

INCLUSION RIDERS AND DIVERSITY MANDATES

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INTRODUCTION

“I have two words to leave you with tonight, ladies and gentleman: inclusion rider,” said actress Frances McDormand at the conclusion of her acceptance speech for the best actress Oscar during the March 4, 2018, Academy Awards.¹ McDormand later explained that “You can ask for and/or demand at least 50 percent diversity in not only the casting but also the crew,”

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1. Carol Buckley & Daniel Victor, *What Did Frances McDormand Mean by an “Inclusion Rider” at the Oscars?*, N.Y. TIMES (March 5, 2018), <https://www.nytimes.com/2018/03/05/movies/inclusion-rider-frances-mcdormand-oscars.html>.

noting that she had “just learned” about that idea “after 35 years of being in the film business.”²

McDormand was specifically drawing on the work of Professor Stacy Smith, a University of Southern California communications professor who coined the “inclusion rider” concept and term several years ago to address the lack of diversity within Hollywood.³ Although the inclusion rider need not involve a demand for 50 percent diversity, the basic concept was for prominent actors and actresses to insist upon, as riders to their individual contracts, a certain level of diversity among the cast and crew.⁴ Professor Smith first introduced the idea in a *Hollywood Reporter* op-ed in 2014⁵ and delivered a widely-watched TED Talk about it in 2016.⁶ At the inaugural Bloomberg Business of Equality Summit in May of 2018, she explained:

[I was] sitting in my office one day, and I was thinking about contracts . . . and I thought to myself, if an A-lister simply does one thing, we could change the epidemic of invisibility, and the lack of females being on-screen, in seven years. All A-listers would have to do is leverage their power and put a clause in their contract that stipulates that equality must be part of the process. And that’s what we did. It’s been adopted by Michael B. Jordan, Brie Larsen, Matt Damon, Ben Affleck, and most importantly, William Morris Endeavors Talent Agency⁷

The Annenberg Inclusion Initiative at USC, a think tank led by Professor Smith, now offers a sample “inclusion rider template” on its

2. Abigail Hess, *Oscar Winner Frances McDormand Encourages Actors to Push for “Inclusion Riders”*—Here’s What That Means, CNBC (March 5, 2018), <https://www.cnbc.com/2018/03/05/frances-mcdormand-encourages-actors-to-push-for-inclusion-riders.html>.

3. Omar Yousif, *Professor Coined Term Inclusion Rider*, DAILY TROJAN (March 6, 2018), <https://dailytrojan.com/2018/03/06/professor-coined-term-inclusion-rider/>.

4. Stacy Smith, *Hey, Hollywood: It’s Time to Adopt the NFL’s Rooney Rule—For Women*, HOLLYWOOD REP. (Dec. 15, 2014), <https://www.hollywoodreporter.com/news/hey-hollywood-time-adopt-nfls-754659>. The “Rooney Rule” is an NFL policy stating that all teams must interview at least one minority for head coach and other senior positions. See, e.g., Kenneth Johnson, *What Corporations Can Learn About Diversity from the NFL’s Rooney Rule*, FORBES (Feb. 1, 2018), <https://www.forbes.com/sites/forbescoachescouncil/2018/02/01/what-corporations-can-learn-about-diversity-from-the-nfls-rooney-rule/#78c6e2e747de>; Harry Lyles, Jr., *The NFL’s Rooney Rule Won’t Solve Tech’s Diversity Problem*, THE VERGE (June 5, 2018), <https://www.theverge.com/2018/6/5/17424992/facebook-amazon-diversity-hiring-rooney-rule>.

5. Smith, *supra* note 4.

6. Stacy Smith, *The Data Behind Hollywood’s Sexism*, TED (Oct. 2016), https://www.ted.com/talks/stacy_smith_the_data_behind_hollywood_s_sexism/transcript?language=en.

