences. As one district court explained in a restroom case, “[m]ore is involved . . . than a mere preference by customers for one method of operation over another. The policy at issue in the instant case involves a recognition of a fundamental concern over the

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biological differences. An example of this is a line of cases that affirm the inferior status of unwed fathers . . . . The third type of reasoning in support of body stereotyping is from heterosexual risk and privacy. An example of this is the validation of sex-segregated spaces . . . .” (footnotes omitted).

221. See generally Yuracko, *supra* note 7 (analyzing courts’ rhetoric in explaining and defending the difference between permissible and impermissible sex discrimination in employment).

222. *Id.* at 191.

223. *Id.*

224. *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191, 1193 (E.D. Ark. 1981), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982).

225. *Id.* (quoting *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963)).

exposure of one's body in the presence of a member of the opposite sex."<sup>226</sup>

Particularly interesting is that courts began holding female sex to be a BFOQ for labor nurse positions even at a time (the late 1970s) when most OB-GYNs were still male.<sup>227</sup> Yuracko hypothesizes that “[c]ourts tolerate[d] this seeming illogic because what is important is not protecting privacy per se, but protecting privacy preferences, which courts deem to be deeply intertwined with individuals’ sense of self.”<sup>228</sup> Indeed, courts often reach these sorts of conclusions on summary judgment motions, holding that a trial is unnecessary.

Numerous scholars, including Noa Ben-Asher, Amy Kapczynski, and Naomi Schoenbaum, have also argued that heteronormative assumptions are at the core of the physical privacy BFOQ. They assert that courts defer to this preference (and/or that customers express it in the first place) out of the misplaced view that sexual desire can only exist between an employee and customer of the opposite sex.<sup>229</sup> “The same-sex BFOQ responds to this presumed heterosexual desire by denying opposite sex contact,” Ben-Asher writes.<sup>230</sup> In other words, these scholars accuse courts of wrongly assuming that there cannot be sexual tension when an employee sees a same-sex customer naked, and deferring to the customer preference for same-sex service on that basis. Although this represents an incomplete picture of why courts have been so deferential to this BFOQ—it seems unlikely, for instance, that courts are focused on sexual attraction or tension when they defer to laboring women’s desire for a female nurse—it is certainly a piece of the puzzle.

Not only does the physical privacy BFOQ preference dovetail with an ingrained social convention, to the point where it strikes courts as a need, but there is also an argument that the burden it imposes with respect to sex is not unacceptably large. Although the

226. *Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410, 1421 (N.D. Ill. 1984) (citing *Brooks v. ACF Indus., Inc.*, 537 F. Supp. 1122, 1132 (S.D. Va. 1982); and then citing *Fesel v. Masonic Home of Del., Inc.*, 447 F. Supp. 1346, 1352 (D. Del. 1978)).

227. *Fesel v. Masonic Home of Del., Inc.*, 447 F. Supp. 1346, 1354 (D. Del. 1978); cf. Mary Alex Bernard, *Where Did All the Male Ob-Gyns Go?*, PHILA. INQUIRER (Aug. 29, 2018), <http://www2.philly.com/philly/health/obgyn-obstetrics-women-men-doctors-decline-20180829.html> [<https://perma.cc/VK3G-MP8V>] (noting that “57 percent of active ob-gyns were men” in 2008).

228. Yuracko, *supra* note 7, at 195.

229. See Ben-Asher, *supra* note 219, at 1225 (“The same-sex privacy exception often presumes heterosexuality . . . .”); Naomi Schoenbaum, *The Law of Intimate Work*, 90 WASH. L. REV. 1167, 1192 (2015); Amy Kapczynski, Note, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1287 (2003).

230. Ben-Asher, *supra* note 219, at 1225.

physical privacy preference definitely results in *individual harms*, there is a “symmetry of exclusion” here, as Yuracko puts it.<sup>231</sup> She explains, “[t]here is at least a theoretical parity to sex-based hiring on behalf of privacy: while women may be denied certain jobs to protect men’s privacy, men will be denied the same range of jobs to protect women’s privacy.”<sup>232</sup> Of course, this may not hold true in practice. If, for instance, women are more concerned about physical privacy in certain situations than men are, there may still be a differential burden in the aggregate. Similarly, as Yuracko points out, there are some jobs where the “customers” are exclusively or mostly of one sex.<sup>233</sup> At least theoretically, however, there is some opportunity for distributional parity. And, of course, there is a limited universe of jobs that involve seeing naked customers.

Because courts consistently defer to the physical privacy preference once customer nudity is involved, this Article classifies the preference as *strongly preferred*.

### C. *Psychological Comfort with the Same Sex*

As we have seen, the story changes dramatically when customer nudity drops out of the picture. Once a preference for same-gender service or care cannot be framed as a desire for physical privacy from the opposite sex—and instead rests on psychological comfort with the same sex (sometimes referred to as “therapeutic privacy”)—much of the judicial deference dissolves and the BFOQ defense is rejected. Although the psychological comfort preference *occasionally* gets deference, it is the most weakly preferred preference in the hierarchy.

Ironically, some of the physical privacy cases are themselves really more about psychological comfort than physical modesty.<sup>234</sup> In particular, many articles about women’s preferences for female OB-GYNs indicate that for those women who do prefer female OB-GYNs (slightly over half of all American women, according to one recent meta-analysis),<sup>235</sup> the desire comes not from unease about having male doctors examine their bodies but from a greater comfort

231. Yuracko, *supra* note 7, at 181.

232. *Id.* (footnote omitted).

233. *Id.* (providing the example of working in an OB-GYN unit).

234. See generally Emily Gold Waldman, *The Case of the Male OB-GYN: A Proposal for Expansion of the Privacy BFOQ in the Healthcare Context*, 6 U. PA. J. LAB. & EMP. L. 357 (2004) (discussing the reasons for preferences for female OB-GYNs and the legal ramifications of those reasons).

235. Kyle J. Tobler, et al., *Gender Preference of the Obstetrician Gynecologist Provider: A Systematic Review and Meta-Analysis*, 127 OBSTETRICS & GYNECOLOGY (SUPP.) 43S, 43S (2016).

level in discussing intimate topics like sex drive.<sup>236</sup> Relatedly, some women believe that female OB-GYNs can better appreciate their specific concerns about issues like menstruation, childbirth, and menopause, given their shared experience.<sup>237</sup> All-female OB-GYN practices sometimes market themselves along precisely those lines.<sup>238</sup>

Analogous psychological comfort preferences are also expressed by men. A January 2018 *New York Times* article about the increase in male nurses described the physical *and* psychological privacy interests that can lead male patients to prefer male nurses in certain situations.<sup>239</sup> One male student nurse at a VA hospital, for example, stated that “I work on this floor with people who just had urology surgery or amputations, and they have told me that when I come in the room and shut the door behind me, they feel more understood and can drop the tough guy attitude.”<sup>240</sup> Another article described men’s greater comfort level with male healthcare providers for certain forms of plastic surgery, such as penile enlargement.<sup>241</sup>

Somewhat surprisingly, there have not been many legal challenges to preferential hiring of female OB-GYNs, the most well-known example of this phenomenon. The only decision is *Veleanu v. Beth Israel Medical Center*,<sup>242</sup> which involved the related question of whether a medical practice’s policy of accommodating patients’ requests to see female OB-GYNs amounted to discrimination against the male plaintiff OB-GYN.<sup>243</sup> The court held that it did not, citing the labor nurse cases and stating that “female patients may have a legitimate privacy interest in seeking to have female doctors perform their gynecological examinations.”<sup>244</sup> But as more such challenges are

236. Waldman, *supra* note 234, at 379–80.

237. *Id.* at 379.

238. See, e.g., *All About Women - Tower Health Medical Group*, TOWER HEALTH, <https://reading.towerhealth.org/locations/profile/?id=329> [<http://perma.cc/98VT-T2C4>]. One Pennsylvania practice’s website, for example, states:

Just like their patients, All About Women providers are are [sic] mothers, daughters, sisters, wives, and friends. As women, they too understand the joy of childbirth and life’s milestones experienced by women of all ages. That personal insight gives them a unique approach to treating patients and providing the best in women’s healthcare.

*Id.*

239. Claire Cain Miller, *The Time Is Ripe for Male Nurses*, N.Y. TIMES, Jan. 5, 2018, at B1.

240. *Id.*

241. See Abby Ellin, *Refuge in the Company of Men*, N.Y. TIMES, Dec. 21, 2017, at D8.

242. No. 98 CIV. 7455(VM), 2000 WL 1400965 (S.D.N.Y. Sept. 25, 2000).

243. *Id.* at \*8.

