

Notes

BETWEEN A STONE AND A HARD PLACE: HOW THE HAJJ CAN RESTORE THE SPIRIT OF REASONABLE ACCOMMODATION TO TITLE VII

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ABSTRACT

Although section 701(j) of the Civil Rights Act of 1964 requires that employers reasonably accommodate their employees' religious practices and beliefs, many commentators acknowledge that the spirit of reasonable accommodation has not been realized because courts have drastically limited the scope of employers' duty. This may be especially true for Muslims, who, according to a 2012 study, are roughly half as likely to prevail in free-exercise and religious-accommodation lawsuits as are non-Muslim claimants. One of the central tenets of Islam, the hajj, poses significant challenges for Muslim employees seeking accommodation under Title VII. Because accommodating the hajj will almost always impose more than a de minimis cost on employers, a court is unlikely to find that Title VII requires employers to accommodate a Muslim employee's decision to complete the pilgrimage.

This Note attempts to articulate a new method for expanding Title VII's protection of employees' religious beliefs and practices. Specifically, this Note argues that increased involvement by the Equal Employment Opportunity Commission and the Department of Justice in hajj-accommodation cases offers a promising approach to developing a more balanced accommodation doctrine, or at least to

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realigning the scales so that they are not tilted so heavily in favor of employers. Despite clear precedent limiting an employer's duty to accommodate, increased intervention by the federal government in Title VII hajj-accommodation cases has the potential to shift the conception of reasonable accommodation. Though the government must pick and choose the cases in which to intervene, hajj-accommodation cases present an opportunity to further the dual purposes of the government's Title VII enforcement authority to implement the public interest as well as to bring about more effective enforcement of private rights. Intervention can restore the spirit of accommodation to section 701(j) and give employers more of an incentive to accommodate their employees' religious obligations.

INTRODUCTION

In August 2008, a Muslim schoolteacher named Safoorah Khan approached her supervisor to request three weeks of unpaid leave so that she could travel to Mecca, Saudi Arabia.¹ This was not simply a request for a vacation. Khan needed time off to complete the hajj, an obligatory pilgrimage that all Muslims are expected to complete once in their lifetime.² The superintendent of her Berkeley, Illinois, school district denied the request, explaining that the school could not afford to lose its only math-lab instructor so close to state testing.³ In response, Khan submitted a letter of resignation but continued to teach until her scheduled departure for Mecca in December.⁴

The Department of Justice (DOJ) found something troubling about Khan's story. In the eyes of the DOJ Civil Rights Division, the school district's denial of Khan's request for unpaid leave "compelled Ms. Khan to choose between her job and her religious beliefs, and thus forced her discharge."⁵ After Khan filed an employment-discrimination complaint with the Equal Employment Opportunity Commission (EEOC), the DOJ filed a lawsuit against the Berkeley school district "to enforce the provisions of Title VII of the Civil

1. Jerry Markon, *Justice Dept. Backs Muslim Teacher*, WASH. POST, Mar. 23, 2011, at A1.

2. *Id.*; see also *infra* notes 40–45 and accompanying text.

3. Markon, *supra* note 1. Khan had informed her school's principal in the spring of 2008 of her intention to complete the hajj in December of that year. She was told that "[a]ll she had to do was submit her paperwork" to receive time off. Manya A. Brachear, *Muslim's Long Pilgrimage Struggle*, CHI. TRIB., Oct. 19, 2011, at 1.

4. Brachear, *supra* note 3.

5. Press Release, U.S. Dep't of Justice, Justice Department Files Religious Discrimination Lawsuit Against Berkeley School District in Illinois (Dec. 13, 2010), available at <http://www.justice.gov/opa/pr/2010/December/10-crt-1432.html>.

Rights Act of 1964.”⁶ Though the DOJ trumpeted the lawsuit as a part of its “ongoing commitment to actively enforce federal employment discrimination laws,”⁷ others were not convinced. A former DOJ civil-rights official from the Bush administration called it “a political lawsuit to placate Muslims.”⁸ Senator Lindsey Graham described the “curious decision” to file suit as having gone “too far.”⁹

Whatever the motivation for bringing the lawsuit, the observation of former Attorney General Michael Mukasey was perhaps the most damning. In a *Washington Post* article, Mukasey opined that bringing the lawsuit was “a very dubious judgment and a real legal reach.”¹⁰ This characterization may very well have been accurate, but because the DOJ threw the weight of the federal government against a small town of around five thousand people, *United States v. Board of Education*¹¹ (the Berkeley case) ultimately settled without resolving the issue of whether Title VII required accommodation.¹²

Section 701(j) of the Civil Rights Act of 1964 requires employers to reasonably accommodate their employees’ religious practices and beliefs unless such accommodation would impose an undue hardship on employers.¹³ But, as many commentators acknowledge, “the spirit of reasonable accommodation has not been realized”¹⁴ because courts

6. Complaint at 1, *United States v. Bd. of Educ.*, No. 1:10-cv-07900 (N.D. Ill. Dec. 13, 2010); see also Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2006 & Supp. IV 2011)).

7. Press Release, U.S. Dep’t of Justice, *supra* note 5.

8. Markon, *supra* note 1 (quoting Hans von Spakovsky) (internal quotation mark omitted).

9. *Protecting the Civil Rights of American Muslims: Hearing Before the Subcomm. on the Constitution, Civil Rights, Human Rights, & the Law of the S. Comm. on the Judiciary* 15–17 (2011), available at http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2011/03/29/National-Politics/Graphics/durbin_islam_transcript.pdf (statement of Sen. Lindsey Graham).

10. Markon, *supra* note 1 (quoting Mukasey) (internal quotation mark omitted). It should be noted that during the Bush administration, the EEOC filed a similar Title VII suit involving a Muslim employee’s request for accommodation to complete the hajj. Consent Decree at 1, *EEOC v. S. Hills Med. Ctr.*, No. 3:07-cv-00976 (M.D. Tenn. Apr. 27, 2009). As in the Berkeley case, the employer denied the allegation but ultimately settled. *Id.*

11. *United States v. Bd. of Educ.*, No. 1:10-cv-07900 (N.D. Ill. Dec. 13, 2010).

12. Consent Decree at 2–3, *Bd. of Educ.*, No. 1:10-cv-7900. The parties waived any findings of fact and conclusions of law on all issues. *Id.* at 3.

13. 42 U.S.C. § 2000e(j) (2006).

14. Thomas D. Brierton, “Reasonable Accommodation” Under Title VII: Is It Reasonable to the Religious Employee?, 42 CATH. LAW. 165, 167 (2002); see also Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision To Redeem Title VII*, 76 TEX. L. REV. 317, 431 (1997) (“The religious accommodation advocates know all

have defined undue hardship at a threshold of “more than a *de minimis* cost.”¹⁵ Rather than ensuring that employees are not forced to choose between their jobs and their religion, courts’ interpretation of section 701(j) has instead allowed employers to deny employees relief.¹⁶ This may be especially true for Muslims: according to a 2012 study, non-Muslims are twice as likely as Muslims to prevail in free-exercise and religious-accommodation lawsuits.¹⁷ And because accommodating the hajj will almost always impose more than a *de minimis* cost on employers, a court is unlikely to find that Title VII requires employers to accommodate a Muslim employee’s decision to complete the pilgrimage. Although a federal judge has never issued an opinion in a Title VII case in which a Muslim employee sought accommodation to complete the hajj,¹⁸ there is reason to believe that a plaintiff in such a case would lose on the merits.¹⁹

That a Muslim employee would likely lose a hajj-accommodation case is particularly unsettling because the hajj is a central tenet of Islam. And although this Note does not advocate that the centrality of a belief is—or should be—relevant to the Title VII analysis,²⁰ it does seem that a law requiring employers to accommodate religious

too well that the doctrine has not ‘worked’ for them.”); Debbie N. Kaminer, *Title VII’s Failure To Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575, 585 (2000) (“The Supreme Court has thereby interpreted § 701(j) in a manner that is clearly at odds with its purpose.”); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 6 (1996) (“[Title VII’s] seemingly broad definition of religion received a surprisingly narrow interpretation . . .”).

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

16. Engle, *supra* note 14, at 388.

17. Non-Muslim claimants succeed in presenting a free-exercise or religious-accommodation claim in 38 percent of cases, compared to 22 percent for Muslims. Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231, 251 (2012). The difference in likelihood of success between Muslims and non-Muslims in Title VII cases may be under- or overstated because the dataset used in this article is not limited to Title VII cases. *See id.* at 236 (explaining that several types of cases were used in the study).

18. A WestlawNext search with the query “hajj & accommodat!” run on January 4, 2013, returned thirty-eight cases, none of which involved a Title VII claim for accommodation. A search with the query “hajj & Title VII” returned fifteen cases, none of which involved a religious-accommodation claim under section 701(j).

19. *See infra* Part III.

20. Granting enhanced protection for central tenets of a faith would almost certainly be unconstitutional. *See Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981) (“[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their . . . faith. Courts are not arbiters of scriptural interpretation.”).

practices should protect the central tenets of a religion. Commentary on Title VII's failure to protect religious minorities is not new;²¹ to address this failure, many commentators suggest that the solution should come through legislative amendment to Title VII²² or through Supreme Court action.²³ Yet Congress has considered legislation aimed at undoing the Court's interpretation of section 701(j) in every legislative session since 1994 without a single bill making it out of committee.²⁴ Similarly, the Court has not overturned its own precedent regarding the duty to accommodate religious observance. Therefore, if the spirit of reasonable accommodation is to be restored, it will have to be done another way.

This Note attempts to articulate a new method for expanding Title VII's protection of religious beliefs and practices and for balancing the sometimes-conflicting interests of employers and employees. Specifically, this Note argues that increased involvement in hajj-accommodation cases by the EEOC and the DOJ is a promising mechanism for developing a more balanced accommodation doctrine, one that realigns the scales so that they are not tilted as heavily in favor of employers. Despite precedent limiting employers' duty to accommodate, increased intervention by the EEOC and the DOJ in Title VII hajj-accommodation cases has the potential to shift the conception of what constitutes reasonable accommodation.²⁵ Moreover, by restoring the spirit of section 701(j) such that Title VII has some bite, employers will have more of an incentive to accommodate their employees' religious obligations in the first instance and thus avert a potential lawsuit. Though the government must pick and choose the cases in which to intervene, hajj-accommodation cases present the opportunity to further the dual

21. See generally Brierton, *supra* note 14 (arguing that Title VII does not provide adequate accommodations for religious employees); Kaminer, *supra* note 14 (same); Sonny Franklin Miller, Note, *Religious Accommodation Under Title VII: The Burdenless Burden*, 22 J. CORP. L. 789 (1997) (same).

22. See, e.g., Kaminer, *supra* note 14, at 629 ("This article proposes that § 701(j) be amended . . .").

23. See, e.g., Bilal Zaheer, Note, *Accommodating Minority Religions Under Title VII: How Muslims Make the Case for a New Interpretation of Section 701(j)*, 2007 U. ILL. L. REV. 497, 522 ("[C]ourts 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.").

24. See *infra* notes 219–223 and accompanying text.

25. This Note uses intervention and involvement interchangeably to mean government participation in Title VII litigation between an employer and an individual employee.

purposes of its Title VII enforcement power “to implement the public interest” and “to bring about more effective enforcement of private rights.”²⁶

This Note proceeds in four parts. Part I provides a brief description of Islam and the hajj to give context to the rest of the analysis. Parts II and III assess the likelihood that a Muslim employee who wishes to complete the hajj would succeed on the merits of a Title VII claim alleging failure to reasonably accommodate. Part II.A discusses the history of section 701(j) and the Supreme Court’s interpretation of the duty to accommodate an employee’s religious practice. Part II.B describes various ways that an employer can avoid providing accommodation for an employee under current Title VII jurisprudence. Part III applies the analysis of the previous Part to explain why Muslims will almost never be able to mount a successful claim of religious discrimination based on an employer’s failure to accommodate the hajj. Finally, Part IV argues that the federal government’s intervention in hajj-accommodation cases will lead to increased protection and accommodation for Muslims as well as for religious employees generally by creating a more robust and balanced Title VII framework of reasonable accommodation.

