A PECULIAR CLAUSE OF POLITICAL COMPROMISE FOR CALIFORNIA'S RELIGIOUS MINORITIES

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ABSTRACT

The U.S. political landscape is increasingly polarized. Differing factions grow increasingly isolated and hope for majoritarian rule over political compromise. The protection of religious practices—including from employment discrimination—is one heated area of polarization and litigation, evidenced by the six cases directly related to religious liberty in the recent Supreme Court term.

In contrast to the nation's growing political divide, this paper tells a legislative history of compromise in California's religious employment discrimination laws. On one side, religious minorities successfully lobbied the state legislature for protection of burdensome religious practices, while on the other side, commercial entities successfully incorporated meaningful compromises in the statutes to protect their business interests. This legislative history serves as an example for similar interest groups to follow in resolution of other disputes concerning religious practice.

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INTRODUCTION

Polarization is a mark of the twenty-first century. Instead of meeting in the middle, societal opposites stake ground closer to the extremes and further from compromise. Echo chambers of support limit each group's ability to recognize the extremity of their position and move toward more favorable and neutral ground. For example, the nation's two recent landmark bills—the Affordable Care Act and the Tax Cuts and Jobs Act—passed on party lines with no semblance of bipartisan support. With increasing regularity, Washington D.C. encounters more gridlock in Congress than in the surrounding highways.

Society is also growing more pluralistic as it becomes more polarized. Incorporating new groups of minorities is burdensome—both for minorities and for society at large. When either the majority or the minority refuses to negotiate toward the middle, the burden of pluralized society can become too strenuous for one group to carry. But, legislative compromise can help society to easily share and carry this burden.

The following social and legislative history tells how religious minorities lobbied the California legislature to provide more equal bargaining power to both religious employees and employers when negotiating workplace accommodations. It is a story of cooperation, and it stands in contrast to the prevailing polarization in other political discourse.

AN EXEMPLARY ACCOMMODATION

A PECULIAR CLAUSE

A reader of California's Fair Employment and Housing statute will encounter a peculiar clause. Although the statute expectedly requires employers to reasonably accommodate employees' religious obligations—it unexpectedly breaks and specifically identifies the type of religious observance that employers should accommodate. "Religious belief . . . includes . . . observance of a Sabbath or other religious holy day or days . . . ."[1]

A state legislature would not include the specific example of "Sabbath" *sua sponte*. Absent some other unique interest, legislation is meant to be direct and straightforward. No superfluous words or phrases. As a comparison, the neighboring subsection about disabilities does not list deafness or paralysis (or anything else) as the prototypical disability for accommodation. And although California is not alone, it finds itself in an exclusive group, as only New York, Massachusetts, and Kentucky also write "Sabbath" in their employment discrimination statutes.[2]

The California legislature would not explicitly list "Sabbath" as the exemplary religious practice on a whim. Some backstory must describe a compelling reason for the legislature to do so.

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[1] CAL. GOV'T CODE § 12940(*l*)(1) (Deering 2021).

[2] N.Y. EXEC. LAW § 296(10)(a) (Consol. 2020); MASS. ANN. LAWS ch. 151B § 4(1)(A) (LexisNexis 2020); KY. REV. STAT. ANN. § 436.165(4)(a)-(b) (LexisNexis 2021) (providing counties and localities with authority to establish Sunday laws, but those laws cannot allow for employment discrimination based on Sabbath observance).

AMERICAN RELIGIOUS COMMUNITIES STRUGGLE TO OBSERVE FAITH AT WORK

West Hollywood Ordinance Ensures Sabbath Accommodations for Russian-American Jews.

Naftali Estulin arrived in West Hollywood, California in the early 1970s as a recently ordained Rabbi with the charge "to do whatever is necessary"[3] to care for Southern California's influx of Russian-Jews. Like those in his care, Rabbi Estulin was a Soviet Jew, and his journey to sunny West Hollywood, with its palm trees among rolling hills, also originated from a dark beginning in the USSR.

Forty years earlier, Rabbi Estulin's father lost a leg from shrapnel at Stalingrad while fighting for the Red Army against Nazi Germany—not out of love for the anti-Semitic policies of Joseph Stalin, but because Joseph Stalin was preferable to Adolph Hitler and Auschwitz. Although victory over the Nazis saved Russian Jews from the concentration camps—it did not save them from Stalinist and Marxist hostility toward religion. Rabbi Estulin's childhood bar mitzvah took place behind closed doors, hidden by shuttered windows, in a cramped single-room apartment. "We had 10 Jews, a loaf of bread and a bottle of Vodka."[4] Not the common fare for the feasts associated with most Jewish boys' thirteenth birthdays.

Eventually, the family fled to Israel. The parents remained there while Naftali Estulin went to Brooklyn to study to become a Rabbi, and from there, to California to be the director of the Russian Outreach Program of the Hasidic Jewish Chabad. At that time in the early 1970s, tens of thousands of Russian Jews fled the Soviet Union to settle in Southern California. Life for the newcomers was difficult, and Rabbi Estulin was there to help.

Employment was a particularly pressing part of the transition. The faithful immigrants did not have many job prospects and were "often forced to take whatever job they [could] find" and then "sometimes forced to make a choice between their

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[3] Samuel G. Freedman, *On Victory Day, Rabbi Honors Red Army's Jewish Veterans*, N.Y. TIMES, June 1, 2013, at A9.
[4] *Id.*

religion and their jobs."[5] Rabbi Estulin "rarely [got] through the week without hearing at least one complaint from a Russian Jewish immigrant forced to work on the Sabbath."[6] Rabbi Estulin's efforts with employers often fell on deaf ears. "I called every boss I could. Not everyone can be convinced."[7]

Without any backing to support the immigrant workers, Rabbi Estulin and others turned to the West Hollywood City Council. The Council gave Rabbi Estulin significant bargaining power by instituting a new city ordinance that prohibited employers from discriminating against a person because of his or her "refusal to work on any particular day or days or any portion thereof as a Sabbath or other holy day [. . .] ."[8]

The Jewish community in West Hollywood had reason to celebrate, but the excitement was soon cut off. Later that year, another development on the Supreme Court of the United States shook the foundation of the West Hollywood ordinance and gave the Jewish community a reason to doubt their ability to negotiate Sabbath-day accommodations.

Supreme Court Requires Reasonable Compromise

Robert Thornton was a manager of the Caldor Department Store in Torrington, Connecticut. Originally, Mr. Thornton, a devout Presbyterian, did not work on Sunday because a Connecticut law required all stores to close on the Christian Sabbath. When the state abandoned this law, the department store required Mr. Thornton to work every fourth Sunday. For a time, Mr. Thornton worked on Sundays even though it violated his conscience. Then, he successfully arranged for others to work his Sunday shifts. This successful arrangement was short-lived, however, as the general manager eventually informed Mr. Thornton that the store would dismiss him if he persisted to avoid all Sunday shifts. Notwithstanding the threat of termination, Mr. Thornton persisted to avoid Sunday shifts.[9]

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[5] Stephen Braun, *Law Protects Jews' Rights to Sabbath*, L.A. TIMES, Jan. 10, 1985, at WS1.
[6] *Id.*
[7] *Id.*
[8] W. Hollywood Mun. Code § 9.32.040 (1985).
[9] David Margolick, *High Court Gets Connecticut Sabbath-Work Case*, N.Y. TIMES, Apr. 11, 1984, at A24.

The department store graciously offered to transfer Mr. Thornton to a separate location that was closed on Sundays, but he declined because it was an hour from his home. The department store separately offered to demote him to a position that never worked on Sunday, but he declined because it paid three dollars less per hour. Mr. Thornton dug in his heels and refused these offers. In his refusal, he cited the Connecticut employment discrimination statute, which states "[n]o person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal."[10]

Despite this law, the department demoted Mr. Thornton, and he resigned. He then filed a discrimination suit in retaliation. Mr. Thornton won at trial, but after a series of appeals, the case reached the United States Supreme Court. The Supreme Court ruled in favor of the department store and held that the Connecticut law was unconstitutional because it provided an absolute and unqualified right not to work on the Sabbath, a feature that violated the Establishment Clause.[11]

Unfortunately, Mr. Thornton was not present for the Court's final decision. He died of a heart attack three years before the decision at the age of forty-one.[12] A Caldor colleague, Sharon Koplar, remembered the day that leadership at Caldor told Thornton, "Either you work on Sundays or you're out the door[,]" and how "his whole face was as red as a tomato . . . [and] his blood pressure was boiling."[13] Ms. Koplar noted that Thornton "believed in his rights, not just for himself, but for all of us. I think that this

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[10] *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985) (holding CONN. GEN. STAT. § 53-303e(b) (1985) unconstitutional because it required all persons to work on the Sabbath in violation of the Establishment Clause of the First Amendment).