7. Stacey Smith, *What is the Inclusion Rider Initiative*, BLOOMBERG (May 9, 2018), <https://www.bloomberg.com/news/videos/2018-05-09/what-is-the-inclusion-rider-initiative-video>.

website.⁸ The template sets forth casting and hiring objectives for both supporting roles (“Wherever possible, the Director and Casting Director will select qualified members of under-represented groups for supporting roles in a manner that matches the expected demographics of the film’s setting”)⁹ and off-screen positions (“The producer or studio shall make all reasonable efforts to fill those positions with qualified and available individuals who have been under-represented in that position”).¹⁰ Additionally, the sample rider includes a compliance mechanism, whereby a quantitative analysis is performed to measure whether the targets were met; if not, the studio is required to make a charitable contribution.¹¹

The “inclusion rider” concept dovetails with a growing trend in corporate America, in which several major corporations have begun requiring their outside law firms to meet numerical diversity targets in working on their specific matters. In 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.”¹² That same year, Hewlett Packard (“HP”) similarly set forth a numerical minimum for how many female and ethnically diverse attorneys must work on their matters, warning law firms that it would “withhold up to 10 [percent] of all amounts invoiced by law firms that d[id] not meet or exceed [its] minimal diverse staffing requirements.”¹³ Other corporations, such as MetLife, Microsoft, and Shell, have taken similar action.¹⁴ Even prior to these developments, the NFL had

8. Kalpana Kotagel, at al., *Inclusion Rider Template*, USC ANNENBERG (March 2018), <http://assets.uscannenberg.org.s3.amazonaws.com/docs/inclusion-rider-template.pdf>.

9. *Id.* at ¶4.a.ii.

10. *Id.* at ¶4.b.

11. *Id.* at ¶8.

12. Ellen Rosen, *Facebook Pushes Outside Law Firms on Diversity*, N.Y. TIMES (Apr. 3, 2017), <https://www.nytimes.com/2017/04/02/business/dealbook/facebook-pushes-outside-law-firms-to-become-more-diverse.html>.

13. Letter from Kim M. Rivera, HP Chief Legal Officer, to Law Firm Partners (Feb. 8, 2017), (instructing all U.S.-based law firms with at least 10 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”), https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/panel_-5-hp_diversity_mandate_to_partner_law-firms_.pdf (last visited Dec. 12, 2018).

14. See Mary Flood, *Shell Lawyer: There’s More to Diversity Than Lip Service*, HOU. CHRON. (May 13, 2007), <https://www.chron.com/business/article/Shell-lawyer-There-s-more-to-diversity-than-lip-1800430.php> (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”); 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 two

adopted the related “Rooney Rule” in 2003, which requires football teams to interview at least one person of color for head coaching and high-level executive positions and, as of 2016, also interview at least one woman for executive positions.¹⁵ However, the Rooney Rule differs from the more recent policies, in that it does not set goals for the ultimate outcome and only covers the interviewing process.¹⁶

These overlapping and converging movements have the worthy and important goals of promoting equal employment opportunity and addressing the under-representation of women and ethnic minorities in a variety of workplace settings. But their co-existence with Title VII’s prohibition of differential treatment of employees based on race, color, religion, sex, or national origin¹⁷ is unclear. For example, if a law firm replaces a male attorney with a female attorney on a client team in direct response to a client’s threat to withhold full payment unless the team has a certain percentage of women, could that male attorney have a successful Title VII claim? Similarly, if a Hollywood studio complies with an A-list actor’s inclusion rider by only considering “individuals who have been under-represented” for, say, a production manager position, is there a viable Title VII claim for rejected job applicants who are of non-under-represented ethnicities?

Unsurprisingly, the very day after Frances McDormand’s “inclusion rider” speech at the Academy Awards, the California office of a leading employment law firm, Proskauer Rose, issued a brief memo to provide a cautionary note to its clients. Proskauer emphasized that “although an actor may request that good faith efforts be undertaken to hire a diverse crew, demanding that certain race or gender quotas be met could run afoul of Title VII.”¹⁸ The update concluded that employers “should be wary of agreeing to riders demanding that specific quotas be met.”¹⁹

In this piece, I situate these sorts of diversity requests within the broader context of other customer/client preferences that implicate Title VII. To be sure, the “inclusion riders” are not literal customer/client requests, but rather requests from celebrities who are themselves being hired by the employer for a specific project. Broadly speaking, however, they raise the

percent 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”); 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/>.

15. See Lyles, Jr., *supra* note 4.

16. *Id.*

17. 42 U.S.C. § 2000e-2(a) (2012).

