HIJAB ON THE JOB

Zeba A. Huq[*]

ABSTRACT

Muslim women who cover their hair with a hijab for religious reasons face significant discrimination in the United States, including in the workplace. Yet studies show that Muslims who bring religious-liberty claims in court prevail only about half as often as adherents of other faiths. As a result, Muslims experience a form of "double discrimination": first through exclusion or bias in the workplace or by the government, and again when they attempt to vindicate their rights in court. This disparity in outcomes reflects differential treatment in the federal courts that violates the First Amendment's foundational neutrality principle, prohibiting the government from favoring or disfavoring any religion. The pattern of double discrimination can be especially pronounced in employment discrimination cases because Muslims file a disproportionate number of claims, and for nearly fifty years, Title VII of the Civil Rights Act has provided weak protection for faith adherents, including Muslim women. Employers have been permitted to defeat claims by invoking speculative, minimal, or even overtly biased justifications under the prevailing legal standard. But this landscape has the potential to shift following the Supreme Court's 2023 decision in Groff v. DeJoy *which fortified Title VII's religious accommodation protections. Although* Groff*'s new framework promises more robust protection for minority faiths, it remains uncertain whether courts will apply it in a way that meaningfully corrects*

* Zeba A. Huq is a civil rights attorney and clinical law teacher who has taught at Stanford Law School, New York University Abu Dhabi, and Zaytuna College. The author thanks Suzanne Luban, Asifa Quraishi, Shirin Sinnar, Adnan Zulfiqar, Katie Kronick, Sarah Sallen, Janel George, Shweta Kumar, Alia Al-Khatib, Laurel Fletcher, Sarah Paoletti, Citlalli Ochoa, Heather Perez Arroyo, Binny Miller, and Phyllis Goldfarb for their invaluable feedback on previous drafts of this Article; the Clinical Law Review Writers' Workshop, the AALS Conference on Clinical Legal Education, and the Mid-Atlantic Clinical Writing Workshop for providing fora to workshop the Article; Jim Sonne for his partnership in litigating, teaching, and discussing religious liberty over the course of almost a decade; Wendy Greene, Elizabeth Kukura, and Molly Kernis for convening scholars and practitioners for a thought-provoking symposium; and the student editors of the *Drexel Law Review* for their wonderful work editing this Article.

longstanding disparities faced by Muslim women. This Article offers guidance on how the new standard should be implemented to ensure that Muslim women can participate fully in the workforce while remaining true to their faith.

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INTRODUCTION

Over the last two decades, religious-liberty challenges have reached the Supreme Court in increasing numbers, with a majority of Justices time and time again favoring religious claimants to purportedly promote religious liberty in line with the First Amendment.[1] These cases often involve a plaintiff who claims a "free-exercise" exemption, or in other words, a religious accommodation, to a law or rule because it conflicts with

1. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534–35 (2022); *infra* cases and discussion pp. 1020–36.

the claimant's religious belief or practice. In ruling on these cases, the Supreme Court has fortified strong protections for their religious practice, while simultaneously decreasing First-Amendment protections prohibiting establishment of religion—interpreted for half a century as a strict separation between church and state.[2] What's more, many of the recent high court cases enhancing free-exercise and eroding separation of religion from government have involved Christian beliefs that foster vigorous debate and often have significant effects on third parties.[3] In contrast, religious-liberty challenges by minority claimants, and particularly Muslims, have not always enjoyed the same success.[4]

As many scholars have pointed out, the Court's lopsided interpretation of religious liberty that focuses on Christian claimants and often excludes Muslim ones has called into question the very meaning of religious freedom in a diverse and multicultural America.[5] The dwindling number of claims by minority faith adherents reaching the high court—and the failure of claims by minorities more generally—obscures the fact that legal protections against religious discrimination (and supporting religious accommodation) by their very nature are designed to protect minority groups.[6] Moreover, the Supreme Court's skewed docket masks the reality that historically, most religious-liberty cases involve minorities attempting to live their faith on the job, in schools, or in the public square. In these cases, lower courts have not necessarily sided with the religious minority claimants, particularly in the employment context when companies insist the religious practice unduly conflicts with their business interests.

Title VII of the Civil Rights Act of 1964, a ground-breaking civil rights statute aimed at eliminating discrimination of all forms in the workplace, governs religious discrimination in

2. *See infra* notes 79–110 and accompanying text.
3. *See infra* note 91–110 and accompanying text.
4. *See infra* notes 103–39 and accompanying text.
5. *See infra* notes 65–78 and accompanying text.
6. *See id*.

employment, including failure-to-accommodate claims.[7] The statute requires an employer to reasonably accommodate employee religious beliefs and practices that conflict with a job rule unless it can show an "undue hardship on the conduct of the employer's business"—a standard that on its face implies a weighty burden.[8] But the 1977 *Trans World Airlines v. Hardison* Supreme Court decision largely gutted the statute's religious accommodation protections by interpreting "undue hardship" to mean "more than a de minimis cost."[9] In other words, the Court held that anything more than a trivial burden on an employer overrides its obligation to accommodate a religious practice.[10]

Once the Court promulgated a standard so inconsistent on its face with the statute's "undue hardship" language, employers could raise almost any burden—often hypothetical or speculative, and sometimes outright bigoted—to defeat a failure-to-accommodate claim.[11] And over time, in the context of an America where Muslims are routinely maligned and viewed with suspicion, Muslim claimants—and in particular Muslim women who dress modestly and cover their hair with a headscarf commonly called "*hijab*"—have been uniquely harmed by *Hardison*'s flimsy yardstick.

Multiple empirical studies have shown that Muslim claimants bringing free-exercise and accommodation suits in federal court—including constitutional and statutory religious accommodation claims with higher standards than that of Title VII—are about half as likely to prevail than claimants of other faiths.[12] The implication of these studies is particularly troubling in the employment context because Muslims have historically filed a disproportionate number of EEOC claims, and of those claims, a significant number involve Muslim women who wear hijab.[13]

7. Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 1981–2000h).

8. *Id*. § 2000e(j).

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

10. *See id*.

11. *See infra* Section IV.

12. *See infra* note 65–78 and accompanying text.

13. *See infra* notes 177–82 and accompanying text.

Muslims thus suffer a "double discrimination"—discrimination due to government policies or in the workplace, and then discrimination again when they attempt to vindicate their rights in court. This Article argues that such disproportionate and differential treatment of Muslims violates the foundational First Amendment neutrality principle prohibiting government, including federal courts, from preferring or disfavoring one religious group over another.

Through a nation-wide survey of Title VII cases involving hijab accommodation, this Article shows that employer undue hardship defenses generally fall into one of three paradigmatic categories: (1) hijab would undermine a perceived need for uniformity or professionalism; (2) the hijab causes safety and security risks not present by other forms of clothing nor amenable to mitigation by other means; and most pernicious and overtly bigoted of all, (3) hijabs scare off customers or other stakeholders who find the hijab offensive. Such employer justifications often fail upon closer inspection or should be rejected because of their underlying intolerance. But with the *Hardison* standard on the books, employers have had little incentive to accommodate religious adherents—including Muslim women—and courts often backed them up without a stronger legal regime to protect employee observance.[14]

This all has the potential to change with the Supreme Court's recent decision in *Groff v. DeJoy*, where the Court dispensed with *Hardison*'s "de minimis" legacy and shifted to an enhanced standard under Title VII for religious accommodation: to satisfy the undue hardship defense, an employer must justify a denial of religious accommodation by proving it would result in substantial increased costs in light of the business's operations.[15] And the Court emphasized the insufficiency of speculative or hypothetical hardships to meet the weighty burden.[16]

To be sure, the new standard is expected to have widespread effects on the provision of religious accommodations to

14. *See Hardison*, 432 U.S. at 84–85; *infra* Section IV.

15. Groff v. DeJoy, 600 U.S. 447, 471–74 (2023).

16. *See id.* at 472–73.

minority faith adherents in the workplace as employers are held to a higher burden of proof.[17] And as some of the most disadvantaged claimants over the past fifty years, Muslim women who wear hijab stand to gain the most. But with the documented, dismal success for Muslim claimants, even under laws with standards that generally favor religious plaintiffs, it remains an open question whether women in hijab will actually benefit as federal courts apply the *Groff* standard in future cases.[18]

Much has been written about outright hijab bans in foreign countries and the implications under international law; however, the literature on discrimination against women in hijab through a domestic religious-liberty lens is sparse. This first-of-its-kind comprehensive study of hijab accommodation cases fills a gap in the literature by identifying the uneven enforcement of religious-liberty protections for American Muslims with a focus on women who wear hijab; by articulating a legal theory by which such uneven enforcement violates the constitutional promise of religious freedom; and by suggesting ways to interpret Title VII's recently updated religious-accommodation standard to attempt to avoid continued discrimination against minority faith practitioners. This Article proposes that the redefined Title VII *Groff* standard should be interpreted in line with state religious-accommodation schemes, federal free-exercise jurisprudence, and federal disability-accommodation law—legal regimes that allow exemptions from general rules subject to analogous hardship standards. By using factors gleaned from these legal schemes, courts can more adequately address federal religious accommodation claims, particularly religious dress and grooming ones, where the requested accommodation most often implicates minority religious observance and rarely, if ever, implicates third-party interests.

The Article proceeds in six parts: First, it describes Muslim women's religious practice of hijab and describes how those

17. *See id.*

18. *See infra* notes 65–78.

who subscribe to the practice, along with Muslims generally, face discrimination in America, including in its federal courts. Second, it outlines the federal protections of religious liberty against government intrusion with a focus on the First Amendment's failed promise of neutrality. Third, it explains Title VII, its affirmative protection of religious accommodation, and how the Supreme Court through *TWA v. Hardison* gutted those protections for fifty years. Fourth, the Article describes both empirically and descriptively how Muslims and hijabis have been uniquely and negatively impacted by Title VII's *Hardison* standard in contravention of the First Amendment's promise of neutrality between religions. Fifth, it outlines the Supreme Court's recent shift to provide more robust protection of religious observance on the job through the Court's decision in *Groff v. DeJoy*. Finally, it argues that *Groff*'s "substantial increased costs" undue hardship standard under Title VII should bring employers' burden closer in line with federal and state accommodation regimes that require greater scrutiny of defenses, and that courts must reject inherently problematic arguments to secure protection of minority faith adherents. In conclusion, the Article provides a skeptically hopeful perspective on the effect of the enhanced Title VII standard on hijab accommodations in the workplace.

I. DOUBLE DISCRIMINATION

Women who identify as Muslim are a diverse group from across the globe with varying beliefs and values, all drawn from the centuries-old Islamic faith. Islam takes many forms and includes various schools of thought with differing interpretations. However, virtually all sects take as their authoritative sources the holy *Qur'an*, believed by Muslims to be the word of God, and the *Sunnah*, the lived experience of Islam's founding prophet, Muhammad.[19] The orthodox positions within both

19. *See generally* WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO THE SUNNĪ UṢŪL AL-FIQH (1997) (discussing the foundations of Islamic jurisprudence); KHALED ABOU EL FADL, REASONING WITH GOD: RECLAIMING SHARI'AH IN THE MODERN AGE 36 (2014) (discussing the Islamic tradition in the modern world).

Sunni and Shi'i branches include precepts regarding modesty for men and women drawn from the Qur'an and Sunnah that encompass modest dress.[20] The focus of this Article is the Islamically mandated modest dress for Muslim women, commonly referred to as the "*hijab*."

This Article uses the term "*hijab*" to describe the myriad versions of modest dress worn by Muslim women and the colloquial Anglicized term "*hijabi*" to refer to a woman who wears hijab. The term hijab has various connotations and definitions, but virtually all iterations concern Islamic notions of modesty, privacy, and morality.[21] The hijab is sometimes narrowly defined as a Muslim woman's headscarf, but the term is also used

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20. The Qur'an and Sunnah are generally interpreted by Islamic scholars to require Muslim women to cover their bodies in public except for their face, hands, and feet. *See* ABOU EL FADL, *supra* note 19, at 73. Some interpretations also include covering the entire body. *Id.* The Quranic injunction of modesty stems from Chapter 24 (Surah An-Nur), verse 31:

> And tell the believing women to lower their gaze and to be mindful of their chastity, and not to display their charms . . . beyond what may . . . be apparent thereof; hence let them draw their headcovers over their bosoms. And let them not display . . . their charms to any but their [close male family relations and] their womenfolk.

See MUHAMMAD ASAD, THE MESSAGE OF THE QUR'AN 737 (2003). Consistent with this verse and other Islamic sources, women need not cover in front of women and certain male family members. *Id.* In addition, Chapter 33 (Surah Al-Ahzab), verse 59 says "O Prophet! Tell thy wives and thy daughters, as well as believing women, that they should draw over themselves some of their outer garments." *Id.* at 730. As to the Sunnah, multiple reports of the Prophet from his companions teach women to avoid thin, revealing, and flashy clothes. *See id.* The Quran and Sunnah themselves refer to headcovers and loose outer clothing in a manner consistent with the historical evidence that women in the Hijaz were already wearing these types of clothing in some form. *See id.* at 795. The Qur'an and Sunnah arguably do not include a clear and definitive mandate for women to cover all or most parts of their body. *See id.* This is where the final authority in Islamic jurisprudence that supports Islam's hijab directive comes in: the consensus of legal scholars, or *ijma'a*. *See* ARON ZYSOW, THE ECONOMY OF CERTAINTY: AN INTRODUCTION TO THE TYPOLOGY OF ISLAMIC LEGAL THEORY 7–11 (2013); Wael B. Hallaq, *On the Authoritativeness of Sunni Consensus*, 18 INT'L J. MIDDLE E. STUD. 427, 427 (1986). Consensus of scholars is considered the third primary source of Islamic law and provides definitive legal rulings from foundational Qur'an and Sunnah guidance where those primary sources are not entirely clear. *Id.* Orthodox Islamic scholars consider the hijab supported by consensus, or *ijma'a*, of the scholarly ranks. *See generally* MOHAMMAD ISMAIL MEMON MADANI, HIJAB: THE COMMANDMENTS OF THE HIJAB (2014). Of course, this allows for ample critique and questions around the institution of hijab. *See generally* FATIMA MERNISSI, THE VEIL AND THE MALE ELITE: A FEMINIST INTERPRETATION OF WOMEN'S RIGHTS IN ISLAM (Perseus Books Pub. trans., 1991) (1987) (arguing the hijab is rooted in patriarchal structures and ideologies). *But see* LEILA AHMED, WOMEN AND GENDER IN ISLAM (1992) (providing critical analysis of feminist critiques of hijab).

21. *See* Aliah Abdo, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 HASTINGS RACE & POVERTY L.J. 441, 448 (2008).

more broadly to signify loose clothing, face covering, and even gender segregation.[22] The term "*hijab*" in this Article encompasses the familiar headscarf, but also includes other terms that denote modest dress for Muslim women, including *khimars*, *dupattas*, *shaylas*, *abayas*, *jilbabs*, *burqas*, *chadors*, and *niqabs*—all of which refer to loose flowing headscarves and/or gowns with headscarves (some with face coverings) that are generally worn in conformance with orthodox Islamic notions of female modesty.[23]

Although Islam's guiding sources provide the religious authority for Islamic modest dress, Muslim women wear the hijab for a multitude of diverse and divergent reasons: in devotion to God and as a manifestation of their commitment to Islam;[24] as a sign of and connection to their cultural, ethnic, or racial background and community;[25] as a means to counter assimilationist pressure in or from the West;[26] to challenge predominant

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22. *See* MERNISSI, *supra* note 20, at 85, 111.

23. *See* Doaa Saber, *Decoding Hijab Types: Khimar, Shayla, Chador, Niqab, Turban, and More*, SHINE THE HIJAB (Sep. 18, 2023), https://shinehijab.com/blogs/shine-the-hijab-socails/decoding-the-types-of-hijabs-from-the-khimar-to-the-shayla-and-the-chador-to-the-niqab?srsltid=AfmBOooD6VF0k-Ttd0-V610u3IiSvFkbleqc27YsKH95LbHVshWI-8EA [https://perma.cc/F4HP-3TT2]; *Dupatta*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/dupatta [https://perma.cc/V5RN-RZ5L] (last visited Mar. 3, 2026); *History and Evolution of Abaya–The Definitive Guide*, MYBATUA (July 19, 2024), https://www.mybatua.com/blogs/news/history-and-evolution-of-abaya-the-definitive-guide?srsltid=AfmBOorr447wQeuAXBII_hXp1QvpJXtXhoKhnHHp2P3pfs0yet9q9t8Z [https://perma.cc/J6RK-MRJX]; *Jilbab*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/jilbab [https://perma.cc/8NAJ-FNMH]. This Article concerns women who wear hijab at all times outside of their home. Most Muslim women wear hijab when at the masjid, the Islamic house of worship, or when engaged in prayer at home, but may not continue the practice in their everyday life outside of the home or masjid. *See* Asma Khalid, *Lifting The Veil: Muslim Women Explain Their Choice*, NPR (Apr. 21, 2011, at 00:01 ET), https://www.npr.org/2011/04/21/135523680/lifting-the-veil-muslim-women-explain-their-choice [https://perma.cc/PH4V-VFPE] (finding that only 43% of Muslim women in America wear their hijab in public).

24. *See* Jen'nan Ghazal Read & John P. Bartkowski, *To Veil or Not to Veil?: A Case Study of Identity Negotiation Among Muslim Women in Austin, Texas*, 14 GENDER & SOC'Y 395, 403 (2000).

25. *Id.* at 404.

26. Sahar F. Aziz, *Coercive Assimilationism: The Perils of Muslim Women's Identity Performance in the Workplace*, 20 MICH. J. RACE & L. 1, 33–34 (2014) ("Some Muslim women invest in their Muslim identity by redefining it and taking control of it based on recognition that there is no escaping mainstream society's negative stereotypes of Muslim women and Muslims. Accordingly, they respond to devaluation of their Muslim and ethnic identities by wearing a headscarf to emphasize their Muslim identity.").

notions of hijab as a symbol of oppression;[27] as a means of empowerment and a form of resistance to hyper sexualization from the male gaze,[28] all as part of—or for some women, separate and apart from—their religious beliefs and practice.[29] Despite the multitude of overlapping reasons women wear their hijab, most hijabis cite Islam's modesty mandate as at least one reason, if not the primary factor, in covering their hair and body.[30] The focus of this Article is on women who wear hijab based, at least in part, on a sincere religious belief derived from their Islamic faith.

Donning the hijab in the United States brings with it a multitude of challenges, particularly in the workplace. Studies indicate hijabis experience employment discrimination at significant levels.[31] One recent study has shown that Muslim women who wear the hijab in America consistently earn less than other

27. *Id.*; *see also* Ayesha Nusrat, *The Freedom of the Hijab*, N.Y. TIMES (July 13, 2012), https://www.nytimes.com/2012/07/14/opinion/the-freedom-of-the-hijab.html [https://perma.cc/8SH8-Q8DW] ("For someone who passionately studied and works for human rights and women's empowerment, I realized that working for these causes while wearing the hijab can only contribute to breaking the misconception that Muslim women lack the strength, passion and power to strive for their own rights."). Of course, some women are forced to wear hijab by family members or state mandates. Several scholars have articulated significant critiques of the practice of hijab generally—whether worn by choice or not. *See* MERNISSI, *supra* note 20, at 97. Critiques to the institution of hijab and responses to such critiques are beyond the scope of this Article.

28. Nusrat, *supra* note 27 ("I see hijab as the freedom to regard my body as my own concern and as a way to secure personal liberty in a world that objectifies women."); Aziz, *supra* note 26, at 44–45; *see also* Mustafa E. Gurbuz & Gulsum Gurbuz-Kucuksari, *Between Sacred Codes and Secular Consumer Society: The Practice of Headscarf Adoption Among College Girls*, 29 J. MUSLIM MINORITY AFFS. 387, 387–88 (2009) (finding that most American Muslim college-age hijabis consider wearing a headscarf as liberating and empowering); Read & Bartkowski, *supra* note 24, at 405 (reporting interview responses from hijabis stating that "wearing hijab actually liberates them from men's untamed, potentially explosive sexuality and makes possible for them various sorts of public-sphere pursuits").

29. *See generally* Rhys H. Williams & Gira Vashi, *Hijab and American Muslim Women: Creating the Space for Autonomous Selves*, 68 SOCIO. RELIGION 269, 284 (2007); Rachel Anderson Droogsma, *Redefining Hijab: American Muslim Women's Standpoints on Veiling*, 35 J. APPLIED COMMC'N RSCH. 294 (2007).

30. *See* Read & Bartkowski, *supra* note 24, at 403; *see generally* BOZENA C. WELBORNE, AUBREY L. WESTFALL, ÖZGE ÇELIK RUSSELL & SARAH A. TOBIN, THE POLITICS OF THE HEADSCARF IN THE UNITED STATES (2018) (discussing the political and social implications for Muslim-American women who wear a hijab in a non-Muslim state).

31. *See* Eman Abdelhadi, *The Hijab and Muslim Women's Employment in the United States*, 61 RSCH. SOC. STRATIFICATIONS AND MOBILITY 26, 32 (2019).

non-hijabi women, including Muslim women who do not cover their hair.[32] In her study, Professor Eman Abdulhadi shows that neutral factors (including education and English proficiency) explain a small portion of this tendency, but postulates that "a labor market manifestation of anti-Muslim attitudes in the United States" is largely to blame.[33] In other words, unequal pay is likely the result of outright employer discrimination against hijabis, self-selection out of public employment by women who cover their hair, or abandonment of hijab by those who remain career-oriented.[34] Another analysis quantified hijabis' chances of being hired and gainfully employed as 40% lower than among similarly situated Muslim women who do not wear hijab.[35] Moreover, studies show hijabis have internalized this

32. *Id.* at 32.

33. *Id.*

34. Specifically, her statistical model shows that a third of the hijabis' differential pay may be attributed to age, ethnicity, English proficiency, education, marriage, and fertility variables, but two-thirds remains unexplained. *Id.* Abdelhadi's model does not support the hypothesis that the salary difference is explained by hijabis' (or their families') conservative gender ideology. *Id.*; *see also* Eman Abdelhadi, *Religiosity and Muslim Women's Employment in the United States*, 3 SOCIUS 1, 9, 11 (2017) (finding mosque attendance positively associated with employment such that practicing Islam alone does not deter American Muslim women's employment); Eman Abdelhadi & Paula England, *Do Values Explain the Low Employment Levels of Muslim Women Around the World? A Within-and Between-Country Analysis*, 70 BRIT. J. SOCIO. 1510, 1524–26 (2019) (noting worldwide gap in employment between Muslim women and other women is largely within-country and cannot be explained by supposed inegalitarian gender ideology associated with Islam).

35. *See* Sofia Ahmed & Kevin M. Gorey, *Employment Discrimination Faced by Muslim Women Wearing the Hijab: Exploratory Meta-Analysis*, 32 J. ETHNIC & CULTURAL DIVERSITY IN SOC. WORK 115, 115–23 (2023) (concluding from a meta-analysis of studies between 2010 and 2020 that hijabis' chances of being hired and gainfully employed were 40% lower than among similarly situated Muslim women who did not wear hijab); *see also* Sonia Ghumman & Ann Marie Ryan, *Not Welcome Here: Discrimination Towards Women Who Wear the Muslim Headscarf*, SAGE HUM. REL. 671, 688 (2013) (field experiment showed evidence that hijabis faced discrimination in employment call backs and interpersonal discrimination as compared to non-hijabis); Bradley R.E. Wright, Michael Wallace, John Bailey, & Allen Hyde, *Religious Affiliation and Hiring Discrimination in New England: A Field Experiment*, 34 RSCH. SOC. STRATIFICATION AND MOBILITY 111, 111 (2013) (finding fictitious Muslim applicants received one-third fewer responses from employers after submitting their resumes than a control group); Michael Wallace, Bradley R.E. Wright, & Allen Hyde, *Religious Affiliation and Hiring Discrimination in the American South: A Field Experiment*, 1 SOC. CURRENTS 189, 189, 198–99 (2014) (finding that all fictitious applicants who indicated a religious affiliation were 26% less likely to receive a response from employers, with Muslims, pagans, and atheists suffering the most).

discrimination by holding lower expectations of receiving a job offer than Muslim women who do not wear the hijab.[36]

Professor Sahar Aziz describes the challenges Muslim women face on the job as a "triple bind," whereby hijabis face discrimination: (1) from stereotypes unique to Muslim women as "oppressed, subjugated, unable to lead, and in need of saving;" (2) as women, "expected to be feminine, deferential to male authority, and attractive at work;" and (3) as Muslims who are inherently suspect and believed to hold "covert terrorist agendas."[37] Such contradictory but mutually reinforcing tropes can serve to stymie hijabis in their careers and may underlie employer discrimination and resistance to accommodating their religious observance.[38] By virtue of covering their hair and body, observant Muslim women are tagged as religious, gendered, and racial "other" and often discriminated against in subtle but pervasive ways.[39] As Aziz puts it, "[t]he multiple stereotypes and contradictory performance expectations related to [Muslim women's] multiple identities . . . create a no-win situation."[40]

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36. Sonia Ghumman & Linda Jackson, *The Downside of Religious Attire: The Muslim Headscarf and Expectations of Obtaining Employment*, 31 J. OF ORG. BEHAV. 4, 12 (2010); Ghumman & Ryan, *supra* note 35, at 689; *see* David R. Hodge, Tarek Zidan & Altaf Husain, *Are Females Who Wear the Hijab More Likely to Experience Discrimination?: A National Study of Perceptions Among American Muslim Women*, 33 J. ETHICAL & CULTURAL DIVERSITY IN SOC. WORK 301, 302 (2023) (discussing the increased perception of religious discrimination among American Muslims).