[11] *Id.*

[12] *See* Margolick, *supra* note 9. Interestingly, Mr. Thornton's estate was insolvent before the Supreme Court case. Two groups of Jewish Americans were concerned about the outcome of the case in the Connecticut Supreme Court and obtained permission from the estate's executor to appeal to the United States Supreme Court. *See also* Linda Greenhouse, *High Court Gets Views on Sabbath Days Off*, N.Y. TIMES, Nov. 8, 1984, at A14. Joseph L. Lieberman, the future U.S. Senator and Vice President Candidate, represented Mr. Thornton at the Supreme Court. At the time, he served as the Connecticut Attorney General.

[13] *See* Margolick, *supra* note 9; *see also* Greenhouse, *supra* note 12.

case really did him in, and I don't think that we'll ever forget what he's done."[14]

Impact of Supreme Court Decision Reaches California

Despite the case's remarkable impact on Mr. Thornton, experts did not expect the ruling to have a noteworthy impact on the nation's employers or religious communities.[15] For a start, the Connecticut law provided religious employees with a rather extreme upper hand and required employers to accommodate any employee's request no matter the cost. This essentially granted an absolute right to a particular religious practice, which is contrary to the First Amendment's Establishment Clause.[16]

Justice O'Connor's concurring opinion specifically noted that federal employment law is not contrary to the Establishment Clause. Federal law simply requires employers to *reasonably* accommodate religious practice so it would not create *undue hardship*. A reasonable accommodation is ok. An absolute accommodation is not.[17] Even the Jewish organization that took Mr. Thornton's appeal to the Supreme Court noted that accommodations "do[] not involve any hardship 99 percent of the time, [so] the effect of the decision appears to be minimal."[18] In other words, Mr. Thornton and the Caldor Department Store was a uniquely thorny dispute. Most employers and employees can resolve conflicts without a significant cost to the employer.

Notwithstanding the promise that the Supreme Court decision would minimally impact Sabbath observers, Jewish-Americans and other religious communities still felt that the decision put them at greater risk to negotiate for religious accommodations. In an internal memorandum, the Agudath Israel of America expressed concerns about the Court decision. Before the official *Thornton* opinion was broadly available and having only seen excerpts of the decision in newspapers, Agudath's legal counsel noted that "yesterday's decision . . . at least creates a perception within the employment community that Sabbath observance is no

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[14] *See* Margolick, *supra* note 9; *see also* Greenhouse, *supra* note 12.
[15] David Margolick, *Ruling About Sabbath Work Seen as Having Slight Impact*, N.Y. TIMES, June 27, 1985, at B8.
[16] *Estate of Thornton*, 472 U.S. at 709.
[17] *Id.* at 711-12 (O'Connor, J., concurring).
[18] Margolick, *supra* note 15.

longer a value that the law requires employers to be sensitive to."[19] His concern possibly had merit. The New York Post headline on June 25, 1985 read, "Court: You Can Be Forced To Work On The Sabbath."[20]

CITIZENS LOBBY CALIFORNIA TO REQUIRE REASONABLE COMPROMISE

Assemblymember Tom Hayden Introduces Bill to Protect Sabbath Observance

Back in California, not only was the West Hollywood ordinance protecting Sabbath-day observance at risk, but the pressure from the *Thornton* decision also extended to many other Jews and Adventists. At that time, Agudath Israel of California and the Anti-Defamation League in Los Angeles handled dozens of requests concerning religious conflicts in the workplace. The California headquarters of Seventh-day Adventists also received a call once every few days from someone with an employment discrimination problem.[21] A Jewish pharmacist in Beverly Hills paid $30,000 in legal fees and reported worsening health before his employer finally agreed to the simple accommodation that would allow Sunday work in lieu of Saturday work. The pharmacist noted that he simply "want[ed] to follow my religious tenets as I see them and perform my job to the best of my ability."[22]

Amid the potential backlash against Sabbath-day observance in the workplace, the Agudath Israel of America led the charge to petition the State of California to specifically reference the Sabbath in the state's employment law statute.

They found their legislative champion in Assemblyman Tom Hayden. Mr. Hayden had previously led a major 1960s radical civil rights and antiwar movement, but by the 1980s, he was a self-

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[19] Memorandum from David Zwiebel to Rabbi Chaim Zchnur (June 26, 1985) (available in Cal. Archives for AB 1180).
[20] *Court: You can Be Forced to Work on the Sabbath,* N.Y. POST, June 25, 1985, at 1 (cited in Memorandum from David Zwiebel to Rabbi Chaim Zchnur (June 26, 1985)).
[21] Lynn O'Shaughnessy, *Bill to Require Time Off to Observe Sabbath Passed*, L.A. TIMES, Sept. 11, 1985, at 6.
[22] *Id.*

described "born-again Middle American."[23] He was married to Jane Fonda and represented most of West Los Angeles County at the state assembly. In his youth, Mr. Hayden attended a Catholic congregation led by a nationally prominent priest who advocated for the jobless during the depression. Sadly, the priest was also a virulent anti-Semite, and Mr. Hayden drifted from his faith as he became disenchanted with the priest's teachings.[24]

Assemblyman Hayden originally introduced the Sabbath bill four months before the *Thornton v. Caldor* decision.[25] Although quietly received and enrolled as AB 1180, the subsequent outcome of *Thornton* placed a magnifying glass over Mr. Hayden's proposal.

The official legislative analysts described AB 1180 in these terms. It "would make it an unlawful employment practice for an employer to discriminate against any applicant or employee because of his or her observance of any day as a Sabbath or other holy day," but—an employer was exempt if it demonstrated "that it ha[d] explored all available means of accommodating the religious observance" and the accommodation would cause "undue hardship on the conduct of business."[26]

In presenting the bill, Mr. Hayden argued that the "Supreme Court decision which struck down a Connecticut law relating to the same subject has enhanced the need for state protection in this area. . . . [E]mployers are already acting on the false belief that they have no obligation to reasonably accommodate employee's religious practices."[27] His bill proposed a constitutional compromise that would "affirm[] the employee's right to practice their religion . . . while at the same time excusing the employer when such accommodation creates an unavoidable undue hardship."[28]

The legislative record does not include any arguments between legislators concerning the bill. But even though the legislative debate is thinly recorded, the record of constituent participation is thick. Multiple constituents came to the legislative

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[23] TOM HAYDEN, REUNION 465 (1988).

[24] Elaine Woo, *Tom Hayden, Preeminent 1960s Political Radical and Antiwar Protester*, WASH. POST (Oct. 24, 2016); Patrick McGreevy, *California Senate Memorializes One of Its Own, Former State Sen. Tom Hayden*, L.A. TIMES, Feb. 21, 2017.

[25] CAL. ASSEMB. Daily J., 1985-86 Sess., Vol. 1 at 575 (Mar. 4, 1985).

[26] *S. Rules Comm.*, S. Floor Analyses, Legislative Analysis of AB 1180 (Sept. 5, 1985) (available in Cal. Archives for AB 1180).

[27] *Senate Industrial Relations Committee on AB 1180* (available in Cal. Archives for AB 1180) (statement of Tom Hayden).

[28] *Id.*

table and argued for their position via letters to their representatives.

