

## THE RELIGIOUS RIGHT TO REFUSE SERVICE: ACCOMMODATING MUSLIMS IN A ‘CHRISTIAN’ AMERICA

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INTRODUCTION.....	381
I.AMERICAN JURISPRUDENCE ON RELIGIOUS ACCOMMODATION .....	385
A. The Twin Constitutional Clauses on Accommodation.....	385
1. The Establishment Clause.....	386
2. The Free Exercise Clause .....	389
B. Title VII of the Civil Rights Act of 1964 .....	391
C. American Jurisprudence’s Effect on Religious Minority Accommodation Claims .....	393
II.THE RELIGIOUS RIGHT TO REFUSE SERVICE .....	395
A. The Somali Muslim Taxi Driver Controversy .....	396
1. The Narrative .....	396
2. The Taxi Drivers’ Legal Claims.....	398
a. Federal Constitution .....	399
b. Minnesota State Constitution.....	400
c. Title VII of the Civil Rights Act.....	401
i. Independent Contractor vs. Employee .....	401
ii. Reasonably Accommodate Without Undue Hardship .....	404
B. The Inequality of Current Religious Refusal Law .....	405
III.AN ALTERNATIVE LEGAL FRAMEWORK FOR RELIGIOUS REFUSAL CLAIMS .....	410
A. The Legal Framework .....	410
1. The First Requirement: Must Not Disrupt Service to the Public.....	410

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2. The Second Requirement: Must Not Violate  
Anti-Discrimination Laws..... 412

B. Comparing the Two Claims under this Framework.. 413

C. Incorporating the Two-Part Test into Religious  
Accommodation Jurisprudence..... 417

CONCLUSION..... 418

## INTRODUCTION

Since 9/11, many countries have become increasingly wary of accommodating certain religious practices of their Muslim minorities. The primary reasons for this apprehension focus around fears of radicalism, disloyalty, and spreading illiberal practices contrary to “universal” human rights.<sup>1</sup> These concerns have led to a number of controversies receiving international attention. Two of the most prominent have been the banning of the Islamic headscarf in French public schools<sup>2</sup> and the rejection of Islamic faith-based family law arbitration in Ontario, Canada.<sup>3</sup> In these cases, state authorities reacted to Muslim accommodation claims by restricting the rights for members of all religious faiths.<sup>4</sup> In the French *l'affaire du foulard*, President Jacques Chirac banned all public school students from wearing conspicuous religious apparel, which, in addition to Muslim headscarves, included Jewish skullcaps, Sikh turbans, and large Christian crosses.<sup>5</sup> In the Canadian case, Ontario Premier Dalton McGuinty prohibited the use of binding religious arbitration to settle family law matters for all religious groups, including Muslims, Jews, Jehovah's Witnesses, and others.<sup>6</sup>

While the French and Ontario governments—to appear as not to discriminate against any particular religion—have taken increasingly secular stances in response to accommodation claims by Muslims, the United States, in recent years, has seen a trend toward greater religious accommodation, especially for the Christian majority. For example, in large part due to pressure from the Christian Right social movement,<sup>7</sup> American legislatures

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<sup>1</sup> See Tariq Modood, *Muslims and the Politics of Difference*, in *MANAGING OPPORTUNITY, CONFLICT AND CHANGE* 100, 101 (Sarah Spencer ed., 2003).

<sup>2</sup> See ROBERT O'BRIEN, *THE STASI REPORT* (2005) (providing commentary on the Stasi Report, a controversial report presented to the French president containing a recommendation against wearing religious symbols in schools).

<sup>3</sup> Prithi Yelaja & Robert Benzie, *McGuinty: No Sharia Law; Move Stuns Sharia Foes, Supporters*, *TORONTO STAR*, Sept. 12, 2005, at A1.

<sup>4</sup> See Peter G. Danchin, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law*, 33 *YALE J. INT'L L.* 1, 2–3, 32 (2008); Yelaja & Benzie, *supra* note 3.

<sup>5</sup> See Danchin, *supra* note 4, at 2–3.

<sup>6</sup> Yelaja & Benzie, *supra* note 3.

<sup>7</sup> See generally STEVE BRUCE, *THE RISE AND FALL OF THE NEW CHRISTIAN RIGHT* (1988) (providing a broad overview of the Christian Right and its influence in the decade of 1978-1988); SARA DIAMOND, *ROADS TO DOMINION* 3–4 (1995) (discussing a general history of the movement beginning with the World War II era); CLYDE WILCOX, *ONWARD CHRISTIAN SOLDIERS* 173–74 (1996) (broadly

and courts have permitted Judeo-Christian displays on public grounds, such as the Ten Commandments, as well as legislation allowing Christian pharmacists to refuse to fill contraception prescriptions.<sup>8</sup> Furthermore, the Obama administration has granted religious employers an exemption from the Affordable Care Act requirement to cover birth control in their health-care plans,<sup>9</sup> and many Catholic groups have argued that the exemption does not go far enough, an issue which has divided the lower courts and is currently on appeal at the Supreme Court.<sup>10</sup> More recently, the Arizona legislature passed S.B. 1062, which permitted businesses to reject service to any customer based on the owners' religious beliefs.<sup>11</sup> Backed by the conservative Christian group Center for Arizona Policy, the bill was drafted to allow Christians to refuse serving gay couples.<sup>12</sup> While Governor Jan Brewer eventually vetoed the bill, several other states have considered similar legislation.<sup>13</sup>

This article examines the effect of this American religious resurgence on a particular Muslim legal claim for religious accommodation: the right of Muslim taxi drivers to refuse service

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discussing the movement, ranging from before its inception to the present and onward).

<sup>8</sup> See *Van Orden v. Perry*, 545 U.S. 677, 690, 692 (2005) (finding that the monument did not violate the Establishment Clause despite its religious symbolism, and noting the historical meaning of the Ten Commandments and American tradition of acknowledging religion's role in American life); Julie D. Cantor, *When Contraceptives Clash with Conscience, Whose Right Prevails?*, 33 HUM. RTS., no. 3, 18, 19 (2006). See also discussion on Christian pharmacists, *infra* Section II(B).

<sup>9</sup> See *Women's Preventive Services and Religious Institutions*, WHITE HOUSE (Feb. 10, 2012), <http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions>.

<sup>10</sup> See, e.g., *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 678 (2013) (pending); *Conestoga Wood Specialties Corp. v. Sebelius*, 134 S. Ct. 678 (2013) (pending).

<sup>11</sup> S.B. 1062, 51st Leg., 2d Reg. Sess. (Az. 2014), available at, <http://www.azleg.gov/legtext/51leg/2r/bills/sb1062p.pdf>.

<sup>12</sup> The bill's sponsor Sen. Steve Yarbrough said it was needed to respond to a New Mexico Supreme Court decision allowing a gay couple to sue a photographer who refused to take pictures of their wedding. See *Arizona Senate OKs bill boosting service refusal*, AZCENTRAL (Feb. 19, 2014, 10:12 PM), <http://www.azcentral.com/news/politics/free/20140219arizona-senate-oks-bill-boosting-service-refusal.html>.

<sup>13</sup> See Alia Beard Rau et al., *Arizona Gov. Jan Brewer vetoes Senate Bill 1062*, AZCENTRAL (Feb. 26, 2014, 11:58 PM), <http://www.azcentral.com/news/politics/articles/20140226arizona-jan-brewer-1062-statement.html>; Amanda Terkel, *Georgia, Mississippi Backtrack On Bills Mirroring Arizona Anti-Gay Legislation*, HUFFINGTON POST (Feb. 27, 2014, 5:04 PM), [http://www.huffingtonpost.com/2014/02/27/anti-gay-bills\\_n\\_4868169.html](http://www.huffingtonpost.com/2014/02/27/anti-gay-bills_n_4868169.html).

to passengers transporting alcohol. Muslims in the United States have faced a variety of socio-legal challenges to their legal claims for religious accommodation, especially since 9/11.<sup>14</sup> One particular example that garnered national attention was a confrontation between Somali Muslim taxi drivers and the Metropolitan Airports Commission (MAC) at Minneapolis-St. Paul International Airport. Some of the Somali Muslims—who make up approximately seventy-five percent of the airport's taxi drivers—asked the MAC to accommodate their request, on religious grounds, to refuse service to passengers at the airport who are visibly carrying alcohol.<sup>15</sup> After the taxi drivers' request received considerable public backlash, the MAC responded by not only rejecting the accommodation claim but also creating stringent penalties for any driver who refuses service to passengers.<sup>16</sup>

The MAC's rejection of the Muslim taxi drivers' claim demonstrates how current American jurisprudence on religious accommodation—under the Constitution and Title VII of the Civil Rights Act of 1964—allows for unequal treatment between various religious groups. For example, although both are employees of state-regulated businesses providing services to the general public, the Muslim drivers must provide service to all

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<sup>14</sup> See *What You Should Know about the EEOC and Religious and National Origin Discrimination Involving the Muslim, Sikh, Arab, Middle Eastern and South Asian Communities*, EEOC, [http://www.eeoc.gov/eeoc/newsroom/wysk/religion\\_national\\_origin\\_9-11.cfm](http://www.eeoc.gov/eeoc/newsroom/wysk/religion_national_origin_9-11.cfm) (last visited Feb. 4, 2014) (illustrating that the Equal Employment Opportunity Commission (EEOC) saw a 250 percent increase in the number of religion-based employment discrimination charges involving Muslims in the initial months after 9/11); Steven Greenhouse, *Muslims Report Rising Discrimination at Work*, N.Y. TIMES (Sept. 23, 2010), <http://www.nytimes.com/2010/09/24/business/24muslim.html> (providing that although Muslims make up less than two percent of the U.S. population, they account for about twenty-five percent of religious discrimination claims filed with the EEOC). See also *EEOC v. Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006, 1016–17 (D. Ariz. 2006) (holding that Alamo Rent-A-Car was liable under Title VII for refusing to allow a female Muslim employee to wear her headscarf). Compare *Elkhatib v. Dunkin' Donuts, Inc.*, 2004 WL 2600119, at \*4–5 (N.D. Ill. Nov. 15, 2004) (rejecting a Muslim's claim for losing his restaurant franchise for refusing to serve pork), with *Potter v. D.C.*, 382 F. Supp. 2d 35, 36–37, 42 (D.D.C. 2005) (accepting Muslim firefighters' claim to wear beards contrary to fire department policy).

<sup>15</sup> Kari Lydersen, *Some Muslim Cabbies Refuse Fares Carrying Alcohol*, WASH. POST (Oct. 26, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/25/AR2006102501727.html>.

<sup>16</sup> See Curt Brown, *Cabbies Ordered to Pick Up All Riders; A Court Fight is Likely as MAC Cracks Down on Muslims Who Decline Alcohol-Carrying Riders*, STAR TRIBUNE (Minneapolis, MN), Apr. 17, 2007, at 1A.

customers, while Christian pharmacists in several states are permitted to refuse service to customers requesting birth control. This disparate treatment is partly because U.S. courts—particularly after the Supreme Court’s decision in *Employment Division v. Smith* eroded the ability of minority faiths to assert claims under the First Amendment’s Free Exercise Clause—have given considerable leeway to state agencies and legislatures to decide which religious groups to accommodate as well as exactly how they should be accommodated.<sup>17</sup> Largely for this reason, religious minorities, especially marginalized groups like Muslims, have been at a significant disadvantage compared to the Christian majority when making legal claims for accommodation.<sup>18</sup>

Exploring the various legal issues at stake regarding the religious right to refuse service to customers, this article offers an alternative to the current legal framework. Instead of leaving the determination of refusal of service claims to administrative or legislative fiat, these accommodation requests should follow a principled legal analysis that treats all claims equally regardless of religious affiliation. In particular, the American legal system should require religious exemptions allowing individuals to refuse service in state-regulated businesses only if the following two conditions are met: 1) the refusal does not disrupt service to the general public, and 2) the refusal does not violate common carrier and public accommodation laws outlawing discrimination based on various protected traits, such as race, sex, religion, national origin, disability, marital status, and sexual orientation. While the Somali Muslim taxi drivers’ claim complies with the second condition, the taxi drivers should be accommodated only if they can also satisfy the first. In short, the taxi drivers must devise a viable solution that would allow them to refuse passengers while not disrupting service. As of yet, such a solution has not been offered.