37. Aziz, *supra* note 26, at 24.

38. *See id.* at 40. Professor Aziz writes:

> Facing the brunt of both negative stereotypes of Muslims as terrorists and gender stereotypes of Muslim women as weak and oppressed, Muslim female employees are caught in a triple bind. The more assertive Muslim women behave to cast off misperceptions of their passivity, the more threatening they are as Muslims to their coworkers. At the same time, Muslim women's assertiveness may violate gender norms further exposing them to discrimination based on gender stereotyping. But any attempts to exercise deference to allay suspicions of their loyalty reinforce stereotypes of their submissiveness and inability to lead.

Id.

39. *See id.*; *see also* D. Wendy Greene, *A Multidimensional Analysis of What Not To Wear in the Workplace: Hijabs and Natural Hair*, 8 FIU L. REV. 333, 359 (2013) ("[V]is á vis their natural hairstyles and religious hair coverings, Black women and Muslim women are marked as racial and gendered 'others,' as they do not represent the prevailing white, female, Protestant normative standard of womanhood and they are deemed 'radical' or 'militant.'").

40. Aziz, *supra* note 26, at 49; *see also* Sylvia Chan-Malik, *Chadors, Feminists, Terror: The Racial Politics of U.S. Media Representations of the 1979 Iranian Women's Movement*, 637 ANNALS AM.

Of course, and as Professor Aziz posits, negative stereotypes of hijabis are not a stand-alone issue; rather they are a part of the larger demonization of Muslims in America.[41] Although a full treatment of this topic is beyond the scope of this Article, a brief overview is important to understand the invidious context in which Muslims in America live and work. Many scholars have concluded that over time and in response to certain international and domestic events, Muslims and Islam have been flattened into a caricature of a violent, irrational, misogynist terrorist—and by extension, Muslim women have been misrepresented alternately as oppressed and in need of saving or as violent terrorists themselves.[42] By painting with a broad brush, orientalist academics, far-right religious leaders, and U.S. politicians have portrayed Islam as a violent political ideology, and over the course of decades, have positioned the entire faith and its adherents as antithetical to western values, modernity, and tolerance.[43]

ACAD. POL. & SOC. SCI. 112, 112 (2011) (arguing that the Iranian revolution "occasioned the emergence of a distinctly American—and deeply racialized—'discourse of the veil,' in which 'Islam' was rendered a national catchphrase for terror and the figure of the 'Poor Muslim Woman' entered U.S. cultural discourse as a symbol of a new world order").

41. *See* SAHAR AZIZ, THE RACIAL MUSLIM: WHEN RACISM QUASHES RELIGIOUS FREEDOM 133–42 (2022) (describing the demonization of Islam in America); Aziz, *supra* note 26, at 49.

42. Professor Sahar Aziz argues that Muslims have become racialized, and thus discriminated against as a class, as a result of seven events: "(1) the establishment of Israel in 1948; (2) the 1967 Arab-Israeli War; (3) the 1973 Arab oil embargo; (4) the 1979 Iranian Revolution; (5) the 1990 first Gulf War; (6) the 1993 World Trade Center bombing; and (7) the September 11 terrorist attacks." AZIZ, *supra* note 41, at 114 ; *see also* Chan-Malik, *supra* note 40, at 112 (arguing the Iranian revolution ushered in the Muslim terrorist trope). Professors Khaled A. Beydoun and Nura A. Sediqe argue that "a 'masculine Islamophobia' . . . casts Muslim men as the protagonists of terrorism, and a 'feminine Islamophobia' . . . frames Muslim women as their obedient accessories, submissive underlings, and most consequentially, their immediate victims." Khaled A. Beydoun & Nura A. Sediqe, *Unveiling: The Law of Gendered Islamophobia*, 111 CALIF. L. REV. 465, 470 (2023).

43. *See* SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996); Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFFS. 22, 31–32 (1993); AZIZ, *supra* note 41, at 129–30 (outlining Bernard Lewis's orientalist perspectives on Islam as antithetical to modernism, Samuel Huntington's clash-of-civilizations hypothesis, and Christian leaders' statements on Islam); *see also* MAHMOOD MAMDANI, GOOD MUSLIM, BAD MUSLIM: AMERICA, THE COLD WAR, AND THE ROOTS OF TERROR 18 (2004) (discussing the western judgments of "good" and "bad" Muslims). In his seminal work, *Orientalism*, Edward Said argued that the West has defined the "Orient"—in other words, the Muslim world—in opposition to itself as inferior, backwards, evil, and characterized by violence. *See generally* EDWARD W. SAID, ORIENTALISM 3 (1979).

This "clash of civilizations" theory that situates Islam as an enemy civilization to the United States has been widely promoted by neo-conservative academics who have also advised the U.S. government and informed domestic and foreign policy decisions, including direct military action in multiple Muslim-majority countries.[44] Some academics argue that the source of discontent and the resulting violence perpetrated by a small subset of Muslims is the result of decades of Western colonialism, the subsequent propping up of authoritarian, corrupt, and repressive governments, and western military incursions—all of which have created significant economic disparities in many Muslim countries.[45] Ignoring this history and context, many Western state and non-state actors blame Islam and consider all Muslims responsible.[46] Members of Congress and Presidents of the United States have pointed to Islam as the enemy for decades.[47] Similar blame does not accrue to far-right terrorists who

44. *See* HUNTINGTON, *supra* note 43, at 217–18 ("The underlying problem for the West is not Islamic fundamentalism. It is Islam, a different civilization whose people are convinced of the superiority of their culture and are obsessed with the inferiority of their power."); MAMDANI, *supra* note 43, at 212–13. Mamdani explains that the phrase "clash of civilizations" first appeared in Bernard Lewis's 1990 article "The Roots of Muslim Rage," and provided the inspiration for Sam Huntington's 1993 article of the same name. *See id.* Both were orientalists who advised the federal government, but Lewis confined his thesis to historical relations between two civilizations that he called "Islamic and "Judeo-Christian," while Huntington broadened his thesis to cover the entire world. *Id.* at 213. This perspective informed the war in Afghanistan and Iraq, drone strikes in Yemen, and ongoing military support for Israel in opposition to Palestinian self-determination. *See id.* at 214–15. Indeed, saving Muslim women from allegedly misogynist Muslim men served as a justification for America's post 9/11 wars by American leaders, intellectuals, and others. *See* Chan-Malik, *supra* note 40, at 116–17 ("Concern for the Poor Muslim Woman's fate has enabled political alliances between such unlikely bedfellows as the Feminist Majority and former first lady Laura Bush, and it was featured prominently in the post-9/11 speeches by former president George W. Bush and former deputy secretary of defense Paul Wolfowitz in their calls for the continuation of the American occupations of Afghanistan and Iraq.").

45. AZIZ, *supra* note 41, at 136.

46. *Id.*

47. Of course, President Trump's statements are some of the worst. In March 2016, in response to a journalist who asked if he believed "Islam is at war with the U.S.," he said "I think Islam hates us. . . . [T]here is a tremendous hatred and we have to be very vigilant and we have to be very careful and we can't allow people coming into this country who have this hatred of the United States and of people who are not Muslim." Theodore Schleifer, *Donald Trump: 'I Think Islam Hates Us'*, CNN (Mar. 10, 2016, at 17:56 ET), www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us [https://perma.cc/9UD4-HLPN]. He stated "it's hard to separate . . . who is who" between Muslims and terrorists. *Anderson Cooper 360 Degrees: Exclusive Interview*

are most often Caucasian and regularly couch their motivation in Christian themes, despite evidence that they pose a greater violent threat to Americans.[48]

Many of these state and non-state actors promoting deeply problematic views of Islam have fixated on Islamic law, or *Shariah*, as the perceived problem, portraying the religious law—which outlines precepts for Muslims to live an ethical and God-conscious life—as the root of Islam's alleged hatred of and

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with Donald Trump, CNN (Mar. 9, 2016, at 20:00 ET), https://www.cnn.com/TRANSCRIPTS/1603/09/acd.01.html [https://perma.cc/H36D-HSAH]. Trump said that "hundreds and thousands of refugees from the Middle East" would attempt to "take over" and radicalize "our children." *Donald Trump Remarks in Manchester, New Hampshire*, C-SPAN (June 13, 2016), https://www.c-span.org/program/campaign-2016/donald-trump-remarks-in-manchester-new-hampshire/445488 [https://perma.cc/E9DR-PVWZ]. He warned that Syrian refugees would "be a better, bigger, more horrible version than the legendary Trojan Horse." Emily Schultheis, *Donald Trump Warns Refugees Could Be 'Trojan Horse' for U.S.*, CBS NEWS (June 13, 2016, at 16:00 ET), www.cbsnews.com/news/donald-trump-warns-refugees-could-be-trojan-horse-for-u-s [https://perma.cc/MB8J-JQ9Y]. Justice Sonia Sotomayor detailed multiple statements by Trump and his affiliates in her dissent in *Trump v. Hawaii*, the challenge to Trump's 2016 travel ban from majority Muslim nations. *See* 585 U.S. 667, 731–37 (2018) (Sotomayor, J., dissenting). In 2016, Newt Gingrich said "[w]e should frankly test every person here who is of Muslim background, and if they believe in Shariah, they should be deported." Tessa Berenson Rogers, *Newt Gingrich Calls for 'Sharia Test' for Every U.S. Muslim*, TIME (July 15, 2016, at 08:26 EDT), https://time.com/4407756/newt-gingrich-muslims-sharia-law/ [https://perma.cc/QC7Y-PWC9]. Such rhetoric at the highest levels of government began years before, sometimes in more subtle ways. For instance, President George W. Bush referred to his war on terror as a "crusade" soon after 9/11, positioning the Islamic world and Western Christianity in a historical oppositional context. *See* Peter Waldman & Hugh Pope, *'Crusade' Reference Reinforces Fears War on Terrorism Is a War on Islam*, WALL ST. J. (Sep. 21, 2001), www.wsj.com/articles/SB1001020294332922160 [https://perma.cc/978Z-VHWZ]; *see also* MANEESH ARORA, PARTIES AND PREJUDICE: THE NORMALIZATION OF ANTIMINORITY RHETORIC IN US POLITICS (2025) (discussing the rise of anti-Islamic rhetoric in the United States).

48. *See* Amna Akbar, *Policing "Radicalization"*, 3 U.C. IRVINE L. REV. 809, 811 n.7 (2013) (citing CHARLES KURTZMAN, MUSLIM-AMERICAN TERRORISM: DECLINING FURTHER 1 (2013) (stating the number of lives taken by Muslim-American terrorists is 5 times less than the number of killings by white supremacists and other far right actors in the eleven years after 9/11)); Maryam Jamshidi, *The Discriminatory Executive and the Rule of Law*, 92 U. COLO. L. REV. 77, 98–99 (2021) (citing ANTI-DEFAMATION LEAGUE, A REPORT FROM THE CENTER ON EXTREMISM: MURDER AND EXTREMISM IN THE UNITED STATES IN 2018, at 10 (2019), and ANTI-DEFAMATION LEAGUE, A REPORT FROM THE CENTER ON EXTREMISM: MURDER AND EXTREMISM IN THE UNITED STATES IN 2019, at 18 (2020)) (indicating right-wing groups were responsible for almost all "extremist-related" murders in 2018 and 2019); Caroline Mala Corbin, *Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 FORDHAM L. REV. 455, 456 (2017); *see also* David French, The Problem of the Christian Assassin, N.Y. TIMES (June 19, 2025), https://www.nytimes.com/2025/06/19/opinion/minnesota-killings-boelter.html?smid=nytcore-ios-share&referringSource=articleShare [https://perma.cc/9KRZ-HYHN] (detailing recent rise of Christian extremists in the United States).

incompatibility with the West.[49] A vast network of individuals and organizations has spent millions of dollars promoting these ideas, even pushing laws to ban Shariah itself—many of which were successfully passed by state legislatures.[50] Despite courts invalidating these laws, the efforts behind them—including new initiatives in Congress and state legislatures targeting Shariah—continue to peddle the view that Muslims and their religion are to be feared, suspected, and surveilled.[51] News media, television dramas, and movies have only reinforced these tropes within the broader population.[52] Muslims in public life

49. *See* AZIZ, *supra* note 41, at 145–47.

50. For a comprehensive overview of the anti-Shariah movement, see ELSADIG ELSHEIKH, BASIMA SISEMORE & NATALIE RAMIREZ LEE, LEGALIZING OTHERING: THE UNITED STATES OF ISLAMOPHOBIA 7–8 (2018); *see also* Aziz Huq, *Private Religious Discrimination, National Security, and the First Amendment*, 5 HARV. L. & POL'Y R. 347, 366–73 (2011) (detailing Oklahoma's efforts to ban Shariah law); Eugene Volokh, *Religious Law (Especially Islamic Law) in American Courts*, 66 OK. L. REV. 431 (2014) (arguing that fear of "creeping Sharia" in American law is misguided, and encouraging courts to follow established legal traditions when it comes to applications of religious law); James A. Sonne, *Domestic Applications of Sharia and the Exercise of Ordered Liberty*, 45 SETON HALL L. REV. 717, 720–21 (2015) (arguing "targeting sharia consideration in domestic courts undercuts religious liberty[,] . . . is inconsistent with our standard approach to foreign law[,] . . . stigmatizes the Muslim community, and clashes with our constitutional tradition"); Cyra Akila Choudhury, *Racecraft and Identity in the Emergence of Islam as a Race*, 91 U. CIN. L. REV. 1, 40, 44–47 (2022) (arguing that anti-Shariah efforts position Islam itself as the problem, prevent Muslims from assimilating, and create a permanent, racialized, subordinated group).

51. *See* Awad v. Ziriax, 670 F.3d 1111, 1119 (10th Cir. 2012) (upholding preliminary injunction against an Oklahoma constitutional amendment knows as the "Save Our State Amendment" that banned the consideration of Shariah Law in American courts); *see also* AZIZ, *supra* note 41, at 145–47. Two Representatives from Texas, Keith Self and Chip Roy, created in December of 2025 the Sharia-Free American Caucus in Congress, which has grown to 60 members from 25 different states in three months. Press Release, Congressman Keith Self, Congressman Keith Self and the Sharia-Free American Caucus Take Over House Floor (Mar. 30, 2026), https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-encourages-texas-schools-begin-legal-process-putting-prayer-back [https://perma.cc/CVK9-V2RS]. Congressman Roy, along with Congressman Self and others, has also advanced legislation to "amend the Immigration and Nationality Act to prohibit the entry of aliens who adhere to Sharia law and for other purposes." Preserving a Sharia-Free America, H.R. 5722, 119th Cong. (2025-26), https://www.congress.gov/bill/119th-congress/house-bill/5722/text [https://perma.cc/39YX-TH3R]. Lawmakers in the state of Texas have launched a similar caucus. *Texas Lawmakers Launch Sharia-Free Caucus*, TEX. POL'Y RSCH. (Mar. 6, 2026) https://www.texaspolicyresearch.com/texas-lawmakers-launch-sharia-free-caucus/ [https://perma.cc/28VE-PX2L] ("The caucus draws inspiration from a similar federal effort known as the Sharia Free America Caucus in Congress.").

52. *See* AZIZ, supra note 41, at 145-47; Choudhury, *supra* note 50, at 34. *See generally* Evelyn Alsultany, *Arabs and Muslims in the Media After 9/11: Representational Strategies for a "Postrace" Era*, 65 AM. Q. 161, 165–66 (2013) (explaining that the use of "simplified complex representations" to depict Islam as "brutal, violent, and oppressive" by commercial news outlets

(and those perceived to be Muslim) are often automatically maligned as terrorists.[53] And over decades, the political branches of the federal and state governments have pursued policies reflecting this view of Muslims, requiring special registration of Muslim immigrants,[54] engaging in surveillance and infiltration of mosques,[55] prescribing removal of non-citizen Muslims from

proliferated post-9/11); JACK SHAHEEN, REEL BAD ARABS: HOW HOLLYWOOD VILIFIES A PEOPLE (2006) (examining stereotypes of Muslim men and women in movies after 9/11).

53. Barack Hussein Obama is the most prominent example of a politician who was smeared as an unpatriotic extremist for his alleged Muslim faith, despite being a Christian. *See* Bryan Adamson, *The Muslim Manchurian Candidate: Barack Obama, Rumors, and Quotidian Hermeneutics*, 25 ST. JOHN'S J. C.R. & ECON. DEV. 581, 582, 584 (2011) (describing the rumor of Obama as Muslim that persisted as perceived truth for 10% of voters on election day, in part because of pervasive anti-Muslim sentiment); Ben Smith, *The Obama-Muslim Myth*, POLITICO (Oct. 13, 2007, at 16:19 ET), https://www.politico.com/blogs/ben-smith/2007/10/the-obama-muslim-myth-003616 [https://perma.cc/V4MU-EDWW]; *see also* Meher Ahmad, *When I Look at Zohran Mamdani, Here's What I See*, N.Y. TIMES (Oct.15, 2025), https://www.nytimes.com/2025/10/13/opinion/zohran-mamdani-muslim-america-new-york.html [https://perma.cc/MWL5-P6WS] (quoting New York City mayoral candidate Zohran Mamdani as saying "[t]he accusations of being a terrorist sympathizer, of being an extremist—these are facts of life for so many Muslims who engage with any part of public life"). Indeed, the Muslim-as-Shariah-imposing-terrorist trope presumably animated the first Muslim nominee for the federal judiciary, Zahid Quraishi, to state "I don't know anything about that" when asked in Senate confirmation hearings about Shariah law. *See* Siddique Malik, *U.S. Senator and Muslim Federal Judge Failed with Question and Answer About Sharia Law*, COURIER J. (July 8, 2021, at 15:50 ET), https://www.courier-journal.com/story/opinion/2021/07/08/sen-durbin-and-quraishi-failed-avail-perfect-opportunity-demolish-lies-americas-bigots-have-been-spe/7876075002/ [https://perma.cc/C9EG-M8N4]. He was confirmed as a federal district court judge. In contrast, terrorist smears stymied the first Muslim nominated to be a federal appellate court judge, Adeel Mangi, despite an impeccable record of law practice and public service. *See* Jonathan Blitzer, *The Two-Pronged Attack on a Muslim Judicial Nominee*, THE NEW YORKER (May 17, 2024), https://www.newyorker.com/news/the-political-scene/the-two-pronged-attack-on-a-muslim-judicial-nominee [https://perma.cc/9NBP-ACLW].

54. Registration of Iranians during the Iran Hostage Crisis was the first instance of such a policy. After 9/11, the U.S. government implemented a more extensive mandatory registration program (NSEERS) requiring all nonimmigrant men over the age of sixteen from twenty-four Muslim majority countries to register with federal immigration authorities and periodically confirm their personal details. *See* AZIZ, *supra* note 41, at 175.

55. *See* Ramzi Kassem, *American Informant*, 27 MICH. J. RACE & L. 171, 173, 175–80 & n.17 (2021) (detailing the extensive use of FBI and NYPD informants within Muslim communities without particularized suspicion of any individual). The New York Police Department (NYPD) engaged in an extensive mass surveillance program after 9/11, with "a web of informants who compiled dossiers on thousands of Muslims, designated mosques as potential terrorist organizations, recorded religious sermons, and surveilled congregations without reasonable suspicion of illegal activity." AZIZ, *supra* note 41, at 179. The FBI also used informants extensively, often with unethical tactics, to encourage illicit behavior that most would consider entrapment. *See id.* at 180–81. At one California mosque, congregants reported an FBI informant *to* the FBI as an extremist and secured a restraining order against him. *Id.*; *see also* THIS AMERICAN LIFE, 755: *The Convert* (Chi. Pub. Radio, Dec. 3, 2021), https://www.thisamericanlife.org/755/transcript

the United States,[56] and barring entry of immigrants from Muslim majority countries,[57] despite limited evidence of such policies' need or success from a national security perspective.[58]

Since the entire Islamic faith, its theological underpinnings, and its history and civilizations have been widely maligned, American Muslims rooted in their faith are accordingly perceived as bad actors who are undeserving of the privileges of American citizenship.[59] These "bad Muslims" are ones who

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[https://perma.cc/LNL6-SXVH]. The legality of this particular surveillance is currently being litigated in the federal courts. *See* Fed. Bureau of Intel. v. Fazaga, 595 U.S. 344, 347 (2022).

56. Along with NSEERS, the Bush administration launched Operation Absconder to "identify and deport thousands of Middle Eastern men," targeting 8,000 men for interrogation regarding terrorism, and ultimately arbitrarily arresting over 1,000 Muslim migrant men. AZIZ, *supra* note 41, at 175. Operation Front Line before the 2004 elections targeted undocumented immigrants, "[75%] of whom were from Muslim-majority countries, on national security grounds." *Id.* at 176.

57. Soon after Donald Trump became President, he instituted his infamous "Travel Ban," immediately restricting entry into the United States for anyone from Libya, Iran, Iraq, Somalia, Sudan, Syria, and Yemen. Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8977 (Jan. 27, 2017). The first "Travel Ban" was so poorly drafted and almost universally enjoined by the federal courts, that only six weeks later, Trump issued a new version immediately restricting entry into the United States for anyone from Libya, Iran, Iraq, Somalia, Sudan, Syria, and Yemen. *See* Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017). In 2017, Trump issued yet a third version. *See* Proclamation No. 9645, 82 Fed. Reg. 45161 (Sep. 24, 2017). This is the version that was ultimately reviewed by the Supreme Court in *Trump v. Hawaii*. 585 U.S. 667 (2018).

58. "Of the tens of thousands of Muslims detained in the years immediately after 9/11, fewer than ten were charged with crimes related to terrorism and none were charged with involvement in the 9/11 terrorist attacks." AZIZ, *supra* note 41, at 175; DIALA SHAMAS & NERMEEN ARASTU, MAPPING MUSLIMS: NYPD SPYING AND ITS IMPACT ON AMERICAN MUSLIMS 4 (2013) (recounting the head of NYPD's Muslim surveillance program testimony that in his six years, surveillance of Muslims had not produced one criminal lead (citing Transcript of Examination Before Trial of a Non-Party Witness at 128–29, Handschu v. Special Servs. Div., 905 F. Supp. 2d 555 (S.D.N.Y. 2012) (No. 71 Civ. 2203))).

59. *See* MAMDANI, *supra* note 43, at 15; Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576 (2002) (arguing "September 11 facilitated the consolidation of a new identity category that groups together persons who appear 'Middle Eastern, Arab, or Muslim.' This consolidation reflects a racialization wherein members of this group are identified as terrorists, and disidentified as citizens"); AZIZ, *supra* note 41, at 6 ("By definition, Racial Muslims do not experience full religious freedom protections afforded to religious minorities. Nor are they considered to have an American national identity, even if they were born in the United States or possess US citizenship. Rather, Racial Muslims are a suspect race, permanent foreigners, and national security threats who warrant exclusion, purging, or incarceration to protect real (White Judeo-Christian) Americans."); Choudhury, *supra* note 50, at 40 ("Once Islam itself has become the problem, Muslims cannot assimilate. They become a permanent subordinated group like other races."); Janet Reitman, *'I Helped Destroy People'*, N.Y. TIMES (Sep. 9, 2021), https://www.nytimes.com/2021/09/01/magazine/fbi-terrorism-terry-albury.html [https://perma.cc/4ESB-AAH6] (describing former FBI agent stating that in training "it was made very clear from Day

observe the faith and are therefore visibly identifiable by their Islamic garb or grooming.[60] Women covering their hair in hijab, as some of the most obvious members of the faith, fit squarely within the "bad Muslim" archetype. As a corollary, "good Muslims" are hand-picked individuals who have rejected Islam's religious precepts—whether by renouncing the faith altogether or claiming to be "secular" or "reformed" Muslims.[61] Ultimately, the laser focus of national security mechanisms, including government surveillance and immigration enforcement, on Muslim institutions and communities has deeply stigmatized Islam and its adherents, causing many Muslims to stay away from the mosque, shave their beards, and take off their hijabs.[62]

Indeed, negative perceptions of Muslims have infected every corner of the American consciousness. National polls reflect that Americans understand Islam to be at odds with American values, do not believe Muslims should hold political or judicial office, think Muslims should be subject to greater scrutiny than other religious adherents, and generally hold unfavorable views of Islam and its followers.[63] Worse yet, hate crimes against Muslims are consistently some of the highest in the

1 that the enemy was not just a tiny group of disaffected Muslims"; rather "Islam itself was the enemy"). American Muslims, among other immigrants and those perceived as immigrants, have recently been juxtaposed with "Heritage Americans"—a new term promoted by right-wing leaders and defined as those who can "find their last names in the Civil War registry," "embody an 'Anglo-Protestant spirit,'" and "have a tie to history and to the land." Ali Breland, *Are You a 'Heritage American'?*, THE ATLANTIC (Oct. 7, 2025), https://www.theatlantic.com/technology/2025/10/heritage-americans-nativist-right/684472/ [https://perma.cc/QT9B-P79A] (quoting statements made by Auron MacIntyre, a columnist for Blaze Media, as a guest on Tucker Carlson's podcast)."Heritage American" and similar terms have also recently been used by Vice President J.D. Vance. *Id.*

60. Professor Sahar Aziz argues that the severity of discrimination against and exclusion of Muslims from the benefits of US citizenship largely depends on their level of religiosity, with observant Muslims as the most suspect. AZIZ, *supra* note 41, at 8; *see also* Choudhury, *supra* note 50, at 49 ("Adherence to Islam by abiding by dietary laws, celebrating religious holidays, or having any outward physical or behavioral markers render their assimilation incomplete.").