Opponents Claim that the Sabbath Bill is Unnecessary

Not everyone supported the bill. The Association of California School Administrators argued that allowing teachers to observe religious holidays would create "additional difficulties" for school districts.[29] The City of San Diego opposed the bill on the belief that the law would result in increased litigation against employers.[30] The Association of California Water Agencies and the Associated General Contractors of California opposed without giving specific reasons.[31]

An overarching theme in opposition was that the bill did not actually change the law. The Supreme Court of California decided six years earlier that the state's constitutional guarantee to practice religion required employers to show a detrimental effect on business to rightfully require a religious employee to work on the Sabbath.[32] Because of this case, the concept of a reasonable accommodation was already present in cases brought by the state's Fair Employment and Housing Commission, including the "commonly requested" accommodation to observe a Sabbath.[33] Further, opponents argued that needlessly adding "Sabbath" to the statute could lead employers to accommodate Sabbath-day observance more than other religious observances. And, like Connecticut, the new law's specificity might violate the Establishment Clause.[34]

Another theme in opposition was that the bill would "make it more difficult, if not impossible, for business to operate in

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[29] Letter from Melinda Melendez, Ass'n of Cal. Sch. Admin., to Assemb. Tom Hayden (June 10, 1985) (available in Cal. Archives for AB 1180).
[30] Letter from John M. Witzel, City of San Diego, to Assemb. Tom Hayden (June 5, 1985) (available in Cal. Archives for AB 1180).
[31] Letter from Louis B. Allen, Ass'n of Cal. Water Agencies, to Assemb. Tom Hayden (Apr. 2, 1985) (available in Cal. Archives for AB 1180); Letter from Warren R. Mendel, Counsel for various contracting associations, to Assemb. Tom Hayden (June 24, 1985) (available in Cal. Archives for AB 1180).
[32] Rankins v. Comm'n on Prof. Competence, 24 Cal.3d 167 (1979).
[33] Letter from Steven C. Owyang, Fair Emp. & Hous. Comm'n, to Assemb. Tom Hayden (May 8, 1985) (available in Cal. Archives for AB 1180).
[34] *See* Letter from Steven C. Owyang, Fair Emp't & Hous. Comm'n, to Assemb. Tom Hayden (May 8, 1985) (available in Cal. Archives for AB 1180).

California."[35] A healthcare corporation wished "personally and corporately" to "be sensitive to the needs of personnel," but expressed that the health care industry worked every hour of the week and could not possibly accommodate religious holy days.[36] A concerned citizen claimed that the state was "playing hardball now for economic survival" and he stood "against further . . . tampering with the free enterprise system."[37] The letters urged opposition "to this well-meaning, but ill-conceived legislation."[38]

Interestingly, the Fair Employment and Housing Commission joined the team that opposed the bill. They felt that the bill "does not add anything to current law and may, in fact, create new problems which do not now exist."[39] But their parent organization, the Department of Fair Employment and Housing, took a "neutral position" because the bill "is essentially the same as existing law."[40]

Proponents Claim Religious Community Needs Support to Obtain and Maintain Employment

On the other hand, the bill had the expected support of religious communities that observe the Sabbath. Mr. Stanley Treitel, a representative of California's Jewish communities, testified before the Labor and Employment Committee and asked for their support. He again referenced "the number of cases where Orthodox Jews have been fired, urged to go elsewhere, or generally harassed" because of their observance of the Sabbath. Although California's Constitution likely called for Sabbath accommodations,[41] discrimination continued because of the vagueness of the employment statute and Fair Employment

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[35] Letter from Joanna Saenz, Oscanbe, to Assemb. Richard Floyd (Apr. 22, 1985) (available in Cal. Archives for AB 1180).
[36] Letter from Allen Braswell, Braswell Enterprises, to Assemb. Richard Floyd (Apr. 22, 1985) (available in Cal. Archives for AB 1180).
[37] Letter from Norman J. Stripp to Assemb. Richard Floyd (Apr. 22, 1985) (available in Cal. Archives for AB 1180).
[38] Letter from L.F. Pittroff, Fleetwood Enterprises, to Assemb. Richard Floyd (Apr. 23, 1985) (available in Cal. Archives for AB 1180).
[39] Letter from Steven C. Owyang, Fair Emp't & Hous. Comm'n, to Assemb. Tom Hayden (May 8, 1985) (available in Cal. Archives for AB 1180).
[40] Letter from Mark Guerra, Dep't of Fair Emp. & Hous., to Assemb. Tom Hayden (Sept. 5, 1985) (available in Cal. Archives for AB 1180).
[41] *See* Rankins, 24 Cal.3d at 167 n.6.

regulations. He also highlighted the bill's intended compromise between employers and religious employees, stating that the law would both "clearly and unequivocally make it an unlawful employment practice" to discriminate on the basis of Sabbath observance, and also allow employers "adequate protections to guarantee the orderly transaction of business."[42]

Representatives from the Seventh-day Adventist community urged the legislature to support the bill. Again, they noted that although case law and administrative regulations had long required employers to accommodate religious observances, "[m]any employers still fail or refuse . . . ." And again, they highlighted the compromise in the bill. It would "provide[] a clear expression of the importance of accommodating religious observance while at the same time protecting employers from an undue hardship on the conduct of their business."[43]

Some unexpected parties supported the bill. The City of Gardena supported the bill to protect the city's "richly mixed . . . diversity of cultures."[44] The ACLU hoped that the law would clearly establish a policy of reasonable accommodation.[45] The California Teachers Association and California State Employees' Association supported the bill without listing specific reasons.[46]

Compromise Is at the Heart of the Sabbath Bill

The word "compromise" is absent from the letters preserved in the legislative record—but the concept of compromise sits at the heart of the religious accommodation bill. Seemingly, the law envisions this quintessential scenario: an employee sitting across the desk in his employer's office; the employee describing a sincere religious commitment; and the employer providing some reasonable

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[42] Stanley Treitel, Testimony on AB-1180 (Apr. 11, 1985) (available in California Archives for AB 1180).

[43] Letter from Claude D. Morgan, Church State Council, to Senator Ruben S. Ayala (Sept. 5, 1985) (available in California Archives for AB 1180).

[44] Letter from Donald Dear, Mayor of Gardena, to Assembly Member Richard Floyd (Apr. 15, 1985) (available in California Archives for AB 1180).

[45] Letter from Daphne Macklin and Marjorie Swartz, Am. C.L. Union, to Assembly Member Tom Hayden (Apr. 10, 1985) (available in California Archives for AB 1180).

[46] Letter from Alice A. Huffman, California Teachers Association, to Assembly Member Tom Hayden (Mar. 18, 1985); Letter from Mike Douglas, California State Employees' Association, to Assembly Member Tom Hayden (Apr. 12, 1985) (available in California Archives for AB 1180).

alternatives to both accommodate the employee and maintain the full profitability of the company.

In Connecticut, the law's absolute accommodation afforded too much bargaining power to the religious employee. In California, the opaqueness of the old law afforded too much bargaining power to the employer (who already had a natural upper hand in negotiations). Advocates in California hoped that explicitly stating "Sabbath" in the employment statute would balance the bargaining positions.

And—for both parties—with compromise comes sacrifice. To limit the overall burden, employers and employees should be prepared to shoulder a minor load. For religious employees, a reasonable accommodation might require them more regularly to work the night shift or the non-Sabbath weekend shift. In Mr. Thornton's case, for example, a reasonable accommodation might require him to move to the other store location. For employers, a reasonable accommodation might require exceptions to traditional work schedules or expanded ability for workers to swap shifts.

In the legislative history of AB 1180, all parties in California agreed that employers should be exempt if providing an accommodation would create "undue hardship." And the *Thornton* decision likely pushed the California legislature to encourage a fluid understanding of "undue hardship." In an untitled Question and Answer (maintained as part of the legislative record at the state archives), a legislative advocate for the bill responded to the question, "Shouldn't we spell out what is an undue hardship?" The response:

> "This bill does not spell out what is an undue hardship and does not spell out what is not an undue hardship. We are clarifying the effort that should be made to develop an accommodation, but the circumstances of each case varies so much that whether an accommodation is possible in each instance must be left to the judgment of the employer and, where necessary, a judicial determination."[47]

The new law would require the employer to make an effort to accommodate—but not mandate one party to bear the entire

[47] AB 1180 Questions and Answers, Question #8 (available in California Archives for AB 1180).

burden of the accommodation. In other words, the law would require compromise.