18. Tony Oncidi & Pietro Deserio, “*Inclusion Riders*” *On the Storm*, PROSKAUER CAL. EMP. L. UPDATE (Mar. 5, 2018), <https://calemploymentlawupdate.proskauer.com/2018/03/inclusion-riders-on-the-storm/>.

19. *Id.*

same legal issue regarding third-party preferences that implicate protected characteristics under Title VII.

As a starting point, the general rule within employment discrimination law is that customer preferences cannot justify discriminatory treatment by employers.²⁰ That baseline has led courts to rule that employers cannot, for instance, hire only female flight attendants on grounds that people prefer to be served by women,²¹ or accommodate racist customers' requests for white employees.²² However, there are certain openings within federal employment discrimination law for *some* customer/client preferences, in *some* situations, to provide successful defenses to what would otherwise likely be actionable discrimination. In a recent article, I provided a taxonomy of those preferences, which I deem the "preferred preferences."²³ Such preferences include (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-speaking environment; (5) the desire not to be proselytized to/feel judged; and (6) convenience.²⁴ As I noted there, an open question is whether diversity itself may become a seventh preferred preference to which courts will defer.

This piece addresses that specific question. First, I describe the broader context of "preferred preferences" within Title VII. Second, I explore how the diversity preference does—and does not—fit into that landscape, and how it connects up with affirmative action doctrine. I conclude with some suggestions about the best ways for employers to respond to the growing diversity preference.

I. THE BROADER CONTEXT: "PREFERRED PREFERENCES" WITHIN TITLE VII

There are four key openings within Title VII for customer preferences to provide employer defenses to what would otherwise likely be actionable discrimination. Three of them come from Title VII's text itself, and the fourth is a judicially-created doctrine.

A. The BFOQ Defense

First, although Title VII prohibits disparate treatment on the basis of an employee's race, color, religion, sex, or national origin, it includes a bona fide occupational qualification ("BFOQ") defense for three of those

20. Sparenberg v. Eagle All., No. JFM-14-1667, 2015 WL 6122809, at *6 (D. Md. Oct. 15, 2015).

21. See Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971); Wilson v. Sw. Airlines Co., 517 F. Supp. 292, 294, 302 (N.D. Tex. 1981).

22. See Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908, 913 (7th Cir. 2010).

23. Emily Gold Waldman, *The Preferred Preferences in Employment Discrimination Law*, 97 N.C. L. REV. 91, 95 (2019).

24. *Id.*

characteristics: sex, religion, or national origin.²⁵ Specifically, Title VII provides 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.”²⁶

Can customer preferences for an employee of a particular religion, sex, or national origin give rise to a BFOQ? Usually, the answer is no.²⁷ However, in a narrow exception, courts have ruled that when the request stems from a customer preference for physical privacy from employees of the opposite sex²⁸—or, occasionally, from a preference for the psychological comfort that accompanies being with an employee of the same sex²⁹—a valid BFOQ can be created. The customer preference for convenience can also play a supporting role here, because sometimes the only way to accommodate customers’ physical privacy preferences without significantly inconveniencing them is to hire employees of a particular sex for the job. For example, a Tennessee district court ruled in favor of the Transportation Security Agency’s argument that female sex was a BFOQ for an open airport screener position because the TSA needed to have a certain number of female screeners to be able to perform same-gender pat downs in a reasonable time frame.³⁰

Thus, the BFOQ defense provides one important customer preference opening, through which customers’ physical privacy, psychological comfort, and convenience preferences can sometimes enter to create a successful employer defense.

B. The “Job-Related and Consistent with Business Necessity” Defense

The second customer preference opening within Title VII arises in the context of disparate impact claims. In addition to prohibiting disparate treatment on the basis of the aforementioned characteristics, Title VII also prohibits facially-neutral policies that have a disparate impact as to those

25. 42 U.S.C. § 2000e-2(e)(1) (2012).

26. *Id.*

27. See *Chaney*, 612 F.3d at 913; *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971); *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 294, 302 (N.D. Tex. 1981).

28. 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*, 671 F.2d 1100, 1103 (8th Cir. 1982); *Fesel v. Masonic Home of Del., Inc.*, 447 F. Supp. 1346, 1354 (D. Del. 1978), *aff’d*, 591 F.2d 1334 (1979).

29. *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 134 (3d Cir. 1996).

