COMMENT

THE *NIQAB* IN THE COURTROOM: PROTECTING FREE EXERCISE OF RELIGION IN A POST-*SMITH* WORLD

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INTRODUCTION

On a Wednesday morning at the small-claims court in Hamtramck, Michigan,[1] Judge Paul J. Paruk called Ginnah Muhammad to testify in support of her claim against Enterprise Rent-A-Car.[2] Muhammad, an African American convert to Islam, wore the *niqab*, a garment that covered her entire face, except for a slit revealing her eyes. Before she began, Judge Paruk asked her to remove her veil.[3] He explained that "unless you take that off, I can't see your face and I can't tell whether you're telling me the truth or not and I can't see certain things about your demeanor and temperament that I need to see in a court of law."[4] Muhammad insisted that she could not remove the *niqab* before a male judge.[5] She explained that as "a practicing Muslim . . . this is my way of life."[6] She said she could remove the *niqab* before a female judge, but "otherwise, I can't follow that order."[7]

Judge Paruk assured Muhammad that he was the only judge available and that he meant "no disrespect to [her] religion" but said that he understood that the *niqab* was "a custom thing," not a religious obligation.[8] Other practicing Muslim women, he reported, had told him that "what I wear on top of my head is a religious thing and what I wear across my face is a non-religious thing. It's a custom thing."[9] Muhammad insisted that for her, this was not the case; she wished "to respect [her] religion" and thus said, "I will not take off my clothes. . . . [T]his is part of my clothes, so I can't remove my clothing

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[1] Hamtramck is an "extraordinarily diverse community" where "Arab-American's [sic], particularly foreign born Arab-American's [sic], represent the most populous group in the city. On a national scale, the State of Michigan has the highest concentration of Arabs outside of the Middle East." Appellant's Brief at 10-11, Muhammad v. Paruk, No. 08-1754 (6th Cir. stipulation to dismiss filed Oct. 15, 2009), 2009 WL 1209297. In communities like Hamtramck, where the number of Muslim Americans ensures that this population will inevitably interact with the court system, the possibility of conflict between the individual and the state is greatest.

[2] *See* Transcript of Record at 3, Muhammad v. Enter. Rent-A-Car, No. 06-41896 (Dist. Ct. Mich. Oct. 11, 2006) (providing a record of Ginnah Muhammad's interaction with the court).

[3] *Id.*

[4] *Id.* at 4.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at 5.

when I'm in court."[10] As a result, Judge Paruk dismissed the case without prejudice, and Muhammad left the courtroom.[11]

As a result of this small-claims action, the Michigan Supreme Court opened the court to public comment on Rule 611 of the Michigan Rules of Evidence.[12] Eventually, it issued an order amending the rule to grant state court judges the power to "exercise reasonable control over the appearance of parties and witnesses so as to (1) ensure that the demeanor of such persons may be observed and assessed by the fact-finder and (2) ensure the accurate identification of such persons."[13] Muhammad sued Judge Paruk in federal district court, alleging that he had violated her right to free exercise of religion and her civil right to access the courts.[14] The district judge abstained from the case,[15] and Muhammad appealed to the United States Court of Appeals for the Sixth Circuit[16] but withdrew the suit shortly before oral argument.[17] Therefore, the federal courts never addressed Muhammad's claims.

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[10] *Id.* at 6.

[11] *Id.*

[12] A diverse group of interest groups from across the political spectrum filed comments. The ACLU; multiple Islamic, Jewish, and Christian religious organizations; organizations dealing with women who are victims of domestic and sexual abuse; legal-services organizations; and individuals supportive of religious liberty opposed the proposed amendment to Rule 611 because it would "allow judges to unconstitutionally close the doors of the courthouse to Michigan citizens based upon their religiously-mandated dress." Letter from Michael J. Steinberg, Legal Dir., ACLU of Mich., to Chief Justice Marilyn J. Kelley, Mich. Supreme Court, and Corbin Davis, Clerk of the Mich. Supreme Court 1 (Apr. 30, 2009) (on file with author); *see also id.* at 11 (listing the organizations and individuals joining the letter).

[13] *See* Order Amending Rule 611 of the Michigan Rules of Evidence at 1, ADM File No. 07-0013 (Mich. Aug. 25, 2009). Muhammad's attorney, Nabih Ayad, assisted her in refiling an action in small-claims court, which was removed to the district court, where summary disposition was granted for the defendants. Telephone Interview with Nabih Ayad, Partner, Nabih H. Ayad & Assocs. (Feb. 9, 2010).

[14] Muhammad v. Paruk, 553 F. Supp. 2d 893, 895-96 (E.D. Mich. 2008).

[15] *See id.* at 901 (declining to exercise jurisdiction because it would "increase the tension between our state and federal courts").

[16] *See* Muhammad v. Paruk, No. 08-1754 (6th Cir. stipulation to dismiss filed Oct. 15, 2009).

[17] *Id.* The case was scheduled for oral argument on October 16, 2009, but on October 12, Muhammad's attorney filed a motion requesting to delay his oral argument. *See* Appellant's Emergency Motion for Continuation of Oral Argument, *Muhammad*, No. 08-1754 (6th Cir. Oct. 12, 2009). When the court refused to grant the motion, he asked that the case be dismissed. With unfavorable precedent on hybrid rights in the Sixth Circuit, *see infra* Section II.B, and a conservative panel, one wonders if this was a strategic decision. Others have taken a more cynical view as to what motivated the motion to dismiss. *See, e.g.*, Debbie Schlussel, *The End of the Niqab Case: HA! Jihadist Lawyer Dumps Client, Throws Case for Greener Pastures*, DEBBIE SCHLUSSEL (Oct. 26, 2009, 1:32 PM), http://www.debbieschlussel.com/10927/the-end-of-the-niqab-case-ha-jihadist-lawyer-

The Muhammad litigation highlights the tension between the individual right to free exercise of religion and judicial norms that address the probative functions of American courts. To what extent must criminal and civil courts accommodate religious preference? This Comment responds to these questions, offering lawyers and judges a framework for thinking about this complex area of the law.

Part I considers Islam and the African American Muslim community in America and explores the history and significance of Muslim dress codes, including the *niqab*. It argues that sincerely held beliefs about dress codes should be recognized as religious beliefs. Next, Part II assesses free exercise law, emphasizing the "hybrid claims" that Muhammad's case represents. Part III applies the strict scrutiny that hybrid claims demand, concluding that courts should respect religious obligations to wear different forms of headgear. Part IV assesses the compelling state interests the Michigan Supreme Court advanced to justify its policy, showing that the rules are not narrowly tailored and that the claimed state interests are less compelling than they initially seem. Finally, the Conclusion argues that the arguments employed to protect the right to wear the *niqab* apply with even greater force to other religious apparel, such as the *hijab, kippah*, or turban.

I. CULTURE OR RELIGION? WHY MUHAMMAD'S DECISION TO WEAR THE *NIQAB* IS RELIGIOUS

The Constitution protects wearing the *niqab* if it is a religious practice.[18] A basic discussion of Islam and the history of veiling within its religious tradition reveals a great diversity of practice around the world.

A. *African American Islamic Beliefs and Practices in Context*

"Islam is one of the world's three major monotheistic religions,"[19] followed by well over one billion people across the globe.[20] Muslims be-

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dumps-client-throws-case-for-greener-pastures (speculating that Muhammad's lawyer "threw his client overboard" because he had no pecuniary interest in pursuing the case further).

[18] This is because the First Amendment protects the free exercise of religion (not custom). *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

[19] JAMILA HUSSAIN, ISLAM: ITS LAW AND SOCIETY 14 (2d ed. 2004).

[20] A recent comprehensive study put the number of Muslims at 1.57 billion. PEW FORUM ON RELIGION & PUB. LIFE, PEW RESEARCH CTR., MAPPING THE GLOBAL MUSLIM POPULATION 1 (2009), *available at* http://pewforum.org/Muslim/Mapping-the-Global-Muslim-Population.aspx.

lieve that in the seventh century, Allah[21] revealed his divine message to the prophet Muhammad, whose written testimony became the Quran.[22] Islamic beliefs are not monolithic; for over 1300 years, people in different parts of the world applied *sharia*[23] through a pliable interpretive process. Over time, Islam came to be studied and practiced differently based on region and society.[24] "Islam comprises not only the cosmological theme of the holy texts, but *lived identities* in local contexts, emerging within ongoing debates about what is right and what is wrong."[25]

Ginnah Muhammad's African American Muslim community exemplifies the diversity that exists within the Muslim population worldwide.[26] "African Americans are the largest group of nonimmigrant Muslims in the United States,"[27] comprising "about a third of the estimated 4 to 8 million Muslims in the U.S."[28] This distinctly American community is historically rooted in the religion of some African slaves and took hold in mainstream communities in the early twentieth cen-

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[21] Allah may also be written as "al-Lah" and literally means "the God." *See* KAREN ARMSTRONG, A HISTORY OF GOD 135 (1993) (describing how Muhammad's one God was the same as that worshipped by Jews and Christians).

[22] *See generally* CHRIS HORRIE & PETER CHIPPINDALE, WHAT IS ISLAM? 14-24 (2003) (describing the life of Muhammad and the writing of the Quran, every word of which, according to the religion, must be accepted as the literal word of Allah). The basic creed can be summed up by two phrases, which one wishing to convert to Islam must recite in the presence of two witnesses: "There is no god but Allah; Muhammad is the messenger of Allah." *Id.* at 25.

[23] *Sharia* is best translated as "law," but it is "more than law; it is also the right teaching, the right way to go in life, and the power that stands behind what is right. . . . [It] comprises all that might be positively called law and occupies the central place in the Islamic system of final authority and ordering principle." FREDERICK MATHEWSON DENNY, AN INTRODUCTION TO ISLAM 195-96 (2d ed. 1994).

[24] *See* AKBAR S. AHMED, ISLAM TODAY, at xiii (1999) ("What repeatedly emerged throughout the Muslim world was the unity of Muslim belief and yet the diversity of Muslim societies. So while prayers, values, emotions and even architecture reflect unity, their expression often changes within a different cultural and political environment."); *see also* Leif Manger, *Muslim Diversity: Local Islam in Global Contexts* ("[T]here are as many Islams as there are situations that sustain them. . . . Islam must be defined by what Muslims everywhere say it is; . . . we should talk not of the world of Islam, but a world of many Islams."), *in* MUSLIM DIVERSITY 17 (Leif Manger ed., 1999).

[25] Manger, *supra* note 24, at 18 (emphasis added).

[26] Muslims call this global community *umma*, a word representing "a vision of a single human family, deriving its life and guidance from God, and returning its life and obedience to Him. . . . [Islam] is a United Nation." JOHN BOWKER, WHAT MUSLIMS BELIEVE 5 (1995). However, "[w]ithin the boundary of umma, it is . . . possible to contain wide variations of practice and interpretation." *Id.* at 11.

[27] Karen Fraser Wyche, *African American Muslim Women: An Invisible Group*, 51 SEX ROLES 319, 322 (2004).

[28] Rose-Marie Armstrong, *Turning to Islam*, CHRISTIAN CENTURY, July 12, 2003, at 18.

tury.[29] It experienced its largest growth in the 1960s as an outgrowth of Black Nationalism.[30] African Americans who turned to Islam sought an "alternative to and in some cases a subversion of the black church"[31] to create "a nation within a nation where they could enjoy freedom, fraternity, justice, and equality under their own government by hard work and a disciplined life."[32] Over time, mainstream African American Muslim communities disassociated themselves from much of the politicized and separatist ideology of institutions like the Nation of Islam so that today, the majority of African American Muslim women belong to "traditional Islamic religious groups in the United States."[33]

Ginnah Muhammad is one such convert to Islam and may represent a group of African American women who "saw in Islam the opportunity to re-create [them]selves as women" and "lay claim to the strong women who surrounded the Prophet Muhammad, such as his wife Khadija, as [their] role models."[34] These women find comfort and support in each other, as well in as the moral, social, and cultural values of Islamic life,[35] including Muslim dress.[36]

B. *Muslim Women and the Veil*

Judge Paruk's statements from the bench highlight the divergent practices within the Muslim community.[37] In Islam, covering the body

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[29] *See* Richard Brent Turner, *Mainstream Islam in the African-American Experience*, ISIM NEWSLETTER (Int'l Inst. for the Study of Islam in the Modern World, Leiden, Neth.), July 1999, at 37, 37.

[30] *See* Wyche, *supra* note 27, at 320-22 (explaining that some African Americans were drawn to Islam as a religion and as a "Black Nationalism movement").

