# ACCOMMODATING MINORITY RELIGIONS UNDER TITLE VII: HOW MUSLIMS MAKE THE CASE FOR A NEW INTERPRETATION OF SECTION 701(J)

BILAL ZAHEER*

*The ramifications of September 11th reach far beyond national security. Bilal Zaheer takes a closer look at a specific area, religion in the workplace, that figures to grow even more prominent in the post-September 11th world. In particular, Islam will soon surpass Judaism as the largest minority faith in the United States. Zaheer emphasizes the unique problems that Islam, with its practice-intensive nature, presents for both employers and employees in trying to provide equitable accommodations to religious minorities in the workplace. Although Congress passed section 701(j) of Title VII to eliminate the tension between religion and work, and force employers to accommodate certain religious practices, modern court interpretations have rendered section 701(j) an empty protection.*

*As a result, Zaheer offers a new framework for analyzing section 701(j). Specifically, Zaheer suggests that employers should be required to accommodate all practices deemed "central" to the employee's faith, unless accommodation of those practices would result in a significant hardship to the employer. In contrast, noncentral religious practices must be accommodated only if the employer can do so without incurring more than a de minimis cost. Although Islam acts as the test case for exposing and resolving interpretation issues under section 701(j), Zaheer's framework provides robust protection for all religious minorities in the workplace.*

* Associate, Jenner & Block LLP. J.D., *magna cum laude*, University of Illinois College of Law (2006); B.A. Washington University in St. Louis (2003). Many thanks to Professor George Mader, Professor David Meyer, and Erich Schork for their thoughtful comments on this note. I would like to thank my family for their love and support, especially my wife, who actually read several drafts of this note.

## I. INTRODUCTION

In the post-September 11th world, Americans have increasingly mixed feelings about religion and the role it should play in the public and private spheres.[1] More and more, Americans believe that organized religion should have less influence in the public sphere. At the same time, they remain steadfast in their personal religious convictions, with roughly sixty percent consistently indicating that religion is very important to them.[2] The implicit tension between these two views becomes explicit in the employment context, where an individual's private life and the public sphere collide, raising difficult questions as to what role religion should have in the workplace.

Conflicts between work and religion are especially acute for Americans who practice a minority religion. For most of the United States' history, Christianity has been the only religion with a meaningful presence, and thus has almost exclusively shaped the work calendar.[3] Before 1972, employers had no affirmative obligation to accommodate religion, and employees who practiced minority faiths faced difficult choices when confronted with conflicts between work and religion.[4] In 1972, Congress amended Title VII to add section 701(j), which requires employers to "reasonably accommodate" an employee's religious practices.[5] Subsequent Supreme Court decisions, however, have drastically narrowed section 701(j)'s accommodation requirement.[6]

As religious convictions in the United States continue to diversify, the Court's narrow interpretation of religious accommodation in the workplace poses serious problems for millions of religiously observant Americans who practice minority or nontraditional religions.[7] The EEOC has observed a nearly twofold increase in religious discrimination claims over the last fifteen years,[8] which can be attributed, at least in part, to changing demographics and immigration patterns.[9] Many com-

1. *See* Albert L. Winseman, *Religion Remains Front and Center—But Should It?*, THE GALLUP POLL, Feb. 1, 2005, http://www.poll.gallup.com/content/?ci=14773.

2. *Id.*

3. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 85–87 (1977) (Marshall, J., dissenting) (noting that most businesses close on Sundays and traditional Christian holidays); Tanenbaum Ctr. for Interreligious Understanding, The Tanenbaum Center and Society for Human Resource Management 2001 Survey of HR Professionals, http://www.tanenbaum.org/programs/diversity/survey2.aspx (last visited Nov. 12, 2006) (conducting a survey that found that in 99% of workplaces Christian holidays are the only official holidays).

4. *See infra* Part II.B.2.

5. *See infra* Part II.B.2.

6. *See infra* Part III.A.

7. *See* MICHAEL WOLF ET AL., RELIGION IN THE WORKPLACE: A COMPREHENSIVE GUIDE TO LEGAL RIGHTS AND RESPONSIBILITIES xiii (1998) ("As the population diversifies, conflicts between work and religion inevitably arise.").

8. *See* U.S. EEOC, RELIGION BASED CHARGES FY 1992–2005, http://www.eeoc.gov/stats/religion.html (last visited Sept. 15, 2006).

9. *See* CTR. FOR IMMIGRATION STUD., THREE DECADES OF MASS IMMIGRATION: THE LEGACY OF THE 1965 IMMIGRATION ACT (1995), http://www.cis.org/articles/1995/back395.html (last visited Oct.

mentators and analysts predict that Islam will soon surpass Judaism as the largest minority faith in the United States, marking the first time in recent American history that a non-Judeo-Christian religion is the most practiced minority faith in the United States.[10] Thus, it is time for courts to reformulate section 701(j) and make it more beneficial to members of minority faiths as Congress originally intended.

This note offers a new framework for accommodating religious practices under section 701(j) of Title VII by using Islam as a test case for exposing problems with the current interpretation of section 701(j). Part II is divided into two sections with the first section providing a brief overview of Islamic practices and American Muslims, and the second section tracing the history of religious accommodation in American statutory and constitutional law. Part III then describes and analyzes the Supreme Court's current interpretation of section 701(j), which requires employers to reasonably accommodate their employees' religious practices, unless accommodation results in an undue hardship. Next, Part IV proposes a new interpretation of section 701(j), one that better balances an employee's religious rights and responsibilities against an employer's business needs by imposing a centrality requirement for religious accommodations. Finally, Part V applies Part IV's interpretation of section 701(j) to Islamic practices to provide employers with a guide to accommodating the religious practices of their Muslim employees.

## II. BACKGROUND

A fair amount of groundwork must be laid before arguing that section 701(j) should be reinterpreted and that American Muslims are or will become critical to any reinterpretation efforts. This Part endeavors to do exactly that, first by providing a brief overview of American Muslims, Islamic duties, and cases involving Muslims in the workplace, and second by describing current statutory and constitutional provisions governing the accommodation of religion.

### *A. American Muslims: A Brief Overview*

Because most Americans think of Islam as a "thoroughly foreign religion," lack of knowledge, rather than open hostility, represents the most potent barrier to properly accommodating Muslims in the workplace.[11] This Section provides a brief overview of Islamic practices and

21, 2006) (noting that since the 1965 Immigration Act was passed, U.S. immigrants have largely come from Asia and Latin America); *see also* Steven A. Camarota, *The Muslim Wave: Dealing with Immigration from the Middle East*, NAT'L REV., Sept. 16, 2002, at 24.

10. *See infra* Part II.A.1; *see also* JOHN L. ESPOSITO, WHAT EVERYONE NEEDS TO KNOW ABOUT ISLAM 172 (2002) (noting that until recently, the vast majority of religious and ethnic minorities in the United States have been Judeo-Christian).

11. *See* ESPOSITO, *supra* note 10, at 172–73.

recounts how Muslims seeking religious accommodations have fared in court.

### *1. Why Muslims?*

At the outset, a threshold question must be asked and answered: why should Muslims, as opposed to any other minority faith, guide an analysis of religious accommodation under Title VII? There are two interrelated responses to this question. First, while there is debate over the exact number of American Muslims,[12] there is a general consensus that the number of Muslims in America has increased rapidly over the last century and is continuing to increase.[13] Indeed, Islam is or will become the most populous minority faith in the United States in the coming century.[14] More important is the unprecedented increase in visibility, via increased media coverage, that Muslims have received since September 11, 2001.[15] Unfortunately for Muslims and non-Muslims alike, this increased attention has been largely negative.[16] The increased attention has, in turn, led many American Muslims to experience "marginalization . . . and powerlessness" and has generally highlighted a wide gap of misunderstanding between American Muslims and their coworkers, employers, and colleagues.[17]

With the number of American Muslims set to eclipse all other minority religions in the United States, employers and federal courts will find themselves increasingly confronted with difficult questions concerning how to accommodate Islamic practices under section 701(j).[18] Unfortunately, the Supreme Court's decisions interpreting section 701(j) have nullified the provision, effectively leaving the statute unable to handle a practice-intensive faith, such as Islam, even though Congress passed the

12. *See* Jane I. Smith, Office of Int'l Info. Programs, U.S. Dep't of State, Patterns of Muslim Immigration, http://usinfo.state.gov/products/pubs/muslimlife/immigrat.htm (last visited Oct. 21, 2006) (noting that because the U.S. Census Bureau survey forms do not include religious preference on them, there is no official count of the number of American Muslims). *Compare* Council on American-Islamic Relations, About Islam and American Muslims, http://www.cair-net.org/default.asp?Page=aboutIslam (last visited Sept. 15, 2005) (estimating the number of American Muslims at seven million), *with* Camarota, *supra* note 9, at 24 (estimating the number of American Muslims at three million).

13. ESPOSITO, *supra* note 10, at 169; Smith, *supra* note 12; *see also* Camarota, *supra* note 9, at 24.

14. ESPOSITO, *supra* note 10, at 169; *see also* Personnel Policy, Inc., Religious Accommodations: Going Beyond the Law Makes Business Sense, http://www.ppspublishers.com/articles/religious_accomodation.htm (last visited Oct. 22, 2006) (noting that "Islam will soon pass Judaism as the second-most practiced religion in [the United States]").

15. ESPOSITO, *supra* note 10, at 171–73.

16. *Id.*; *see also* Islamophobia Watch, http://www.islamophobia-watch.com (last visited Sept. 15, 2006) (further illustrating negative media coverage of Muslims).

17. ESPOSITO, *supra* note 10, at 172–74. In fact, a *USA Today*/Gallup poll found that a substantial percentage (nearly forty percent) of Americans admit to having "at least some feelings of prejudice against Muslims." Lydia Saad, *Anti-Muslim Sentiments Fairly Commonplace*, THE GALLOP POLL, Aug. 10, 2006, http://www.galluppoll.com/context/default.aspx?ci=24073.

18. Consider the additional fact that, so far, American Muslims are a highly educated group and thus likely to be employed in influential sectors of the economy. *See* Smith, *supra* note 12 (noting that Muslims are increasingly "highly educated, successful professionals").

amendment with the intention of making religious adherence in the workplace easier for members of minority faiths.[19] Thus, Islam is an appropriate lens through which to analyze section 701(j), both because Muslims are the most likely group to seek its protection in the coming century and because Islam's practice-intensive nature, which varies significantly from mainstream American religion, highlights many of the problems with the Court's current interpretation of section 701(j).[20]

### *2. Islam: Beliefs and Practices*

Islamic law derives from two main sources: (1) the Qur'an,[21] which Muslims believe contains the direct words of God,[22] and (2) the *ahadith*, which is a voluminous collection of sayings and actions from the Prophet Muhammad, the messenger of Islam.[23] Islam places a heavy emphasis on actions in conformity with belief;[24] thus, Islamic law defines not only a Muslim's duties to God but also a Muslim's duties towards the wider community[25] and generally covers almost every aspect of life.[26] The remainder of this Section discusses the former set of duties.[27]

19. *See infra* Part III.B.2.

20. *See infra* Part II.A.2. This is not to suggest that other minority religions would not benefit from a new interpretation of section 701(j) or that Islam should exclusively shape any new interpretation. Rather, this note argues only that Muslims are an appropriate test case for a new interpretation of Title VII and that the general failure to accommodate central religious practices of the United States' soon-to-be second largest faith highlights critical problems with the Supreme Court's current interpretation of section 701(j).