30. *Wade v. Napolitano*, No. 3–07–0892, 2009 WL 9071049, at * 2 (M.D. Tenn. Mar. 24, 2009) (deferring to TSA’s determination “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).

characteristics.³¹ But Title VII also provides a defense: the employer can continue to use that policy if it can show that the practice is “job related for the position in question and consistent with business necessity,” and that an alternative practice would not suffice.³² Thus, here, the question is whether employers can make out the business necessity showing by arguing that the facially-neutral policy responds to a strong customer preference.

Two customer preferences have come up in this context: aesthetic appeal and an English-speaking environment. With regard to aesthetic appeal, plaintiff employees have had mixed success in challenging facially-neutral appearance policies that have an alleged disparate impact on race.³³ Similarly, customers’ expressed or assumed preferences for employees to speak English in their presence have also been held to satisfy the business necessity defense.³⁴ Specifically, several courts have held that employers are justified in fearing that if customers overhear employees conversing with each other in another language, they will find those employees less approachable and may even think that the employees are mocking them.³⁵ That said, courts are not as tolerant of policies that require employees to speak English at all times, as opposed to only when they can be overheard by customers.³⁶

C. The “Undue Hardship” Defense

The third customer preference opening in Title VII’s text arises in connection with religious accommodation claims. Title VII recognizes, as a

31. 42 U.S.C. § 2000e-2(k)(1)(A) (2012).

32. § 2000e-2(k)(1)(A)(i)-(ii).

33. Compare *Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795, 799 (8th Cir. 1993) (ruling in favor of African-American employee who challenged no-beard rule on grounds that it had a disparate impact on African-American man, who were more likely to have a medical condition that made shaving unhealthy), with *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1035 (11th Cir. 2016) (ruling against African-American female employee who challenged no-dreadlocks rules), and *Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256, 259, 265–67 (S.D.N.Y. 2002) (ruling against African-American male employee who challenged employer’s requirement that employees wear a hat over their dreadlocks, or other “unbusinesslike” hairstyles). Note that in the latter cases, the plaintiff employee did not fully flesh out the disparate impact argument, so the courts did not explicitly address whether the assumed customer preferences that gave rise to these rules could rise to the level of business necessity.

34. See, e.g., *Pacheco v. N.Y. Presbyterian Hosp.*, 593 F. Supp. 2d 599, 614, 621-22 (S.D.N.Y. 2009); *EEOC v. Sephora USA, LLC*, 419 F. Supp. 2d 408, 416-17 (S.D.N.Y. 2005).

35. See, e.g., *Pacheco*, 593 F. Supp. 2d at 614, 621-22; *Sephora*, 419 F. Supp. 2d at 416-17.

36. See, e.g., *EEOC v. Premier Operator Servs., Inc.*, 75 F. Supp. 2d 550, 556-57 (N.D. Tex. 1999) (striking down blanket “English-only” rule and noting the distinction between rules that apply to all times and places and those that are more limited). EEOC 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).

form of religious discrimination, the failure to accommodate an employee's religious observance or practice—unless the “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.”³⁷ This, too, provides a potential opening: if the employer can show that the accommodation will upset or offend customers, then the employer may be able to argue that the accommodation is not reasonable and/or would impose an undue hardship.

Three customer preferences have sometimes been able to enter this opening: (1) aesthetic appeal; (2) the desire not to feel proselytized to or judged; and (3) convenience. The aesthetic appeal preference appears in this opening when employers have appearance-related rules (most commonly relating to headcoverings, body-piercings, and beards) that conflict with employees' religious practice, and the employers argue that exempting religious employees from those rules would turn off customers.³⁸ The non-proselytization/judgment preference appears when employees seek to convey religious messages to customers³⁹ or to refuse to perform certain aspects of the job for religious reasons.⁴⁰ Here, employers argue that the likely customer offense renders the accommodation unreasonable and/or likely to impose an undue hardship.⁴¹ Finally, the convenience preference appears as a supporting preference when religious employees seek to opt out of certain aspects of the job, and the requested accommodation would inconvenience customers by making them find another employee to serve them.⁴²

D. The “Equal Burdens” Doctrine

The final customer preference opening appears not in the actual text of Title VII, but from a judicially-created doctrine for interpreting Title VII's ban on disparate treatment based on sex. This doctrine, known as the “equal

37. 42 U.S.C. § 2000e-2(a)(1); § 2000e(j).