[31] Armstrong, *supra* note 28, at 18.

[32] Wyche, *supra* note 27, at 326.

[33] *Id.* at 319.

[34] Aisha H.L. al-Adawiya, *African American Muslim Women Are a Rare Gift*, COMMON GROUND NEWS SERVICE (June 3, 2008), http://www.commongroundnews.org/article.php?id=23266&lan=en&sid=1&sp=0.

[35] *See generally* Wyche, *supra* note 27, at 324-27 (providing an overview of studies that attempt to determine why African American women are drawn to Islam).

[36] *See* Caryle Murphy, *Behind the Spread of the Muslim Veil*, ABC NEWS INT'L, Dec. 20, 2009, *reposted on* http://www.muslimahnews.com/hijab-news/behind-the-spread-of-the-muslim-veil (reviewing the meaning of the *hijab* among various Muslim communities).

[37] As one scholar explains, "[T]he veil cannot be understood as a symbol with singular meaning. Rather than conceptualizing the veil as a frozen embodiment of a particular culture or its subversion, most women actively engage with the symbols that the veil represents." Natasha Bakht, *Veiled Objections: Facing Public Opposition to the Niqab*, *in* DEFINING REASONABLE ACCOMMODATION (Lori Beaman ed.) (forthcoming 2011) (manuscript at 6), *available at* http://ssrn.com/abstract=1476029.

is known as *hijab*.[38] *Hijab* varies from wearing loose-fitting clothes and covering the hair to completely covering the face and hands,[39] and women observe it differently in various countries and regions.[40] The source of the obligation is disputed. Some Muslims argue that the practice is a mandate from the prophet himself and is contained in the Quran.[41] Others maintain that the verse applied only to the wives of the prophet in Medina.[42] Still others believe that the *hadith* contains the authority for the obligation.[43] The practice is buttressed by concerns for modesty that are incumbent on both men and women in Islam.[44] For many devout Muslim women, some type of body covering whenever they are in the presence of a man who is not their husband or close relative,[45] especially a covering of the hair,[46] is an essential part of religious practice.[47]

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[38] *Hijab* comes from the Arabic word *hajaba*, meaning "to hide from view or conceal." *See* Mary Ali, *The Question of Hijab*, INST. ISLAMIC INFO. & EDUC., http://www.iiie.net/index.php?q=node/37 (last visited Feb. 15, 2011) (explaining why Muslim women wear head coverings).

[39] *See* DENNY, *supra* note 23, at 351 (discussing differences in veiling practices).

[40] Some feminists have written powerfully about how truly diverse this practice is among Muslim women. *See, e.g.*, NANCY J. HIRSCHMANN, THE SUBJECT OF LIBERTY: TOWARD A FEMINIST THEORY OF FREEDOM 171-72 (2003) ("[A]s a practice, veiling differs widely among countries and regions, all of which assign it different historical and cultural meanings and adopt different styles . . . . [T]here is also a wide range of social norms concerning women's decisions to veil . . . . [V]eiling can provide a sense of identity, community, and religious faith.").

[41] *See* THE QUR'AN 33:53 (Abdullah Yusuf Ali trans., 2007) ("[W]hen you ask ([the Prophet's] ladies) for anything you want, ask them from before a screen [*hijab*]: that makes for greater purity for your hearts and for theirs.").

[42] *See* DENNY, *supra* note 23, at 351 (explaining some commentators' belief that only the Prophet's wives were required to wear veils).

[43] *See* HUSSAIN, *supra* note 19, at 67 ("A *hadith* recounts that the Prophet told Asma that once a woman reaches puberty, she should cover all of her body except for her hands and face.").

[44] *See* AHMED, *supra* note 24, at 159-60 (explaining that "the Quran teaches modesty for both men and women," and while "[t]he covering of the face by a veil has never been universal in the Muslim world . . . the Quranic injunction to modesty, however it is applied, cannot be set aside. Its interpretation has varied, and does vary, but its importance is basic").

[45] *See An Islamic Perspective on Women's Dress*, MUSLIM WOMEN'S LEAGUE (Dec. 1997), http://www.mwlusa.org/topics/dress/hijab.html (describing the obligation to wear the *hijab*).

[46] *See* HUSSAIN, *supra* note 19, at 68 ("[A]lmost all religious authorities say that women should cover their hair . . . .").

[47] *See* THE QUR'AN, *supra* note 41, at 24:31 ("And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw their veils over their bosoms and not display their beauty except to their

So many American Muslim women wear the headscarf[48] that the word *hijab* has become interchangeable with the headscarf itself.[49] In recent years, the practice of wearing a headscarf has blossomed, particularly among young, second-generation Muslim women.[50] The *niqab*, on the other hand, is much more controversial. A much smaller minority of Muslim women veil everything but the eyes.[51] In the early twentieth century, some Muslim scholars and leaders began to condemn the *niqab*.[52] Most Islamic jurists abandoned the face-veil requirement in the first half of the twentieth century; until recently, only a small minority of ultraconservative communities mandated the face-veil.[53] Saudi Arabia is the only country that requires women to wear the face-veil in public as a matter of law.[54] In 2009, Egypt's highest legal authority, Sheikh Mohamed Tantawi, issued an edict (later

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[male relatives and servants, other women, and children] . . . ."); Aliah Abdo, Note, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 HASTINGS RACE & POVERTY L.J. 441, 446 (2008) (explaining that for all Muslim women who wear the *hijab*, it "is a religious obligation and any policy prohibiting the wearing of hijab is a requirement that they violate their religious beliefs").

[48] *See* Interview with Imam Anas Muhaiman, Leader of Quba Masjid (Dec. 23, 2009) (explaining that wearing the headscarf is a mainstream practice adopted by most observant Muslim women).

[49] As a result of the power and ubiquity of the headscarf, it has become a touchstone of the debate about Muslims in America. *See, e.g.*, Rhys H. Williams & Gira Vashi, Hijab *and American Muslim Women: Creating the Space for Autonomous Selves*, 68 SOC. RELIGION 269, 271 (2007) ("*[H]ijab* has become the most visible symbol of Muslim identity and issues in America.").

[50] *See id.* at 270 (drawing on a number of sources to conclude that "[m]any second-generation young women in the U.S. choose to wear *hijab*").

[51] *See* Anita L. Allen, *Veiled Women in the American Courtroom: Is the* Niqab *a Barrier to Justice?* 2 (Univ. of Pa. Law Sch. Pub. Law & Legal Theory Research Paper No. 10-25, 2010), *available at* http://ssrn.com/abstract=1651140 ("A few [U.S. Muslim women] wear the *niqab*. The *niqab* . . . cloaks a woman's head and neck, leaving only her eyes exposed.").

[52] Egyptian scholar Qasim Amin sparked the modern debate about the *niqab* in Islam by taking a strong public stand against veiling, arguing that Islamic law does not require the practice. *See* JUDITH E. TUCKER, WOMEN, FAMILY, AND GENDER IN ISLAMIC LAW 200-01 (2008) (describing Amin's views). Some other scholars agreed with his position. Tunisian scholar al-Tahir al-Haddad argued that the face-veil would sap women of their ability to exercise their will in society, weaken marriage, prevent a woman from acquiring the knowledge needed to fulfill her duties as a mother and household manager, and even "stand[] in the way of a woman realizing her civil rights in court." *Id.* at 201. Iraqi scholar Jamil Sidqi al-Zahawi believed that veiling "promoted immorality by facilitating secret liaisons" and created a "barrier to female education" that threatened "the wellbeing of the family and by extension the wider society." *Id.* at 201-02.

[53] *Id.* at 202.

[54] *Id.*

overturned) banning the *niqab* on the grounds that it is "a custom that has nothing to do with the Islamic faith."[55]

It is therefore understandable that Judge Paruk might have been confused about the *niqab*'s status as a religious obligation. Even within the community of Muslims who believe the *niqab* is required, opinions by some Islamic scholars suggest that it may be removed when giving testimony in a court of law.[56] These opinions influence some judges; Judge Corrigan devotes an entire section to "[e]xceptions to the [p]ractice of [v]eiling" in his concurrence to the order amending the Michigan Rules of Evidence.[57] He cites *Freeman v. Department of Highway Safety & Motor Vehicles*[58] as support for his conclusion that "Islamic law accommodates exceptions to the practice of veiling because of 'necessity.'"[59] He quotes the website "Islam Question & Answer," which instructs women to remove their veil for court cases.[60] With so much legal authority aligned with the secular interests of the state, some judges believe their inquiry should end there. Yet the Free Exercise Clause requires deference to sincerely held, bona fide religious beliefs, even if they do not match "authoritative" interpretations of those beliefs.[61]

C. *What Constitutes a Religious Belief*

A woman's decision to wear the *niqab* is a religious practice.[62] Muhammad's testimony suggests she would pass the initial requirement

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[55] *Egypt Cleric 'to Ban Full Veils,'* BBC NEWS (Oct. 5, 2009), http://news.bbc.co.uk/2/hi/middle_east/8290606.stm. Egypt's high court overturned the ban several months later. *Court Overturns Egypt's Islamic Schools' Niqab Ban*, REUTERS, Jan. 28, 2010, http://af.reuters.com/article/topNews/idAFJOE60R0OO20100128.

[56] Order Amending Rule 611 of the Michigan Rules of Evidence, *supra* note 13, at 5.

[57] *Id.* at 5-7.

[58] 924 So. 2d 48 (Fla. Dist. Ct. App. 2006).

[59] Order Amending Rule 611 of the Michigan Rules of Evidence, *supra* note 13, at 5 (quoting *Freeman*, 924 So. 2d at 52).

[60] *Id.* at 6. He also quoted the weblog of Dawud Walid, the Executive Director of the Michigan Chapter of the Council on American-Islamic Relations, for the proposition that even in countries where the veil is mandatory, it must be removed in court. *Id.* at 6-7 (citing Dawud Walid, *Drama in MI Regarding Niqab in Courts*, WEBLOG OF DAWUD WALID (May 11, 2009, 2:22 PM), http://dawudwalid.wordpress.com/2009/05/11/drama-in-mi-regarding-niqab-in-courts/).

[61] *See* United States v. Seeger, 380 U.S. 163, 184 (1965) ("The validity of what [an individual] believes cannot be questioned. Some theologians . . . might be tempted to question the existence of [an individual's] 'Supreme Being' or the truth of his concepts. But these are inquiries foreclosed to Government.").

[62] With respect to the *niqab*, Ginnah Muhammad testified, "[I am] a practicing Muslim and this is my way of life and I believe in the Holy Koran and God is first in my life." Transcript of Record, *supra* note 2, at 4. Sultaana Freeman, another litigant in a *niqab*

of the Free Exercise Clause that a belief be sincerely held.[63] Once a belief has been deemed sincere and religiously motivated, "the fact-finder may not delve into the question of religious verity, or the reasonableness of the belief."[64] The Supreme Court has made clear that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."[65] As Justice Antonin Scalia noted in *Employment Division v. Smith*, the leading case on these issues, "Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."[66] Judges Paruk and Corrigan's hairsplitting over whether the *niqab* represents religion or culture runs afoul of this clear rule. Even if some Muslims find Muhammad's refusal to remove the *niqab* in court to be inscrutable, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[67]

The concept of "lived religion" reinforces the wisdom of the Supreme Court. Rather than viewing religion as "some 'trans-historical essence,' existing as a timeless and unitary phenomenon," lived-religion scholars acknowledge that "religions change over time" so that "what people understand to be 'religion' changes."[68] Religious organizations may have approved certain orthodox practices, yet the religious practices of individuals and communities often differ from those of religious authorities.[69] Ginnah Muhammad, like other Afri-

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case, issued a public statement explaining, "I wear the niqab because I believe that according to The Qur'an and Sunnah, Allah has legislated for the believing woman to dress in this modest way." *Statement by Sultaana Lakiana Myke Freeman*, ACLU FLA. (May 27, 2003), http://www.aclufl.org/issues/religious_liberty/freemanpersonal_statement.cfm.

[63] *See Seeger*, 380 U.S. at 185 (explaining that courts "decide whether the beliefs professed by a [claimant] are sincerely held and whether they are, in his own scheme of things, religious").

[64] Ala. & Coushatta Tribes of Tex. v. Trs. of the Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319, 1328 (E.D. Tex. 1993) (citing United States v. Ballard, 322 U.S. 78, 86-87 (1944)).

[65] Hernandez v. Comm'r, 490 U.S. 680, 699 (1989).

[66] 494 U.S. 872, 887 (1990).