This article challenges current American jurisprudence on religious refusal accommodation claims, and advocates for a more principled approach to this area of the law. Part I addresses the legal framework for employment-related religious accommodation

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<sup>17</sup> *Emp’t Div., Dep’t Hum. Res. Or. v. Smith*, 494 U.S. 872, 888–90 (1990) (holding that neutral, generally applicable laws that incidentally burden religion need not be reviewed under a compelling governmental interest standard).

<sup>18</sup> See *infra* Section I(B).

claims in the United States. It first provides a brief historical analysis of religious accommodation jurisprudence under the Constitution's Establishment and Free Exercise Clauses as well as Title VII. It then examines the difficulties religious minorities, such as Muslims, face when making accommodation claims in the United States. Part II examines the effect of current religious accommodation jurisprudence on a particular Muslim legal claim: the Somali Muslim taxi drivers' request to refuse service to passengers carrying alcohol. After determining that the taxi drivers likely have no legal claim under current American law, Part II compares the taxi drivers' claim to that of Christian pharmacists to demonstrate how the legal system favors the Christian majority and other legislatively powerful groups over Muslims and other unpopular minorities. Part III subsequently offers an alternative legal framework for addressing religious refusal claims, based on a principled analysis of the socio-legal issues at play.

#### I. AMERICAN JURISPRUDENCE ON RELIGIOUS ACCOMMODATION

American jurisprudence has not generated a consistent and established constitutional doctrine on religious accommodation.<sup>19</sup> Scholars, judges, and lawmakers have offered strikingly different approaches as to how a neutral, secular United States should manage its authority over religious practices within its jurisdiction.<sup>20</sup> Largely for this reason, American jurisprudence on religious accommodation has set the stage for "various political struggles and pragmatic compromises by both legislatures and courts . . ."<sup>21</sup> These struggles are exemplified by the historical progression of religious accommodation law under both the U.S. Constitution and Title VII of the Civil Rights Act of 1964.

##### A. *The Twin Constitutional Clauses on Accommodation*

The struggles over religious accommodation law are most apparent in the inherent tension between the First Amendment's

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<sup>19</sup> See, e.g., Danchin, *supra* note 4, at 42. See also Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 67 (1983) (criticizing the Supreme Court's decision in the *Bob Jones University* case for not providing a constitutional commitment of how to solve the conflict between two very different beliefs each side had about the social order).

<sup>20</sup> See Danchin, *supra* note 4, at 32–33.

<sup>21</sup> *Id.* at 33–34.

twin religion clauses: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”<sup>22</sup> Religious accommodation concerns arise under both clauses. The first clause, the Establishment Clause, determines when the Constitution permits accommodations, while the second clause, the Free Exercise Clause, determines when the Constitution compels accommodations.<sup>23</sup> Thus, “free exercise” accommodations are those required by the Free Exercise Clause, while “discretionary” accommodations are those not required by the Free Exercise Clause, but permitted by the Establishment Clause.<sup>24</sup> The Establishment Clause serves to protect the separation of religion and politics in the public sphere, while the Free Exercise Clause serves to protect the free exercise of religious beliefs without government interference.<sup>25</sup> The Supreme Court has struggled to grapple with the inherent tension between these two clauses, which has led to a number of competing approaches to religious accommodation.<sup>26</sup>

### 1. The Establishment Clause

Establishment Clause jurisprudence was delineated by the Supreme Court in the landmark case *Lemon v. Kurtzman* in 1971.<sup>27</sup> The case was an attempt to reconcile inconsistent federal and state judicial treatment of religious freedom (in which established tenets of Christianity were sporadically declared constitutional)<sup>28</sup> and to further clarify the meaning of Thomas

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<sup>22</sup> U.S. CONST. amend. I.

<sup>23</sup> Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992).

<sup>24</sup> See *id.* (stating that accommodation encompasses both discretionary actions that the Free Exercise Clause does not require and accommodations that the Constitution compels).

<sup>25</sup> *Id.*

<sup>26</sup> See *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (stating that the two religious clauses often produce inconsistent demands on the government) (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 668–69 (1970) (“The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.”)).

<sup>27</sup> See generally *Lemon v. Kurtzman*, 403 U.S. 602, 606 (1971).

<sup>28</sup> See *id.* at 611–13. Compare *State v. Ambs*, 20 Mo. 214, 214 (Mo. 1854) (religiously based statute compelling the observance of Sunday declared constitutional), with *Ex parte Newman*, 9 Cal. 502, 502, 510 (Cal. 1858) (declaring language of an act “for the better observance of the Sabbath” unconstitutional and void as a violation of religious freedom by enforcing the compulsory observance of a day held sacred by believers in one religion and thus



Jefferson's "metaphorical wall" separating church and state.<sup>29</sup> In *Lemon*, the Court ruled that a Pennsylvania statute that allowed the state to reimburse Catholic schools for teachers' salaries, textbooks, and instructional materials violated the Establishment Clause.<sup>30</sup> Chief Justice Warren Burger's majority opinion established what has become known as the *Lemon* test, which specifies the requirements for government action concerning religion.<sup>31</sup> First, the state action substantially affecting religious accommodation must have a legitimate secular purpose.<sup>32</sup> Therefore, if a statute had a religious as well as a secular purpose, it would not necessarily be prohibited; the religious purpose must predominate. Second, the action's primary effect must neither advance nor inhibit religion.<sup>33</sup> Courts must determine whether the government action favors, endorses, or inhibits "particular religious beliefs and the degree to which this action might harm religious or irreligious minorities."<sup>34</sup> Third, the action must not "foster an excessive government entanglement with religion."<sup>35</sup> For example, in *Lemon*, the state's supervision over Catholic schools and the Catholic Church's influence over state employees represented a prima facie case of excessive government entanglement with religion.<sup>36</sup>

Although the *Lemon* test has been criticized by judges and commentators alike,<sup>37</sup> the Supreme Court continues to apply it

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discriminated in its favor).

<sup>29</sup> *Lemon*, 403 U.S. at 614 ("[T]he line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."). See generally Julie A. Oseid, *The Power of Metaphor: Thomas Jefferson's "Wall of Separation Between Church & State"* (Univ. St. Thomas Sch. Law Legal Studies Research, Working Paper No. 10-14, 2010), available at <http://papers.ssrn.com/abstract=1584966> (for a general discussion of Thomas Jefferson's "metaphorical wall" and its metaphorical meaning).

<sup>30</sup> *Lemon*, 403 U.S. at 606-07.

<sup>31</sup> *Id.* at 612-13. See Daniel O. Conkle, *Lemon Lives*, 43 CASE W. RES. L. REV. 865, 865-66 (1993).

<sup>32</sup> *Lemon*, 403 U.S. at 612.

<sup>33</sup> *Id.*

<sup>34</sup> Conkle, *supra* note 31, at 870.

<sup>35</sup> *Lemon*, 403 U.S. at 613 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)).

<sup>36</sup> *Id.* at 609, 611.

<sup>37</sup> See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319-20 (2000) (Rehnquist, C.J., dissenting) (describing *Lemon's* career as "checkered" and collecting cases questioning it) (citing *Lamb's Chapel v. Cent. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-99 (1993)); *Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 655-56 (1989) (Kennedy, J., dissenting) (citing *Edwards v.*

when deciding whether employment-related religious accommodation claims violate the Establishment Clause.<sup>38</sup> Therefore, under *Lemon*, if an employment-related statute “has a primary effect that impermissibly advances a particular religious practice[,]” it will violate the Establishment Clause.<sup>39</sup> For example, in *Thornton v. Caldor*, the Supreme Court held that a Connecticut state statute that provided employees with the absolute right not to work on their chosen Sabbath violated the Establishment Clause.<sup>40</sup> The Court reasoned that under the statute, “Sabbath religious concerns automatically control over all secular interests at the workplace; the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath.”<sup>41</sup>

However, if a statute contains religious exemptions for employees from an otherwise generally applicable law, then it will not violate the Establishment Clause. For example, in *Corp. of the Presiding Bishop v. Amos*, the Supreme Court upheld an exemption from Title VII of the Civil Rights Act that permitted a wide array of religious organizations to discriminate on the basis of religion in employment decisions.<sup>42</sup> The Court reasoned that the exemption did not have the primary effect of impermissibly advancing religion because the statute did not discriminate among religions, and instead, is “neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion . . . .”<sup>43</sup> Moreover, according to Justice Thurgood Marshall, religious exemptions in the employment context do not violate the Establishment Clause

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Aquillard, 482 U.S. 578, 636–40 (1987) (Scalia, J., dissenting)); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (noting the Court’s refusal to be bound by a single test in such a sensitive area) (citing *Tilton v. Richardson*, 403 U.S. 672, 677–78 (1971)).

<sup>38</sup> *Thornton v. Caldor, Inc.*, 472 U.S. 703, 708 (1985).

<sup>39</sup> *See id.* at 710–11.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 709.

<sup>42</sup> *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329–30 (1987). Even outside the employment context, the Supreme Court has “repeatedly found no Establishment Clause problems in exempting religious observers from state-imposed duties.” *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 90 (1977) (citing *Wis. v. Yoder*, 406 U.S. 205, 234–35, n.22 (1972); *Sherbert v. Verner*, 374 U.S. 398, 409 (1963); *Zorach v. Clauson*, 343 U.S. 306, 314–15 (1952); *Gillette v. U.S.*, 401 U.S. 437 (1971); *Welsh v. U.S.*, 398 U.S. 333, 371–72 (1970); *Braunfeld v. Brown*, 366 U.S. 599, 608 (1961) (dictum); *McGowan v. Md.*, 366 U.S. 420, 520 (1961)).

<sup>43</sup> *Amos*, 483 U.S. at 339.

because

[t]he purpose and primary effect of requiring such exemptions is the wholly secular one of securing equal economic opportunity to members of minority religions (citation omitted). And the mere fact that the law sometimes requires special treatment of religious practitioners does not present the dangers of ‘sponsorship, financial support, and active involvement of the sovereign in religious activity,’ against which the Establishment Clause is principally aimed.<sup>44</sup>

## 2. The Free Exercise Clause

Religious accommodation jurisprudence under the Free Exercise Clause has changed significantly over the past 50 years. Although the Supreme Court had historically interpreted the Free Exercise Clause to reject the argument that religious exemptions are required from generally applicable laws,<sup>45</sup> it fundamentally altered this approach in 1963 in the landmark case *Sherbert v. Verner*.<sup>46</sup> In *Sherbert*, the Court held that a South Carolina law could not deny unemployment compensation to an individual who was fired because her religion obligated her not to work on Saturdays.<sup>47</sup> The Court stated that to justify imposing such a burden on religion, the government must demonstrate a “compelling state interest” that could not be served by any “alternative forms of regulation.”<sup>48</sup> The Court’s ruling helped establish the exemption doctrine, which permitted religious individuals and organizations to be exempted from abiding by laws that impeded their religious practices, unless the state overcomes the judicial standard of strict scrutiny by identifying a particularly persuasive regulatory interest.<sup>49</sup>

However, in 1990, the Court again substantially shifted its

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<sup>44</sup> *Trans World Airlines, Inc.*, 432 U.S. at 85, 90, n.4 (Marshall, J. dissenting) (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970)).