38. *See, e.g.*, *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 128 (1st Cir. 2004) (upholding Costco's no-body-piercing rule in the face of a challenge from a religious employee who said that her membership in the Church of Body Modification required her to display her piercing, on grounds that Costco had made out the undue hardship defense).

39. *See, e.g.*, *Anderson v. U.S.F. Logistics, Inc.*, 274 F.3d 470, 473 (7th Cir. 2001) (ruling in favor of employer that would not allow religious employee to say “Have a blessed day” to customers).

40. *See, e.g.*, *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 496 (5th Cir. 2001) (ruling in favor of employer that would not allow religious employee to refuse to counsel gay clients about their romantic relationships).

41. *Id.*

42. *See, e.g.*, *Noesen v. Med. Staffing Network*, 232 F. App'x 581, 582 (7th Cir. 2007) (ruling 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 given that the only alternatives were keeping customers waiting or forcing other employees to assume a disproportionate workload).

burdens” standard, provides that gender-differentiated appearance requirements for male and female employees do not violate Title VII unless the requirements impose unequal burdens on men and women.⁴³ Typically, these appearance requirements—which require employees to conform with traditional gender stereotypes about how males and females should appear, such as by requiring female employees to have long hair and wear make-up—stem from customers’ expressed or assumed aesthetic appeal preferences.⁴⁴ Courts have tended to apply this “equal burdens” test remarkably loosely, deferring even to those preferences that are quite obviously more burdensome on women than men.⁴⁵

Thus, this doctrine—like the “job-related and consistent with business necessity” and “undue hardship” defenses—provides another opening through which customer preferences for aesthetic appeal can justify certain forms of discriminatory treatment.

E. Reflections on the Broader Context

In sum, Title VII’s four customer preference openings have given rise so far to six “preferred preferences,” as noted above: (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-speaking environment; (5) the desire not to be proselytized to/feel judged; and (6) convenience. To be sure, courts do not always defer to these preferences.⁴⁶ But each of these six preferences has, at least occasionally, provided the basis for a successful employer defense to a Title VII discrimination claim.⁴⁷ As I have written elsewhere, the *strongly* preferred preferences (i.e., the ones to which courts frequently defer) are physical privacy from the opposite sex, an English-speaking environment, and the desire not to be proselytized to or feel judged; the *moderately* preferred preferences (the ones to which courts sometimes defer) are aesthetic appeal and convenience; and the *weakly* preferred preference (the one to which courts only occasionally defer) is psychological comfort with the same sex.⁴⁸

Although the preferred preferences are substantively very different, they share some common threads. They seem to intuitively strike courts as reasonable and natural—likely because the preferences do not immediately seem invidiously discriminatory and are aligned with ingrained social

43. See, e.g., *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.”).

44. See, e.g., *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1209 (8th Cir. 1985).

45. See, e.g., *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1107 (9th Cir. 2006).

46. Waldman, *supra* note 23, at 125 (“Judicial deference to the preference . . . varies according to the extent to which they find the above factors satisfied.”).

47. See *id.* at 125–51 (listing examples of a successful employer defense case for each of the six preferences).

48. *Id.* at 125.

conventions and norms. Because the preferences seem so “normal,” courts tend to consider them weightier than “mere preferences” and/or view compliance with them as not particularly burdensome for employees. The more that these two factors are satisfied in a particular case, the more preference deference we see.⁴⁹

Viewing the diversity preference expressed in inclusion riders within the broader landscape of other preferred preferences sheds light on how courts would—and should—treat it. On the one hand, the above discussion shows that if courts *were* to show some deference to the diversity preference would not be entirely anomalous. After all, there are already other customer preferences to which courts defer in the face of Title VII challenges, and some of them are much less consistent with Title VII’s antidiscrimination mandate.

On the other hand, the above analysis also reveals some important differences between the diversity preference and the other preferences. First, there is no clear statutory or judicially-created opening within Title VII that the diversity preference fits into. Moreover, the diversity preference overtly challenges the status quo, as opposed to the existing preferred preferences, which all reinforce the status quo. In the next section, I explore this tension, and also touch on the limited applicability of affirmative action doctrine in this area of law.