61. These individuals generally reject orthodox Islam and are considered outsiders by the broader American-Muslim community. Some of these prominent individuals include: Ayaan Hirsi Ali (left Islam as an atheist and later converted to Christianity), Nonie Darwish (left Islam), and Wafa Sultan (left Islam). AZIZ, *supra* note 41, at 9–10.

62. *See* Akbar, *supra* note 48, at 869–72; Shamas & Arastu, *supra* note 58, at 16.

63. *See* AZIZ, *supra* note 41, at 161–63, 166 (describing multiple polls over the course of a decade).

country (despite likely underreporting), including acts of violence, intimidation, and vandalism, with mosques often the target.[64]

Unfortunately, the federal judiciary is not immune from internalizing negative perceptions of Muslims. Despite our nation's First Amendment protections, studies have shown that Muslims do not enjoy these protections equally as compared to other faith adherents. Michael Heise and Gregory Sisk examined religious-liberty cases against the government in the federal courts between 1986 and 1995, then again from 1996 to 2005, and noticed a troubling negative trend for Muslim claimants.[65] In the first decade of study, mounting evidence showed that Muslims were less likely to succeed in their claims than people of other faith traditions.[66] In the latter decade, the evidence more conclusively showed that Muslim plaintiffs were likely to prevail about *half* as frequently as plaintiffs from other religious communities.[67] That is to say, claimants from other faith traditions were twice as likely than Muslims to win in federal court when asserting free-exercise claims.[68] As the study's authors

64. *See generally* COUNCIL ON AM.-ISLAMIC RELS., FATAL: THE RESURGENCE OF ANTI-MUSLIM HATE 4 (2024) (stating 2023 marked the highest number of reported hate crimes against Muslims in the Council's thirty-year history, with a 56% increase from 2022); COUNCIL ON AM.-ISLAMIC RELS., THE EMPOWERMENT OF HATE 6 (2017) (detailing the rise in hate crimes following the 2016 campaign and election of President Trump); COUNCIL ON AM.-ISLAMIC RELS., TARGETED 6 (2018) (detailing the rise in hate crimes following the 2016 election of President Trump).

65. Gregory C. Sisk, Michael Heise, & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 497, 499, 566–67 (2004) [hereinafter Sisk et. al., *Soul of Judicial Decisionmaking*]; Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231, 237–38, 248–49 (2012) [hereinafter Sisk & Heise, *Muslims and Religious Liberty*]. The data set that formed the basis for these studies included federal free-exercise cases involving the government as a defendant under the First Amendment, the Religious Freedom Restoration Act, the Religious Land Use and Institutionalized Persons Act, and Title VII of the Civil Rights Act of 1964. *Id.* at 237–38.

66. Sisk et al., *Soul of Judicial Decisionmaking*, *supra* note 65, at 566–67.

67. Sisk & Heise, *Muslims and Religious*, *supra* note 65, at 249.

68. *Id.* Notably, the authors concluded that this trend could not be attributed to partisan affiliations. *Id.* at 266; *see also* Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 NOTRE DAME L. REV. 1371, 1374 (2013) [hereinafter Heise & Sisk, *Free Exercise of Religion*] (concluding no discernable difference between how Republican and Democrat-appointed judges decided free exercise cases between 1996–2025); Sepehr Shahshahani & Lawrence J. Liu, *Religion and Judging on the Federal Courts of Appeals*, 14 J. EMPIRICAL LEGAL STUD. 716, 729–31 (2017) (noting "attitudes toward [free exercise]

put it, "[a]mong all of the diverse categories of religious claimants . . . Muslims nearly alone were significantly and powerfully associated with a negative outcome before the federal courts."[69]

Heise and Sisk rejected multiple hypotheses before concluding that the extreme disadvantage suffered by Muslim claimants was most likely due to implicit bias.[70] They term this theory the "Islam Viewed as Dangerous" hypothesis and briefly review the context described above, with Muslims viewed as violent cultural invaders intent to impose Shariah law.[71] They say "[s]tereotypes about Muslims may have been so powerful as to override the social psychology patterns and judicial role attitudes that otherwise would move federal judges toward greater tolerance."[72] Notwithstanding the fact that we have no reason to believe judges are more tolerant than the rest of the American population, the scholars go on to describe how religious-liberty cases exacerbate underlying bias since a claimant's "Muslim identity is placed front and center, not merely being a secondary attribute of the litigant."[73] Before describing the

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cannot be easily classified on a liberal-conservative spectrum" because their data shows that "partisan affiliation is . . . nowhere near significant in [free exercise] cases").

69. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 65, at 249. Heise and Sisk's study noted that Black separatist faith groups also had negative outcomes. *Id.* Notably, these groups can be considered offshoots of or connected to Islam, as they incorporate nomenclature and beliefs that parallel those of Islam. *See generally* SHERMAN A. JACKSON, ISLAM AND THE BLACKAMERICAN: LOOKING TOWARD THE THIRD RESURRECTION (2011).

70. *See* Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 65, at 288. The three hypotheses they rejected are (1) Muslims face a general minority disadvantage; (2) Judges rule against Muslims as a backlash against Islamic conservative ideology in the context of the culture wars; and (3) Muslim claims deserve to lose because they are weaker on the merits. *Id.* at 259–60. First, they rejected the minority disadvantage hypothesis as not borne out by the data since other minority faith adherents did not experience the same failures in court. *Id.* at 260–62. Next, they rejected the culture wars theory because the majority of Muslim claims were not conflicts between traditionalist views and secular government policies. *Id.* at 262–69. Finally, they rejected that Muslims bring less meritorious claims since such cases would have been weeded out earlier than the stage of litigation reflected in the published cases used in their model. *Id.* at 270–77. The authors also adjusted their model to account for the fact that Muslims tend to litigate as individuals in contrast to other faith-based litigants who are generally organizations and may enjoy greater credibility, more community standing, and greater access to litigation resources and superior representation. *Id.* at 271.

71. *Id.* at 260, 277–86.

72. *Id.* at 282.

73. *Id.* at 283.

contemporary literature on implicit bias and judges, they highlight that "[s]tereotypes about Muslims as security risks and Islam as a religion of violence are especially likely to be activated in contexts that already breed negative stereotypes, such as claims by prisoners—the lion's share of claims by Muslims included in this study."[74]

Heise and Sisk studied more recent data in the subsequent years of 2006 to 2015 and concluded that the disadvantage Muslims faced had dissipated.[75] However, other scholarship challenges that conclusion post-2015. A recent study has found that federal judges appointed by Trump between 2016 and 2020

74. *Id.* Other scholars have explored implicit bias in the courts. *See, e.g.*, Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 63 (2017) (testing whether negative implicit biases against minorities exist in federal and state judges); ANDREW J. WISTRICH & JEFFREY J. RACHLINSKI, ENHANCING JUSTICE: REDUCING BIAS 99–100 (Sarah E. Redfield ed., 2017) (discussing implicit racial bias in judges). Indeed, it remains disputed whether additional training or other methods can blunt the effects of implicit bias. *Compare* Tiffany L. Green & Nao Hagiwara, *The Problem with Implicit Bias Training*, SCI. AM. (Aug. 28, 2020), https://www.scientificamerican.com/article/the-problem-with-implicit-bias-training/ [https://perma.cc/A6MK-37H4] (stating there is inconclusive evidence as to whether implicit bias training helps to reduce implicit biases), *with* Evelyn R. Carter, Ivuoma N. Onyeador & Neil A. Lewis, Jr., *Developing & Delivering Effective Anti-Bias Training: Challenges & Recommendations*, 6 BEHAV. SCI. & POL'Y ASS'N 57, 57 (2020) (making evidence-based recommendations as to implementing anti-bias training in miscellaneous organizations). More Muslims serving on the federal judiciary has the potential to decrease bias against Muslim claimants. At the time of a 2017 study, the authors counted zero Muslim judges on the federal bench, while Protestant and Catholic federal judges numbered in a ratio close to their percentage in the U.S. population, and Mormons and Jewish judges were represented three times and ten times their respective percentages. *See* Shahshahani & Liu, *supra* note 68, at 725–26. Since that study, President Biden appointed four federal district court judges who were confirmed by a slim Democratic Senate majority: Zahid Quraishi, Nusrat Choudhury, Amir Ali, and Mustafa Kasubhai. *Federal Judges Nominated by Joe Biden*, BALLOTPEDIA, https://ballotpedia.org/Federal_judges_nominated_by_Joe_Biden#List_of_judges [https://perma.cc/QV5S-9EYT] (last visited Apr. 10, 2026). However, future potential Muslim judges can face an uphill battle to confirmation, as was the case with Adeel Mangi. *See* Letter from Adeel A. Mangi to President Joseph R. Biden, at 3 (Dec. 16, 2024), https://static01.nyt.com/newsgraphics/documenttools/790ef825561421c3/92cdcf4b-full.pdf [https://perma.cc/GJM5-LK5R]. Mangi endured smear campaigns while fielding inappropriate confirmation questions about belief in Shariah law, on connections to extremism, and about sufficient loyalty to America. *Id.* at 3–4 (citing his targeting by a "[negative] campaign . . . intended to make it intolerable for Muslims proud of their identity to serve this nation" as evidence of a "fundamentally broken process for choosing federal judges"). Indeed, Zahid Quraishi explicitly disclaimed any knowledge of Shariah law during his confirmation hearing. *See* Malik, *supra* note 53.

75. Michael Heise & Gregory C. Sisk, *Approaching Equilibrium in Free Exercise of Religion Cases? Empirical Evidence from the Federal Courts*, 64 ARIZ. L. REV. 989, 993, 1043–44 (2022) [hereinafter Heise & Sisk, *Approaching Equilibrium*].

supported religious-liberty claims of Muslim claimants significantly less often—in fact, less than half as often—than similar claims from members of other faith traditions: Trump appointees voted in favor of free-exercise claims 45.4% of the time as a general matter, 56.5% when the plaintiff was Christian, and 19.2% when the plaintiff was Muslim.[76] And of course these judges were appointed following Trump's campaign where he repeatedly maligned Islam and Muslims.[77] Notably, Trump-appointed judges' approach to religious liberty was one of the most striking takeaways from the study: despite a general trend of favoring religious-liberty claims, these judges deeply disfavored Muslim claimants as compared to other federal judges.[78]

These studies reveal a distinct "double discrimination" faced by American Muslims—discrimination from government or employer rules, policies, and actions, followed by discrimination when they attempt to vindicate their rights in federal court. Whether implicit or explicit, bias against Muslims resulting from the "clash of civilizations" paradigm cannot be ignored as a factor in such double discrimination. Within this context, and despite the development of robust constitutional protections of religion, America's promise of religious freedom has remained largely elusive for Muslim Americans, as explained more fully in the following sections.

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76. *See* Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Trump's Lower-Court Judges and Religion: An Initial Appraisal*, 54 J. LEGAL STUD. 1, 20, 22 (2025); *see also* Adam Liptak, *Trump's Judges: More Religious Ties and More N.R.A. Memberships*, N.Y. TIMES (July 17, 2023), https://www.nytimes.com/2023/07/17/us/politics/trump-judges-religion-nra.html [https://perma.cc/8WUB-VBET]. Contrary to previous empirical studies, the Choi, Gulati, and Posner study analyzed more recent data to conclude partisanship may play a role in the disadvantage Muslim claimants face. *See* Choi et al., *supra*; *see also* Zalman Rothschild, *Free Exercise Partisanship*, 107 CORN. L. REV. 1067, 1069–72 (2022) (analyzing data from constitutional free exercise cases to argue that partisan affiliation of a judge correlates with free exercise outcomes since religious liberty has transformed from an uncontroversial topic to a "provocative issue"). Regardless of free exercise decision-making based on any partisan affiliation, the disadvantage of Muslim claimants documented across the federal judiciary remains concerning.

77. *See supra* note 47.

78. *See* Liptak, *supra* note 76.

II. THE FIRST AMENDMENT

The last twenty years has seen significant changes to First Amendment doctrine at the hands of the U.S. Supreme Court, largely to the benefit of Christians and to the detriment of minority faith adherents. The Court has traditionally bifurcated the Amendment to understand and analyze claims separately under its two clauses—the Free Exercise Clause and the Establishment Clause. The former has enjoyed a renaissance of sorts, with the Supreme Court enhancing robust protection of individualized free-exercise exemptions from general laws, particularly for Christian claimants.[79] This development has occurred despite the Court's attempt three and a half decades ago to reduce such exemptions and instead focus on prohibiting animus and targeting of religion.[80] Ironically, free-exercise protection in the form of exemptions for mostly Christian claimants has reached a zenith, while the government has successfully employed national security defenses to defeat Muslims' claims where animus and targeting are alleged to be at play. To be sure, free-exercise exemptions have benefited Muslims in contexts where they will also inevitably be claimed by—and the benefit will also enure to—Christians, but always at the level of individual accommodation of a particular religious belief or practice.[81] In contexts where only minority groups are likely to benefit, like immigration or national security, the Court has not been so forthcoming.[82] Moreover, the narrow focus on a particular claimant's religious belief or practice in the free-exercise context has created a paradigm that fails to adequately address challenges stemming from institutionalized and pervasive bias against Islam and Muslims.

With the rise of robust individual free-exercise protection at the hands of the Justices, the Supreme Court's appetite to uphold disestablishment protections has correspondingly

79. *See* Christopher C. Lund, *Second-Best Free Exercise*, 91 FORDHAM L. REV. 843, 845 (2022).

80. *See* Emp. Div. v. Smith, 494 U.S. 872, 877–90 (1990).

81. *See infra* note 110.

82. *See infra* notes 112–19.

decreased. Within the last decade, the Court has abandoned its objective endorsement test in favor of an approach it claims focuses on history and tradition, dismantling the wall separating church and state to the benefit of Christian institutions and citizens, and to the detriment of minority faith adherents, including Muslims.[83] But in spite of the sea-change in First Amendment jurisprudence within the last decade, the Supreme Court has never disavowed one fundamental principle derived from the Amendment as a whole: government must remain neutral and cannot prefer or disfavor one religion over another.[84] This promise, however, remains unfulfilled when it comes to Muslims, as explained further below.

The evolution of the Supreme Court's approach to the First Amendment can best be understood by its approach to prayer in public schools. From the 1960s through the turn of the century, the Court prohibited school prayer in any form under the Establishment Clause—in the classroom,[85] at school graduations,[86] and on the football field.[87] But with the Court's increasing focus on promoting individual religious observance under the Free-Exercise Clause and move away from a separation of

83. The Court first announced a "wall of separation between church and state" and extended First Amendment protections to the states in the mid-twentieth century. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)). It repeated this bedrock principal time and time again. The Supreme Court fashioned a test in 1971, asking whether the government action had an impermissible religious purpose, an excessive religious effect, or fostered excessive entanglement with religion. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). The test has been abandoned in recent years for a historical approach. *See* Am. Legion v. Am. Humanist Ass'n., 588 U.S. 29, 60 (2019); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 534–35 (2022).

84. *See, e.g.*, Larson v. Valente, 456 U.S. 228, 244–46 (1982) (explaining how "[the] princip[le] of denominational neutrality" originated from the founding era and is "inextricably connected with the continuing vitality" of the First Amendment). For further discussion of this principle, see *infra* notes 111–17 and accompanying text.

85. Engel v. Vitale, 370 U.S. 421, 599 (1962) (holding recitation of non-denominational prayer in public school prohibited); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205 (1963) (holding bible reading in public school prohibited); Wallace v. Jaffree, 472 U.S. 38, 40, 61 (1985) (holding statute authorizing one-minute period of silence in all public schools "for meditation or voluntary prayer" unconstitutional).

86. Lee v. Weisman, 505 U.S. 577, 598–99 (1992) (holding religious prayer led by clergy during graduation prohibited).

87. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 316 (2000) (holding student-led, student-initiated prayer before high school football games prohibited).

church and state under the Establishment Clause, it engaged in a complete 180-degree reversal when it held in 2022 that a high school football coach's prayer on the field and in the locker room was actually constitutionally protected free exercise and free speech.[88] So, in the school prayer cases, as well as in cases

88. *Bremerton*, 597 U.S. at 512. Curiously, Justice Gorsuch analogizes Coach Bremerton's prayer and inspirational talks to a Muslim teacher's hijab in the classroom. *Id.* at 530–31. In rejecting the Ninth Circuit and District's arguments that the coach's prayer was coercive to students, Gorsuch states, "this argument commits the error of positing an 'excessively broad descriptio[n]' by treating everything teachers and coaches say in the workplace as government speech subject to government control. On this understanding, a school could fire a Muslim teacher for wearing a headscarf in the classroom." *Id.* (quoting Garcetti v. Ceballos, 547 U.S. 410, 424 (2006)). The analogy strains credulity—notwithstanding that religious dress can be protected as speech, the challenged action in the case involved Coach Bremerton audibly praying with students and giving them inspirational talks with religious themes in the locker room before games, at the 50-yard line after games, and in the locker room after games. *Id.* at 512–16. Coach Bremerton's speech is a far cry from a hijabi teacher simply existing in the classroom, and Gorsuch's analogy creates a problematic identity between the two. Putting aside Gorsuch's inapt comparison, the problematic idea that religious garb in the classroom can coerce is one rooted in our country's history but rejected over time. Until 2023, a Pennsylvania statute prohibited teachers from wearing any "dress, mark, emblem or insignia" that would indicate they are "a member [of] or adherent [to] any religious order" while in performance of their teacher duties. *See* Act of Mar. 10, 1949, No. 14, 1949 Pa. Laws 30, 30, *repealed by*, Act of Nov. 6, 2023, No. 26, § 1(a), 2023 Pa. Laws 166, 166. The first violation would result in a minimum one-year suspension, and a second offense would permanently disqualify the teacher from teaching. *Id.* § 1(b). In addition, the statute allowed a public-school director to be held criminally liable for failing to enforce the prohibition. *Id.* One year after the Pennsylvania Supreme Court affirmed that Catholic nuns could not be dismissed from their jobs as public school teachers on account of their religion, this "Garb Law" was passed in 1895, and subsequently renewed in 1949. *See* Steven M. Nolt & Jean-Paul Benowitz, *Plain Dress in the Docket: Lillian Risser, the Pennsylvania Garb Law, and the Free Exercise of Anabaptist Religion, 1908-1910*, 89 PENN. HIST. J. MID-ATLANTIC STUD. 227, 227–28 (2022) (describing *Hysong v. Gallitzin School District*, where the Court held that public schools could not terminate teachers who were nuns because of their religious dress). More than twenty states followed Pennsylvania and passed similar laws—all motivated by anti-immigrant and anti-Catholic sentiment. *Id.* at 228. The first teacher to challenge the law in Pennsylvania was an Anabaptist teacher who wore the faith's required "plain dress," which included a "prayer covering" or head covering. *Id.* at 230 n.11, 232–33. Although the trial court ruled the statute unconstitutional, an appellate court overruled it based on an acts/belief distinction, holding that only religious beliefs were protected by the governing religious-liberty protections, not religious acts. *Id.* at 234, 237. In 1910, the Pennsylvania Supreme Court sustained the appellate ruling and imposed criminal liability on the school board for allowing the teacher to teach in her religious dress. *Id.* at 238. Almost one hundred years later, a federal court finally enjoined the statute as violative of the First Amendment after a Christian teacher's challenge. *See* Nichol v. Arin Intermediate Unit 28, 268 F. Supp. 2d 536, 541 (W.D. Pa. 2003) (granting preliminary injunction of public-school teacher's suspension for wearing a small cross necklace because it violated the Free Exercise and Free Speech clauses of the First Amendment). Notably, a hijabi's challenge to the statute a decade earlier did not produce the same result, seemingly because the challenge involved Title VII and *TWA v. Hardison*'s flimsy standard, as further discussed below. *See* United States v. Bd. of Educ., 911 F.2d 882, 890–91 (3d Cir. 1990) (holding the School Board

of providing government funds to private religious schools,[89] government public displays,[90] and others, the Supreme Court has moved from prohibiting most religious elements in an effort to maintain a separation between government and religion, to allowing more religion in government to ostensibly protect free exercise.[91] As three scholars recently put it, "[w]ithin the span

would suffer undue hardship in the form of criminal liability and penalties under the state's Garb Law if it were to accommodate a hijabi as a public school teacher, noting the Supreme Court's opinion in "*Hardison* strongly suggests that the undue hardship test is not a difficult threshold to pass"). Just one year after the hijabi case, a district court found an employer had failed to accommodate a Muslim woman, largely based on her own and an Imam's testimony that her dress did not clearly identify her as a Muslim, and thus did not trigger the Garb Law nor did it pose an undue hardship. *See* EEOC v. Reads, Inc., 759 F. Supp. 1150, 1160–61 (E.D. Pa. 1991) ("Moore's headcoverings are not 'religious garb' proscribed by the Department of Education standard because although worn for religious purposes they are not perceived as such."). Indeed, Pennsylvania was the last state to repeal such a law in 2023, after Nebraska repealed its analogous statute in 2017, Oregon in 2010, and North Dakota in 1998. *See* Mark A. Kellner, *Pennsylvania Repeals Ban on Religious Garb for Public School Teachers*, WASH. TIMES (Nov. 13, 2023), https://www.washingtontimes.com/news/2023/nov/13/pennsylvania-repeals-ban-religious-garb-ban-public/ [https://perma.cc/Q5WQ-VDWD]; Nolt & Benowitz, *supra*, at 239.

89. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 606–07 (1971) (striking down state programs reimbursing religious schools for teacher salaries and instructional materials under the Establishment Clause); Agostini v. Felton, 521 U.S. 203, 234–35 (1997) (allowing public school teachers to provide remedial education at religious school using federal funds under the Establishment Clause); Trinity Lutheran Church v. Comer, 582 U.S. 449, 466 (2017) (prohibiting a state from denying funding to a church-run pre-school as part of a generally available playground resurfacing program under the Free Exercise Clause); Espinoza v. Mont. Dep't of Rev., 591 U.S. 464, 486–87 (2020) (prohibiting a state from excluding religious schools from a generally available scholarship program funded by tax credits under the Free Exercise Clause); Carson v. Makin, 596 U.S. 767, 789 (2022) (invalidating the exclusion of religious schools from Maine's tuition assistance program under the Free Exercise Clause).

90. McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 873–74 (2005) (holding display of Ten Commandments in courthouses violated the Establishment Clause); Van Orden v. Perry, 545 U.S. 677, 691–92 (2005) (holding Ten Commandments monument on Texas State Capitol grounds did not violate the Establishment Clause because it was surrounding by other historical markers); Cnty. of Allegheny v. ACLU, 492 U.S. 573, 678–79 (1989) (holding a nativity scene inside a courthouse violated the Establishment Clause, while a menorah displayed with a Christmas tree and a "salute to liberty" sign outside of a city building did not); Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 37–38 (2019) (holding a large war memorial in the shape of a cross on public land did not violate the Establishment Clause because it had a secular meaning).

91. *See* Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Structure of Religious Preference*, 139 HARV. L. REV. 211, 225 (2025) (describing the shift in First Amendment doctrine). The scholars outline what they term "structural preferentialism" where religion enjoys "equal treatment for benefits and special exemptions from burdens." *Id.* at 213 ("On one hand, the Court now requires equal treatment of religious individuals and associations with respect to funding and access to other publicly available benefits, and on the other, it requires special treatment in the form of accommodations from laws that burden religious beliefs and practices.").

of a generation, what had been constitutionally forbidden under the Establishment Clause is now mandated under the Free Exercise Clause."[92]

Ultimately, the high court's focus on free exercise of religion at the expense of keeping religion separate from the state has most often benefited Christian claimants, infringed upon minority religious freedom, and thus undermined the required neutrality between religions.[93] Religious liberty in schools again demonstrates this dynamic as it plays out in the United States today. Multiple states, including Texas, have recently passed laws requiring the display of the Ten Commandments in schools, and Texas has passed a law requiring school prayer, all promoted by Christian lawmakers who have presumably been buoyed by the Supreme Court's recent jurisprudence eroding disestablishment principles and promoting religion in public spaces as a matter of free exercise.[94] Although many Jews and

92. Schwartzman et al., *supra* note 91, at 225.

93. *See* Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 U. CHI. S. CT. REV. 315, 324–25 (2021) (finding the Roberts Court has ruled in favor of religious organizations over 83% of the time, compared to about 50% for all previous eras since 1953, and the winning party was most often a mainstream Christian organization). In most cases upholding free exercise of religion where the court previously prohibited the challenged action on Establishment Clause grounds (namely, prayer in schools, government funding to religious schools, and religious displays in government), the issue has centered upon Christian belief and practice, and Christians or Christian organizations have been the beneficiary of the Court's rulings. *See, e.g.*, Kennedy v. Bremerton, 597 U.S. 507, 512 (2022) (Christian prayer in school); *Trinity Lutheran Church*, 582 U.S. at 453–54 (Christian church receiving government funds); *American Legion*, 588 U.S. at 37–38 (display of Christian cross supported by government funds). Religious minorities generally do not benefit from such precedents. *See* Schwartzman et al., *supra* note 91, at 249–50 (arguing that under the Supreme Court's approach to religious liberty, "[d]enominational preference is likely too"). Take prayer in school—prayer by a teacher or coach akin to Coach Kennedy's will rarely take the form of non-Christian prayer based on the demographics and political realities of the United States. To be sure, Muslims who give benedictions in Congress are subject to attacks and vitriol. *See, e.g.*, Azad Essa, *Imam Omar Suleiman Targeted in US Smear Campaign Led by Republican Congressman [incl. Todd Green]*, CAMPUS WATCH (May 11, 2019), https://www.meforum.org/campus-watch/imam-omar-suleiman-targeted-in-us-smear-campaign [https://perma.cc/YDH4-D5AX]. So, minority religious adherents may be subject to Christian prayer in schools, without the ability to themselves meaningfully engage in such public forms of prayer in their communities. *See id.*

94. Indeed, several states have recently passed laws requiring the Ten Commandments to be displayed in all public schools despite the Supreme Court striking down a similar state statute forty-five years ago. *See* Stone v. Graham, 449 U.S. 39, 42-43 (1980); *see also* Carl H. Esbeck, *Louisiana's Ten Commandments Statute: With Litigation Updates from Arkansas and Texas* 1–2 (Univ.