21. *See* THE NOBLE QUR'AN 28 (Thomas B. Irving trans., Amana Books 1992) ("[T]he Qur'an was sent down as guidance for mankind."). The Qur'an was originally written and has been preserved in Arabic. ESPOSITO, *supra* note 10, at 8–9. The main text, along with the chapter and verse designations, is constant across translations, though the translations themselves are not entirely consistent with each other. *See id* at 8–10. Thomas Irving's translation has been chosen because of the clarity and modernity of the English that Professor Irving uses. Therefore, the listed page numbers correspond with Professor Irving's translation. The chapter and verse numbers for each cited verse have also been noted after the page numbers so that readers may refer to other Qur'anic translations, if they wish.

22. ESPOSITO, *supra* note 10, at 10.

23. JOHN ESPOSITO, ISLAM: THE STRAIGHT PATH 80–81 (1998); *see* THE NOBLE QUR'AN, *supra* note 21, at 420 ("In God's messenger [Muhammad] you have a fine model . . . ."). Like the Qur'an, the *ahadith* (singular: *hadith*) were originally written and have been preserved in Arabic. Ismail al-Bukhari's compilation of *ahadith* is considered the most authoritative collection, and thus all of the *ahadith* quoted in this note come from Bukhari's compilation. ESPOSITO, *supra*, at 82. Muhammad Muhsin Khan's translation of Bukhari's compilation is the most widely used by Muslims and non-Muslims and is the translation this note will use; to ease access to the *ahadith,* parallel citations to an internet database of Dr. Khan's translation have been provided as well.

24. ESPOSITO, *supra* note 23, at 69.

25. Abdullah bin Bayyah, Muslims Living in Non-Muslim Lands (July 31, 1999), http://www.themodernreligion.com/world/muslims-living.html.

26. ESPOSITO, *supra* note 23, at 75.

27. Muslims' duties to the wider community are not discussed in this note because most Muslim scholars agree that Islamic communal duties are enforceable only in a state that has a valid Islamic government. *See* Bayyah, *supra* note 25.

Every Muslim has five primary duties to God, known as the "pillars of Islam":[28] (1) bearing witness that God exists (*shahadah*);[29] (2) five daily prayers (*salah*), including a special Friday afternoon prayer (*jummah*); (3) fasting for one month during the lunar calendar year (*sawm*); (4) paying a fixed percentage of one's disposable income towards charity (*zakat*);[30] and (5) making a pilgrimage to Makkah, Saudi Arabia, once in one's lifetime (*hajj*). Islam's heavy emphasis on the five daily prayers as a means for both spiritual guidance and salvation, coupled with its emphasis on praying at regular intervals, makes *salah* the most challenging pillar for an employer to accommodate.[31]

In at least four different Qur'anic verses, Muslims are admonished to pray regularly and on time.[32] The Prophet Muhammad, in a well-known hadith, called praying on time one of the three best deeds a Muslim can perform.[33] Every day, a Muslim must pray five prayers at relatively fixed times: before sunrise (*fajr*), around noon (*dhur*), at midday (*'asr*), at sunset (*magrib*), and after sunset (*'isha*).[34] Each of these prayers lasts about five to ten minutes[35] and must be preceded by a ritual cleansing, known as *wudu*, which consists of washing one's mouth, nose, face, forearms and feet with water.[36] Furthermore, Muslims are highly encouraged, but not required, to perform these prayers in congregation

28. 1 THE TRANSLATION AND MEANINGS OF SAHIH AL-BUKHARI 17 (Muhammad Muhsin Khan trans., Kazi Publ'ns 6th ed. 1983) [hereinafter BUKHARI], *available at* http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/002.sbt.html#001.002.007; *see also* ESPOSITO, *supra* note 23, at 90 (calling the five pillars of Islam "the five essential and obligatory practices all Muslims accept and follow").

29. Because an employer could interfere with a Muslim's duty to believe in God only in extreme circumstances, *shahadah* will not be discussed further.

30. Because *zakat*, like *shahadah*, generally falls outside of the employer-employee relationship, it will not be discussed in this note.

31. *See* THE NOBLE QUR'AN, *supra* note 21, at 313, 20:14 ("[K]eep up prayer to remember [God] by.").

32. *See* THE NOBLE QUR'AN, *supra* note 21, at 95, 4:103 ("Prayer is a timely prescription for believers . . . ."); *id.* at 7, 2:43 ("[K]eep up prayer, pay the welfare tax, and worship along with those who bow their heads."); *id.* at 17, 2:110; *id.* at 313, 20:14.

33. 9 BUKHARI, *supra* note 28, at 471, *available at* http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/093.sbt.html#009.093.635 ("A man asked the Prophet 'What deeds are the best?' The Prophet said, '(1) To perform the (daily compulsory) prayers at their (early) stated fixed times, (2) To be good and dutiful to one's own parents. (3) and to [struggle] in Allah's Cause.'").

34. ESPOSITO, *supra* note 10, at 24. These times are "relatively fixed" because they change seasonally according to the sun's position. *See also* IslamicFinder.org, http://www.IslamicFinder.org (last visited Oct. 23, 2006) (yearly listing of prayer times in major cities).

35. *See* Alsaras v. Dominick's Finer Foods, Inc., No. 99C4226, 2001 WL 740515, at *1 (N.D. Ill. June 28, 2001) (listing the prayer times as ranging from five to ten minutes). The length of time each prayer takes is not exact.

36. THE NOBLE QUR'AN, *supra* note 21, at 108, 5:6 ("[W]henever you intend to pray, wash your face and your hands up to the elbows, and wipe off your heads and [wash] your feet up to the ankles."). As one could imagine, *wudu*, more so than the actual prayers, is a difficult concept for non-Muslims to grasp. For example, see *Tyson v. Clarian Health Partners, Inc.*, No. 1:02-CV-01888-DFH-TA, 2004 WL 1629538, at *1 (S.D. Ind. June 17, 2004), where a Muslim plaintiff's supervisor at work found her performing *wudu* in an empty patient room and thought the plaintiff was trying to take a shower.

at a designated place of worship, known as a *masjid*.[37] In addition to the five daily prayers, a special congregational prayer, known as *jummah*, is held each Friday in place of the regular noon prayer.[38] *Jummah* prayer, generally lasting an hour, is mandatory for every Muslim male, must be prayed at a *masjid*, and Muslims must not engage in business until the prayer ends.[39]

Another challenging pillar for an employer to accommodate is a Muslim's duty to fast during *Ramadan*. For one month each lunar year, known as *Ramadan*, Muslims are required to abstain from food and drink during daylight hours.[40] At sunset of each day during *Ramadan*, Muslims must break their fast with a meal,[41] and they are highly encouraged, but not required, to attend special night prayers at a local *masjid*.[42] Because Islam bases its calendar on the lunar year, *Ramadan* moves up approximately eleven days each year.[43] The first day after *Ramadan* is *Eid ul-Fitr*, which is one of two annual Muslim holidays.[44] Both the Qur'an and practice of the Prophet Muhammad have designated *Eid ul-Fitr* as a day of celebration.[45]

Finally, every Muslim who can afford the trip is required to make a pilgrimage (*hajj*) to Makkah, Saudia Arabia, at least once in one's lifetime.[46] *Hajj* lasts six days and, like the month of *Ramadan*, falls on different dates each year relative to the solar calendar.[47] Once the *hajj*

37. 1 BUKHARI, *supra* note 28, at 352, *available at* http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/008.sbt.html#001.008.466 ("[The Prophet Muhammad said], 'The reward of the prayer offered by a person in congregation twenty . . . times greater than that of the prayer in one's house or in the market."); *see also* IslamiCity, Understanding Islam and the Muslims—Prayer, http://www.islamicity.com/education/understandingislamandmuslims (follow "What Are The Five Pillars Of Islam?" hyperlink; then follow "Prayer" hyperlink) (last visited Oct. 21, 2006).

38. ESPOSITO, *supra* note 23, at 91.

39. THE NOBLE QUR'AN, *supra* note 21, at 554, 62:9–11 ("[W]hen [the call to] prayer is announced on the day of Congregation, hasten to remember God and close your place of business."); *see also* The Muslim Forum of Utah, An Employer's Guide to Islamic Religious Practices, http://www.muslim-forum.org/documents/Employer.pdf (last visited Oct. 21, 2006) (noting that Friday prayers last forty-five to ninety minutes).

40. *See* THE NOBLE QUR'AN, *supra* note 21, at 28, 2:185; *id.* at 29, 2:187.

41. ESPOSITO, *supra* note 23, at 91.

42. *See id.* at 930.

43. F.C. De Blois, *Ta'rikh, Dates and Eras in the Islamic World, In the Sense of "date, dating," etc.*, *in* 10 THE ENCYCLOPEDIA OF ISLAM 258 (P.J. Bearman et al. eds., 1998).

44. IslamiCity, The Five Pillars of Islam, http://www.islamicity.com/mosque/pillars.shtml (last visited Sept. 18, 2006).

45. *See* ESPOSITO, *supra* note 10, at 2. In fact, fasting has been specifically forbidden on *Eid-ul-Fitr*. 3 BUKHARI, *supra* note 28, at 120, *available at* http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/031.sbt.html#003.031.212 ("The Prophet forbade the fasting of *'Id-ul-Fitr* and *'Id-ul-Adha* . . . .").

46. THE NOBLE QUR'AN, *supra* note 21, at 62, 3:97 ("Pilgrimage to the House is a duty imposed on mankind by God, for anyone who can afford a way to do so."); *see also* ESPOSITO, *supra* note 10, at 21.

47. *See* Islam.com, Hajj, http://www.islam.com/hajj/hajj.htm (last visited Mar. 17, 2006) (noting that *hajj* must be completed between the 8th and 13th day of the Islamic month of *Dul-Hajj*); Salam, The Islamic Calendar, http://www.salam.co.uk/themeofthemonth/june_index.php?1=2 (last visited Sept. 17, 2006).

ends, Muslims celebrate their second annual holiday, *Eid ul-Adha*.[48] Regardless of whether one has performed *hajj*, every Muslim around the world celebrates *Eid ul-Adha*, which, like *Eid ul-Fitr*, has been designated as a day of celebration.[49] Due to the cost involved in making a trip to Saudi Arabia and the inflexible timing of *hajj*, Muslim employees fortunate enough to save the requisite money to embark on the trip would need to make the pilgrimage immediately. This immediacy requirement presents a potential accommodation problem for Muslims who work in lower-paying jobs and their employers, as the Muslim employees would have little flexibility in choosing when to perform *hajj* and would need to take at least one week off from work to complete the trip.

Other than the five pillars, Muslim men and women have certain dress requirements they must fulfill. Although the Qur'an does not specify a dress code for Muslims, it does emphasize modesty in dress for both men and women.[50] Muslim women have traditionally covered their heads with a headscarf (called *hijab*), and although there is some debate even amongst Muslims about whether Islamic law strictly requires *hijab*, Muslim women have consistently covered their heads since the time of Islam's inception.[51] Thus, at a minimum, *hijab* constitutes a very strong Islamic tradition. Although not required to cover their heads, Muslim men are encouraged to do so with a prayer cap, are required to dress modestly, and are encouraged to keep a beard in honor of the Prophet Muhammad.[52]

Thus, unlike Judeo-Christian religions, which traditionally observe a day of Sabbath and various religious holidays on fixed days of the year, Islamic law has no required weekly Sabbath. In contrast, Islamic law spreads out religious obligations over smaller time increments and does not observe holidays at consistent times each year. These differences make accommodating Islam in the workplace more difficult and costly than accommodating other religions. The next Section will discuss some of the difficulties Muslim employees have faced in trying to obtain accommodations from their employers, and Part III will analyze why the current interpretation of section 701(j) is inadequate for accommodating Islam and other minority religions.