<sup>45</sup> *See, e.g.*, *Reynolds v. U.S.*, 98 U.S. 145, 166–67 (1878) (explaining that a religious accommodation requirement would “make the professed doctrines of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself.”).

<sup>46</sup> *See Sherbert*, 374 U.S. at 409.

<sup>47</sup> *Id.* at 399–402.

<sup>48</sup> *Id.* at 406–07.

<sup>49</sup> *See generally* *Wisconsin v. Yoder*, 406 U.S. 205, 207, 214 (1972) (holding that a compulsory education law could not be applied to Amish parents who kept their children out of school for religious reasons unless the state could satisfy strict scrutiny).

meaning of the Free Exercise Clause in *Employment Division v. Smith*.<sup>50</sup> The Court abandoned the exemption doctrine necessitating religious accommodation in certain circumstances in favor of a doctrine requiring no exemptions from laws that are religiously neutral and “generally applicable”.<sup>51</sup> In *Smith*, the Court held that members of the Native American Church who ingested peyote during a religious ceremony could not be exempted from an Oregon drug law.<sup>52</sup> Instead of applying strict scrutiny to see if the state of Oregon had a compelling interest to prohibit the Native American practice of ingesting peyote, the Court applied no scrutiny at all. The majority opinion held that the Free Exercise Clause is not violated when the prohibition of religious exercise is “merely the incidental effect of a generally applicable and otherwise valid provision . . . .”<sup>53</sup> Therefore, under *Smith*, as long as a statute is not actively discriminating against a particular religion, the Free Exercise Clause would not require any religious accommodation.

The *Smith* decision was extremely controversial and has faced criticism by Justices and commentators alike.<sup>54</sup> In a direct response to *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA) in order “to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . .”<sup>55</sup> However, in *City of Boerne v. Flores*, the Court severely limited RFRA’s applicability, holding that Congress lacked authority to enact RFRA under Section Five of the Fourteenth Amendment, and that RFRA no longer furnished a cause of action against state governments.<sup>56</sup> Although, in response to *City of Boerne v. Flores*, some state

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<sup>50</sup> See *Emp’t Div., Dep’t Hum. Res. Or. v. Smith*, 494 U.S. 872, 874–90 (1990).

<sup>51</sup> *Id.* at 879 (quoting *U.S. v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

<sup>52</sup> *Id.* at 874, 890.

<sup>53</sup> *Id.* at 878.

<sup>54</sup> See *id.* at 891 (O’Connor, J., concurring) (stating that the holding is “incompatible with our Nation’s fundamental commitment to individual religious liberty”). For criticism of *Smith*, see generally Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651, 670–80 (1991). In support of *Smith*, see generally William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

<sup>55</sup> Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(b)(1).

<sup>56</sup> *Boerne v. Flores*, 521 U.S. 507, 511, 519 (1997).

legislatures have adopted their own versions of RFRA,<sup>57</sup> and other state constitutions provide greater protection for religious accommodation than the federal Constitution,<sup>58</sup> the Supreme Court's restrictive reading of the Free Exercise Clause in *Employment Division v. Smith* continues to be applicable nationwide.

### B. Title VII of the Civil Rights Act of 1964

In addition to the Constitution's twin religion clauses, American jurisprudence on religious accommodation—as it pertains to the workplace—is found in Title VII of the Civil Rights Act of 1964. Before Congress passed Title VII, no overarching legislation governed the accommodation of religion in the workplace. While Title VII, as originally enacted, prohibited discrimination on the basis of religion, it provided no statutory definition of religion and left open the question of whether employers had an affirmative obligation to accommodate religious practices. However, in response to the Sixth Circuit case *Dewey v. Reynolds Metals Co.*—which stated that “[n]owhere in the legislative history of [Title VII] do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another”<sup>59</sup>—Congress added § 701(j) to Title VII in 1972.<sup>60</sup> Section 701(j) states: “The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”<sup>61</sup> Thus, § 701(j) adds as a distinct obligation for employers to “*reasonably accommodate*” the

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<sup>57</sup> James W. Wright, Jr., Note, *Making State Religious Freedom Restoration Amendments Effective*, 61 ALA. L. REV. 425, 426, n. 4 (2010) (citing ARIZ. REV. STAT. ANN. § 41-1493 (1999); CONN. GEN. STAT. ANN. § 52-571b (West 20058); 775 ILL. COMP. STAT. ANN. 35/1–99 (West 2000); R.I. GEN. LAWS § 42-80.1-1 to -4 (1998); S.C. CODE ANN. § 1-32-10 to -60 (1999); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001-.012 (Vernon Supp. 2000)).

<sup>58</sup> Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 BYU L. REV. 275, 275, 280 (1993).

<sup>59</sup> *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 334 (6th Cir. 1970).

<sup>60</sup> See generally Equal Opportunity Employment Opportunity Act of 1972, Pub. L. No. 92-261 (1972). See *Trans World Airlines, Inc. v. Hardison* 432 U.S. 63, 73–74 (1977) (noting that Congress passed section 701(j) in response to *Dewey*).

<sup>61</sup> Equal Opportunity Employment Opportunity Act of 1972 § 2(7)(j).

religious practices of employees to the extent that they can do so without “*undue hardship*.”<sup>62</sup>

Because Congress neglected to define “reasonably accommodate” and “undue hardship,” the Supreme Court has preserved its judicial discretion in delineating the extent of an employer’s duty of religious accommodation. In *Trans World Airlines, Inc. v. Hardison* and *Ansonia Board of Education v. Philbrook*, the Court interpreted these terms favorably for employers.<sup>63</sup> In *Hardison*, the Court held that an airline did not violate § 701(j) when firing an employee who refused to work on Saturdays for religious reasons.<sup>64</sup> In rejecting the employee’s accommodation claim, the Court stated that religious accommodations that result in favorable treatment for an employee violate Title VII’s antidiscrimination principle and, therefore, are unreasonable.<sup>65</sup> The Court also defined “undue hardship” extremely narrowly, as any costs greater than “de minimis.”<sup>66</sup> The ruling permits employers to reject any accommodation that results in more than a nominal cost. In *Ansonia*, the Court further narrowed the employer’s obligation of “reasonable accommodation.”<sup>67</sup> Upholding a school district’s policy of requiring a teacher to take unpaid leave for three days to observe extra religious holidays, the *Ansonia* decision indicates that when resolving whether an accommodation is reasonable, the Court views “reasonableness” from the employer’s perspective.<sup>68</sup> For example, the Court concluded that the Ansonia school district’s proposal of unpaid leave was *prima facie* “reasonable” without taking into account the difficult choice the teacher had to face between foregoing his salary to adhere to his faith or earning income in violation of his religion.<sup>69</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> *Trans World Airlines, Inc.*, 432 U.S. at 77; *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986).

<sup>64</sup> *Trans World Airlines, Inc.*, 432 U.S. at 84–85.

<sup>65</sup> *Id.* at 81.

<sup>66</sup> *Id.* at 84.

<sup>67</sup> *Philbrook*, 479 U.S. at 68.

<sup>68</sup> *Id.* at 60, 70.

<sup>69</sup> *Id.* at 70.

*C. American Jurisprudence's Effect on Religious Minority  
Accommodation Claims*

American jurisprudence on religious accommodation was designed in large part to protect religious minorities. The Establishment Clause was established to “protect[] the status of religious outsiders as equal citizens by forbidding governmental sponsorship of religion.”<sup>70</sup> Likewise, a primary purpose of the Free Exercise Clause was to protect the practice of religious minority beliefs from the whims of the majority. As Justice O’Connor writes in her concurrence in *Smith*, “[T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups . . . .”<sup>71</sup>

Despite this historical precedent to protect religious minorities, in the aftermath of *Smith*, *Hardison*, and *Ansonia*, accommodation law has had a disproportionate negative effect on the claims of religious minorities. First, after *Smith*, the only way religious groups can receive accommodation is if federal, state, or local legislative bodies pass laws creating religious exemptions. In *Smith*, Justice Scalia acknowledged the difficulty religious minorities would face when making accommodation claims. He states, “It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that [is an] unavoidable consequence of democratic government . . . .”<sup>72</sup> In *City of Boerne*, Scalia expanded on his belief that legislatures, not courts, should decide when religious exemptions are necessary. He writes, “[t]he issue presented by *Smith* is, quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome of [religious accommodation claims]. . . . It shall be the people.”<sup>73</sup>

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<sup>70</sup> Kenneth L. Karst, *Paths To Belonging: The Constitution And Cultural Identity*, 64 N.C. L. REV. 303, 358 (1986).

<sup>71</sup> Emp’t Div., Dep’t Hum. Res. Or. v. *Smith*, 494 U.S. 872, 902 (O’Connor, J., concurring). See also *Boerne v. Flores*, 521 U.S. 507, 545–65 (O’Connor, J., dissenting) (recounting the history of the establishment of the Free Exercise Clause).

<sup>72</sup> *Smith*, 494 U.S. at 890.

<sup>73</sup> *Boerne*, 521 U.S. at 544.

According to Justice O'Connor's concurrence in *Smith*, what Justice Scalia fails to understand is that the primary justification for the First Amendment, and the Bill of Rights more generally, is to protect certain inalienable rights from legislative fiat. She adopts the following words from Justice Jackson's opinion in *West Virginia State Board of Education v. Barnette*:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.<sup>74</sup>

As Justice O'Connor recognized, not only are many religious minority groups unable to influence public debate and introduce accommodation legislation, but also the majority can be inimical toward providing concessions to minorities that arguably could dilute their power. Therefore, after *Smith*, religious minorities have had a difficult time obtaining religious exemptions from legislatures or courts.<sup>75</sup> This is especially a problem for minorities considered outside the American religious mainstream. For example, an empirical study of religious freedom judicial decisions found that Muslims in particular "may be significantly disadvantaged in asserting Free Exercise/Accommodation claims."<sup>76</sup>

Adherents of majority faiths also require less accommodation than religious minorities do. The views of majority religions are not as likely to conflict with preexisting legislation or employment practices. Most laws and employment practices already conform to the religious practices of the majority. Additionally, democratically elected legislatures and employers are unlikely to pass legislation or implement policies restricting the religious practices of the majority. For example, due to the United States' Christian majority, the American work schedule is

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<sup>74</sup> *Smith*, 494 U.S. at 903 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)). See also Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 216 (1992) (criticizing *Smith's* holding on the grounds that it "entrenches patterns of de facto discrimination against minority religions").

<sup>75</sup> See, e.g., *Yang v. Sturner*, 750 F. Supp. 558, 559 (D. R.I. 1990) (Hmong natives denied exemption from law mandating son's autopsy).

<sup>76</sup> Gregory C. Sisk et al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 566 (2004).



well equipped to handle Christian holidays and religious practices. Most businesses close, or have reduced hours on, Christmas and Sundays. For these reasons, Christians are less likely than religious minorities to prosecute free exercise or Title VII claims of accommodation.<sup>77</sup> Furthermore, legislation is often written to reflect the beliefs of the religious majority. That is why, for example, Christmas is a federal holiday while Hanukkah and *Eid-al-Fitr* are not.<sup>78</sup> In addition, regarding the challenged anti-drug statute in *Smith*, the Oregon legislature would likely not have listed peyote as a controlled substance if the majority viewed it as a religious necessity.<sup>79</sup>

Finally, with regard to employment specifically, religious minority accommodation claims are limited by business interests. It can be argued that the costs of accommodating minority faiths will almost always be higher than accommodating majority religions. Employers will generally find it cheaper to make one accommodation for a large group of employees practicing a majority faith, as opposed to many different accommodations for a handful of employees subscribing to minority religions.<sup>80</sup> Therefore, employers have less of a financial incentive to accommodate minorities. Furthermore, the *Hardison* decision relaxes Title VII's requirement that employers reasonably accommodate their employees. Because religious minority claims are likely to cost employers more than a de minimis cost, employers post-*Hardison* can reject those accommodations for causing undue hardship.<sup>81</sup>

## II. THE RELIGIOUS RIGHT TO REFUSE SERVICE

The difficulties that the Muslim minority in the United States has faced when making religious accommodation claims appear distinctly in the area of refusal claims: the right of groups and individuals to refuse service to customers based on religious

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<sup>77</sup> See, e.g., Frank Way & Barbara J. Burt, *Religious Marginality and the Free Exercise Clause*, 77 AM. POL. SCI. REV. 652, 656 (1983).