Muslims also hold the Ten Commandments and prayer as religious values, the impetus behind the current campaign comes from the Christian right, with text or prayer versions and overall messaging focused on the alleged Christian nature of our country and its founding.[95] This means that children who follow minority faith traditions—including Muslims and Jews—will be subject to religious messaging (and likely coercion) in public schools contrary to their faith.

Simultaneously, Texas has excluded at least two dozen Islamic schools from its $1 billion voucher program that allows parents to use public funds for their children's private school tuition—up to $10,474 in most cases.[96] Texas officials say the Islamic schools have been barred from the program because they hosted events for the Council on American-Islamic Relations, or CAIR, a prominent Muslim civil rights group, which Texas

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of Mo. Sch. of L., Legal Stud. Rsch. Paper No. 2025-40, 2025). The recent Ten Commandment statutes were struck down by federal district courts. *Id.* at 2. However, the Court of Appeals for the Fifth Circuit has subsequently held that the challenge to the Louisiana statute is not yet ripe for review, and that the Texas law is consistent with the Free Exercise and Establishment Clauses. *Roake v. Brumley*, 170 4th 292, 297 (5th Cir. 2026) (en banc) (LA Statute); Nathan v. Alamo Heights Ind. Sch. Dist., No. 25-20695, 2026 WL1078691 (5th Cir. April 21, 2026) (TX statute). It remains to be seen whether or how the Supreme Court will treat the issue, but based on its recent jurisprudence, it is likely to uphold both laws. Texas has also recently passed a law encouraging public schools to dedicate time for prayer and scripture reading, with Attorney General Ken Paxton encouraging children to recite "the Lord's Prayer, as taught by Jesus Christ." Press Release, Attorney General of Texas, Attorney General Ken Paxton Encourages Texas Schools to Begin Legal Process of Putting Prayer Back in the Classroom and Recommends the Lord's Prayer for Students (Sep. 2, 2025), https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-encourages-texas-schools-begin-legal-process-putting-prayer-back [https://perma.cc/E7WY-LT68]. Texas has also introduced a new English curriculum with a focus on Christian stories, themes, and texts. Troy Closson, *Inside a New Bible-Infused Texas English Curriculum*, N.Y. TIMES (Oct. 14, 2025), https://www.nytimes.com/2025/10/14/us/bible-public-school-curriculum-texas.html# [https://perma.cc/C6JW-6CUR] (comparing new and previous curriculum and finding references to Jesus increased from nineteen to eighty-seven with the addition of multiple lessons about Christianity, while lessons on Islam and Muslims were cut). For a recent overview of the litigation challenging the Ten Commandments in public schools as of the publication of this Article, see Pooja Salhotra, *What to Know About the Push to Display the Ten Commandments in Classes*, N.Y. TIMES (Mar. 19, 2026), https://www.nytimes.com/2026/03/19/us/ten-commandments-schools-states.html [https://perma.cc/RGS7-4AQY].

95. *Id.*

96. Laura Lumpkin, *Islamic Schools Excluded from Texas's $1 Billion Voucher Program*, WASH. POST (Mar. 11 2026), https://www.washingtonpost.com/education/2026/03/11/texas-vouchers-islamic-schools/ [https://perma.cc/ECA4-9G9P].

Governor Greg Abbott recently designated as a terrorist organization.[97] However, many schools say they have never done so, and in any event, maligning CAIR and Islamic schools is part of an anti-Muslim smear campaign.[98] One parent of children in an excluded Islamic school is challenging the policy in court.[99] In Texas and throughout the country, the use of vouchers for parochial schools has also gained traction due to the abrupt shift in First Amendment doctrine.[100]

Ultimately, Texas policies regarding Christian prayer and religious messages in public schools coupled with the exclusion of Islamic institutions from valuable funding for private education exemplifies the real consequences of policies based on the prevalent Muslim-as-terrorist narrative: government action placing adherents of Islam at a disadvantage when it comes to practicing their faith as compared to other Americans, particularly Christians, despite supposed robust religious liberty protections. Texas's recent actions subject Muslim students to unwelcome religious messaging and coercion in public schools, while also rendering them unable to access the benefits of generally available public programs to attend Islamic school. Beyond the classroom, Texas has also targeted Muslim houses of

97. *Id.* Such designations are generally made pursuant to the authority of the federal government, and CAIR does not appear on any such federal lists. *Id.*

98. *Id.*

99. *Id.*; *see also* Complaint at 1–2, Cherkaoui v. Paxton, No. 2:26-cv-1675 (S.D. Tex. Mar. 1, 2026, https://www.texastribune.org/wp-content/uploads/2026/03/Islamic-School-Voucher-Lawsuit-3_1_26.pdf [https://perma.cc/T392-JVE2].

100. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) (holding Ohio's school voucher program providing tuition aid for students to attend private schools, including religious ones, did not violate the Establishment Clause); Trinity Lutheran Church v. Comer, 582 U.S. 449, 466 (2017) (prohibiting a state from denying funding to a church-run pre-school as part of a generally available playground resurfacing program under the Free Exercise Clause); Espinoza v. Mont. Dep't of Rev., 591 U.S. 464, 486–87 (2020) (prohibiting a state from excluding religious schools from a generally available scholarship program funded by tax credits under the Free Exercise Clause); Carson v. Makin, 596 U.S. 767, 789 (2022) (invalidating the exclusion of religious schools from Maine's tuition assistance program under the Free Exercise Clause); Laura Meckler & Michelle Boorstein, *Billions in Taxpayer Dollars Now Go to Religious Schools via Vouchers*, WASH. POST (June 3, 2024), https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.washingtonpost.com/nation/2024/06/03/tax-dollars-religious-schools/&ved=2ahUKEwjvysLVisGTAxWDFDQIHTZUEBMQFnoECBgQAQ&usg=AOvVaw0470VtIOA9j4FM9Fl4cDhe [https://perma.cc/6GAQ-SZNC].

worship, housing developments, mediation programs, and as mentioned above, a civil rights group.[101] It is easy to see the anti-Muslim and anti-Shariah movements' hand behind such policies in Texas and similar efforts proliferating in other states.[102] These efforts are all possible—and legally plausible—because of the Supreme Court's re-ordering of the First Amendment's balance between free exercise and dis-establishment.

Ironically, the focus on individualized free-exercise exemptions at the expense of disestablishment has occurred despite an effort by the Supreme Court to curtail such exemptions back in 1990 when it pulled back on the use of strict scrutiny review in such cases.[103] In the seminal *Employment Division v. Smith* case, the Court rejected its previous practice and held that no automatic entitlement to strict scrutiny for burdens on religion existed under the First Amendment; rather only laws that were non-neutral or not generally applicable as to religion would implicate the exacting constitutional test.[104] In other words, strict

101. Press Release, Off. of the Tex. Governor, Governor Abbott Directs Texas Rangers to Open Criminal Investigation into East Plano Islamic Center (Mar. 31, 2025) (targeting prominent Texas masjid); Press Release, Off. of the Tex. Governor, Governor Abbott Signs Law Banning Sharia Compounds in Texas (Sep. 12, 2025) (targeting housing complex development with masjid); Letter from Governor Greg Abbott to District Attorney Willis, District Attorney Creuzot, Sheriff Skinner, and Sheriff Brown (Nov. 19, 2025) (on file with Drexel Kline School of Law) (targeting Islamic mediation program); Press Release, Off. of the Tex. Governor, Governor Abbott Designates Muslim Brotherhood, CAIR as Foreign Terrorist Organizations (Nov. 18, 2025) (targeting civil rights organization). The U.S. Department of Justice has since cleared the Texas housing development of any wrongdoing. David J. Goodman, *D.O.J. Ends Inquiry of Housing Development by Texas Muslims*, THE N.Y. TIMES (June 25, 2025), https://www.nytimes.com/2025/06/25/us/politics/texas-muslim-development-justice-department.html [https://perma.cc/5BF9-R4BP].

102. Lumpkin, *supra* note 96 (indicating Florida is following Texas's lead in targeting Muslims, their civil rights organizations, their schools, their masjids, and other institutions); Robert Draper, *'It Doesn't Need to Be Here': The Right Vilifies a Muslim School in Alabama*, The N.Y. TIMES (Mar. 16, 2026), https://www.nytimes.com/2026/03/16/us/politics/muslims-alabama-islamic-school-republicans.html [https://perma.cc/559R-UBCS] (detailing opposition to Islamic schools, places of worship, and Muslims generally by various officials in multiple states).

103. Emp. Div. v. Smith, 494 U.S. 872, 877–90 (1990).

104. Justice Scalia, writing for the majority, wrote that the automatic triggering of heightened scrutiny for challenged laws in the free-exercise context excessively facilitated exemptions that would create "anarchy" and allow "every citizen to become a law unto himself." *Id.* at 879, 888 (citations omitted). Although the precedents that had analyzed such cases under strict scrutiny for decades had not been seriously called into question by any litigants before the Court, the majority believed that requiring any request for a religious accommodation from a neutral

scrutiny would only be employed when governmental targeting or animus were at issue.[105]

Despite the Court's pronouncement in *Smith*, subsequent statutory enactments[106] and shifts in the Supreme Court's approach to constitutional free exercise more or less eliminated

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or general law under the Constitution to be subject to strict scrutiny undermined legitimate laws passed via the democratic process. *Id.* at 890. Surprisingly, Justice Scalia did not engage in a detailed originalist analysis in coming to this conclusion. Rather he purported to rely on the plain meaning of the First Amendment's text, and cabined previous precedent from the automatic-strict-scrutiny regime to either a particularized employee-benefits context with individualized determinations, or a hybrid rights situation where multiple constitutional rights were implicated. The irony is that the *Smith* case itself involved a particularized employee-benefits context. *Id.* at 874.

105. For decades before *Smith*, any burden on religion implicated strict scrutiny—the most demanding test known to the law—and required the government show that the application of the law to the claimant was supported by a compelling interest effectuated in the least restrictive manner. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303–07 (1940) (using strict scrutiny to hold that law burdening religious belief and practice violated the First Amendment); Murdock v. Pennsylvania, 319 U.S. 105, 114–17 (1943) (same); Torcaso v. Watkins, 367 U.S. 488, 495–96 (1961) (same). In other words, the government had to justify any action that burdened a religious belief or practice by showing the restriction was the only way to serve a vital public interest, and if alternatives existed, the government had to provide them. *See* Sherbert v. Verner, 374 U.S. 398, 406–07 (1963); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 719 (1981). If the government could not meet its burden, the religious claimant would be entitled to an exemption. This outcome differs from most constitutional challenges in that a successful challenge does not invalidate the law, but only entitles the claimant to an exemption, or accommodation of their religious belief or practice.

106. Soon after *Smith*, Congress acted with near unanimity to pass federal statutes to reinstate the previous constitutional strict scrutiny regime for free-exercise exemptions as a statutory matter: First, Congress unanimously passed the Religious Freedom Restoration Act which reestablished the previous constitutional strict scrutiny regime for free-exercise exemptions as a statutory matter. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb). And when that federal statute was upheld only as to federal governmental actions, *see* City of Boerne v. Flores, 521 U.S. 507, 533–34 (1997), Congress then passed the Religious Land Use and Institutionalized Persons Act to protect against unjustified state burdens on faith practice in the areas of local zoning laws and policies in state and local carceral facilities. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. § 2000cc). These constitutional follow-on statutes continued to provide the broad free-exercise protection that the First Amendment had offered prior to the *Smith* decision and the two laws' passage, albeit in more limited contexts. Indeed, post-*Smith*, the Court heard numerous cases under RFRA and RLUIPA in which strict scrutiny played a role in the success of religious claimants. *See, e.g.*, Holt v. Hobbs, 574 U.S. 352, 369–70 (2015) (applying RLUIPA's strict scrutiny standard to allow a Muslim prisoner's one-inch beard that was previously prohibited by prison grooming policies); Burwell v. Hobby Lobby Stores, 573 U.S. 682, 725–26 (2014) (applying RFRA's strict-scrutiny standard to provide an exemption from federal health care regulations that burdened religious exercise). Of course, the Supreme Court struck down the application of RFRA to the states, which was a big loss for religious liberty. *See Flores*, 521 U.S. at 533–34.

Smith's intended effect.[107] In recent free-exercise cases before the Supreme Court—most of which involve Christian claimants—the Justices have held that the laws at issue were non-neutral or not generally applicable, and ultimately found for the religious party.[108] In fact, the Supreme Court has handed a win to the religious party in nearly every religious-liberty case claiming a free-exercise exemption since *Smith*.[109] In so doing, the Court has gradually created a far stronger free-exercise regime than the doctrine it purported to abolish in *Smith*—particularly for religious Christians.[110]

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107. Beginning in 2018, the Supreme Court leaned into *Smith*'s two exceptions where strict scrutiny could be employed in two types of cases that began reaching the federal judiciary in unprecedented numbers. First, courts across the country saw an increase in "complicity-based" claims, where small-business owners objected to providing services to LGBTQ individuals in contravention of local anti-discrimination laws, particularly in the context of weddings. *See, e.g.*, Masterpiece Cakeshop Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617 (2018); *see also* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2523 (2015) (describing claims of religious claimants as based on beliefs that "preclude them from engaging in conduct that would make them complicit in sin" by participating, paying for, facilitating, or otherwise supporting what they consider a sinful act). And most importantly, the Covid-19 pandemic brought about a tsunami of challenges in the courts—mostly by individuals claiming religious objections to vaccine mandates but also by religious institutions challenging pandemic shutdowns. *See* Roman Cath. Diocese v. Cuomo, 592 U.S. 14, 15–16 (2020); Tandon v. Newsom, 593 U.S. 61, 63–64 (2021) (per curiam). Once a few of these cases reached the Supreme Court, the resulting decisions—seemingly driven by the underlying political and cultural disagreements—brought constitutional free-exercise protection as understood by the high court to its apex.

108. *See* Lund, *supra* note 79, at 845 ("[Yet] despite having an official rule against religious exemptions, the Roberts Court has somehow managed to keep giving religious exemptions in case after case.").

109. *See id.* at 845 n.6 ("[R]eligious claimants have not lost an exemption case since 1997."). For instance, three years after *Smith*, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court found a free-exercise violation because it concluded that the City's ordinance restricting animal sacrifice was neither neutral (since it had been passed specifically to prohibit the religious practitioners' ritual animal sacrifice), and not generally applicable (since the city made secular exemptions to the general rule). 508 U.S. 520, 542, 545–46 (1993).

110. The federal religious-liberty regime provides robust protection not only because of the shift in First Amendment interpretation but also because of the additional statutory enactments, including RLUIPA and RFRA. *See* Nathan S. Chapman, *The Case for the Current Free Exercise Regime*, 108 IOWA L. REV. 2115, 2119–21, 2121 n.21 (2023). And although most of these cases involve Christian claimants, a few have involved Muslim ones. *See, e.g.*, Holt v. Hobbes, 547 U.S. 352, 369–70 (2015) (holding Muslim prisoner could maintain half-inch beard under RLUIPA); Tanzin v. Tanvir, 592 U.S. 43, 51–52 (2020) (holding Muslims retaliated against for refusing to become informants for the FBI could recover damages under RFRA); Mahmoud v. Taylor, 606 U.S. 522, 569 (2025) (holding Muslim and Christian plaintiffs who objected to LGBTQ+ curriculum in public schools were entitled to opt-out their children under the First Amendment). Notably, *Tanzin v. Tanvir* was not about the Muslim plaintiffs and the substance of their RFRA

Notwithstanding these significant shifts in First Amendment doctrine, the Supreme Court has never disavowed one fundamental principle: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[111] Despite the invocation of Establishment principles, the Court has explained that this bedrock neutrality principle is premised on both clauses.[112] The neutrality principle has been repeated time and time again—in both Establishment and Free-Exercise cases, including:

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claim, but rather whether the statute allowed for damages as a matter of statutory interpretation. *See* 592 U.S. at 48–52. On remand, the *Tanzin* plaintiffs lost their claims for damages because the Second Circuit held that the responsible government actors were entitled to qualified immunity. Tanvir v. Tanzin, 120 F.4th 1049, 1065 (2d Cir. 2024). And *Mahmoud v. Taylor* involved mostly Christian plaintiffs (two families and an organization), with the Muslim parents as lead plaintiffs for obvious strategic purposes. 606 U.S. at 540–42.

111. Larson v. Valente, 456 U.S. 228, 244 (1982).

112. The Court explained that "this principle of denominational neutrality" stemmed from the founding era and implicated both clauses of the First Amendment:

> This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause. Madison once noted: "Security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests and in the other in the multiplicity of sects." Madison's vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference. Free exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations.

Larson, 456 U.S. at 245–46; *see also* Schwartzman et al., *supra* note 91, at 247 ("[D]enominational neutrality . . . is common ground among the Justices."). The Court in *Larson* invalidated as an impermissible denominational preference a state statute that exempted from state reporting requirements only religious organizations that received more than half of their contributions from affiliates. 456 U.S. at 230, 255. The Court noted that the legislative history of the statute at issue indicated a motivation to regulate the Unification Church, whose followers were sometimes informally called the Moonies, and to ensure that the Catholic Church remained exempt from the reporting requirements. *Id.* at 254–55. The concept of neutrality between religions is also called non-preferentialism. *See* Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) ("The Framers intended the Establishment Clause to prohibit the designation of any church as a 'national' one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others."); *see also* Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1266 (10th Cir. 2008) (noting in an opinion penned by Judge Michael MsConnell that, under Supreme Court precedent, laws "involving discrimination on the basis of religion, including interdenominational discrimination, are subject to heightened scrutiny whether they arise under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause." (citations omitted)).

- In the 1947 establishment case providing busing to parochial schools, the Court stated, "[n]either a state nor the Federal Government can . . . pass laws which aid one religion . . . or prefer one religion over another."[113]
- In the 1952 establishment case allowing early-release from public school for religious instruction elsewhere, the Court said that "[t]he government must be neutral when it comes to competition between sects."[114]
- In the 1968 establishment case invalidating a law that prohibited teaching evolution in public schools, the Court stated: "The First Amendment mandates governmental neutrality between religion and religion. . . . [T]he State may not adopt programs or practices . . . which 'aid or oppose' any religion. This prohibition is absolute."[115]
- In the 1993 free-exercise case targeting a particular religious group and its practice, the Court said "the First Amendment forbids an official purpose to disapprove of a particular religion."[116]
- And in the 2005 establishment case challenging a public Christmas display, the Court stated "the government may not favor one religion over another."[117]

However, the high court has failed to live up to its long-held principle of government neutrality when it comes to Muslims by excluding them from the robust free-exercise protection it has ordained over the last twenty years. This is particularly disturbing since Muslims have consistently claimed targeting and

113. Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).
114. Zorach v. Clauson, 343 U.S. 306, 314–15 (1952).
115. Epperson v. Arkansas, 393 U.S. 97, 104, 106 (1968) (citations omitted).
116. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993).
117. McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 875 (2005).

animus have restricted their religious liberty—precisely the types of government overreach *Smith* purported to prohibit.[118] This failure was on display in the Supreme Court's 2018 term when it upheld Trump's notorious travel ban targeting individuals from Muslim-majority nations entering the United States, following Trump's 2016 campaign where he repeatedly and unabashedly maligned Islam and Muslims.[119] The Court took a national security-focused approach, interpreting the First Amendment challenge to the ban under rational-basis review, deferring to the executive despite administrative irregularities and evidence of pretext—including the President's (and his administration's) multiple public statements indicating that animus against Muslims drove the executive action.[120] The main claim before the Court was an Establishment Clause challenge that the majority sidestepped by focusing on the executive's power to exclude individuals from entering the country.[121]

This result stands in stark contrast to a case decided the same term, where the Supreme Court interpreted a local government official's statements reflecting negative views about Christianity as sufficiently hostile to religion to trigger strict

118. *See, e.g.*, FBI v. Fazaga, 595 U.S. 344, 351 (2022) (claiming government placement of an FBI informant in a masjid without any particularized suspicion violated both the Free Exercise and Establishment Clauses).

119. *See* Trump v. Hawaii, 585 U.S. 667, 731–37 (2018) (Sotomayor, J., dissenting); *see also supra* note 47.

120. *See Hawaii*, 585 U.S. at 699–708, 710. The Court arguably applied a standard even more deferential than rational basis review by failing to address the legal significance of the Trump administration's discriminatory statements. *See* Cristina M. Rodríguez, Adam B. Cox & Ryan Goodman, *The Radical Supreme Court Travel Ban Opinion—But Why It Might Not Apply to Other Immigrants' Rights Cases*, JUST SEC. (June 27, 2018), https://www.justsecurity.org/58510/radical-supreme-court-travel-ban-opinion-but-apply-immigrants-rights-cases/ [https://perma.cc/2ZZ9-9GBA] ("Normally, the existence of discriminatory intent is what moves the inquiry out of rational basis review and triggers more heightened scrutiny of the decision-making process."); Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 168 (2018) ("There has never been a case in which the Court was presented with more evidence of religious animus on the part of a single and final executive decisionmaker."); *see also* James A. Sonne & Zeba A. Huq, *Trump's Travel Order's Dubious Invocation of Domestic Violence*, S.F. CHRON. (Dec. 7, 2017, at 09:01 ET), https://www.sfchronicle.com/opinion/openforum/article/The-Trump-travel-order-s-dubious-invocation-of-12411468.php [https://perma.cc/WE2T-M775] (describing the Travel Ban provision requiring a government report on "honor killings" in the United States perpetrated by foreign nationals as evidence of bias, drawing upon anti-Muslim tropes often used by the anti-Shariah movement).

121. *See Hawaii*, 585 U.S. at 699, 702–08, 710.

scrutiny and ultimately hold for a Christian cake baker who objected to making cakes for LGBTQ weddings as a matter of free-exercise.[122] The difference in the results could perhaps be chalked up to the different First Amendment clauses at issue—Establishment in the travel ban case and Free Exercise in the cake baker case—but such a profound difference highlights the failure of the Supreme Court to uphold First Amendment neutrality among religions regardless of the clause alleged to have been violated.[123] Different clauses at issue cannot be the reason to denounce religious discrimination in one localized context and condone it in another pervasive and national one.[124] Nor is it a satisfying response that the national security context abrogates all First Amendment principles, including the precedent to strictly scrutinize laws where targeting and animus have been alleged.[125]

In response to the *Trump v. Hawaii* majority's deferential justification of the ban, Justice Sonia Sotomayor dissented, focusing on the fundamental First Amendment principle of neutrality.[126] She emphasized the guiding principle prohibiting government from preferring or disfavoring one religion over another as fundamental to the idea of constitutional religious liberty in a diverse democracy.[127] She argued that Trump's

122. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 617–19 (2018).

123. Although the travel ban litigation focused on the Establishment Clause as it wound its way through the federal courts, the plaintiffs alleged violations of the Free-Exercise Clause in their complaint as well. Lower courts did not meaningfully analyze that claim, and it was not before the Supreme Court for its review. *See* Hawaii v. Trump, 265 F. Supp. 3d 1140, 1147 n.8 (D. Haw. 2017).

124. *See* Christopher C. Lund, *Discrimination,* Trump v. Hawaii*, and* Masterpiece Cakeshop, 56 GA. L. REV. 1551, 1552 (2022); Ilya Somin, *The Supreme Court's Indefensible Double Standard in the Travel-Ban Case and Masterpiece Cakeshop*, CATO INST. (June 28, 2018), https://www.cato.org/commentary/supreme-courts-indefensible-double-standard-travel-ban-case-masterpiece-cakeshop [https://perma.cc/5M4Z-ATZ8].

125. *See Smith*, 494 U.S. at 877–90.

126. *Hawaii*, 585 U.S. at 728–29 (Sotomayor, J., dissenting).

127. *Id*. Even when religion in government skews decidedly majoritarian Christian, the Supreme Court has indicated that a preference for one religion would be impermissible. *See* Town of Greece v. Galloway, 572 U.S. 565, 585–86 (2014) (upholding historical practice of legislative prayer where vast majority of prayers were Christian because the town "maintain[ed] a policy of nondiscrimination [and was] not requir[ed] . . . to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing"). However, in its formulations of a First Amendment neutrality principle, the Court has also said in certain cases that government

statements reeked of animus towards Muslims and when in office, his administration, "repeatedly acknowledged that the Proclamation and its predecessors are an outgrowth of the President's campaign statements."[128] She noted, "[i]ndeed, even a cursory review of the Government's [] national-security rationale reveals that the Proclamation is nothing more than a 'religious gerrymander.'"[129] She called out as problematic the majority's decision to "forgo any meaningful constitutional review at the mere mention of a national-security concern" as blatant disregard for the First Amendment.[130]

Sotomayor concluded that the "'openly available data,' the text and 'historical context' of the Proclamation, and the 'specific sequence of events' leading to it" compels the conclusion that its purpose was to "disfavor Islam and its adherents by excluding them from the country" and "was driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications" in violation of the First Amendment.[131]

The travel ban case is perhaps the best-known modern example of the Court accepting a broad and generalized national security defense premised on religious stereotypes to defeat Muslims' claim of unjustified targeting, but it is certainly not the only one. Numerous Muslim plaintiffs have been stymied by national security defenses over the last two decades as they have faced increasing government surveillance.[132] And the

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cannot prefer "religion over irreligion," *McCreary*, 545 U.S. at 875, or "aid all religions," *Everson*, 330 U.S. at 15, but such formal neutrality has never ruled the day in the United States and could actually undermine religious liberty by preventing certain religious observances, akin to the practice in France. *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999–1000, 1016 (1990).