[67] Thomas v. Review Bd., 450 U.S. 707, 714 (1981).

[68] MEREDITH B. MCGUIRE, LIVED RELIGION 5 (2008).

[69] Lived-religion studies provide vivid examples of this reality. *See, e.g.*, ROBERT A. ORSI, THANK YOU, SAINT JUDE 42-44 (1996) (describing how immigrant Catholic women in Depression-Era Chicago established a cult of Saint Jude that assisted them in the difficult transition to their new lives in the United States). *See generally* LIVED RELIGION IN AMERICA (David D. Hall ed., 1997) (collecting studies on lived religion in America—from the cremation movement in Gilded Age America to modern homesteading).

can American Muslims who wear the *niqab*, is part of a long tradition. People like Muhammad "assert their own distinctions"[70] from traditional forms of religious practice through embodied practices that "can effectively link the material aspects of people's lives with the spiritual."[71] Slowly, the larger American community is beginning to acknowledge them.[72] While some religious authorities may consider the *niqab* to be a "mere custom," it plays a central role in the way Ginnah Muhammad and thousands of other veiled women live their religion everyday.[73] Wearing a veil is the means by which "the sacred is made vividly real and present through the experiencing body."[74]

II. FREE EXERCISE TODAY

The Supreme Court has struggled to balance claims for religious exemptions against legitimate government interests. Free exercise jurisprudence is fraught with this tension, beginning with a limited view of the necessity of exemptions for religious practices in *Reynolds v. United States*,[75] expanding exemptions in the mid-twentieth century by subjecting free exercise claims to strict scrutiny in *Sherbert v. Verner*,[76] and then constricting the scope of practices exempt from secular laws in 1990 in *Employment Division v. Smith*.[77] Currently, free exercise claims receive only rational basis review where facially neutral laws of general applicability are at issue.[78] In a "hybrid situation" in which a free exercise claim is made in conjunction with another constitutional claim, strict scrutiny applies.[79] The hybrid-rights standard is difficult to understand and apply, however, and courts of appeals have taken widely disparate positions on how to implement the rule. The most

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[70] MCGUIRE, *supra* note 68, at 6.

[71] *Id.* at 13.

[72] For example, the *New York Times* recently ran an article on the cover of the Sunday Styles section exploring the lives of several Muslim women who wear the veil, including Ginnah Muhammad. Lorraine Ali, *Behind the Veil*, N.Y. TIMES, June 13, 2010, at ST1. It attempts to provide a context for understanding the unique challenges these women face every day. *Id.*

[73] The *niqab* practices of many American Muslim women support Orsi's stipulation that "religion does not necessarily conform to the creedal formulations and doctrinal limits developed by cultured and circumspect theologians, church leaders, or ethicists." *See* ROBERT A. ORSI, BETWEEN HEAVEN AND EARTH 191 (2005).

[74] MCGUIRE, *supra* note 68, at 13.

[75] 98 U.S. 145 (1878).

[76] 374 U.S. 398 (1963).

[77] 494 U.S. 872 (1990).

[78] *Id.* at 878-79.

[79] *Id.* at 881-82.

sensible approach recognizes hybrid rights whenever a plaintiff makes a colorable showing that a companion right has been violated.

A. *Setting the Stage*

In *Smith*, the Court declined to apply strict scrutiny to a challenge to a facially neutral law of general applicability.[80] Focusing on the freedom to engage in religious practices, *Smith* reasoned that a law banning an action because of its religious content, or only when the act is engaged in for a religious purpose, would not be neutral or generally applicable.[81] For claims challenging general laws like the criminal prohibition on peyote, however, Justice Scalia declared, "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[82] Citing *Reynolds*, Justice Scalia resurrected an old and largely discredited distinction between beliefs and practices.[83] Thenceforth, if a law were facially neutral and generally applicable, any burden on religion would be "merely the incidental effect" of the law.[84]

In *Smith*, the Court distinguished *Sherbert*, explaining that in *Sherbert* the state had established a system of exemptions to an otherwise neutral and generally applicable law.[85] Yet that reasoning alone could not account for prior cases in which the Court had invalidated laws on

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[80] *Id.* at 884-85. Like *Sherbert*, *Smith* involved a challenge to a state employment agency's decision to deny benefits to two discharged workers because they were discharged for work-related "misconduct." *Id.* at 874. Smith and Black were Native Americans who were fired from work after their employer found that they had ingested peyote (a hallucinogenic drug) for sacramental purposes during a religious ceremony at their church. *Id.*

[81] *Id.* at 877.

[82] *Id.* at 878-79. This assertion seems to conflict directly with the statement in *Wisconsin v. Yoder* that "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability." 406 U.S. 205, 220 (1972).

[83] Scalia quotes *Reynolds* for the proposition that permitting religious belief to excuse prohibited behavior "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Smith*, 494 U.S. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1879)). *But see Smith*, 494 U.S. at 896 (O'Connor, J., concurring) (noting that "in each of the other cases cited by the Court to support its categorical rule, we rejected the particular constitutional claims before us only after carefully weighing the competing interests" (citations omitted)).

[84] *Id.* at 878.

[85] *See infra* text accompanying notes 165 and 166 (describing the *Smith* majority's analysis of the holding in *Sherbert*).

free exercise grounds.[86] The Court attempted to cure this inconsistency by declaring that

> [t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law . . . have involved . . . the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents . . . to direct the education of their children.[87]

The Court labeled these cases "hybrid[s]"[88] but failed to describe how hybrid rights would actually work. Justice Scalia posited that a free exercise challenge could "reinforce[]" a freedom of association claim.[89] He also said that an interest in parenthood "combined" with a free exercise claim requires something more than mere rational basis scrutiny,[90] yet did not specify precisely what that level of scrutiny should be. Considering the Court's oblique treatment of the hybrid situation, as well as scathing dissents by several Justices[91] and critiques in the legal literature,[92] the subsequent difficulties the courts of appeals have experienced are understandable.

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[86] *See, e.g.*, *Yoder*, 406 U.S. 205; Cantwell v. Connecticut, 310 U.S. 296 (1940); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[87] *Smith*, 494 U.S. at 881 (citations omitted).

[88] *Id.* at 882. The hybrid concept may not be entirely new to constitutional law. Richard Duncan argues that a hybrid concept might explain the Supreme Court's decision in *Stanley v. Georgia*, 394 U.S. 557 (1969), which found a right to possess obscene materials in the home. Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith*,* Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 857 n.58 (2001). Although *Stanley* involved a lawful search under the Fourth Amendment and the discovery of obscene materials that the First Amendment generally did not protect, the Court held that possession of obscene materials in one's private home could not constitutionally be considered a crime. *Stanley*, 394 U.S. at 559, 568. The Court explicitly stated that Stanley's case presented an "added dimension" because of the link between his privacy interest and a free speech interest. *Id.* at 564. Professor Duncan argues "[t]he arithmetic of Stanley—'First amendment satisfied plus fourth amendment satisfied equals Constitution unsatisfied'—is no less paradoxical than that of the Court in *Smith*." Duncan, *supra*, at 857 n.58 (quoting Gerard V. Bradley, *Remaking the Constitution: A Critical Reexamination of the* Bowers v. Hardwick *Dissent*, 25 WAKE FOREST L. REV. 501, 512 (1990)).

[89] *Smith*, 494 U.S. at 882.

[90] *Id.* at 881 n.1.

[91] *Smith*, 494 U.S. at 908 (Blackmun, J., dissenting) (describing the hybrid reasoning as a "distorted view of our precedents"); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 566-67 (1993) (Souter, J., concurring) (beginning a lengthy critique of the *Smith* rule by attacking the hybrid distinction as "ultimately untenable" and unpersuasive).

[92] *See, e.g.*, John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of* Oregon v. Smith, 25 IND. L. REV. 71, 74 (1991) ("The Court's error in *Smith* is fundamental . . . ."); Michael P. Farris & Jordan W. Lorence, Employment

B. *Variance Among the Circuits*

The *Smith* standard for a neutral, generally applicable law has proven difficult for legislators to change and for plaintiffs to overcome. Congress attempted to restore the pre-*Smith* strict scrutiny standard with the Religious Freedom Restoration Act of 1993 (RFRA),[93] but the Supreme Court struck down the statute in 1997.[94] Over twenty states continue to apply heightened scrutiny to free exercise claims through state RFRA laws,[95] and the RFRA still applies to the

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Division v. Smith *and the Need for the Religious Freedom Restoration Act*, 6 REGENT U. L. REV. 65, 66 (1995) ("Smith relegated our national commitment to the free exercise of religion to the sub-basement of constitutional values."); Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 260 ("Like many others, I believe that *Employment Division v. Smith* is substantively wrong and institutionally irresponsible."); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1122 (1990) ("[A] legal realist would tell us . . . the *Smith* Court's notion of 'hybrid' claims was not intended to be taken seriously."); Chris Day, Note, Employment Division v. Smith*: Free Exercise Clause Loses Balance on Peyote*, 43 BAYLOR L. REV. 577, 608 (1991) (criticizing the Court for failing to protect religious minorities' rights); Debra Ann Mermann, Note, *Free Exercise: A "Hollow Promise" for the Native American in* Employment Division, Department of Human Resources of Oregon v. Smith, 42 MERCER L. REV. 1597, 1621 (1991) ("Clearly, the continued survival of the first amendment concept of religious freedom awaits the re-evaluation of this dubious decision."); Paul S. Zilberfein, Note, Employment Division, Department of Human Resources of Oregon v. Smith*: The Erosion of Religious Liberty*, 12 PACE L. REV. 403, 433-34 (1992) (arguing that the *Smith* decision is "contrary to both the Madisonian interpretation of the 'free exercise of religion' and the principle of *stare decisis*").

[93] 42 U.S.C. §§ 2000bb to 2000bb-4 (1994), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[94] *See* City of Boerne v. Flores, 521 U.S. 507, 512, 524 (1997) (striking down the RFRA as applied to the states for exceeding Congress's power under section 5 of the Fourteenth Amendment and improperly interfering with the federal judiciary's exclusive right to interpret the Constitution in a case or controversy).

[95] Fourteen states passed Religious Freedom Restoration Acts or Amendments codifying the strict scrutiny test for state free exercise claims after the *Smith* decision. *See* ALA. CONST. amend. 622; ARIZ. REV. STAT. ANN. §§ 41-1493.01 to .02 (2004); CONN. GEN. STAT. ANN. § 52-571b (West 2005); FLA. STAT. §§ 761.01–.05 (2010); IDAHO CODE ANN. §§ 73-401 to -404 (2006); 775 ILL. COMP. STAT. ANN. 35/1 to 35/99 (West 2001); MO. ANN. STAT. §§ 1.302, 1.307 (West 2000 & Supp. 2009); N.M. STAT. ANN. §§ 28-22-1 to -5 (2003); OKLA. STAT. ANN. tit. 51, §§ 251–258 (West 2008); 71 PA. STAT. ANN. §§ 2401–2407 (West Supp. 2010); R.I. GEN. LAWS §§ 42-80.1-1 to -4 (2006); S.C. CODE ANN. §§ 1-32-10 to -60 (2005); TEX CIV. PRAC. & REM. CODE ANN. §§ 110.001–.012 (West 2005); VA. CODE ANN. § 57-2.02 (2007). During this same period, the courts of seven more states explicitly interpreted their state constitutions to require the application of strict scrutiny to free exercise claims. *See* Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67 (Cal. 2004); Fortin v. Roman Catholic Bishop of Portland, 871 A.2d 1208, 1227-28 (Me. 2005); Attorney Gen. v. Desilets, 636 N.E.2d 233, 235-36 (Mass. 1994); State v. Pedersen, 679 N.W.2d 368, 373 (Minn. Ct. App. 2004); Humphrey v. Lane, 728 N.E.2d 1039, 1043 (Ohio 2000); Munns v. Martin, 930 P.2d 318, 321 (Wash. 1997); State v. Miller, 549 N.W.2d 235, 239 (Wis. 1996). In addition,

federal government.[96] For cases brought under the federal Constitution challenging a state action, however, a plaintiff's best hope for overcoming a neutral, generally applicable law is a hybrid-rights claim.[97]

A faithful interpretation of *Smith* subjects free exercise claims to strict scrutiny when they are joined with a claim involving an additional constitutional right. In practice, however, hybrid-rights claims are a phantom menace: strict scrutiny still exists in the minds of academics, lawyers, and sympathetic judges, but in practice, no court has applied strict scrutiny even when squarely presented with a classical "hybrid situation" as envisioned in *Smith*.[98] When courts have cited the hybrid-rights theory favorably for a plaintiff, the principal reason has always been the "additional" constitutional right or some other state constitutional or federal law calling for a higher level of scrutiny.[99] The hybrid-rights theory may thus be a useless appendage the Su-

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since *Smith*, three more state supreme courts have determined that their state constitutions provide greater protection for the free exercise of religion than the Federal Constitution does. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280-81 (Alaska 1994); City Chapel Evangelical Free Inc. v. City of South Bend, 744 N.E.2d 443, 446 (Ind. 2001); State v. Schwartz, 689 N.W.2d 430, 441-42 (S.D. 2004).