244. *Id.*

brought, it is a safe prediction that the physical privacy argument will carry the laboring oar for the defense, even though psychological comfort may be a more accurate label for what is actually occurring.<sup>245</sup>

Why does a same-gender preference that is more about mind than body get so much less deference? The easy answer is that, even though the psychological comfort preference does align with certain social conventions about male-female interactions, and thus the threshold requirement is met, courts are much quicker to dismiss it as a “mere preference” rather than a need. As noted above, for example, the *Hi 40 Corp.* court was very skeptical of a diet center’s defense that its almost exclusively female clientele expressed a strong preference for discussing weight-loss and body-image concerns with female counselors.<sup>246</sup> The court acknowledged that customers were actually expressing these sentiments but viewed them as irrelevant.<sup>247</sup> Indeed, the court stated that it did “not accept the proposition that . . . customers have a privacy interest that extends to the counseling function,” because “*real* privacy interests . . . only extend to” the physical concerns.<sup>248</sup>

But that doctrinal approach, of course, just begs the question of why physical privacy preferences are so much more compelling to courts. Here, Ben-Asher’s emphasis on the salience of *body stereotyping* is particularly relevant. As Ben-Asher writes, courts consistently reject division-of-labor stereotyping, i.e., differential treatment stemming from traditional presumptions about “men’s work” versus “women’s work.”<sup>249</sup> But courts are more willing to accept body stereotyping, i.e., differential treatment for male and female bodies, on grounds that such stereotypes are linked to “‘real’ biological differences” between men and women.<sup>250</sup> Once there is no customer nudity and the body is less salient, the cases seem to shift from the favored body-stereotyping category into the disfavored division-of-labor category.

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245. See Paul-Emile, *supra* note 42, at 486 (stating that, “unlike the prototypical BFOQ situation, the relationship between physician and patient in the hospital context is not defined by issues of personal modesty but is instead fundamentally diagnostic and therapeutic”).

246. EEOC v. Hi 40 Corp., 953 F. Supp. 301, 303, 305–06 (W.D. Mo. 1996).

247. See *id.* at 303, 305.

248. *Id.* at 304 (emphasis added); see also Olsen v. Marriott Int’l, Inc., 75 F. Supp. 2d 1052, 1068 (D. Ariz. 1999) (holding that female sex may not be a BFOQ for a massage therapist position because the massage did not involve complete nudity).

249. Ben-Asher, *supra* note 219, at 1190–92.

250. *Id.* at 1192.

In addition to faring poorly on the need versus preference issue, the psychological comfort preference prompts courts to express more concern about the burden imposed on the disfavored employees.<sup>251</sup> There are two likely reasons for this. First, the burden imposed by the physical privacy preference is at least limited to the small universe of occupations that involve seeing or touching a customer's naked body. Once psychological comfort enters the mix, courts may be worried about the potential for a slippery slope. Second, although courts have never articulated this, there may be some concern that this preference will particularly favor women—i.e., that psychological comfort with the same gender tends to be expressed more by female than male customers. There is indeed some empirical support for this possible concern, particularly with respect to therapist preference.<sup>252</sup>

That said, even here, courts will occasionally defer to the preference. As discussed above, in *Healey*, the Third Circuit accepted a psychiatric hospital's argument that its children and adolescent patients needed same-sex care because of both psychological concerns (including the need for role modeling and greater comfort discussing menstruation and sexuality) as well as physical concerns (since young patients sometimes needed to be bathed).<sup>253</sup> The court's extended discussion of the patients' psychological interests here suggests that it would have ruled this way even without the physical bathing concern, but it is hard to know for sure.<sup>254</sup>

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251. See, e.g., *Hi 40 Corp.*, 953 F. Supp. at 304–05 (minimizing the psychological interest of the female customers and concluding that, “[o]n the other hand, the employment restriction utilized by Physicians Weight Loss, namely the refusal to hire male counselors, has a dramatic impact on the employment opportunity of male applicants. . . . [T]he privacy interests of customers cannot be used to justify a policy of not hiring male counselors because the minimal impact of male counselors on the privacy interests of customers is outweighed by the substantial impact on the employment opportunities of male applicants.”).

252. See, e.g., Sara J. Landes et al., *Women's Preference of Therapist Based on Sex of Therapist and Presenting Problem: An Analog Study*, 26 COUNSELLING PSYCHOL. Q. 330, 337 (2013) (surveying female college students and finding that “[e]ighty-seven percent of the women surveyed preferred the female therapist, regardless of the presenting problem”); Cynthia F. Pikus & Christopher L. Heavey, *Client Preferences for Therapist Gender*, 10 J.C. STUDENT PSYCHOTHERAPY 35, 39 (1996) (surveying 116 college students and finding that 56% of women preferred a female therapist while 58% of men had no preference); Matthew B. Wintersteen, Janell L. Mensinger & Guy S. Diamond, *Do Gender and Racial Differences Between Patient and Therapist Affect Therapeutic Alliance and Treatment Retention in Adolescents?*, 36 PROF. PSYCHOL.: RES. & PRAC. 400, 400 (2005) (summarizing research findings as indicating that “[g]enerally, female patients tend to prefer female therapists”).

253. *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 133–34 (3d Cir. 1996).

254. *Id.* (stating that it had reached its BFOQ conclusion “due to both therapeutic and privacy concerns”); see also *Henry v. Milwaukee County*, 539 F.3d 573, 583–86 (7th Cir.

Because courts only rarely defer to the preference for psychological comfort with the same sex, this Article classifies the preference as *weakly preferred*.

#### D. English-Only Environment

In light of courts' skepticism toward customers' psychological privacy interests, the significant judicial deference to the next customer preference—an English-only environment—is striking. This preference enters through one opening—the business necessity defense to disparate impact—and is often successful in court. Courts typically accept that such policies have a disparate impact based on national origin, but then conclude that the policies are justified by business necessity because they respond to customer preference.

If this preference were limited to English-speaking customers' desire for employees to speak English in their interactions *with them*, it would be unsurprising that it fares so well. But the preference is broader than that. In numerous cases, employers have said that employees have to speak English whenever they are in the customers' *presence*—and courts have been deferential.<sup>255</sup>

Once again, the above-described factors illuminate how courts reach that result. As an initial matter, in keeping with the threshold requirement described previously,<sup>256</sup> courts view this preference as

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2008) (accepting that same-sex juvenile counselors might be necessary during the daytime shifts in order to perform the “direct role modeling/mentoring form of supervision” most effectively, but rejecting the employer’s argument that this was necessary at night because the juveniles were sleeping most of that time).

255. It is important to note, however, that courts are much less deferential when the rule requires employees to speak English at *all* times, even outside customers' presence. *See, e.g.*, *EEOC v. Premier Operator Servs., Inc.*, 75 F. Supp. 2d 550, 556 (N.D. Tex. 1999) (noting the distinction between rules that apply to all times and places and those that are more limited). Regulations also differentiate between rules that require “employees to speak only English at all times in the workplace,” which are viewed as presumptively violating Title VII, and English-only rules that are applied “only at certain times,” which can be permissible if “justified by business necessity.” 29 C.F.R. § 1606.7(a)–(b) (2018). That said, the EEOC’s guidance expresses some skepticism even about the latter category of cases. *See* U.S. EQUAL EMP’T. OPPORTUNITY COMM’N, EEOC No. 915.005, ENFORCEMENT GUIDANCE ON NATIONAL ORIGIN DISCRIMINATION § V(C)(3)(d)(2) (2016), <https://www.eeoc.gov/laws/guidance/national-origin-guidance.cfm> [<http://perma.cc/4GHL-GN5N>] (“If coworkers or customers are concerned about exposure to languages they do not understand, or about gossip in these languages, one approach is to address these concerns on an individualized basis without resorting to language-restrictive policies. A language-restrictive policy that has a disparate impact on a particular group cannot be justified if an employer can effectively promote safe and efficient business operations through a policy that does not disproportionately harm protected national origin groups.” (footnotes omitted)).

256. *See supra* Part II.

reasonable and not invidiously discriminatory. This is most clearly illustrated by the *Sephora* case. In deferring to Sephora's assertion that customers preferred salespeople to speak English in their presence, the court stated that "[h]elpfulness, politeness and approachability . . . are central to the job of a sales employee at a retail establishment, and are distinct from customers' prejudices."<sup>257</sup> From there, the *Sephora* court quickly segued into elevating the preference beyond a mere preference. Indeed, the *Sephora* court suggested that the customer preference for an English-only environment was *not* a preference, stating that "as we explained above we do not believe Sephora's justifications rest on customer preference."<sup>258</sup> In other words, once the preference did not reflect a prejudice, it was not even a "preference" at all.<sup>259</sup>

Particularly telling is that courts generally decline even to evaluate whether customers actually feel disturbed by hearing employees converse in languages other than English. In *Kania v. Archdiocese of Philadelphia*,<sup>260</sup> for instance, the district court deferred to the archdiocese's rule that employees could not speak Polish at all during business hours, speculating that speaking a language other than English could "alienat[e] . . . perhaps church members themselves."<sup>261</sup> The *Kania* court's speculation about church members' reactions was not backed up by any evidence,<sup>262</sup> and the *Sephora* court specifically stated that none was needed: "Sephora need not demonstrate that a particular percentage of customers' opinions corroborate its business judgment that certain behavior is impolite and unhelpful. We 'do[] not sit as a super-personnel department . . .'"<sup>263</sup> This passage was later approvingly cited by *Pacheco*.<sup>264</sup> In short, courts are so willing to accept the validity of the potential customer concern here that they somewhat take it on faith from the employer.

257. EEOC v. Sephora, 419 F. Supp. 2d 408, 417 (S.D.N.Y. 2005) (emphasis added).

258. *Id.*

259. See *id.* Indeed, in the same discussion, the *Sephora* court reiterated that "[w]hen salespeople speak in a language customers do not understand, the effects on helpfulness, politeness and approachability are *real and are not a matter of abstract preference.*" *Id.* (emphasis added).