A PECULIAR CLAUSE EXPLAINED

In the end, the bill met little opposition in the California legislature and passed 69-4 on September 10, 1985.[48] Assembly Member Hayden encouraged Governor Deukmejian to sign the bill, noting that the bill would clarify the right of employees to practice their religion while protecting employers from any burden that might be caused by unusual claims. Mr. Hayden said that the law would "make it easier for employers and employees to come to mutual agreement without state involvement."[49]

Because the bill exempted employers from accommodations that would result in undue hardship, the Legislative Counsel of California assured the governor that the new law would be constitutional.[50] The governor signed the bill on October 4, 1985.

And now, more than thirty years later, California's employment discrimination statute maintains the curiously specific language usually left for regulations. Sabbath-day observance is the type of religious practice that employers should accommodate.

Russian-American Jews in California were no longer compelled to choose between gainful employment and faithful adherence. One month after the bill became law, Guitelle Tova Dershowitz wrote to Assembly member Hayden—"This bill now makes it possible for persons of all faiths to observe their religious holidays in accordance with the dictates of their traditions and without fear of retribution by their employers. I am greatful [sic] to you . . . ."[51]

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[48] Cal. Assemb. B. 1910, 1985-1986, Reg. Sess., at 4465-66 (Ca. 1985).
[49] Letter from Tom Hayden, Assemb. Member, to George Deukmejian, Governor (Sept. 24, 1985) (available in California Archives for A.B. 1180).
[50] Letter from Bion Gregory, Legislative Counsel, to George Deukmejian, Governor (Sept. 27, 1985) (available in California Archives for A.B. 1180).
[51] Letter from Guitelle Tova Dershowitz to Tom Hayden, Assemb. Member (Nov. 22, 1985) (available in California Archives for A.B. 1180).

ANOTHER EXEMPLARY ACCOMMODATION

A PECULIAR CLAUSE REVISITED

A further reading of California's Fair Employment and Housing statute leads to another peculiar clause. Immediately following the language that employers must accommodate religious belief that "includes, but is not limited to, observance of a Sabbath," the statute lists "religious dress practice and religious grooming practice"[52] as another exemplary religious observance for accommodation.

Again, exemplary hypotheticals are typically reserved for regulations. Some compelling circumstances must have led the California legislature to add an explicit protection for religious dress and grooming.

NEW IMMIGRANT COMMUNITIES STRUGGLE TO OBSERVE RELIGION

A Sikh American Refuses to Shave and is Rejected from Work

After serving for thirty-four years in the high seas with the Indian Navy, Trilochan Singh Oberoi immigrated to California in

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[52] *See* CAL. GOV. CODE § 12940(*l*)(1) (Deering 2021). Interestingly, between legislative action in 1985 and 2012, the United States Supreme Court made a significant change to religious exercise jurisprudence. In the 1980s, the First Amendment barred the government from passing any law that burdened a sincere religious practice—unless the government could prove that the law furthered a compelling interest, and the law was narrowly tailored to advance that interest. *See also* Sherbert v. Verner, 374 U.S. 398 (1963). In *Emp. Div. v. Smith*, 494 U.S. 872 (1990), the Court abandoned this approach and adopted a new test where any neutral law of general applicability is constitutional, even if it has the peripheral impact of burdening religious practice. In its reasoning, the Court described that religious accommodations for generally applicable laws are best carved out by legislatures—and not individually discerned by courts. Courts have a difficult time "weigh[ing] the social importance of all laws against the centrality of all religious beliefs." *See also Emp. Div. v. Smith*, 494 U.S. 872, 890 (1990). Accordingly, the accommodation process is best left to the legislature. California anticipated this decision and took a similar approach in 1985 when it accommodated religious holy days, and it again affected a rule in 2012 that accommodated religious dress and grooming. To re-tip the scales away from the weight of the employer toward the employee, the new law also increased the burden that employers should bear to grant these accommodations.

1999 at the age of fifty-three.[53] Since the early twentieth century, thousands of Punjabi Indians immigrated to the United States. The largest community congregated in Yuba City, California, a town of 50,000 just north of Sacramento and situated along the Feather River in view of the Sutter Butte mountain range.[54]

Oberoi, like the majority of Punjabi immigrants in northern California, practiced the Sikh religion. Sikh individuals observe five articles of faith. One of these, called "Kesh," forbids men and women from cutting any of their hair. Men (and some women) cover their hair in a turban.[55] These exterior religious practices tend to distinguish Sikh individuals in a crowd, especially in the western world.

Soon after migrating to his new Northern California community, Mr. Oberoi, with his own turban and carefully groomed beard, found a job as a Wal-Mart cashier and an assistant elementary school math teacher. But after becoming an official U.S. citizen, Oberoi reflected on his decades of service as an Indian Naval Officer and wanted "to serve California and the U.S. as honorably as [he] had served India."[56] He applied to work as a correctional officer for the California Department of Corrections and Rehabilitation ("CDCR").[57]

To promote safety within the difficult environment of a correctional facility, CDCR subjects' applicants to a rigorous series of evaluations. Over the course of a year, Oberoi successfully passed a physical abilities test, a vision test, a background check, a psychological evaluation, and a prescreening test. Next, CDCR administered a "respirator fit" test that required applicants to wear a gas mask.[58] On occasion, prisons use tear gas to manage inmate insurrection and other dangerous situations, during which

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[53] Stephen Magagnini, *Sikh Prison Guard Applicant May Keep Beard, Board Rules*, SIKHNET (Dec. 10, 2008), https://www.sikhnet.com/news/sikh-prison-guard-applicant-may-keep-beard-board-rules.

[54] Bruce La Brack, *A Century of Sikhs in California*, SIKH FOUND. INT'L (July 3, 2011), http://www.sikhfoundation.org/sikh-punjabi-language-studies/a-century-of-sikhs-in-california-by-bruce-la-brack/; *American Punjabi Sikhs*, U.S. DEP'T OF STATE BUREAU OF INT'L INFO. PROGRAMS (Apr. 2012), https://static.america.gov/uploads/sites/8/2016/05/American-Communities-Series_American-Punjabi-Sikhs_English_508.pdf.

[55] *FAQ*, SIKH COALTION, https://www.sikhcoalition.org/about-sikhs/faq/.

[56] Magagnini, *supra* note 53.

[57] *Id.*

[58] Sunita Sohrabji, *Gubernatorial Hopeful Brown Targeted by Sikh Group*, INDIA–WEST, Oct. 15, 2014, at A14; Magagnini, *supra* note 53.

correctional officers must wear gas masks. A poorly fitting gas mask poses a significant risk to both the correctional officer and to others in the prison, so for this reason, CDCR asks applicants to shave facial fair to ensure the gas mask has a sealed fit. Due to the Sikh belief that forbids cutting hair, Oberoi refused to shave for the gas mask test. When questioned, Oberoi stated, "Inside I'll die if I cut my beard[. . . .] Once you touch the razor or touch the scissor, your religion is gone."[59]

At first glance, the gas mask issue may present a compelling reason for CDCR to categorically ban any observant Sikh, Muslim, or Orthodox Jew from working in a prison. Strangely, however, CDCR hires correctional officers who cannot shave due to dermatological conditions, and CDCR allows individuals with medically mandated beards to use special gas masks.[60] Further, Mr. Oberoi tautly tied his beard, and it would not impact the traditional gas mask. He successfully wore gas masks during nuclear biological chemical damage control courses in the Indian Navy.[61] Notwithstanding these mitigating circumstances, CDCR dismissed Oberoi's application for his refusal to shave his beard.[62] CDCR resolutely maintained that applicants must abide by its rules, and it refused to come to the middle to work out a resolution.

Oberoi appealed the decision to the California State Personnel Board. After a two-day trial, the board ruled in Oberoi's favor and ordered CDCR to expedite his application and accommodate his religious observant beard.[63] CDCR did not comply and continued to fight Oberoi's application in a subsequent state court proceeding.[64] Two years after the Personnel Board decision, and six years after filing his application, CDCR and Oberoi settled the dispute in October 2011 for $295,000 in damages.[65]

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[59] Magagnini, *supra* note 53.
[60] *Id*.
[61] Sohrabji, *supra* note 58; Magagnini, *supra* note 53.
[62] Magagnini, *supra* note 53.
[63] Sohrabji, *supra* note 58.
[64] Ritu Jha, *Six Years On, He Still Wants that Job, and Beard*, INDIA ABROAD, Feb. 4, 2011 at A13.
[65] *Sikh Gets Job, USD 295,000 in Discrimination Case in US*, PRESS TR. OF INDIA, Oct. 28, 2011.