[96] *See* Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006) (involving unanimous application of the RFRA by the Court against the federal government in a free exercise case involving a federal statute).

[97] This is true unless the claim falls into the *Sherbert* exception. *See infra* Section III.A.

[98] *See, e.g.*, Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419, 440 n.45 (9th Cir. 2008) (declining to apply a hybrid-rights theory in a challenge to a school-uniform policy that purportedly violated both free speech and free exercise on the grounds that "no court has ever allowed a plaintiff to bootstrap a free exercise claim in this manner. We decline to be the first." (citations omitted)).

[99] *See* Olsen v. Mukasey, 541 F.3d 827, 832 (8th Cir. 2008) (declining to apply strict scrutiny to an alleged federal constitutional violation because the issue had already been decided using that level of scrutiny under the RFRA, which still applies to the federal government); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467-70 (D.C. Cir. 1996) (applying strict scrutiny because of the RFRA and only relying on the hybrid-rights theory as a secondary basis for its holding); People v. DeJonge, 501 N.W.2d 127, 131, 134-35 & n.27 (Mich. 1993) (acknowledging the existence of a hybrid-rights claim, yet relying principally on an interpretation of the Michigan State Constitution that calls for strict scrutiny of free exercise claims); William L. Esser IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211, 242-43 (1998) (reviewing state and federal cases to conclude that in every case in which a court has cited the hybrid-rights theory as supporting its decision, "it never does so as the primary basis of the decision," and the success of such claims is always "tied to the constitutional strength of the right with which free exercise is combined").

preme Court created only to deal with precedent that did not fit neatly into its new free exercise jurisprudence.[100]

It is for this reason that a minority of the Supreme Court has called for its reversal. If the conservative majority currently on the Court finally grants certiorari on this issue, however, they may try to save the theory by more firmly establishing its contours. Either way, it is clear that this is an area in need of doctrinal cleanup.[101]

One group of circuit courts has refused to apply the hybrid-rights exemption. These courts—the Second, Third, and Sixth Circuits—maintain that *Smith*'s holding is so muddled that it cannot be reliably applied[102] and that it is "dicta and not binding."[103] Several criticisms of hybrid-rights theory explain their reasoning.[104] First, the courts "can

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[100] *See* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of the Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 187 (2002) ("[T]he *Smith* Court's exception for hybrid rights quite obviously served a specific function. It allowed the Court to avoid overruling *Yoder*, a long accepted precedent protecting free exercise rights against a neutral law of general applicability." (footnote omitted)).

[101] *See* Jonathan B. Hensley, Comment, *Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases*, 68 TENN. L. REV. 119, 138 (2000) ("The various attempts to deal with the hybrid-rights doctrine in the lower federal courts have not produced a consensus as to how to interpret the doctrine. Only a few of these decisions have earnestly tried to make sense of the vague dicta in *Smith* about hybrid situations, but all have left significant questions unresolved."). For an even more thorough, case-by-case analysis of the hybrid-rights theory as the lower courts have interpreted it, see John L. Tuttle, *Adding Color: An Argument for the Colorable Showing Approach to Hybrid Rights Claims Under* Employment Division v. Smith, 3 AVE MARIA L. REV. 741 (2005).

[102] *See, e.g.*, Kissinger v. Bd. of Trs. of the Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993) (declining to apply the hybrid-rights theory to a free exercise claim because it is "completely illogical").

[103] Leebaert v. Harrington, 332 F.3d 134, 143 (2d Cir. 2003) (quoting Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001)); *accord* Combs v. Homer-Ctr. Sch. Dist., 540 F.3d 231, 247 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1013 (2009); Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 240 F.3d 553, 561 (6th Cir. 2001), *rev'd on other grounds*, 536 U.S. 150 (2002).

[104] Justice Souter's concurrence in *Hialeah* heavily influences these critiques, which cite it to support their decision to treat the hybrid-rights doctrine as dicta.

> [T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring).

think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated."[105] Second, they are troubled by *Smith*'s lack of clarity, including its failure to "explain how the standards under the Free Exercise Clause would change depending on whether other constitutional rights are implicated."[106] Since *Smith*, the Supreme Court has been virtually silent on the hybrid-rights question.[107] Rather than create their own hybrid-rights theory, these circuit courts have treaded cautiously.

The Ninth Circuit's complicated jurisprudence exemplifies the wisdom of caution in this field. That Circuit first adhered to the broadest strict scrutiny interpretation of the hybrid-rights theory: the "colorable showing" theory.[108] Yet a recent Ninth Circuit decision undermines that initial approach. In *Jacobs v. Clark County School District*,[109] high school students challenged a school-uniform policy as a violation of freedom of speech and religion.[110] Such a combination should, in theory, trigger strict scrutiny.[111] Yet the court treated the speech and religion claims separately, applying intermediate scrutiny to reject the former[112] and citing *Smith*'s rules on neutral, generally applicable laws to dismiss the latter.[113] The court, explaining its reasons in a footnote, decided not to recognize hybrid-rights in this case,[114] which directly contradicted its earlier precedent in *Thomas v.*

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[105] *Leebaert*, 332 F.3d at 144.

[106] *Kissinger*, 5 F.3d at 180.

[107] *See Combs*, 540 F.3d at 246-47 ("Since *Smith*, a majority of the Court has not confirmed the viability of the hybrid-rights theory."); *see also Watchtower*, 240 F.3d at 562 ("The Court has yet to provide . . . guidance, and therefore, we adhere to our decision in *Kissinger* and continue to decline to alter the standard of scrutiny.").

[108] *See Combs*, 540 F.3d at 246 (identifying the Ninth Circuit as recognizing hybrid rights and requiring a plaintiff to raise a "'colorable claim that a companion right has been violated'" (quoting San Jose Christian Coll. v. Morgan Hill, 360 F.3d 1024, 1032 (9th Cir. 2004))); Ryan M. Akers, *Begging the High Court for Clarification: Hybrid Rights Under* Employment Division v. Smith, 17 REGENT U. L. REV. 77, 90-92 (2004) (discussing Ninth Circuit cases that support this interpretation of the hybrid-rights theory); Tuttle, *supra* note 101, at 757-60 (examining case law in the Ninth Circuit to conclude that it supports the colorable-claim-showing interpretation).

[109] 526 F.3d 419 (9th Cir. 2008).

[110] *Id.* at 423.

[111] *See* Emp't Div. v. Smith, 494 U.S. 872, 881 (1990) (declaring that a hybrid situation exists in cases involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press").

[112] *Jacobs*, 526 F.3d at 434-38.

[113] *Id.* at 439-40.

[114] *See id.* at 440 n.45 (rejecting the plaintiffs' invitation to apply the hybrid-rights doctrine, recognizing that it "has been widely criticized," and citing a number of cases expressing this criticism). The footnote is remarkable in that it cites the Sixth Circuit's

Anchorage Equal Rights Commission.[115] There, the same court held that hybrid-rights claims were governed by a colorable-showing standard.[116] The court then granted the defendant landlords an exemption from Alaska's anti–marital discrimination laws.[117] The court exhibited support for the colorable-showing interpretation of hybrid rights in theory; but when squarely presented in *Jacobs* with a case ripe for application of this standard, it chose "the path of least resistance."[118]

The "no hybrid" approach has its merits, particularly as a method of avoiding complexity and limiting the claims of free exercise plaintiffs.[119] Yet faithful application of Supreme Court precedent requires more. Further, the Ninth Circuit's own decision in *Thomas* criticized its sister circuits for turning away cases that dealt with complex, "hybrid" issues, as in *Yoder*.[120] In *Yoder*, the Supreme Court explained that the case combined free exercise and due process claims that *together* merited strict scrutiny.[121] Courts that reject the hybrid-rights approach

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Kissinger decision, rather than its own case law, to support its decision not to recognize the hybrid-rights theory. *Id.* Its reasoning directly conflicts with the Ninth Circuit's decision in *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692 (9th Cir. 1999), *rev'd en banc*, 220 F.3d 1134 (9th Cir. 2000). There, rather than citing the Sixth Circuit with approval, the Ninth Circuit criticized its approach to the hybrid-rights theory for taking a "path of least resistance" that ignores the fact that "*Smith* did not overrule *Cantwell*, *Murdock*, *Follett*, and *Yoder*; it distinguished them. . . . We are not at liberty to ignore them." *Id.* at 704. After a lengthy analysis of "the nature of hybrid rights," *id.* at 703, the court concluded that "plaintiff[s] invoking *Smith*'s hybrid exception must make out a 'colorable claim' that a companion right has been infringed." *Id.* at 705. The *Jacobs* court quite obviously ignored that standard.

[115] 165 F.3d at 692. Though *Thomas* was overturned en banc on ripeness grounds, *see Thomas*, 220 F.3d at 1137, subsequent cases affirmed its reasoning on the hybrid-rights theory. *See* Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999) (holding that a plaintiff may make a hybrid claim if he can bring a "'colorable claim'" that has "a 'fair probability' or a 'likelihood,' but not a certitude, of success on the merits" (quoting *Thomas*, 165 F.3d at 707)); Am. Family Ass'n v. City of San Francisco, 277 F.3d 1114, 1124-26 (9th Cir. 2002) (applying the "colorable claim" language from *Miller* to reject the plaintiff's hybrid claim).

[116] *See Thomas*, 165 F.3d at 705 ("[W]e conclude that a plaintiff invoking *Smith*'s hybrid exception must make out a 'colorable claim' that a companion right has been infringed.").

[117] *Id.* at 717-18.

[118] *Id.* at 704.

[119] *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME 259 (1999) (describing the merits of a minimalist approach in cases where judges "lack . . . relevant information" and "obtaining consensus amid pluralism" is difficult).

[120] *Thomas*, 165 F.3d at 704.

[121] *See* Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972). In that case, the Court created an exemption from Wisconsin's compulsory education law for Amish students past the eighth grade. For a more detailed discussion of the reasoning in that case, see *infra* text accompanying notes 156-60 and 193-98.

have stripped the concept of judicial relevance. Thus, an approach rejecting hybrid rights should be disfavored.[122]

Other circuits employ a variety of means to recognize some form of hybrid rights. The weakest group, comprised of the First and D.C. Circuits, has never actually applied strict scrutiny to hybrid claims but suggests that "an independently viable companion" claim would be enough to trigger heightened scrutiny.[123] The Ninth Circuit summarized the central concerns raised by this requirement of two distinct constitutional infringements as the key to finding a hybrid claim: "We will not lightly presume that, in specifically and continually invoking the Free Exercise clause, the Supreme Court was wasting its breath. . . . When the Court said 'Free Exercise Clause,' it meant it."[124] Requiring an independently viable claim is the practical equivalent of the Second, Third, and Sixth Circuits' approaches to the hybrid-rights theory because "such a test would make the free exercise claim unnecessary."[125] Neither of these approaches faithfully interprets the plain language of *Smith*.

The best approach,[126] adopted outright by the Ninth[127] and Tenth Circuits,[128] cited favorably by others,[129] and employed by district courts

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[122] Judge Justice of the Eastern District of Texas wrote that applying the hybrid-rights approach "to every free exercise challenge"

> would be a gross aberration from decades of established Supreme Court precedent in the First Amendment arena. Moreover, it would represent the erosion, if not the absolute obliteration, of one of the most basic principles our Founders, recently freed from the oppression of European government, sought to establish through the Bill of Rights—the free exercise of religion as a fundamental right of the new American democracy.

Ala. & Coushatta Tribes of Tex. v. Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319, 1331-32 (E.D. Tex. 1993) (citations and footnote omitted).