I. A BRIEF INTRODUCTION TO ISLAM AND ITS PRACTICES

There are 2.6 million Muslims living in the United States as of 2010, and that number is projected to increase to 6.3 million by 2030.²⁷ This increase will be fueled in part by a rise in Muslim immigration, which has increased steadily since the 1990s,²⁸ but there will also be a noticeable change as the population of native-born Muslims grows.²⁹ Despite America’s burgeoning and increasingly native-born Muslim population, Islam remains largely misunderstood,³⁰ perhaps in part because of media reports that tend to “misrepresent not only the details of the Islamic system . . . but also the fundamental concepts

26. *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980).

27. PEW RESEARCH CTR. FORUM ON RELIGION & PUB. LIFE, *THE FUTURE OF THE GLOBAL MUSLIM POPULATION: PROJECTIONS FOR 2010–2030*, at 15 (2011).

28. *Id.* at 147.

29. *Id.* at 152.

30. Nearly 60 percent of Americans admit to having little to no knowledge of Islamic practices. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *BENEDICT XVI VIEWED FAVORABLY BUT FAULTED ON RELIGIOUS OUTREACH: PUBLIC EXPRESSES MIXED VIEWS OF ISLAM, MORMONISM 1* (2007).

and teachings of the religion.”³¹ To contextualize the forthcoming discussion, this Part provides background on Islam’s major tenets, with a particular emphasis on the hajj.

Although 70 percent of Americans believe that Islam is “very different” from their own religion,³² the truth is that Islam shares substantial similarities with other major Western faiths.³³ Like Christianity and Judaism, Islam is rooted in the Abrahamic tradition.³⁴ The Qur’an³⁵ references Christianity and Judaism and endorses many of the teachings of those faiths.³⁶

Central to Islamic faith are various obligatory acts of worship, called *ibadat*, which are often referred to as the “Five Pillars of Islam.”³⁷ The *ibadat* consists of (1) the declaration of faith, *shahadah*; (2) the five prescribed daily prayers, *salah*; (3) fasting during the Islamic month of Ramadan, *sawm*; (4) giving a portion of one’s disposable income to those in need, *zakah*; and (5) the pilgrimage to Mecca, hajj.³⁸ Each act is prescribed by the Qur’an, and is obligatory for all Muslims, regardless of where they may live.³⁹

The obligation to complete the hajj is found directly in *Al-’Imran*, the third *sura* of the Qur’an:

31. SUZANNE HANEEF, WHAT EVERYONE SHOULD KNOW ABOUT ISLAM AND MUSLIMS, at ix (14th ed. 1996). In fact, a 2007 poll found that “[t]he biggest influence on the public’s impressions of Muslims, particularly among those who express an unfavorable opinion of Muslims, is what people hear and read in the media.” PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *supra* note 30, at 4–5.

32. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *supra* note 30, at 1.

33. HANEEF, *supra* note 31, at 195; *see also* JOHN L. ESPOSITO, ISLAM: THE STRAIGHT PATH, at xii (4th ed. 2011) (“Media images of Islam have often obscured the fact that Muslims, Jews, and Christians share much in common . . .”).

34. *See* HANEEF, *supra* note 31, at 196 (“Abraham symbolizes the unity of this belief [in the Oneness of God] from which issued forth Judaism, Christianity and Islam.”).

35. The Qur’an is the holy scripture of the Islamic faith, which Muslims believe was revealed to the Prophet Mohammed between 610 and 632 AD. *Id.* at 20.

36. *See, e.g.*, THE QUR’AN: TEXT, TRANSLATION AND COMMENTARY 5:69 (Abdullah Yusuf Ali trans., Tahrike Tarsile Qur’an 2008) (“Those who believe (in the Qur-án), those who follow the Jewish (scriptures), and the Sabians and the Christians,—any who believe in God and the Last Day, and work righteousness—on them shall be no fear, nor shall they grieve.” (footnote omitted)). Of course, there are fundamental differences between the faiths as well. For example, Muslims and Jews do not believe in the divinity of Jesus Christ, though Muslims do recognize that Jesus was a “prophet in the line of the other prophets raised among the Children of Israel.” HANEEF, *supra* note 31, at 202.

37. HANEEF, *supra* note 31, at 49 (internal quotation marks omitted).

38. For a description of the details of each of these practices, *see generally id.* at 51–70.

39. *Id.* at 50.

The first house (of worship) appointed for men was that at Bakka: full of blessing and of guidance for all kinds of beings.

In it are signs manifest; (for example), the Station of Abraham; whoever enters it attains security; pilgrimage thereto is a duty men owe to God,—those who can afford the journey⁴⁰

The Qur'an imposes this duty upon all Muslims, but because the cost of completing the hajj is substantial,⁴¹ an exception is made for those who are unable to afford it.⁴² Those who are physically unable to participate in the hajj are similarly exempted from the obligation.⁴³

Each year, more than two million Muslims travel to Mecca, Saudi Arabia, to perform the hajj.⁴⁴ The pilgrimage occurs each year from the eighth through the thirteenth day of *Dhu Al-Hijjah*, the twelfth month of the Islamic calendar.⁴⁵ Dressed in white cloth, called *ihram*, Muslims participating in the hajj spend specified moments in Mecca and certain locations nearby performing obligatory rites.⁴⁶ The central ritual of the hajj is the circumambulation of the *Ka'bah*, the House of God.⁴⁷ A black stone located in the eastern corner of the *Ka'bah* is said to have been delivered by an angel to Abraham as he built the

40. THE QUR'AN: TEXT, TRANSLATION AND COMMENTARY, *supra* note 36, 3:96–97 (footnotes omitted).

41. There are travel agencies dedicated to providing a range of services for Muslims to complete the hajj. *See, e.g.*, DAR EL SALAM, <http://www.darelsalam.com> (last visited Jan. 16, 2012) (offering hajj travel packages that can cost up to \$16,900).

42. THE QUR'AN: TEXT, TRANSLATION AND COMMENTARY, *supra* note 36, 3:97; *see also Hajj*, ROYAL EMBASSY OF SAUDI ARABIA, <http://www.saudiembassy.net/issues/hajj> (last visited Jan. 16, 2012) (“The emphasis on financial ability is meant to ensure that a Muslim takes care of his family first.”).

43. THE QUR'AN: TEXT, TRANSLATION AND COMMENTARY, *supra* note 36, 2:196. One could argue that Islam itself provides reasonable accommodation by exempting Muslims from the obligation to complete the hajj in certain situations. But if an employee claims to have a sincerely held religious belief that they must complete the hajj, it is not a court's place to question the validity of that belief. *See Engle, supra* note 14, at 386 (“[T]he *Guidelines*[, 29 C.F.R. pt. 1605 (1996),] on religious accommodation allow for self-definition regarding both belief and observance. That one is required to be sincere in that definition is the only limitation.”).

44. David Clingingsmith, Asim Ijaz Khwaja & Michael Kremer, *Estimating the Impact of the Hajj: Religion and Tolerance in Islam's Global Gathering*, 124 Q.J. ECON. 1133, 1134 (2009).

45. *Hajj, supra* note 42. Because the Islamic calendar is based on the lunar calendar, the hajj begins ten or eleven days earlier in the Gregorian calendar than it did the year before. JUAN E. CAMPO, *ENCYCLOPEDIA OF ISLAM* 124 (J. Gordon Melton & Juan E. Campo eds., 2009).

46. REEM AL FAISAL & SEYYED HOSSEIN NASR, *HAJJ* 87 (2009).

47. *Id.*

Ka'bah on top of the base of the original temple built by Adam.⁴⁸ The Black Stone “is the holiest object in the Holy Sanctuary and every pilgrim seeks to touch and kiss it.”⁴⁹ The practice has continued for more than 1,400 years, with Muslims traveling from all parts of the globe to perform the sacred and obligatory rite.⁵⁰ After participating in the hajj, some Muslims choose to add the honorific title *Hajji* before their name to signify their completion of the pilgrimage.⁵¹ Many describe the hajj as “the most significant religious event in their lives.”⁵²

In countries where Islam is the majority religion, such as Pakistan or Saudi Arabia, Islamic obligations are relatively easy to accommodate. For instance, Friday is a holiday rather than Sunday in order to facilitate the weekly congregational worship *salah al-jumma*, which occurs on Friday afternoon.⁵³ Because Islam is a minority religion in the United States, however, such accommodations are not readily available as a matter of course. Therefore, Muslims who wish to practice the central tenets of their faith must ask their employers for special accommodations, and those requests are often refused.⁵⁴ These refusals may be attributable to a lack of knowledge about the practices of Islam,⁵⁵ the fact that accommodating Muslims can be “more difficult and costly than accommodating other religions,”⁵⁶ or, more likely, it could be some combination of the two.

Muslim employees will face a particularly difficult challenge when they seek accommodation to complete the hajj. The hajj requires an extended absence from work and can only be performed

48. *Id.* at 88.

49. *Id.*

50. *Id.* at xiii.

51. ESPOSITO, *supra* note 33, at 113.

52. Clingsmith et al., *supra* note 44, at 1139. For a more thorough account of events that occur during the hajj, see generally AL FAISAL & NASR, *supra* note 46, at 87–89.

53. HANEEF, *supra* note 31, at 143.

54. Not only do employers often refuse to accommodate, but their decisions are often upheld in court. *See, e.g.*, Khan v. Fed. Reserve Bank, No. 02 Civ.8893(JCF), 2005 WL 273027, at *1–2 (S.D.N.Y. Feb. 2, 2005) (granting summary judgment in favor of an employer who refused to accommodate a Muslim employee’s request to alter her work schedule during the month of Ramadan so that she could work through lunch); Elmenayer v. ABF Freight Sys., No. 98-CV-4061 (JG), 2001 WL 1152815, at *1–2 (E.D.N.Y. Sept. 20, 2001), *aff’d*, 318 F.3d 130 (2d Cir. 2003) (granting summary judgment in favor of an employer who refused to accommodate a Muslim employee’s request for accommodation so that he could attend *salah al-jumma*).

55. *See supra* notes 30–31 and accompanying text.

56. Zaheer, *supra* note 23, at 504.

at one specific time each year. Thus employers will have fewer options for accommodating their employees. If an employer refuses to accommodate, the Muslim employee must wait an entire year to perform the hajj, and it is not guaranteed that circumstances would change such that the employer will be more accommodating the next year. Given the profound importance of the pilgrimage, American Muslims are likely to have a strong interest in participating in the hajj at the specific time that they decide is right for them. The question is how much control an employer should have over a Muslim employee's decision to complete the pilgrimage in a given year. The next Part analyzes employers' duty to provide reasonable accommodation when a religious practice conflicts with an employment obligation.

II. RELIGIOUS ACCOMMODATION UNDER TITLE VII

Although Title VII guarantees reasonable accommodation of religious beliefs and observances, judicial decisions have narrowed the scope of that guarantee, leaving employees of all faiths with a largely empty promise. To understand why a Muslim who wishes to complete the hajj is nearly certain to lose in a Title VII religious-accommodation case, one must first appreciate the history of section 701(j) and how courts' interpretations of that section have affected the scope of an employer's duty to accommodate.

A. *The Tension Within Title VII: Congress's Intent and the Supreme Court's Interpretation of the Duty To Accommodate*

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."⁵⁷ Notably, however, the original act did not define the term "religion."⁵⁸ The act also failed to clarify whether Title VII included an affirmative duty to accommodate an employee's religious beliefs

57. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e-2(a)(1) (2006)). The Civil Rights Act of 1964 also established the EEOC, which was charged with effectuating the "purposes and policies" of Title VII. *Id.* § 705, 42 U.S.C. § 2000e-4.