Sikh Coalition Advocates for Mr. Oberoi and Other Sikh Americans

On the sidelines of Mr. Oberoi's accommodation dispute was a group of advocates called the Sikh Coalition. The organization was founded on the night of September 11, 2001 as a loose collaboration of volunteers who wanted to represent Sikh Americans targeted for a mistaken connection to fundamentalist terrorists. The organization added their first full-time employee in 2003, and the group now employs fifteen full-time staff across three offices in the United States.[66]

A year before Oberoi settled his dispute, the Sikh Coalition started a grassroots effort to assist Mr. Oberoi. They asked community members to call state legislators and demand the state attorney generals to stop defending the CDCR position. Interestingly, the attorney general at the time of the dispute, former and future governor Jerry Brown and future U.S. Senator Kamala Harris, supported the CDCR position and allowed state attorneys to draw out the litigation.[67] The Sikh Coalition's influence likely played a significant role in helping Mr. Oberoi settle the dispute.

Beyond Mr. Oberoi's case, the Sikh Coalition reportedly helped many California Sikhs with discrimination issues.[68] According to a survey of Sikhs in Northern California, twelve percent of Sikhs reported that they were refused employment because of their religious obligations—comparable to the ten percent of the community who reported being the target of hate crimes, and relatively low compared to the roughly seventy percent of Sikh boys who suffered harassment in school.[69]

Under this sense of discrimination, the Sikh Coalition led a charge to amend California's employment statute to specifically

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[66] *History,* SIKH COALITION, https://www.sikhcoalition.org/about-us/history/ (last visited Feb. 5, 2021).

[67] Sohrabji, *supra* note 58; Jha, *supra* note 64.

[68] *See* E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 966 F.Supp.2d 949 (N.D. Cal. 2013). Beyond the Sikh community, Muslim Americans also faced significant problems with employment discrimination. For example, Umme–Hani Khan started working at Abercrombie & Fitch in late 2009 in the San Francisco suburb of San Mateo. She wore a hijab head covering in accordance with her belief in Islam. A few months into her job, a visiting manager noted that Khan's hijab violated the company's look policy, and an HR manager subsequently fired her for non-compliance with the company policy.

[69] *Sikh Coalition*, *Bay Area Civil Rights Report 2010* (2010).

protect religious dress and grooming. Their push for legislative recognition is remarkably similar to the Los Angeles Jewish communities' push to add "Sabbath" to California law. Assemblyperson Mariko Yamada, a daughter of Japanese Internment Camp survivors[70], sponsored the Sikh Coalition's bill.

RELIGIOUS COMMUNITIES LOBBY CALIFORNIA TO ACCOMMODATE RELIGIOUS DRESS AND GROOMING

The Workplace Religious Freedom Act of 2012

The legislature enrolled the Sikh Coalition's bill as AB 1964 (in recognition of the Civil Rights Act passage year) and colloquially titled it "The Workplace Religious Freedom Act of 2012." The bill intended to explicitly protect religious dress and grooming. The legislative analysts' description of the bill stated that it would specify that religious belief includes "the practice of wearing religious clothing or a religious hairstyle."[71] More specifically, the bill defined religious clothing and hairstyle to include apparel, jewelry, hairstyles, and beards that are part of the observance of religious faith.[72] It would also include "carrying an object," a nod to the sometimes controversial practice of Sikh individuals who carry a symbolic sword or knife called a Kirpan.[73]

The bill also gave guidance for employers and employees who needed to agree to reasonable accommodations for this type of religious practice. Beyond redefining "undue hardship,"[74] the new law specifically stated that segregation (either from other

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[70] Giovanni Hashimoto, *Assemblymember Yamada Speaks to College Democrats*, Pac. Union Coll. (Oct. 19, 2012), https://www.puc.edu/news/archives/2012/assemblymember-yamada-speaks-to-college-democrats.

[71] Ben Ebbink, California Assembly Floor Analyses, Third Reading Summary, Legislative Analysis of AB 1964, at 1 (Apr. 30, 2012) (available in California Archives for AB 1964).

[72] *Id*.

[73] Ben Ebbink, California Assembly Floor Analyses, Third Reading Summary, Legislative Analysis of AB 1964, at 1 (Apr. 30, 2012) (available in California Archives for AB 1964); *FAQ*, *supra* note 55.

[74] See *infra* Redefining the Terms.

employees or from the general public) is not a reasonable accommodation nor is violating other employees' civil rights.[75]

Generally, most elements of the bill directly connected to Mr. Oberoi's employment dispute against CDCR. For example, the updated example of religious practice would explicitly protect wearing a turban or maintaining a beard. For employers like CDCR, the proposed bill allowed them to point to other employee rights as reasons why an accommodation is unduly burdensome.

But one element of the bill did not directly relate to Mr. Oberoi's case. The bill would specifically define that segregation of a religious employee is not a reasonable accommodation. The motivation for this clause did not explicitly originate from a specific experience in California but was borrowed from an unreported federal dispute in Northern Illinois. Somewhere near Chicago, an observant Sikh named Mr. Birdi worked as a customer service representative for UAL Corporation. UAL banned hats or other head dress as part of its dress code. To accommodate Mr. Birdi's turban, UAL offered him a number of alternative positions, most of which involved segregation from clients. The judge suggested that segregation from the general public would eliminate the conflict between the employment requirement and the religious practice and was therefore reasonable.[76] The legislative history of AB 1964 specifically referenced this decision as the reason why the new bill would "clearly state the segregation of religious clothing or hairstyle is not an appropriate accommodation by an employer."[77]

No Formal Opposition Argues Against the Initiative

The legislative process to pass AB 1964 was almost entirely unopposed. At least fourteen organizations expressly supported the bill, including interested, though not always friendly, parties like the Sikh Coalition, Hindu American Foundation, the Council on American Islamic Relations, and the American Jewish Committee. Other supporting organizations included the ACLU, the California

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[75] Ben Ebbink, California Assembly Floor Analyses, Third Reading Summary, Legislative Analysis of AB 1964, at 1-2 (Apr. 30, 2012) (available in California Archives for AB 1964).

[76] Birdi v. UAL Corp., 99 C 5576, 2002 WL 471999 (N.D. Ill. Mar. 26, 2002).

[77] Kimberly Rodriguez, California Assembly Committee on Appropriations, Hearing Report, Legislative Analysis of AB 1964, at 2 (May 16, 2012) (available in California Archives for AB 1964).

Employment Lawyers Association, the California Nurses Association, and the California Immigrant Policy Center.[78] When the legislative documents asked to list opposing groups, the regular response was "None Known."[79]

One of the lone documents opposing AB 1964 came from Americans United for Separation of Church and State, and even then, the opposition was minimal. The group simply opposed the language of the original bill for being overly broad, although the group was also "committed to achieving consensus on legislation that would increase religious freedom in the workplace" and noted that the general measures were "commendable steps to take."[80]

Various Communities Supply Simple Support for Religious Dress and Grooming in the Workplace

In the letters supporting AB 1964, few made substantial references to the inclusion of dress and grooming practices in the statute. Most letters simply restated the purpose of the bill but failed to affirmatively argue for its passage. The ACLU, for example, simply noted that "AB 1964 adds 'religious clothing or a religious hairstyle' to the illustrative list of religious beliefs or observances" with no further discussion.[81]

The North American Religious Liberty Association argued that "[t]he Sikh should not be denied consideration for a job because he appears for his job interview wearing a long beard and a turban. An observant Jew should not be segregated from the public because he wears a yarmulke."[82]

Interestingly, a number of letters from Sabbatarians supported the bill, but made minimal reference to religious clothing

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[78] California Senate Judiciary Committee, Legislative Analysis of AB 1964 Background Information Request, S. 2011-2012, at 5 (2012) (available in California Archives for AB 1964).

[79] California Senate Judiciary Committee, Legislative Analysis of AB 1964 Background information request, S. 2011-2012, at 9 (2012).

[80] Letter from Amanda Rolat, Americans United for Separation of Church and State, to Mike Feuer, Chairman of Assembly Judiciary Committee (Apr. 17, 2012) (available in California Archives for AB 1964).