<sup>78</sup> 5 U.S.C. § 6103 (2012).

<sup>79</sup> See Leslie Gielow Jacobs, *Adding Complexity to Confusion and Seeing the Light: Feminist Legal Insights and the Jurisprudence of the Religion Clauses*, 7 YALE J.L. & FEMINISM 137, 155–56 (1995) (“The laws that the Court has recently characterized as ‘neutral’ reflect majority religious assumptions . . . . Including peyote in a broad list of illegal controlled substances makes sense only from the point of view of those who do not recognize its religious significance.”).

<sup>80</sup> See e.g., *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84–85 (1977).

<sup>81</sup> *Id.*

beliefs. The denial of the Somali Muslim taxi drivers' request at Minneapolis-St. Paul International Airport to refuse transporting passengers with alcohol is a telling example of how the law allows a Muslim refusal claim to be treated much differently than conceptually similar Christian claims, such as pharmaceutical conscience clauses.<sup>82</sup> A comparison between the legal system's treatment of the Muslim taxi drivers' request to refuse service to customers with alcohol and the Christian pharmacists' request to refuse service to customers needing birth control demonstrates, post-*Employment Division v. Smith*, American accommodation law's inherent inequality between the majority and religious minorities.

### A. *The Somali Muslim Taxi Driver Controversy*

#### 1. The Narrative

Beginning in 2006, some Somali Muslim taxi drivers serving Minneapolis-St. Paul International Airport refused to transport passengers visibly carrying alcohol—in transparent duty-free shopping bags, for example.<sup>83</sup> The cab drivers argued that the transportation of alcohol is against their religious beliefs.<sup>84</sup> Previously, the regulations of the Metropolitan Airports Commission (MAC)—the Minnesota state agency established to coordinate aviation services throughout the Minneapolis-St. Paul area<sup>85</sup>—required that when drivers at the airport refuse a fare for any reason, they must go to the back of the taxi line and wait for hours until receiving another potential fare.<sup>86</sup> To avoid this

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<sup>82</sup> See Lydersen, *supra* note 15.

<sup>83</sup> *Id.* The taxi drivers have stated that they are only opposed to transporting “exposed” alcohol. They would not inquire of passengers or search their baggage to determine whether they are carrying alcohol. Furthermore, they would not refuse service if it is determined that a passenger is carrying alcohol after the trip has started. See Brief for Plaintiffs in Supp. of Mot. Injunctive Relief at 2–3, *Abdi Noor Dolal v. Metro. Airports Comm’n*, No. 27-cv-07-12907 (Minn. D. Ct. 2008) [hereinafter “Brief for Plaintiffs”].

<sup>84</sup> Brief for Plaintiffs, *supra* note 83, at 2.

<sup>85</sup> The MAC is a public corporation created by the Minnesota Legislature, and organized pursuant to Minnesota Statutes § 473.601 to 473.679. MINN. STAT. § 473.601 (1986). It is authorized under Minnesota Statutes § 221.091 to regulate ground transportation at the Minneapolis-St. Paul Airport. MINN. STAT. § 221.091(3)(a) (2013).

<sup>86</sup> Keith Oppenheim, *If You Drink, Some Cabbies Won't Drive*, CNN.COM (Jan. 26, 2007, 12:25 AM), <http://www.cnn.com/2007/US/01/25/oppenheim.cabbies/index.html>.

problem, the Muslim taxi drivers had asked the MAC for permission to refuse passengers carrying alcohol without being sent to the end of the queue. Furthermore, according to airport officials, the issue had become a significant customer service problem, with approximately 100 people being denied taxi service each month.<sup>87</sup>

Since September 2006, the taxi drivers and the MAC—with public input—had attempted to find suitable solutions to the problem. One proposal that was initially accepted by both parties was for drivers unwilling to carry alcohol to receive a special color light on their car roofs, signaling their views on alcohol to taxi starters and customers alike.<sup>88</sup> However, once the proposal became known, it received significant criticism from the public, many who attacked, in their view, the MAC's capitulation to "Shari'a law," and rejected the very premise that Muslims in the United States—let alone in the specific scenario—should be accommodated at all.<sup>89</sup> A group of right-wing commentators led an email and phone call campaign to convince the MAC to overturn the two-light compromise and increase penalties for cab drivers who refuse passengers with alcohol.<sup>90</sup> They opposed the taxi drivers' request for two main reasons. First, viewing the drivers as a Muslim "other" whose intolerant beliefs should not be accommodated, some commentators contended that if the taxi drivers disapproved of American laws and regulations, they should leave the country.<sup>91</sup> Second, the taxi drivers' request was

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<sup>87</sup> John Reinan, *Taxi Proposal Gets Sharp Response*, STAR TRIBUNE (Feb. 27, 2007, 8:25 PM), <http://www.startribune.com/local/11586646.html>. The taxi drivers contest that the issue had become a significant customer service problem. They cite data arguing that a little more than one person out of every ten thousand passengers was denied service from January 2002 to December 2006. See Brief for Plaintiffs, *supra* note 83, at 2.

<sup>88</sup> Joshua Freed, *Minn. Airport Proposes Lights for Taxis*, ASSOCIATED PRESS ONLINE (Sept. 29, 2006), <http://www.highbeam.com/doc/1Y1-98630634.html>.

<sup>89</sup> *Id.*; Oppenheim, *supra* note 86.

<sup>90</sup> See Daniel Pipes, *No Islamic Law in Minnesota, For Now*, FRONTPAGEMAGAZINE.COM (Oct. 16, 2006), <http://www.danielpipes.org/article/4058/no-islamic-law-in-minnesota-for-now>. Regarding Daniel Pipes' political views, see *Daniel Pipes*, RIGHT WEB, [http://www.rightweb.irc-online.org/profile/pipes\\_daniel](http://www.rightweb.irc-online.org/profile/pipes_daniel) (last updated May 9, 2013).

<sup>91</sup> Pipes, *supra* note 90. Comments included the following: "The only acceptable cultural accommodation: The Muslims in this country accommodate our culture, no exceptions! If they do not like it here, why not go back[?]" Submitted by Harald W. Behrend, Feb. 21, 2007 at 15:21 EST, available at <http://www.danielpipes.org/comments/78211>. "If the Muslims want to have Sharia laws, then they should return to the Middle East and leave us alone . . . I will never condon[e] a woman being forced to adhere to the Sharia laws in the

regarded as part of a larger dangerous plot by Muslims radicals to take over the United States and impose their extremist ideology.<sup>92</sup>

The MAC responded to the public backlash by not only discarding the proposal, but also refusing to consider other proposals to accommodate the cab drivers. Instead, the commission took an about-face and unanimously passed, by an 11-0 vote, a proposal for stricter penalties for taxi drivers who refuse service to customers for any reason: a 30-day suspension of a driver's airport taxi license for the first violation, and license revocation for two years for a second violation.<sup>93</sup> When passing the new regulation, the MAC avoided addressing the right-wing commentators' concerns. Instead the MAC stated that its decision was "simply a customer-service issue" and deemed the change "reasonable, practical and important for rider safety."<sup>94</sup> The commissioners focused on the danger refusal of service can cause for passengers who would wander through lanes of traffic to find an alternative taxi. They also wanted to deter recalcitrant behavior of taxi drivers who had left passengers stranded in undesirable locations upon finding out they were transporting alcohol.<sup>95</sup>

## 2. The Taxi Drivers' Legal Claims

A group of the taxi drivers responded to the stricter penalties by filing a lawsuit in Minnesota state court, arguing that the new regulation substantially restricted their free exercise of religion in violation of the Minnesota state constitution.<sup>96</sup> They contended

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USA. It is asking the women in this country to approve slavery." Submitted by Mennie Flannery, Mar. 26, 2007 at 22:37 EST, *available at* <http://www.danielpipes.org/comments/88028>.

<sup>92</sup> Pipes, *supra* note 90. Commentators who advocated this position based their allegations on the fact that the Minnesota chapter of the Muslim American Society had been the primary group working with the MAC to find a solution to the drivers' accommodation claim. Accusing the Muslim American Society of ties to Middle Eastern militant groups and even Osama bin Laden, these critics claimed that the taxi drivers were pawns in the Muslim American Society's greater goal of establishing an Islamic state in the United States. *See, e.g.*, Katherine Kersten, *Airport Taxi Flap About Alcohol Has Deeper Significance*, STAR TRIBUNE, Oct. 26, 2006, at A1.

<sup>93</sup> Brown, *supra* note 16. *See* Metro. Airports Comm'n, Ordinance No. 106 (2007).

<sup>94</sup> Brown, *supra* note 16.

<sup>95</sup> *Id.*

<sup>96</sup> *See* Abdi Noor Dolal v. Metro. Airports Comm'n, 2008 Minn. App. LEXIS

that the harsh new penalties unduly burden their religious obligation not to transport alcohol by forcing them to make the difficult choice between continuing their jobs and practicing their faith.<sup>97</sup> In September 2008, the district court dismissed the taxi drivers' claims and granted the MAC's motion for summary judgment, which was affirmed by the Court of Appeals of Minnesota.<sup>98</sup> Because of the current status of religious accommodation law analyzed in Part I of this paper, not only was the taxi drivers' state-based free exercise claims likely to fail, but also so was any other potential legal challenge the taxi drivers could have made under the federal Constitution's Free Exercise Clause or Title VII of the Civil Rights Act.

*a. Federal Constitution*

Regarding the taxi drivers' ability to assert a federal free exercise claim, post-*Employment Division v. Smith*, the Free Exercise Clause does not require religious exemptions from "valid and neutral law[s] of general applicability."<sup>99</sup> According to the Supreme Court, a law is not "neutral" if its objective is to curb religious conduct.<sup>100</sup> Moreover, a law is not "generally applicable" if it only burdens conduct motivated by religious belief.<sup>101</sup> Because the MAC's regulation denies not only the Muslim taxi drivers' right to refuse passengers who transport alcohol, but also all taxi drivers' requests to refuse service for any reason whatsoever, the regulation is a "neutral law of general applicability," satisfying *Smith's* narrow test.<sup>102</sup> Therefore, the taxi drivers would easily lose any free exercise claim brought under the federal Constitution. This is likely the reason for why the taxi drivers' lawyers did not even attempt to assert a federal claim against the MAC.

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1075 at \*1, \*3 (Minn. Ct. App. 2008).

<sup>97</sup> Brown, *supra* note 16. See also Herón Márquez Estrada, *Cabbies on Edge as Penalties Begin*, STAR TRIBUNE (Minn., MN), May 12, 2007, at 3B (stating that Local 120 of the International Brotherhood of Teamsters have tried to persuade the taxi drivers to organize around the issue).

<sup>98</sup> See Abdi Noor Dolal, 2008 Minn. App. LEXIS 1078, at \*1.

<sup>99</sup> *Emp't Div., Dep't Hum. Res. Or. v. Smith*, 494 U.S. 872, 879 (quoting *United States v. Lee*, 455 U.S. 252, 263, n.3 (1982)).

<sup>100</sup> *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 533 (1993).