58. *See id.* § 701 (failing to define the term "religion").

and practices.⁵⁹ In 1972, however, Congress specifically amended Title VII to impose a duty to accommodate, but it did so “rather awkwardly” by incorporating the duty into a definition of religion.⁶⁰ Specifically, Congress defined “religion” to include “all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”⁶¹

Though the floor debate on the proposed amendment was short,⁶² section 701(j)’s primary purpose was to ensure that employers would accommodate employees who strictly observe the Sabbath on days other than Sunday.⁶³ Senator Jennings Randolph, the amendment’s sponsor and a practicing Seventh Day Baptist, expressed a concern that “there are certain faiths that are having a very difficult time” convincing employers to “adjust work schedules to fit the requirements of the faith of some of their workers.”⁶⁴ Although Sabbatarians were the intended beneficiaries of the amendment, Senator Randolph suggested in a colloquy with Senator Hoyt Dominick that the provision would also extend to “other religious sect[s] which [have] a different method of conducting their lives than do most Americans.”⁶⁵

59. See Brierton, *supra* note 14, at 167 n.14 (noting that the Civil Rights Act of 1964 “did not specifically mandate ‘reasonable accommodation’”). Although the EEOC promulgated guidelines that imposed such a duty, “most courts chose not to follow the EEOC Guidelines” and instead “determin[ed] that failure to accommodate . . . should not be equated with religious discrimination.” Kaminer, *supra* note 14, at 582.

60. Kaminer, *supra* note 14, at 580.

61. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, sec. 2, § 701(j), 86 Stat. 103, 103 (codified at 42 U.S.C. § 2000e(j)).

62. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 n.9 (1977) (“The legislative history of the measure consists chiefly of a brief floor debate in the Senate, contained in less than two pages of the Congressional Record and consisting principally of the views of the proponent of the measure, Senator Jennings Randolph.”).

63. See 118 CONG. REC. 705 (1972) (statement of Sen. Jennings 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.”); see also *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting) (“The primary purpose of the amendment . . . was to protect Saturday Sabbatarians . . .”).

64. 118 CONG. REC. 705 (1972) (statement of Sen. Jennings Randolph).

65. *Id.* at 706 (statement of Sen. Hoyt Dominick). Neither Senator Randolph nor Senator Dominick explicated which faiths they were referring to during this floor debate, but it is doubtful that they had Muslims and the hajj in mind. Nevertheless, “statutory prohibitions often go beyond the principal evil” that the statute was designed to remedy—in this case employers’

Of course, section 701(j) was not designed to anticipate and resolve every conflict between employment duties and religious practices. But the amendment reflected a belief that “insofar as possible, the law flowing from the original Constitution of the United States should protect . . . religious freedom, and hopefully [one’s] opportunity to earn a livelihood within the American system, which has become . . . more pluralistic and more industrialized through the years.”⁶⁶ Senator Randolph assumed that the language of section 701(j) was sufficient to protect most religious observances and that only “a very, very small percentage of cases” would actually present an undue hardship sufficient to justify nonaccommodation.⁶⁷ There would be “gray areas,” but Senator Randolph argued that these uncertainties “should not deter the Senate in its action” to approve the amendment.⁶⁸

These gray areas became very important, however, when the Supreme Court was confronted with the task of interpreting the scope of section 701(j) in *Trans World Airlines, Inc. v. Hardison*.⁶⁹ In the Court’s view, it was clear that employers had a statutory obligation to provide reasonable accommodations for religious employees, but the reach of that obligation had not been clearly spelled out by Congress or by the EEOC.⁷⁰ Thus, the Court was left to fill in the gaps, which it did by severely limiting employers’ duty to accommodate their employees.

In *Hardison*, an employee who was a member of the Worldwide Church of God requested Saturdays off from work to observe the Sabbath.⁷¹ Like Seventh Day Baptists, one of the tenets of the Worldwide Church of God is that its members must refrain from performing any work from sunset on Friday until sunset on

unwillingness to provide time off for Sabbatarians—to cover other “reasonably comparable evils.” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

66. 118 CONG. REC. 706 (1972) (statement of Sen. Jennings Randolph). Some commentators have argued that Senator Randolph’s “desire to give private employees the same protection granted under the Constitution to public employees . . . might seem a little odd” because “even at the time of his amendment, free exercise accommodation claims were not faring well in courts.” Engle, *supra* note 14, at 371; *see also id.* at 362 n.174 (discussing pre-1972 cases in which courts were reluctant to hold that the Free Exercise Clause requires employers to accommodate their employees).

67. 118 CONG. REC. 706 (1972) (statement of Sen. Jennings Randolph).

68. *Id.*

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

70. *Id.* at 75.

71. *Id.* at 67–68.

Saturday.⁷² Trans World Airlines (TWA), the employer, agreed to permit the union to seek a change of work assignment for Hardison, but the union was unwilling to do so.⁷³ To further accommodate Hardison, TWA would have been forced to (1) leave Hardison's position unfilled, which would have impaired critical airline operations, (2) fill his position with another employee, which would have undermanned another position, or (3) employ someone not regularly assigned to work on Saturdays, which would have required TWA to pay premium wages.⁷⁴ TWA refused to make any of these accommodations.⁷⁵ When Hardison did not report for work on Saturdays, he was discharged for insubordination.⁷⁶

Hardison filed suit against TWA, claiming that his discharge constituted religious discrimination in violation of Title VII.⁷⁷ The district court ruled in favor of TWA, finding that the airline had made reasonable accommodations and that any additional accommodation would have imposed an undue hardship on the company.⁷⁸ The Sixth Circuit reversed, holding that TWA breached its duty to provide reasonable accommodation to Hardison's religious needs and therefore was liable for religious discrimination.⁷⁹

The Supreme Court disagreed with the Sixth Circuit "in all relevant respects."⁸⁰ The Court was "convinced . . . that TWA itself [could not] be faulted for having failed to work out a shift or job swap for Hardison" because any unilateral swap would have violated the terms of the collective-bargaining agreement.⁸¹ Furthermore, the proposed alternative accommodations "would involve costs to TWA,

72. *Id.* at 67.

73. *Id.* at 68. As part of the collective-bargaining agreement with TWA, the union allocated shifts based on seniority. *Id.* The union would not violate the seniority provisions of the agreement, and Hardison had insufficient seniority to switch shifts. *Id.*

74. *Id.* at 68–69.

75. *Id.*

76. *Id.*

77. *Id.* at 69. Hardison also filed suit against the union, but the district court ruled that the union was not obligated to ignore its seniority system. *Id.* The Court of Appeals affirmed the judgment regarding the union because Hardison did not appear to raise the issue on appeal. *Id.* at 70.

78. *Hardison v. Trans World Airlines, Inc.*, 375 F. Supp. 877, 891 (W.D. Mo. 1974), *rev'd*, 527 F.2d 33 (6th Cir. 1975), *rev'd*, 432 U.S. 63 (1977).

79. *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 44 (6th Cir. 1975), *rev'd*, 432 U.S. 63 (1977).

80. *Hardison*, 432 U.S. at 77.

81. *Id.* at 78–79.

either in the form of lost efficiency in other jobs or higher wages.”⁸² This cost, the Court determined, was too much to ask of an employer: “To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off [was] an undue hardship.”⁸³ Thus, TWA was not obligated to accommodate Hardison’s religious observance.⁸⁴

In a blistering dissent, Justice Marshall argued that the Court’s definition of undue hardship was strained, stating that “[a]s a matter of law, I seriously question whether simple English usage permits ‘undue hardship’ to be interpreted to mean ‘more than *de minimis* cost.’”⁸⁵ He further observed that, even under the majority’s definition, “[t]o conclude that TWA, one of the largest air carriers in the Nation, would have suffered undue hardship . . . defies both reason and common sense.”⁸⁶ Justice Marshall concluded with a mournful assessment of the implications of the majority’s holding on the future of Title VII:

What makes today’s decision most tragic, however, is not that respondent Hardison has been needlessly deprived of his livelihood simply because he chose to follow the dictates of his conscience. Nor is the tragedy exhausted by the impact it will have on thousands of Americans like Hardison who could be forced to live on welfare as the price they must pay for worshiping their God. The ultimate tragedy is that, despite Congress’ best efforts, one of this Nation’s pillars of strength—our hospitality to religious diversity—has been seriously eroded. All Americans will be a little poorer until today’s decision is erased.⁸⁷

Many commentators have sympathized with Justice Marshall’s dissent, arguing that the Court’s interpretation of “undue hardship” in *Hardison* is contrary to both the plain meaning of the term⁸⁸ and the spirit of section 701(j).⁸⁹ The fact remains, however, that the Court

82. *Id.* at 84.

83. *Id.*

84. *Id.* at 84–85.

85. *Id.* at 93 n.6 (Marshall, J., dissenting) (quoting *id.* at 84 (majority opinion)).

86. *Id.* at 91; *see also id.* at 92 n.6 (noting that TWA would have been forced to pay “\$150 for three months, at which time [Hardison] would have been eligible to transfer”).

87. *Id.* at 96–97 (footnote omitted).

88. *See, e.g., Zaheer, supra* note 23, at 515 (“[I]t appears that only for religious accommodations has the Court interpreted ‘undue hardship’ in a manner at odds with its ordinary meaning . . .”).

89. *See, e.g., Engle, supra* note 14, at 388 (“Far from preventing employees from having to choose between their religion and their jobs, as Senator Randolph had hoped, the latter part of section 701(j) has been used over and over to deny plaintiffs relief.”).

has not seen the need to reevaluate *Hardison*'s interpretation of undue hardship, nor has Congress legislatively overridden the Court's holding. Thus, *Hardison* remains the law.

B. The Empty Promise of Section 701(j): Avoiding Accommodation After Hardison

The Court's decision in *Hardison* "tipped the balance in favor of the employer in determining what is a reasonable accommodation,"⁹⁰ thus making it exceedingly difficult for religious employees to prevail in Title VII claims. But the limitations on an employer's duty to accommodate did not end with *Hardison*. Subsequent cases decided by the Supreme Court and lower courts have further narrowed the scope of section 701(j), which has ultimately led to less accommodation of religious practice and observance. This Section discusses those limitations.

Before employees may bring a Title VII claim, there are a series of procedural requirements that they must satisfy. First, an employee must file a charge of discrimination with the EEOC, at which point the EEOC will investigate to see whether there is probable cause to believe that an unlawful employment practice has occurred.⁹¹ If the EEOC determines that there is probable cause, it will meet with the employer and the employee to attempt to resolve the conflict through informal methods.⁹² If conciliation is unsuccessful, the EEOC has three options: it may itself initiate a civil action against a private employer, it may authorize the aggrieved party to file a claim against the employer by issuing a notice of the right-to-sue, or, if the employer is a state or local government entity, the EEOC may refer the matter to the DOJ with a recommendation that the Attorney General file suit against the government entity.⁹³ These procedural hurdles protect employers from being forced to defend employment

90. Brierton, *supra* note 14, at 192.

91. For details on the EEOC's investigative authority and procedure, see generally 29 C.F.R. §§ 1601.15–1601.17 (2012).

92. 42 U.S.C. § 2000e-5(b) (2006).

93. *Id.* § 2000e-5(f)(1). In cases in which the EEOC or the Attorney General files charges against the employer, the aggrieved employee is not precluded from joining the suit. *Id.* If the EEOC or the Attorney General files a complaint against an employer, the aggrieved party *may not* initiate a separate action against the employer. See *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 466 (6th Cir. 1999) ("[W]hile Title VII affords recovery through private action or an action by the EEOC, it does not allow both . . .").

actions that occurred long ago,⁹⁴ but they also risk silencing legitimate claims.⁹⁵ Once employees satisfy the procedural prerequisites, employees must still prevail on the merits of their claim.

The *prima facie* case for a Title VII accommodation claim consists of three elements: (1) the employee had a bona fide religious belief that conflicted with an employment duty, (2) the employee provided notice to the employer of the conflict, and (3) the employee was disciplined for failing to comply with the employment duty.⁹⁶ Because the second and third elements are relatively unobjectionable,⁹⁷ this Note focuses only on the conflict between an employee's religious belief and employment duties. Once the plaintiff establishes the *prima facie* case, the burden shifts to the employer to show that it made good faith efforts to reasonably accommodate the employee's religious belief⁹⁸ or that any accommodation would have imposed an undue hardship on the employer.⁹⁹ After *Hardison* and subsequent decisions, employers can provide poor accommodation—or even deny accommodation outright—without being held liable for violating Title VII.