### *3. Muslims in American Jurisprudence*

While the number of religious discrimination complaints filed by Muslims with the EEOC has more than doubled since September 11,

48. ESPOSITO, *supra* note 10, at 34.
49. *Id.*
50. THE NOBLE QUR'AN, *supra* note 21, at 353, 24:30–31
51. *See* ESPOSITO, *supra* note 10, at 95–98.
52. *Id.* at 100–01.

2001,[53] the number of actual court cases involving religious accommodation of Islamic practices has remained low.[54] However, with the increase of Muslim immigration to the United States and subsequent likely increase of Muslims in the labor force, the number of conflicts involving accommodating Muslims will likely rise, unless a new religious accommodation framework is developed.[55] This Section details a few of the more instructive federal court cases involving accommodating Islam and highlights the difficulties Muslims have faced in receiving accommodations from their employers for some of Islam's most central practices.

Most federal and state cases involving the accommodation of Islamic practices deal with accommodating prayer schedules, particularly Friday prayer. For example, in two New York cases, Muslim plaintiffs requested accommodations for Friday prayers. In the first case, the court held that the employee was bound to accept a very unappealing accommodation granted by the employer.[56] In the second case, the court held that accommodating the Muslim employee's request to attend Friday prayers would result in more than a de minimis cost to his employer, and therefore, the employer was not required to accommodate him under Title VII.[57] Thus, in both cases, the courts accorded the employer's business needs primacy over the religious needs of the employee,[58] and the

53. *See* Press Release, Equal Employment Opportunity Comm'n, EEOC Provides Answers About Workplace Rights of Muslims, Arabs, South Asians, and Sikhs (May 15, 2002), *available at* http://www.eeoc.gov/press/5-15-02.html. The EEOC also reports that from September 2001 to May 2002, 497 charges of discrimination based on being Muslim were charged, compared to 193 the previous year. *Id.*; *see also* Stephanie Armour, *Post-9/11 Charges of Bias Continue*, USA TODAY, July 6, 2005, http://www.usatoday.com/money/workplace/2005-07-05-anti-arab-workplace_x.htm?POE=click-refer.

54. There are a number of possible explanations for this discrepancy, the most likely of which is that most cases reach a settlement before trial.

55. *See infra* Part IV.

56. *See* Elmenayer v. ABF Freight Sys., No. 98-CV-4061, 2001 WL 1152815, at *1, *3–6 (E.D.N.Y. Sept. 20, 2001). Elmenayer was a Muslim truck driver in New York City who had requested an accommodation from his employer ABF that would enable him to attend Friday prayers. *Id.* at *2. Under a collective bargaining agreement, ABF employees were allowed a maximum one-hour lunch break and a subsequent fifteen-minute coffee break during their nine-hour driving shift; three such shifts existed: 12:00 a.m. to 9:00 a.m., 5:00 p.m. to 2:00 a.m., and 9:00 a.m. to 6:00 p.m. *Id.* at *2–3. Elmenayer, who worked the 9:00 a.m. to 6:00 p.m. shift, proposed that on Fridays ABF allow him to combine his lunch and coffee break (thus giving him a break totaling one hour and fifteen minutes), which would have given him enough time to complete his Friday prayers and return to work. *Id.* at *2. ABF rejected this accommodation and instead told Elmenayer that he could bid for the two night-shifts that did not conflict with his Friday prayers. *Id.* at *2. Thus, rather than simply allowing Elmenayer to combine his two breaks, ABF forced Elmenayer to choose between going to Friday prayers or working one of two very unappealing driving shifts every Friday. The court upheld ABF's decision under *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986), holding that ABF's proposed solution was a "reasonable accommodation." *Id.* at *5.

57. *See* Hussein v. Hotel Employees & Rest. Union, Local 6, 108 F. Supp. 2d 360, 370–73 (S.D.N.Y. 2000). Part III.A.1 discusses the de minimis standard in detail.

58. This is not to suggest that the courts behaved in an anomalous or prejudicial fashion; rather, both courts applied the Supreme Court's current interpretation of section 701(j). Parts IV and V argue that the current interpretation should be changed to alter the results of cases like those discussed in this Section.

employees found themselves faced with the difficult decision of finding another job or foregoing a central religious practice.[59]

In *Tyson v. Clarian Health Partners, Inc.*,[60] Fatou Tyson, a Muslim woman, worked at a hospital in Indiana as a Patient Service Assistant.[61] One week after starting work, Tyson notified her supervisor that she was Muslim and would need accommodations for her daily prayers. Initially, her supervisor agreed to accommodate Tyson's request.[62] About six months after Tyson started work, she was preparing for prayer in the bathroom of an empty patient room when her supervisor saw her performing *wudu*.[63] Using the bathroom of an empty patient room apparently violated a hospital "policy," so Tyson received a reprimand for her actions even though *wudu* is a mandatory religious prerequisite to prayer and her supervisor had already agreed to accommodate her prayer schedule.[64] One week later, the hospital fired Tyson, basing its decision partly on her performing *wudu* in a patient room.[65] In other words, the hospital fired Tyson, in part, for performing an indispensable religious practice.

Finally, in *Khan v. Federal Reserve Bank of New York*,[66] a Muslim computer programmer for the Federal Reserve Bank of New York, Zarin Khan, requested an adjustment to her work schedule while she fasted during *Ramadan*.[67] The Federal Reserve normally required its employees to work from 9:00 a.m. until 5:45 p.m. with a one hour lunch break. Khan proposed that she instead work from 8:00 a.m. to 4:00 p.m. without a lunch break.[68] Her supervisor rejected the proposed accommodation and cited an "official bank policy" that barred employees from working

59. It is worth mentioning that in both of these cases, the courts at least partly based their decision to deny the employees' accommodation requests on the fact that granting the request would violate a pre-existing collective bargaining agreement. *See Hussein*, 108 F. Supp. 2d at 371; *Elmenayer*, 2001 WL 1152815, at *1. The mere existence of a collective bargaining agreement, however, does not absolve an employer's duty to comply with section 701(j). Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 79 (1977) ("[N]either a collective-bargaining contract nor a seniority system may be employed to violate [Title VII]."). Furthermore, as Justice Marshall argued in his *Hardison* dissent, "an employer cannot avoid his duty to accommodate by signing a contract that precludes all reasonable accommodations . . . ." *Id.* at 96. Thus, courts should remain primarily concerned with whether employers offered a reasonable accommodation, and the existence of a collective bargaining agreement should not affect the court's analysis.

60. No. 1:02-CV-01888-DFH-TA, 2004 WL 1629538, at *1 (S.D. Ind. June 17, 2004).

61. *Id.*

62. *Id.* at *4.

63. *Id.* at *3.

64. *Id.* It is not clear from the opinion which hospital policy Tyson violated, but the hospital alleged that she did violate a policy and that this violation was the ground for reprimanding her. *Id.* at *1.

65. *Id.*

66. Khan v. Fed. Reserve Bank of N.Y., No. 02 Civ. 8893(JCF), 2005 WL 273027, at *1 (S.D.N.Y. Feb. 2, 2005).

67. *Id.*

68. *Id.*

through lunch.[69] Although the court ultimately decided the case on other grounds,[70] the decision still demonstrates the relative difficulty Muslims have faced in obtaining religious accommodations from their employers.

### *B. Religious Accommodation in Statutory and Case Law*

Currently, First Amendment jurisprudence permits, but does not require, the accommodation of religion, and only section 701(j) of Title VII directly addresses accommodating religion in the workplace. However, the Workplace Religious Freedom Act of 2005, which has circulated through the last five sessions of Congress (albeit without success), would significantly amend section 701(j). This Section describes all three provisions and their effect on workplace religious accommodations.

#### *1. Constitutional Provisions Governing the Accommodation of Religion*

The Constitution contains two clauses governing the relationship between religion and the government: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[71] The twin religion clauses have produced an immense amount of litigation concerning the tension between what jurists refer to as the Free Exercise Clause and the Establishment Clause.[72] In the context of accommodating religion, courts have had an especially difficult time grappling with this tension. While accommodating religious practice accords with the notion of protecting the free exercise of religion,[73] constitutionally mandating the accommodation of religion could violate the Establishment Clause. Over the last quarter century, the Supreme Court has inconsistently drawn the line between free exercise and establishment of religion.[74] Current Supreme Court jurisprudence holds that the Constitution does not require accommodating religious practices and that any accommodations must be created by the legislature.[75]

69. *Id.* The Bank also argued that allowing Khan to work through lunch would create discord with her coworkers; it is unclear from the court's opinion what kind of discord among bank employees the Bank feared. *See id.*

70. *See id.* at *3.

71. U.S. CONST. amend. I.

72. *See generally* 5 JOHN E. NOWAK & RONALD D. ROTUNDA, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 21 (3d ed. 1999) (providing a detailed discussion of the history and subsequent jurisprudence of these two clauses).

73. *See id.*

74. *Compare* Lynch v. Donelly, 465 U.S. 668, 673 (1984) (declaring that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions . . . ."), *with* Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (noting that religious accommodation, although legislatively permissible, is not constitutionally mandated).

75. *Smith*, 494 U.S. at 890.

*2. Statutory Provisions Governing the Accommodation of Religion*

Before Congress passed Title VII, no overarching statutory laws governed the accommodation of religion in the workplace. Title VII, as originally enacted, prohibited discrimination on the basis of religion but included neither a statutory definition of religion nor any mention of religious accommodations, thus leaving open the question of whether employers had an affirmative duty to accommodate religion in the workplace.[76] The question remained unanswered until 1970, when the Sixth Circuit Court of Appeals addressed it in *Dewey v. Reynolds Metals Co*.[77]

*Dewey* involved a member of the Faith Reformed Church, Robert Dewey, who was a union member and employee of Reynolds Metal. After Reynolds negotiated with the union for mandatory employee overtime shifts, Dewey objected to the extra hours and refused to work on Saturdays, arguing that his religious beliefs prohibited him from working on his Sabbath.[78] Reynolds eventually fired Dewey for his refusal to work on Saturday, and Dewey filed suit against Reynolds, arguing that Reynolds violated Title VII by discriminating against him because of his religion.[79] The Sixth Circuit rejected Dewey's claim, stating, "[n]owhere in the legislative history of [Title VII] do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another."[80] On appeal, the Supreme Court affirmed the Sixth Circuit's decision in a 4-4 per curium decision, thus leaving unresolved many questions surrounding religious accommodation.[81]

In 1972, Congress responded to *Dewey* by adding section 701(j) to Title VII.[82] Section 701(j) states: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[83] Thus, section 701(j) essentially codified the EEOC's 1967 regulations, which also required an employer to reasonably accommodate the religious needs of its employees "where such accommodations can be made without undue hardship" to the employer's business needs.[84] When the

76. Civil Rights Act of 1964, Pub. L. No 88-352, §§ 701–716, 78 Stat. 253 (current version at 42 U.S.C. § 2000e (2000)).

77. 429 F.2d 324 (6th Cir. 1970).

78. *Id.* at 327–28.

79. *Id.* at 327.

80. *Id.* at 334.

81. Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971) (per curiam).

82. Equal Opportunity Employment Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103, 103 (codified as amended at 42 U.S.C. § 2000e(j) (2000)); *see* 118 CONG. REC. 705, 705–06 (1972) (statement of Sen. Randolph); *see also* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 73–75 (1977) (noting that Congress passed section 701(j) in response to *Dewey*).

83. 42 U.S.C. § 2000e(j).