[123] *Thomas*, 165 F.3d at 703; *see also* Gary S. v. Manchester Sch. Dist., 374 F.3d 15, 18-19 (1st Cir. 2004) (affirming the district court's rejection of a hybrid-rights claim because it failed to conjoin the free exercise claim with an independently viable claim); Henderson v. Kennedy, 253 F.3d 12, 19 (D.C. Cir. 2001) (declining to recognize a "hybrid claim" argument because "the combination of two untenable claims [does not] equal[] a tenable one"); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996) (holding in the alternative that the EEOC's violation of the Establishment Clause, as well as the Free Exercise Clause, triggered the hybrid-rights exemption); Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 539 (1st Cir. 1995) (rejecting a hybrid-rights claim because "[plaintiffs'] free exercise challenge is . . . not conjoined with an independently protected constitutional protection").

[124] *Thomas*, 165 F.3d at 705.

[125] *See* Axson-Flynn v. Johnson, 356 F.3d 1277, 1297 (10th Cir. 2004).

[126] I share this opinion with others in the legal literature. *See, e.g.*, Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN ST. L. REV. 573, 608 (2003) ("[T]he

in several other circuits,[130] requires a showing of a colorable companion claim to a free exercise challenge. If a plaintiff makes such a colorable showing, then the challenged law will be subject to strict scrutiny.[131] The colorable-showing standard avoids the extreme position

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colorable claim standard alleviates much of the alleged difficulty associated with hybrid claims."); Tuttle, *supra* note 101, at 742 ("[T]he colorable showing approach to the hybrid rights exception of *Smith* is the most appropriate approach adopted by the lower courts."); Timothy J. Santoli, Note, *A Decade After* Employment Division v. Smith*: Examining How Courts Are Still Grappling with the Hybrid-Rights Exception to the Free Exercise Clause of the First Amendment*, 34 SUFFOLK U. L. REV. 649, 669-70 (2001) ("The colorable claim theory is perhaps the best interpretation of the hybrid-rights exception because it accords with *Smith* and other free exercise cases that Justice Scalia used to formulate the hybrid-rights exception.").

[127] Of course, *Jacobs* raises questions about the Ninth's Circuit position. *See supra* notes 114-18.

[128] *See Axson-Flynn*, 356 F.3d at 1295-97 (holding that the court would "only apply the hybrid-rights exception to *Smith* where the plaintiff establishes a 'fair probability, or a likelihood,' of success on the companion claim," and that the "colorable" inquiry is "fact-driven and must be used to examine hybrid rights on a case-by-case basis"); Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 700 (10th Cir. 1998) (holding that a hybrid-rights claim requires "a colorable showing of infringement of recognized and specific constitutional rights, rather than the mere invocation of a general right"); *see also* Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 656 (10th Cir. 2006) (citing *Swanson* and *Axson-Flynn* as clear statements of the law in the circuit).

[129] The Fifth Circuit recently cited *Swanson* favorably in discussing how it would analyze a hybrid-rights claim. *See* Cornerstone Christian Sch. v. Univ. Interscholastic League, 563 F.3d 127, 136 n.8 (5th Cir. 2009). The Seventh Circuit has not yet definitively adopted a clear approach. *See* Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 765 (7th Cir. 2003) (quoting *Miller v. Reed*, 176 F.3d 1202, 1207-08 (9th Cir. 1999), to support the proposition that the mere allegation of a companion claim is insufficient to warrant heightened scrutiny). *But see id.* (citing Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 539 (1st Cir. 1995), and Kissinger v. Board of Trs., 5 F.3d 177, 180 (6th Cir. 1993)). The Eighth Circuit has recognized the existence of a hybrid-rights claim but has failed to define its contours. *See* Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 474 (8th Cir. 1991) (reversing and remanding to the district court to consider the hybrid-rights claim).

[130] *See* Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961, 989 (N.D. Ill. 2003) ("This court therefore will follow the logic of the Ninth and Tenth Circuits, which require that in order for strict scrutiny to apply, a plaintiff must make a showing of a colorable infringement of one of the other constitutional rights involved in the hybrid claim."); Hicks v. Halifax Cnty. Bd. of Educ., 93 F. Supp. 2d 649, 662-63 (E.D.N.C. 1999) (subjecting a school-uniform policy to strict scrutiny because the companion free speech claims constituted "a genuine claim of infringement of a constitutional interest identified in *Smith*'s hybrid-rights passage" based on "a record that provide[d] evidence supporting th[e] claim," and thus fell "within the hybrid-rights exception outlined in *Smith* and illustrated by *Yoder*"); Ala. & Coushatta Tribes of Tex. v. Big Sandy Sch. Dist., 817 F. Supp. 1319, 1332 (E.D. Tex. 1993) (endorsing the "hybrid claim" as a valid judicial avenue to decide some free exercise cases).

[131] *See, e.g.*, Am. Family Ass'n v. City & Cnty. of San Francisco, 277 F.3d 1114, 1124 (9th Cir. 2002) (explaining that a free exercise claim with a companion free speech claim could "qualify for strict scrutiny review").

the First and D.C. Circuits have taken—the effects of which are practically indistinguishable from the "no hybrid" approach the Second, Third, and Sixth Circuits have taken. Yet it remains a true hurdle, requiring more than a mere "implication" or "allegation" of an additional constitutional right. "Government action will almost always 'implicate' a host of constitutional rights," as the Ninth Circuit noted in *Thomas*, "even though it does not seriously threaten, much less violate any of them."[132] It is only when a plaintiff can show a "'fair probability'" or "'likelihood'" of success on the merits that the hybrid-rights theory dictates that courts should apply strict scrutiny.[133]

This approach takes the Supreme Court seriously, breathing real life into the hybrid-rights exception. Under the colorable-showing test, the *Yoder* plaintiffs would still prevail and the *Smith* plaintiffs would still lose.[134] The colorable-showing requirement "accounts *both* for *Smith* (which an implication standard cannot) *and* for the original hybrid cases (which an independently-viable-rights standard cannot)," and in practice ensures that "neither the central holding of *Smith* nor the Free Exercise Clause is rendered without substantive bite."[135] This interpretation is loyal to *Smith*, which mandated rational basis scrutiny when only a free exercise right was implicated, but offered additional protection to those who were denied religious *and* other constitutionally protected freedoms.[136]

The most salient criticism of the colorable-showing test is that it allows two losing claims to combine to create one winner.[137] This is a

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[132] Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 705 (9th Cir. 1999).

[133] *Id.* at 707.

[134] In *Thomas*, Judge O'Scannlain reasoned that ingesting peyote "at best" constitutes "'expressive conduct,'" so the *Smith* plaintiffs had no "'colorable claim of infringement' with respect to their free speech rights" because the Supreme Court has only invalidated laws regulating expressive conduct where "it has concluded that the government has prohibited such conduct '*precisely because of its communicative attributes.*'" *Id.* at 706 (quoting Barnes v. Glen Theatre, Inc., 501 U.S. 560, 576 (1991) (Scalia, J., concurring in the judgment)).

[135] *Id.* at 707.

[136] *See supra* Section II.A; *see also* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) ("[A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, *and* the traditional interest of parents with respect to the religious upbringing of their children . . . ." (emphasis added)). *Smith* did not overrule *Yoder*; it reinterpreted it. An interpretation of the Court's free exercise jurisprudence that gives independent meaning to hybrid-rights claims will be true to the purpose of its decisions in cases like *Yoder* and *Sherbert*.

[137] *See* Eric J. Neal, Note, *The Ninth Circuit's "Hybrid Rights" Error: Three Losers Do Not Make a Winner in* Thomas v. Anchorage Equal Rights Commission, 24 SEATTLE U. L.

complaint "not with the colorable showing approach, but rather with the hybrid rights exception itself."[138] Indeed, a law that adversely affects multiple constitutional interests may become so onerous to the individual that it merits closer scrutiny.[139] Lower courts should apply the Supreme Court's hybrid-rights precedent faithfully, and a colorable-showing test is the most logical means by which to achieve this objective.[140]

III. APPLYING THE HYBRID-RIGHTS THEORY

A. *Invoking the Hybrid-Rights Exception*

To have the right to wear the *niqab* in state court assessed under strict scrutiny in states that do not independently apply strict scrutiny to free exercise claims, a plaintiff must prove, at the very least, that she also has a colorable showing of a claim to an additional, fundamental constitutional right. In cases like Ginnah Muhammad's, the strongest right to combine with a free exercise right is the due process right of access to the courts, which is guaranteed by the Fourteenth Amendment.

Access to the courts is a fundamental constitutional right[141] the Supreme Court has long recognized.[142] It is a right that "stands at the confluence of three lines of doctrine": "[t]he First Amendment's right to petition for redress of grievances," "[t]he Court's equal protection jurisprudence [that] treats access to courts as a 'fundamental interest' that cannot be denied arbitrarily when addressing claims of

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REV. 169, 185 (2000) (criticizing the colorable-claim standard because it "allows a party to join losing free exercise claims with other losing claims to create a winning free exercise claim"); *cf.* Duncan, *supra* note 88, at 858 ("Although it is certainly true that zero plus zero does not equal one, it is equally true that the sum of a number of fractions—one-half plus one-half, for example—may equal one.").

[138] Tuttle, *supra* note 101, at 767.

[139] *See* Duncan, *supra* note 88, at 858 (noting that the concept of hybrid claims is logical).

[140] Moreover, if the Supreme Court grants certiorari to clarify this issue, adoption of the colorable-showing test would be a measured way of retaining *Smith*'s core holding while still allowing *Yoder*-like claims to prevail in compelling circumstances.

[141] *See* 16D C.J.S. Constitutional Law § 1725 (2009). Many state constitutions also protect this right. *Id.* § 2150.

[142] *See* Windsor v. McVeigh, 93 U.S. 274, 277, 280 (1876) (proclaiming that the right to be heard by a tribunal "lies at the foundation of all well-ordered systems of jurisprudence" and is "'founded in the first principles of natural justice'" (quoting Bradstreet v. Neptune Ins. Co., 3 F. Cas. 1184, 1187 (Story, Circuit Justice, C.C.D. Mass. 1839))); *see also* Hovey v. Elliott, 167 U.S. 409, 417 (1897) ("Can it be doubted that due process of law signifies a right to be heard in one's defence?").

right over which the state exercises a monopoly," and the Due Process Clauses of the Fifth and Fourteenth Amendments.[143] In criminal cases, this right is bolstered by the Sixth Amendment's Confrontation Clause, which guarantees a defendant the "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings."[144] In civil cases, litigants must be afforded "a 'meaningful opportunity to be heard' by removing obstacles to their full participation in judicial proceedings."[145]

The Supreme Court has identified two categories of successful access-to-the-courts claims. The first is "claims that systemic official action frustrates a plaintiff or plaintiff class in preparing and filing suits at the present time."[146] In Muhammad's case, the ban on the *niqab* in the courtroom is a "systemic official action" that prevents her from filing suit in civil court or defending herself in criminal cases since she will be unable to serve as a witness in the proceedings.[147]

Most access-to-the-courts claims concern official actions that make it difficult to present an effective case—for example, a claim that a prisoner has been denied access to the prison library to prepare a suit.[148] Muhammad's claim is even more powerful. It asserts that a courtroom practice prevents her from meaningful access to justice. Her complaint closely resembles the plaintiffs' arguments in *Tennessee v. Lane*, in which two paraplegics filed an action under Title II of the Americans with Disabilities Act (ADA), arguing that Tennessee's refusal to make its courthouse handicap-accessible prevented them from accessing the courts.[149] One claimant, Lane, had to crawl up the stairs to reach the courtroom.[150] Even though Lane could enter the building, albeit with great effort and loss of dignity, the Court subjected the state's denial of accommodation to heightened scrutiny.[151] It upheld the constitutionality

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[143] Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 565-67 (2002).

[144] Faretta v. California, 422 U.S. 806, 819 n.15 (1975) (citing Snyder v. Massachusetts, 291 U.S. 97 (1934)).

[145] Tennessee v. Lane, 541 U.S. 509, 523 (2004) (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)).

[146] Christopher v. Harbury, 536 U.S. 403, 413 (2002).

[147] *Id.*

[148] *See, e.g.*, Madrid v. Gomez, 190 F.3d 990, 995-96 (9th Cir. 1999) (denying prisoners' access-to-the-court counterclaim because they were not deprived of "the 'minimal help necessary' to file legal claims" (quoting Lewis v. Casey, 518 U.S. 343, 360 (1996))).

[149] 541 U.S. at 513-15.

[150] *Id.* at 514.