1. *The Plaintiff's Burden and Reasonable Accommodation.* Courts are understandably uncomfortable with the prospect of questioning whether an employee's belief is in fact religiously based,¹⁰⁰ and thus “the claim of [an individual] that his belief is an

94. *Del. State Coll. v. Ricks*, 449 U.S. 250, 256–57 (1980).

95. See 156 CONG. REC. S10,517 (daily ed. Dec. 17, 2010) (statement of Sen. John Kerry) (“There is no way to tell how many people simply quit their job rather than complain.”).

96. *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985), *aff'd*, 479 U.S. 60 (1986); *accord* *Turpen v. Mo.-Kan.-Tex. R.R.*, 736 F.2d 1022, 1026 (5th Cir. 1984); *Brown v. Gen. Motors Corp.*, 601 F.2d 956, 959 (8th Cir. 1979).

97. The second element is reasonable because an employer needs notice of a potential conflict in order to make accommodations. The third element ensures that the plaintiff has standing to bring the case in the first place. Of course, the injury requirement could also lead to an underreporting of discrimination, because employees may sit in silence and comply with the employment duty that is contrary to their religious belief rather than risk losing both their job *and* a subsequent lawsuit.

98. See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986) (“[A]n employer has met its obligation under § 701(j) when it demonstrates that it has offered a reasonable accommodation to the employee.”).

99. 42 U.S.C. § 2000e(j) (2006).

100. See *Emp't Div. v. Smith*, 494 U.S. 872, 887 (1990) (“Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.”).

essential part of a religious faith must be given great weight.”¹⁰¹ That is not to say, however, that courts will never look to ensure that the employee holds a bona fide religious belief, as the Ninth Circuit demonstrated in *Tiano v. Dillard Department Stores, Inc.*¹⁰² In that case, a Roman Catholic employee requested unpaid leave after she learned of a pilgrimage opportunity to the former Yugoslavia to witness visions of the Virgin Mary.¹⁰³ When her employer denied the request, the employee went on the pilgrimage anyway and filed a Title VII claim after she was discharged.¹⁰⁴ During the trial, Tiano testified, “I felt I was called to go [on the pilgrimage]. . . . I felt that from deep in my heart that I was called. *I had to be there at that time.*”¹⁰⁵ The Ninth Circuit found this “lone unilateral statement” to be insufficient evidence of a “temporal mandate” to her religious belief.¹⁰⁶ Because Tiano failed to present corroborating evidence, the court found that the timing of the pilgrimage was a matter of personal preference and ruled that Tiano failed to establish a prima facie case of religious discrimination.¹⁰⁷ Specifically, the court held that “where an employee maintains that her religious beliefs require her to attend a particular pilgrimage, she must prove that the temporal mandate was part of the bona fide religious belief.”¹⁰⁸ Otherwise, the court

101. *United States v. Seeger*, 380 U.S. 163, 184 (1965). That is not to say that the inquiry concludes when plaintiffs claim that they hold a religious belief. Rather than focusing on whether the belief is truly a *religious* belief, the courts have instead focused on whether the claimed religious belief is *sincerely* held. *See id.* at 185 (“[T]he threshold question of sincerity . . . must be resolved in every case.”). Though *Seeger* dealt with exemption from the military draft, *id.* at 164–65, its logic has been applied in Title VII cases, *see, e.g.*, *Redmond v. GAF Corp.*, 574 F.2d 897, 901 n.12 (7th Cir. 1978) (“We believe the proper test to be applied to the determination of what is ‘religious’ under § 2000e(j) can be derived from the Supreme Court decisions in *Welsh v. United States*, [398 U.S. 333 (1970)], and *United States v. Seeger*” (citation omitted)).

102. *Tiano v. Dillard Dep’t Stores, Inc.*, 139 F.3d 679 (9th Cir. 1998).

103. *Id.* at 680.

104. *Id.* at 680–81.

105. *Id.* at 680 (emphasis added) (quoting Mary Tiano) (internal quotation mark omitted).

106. *Id.* at 682 (“For example, she did not testify that the visions of the Virgin Mary were expected to be more intense during that period. Nor did she suggest that the Catholic Church advocated her attendance at that particular pilgrimage.”).

107. *Id.* at 683.

108. *Id.* at 682. Recall, however, that courts are fairly deferential to a party’s characterization of a particular belief as religious. *See supra* notes 100–101 and accompanying text. Thus, *Tiano* may be appropriately characterized as a case of inadequate proof. Had Tiano presented proof of a sincerely held religious belief, the Ninth Circuit presumably would not have granted summary judgment.

reasoned, employers might be “forced to accommodate the personal preferences of the employee.”¹⁰⁹

Other courts outside of the Ninth Circuit have cited *Tiano* with approval,¹¹⁰ with one court explaining that “[an] employee’s desire to make [a] pilgrimage, which could be made at any time, at a time of her own choosing is a matter of personal preference” and thus is not entitled to Title VII protection.¹¹¹ Although Title VII “leaves little room for a party to challenge the religious nature of an employee’s professed beliefs,”¹¹² these cases demonstrate that employers are not precluded from doing so and that such tactics can be successful.

In addition to requiring a bona fide religious belief, an employee’s belief must actually conflict with an employment duty.¹¹³ Thus, when an employer presents a reasonable accommodation that eliminates the conflict, the Title VII inquiry is at an end.¹¹⁴ As the Supreme Court articulated in *Ansonia Board of Education v. Philbrook*,¹¹⁵ “By its very terms [Title VII] directs that *any* reasonable accommodation by the employer is sufficient to meet its accommodation obligation.”¹¹⁶ Employers are not required to accept an employee’s preferred accommodation, nor are they required to show that the alternatives proposed by an employee would impose more of an undue hardship than the employer’s chosen method of accommodation.¹¹⁷ The accommodation need only be *reasonable*.

109. *Id.*

110. *E.g.*, *Dachman v. Shalala*, 9 F. App’x 186, 192 (4th Cir. 2001); *Jiglov v. Hotel Peabody, G.P.*, 719 F. Supp. 2d 918, 929 (W.D. Tenn. 2010); *Loftus v. Blue Cross Blue Shield of Mich.*, No. 08-13397, 2010 WL 1139338 (E.D. Mich. Mar. 24, 2010); *Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256, 268 (S.D.N.Y. 2002). *But see* *Cal. Fair Emp’t & Hous. Comm’n v. Gemini Aluminum Corp.*, 18 Cal. Rptr. 3d 906, 911 (Ct. App. 2004) (“We have found no other published opinion relating to religious discrimination in which the expression, ‘temporal mandate,’ appears.”).

111. *Jiglov*, 719 F. Supp. 2d at 929.

112. *EEOC v. Unión Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 56 (1st Cir. 2002).

113. *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985), *aff’d*, 479 U.S. 60 (1986).

114. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986). For an accommodation to be reasonable, however, it must actually “eliminate[] the conflict between employment requirements and religious practices.” *Id.* at 70. Lower courts “generally refuse” to find an accommodation reasonable if that accommodation could not possibly eliminate the conflict. *Kaminer*, *supra* note 14, at 605.

115. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

116. *Id.* at 68 (emphasis added).

117. *Id.* at 69; *see also* *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982) (“Although the statutory burden to accommodate rests with the employer, the employee has a

Lower courts are generally in agreement that voluntary shift swaps within a neutral rotating shift system are a reasonable method of accommodating a religious employee,¹¹⁸ even if there are no employees who are willing to swap shifts.¹¹⁹ The Tenth Circuit succinctly articulated a rationale for this stance, stating:

[A]n employer [has] done all that was reasonably required under [Title VII] once it [has] encouraged the employee to try to find another employee to swap shifts with him so that he could avoid working . . . in violation of his religious beliefs. . . . [I]t would [be] unreasonable to require the employer to go further and attempt to arrange a schedule swap for the plaintiff. We recognize[] the interactive and reciprocal duties inherent in a reasonableness analysis, and conclude[] that the employer had done all that was reasonably required of it when it was amenable to, and receptive to, efforts that the employee could have conducted for himself to arrange his own schedule swap.¹²⁰

Furthermore, a proposed accommodation is not unreasonable simply because it requires an employee to bear some economic cost.¹²¹ In *Philbrook*, for instance, the Supreme Court held that unpaid leave is a reasonable accommodation because “[t]he direct effect of [unpaid leave] is merely a loss of income for the period the employee is not at work.”¹²² Similarly, an employer can propose that employees use their vacation days for religious observance,¹²³ though some courts have

correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer.”).

118. See, e.g., *Beadle v. Hillsborough Cnty. Sheriff’s Dep’t*, 29 F.3d 589, 593 (11th Cir. 1994) (“Numerous courts have relied on *Hardison* in holding that similar authorizations of voluntary swaps instituted by employers within neutral rotating shift systems constitute reasonable accommodations under Title VII.”).

119. *Kaminer*, *supra* note 14, at 605.

120. *Thomas v. Nat’l Ass’n of Letter Carriers*, 225 F.3d 1149, 1157 (10th Cir. 2000).

121. See *Kaminer*, *supra* note 14, at 606 (“The courts agree that a reasonable accommodation can require an employee to bear some economic cost.”).

122. *Philbrook*, 479 U.S. at 70–71 (alteration in original) (quoting *Nashville Gas Co. v. Satty*, 434 U.S. 136, 145 (1977)) (internal quotation marks omitted). Justice Marshall argued that the majority’s distinction was a false one because unpaid leave is a “forced reduction in compensation based on an employee’s religious beliefs.” *Id.* at 74 (Marshall, J., concurring in part and dissenting in part).

123. See, e.g., *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1379 (6th Cir. 1994) (“We recognize that use of vacation time legitimately may be required to allow an employee to avoid work on religious holidays or, in combination with other methods, to allow an employee to regularly avoid working on the Sabbath.”); *Getz v. Pennsylvania*, 802 F.2d 72, 74 (3d Cir. 1986) (holding that Title VII does not require that an employee be able to “have her religious holidays and keep her vacation days as well”).

held that requiring an employee to use all of their vacation days is unreasonable.¹²⁴ Employers can also satisfy their obligation by offering to transfer the employee to another position, so long as the new position preserves the employee's employment status.¹²⁵ If the trier of fact finds that the new position fails to sufficiently preserve the "compensation, terms, conditions, and privileges of employment," then an employee's Title VII claim may proceed.¹²⁶ The fact that the new position is less desirable is not dispositive,¹²⁷ at least in part because "[i]t is difficult for any organization to accommodate employees who are choosy about assignments."¹²⁸

2. *The Employer's Burden and Undue Hardship.* As noted in Section B.1, a court will inquire into whether an accommodation results in undue hardship for an employer only after the court finds that the employer failed to reasonably accommodate an employee's religious beliefs or practices.¹²⁹ Even then, however, the religious employee has an uphill battle because lower courts have interpreted the Supreme Court's decision in *Hardison* to require "a minimal level of accommodation."¹³⁰ Indeed, shortly after *Hardison* was decided, the Ninth Circuit recognized that "a standard less difficult to satisfy than the [*de minimis*] standard for demonstrating undue hardship expressed in *Hardison* is difficult to imagine."¹³¹

124. See, e.g., *Cooper*, 15 F.3d at 1379 ("[The employee] was faced with the choice of working on the Sabbath or potentially using all of her accrued vacation to avoid doing so. . . . Such an employee stands to lose a benefit, vacation time, enjoyed by all other employees who do not share the same religious conflict, and is thus discriminated against with respect to a privilege of employment.").

125. See, e.g., *Wright v. Runyon*, 2 F.3d 214, 217 (7th Cir. 1993) (holding that an employer reasonably accommodated an employee by inviting the employee to bid for another "essentially equivalent" position with requirements that did not interfere with the employee's religious belief); *Am. Postal Workers Union, S.F. Local v. Postmaster Gen.*, 781 F.2d 772, 776-77 (9th Cir. 1986) ("[T]he inquiry under Title VII reduces to whether the accommodation reasonably preserves the affected employee's employment status.").

126. *Kelly v. Cnty. of Orange*, 101 F. App'x 206, 207 (9th Cir. 2004).