II. WHERE DOES THE DIVERSITY PREFERENCE FIT IN?

As described above, certain customer preferences can sometimes provide successful employer defenses to what would otherwise likely be actionable discrimination. Moreover, some of the preferred preferences—particularly the aesthetic appeal and English-speaking environment preferences—fall especially hard on women and minorities. These two preferences often reinforce majority default norms about gender-presentation, religion, and language, and burden those who deviate from those norms in some way.⁵⁰

In that sense, the diversity preference feels like a bracing fresh of breath air: a preference that actually *benefits* those who have historically been disfavored—i.e., the same types of employees who tend to get harmed by some of the other customer preferences. Indeed, the diversity preference seems more consistent with the underlying purpose of Title VII than do some of the already-preferred preferences within the Title VII landscape. But it still faces doctrinal challenges.

49. *Id.* at 96.

50. *Id.* at 158; *see also Jespersion*, 444 F.3d at 1110–13.

A. The Existing Diversity Preference Openings: An Awkward Fit

Can the diversity preference be neatly slotted into any of the existing customer preference openings within Title VII? Not easily. The religion-specific “undue hardship” opening is clearly inapplicable here, since these preferences are not about religion. The “job-related and consistent with business necessity” opening, while perhaps initially tempting, does not work because that defense only applies in the context of *disparate impact* claims.⁵¹ Overtly taking an employee’s gender or ethnicity into account in order to respond to a customer’s diversity preference amounts to disparate treatment, not disparate impact.

That leaves us with the remaining two customer preference openings: the statutory BFOQ defense and the judicially-created “equal burdens” doctrine (whereby gender-differentiated appearance codes are not seen as amounting to disparate treatment unless they are unequally burdensome).

The BFOQ defense is unlikely to work. By its very terms, it does not cover race or color—just sex, religion, and national origin. Additionally, the only situation in which customer preferences have given rise to a successful BFOQ is when some sort of privacy interest (typically a physical privacy interest) is at stake.⁵² That is inapplicable to the types of diversity preferences expressed in the inclusion riders or corporate policies described above. Those preferences are not being expressed in the context of situations where a customer will be seen nude or will even converse about emotionally intimate topics with an employee. Rather, the above-described policies relate to the formation of diverse *teams* of employees in contexts that are not particularly private.

The “equal burdens” defense has more potential. First, since this doctrine is judicially-created, judges could theoretically choose to expand it beyond the narrow context of gender-differentiated appearance codes where it is currently applied. Additionally, the *spirit* of the “equal burdens” doctrine—that sometimes, differential treatment is acceptable, as long as the overall result is not unequally burdensome⁵³—is somewhat applicable here. The above-described corporate policies all establish quantitative requirements that leave room for men (and non-minorities) to still hold the majority of positions, so it would be hard for them to argue that they are being unequally burdened.⁵⁴ Similarly, the inclusion rider template developed by Professor Smith and her associates is largely focused on increasing the

51. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

52. 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, 372–88 (2004) (discussing privacy BFOQs created by several lower courts).

53. *See, e.g.,* *Viscecchia v. Alrose Allegria LLC*, 117 F. Supp. 3d 243, 250–53 (2015) (summarizing the case law in this area).

54. *See supra* text accompanying note 12–14.

proportion of under-represented groups, not on giving such groups a *disproportionate* advantage.

That said, I am not at all confident that courts would, of their own accord, undertake what would obviously be a sizeable expansion of the “equal burdens” doctrine. As noted above, right now the doctrine only applies to the narrow context of gender-differentiated appearance codes, not to other forms of gender-differentiated treatment, let alone to explicitly-differentiated treatment based on characteristics *other than gender* (namely, race and ethnicity).⁵⁵

Moreover, such an expansion—i.e., basically giving employers free rein to respond to the diversity preference, as long as the overall quantitative requirements do not disproportionately burden any particular group—would involve a very different approach to customer preferences than the one courts have historically followed. As noted above, the customer preferences that receive the most deference tend to be the ones that align with ingrained social conventions and norms, to the point that they seem reasonable, natural, and even near-invisible at times.⁵⁶ The diversity preference, in trying to change rather than reinforce the default, is much more visible and blatant. That does not mean that it is necessarily suspect or wrongheaded—quite the contrary. But it does mean that it is less likely to fly under the radar and more likely to trigger close analysis.