[81] Letter from Francisco Lobaco, American C.L. Union of California, to Assemb. Member Mariko Yamada (Apr. 21, 2012) (available in California Archives for AB 1964).

[82] Letter from North American Religious Liberty Association—West to Assembly Committee on Labor and Employment (Apr. 18, 2012) (available in California Archives for AB 1964).

or grooming. Reminiscent of AB 1180 in 1985, the Agudath Israel of California advocated for AB 1964 because "[m]embers of the Jewish community have lost jobs because they had to leave early on Friday in order to make it home by sundown for the Sabbath."[83] The letter did note, however, that the organization had "received complaints from Jewish women who were denied jobs because of their modest dress."[84]

Four unaffiliated constituents sent a standardized email with a thoughtful argument to specifically protect religious dress and grooming standards. The email noted that it was previously "common to discriminate against Catholics who wore crucifixes as an expression of their faith, while Jews, who wore the Star of David, faced similar discrimination. . . . [M]ost people now understand that such discrimination is totally unacceptable." Then, by extension, the emails argued, "The same should be true of other faiths. Our nation's and state's guarantee of freedom of religion is a hollow promise if it means freedom of religion for only certain faiths."[85]

The strongest argument for the inclusion of dress and grooming standards came, unsurprisingly, from the Sikh Coalition who sponsored the bill. The Sikh Coalition described the extent of the discrimination—"One in ten Sikhs in the San Francisco Bay Area reported suffering discrimination in employment"—and both the California Department of Corrections and Rehabilitation and California police agencies refused to hire Sikhs unless they removed their beards or turbans. Additionally, the Sikh Coalition explained the indefensibility of this position, as both the United States Army and Federal Protective Service regularly accommodated Sikhs in similar service positions.[86]

Another common theme among supporters was the aspect of the law that stated that segregating religious employees was not a reasonable accommodation. The Council on American-Islamic Relations California chapter argued that the confusing legal

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[83] Letter from Irving Lebovics, Agudath Israel of California, to California Assembly Judiciary Committee (Apr. 23, 2012) (available in California Archives for AB 1964).
[84] *Id.*
[85] Email from L Wayne Bennett to Senate Judiciary Committee (June 13, 2012); Email from Gus Gilbert Guichard to Senate Judiciary Committee (June 13, 2012); Email from LuRetta Fairman to Senate Judiciary Committee (June 13, 2012); Email from Whitney Weddell to Senate Judiciary Committee (June 13, 2012) (all emails available in California Archives for AB 1964).
[86] Letter from Sikh Coalition to "Colleagues" (Apr. 11, 2012) (available in California Archives for AB 1964).

standard allowed employers to "accommodate" Muslims with religious beards and head coverings by segregating them from the general public.[87] The Consumer Attorneys of California highlighted their "reason for support" in block, bolded letters, "AB 1964 ensures that an employee will not be segregated from customers or the general public because of his religion or religious observances."[88] The California Council of Community Mental Health Agencies supported the bill because segregating and censoring religious employees based on their religious practices "will harm the mental health of employees and can become a catalyst for mental health crisis."[89]

Although the legislative history does not substantially cover the dress and grooming aspect of AB 1964—the history substantially addresses the redefinition of "undue hardship" as "significant burden or expense." This discussion is covered in the following section.[90]

Comparing and Contrasting the 2012 Bill Concerning Dress and Grooming Standards and the 1985 Bill Concerning Sabbath Observance

In many ways, the history of religious dress and grooming practices in California's Fair Employment and Housing statute is remarkably similar to the 1985 legislative history that recognized Sabbath observance. Both bills resulted from religious migrant communities facing employment discrimination—and both communities successfully lobbied the state legislature for official recognition. Neither group sought for absolute bargaining power—but both lobbied for a law that would exempt employers who could show undue hardship.

The two bills, however, presented two differences, unapparent to the casual observer. The first difference is that

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[87] Letter from Masoud Nassimi, Council on American Islamic Relations California Chapter, to Assemb. Member Mariko Yamada, (Apr. 17, 2012) (available in California Archives for AB 1964).

[88] Letter from Jacquie Serna, Consumer Attorneys of California, to Assemb. Member Mariko Yamada (July 31, 2012) (available in California Archives for AB 1964).

[89] Letter from Rusty Selix and Zima Khanna, California Council on Community Mental Health Agencies, to Assemb. Member Mariko Yamada (June 22, 2012) (available in California Archives for AB 1964).

[90] *See supra* notes 30-41; *see also infra* Redefining the Terms.

"Sabbath" invokes a specific Judeo-Christian religious practice, whereas "religious dress and grooming" is not so specific to one religious group. In this way, the 2012 bill seems much more favorable when viewed in light of the Establishment Clause.

The second difference is how the burden of accommodation is borne between the employer and the religious employee. For Sabbath observance, an employer could expect the employee to bear some of the burden of the scheduling accommodation. That is, an employee who observes a Saturday Sabbath would likely need to work on Sundays and secular holidays. For religious dress and grooming, however, the employee is not expected to bear any of the burden.

For example, the anticipated cost of an accommodation for a retailer is the fact that a shopper might not like to purchase goods from a person in a turban—and the shopper might visit a neighboring competitor with a non-minority sales associate. Although accommodating religious dress in this situation likely poses a minimal cost to business, the employee is not able to bear his or her part of the burden like his Sabbath observant counterpart.

The legislative history provides no discussion about this aspect of the law. One possible view is that living in a pluralistic society means that some groups will have unfounded prejudices against others. Given the burden that religious minorities already face to combat prejudice in aspects of life beyond employment, the legislature may be more justified in asking employers to bear the whole of the burden in the employment context.

Notwithstanding these differences, in both cases the California legislature extended bargaining power to religious minorities facing employment discrimination. The next Trilochan Singh Oberoi will more easily negotiate for a reasonable accommodation than his Sikh predecessors.

ANOTHER PECULIAR CLAUSE EXPLAINED

Ultimately, the debate concerning the inclusion of dress and grooming standards is one-sided and thin. Most everyone agreed to explicitly recognize the practice in California's Fair Employment and Housing statute. The law passed with super majorities, as described in the following section.[91]

[91] *See supra* notes 40-41.

REDEFINING THE TERMS

ONE FINAL PECULIAR CLAUSE

A reader of California's Fair Employment and Housing statute will encounter one final peculiar clause. But unlike the overt references to the Sabbath and religious dress and grooming, this final peculiarity is much more obscure. An employer may refuse to accommodate an employee's religious practice, but only if the employer shows that an accommodation creates "undue hardship, as defined in subdivision (u) of Section 12926 . . . ."[92] From there, the subsequent definition of undue hardship is "an action requiring significant difficulty or expense."[93]

Statutes typically define burdens—but religious discrimination statutes do not typically define the burden so strongly. Federal law, for example, defines "undue hardship" for religious discrimination as nothing more than "de minimis cost."[94] And, as previously noted, when the California legislature addressed the issue in the 1980s, it specifically did "not spell out" what is and what is not an undue hardship.[95] California must have had a compelling reason to buck away from national law and make an about-face concerning its own definition of undue hardship.

DIFFERING OPINIONS ABOUT THE DEFINITION OF UNDUE HARDSHIP

U.S. Supreme Court Interprets Federal Law to Require Only Minimal Costs for Undue Hardship

Federal law governing accommodations for religious employees has long applied a unique "de minimis" standard to religious accommodations. The governing statute, Title VII of the Civil Rights Act, simply outlines that employers must accommodates a religious practice unless they are "unable to

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[92] CAL. GOV. CODE § 12940(*l*)(1) (Deering 2021).
[93] CAL. GOV. CODE § 12926(u) (Deering 2021).
[94] 29 C.F.R. § 1605.2(e)(1) (2021); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).
[95] AB 1180 Questions and Answers, Question #8 (available in California Archives for AB 1180).

reasonably accommodate . . . without undue hardship."[96] A Supreme Court decision, however, provided the more precise definition to understand this vague standard.[97]

Larry G. Hardison worked for Trans World Airlines (TWA) and adhered to a strict observance of the Sabbath from Friday sunset to Saturday sunset. Initially, Hardison and TWA met in the middle and resolved the conflict without a problem. Hardison informed his manager, and his manager and union representative offered to help Hardison swap shifts and observe religious holidays if Hardison agreed to work other non-religious holidays. Hardison worked the night shift on non-Sabbath days, and all parties were happy with this arrangement. Eventually, however, Hardison grew tired of the night shift and transferred to the day shift. The day shift had a different manager and union representative, and although TWA was happy to accommodate Hardison on the day shift, the union refused to violate seniority to allow Hardison to swap his Saturday shifts. Hardison refused to violate the Sabbath and work on Saturdays, and TWA subsequently fired him for insubordination.[98]

The Court found that TWA made reasonable efforts to accommodate Hardison's religious request. TWA sought another position that would fit his schedule, and TWA requested that the union relax its seniority system to accommodate Hardison. In weighing TWA's burden to accommodate religious practice, the Supreme Court drew the line that continues to influence religious accommodations under federal employment law. "To require TWA to bear more than a de minimis cost . . . is an undue hardship."[99]

TWA came far enough to middle ground to accommodate Mr. Hardison and were therefore exempt from legal consequences.