128. Trump v. Hawaii, 585 U.S. 667, 738 n.3 (Sotomayor, J., dissenting).

129. *Id.* at 743–44 (citing Lukumi, 508 U.S. at 535).

130. *Id.* at 744 n. 6.

131. *Id.* at 737.

132. *See, e.g.*, Abdi v. Wray, 942 F.3d 1019, 1033–34 (10th Cir. 2019) (dismissing a challenge to FBI surveillance of Muslims based on national security and states secret privilege); Arar v. Ashcroft, 585 F.3d 559, 576–77 (2d Cir. 2009) (dismissing a challenge to Muslim's extraordinary rendition and detention for national security reasons); Elhady v. Kable, 993 F.3d 208, 229 (4th Cir. 2021) (upholding challenge to federal Terrorist Screening Databases by Muslim Americans as constitutionally valid); *see also* Shirin Sinnar, *A Label Covering A "Multitude of Sins": The Harm*

Supreme Court has recently made it even harder for Muslim plaintiffs to challenge discriminatory surveillance and targeting by expanding the state's secret privilege—a doctrine allowing the government to withhold sensitive national security information from disclosure in court—enabling judges to dismiss these cases out of hand.[133]

Government targeting of Muslim communities has had severe and pervasive effects on religious practice, including decreased mosque attendance, avoidance of public prayer, abstaining from discussions about religion, and eschewing overt expressions of faith, including by removing hijabs, skull caps, or beards.[134] But courts rarely if ever examine—much less rebuke—these burdens on Muslim faith practice because they are swiftly justified in the name of national security.[135] As the

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of National Security Deference, 136 HARV. L. REV. F. 59, 67–69 (2022) (critiquing the Supreme Court's acceptance of broad national security defenses it).

133. FBI v. Fazaga, 595 U.S. 344, 358–59 (2022) (holding provisions of the Foreign Intelligence Surveillance Act of 1978 authorizing a judge to review sensitive national security evidence *in camera* does not displace the states secret privilege). Under *Fazaga*, invocation of the states secret privilege can serve as a complete bar to litigation—even when publicly available information is available to prosecute a plaintiff's case, the government may be able to invoke the doctrine as limiting its ability to mount a defense, allowing courts to dismiss the case entirely. *See id.* at 351–52; *see also* Sinnar, *supra* note 132, at 59–60 ("While permitting the challenge to Federal Bureau of Investigation (FBI) surveillance to survive another day in that case, the decision stymies efforts to contest surveillance, especially where plaintiffs do not have independent evidence that they've -been surveilled."). In a recent article, Professor Sinnar explains that the Supreme Court uses national security to defer to the executive in three distinct ways: "first, refusing to hear a case or claims altogether; second, hearing a case but applying a lenient legal standard that made it easier for the government to prevail; and third, deferring to the executive's view on a question of fact even while claiming to apply a standard legal test." Shirin Sinnar, *The Supreme Court & the Unaccountable Racialized Security State*, 154 DAEDALUS, J. AM. ACAD. ARTS & SCIS. 106, 109 (2025).

134. *See* DIALA SHAMAS & NERMEEN ARASTU, MAPPING MUSLIMS: NYPD SPYING AND ITS IMPACT ON AMERICAN MUSLIMS 4, 15, 17 (2013), https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/clinics/immigration/clear/Mapping-Muslims.pdf [https://perma.cc/R4FZ-6PU2]; Hassan v. City of New York, 804 F.3d 277, 287–88 (3d Cir. 2015).

135. *See id.* at 289. The *Hassan* case is one instance where a court did not allow a national security defense to completely override Muslims claims of targeting and animus. *Id.* at 307. There, the Third Circuit denied New York City's motion to dismiss a suit brought by Muslims challenging a widespread and pervasive surveillance campaign targeted at Muslims, their business, places of worship, and beyond without any particularized suspicion. *Id.* at 285, 309. Judge Ambro wrote a scathing opinion questioning the government's tactics without more than a generalized national security argument and allowed the suit to move forward. *Id.* at 309. Soon after, New York City settled with the plaintiffs. Stipulation of Settlement at 1, 2–4, Hassan v. City of New York, No. 2:12-cv-03401 (D.N.J. Apr. 5, 2018).

intense focus on radicalization in the American-Muslim community has increased, the ability of Muslims to challenge discriminatory targeting has significantly decreased, even as non-Muslim religious claimants have enjoyed a religious-liberty heyday at the high court for lesser instances of religious intolerance.

These cases may seem like anecdotal instances of Muslims losing out to important national security interests. But the statistical data reviewed above shows more: Muslims in particular have suffered when it comes to free-exercise claims more generally by facing a double discrimination—first under government policies, and again in federal court—and since long before the Trump era.[136] This significant differential treatment spanning decades calls into question the First Amendment's promise of religious neutrality at the level of judicial enforcement. Beyond one-to-one comparisons of cases—including that of the Trump travel ban and the cake baker—these studies validate the long-time view that Muslims are disfavored by the judiciary in violation of the central neutrality premise of the First Amendment.[137] The wide-spread perception of Muslims as violent and incompatible with Western values undermines Muslims' constitutional rights when they turn to the court to vindicate those rights, whether in the context of national security, religious liberty, or both.[138] Moreover, the categorical nature of national security defenses prevents any meaningful adjudication of Muslims' claims of unjustified and severe deprivation of rights, despite the Supreme Court's prioritization of religious liberty as a general matter.[139] Thus, both the statistical and anecdotal evidence show that when Muslims contest violations of religious liberty—whether as a matter of national security surveillance or as burdens on individualized faith practice akin to

136. *See supra* notes 65–78 and accompanying text; Sisk et. al., *Soul of Judicial Decisionmaking*, *supra* note 65, at 566; Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 65, at 248–50.

137. *See* Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 65, at 248–50; Choi et al., *supra* note 76, at 18.

138. *See* AZIZ, *supra* note 41, at 114; MAMDANI, *supra* note 43, at 18; SAID, *supra* note 43, at 3; Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 65, at 285–86.

139. *See supra* notes 79–110 and accompanying text.

Christian claimants—the judicial branch is failing to uphold the central promise of government neutrality among religions under the First Amendment.

III. TITLE VII & *TWA V. HARDISON*

As described above, the Constitution prevents government overreach as to religion so, as one would expect, protections against unjustified government infringement on religious exercise are robust, with the caveat for Muslim claimants. Outside of claims involving governmental action, religious-liberty protections have generally been more limited. But additional legal protections against private actors also exist in federal anti-discrimination statutes focused on employment, public accommodation, education, and other contexts. In particular, the Civil Rights Act of 1964 provides sweeping protection for civil rights in these areas.[140]

When it comes to requests for exemptions by religious practitioners, most of these claims occur in places of work. Title VII of the Civil Rights Act applies in the workplace and forbids an employer from discriminating against an employee "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion."[141] Title VII further defines "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate [such] observance or practice without undue hardship on the conduct of the employer's business."[142] Title VII's prohibition of

140. *See, e.g.*, Civil Rights Act of 1964 tit. II, 42 U.S.C. §§ 2000a–2000a-6 (prohibiting discrimination in public accommodation); Civil Rights Act of 1964 tit. VI, 42 U.S.C. §§ 2000d–2000d-7 (prohibiting discrimination in federally funded programs).

141. 42 U.S.C. § 2000e-2(a)(1).

142. 42 U.S.C. § 2000e-(j). The statute's peculiar definition of religion—excluding beliefs or practices causing undue hardship to the employer—is the result of a 1972 amendment to the statute and translates into two distinct theories of liability under Title VII's disparate treatment provision: the familiar protected-status discrimination theory and the religion-specific failure-to-accommodate theory. *See* EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 771–75 (2015) (explaining the failure-to-accommodate theory is a form of disparate-treatment claim). For a history of the 1972 amendment to Title VII, see Justice Marshall's dissent in *TWA v. Hardison*. The definition limiting religion based on undue hardship was perhaps inartful but

disparate treatment in the religion context encompasses both employer discrimination based on an employee's protected religious status, plus a distinct form of discrimination based on the failure to reasonably accommodate an employee's religious belief or practice.[143]

This Article focuses on cases that involve the latter non-accommodation claims under the statutory scheme—Title VII's affirmative protection of free exercise of religion. In other words, a free-exercise exemption is called a "religious accommodation" in the employment context. Although the terms are different, the concepts are the same—a religious exception to a general rule. To make out a prima facie case of religious non-accommodation under Title VII, a plaintiff must show a sincere religious belief that conflicts with a work requirement, the employer's knowledge of (or motivation to avoid) the conflict, and a resulting adverse employment action.[144] Once the plaintiff asserts the prima facie elements, the burden shifts under the statute to the employer to show that it could not accommodate without incurring "undue hardship on the conduct of the employer's business."[145]

Despite the strong statutory language embodied in Title VII supporting reasonable accommodation of religion, the "undue hardship" standard was inconsistently interpreted for years.[146] The Supreme Court took up the issue in *Trans World Airlines v. Hardison*, when it considered and rejected a scheduling accommodation request by a Saturday Sabbatarian.[147] In so doing, the

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allowed amendment to the statute to include reasonable accommodation of religion. TWA v. Hardison, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting).

143. *See* Peterson v. Hewlett-Packard Co., 358 F.3d 599, 603 (9th Cir. 2004) ("A claim for religious discrimination under Title VII can be asserted under several different theories, including disparate treatment and failure to accommodate.").

144. *Id.* at 606; *Abercrombie*, 575 U.S. at 772–74.

145. *Abercrombie*, 575 U.S. at 771–72.

146. *See Hardison*, 432 U.S. at 85–86 (Marshall, J., dissenting).

147. *Id.* at 63. Hardison's request for Saturday and certain religious holidays off initially resulted in a shift change and the ability to shift-swap as an accommodation. *Id.* at 68. But when his circumstances changed and he no longer had the seniority to obtain an adequate schedule, he was denied any religious accommodation. *Id.* Hardison stopped reporting to work on Saturdays and was eventually fired for insubordination. *Id.* at 69. He then sued in federal court under Title VII, alleging his discharge from TWA constituted religious discrimination. *Id.*

Court created the guiding precedent that limited Title VII religious accommodation for almost fifty years.

Justice Byron White, writing for the majority, held TWA could not have accommodated Hardison's religious observance without incurring undue hardship under Title VII.[148] The opinion rejected alternate accommodation options as either violative of TWA's collectively bargained seniority system or too costly for the company, and thus not required by Title VII.[149] Justice White focused much of his opinion on the importance of the seniority system and indicated that its violation would constitute a per se hardship in the context of religious accommodation. In the Court's view, TWA's collectively bargained seniority system "itself represented a significant accommodation to the needs, both religious and secular, of all of TWA's employees."[150] The Court concluded: "TWA was not required by Title VII to carve out a special exception to its seniority system in order to help Hardison meet his religious obligations."[151]

To the *Hardison* Court, therefore, Title VII's religious accommodation provisions were intended to prevent discrimination, or unequal treatment between and amongst all employees.[152] Thus, to require a senior non-religious employee to take a shift of a junior religious employee would itself constitute discrimination that violated the statute.[153] Similarly, but much more

148. *Id.* at 77.

149. *Id.* at 79–81, 83–84.

150. "Neither a collective-bargaining contract nor a seniority system may be employed to violate the statute, but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement." *Id.* at 79. The majority focused on seniority but also indicates that a collective bargaining agreement more generally must not be breached as part of an employer's duty to accommodate. *Id.*

151. *Id.* at 83.

152. *See id.* at 81–83.

153. Indeed, according to the Court, "[t]he repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities." *Id.* at 81. To grant Hardison an accommodation under this view would be unfair because it would provide him a preference outside of the seniority system that other employees could not access. *Id.* The Court reasoned, "[t]here were no volunteers to relieve Hardison on Saturdays, and to give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the

briefly, the Court rejected the options of TWA using supervisory or otherwise qualified personnel from other departments or providing premium wages to an available employee to cover Hardison's shift.[154] In rejecting these options, the Court pronounced "[t]o require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship"—a statement that on its face seems to conflict with the plain meaning of "undue hardship" from the statute.[155] Again, the Court viewed granting alternative accommodation options as a form of discrimination against Hardison's co-workers in violation of Title VII since "the privilege of having Saturdays off would be allocated according to religious beliefs."[156] Of course, this is exactly what the religious accommodation provisions of Title VII were intended to do.[157]

From *Hardison*, lower courts took two lessons: First, a religious accommodation that violates a seniority system constitutes a per se hardship under Title VII,[158] and second, any option that requires an employer "to bear more than a de minimis cost" is likewise an undue hardship under the statute.[159] The impenetrability of seniority systems persists to this day, and the "de minimis" standard had lasting effects on individual claimants for almost fifty years before the Court finally rejected it in 2023 as inconsistent with the language of Title VII's statutory text, as described more fully below.[160]

Justice Thurgood Marshall dissented in *Hardison*, presenting a drastically different view of Title VII.[161] Marshall believed Title VII's provisions regarding religious accommodation require preferential treatment in certain instances, since "[t]he

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Saturday Sabbath." *Id.* This approach echoes Justice Scalia's concerns in *Smith*, two decades in advance. *See* Emp. Div. v. Smith, 494 U.S. 872, 879, 888 (1990).

154. The Court devoted only three paragraphs of its thirty-page opinion to its discussion of the premium-wage option. *Hardison*, 432 U.S. at 84–85.

155. *Id.* at 84; *see* 42 U.S.C. § 2000e-(j).

156. *Id.* at 84–85.

157. *See id.* at 87–89 (Marshall, J., dissenting).

158. *Id.* at 79–82 (majority opinion).

159. *Id.* at 84.

160. *See* discussion *infra* Part V.

161. *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting).

accommodation issue by definition arises only when a neutral rule of general applicability conflicts with the religious practices of a particular employee."[162] In other words, a religious accommodation to the requesting employee often means granting that employee an exception to a general rule that other employees would not be given absent a similar religious belief or practice—or what the majority considered preferential treatment.[163] To Justice Marshall, therefore, the entire statutory scheme of religious accommodation requires preferential treatment of an employee whose religious belief and practice conflicts with a job rule, as long as it does not impose undue hardship on the employer.[164] Under this view, Hardison was entitled to a religious accommodation.[165]

Justice Marshall accused the majority of holding that the statute's words "do not really mean what they say."[166] By requiring only "de minimis" costs to defeat a request for accommodation, Justice Marshall predicted religious employees would be compelled to choose between their faith and their job.[167] He argued that the Court's holding undermined the

162. *Id.* ("If an accommodation can be rejected simply because it involves preferential treatment, then the regulation and the statute . . . ultimately '[s]ignify nothing.'").

163. *Id.*

164. *Id.* at 85, 87–88.

165. More specifically, Justice Marshall disputed the majority's portrayal of the record that there were no volunteers to relieve Hardison of his Sabbath-day work. *Id.* at 93. Rather, Marshall detailed the record evidence indicating that neither TWA nor the union had explored the options of voluntary trades, volunteers working Hardison's Sabbath shifts (and passing any overtime cost on to Hardison through him working overtime for regular pay), or transferring Hardison back to his old department. *Id.* at 93–94. Thus, Marshall concluded TWA could not meet its burden. *Id.* at 95. Marshall also differentiated between the import of a collective bargaining agreement and a seniority system. Marshall acknowledged that the accommodation options he described—volunteers to be paid overtime or a transfer to Hardison's previous department—would violate the collective bargaining agreement, but argued that "[p]lainly an employer cannot avoid his duty to accommodate by signing a contract that precludes all reasonable accommodations." *Id.* at 96. He noted that some options would not violate any seniority provisions and thus were viable under the Title VII statutory scheme. *Id.*

166. *Id.* at 86–87.

167. *Id.* at 87, 92.

statutory purpose of Title VII and drastically reduced the incentives for employers to try to accommodate a religious employee.[168]

Notably, Justice Marshall highlighted an example pulled from a case previously before the EEOC to illustrate the fundamental problem with the majority's approach—religious beliefs and practices that could easily be accommodated would not be allowed by employers under the de minimis standard.[169] Marshall described an employee who wears a religiously mandated headscarf and requires an accommodation from her employer's uniform policy requiring a particular hat.[170] Marshall noted that "the employer could accommodate this religious practice without undue hardship or any hardship at all" by allowing the employee to wear her headscarf underneath the mandated hat.[171] But pursuant to the majority's rule, because this accommodation would afford the employee a privilege that others would not have, the employer would not be required to provide it.[172] The tragic result, Marshall concluded, would be the employee "would have to give up either the religious practice or the job . . . [which] makes a mockery of the statute."[173]

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168. *See id.* at 87. To support his view, Justice Marshall detailed the legislative history of the 1972 amendment to Title VII that inserted an explicit duty to accommodate religious beliefs absent undue hardship. *Id.* at 88–89.

169. *Id.* at 88.

170. *Id.*

171. *Id.* (citing 1972 EEOC Decisions (CCH) ¶ 6180, at 4304–06 (Dec. 21, 1970)). The religious claimant there described her faith as "Old Catholic." *Id.* at 4304. The EEOC found that the employer's "policy of requiring its nurses to wear white caps . . . is not so necessary to the operation of its business as to justify" the denial of the accommodation." *Id.* at 4306. The agency did not state its finding under a particular standard. *Id.*

172. *Hardison*, 432 U.S. at 88.

173. *Id.* Indeed, many have criticized *Hardison* and its de minimis standard over the years, drawing on similar arguments and themes in Marshall's dissent. *See, e.g.*, Small v. Memphis Light, Gas & Water, 952 F.3d 821, 829 (6th Cir. 2020) (Thapar, J., concurring) ("The irony (and tragedy) of decisions like *Hardison* is that they most often harm religious minorities—people who seek to workshop their own God, in their own way, and on their own time."); Randall J. Borkowski, *Defining Religious Discrimination in Employment: Has Reasonable Accommodation Survived Hardison?*, 2 SEATTLE U. L. REV. 343, 343 (1979) (critiquing *Hardison*); Kade Allred, *Giving Hardison the Hook: Restoring Title VII's Undue Hardship Standard*, 36 BYU J. PUB. L. 263, 263 (2022) (same); Debbie N. Kaminer, *Title VII's Failure To Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575, 589–90 (2000) (same); Keith S. Blair, *Better Disabled Than Devout? Why Title VII Has Failed To Provide Adequate*

Ultimately, Justice Marshall had the better read of the statute and over the following decades, the Supreme Court gradually incorporated his view.[174] Moreover, Marshall's prediction and his use of a woman's need to wear a headscarf as an example was prescient: for the last fifty years, accommodation claims of women requesting to wear modest dress and cover their hair on the job frequently resulted in denials under the *Hardison* standard and deprived these women of either their livelihood or the ability to practice their faith.[175] The minimal protections the Supreme Court had interpreted Title VII to offer from 1977 to 2023 coupled with the disadvantage Muslims face before the federal judiciary as a general matter, handicapped these women in the American workplace in ways contrary to this country's promise of religious freedom, as further explored in the next section.

IV. CHALLENGES TO HIJAB ON THE JOB

As Justice Marshall foretold, minority religious practitioners have been negatively affected under Title VII's lax standard—particularly Muslim claimants. On the legal side, the *Hardison* standard favored employers and allowed courts to approve the rejection of religious accommodations with scant evidence of hardship. And unfortunately, on the human side, the federal judiciary is not necessarily immune from the pervasive negative perceptions of Muslims in America. As explored above, empirical research over the course of almost four decades has shown that Muslims bringing religious-liberty suits suffer a deep disadvantage when litigating before the federal courts, resulting in

Accommodations Against Workplace Religious Discrimination, 63 ARK. L. REV. 515, 524–25 (2010) (same); Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 389–390 (1997); Dallan F. Flake, *Restoring Reasonableness to Workplace Religious Accommodations*, 95 WASH L. REV. 1673, 1682–84 (2020) (same).

174. *See* EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 775 (2015) (describing Title VII as giving religion "favored treatment"); *see also* Groff v. DeJoy, 600 U.S. 447, 469–470 (2023) (redefining "undue hardship" under Title VII to be "substantial increased costs").

175. *See infra* Part IV.

a double discrimination—once in the workplace, and once again before the courts.[176]

The research on Muslim religious-liberty claims is all the more troubling given that Muslims appear to face significant challenges to practicing their religion on the job, according to the number of filed federal agency complaints and lawsuits. According to Equal Employment Opportunity Commission data, Muslim workers submitted 20% or more of all religion-based EEOC complaints (the first step to bringing suit in federal court) from 2002 to 2017, with peaks in 2002 and 2016 at 28%, correlating to 9/11 and Trump's first presidential campaign, respectively.[177] Of all reported religious accommodation cases decided on summary judgment between 2000 and 2018 concerning undue hardship, 18.6% involved Muslims plaintiffs.[178] And 26% of religious non-accommodation lawsuits brought by the EEOC between 2009 and 2015—in other words, those cases that the agency decided to intervene on behalf of the federal government to enforce its civil rights laws—were brought on behalf of Muslim employees.[179] Though Muslim Americans comprise

176. Although the free-exercise studies described above focus on lawsuits with the government as the defendant, Sisk and Heise found that the second most common religious liberty claim brought by Muslims in their data set were employment discrimination cases against the government, after Muslim prisoner claims. *See* Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 65, at 269. Moreover, in the context of private employers, there is no reason to believe that Muslims do not face a similar disadvantage in the courts when it comes to employment discrimination cases where a Muslim's faith is similarly front and center.

177. *Religion-Based Charges Filed from 10/01/2000 through 9/30/2011 Showing Percentage Filed on the Basis of Religion – Muslim*, U.S. EEOC, https://www.eeoc.gov/religion-based-charges-filed-10012000-through-9302011-showing-percentage-filed-basis-religion [https://perma.cc/F3CP-CN6Z] (last visited Apr. 14, 2026); *see also* Eugene Volokh, *The EEOC, Religious Accommodation Claims, and Muslims*, THE WASH. POST (June 21, 2016), https://wapo.st/2OdcJin [https://perma.cc/DTY5-3BVN] (noting that from 2009 to 2015, around 20% of all EEOC complaints were submitted by Muslims). We can assume that more instances of non-accommodation exist and go unreported. *See generally* ELSADIG ELSHEIKH & BASIMA SISEMORE, ISLAMOPHOBIA THROUGH THE EYES OF MUSLIMS: ASSESSING PERCEPTIONS, EXPERIENCES, AND IMPACTS 2, 16 (2021), https://belonging.berkeley.edu/sites/default/files/2021-10/Islamophobia%20Through%20the%20Eyes%20of%20Muslims.pdf [https://perma.cc/G4RJ-6BQX].

178. Brief of Christian Legal Society et al. as Amici Curiae Supporting Petitioner at 23–24, Petition for Writ of Certiorari, Patterson v. Walgreen Co., 589 U.S. 1229 (2020) (No. 18-349) (examining 102 religious accommodation cases).

179. Brief for the Sikh Coalition as Amici Curiae Supporting Petitioner at 16, Petition for Writ of Certiorari, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174). This time period is most relevant, as it directly preceded the explosion of accommodation cases regarding transgender

only 1.1% of the national population, just over a quarter of religious accommodation cases pursued in federal court by the EEOC involved Muslim employees.[180]

Notably, 15% of all EEOC non-accommodation lawsuits and 57% of all EEOC non-accommodation suits on behalf of Muslims between 2009 and 2015 involved restrictions on employees wearing hijab.[181] Between 2015 and 2025, the ability to wear hijabs on the job remained a persistent issue with 50% of all EEOC non-accommodation lawsuits brought on behalf of Muslims involving non-accommodation of hijabs.[182] This means that the right to wear a headscarf on the job was one of the EEOC's most litigated accommodation issues when it came to Muslim claimants. As to case outcomes, the data shows that the undue-hardship defense under *Hardison* stymied religious plaintiffs across the board: from 2000 to 2018, the employer prevailed 85.7% of the time when the defense was raised.[183]

In the employment context, because the Supreme Court's guidance in *Hardison* has been interpreted to allow almost any employer excuse to pass statutory muster, employers know they can deny a religious accommodation request without repercussion as long as they have some plausible reason.[184]

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diversity initiatives. *See* Katie Eyer, *Anti-Transgender Constitutional Law*, 77 VAND. L. REV. 1113, 1113 (2024) (noting that while trans-protective measures date back much further, anti-transgender constitutional litigation was virtually nonexistent prior to 2016).

180. *Muslim Population by State 2026*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/muslim-population-by-state [https://perma.cc/ZH63-WDZL] (last visited Apr. 1, 2026); Brief for the Sikh Coalition as Amici Curiae Supporting Petitioner, *supra* note 179, at 16.

181. Eugene Volokh, *The EEOC, Religious Accommodation Claims, and Muslims*, REASON (June 21, 2016, at 16:39 ET), https://reason.com/volokh/2016/06/21/the-eeoc-religious-accommodati/ [https://perma.cc/CDH9-G83].

182. In response to a FOIA request, the EEOC provided to the author all complaints filed by the EEOC or DOJ in federal court from January 2015 to August 2025 alleging disparate treatment based on religion under Title VII. The EEOC provided 81 complaints, and 70 involved non-accommodation of religion. The religion of the charging parties in the failure to accommodate suits broke down follows: 40 Christians, 7 Jews, 10 Muslims, and 13 involved adherents of various other faiths (Rastafarians, Buddhists, Atheists, and others). Of the 10 cases involving Muslims, 5 involved denials of hijab accommodation. All documents remain on file with the author.