B. What About Affirmative Action Doctrine?

It is also worth considering whether employers can invoke affirmative action doctrine to justify their satisfaction of third parties’ diversity preferences. Here, too, there are major wrinkles. The Supreme Court’s (scant) discussion in the Title VII context has indeed indicated that there is some room for employers to engage in voluntary affirmative action programs “designed to eliminate conspicuous racial imbalance in traditionally segregated job categories.”⁵⁷ However, there are several key differences between a traditional affirmative action program and an employer’s decision to take sex or ethnicity into account in response to specific diversity requests by customers, clients, or A-list celebrities.

First, in all of the cases where an affirmative action program was upheld (whether under Title VII or, in the case of public universities, the Equal Protection Clause), the defendant entity had a general affirmative action policy that it had itself developed and implemented and was now standing behind.⁵⁸ That is very different from a situation in which the

55. *See, e.g.,* Frank v. United Airlines, Inc., 216 F.3d 845, 854 (9th Cir. 2000) (discussing the doctrine of unequal burdens and gender appearance codes).

56. Waldman, *supra* note 23, at 125.

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

58. *See, e.g., id.*; Fisher v. Univ. of Tex., 136 S.Ct. 2198, 2206 (2016); Grutter v. Bollinger, 539 U.S. 306, 313 (2003).

employer lacks a comprehensive policy and merely engages in diverse staffing to the extent that a particular customer, client, or celebrity demands it.

Second, and relatedly, the reasons for a particular customer, client, or celebrity to demand such diversity are typically multi-faceted and expressed in broad, almost tautological terms. For example, Facebook's general counsel justified its diversity policy simply by stating that "we want to see [our law firms] win our cases and create opportunities for women and people of color."⁵⁹ Similarly, HP's Chief Legal Officer stated that "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."⁶⁰ The inclusion rider template similarly states, in its statement of purpose, that "increasing the number of females—particularly recognizing the intersectional discrimination faced by females of color—and individuals from other underrepresented groups . . . will facilitate employment and create a stronger pipeline for diverse representation on screen."⁶¹ Indeed, the benchmark for meeting the diversity goal in connection with the casting of supporting roles is not the relevant labor market of employees, but rather "the expected demographics of the film's setting."⁶²

These broad rationales differ from the traditional, remedial, Supreme Court-approved rationale for affirmative action under Title VII, which, as Deborah Malamud has written, was explicitly "aimed at remedying an imbalance caused by race or gender discrimination in labor markets."⁶³ Malamud has contrasted this focus to today's "diversity" rationale, under which "employers seek to increase the representation of members in underrepresented groups not with reference to the 'balance' that would exist absent discrimination (measured by some relationship to a relevant labor market), but rather with reference to one of any number of business goals their presence is said to serve."⁶⁴ The diversity preference cases, of course, involve another wrinkle: it is not even the employer *itself* articulating those goals, but the customer/client/celebrity whom the employer simply wants to please. Thus, Malamud's prediction that the Supreme Court is likely to reject a diversity-based rationale for affirmative action under Title VII⁶⁵ seems to apply with even fuller force to this situation.

A final—and very important—reason why employers are unlikely to be able to successfully invoke the affirmative action doctrine as a defense for satisfying their clients' diversity preferences is that the diversity preferences

59. See Rosen, *supra* note 12.

60. See Rivera, *supra* note 13.

61. See Kotagel, *supra* note 8, at ¶1.

62. *Id.* at ¶4.a.ii.

63. Deborah Malamud, *The Strange Persistence of Affirmative Action Under Title VII*, 118 W. VA. L. REV. 1, 3 (2015).

64. *Id.* at 5.