84. Clare Zerangue, *Sabbath Observance and the Workplace: Religion Clause Analysis and Title VII's Reasonable Accommodation Rule*, 46 LA. L. REV. 1265, 1278 (1986) (quoting Guidelines on Dis-

amendment was introduced in the Senate, Senator Jennings Randolph, the main proponent of section 701(j), expressed his desire "to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law."[85]

Senator Randolph belonged to a religious minority, the Seventh-Day Baptists, and expressed strong concern over court decisions that did not protect the right of an employee to observe the Sabbath on a day other than Sunday.[86] He also expressed concern that should the amendment not pass, employees who were not receiving religious accommodations might soon find themselves in the unfortunate position of choosing between work and religion.[87] Thus, Senator Randolph introduced, and the Senate passed, section 701(j) with the express intention of superseding *Dewey* and, at a minimum, requiring employers to accommodate employees' religious obligation to observe their Sabbath.[88] Because Congress failed to define "reasonable accommodation" or "undue hardship," the judiciary has retained considerable discretion in defining the scope of an employer's religious accommodation duty. As Part III.A will demonstrate, the Supreme Court has interpreted these two terms in a manner extremely favorable to employers, essentially nullifying section 701(j).[89]

### *3. The Proposed Workplace Religious Freedom Act of 2005*

Since 1996, Congress has introduced some variant of an amendment to section 701(j) in every session.[90] The most recent bill, called the Workplace Religious Freedom Act (WRFA) of 2005, defines "undue hardship" as "requiring significant difficulty or expense" and includes a nonexhaustive list of factors that courts should consider in determining

crimination in Religion, 29 C.F.R. § 1605.1(b) (1968)); *see also* Mich. Dep't of Civil Rights *ex. rel.* Parks v. Gen. Motors Corp., 317 N.W.2d 16, 25 (Mich. 1982) ("[T]he passage of . . . [section 701(j)] . . . was hailed . . . as having laid to rest any doubts as to the effect of the EEOC guidelines.").

85. 118 CONG. REC. 705 (1972) (statement of Sen. Randolph). The congressional record is cited here, as opposed to other forms of legislative history (such as a committee report), because the brief debate preceding the passage of the amendment is the only form of legislative history available. Furthermore, the Supreme Court cited the congressional record in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), and referred to it as the "legislative history" of section 701(j). *Id.* at 74; *see also* Sonny Franklin Miller, *Religious Accommodation Under Title VII: The Burdenless Burden*, 22 J. CORP. L. 789, 793 n.31 (1997) (noting that the floor debate constitutes all of section 701(j)'s legislative history).

86. *See* 118 CONG. REC. 705 (1972) (statement of Sen. Randolph) ("[T]here has been a partial refusal at times on the part of employers to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work . . . on particular days. So there has been . . . a dwindling of the membership of some of the religious organizations . . . .").

87. *See id.*

88. *See id*. at 705–06.

89. *See* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 67–71 (1986); *Hardison*, 432 U.S. at 75–85; *see also* Miller, *supra* note 85, at 797 (arguing that the Supreme Court's current interpretation of section 701(j) has transformed it into "an empty protection").

90. Robert A. Caplen, *A Struggle of Biblical Proportions: The Campaign to Enact the Workplace Religious Freedom Act of 2003*, 16 U. FLA. J.L. & PUB. POL'Y 579, 600–01 (2005).

what constitutes an "undue hardship."[91] The proposed amendment also seeks to increase protection for employees wishing to take time off from work for a "religious observance or practice."[92] According to Senator Rick Santorum, one of the bill's co-sponsors, the WRFA would restore "a balanced approach to religious freedom in the workplace" by "clarif[ying] current law."[93] So far, the WRFA has not passed, and it seems unlikely to pass any time soon.[94] However, the mere fact that members of Congress have proposed the bill more than once warrants further analysis of the WRFA and what effect it would have, if enacted, on the recommendation this note makes in Part IV. Accordingly, Part III analyzes the WRFA's relationship to section 701(j) in the context of congressional intent, and Part IV proposes a solution that resembles parts of the WRFA, while adding a few limitations that better balance the rights of employees and employers than the proposed WRFA.[95]

## III. ANALYSIS

The text of section 701(j), read in conjunction with the legislative history discussed above, suggests that section 701(j) should have provided strong support to employees in need of religious accommodations. In practice, the Supreme Court has interpreted an employer's duty to accommodate religion so narrowly that some commentators question whether the duty still exists.[96] This Section describes and analyzes two seminal Supreme Court cases interpreting section 701(j), and then argues that these two cases interpret section 701(j) in a manner inconsistent with the statute's plain meaning and purpose as well as in a manner that disproportionately affects members of minority religions.

### *A. Supreme Court's Interpretation of Section 701(j)*

Although the Supreme Court has never directly decided whether section 701(j) passes constitutional muster,[97] the Court has on two sepa-

91. Workplace Religious Freedom Act of 2005, S. 677, 109th Cong. § 2(a)(4) (2005).

92. *Id.* § 2(b).

93. 152 CONG. REC. 1407–08 (daily ed. Feb. 16, 2006) (statement of Sen. Santorum).

94. Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & RELIGION 187, 214 (2001).

95. *See infra* Parts III, IV. The recommendation in Part IV does not, however, depend on the WRFA passing; rather, it suggests that the judiciary should reinterpret key terms in section 701(j), and the recommended interpretations resemble the definitions in the proposed WRFA. *See infra* Part IV.

96. *See generally* Miller, *supra* note 85.

97. *See* NOWAK & ROTUNDA, *supra* note 72, § 21.13, at 175; *see also* Miller, *supra* note 85, at 806. Although the Court has never directly addressed the constitutionality of section 701(j), *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), strongly suggests that when the Court does decide this question, it will hold that section 701(j) does not violate the Constitution. *Id.* at 711–12 (O'Connor, J., concurring). Justice O'Connor's concurring opinion in *Estate of Thornton* expressly found section 701(j) to be harmonious with the Court's Establishment Clause jurisprudence. *Id.*; *cf.* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 91 (1977) (Marshall, J., dissenting) ("I think it beyond dispute

rate occasions interpreted the scope of an employer's duty under section 701(j).[98] In *Trans World Airlines, Inc. v. Hardison*,[99] the Court defined "undue hardship" and its relationship to what constitutes a reasonable accommodation. Nine years later, the Court elaborated on the scope of reasonable accommodation in *Ansonia Board of Education v. Philbrook*.[100] Together, these two cases have significantly narrowed an employer's duty to accommodate religion in the workplace.

*1.* Trans World Airlines, Inc. v. Hardison

The issue in *Hardison* was "the extent of the employer's obligation under Title VII to accommodate an employee whose religious beliefs prohibit him from working on Saturdays."[101] Larry Hardison, who was a member of a religion that required its followers to observe a Saturday Sabbath, worked as a desk clerk for TWA, which never closed even for traditional holidays.[102] When Hardison's transfer to a new building at TWA reduced his seniority level, his union refused to depart from its seniority system and permit Hardison to take Saturdays off.[103] Hardison proposed several alternative work arrangements to TWA, but TWA eventually rejected all of them.[104] After TWA fired him for refusing to work on Saturday, Hardison sued TWA, arguing that the airline had discriminated against him on account of his religion.[105]

The Court began its analysis by noting that Congress passed Title VII to "eliminat[e] discrimination in employment; [thus] similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin."[106] Therefore, the Court concluded that religious accommodations resulting in preferential treatment for an employee violate Title VII's antidiscrimination principle and are necessarily unreasonable.[107] Furthermore, the Court held that requiring an employer "to bear more than a de minimis cost" in providing a religious accommodation constitutes an undue hardship to the employer.[108]

Thus, under *Hardison*'s narrow interpretation of section 701(j), Title VII permits only religious accommodations that do not result in preferential treatment for an employee and incur no more than a de minimis

that [section 701(j)] does—and, consistent with the First Amendment, can—require employers to grant privileges to religious observers as part of the accommodation process.").

98. *See Hardison*, 432 U.S. at 63; Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986).
99. 432 U.S. 63.
100. 479 U.S. 60.
101. 432 U.S. at 66.
102. *Id*. at 66–67.
103. *Id.* at 67–68.
104. *Id.* at 68–69.
105. *Id.* at 69.
106. *Id.* at 71.
107. *Id.* at 81.
108. *Id.* at 84.

cost to the employer. More astounding than this narrow holding, however, is that it would have cost TWA, a multinational corporation, only $150 to accommodate Hardison's Sabbath observance, but the Court still deemed this insignificant cost an undue hardship.[109] Rather than focusing on an employee's right to religious accommodation, which section 701(j) creates, the Court instead focused on Title VII's overall antidiscrimination mandate in holding that employers need not accommodate religious practices if doing so would result in "preferential" treatment for employees.[110]

However, "if an accommodation can be rejected simply because it involves preferential treatment, then . . . [section 701(j)], while brimming with sound and fury, ultimately signif[ies] nothing."[111] The very idea of accommodating a religious practice involves exempting an employee from an otherwise neutral employment rule.[112] Thus, the issue is not whether an employee receives preferential treatment, but rather whether granting this treatment results in an undue hardship to the employer.[113] In reaching its holding, the Court clearly signaled that employer business needs and the rights of other employees heavily outweigh an employee's right to religious accommodation.[114] This reasoning not only directly contradicts the plain language and congressional intent behind section 701(j), but also disproportionately impacts the rights of adherents to minority religions.[115]

*2.* Ansonia Board of Education v. Philbrook

Nine years after *Hardison*, the Supreme Court again addressed the extent of an employer's duty to reasonably accommodate religion in *Ansonia*, and rather than mitigate *Hardison*'s harsh result, the Court further narrowed the employer's accommodation duty.[116] Under the Ansonia School District's collective bargaining agreement, each teacher received three days of paid leave to attend religious holidays and three days of paid leave to attend to "necessary personal business," which could *not* include religious holidays.[117] Robert Philbrook, a teacher, subscribed to a faith that required him to observe six religious holidays a year.[118] Prior to 1976, Philbrook took unpaid leave to observe the extra three religious holidays; however, in 1976, Philbrook proposed two alternative arrange-

109. *Id.* at 92 n.6 (Marshall, J., dissenting).
110. *See id.* at 71 (majority opinion).
111. *Id.* at 87 (Marshall, J., dissenting) (internal quotation marks omitted).
112. *Id.* at 87–88.
113. *See id.* at 88.
114. *See* Zerangue, *supra* note 84, at 1288.
115. *See infra* Part III.B.
116. Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986).
117. *Id*. at 63–64.
118. *Id*. at 62–63.

ments to the school board, both of which the school board rejected.[119] Philbrook responded by filing a complaint against the school board, alleging that it had discriminated against him on the basis of his religion.[120]

Although the Supreme Court ultimately remanded the case to the district court for further findings, it did address the question whether, in trying to reasonably accommodate an employee's religious practices, an employer must accept the employee's preferred accommodation, unless that accommodation results in an undue hardship.[121] The Court answered this question in the negative, finding "no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation."[122] Furthermore, the Court held that "*any* reasonable accommodation by the employer is sufficient to meet its [Title VII] obligation."[123] In so holding, the Court implicitly raised and answered a central question that underlies section 701(j)'s reasonable accommodation requirement: for *whom* should the accommodation be reasonable?