[151] *See id.* at 529 ("[T]he right of access to the courts at issue in this case . . . call[s] for a standard of judicial review at least as searching, and in some cases more search-

of the ADA because its mandate that states provide reasonable access is "perfectly consistent with the well-established due process principle that, 'within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard' in its courts."[152]

For a religious Muslim woman like Muhammad, the ban on the *niqab* in Michigan courtrooms is the functional equivalent of a courthouse without a ramp or an elevator for a paraplegic. Though she can technically enter by removing her veil, this would be an affront to her dignity and integrity as a human being,[153] just as forcing Lane to be carried or to drag his body up the stairs to enter the Tennessee courthouse was an affront to his. In Lane's case, that affront resulted from a physical characteristic beyond his control: his inability to walk. For a woman like Muhammad, religious obligations are just as intrinsic to her personhood and as out of her control as Lane's disability.[154] She sincerely believes that God has commanded her to wear the *niqab*, and to take it off before a male judge or juror would violate her sacred commitment. Just as Tennessee failed to provide meaningful access to its courts by refusing to make reasonable structural changes or finding alternative, accessible sites, the courts in Michigan and other jurisdic-

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ing, than the standard that applies to sex-based classifications."). This level of scrutiny, which asks whether the state action or classification serves "important governmental objectives" and is "substantially related to achievement of those objectives," is a less searching inquiry than strict scrutiny. Craig v. Boren, 429 U.S. 190, 197 (1976). Though far better than rational basis scrutiny, this standard of review would not be as favorable to plaintiffs like Muhammad—a crucial reason why establishing a hybrid claim is so important.

[152] *Lane*, 541 U.S. at 532 (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)).

[153] Britain's Judicial Study Board made this same argument. It noted that

> [t]o force a choice between that identity [of a veil-wearing woman] . . . and the woman's involvement in the criminal, civil justice, or tribunal system (as a witness, party, member of court staff or legal office-holder) may well have a significant impact on that woman's sense of dignity and would likely serve to exclude and marginalise further women with limited visibility in courts and tribunals. This is of particular concern for a system of justice that must be, and must be seen to be, inclusive and representative of the whole community. While there may be a diversity of opinions and debates between Muslims about the nature of dress required, for the judicial system the starting point should be respect for the choice made, and for each woman to decide on the extent and nature of the dress she adopts.

JUDICIAL STUDIES BD., EQUAL TREATMENT BENCH BOOK 3-18/2 (2009).

[154] Skeptics might scoff at the notion that a religious practice is beyond an individual's control, but careful attention must be paid to the religion at issue here. Islam literally means "submission," and many devout Muslims sincerely believe in "the soul's absolute devotion and submission to God alone." *See Submission to God (Islam), An Introduction*, SUBMISSION.INFO, http://www.submission.info (last visited Feb. 15, 2011).

tions that require religious Muslim women to remove their veils similarly prevent them from accessing their courts of justice. Such a rule creates, at the very least, a colorable claim of infringement on the constitutional right of access to the courts.

At this point, the purpose of the hybrid-rights doctrine comes into focus. The key fact is that the Muslim woman's right of access to the courts is impeded *because* her free exercise rights are under assault. The *combination* of infringements on her free exercise right and on her right to access the courts makes the state's rule so onerous that it demands strict scrutiny. This analysis closely mirrors the reasoning that animated the Court's decision in *Yoder*.[155] There, the Court understood that a decision by Amish parents not to send their child to public schools after eighth grade was "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."[156] As the *Smith* majority reasoned, it was precisely the combination of Jonas Yoder's "free exercise claim" with "the interests of parenthood" that required "more than merely a 'reasonable relation to some purpose within the competency of the State' . . . to sustain the validity of the State's requirement."[157] Similarly, the Muslim woman who refuses to remove her *niqab* acts on deep religious convictions. Just as religious convictions elevated Yoder's right to raise his children, religious convictions elevate the Muslim woman's right to access the courts.

Muhammad's case is comparable to the line of "fundamental interest" cases that have helped define the Supreme Court's jurisprudence regarding access to the courts. In most of these cases, the Court has mandated representation for indigent appellants,[158] but it has also done so for parties in some forms of civil litigation.[159] These

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[155] Wisconsin v. Yoder, 406 U.S. 205, 236 (1972).

[156] *Id.* at 216.

[157] Emp't Div. v. Smith, 494 U.S. 872, 881 n.1 (1990) (quoting *Yoder*, 406 U.S. at 233).

[158] *See, e.g.*, Halbert v. Michigan, 545 U.S. 605, 621-24 (2005) (holding unconstitutional Michigan's practice of denying appointed appellate counsel to indigents convicted by guilty or no-contest pleas because of due process and equal protection concerns); Douglas v. California, 372 U.S. 353, 357-58 (1963) (holding that a state must appoint counsel for an indigent defendant for the first appeal from a criminal conviction because denial would discriminate based on wealth); Griffin v. Illinois, 351 U.S. 12, 17-19 (1956) (plurality opinion) (holding that a state must provide a trial transcript or its equivalent to an indigent criminal defendant appealing a conviction because refusal to do so would discriminate on account of poverty).

[159] *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 382-83 (1971) (holding, on due process grounds, that the state must waive a divorce filing fee for indigents because

cases demonstrate that when fundamental interests are at stake, states must not exclude individuals who are pursuing their rights. Such discrimination violates equal protection for the indigent and thus subjects state decisions that would otherwise be judged by rational basis scrutiny to strict judicial review.

Analogy to the *niqab* is straightforward. Here, religious obligations prevented a Muslim woman from obtaining access to the court system. Discrimination on the basis of her religion triggers equal protection concerns and therefore a higher level of scrutiny.[160] Though perhaps neutral and generally applicable on its face, a rule that authorizes judges to force witnesses to remove facial coverings will disproportionately affect religious females (Muslim) and often racial minorities (African American). A rule that effectively bars court access for such discrete and insular minorities raises equal protection concerns that reinforce the importance of employing the hybrid-rights doctrine to review the courtroom *niqab* ban with strict scrutiny.

B. *Alternative Means of Arriving at Strict Scrutiny: The* Sherbert *Exception*

A second, and perhaps more direct, way of persuading a court to apply strict scrutiny to a rule like the one the Michigan Supreme Court adopted is by showing that the rule falls into the *Sherbert* exception for statutes that employ a system of secular exemptions.[161] The Court reasoned in *Smith* that the "*Sherbert* test . . . was developed in a context that lent itself to individualized government assessment of the

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failure to do so unconstitutionally barred access to the courts in a situation where a fundamental interest was at stake). Justice Douglas's concurrence stated that this decision should be based on equal protection grounds. *Id.* at 386; *see also* M.L.B. v. S.L.J., 519 U.S. 102, 116-19, 128 (1996) (invalidating a state's conditioning appeal of a trial court decree terminating parental rights on ability to pay fees, in part because this barred access to the courts in a situation where a fundamental right was at stake); Little v. Streater, 452 U.S. 1, 16-17 (1981) (holding that due process entitled an indigent defendant in a paternity action to state-subsidized blood grouping tests).

[160] *Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that higher standards of judicial review could be applied to statutes "directed at particular religious, or national, or racial minorities . . . [because] prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry" (citations omitted)).

[161] *See* Sherbert v. Verner, 374 U.S. 398, 406-09 (1963). *Smith* did not overrule *Sherbert*. Justice Souter later noted that though *Smith* rejected the doctrine of previous free exercise cases such as *Yoder* and *Sherbert*, it nevertheless "left those prior cases standing," creating a doctrinal tension. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 564 (1993) (Souter, J., concurring).

reasons for the relevant conduct"[162] and therefore is best understood as standing for "the proposition that where the State has in place a system of individualized exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[163] According to the *Smith* majority, the *Sherbert* Court used strict scrutiny because South Carolina allowed discharged workers to collect benefits for secular "good cause."[164] Some scholars argue that *Smith* treats *Sherbert* as mandating strict scrutiny whenever secular exemptions to the rule in question are available.[165] Courts, however, have not consistently applied this interpretation of *Sherbert*. Decisions run the gamut from applying this view only in unemployment compensation cases to applying it in any situation where secular but not religious exemptions are available, while others only apply the exception "to laws or regulations that contain a mechanism for individualized exemptions resembling those found in the unemployment cases."[166]

The best interpretation applies strict scrutiny in situations where laws or regulations contain individualized exemptions resembling those found in *Sherbert*.[167] Unemployment compensation statutes grant review boards discretion to determine whether a person has "good cause" for refusing available work or quitting.[168] Because such decisions are highly discretionary and are made on a case-by-case basis,

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[162] *Smith*, 494 U.S. at 884.

[163] *Id.* (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

[164] *Id.*

[165] *See, e.g.*, Duncan, *supra* note 88, at 862 ("*Smith*'s reconceptualization of *Sherbert* states that when the government has in place a system of individual exemptions, it must treat religious exemption claims as well as the *most favored* secular exemption claims, even if this means that religious claims are treated better than the *disfavored* subset of secular exemption claims. In other words, the government may not refuse to treat religious reasons for exemptions as well as the preferred secular reasons without compelling justification.").

[166] Carol M. Kaplan, Note, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions From* Smith, 75 N.Y.U. L. REV. 1045, 1062-63 (2000).

[167] *See, e.g.*, Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 701-02 (10th Cir. 1998) (distinguishing a school board policy from *Sherbert*'s individualized exceptions); Am. Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405, 1408 (9th Cir. 1992) (holding that there is a difference between exceptions that "exclude entire, objectively-defined categories of employees from the scope of the statute" and "individualized exemptions"); Vandiver v. Hardin Cnty. Bd. of Educ., 925 F.2d 927, 934 (6th Cir. 1991) (distinguishing a school board's choice to assign credits for prior work to students transferring from nonaccredited schools from a "good cause" exemption standard under *Sherbert*).

[168] *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 717 (1981) ("Indiana requires applicants for unemployment compensation to show that they left work for 'good cause in connection with the work.'").

they are the most susceptible to charges of discrimination.[169] By limiting rather than overruling *Sherbert*, the Supreme Court retained strict scrutiny where "a challenged law or regulation allows for wholly discretionary decisions by unelected officials who discriminate between religious and secular reasons for granting individual exemptions from otherwise generally applicable laws."[170] *Smith* provided a narrow yet significant exception to the usual rule for neutral laws of general applicability.[171] The *Smith* exception applies to the rule at issue here.

Michigan Rule of Evidence 611, as amended, empowers judges to "exercise reasonable control over the appearance of parties and witnesses."[172] Rule 611 creates the type of wholly discretionary decision-making by an unelected official that the *Sherbert* exception encompasses. In courts across the United States, judges admit the testimony of some individuals whose faces are not revealed in court. Under state and federal rules of evidence, testimony can frequently be admitted when the declarant is absent. In Michigan, statements made at an earlier trial or deposition are admissible, even if the speaker herself does not appear in court.[173] State and federal rules also allow admission of various forms of hearsay testimony, such as present sense impressions, excited utterances, descriptions of a declarant's existing state of mind or emotion at the time, and statements made for the purpose of medical treatment.[174]

Moreover, courts allow testimony by individuals who are incapable of displaying their emotions through facial expressions, such as those

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[169] *See* Frederick Mark Gedicks, Essay, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States*, 19 EMORY INT'L L. REV. 1187, 1223 (2005) ("*Smith*'s requirement that strict scrutiny be applied to government decisions that deny religious exemptions within the context of a system providing for individualized assessment of a law's burdens on secular conduct [makes sense], for it is the regrettable reality in the United States that government discretion with respect to religious activities is likewise frequently exercised to disadvantage controversial or unpopular religions." (footnote omitted)).

[170] Kaplan, *supra* note 166, at 1083.

[171] An excellent example of this view in practice is *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999). There, the Third Circuit held that a police force's refusal to allow officers to wear beards for religious reasons when it did allow the wearing of beards for medical reasons placed it outside of *Smith*, and the court deemed that it could not survive heightened scrutiny. *Id.* at 365-66. Because the Newark police could not explain why officers who wore beards for religious reasons created any more problems than officers who wore beards for medical reasons, the court held that Sunni Muslim officers who wished to wear beards had to be allowed an exemption from the neutral, generally applicable rule. *Id.* at 366-67.

[172] *See* Order Amending Rule 611 of the Michigan Rules of Evidence, *supra* note 13, at 1.

[173] MICH. R. EVID. 804(b)(1), (5).