California Introduces Undue Hardship Standard, But Fails to Provide a Clear Definition

Although federal law is clear on the matter, "undue hardship" under California evaded a precise definition for decades. As previously noted, the general idea of "undue hardship" was

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[96] 42 U.S.C. § 2000e(j) (2021).
[97] *Trans World Airlines, Inc.*, 432 U.S. at 63.
[98] *Id.* at 66-69.
[99] *Id.* at 84. This standard has since been adopted into the Code of Federal Regulations, 29 C.F.R. § 1605.2(e)(1) (2021).

introduced to California legal parlance in a California Supreme Court case, *Rankins v. Commission on Professional Competence*, decided in 1979, two years after the United States Supreme Court Decision in Hardison.[100] In *Rankins*, the court determined that the employment nondiscrimination clause of the California Constitution did not require employers to accommodate religious practices that "impose undue hardship on employers."[101] The Court did not offer any further guidance or specific definition of undue hardship.

Six years after the *Rankins* decision, the 1985 bill that added "Sabbath" to the employment discrimination statute similarly avoided a specific definition of "undue hardship"—most likely to avoid the pitfall of the First Amendment's Establishment Clause that bars a state from crossing the line of protecting religious practice to promoting religious practice.[102]

In 1992, however, the California Legislature defined "undue hardship" as "significant difficulty or expense" for all California Fair Employment and Housing Act (FEHA) statutes, including sex, race, religion, and disabilities.[103] Unlike religious accommodations, the Establishment Clause does not limit the breadth of protection for these other classes. Because of this legal subtlety, perhaps, the legislature specifically defined undue hardship without addressing its impact on religious accommodations.

In addition to the new definition, the law outlined five factors to determine whether an accommodation crossed the line of reasonability.[104] To add to the confusion for religious

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[100] *Rankins*, 24 Cal.3d at 167.
[101] *Id*. at 178.
[102] AB 1180 Questions and Answers, Question #8 (available in California Archives for AB 1180); see *supra* at 14-15.
[103] A.B. 311 (1992), A.B. 1286 (1992).
[104] *Id.* The five factors are:
"(1) The nature and cost of the accommodation needed.
(2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility.
(3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities.
(4) The type of operations, including the composition, structure, and functions of the workforce of the entity.
(5) The geographic separateness or administrative or fiscal relationship of the facility or facilities." CAL. GOV. CODE § 12926(u)(1)–(5) (Deering 2021).

discrimination, the new statutory definition would apply "unless a different meaning clearly appears from the context."[105]

California's Indefinite Standard for Undue Hardship Results in an Ambiguous Court Decision and Failed Negotiations for Accommodations

When employers and employees in California sat down to discuss a religious accommodation, they had a confusing standard guiding their decision. Should the federal "de minimis" standard apply as outlined in *Hardison*? Should no standard apply, as outlined in the 1985 amendment? Or should the "significant difficulty or expense" standard apply, as outlined in the 1992 amendments?

This ambiguity became even more apparent in a 1997 decision that confusingly referenced the federal "de minimis" standard in context of California employment law.

Geraldine Soldinger led a prototypical life for a Conservative Jew in California. She was married to a Holocaust survivor. She kept a kosher home. She sent her children to religious school. She strictly observed the three major Jewish holidays of Yom Kippur, Rosh Hashana, and Passover. In fact, in the thirteen years from 1977 to 1990 that Ms. Soldinger worked for Northwest Airlines, she faithfully observed these holidays each year, resting from work and refraining from driving a car, watching television, or answering the phone. Ms. Soldinger typically worked Sundays, but in 1991, the Passover overlapped with Easter Sunday, and due to the overlapping holidays, she was not able to schedule the day off. After unsuccessfully asking more than fifteen other employees and her manager for help, Ms. Soldinger resigned herself to the fact that she could not find a replacement. Still, she faithfully observed the holiday and did not report to work. Although Northwest Airlines covered her responsibilities "with ease," the airline fired her one week later for insubordination. Soldinger filed grievances, which the airline rejected, and she subsequently sued in California state courts.[106]

Part of the outcome hinged on whether Northwest Airlines faced "undue hardship" under California law to accommodate Ms.

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[105] CAL. GOV. CODE § 12926(u) (Deering 2021), A.B. 311 (1992), A.B. 1286 (1992).
[106] Soldinger v. Nw. Airlines, 51 Cal.App.4th 345, 354-56 (2nd Dist. 1997).

Soldinger's request to observe the Sabbath. Importantly, the court referenced *Hardison* as "the leading case." Although *Hardison* was based on federal law and *Soldinger* was based on state law, the facts of both cases involved airlines, unions, collective bargaining agreements, holy day accommodations, and dismissals for insubordination. Perhaps due to its similarities, the *Soldinger* court seemingly applied the federal "de minimis" standard for undue hardship. The court made no reference to the state statutory definition of "significant burden or expense"—nor did it reference the state's unwillingness to define "undue hardship" for Sabbath day accommodations twelve years earlier.[107]

Notwithstanding its use of the lower standard, the California court still found that Northwest Airlines did not face a de minimis burden to accommodate Ms. Soldinger's request to observe the Passover. The airline did, in fact, cover her responsibilities "with ease." The court ruled in Ms. Soldinger's favor.[108] Perhaps the court in *Soldinger* was casual with the legal standard, because in the end, Northwest Airlines failed under either approach.

Ms. Soldinger's success was clear—but the definition of "undue hardship" was not. The court provided no additional explanation for why it applied a federal Title VII standard to California employment law. Future employers and employees were rightfully confused about where to draw the line between a reasonable religious accommodation and an unreasonable one.

The confusing standard likely impacted Trilochan Singh Oberoi's efforts to work out an accommodation with the California Department of Corrections and Rehabilitation. As previously mentioned, Oberoi sought a position as a correctional officer, but CDCR rejected his application because Oberoi refused to shave his beard to pass a gas mask respiratory test. CDCR had another mask for individuals with medical conditions to use with facial hair.[109] If the burden for a religious accommodation was significant burden or expense, like it is for medical accommodations, then CDCR would know that it must provide the special gas mask for Mr. Oberoi. But, if the burden for religious accommodation was only de minimis cost, then CDCR would not need to bear the cost of providing a special mask for Oberoi. In the long litigation, Oberoi may have operated on the assumption that CDCR bore a significant burden, and CDCR

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[107] *Id.* at 371.
[108] *Id.* at 383.
[109] Magagnini, *supra* note 53.

may have operated on the assumption that it bore a minimal burden, and this could explain why the two parties failed to reach a compromise for multiple years until eventually coming to a workable solution.[110]

CALIFORNIA'S RELIGIOUS COMMUNITIES LOBBY THE LEGISLATURE TO EXPLICITLY DEFINE UNDUE HARDSHIP AS SIGNIFICANT BURDEN OR EXPENSE

The Heart of the Workplace Religious Freedom Act of 2012 Struck at the Definition of Undue Hardship

Given this context, when the Sikh Coalition promoted AB 1964, the "Workplace Religious Freedom Act of 2012," multiple religious groups hoped that the new law would end the ambiguity and clearly define the burden that employers should bear when accommodating employee's religious practices. In fact, although the Sikh Coalition originally sponsored the bill to promote religious dress and grooming, the most prominent feature of their bill was the specific statement that FEHA's undue hardship definition, "significant burden or expense," would apply to religious discrimination.