127. See *Ayele v. Allright Bos. Parking, Inc.*, No. 99-1044, 1999 WL 1319012, at *1 (1st Cir. Oct. 13, 1999) ("To be reasonable the accommodation, as the district court explained, need not measure up to plaintiff's preferences, but it must be sufficiently comparable to the original position to amount to a reasonable alternative."); *Wright*, 2 F.3d at 217 ("A much more searching inquiry might also be necessary if *Wright*, in order to accommodate his religious practices, had to accept a reduction in pay or some other loss of benefits.").

128. *Ryan v. U.S. Dep't of Justice*, 950 F.2d 458, 462 (7th Cir. 1991).

129. See *supra* notes 114-117 and accompanying text.

130. *Kaminer*, *supra* note 14, at 610.

131. *Yott v. N. Am. Rockwell Corp.*, 602 F.2d 904, 909 (9th Cir. 1979).

Post-*Hardison*, lower courts have consistently affirmed that the inquiry into whether a proposed accommodation imposes an undue burden is fact-driven and case-specific.¹³² Furthermore, an employer must demonstrate *actual* hardship, not merely hypothetical or speculative hardship.¹³³ If courts were to consider anticipated hardship or the hardship that would be incurred if multiple employees requested the same accommodation, any proposed accommodation could be calculated to reach the level of undue hardship,¹³⁴ which “would essentially render section 701(j) meaningless.”¹³⁵ Employers are not required, however, to actually implement an accommodation to prove undue hardship.¹³⁶

As *Hardison* demonstrates, employers are not required to bear significant economic or efficiency costs in order to accommodate a religious employee.¹³⁷ Many plaintiffs continue to lose Title VII cases because the court finds that accommodating the religious observance would either impose more than a *de minimis* economic cost¹³⁸ or decrease productivity.¹³⁹ Courts also agree that an employer is not

132. See, e.g., *Brown v. Polk Cnty.*, Iowa, 61 F.3d 650, 655 (8th Cir. 1995) (“[T]he precise reach of the employer’s obligation to its employee is unclear . . . and must be determined on a case-by-case basis.” (quoting *Beadle v. Hillsborough Cnty. Sheriff’s Dep’t*, 29 F.3d 589, 592 (11th Cir. 1994)) (internal quotation mark omitted)).

133. See *Cook v. Chrysler Corp.*, 981 F.2d 336, 339 (8th Cir. 1992) (“[A]n employer’s costs of accommodation ‘must mean present undue hardship, as distinguished from anticipated or multiplied hardship.’” (quoting *Brown v. Gen. Motors Corp.*, 601 F.2d 956, 961 (8th Cir. 1979))); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989) (“Any proffered hardship, however, must be actual . . .”).

134. *Brown*, 601 F.2d at 961.

135. Kaminer, *supra* note 14, at 611.

136. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 76–81 (1977) (finding that the proposed accommodations would impose undue hardship despite the fact that none of the accommodations were implemented); *Virts v. Consol. Freightways Corp.*, 285 F.3d 508, 519 (6th Cir. 2002) (“[A]n employer does not have to actually experience the hardship in order for the hardship to be recognized as too great to be reasonable.”).

137. *Hardison*, 432 U.S. at 84. Whether or not the financial cost at stake in *Hardison* was significant is a matter of debate; it would have cost TWA \$150 for three months to accommodate *Hardison*. *Id.* at 92 n.6 (Marshall, J., dissenting).

138. See, e.g., *Lee v. ABF Freight Sys., Inc.*, 22 F.3d 1019, 1023–24 (10th Cir. 1994) (holding that an employee’s proposal that his employer hire an additional driver to cover the employee’s shifts “would result in a significant additional cost” and would “impose more than a *de minimis* cost”); *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1380 (6th Cir. 1994) (“[T]he hiring of an additional worker . . . would have entailed more than a *de minimis* cost, relieving [the employer] of the obligation to accommodate.”).

139. See, e.g., *Brown v. Polk Cnty.*, Iowa, 61 F.3d 650, 655 (8th Cir. 1995) (“[A]llowing [an employee] to direct [another] employee to type his Bible study notes would amount to an undue hardship on the conduct of county business, since the work that that employee would otherwise be doing would have to be postponed, done by another employee, or not done at all.”); *Mann v.*

required to provide accommodation if doing so would violate a valid law or regulation,¹⁴⁰ result in health or safety hazards,¹⁴¹ violate seniority provisions and collective-bargaining agreements,¹⁴² or adversely impact coworkers.¹⁴³

In sum, courts tend to interpret section 701(j) of Title VII narrowly, imposing “a minimally low burden upon the employer [and] making most accommodations of religious employees unreasonable.”¹⁴⁴ Employees are thus pressured to accept any offered accommodation—even when it does not adequately accommodate their religious observance—because courts are unwilling to require more of an employer.¹⁴⁵ In some situations employers may accommodate their employees’ religious commitments of their own accord, but it is important to recognize that employers “are under only a very slight legal obligation to do so.”¹⁴⁶

III. TITLE VII AND THE HAJJ

As demonstrated in Part II, current Title VII jurisprudence provides employers with a number of methods to avoid accommodating an employee’s religious obligations. Due to some of the unique features of the hajj, however, Muslim employees will likely

Frank, 7 F.3d 1365, 1370 (8th Cir. 1993) (“[The employee’s] proposed accommodation that the Postal Service ‘just do without’ her would have caused the Postal Service to suffer a significant loss in efficiency.”).

140. See, e.g., *Cassano v. Carb*, 436 F.3d 74, 75 (2d Cir. 2006) (holding that an employer did not discriminate against an employee when it fired her for failing to provide her social security number because accommodating her belief would cause the employer to violate federal law).

141. See, e.g., *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984) (holding that an employer did not violate Title VII when accommodating the employee’s religious belief would have violated California health and safety standards).

142. See, e.g., *Hardison*, 432 U.S. at 79 (majority opinion) (“[W]e do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid [collective-bargaining] agreement.”).

143. See, e.g., *Harrell v. Donahue*, 638 F.3d 975, 980 (8th Cir. 2011) (“[I]f accommodating an employee’s religious beliefs also causes a ‘real’ and ‘actual’ imposition on co-workers, Title VII does not require an employer to make such an accommodation.” (citation omitted) (quoting *Brown*, 61 F.3d at 655)); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 147 (5th Cir. 1982) (“[The plaintiff’s] characterization of complaints by others as mere grumbling underestimates the actual imposition on other employees in depriving them of their shift preference at least partly because they do not adhere to the same religion as [the plaintiff].”).

144. Brierton, *supra* note 14, at 174.

145. See Engle, *supra* note 14, at 397 (“[P]laintiffs have generally only succeeded in their claims (if only by having summary judgments or dismissals reversed) when . . . courts have determined that the employer made no attempt at accommodation.”).

146. Karlan & Rutherglen, *supra* note 14, at 7.

find that Title VII is even less accommodating of this practice than it is for religious observance generally. First, employers may not even be obligated to accommodate the hajj, as the hajj lacks a temporal mandate. Second, it is difficult to imagine a situation in which accommodating the hajj would *not* impose more than a *de minimis* cost on an employer. Thus, Muslims will find little refuge in federal employment-discrimination law.

Muslims are obligated to complete the hajj once in their life,¹⁴⁷ but the Qur'an does not dictate when a Muslim must do so, only that it must be performed during *Dhu al-Hijjah*.¹⁴⁸ So long as Muslims complete the hajj at some point in their lives, they have satisfied their religious obligation.¹⁴⁹ Therefore, a Muslim employee might fail to establish a *prima facie* case because there is no temporal mandate to the hajj; hence, there would be no conflict between employment duty and religious obligation.¹⁵⁰ An employer could argue that the decision to go on the hajj in any particular year is a matter of personal choice and not of religious belief, and there is a strong possibility that the argument would prevail.¹⁵¹

In the Berkeley case, it appears that the school district would have made this very argument had the case not settled.¹⁵² If the school district had prevailed at trial, Safoora Khan would have been forced to wait nearly a decade for the hajj to occur at a time that would not conflict with the school year. And it is important to recognize that Khan's case is somewhat unique: most employees do not have three months off from work in the summer during which they can partake in the hajj.

147. AL FAISAL & NASR, *supra* note 46, at xiv.

148. *See supra* notes 40–45 and accompanying text.

149. ESPOSITO, *supra* note 33, at 111.

150. *See supra* note 108 and accompanying text.

151. *Cf. Dachman v. Shalala*, 9 F. App'x 186, 192 (4th Cir. 2001) (“[A]ppellant’s own testimony confirmed that her decision to pick up the bread on Friday afternoon was simply her preference and not a religious requirement.”); *Tiano v. Dillard Dep’t Stores, Inc.*, 139 F.3d 679, 682 (9th Cir. 1998) (“Title VII does not protect secular preferences.”); *Loftus v. Blue Cross Blue Shield of Mich.*, No. 08-13397, 2010 WL 1139338, at *5 (E.D. Mich. Mar. 24, 2010) (holding that the plaintiff failed to establish a *prima facie* case where the plaintiff’s “desire to travel to the Holy Land for six months was based on his personal preference rather than a religious obligation”).

152. *See Consent Decree, supra* note 12, at 2 (“The Board of Education denies that it has discriminated against Ms. Khan on the basis of her religious observance . . . and further contends that Ms. Khan’s decision to perform the *Hajj* in December 2008 was a personal choice of Ms. Khan’s, which it was not required to accommodate . . .”).

If, however, a plaintiff can establish that the decision to perform the hajj in a specific year is a sincerely held religious belief, then that plaintiff should be able to establish a prima facie case of employment discrimination, even if the belief is idiosyncratic or not widely held.¹⁵³ Assuming that the Muslim plaintiff establishes a prima facie case, the employer still has a number of chances to avoid providing accommodation. The only way to accommodate the hajj is to grant time off during *Dhu al-Hijjah*, which leaves the employer and employee constrained in finding a mutually agreeable solution. It is quite likely that Muslim employees will have to use most, if not all, of their accumulated vacation days to complete the hajj, and even that may not be enough time off. An employer is permitted to offer unpaid leave as a reasonable accommodation under most circumstances,¹⁵⁴ but the employer would still have to hire a temporary employee, reschedule current employees and pay overtime wages, or simply accept lost efficiency from not having that employee work. But all of these options impose costs that would almost certainly surpass the *de minimis* threshold.¹⁵⁵ In addition, a risk of lower morale among employees can be sufficient to constitute undue hardship.¹⁵⁶

There is some authority that illustrates the difficulty of prevailing in a Title VII pilgrimage-accommodation lawsuit. In similar pilgrimage-accommodation cases, many religious employees lost their Title VII claims because the court in each case determined that accommodating the pilgrimage would impose an undue hardship on

153. See *EEOC v. Unión Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 56 (1st Cir. 2002) (“[T]he plaintiff must demonstrate both that the belief or practice is religious and that it is sincerely held.”); *supra* notes 100–101 and accompanying text. If pressed, Muslim employees should be able to make the argument that they have a sincerely held, personal, and religious belief that they must partake in the hajj during the current year. Otherwise the *Tiano* line of reasoning would defeat every claim a Muslim could bring under section 701(j). See *supra* notes 102–112 and accompanying text.

154. See *supra* notes 121–124 and accompanying text.

155. See Peter Zablotsky, *After the Fall: The Employer's Duty To Accommodate Employee Religious Practices Under Title VII After Ansonia Board of Education v. Philbrook*, 50 U. PITT. L. REV. 513, 547 (1989) (“Because of the per se nature of [the *de minimis* cost] approach, cost alternatives are generally no longer available to employees seeking accommodation under Title VII.”); *supra* notes 137–143 and accompanying text.

156. See *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 317 (4th Cir. 2008) (“[A]n employer is not required to adversely impact or infringe on the rights of other employees when accommodating religious observances.”); *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 274 (5th Cir. 2000) (“The mere possibility of an adverse impact on co-workers . . . is sufficient to constitute an undue hardship.”).

the employer.¹⁵⁷ In the few cases in which the plaintiff prevailed, the court's decision generally turned on the employer's failure to make any attempt to accommodate the religious employee.¹⁵⁸ Indeed, these cases confirm what is already apparent from other religious-accommodation cases: so long as employers demonstrate that they attempted to accommodate their employees and that any further proposed accommodation would impose more than a *de minimis* cost, the employer will likely prevail.¹⁵⁹ Muslims will find that they face a nearly insurmountable task when seeking Title VII accommodation to complete the hajj. Instead, they will have to rely on an employer's goodwill and willingness to provide extended leave to travel to Mecca or they will be forced to forgo the hajj.