<sup>101</sup> *Id.* at 543, 546.

<sup>102</sup> *Smith*, 494 U.S. at 879.

*b. Minnesota State Constitution*

Some state constitutions, including Minnesota's, afford their residents with greater free exercise protection than the Federal Constitution, as interpreted by *Smith*. Article I, Section 16 of the Minnesota Constitution states that: "The right of every man to worship God according to the dictates of his own conscience shall never be infringed; . . . nor shall any control of or interference with the rights of conscience be permitted . . ." <sup>103</sup> Minnesota courts have argued that this language is of a "distinctively stronger character" than the Federal Free Exercise Clause. <sup>104</sup> "Whereas the first amendment establishes a limit on government action at the point of *prohibiting* the [free] exercise of religion," Minnesota courts contend that Section 16 "precludes even an *infringement* on or an *interference* with religious freedom." <sup>105</sup>

The Minnesota Supreme Court has established a *Sherbert*-like four-part test to determine whether government action violates an individual's right to religious freedom: (1) whether the belief is sincerely held; (2) whether the state action burdens the exercise of religious beliefs; (3) whether the state interest is overriding or compelling; and (4) whether the state uses the least restrictive means. <sup>106</sup> In their lawsuit against the MAC, the Somali taxi drivers alleged that their claim met this four-part test: (1) their belief that carrying alcohol is a major sin and prohibited by their religion is sincerely held; (2) the MAC Ordinance burdens their religious right to refuse to carry alcohol; (3) the MAC's interest in transportation efficiency, customer satisfaction, and public safety is not overriding or compelling; (4) the MAC did not use the least restrictive means to accomplish its interests of transportation efficiency, customer satisfaction, and public safety. <sup>107</sup>

Despite these arguments, the Minnesota district court ruled in favor of the MAC. Although the court acknowledged the taxi drivers' beliefs were sincerely held, it ruled that the taxi drivers did not meet the other three factors. First, the court held that the MAC ordinance did not excessively burden the taxi drivers because, by choosing to serve individuals at the airport, the taxi

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<sup>103</sup> MINN. CONST. art. I, § 16. See also *State v. French*, 460 N.W.2d 2, 8 (Minn. 1990) ("The Minnesota Constitution, unlike the United States Constitution, treats religious liberty as more important than the formation of government.").

<sup>104</sup> *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990).

<sup>105</sup> *Id.*

<sup>106</sup> *State v. Hershberger*, 444 N.W.2d 282, 285, 288 (Minn. 1989).

<sup>107</sup> See Brief for Plaintiffs, *supra* note 83, at 3, 12–14.

drivers “entered into the economic arena at the airport and began trafficking in that marketplace.”<sup>108</sup> Therefore, according to the court, “they subjected themselves to the standards that the MAC had prescribed for the safety of the citizens of the state that use the facility and the employees that work there.”<sup>109</sup> Second, the court held that the public safety interests in the ordinance were an overriding and compelling interest. The court stated that if the taxi drivers were allowed to refuse service, it “would disrupt the orderly flow of passengers in a congested area. Confrontations would be inevitable when passengers are singled out and inconvenienced for their legal, appropriate behavior.”<sup>110</sup> Finally, without explanation, the court held that “the MAC has demonstrated that the enforcement of [the MAC ordinance] is the least restrictive means to insure the safety and convenience of the traveling public.”<sup>111</sup>

Although one could differ with the reasoning offered by the district court, the opinion does demonstrate the difficulty the taxi drivers have making a legal claim under the Minnesota state constitution.

*c. Title VII of the Civil Rights Act*

The final legal claim the Muslim taxi drivers could have potentially brought is that their religious belief not to transport alcohol must be reasonably accommodated under § 701(j) of the Civil Rights Act. However, the taxi drivers would face a number of obstacles to asserting a valid claim under Title VII.

*i. Independent Contractor vs. Employee*

The first problem the taxi drivers would have to overcome is that Title VII by its terms, applies only to “employees,”<sup>112</sup> and explicitly rejects “independent contractor[s].”<sup>113</sup> At first glance, it seems difficult to argue that the taxi drivers would be “employees” of the Metropolitan Airports Commission. Under the

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<sup>108</sup> Abdi Noor Dolal v. Metro. Airports Comm’n, No. 27-cv-07-12907, Slip Op. at 9 (Minn. D. Ct. 2008).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 9–10.

<sup>111</sup> *Id.* at 10.

<sup>112</sup> 42 U.S.C. § 2000e(f) (2012).

<sup>113</sup> U.S. EQUAL EMP’T OPPORTUNITY COMM’N, EEOC COMPLIANCE MANUAL, Sec. 2-III(A)(1), available at <http://www.eeoc.gov/policy/docs/threshold.html#2-III-A>.

Minneapolis Code of Ordinances, to operate a taxi in Minneapolis, a taxi driver must be a member of a taxicab service company, consisting of “at least fifteen (15) licensed taxicabs operated under a common color scheme with common radio dispatching facilities.”<sup>114</sup> If anything, the taxi drivers would be “employees” of the taxicab service companies to which they belong. However, under the joint employer theory, the taxi drivers could arguably be considered joint employees of both the taxicab service companies and the MAC, and could hold the MAC liable for violating § 701(j) of Title VII.<sup>115</sup>

Pursuant to Supreme Court precedent, to determine whether the taxi drivers are MAC employees under Title VII, one must first look at how “employee” is defined in the statute. Title VII does not provide much help because it defines an employee circularly as “an individual employed by an employer.”<sup>116</sup> Whenever the statute fails to specifically define “employee,” the Supreme Court has ruled that the definitions of “employee,” “employer,” and “employment” are to be determined under the common law of agency, rather than individual state law.<sup>117</sup> Whether an individual is an employee under the common law of agency depends on a fact-specific analysis of thirteen factors articulated by the Supreme Court in *Community for Creative Non-Violence v. Reid*, a case dealing with the ownership of a copyright arising from artwork done “for hire.”<sup>118</sup> The “*Reid* factors” are as follows:

[1] the hiring party’s right to control the manner and means by which the product is accomplished[;] . . . [2] the skill required; [3] the source of the instrumentalities and tools; [4] the location of the work; [5] the duration of the relationship between the parties; [6] whether the hiring party has the right to assign additional projects to the hired party; [7] the extent of the hired party’s discretion over when and how long to work; [8] the method of payment; [9] the hired party’s role in hiring and paying assistants; [10] whether the

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<sup>114</sup> MINNEAPOLIS CODE OF ORDINANCES § 341.290(b)(1) (1991).

<sup>115</sup> Courts have recognized the joint employer theory under Title VII. *See, e.g.,* *Hunt v. Missouri*, 297 F.3d 735, 742–43 (8th Cir. 2002); *Piano v. Ameritech/Sbc*, 2003 U.S. Dist. LEXIS 1696, at \*14 (N.D. Ill. Feb. 5, 2003).

<sup>116</sup> 42 U.S.C. § 2000e(f).

<sup>117</sup> *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992). While *Darden* addressed employment in the ERISA context, courts have adopted its reasoning to apply the common-law agency test to Title VII and other employment discrimination statutes. *See O’Connor v. Davis*, 126 F.3d 112, 114–15 (2d Cir. 1997).

<sup>118</sup> *Cnty. For Creative Non-Violence v. Reid*, 490 U.S. 730, 732 (1989).



work is part of the regular business of the hiring party; [11] whether the hiring party is in business; [12] the provision of employee benefits; [13] and the tax treatment of the hired party.<sup>119</sup>

Courts have indicated that the *Reid* factors are not exhaustive. Moreover, in the context of anti-discrimination cases (including Title VII cases), courts “place special weight on the extent to which the hiring party controls the ‘manner and means’ by which the worker completes her assigned tasks.”<sup>120</sup>

Under the *Reid* factors, including the special emphasis placed upon the first *Reid* factor, it will be difficult for the Muslim taxi drivers at the Minneapolis-St. Paul Airport to demonstrate they are “employees” of the MAC, and obtain protection under Title VII. Adopting a similar test in the labor law context, courts have found that taxi drivers can rarely be considered “employees” of taxicab service companies, and therefore, do not have the right to organize and engage in collective bargaining under the National Labor Relations Act.<sup>121</sup> These courts have found that the pay structure between the taxi drivers and the taxicab service companies “creates a strong inference”<sup>122</sup> that the companies “[do] not exert control over ‘the means and manner’ of [the drivers] performance.”<sup>123</sup> Usually, taxi drivers pay the companies a fixed rental rate, and the drivers retain all fares collected without accounting. Because of this pay structure, courts argue that the companies do not have an incentive to control the means and manner of the drivers’ performance when the company makes the same amount of money irrespective of the fares received by the drivers.<sup>124</sup> Under this reasoning, the MAC makes the same amount of money—a \$3,500 license<sup>125</sup>—from the taxi drivers, irrespective of how many fares the taxi drivers obtain at the

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<sup>119</sup> *Id.* at 751–52.

<sup>120</sup> *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 117 (2d Cir. 2000). *See also* U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *supra* note 113, at Sec. 2-III(A)(1) (“The question of whether an employer-employee relationship exists is fact-specific and depends on whether the employer controls the means and manner of the worker’s work performance.”).

<sup>121</sup> *See, e.g.*, *Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 367 (D.C. Cir. 1983); *Democratic Union Org. Comm. v. NLRB*, 603 F.2d 862, 892 (D.C. Cir. 1979). *But see* *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1103 (9th Cir. 2008) (holding that taxi drivers were “employees” of the taxicab service companies under the NLRA).

<sup>122</sup> *See* *NLRB v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 924 (11th Cir. 1983); *Democratic Union Org. Comm.*, 603 F.2d at 897.

<sup>123</sup> *City Cab Co. of Orlando, Inc.*, 285 N.L.R.B. 1191, 1194 (1987).

<sup>124</sup> *Id.* at 1194.

<sup>125</sup> *See* Estrada, *supra* note 97.

airport. The taxi drivers' main counterargument would be that, despite this strong inference, the MAC does exert control over the taxi drivers because it strictly regulates their conduct in many areas: vehicle standards, payment options, use of traffic lanes, and right to refuse service.<sup>126</sup> However, in the NLRA context, courts have found similar restrictions to taxi drivers unavailing.<sup>127</sup>

Most of the other applicable *Reid* factors would also weigh against finding that the taxi drivers are "employees" of the MAC. Regarding the third factor, the MAC is not "the source of [the taxi drivers'] instrumentalities and tools" (i.e., their taxicabs); to the contrary, the taxicab service companies provide the cars, even if the MAC regulates the vehicle standards. Regarding the fourth factor, the taxi drivers can choose a different location of work (i.e., not to serve the airport). Regarding the fifth factor which refers to the length of a relationship to the parties, the duration of the relationship between the MAC and the taxi drivers is for a limited two-year license.<sup>128</sup> Therefore, it is very unlikely that a court would find the taxi drivers to be "employees" of the MAC for purposes of Title VII, and it is likely for this reason why the Muslim taxi drivers' lawyers did not pursue a claim under the Civil Rights Act.<sup>129</sup>

ii. Reasonably Accommodate Without Undue Hardship

However, even if a court would consider the taxi drivers to be the MAC's employees, after the Supreme Court's decision in *Trans World Airlines, Inc. v. Hardison*, they would face another obstacle convincing the court that the MAC ordinance violates the agency's duty to "reasonably accommodate" the drivers' religious beliefs without "undue hardship."<sup>130</sup> First, a court following

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<sup>126</sup> See Metro. Airports Comm'n, Ordinance No. 102 (2005).

<sup>127</sup> See generally *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 112 (2d Cir. 2000); *Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 384 (D.C. Cir. 1983).