[174] *See* FED. R. EVID. 803–04; MICH. R. EVID. 803.

who suffer from amyotrophic lateral sclerosis and Parkinson's disease, as well as individuals with medical conditions, injuries, or burns that leave their faces immobile or obscured by protective covering.[175] Judges permit individuals like Stephen Hawking or Michael J. Fox to testify in court despite their inability to control their facial expressions, and judges similarly allow testimony from soldiers and burn victims with dramatic facial disfigurations.[176]

These examples demonstrate that, when deciding whether a witness whose face cannot be seen can nonetheless testify in court, judges make a determination analogous to a review board's decision as to whether a worker had "good cause" for her actions. In both situations, an official grants "individualized exemptions" based on an "individualized governmental assessment of the reasons" for the individual's conduct.[177] Judges may not grant medical exceptions to the general rule that testimony may be accepted only from a witness whose face can be readily observed by the factfinder and then deny analogous exceptions to others with sincere religious beliefs unless that denial is based on a compelling state interest. Following the law of *Sherbert*, therefore, a judge's decision to prohibit a Muslim woman from testifying in her *niqab* should be strictly scrutinized, even if a reviewing court declines to apply the hybrid analysis.

IV. THE CASE FOR THE *NIQAB* AND THE STATE'S INTEREST IN REMOVING THE VEIL

Finally, to secure her right to wear her *niqab* in the courtroom, a Muslim woman like Ginnah Muhammad must convince the court that forcing her to remove the veil during her testimony is not narrowly tailored to meet a compelling state interest. The *Sherbert* formulation of this standard of review applies: "no showing merely of a rational

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[175] Letter from Michael J. Steinberg, Legal Dir., ACLU of Mich., to Chief Justice Marilyn J. Kelley, Mich. Supreme Court, and Corbin Davis, Clerk of the Mich. Supreme Court, *supra* note 12, at 7.

[176] *See id.* (arguing that "[t]here is no reason why a woman in a niqab should be treated any differently" from these disabled individuals).

[177] *See* Emp't Div. v. Smith, 494 U.S. 872, 884 (1990). Some scholars confine this analysis to situations where the decisionmaker is unelected. *See* Kaplan, *supra* note 166, at 1083 (arguing that the *Sherbert* exemption should apply only where "a challenged law or regulation allows for wholly discretionary decisions by *unelected* officials who discriminate between religious and secular reasons for granting individual exemptions from otherwise generally applicable laws" (emphasis added)). While some state judges are elected, the overall analogy to *Sherbert* is still direct, because those seeking an exemption tend to be minorities with little political sway over the judge.

relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'"[178] Courts applying this test first identify the government's interest and assess its strength.[179] Then they inquire whether accommoaccommodating religious belief will "unduly interfere with fulfillment of the governmental interest."[180] "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[181] Such interests include preventing children from being exploited through child labor,[182] a uniform day of rest,[183] military affairs,[184] and a comprehensive social security system.[185] In short, a compelling state interest exists where a claimed exemption represents "a substantial threat to public safety, peace, or order."[186]

The strength of the state's interest depends on whether the claimed exemption would undermine the purpose and function of that interest. In *Braunfeld*, the Court deemed the economic burden on Orthodox Jews of not being able to open their stores on Sunday insufficient to defeat the state's interest in having a uniform day of rest.[187] On the other hand, in *Sherbert*, the state's interest in orderly administration of its unemployment compensation fund did not justify denying Adell Sherbert unemployment compensation after she was

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[178] *Sherbert*, 374 U.S. at 406 (alteration in original) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)). As Justice O'Connor explained, "Only an especially important government interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens." Bowen v. Roy, 476 U.S. 693, 728 (1986) (O'Connor, J., concurring in part and dissenting in part).

[179] *See, e.g.*, *Bowen*, 476 U.S. at 728.

[180] United States v. Lee, 455 U.S. 252, 259 (1982).

[181] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

[182] *See* Prince v. Massachusetts, 321 U.S. 158, 168-70 (1944) (holding that the state can regulate employment of children of Jehovah's Witnesses because of "the crippling effects of child employment").

[183] *See* Braunfeld v. Brown, 366 U.S. 599, 608-09 (1961) (plurality opinion) (finding state power to impose a uniform day of rest because such a regulation "eliminates the atmosphere of commercial noise and activity").

[184] *See* Gillette v. United States, 401 U.S. 437, 462 (1971) (holding that a state interest in military affairs justified denial of a religious exemption from conscription laws).

[185] *See Lee*, 455 U.S. at 258-59 ("[M]andatory participation is indispensable to the fiscal vitality of the social security system.").

[186] *Yoder*, 406 U.S. at 239 n.1 (White, J., concurring).

[187] *See Braunfeld*, 366 U.S. at 606-09 (describing the mandate of a weekly day of rest as creating "only an indirect burden on the exercise of religion," similar to tax requirements).

discharged for refusing to work on her Sabbath.[188] Justice William Brennan noted that in *Braunfeld*, allowing the exemption would have defeated the entire secular objective of uniformity and "appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable."[189] By contrast, because South Carolina already exempted worshippers who refused to work on Sunday, such administrative difficulties did not exist in *Sherbert*. Allowing the exemption therefore did not threaten to undermine the system in which the government claimed a compelling interest.[190]

Two cases involving the Amish illustrate how the *Sherbert* standard works in practice. In *United States v. Lee*, the Supreme Court required Amish workers who engaged in commercial activity to pay social security taxes, despite their religious objection to paying into or accepting benefits from this system.[191] The government's interest in "mandatory and continuous participation in and contribution to the social security system [was] very high" because a comprehensive national system would fail if individuals could evade the mandate based on religious beliefs despite their commercial employment.[192]

In contrast, the Court in *Yoder* exempted Amish schoolchildren from the state's compulsory education law past the eighth grade.[193] The Court stressed that the alternative education Amish children receive from their training in traditional Amish skills including farming, animal husbandry, and carpeting would fulfill the state's interest in compulsory education because it would "prepar[e] individuals to be self-reliant and self-sufficient" members of the American political community.[194] Moreover, the original "humanitarian instincts" that animated compulsory education laws—preventing child labor and ex-

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[188] *See* Sherbert v. Verner, 374 U.S. 398, 407 (1963) ("The appellees suggest no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work. But that possibility is not apposite here . . . .").

[189] *Id.* at 408-09.

[190] *Id.* at 409.

[191] *See* 455 U.S. at 260 ("Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.").

[192] *Id.* at 258-59.

[193] Wisconsin v. Yoder, 406 U.S. 205, 234 (1972).

[194] *Id.* at 221-30.

ploitation—were not violated, because the "employment of children under parental guidance and on the family farm from age 14 to age 16 is an ancient tradition that lies at the periphery of the objectives of such laws."[195] Again, the Court's reasoning focused on the distinction drawn above between exemptions that do and do not undermine the purpose and function of the challenged law or system.[196]

Finally, strict scrutiny requires that the government's law be "narrowly tailored," meaning that it is "specifically and narrowly framed to accomplish" a compelling state interest.[197] No case since *Sherbert* has held that a law implicating free exercise met a compelling government interest but was not sufficiently narrowly tailored. But the narrow-tailoring requirement in the First Amendment's free speech guarantee provides a helpful analogous standard. For example, any court order restricting speech must "'burden no more speech than necessary' to accomplish its objective."[198] An injunction "issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order."[199] By analogy, a neutral, generally applicable law that infringes on a hybrid right or falls into the *Sherbert* exception must accomplish its objective in the narrowest terms to fulfill the goals of "public safety, peace, order, or welfare."[200] Courts must strictly scrutinize broad rules and inquire whether alternative means that do not infringe on individual constitutional rights could meet these same objectives.

To determine whether a rule requiring a Muslim woman to remove her veil in the courtroom can withstand the requirements of strict scrutiny, we must consider the justifications for this rule that the

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[195] *Id.* at 227, 229.

[196] *See id.* at 221 ("[W]e must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.").

[197] Shaw v. Hunt, 517 U.S. 889, 908 (1996).

[198] Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 767 (1994).

[199] Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 183 (1968). In a more recent case, the Court reaffirmed this holding, determining that an injunction against Ulysses Tory for defaming attorney Johnnie Cochran that prevented him and his wife from saying anything about Cochran or his law firm in a public forum was unconstitutionally overbroad. *See* Tory v. Cochran, 544 U.S. 734, 738 (2005) (noting that since Cochran had died, "the grounds of the injunction [we]re much diminished . . . [and] the injunction . . . amount[ed] to an overly broad prior restraint upon speech"). The Court reaffirmed that any injunction restricting speech must be narrowly tailored to achieve its goals. *Id.* at 738.

[200] *Yoder*, 406 U.S. at 230.

Michigan Supreme Court and some academics have proffered. If these reasons can be shown to be less compelling than they seem at first glance, or if the methods used are not narrowly tailored, then the courts should exempt plaintiffs like Ginnah Muhammad from court-imposed rules that restrict the free exercise of religion.

A. *Accurate Identification and Safety*

A face covering could prevent accurate identification of witnesses and parties, thus undermining the court's truth-seeking function. A compelling interest advanced in favor of the courtroom ban, therefore, is ensuring that the factfinder can confirm that witnesses are who they purport to be.[201] Additionally, court authorities have a safety interest in knowing who is in the courthouse at any given time.

Although these concerns may be compelling, a rule banning the *niqab* in court on these grounds must fail because it is not narrowly tailored. Less intrusive means of accomplishing these goals exist: for example, the court could require a witness wearing the *niqab* to unveil privately in front of a female officer, who could verify her identity.[202] This method could also be used for women entering the courthouse. Such a procedure would protect the court's interest in safety and identification, while preserving the *niqab*-wearing woman's free exercise rights.

In several cases, lower courts have determined that an interest in identification and safety justified compelling a *niqab*-wearing woman to remove her veil. In *Freeman v. Department of Highway Safety and Motor Vehicles*, for example, the Florida District Court of Appeal upheld the cancellation of a *niqab*-wearing woman's driver's license based on her refusal to submit to a photograph of her face.[203] Applying strict scru-

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[201] *See* Order Amending Rule 611 of the Michigan Rules of Evidence, *supra* note 13, at 7 (Markman, J., concurring).

[202] Others examining this issue have suggested this common-sense proposal. *See, e.g.*, Natasha Bakht, *Objection, Your Honour! Accomodating* Niqab*-Wearing Women in Courtrooms* ("In situations where the identity of the *niqab*-wearing woman must be verified, women court staff can simply validate a woman's identity by asking her to remove the veil for the purposes of comparing a piece of photo identification with her face."), *in* LEGAL PRACTICE AND CULTURAL DIVERSITY 115, 129 (Ralph Grillo et al. eds., 2009).

[203] 924 So. 2d 48, 57 (2006). There has been significant scholarly criticism of this opinion on the basis that it misread the case law, quashed the plaintiff's right to exercise her religion freely, and was an overreaction based on post–September 11 security concerns. *See, e.g.*, Nadine Strossen, *Freedom and Fear Post-9/11: Are We Again Fearing Witches and Burning Women?*, 31 NOVA L. REV. 279, 311 (2007) (arguing that the government revoked Freeman's license "not because she was a security threat or unsafe driver, but only because of discriminatory stereotypes"); Aliah Abdo, Note, *The Legal*

tiny under the state's RFRA statute, the court determined that the photograph requirement did not substantially burden Freeman's religious freedom, because the state allowed her to have a female officer take the photograph in a private room.[204]

Similarly, in *Bint-Ishmawiyl v. Vaughn*, a judge in the Eastern District of Pennsylvania refused to enjoin prison officials who required a devout Muslim woman visiting her incarcerated son to remove her veil upon entry and exit of the prison.[205] The court reasoned that

> [t]here can be no doubt that the defendants have a compelling interest in making sure that visitors to inmates are indeed the persons they profess to be, and, of greater importance, that the person leaving the prison after a visit is indeed the same person as the visitor who entered the prison.[206]

The *Bint-Ishmawiyl* court was also sensitive to the need for narrow tailoring, however, concluding that "permitting the unveiling to occur only in the presence of a female corrections officer represents the least restrictive means of furthering that compelling interest."[207] Similar procedures are currently used in airport security screening,[208] and at least one state attorney general recommends them for use in court-

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Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf, 5 HASTINGS RACE & POVERTY L.J. 441, 492 (2008) (describing the court's reasoning in *Freeman* as "problematic" for a variety of reasons); Patrick T. Currier, Note, Freeman v. State of Florida*: Compelling State Interests and the Free Exercise of Religion in Post–September 11th Courts*, 53 CATH. U. L. REV. 913, 915 (2004) (citing *Freeman* as illustrative of how "following the events of September 11th, the right for all Americans, particularly Muslim-Americans, to engage in the free exercise of religion without governmental interference has been compromised under the judicial guise of public safety and national security"); Peninna Oren, Note, *Veiled Muslim Women and Driver's License Photos: A Constitutional Analysis*, 13 J.L. & POL'Y 855, 902-11 (2005) (engaging in a hybrid-right analysis of Freeman's claim and calling for an exception for *niqab*-wearing women). *But see* Anita L. Allen, *Undressing Difference: The* Hijab *in the West*, 23 BERKELEY J. GENDER L. & JUST. 208, 218-19 (2008) (book review) ("It seems reasonable to expect that even a very religious woman can be asked to remove her veil briefly to take a driver's license or passport photograph, or to go through airport security.").