Legislative analysts indicated that AB 1964 would clarify that "undue hardship" in context of religious accommodation is the same as "defined statutorily in FEHA."[111] It further stated that the bill's sponsor, Assemblymember Yamada, intended to "correct certain deficiencies in current law by clarifying that the FEHA definition of undue hardship applies to the FEHA religious discrimination section (rather than the '*de minimus*' standard under federal law)."[112]

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[110] Margolick, *supra* note 15; Memorandum from David Zwiebel to Rabbi Chaim Zchnur (June 26, 1985) (available in Cal. Archives for AB 1180).

[111] Ben Ebbink, California Assembly Floor Analyses, Concurrence in Senate Amendments Summary, Legislative Analysis of AB 1964, p.2 (Aug. 21, 2012) (available in California Archives for AB 1964).

[112] *Id.*

Proponents Argue that the Clear Standard Results in Less Disputes, Broader Protections, and Fewer State Expenses

The bill's proponents found that eliminating the ambiguity would yield positive results. The Consumer Attorneys of California, for example, supported the bill because it would "correct an ambiguity . . . by clarifying that undue hardship . . . applies to religious discrimination."[113]

Masoud Nassimi, the chairman for the California section of the Council on American Islamic Relations, gave a strong argument for clearly defining undue hardship for religious accommodations as a significant burden or expense. First, the ambiguity led to conflicts between employers and employees, and the natural bargaining power of the employer meant that new employees regularly lost. "The debate over whether and to what extent employers are obligated to accommodate an employee's religion has resulted in the filing of lawsuits against employers as well as the ostracization of religious minorities in the workplace."[114]

Beyond the easy arguments for a clear and unambiguous standard, religious communities unsurprisingly argued that a "de minimis" standard for undue hardship was not nearly as favorable as the "significant burden or expense" standard. The American Jewish Committee argued that the minimal federal standard "afforded inadequate protection against religious discrimination" and "often plac[ed] these employees in the position of having to choose between their faith and their livelihood."[115] Their theological adversaries, the Council for American Islamic Relations, agreed. "The current federal standard . . . is unacceptably low because it allows employers to deny religious accommodations altogether by claiming that the cost of making such accommodations would be

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[113] Letter from Jacquie Serna, Consumer Attorneys of California, to Assemblymember Mariko Yamada (July 31, 2012) (available in California Archives for AB 1964). The author finds it interesting that consumer attorneys would support the legislation. In their line of work, ambiguity is good for business. The reason for this inconsistent position is not completely obvious.

[114] Letter from Masoud Nassimi, Council on American Islamic Relations California, to Assemblymember Mariko Yamada (Apr. 17, 2012) (available in California Archives for AB 1964).

[115] Letter from Ira Handelman & Eli Lipmen, American Jewish Committee, to Assemblymember Mike Feuer, Assembly Judiciary Committee Chair (Apr. 12, 2012) (available in California Archives for AB 1964).

prohibitively high, even if the true cost is objectively minimal or even theoretical."[116]

Some supporters made the pragmatic argument that the "de minimis" standard was costing the state of California non-trivial amounts in extended unemployment benefits and lost income tax revenues.[117]

Limited Opposition Argues that Higher Standard Needlessly Interferes with Employer's Right to Operate Business

As noted previously, no organizations formally opposed AB 1964, but early in the legislative process, the Republican Party provided an analysis that "regrettably" opposed the bill. "While the bill has good and important goals, it is necessary to focus on the specific details that might cause real harm to businesses and individuals by enactment of an imprecise and insufficiently carefully tailored law, however well intended."[118] More specifically, the opposition analysis claimed that defining undue hardship as a significant burden would "interfere with an employer's right to manage his workforce," and mandating accommodations "can be extremely difficult."[119]

Although no significant record is found of the ensuing negotiations, the Republican opposition analysis also noted that "[t]he business community is working with the author on possible amendments. They have not taken a position on the bill."[120] Neither the employers nor the religious employees needlessly fought the other side or used the situation to make political gains among their supporters. They were willing to work together on the bill with the hope of finding middle ground to best accommodate both interests.

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[116] Letter from Masoud Nassimi, Council on American Islamic Relations California, to Assemblymember Mariko Yamada (Apr. 17, 2012) (available in California Archives for AB 1964).

[117] *See* letter from Pastor Norman Farley, North American Religious Liberty Association—West, to Assemblymember Mariko Yamada (Apr. 11, 2012); letter from Alan J. Reinach, Church State Council, to Assemlymember Mariko Yamada (Apr. 10, 2012) (available in California Archives for AB 1964).

[118] Assembly Republican Bill Analysis, Labor and Employment, p.1 (Apr. 30, 2012) (available in California Archives for AB 1964).

[119] *Id.*

[120] *Id.*

The Differing Groups Meet in the Middle for a Workable and Mutually Beneficial Solution

Just as the business community willingly worked to pass a workable bill, the religious community also hoped to protect business interests. The Anti-Defamation League, for example, noted that the bill "protects employers by requiring them only to provide accommodations that do not impose an undue hardship on them."[121]

As a nod to business interests, the Sikh sponsors potentially intended the bill to be as business friendly as possible. "AB 1964 is not an affirmative action bill. It does not mandate that an employer hire candidates because of their religious beliefs, and it does not supersede any law regarding workplace safety or the civil rights of others."[122] They saw that their community faced needless discrimination, and they hoped that the new law would allow them an opportunity to negotiate for reasonable accommodations, but not at the cost of business interests. In the words of the California Immigrant Policy Center, "Both employers and employees have the obligation to make a good faith effort . . . ."[123]

A FINAL EXPLANATION OF ANOTHER PECULIAR CLAUSE

AB 1964, the Workplace Religious Freedom Act of 2012, received broad legislative support and passed with super majorities. The bill's final vote in the Senate passed 32–4,[124] and the final vote in the Assembly passed 67–6.[125] The governor signed the bill into law soon thereafter on September 8, 2012.[126]

In the process of about thirty years, California introduced the concept of undue hardship, considered various approaches to

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[121] Letter from Steven Freeman, Anti-Defamation League California Offices, to Senator Noreen Evans, Senate Judiciary Committee Chair (June 13, 2012) (available in California Archives for AB 1964).

[122] Winty Singh, *Assembly Bill Would Combat Workplace Discrimination*, SACRAMENTO BEE, July 5, 2012, at A11.

[123] Letter from Ronald E. Coleman, California Immigrant Policy Center, to Senator Noreen Evans, Senate Judiciary Committee Chair (June 19, 2012) (available in California Archives for AB 1964).

[124] California Senate Daily Journal 2011-2012 Session, p. 4871 (Aug. 27, 2012).

[125] California Assembly Daily Journal 2011-2012 Session, Vol. 5, p. 6510 (Aug. 29, 2012).

[126] California Session Laws, 2011-2012 Session, Ch. 287, p. 3345, 3356.

precisely define it, and eventually settled on a standard of "significant burden or expense."

Once again, a group of religious, immigrant minorities in California successfully petitioned their state representatives for greater bargaining power. All interested parties worked together to settle on the most appropriate burden distribution for incorporating a minority group. The law did not intend to significantly shift the burden to employers. The Sikh Coalition simply wanted to give more authority to the minority position because the bargaining powers were out of balance. In the words of the Sikh Coalition, the new law would simply "level the playing field."[127]

[127] Mass letter from Simran Kaur, Sikh Coalition, to California Senate (Aug. 8, 2012) (available in California Archives for AB 1964).

CONCLUSION

Under California's Fair Employment and Housing laws, neither employers nor religious employees should find it easy to take an extreme position when negotiating for religious accommodations. Employers, on one hand, must accommodate religious practice, including Sabbath observance and religious dress and grooming, unless it would cause significant burden or expense. Employees, on the other hand, must accept any workable compromise—and should expect to shoulder some of the load. In short, the law expects both groups to meet in the middle and compromise.

In an increasingly plural and polarized society, conflict tends to dominate newspaper headlines much more than common compromise—but this piece of California history shows that at least some groups are willing to reverse the trend and work toward resolutions.