260. 14 F. Supp. 2d 730 (E.D. Pa. 1998).

261. *Id.* at 731, 736.

262. *Id.*

263. *Sephora*, 419 F. Supp. 2d at 417 (alteration in original) (quoting *Scaria v. Rubin*, 117 F.3d 652, 655 (2d Cir. 1997)).

264. *Pacheco v. N.Y. Presbyterian Hosp.*, 593 F. Supp. 2d 599, 622 (S.D.N.Y. 2009).

Finally, courts are quick to dismiss any burden that limited English-only rules impose on employees whose native language is not English.<sup>265</sup> Once again, as with the aesthetic appeal cases, there is a lurking assumption that this is just about choice and that the plaintiff-employees are being unreasonable by objecting. “Kania admits that she is bilingual,”<sup>266</sup> the *Kania* court wrote. “Because she could have readily complied with the English-only rule, it did not cause a legally cognizable adverse impact . . . .”<sup>267</sup> The *Pacheco* court similarly reasoned that “[t]he alleged difficulty Plaintiff had in not lapsing into Spanish is belied by Plaintiff’s testimony that he is fully bilingual in English and Spanish,”<sup>268</sup> and also pointed out that the plaintiff could still speak Spanish outside of patients’ presence.<sup>269</sup>

An important parallel exists between courts’ deference to the English-only preference and to many iterations of the aesthetic appeal preference, particularly those that implicate race and ethnicity, such as rules prohibiting dreadlocks. As Camille Gear Rich explains, both categories involve employees’ “race/ethnicity performance,” which she defines as “any behavior or voluntarily displayed attribute which, by accident or design, communicates racial or ethnic identity or status,” including hairstyle, language, and the like.<sup>270</sup> Even though the employees regard these choices as “an essential part of their racial or ethnic identity,” Rich writes, courts view them as a “marginal concern, beyond the scope of [Title VII’s] protections.”<sup>271</sup> Indeed, as this Article has shown, courts reach that conclusion through a two-step maneuver: viewing the applicable preference as a reasonable desire for professionalism or even a virtual need, and then minimizing the burden imposed by the preference on the affected employee.

Because courts consistently defer to the customer preference for an English-only environment in their presence, this Article classifies the preference as *strongly preferred*.

#### *E. Avoidance of Proselytization or Judgment*

Although the English-only preference involves employees’ language outside the customer-employee interaction, the next

265. See, e.g., *Kania*, 14 F. Supp. 2d at 736.

266. *Id.*

267. *Id.* (citing *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1488 (9th Cir. 1993)).

268. *Pacheco*, 593 F. Supp. 2d at 624.

269. *Id.* at 614.

270. Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1139–40 (2004).

271. *Id.* at 1136 (footnote omitted).

preference implicates the customer-employee interaction itself. This customer preference—not wanting to receive any proselytization or judgment from employees—enters through one opening: the reasonable accommodation/undue hardship limitation on employers' obligation to accommodate their employees' religious practices. And it receives great deference here.

It is important to separate this preference from the related issue of whether employers have to accommodate employees' religious views in ways that are *invisible* to the customer—such as, for instance, reassigning job responsibilities so that the employee will not perform certain duties or work at certain times.<sup>272</sup> Those situations, too, typically implicate questions of reasonable accommodation and undue hardship (e.g., cost, burden on other employees, administrative complications, and so on).<sup>273</sup> This specific preference, however, implicates a narrower question: whether an accommodation that will cause potential customer offense imposes, *by reason of that customer offense*, an undue hardship. As explained above, this can happen in two situations: (1) the employee's insistence on proselytizing to customers or (2) the employee's visible refusal to assist customers with certain tasks due to religious objections.

In both situations, the court usually sides with the employer. Courts generally view this interest as more than a mere preference; indeed, in some situations where the religious expression itself conveys prejudice, customers' own legal rights can be at stake.<sup>274</sup> Even when they are not, courts quite clearly view the preference as reasonable.<sup>275</sup> Similarly, courts are comfortable with the burden that this preference imposes on religious employees, often implying that the employee is the one being unreasonable. In *Bruff*, for instance, the Fifth Circuit stated—in rejecting a therapist's request to counsel only on topics that did not conflict with her religion—that “[a]n employee has a duty to cooperate in achieving accommodation of his or her religious beliefs, and must be flexible in achieving that end.”<sup>276</sup> Similarly, in *Anderson*, the Seventh Circuit rejected an employee's

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272. See, e.g., *Rodriguez v. City of Chicago*, 156 F.3d 771, 773, 776–77 (7th Cir. 1998) (holding, in a case involving police officer who was uncomfortable serving outside an abortion clinic because of his Catholic pro-life beliefs, that it was a reasonable accommodation to transfer him to a different district that did not include abortion clinics, and that the employer did not have to provide him with his requested accommodation of keeping him in the same district and exempting him from that assignment).

273. See *supra* note 177 and accompanying text.

274. See *supra* text accompanying notes 174–76.

275. See *supra* Section I.C.II.

276. *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 503 (5th Cir. 2001).

claim that the employer had to let her say “Have a Blessed Day” to all customers, emphasizing that the employer had done enough by letting her use the phrase with colleagues and display religious objects in her work area.<sup>277</sup> The only such case that survived summary judgment was *Hellinger*. Even there, however, the precise basis for the court’s holding was unclear, and it seems to have been partially based on the potential for an accommodation that would be invisible (and thus inoffensive) to the customer.

Because courts almost always defer to the customer preference not to be proselytized to or overtly judged by employees, this Article classifies it as *strongly preferred*.<sup>278</sup>

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277. *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 473–74, 477 (7th Cir. 2001).

278. That said, different outcomes would of course be reached under lawsuits arising under state laws that address this issue and provide more protection. *See supra* note 184. This Article’s focus, however, is on federal employment discrimination law.

Another interesting question is whether, in the aftermath of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), courts will become more deferential to claims for religious accommodation. There, the court ruled in favor of a bakery owner who raised a free exercise claim after being sanctioned by the Colorado Civil Rights Commission for refusing to bake a wedding cake for a same-sex couple, therefore violating the Colorado Anti-Discrimination Act. *Id.* at 1725–26, 1732. The Supreme Court’s precise holding was narrow in that it was based on purported hostility to religion shown by certain members of the Commission, but it also indicated a general solicitude for individuals like the baker. *See id.* at 1723–24, 1731.

However, although *Masterpiece Cakeshop* may prompt courts to become more deferential to religious accommodation claims in the free exercise context, that is unlikely to affect the Title VII employment discrimination context addressed by this Article. For this Article’s purposes, the relevant scenario would be as follows: (1) a bakery owner hires an employee who refuses to take an order from a same-sex couple for a wedding cake, contrary to the bakery’s own policy; (2) the owner terminates the employee; (3) the employee brings a Title VII lawsuit alleging that the employer failed to reasonably accommodate his religion; and (4) the employer defends itself from the Title VII claim by pointing to the customer preference for avoidance of proselytization or judgment.

In other words, our hypothetical bakery owner would argue that allowing a religious employee to reject a same-sex couple’s wedding cake order would not be a reasonable accommodation and would impose an undue hardship because of the likely customer offense that would ensue. Given the very low threshold for undue hardship in the Title VII religious discrimination context (anything more than a *de minimis* cost), it would be an easy showing to make. *See, e.g.,* Mihir Zaveri, *Alaska Airlines Apologizes to Gay Couple Asked to Move for Straight Couple*, N.Y. TIMES (Aug. 1, 2018), <https://www.nytimes.com/2018/08/01/business/alaska-airline-apology-gay-couple-seats.html> [<http://perma.cc/668J-MAK8> (dark archive)] (describing the public furor against Alaska Airlines after an incident when a gay couple on the plane was asked to move so that a straight couple could sit next to each other). In short, for the outcomes to change materially here, Title VII’s undue hardship standard would have to be substantially raised.

*F. Convenience*

The convenience preference is only a minor player in the preferred preference hierarchy. It usually functions as a supporting preference for two of the strongly preferred preferences: physical privacy from the opposite sex and avoidance of proselytization/judgment.

In the physical privacy context, convenience typically connects with the question of whether employers can accommodate customers' physical privacy preferences through careful scheduling of timing and shifts. This arises in two settings: restrooms and nursing homes/hospitals. Courts have generally suggested that, if such careful scheduling can be easily accomplished, then that is the better approach for satisfying the physical privacy preference (as opposed to only hiring employees of one sex for the position).

On the other hand, if such scheduling would impose nontrivial inconveniences on customers, then the sex BFOQ permits employers to hire employees of one sex for the position. For example, in *Hernandez v. University of Saint Thomas*,<sup>279</sup> the district court accepted the argument that having male custodians service women's restrooms might lead to inconveniences (because those restrooms would have to be closed during the cleaning, leading to overcrowding in the other bathrooms).<sup>280</sup> The court thus rejected the employee's motion for summary judgment, suggesting that if at trial the university could support its contention that "any alternatives to a sex-based policy would significantly decrease the efficiency and the quality of custodial operations," then it could prevail on its BFOQ defense.<sup>281</sup>

A similar approach applies to customers' preference to avoid employees' proselytization or judgment: if it is easy and inexpensive to reassign duties to shield the customer from this experience, then the reassignment is likely to be a reasonable accommodation.<sup>282</sup>

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279. 793 F. Supp. 214 (D. Minn. 1992).