<sup>128</sup> *Cnty. For Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989); Metro. Airports Comm'n, Ordinance No. 102 sec. 6.1.

<sup>129</sup> See generally MINNESOTA HUMAN RIGHTS ACT § 363A.08 (2013); MINNEAPOLIS CODE OF ORDINANCES § 139.10(b)(2) (2006) (In addition to Title VII, the taxi drivers could have made similar religious accommodation claims under the Minnesota Human Rights Act and the Minneapolis Code of Ordinances. However, because of the difficulty of proving that the taxi drivers are "employees" of the MAC, these claims would also likely fail).

<sup>130</sup> *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 66 (1977).

*Hardison* would likely determine that accommodating the taxi drivers' request not to transport passengers with alcohol would result in favorable treatment for the Somali Muslims and, thus, would be "unreasonable." Second, because *Hardison* defined "undue hardship" as any costs greater than "de minimis,"<sup>131</sup> the two-light proposal to accommodate the taxi drivers' request would likely fail as it would result in more than a nominal cost.

*B. The Inequality of Current Religious Refusal Law*

Although neither Title VII nor federal or state constitutions would likely require religious exemptions such as the Muslim taxi drivers' refusal request, the federal Constitution tolerates broad religious exemptions, as long as they do not violate the Establishment Clause. As mentioned earlier, under current Supreme Court precedent, the Establishment Clause allows religious exemptions from otherwise generally applicable laws.<sup>132</sup> Thus, consistent with the federal Constitution, a federal or state law may offer protection for employees who refuse service to customers for religious reasons. Lobbied heavily by the Christian Right, federal and state governments, in recent years, have passed laws and regulations permitting the Christian majority to refuse service in a number of areas.<sup>133</sup>

In the United States, refusal exemptions for the Christian majority are most prevalent with regard to health care providers. The federal government and many states have enacted "conscience clauses" which allow health care providers the right to refuse to offer services they deem contrary to their religious beliefs.<sup>134</sup> Regarding federal legislation, the Church Amendments, Section 245 of the Public Health Service Act, and the Weldon Amendment, collectively known as the "federal health care provider conscience protection statutes," prohibit recipients of certain federal funds from discriminating against health care

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<sup>131</sup> *Id.* at 84.

<sup>132</sup> *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987).

<sup>133</sup> Diana B. Henriques, *As Exemptions Grow, Religion Outweighs Regulation*, N.Y. TIMES (Oct. 8, 2006), <http://www.nytimes.com/2006/10/08/business/08religious.html?pagewanted=all&r=0>.

<sup>134</sup> 45 C.F.R. § 88.1 (2011); DEP'T OF HEALTH & HUMAN SERVS., ENSURING THAT DEPARTMENT OF HEALTH AND HUMAN SERVICES FUNDS DO NOT SUPPORT COERCIVE OR DISCRIMINATORY POLICIES OR PRACTICES IN VIOLATION OF FEDERAL LAW (2008) [hereinafter DEP'T OF HEALTH AND HUMAN SERVS.].

providers based on their refusal to participate in certain health care services they find religiously or morally objectionable.<sup>135</sup>

While the federal conscience statutes primarily protect health-care workers from assisting with abortions, in December 2008, the Bush administration enacted a regulation broadening protection for Christian health-care workers.<sup>136</sup> The regulation was interpreted as possibly allowing pharmacists to not provide prescriptions for birth control pills or emergency contraception, permitting physicians to refuse to see gay AIDS patients or provide fertility treatment to lesbians, and allowing an ambulance driver to refuse to transport women wanting to obtain an abortion.<sup>137</sup> In February 2011, the Obama administration rescinded the regulation because it “could limit access to reproductive health services and information, including contraception, and could impact a wide range of medical services, including care for sexual assault victims, provision of HIV/AIDS treatment, and emergency services.”<sup>138</sup> At the same time, the Obama administration reaffirmed its commitment to enforcing the federal conscience statutes, which provide “clear and strong conscience protections for health care providers who are opposed to performing abortions.”<sup>139</sup> Moreover, the Affordable Care Act added new conscience protections for health care providers who refuse to provide abortions.<sup>140</sup>

Regarding state governments, as of January 2014, forty-six states permit “some health care providers to refuse to provide abortion services”, thirteen states permit “some health care providers to refuse to provide services related to contraception”, and eighteen states permit “some health care providers to refuse to provide sterilization services.”<sup>141</sup> Furthermore, Arizona, Idaho,

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<sup>135</sup> See 42 U.S.C. § 300a-7 (2012) (the Church Amendments); 42 U.S.C. § 238(n) (2012) (Public Health Service Act § 245); Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844 (2007); DEP’T OF HEALTH AND HUMAN SERVS., *supra* note 134.

<sup>136</sup> See DEP’T OF HEALTH AND HUMAN SERVS., *supra* note 134.

<sup>137</sup> Rob Stein, *Health ‘Conscience’ Rule Replaced*, WASH. POST, Feb. 19, 2011, at A03.

<sup>138</sup> Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968, 9974 (Feb. 23, 2011) (to be codified at 45 C.F.R. pt. 88).

<sup>139</sup> *Id.* at 9969.

<sup>140</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1303, 124 Stat. 119 (2010). See also Exec. Order No. 13535, 75 Fed. Reg. 15599–15600 (2010).

<sup>141</sup> GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF 2 (2014).

South Dakota, Arkansas, Mississippi, and Georgia have passed pharmacist conscience clauses explicitly permitting pharmacists the right to refuse to fill prescriptions based on religious beliefs.<sup>142</sup>

For example, the Georgia statute states:

Any pharmacist who states in writing an objection to any abortion . . . on . . . religious grounds shall not be required to fill a prescription for a drug which purpose is to terminate a pregnancy; [this] refusal . . . shall not form the basis of any claim for damages . . . or for any disciplinary . . . action against the person.<sup>143</sup>

“Colorado, Florida, Illinois, Maine and Tennessee have broad refusal [conscience] clauses that do not specifically mention pharmacists.”<sup>144</sup> Several other states have considered similar legislation.<sup>145</sup>

Therefore, while Christian health care providers in many states have been granted the right to refuse service to their customers under current religious accommodation jurisprudence, the Muslim taxi drivers clearly have not. The right of Christian pharmacists to refuse service is a conceptually similar claim to that of the Muslim taxi drivers at the Minneapolis airport. Although the taxi driver and pharmaceutical conscience-clause scenarios are factually distinct—forcing a Christian pharmacist to dispense and sell contraception prescriptions seems more akin to forcing a Muslim taxi driver to dispense and sell alcohol, conceptually the two issues are the same. First, the taxi drivers contend that their religious obligation is not to merely abstain from selling or drinking alcohol, but also transporting it.<sup>146</sup> Therefore, according to them, transporting alcohol is just as much a religious prohibition as the Christian pharmacists dispensing and selling emergency contraception and birth control pills. Second, both the taxi drivers and pharmacists are workers in state-regulated businesses providing services to the general public.<sup>147</sup> Just as the taxi drivers must obtain a license from the MAC to legally pick up passengers at Minneapolis-St. Paul International Airport, the pharmacists must obtain a license from

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<sup>142</sup> *See id.* at 3.

<sup>143</sup> GA. CODE ANN. § 16-12-142(b) (2013).

<sup>144</sup> *Pharmacist Conscience Clauses: Laws and Information*, NATIONAL CONFERENCE OF STATE LEGISLATURES (May 2012), [www.ncsl.org/research/health/pharmacist-conscience-clauses-laws-and-information.aspx](http://www.ncsl.org/research/health/pharmacist-conscience-clauses-laws-and-information.aspx).

<sup>145</sup> *See* Claire Marshall, *The Spread of Conscience Clause Legislation*, 39 HUM. RTS. MAG. 2 (2013).

<sup>146</sup> Lydersen, *supra* note 15.

<sup>147</sup> *Id.* *See also* Metro. Airports Comm’n, Ordinance No. 102.

state pharmacy boards to legally dispense prescription drugs.<sup>148</sup>

Once one acknowledges the two claims are similar, it becomes apparent how the American legal system treats them differently. First, neither claim would be protected under either federal or state constitutions. That is, neither the federal Free Exercise Clause nor state freedom of religion clauses would compel a government agency to accommodate either the taxi drivers or pharmacists. Regarding the federal free exercise claims, both the taxi drivers and the pharmacists are seeking religious exemptions from generally applicable and religiously neutral laws requiring that all taxi drivers licensed at the Minneapolis Airport and all pharmacists licensed by state boards serve their customers without exception. Thus, under *Employment Division v. Smith*, neither group could make a colorable federal free exercise claim.<sup>149</sup> Regarding the state constitutional claims, the Muslim taxi drivers, as mentioned above, challenged the MAC ordinance under the Minnesota constitution, and failed.<sup>150</sup> The Christian pharmacists would likely face a similar fate, as courts have ruled that various state constitutions do not require a religious exemption to reproductive health mandates.<sup>151</sup>

Second, neither the Muslim taxi drivers nor the Christian pharmacists would be protected under § 701(j) of Title VII of the Civil Rights Act. As mentioned above, because the taxi drivers would likely not be considered employees of the MAC, and because the drivers have not found a solution that would “reasonably accommodate” their religious beliefs without “undue hardship”—as defined by *TWA v. Hardison*<sup>152</sup>—the Muslim taxi drivers’ Title VII claim would likely fail. Similarly, courts have found that Christian pharmacists are not entitled to Title VII protection, reasoning that the statute does not allow pharmacists to abandon their customers.<sup>153</sup>

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<sup>148</sup> Metro. Airports Comm’n, Ordinance No. 102; *State Regulation of Compounding Pharmacies*, NAT’L CONF. OF STATE LEGIS. (Dec. 2013), <http://www.ncsl.org/research/health/regulating-compounding-pharmacies.aspx>.

<sup>149</sup> See *Emp’t Div., Dep’t Hum. Res. Or. v. Smith*, 494 U.S. 872, 881 (1990).

<sup>150</sup> See Brief for Plaintiffs, *supra* note 83, at 3–4, 8. Abdi Noor Dolal, No. 27-cv-07-12907.

<sup>151</sup> See *Catholic Charities of Sacramento, Inc. v. Superior Ct.*, 85 P.3d 67, 73–74, 81–83, 91 (Cal.) (2004) (*cert. denied*, 543 U.S. 816 (2004)); *Catholic Charities of the Diocese v. Serio*, 7 N.Y.3d 510, 518 (Ct. of App. 2006).

<sup>152</sup> *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

<sup>153</sup> See *Noesen v. Medical Staffing Network, Inc.*, 2006 U.S. Dist. LEXIS 36918, at \*6, \*9, \*13 (W.D. Wis. June 1, 2006); *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359, 1360, 1366 (S.D. Fla. 1999).

Finally, while neither federal and state constitutions nor Title VII would offer protection to the Muslim taxi drivers' and Christian pharmacists' religious accommodation claims, state laws have offered protection to the pharmacists, but not to the taxi drivers. Many state legislatures, lobbied heavily by the Christian Right, have passed laws permitting pharmacists to refuse service to customers asking for emergency contraception and birth control pills.<sup>154</sup> On the other hand, anti-Muslim sentiment in the United States would make it nearly impossible for any federal, state, or local legislature to pass a law accommodating Muslim taxi drivers to refuse service to customers transporting alcohol.<sup>155</sup> Judging from the public's reaction to the initial two-light compromise that would have accommodated the taxi drivers, any attempt at accommodating this Muslim religious claim, which is clearly outside of "mainstream" American practice, would be met with hostile and fervent opposition.<sup>156</sup> American religious accommodation law's unequal treatment between the Muslim taxi drivers' and Christian pharmacists' claims is a striking example of Justice O'Connor's admonition in her concurrence in *Employment Division v. Smith*.<sup>157</sup> If courts permit state legislatures, or in Justice Scalia's terms "the people,"<sup>158</sup> to decide which religious groups get exemptions from generally applicable laws, and which do not, religious minorities, especially those with little political power and considered outside of the mainstream, will always be

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<sup>154</sup> *Pharmacist Conscience Clauses: Laws and Information*, *supra* note 144.