The Court's holding strongly suggests that in determining whether an accommodation is reasonable, the Court views "reasonableness" from the perspective of the employer, not the employee. For example, in requiring the Ansonia school board to provide a reasonable accommodation to Philbrook, the Court concluded that allowing Philbrook to take unpaid leave to observe religious holidays "eliminate[d] the conflict between employment requirements and religious practices," and thus constituted a reasonable accommodation.[124] In this case, however, the school board's proposed accommodation only *superficially* eliminated the religious conflict for Philbrook. Although he could take unpaid leave to observe religious holidays, Philbrook still faced the difficult choice of foregoing three days of income to stay faithful to his religion, or earning income but violating his faith by working during a religious holiday.[125]

As Justice Marshall argued in his partial dissent, Congress passed section 701(j) precisely to alleviate this conflict,[126] and in ignoring congressional intent, the Court's interpretation essentially lifts any duty on the employer to work with the employee to find a reasonable accommodation.[127] An employer can easily devise any number of "accommoda-

119. *Id*. at 64–65.
120. *Id*. at 65.
121. *Id*. at 66.
122. *Id*. at 68.
123. *Id*. (emphasis added).
124. *Id.* at 70.
125. Given that teachers already earn a low salary, foregoing three days of income would only have exacerbated this difficult choice for Philbrook. *See* Press Release, Nat'l Educ. Ass'n, Inflation Outpaces Teacher Salary Growth in More Than 40 States (Dec. 5, 2005), *available at* http://www.nea.org/newsreleases/2005/nr051205.html.
126. *Ansonia*, 479 U.S. at 74 (Marshall, J., concurring in part, dissenting in part).
127. Huma T. Yunus, *Employment Law: Congress Giveth and the Supreme Court Taketh Away: Title VII's Prohibition of Religious Discrimination in the Workplace*, 57 OKLA. L. REV. 657, 662–63

tions" that at least superficially eliminate the employee's religious conflict but in actuality still leave the employee with a difficult choice between religious duty and work obligations.[128] Until an accommodation "*fully* resolves the conflict between the employee's work and religious requirements" or at least *mostly* resolves the conflict, the accommodation is of little use to an employee.[129] As Part III.B will argue, the *Ansonia* Court's decision to view reasonableness from the perspective of the employer poses several additional problems, including contravening congressional intent.

### *B. Criticisms of the Current Section 701(j) Interpretation*

The Court's current interpretation of section 701(j) poses three interrelated problems. First, it violates the plain meaning of the amendment by interpreting "undue hardship" to mean the opposite of its ordinary meaning. Second, the Court's narrow, employer-friendly reading of section 701(j) contradicts the purpose of the amendment. Finally, because the current interpretation heavily favors employers, it disadvantages employees who practice minority religions such as Islam.[130]

#### *1. Plain Meaning*

Perhaps one of the most firmly rooted canons of statutory interpretation is that the language of a statute is the starting point for interpretation.[131] Only when there is express congressional intent supporting an interpretation contrary to the plain language of the statute,[132] or where the statutory language is ambiguous, do courts look beyond the statute.[133] In

(2004) (arguing that "[a]s a practical matter, almost any type of employer accommodation is sufficient to uphold the employer's duty to reasonably accommodate under Title VII").

128. *See* Elmenayer v. ABF Freight Sys., No. 98-CV-4061(JG), 2001 WL 1152815, at *3–4 (E.D.N.Y. Sept. 20, 2001) (employer "accommodated" Muslim employee by forcing employee to switch to one of two night shifts); *see also supra* note 56 (providing a more detailed description of *Elmenayer*'s facts).

129. *Ansonia*, 479 U.S. at 72–73 (Marshall, J., concurring in part, dissenting in part).

130. Included in "minority religions" are not only those religions that have fewer adherents than Christianity, but also (and perhaps especially) nontraditional religions, that is, religions that do not descend from the Judeo-Christian tradition or that most Americans do not believe descend from this tradition, such as Islam. *See* ESPOSITO, *supra* note 10, at 172–73 (noting that most Americans think of Islam as a religion that is not part of the Judeo-Christian tradition).

131. *See, e.g.*, Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). *See generally* Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 1 (Amy Gutman ed., 1997). Of course, Justice Scalia believes the language of the statute is also the endpoint of statutory interpretation. *See id.* at 23–24.

132. *GTE Sylvania*, 447 U.S. at 108.

133. *See, e.g.*, Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892). This case is most frequently cited for its famous declaration that "[i]t is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." *Id.*; *see also* Scalia, *supra* note 131, at 20–21 (lamenting the fact that lawyers frequently cite *Holy Trinity* as support for looking beyond the statutory language to interpret it).

trying to determine the plain meaning, courts frequently consult canons of statutory interpretation and dictionary definitions of relevant terms in the statute.[134] Notably, the Court's current interpretation of section 701(j) contradicts both the statute's plain meaning and the underlying congressional intent.[135]

*The Oxford English Dictionary* defines "undue" as "[g]oing beyond what is appropriate, warranted, or natural," including "excessive" as a synonym.[136] Furthermore, *Oxford Dictionary* defines "hardship" as "an infliction of severity or *suffering*."[137] Taken together, a dictionary definition of "undue hardship" essentially equates the phrase with an excessive amount of suffering. *Black's Law Dictionary* defines an analogous phrase, "undue burden," as a burden that is "excessive or unwarranted."[138] In contrast to "undue burden," *Black's Law* defines "de minimis" as "trifling" and "so insignificant that a court may overlook it in deciding an issue or case."[139] Thus, the plain meaning of undue hardship is diametrically opposed to the plain meaning of de minimis. By interpreting section 701(j)'s undue hardship language as requiring an employer to bear no more than a de minimis cost to accommodate an employee's religious practices, the Supreme Court has disregarded the plain meaning of section 701(j) and "effectively nullif[ied]" the statute.[140]

Indeed, the Court's interpretation of undue hardship in the religious accommodation context differs markedly from its application of this phrase and similar phrases in other contexts, further highlighting the atypical nature of the Court's current interpretation. For example, in deciding whether a particular law regulating abortion is valid, the Court has held that any law that imposes an "undue burden" on a woman's right to choose to have an abortion violates the Due Process Clause.[141] In this context, the Court defines undue burden as any law or regulation that has the "purpose or effect of placing a *substantial obstacle* in the path" of a woman seeking an abortion.[142] Congress also employed the phrase "undue hardship" in the Americans with Disabilities Act (ADA), but unlike section 701(j), the ADA includes a definition of that phrase—a definition that significantly differs from the Court's interpretation of this same phrase in the religious discrimination context.[143] The ADA defines

134. *See, e.g.*, O'Gilvie v. United States, 519 U.S. 79, 83 (1996).

135. See *infra* Part III.B.2 for a discussion of congressional intent.

136. 18 THE OXFORD ENGLISH DICTIONARY 1010 (2d ed. 1989).

137. 6 *id*. at 1114 (emphasis added).

138. BLACK'S LAW DICTIONARY 732 (2d Pocket ed. 2001).

139. *Id*. at 192.

140. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 89 (1977) (Marshall, J., dissenting); *see also id.* at 92 n.6 ("As a matter of law, I seriously question whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than *de minimis* cost' . . . .").

141. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992).

142. *Id*. at 877 (emphasis added).

143. Americans with Disabilities Act, 42 U.S.C. § 12111(10)(A) (2000). Unlike section 701(j), the ADA provides an express definition of "undue hardship." *Id*. Some commentators have argued that the Court should adopt the ADA's undue hardship standard for section 701(j) religious discrimination

"undue hardship" as "action requiring *significant difficulty or expense*"[144] when considered in light of several factors listed in subsection 101(B).[145] Thus, it appears that only for religious accommodations has the Court interpreted "undue hardship" in a manner at odds with its ordinary meaning, and this deviation has significantly hampered section 701(j)'s effectiveness.

The Court's current interpretation of section 701(j) departs so significantly from the plain meaning of the statute that it raises the question: what motivated the Court to choose the interpretation it ultimately settled on in *Hardison*? As Justice Marshall pointed out in his *Hardison* dissent, the majority's opinion, while ignoring the plain language of the statute, possessed the "singular advantage" of avoiding any potential constitutional problems with section 701(j).[146] In deciding *Hardison*, the Court could have chosen one of two routes: (1) interpret section 701(j) as requiring employers to accommodate *all* religious practices, unless doing so results in *significant* hardship, and thereby subject section 701(j) to constitutional attacks,[147] or (2) interpret section 701(j) as requiring employers to accommodate only those religious practices that result in a less than de minimis cost to the employer. The *Hardison* majority ultimately chose the second route, and avoided any potential constitutional difficulties with section 701(j). However, as Part IV will show, another framework for interpreting section 701(j) exists—one that reaches a better balance between plain meaning, congressional intent, and the Constitution.[148]

Although the Court's current interpretation of section 701(j) contradicts the statute's plain meaning, its approach has some advantages. First, as mentioned above, by equating undue hardship with de minimis cost, the *Hardison* majority avoided confronting the potentially difficult issue of whether the Establishment Clause would permit "interpreting [Title VII] to compel employers . . . to incur substantial costs to aid the religious observer."[149] This advantage has been seriously eroded, how-

cases. *See generally* Miller, *supra* note 85. Indeed, some commentator's have argued that the WRFA essentially codifies the ADA's standard for section 701(j) religious accommodations. *See* James A. Sonne, *The Perils of Universal Accommodation: The Workplace Religious Freedom Act of 2003 and the Affirmative Action of 147,096,000 Souls*, 79 NOTRE DAME L. REV. 1023, 1024 (2004). However, because religious accommodation differs significantly from disability accommodation, this note develops a different framework. *See infra* Part IV.

144. 42 U.S.C. § 12111(10)(A) (emphasis added).

145. *Id.* § 12111(10)(B). Some of the factors affecting the nature of this burden include: (1) the nature and cost of the proposed accommodation, (2) the size of the employer, and (3) the financial resources of the employer. *Id.*

146. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 89–90 (1977) (Marshall, J., dissenting). As Justice Marshall further argued, statutory interpretations that avoid constitutional problems are preferable to interpretations that might pose a constitutional problem only when the former interpretation is *reasonable*. *Id.* In light of Marshall's dissent, it is questionable whether the Court's holding in *Hardison* reached a reasonable compromise solution. *See id*.

147. *Id.* at 85 (Marshall, J., dissenting).

148. *See infra* Part IV.

149. *Hardison*, 432 U.S. at 90 (Marshall, J., dissenting).

ever, by subsequent Supreme Court decisions that have all but confirmed that the Court will find section 701(j) consistent with the Establishment Clause.[150] Second, the Court's current interpretation creates a simple, bright-line rule, which results in easy application and prevents employers from having to deal with a potentially high number of accommodation requests, many of which could be trivial or insincere.[151] In creating this bright-line rule, however, the Court effectively has eliminated an employee's ability to obtain religious accommodations and has tipped the scale too far in the favor of employers.[152] Part IV develops a framework that better balances an employee's religious needs with an employer's business needs.[153]

### *2. Congressional Intent*

The Court's current interpretation of section 701(j) also directly contradicts congressional intent.[154] The *Hardison* majority asserted that "[t]he brief legislative history of § 701(j) is . . . of little assistance."[155] However, as Part II.B demonstrated, the legislative history of section 701(j), although admittedly short, deals directly with the factual scenario that the *Hardison* Court faced.[156] Moreover, while the *Hardison* majority insisted that the "reach" of the duty to reasonably accommodate "has never been spelled out by Congress,"[157] the congressional record contains two hypothetical situations posed to Senator Randolph by other Senators wishing to clarify the scope of the duty imposed by the amendment.[158]

For example, when attempting to clarify what might constitute an undue hardship, Senator Williams outlined the scenario of an employee

150. *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 711 (1985) (O'Connor, J., concurring). In discussing the constitutionality of section 701(j), Justice O'Connor stated in her concurring opinion, "I do not read the Court's opinion as suggesting that the religious accommodation provisions of Title VII . . . are . . . invalid. . . . Since Title VII calls for reasonable rather than absolute accommodation . . . I believe an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion . . . ." *Id.* at 711–12; *see also* Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (holding that religious accommodations, although not mandated by the Constitution, can be created by the legislature).