280. *Id.* at 218.

281. *Id.* (explaining that there was a genuine issue of fact as to how disruptive the alternatives would be and stating that "[a]t some point, a high degree of added cost, decreased cleanliness, or intrusion on privacy could undermine the central mission of the enterprise").

282. See *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359, 1364, 1366 (S.D. Fla. 1999) (suggesting that there needed to be a trial on whether the employer could accommodate, without undue hardship, the religious employee's desire not to sell condoms); cf. *Rodriguez v. City of Chicago*, 156 F.3d 771, 775 (7th Cir. 1998) (defining a reasonable accommodation of religious beliefs as "one that 'eliminates the conflict between employment requirements and religious practices'" (quoting *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986))).

However, if such reassignment would materially inconvenience customers—say, by requiring them to undergo a long wait for another employee—employers are not required to take this approach. In *Noesen v. Medical Staffing Network*,<sup>283</sup> for instance, the Seventh Circuit rejected the religious discrimination claim of a pharmacist who was fired after refusing to play *any* role in helping customers who were attempting to order birth control, including “even briefly talking to customers seeking contraception.”<sup>284</sup> The court accepted the employer’s position that, “due to high caller volume [the plaintiff], like all other staff, needed to answer the telephones.”<sup>285</sup> Thus, just as in the sex BFOQ situation, the convenience preference works with the nonproselytization/judgment preference to create a successful employer defense.

Unlike most of the other preferences, convenience is entirely a matter of degree: a one-minute wait is obviously very different from a twenty-minute wait, let alone a one-hour wait. The greater the inconvenience, the more likely courts are to defer to the preference, because then it seems closer to a need. Because the level of preference deference here varies depending on the inconvenience involved and its interaction with another preference, this Article classifies the convenience preference as *moderately preferred*.

### G. Diversity?

I conclude this section by considering a potential new preferred preference: diversity. Customers—particularly large clients of law firms—have increasingly expressed this preference in recent years in regard to the composition of the team working on their matters.<sup>286</sup> In

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283. 232 F. App’x 581 (7th Cir. 2007).

284. *Id.* at 583–85.

285. *Id.* at 583–84 (“Wal-Mart contends, and we agree, that [the plaintiff’s] proposed accommodation would impose an undue hardship. It is undisputed that Wal-Mart’s relieving [the plaintiff] of all telephone and counter duties would have shifted his share of initial customer contact to other pharmacy staff.”). Interestingly, here the employer actually offered the employee the option of referring callers with birth control issues to others, but the employee refused the offer and was only willing to place the customers on an indefinite hold. *Id.* at 583. Thus, the court did not have to rule on whether, had the employer *not* offered this accommodation, it would have been required to do so under Title VII.

286. See Douglas E. Brayley & Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 J. LEGAL PROF. 1, 25–28 (2009); Stacy Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard: Mounting an Effective Title VII Defense of the Commitment to Diversity in the Legal Profession*, 83 FORDHAM L. REV. 2457, 2460 (2015) (“[L]egal employers face increasing demands from external stakeholders to produce demonstrable evidence of success in achieving these diversity goals.”); Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law*

2017, Facebook announced that it would require “women and ethnic minorities [to] account for at least 33 percent of law firm teams working on its matters,”<sup>287</sup> while HP announced that it would withhold up to 10% of bills from firms that do not meet its diversity criteria (which include a numerical minimum for how many female and ethnically diverse attorneys must work on their matters).<sup>288</sup> Corporations including MetLife,<sup>289</sup> Microsoft,<sup>290</sup> and Shell<sup>291</sup> have taken similar steps. Retired Federal District Judge Shira Scheindlin recently wrote a *New York Times* op-ed encouraging other

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*Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1062 (2011); Clare Tower Putnam, Comment, *When Can a Law Firm Discriminate Among Its Own Employees to Meet a Client's Request? Reflections on the ACC's Call to Action*, 9 U. PA. J. LAB. & EMP. L. 657, 658 (2007); Lisa Kirby & Caren Ulrich Stacy, *Client Call for Greater Diversity at Fever Pitch*, LAW.COM (July 17, 2017), <https://www.law.com/sites/almstaff/2017/07/17/client-call-for-greater-diversity-at-fever-pitch/> [<https://perma.cc/8GHC-FJKH>].

287. Ellen Rosen, *Facebook Pushes Outside Law Firms on Diversity*, N.Y. TIMES, Apr. 3, 2017, at B2.

288. Letter from Kim M. Rivera, HP Chief Legal Officer, to Law Firm Partners (Feb. 8, 2017), [http://www8.hp.com/us/en/images/Diversity\\_Holdback\\_Open\\_Letter\\_to\\_Law\\_Firms\\_tcm245\\_2406164\\_tcm245\\_2403754\\_tcm245-2406164.pdf](http://www8.hp.com/us/en/images/Diversity_Holdback_Open_Letter_to_Law_Firms_tcm245_2406164_tcm245_2403754_tcm245-2406164.pdf) [<https://perma.cc/F8EH-L98D>] (instructing all U.S.-based law firms with at least ten attorneys that, “[i]n order to comply with the requirement, firms must field (i) at least one diverse Firm relationship partner, regularly engaged with HP on billing and staffing issues; or (ii) at least one woman and one racially/ethnically diverse attorney, each performing or managing at least 10% of the billable hours worked on HP matters”).

289. Casey Sullivan, *Deadline for Diversity Issued by Top MetLife Lawyer*, BIG L. BUS. (Apr. 3, 2017), <https://biglawbusiness.com/deadline-for-diversity-issued-by-top-metlife-lawyer/> [<https://perma.cc/MAQ8-JBAH>] (“[MetLife General Counsel] plans to give law firms until June 2018 to present MetLife with a formal talent development plan that shows how they will promote and retain diverse lawyers. If the plan is not acceptable the outside law firm will have until December 2018 to revise its plan, although there will be no third try after that.”).

290. Letter from Brad Smith, Exec. Vice President & Gen. Counsel, Microsoft Corp., to Microsoft’s Premier Preferred Provider Firms (July 31, 2015) (on file with the North Carolina Law Review); Brad Smith, *Announcing the Next Generation of Microsoft’s Law Firm Diversity Program: Working Towards a More Diverse and Inclusive Legal Profession*, MICROSOFT ON ISSUES (Aug. 4, 2015), <https://blogs.microsoft.com/on-the-issues/2015/08/04/announcing-the-next-generation-of-microsofts-law-firm-diversity-program-working-towards-a-more-diverse-and-inclusive-legal-profession/> [<https://perma.cc/4HQQ-F6KF>] (describing bonus structure of up to 2% of the legal fees billed to the company “based on their performance in increasing diversity in three aspects of a firm’s leadership. . . . (1) leading the management of the law firm; (2) leading the law firm’s relationship with Microsoft; and (3) leading work on Microsoft’s legal matters” (footnote omitted)).

291. See, e.g., Mary Flood, *Shell Lawyer: There’s More to Diversity Than Lip Service*, HOUS. CHRON. (May 13, 2007), <https://www.chron.com/business/article/Shell-lawyer-There-s-more-to-diversity-than-lip-1800430.php> [<https://perma.cc/2X8D-2EFX> (staff-uploaded archive)] (describing the push by Shell’s general counsel to “insist[] on diversity and inclusiveness in her workplace and the places she hired,” such as requiring Shell’s law firms “to account . . . for how many female and minority lawyers work on Shell business, for how many hours they work and what they do”).

corporations to similarly “demand[] that the firms representing them field a diverse team of lawyers.”<sup>292</sup> The preference is usually justified as being connected to both work performance and societal improvement.<sup>293</sup> But can employers comply with such demands and explicitly take sex and race into account when staffing matters without running afoul of Title VII? In other words, can diversity become another preferred preference that successfully provides a defense to an employment discrimination claim?

It is important to note both the overlap—and the key distinction—between the diversity preference and some of the physical privacy and psychological comfort cases discussed above, such as *Wade*, *Little Forest*, and *Southwood*. There, the employers sought to have diverse workforces (i.e., a male/female mix) present at all times so that they could satisfy their individual customers’ preferences. But in those cases, the employers were responding to their customers’ preferences for *same-sex* service or care. The ultimate effect was a diverse workforce, because the employers needed male employees for the male customers and female employees for the female customers. But that was not because any individual customer actually sought diversity—quite the contrary. Here, by contrast, the customer itself is requesting to be served by a diverse team of employees.

As an initial matter, sometimes Title VII’s antidiscrimination provisions may not even be violated by creating employee teams that respond to customers’ diversity preferences. It is true that Title VII makes it unlawful both (1) 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”<sup>294</sup> and (2) to “limit, segregate, or classify his

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292. Shira A. Scheindlin, Opinion, *Female Lawyers Can Talk, Too*, N.Y. TIMES, Aug. 8, 2017, at A23. Most recently, prodded by client Shonda Rhimes, Hollywood agency ICM Partners “pledged to reach 50-50 gender parity by the year 2020,” meaning that “in two years’ time, women will represent half the agency’s partnership, half its department heads and half its board of directors.” Rebecca Sun, *ICM Partners Pledges to Reach 50-50 Gender Parity by 2020 (Exclusive)*, HOLLYWOOD REP. (Dec. 6, 2017, 6:30 A.M.), <https://www.hollywoodreporter.com/news/icm-partners-pledges-reach-50-50-gender-parity-by-2020-1064634> [<https://perma.cc/PC6W-E4DY>].