<sup>155</sup> See Daniel J. Cox et al., *What It Means to Be an American: Attitudes in an Increasingly Diverse America Ten Years after 9/11*, THE BROOKINGS INST. & THE PUB. RELIG. RESEARCH INST. (Sept. 6, 2011). The widespread suspicion and animosity directed towards Muslims in the United States is reflected in a number of public opinion polls. In a recent Brookings Institution poll, for example, forty-seven percent of Americans stated that Islam and American values are incompatible, forty-six percent were uncomfortable with a mosque being built near their home, and forty-one percent were uncomfortable with Muslims being their children's elementary school teacher. *Id.*

<sup>156</sup> Notably, opposition to S.B. 1062, the Arizona bill permitting businesses to refuse service for religious reasons, increased after commentators complained that it would permit Muslim taxi drivers to reject customers based on "Shari'a law," which they argued was inimical to American values. See William Saletan, *The Muslim Taxi Driver*, SLATE (Feb. 27, 2014), [http://www.slate.com/blogs/saletan/2014/02/27/arizona\\_s\\_antigay\\_bill\\_did\\_warnings\\_about\\_muslim\\_religious\\_freedom\\_help.html](http://www.slate.com/blogs/saletan/2014/02/27/arizona_s_antigay_bill_did_warnings_about_muslim_religious_freedom_help.html). Many of these same commentators had no problem allowing Christian businesses to refuse serving gays or others deemed contrary to their religious beliefs. *Id.*

<sup>157</sup> See *Emp't Div., Dep't Hum. Res. Or. v. Smith*, 494 U.S. 872, 902 (1990).

<sup>158</sup> *Id.* at 878–79.

at a significant disadvantage. After *Smith*, the First Amendment clearly prefers majoritarian and politically powerful religious groups over others. American religious accommodation law no longer pays heed to the Supreme Court's suggestion that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."<sup>159</sup>

### III. AN ALTERNATIVE LEGAL FRAMEWORK FOR RELIGIOUS REFUSAL CLAIMS

#### A. *The Legal Framework*

Because current religious accommodation law permits disparate treatment among religious groups, a new legal paradigm to address religious refusal claims is needed. Instead of granting administrative and legislative bodies with the primary discretion to determine which accommodation claims should be granted, these requests for refusing service to customers based on religious objections should follow a principled legal analysis that treats all claims equally regardless of religious affiliation. This article offers such an alternative legal framework. Specifically, U.S. religious accommodation law should require exemptions for members of religious groups to refuse service in state-regulated businesses only if the following two conditions are met: 1) the refusal does not disrupt service to the general public, and 2) the refusal does not violate common carrier and public accommodation laws outlawing discrimination based on various protected criteria, such as race, sex, religion, national origin, disability, marital status, and sexual orientation.

#### 1. The First Requirement: Must Not Disrupt Service to the Public

The first requirement of this alternative approach is that the religious refusal claim must not disrupt the duty that state-regulated businesses have to the general public of providing services without delay. Both the airport taxi drivers and the pharmacists operate in professions with a state-created collective monopoly to be the sole supplier of certain services and products.

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<sup>159</sup> *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981).



The licensed taxi drivers are the only authorized persons to transport passengers from the airport,<sup>160</sup> while the licensed pharmacists are the only authorized persons to dispense and sell prescription medication.<sup>161</sup> Unlike the situation of a free market of products and services where businesses and customers search for each other without limitations, customers of state-regulated businesses have no other legitimate options if they are refused service. Therefore, both the Muslim taxi drivers and Christian pharmacists have a duty to ensure that all members of the public have access to their services and products without delay. For example, in *Endres v. Indiana State Police*, the Seventh Circuit held that a state trooper could not refuse his assignment to work as a Gaming Commission agent based on a religious objection to gambling.<sup>162</sup> Because state laws have provided the police department with various tools—surveillance, arrest, detention, etc.—to give them the monopoly on protecting the public, the court reasoned that the police officers have a duty to “protect *all* members of the public” without exception.<sup>163</sup> In the same way, public utilities—companies that produce, sell, or deliver heat, cold, power, electricity, water, or light—frequently operate under state-created monopolies when providing their services to the public. Therefore, state laws regularly prohibit public utilities from refusing service to their customers, notwithstanding the religious beliefs of the public utility providers.<sup>164</sup> The Minnesota district court made a similar argument when denying the Muslim taxi drivers’ claim. The court reasoned that “[i]n the [taxicab business at the airport], you are licensed. You are using a public facility to make a profit. You are in a business that is highly regulated so as to provide safe and efficient transportation to all orderly passengers.”<sup>165</sup>

Although recognizing the heightened standard when individuals operate in state-created monopolies, my framework, unlike the Minnesota district court, would not completely reject religious accommodation claims on this basis alone. Under my

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<sup>160</sup> See Metro. Airports Comm’n Ordinance, No. 102, Sec. 3.1.

<sup>161</sup> See 18 VA. ADMIN. CODE § 110-20-10 (2013).

<sup>162</sup> *Endres v. Indiana State Police*, 349 F.3d 922, 927, 928 (7th Cir. 2003) (*cert. denied*, 541 U.S. 989 (2004)).

<sup>163</sup> *Id.* at 926 (emphasis in original).

<sup>164</sup> See, e.g., Public Utilities Act, 220 ILL. COMP. STAT. 5/8-101 (2013); 16 TEX. ADMIN. CODE. § 26.23 (2012).

<sup>165</sup> *Abdi Noor Dolal v. Metro. Airports Comm’n*, No. 27-cv-07-12907, Slip Op. at 8 (Minn. D. Ct. 2008).

first requirement, the individual Muslim taxi drivers and Christian pharmacists may refuse service to customers only if the service or product they are providing—transportation from the airport for the former and prescription birth control and emergency contraception for the latter—is offered to the customers by another taxi driver or pharmacist without any delay or interruption in customer service.

## 2. The Second Requirement: Must Not Violate Anti-Discrimination Laws

The second requirement of my alternative legal framework for religious refusal accommodation claims is that the refusal must not violate common carrier and public accommodation laws banning discrimination based on a number of protected criteria, such as race, sex, religion, national origin, disability, marital status, and sexual orientation.<sup>166</sup> In general, common carrier and public accommodation laws ensure that any business that obtains or solicits customers from the general public provides its services free from discrimination on the basis of some or all of the above traits.

As operators of transportation offering their services to all, taxis, like public buses, airlines, and trains, are considered common carriers under the common law.<sup>167</sup> Numerous states and the federal government have passed laws and regulations prohibiting common carriers to discriminate on the basis of certain protected criteria.<sup>168</sup> For example, at the Minneapolis Airport, MAC Ordinance 102, § 7.4(d), states: “Under no circumstances may a Taxicab Driver refuse service to a passenger

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<sup>166</sup> This article only addresses the religious accommodation claims of individuals in institutions operating in the public sphere. It does not address the religious accommodation claims of pervasively sectarian institutions such as churches, temples, mosques, and seminaries engaged in religious practices that courts have held to generally be free from requirements of state and federal laws which go against their religious beliefs. For example, in refusing to allow employment discrimination claims by ministers against their churches, courts have concluded that the state should not intrude into church governance matters because a church’s independence in these areas is central to its religious mission. *See, e.g.,* *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1304 (11th Cir. 2000).

<sup>167</sup> BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>168</sup> *See, e.g.,* 49 C.F.R. § 374.101 (2008) (“No motor common carrier of passengers subject to 49 U.S.C. subtitle IV, part B shall operate a motor vehicle in interstate or foreign commerce on which the seating of passengers is based upon race, color, creed, or national origin.”).

at the Airport on account of race, gender, religion, national origin, ethnicity, marital status, disability of any passenger who may be safely transported in the Taxicab, status with regard to public assistance, sexual orientation, or age.”<sup>169</sup>

Likewise, as an establishment that serves the public, pharmacies are institutions whose goods and services are extended, offered, sold, or otherwise made available to the public, and therefore are considered places of “public accommodation” under many state public accommodation laws.<sup>170</sup> Like common carrier laws, most public accommodation legislation also prohibits discrimination on the basis of certain protected criteria.<sup>171</sup>

Therefore, both the Muslim taxi drivers and Christian pharmacists have legal obligations under common carrier and public accommodation legislation to provide their customers with non-discriminatory service. Under my second requirement, these obligations demonstrate a state’s compelling interest in creating a public arena free from discrimination, and therefore, should trump religious refusal claims for individuals working in state-created monopolies.

### *B. Comparing the Two Claims under this Framework*

Based on the two requirements under my alternative legal framework, a comparison between the legal claims of the Muslim taxi drivers and Christian pharmacists demonstrates that the former would have a stronger accommodation claim than the latter.

Under the first requirement, the Muslim taxi drivers’

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<sup>169</sup> Metro. Airports Comm’n, Ordinance No. 102, sec. 7.4(d). *See also* MINNEAPOLIS CODE OF ORDINANCES § 341.170 (“No taxicab driver shall refuse or fail to provide services to any person [based on race, color, creed, religion, ancestry, national origin, sex, including sexual harassment, sexual orientation, disability, age, marital status, or status with regard to public assistance or familial status].”).

<sup>170</sup> In a few states, a pharmacy is expressly included in the definition of a place of public accommodation. *See* ME. REV. STAT. ANN. tit. 5, § 4553(8)(F) (2012) (“pharmacy”); 43 PA. CONS. STAT. ANN. § 954(l)(2013) (“drug stores”). In many other states, the definition is so broad that it would include pharmacies. *See, e.g.*, MICH. COMP. LAWS ANN. § 37.2301(a) (2000) (“institution of any kind, whether licensed or not, whose goods, services . . . are extended, offered, sold, or otherwise made available to the public”); N.J. STAT. ANN. § 10:5-5(l) (2000) (“retail shop, store, establishment, or concession dealing with goods or services of any kind”).

<sup>171</sup> ME. REV. STAT. ANN. tit. 5, § 4553(8)(F); 43 PA. CONS. STAT. ANN. § 954(l); MICH. COMP. LAWS ANN. § 37.2301(a); N.J. STAT. ANN. § 10:5-5(1).

accommodation claim is stronger than the Christian pharmacists' claim. Granting a religious exemption to Christian pharmacists could impose a substantial burden on women's access to reproductive health care. A woman's inability to obtain contraception in a timely manner due to a pharmacist's refusal can create serious health and safety concerns.<sup>172</sup> For example, according to medical experts, rape victims and women who have experienced a contraceptive failure have, at most, 120 hours after unprotected intercourse to take emergency contraception to prevent an unintended pregnancy.<sup>173</sup> Because the efficacy of emergency contraception declines with every passing hour, taking it during the first twenty-four hours provides the best chance of preventing pregnancy.<sup>174</sup> Therefore, under the first condition of my framework, a pharmacist's refusal claim should only be granted if the pharmacy ensures that the customer can purchase the needed prescription on-site without any delay (for example, by requiring pharmacies to have at least one pharmacist on duty who is able to fill all prescriptions).<sup>175</sup>

On the other hand, granting the Muslim taxi drivers' request would impose a much smaller burden on passengers at the Minneapolis-St. Paul International Airport. A passenger carrying alcohol that was denied transportation by a taxi driver would most likely have to wait only a short time before taking the next available taxi. The taxi drivers even presented proposals to the MAC that would permit their refusal claim while ensuring all passengers at the airport would receive transportation without any delay or interruption in customer service. One such proposal was the initial two-light compromise, which would have taxis unwilling to transport alcohol install a special color light. However, because of the overwhelming public backlash to the

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<sup>172</sup> See examples in SONDR A GOLDSCH E IN, ACLU, RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS: ACCESSING BIRTH CONTROL AT THE PHARMACY 1, 3 (2007).