183. Petition for Writ of Certiorari at 29, Dalberiste v. GLE Assocs., 141 S. Ct. 2463 (2021) (No. 19-1461), 2021 LEXIS 1773.

184. *Id*.

Hardison thus allowed employers to make dress and grooming accommodation requests seem burdensome with minimal evidence, and judges could easily credit the employer representation under its standard.[185] Thus, the de minimis standard at the very least allowed, and has likely enabled, such disadvantage and differential treatment of Muslims to occur by courts in the employment context. Much has been written on hijab bans in parts of Canada, Europe, and beyond over the last twenty years, often through an international law lens.[186] However, significantly less scholarly attention has been paid to employment hijab bans that U.S. courts have allowed on a case-by-case basis, enabled by weak protections under *Hardison*.

185. *See Id*. at 29–30. In a recent article, Professor James Nelson argues that dress and grooming accommodation requests were often reasonably accommodated under the *Hardison* standard "unless doing so would implicate employee safety," parroting the U.S. Solicitor General's bald assertion at the *Groff* oral argument. James D. Nelson, *Disestablishment at Work*, 134 YALE L.J. 1890, 1906 & n.79 (2025) (arguing the *Hardison* standard was a balanced compromise to uphold disestablishment principles and employee religious observance). However, this Article refutes that argument, particularly as to hijab. To be sure, employers have also regularly skirted the obligation to reasonably accommodate other faith practices under *Hardison* when they could have easily done so. *See, e.g.*, EEOC v. Sambo's of Georgia, Inc., 530 F. Supp. 86, 89 (D. Ga. 1981) (discussing employer who refused to hire a Sikh manager because of potential adverse customer reactions "from a simple aversion to, or discomfort in dealing with bearded people; from a concern that beards are unsanitary or conducive to unsanitary conditions; or . . . from a concern that a restaurant operated by a bearded manager might be lax in maintaining its standards as to cleanliness and hygiene in other regards"); Brown v. F.L. Roberts & Co., 419 F. Supp. 2d 7, 15 (D. Mass. 2006) (allowing Rastafarian's demotion to a position without customer interaction because accommodating employee's unshorn hair might "adversely affect the employer's public image.").

186. *See, e.g.*, Karima Bennoune, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality Under International Law*, 45 COLUM. J. TRANSNAT'L L. 367 (2007); Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743 (2006); Robert A. Kahn, *Are Muslims the New Catholics? Europe's Headscarf Laws in Comparative Historical Perspective*, 21 DUKE J. COMP. & INT'L L. 567 (2011); Seval Yildrim, *Global Tangles: Laws, Headcoverings and Religious Identity*, 10 SANTA CLARA J. INT'L L. 45 (2012); Guy Haarscher, *Secularism, the Veil and "Reasonable Interlocutors": Why France Is Not that Wrong*, 28 PENN. ST. INT'L L. REV. 367 (2010); Mohamed Abdelaal, *Extreme Secularism vs. Religious Radicalism: The Case of the French Burkini*, 23 ILSA J. INT'L & COMP. L. 443 (2017); Sofie G. Syed, Liberté, Égalité, Vie Privée: *The Implications of France's Anti-Veiling Laws for Privacy and Autonomy*, 40 HARV. J.L. & GENDER 301 (2017); Róisín Áine Costello & Sahar Ahmed, *Citizenship, Identity, and Veiling: Interrogating the Limits of Article 8 of the European Convention on Human Rights in Cases Involving the Religious Dress of Muslim Women*, 38 J.L. & RELIGION 81 (2023); Kaushik Paul, *Banning Islamic Veils: Is Social Cohesion (or Living Together) a Valid Argument?*, 39 J.L. & RELIGION 34 (2024).

In hijab accommodation cases, a nationwide survey of federal court decisions shows that the hardships proffered by employers, and often credited by judges, generally fall into one of three categories: (1) uniformity and professionalism; (2) safety and security; and (3) customer or other stakeholder preference.[187] Although employers sometimes offer a combination of these defenses, each alleged hardship has been justified as a distinct rationale underpinning an employer's rejection of a reasonable accommodation to wear hijab. Most of these defenses are either inherently bigoted or fail to stand up to closer scrutiny.

A. Uniformity & Professionalism

Employers often use the excuse of a perceived need for uniformity or a particular professional image in rejecting hijab accommodation requests. However, a religious dress accommodation necessarily requires a variance from a uniform or look. A uniformity defense is thus essentially a statement that the hijab is too far from the norm for the employer to accept—an unpersuasive argument underpinned by intolerance.

For instance, the Third Circuit in *Webb v. City of Philadelphia* relied on the need for uniformity to hold that a Muslim woman's request to wear a hijab underneath her police cap would pose an undue hardship on the department.[188] The Court affirmed the district court's finding that the police department

187. Searches were conducted on both LexisNexis and Westlaw for published cases concerning non-accommodation claims and variations on the terms hijab, headscarf, khimar, veil, shayla, dupatta, abaya, niqab, and burqa. The results were filtered down to the twenty-seven cases cited in this article where hijabi plaintiffs alleged a failure to accommodate, and the opinions describe facts, employer arguments, and/or defenses that bear on the issue of reasonable accommodation and undue hardship. Each employer defense (and sometimes court conclusion) falls into at least one of the three paradigmatic categories. Cases where procedural or other issues were the focus, or where the plaintiff alleged harassment or disparate treatment (as opposed to non-accommodation) are excluded from this Article. Beyond published cases, hijab accommodation cases have been litigated and settled short of dispositive court action in favor of hijabis, including by the EEOC. *See, e.g.*, Press Release, EEOC, Imperial Security Will Pay $50,000 to Settle EEOC Religious Discrimination Lawsuit, (Nov. 23, 2011), https://www.eeoc.gov/newsroom/imperial-security-will-pay-50000-settle-eeoc-religious-discrimination-lawsuit [https://perma.cc/A6PQ-7B7S].

188. Webb v. City of Philadelphia, 562 F.3d 256, 258, 261, 264 (3d Cir. 2009).

policy, with its "detailed standards with no accommodation for religious symbols and attire not only promote[s] the need for uniformity, but also enhance[s] cohesiveness, cooperation, and the esprit de corps of the police force."[189] The Court further credited as sufficient to meet the *Hardison* standard the police commissioner's view that "uniformity 'encourages the subordination of personal preferences in favor of the overall policing mission' and conveys a 'sense of authority and competence to other officers inside the Department, as well as to the general public.'"[190]

The *Webb* Court nowhere explained why the addition of a headscarf underneath the required cap and with the department-issued uniform would so undermine the uniformity and professionalism the court believed was required. Moreover, the court chalks up Webb's religious request to wear a headscarf as a mere "personal preference" that must be subordinated, seemingly disregarding Title VII's protection of an individual's sincere religious practice on the job.[191] Here, *Hardison*'s standard is satisfied with the bald assertion that the hijab is too different for the police department to accommodate. Indeed, this case exemplifies the exact scenario Justice Marshall warned would come to pass.[192]

The Supreme Court has since provided some limited guidance to the contrary. In perhaps the most well-known hijab accommodation case, the retailer Abercrombie & Fitch failed to hire a Muslim woman in hijab because her headwear violated its "look policy"—a policy that required company stores to present a uniform branded appearance.[193] To promote its chosen

189. *Id.* at 258.

190. *Id.* at 261.

191. *Id.*

192. *See* TWA v. Hardison, 432 U.S. 63, 88 (1977) (Marshall, J., dissenting). It appears that the police department in Philadelphia has since allowed its policewomen to wear hijab as part of their uniform. *See* PHILA. POLICE DEP'T, DIRECTIVE 6.7, at 17 (2025).

193. EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 770 (2015). Before the passage of the 1972 Title VII amendment incorporating an explicit reasonable accommodation provision, the EEOC rejected a similar employer argument that a Muslim's ankle-length dress did not comport with "certain standards of dress to which we expect our employees to conform and that frankly, the attire . . . did not fall within those standards . . . ." EEOC Decision No. 71-2620,

image, the company's policy prohibited "caps" as too informal.[194] When a Muslim woman in hijab interviewed for a job with the company, a manager rejected her because her headscarf violated its look policy.[195] The issue that reached the Supreme Court centered on knowledge—since the plaintiff had never informed the company of her need for an accommodation, Abercrombie argued it did not know she needed one and thus she could not satisfy her prima facie burden.[196] The Court rejected this argument and held she must only show that "[her] need for an accommodation was a *motivating factor* in the employer's decision" not to hire her.[197] This decision was a win for minority religious claimants because its "motivating factor" language discourages bias against religious minorities in employment decisions where employers attempt to avoid reasonable accommodation of religious dress and grooming.[198]

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4 Fair Empl. Prac. Cas. (BNA) 23 (1971). The EEOC tribunal explained that "[w]here an employment policy has a disproportionate impact on members of a group protected by Title VII, the employer has the burden of showing that the policy is so necessary to the operation of his business as to justify the policy's discriminatory effects"—a precursor to the undue hardship defense. *Id.* at 2. The EEOC concluded the Muslim employee had been constructively discharged because she was forced to choose between her job and her religious beliefs, and the employer had discriminated against her because of her religion. *Id.*

194. *Abercrombie*, 575 U.S. at 770.

195. *Id.*

196. *Id.*

197. *Id.* at 772 (emphasis added). The Court stated the rule thus: "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." *Id.* at 773. Other employers have also defended non-accommodation suits claiming that they did not know of the applicant's need for a religious accommodation. *See also* EEOC v. White Lodging Servs. Corp., No. 3:06CV-353-S, 2010 WL 1416676, at *2 (W.D. Ky. Mar. 31, 2010) (denying summary judgment to an employer who asked its staffing company if four prospective housekeepers could remove their hijab, and upon learning they could not, the employer failed to interview the women and subsequently hired other housekeepers from the same staffing company who did not wear hijab).

198. The Court also validated Justice Marshall's view of Title VII's religious accommodation provisions:

> But Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not "to fail or refuse to hire or discharge any individual . . . because of such individual's" "religious observance and practice." An employer is surely entitled to have, for example, a no-headwear policy as an ordinary matter. But when an applicant requires an accommodation as an "aspec[t] of religious . . . practice," it is no response that the subsequent "fail[ure] . . . to hire"

However, since the Court did not directly address Abercrombie's undue hardship defense, the intolerance and prejudice underlying the company's decision to refuse to hire a Muslim hijabi because her "look" did not fit with the company's image was left unaddressed. Abercrombie defended multiple suits across the country filed by Muslim women wearing hijab who were rejected or fired by the company, consistently arguing that accommodating the hijab would be a hardship because it violated its "look policy."[199] Each district court that addressed the issue rejected the retailer's defense.[200]

When employers demand uniformity that excludes an employee's hijab, they conceal deeply ingrained assumptions about what kinds of people, clothes, and appearances constitute the norm, and ultimately are acceptable in America.[201] But in a diverse and multicultural America, such assumptions and demands—particularly when validated by the courts—undermine the core purpose and protections of Title VII.

B. Safety and Security

Employers also routinely raise safety and security concerns related to hijab, and under the *Hardison* standard, courts often accept the defense as a valid hardship, excusing the need to accommodate. Because of the low standard, courts generally do

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> was due to an otherwise-neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation.

Abercrombie, 575 U.S. at 775.

199. EEOC v. Abercrombie & Fitch Stores, Inc., No. 5:10-CV-03911, 2013 WL 1435290, at *1, *4 (N.D. Cal. Apr. 9, 2013) (rejecting retailer's look policy defense and granting summary judgment to the EEOC on undue hardship); EEOC v. Abercrombie & Fitch Stores, Inc., 798 F. Supp. 2d 1272, 1280 (N.D. Okla. 2011), *rev'd*, 731 F.3d 1106 (10th Cir. 2013), *rev'd*, 575 U.S. 768 (2015) (same); EEOC v. Abercrombie & Fitch Stores, Inc., 966 F. Supp. 2d 949, 962–63 (N.D. Cal. 2013).

200. *Abercrombie*, 2013 WL 1435290, at *10, *15; *Abercrombie*, 798 F. Supp. 2d at 1287; *Abercrombie*, 966 F. Supp. 2d at 965. Other employers have defended their failure to reasonably accommodate an employee in hijab by citing the need for a uniform workforce. *See, e.g.*, Lewis v. N.Y.C. Transit Auth., 12 F. Supp. 3d 418, 445–46 (E.D.N.Y. 2014) (transferring Muslim woman in hijab to inferior position at bus depot where customers would not see her in order to "present its chosen image to the public through a uniformly applied appearance standard"); Muhammad v. N.Y.C. Transit Auth., 52 F. Supp. 3d 468, 486, 489–90 (E.D.N.Y. 2014) (same); U.S. v. N.Y.C. Transit Auth., No. 04-CV-4237, 2010 WL 3855191, at *22 (E.D.N.Y. Sep. 28, 2010) (same).

201. *See infra* Section VI.B.7.

not spend much time assessing whether the asserted safety risk is particular to the hijab or whether it can be mitigated.

For instance, the Third Circuit held in *EEOC v. Geo Group* that accommodating Muslim female employees' need to wear hijab at a private prison posed a risk of danger, imposing more than a de minimis cost on the employer.[202] Although the employees had worn hijabs without issue before a rule change, the prison claimed they posed various hypothetical risks: they could cast a shadow on the employee's face or could be used to smuggle contraband or strangle someone.[203] While the Court observed this was a "close case," it reasoned that, even if the hijab posed "only a small threat of the asserted dangers," it was too much.[204] The opinion included no discussion of why other pieces of clothing did not create similar risks or why these risks could not be mitigated, for instance by requiring a tight-fitting headscarf or subjecting employees to more extensive searches.[205] And although one hijabi plaintiff's request was met with a supervisor's response that "no religion will be honored in the jail," GEO allowed accommodation from its no-beard policy for religious men.[206]

Similarly, an Arkansas federal court accepted a prison's argument that a hijabi correctional officer would affect the "security and good order" of the institution because a "misappropriated hijab could be used to conceal the identity of an inmate, facilitate escape, conceal contraband or weapons, and could even be used as a weapon itself."[207] The court concluded that

202. EEOC v. GEO Group, Inc., 616 F.3d 265, 276–77 (3d Cir. 2010).

203. *Id.* at 272–74.

204. *Id*. at 285.

205. Philadelphia prisons currently allow their correctional officers to wear a uniform hijab. However, it is unclear whether such policy applies to private prisons run by corporations like GEO Group. TRIB. STAFF REP., *Philadelphia Prisons Approve Hijabs for Correctional Officers*, PHILA. TRIB. (Mar. 11, 2026), https://www.phillytrib.com/philadelphia-prisons-approve-hijabs-for-correctional-officers/article_046a564b-f578-4b73-8549-a3c4e44e5a6e.html?fbclid=IwY2xjawQfEqdleHRuA2FlbQIxMQBzcnRjBmFwcF9pZBAyMjIwMzkxNzg4MjAwODkyAAEeKkok5Ird2piNeHincWUpO-1WGymtUMafdaPbUfuP2R5P63OFdDl_LZ1IoGM_aem_DUO9xTdlQ2SyCAVAD2C3w [https://perma.cc/U8KC-3TAN].

206. *Id.* at 282.

207. Parker v. Ark. Dep't of Corr., No. 4:05CV00850 GH, 2006 U.S. Dist. LEXIS 106804, at *9 (E.D. Ark. Apr. 26, 2006).

accommodating a correctional officer would be an undue hardship for the employer because it violated the uniform policy and created a safety hazard, without indicating why a hijab in particular is more dangerous than other articles of clothing.[208]

In yet another case, an employment agency refused to refer a Muslim woman in hijab to a printing press because of its no headwear policy and the court validated its decision without any scrutiny.[209] The company alleged the headscarf could get caught in machinery, which it claimed was a greater safety risk than hair because "hair is permanent" and with a hijab or hat, the worker would "[r]each[] in and try[] to grab it, pulling an individual into a piece of equipment, damaging equipment, or other individuals that are trying to help could potentially be hurt as well."[210] In crediting the employer's safety rationale, the Eighth Circuit failed to address the equal or greater risk of hair getting caught in machinery and automatically pulling the worker into it, precisely because it is "permanent" and attached to the head. And again, the court failed to explore whether the risks could be mitigated by appropriate policies—for instance, requiring a tight-fitting scarf—and training to prevent injury.[211] *Hardison*'s toothless standard allowed the employer's proffer of a specious safety and security risk to defeat a Muslim woman's request to practice her religion on the job, and ultimately resulted in the loss of her employment itself.

208. *Id.* at *22.

209. EEOC v. Kelly Servs., Inc., 598 F.3d 1022, 1023–25, 1032 (8th Cir. 2010).

210. *Id.* at 1027.

211. Employers have argued hijab and modest clothing pose a safety and security risk in various other industries as well. *See, e.g.*, EEOC v. 704 HTL Operating, LLC, 979 F. Supp. 2d 1220, 1223–24, 1234 (D.N.M. 2013) (arguing hijab is a safety risk for housekeeping job); Mohammed v. May Dep't Stores, Co., 273 F. Supp. 2d 531, 532–33 (D. Del. 2003) (arguing hijab is a safety hazard for a sales associate position in a department store); Mohamed-Sheik v. Golden Foods/Golden Brands LLC, No. Civ.A. 303CV737H, 2006 WL 709573, at *3 (W.D. Ky. 2006) (arguing an untucked shirt can get entangled in machinery and poses a safety hazard in a factory); United States v. Essex Cty., No. 09-2772 (KSH), 2010 WL 551393, at *3 (D.N.J. Feb. 16, 2010) (arguing hijab posed unspecified "security concerns").

C. Customer Preference

Some employers have asserted arguments that incorporate negative stereotypes and exhibit outright discrimination toward Muslims and hijab—often in the name of customer preference.

For example, a federal court in Georgia in 2006 rejected a hijabi's non-accommodation claim in the context of a forced transfer to a different location, and accepted the employer's argument denying as direct evidence of discrimination a supervisor's statements that the woman had a "scary appearance" and her "turban disturbed people."[212] The employer argued that a hijab accommodation "could have resulted in [the employer] losing an important contract" with the third-party at that site, which would amount to an undue hardship.[213]

In 2006, the same Georgia court justified the firing of a Muslim woman wearing hijab eleven years later, crediting the employer's speculative argument that it could lose business if she remained visible to customers.[214] After years of the plaintiff working as a customer service representative for the company, the employer tried to transfer the woman to a non-customer-contact position when she asked to wear her hijab while working.[215] When she insisted on adhering to her faith in her existing position, the employer fired her.[216]

The district court approved the termination, accepting the employer's arguments that the hijab "did not project the image"

212. Wiley v. Pless Sec., Inc., No. 1:05-CV-0332-TWT, 2006 WL 8431781, at *1, *9, *19, *25–26 (N.D. Ga. June 16, 2006) (report and recommendation of magistrate judge); *see* Wiley v. Pless Sec., Inc., No. 1:05-CV-332-TWT, 2006 WL 1982886, at *1 (N.D. Ga. July 12, 2006) ("It seems to me that the Defendant makes a good point that this statement must be considered in the context in which it was made. . . . The Court should be hesitant to impute discriminatory animus to statements made in the course of attempts to accommodate an employee's practice.").

213. *Wiley*, 2006 WL 8431781, at *26–27.

214. Camara v. Epps Air Serv., Inc., 292 F. Supp. 3d 1314, 1331–32 (N.D. Ga. 2017) ("[I]f the district judge finds that Epps's transfer offer was not a reasonable accommodation, then a relaxation of Epps's dress policy—or granting an exemption from those standards—would impose an undue hardship on Epps in that doing so would adversely affect the image that it seeks to present to the public through a uniform policy and potentially cost it business if some customers go elsewhere . . . .").

215. *Id.* at 1320–23.

216. *Id.* at 1324.

the employer sought for the company and customers may have "negative reactions" when seeing a woman in a hijab.[217] The court ruled that the transfer was a reasonable accommodation and the employer would incur undue hardship by keeping her in a customer-facing post, essentially concluding that the alleged possible costs outweighed the woman's sincere religious practice.[218] The court reasoned that allowing the hijab could have harmed the "image" the company sought "to present to the public" and "potentially cost it business if some customers [went] elsewhere."[219] In other words, speculation about *possible* customer perceptions—even those rooted in bias—could prevent a Muslim from practicing her faith on the job.

The Fourth Circuit similarly dismissed a hijabi's claim of non-accommodation when four months into her retail job, her new supervisor told her she would have to stop wearing her hijab or be transferred to a position where she would have less frequent contact with customers.[220] The court dismissed the case because it deemed the transfer not an adverse action as required

217. *Id.* at 1319, 1322. In relating the facts, the court parroted the employer's allegation that "[t]he Company could have lost business by plaintiff wearing a hijab at the front counter" and "conceded that negative stereotypes and perceptions about Muslims was a factor in [its] decision," taking pains to explain that the decisionmaker himself did not harbor negative stereotypes, but customers "might." *Id.* at 1322, 1322 n.6. The court noted that the plaintiff in *Wiley* was not terminated but instead quit; however the court still found the distinction unimportant since "she left [the employer] no choice but to terminate her employment when she refused the transfer offer." *Id.* at 1333. Notwithstanding the improper use of bias and discrimination to validate a non-accommodation claim, the court here also denied the hijabi plaintiff's legitimate claim of constructive discharge under Title VII. *Id.* at 1335 n.29. *See also* Young v. Sw. Sav. & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975) (holding atheist employee's resignation due to required attendance at work prayer meetings constituted constructive discharge); EEOC v. Consol. Energy, Inc., 860 F.3d 131, 141 (4th Cir. 2017) (holding religious employee who quit rather than use a biometric device that violated his faith was constructively discharged); Mathis v. Christian Heating & Air Conditioning Inc., 158 F. Supp. 3d 317, 335–36 (E.D. Pa. 2016) (finding an actionable constructive discharge where employer issued ultimatum to employee to wear a badge with religious message or leave).

218. *Camara*, 292 F. Supp. 3d at 1330, 1331–32.

219. *Id.* at 1331–32.

220. Ali v. Alamo Rent-A-Car, Inc., 8 F. App'x 156, 157 (4th Cir. 2001). Ali argued that "Title VII . . . d[id] not require a showing of [an] adverse . . . action," rather than arguing that such a transfer would amount to one. *Id.* at 158. The law on transfers has been mixed, but a recent case has provided some guidance that a transfer—even one that does not result in changes in pay—may rise to the level of an adverse action. *See* Muldrow v. City of St. Louis, 601 U.S. 346, 350–51 (2024).

for Plaintiff's prima facie case—relieving the employer from showing any hardship whatsoever.[221]

What's most disturbing about these cases is the courts' acceptance of possible customer antipathy towards the hijab as a reason obviating the need to accommodate her religious observance within the employee's current position. It is impossible for these dispositions to occur without the courts themselves accepting and internalizing those same negative stereotypes of women in hijab, whether as oppressed, terrorists, un-American, or foreign "other" tropes derived from the invidious clash of civilizations paradigm.[222]

Terminating or transferring an employee because their neutral religious garb purportedly offends others is itself discriminatory by prioritizing biased views toward hijab.[223] In fact, the employer action in these cases—statements disparaging the hijab and terminating or transferring a hijabi so that customers won't see her—amounts to disparate treatment in addition to non-accommodation under Title VII.[224] Customer or other third-party bias against hijab cannot defeat a claim for religious accommodation in the workplace.

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221. *Ali*, 8 F. App'x at 157–59. *See also* EEOC v. Morningside House of Ellicott City, LLC, No. 1:11-cv-02766-JKB, 2012 WL 1655324, at *1 (D. Md. May 9, 2012) (discussing facts where director of assistant living facility told prospective nursing assistant who wore hijab that "she was worried that her hijab (headscarf) might frighten some of the elderly patients who suffered from dementia and asked whether she would be willing to take it off").

222. *See supra* Part I.

223. For example, California's analog to Title VII, the California Fair Employment and Housing Act, explicitly prohibits segregating a religious employee as a form of reasonable accommodation. CAL. GOV'T CODE § 12940(*l*)(2) (West 2025) ("An accommodation of an individual's religious dress practice or religious grooming practice is not reasonable if the accommodation requires segregation of the individual from other employees or the public.").

224. *See* 42 U.S.C. § 2000e-2(a)(2) ("It shall be an unlawful employment practice for an employer . . . to limit, *segregate*, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.") (emphasis added). Indeed, Sikh employees have also faced transfer because of their religiously mandated turban, and when they sue claiming discrimination under Title VII, courts have been reluctant to find a violation of the statute. *See* Dawinder S. Sidhu, *Out of Sight, Out of Legal Recourse: Interpreting and Revising Title VII to Prohibit Workplace Segregation Based on Religion*, 36 N.Y.U. REV. L. & SOC. CHANGE 103, 118–123 (2012).