293. See, e.g., Rosen, *supra* note 287 (quoting Facebook’s General Counsel who stated that “[f]irms typically do what their clients want . . . . And we want to see them win our cases and create opportunities for women and people of color”); Letter from Kim M. Rivera, *supra* note 288 (“Our vision at HP is to create technology that makes the world a better place for everyone, everywhere. To achieve that vision, business leaders must represent the diversity of our customers and stakeholders.”).

294. 42 U.S.C. § 2000e-2(a)(1) (2012).

employees . . . 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."<sup>295</sup> Both of these provisions are broadly implicated when an employer takes any of these protected characteristics into account when staffing matters. But limiting constructions apply to each of them.

Under the first provision, it must be shown that an employer took a materially adverse employment action against the employee, rather than something that was de minimis or only temporary in effect.<sup>296</sup> In particular, courts have held that lateral transfers—which seem roughly analogous to the re-staffing of particular client matters—are not necessarily adverse employment actions under Title VII, unless they result in a loss of prestige or diminished options for advancement.<sup>297</sup>

Similarly, as to the second provision, the Seventh Circuit recently held that it is not enough to show that the employer took an action to classify employees based on race (or another protected characteristic). The plaintiff must also show that the classification either deprived, or at least had the tendency to deprive, a person of employment opportunities.<sup>298</sup>

Thus, if an employer creates diverse work teams in a way that ensures that all employees are receiving equal employment opportunities, there may not be a Title VII issue at all. That is because it will be difficult for the plaintiff-employee to prove either a materially adverse employment action (under the first provision) or the tendency for a deprivation of employment opportunities (under the second provision). The more diverse an employer's workforce is, the more easily it will be able to accomplish this, since the various client teams will likely each be diverse without active intervention or manipulation.

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295. *Id.* § 2000e-2(a)(2).

296. *See, e.g.,* *McMillian v. Potter*, 130 F. App'x 793, 796–97 (6th Cir. 2005); *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 461–62 (6th Cir. 2000).

297. *See, e.g.,* *Stewart v. Union Cty. Bd. of Educ.*, 655 F. App'x 151, 157 (3d Cir. 2016); *Czekalski v. LaHood*, 589 F.3d 449, 456–57 (D.C. Cir. 2009); *Perrea v. Cincinnati Pub. Schs.*, 709 F. Supp. 2d 628, 647 (S.D. Ohio 2010).

298. *See* *EEOC v. AutoZone, Inc.*, 860 F.3d 564, 568 (7th Cir. 2017) (rejecting the EEOC's argument that “any action to limit, segregate, or classify employees because of race automatically violates” this section, and reasoning that “[i]f it's not necessary to show that the challenged employment action ‘deprive[d] or tend[ed] to deprive’ the employee of employment opportunities ‘or otherwise adversely affect[ed] his status as an employee,’ what is the point of this statutory language?”) (alterations in original), *reh'g denied*, 875 F.3d 860 (7th Cir. 2017).

In other situations, though, an employee may be able to show at least the tendency for a deprivation and/or the potential for a materially adverse result. After all, some of the most high-profile companies are the ones currently expressing this preference—and their matters could arguably present the most career-enhancing opportunities.<sup>299</sup> If an employer’s demographic makeup largely consists of *nondiverse* employees, then its diverse employees would likely get a disproportionate opportunity to work on those desirable matters in order to satisfy those clients’ diversity requirements. Thus, at some point courts may well have to decide whether the diversity preference can create a valid defense.

So far, there is little precedent here that is directly on point. As Deborah Rhode has noted (in the specific context of analyzing how law firms should work toward diversity), “[w]hat further complicates the legal landscape is the uncertain status of preferential treatment that disfavors white men. . . . Client pressures typically are not a justification for such preferential treatment.”<sup>300</sup> Similarly, Patrick Shin, Devon Carbado, and Mitu Gulati write:

Is there a tension between firms expressing an interest in pursuing diversity, on the one hand, and the space they have to do so, on the other, under current antidiscrimination law? Arguably, there is. . . . There is little doubt that at some point in the near future, the Supreme Court will weigh in on this question.<sup>301</sup>

For sex-based decisions in staffing matters, there are two potential openings through which the diversity preference could plausibly enter: the BFOQ opening and the equal burdens opening. The latter seems more promising. As discussed above, the sex-based customer preferences that have successfully entered the BFOQ opening implicate privacy, particularly physical privacy. The physical privacy concern is clearly not applicable in situations involving the above types of requests by corporations for diverse teams. Moreover, employers would not be able to argue that female sex is a BFOQ for doing the actual work for a particular client, but would instead have

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299. See *supra* notes 287–93 and accompanying text.

300. Rhode, *supra* note 286, at 1068 (footnote omitted).

301. Patrick Shin, Devon Carbado & Mitu Gulati, *The Diversity Feedback Loop*, 2014 U. CHI. L.F. 345, 345–46 (2014). Kingsley Browne also supports this proposition by stating, “[g]iven the widespread emphasis on diversity and the apparently common use of racial preferences to achieve it, there is surprisingly little case law under Title VII addressing the use of preferences outside the remedial context.” Kingsley R. Browne, *Title VII and Diversity*, 14 NEV. L.J. 806, 807 (2014).

to argue that having a female member of the *larger team* is necessary. This, too, makes the BFOQ defense an awkward fit here. Under existing precedent, it would be difficult for a law firm to argue that female sex is a BFOQ, say, for being a member of the team working on Facebook's matters but not Twitter's, simply on the grounds that Facebook has a diversity requirement while Twitter does not.<sup>302</sup>

There is, however, some potential for the equal burdens opening if courts are willing to expand it beyond its usual context of sex-differentiated *appearance* policies. Like the employers in *Craft* and *Jespersen*, a defendant-employer could argue that satisfying these client preferences does not impose a greater burden on males than females. After all, men and women can still be staffed on any particular matter in equal numbers. Indeed, so far, all of these quantitative requirements still leave room for men to hold the majority of positions, making it even harder for men to argue that they are being unequally burdened. Moreover, except for situations where a client team is reshuffled midstream in response to a client's diversity preference, it may be hard for any one employee to prove that he necessarily would have been staffed on the matter absent the diversity preference. Thus, the equal burdens opening could theoretically work here, in concert with the above-described requirement that the plaintiff-employee prove a materially adverse action or the tendency for a deprivation of opportunities in the first place. It is not clear, however, that courts would be willing to apply this opening to sex-differentiated treatment that goes beyond differential appearance policies. As discussed above, courts tend to be much more deferential to sex-differentiation that relates to bodies as opposed to division of labor.<sup>303</sup>

For race/ethnicity-based staffing decisions, the openings largely disappear. The BFOQ defense does not apply to race or color, and there is no equal burdens doctrine for race/ethnicity-differentiated

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302. See, e.g., *id.* at 822 (“[T]he BFOQ cases strongly suggest that an employer’s desire for diversity would not be a sufficient justification for preferences even if limited only to those classes for which the BFOQ defense is potentially available under Title VII (sex, religion, and national origin).”). But see Ernest F. Lidge III, *Law Firm Employment Discrimination in Case Assignments at the Client’s Insistence: A Bona Fide Occupational Qualification?*, 38 CONN. L. REV. 159, 176 (2005) (arguing that the BFOQ defense should allow law firms to satisfy individualized client requests for attorneys of a particular sex, given the intimacy of the attorney-client relationship); Deborah C. Malamud, *The Strange Persistence of Affirmative Action Under Title VII*, 118 W. VA. L. REV. 1, 21 (2015) (suggesting, without further discussion, that “[t]o a limited extent, employers can use [the BFOQ defense] to justify diversity-based hiring” for sex, but not “race or color”).

303. See *supra* text accompanying notes 249–50.

policies. The business necessity defense to disparate impact claims is also inapplicable, because that only applies to facially neutral policies as opposed to policies that explicitly take protected characteristics into account.

The one remaining avenue comes from a source outside the realm of customer preference openings: affirmative action doctrine. The Supreme Court has indeed indicated that Title VII leaves some room for employers to engage in voluntary affirmative action programs “designed to eliminate conspicuous racial imbalance in traditionally segregated job categories.”<sup>304</sup> However, diversity rationales for affirmative action have not been explicitly endorsed outside the educational setting. Moreover, to the extent that such staffing approaches are used only for specific clients and tailored to those clients’ particular numerical requests, the affirmative action defense—which presumes a generally applicable policy—is a particularly awkward fit.<sup>305</sup> Additionally, running throughout the affirmative action case law is disapproval of quotas or other quantitative requirements—the very type of numerical preference that clients are now expressing.

Moving beyond the doctrinal challenges, the factors that this Article has used to unpack when and why courts are deferential to customer preferences also indicate some roadblocks. First, although the diversity preference does not seem invidiously discriminatory—quite the contrary—it is not the same type of longstanding, ingrained social convention implicated by the other preferred preferences. Indeed, clients seem to be demanding diverse teams precisely because employers are not always providing them on their own. Indeed, rather than reaffirming the default norm, these overt diversity policies seem

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304. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 209 (1979).