IV. IMPLICATIONS OF THE BERKELEY CASE AND THE POTENTIAL FUTURE OF RELIGIOUS ACCOMMODATION

Title VII, as applied, is not particularly accommodating of religious belief generally, and section 701(j) is of little benefit for Muslim employees who wish to complete the hajj. Yet calls for legislative amendment to or Supreme Court action on section 701(j) have been unavailing.¹⁶⁰ Thus, if reasonable accommodation under

157. See, e.g., *Firestone Fibers*, 515 F.3d at 319 (“Firestone’s inability to completely accommodate Wise was not the result of a lack of desire, nor was it based on any intent to discriminate against his religion. Rather, the failure to achieve a total accommodation rests on the simple fact that Wise’s request for such an extraordinary number of hours exceeded what could be reasonably accommodated”); *Favero v. Huntsville Indep. Sch. Dist.*, 939 F. Supp. 1281, 1294 (S.D. Tex. 1996) (“The undisputed facts as to the regular, substitute, and other drivers available and used, and the effect on Huntsville [Independent School District’s] operations . . . establish a more than *de minimis* loss of efficiency.”), *aff’d*, 110 F.3d 793 (5th Cir. 1997); *Smith v. United Ref. Co.*, No. 77-71, 1980 WL 98, at *10 (W.D. Pa. Jan. 30, 1980) (holding that an employer was not obligated to accommodate an employee’s request for accommodation to perform a pilgrimage when “there were no adequate substitutes, either inside or outside [the employer’s] workforce, who could perform [the employee’s] duties”).

158. See, e.g., *EEOC v. Universal Mfg. Corp.*, 914 F.2d 71, 72 (5th Cir. 1990) (per curiam) (reversing a summary-judgment order when the employer made no showing that accommodating the employee would impose an undue hardship); *United States v. Bd. of Trs.*, No. 92 733 WL, 1995 WL 311336, at *13 (S.D. Ill. Jan. 13, 1995) (“[T]he University cannot deny a request [for accommodation to perform a pilgrimage] based solely on the duration of the leave requested without analyzing its operational needs and the individual employer/employee relationship.”).

159. See Engle, *supra* note 14, at 388 (“[A]bout the only time that plaintiffs consistently win is when courts find that employers have made no effort to accommodate the employees. Otherwise, almost any effort seems sufficient.”).

160. See *supra* notes 22–23 and accompanying text.

section 701(j) is to be more than simply an empty promise, a new means must be found for achieving those ends.

To kick-start the development of a more accommodating and balanced Title VII doctrine for religious employees of all faiths, the EEOC and the DOJ should increasingly intervene in private hajj-accommodation cases such as the Berkeley case. As is the case in other areas of the law in which the executive branch shapes the policy embodied in a statute,¹⁶¹ the EEOC and DOJ are tasked by statute to intervene in civil lawsuits when doing so is “of general public importance.”¹⁶² Here, even if future cases settle, increased government involvement in hajj-accommodation cases will further the dual purposes of the government’s enforcement authority under Title VII “to implement the public interest as well as to bring about more effective enforcement of private rights.”¹⁶³ This Part outlines the benefits of the proposal in Sections A and B. Section C responds to some of the most pressing and significant objections to such a proposal.

A. *Increased Government Intervention in Hajj-Accommodation Cases Will More Effectively Vindicate Private Employees’ Requests for Reasonable Accommodation*

The EEOC and the DOJ’s involvement in hajj-accommodation cases will increase individual plaintiffs’ likelihood of prevailing in a Title VII claim and protect their right to reasonable accommodation. Employers know that, with the government’s weight behind hajj-accommodation cases, they are more likely to face the prospect of a

161. The Securities and Exchange Commission (SEC) is one example of an executive agency that often shapes substantive policy through enforcement. *See* Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. ON REG. 149, 157 (1990) (“Throughout most of its history, the SEC has consistently relied on this *ad hoc* enforcement approach to the development of certain regulatory standards.”). President Obama’s decision to provide temporary relief from prosecution proceedings to immigrants who entered the country illegally is but another example of the executive branch shaping policy through enforcement discretion. *See generally* President Barack Obama, Remarks by the President on Immigration at the Rose Garden (June 15, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>. Moreover, congressional inaction in the face of *Hardison* is not necessarily indicative of acquiescence to the Supreme Court’s interpretation of section 701(j). *See Rapanos v. United States*, 547 U.S. 715, 750 (2006) (plurality opinion) (“Congress takes no governmental action except by legislation. . . . ‘Congress’ deliberate acquiescence’ should more appropriately be called Congress’s failure to express any opinion.” (quoting *id.* at 797 (Stevens, J., dissenting))).

162. 42 U.S.C. § 2000e-5(f)(1) (2006).

163. *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980).

long and drawn-out litigation than they would if the individual employee were to bring a suit.¹⁶⁴ And as the cost of litigation increases, so too does the incentive to settle.¹⁶⁵ Even if the employer would ultimately prevail on the merits at trial, settling is still a more attractive alternative if doing so would be less expensive than litigating the case.¹⁶⁶ This is what seems to have happened in the Berkeley case. Although the school district maintained that it had not discriminated against Khan, it nonetheless settled because of the high cost of resolving the case through litigation and trial.¹⁶⁷

Beyond exerting economic pressure on an employer to settle, the government is a more informed plaintiff than are individual employees. As a repeat player, the government can amass useful information from prior settlements that one-shot plaintiffs cannot obtain.¹⁶⁸ This information can be presented to the opposing party and to the judge as a trend in settlements or to demonstrate the reasonableness of an employee's request for accommodation to complete the hajj.¹⁶⁹ Because settlement operates as an "informal system of precedent,"¹⁷⁰ the government can employ past settlement outcomes as bargaining chips in future settlement conferences.¹⁷¹

164. See GREGORY C. SISK, *LITIGATION WITH THE FEDERAL GOVERNMENT* 53 (4th ed. 2006) ("The government's endurance and resources for litigation are so great as to make its full scale conduct of litigation particularly burdensome for even rich and patient private litigants." (footnote omitted)).

165. See Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 225 (1999) ("[T]he reason cases settle is because the alternative to settlement is litigation, which is generally quite costly." (footnote omitted)).

166. See generally George L. Priest, *Regulating the Content and Volume of Litigation: An Economic Analysis*, 1 SUP. CT. ECON. REV. 163, 165 (1982) (outlining an economic model for litigants' decisions to settle or to go to trial).

167. Consent Decree, *supra* note 12, at 2–3. In the hajj-accommodation case brought by the EEOC during the Bush administration, the employer also denied any wrongdoing but settled the case in order to avoid additional expense. Consent Decree, *supra* note 10, at 2.

168. Blanca Fromm, Comment, *Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 699 (2002).

169. See Ben Depoorter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957, 960 (2010) (arguing that prior settlements can exert "peer pressure" on similar litigation and can frame the normative outlook of a particular claim). In a survey conducted for the essay, Professor Depoorter finds that 96 percent of litigators agree that a lawyer must be aware of developments in settlement awards in their area of practice. *Id.* at 971.

170. Fromm, *supra* note 168, at 705.

171. According to Professor Depoorter's survey, 65 percent of lawyers agreed that it is useful to refer to favorable settlements from similar cases when in front of a judge during a

Although general information regarding the Berkeley case is available through traditional media sources¹⁷² and professional networks,¹⁷³ the details these sources provide are incomplete. Often, secondary sources do not provide a complete picture of the settlement landscape of employment-discrimination cases, focusing instead on cases that may be outliers or that involve large rewards or novel remedies.¹⁷⁴ As a result of this selective reporting, “[t]he scope, quality, and utility of information” available to private plaintiffs about individual lawsuits “will vary on a case-by-case basis.”¹⁷⁵ Only those with firsthand knowledge of a case will understand how the specific facts, legal issues, and other circumstances of that case unfolded.¹⁷⁶ The Berkeley case was part of a larger effort between the DOJ and the EEOC to coordinate enforcement of Title VII,¹⁷⁷ and this coordination will allow the federal government to present a united front in future cases. The religious-accommodation doctrine requires a fact-intensive inquiry,¹⁷⁸ and although a private plaintiff’s general knowledge of settlement trends from hajj-accommodation cases might be somewhat persuasive during a settlement conference, the persuasive effect is likely to be greater when the government can discuss the factual similarities between the cases in detail. Without a credible threat of a successful lawsuit—the situation in which Muslim employees wishing to complete the hajj will find themselves—employers have little incentive to engage in negotiations to find a reasonable accommodation. The government’s intervention has the potential to realign the scales toward a more equal bargaining position. That is, employees would have the government on their side; employers would have the unaccommodating Title VII accommodation doctrine on theirs.

Finally, government intervention in hajj-accommodation cases can serve an educational function, which has the potential to lead to

settlement conference, and 90 percent said it was helpful to do so during settlement negotiations with opposing counsel. Depoorter, *supra* note 169, at 976.

172. *E.g.*, Brachear, *supra* note 3; Markon, *supra* note 1.

173. *E.g.*, Andrew Lu, *Teacher’s Hajj Lawsuit Against Berkeley School District Settles*, THE CHI. EMP’T LAW BLOG (Oct. 17, 2011, 3:09 PM), <http://chicagoemploymentattorneysblog.com/2011/10/teacher-hajj-lawsuit-against-berkeley-school-district-settles.html>.

174. Depoorter, *supra* note 169, at 973.

175. Fromm, *supra* note 168, at 697.

176. *Id.* at 699.

177. Press Release, Dep’t of Justice, *supra* note 5.

178. *See supra* notes 132–135 and accompanying text.

increased accommodation of Muslims' beliefs and observances in the future without the need to resort to litigation. Islam remains largely misunderstood by the public,¹⁷⁹ and many people do not appreciate the profound significance of the hajj.¹⁸⁰ For example, while discussing the Berkeley case during a hearing entitled Protecting the Civil Rights of American Muslims, Senator Lindsey Graham argued:

If you were a Christian that says I want to go to Rome for three weeks or I want to go to Jerusalem for three weeks in the middle of the school year, I would say no. You know, I'm a Christian. I don't believe there's anything in my faith that says that I get three weeks off to observe Easter on any particular year.¹⁸¹

The Senator's comments demonstrate two broad misunderstandings about the hajj. First, the Senator's analogy insinuates that the pilgrimage to Mecca is simply a trip or vacation to a holy site rather than a religious obligation prescribed by the Qur'an. Second, the comment demonstrates that—possibly because there is no parallel obligation in Christianity—many Americans do not realize how important the hajj is for Muslims. Together, these observations suggest that, without more information, some employers may not see the need to accommodate their employees.

These cases will surely be controversial,¹⁸² but media reports of situations like the Berkeley case may also help educate the public about the hajj and its importance to Muslims.¹⁸³ With targeted government intervention, the public may begin to understand that the hajj is a central tenet of Islamic faith and that any inconvenience employers experience as a result of accommodating their employees

179. See *supra* notes 30–33 and accompanying text.

180. Cf. *Rattigan v. Gonzales*, 503 F. Supp. 2d 56, 81 (D.D.C. 2007) (“[T]he occasional cancellation or postponement of both work-related and personal travel plans, including the cancellation of plaintiff’s planned trip to Mecca to participate in the Hajj . . . are the type of employee grievances that can reasonably be expected to arise in every workplace.”).

181. *Protecting the Civil Rights of American Muslims*, *supra* note 9, at 16 (statement of Sen. Lindsey Graham).