<sup>173</sup> Frank Davidoff & James Trussel, *Plan B and the Politics of Doubt*, 296 JAMA 1775, 1775 (2006).

<sup>174</sup> D. Grimes, et al., *Randomised Controlled Trial of Levonorgestrel Versus the Yuzpe Regimen of Combined Oral Contraceptives for Emergency Contraception*, 352 THE LANCET 428, 430 at Table 2 (1998), [www.science.direct.com/science/article/pii/S0140673698051459](http://www.science.direct.com/science/article/pii/S0140673698051459). See also Davidoff & Trussel, *supra* note 173 at 1775 ("Plan B's contraceptive activity is evident within hours; delaying the first dose by 12 hours increases the odds of pregnancy by almost 50%, and its efficacy diminishes linearly with time.")

<sup>175</sup> However, because the pharmacists' claim does not meet the second condition of my framework, I contend it should not be accommodated. See discussion *infra*.

proposal—the MAC received over 500 e-mails and phone calls against the two-light solution, and none supporting it<sup>176</sup>—the two-light solution could have led to more customer service problems. A more promising proposal was for the MAC to change its Automatic Vehicle Identification System (AVIS) software to allow the system to designate taxicabs that will not transport alcohol. Under this proposal, taxi starters would receive this information through wireless hand-held devices, take notice of passengers who are visibly transporting alcohol, and then direct those passengers to taxis accordingly.<sup>177</sup> With this proposal, customer service would not be interrupted, and the passengers with alcohol would have no idea they were being “refused.” However, one potential problem would still exist. The taxi drivers contend that fifty percent of Muslim taxi drivers share the religious belief that transporting alcohol is a sin.<sup>178</sup> If, as reported, percent of the taxi drivers at the airport are Muslim,<sup>179</sup> that means 37.5 percent of the taxi drivers licensed to conduct business at the Minneapolis airport would request the refusal accommodation. Therefore, even under the AVIS system proposal, a customer with alcohol might have to wait for a significant period of time if no taxicab willing to transport a passenger carrying alcohol was immediately available in the taxi queue.

Regarding the second requirement, the Muslim taxi drivers would also have a stronger accommodation claim than the Christian pharmacists. Granting a religious exemption to Christian pharmacists allowing them to refuse the dispensing of birth control, emergency contraception, and other medication used only by women would likely constitute sex discrimination in violation of many state public accommodation laws.<sup>180</sup> If the refusal claim allowed pharmacists to refuse providing contraception to unmarried women, it would also likely violate some states’ prohibitions on discrimination on the basis of marital

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<sup>176</sup> Katherine Kersten, *A two-tiered airport taxi system could lead to ‘Chapter Two,’* STAR TRIBUNE, Oct. 16, 2006, at 1B.

<sup>177</sup> See Brief for Plaintiffs in Supp. of Mot. Summ. J. at 24–25, *Abdi Noor Dolal v. Metro. Airports Comm’n*, No. 27-cv-07-12907 (Minn. D. Ct. 2008).

<sup>178</sup> See Brief of Plaintiffs, *supra* note 83, at 10.

<sup>179</sup> Lydersen, *supra* note 15.

<sup>180</sup> See, e.g., DEL. CODE ANN. tit. 6, § 4504(a) (2013); MICH. COMP. LAWS ANN. § 37.2302(a) (2013); UTAH CODE ANN. § 13-7-3 (2013). However, federal public accommodation law would not apply in this situation because it does not ban sex-based discrimination. Federal protection is limited to race, color, religion, and national origin, and only addresses discrimination in entertainment centers, hotels, and restaurants. See 42 U.S.C. § 2000a(a) (2012).

status.<sup>181</sup> There is legal precedent to support the argument that restrictions on women's access to reproductive health care would violate Constitutional bans on sex-discrimination. For example, in *Erickson v. Bartell Drug Co.*, a federal district court held that an employer's failure to cover prescription contraceptives—"drugs made for women"—in its health insurance plan violated Title VII's prohibition against sex discrimination.<sup>182</sup> Furthermore, the Equal Employment Opportunity Commission and many state attorney generals have determined that refusing to provide insurance for contraception is sex discrimination.<sup>183</sup> For these reasons, under my second requirement, the Christian pharmacists' request to refuse the dispensing of birth control likely violates Constitutional bans on sex and marital status discrimination, and therefore, should not be accommodated.

On the other hand, the Muslim taxi drivers' request to refuse service would not discriminate on the basis of any of the protected criteria established under common carrier and public accommodation laws, as the sole factor for their refusal is the transportation of alcohol. Therefore, the taxi drivers would satisfy the second requirement of my legal paradigm for granting accommodation for refusal claims. Some opponents of the taxi drivers' claim were concerned that if the MAC yielded to the Muslims' demands on the no-alcohol issue, they could potentially be forced to consent to more egregious practices, such as refusing taxi service to blind passengers with seeing-eye dogs or even women who were deemed not to be dressed properly.<sup>184</sup> Both of these practices would undoubtedly violate discrimination prohibitions, the former on the basis of disability and the latter on the basis of sex. However, the taxi drivers repeatedly have denied that their request would extend beyond the transportation of alcohol. For example, in an attempt to disprove the notion that the drivers would deny customers with seeing-eye dogs, taxi drivers offered free rides to blind individuals attending the

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<sup>181</sup> See, e.g., MD. ANN. CODE tit. 20, sub. 3 § 20-302 (2013).

<sup>182</sup> *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1271–72, 1274 (W.D. Wash. 2001).

<sup>183</sup> See, e.g., Off. of the Att. Gen., State of Montana, Opinion No. 16 (2006), 2006 WL 842284, at \*5; Off. of the Att. Gen., State of Washington, Opinion No. 5 (2002), 2002 WL 31936085, at \*6, 7; Off. of the Att. Gen., State of Wisconsin, Opinion 1-04 (2004), 2004 WL 3078999, at \*1. See EEOC, COMMISSION DECISION ON COVERAGE OF CONTRACEPTION, \*4–5 (Dec. 14, 2000), available at 2000 WL 33407187.

<sup>184</sup> See, e.g., Kersten, *supra* note 176.

National Federation of the Blind in Minnesota convention in spring 2007.<sup>185</sup>

In summation, under the two conditions presented in my alternative legal framework to address accommodation requests for refusing service to customers based on religious objections, the Somali Muslim taxi drivers would have a stronger claim than the Christian pharmacists to obtain relief. The pharmacists' request to refuse the dispensing of medication used exclusively by women not only would seriously impede a woman's access to essential reproductive health care, but also would likely violate prohibitions on sex and marital status discrimination. On the other hand, the taxi drivers' request to refuse passengers with alcohol would not violate prohibitions on discrimination of any protected category. However, while the taxi drivers' request would not create as substantial a burden on their customers as the pharmacists' demand, they too should not be accommodated unless a solution is devised which would allow them to refuse passengers without interrupting customer service at Minneapolis-St. Paul International Airport. As of yet, they have not come up with such a solution.

*C. Incorporating the Two-Part Test into Religious  
Accommodation Jurisprudence*

At present, it would be difficult to incorporate my alternative legal framework into federal religious accommodation law, primarily because post-*Employment Division v. Smith*, federal courts have interpreted the Free Exercise Clause as not requiring religious exemptions from neutral laws of general applicability.<sup>186</sup> However, if *Smith* were overturned, and the United States reverted back to *Sherbert v. Verner's* precedent requiring religious exemptions when the law substantially burdens religion and the exemption would not undermine compelling state interests (as many state constitution free exercise clauses are still interpreted)<sup>187</sup>, my two-part test on refusal claims could be incorporated into American jurisprudence on religious

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<sup>185</sup> Pamela Miller, *For Blind, Free Rides Are a Matter of Dignity*, STAR TRIBUNE, Apr. 1, 2007, at 8B.

<sup>186</sup> See, e.g., *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 542 (1993) (describing the requirements of a generally applicable law, which substantiates restrictions on religious practices).

<sup>187</sup> *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

accommodation. Specifically, when determining whether a state's interest is compelling regarding requests from religious groups to refuse service in state regulated-businesses, courts could conclude that the state's interest is compelling—and, therefore, the religious exemption should be denied—if the refusal claim: 1) disrupts service to the general public, or 2) violates common carrier and public accommodation laws outlawing discrimination based on various protected traits, such as race, sex, religion, national origin, disability, marital status, and sexual orientation.

### CONCLUSION

In conclusion, the Metropolitan Airports Commission's denial of the Somali Muslim taxi drivers' request to refuse transporting passengers with alcohol is a telling example of how American religious accommodation jurisprudence permits unequal treatment between various religious groups. For example, although both are workers in state-regulated businesses providing services to the general public, the Muslim drivers' claim was rejected, while a similar request by Christian pharmacists to refuse dispensing and selling prescription contraceptives has been accepted in several states.<sup>188</sup> This disparate treatment is largely due to federal and state courts giving considerable leeway to state administrative and legislative bodies to decide which religious groups to accommodate as well as exactly how they should be accommodated.<sup>189</sup>

For these reasons, a new legal framework to address religious refusal claims is needed. Instead of granting state agencies and legislatures the primary discretion to determine accommodation claims, requests for refusing service to customers based on religious objections should follow a principled legal analysis that treats all claims equally regardless of religious affiliation. Some may argue, as Justice Scalia did in *Employment Division v. Smith*, that although "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in... [this is an]

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<sup>188</sup> Cantor, *supra* note 8.

<sup>189</sup> Ira C. Lupu et al., *A Fluid Boundary: The Free Exercise Clause and the Legislative and Executive Branches*, THE PEW FORUM ON RELIG. & PUB. LIFE (2008), available at [www.pewforum.org/2008/10/23/a-fluid-boundary-the-free-exercise-clause-and-the-legislative-and-executive-branches/](http://www.pewforum.org/2008/10/23/a-fluid-boundary-the-free-exercise-clause-and-the-legislative-and-executive-branches/).



unavoidable consequence of democratic government . . . .”<sup>190</sup> However, when the political process is used to reinforce inequalities and to substantiate the public’s fear of a disadvantaged minority—as in the Somali Muslim taxi driver issue—courts and others have recognized that the minority group is entitled to added protection.<sup>191</sup> Therefore, this article puts forth a new legal approach to religious refusal claims. Specifically, the law should require religious exemptions for individuals to refuse service in state-regulated businesses only if the following two conditions are satisfied: 1) the refusal does not disrupt service to the general public, and 2) the refusal does not violate common carrier and public accommodation laws outlawing discrimination based on various protected traits, such as race, sex, religion, national origin, disability, marital status, and sexual orientation. Under these requirements, the Muslim taxi drivers should be accommodated only if they can devise a viable solution which would allow them to refuse passengers while not disrupting service. As of yet, such a solution has not been offered. The Somali Muslim taxi driver controversy provides an important lesson on the need for a new legal framework for religious refusal claims, one which treats all religious groups fairly. As the population of Muslims and other religious minorities continues to grow in the United States, the need for change will become even more apparent in the coming years.

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<sup>190</sup> *Emp’t Div., Dep’t Hum. Res. Or. v. Smith*, 494 U.S. 872, 890 (1990).

<sup>191</sup> For example, special protections are afforded to “discrete and insular minorities,” as defined in the famed footnote four of the Supreme Court’s decision in *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938). See also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 135–81 (1980) (discussing his “representation-reinforcing theory” directed toward “[f]acilitating the [r]epresentation of [m]inorities”).