305. *See* Browne, *supra* note 301, at 807–08 (arguing that current affirmative action doctrine would not justify such policies); Corey A. Ciocchetti & John Holcomb, *The Frontier of Affirmative Action: Employment Preferences & Diversity in the Private Workplace*, 12 U. PA. J. BUS. L. 283, 347 (2010) (predicting that the Supreme Court would “strike down a voluntary, forward-looking, diversity-based workplace affirmative action plan”); Malamud, *supra* note 302, at 23 (viewing it as unlikely that the Supreme Court will see *Grutter*’s affirmative action doctrine “as creating a safe haven for corporate diversity practice”); Rhode, *supra* note 286, at 1068–69 (“Although the Supreme Court has narrowly upheld considerations based on diversity in educational admission programs so long as they do not involve fixed quotas, it is by no means clear how far this rationale would extend to employment contexts.”); Shin et al., *supra* note 301, at 345–46 (“[I]t is uncertain whether Title VII permits race-conscious hiring measures that seek to reap the workplace benefits of racial diversity, especially if such measures do not fit the mold of traditional affirmative action plans designed to remedy ‘manifest imbalances’ associated with past discrimination.”); Putnam, *supra* note 286, at 675.

to be trying to *change* the default. This differentiates the diversity preference from all of the other preferred preferences discussed above. That said, courts may be impressed that this is the one preference whose very goal is to *promote* equal employment opportunity, rather than being neutral (or worse) on the subject.

Second, it is difficult to view the diversity preference for diverse teams as an actual need—particularly because it is new and only a handful of clients are expressing it. On the other hand, judges may be sympathetic to the diversity preference and find it reasonable. Indeed, some judges have recently been taking their own steps to increase diversity among the lawyers who have speaking roles in the courtroom, although they have not gone as far as imposing specific quantitative requirements.<sup>306</sup>

Finally, there may be real judicial concern about the burden that employers' satisfaction of these customer preferences could impose on nondiverse employees. Recall that in many of the above-described situations, employees at least had the theoretical option to comply with the preference—whether by wearing makeup, removing dreadlocks, exclusively speaking English at work, refraining from proselytization, or the like. Here, the disfavored employee has no option. In that way, the situation is more like the same-sex privacy preferences, where we saw that unless customer nudity was present,

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306. Beyond retired Judge Scheindlin's op-ed, at least two federal judges have recently amended their own courtroom rules to give junior attorneys more opportunities and incentives to speak in court in the hope of advancing the professional development of female and ethnically diverse attorneys. See Alan Feuer, *A Federal Judge's New Rule: Let More Women Argue Cases*, N.Y. TIMES, Aug. 24, 2017, at A16 (discussing Eastern District of New York Judge Jack Weinstein's new courtroom rules, which he implemented after speaking with Judge Scheindlin and learning more about the underrepresentation of female attorneys and ethnically diverse attorneys in the courtroom); see also HON. ANN DONNELLY, INDIVIDUAL PRACTICES AND RULES 3, <https://img.nyed.uscourts.gov/rules/AMD-MLR.pdf> [<https://perma.cc/A4AK-L328>]

("The participation of relatively inexperienced attorneys in all court proceedings—including but not limited to pre-motion conferences, pre-trial conference, hearings on discovery motions and dispositive motions, and examination of witnesses at trial—is strongly encouraged."); HON. JACK B. WEINSTEIN, INDIVIDUAL MOTION PRACTICE OF JUDGE JACK B. WEINSTEIN, <https://img.nyed.uscourts.gov/rules/JBW-MLR.pdf> [<https://perma.cc/SQB3-KLEK>] ("Junior members of legal teams representing clients are invited to argue motions they have helped prepare and to question witnesses with whom they have worked. . . . This court is amenable to permitting a number of lawyers to argue for one party if this creates an opportunity for a junior lawyer to participate."); Kathryn Rubino, *Hero Federal Judge Takes Steps to Increase Meaningful Experience for Diverse Lawyers*, ABOVE THE L. (Aug. 24, 2017, 3:29 PM), <https://abovethelaw.com/2017/08/hero-federal-judge-takes-steps-to-increase-meaningful-experience-for-diverse-lawyers/?rf=1> [<https://perma.cc/4PGP-5QMB>] (noting that, in addition to Judge Weinstein, Eastern District of New York Judge Ann M. Donnelly has taken a similar approach).

courts were largely unwilling to overlook the burden imposed on the disfavored sex.

In sum, an expanded version of the equal burdens opening could theoretically work for the diversity preference. Courts may be willing to expand the equal burdens doctrine beyond the context of sex-differentiated appearance standards—most likely for sex-based staffing decisions, and perhaps even to ethnicity-based staffing decisions too. But this would require a significant expansion, leading me to predict that diversity is likely to become—at most—a *weakly preferred* preference. In the next part, I suggest a new way of thinking about customer preferences, one that—among other things—points toward a better, and more legally defensible, way for employers to satisfy individual clients’ diversity preferences.

### III. RETHINKING PREFERENCE DEFERENCE

Looking at the preferred preferences collectively is illuminating. It makes clear that the doctrinal opening through which the customer preference enters is less important than the substance of the preference itself. The aesthetic appeal preference, for instance, gets roughly the same treatment whether it appears in the equal burdens opening, the job-related and consistent with business necessity opening, or the undue hardship opening. Moreover, legal principles migrate across the customer preference openings. Courts sometimes invoke BFOQ language when analyzing disparate impact and failure-to-accommodate claims,<sup>307</sup> and they sometimes employ reasonable accommodation language when coming up with disparate impact remedies.<sup>308</sup>

It is not surprising that, despite the customer preference openings’ different formulations, they end up functioning similarly. The openings all sit at the tension between two different models of antidiscrimination law, persuasively described by Robert Post as the “dominant conception” and the “sociological account.”<sup>309</sup> The “dominant conception” suggests that the purpose of antidiscrimination law is to remove all consideration of forbidden

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307. See, e.g., *Hussein v. Waldorf-Astoria*, 134 F. Supp. 2d 591, 599 (S.D.N.Y. 2001) (justifying ruling against bearded religious employee on grounds that “[s]ome courts have found that clean-shavenness is a bona fide occupational qualification in certain businesses” (citing *EEOC v. Sambo’s of Ga.*, 530 F. Supp. 86, 91 (N.D. Ga. 1981); and then citing *In re E. Greyhound Lines Div. of Greyhound Lines, Inc.*, 265 N.E.2d 745 (N.Y. 1970))), *aff’d*, 31 F. App’x 740 (2d Cir. 2002).

308. See, e.g., *Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795, 799 (8th Cir. 1993).

309. Post, *supra* note 198, at 31.

characteristics like race or sex—to “require[] employers to regard their employees as though they did not display socially powerful and salient attributes, because these attributes may induce irrational and prejudiced judgments.”<sup>310</sup> By contrast, the “sociological account” does not expect or require such blindness, which Post views as unrealistic.<sup>311</sup> Post further explains:

The dominant conception of American antidiscrimination law aspires to suppress categories of social judgment that are deemed likely to be infected with prejudice. . . . There is thus a strong impulse within the dominant perspective to imagine the law as standing in a neutral space outside of history and of the contingent social practices of which history is comprised. . . .

Because the dominant conception offers an implausible story about the actual shape of antidiscrimination law, I have proposed an alternative perspective, which we may call the *sociological account*, in which antidiscrimination law is understood as a social practice that acts on other social practices. . . .

In contrast to the dominant conception, the sociological account accepts the inevitability of social practices. But precisely because of this acceptance, the account requires that principles be articulated that will guide and direct the transformation of social practices. Because the dominant conception seeks entirely to transcend and eliminate social practices, it has not fully developed such principles.<sup>312</sup>

The customer preference openings provide important support for Post’s view that the sociological account better captures how antidiscrimination law actually works. After all, under the dominant conception, customer preferences should generally not be able to enter these openings at all. Moreover, each of the openings provides a mechanism through which the sociological approach can operate by facilitating a discussion about which preferences deserve to enter the openings and which should be ignored.

Because of courts’ loyalty to the dominant conception, however, they struggle with how to use these openings. They state that

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310. *Id.* at 11–12, 30.

311. *See id.* at 17, 31 (“Law is made by the very persons who participate in the social practices that constitute race, gender, and beauty. It would be astonishing, therefore, if American antidiscrimination law could transcend these categories, if it could operate in a way that rendered them truly irrelevant.”).

312. *Id.* at 30–31.

customer preferences are irrelevant while simultaneously deferring to some; and they frequently deny that the preferences are burdensome even when they are. Essentially, courts are trying to reconcile the cognitive dissonance between the theory that customer preferences should be irrelevant within antidiscrimination law and the reality that they still play a role (and indeed, that antidiscrimination law's structure itself provides opportunities for them to do so).