182. See *supra* notes 7–10 and accompanying text.

183. See, e.g., Brachear, *supra* note 3 (describing the hajj as “one of the most important requirements of . . . Muslim faith”); Markon, *supra* note 1 (“[T]he hajj [is] one of the five pillars of the Islamic faith, which Muslims are obligated to do once.”). On the other hand, this strategy could backfire. Rather than serving an educational purpose, the government’s involvement in these cases could lead to a backlash similar to what the country witnessed in the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954). See Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1505–11 (2006) (summarizing the political and legal backlash of *Brown*).

is only temporary. Muslim employees will make a request for time off to complete the hajj once in their life. An employer who understands these facts may be willing to make an accommodation rather than bear the cost of litigating a Title VII claim.¹⁸⁴

In sum, increased governmental involvement in hajj-accommodation cases will effectively vindicate Muslim employees' rights to reasonable accommodation in several significant ways. First, the weight of government resources increases the potential for costly and drawn-out litigation, thereby making settlement a much more attractive option for employers. Second, as a repeat player, the government has an informational advantage over one-shot plaintiffs and will be able to more effectively bargain with employers. Finally, government involvement will bring increased media exposure, which has the potential to educate the public about the hajj and to help employers see the reasonableness of the request for time off so that litigation can be avoided in the future.

B. Vindicating the Broader Public Interest in Combating Employment Discrimination Through Hajj-Accommodation Cases

Increased governmental intervention in hajj-accommodation cases also serves the public interest in preventing discrimination and providing more robust accommodation for religious employees generally, not just for Muslims. In this respect, government intervention serves as a means to a larger end. Islam is a religion that places a heavy emphasis on practice in addition to belief,¹⁸⁵ and as the number of Muslims living in the United States grows, there will likely be increased pressure for Title VII to accommodate those practices. As Muslims find their practices accommodated, other religious employees will have precedent to cite to for their own requests.

One-shot plaintiffs are unlikely to be concerned with the larger implications of their case on religious-accommodation jurisprudence;¹⁸⁶ government intervention ensures that the public's

184. The Berkeley case settled for \$75,000, including attorney's fees. Consent Decree, *supra* note 12, at 9–10. The hajj-accommodation case that was brought during the Bush administration settled for \$70,000. Consent Decree, *supra* note 10, at 4.

185. ESPOSITO, *supra* note 33, at 86.

186. See Lederman, *supra* note 165, at 225–26 (“The parties [to a lawsuit] do not internalize costs or benefits to third parties. Thus, the potential precedential value of a court decision will factor into settlement only to the extent that the precedent would have value to one or both parties to the litigation itself.”).

interest in favorable precedent is accounted for.¹⁸⁷ The government can choose cases to influence the order in which cases are brought before a court, potentially affecting the development of a substantive body of precedent.¹⁸⁸ Although employers may prefer to fight each claim to establish favorable precedent, the cost of doing so will likely exceed the cost of settlement when the government is on the other side of the “v.”¹⁸⁹ The government’s intervention, then, may keep cases from reaching trial.

But settlements do not take place in a vacuum. Though many agree that past judicial precedent affects settlement outcomes,¹⁹⁰ some commentators argue that “the supposed strict division between the private realm of settlement agreements and the public forum of trial outcomes is naive.”¹⁹¹ When a hajj-accommodation case settles, the outcome of that settlement may extend beyond the individual settlement agreement to affect future litigation.¹⁹² As Professor Carrie Menkel-Meadow explains:

[Settlement reports] are used by practicing lawyers to guide their demands, settlements, and litigation decisions just as reported decisions do. These reports may not include . . . elaborated legal reasoning . . . but they provide at least as much guidance as jury verdicts and unreported judicial decisions. . . . [A]s cases of significant public importance are covered in the news, both the precedential and publicity effects of settlements may well exceed those of reported decisions, and the public . . . may be more

187. See Depoorter, *supra* note 169, at 982 n.98 (“[T]he collective action perspective on the evolution of law . . . postulates that areas of law expand more rapidly if plaintiffs are supported by the presence of long-term stakeholders . . .”).

188. See Lederman, *supra* note 165, at 234 (“Precedent is . . . ‘path-dependent’: the order in which cases are presented to a court for decision can influence the substantive content of precedent.”).

189. See Depoorter, *supra* note 169, at 981 (“In the absence of effective coordination, defendants cannot take into account the costs that their own settlement imposes on similarly situated companies. . . . Future defendants would rather see a novel claim fought off, but when individually faced with a claim, they prefer to settle the dispute . . .”).

190. See, e.g., Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 *GEO. L.J.* 2663, 2680 (1995) (“To charge that settlement is ungoverned by precedent is to be grossly insensitive to the contexts in which settlements occur.”).

191. E.g., Depoorter, *supra* note 169, at 973.

192. See *id.* at 979 (“[T]he outcome of a settlement may reach beyond the individual settlement agreement and affect adjudication.”).

informed than if precedents were left totally to lawyer access and interpretation.¹⁹³

Even though settlement lacks formal binding power on future parties, it can still influence the development of law.¹⁹⁴ Settlement outcomes will affect future settlement and litigation decisions because past settlement precedent can make a claim seem more reasonable and less novel.¹⁹⁵ Past settlement concessions can create a pressure toward future concessions, and that pressure will likely be spread across all employers.¹⁹⁶

Lawyers may not be the only ones who will use settlement information to shape future decisions. Due to the increased involvement of judges in settlement proceedings, prior settlements can become a “benchmark or reference point” for judges when deciding the merits of similar cases in the future.¹⁹⁷ Additionally, media coverage of lawsuits tends to affect future jury decisions and awards,¹⁹⁸ and it is quite possible that media coverage of settlements will influence jurors’ perceptions of employment discrimination.¹⁹⁹ The public may begin to readjust the normative lens through which future religious-accommodation suits are litigated despite the fact

193. Menkel-Meadow, *supra* note 190, at 2681.

194. Depoorter, *supra* note 169, at 974.

195. *Id.* at 987.

196. *Id.* at 981.

197. *Id.* at 975. Judges can use their experience and personal relationships to remain knowledgeable of novel settlements and trends. As Professor Depoorter explains:

Judges . . . may interpret settlement precedents as expressive statements regarding the appropriateness of compensation. Once a novel legal claim for tort compensation has been gratified by a (presumed) concession of the same sort in a private settlement agreement, future claims will be perceived as less extraordinary. If a company refuses to accept an offer that is comparable to concessions that competitors made in prior settlements, judges might be less sympathetic to that firm in subsequent proceedings.

Id. at 976.

198. See Edith Greene, Jane Goodman & Elizabeth F. Loftus, *Jurors’ Attitudes About Civil Litigation and the Size of Damage Awards*, 40 AM. U. L. REV. 805, 816–17 (1991) (finding a positive correlation between mock jury damage awards and the frequency of large awards in other cases, suggesting that jurors are influenced by media coverage and use media coverage as a benchmark); Laura Beth Nielsen & Aaron Beim, *Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, 15 STAN. L. & POL’Y REV. 237, 260 (2004) (“Through repeated and patterned reading of [media] coverage [of employment discrimination complaints], individuals come to possess cultural knowledge about the law.”).

199. See Depoorter, *supra* note 169, at 978 (“[I]t is reasonable to assume that information on settlements will likewise influence attitudes of jurors and their perceptions of right and wrong. As such, information on settlements will influence the viewpoints of juries . . .”).

that settlements do not formally bind future parties.²⁰⁰ Because of the feedback effect of past settlements, the legal community and the public will begin to view these claims as legitimate. In addition, because the government is able to selectively pursue Title VII claims, the government's involvement could serve as a signal that a particular case has more merit than if the individual employee sued the employer.²⁰¹ Thus, when an employer finally does challenge an employee's hajj-accommodation case, it will be too late.²⁰² As past settlements are employed in future litigation, the coverage of the settlements will affect the public's perception of reasonable accommodation. The government's involvement may thereby shift the normative view of what constitutes more than *de minimis* cost, and religious employees will be able to have their beliefs and practices more readily accommodated.

Title VII should not be used simply as an ex post method of punishing employers for failing to accommodate their employees. Instead, the prospect of Title VII litigation should incentivize employers to cooperate with their employees to find a reasonable accommodation prior to the filing of charges with the EEOC. For instance, the two parties could agree that unpaid leave is an appropriate balance between a Muslim's need to complete a fundamental religious obligation and an employer's need to avoid

200. *See id.* at 976 ("Given their noncoercive nature, settlement agreements may be perceived in a normative light.").

201. The EEOC and the DOJ may have an institutional interest in maintaining their credibility before the courts because of their status as repeat players. *See* Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1245 (2012) ("Whatever obligations government lawyers may have to their client, the United States, they also 'have an obligation to see that justice is done.' This special obligation carries with it both responsibilities and rewards: the responsibility to temper zealous advocacy with a commitment to the right outcome and the concomitant reward of special respect from the courts." (citation omitted) (quoting W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law*, 77 FORDHAM L. REV. 1333, 1349 (2009))). Moreover, a court's awareness of the government's interest in maintaining credibility could affect the way a court views the case. *See* S. REP. NO. 96-416, at 23 (1979), *reprinted in* 1980 U.S.C.C.A.N. 787, 805 (stating, in the context of the Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified as amended at 42 U.S.C. §§ 1997-1997j (2006 & Supp. IV 2011)), that the "Justice Department brings credibility to the proceedings," as "[t]he mere presence of the Department alerts a court that conditions . . . are sufficiently serious to warrant the attention of the Attorney General").

202. *Cf. Depoorter, supra* note 169, at 976-77 ("When the judge considers these standards in settlement conferences, bench trials, or remittitur, he or she might perceive this as enforcing an industry norm, instead of introducing novel changes to existing law. In this sense, settlement conferences are an opportunity for judges to reinforce settlement norms and standards." (citation omitted)).

incurring extensive costs. In fact, allowing a Muslim employee to take unpaid leave is probably the most reasonable method of accommodating the competing interests of the employer and the employee. Under *Hardison* and subsequent cases, however, an employer can simply decline to offer any accommodation because even this sensible accommodation would impose more than a *de minimis* cost.²⁰³

So long as employers know that Title VII requires so little,²⁰⁴ section 701(j) cannot provide the incentive to find solutions to conflicts between employment duties and employees' religious beliefs.²⁰⁵ Insofar as parties operate and bargain in the shadow of the law, Title VII casts a decidedly small shadow on employers. Hajj-accommodation cases such as the Berkeley case present an entry point for effecting change because they can demonstrate to employers that the federal government believes that Title VII actually *does* require accommodation of employees' religious practices. Beyond protecting private plaintiffs, the EEOC and the DOJ have an obligation to vindicate the public interest; they "should not sit on the sidelines as courts apply the law and establish precedent."²⁰⁶ By intervening in future cases, the government can fulfill its twin roles²⁰⁷ and begin to realign the scales toward reasonable accommodation. Once that happens, the government can reduce its involvement because section 701(j) will provide a stronger ex ante incentive to accommodate.

If increased government involvement in Title VII creates favorable precedent for Muslim employees wishing to complete the hajj, other religious employees stand to benefit as well. Non-Muslim employees can use precedent from hajj-accommodation cases to show the reasonableness of their own religious-accommodation claims. Islam is a religion with many requirements and obligations, and many of these practices create conflicts that will impose more than a *de*

203. See *supra* Part II.

204. See *supra* note 145; see also *supra* Part II.

205. See Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 327 (1991) ("[L]itigants order their private, out-of-court negotiations around the substantive law and procedure that will be applied if the negotiations break down and the court steps out of the shadows to adjudicate the dispute."). To the extent that employers know that they will not be held liable under the substantive law, there is little incentive to negotiate a suitable accommodation for employees.

206. Edward M. Kennedy, *Restoring the Civil Rights Division*, 2 HARV. L. & POL'Y REV. 211, 234 (2008).

207. See *supra* note 26 and accompanying text.

minimis cost on employers, as the term is currently understood. But if there is precedent for accommodating these practices, then less burdensome accommodations proposed by other religious employees are more likely to be accommodated as well. Although the Supreme Court's definition of "undue hardship" may remain the same, government intervention in Title VII litigation has the potential to breathe new life into section 701(j).