* * *

To be sure, some courts have rejected such bias-based arguments and instead engaged in a substantive analysis to decide whether a headscarf accommodation would actually pose an undue hardship on the company.[225] But it is important to note that most of these published opinions deny an employer's motion for summary judgment to allow the case to go forward to trial.[226] So although the courts may not grant employers an easy "get-out-of-jail-free card," Muslim women subject to *Hardison*'s lenient standard have been compelled to either continue to litigate, or more commonly and as a practical matter, settle the case, perhaps with a result short of full vindication and compensation.[227] However, this may all change with the Supreme Court's recent ruling in *Groff v. DeJoy*.[228]

V. *GROFF V. DEJOY*'S NEW STANDARD

Forty-five years after the Court's decision in *TWA v. Hardison*, the Supreme Court in *Groff v. DeJoy* unanimously departed

225. *See, e.g.*, EEOC v. Greyhound Lines, Inc., 554 F. Supp. 3d 739, 748, 761 (D. Md. 2021) (rejecting employer's summary judgment motion based on safety argument that Muslim woman's loose clothing would pose safety risk in inspecting and driving bus); EEOC v. Jetstream, 134 F. Supp. 3d 1298, 1307, 1320–21 (D. Colo. 2015) (denying employer summary judgment where hijabi cleaners were fired from airplane cleaning company after president made comments stating he did not want to maintain their employment because passengers would think they are terrorists); Muhammad v. New York City Transit Authority, 52 F. Supp. 3d 468, 473 (E.D.N.Y. 2014) (denying employer summary judgment because woman in hijab alleged prima facie case of failure to accommodate after she was terminated for not removing her hijab); Lewis v. New York City Transit Authority, 12 F. Supp. 3d 418, 445–46 (E.D.N.Y. 2014) (same); Mohamed-Sheik v. Golden Foods/Golden Brands LLC, No. Civ. A. 303CV737H, 2006 WL 709573, at *5 (W.D. Ky. Mar. 16, 2006) (denying employer summary judgment based on "significant material facts in dispute . . . [on] undue hardship . . . where there is evidence that safety concerns may not have been the exclusive, or even the primary factor behind the enforcement of the policy"); EEOC v. Rollins, Inc., No. 74-123, 1974 WL 208, at *7 (N.D. Ga. June 7, 1974) (denying summary judgment to employer who refused to allow a Black Muslim woman to wear modest clothing required by her faith).

226. *See supra* note 225.

227. There are only a few exceptional cases where the courts granted summary judgment in support of the hijabi claimant for a failure to accommodate religion, including some of the *Abercrombie* district court cases. *See supra* note 199; *see also* EEOC v. Alamo Rent-A-Car LLC, 432 F. Supp. 2d 1006, 1015 (D. Ariz. 2006) (finding employer could not show undue hardship and granting EEOC summary judgment as to liability) .

228. 600 U.S. 447 (2023).

from its former employer-friendly approach.[229] *Groff* clarified that Title VII requires an employer to justify its denial of a religious accommodation by proving it would result in "substantial increased costs" in relation to the operation of the particular business.[230] The Court dispensed with the de minimis standard by calling the term dicta that had inadvertently become the reigning standard when the plain meaning of the "undue hardship" statutory language requires more.[231] Through its explanation of the appropriate framework to address religious accommodation claims, the Court finally validated Justice Marshall's approach in dissent to the *Hardison* decision.[232]

In addressing the U.S. Post Office's rejection of a Sabbatarian's request for accommodation on Sundays, the Court first outlined the history of the undue hardship standard.[233] It briefly described the EEOC's elaboration of the standard through administrative decisions from 1968 to 1972 (citing as an example the headscarf decision Justice Marshall highlighted in his *Hardison* dissent).[234] Then, it reviewed the contemporaneous circuit court decisions that held Title VII did not require accommodation of religious practices from a neutral rule because to do so would violate the Establishment Clause, clarifying that these cases relied on an erroneous interpretation of the First Amendment.[235] Finally, it described the resulting 1972 amendment to Title VII where Congress explicitly voted to protect an

229. *See id.* at 470.

230. *Id*. In the years before *Groff*, several other petitions for certiorari presenting the question of undue hardship's meaning were denied by the Court. *See* Patterson v. Walgreen Co., 589 U.S. 1229, 1229 (2020); Petition for Writ of Certiorari, Patterson v. Walgreen Co., 589 U.S. 1229, 1229 (2020) (No. 18-349); Small v. Memphis Light, Gas, & Water, 141 S. Ct. 1227, 1227 (2021); Petition for Writ of Certiorari, Small v. Memphis Light, Gas, & Water, No. 19-1388, 2020 WL 3317131, at *16 (June 15, 2020); Dalberiste v. GLE Assoc., 141 S. Ct. 2463, 2463 (2021); Petition for Writ of Certiorari, Dalberiste v. GLE Assoc., 141 S. Ct. 2463 (2021) (No. 19SC19-1461), 2020 WL 3841282, at *18 (June 24, 2020).

231. *See Groff*, 600 U.S. at 470.

232. *Id.* at 870; TWA v. Hardison, 432 U.S. 63, 85–88 (1977) (Marshall, J., dissenting).

233. *Groff*, 600 U.S. at 457–59.

234. *Id.* at 457 n.3.

235. *Id.* at 458.

employee's right to religious accommodation absent undue hardship.[236]

The Court explained that the *Hardison* case arose in the context of challenges to the 1972 amendment under the Establishment Clause—in fact, TWA's petition asked the Court to decide whether the 1972 amendment violated the clause.[237] The question was relevant since only one year earlier, the Court had promulgated its now-abrogated *Lemon* Test which deemed violative of the Establishment Clause any law whose principal or primary effect was to advance religion.[238] Because a special accommodation to employees' religious practice could be deemed to have such a purpose and effect, TWA, the union, and supporting amici argued in their briefs, and perhaps some Supreme Court justices agreed, that the 1972 amendment could indeed be unconstitutional.[239] And although Establishment Clause concerns "played no on-stage role" in *Hardison*, the Court explained, many commentators interpreted *Hardison*'s description of "undue hardship" as a "de minimis" standard as a way to avoid the constitutional question altogether.[240]

The *Groff* Court then explained that the primary issue in the 1972 case—and thus the *Hardison* Court's focus—was on whether a religious accommodation would pose an undue hardship if it violates a seniority system, namely by depriving senior employees of their rights in order to accommodate a

236. *Id.* It is interesting to note that the Sabbath accommodation at issue here involves rest from work on a Sunday. Of course, the majority of Sabbath cases in the free-exercise realm have historically involved a Saturday Sabbath because, as a country with a largely mainstream Christian population, many companies and government entities (USPS included) were closed on Sundays. However, changing norms in the United States means Sunday work has become more common over time, and even those who practice the majority religion may require religious accommodation.

237. *Id.* at 459–60.

238. *Id.* at 460; *see* Kennedy v. Bremerton Sch. Dist., 597 U. S. 507, 572–73 (2022), *abrogating*, Lemon v. Kurtzman, 403 U. S. 602 (1971).

239. *Groff*, 600 U.S. at 460–61. The Court highlighted that just months before granting certiorari in *Hardison*, it had "announced that the Justices were evenly divided in a case that challenged the 1972 amendment as a violation of the Establishment Clause." *Id.* at 460.

240. *Id.* at 461 n.9 (citing as examples Marshall's dissent in *Hardison*, 432 U.S. 63, 89 (1977) (Marshall, J., dissenting), Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 6–7 (1996), and Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 704 (1991)).

junior employee's religious observance.[241] On this point, the Court explained that the *Hardison* Court had held that Title VII does not require an accommodation that involuntarily deprives employees of seniority rights.[242] Accordingly, and since in the *Hardison* Court's view, no option existed for TWA to accommodate Hardison without violating seniority (whether by compelling senior employees or paying overtime to other employees to cover his Sabbath shift), TWA had shown an undue hardship.[243]

On the issue of costs, the *Groff* Court said that TWA and Hardison had barely briefed the issue of when increased costs amount to an undue hardship, and the Court's treatment of the issue in *Hardison* was therefore only dicta.[244] That is to say, the *Groff* Court rejected the "de minimis" language as authoritative on the issue of the employer's burden in these types of cases.[245] Instead, the Court focused on the *Hardison* Court's description elsewhere in its opinion of undue hardship as '"substantial' 'costs' or 'expenditures.'"[246] The Court held that to establish an undue hardship, "an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business."[247]

Ultimately, the *Groff* Court rejected *Hardison*'s *de minimis* standard because it "does not suffice to establish 'undue hardship' under Title VII."[248] Instead, the Court understood the *Hardison* case to mean that undue hardship is met "when a burden is substantial in the overall context of an employer's business."[249] To support its holding, the Court relied primarily on the plain meaning of the "undue hardship" text of the statute, and also observed that the EEOC guidance before 1972

241. *See id.* at 461–62, 464–65.
242. *Id.* at 462.
243. *Id.* at 462–64.
244. *Id.* at 464.
245. *Id.* at 464–65.
246. *Id.* at 464.
247. *Id.* at 470.
248. *Id.* at 468.
249. *Id.*

supported this conclusion.[250] Compelling to the Court was that both parties agreed the de minimis test was inappropriate and the statute required a higher standard.[251]

The Court also provided some important "clarification" on issues raised by the parties.[252] First, to decide whether an accommodation would pose an undue hardship, courts may only consider impacts on coworkers that "have ramifications for the conduct of the employer's business."[253] On this point, the Court unequivocally stated "bias or hostility to a religious practice or a religious accommodation" cannot form the basis of an undue hardship defense.[254] Second, the Court emphasized that employers must explore reasonable accommodation options and not only one particular possible accommodation, underscoring the need for employers to canvas the universe of options in light of their business operations and consider whether each option could reasonably be provided.[255] The Court went so far as to say that when considering reasonable accommodations and the impact on other employees, "it would not be enough for an employer to conclude that forcing other employees to work

250. *Id.* at 468–69.

251. *Id.* at 470. Petitioners argued the Court should adopt a "significant difficulty or expense" standard from the Americans with Disabilities Act, along with its accompanying caselaw. *Id.* at 470–71. The United States suggested the Court should hold *Hardison's* reference to "substantial expenditures" or "substantial additional costs" is the appropriate standard without any change to the EEOC's guidance promulgated following *Hardison*. *Id.* The Court took a middle ground position, adopting Hardison's language and calling it a "clarifying decision." *Id.* at 471. The Court noted that some EEOC guidance in this area will be unaffected, but "courts should resolve whether a hardship would be substantial in the context of an employer's business." *Id.*

252. *Id.* at 471–72.

253. *Id.* at 472.

254. *Id.* In rejecting bias and discrimination within the hardship analysis, the Court cited as a contrary example *EEOC v. Sambo's of Georgia, Inc.*, where a district court held a restaurant would experience undue hardship to hire a Sikh man because of "[a]dverse customer reaction from a simple aversion to, or discomfort in dealing with, bearded people." *Id.* at 472–73 (quoting *Sambo's*, 530 F. Supp. at 89 (N.D. Ga. 1981)). The Court cited this case earlier in a footnote to its opinion, along with *Camara v. Epps Air Service, Inc.* with its similar reasoning, in indicating that some courts had rejected accommodations that, even under *Hardison*, the EEOC "consider[ed] to be ordinarily required." *Id.* at 466 n.13 (citing *Camara*, 292 F.Supp.3d 1314, 1322, 1331–32 (N.D. Ga. 2017)). Curiously, the *Groff* Court did not cite to *Camara* here, despite the *Camara* Court stating the "negative stereotypes and perceptions about Muslims was a factor in [its] decision" finding undue hardship. *See id.* at 472; *see supra*, notes 214–19 and accompanying text.

255. *Id.* at 473.

overtime would constitute an undue hardship" in a similar Sabbath accommodation situation—directly rejecting *Hardison*'s conclusion to the contrary.[256]

VI. GUIDANCE FOR THE JUDICIARY

The Supreme Court's recent shift under Title VII to a "substantial increased costs" religious-accommodation standard, although significant, was not accompanied by much guidance to lower federal courts as to how to apply it. Numerous questions remain unanswered: at what point do costs become substantial? How does the Title VII undue hardship standard compare to the Americans with Disabilities Act's undue hardship standard for disability accommodations, which is defined within that statute as "significant difficulty or expense"?[257] Can courts look to disability accommodation precedent under the ADA to interpret Title VII religious accommodation cases? These open questions should eventually reach the courts and be elucidated over time.

In the meantime, this Article offers general recommendations for courts when adjudicating Title VII religious accommodation claims, and specific suggestions relating to minority faith adherents, with a focus on dress and grooming requests. These recommendations reflect the work of courts and legislatures in analogous contexts to balance a claimant's need for an accommodation, or an exemption from a general rule, with competing considerations. First, courts should look to state analogs of Title VII that have been in effect for years with similar heightened standards as a guide for their analysis. Second, courts should incorporate important considerations from constitutional free-exercise and federal disability contexts in considering employer defenses, including employer provision of other exemptions. Finally, courts must be careful to avoid problematic employer defenses that are routinely employed against

256. *Id.*; *see* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84–85 (1977).

257. 42 U.S.C. § 12111(10)(A); *id.* § 12112 (b)(5)(A).

minority claimants requesting accommodation, including hijabis.

A. Factors from State Analogs

A heightened accommodation standard for employers may be a new paradigm at the federal level, but several states have passed civil rights laws that require significant proof to reject a religious accommodation. Namely, California,[258] New Jersey,[259] Oregon,[260] and New York[261] all require employers to justify a

258. CAL. GOV'T CODE § 12940(l)(1) (West 2025) (prohibiting religious discrimination in employment); *id.* § 12926(u) (defining "undue hardship" as "significant difficulty or expense"). California's statute lists five factors to consider in determining whether an accommodation amounts to an "undue hardship": (1) the nature and cost of the accommodation; (2) the financial resources and number of employees of the facilities involved in the accommodation; (3) the overall size and financial resources of the employer, including the number of employees and facilities; (4) the nature of the employer's work, including structure and employee responsibilities; and (5) the distribution of the employer's physical locations. *Id.* §§12926(u), 12940 (l)(1).

259. N.J. STAT. ANN. § 10:5-12(q)(1)–(2) (West 2025) (prohibiting religious discrimination in employment); *id.* § 10:5-12(q)(3)(a), (b)(i)–(iii) (defining "undue hardship" as "requiring unreasonable expense or difficulty, unreasonable interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system or a violation of any provision of a bona fide collective bargaining agreement" and listing relevant factors, including: "(i) The identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer. (ii) The number of individuals who will need the particular accommodation for a sincerely held religious observance or practice. (iii) For an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.").

260. OR. REV. STAT. § 659A.033(4)(a)–(d) (West 2025) ("A reasonable accommodation imposes an undue hardship on the operation of the business of the employer for the purposes of this section if the accommodation requires significant difficulty or expense. For the purpose of determining whether an accommodation requires significant difficulty or expense, the following factors shall be considered: (a) The nature and the cost of the accommodation needed. (b) The overall financial resources of the facility or facilities involved in the provision of the accommodation, the number of persons employed at the facility and the effect on expenses and resources or other impacts on the operation of the facility caused by the accommodation. (c) The overall financial resources of the employer, the overall size of the business of the employer with respect to the number of persons employed by the employer and the number, type and location of the employer's facilities. (d) The type of business operations conducted by the employer, including the composition, structure and functions of the workforce of the employer and the geographic separateness and administrative or fiscal relationship of the facility or facilities of the employer.") .

261. N.Y. EXEC. LAW § 296(10)(a)–(c) (McKinney 2025) (prohibiting religious discrimination in employment); *id.* § 296(10)(d)(1) (defining "undue hardship" as "requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system). New York's law lists factors to guide

denial of a religious accommodation request by meeting a standard akin to *Groff*'s. All four statutory schemes enumerate factors to be considered when courts evaluate a non-accommodation case, which can be condensed into four concerns: (1) the nature of the accommodation; (2) the cost of the accommodation; (3) the nature of the employer's work; and (4) the size and resources of the employer and the specific facility where the claimant works.[262]

These factors boil down to looking at what the religious claimant is asking for and how much it would cost on the one hand, and assessing the ability of the employer to provide it, taking into account its resources and the nature of its work, on the other. It is essential that in analyzing these factors, courts rely on concrete evidence, rather than generalized or overbroad statements of hardship without examining different accommodation options, as the Court stressed in *Groff*.[263] By assigning a heightened standard and enumerating factors to consider, these statutory schemes require courts to vigorously kick the tires on any employer defense to accommodation. Under *Groff*, federal courts should follow suit to avoid specious employer arguments credited under *Hardison*.

B. Factors from Federal Schemes with Similar Standards

In addition, and in line with *Groff*'s guidance, Courts should examine the following additional considerations, some of which are part of the free-exercise strict scrutiny analysis and

courts in assessing undue hardship, including: (1) the cost of the accommodation relative to the employer's size and budget; (2) the number of employees likely to request the accommodation; and (3) the added costs of the accommodation for employers with multiple locations. *Id.* § 296(10)(d)(1)(i)–(iii).

262. *See* CAL. GOV'T CODE § 12926(u)(1)–(5) (West 2025); N.J. STAT. ANN. § 10:5-12(q)(3)(a), (b)(i)–(iii) (West 2025); OR. REV. STAT. § 659A.033(4)(a)(b)–(f) (West 2025); N.Y. EXEC. LAW § 296(10)(d)(1)(i)–(iii) (McKinney 2025). Notably, California extends the definition of religion to include "all aspects of religious belief, observance, and practice, including religious dress and grooming practices," defining religious dress as "[r]eligious wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item" related to religious observance. CAL. GOV'T CODE § 12926(q) (West 2025). "Religious grooming practice" is defined "to include all forms of head, facial, and body hair" related to religious observance. *Id.*

263. *See* Groff v. DeJoy, 600 U.S. 447, 472–73 (2023).

others from disability law: (5) other accommodations that have been made by the employer; (6) the extent the employer engaged in an individualized assessment and considered alternatives through an interactive process; (7) whether an accommodation denial is rooted in bias or other problematic arguments; and (8) if any material negative third-party harms will result from the religious accommodation. This Section proceeds with each of these considerations in turn.

(5) Other Employee Accommodations

As is routinely the case in federal free-exercise cases, courts should consider whether there are or have been similar exceptions made to the employer policies for other employees, whether religious or otherwise. This can serve as concrete evidence of the employer's ability to provide the requested accommodation at hand, as part of or in addition to analyzing the core factors (1 through 4) enumerated above.

On this point, a Third Circuit case is instructive. In *Fraternal Order of Police v. City of Newark*, in the context of a First Amendment challenge, the Third Circuit rejected a police department's argument that it had a compelling interest to deny religious policemen an accommodation from the department's no-beard policy since it granted identical, secular exemptions to officers with a skin condition that caused pain and irritation from shaving.[264] The Court reasoned that the existence of secular exemptions required strict scrutiny review of the policy under *Smith*, and proceeded to reject the employer's argument—(1) that the policy conveys a uniform image of the police force, and (2) exemptions would undermine morale and the "esprit de corps" of the force—because these reasons applied with equal force to the secular exemptions already in place.[265] Thus, the employer's arguments could not withstand the heightened requirements of strict scrutiny in the constitutional context.[266]

264. 170 F.3d 359, 360 (3d Cir. 1999).

265. *Id.* at 366 (citing Emp. Div. v. Smith, 494 U.S. 872 (1990)).

266. *Id.* at 367.

In a *Groff* world, courts should follow *Fraternal Order*'s lead and interrogate an employer's history of exceptions to the job rule at issue. Even a different type of accommodation may undermine a claim of undue hardship. Take the hijab accommodation in *GEO Group*—the prison there refused to accommodate hijab but allowed religious exemptions to its no-beard policy.[267] GEO's alleged security arguments against hijab—that it could be a safety hazard by casting a shadow on the face or grabbed by inmates—could also apply equally to beards, undermining its hardship defense.[268]

(6) Individualized Assessment & Interactive Process

Another important factor for courts to consider is whether the employer engaged in an individualized assessment and interactive process, attempting to accommodate the employee by exploring alternatives. The Court in *Groff* emphasized this process.[269] Courts (and employers) should be familiar with the interactive process when it comes to accommodations in the workplace—the ADA also incorporates an interactive process for disability accommodations.[270] EEOC regulations on disability encourage employers to "initiate an informal interactive process" with the employee in good faith to determine an appropriate reasonable accommodation.[271]

The interactive process for religious accommodation should be a timely, meaningful, and cooperative dialogue between employer and employee to explore various options that take into account both the employee's need for accommodation and the

267. EEOC v. GEO Group, Inc., 616 F.3d 265, 278–79, 282 (3d Cir. 2010) (Tashima, J., dissenting).

268. *Id.* at 272.

269. *See Groff*, 600 U.S. at 472–73.

270. *See* 42 U.S.C. § 12112(b)(5)(A) (requiring "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability," unless the employer can show undue hardship); 29 C.F.R. § 1630.2(o)(3) ("To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.").

271. 29 C.F.R. § 1630.2(o)(3).

employer's business needs. Often this begins with the employee suggesting their preferred accommodation. A straight denial of the employee's requested (i.e., preferred) accommodation means only that the employer allegedly determined it could not provide that particular solution.[272] If other potential solutions exist, the employer should explore them.[273]

The process requires flexibility and iteration—if the accommodation proposed by the employee doesn't work for the employer, the employer must suggest something else and continue the conversation.[274] The process should include exploration of accommodations in the employee's existing position and at their particular location, but may also include consideration of other positions and locations that reasonably preserve their compensation and benefits.[275] Sometimes this back-and-forth requires repetition before the parties land on a feasible solution, or the employer denies the accommodation request by claiming it cannot reasonably accommodate without undue hardship.[276] Ultimately, when a claim is brought to the courts, the trier of fact must determine whether the employer adequately engaged in the interactive process before determining an accommodation would result in undue hardship.[277]

One hijab accommodation case decided post-*Groff* provides an example of how *not* to engage in an interactive process with a hijabi employee.[278] In response to a New York prison guard's request to wear her hijab at work, she was informed by letter that her hijab could be accommodated subject to two

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272. The Supreme Court held in *Ansonia Board of Education v. Philbrook* that employers need not accept an employee's preferred religious accommodation. 479 U.S. 60, 68 (1986). Rather, the employer may choose between various reasonable accommodations. *Id.* at 68–69 ("Thus, where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship.").

273. *See id.*

274. *See, e.g.*, Thompson v. Microsoft Corp., 2 F.4th 460, 468–69 (5th Cir. 2021) (detailing iterative, interactive process between employee and employer under ADA).

275. *See, e.g.*, *id.* at 469.

276. *See, e.g.*, *id.* at 466.

277. *See, e.g.*, *id.* at 468–69.

278. *See* Billings v. Murphy, No. 22-2010-CV, 2024 WL 444727, at *1–2 (2d Cir. Feb. 6, 2024).

conditions: the headscarf easily tear off if grabbed, and the hijab be checked by the male Deputy Superintendent of Security.[279] A few days later, a different male supervisor called her into his office and said her hijab must be limited in size to three feet by three feet.[280] When the hijabi employee asked for the authority for the rule, he replied "You can like it or take it off."[281] Outside of his presence, she cut down her hijab and returned.[282] He then gave her three options: (1) take off the hijab and continue to work, (2) keep the hijab on and go home, (3) demonstrate to him that the "hijab could be pulled off quickly without" choking her in case of a prisoner attack.[283] The hijabi employee responded that she was happy to comply with the inspection before a female supervisor since her religion prohibited her from removing her hijab in the presence of a man outside of her family.[284] The supervisor demanded she immediately remove her hijab for him, claiming no female supervisors were available.[285] The hijabi guard removed her hijab under duress.[286] She was later sent home after suffering an anxiety attack and told to fill out workers' compensation paperwork.[287] She was prohibited from returning to work for over six months, mostly without pay, because the prison mistakenly alleged she had made errors in her paperwork.[288]

Ultimatums and demands are never appropriate in an interactive process. It should be self-evident that requiring the religious employee to engage in the religiously prohibited activity—including, for example, taking off a hijab in front of a male supervisor or working on a Sabbath—while the interactive process plays out constitutes a breakdown of the process itself. In

279. *Id.* at *1.
280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. *See id.*
286. *Id.*
287. *Id.*
288. *Id.* at *2.

the above-described case, the failure of the prison supervisor to engage in a good-faith discussion with the guard requesting accommodation, the categorical nature of the supervisor's demands, and his command to immediately remove her hijab in violation of her faith all bear negatively on any employer hardship defense.[289] Of course, conditions regarding safety may be reasonable as long as they are connected to a legitimate reason. In sum, courts must look closely at the employer's engagement in the interactive process to ensure that any claims of hardship are supported by the requisite exploration of alternatives in line with the employee's needs.

(7) Biased or Problematic Defenses

Importantly, courts should also be on alert for and skeptical of arguments that are inherently prejudicial or otherwise problematic, including arguments regarding uniformity and professionalism; incorporating bias and stereotypes; and warning of a slippery slope that would encourage an avalanche of similar requests. In the constitutional free-exercise context, the Supreme Court has similarly instructed courts to interrogate intolerant, biased, or otherwise baseless arguments about religion.[290]

In the dress and grooming context, arguments about uniformity and professionalism disproportionately affect minority claimants and undermine the very premise of an accommodation scheme. Accordingly, uniformity defenses by employers should be approached with skepticism. A request for accommodation takes the form of an ask for a variance from a general policy, and in the context of dress and grooming, *any* accommodation will necessarily require some deviation from a uniform-looking workforce. The very nature of a request for accommodation by a hijabi, for instance, will require some level of

289. The unpublished opinion did not directly address any employer hardship defense; rather the Court vacated the district court's dismissal of the plaintiff's claims under Title VII and the First and Fourteenth Amendments under 42 U.S.C. § 1983. The Court did indicate that the prison did not argue plaintiff's request for a female supervisor would place an "undue burden" on the prison. *Id*. at *3.

290. *See* Masterpiece Cakeshop v. Colo. C.R. Comm'n, 584 U.S. 617, 619 (2018).

variation in employee appearance. To oppose such an accommodation with a uniformity defense is deeply problematic since non-homogeneity is inherent in the nature of a dress or grooming accommodation itself. And whether used as a pretext for discrimination or not, uniformity defenses discourage a diverse workforce by blocking from employment Muslims, Sikhs, Jews, and others who may cover their hair or otherwise need a similar accommodation as part of their faith. Accordingly, courts should avoid crediting an employer's uniformity defense and note that such defenses undermine the very right to dress and grooming accommodations, disproportionately affecting minority faith adherents.