That blurred reasoning, in turn, has consequences for development of the law and for judicial legitimacy itself. For example, as Post observes:

[A]n approach that accepted the insights of the sociological account would have invited the court in *Craft* explicitly to state and defend the grounds for its conclusions, and this in turn would have facilitated public review and critique. Such an approach would thus render decisions such as *Craft* far more accountable for their actual judgments.<sup>313</sup>

But instead of doing that, the *Craft* court oversimplified and distorted the case, suggesting that it was just about the television station's equal expectations of male and female newscasters to present a professional appearance.<sup>314</sup> Similarly, the *Jespersen* court recast the casino's explicitly sex-differentiated appearance policy as “for the most part unisex,” even though its requirement that female employees wear full makeup was the very focus of the claim.<sup>315</sup>

So, what should courts do instead? First, they should be more explicit about their reasoning. Moreover, they should recognize that the considerations that are intuitively shaping their decisions—such as the strength of customer sentiment, and how burdensome it is on employees—are not as objective as they might seem. Rather, these considerations are inevitably viewed through the lens of judges' own life experiences. Preferences that accord with majority practice, and with judges' *own* conceptions of what seems reasonable, are most likely to strike judges as weighty and/or nonburdensome (because complying with them is the “reasonable,” “professional” thing to do).

313. *Id.* at 32.

314. *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1217 (8th Cir. 1985).

315. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1111–12 (9th Cir. 2006) (en banc) (“[Harrah's] policy does not single out Jespersen. It applies to all of the bartenders, male and female. It requires all of the bartenders to wear exactly the same uniforms while interacting with the public in the context of the entertainment industry. It is for the most part unisex, from the black tie to the non-skid shoes. . . . The only evidence in the record to support the stereotyping claim is Jespersen's own subjective reaction to the makeup requirement.”).

The cases involving the aesthetic appeal and English-only preferences especially illustrate this phenomenon, with women and ethnic/religious minorities often faring poorly.<sup>316</sup> And of course, because these factors are not explicitly articulated by courts in the first place but are just lurking in the background, it is even easier for inconsistencies and biases to creep in.

A better approach is to acknowledge that these customer preference openings exist, that none of them are limited to actual necessity, and that there is going to be some inevitable line drawing about which preferences get to enter and which do not. To aid that line drawing, this Article proposes two key guideposts: (1) a context-specific look at whether the preference relates to the employee's actual performance of the specific job and (2) a broad look at the extent to which the preference limits equal employment opportunity in the workplace. These guideposts are at least somewhat more objective than the factors described above. More importantly, they better reflect what antidiscrimination law is trying to achieve.

#### A. *Actual Performance of the Job*

The first guidepost that this Article proposes—whether the preference relates to the employee's actual performance of the specific job—may sound familiar. It echoes the essence of the business standard that courts have articulated for the BFOQ defense.<sup>317</sup> To be sure, “essence of the business” is not a self-defining term, nor is this Article's proposed standard. As Yuracko has written, a business's essence can be defined by employers, by customers, by some sort of inherent meaning, or by some sort of shared meaning.<sup>318</sup> Similarly, “actual job performance” can be defined expansively (by, for instance, encompassing even how the employee looks while performing the job) or narrowly (by focusing only on the performance of the substantive job responsibilities). I strongly advocate a narrow interpretation of this guidepost. Courts should

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316. See Rich, *supra* note 270, at 1194 (arguing that modern Title VII cases are characterized by “discrimination by proxy,” in which an ostensibly neutral policy specifically names and prohibits cultural practices associated with particular racial/ethnic minorities); see also Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2029 (1995) (describing the phenomenon of “[t]ransparently white decisionmaking,” which “consists of the unconscious use of criteria of decision that are more strongly associated with whites than with nonwhites”). Flagg argues that “the imposition of transparently white norms amounts to a requirement that nonwhite employees assimilate to whites' cultural expectations.” *Id.*

317. See *supra* text accompanying notes 30–31.

318. Yuracko, *supra* note 7, at 160–66.

limit it to the employee's performance of specific tasks for the customer.

Of the six preferred preferences, four typically implicate such performance: the preference for physical privacy from the opposite sex; the preference for psychological comfort with the same sex; the preference not to receive proselytization or judgment; and the convenience preference. All of those preferences, in different ways, involve the core interaction/transaction between employee and customer. The physical privacy preference involves situations where the employee, in performing the job itself, is seeing or even touching the naked body of the customer/client. The non-proselytization preference involves the substance of the employee's words to the customer/client, simultaneous to the employee's performance of the job. Indeed, in the case of counselors and therapists, the proselytization is sometimes occurring as *part* of the job. Recall that in *Knight*, the employees were not asking to be exempted from counseling certain clients. Rather, they were arguing that Title VII protected their affirmative right to proselytize to all clients.<sup>319</sup> Convenience, too, is connected to the core task: it is about how quickly the task at hand gets done for the customer.

The most complex one is the same-sex psychological comfort preference, since it is less measurable and bounded than the other three, in which courts can look to purely objective markers—respectively, whether pure nudity is involved, whether the employee is vocally proselytizing or expressing negative judgment toward customers, and the length of time that the customer is being inconvenienced. Because certain therapeutic jobs do implicate gender-related psychological privacy interests, however, courts should be more open to this preference. A number of psychological studies indicate not only that clients, particularly women, often prefer therapists of the same sex,<sup>320</sup> but also that same-sex matches can actually lead to better therapeutic outcomes.<sup>321</sup> The research is

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319. See *Knight v. Conn. Dep't of Health*, 275 F.3d 156, 167 (2d Cir. 2001); see also *supra* Section I.C.2.

320. See *supra* note 252.

321. Loree A. Johnson & Benjamin E. Caldwell, *Race, Gender, and Therapist Confidence: Effects on Satisfaction with the Therapeutic Relationship in MFT*, 39 AM. J. FAM. THERAPY 307, 315 (2011) (finding that “when therapists and clients matched in terms of gender, clients reported significantly greater satisfaction with the therapeutic relationship”); Landes et al., *supra* note 252, at 337 (“[Female p]articipants reported lower anticipated comfort self-disclosing to a male therapist and lower anticipated comfort self-disclosing when the hypothetical presenting problem they were considering for therapy was female sex-specific. These findings extend previous literature showing that women

certainly mixed on this, and other factors matter too.<sup>322</sup> It does, however, suggest that courts are being too simplistic in dismissing this interest as necessarily less weighty than the physical privacy interest.<sup>323</sup> Again, none of this is to suggest that the same-sex psychological comfort preference is a *need*. It is not. But there is no principled basis for courts to treat it so much more skeptically and as less “real” than the other preferred preferences. Indeed, in jobs that implicate both physical privacy and psychological comfort, such as OB-GYNs, customers/patients often emphasize the psychological reasons over the physical privacy ones for preferring a same-sex provider.<sup>324</sup>

The diversity preference can also directly relate to the performance of actual job responsibilities. Much research is being done on the issue of how diversity affects group performance in the employment setting, and the results so far are varied. On the one

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prefer a female therapist.”); Wintersteen et al., *supra* note 252, at 405 (focusing on adolescents and finding that, “[f]rom a patient perspective, a gender match with the therapist facilitated alliance development, and gender-matched dyads were more likely to complete two thirds of treatment”). A related question, as noted above, is whether and how employment discrimination doctrine will respond to the growing evidence that having a doctor of the same race can lead to better medical outcomes for racial-minority patients. *See supra* note 42 and accompanying text.

322. *See, e.g.*, Adrian J. Blow, Tina M. Timm & Ronald Cox, *The Role of the Therapist in Therapeutic Change: Does Therapist Gender Matter?*, 20 J. FEMINIST FAM. THERAPY 66, 78 (2008) (concluding that there are “mixed findings” on whether gender predicts outcomes in therapy, noting that “there do not appear to be big differences between male and female therapists, *except in working with adolescents (where [male] therapist gender seems particularly pertinent for engaging adolescent boys in treatment and keeping them engaged)*” (emphasis added)); Caron Zlotnick, Irene Elkin & M. Tracie Shea, *Does the Gender of a Patient or the Gender of a Therapist Affect the Treatment of Patients with Major Depression?*, 66 J. CONSULTING & CLINICAL PSYCHOL. 655, 657–58 (1998) (finding that “among depressed patients, a male or female therapist, or same- versus opposite-gender pairing, was not significantly related to level of depression at termination, to attrition rates, or to the patient’s perceptions of the therapist’s degree of empathy early in treatment and at termination,” but noting that the therapists in this study had been “carefully selected, received specific training, and attained a certified level of competence,” which may have left “limited opportunity for differences to emerge between male and female therapists in their attitude and behavior toward patients”).

323. Particularly ironic, in light of the *Hi 40 Corp.* court’s dismissal of female customers’ preferences for discussing their weight loss and body image with female counselors, is an article suggesting that therapists’ gender may be especially relevant for bulimic patients. *See* Natalia Zunino, Ellen Agoos & William N. Davis, *The Impact of Therapist Gender on the Treatment of Bulimic Women*, 10 INT’L J. EATING DISORDERS 253, 255 (1991) (suggesting, albeit without an actual experiment, that a therapist’s female gender may be particularly important in working with bulimic patients because that work implicates body image problems, mother-daughter relationships, ambivalent feelings about gender identity, and the need for a role model).

324. *See* Waldman, *supra* note 234, at 379–80.

hand, workforce diversity can yield more creativity and expanded perspectives; on the other, it can bring friction, especially when it is not well managed.<sup>325</sup> In addition to these general results, there is also interesting anecdotal and empirical evidence about the benefits of diversity in specific job contexts. For example, one recent analysis concluded that gender diversity might also help reduce excessive risk taking among financial institutions.<sup>326</sup> Relatedly, numerous articles have documented the value of having diverse writers' rooms in Hollywood, in terms of leading to more interesting, realistic, and original scripts.<sup>327</sup>

By contrast, the aesthetic appeal preference and the English-speaking environment preference typically do not implicate the actual exchange of goods or services for which customers came. They are largely tangential to actual job performance. Some customers certainly may prefer that employees adhere to common appearance conventions or speak English to one another whenever the customer can hear them. But those are atmospheric preferences that are separable from how the employee actually performs his or her job responsibilities vis-à-vis the customer. Indeed, these preferences often appear in retail positions where the employee/customer interaction is more limited and transactional in the first place.