151. *See, e.g., Hardison*, 432 U.S. at 85 n.15 (noting that accommodating the plaintiff's request to have Saturday off would result in a more-than-trivial cost to TWA because of "the likelihood that a company as large as TWA may have many employees whose religious observances . . . prohibit them from working on Saturdays or Sundays").

152. *See infra* Parts III.B.2, III.B.3.

153. *See infra* Part IV.

154. *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting) ("[T]oday's result is intolerable, for the Court adopts the very position that Congress expressly rejected in 1972, as if we were free to disregard congressional choices that a majority of this Court thinks unwise.").

155. *Id.* at 74.

156. *See supra* Part II.B; *see also Hardison*, 432 U.S. at 88 (Marshall, J., dissenting) ("In reaching [its] result, the Court seems almost oblivious of the legislative history of . . . [section 701(j)] . . . which . . . is far more instructive than the Court allows.").

157. *Hardison*, 432 U.S. at 75.

158. 118 CONG. REC. 705, 705–06 (daily ed. Jan. 21, 1972).

hired to work a weekend-only job.[159] If this employee could not work one of the two days because of a religious observance, then that constituted an undue hardship that section 701(j) would not require the employer to accommodate.[160] On the other hand, no undue hardship would fall on an employer who had to create a flexible work schedule for an employee whose religion required him to work fifteen days and then take off fifteen days.[161] Thus, despite the *Hardison* majority's assertion that the legislative history of section 701(j) does not clarify the scope of an employer's duty, the Senate clearly contemplated a much higher level of accommodation than the Court currently requires.[162]

Senator Randolph's remarks reveal another important point that sheds light on the purpose of the amendment: the senator's deep concern over employees being forced to choose between religion and their jobs.[163] Thus, in proposing section 701(j), Senator Randolph hoped to eliminate that difficult choice for employees by requiring employers to make reasonable accommodations for the religious needs of employees.[164] This demonstrates that, at a minimum, reasonable accommodation includes those practices that, if prohibited, would force the employee to choose between religion and work.[165]

Furthermore, in holding that an employer satisfies its duty to accommodate an employee simply by choosing any "reasonable accommodation," the Court purportedly relied on section 701(j)'s legislative history, which calls for "flexibility" in devising reasonable accommodations.[166] However, as Justice Marshall noted in his partial dissent, the specific language on which the majority relied is ambiguous and can easily support the opposite of the Court's conclusion.[167] Much like in *Hardison*, the *Ansonia* Court seemingly ignored the overall message of section 701(j)'s legislative history and instead narrowed the employer's duty to accommodate even further, despite convincing evidence in the congressional record indicating a contrary intent.

Finally, the fact that members of Congress have repeatedly introduced some variant of the WRFA, essentially aimed at overruling *Hardi-*

159. *Id*. at 706.

160. *Id.* (statement of Sen. Randolph).

161. *Id.* It is unclear from the exchange between Senator Randolph and Senator Dominick exactly what kind of arrangement the employer would be required to make, but the critical point here is that the chief proponent of the amendment, which was unanimously passed by the Senate, did not imagine the described scenario would create an undue hardship. *Id.*

162. Miller, *supra* note 85, at 793.

163. 118 CONG. REC. 705, 705 (daily ed. Jan. 21, 1972); *see also* Miller, *supra* note 85, at 792–93.

164. 118 CONG. REC. 705, 705 (daily ed. Jan. 21, 1972).

165. *Cf.* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 88 (1977) (Marshall, J., dissenting) (calling a hypothetical application of the majority's interpretation of section 701(j), which could result in an employee being forced to choose between work and religion, a "mockery of the statute").

166. Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 69 (1986). Although purporting to rely on the legislative history of section 701(j), the Court also stated that it thought this history was of "little help in defining the employer's accommodation obligation." *Id.*

167. *See id.* at 74 (Marshall, J., concurring in part, dissenting in part).

*son* and part of *Ansonia*, could point to Congress' awareness of the problems with the Court's interpretation of section 701(j). On the other hand, one might conclude from the WRFA's inability to pass, or even come to a vote, that a majority of Congress tacitly approves of the way courts have handled interpreting key terms in section 701(j).[168] However, the most likely explanation for the WRFA's nonpassage lies not in any tacit congressional approval but in the strong lobbying efforts of powerful corporate interest groups set on ensuring that the WRFA does not pass.[169] The inability of the various versions of the WRFA to pass probably means that while Congress recognizes problems with current section 701(j) jurisprudence, it is unsure how best to correct the problem in a manner satisfactory to both corporate and religious lobbying coalitions.[170]

### *3. Effect of Current Interpretation on Minority Religions*

Lastly, the Court's imposition of a de minimis ceiling on the cost of religious accommodations and its narrow definition of "reasonable accommodation" results in a very employer-friendly application of section 701(j), making it nearly impossible for an employee who practices a minority religion to obtain meaningful accommodations from an employer. Due to the United States' largely Christian history, the vast majority of work calendars are well equipped to handle Christian holidays and religious practices.[171] For example, most businesses close, or have reduced hours on, Christmas and Sundays.[172] Therefore, employees who subscribe to a majority sect of Christianity will find it relatively easy to practice their religion, as most of the necessary holidays are already built into the employer's work calendar and impose no additional costs on the employer.

Furthermore, the cost to accommodate members of a majority religion will almost always be significantly less than the cost to accommodate members of minority religions because of sheer numbers. Employers

168. Sonne, *supra* note 143, at 1045.

169. *See* Kevin Eckstrom, *Bill Aimed at Protecting Faith While on the Job*, WASH. POST, May 10, 2003, at B8 ("Business lobbyists have stalled attempts to advance the bill for almost a decade."); *see also* Berg, *supra* note 94, at 214 ("[T]he [WRFA] is opposed by a virtually unbeatable coalition . . . . Unless the political dynamics change substantially, the bill is unlikely to pass . . . ."). *But see* Laura M. Johnson, *Whether to Accommodate Religious Expression That Conflicts With Employer Anti-Discrimination and Diversity Policies Designed to Safeguard Homosexual Rights: A Multi-Factor Approach for the Courts*, 38 CONN. L. REV. 295, 302 (2005) (noting that supporters of the WRFA are hopeful that the post-9/11 resurgence of interest in religion leads to the WRFA passing).

170. *See* Johnson, *supra* note 169, at 303 (noting that the WRFA is "supported by a coalition of over twenty religious groups").

171. Thomas D. Brierton, *"Reasonable Accommodation" Under Title VII: Is it Reasonable to the Religious Employee?*, 42 CATH. LAW. 165, 170 (2002) ("The vast majority of employers observe the traditional Christian holidays such as Christmas and Thanksgiving, leaving out the minority religions."); *see* Tanenbaum Ctr. for Interreligious Understanding, *supra* note 3 (conducting a survey that found that in 99% of workplaces Christian holidays are the only official nonsecular holidays).

172. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 85 (1977) (Marshall, J., dissenting).

will generally find it less costly to make one accommodation for a large group of employees subscribing to one faith, as opposed to a number of different accommodations for employees practicing minority religions. As discussed above, however, Congress passed section 701(j) mainly to protect minority religious practices, not to place an extra burden on them.[173] Thus, in making the attainment of religious accommodations more difficult for members of minority religions, the Court's current interpretation again contravenes section 701(j)'s purpose.

Moreover, in allowing employers to reject an accommodation simply because it results in more than a de minimis cost, the Court has effectively placed an insurmountable burden on employees seeking religious accommodations, while vitiating employers' affirmative duty to accommodate religious practices. Employers can easily demonstrate that a requested accommodation imposes a de minimis cost on their operations because by definition every accommodation involves an exemption from an otherwise neutral employment rule or practice.[174] And almost every exception to such a rule or practice will cost an employer *something*.[175] In the vast majority of cases, it will be impossible for an employee to argue that a given religious accommodation does not impose even a de minimis cost on an employer.[176] Thus, the Court's current interpretation poses an almost insurmountable burden on religious employees, while imposing no burden on employers. Because adherents to majority religions will not need to request accommodations as frequently as adherents to minority religions, this insurmountable burden falls squarely on the shoulders of adherents to minority faiths. This outcome is in direct opposition to Congress' intent.

Finally, the Court's holding that an employer need only accept any reasonable accommodation to satisfy its section 701(j) obligation also disproportionately affects members of minority religions. By holding that a reasonable accommodation is one that merely "eliminates"[177] the conflict between religious and work obligations, the Court has essentially

173. *See supra* Part II.B.2.

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

175. Justice Marshall noted in his *Hardison* dissent that nearly all of the religious accommodation litigation falls into four main categories: (1) religious dress, (2) attendance at a religious function, (3) compelled membership in a union, and (4) shifting work schedules. *Id*. Of these four categories, only the first one reasonably involves costless accommodations; the other three involve rearranging work schedules or salary benefits, both of which would result in at least de minimis costs to an employer. And because, as Justice Marshall noted, the largest class of religious accommodation centers on rearranging work schedules, *id.*, and rearranging work schedules will almost always entail some cost, it is reasonable to conclude that the vast majority of requests for religious accommodations will involve some sort of cost to the employer. Thus, an employer does not have to grant such requests under the Court's current interpretation of section 701(j). *See id.* at 93 n.6.

176. *See* Timothy H. Hall, *Religion, Equality, and Difference*, 65 TEMP. L. REV. 1, 86 (1992) ("Religious accommodations invariably entail some costs.").

177. Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 70 (1986); *see also supra* Part III.A.2 (arguing that this "elimination" standard does not adequately resolve the conflict between the employee's work and religious obligations).

given employers complete freedom to choose the accommodation most convenient to them, no matter how much of a burden that accommodation may place on the religious employee.[178] Because fully accommodating minority religious practices will almost always be inconvenient for employers, employees adhering to minority faiths are far less likely to receive accommodations of which they can actually take advantage. Therefore, the Court's current interpretation of section 701(j) excludes the very class of employees that Congress intended it to protect.

Using Islam as an example, imagine a Muslim who works as a janitor in an office building for an eight-hour shift with only one hour-long break allowed for lunch each day. Imagine further that this break must be used all at once and cannot be split.[179] The employee would naturally prefer to take three ten-minute breaks during the day to pray his required prayers and shorten his lunch by thirty minutes. All the employer would have to do to avoid accommodating this Muslim employee, however, is show that this accommodation would result in more than a de minimis cost, which it almost certainly would because it would require the Muslim employee to take more breaks during his shift. And if, somehow, no proposed accommodation actually resulted in more than a de minimis cost, the employer could reject the employee's proposed accommodation and instead offer the Muslim employee an eight-hour night-shift, which would not conflict with any of his prayers and would thus satisfy the reasonable accommodation standard.

In this situation the Muslim employee would have to decide between three very unappealing choices: (1) elect to work an eight-hour night-shift at least five days a week, (2) continue to work the day shift but neglect one of the most central Islamic duties, or (3) find a new job that will somehow accommodate his religious obligations. The employee in this situation would clearly prefer his proposed accommodation of splitting up his one-hour lunch break to perform his prayers, and in most respects, the employee's proposed accommodation is undoubtedly more reasonable than making him substantially rearrange his life by working the night-shift. However, under the Court's current interpretation of section 701(j), the employer would have no duty to accept this employee's accommodation, and the employee would likely have to choose between work and fulfilling a central religious obligation.

## IV. RECOMMENDATION

The above analysis demonstrates that Congress had two main concerns in passing section 701(j): (1) allowing religiously observant em-

178. *See, e.g.*, Elmenayer v. ABF Freight Sys., No. 98-CV-4061, 2001 WL 1152815, at *5 (E.D.N.Y. Sept. 20, 2001). See *supra* note 56 for a brief factual description of *Elmenayer*.