65. *Id.* at 9, 21–23.

are often framed in numerical terms.⁶⁶ Even in the educational context, where the Supreme Court has been more open to the diversity rationale for affirmative action, it has still shunned any use of quotas or hard numerical targets. That concern dates back to *Regents of University of California v. Bakke*,⁶⁷ and was echoed in the Supreme Court's split result when it decided *Grutter v. Bollinger*⁶⁸ and *Gratz v. Bollinger*⁶⁹ on the same day in June of 2003. There, the Court upheld the University of Michigan Law School's affirmative action admissions policy in *Grutter* while rejecting its undergraduate affirmative action admissions policy in *Gratz*, in large part because of *Gratz*'s more quantitative approach (in attaching 20 points to the composite admissions score of any applicant from an underrepresented minority group). Indeed, the *Grutter* court specifically emphasized that in establishing affirmative action programs, "universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks."⁷⁰

The Supreme Court echoed this concern in *Parents Involved v. Seattle School District 1*.⁷¹ Chief Justice Roberts, writing for four justices, stated,

[T]he racial balance the districts seek is a defined range set solely by reference to the demographics of the respective school districts. This working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent.⁷²

While Justice Kennedy did not join that portion of the opinion, his separate concurrence also indicated a rejection of explicit racial targets as opposed to facially-neutral measures for achieving diversity.⁷³

Indeed, the strength of the Supreme Court's disfavor toward numerical targets in achieving diversity is not only problematic for the affirmative action rationale. It is also quite likely to have a chilling effect on courts considering an expansion of the "equal burdens" doctrine to this setting.

66. See Rivera, *supra* note 13.

67. 438 U.S. 265, 270–71 (1978) (holding the school's policy of accepting a specified number of minority students unlawful but still allowing minority status to be taken into consideration in admission decisions).

68. 539 U.S. 306, 333–34 (2003).

69. 539 U.S. 244, 280 (2003).

70. *Grutter*, 539 U.S. at 334.

71. 551 U.S. 701 (2007).

72. *Id.* at 729.

73. *Id.* at 788–89 (Kennedy, J., concurring).

C. The Best Way for Employers to Satisfy the Diversity Preference

Where does that leave us? Are employers who comply with the diversity preferences expressed by customers, clients, or celebrities simply waiting to be on the losing end of a Title VII lawsuit? Much will depend on *how* they comply. If they satisfy the preference narrowly—for example, by simply rejiggering a few client teams to meet the numerical targets of the clients who specifically request a certain percentage of women or minorities, or by adopting special staffing approaches for crew positions when an A-list celebrity with an inclusion rider is cast in a movie—then they are indeed at risk. For the reasons stated above, an employer’s defense that it was simply satisfying a preference expressed by a customer, client, or celebrity is unlikely to work here.

On the other hand, if employers take a broader approach, in which they adopt mechanisms and policies that are designed to promote equal employment opportunity for all prospective and current employees in connection with recruiting, hiring, training, and staffing, then they will be on much safer ground. First, over time this will enable employers to more naturally satisfy the variously-expressed diversity preferences, since the employers will have a more diverse workforce. In other words, there will be less need for active “rejiggering” of client teams to meet particular diversity goals of specific clients; the client teams should organically become much more diverse. Second, such policies will limit any individual employee’s opportunity for a successful Title VII lawsuit, since a threshold requirement of Title VII is to show some sort of measurable harm.⁷⁴ If all employees are truly receiving equal opportunities, a court is less likely to find that a deprivation in violation of Title VII has occurred.

74. 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,” and (2) to “limit, segregate, or classify his 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[.]” 42 U.S.C. § 2000e-2(a). Under the first provision, it must be shown that the employer took a materially adverse employment action against the employee. *See, e.g.,* Waldman, *supra* note 23, at 146. Under the second provision, it must be shown that the employer classified employees in a way that deprived, or at least had the tendency to deprive, a person of employment opportunities. *See id.*; *see also* EEOC v. AutoZone, Inc., 860 F.3d 564, 567 (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 ‘deprived’ 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?’”).

III. CONCLUSION

The confluence of the corporate diversity policies and the inclusion rider concept is no accident. They are both growing out of a larger frustration that we still have not achieved true diversity in the workplace (or on the movie screen) and a desire on the part of powerful corporations and celebrities to take matters into their own hands and use their power to effect change. That sentiment is laudable. But it is important for employers to be proactive—not merely reactive to the diversity preferences expressed by customers, clients, and celebrities. By proactively developing policies that promote equal employment opportunity in connection with recruiting, hiring, training, and staffing, employers will help contribute to better long-term outcomes *and* protect themselves from liability under Title VII.