Furthermore, employer defenses that a religious dress or grooming practice is unprofessional or violates the "look" of the company are also deeply problematic—the idea that religious dress falls outside of professional norms is rooted in a symbolic message of inferiority, whether of religion, race, culture, ethnicity, or national origin, and should never be an acceptable legal defense.[291] Muslims are not the first to encounter these critiques, and they won't be the last. For decades, Black employees have run up against employer grooming codes that prohibit their hairstyles, purportedly justified by claims of upholding a "conservative," "business-like," and professional image.[292] As Professor Wendy Greene argues, "[o]ften these statements are code for the dominant, structural cultural norm," undermining any

291. *See* Sahar F. Aziz, *Coercive Assimilationism: The Perils of Muslim Women's Identity Performance in the Workplace*, 20 MICH. J. RACE & L. 1, 57 (2014); D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do With It?*, 79 U. COLO. L. REV. 1355, 1391–92 (2008) (arguing that cases involving "employers who affirmatively implemented preferred cultural or racial norms in the workplace. . . . sustain negative meanings associated with 'Blackness,' 'whiteness,' 'Asianness,' and other racial identities, [to] render not only economic but also emotional and psychological harm, which is antithetical to the thrust of Title VII and should be prohibited").

292. *See, e.g.*, Rogers v. American Airlines, Inc., 527 F. Supp. 229, 233 (S.D.N.Y. 1981) (finding employer's grooming policy prohibiting all-braided hairstyle supported a bona-fide business purpose of "project[ing] a conservative and business-like image"); Eatman v. United Parcel Service, 194 F. Supp. 2d 256, 259, 266 (S.D.N.Y. 2002) (upholding employer grooming policy prohibiting "'unconventional' hairstyles" including dreadlocks, braids, corn rows, a doo rag, and ponytails).

legitimate, non-discriminatory employer defense.[293] The bottom line is that employer justifications for denying dress and grooming accommodations that include uniformity or professionalism concerns often mask underlying intolerance and should be vigorously probed by courts to understand if a legitimate defense actually exists.

Bias and bigotry can also be more overt. Courts should consider whether the denial of an accommodation is motivated by negative stereotypes. In the case of hijab accommodations, courts should be weary of stereotypes of Muslim women as oppressed, backward and subjugated, or as violent, disloyal, or suspect—typical caricatures of Muslims rooted in bigotry.[294] It should be obvious at this point that any employer actions or defenses that stigmatize, discriminate, or otherwise reflect bias against a hijabi claimant are unacceptable in the accommodation process and cannot be legally sanctioned. Arguments that

293. Greene, *supra* note 291, at 1386 (citing Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 648 (2005) (arguing American workplaces are often modeled on a "white, male cultural norm"). Professor Wendy Greene has worked to de-stigmatize Black hairstyles in the workplace, both through her scholarship and her policy advocacy, culminating in multiple states passing C.R.O.W.N. Acts (Creating a Respectful and Open Workplace/World for Natural Hair Acts). D. Wendy Greene, *Forward to the Republication of Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do With It?*, 92 U. COLO. L. REV. 1265, 1270–73 (2021). These statutes "address racial discrimination that African descendants systemically endure when donning natural hairstyles" in the workplace and beyond. *Id.* at 1272. Some C.R.O.W.N. Acts go beyond Black hairstyles to include hijabis and other minorities. *See* D. Wendy Greene, *#FREETHEHAIR: How Black Hair is Transforming State and Local Civil Rights Legislation*, 22 NEV. L.J. 1117, 1125 (2022). For example, New Mexico's version prohibits discrimination including for "cultural headdresses," defined as "hijabs, head wraps or other headdresses used as part of an individual's personal cultural or religious beliefs." H.B. 29, 55th Leg., 1st Sess., at 4 (N.M. 2021) (codified at N.M. STAT. ANN. § 22-5-4.3 (West 2025)). And Allegheny County Pennsylvania's ordinance prohibits discrimination on the basis of "any characteristic, texture form, or manner of wearing an individual's hair if such characteristic, texture, form or manner is commonly associated with a particular race, national origin, gender, gender identity or expression, sexual orientation, or religion" in the context of employment, housing, real estate transactions public accommodations, medical care, and public education. ALLEGHENY CNTY., PA., CODE, § 215–31 (2009) (amended 2020). Notably, Allegheny County has a special place in religious liberty jurisprudence. *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 635 (1989) (describing the County's religious displays, one of which was held consistent with the First Amendment). Thus, C.R.O.W.N. Acts constitute important additional protections for hijab beyond Title VII, along with fortified protections for other marginalized and minority groups.

294. *See* Aziz, *supra* note 26, at 19, 24, 59.

allege important stakeholders have negative reactions to hijab are not a legitimate defense to a request for accommodation.[295]

Another common defense employed in the religious accommodation context that must be rejected is the "slippery slope"—in other words, the argument that if the employer grants an exemption from a rule to the religious employee, it will be inundated with similar requests from other employees that it will be forced to grant, and the business will be adversely affected.[296] A slippery slope argument is always a logical fallacy based on speculation. In the Title VII context, employers can rarely provide evidence that they will face increased legitimate requests for accommodation. Namely, if an employee requests an exemption without a religious justification, then no legal basis for the accommodation exists, and the employer can easily deny it. Title VII requires accommodation only for religious belief and practice (and of course the ADA requires disability or medical accommodation)—general preferences are not protected under any statute. And to the extent employees believe this is unfair, the Supreme Court has said that such complaints cannot amount to an undue hardship.[297]

Moreover, the process of individualized assessment allows for evaluation of whether the employer can manage that particular accommodation, taking into account other similar accommodations already granted. For example, perhaps the first, second, or third Sabbath accommodations are not an undue hardship and can be granted by the employer, but once the fourth is requested, the employer can no longer manage its schedule and it would be an undue hardship on the business.

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295. *See* Groff v. DeJoy, 600 U.S. at 472.

296. For example, the Supreme Court in *Trans World Airlines, Inc. v. Hardison* appeared to incorporate such a concern when it said that the cost of accommodation must be evaluated in light of the "likelihood that . . . TWA may have many employees whose religious observances, like Hardison's, prohibit them from working on Saturdays or Sundays." 432 U.S. 63, 84 n.15 (1977). Justice Marshall in dissent rejected this approach, stating such concerns are "not only contrary to the record . . . but also irrelevant, since the real question is not whether such employees exist but whether they could be accommodated without significant expense." *Id.* at 92 n.6 (Marshall, J., dissenting). Of course, Justice Marshall had the better read of the statute's requirements and the proper analytical framework. *See supra* Part V.

297. Groff v. DeJoy, 600 U.S. 447, 472 (2023).

The legal regime by its nature thus accounts for the possibility that a large number of accommodation requests may be untenable in some situations.[298]

Indeed, in another religious-liberty context, the Supreme Court rejected a government slippery slope defense as: "the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions."[299] The Court made clear that such a generalized argument by the government in the context of legal protections intended to allow for religious exemptions must fail.[300] The same applies equally to private employers.

(8) Third-Party Harms

Finally, an important note on third-party harms. In the context of requests for free-exercise exemptions or accommodations, the interests of other non-religious parties may be negatively impacted by the requested carve-out. The Supreme Court has historically weighed any such third-party harms resulting from the potential religious exemption as part of its analysis, with material harms militating against a grant of the exemption.[301]

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298. New Jersey and New York each incorporate into the undue hardship analysis a factor considering how many employees "will need" a similar accommodation. *See* N.J. STAT. ANN. § 10:5-12(q)(3)(a)(ii) (West 2025); N.Y. EXEC. L. § 296(10)(d)(ii) (McKinney 2025). These factors should be supported with concrete evidence and not mere speculation.

299. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 435–36 (2006).

300. *See id*.

301. *See Reframing the Harm: Religious Exemptions and Third-Party Harm After* Little Sisters, *in* DEVELOPMENTS IN THE LAW, 134 HARV. L. REV. 2186 (2021) [hereinafter *Reframing the Harm*] (describing the Supreme Court's treatment of third-party harm from religious exemptions over time). Some scholars argue that material third-party harm resulting from a religious exemption violates the Establishment Clause. *See, e.g.*, Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 361–62 (2014) ("Commentators have been as consistent as the Court in condemning permissive accommodations that materially burden third parties. . . . [T]he Establishment Clause precludes permissive accommodations that shift the material costs of practicing a religion from the accommodated believers to those who believe and practice differently."); Micah Schwartzman, Richard Schragger & Nelson Tebbe, Hobby Lobby *and the Establishment Clause, Part III: Reconciling Amos and Cutter*, BALKINIZATION (Dec. 9, 2013), https://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause_9.html [https://perma.cc/N3FX-MNEB] ("[T]he Supreme Court has . . . allowed religious employers to

In the Title VII context, the Supreme Court clarified that employer hardship must be rooted in articulable costs to the business and does not encompass co-worker complaints about a religious preference.[302] Apart from co-worker grumbling and discontent, some requests for certain religious accommodation may affect employees or other stakeholders in material ways, which can in turn result in substantial increased costs to the business. Take for instance a Sabbath accommodation. These requests sometimes require other employees to pick up undesirable shifts to allow the religious employee a day off for his religious observance. This can seem to unfairly transfer work to the other non-religious employee (who otherwise would enjoy a Saturday or Sunday off). When there are insufficient number of employees on staff to cover the work, an employer has a potential argument that the accommodation poses an undue hardship. But what if enough employees *are* available to cover the work? The Supreme Court has answered that question: if other employees are available to cover the religious employee's shift, and the business does not incur significant additional costs,

impose substantial burdens on their employees . . . [because] the Establishment Clause does not prohibit costs shifting when the government lifts burdens it has imposed on private religious actors."). Others argue that the Establishment Clause does not forbid such third-party harms. *See, e.g.*, Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871, 877 (2019) (arguing the Establishment Clause does not preclude a third party bearing some costs for a religious adherent's accommodation, but rather "the government . . . using its power to foster religious conformity" because the First Amendment historically "prohibits accommodations that seek to selectively subsidize the government's preferred religious messages. . . . [or] that provide exceptionally powerful incentives to adopt the religion being accommodated"); Gene Schaerr & Michael Worley, *The "Third Party Harm Rule": Law or Wishful Thinking?*, 17 GEO. J.L. & PUB. POL'Y 629, 629–32 (2019) (arguing the original understanding of the Establishment Clause did not prohibit the costs of religious accommodation to be spread among others). Ultimately, third-party harms must be considered in the context of religious exemptions because "religious freedom does not operate in a vacuum; often it can bump up against other important rights and interests, thus creating thorny legal questions about the limits of conflicting aspects of liberty." *Reframing the Harm*, *supra* note 300, at 2186; *see also* Christopher C. Lund, *Religious Exemptions, Third-Party Harms, and the Establishment Clause*, 91 NOTRE DAME L. REV. 1375, 1376–79, 1381 (2016) (outlining four factors relevant to assessing religious exemptions and third-party harm: the magnitude of the harm, the likelihood of the harm, the religious interest, and exemptions made for non-religious reasons).

302. Groff v. DeJoy, 600 U.S. 447, 472 (2023).

then such third-party harm does not in-and-of-itself create an undue hardship.[303]

However, some religious accommodation requests that have appeared before courts in increasing numbers—including asks for exemptions from vaccine mandates, opt-outs from non-discrimination training requirements, or relief from job duties providing abortion care or medication—can affect third parties in serious ways that are less quantifiable, including exposure to harmful diseases, undermining enforcement of anti-discrimination law, or deprivation of necessary medical care.[304]

In these cases, courts must carefully weigh the interests of the religious claimant against the evidence of material third-party harm if presented as part of an employer's undue hardship defense. California's Fair Education and Housing Act provides a solution that courts can follow to avoid significant third-party harms: prohibit an accommodation if it would discriminate against another person based on protected characteristics, including race, national origin, and sex.[305] In his recent article, Professor James Nelson also articulates three principles for courts to consider to minimize third-party harm as a result of a religious accommodation, particularly those that implicate broader "culture war" issues: nondisparagement, reciprocity, and proportionality.[306] First, he argues courts should reject "religious denigration or subordination" to allow for diverse workforces.[307] Next, he asserts that religious employees should share the burdens of accommodations rather than "unilateral

303. *Id.* at 472–73 ("Faced with an accommodation request like Groff's, it would not be enough for an employer to conclude that forcing other employees to work overtime would constitute an undue hardship.").

304. *See* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2518–19 (2015).

305. CAL. GOV'T CODE § 12940(l)(3) (2025) ("An accommodation is not required under this subdivision if it would result in a violation of this part or any other law prohibiting discrimination or protecting civil rights. . . ."). Similarly, Texas and Missouri both have state Religious Freedom Restoration Acts that provide religious accommodation protections, but exclude accommodations from civil rights laws. *See* TEX. CIV. PRAC. & REM. CODE ANN. §110.011(a)–(b) (West 2025); MO. REV. STAT. § 1.307(2) (West 2025).

306. Nelson, *supra* note 184, at 1896.

307. *Id.* at 1896, 1909–17

impositions" on non-religious coworkers.[308] Finally, he argues that the costs of religious accommodation should be limited in magnitude and equitably distributed.[309] These principles generally constitute appropriate considerations for courts and should underpin options explored by the employer and employee during the interactive process. However, the idea of a "magnitude" limitation principle appears to simply reflect the ultimate consideration of undue hardship itself. To the extent the "magnitude" principle is a further limitation on undue hardship, courts must be careful not to short-circuit the existing legal standard to allow for unsupported, biased, or otherwise problematic arguments to undermine a legitimate claim for accommodation.[310]

As a general matter, dress and grooming accommodations rarely, if ever, meaningfully implicate third parties in most contexts. These accommodations most often involve covering one's hair; growing a beard or unshorn hair; or wearing long pants, long sleeves, or a skirt. Relevant stakeholders may complain that such accommodations are offensive, but such objections are inherently problematic and cannot be credited in the hardship

308. *Id.* at 1896, 1917–23.

309. *Id.* at 1896, 1923–28.

310. On "magnitude," Professor Nelson focuses on preventing threats to coworker safety, which of course is an important consideration in the accommodation calculus. *Id.* at 1923–24. To support this principle, he points to a case where a request to wear a tight-fitting dress on a factory floor instead of pants was rejected by the employer and that rejection was validated by the court, which reasoned that Title VII does not require the employer to engage in a "novel experiment in industrial safety." *Id.* at 1924 (citing EEOC v. Oak-Rite Manufacturing Corp., No. IP99-1962-C H/G, 2001 WL1168156, at *1–11 (S.D. Ind. Aug. 27, 2001)). Although the court engaged in a detailed and thoughtful analysis, a few problems potentially undermine its conclusion: the employer's expert who was credited by the court never opined on the employee's proffered reasonable accommodation to wear a close-fitting denim or canvas skirt a few inches above the ankle with above-the-ankle boots extending up underneath the skirt; the employer representative testified that the pants-only policy ensured employees are "dressed in a 'decent' manner" without explaining more about how perceived decency bears on factory job duties; and rejecting the possibility of the employer exploring alternative posts within the factory that may be better suited to wearing a skirt. *See Oak-Rite Manufacturing Corp.*, 2001 WL1168156, at *6–8, *15–16. Perhaps the court came to the correct conclusion for the factory floor, but this case indicates the potential shortfalls of *Hardison* in allowing employers and courts to reject accommodation requests without squarely addressing potential solutions, invocations of certain normative dress standards, and alternative job duties. Under *Groff*, a more searching inquiry would be required.

analysis.[311] Even if safety or security concerns are implicated, such defenses must be vigorously assessed to determine whether valid reasons preclude accommodation or if alternative, feasible accommodations exist.

C. A Model from One Federal District Court

A recent judicial opinion out of the Eastern District of California regarding a grooming accommodation request where the employer claimed a safety hardship is instructive on best practices under the *Groff* standard.[312] In that case, a state prison system instituted a no-beard policy for its correctional officers after the Covid-19 pandemic, allegedly to enforce state laws requiring officers to wear respirators when exposed to airborne diseases and chemical agents.[313] The respirators are alleged to be ineffective when used with facial hair.[314] The prison took the sweeping position that all correctional officers must be prepared to wear a respirator at any time as part of their job duties, so no guards could maintain a beard.[315] The prison rejected multiple religious officers' requests for accommodation to its

311. In the one published hijab case decided since *Groff*, the court denied summary judgment to the employer on the issue of undue hardship, among others, and included limited analysis but highlighted that the employer's defense was undermined by widespread practice. *See* Hamood v. Arab Cmty. Ctr. for Econ. & Soc. Servs. (ACCESS), No. 23-cv-10270, 2025 WL 975389 *5–6 (E.D. Mich. Mar. 31, 2025) (finding fact dispute on whether teacher covering her face with a niqab posed an undue hardship to language education provider by inhibiting student learning during the pandemic, "particularly when schools across the country required teachers, including language teachers, to be masked").

312. *See* United States v. Cal. Dep't of Corr. & Rehab., 737 F.Supp. 3d 977 (E.D. Cal. 2024).

313. *Id.* at 980. The U.S. Department of Justice filed suit for preliminary injunctive relief on behalf of eight charging parties who had filed charges of discrimination with the EEOC. *Id.* at 982–83. The suit was filed after the agency concluded preliminary relief was necessary to allow religious charging parties to maintain their beards while the EEOC completes its investigation. *Id.* at 981.

314. *Id*. at 982.

315. *Id*. at 988. The Court articulated the argument thus: "Defendant's argument is that because all Correctional Officers can, at any time, be required to work in any section of a prison or in any posting, they thus may need to don a respirator in response to the usage of chemical agents or risk of encountering [Aerosol Transmissible Diseases]. Therefore, Defendant argues all Correctional Officers must be able to use a respirator at all times." *Id.*

policy.[316] The court engaged in a thoughtful and thorough analysis under *Groff* before rejecting the prison's arguments.[317]

In its exhaustive opinion, the court explained its order granting the religious claimants a preliminary injunction from the policy.[318] The court reasoned that the prison had not shown substantial increased costs amounting to undue hardship because: (1) when it came to protecting against airborne diseases, the prison failed to show how frequently such respirators were used, and the evidence showed their need is confined to specific locations and duties within individual institutions or exigent circumstances like a particular outbreak when beard accommodations could be reevaluated; and (2) as far as chemical agent respirators, the prison failed to show the frequency and need for them since events requiring their use either occurred quickly with no time for an officer to put on the bulky apparatus, or were well planned in advance such that officers who did not require religious accommodations could be tapped for such missions.[319]

These conclusions followed a close analysis of the evidence of how a beard accommodation preventing proper use of a respirator (*factor 1*) would affect the prison's work and the officer's duties (*factor 3*), in light of the multiple large facilities and thousands of correctional officers employed by the prison (*factor 4*). Although a specific cost of a beard accommodation (*factor 2*) was not presented by the prison, the court highlighted the lack of evidence of any significant cost to the prison, other than some minimal administrative ones.[320] The court ultimately concluded

316. *Id.* at 982. The officers who were the subject of the instant litigation are of the Muslim, Sikh, and Odinist faiths. The author represented six of the eight charging parties who are of the Sikh faith, along with a team of attorneys from the Sikh Coalition, attorneys and students from Stanford Law School's Religious Liberty Clinic, and attorneys from the Law Offices of Wendy Musell.

317. *See id*. at 980–1002.

318. *See id*. at 980–82.

319. *See id.* at 981–82, 990–96. The Court found compelling evidence that two charging parties had never used a respirator over the course of several years on the job. *Id.* at 993.

320. For instance, the Court noted that "[w]hile it would certainly be administratively easier for Defendant to not have to consider who can and who cannot work in an [aerosol transmissible diseases]-exposure environment, administrative inconvenience does not constitute an

that based on the minimal use of respirators and the ability of the prison to assign other officers the duties requiring respirators in most instances, providing an accommodation to the employees requesting it would not amount to an undue hardship.[321]

The court also carefully examined some of the additional considerations listed as factors five through eight above. The court noted that the prison did not engage in an individualized assessment for each charging party "in their specific role at the institution in which they were posted," (*factor 6*), but instead issued blanket denials, undermining any hardship defense.[322] The court looked at the effect on third-parties (*factor 8*), noting that the prison failed to show that seniority prevented accommodation, and provided no evidence on the amount of work that would be shifted to other employees or its effect on the conduct of the prison's business.[323] The court clarified that "[a]n employee doing more of a portion of his job so that the employer can accommodate a religious observance is not inherently an undue hardship" but rather can rise to that level if evidence shows a significant effect to the conduct of the business.[324]

The court also called out a problematic argument by the prison (*factor 7*), suggesting that allowing beard accommodations would result in officers falsely claiming "religious beliefs [that] prevent them from shaving."[325] The court made clear that the "claim appears to be entirely without basis" and "is an inappropriate suggestion without concrete evidence . . . where

undue hardship." *Id.* at 994. Dress and grooming accommodation often do not pose specific articulable costs.

321. *See id.* at 994–96.

322. *Id.* at 998. The Court concluded that "because Defendant has relied on highly generalized arguments that all Correctional Officers must be able to wear a respirator at all times and in all assignments, Defendant has refused to grapple with specific circumstances of the individual Charging Parties. Its failure to engage in a meaningful assessment of the options available to accommodate the individual Charging Parties is fatal to its opposition." *Id.* at 989.

323. *Id.* at 996–98. Regarding seniority, the Court also noted that the prison presented no evidence that it had contacted the union about whether a variance would be acceptable. *Id.* at 997.

324. *Id.* at 998.

325. *Id.* at 984 n.2.

the Charging Parties all appear to have genuinely held religious beliefs."[326] The court clearly rejected employer assertions implying insincerity that may be motivated by bias against religion.[327]

Importantly, the court made clear that any hardship defense must be supported by evidence of substantial increased costs, and generalized, conclusory, or hypothetical hardships are insufficient:

> [D]espite claiming that it is necessary for all Correctional Officers to be able to don respirators and relying on the necessity of this policy as a basis to deny the Charging Parties accommodations, Defendant fails to provide evidence establishing that this requirement is truly necessary. The mere fact of this policy—which was adopted by Defendant as one of myriad options to comply with state law—does not establish that it is required nor that deviation from this system would result in substantial increased costs, and thus undue hardship. Rather than present specific evidence supporting this policy, Defendant only provides conclusory statements suggesting that "it would be impossible for [the prison] to adequately staff prisons and respond to emergencies if even one on-duty [correctional officer] is not able to respond" . . . and supports this with a few declarations providing similarly conclusory statements.[328]

Again, properly enforcing the heightened *Groff* standard through the above-enumerated factors and requiring employers to provide concrete evidence of hardship can have the effect of discouraging bias against employees of all faiths.

326. *Id.*

327. *See id.*

328. *Id.* at 990.

Summary

To summarize, when evaluating Title VII non-accommodation cases under the "substantial increased costs" standard, federal courts should ask the following factors, gleaned from analogous state and federal schemes:

Core Factors

(1) Nature of accommodation: what is the religious objection to the job rule and the accommodation requested?
(2) Cost of accommodation: what is required from the employer to accommodate the religious practice?
(3) Nature of employer's work: what work does the employer do, what is the employee's role, and how will that work be impacted by the requested accommodation?
(4) Size of employer: how big is the employer and the facility in which the employee works in terms of revenue/profit and human capital to assess whether it has the resources to provide the requested accommodation?

Additional Considerations

(5) Other accommodations made by employer: are accommodations made to other employees, whether for religious, medical, disability, or other reasons? In particular, are exceptions made to a job rule that are analogous or pose similar alleged hardships to the one requested by the religious employee?
(6) Individualized assessment considering alternatives: did the employer work with the employee to consider and/or offer options to accommodate the employee's religious needs?
(7) Discrimination or problematic arguments: is there any indication that a denial of accommodation is

rooted in animus, bias, generalizations, or pernicious stereotypes rather than concrete hardship?

(8) Significant third-party harms: are third-party stakeholders (other employees, customers, etc.) materially negatively affected by the requested accommodation?

Each of these factors must be analyzed with concrete evidence and thoughtful consideration, rather than generalized arguments, to establish whether an "undue hardship" on the business would result from the requested religious accommodation.

CONCLUSION

No easy solution exists for entrenched and institutionalized discrimination towards Muslims and Islam, including the double discrimination whereby Muslims face targeting under government policies or bias in the workplace, then also face discrimination when they attempt to vindicate their rights in court. Such disparate and differential treatment of Muslims by the federal judiciary violates the First Amendment's fundamental neutrality principle.

When it comes to the narrower issue of helping minority faith adherents live their faith on the job, the new *Groff* standard may allow courts to adjudicate religious non-accommodation claims fairly if employer hardship defenses are adequately scrutinized as described above. For fifty years, the *Hardison* standard allowed employers to deny religious accommodations for minimal (and sometimes biased and pretextual) reasons, with courts often accepting those reasons at face value. Muslim claimants, and in particular hijabis, have borne the brunt of such lax protections in the employment discrimination space. The updated *Groff* standard can shift employer responses to requests for accommodation from a default of "no" to a default of "yes."

Although the heightened standard has the potential to produce better outcomes for minorities, including Muslim women,

it remains to be seen how courts will proceed. With the pervasive negative views of Muslims in America, and the historical data indicating Muslim plaintiffs are significantly less successful in the federal courts when it comes to religious-liberty claims than other religious adherents, it is an open question whether *Groff* can change the trajectory and create a new paradigm. If courts adhere to the heightened standard to engage in a searching review as outlined in this Article, and with the neutrality required under the First Amendment, there is hope for hijabis yet.