179. This hypothetical was derived and modified from the facts of *Elmenayer*. *Cf. Elmenayer*, 2001 WL 1152815, at *1.

ployees to both practice their religion and retain their jobs, and (2) protecting the religious practices of adherents to minority religions. The Court's current interpretation seriously hinders both of these goals. Thus, a new interpretation of the statute is necessary to extend its reach and better implement Congress' vision of section 701(j). The remainder of this Section develops a new framework for accommodating the needs of religious employees, addresses potential objections to this framework, and analyzes what effect passage of the WRFA would have on this proposal.

### *A. Reviving Section 701(j): Developing a Framework That Accommodates Those Religious Practices Most in Need of Accommodation*

Rather than allowing employers to reject accommodations that result in more than a de minimis cost, thereby eliminating virtually all religious accommodations, courts should require employers to accommodate all religious practices deemed "central" to the employee's faith, unless accommodation of those practices would result in an undue (i.e., *significant*) hardship to the employer.[180] The less central a particular religious practice is to a given faith, the less cost an employer should be required to bear in accommodating the practice. Thus, if a given practice is a religious preference as opposed to a religious mandate, then employers would not be required to incur more than a de minimis cost to accommodate this preference.[181] If, however, an employee demonstrates that a given practice is central to his faith, then an employer would be required to accommodate this practice, unless it could not do so without incurring *significant* expense. Central religious practices include those practices without which an employee's ability to practice religion is substantially undermined.[182]

To prove centrality and receive the higher level of accommodation, employees would be required to: (1) notify the employer of the need for a religious accommodation; (2) present evidence that not accommodating the practice at issue poses a substantial threat of frustrating religious practice and undermines employees' ability to stay faithful to their religion (i.e., prove that the practice is "central"); (3) be honest and sincere in their claim of centrality; and (4) propose a reasonable accommodation.[183] Thus, the employee would have the burden of both proving the centrality

180. Undue hardship is used here in its textual or dictionary sense, not the way the Court defined it in *Hardison*, 432 U.S. 63. See *supra* Part III.B.1 for the textual definition.

181. In other words, religious preferences would be evaluated under the Court's current section 701(j) standards, and only central religious practices would receive heightened accommodations.

182. *Cf.* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 475 (1987) (Brennan, J., dissenting).

183. The second and third requirements have been adapted from the centrality test Justice Brennan proposed in *Lyng*, 485 U.S. at 475 (Brennan, J., dissenting). *Lyng* is a Free Exercise Clause case in which the Court ultimately rejected Justice Brennan's test. *Id.* at 457–58; *see infra* Part IV.B.1.

of the religious practice in need of accommodation and devising a reasonable way to accommodate this practice.

Once an employee has met this burden, the employee's proposed accommodation would be presumed reasonable unless the employer could demonstrate that the proposed accommodation results in an undue hardship to the employer. In proving undue hardship, employers would be required to produce affirmative evidence of the undue hardship and would not be allowed to reject an accommodation based on speculation that it *might* result in an undue hardship.[184] Although an employer could prove an undue hardship in several ways, some of the most common would include: (1) demonstrating that the accommodation results in an undue financial hardship; (2) showing that the accommodation would expose the employer to criminal or civil liability; (3) demonstrating that the accommodation would *actively* invade the rights of coworkers or supervisors; or (4) showing that the accommodation would pose health or safety risks.

Thus, for example, an employer could successfully reject, on undue hardship grounds, accommodating the Sikh religious practice of carrying a large sharpened sword in public because it creates a safety risk.[185] An employer would also not be required to accommodate an employee who insisted that racial segregation was a central tenet of his faith, as doing so would expose the employer to civil liability.[186] More difficult questions arise with religious employees who argue that their religion mandates proselytizing, even at work.[187] Assuming other employees oppose such religious solicitation, an employer could reasonably argue that accommodating this practice results in an undue hardship because it *actively* invades the rights of coworkers. An employer could not, however, ban headscarves or beards on the theory that it makes other workers uncom-

184. Though the Supreme Court has not addressed what evidence an employer must produce to prove the cost of an accommodation, the Sixth Circuit has held that employers cannot speculate about the cost of a proposed accommodation. *See* Draper v. U.S. Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1975).

185. *See* People v. Singh, 516 N.Y.S.2d 412 (N.Y. Crim. Ct. 1987). The sword is called a *kirpan*, and Sikh men are required to carry it as a symbol of their religion. *Id.* at 413. If a Sikh employee devised a way to wear the *kirpan* that eliminated the safety risk, then the employer would have to accommodate the practice, unless the employer had other grounds for asserting undue hardship. *See* Cheema v. Thompson, 67 F.3d 883, 885 n.3 (9th Cir. 1995) (describing several ways school officials accommodated Sikh children who had to carry a *kirpan*).

186. *Cf.* Brown v. Dade County Christian Sch., Inc., 556 F.2d 310 (5th Cir. 1977). The school in *Brown* sought to justify its refusal to admit African American students on the ground that the school's affiliated religion prohibited racial integration. *Id.* at 311. Both the trial court and the Fifth Circuit rejected this argument, holding that racial segregation could not be considered "religious" conduct in this case. *Id.* at 314. Judge Goldberg, in a concurring opinion, argued that the government has a compelling interest in ending discrimination, and thus, the Court would not sanction racial segregation, even if religiously motivated. *Id.* at 314 (Goldberg, J., concurring). This note adopts Judge Goldberg's position: even if an employee could prove that racial segregation was a central tenet of his faith, an employer could still refuse to accommodate this practice on undue hardship grounds.

187. *See generally* Michael D. Moberly, *Bad News for Those Proclaiming the Good News: The Employer's Ambiguous Duty to Accommodate Religious Proselytizing*, 42 SANTA CLARA L. REV. 1 (2001). A full discussion of the special case of religious speech is outside of the scope of this note.

fortable and therefore constitutes an undue hardship. The mere fact that an employee dislikes looking at a woman's headscarf or a man's beard does not *actively* invade that employee's rights.

Reinterpreting section 701(j) to require employers to bear higher costs in order to accommodate "central" religious practices poses several distinct advantages over the Court's current interpretation. First, it shifts the burdens of devising and implementing religious accommodations to the parties best able to handle them. Because employees, especially members of minority religions, will understand the nature of their religious obligations much better than their employers, they will be far more adept at finding reasonable solutions to conflicts between religious and work requirements. Thus, it makes sense to put the burden of devising an accommodation and proving its reasonable nature on the employee seeking the accommodation. Furthermore, because employers are in the best position to assess the cost a proposed accommodation would impose on their business, they should shoulder the burden of proving that the employee's proposed accommodation would inflict an undue hardship on the employer's business.

Second, the proposed interpretation strikes a better balance between congressional intent and the plain meaning of section 701(j). As Part III.B.1 demonstrated, a straightforward textual interpretation of section 701(j) would require employers to accommodate *every* sincere religious practice, no matter how trivial that particular practice may be to the employee's overall faith, unless accommodation resulted in an undue hardship. Such an interpretation would inflict significant costs on employers because while one accommodation might be inexpensive, small accommodations aggregated together could result in large costs and completely disrupt the workplace. However, the Court's current interpretation places no burden on the employer and nearly extinguishes the employee's right to any religious accommodations. By interpreting undue hardship in its ordinary sense but also imposing a centrality requirement, the proposed interpretation requires employers to bear more costs to accommodate those practices most in need of accommodation, thereby staying within constitutional boundaries by removing a burden on religious practice without promoting religion. Requiring employers to bear more financial costs to accommodate only central religious practices also significantly decreases the likelihood that an employee might be forced to choose between work and religion, thereby aligning this interpretation with congressional intent.

Finally, by requiring an employer to assume more costs to accommodate religious practices, this new framework improves a minority-religion member's chances of receiving religious accommodations in the workplace. Because accommodating minority religious practices will cost more than accommodating majority religions, requiring employers to bear higher costs for religious accommodations ensures that minority re-

ligious practices are not excluded from the workplace simply because they cost more.[188] Also, requiring employers to accept the employee's proposed accommodation, unless that accommodation causes significant hardship, further improves accommodation opportunities for members of minority religions.

### *B. Objections to the "Centrality" Requirement in Determining Religious Accommodations*

Requiring employers to make special efforts to accommodate religious practices deemed central to an employee's faith raises two possible objections: (1) such a rule could potentially entangle the judiciary in theological debates outside its authority, and (2) nothing in the language of section 701(j) appears to suggest that its protection should be limited to religious practices central to an employee's faith.

#### *1. Objection 1: Courts Are Not Ecclesiastical Bodies or Arbiters of Religion*

First, federal courts have by and large declined explicit invitations[189] to evaluate the place a particular belief or practice holds in a religion.[190] These courts have argued that the judiciary is neither equipped to decide such questions nor given the authority to do so,[191] and they have further argued that allowing a court to evaluate the place a particular religious practice occupies within a religion would put courts in the untenable position of instructing "some religious adherents [that they] misunderstand their own religious beliefs."[192]

In fact, two Supreme Court cases have explicitly rejected the centrality test for religious accommodations in the free exercise context on the grounds that such a test would force courts into constitutionally im-

188. *See supra* Part III.B.3.

189. Interestingly enough, these invitations have frequently come from the person seeking a religious accommodation and not from the objecting party. *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 457–58 (1988).

190. *See* Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 716 (1981) (noting that "[c]ourts are not the arbiters of scriptural interpretation").

191. Redmond v. GAF Corp., 574 F.2d 897, 900 (7th Cir. 1978) (stating that it is not the judiciary's function to make determinations about religious practices). While many courts have explicitly rejected any attempt to evaluate the central nature of a religious practice, other courts have implicitly made this determination. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that the state did not have a compelling interest in requiring Amish children to attend school until age sixteen and basing this holding, in part, on the significance (i.e., centrality) the Amish religion places on rejecting modern ways of life).

Other courts have even made explicit centrality determinations. *See* McCrory v. Rapides Reg'l Med. Ctr., 635 F. Supp. 975, 979 (W.D. La. 1986) (holding that the plaintiffs could not sincerely claim that adultery was a central tenet of their faith because they were Baptists, and Baptism forbids adultery); Brown v. Polk County, 61 F.3d 650, 656 (8th Cir. 1995) (holding that a supervisor could not direct an employee to type his Bible-study notes under Title VII because that conduct was not mandated by his religion).

192. *Lyng*, 485 U.S. at 458.

proper theological debates. In *Employment Division v. Smith*, Justice Scalia, writing for the majority, rejected an invitation to apply the centrality principle to allow religious exemptions to an otherwise "generally applicable criminal law."[193] According to Justice Scalia, the Free Exercise Clause protects all forms of religious belief and prohibits the government from singling out any religious practice, not just central practices, for prohibition or other forms of discrimination.[194] As long as a law does not target any specific religion or practice, however, religiously observant citizens cannot find sanctuary for violating a neutral law in the Free Exercise Clause.[195]

But while *Smith* ultimately concluded that the Free Exercise Clause does not mandate religious exemptions from generally applicable rules or laws, it did note that legislatures are free to enact religious-practice exemption laws.[196] Section 701(j) is one such law.[197] Furthermore, Justice Scalia conceded in *Smith* that "if general laws are to be subjected to a 'religious practice' exception, *both* the importance of the law at issue *and* the centrality of the practice at issue must be reasonably considered."[198] Thus, though the Court rejected the centrality requirement in the free exercise context, it explicitly recognized that any law[199] that requires religious accommodation and allows religious exemptions from neutral rules must be subject to a centrality requirement to be fairly applied. Because section 701(j) creates exactly this sort of situation (i.e., general employment rules subject to a religious exemption requirement),[200] a centrality requirement is the only reasonable way to balance the employer's business needs against the employee's religious needs.