Additionally, it is unclear that customers even care about these atmospherics as much as employers think they do. Recall, for instance, the *Sephora* case, where the court deferred to Sephora's

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325. See Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 21–22 (2005) (asserting that, while some evidence indicates that diverse workgroups generate a broader range of ideas early on in decision-making processes, diversity can also bring friction, decreased workplace satisfaction, and increased absenteeism and turnover); Rhode, *supra* note 286, at 1061–63.

326. Kristin N. Johnson, *Banking on Diversity: Does Gender Diversity Improve Financial Firms' Risk Oversight*, 70 SMU L. REV. 327, 356–59 (2017); cf. Darren Rosenblum & Daria Roithmayr, *More Than a Woman: Insights into Corporate Governance After the French Sex Quota*, 48 IND. L. REV. 889, 890–92 (2015) (looking at the related question of whether adding women to a board affects decision making, and concluding that it may, primarily because they are more likely to be outsiders).

327. See Cara Buckley, *Embracing Diversity, but Finding It Out of Reach*, N.Y. TIMES, Sept. 3, 2018, at A1 (“Having female or minority writers can have an enormous impact on what goes onscreen. Stereotypes can be challenged and questions asked . . . [a]nd when there is more than one woman or minority writer in the room, several writers said, they are more likely to be heeded, and less likely to be called on as the voice of all women or people of color.”); Bryn Elise Sandberg, *TV Showrunners Talk Sexism in Writers Rooms, Hiring Diverse Staff and Weinstein's Blacklist*, HOLLYWOOD REP. (June 9, 2018, 6:18 PM), <https://www.hollywoodreporter.com/live-feed/tv-showrunners-talk-sexism-writers-rooms-hiring-diverse-staff-weinsteins-blacklist-1118723> [<https://perma.cc/ZBT5-Z5U6>].

belief that customers would be turned off by hearing employees converse with each other in Spanish, without any actual evidence supporting that view.<sup>328</sup> Courts should heighten their skepticism here.

*B. Effect on Equal Employment Opportunity*

In addition to considering whether the preference relates to actual job performance, courts should also consider—when deciding how much deference to accord—whether the preference, particularly in the aggregate, is likely to limit equal employment opportunity. Here, too, the aesthetic appeal and English-speaking environment preferences raise the strongest concerns. Their burdens are not equally distributed but instead fall hardest on women and minority groups in ways that can prevent their equal thriving in the workplace. Consider, for instance, Darlene Jespersen’s exit from her long-held bartender position specifically because she was uncomfortable wearing full makeup every day;<sup>329</sup> Chastity Jones’s decision to quit her job at Catastrophe Management Solutions rather than cut off her dreadlocks;<sup>330</sup> or the *Camara* court’s suggestion that an employee should just transfer to a non-customer-contact position if she insisted on continuing to wear a hijab.<sup>331</sup> Neither the various aesthetic appeal preferences nor the English-speaking environment preferences are randomly distributed among a variety of looks, religions, or dialects. Rather, they specifically reinforce majority default norms and burden those who differ from them.

By contrast, the other four preferred preferences—along with the diversity preference—do not operate in such a one-sided way. Thus, they do not undermine equal employment opportunity to the same extent. The physical and psychological same-sex privacy preferences are symmetrical, with males preferring males and females preferring females.<sup>332</sup> Thus, they do not necessarily favor either sex—as opposed to, for instance, the early BFOQ cases in which airlines argued that everyone preferred a female flight attendant.<sup>333</sup> The preference not to receive proselytization or judgment, while indeed burdening the small number of employees whose religion *requires*

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328. See *EEOC v. Sephora USA, LLC*, 419 F. Supp. 2d 408, 417 (S.D.N.Y. 2005); see also *supra* text accompanying note 263.

329. *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1107–08 (9th Cir. 2006).

330. *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1020–22 (11th Cir. 2016), *reh’g denied*, 876 F.3d 1273 (11th Cir. 2017).

331. *Camara v. Epps Air Serv., Inc.*, 292 F. Supp. 3d 1314, 1327–28 (N.D. Ga. 2017).

332. See discussion *supra* Sections II.B–C.

333. See *supra* notes 26–34 and accompanying text.

them to vocally proselytize or judge others, also works to ensure that other customers and employees feel welcome in the workplace. Recall, for instance, the *Peterson* case, in which the plaintiff-employee posted anti-gay quotations that were visible to customers and colleagues.<sup>334</sup> By ruling in favor of the employer that had refused to allow this,<sup>335</sup> the court ensured that others would feel welcome in the workplace. In that way, although the preference does limit employment opportunities for some, it tends to ensure those opportunities for many more. And the convenience preference largely supports the privacy and nonproselytization/judgment preferences; it does not impose an additional burden of its own.

Finally, the diversity preference—whose legal status is still uncertain<sup>336</sup>—is the one preference explicitly *aimed* at promoting equal employment opportunity in the workplace. That is certainly to its credit. Even so, employers should not respond to this preference merely by cobbling together teams on an ad hoc basis to meet particular clients' quantitative diversity preferences. Such an approach is normatively undesirable for several reasons. Not only does it suggest that diversity only matters when important clients request it, but it can pit employees against each other for spots on these high-profile matters, leading to resentment and discord.<sup>337</sup> And it is legally risky to respond to the preference in this way, given the prevailing doctrine. As explained above, the diversity preference does not fit neatly into any of the existing customer preference openings, and it is not at all clear that courts will defer to it.

The best approach here is for employers to respond to the growing diversity preference through mechanisms that are truly geared toward promoting equal opportunity for all. This means not just satisfying the diversity preference for the specific clients who request it, but instead adopting broad workplace policies that are aimed at making sure that all employees receive good opportunities for professional development and can thrive in the workplace. Such policies include close attention to the staffing of all matters (not only in terms of the diversity of each client team but also in terms of

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334. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 601 (9th Cir. 2004).

335. *Id.* at 608.

336. *See supra* Section II.G.

337. *Cf.* Buckley, *supra* note 327 (noting, in the context of television studios' push for more diverse writing staffs, that "some female and minority writers question whether they are being courted because of a genuine push for diversity, or simply because male showrunners want cover from criticism" and quoting a supervising producer from "The Americans" as having "met white male writers who believe they were passed over because a minority or women got their slot," an attitude she described as "poisonous").

whether different employees are getting equivalent opportunities to work on high-profile matters), plus initiatives like broadly available part-time options and parental leave.

Not only is this approach more normatively consistent with equal employment opportunity, but it is doctrinally safer. After all, the more that employers adopt these measures as part of an overall approach toward ensuring equal opportunity for each employee, the harder it will be for any particular employee to show that he or she was harmed by the way that the employer satisfied a specific client's diversity preferences. This will make it less likely for a court to find that a materially adverse action and/or the deprivation of an employment opportunity has occurred at all. By the same token, such an approach makes the "equal burdens" doctrine—to the extent that courts are inclined to adapt it to this context—an easier fit. Additionally, adopting diverse staffing as part of a general policy (rather than only in response to customers' specific numerical requests) betters the prospects for an affirmative action defense. Finally, to the extent that such policies help employers continue to diversify their employee pool, the more naturally employers can satisfy their clients' diversity preferences in the future without active intervention. Thus, although these measures will require real time, thought, and effort by employers, they are the best way to respond to the growing diversity preference in the workplace.

#### CONCLUSION

The preferred preference hierarchy needs some reordering. The first step is acknowledging that it exists at all and recognizing how it works. This Article has sought to provide that contribution, showing that each individual preferred preference is not just a one-off exception to the supposed irrelevance of customer preferences but part of a collective body of doctrine that operates according to its own largely unarticulated principles.

By teasing out those principles and proposing to supplant them with two more objective guideposts—whether the preference (1) relates to actual job performance and (2) will limit equal employment opportunity—this Article hopes to reshape the role of customer preferences within employment discrimination law. In particular, this Article argues that the English-only environment and aesthetic appeal preferences do not warrant their respective statuses as strongly preferred and moderately preferred. They are tangential to actual job performance and they limit equal employment opportunity. The presumption should be that these preferences do not deserve

deference, and they should only be weakly preferred, if at all. By contrast, the same-gender psychological comfort preference does not deserve its current position at the bottom of the hierarchy, given its relationship to the actual performance of certain jobs that implicate therapeutic concerns and its symmetrical treatment of both sexes. It should be moderately preferred rather than weakly preferred. Additionally, although the diversity preference is markedly different from the other preferences—given that it attempts to change, rather than reaffirm, default norms—it too should receive some deference, particularly when it is satisfied as part of an overall commitment to equal employment opportunity.

In the end, the validity of a particular customer preference is always going to be context specific, and it should be. But by keeping the above guideposts in mind, courts can strike a better balance of incorporating customer preferences into antidiscrimination law while remaining true to its ultimate aims.