C. *A Response to Potential Objections*

Of course, a proposal for increased governmental involvement in private hajj-accommodation cases is likely to raise more than a few objections. This Note will respond to three here: (1) employers should not be forced to accommodate every religious belief and practice, (2) the government should not shape the course of religious-accommodation doctrine through litigation, and (3) even if the government should, it should not litigate on behalf of a particular religion.

1. *How far is too far?* The language of Title VII is clear and sensible: employers are not required to accommodate an employee's religious practice if doing so would impose an undue hardship.²⁰⁸ There are costs that employers cannot—and should not—be expected to bear. But by equating undue hardship with *de minimis* cost, the Supreme Court "effectively nullif[ied]" section 701(j).²⁰⁹

The law is full of difficult balancing tests, and the courts have shown themselves to be capable of "distinguish[ing] between real threat and mere shadow."²¹⁰ Although it may be difficult in certain situations, judges are required to engage in the "hard task of judging,"²¹¹ and they must fairly consider the important competing values at stake in religious-accommodation cases.²¹² Concededly, government intervention risks swinging the pendulum too far in the other direction, but there is a point at which the government could temper its intervention. It is not the aim of this Note to suggest that the government should intervene in every hajj-accommodation case—

208. 42 U.S.C. § 2000e(j) (2006).

209. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 89 (1977) (Marshall, J., dissenting).

210. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring).

211. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring).

212. *See id.* ("When two bedrock principles so conflict, understandably neither can provide the definitive answer. Reliance on categorical platitudes is unavailing.")

or even most cases. Nor does this Note advocate for an absolute obligation to accommodate religious employees. Instead, this Note proposes a means to achieving a more robust and balanced accommodation doctrine, one in which courts actually balance the competing interests, rather than summarily dismissing the concerns of religious employees by rubber-stamping an employer's decision. Although the slippery-slope objection is a fair one, it cuts both ways. *Hardison* and subsequent cases demonstrate what happens when the law strays too far in the other direction.

The First Amendment serves as a natural backstop for this Note's proposal because the government cannot impose an absolute obligation on employers to accommodate their employees' religious practices.²¹³ Title VII does not purport to establish a religion or to mandate absolute accommodation. Rather, its prohibition of employment discrimination based on race, color, religion, sex, or national origin has the secular purpose of ensuring employment opportunity to all groups in society.²¹⁴ As Justice O'Connor observed, "Title VII calls for *reasonable* rather than absolute accommodation and extends that requirement to all religious beliefs and practices . . . an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice."²¹⁵ The government's intervention is an attempt to restore that spirit of *reasonable* accommodation such that section 701(j) can have some import in future accommodation cases and can—like the prohibition of employment discrimination based on race, color, sex, and national origin—provide employment opportunities for members of all faiths.

Furthermore, accommodating the hajj is in some ways *less* burdensome than other accommodations that employers are required by law to make. For instance, an employer who accommodates a Sabbatarian pursuant to Title VII loses that employee for fifty-two

213. See *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710–11 (1985) (“[T]he Connecticut statute, which provides Sabbath observers with an absolute and unqualified right not to work on their Sabbath, violates the Establishment Clause of the First Amendment.”). One commentator suggests that the Court's decision in *Hardison* was motivated by a “concern that a more burdensome accommodation requirement would violate the Establishment Clause.” Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 704 (1992). Professor McConnell concludes, however, that “[t]his cannot be the constitutional test; most accommodations that have been recognized as legitimate impose more than a de minimis burden on others.” *Id.*

214. *Estate of Thornton*, 472 U.S. at 712 (O'Connor, J., concurring).

215. *Id.* (emphasis added).

days out of the year, every year. An employee who takes advantage of the Family and Medical Leave Act of 1993²¹⁶ is eligible for up to twelve weeks of unpaid leave each year a child is born or adopted.²¹⁷ Muslims who wish to complete the hajj, by contrast, will only need about three weeks of leave, once in their life. All of this is not to say that accommodating the hajj will not impose costs on an employer, but the hajj is not necessarily unique in that employees must take time off from work. Certainly there will be cases in which the cost of accommodating the hajj will be significant, and in those cases, accommodation may be impossible. But *Hardison* and subsequent cases dictate that almost any cost, significant or otherwise, is sufficient to deny accommodation. A more balanced approach is needed.

2. *It Is Not the Government's Place To Shape the Course of Title VII Accommodation Through Litigation.* First, there is a pragmatic answer to this objection that probably begs the question: nothing else has worked. Though commentators deride the Court's decision in *Hardison*,²¹⁸ the fact remains that the Court has not overturned its holding. Similar cries for legislative amendment to Title VII have proved fruitless.

It is not as if Congress is unaware of the impact that *Hardison* and subsequent cases have had on religious accommodation. At least one chamber of Congress has considered the Workplace Religious Freedom Act (WFRA)—a piece of legislation specifically aimed at amending section 701(j) of Title VII—in every session since 1994.²¹⁹ The 2012 incarnation of the WFRA specifically finds that the Court's holding in *Hardison* is “contrary to the intent of Congress.”²²⁰ But the WFRA has never passed through a chamber of Congress. In fact, it

216. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 5 and 29 U.S.C.).

217. *Id.* § 102, 29 U.S.C. § 2612(a)(1)(A)–(B) (2006).

218. *See supra* note 14 and accompanying text.

219. *See* S. 3686, 112th Cong. (2012); S. 4046, 111th Cong. (2010); S. 3628, 110th Cong. (2008); H.R. 1431, 110th Cong. (2007); S. 677, 109th Cong. (2005); H.R. 1445, 109th Cong. (2005); S. 893, 108th Cong. (2003); S. 2572, 107th Cong. (2002); H.R. 4237, 106th Cong. (2000); S. 1668, 106th Cong. (1999); S. 92, 105th Cong. (1997); H.R. 2948, 105th Cong. (1997); S. 2071, 104th Cong. (1996); H.R. 4117, 104th Cong. (1996); H.R. 5233, 103d Cong. (1994).

220. S. 3686 § 2. The WFRA redefines undue hardship to include only those accommodations that “impose[] a *significant* difficulty or expense on the conduct of the employer's business.” *Id.* § 4 (emphasis added). This definition of undue hardship is similar to the one contained in the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, tit. I, § 101(10), 104 Stat. 327, 331 (codified at 42 U.S.C. § 12111(10) (2006)).

has never made it out of committee.²²¹ And as Congress failed to restore section 701(j) to its intended purpose, the number of claims of religious discrimination filed with the EEOC more than doubled between 1992 and 2007, and “there is no way to tell how many people simply quit their job rather than complain.”²²² If minority religions are to be protected, legislative amendment is not a promising route.

A more nuanced answer must acknowledge that the discussion about a framing effect of settlement and its impact on future cases is speculative. It may very well be the case that even if the government settles twenty hajj-accommodation cases, a district court will throw out the first case to reach trial on summary judgment, and an appellate court will affirm the decision. That rejection would create unfavorable precedent, which would negatively impact future cases for Muslims and religious employees generally. But this point circles back to the first answer: nothing else has worked. Waiting for the Court to reexamine *Hardison* or for Congress to amend section 701(j) means that religious employees have to accept an unaccommodating religious-accommodation jurisprudence. If this Note’s proposed strategy does not work, and Title VII does not impose a duty to accommodate one of the Five Pillars of Islam, then section 701(j) truly has become a statute that “while brimming with sound and fury, ultimately signif[ies] nothing.”²²³

3. *The Government Should Not Litigate on Behalf of a Particular Religion.* Government intervention on behalf of a particular religion in the context of Title VII is not unprecedented. Indeed, the EEOC and the DOJ have filed numerous religious-accommodation lawsuits on behalf of Worldwide Church of God members.²²⁴ Just as other agencies of the executive branch have enforcement discretion in other areas of law,²²⁵ the EEOC and the DOJ have discretion in whether

221. See, e.g., S. 3686 (112th): *Workplace Religious Freedom Act of 2013*, GOVTRACK, <http://www.govtrack.us/congress/bills/112/s3686> (last visited Jan. 16, 2013).

222. 156 CONG. REC. S10,517 (daily ed. Dec. 17, 2010) (statement of Sen. John Kerry).

223. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting) (internal quotation marks omitted).

224. Eugene Volokh, “*Department of Justice Enforces the Sharia: Sues Illinois School District for Muslim Teacher Hajj*,” VOLOKH CONSPIRACY (Dec. 14, 2010, 2:02 PM), <http://volokh.com/2010/12/14/department-of-justice-enforces-the-sharia-sues-illinois-school-district-for-muslim-teacher-hajj> (citing those cases).

225. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) (“A principal feature of the removal system is the broad discretion exercised by immigration officials.”); *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“In our criminal justice system, the Government retains

and how to enforce Title VII.²²⁶ The government is tasked with ensuring effective enforcement of employees' Title VII rights, and the hajj presents an opportune point of entry for government intervention. But the intervention is not just about obtaining accommodation for Muslims; it is about restoring some semblance of reasonableness to section 701(j).

Although the immediate impact of this strategy benefits Muslims, other religious employees will benefit from these cases as well.²²⁷ Many of the requirements of Islam actually impose more than a *de minimis* cost on employers, but these cases may begin to shift the normative framework through which reasonable accommodation is applied. Government involvement will likely be controversial; it was in the Berkeley case. The long-term effect of these cases, however, will lead to increased accommodation for religious employees of all faiths.

CONCLUSION

The Berkeley case demonstrates the need for a shift in the way that the Title VII religious-accommodation doctrine is applied. The hajj is a central tenet of Islam, yet the Berkeley school district probably would have mounted a successful defense against Safoora Khan's claim of religious discrimination but for the DOJ's involvement. Indeed, the hajj will almost always impose more than a *de minimis* cost on employers, and in those situations Title VII will provide no protection for Muslim employees. Muslims wishing to complete the hajj will be forced to choose between their faith and their job, the exact choice that Senator Randolph hoped to eliminate when he proposed section 701(j).²²⁸

In this regard, this Note joins the commentary on the failure of Title VII to fulfill its promise of reasonable accommodation for religious belief and practice. The standard articulated in *Hardison* and applied in subsequent cases—which equates undue hardship with more than a *de minimis* cost—is contrary to the spirit of section

'broad discretion' as to whom to prosecute." (quoting *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982))).

226. *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 458 (6th Cir. 1999); cf. Kennedy, *supra* note 206, at 232 (arguing that the president assuming office after George W. Bush should establish new enforcement priorities within the DOJ Civil Rights Division).

227. *See supra* Part IV.B.

228. *See supra* note 66 and accompanying text.

701(j).²²⁹ Unlike previous commentary, however, this Note attempts to articulate a workable strategy that can begin to tip the scales so that the interests of employees and employers are fairly balanced. *Hardison* was decided in 1977—more than twenty-five years ago—and the Court has not seen fit to reexamine its holding since then. Despite repeated attempts by members of Congress, the WFRA has never made it out of committee. With two branches of the government unwilling or unable to act, the path to more effective accommodation must begin from another source—the third, remaining branch.

The EEOC and the DOJ have a clear mandate from Congress to enforce Title VII,²³⁰ and action taken on behalf of individuals also furthers the public interest.²³¹ Increased intervention by the EEOC and the DOJ in future hajj-accommodation cases has the potential to be the solution to the vexing problem of providing reasonable accommodation—for Muslims as well as for religious employees generally. In the short term, these interventions benefit the individual plaintiffs seeking accommodation because employers are more likely to settle when the government is involved in the case. But these settlements have value outside of the immediate lawsuit. Over time, hajj-accommodation cases can begin to adjust the lens through which the courts and the public view reasonable accommodation and undue hardship. Courts may begin to evaluate undue hardship consistent with congressional intent and the plain language of section 701(j). Employees can use information about past settlements in future negotiations to demonstrate the reasonableness of their proposed accommodation. Title VII will finally be able to create an incentive for employers to cooperate with their employees in working to resolve conflicts between employment duties and religious practices *prior* to litigation. Religious employees will finally have a legitimate opportunity to benefit from the protections promised by section 701(j), and the government will help to restore the spirit of reasonable accommodation.

229. See *supra* notes 57–68 and accompanying text.

230. 42 U.S.C. § 2000e-5 (2006).

231. *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980).