Furthermore, implementing a centrality requirement for religious accommodations would not actually drag courts into protracted theological debates. In *Lyng v. Northwest Indian Cemetery Protective Association*, the majority rejected Justice Brennan's call to use a centrality test to determine which religious practices the Free Exercise Clause required the government to accommodate, concluding that such a test would improperly entangle courts in theological debates by "cast[ing] the Judiciary in a role . . . we were never intended to play."[201] However, as Justice Brennan argued in his dissent, making a determination of what beliefs are central to a religion does not in fact place courts in this position be-

193. Employment Div. v. Smith, 494 U.S. 872, 884 (1990).

194. *Id.* at 877–78.

195. *Id.* at 890.

196. *Id.*

197. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting) ("The accommodation issue by definition arises only when a neutral rule of general applicability conflicts with the religious practices of a particular employee.").

198. *Smith*, 494 U.S. at 887 n.4 (emphasis in original).

199. Here "law" should be distinguished from a constitutional mandate, which is what was at issue in *Smith*. *See id*. at 872.

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

201. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 457–58 (1988).

cause courts would not be called upon to determine whether a religious adherent *understands* a given faith.[202] Instead, courts would be called upon to determine whether the proponent of the religious accommodation has met the *burden* of demonstrating that the practice in need of accommodation is central to the faith.[203] Thus, requiring an employee to demonstrate the centrality of a religious practice before an employer must assume significant cost to accommodate that practice will not have the effect of dragging federal courts into theological disputes.

### 2. *Objection 2: The Proposed Interpretation Ignores Religious Practices That Congress Intended to Protect*

A second possible objection to the centrality requirement is that nothing in the language of section 701(j) suggests that extra accommodation protections should be afforded to religious practices deemed central to one's faith.[204] In fact, on its face, section 701(j) appears to require employers to accommodate *all* religious practices, no matter how trivial, unless the employer can demonstrate an undue or significant hardship. But as Part II.B.2 demonstrated, Congress amended Title VII in 1972 based mainly on the views of the amendment's chief proponent, Senator Jennings Randolph, who proposed the amendment in large part to alleviate the difficulty that many religious employees faced—having to choose between work and religion.[205] As long as an employer accommodates, subject to the "undue hardship" limitation, those religious practices without which an employee's ability to practice his faith would be substantially undermined (i.e., central practices), employees will no longer find themselves in the difficult position of choosing between work and religion. Thus, requiring employers to bear more costs to accommodate central religious practices and beliefs falls squarely in line with the purpose of the amendment, even if it does not square exactly with the amendment's literal language.

Furthermore, imposing a centrality requirement might be the only way to fairly balance employee religious practice rights with the employer's right to run an efficient and orderly work environment. In noting that any religious exemption law must necessarily have a centrality component, Justice Scalia observed that without a centrality requirement, the custom of throwing rice at church weddings would receive the same level of protection that the practice of having a wedding in a church

202. *Id.* at 475 (Brennan, J., dissenting).

203. *Id.* There is no reason to treat this evidentiary burden differently than the burden a plaintiff must carry to prove any fact in civil litigation; the plaintiff's assertion of centrality would still be subject to the normal rules of evidence as well as the requirement that the claim be both "genuine and sincere." *See id.*

204. 42 U.S.C. 2000e(j) (2000) ("The term 'religion' includes *all aspects of religious observance and practice*, as well as belief . . . .") (emphasis added).

205. *See supra* Part II.B.2.

would receive, even though these religious practices clearly do not carry the same importance.[206] In the employment context, without a centrality requirement, employers could find themselves flooded with accommodation requests that, although sincere, are not actually necessary to remove a burden on religious practice. Moreover, not imposing a centrality requirement for religious accommodations leaves section 701(j) prone to use as a tool to harass employers with insincere accommodation requests and threatens to undermine the protection Congress intended section 701(j) to give religion in the workplace.

### *C. Effect of WRFA on the Proposed Interpretation of Section 701(j)*

Should the WRFA finally pass, it would have a substantial effect on workplace religious accommodations, but it would not necessarily create the proper balance between employee accommodation rights and employer business needs. Whereas the current interpretation of section 701(j) overemphasizes the employers' business needs, the WRFA suffers from the opposite problem: it significantly broadens the scope of an employer's duty to accommodate religion without a corresponding requirement that employers bear significant accommodation costs only for central religious practices. This would leave the WRFA, and by extension section 701(j), open to constitutional attacks for crossing the line, painstakingly drawn by Free Exercise and Establishment Clause jurisprudence, between removing burdens on religious practice and promoting religion.[207] As Part II.B.2 demonstrated, Congress primarily intended section 701(j) to remove those burdens on religious practice that might force an employee to choose between religion and work (i.e., those practices that this note has defined as central to a given religion). By not including a centrality requirement in the WRFA, Congress risks courts holding the WRFA, or even all of section 701(j), unconstitutional.

If the WRFA does pass, and courts are forced to consider its constitutionality, they can avoid declaring it unconstitutional by reading into the WRFA the centrality requirement developed above.[208] As the Supreme Court has repeatedly held, courts are permitted to interpret statutes in a manner that avoids constitutional questions when such an interpretation "is not plainly contrary to the intent of Congress."[209] The legislative history recounted in Part II and the related analysis contained in Part III demonstrate that a centrality requirement squares with con-

206. Employment Div. v. Smith, 494 U.S. 872, 887 n.4 (1990). It seems that Justice Scalia assumed that throwing rice at weddings has religious significance; regardless of the validity of that assumption, his example is useful to demonstrate the necessity of a centrality requirement.

207. *See* Sonne, *supra* note 143, at 1026–27 (questioning the WRFA's compatibility with the Establishment Clause). *But see* Caplen, *supra* note 90, at 621–23 (concluding that the WRFA would not violate the Constitution).

208. *See supra* Part IV.A.

209. Miller v. French, 530 U.S. 327, 341 (2000) (internal quotation marks omitted).

gressional intent. Thus, courts fairly could read in a centrality requirement for religious accommodations under section 701(j), even if Congress passes the WRFA, in order to preserve section 701(j)'s constitutionality.

## V. APPLICATION OF RECOMMENDATION: ACCOMMODATING MUSLIMS IN THE WORKPLACE

Having proposed a new framework under which courts can analyze religious accommodation claims, it is time to apply this framework to the group most likely to seek section 701(j) protection in the coming century: American Muslims. Because satisfied employees foster a productive work environment, it behooves employers to learn how best to accommodate the religious practices of their employees, particularly when those employees practice a religion with which the employer is likely unfamiliar, such as Islam.[210] Furthermore, as Part II.A.3 demonstrated, the current interpretation of section 701(j) has done, at best, a mediocre job of accommodating Islam's central practices. Meanwhile, the number of American Muslims has grown dramatically and continues to rise, so employers will increasingly find themselves faced with questions of how to accommodate their Muslim employees.[211] This Section seeks to provide employers and courts with a guide for accommodating Islamic practices under Part IV's proposed interpretation of section 701(j).

Part II.A.2 outlined five central Islamic duties, known as the "pillars of Islam," that every Muslim must perform, three of which have the potential to interfere with work obligations: prayers, fasting, and *hajj*.[212] Because the pillars of Islam constitute the very foundation of a Muslim's relationship to God, these pillars clearly qualify as "central" religious obligations, as defined above.[213] Thus, under the framework proposed in Part IV, employers should accommodate their Muslim employees' obligations to pray, fast, and attend *hajj*, unless the employer can prove that the accommodation would result in significant hardship. Because dress requirements likely will not cost anything, employers should accommodate a Muslim woman's desire to cover her head or a Muslim man's desire to keep a beard and wear a prayer cap.[214]

Establishing *which* Islamic practices an employer should accommodate, however, is a far easier task than determining *how* these practices

210. Anayat Durrani, Religious Accommodation for Muslim Employees, http://www.workforce.com/archive/feature/22/26/98/index.php?ht=muslim%20muslim (last visited Mar. 16, 2006); *see also* Minn. Dep't of Human Rights, An Islamic Point of View, http://www.humanrights.state.mn.us/somali_islam_pov.html (last visited Mar. 5, 2006).

211. *See supra* Part II.A.3.

212. *See supra* Part II.A.2.

213. *See supra* Parts II.A.2, IV.A.

214. *Cf.* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 88 (1977) (Marshall, J., dissenting) (arguing that allowing an employee to wear a headscarf for religious reasons would bring no "undue hardship" to an employer).

might reasonably be accommodated in a work environment admittedly not designed to accommodate such practices. While the best approach is for employers to work together with their Muslim employees to resolve the specific conflict between work and religion, a few general guidelines will help identify the best accommodations for Muslim employees. First, where possible, employers must not insist on rigid work schedules because the prayer times, the month of fasting, and the pilgrimage occur at different times each year. If, for example, employees are permitted only a one-hour lunch break each work day, employers should permit Muslim employees to divide that break and use parts of it to pray at stated prayer times. Flexible work schedules become even more important during *Ramadan*. To accommodate fasting, employers should allow their Muslim employees to work through lunch breaks, rearrange working hours, or start and leave work earlier if necessary.

Second, employers should work with their Muslim employees to devise the necessary accommodations for daily prayers, such as a location to pray and perform *wudu*, as well as methods whereby Muslim employees can notify supervisors before they begin praying, so as to avoid any later confusion.[215] As for a location to pray, empty offices, conference rooms, or hallways would work for employees who do not have their own office. Employers may also wish to educate non-Muslim employees about a Muslim's need to perform *wudu* and designate certain bathrooms or sinks as appropriate places for Muslim employees to wash their feet in preparation for prayers.[216]

Finally, even if courts do not reinterpret section 701(j) and Congress never passes the WRFA, employers should remember that it makes good business sense to go beyond the legal minimum in accommodating the religious practices of its employees.[217] A study conducted by the Tanenbaum Center for Interreligious Understanding found that Muslims are the religious group most vulnerable to religious discrimination in the workplace.[218] The study further found that not only do Muslims experience workplace discrimination, but they *expect* it.[219] Thus, employers should take special care to learn about Islam and reach out to their Muslim employees, whose numbers will only increase in the coming years.[220]

215. *See* Minn. Dep't of Human Rights, *supra* note 210 (describing the story of a Somali worker who was fired for refusing to break his prayer when his boss, who did not know the employee was praying, called him).

216. *See* Tyson v. Clarian Health Partners, Inc., No. 1:02-CV-01888-DFH-TAB, 2004 WL 1629538, at *1 (S.D. Ind. June 17, 2004). For the facts of this case, see *supra* Part II.A.3.

217. Personnel Policy, Inc., *supra* note 14.

218. Tanenbaum Ctr. for Interreligious Understanding, *supra* note 3.

219. *Id.* Interestingly, this survey was conducted *before* September 11, 2001; thus, the need for employers to reach out to Muslim employees has only increased since the survey was conducted.

220. Personnel Policy, Inc., *supra* note 14.

## VI. CONCLUSION

Even though Congress enacted section 701(j) to help members of minority faiths obtain religious accommodations in the workplace, the Supreme Court's narrow interpretation of the statute has allowed employers to escape their religious accommodation obligations. As the United States continues to diversify religiously, an increasing number of religiously observant Americans may find themselves forced to choose between their careers and their faith, unless swift action is taken to restore section 701(j)'s original meaning. Above all, if courts want to reaffirm this nation's commitment to religious pluralism, section 701(j) must be reinterpreted to better protect minority religious practices; otherwise, 701(j) will remain an empty protection.