[204] *Freeman*, 924 So. 2d at 56.

[205] *See* No. 94-7040, 1995 WL 461949, at *2 (E.D. Pa. Aug. 1, 1995) ("I conclude that plaintiff has shown no manifest need for a preliminary injunction: she can . . . schedule her visits so that a female corrections officer will be available.").

[206] *Id.* at *2. Because *City of Boerne v. Flores*, 521 U.S. 507 (1997), had not yet overruled the RFRA, the Court analyzed the plaintiff's claim using strict scrutiny as the RFRA required at the time.

[207] *Bint-Ishmawiyl*, 1995 WL 461949, at *2.

[208] *See Religious and Cultural Needs*, TRANSP. SECURITY ADMIN., http://www.tsa.gov/travelers/airtravel/assistant/editorial_1037.shtm (last visited Feb. 15, 2011) ("If the issue cannot be resolved through a pat-down search, the individual will be offered the opportunity to remove the head covering in a private screening area.").

houses.[209] These examples demonstrate that governments can act on their interests in identification and security without requiring removal of the *niqab* in open court.[210]

B. *Demeanor Evidence and Credibility Assessment*

The credibility of witnesses, argue defenders of the ban, can only be determined when "demeanor . . . may be observed and assessed by the fact-finder."[211] In the adversarial process, this makes intuitive sense; many observers question the ability of a judge or jury to determine credibility without seeing a witness's face. Proponents of the ban also argue that the veil impedes cross-examination, because it prevents the attorney from capitalizing on an ability "to assess a witness's expression and general demeanor," leaving the attorney "helpless to the fact that all of the assessments [one can make based on demeanor evidence] . . . can never be fully implemented when the witness wears a veil over her face."[212] If the face, "the most expressive part of the body," cannot be seen, then the jury will be prevented from assessing a witness's credibility.[213] The argument is that the veil renders its wearer's testimony "essentially worthless in terms of reliability."[214]

Upon closer inspection, however, the empirical evidence demonstrates that people's ability to judge credibility based on facial expressions is uncertain at best. Less obtrusive methods can achieve these goals more effectively, such as instructing jurors to assess a witness's voice and body movements. Because the state possesses methods for

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[209] *See generally* Whether Deputy Sheriffs May Require an Individual Entering a Courthouse to Remove a Religious Face Covering for Security Purposes, 94 Md. Op. Att'y Gen. 81 (2009) (explaining that deputy sheriffs may require temporary removal of face coverings used for religious reasons, but recommending that a private space be made available for same-gender officers to view the identities of those removing face coverings).

[210] A recent comment analyzing Muhammad's case came to a similar conclusion, opining that "[b]y allowing a female court officer to identify a niqab wearing party in private, the issue of identification could be circumvented with relative ease." Aaron J. Williams, Comment, *The Veiled Truth: Can the Credibility of Testimony Given by a Niqab-Wearing Witness Be Judged Without the Assistance of Facial Expressions?*, 85 U. DET. MERCY L. REV. 273, 287 (2008).

[211] *See* Order Amending Rule 611 of the Michigan Rules of Evidence, *supra* note 13, at 1.

[212] Steven R. Houchin, Comment, *Confronting the Shadow: Is Forcing a Muslim Witness to Unveil in a Criminal Trial a Constitutional Right, or an Unreasonable Intrusion?*, 36 PEPP. L. REV. 823, 861 (2009).

[213] *Id.* at 864.

[214] *Id.* at 865.

evaluating witness credibility short of forced removal of the *niqab*, a rule mandating total removal is not narrowly tailored and does not meet constitutional muster.

Analogy to a disabled person who is unable to control her facial movements or whose face must be covered with bandages or other medical devices is instructive. Some critics suggest that wearing a *niqab* is a "self-inflicted disability" and therefore not natural,[215] but wearing the *niqab* is as much a part of a Muslim woman's essential identity and daily life as a traditional disability would be. Disability-rights scholars and activists argue that a disability does not prevent "one from being an active member of society. It is the social construction of disability and society's unwillingness to fundamentally increase accessibility that prevent people with disabilities from participating actively in social life."[216] Likewise, the *niqab* does not prevent Ginnah Muhammad from participating in our court system; rather, it is society's unwillingness to accommodate her that prevents her participation.

American courts also allow blind judges and blind jurors, on the ground that "a long list of factors besides demeanor [can] be used in evaluating a witness' testimony."[217] At the confirmation hearing of federal district court judge Conway Casey before the United States Senate, Casey was asked how he would assess a witness's credibility without seeing him.[218] Casey replied he "saw no disadvantage, since the sighted might be distracted by a pretty face, hair or clothing. 'What it really comes down to is whether their story strings together . . . [s]o I see the real world without ever seeing it.'"[219] Judge Casey persuaded the Senate to confirm him.

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[215] Bakht, *supra* note 37 (manuscript at 20).

[216] *Id.* (manuscript at 20-21).

[217] People v. Caldwell, 603 N.Y.S.2d 713, 715 (N.Y. Crim. Ct. 1993). Several states have enacted statutes that prohibit the exclusion of blind jurors on the basis of their disability. *See, e.g.*, MASS. ANN. LAWS ch. 234, § 4 (2009); TEX. GOV'T CODE ANN. § 62.104 (a) & (b) (West 2008); VA. CODE ANN. § 8.01-337 (2007). In addition, numerous federal, state, and administrative judges are blind. *See* Galloway v. Superior Court of D.C., 816 F. Supp. 12, 17 (D.D.C. 1993) (noting "several active judges who are blind"); *see also* ARLO GUTHRIE, *Alice's Restaurant Massacree*, *on* ALICE'S RESTAURANT (Reprise 1967) ("[T]he judge walked in sat down with a seeing eye dog, and he sat down, we sat down. Obie looked at the seeing eye dog, and then at the twenty seven eight-by-ten colour glossy pictures with circles and arrows and a paragraph on the back of each one, and looked at the seeing eye dog . . . and began to cry, 'cause Obie came to the realization that it was a typical case of American blind justice . . . .").

[218] Larry Neumeister, *Judge in Abortion Trial Overcomes Personal Obstacles in Successful Career*, SIGN ON SAN DIEGO (Apr. 11, 2004, 10:53 AM), http://legacy.signonsandiego.com/news/nation/20040411-1053-abortionlawsuit-judge.html.

[219] *Id.*

Furthermore, empirical evidence on witness credibility proves that visual indicators can be ineffective in assessing credibility. Nonvisual indicators—particularly the voice and body language—are often more effective for determining the veracity of witness testimony.[220] Scholars have concluded that visual indicators may actually mislead factfinders.[221] It is not the face, but words, whether written[222] or spoken,[223] that

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[220] Several studies show just how ineffective judging credibility based on demeanor evidence can be and highlight the superiority of vocal cues. For example, one study divided subjects into three groups and asked them to evaluate the honesty of an interviewee. Norman R.F. Maier & James A. Thurber, *Accuracy of Judgments of Deception When an Interview Is Watched, Heard and Read*, 21 PERSONNEL PSYCHOL. 23, 24-25 (1968). Groups that heard recordings and read transcripts of the interviews determined veracity with an average accuracy of seventy-seven percent, whereas those that watched the interviews averaged only fifty-eight percent. *Id.* at 26 tbl.1. The authors of the study concluded that "the visual cues of the interview served primarily as distracters lowering the proportion of accurate decisions. Interview situations in which an interviewee may be motivated to deceive may be more accurately judged when the interview is not directly observed." *Id.* at 23.

In a second study, three groups of people observed a video of six males and six females who were sometimes lying. Bella M. DePaulo et al., *Attentional Determinants of Success at Detecting Deception and Truth*, 8 PERSONALITY & SOC. PSYCHOL. BULL. 273, 274-75 (1982). The first group was told to focus on the speaker's tone of voice, the second group was told to focus on visual cues, and the third group was not given any specific instructions. *Id.* at 275. The group that was told to focus on the speaker's tone of voice did significantly better at detecting deceit, while the group told to focus on visual cues did no better than the control group. *Id.* at 275-76.

Other articles analyze the data from a large number of empirical studies and conclude, based on five decades of research, that cues to deception are more often present in the voice than in visual appearance. *See* Bella M. DePaulo et al., *Deceiving and Detecting Deceit*, *in* THE SELF AND SOCIAL LIFE 323, 328-31 (Barry R. Schlenker ed., 1985); Miron Zuckerman et al., *Verbal and Nonverbal Communications of Deception*, 14 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 1, 4-6 (1981).

[221] *See* Jeremy A. Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1189 (1993) ("Substantial evidence, amassed from studies conducted by social psychologists and others, indicates that the mechanism underlying demeanor evidence—judging a person's credibility by his or her outward behavior, manner or conduct—promotes faulty judgments and greatly disserves the truth-seeking process."); Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1075 (1991) ("There is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments."); Williams, *supra* note 210, at 290 (concluding, based on a thorough assessment of available empirical evidence, that "extensive consideration and treatment of facial expressions may be unnecessary or even detrimental to the trial process").

[222] The Pennsylvania Supreme Court noted that even reading a transcript of testimony may reveal "countless objective factors" that allow a trier of fact to determine credibility. Daniels v. Workers' Comp. Appeal Bd., 828 A.2d 1043, 1053 (Pa. 2003).

[223] In *Commonwealth v. Paxton*, the Pennsylvania Superior Court specifically recognized the great reliability that vocal evidence affords a trier of fact:

provide the greatest insight into credibility.[224] As social scientist and attorney Jeremy Blumenthal explains, empirical studies show that

> [a] trier of fact, when using demeanor as a gauge of a witness's credibility, places emphasis on cues that have been shown to be not only unhelpful but actually misleading. Thus, not only is the use of demeanor evidence unhelpful in the detection of deception, but given the cues on which the legal process focuses, it in fact "diminishes rather than enhances the accuracy of credibility judgments."[225]

Additionally, research suggests that other nonverbal cues, including "self touching" and hand gestures, may assist factfinders in assessing credibility.[226] Such movements are better proxies for dishonesty and are easier for factfinders to detect than the "microexpressions"

> This Court is never privy to live courtroom presentations of testimony but relies on trial transcripts of the proceedings. There is a purpose to that rule; were it otherwise, we could be swayed by witness demeanor, voice inflections, body movements, sighs of frustration, sorrow, joy or pain, thereby logically and improperly placing us in the unenviable and improper position of factfinder. . . . The suggested "exhaustion" that may be able to be identified in the appellant's voice . . . [is] not for this Court's ears. Those factors are for the trier of fact. The jury in this case heard all of the tapes with the various inflections, tones and background noises and chose what weight, if any, to place on them.

821 A.2d 594, 597 (Pa. Super. Ct. 2003).

[224] In an extensive analysis of all the available data and studies at the time, one group of scholars concluded, "The surprising finding . . . is the power (i.e., the accuracy) of the word, either written or spoken. The assumption that nonverbal channels are more important in the communication of deception than the verbal cues is simply not true." Zuckerman et al., *supra* note 220, at 27. In his own analysis of the data compiled in this article, Wellborn explains that "'the face did not seem to give away deception cues and may even have provided misleading information.' Detection accuracy in the absence of facial cues was higher than in their presence. Of all channels and channel combinations, only the facial channel failed to produce accuracy significantly greater than chance." Wellborn, *supra* note 221, at 1087 (footnote omitted) (quoting Zuckerman et al., *supra* note 220, at 27). He concludes, "Whereas 'facial cues seem to be faking cues,' which may hinder rather than assist in lie detection, 'success at deceiving and success at detecting deceit are both mediated largely by adeptness at construing and interpreting verbal nuances.'" *Id.* at 1088 (quoting Zuckerman et al., *supra* note 220, at 39). A more recent analysis of available data concluded, "Several years of studies have indicated that jurors could be stronger detectors of deception if they would focus their detection skills on vocal cues and verbal testimony, while downplaying, but not avoiding altogether, their use of visual cues, which can be easily manipulated." Lindsley Smith, *Juror Assessment of Veracity, Deception, and Credibility*, COMM. L. REV., no. 1, 2002 at 45, 68, http://commlawreview.org/Archives/v4i1/Juror%20Assessment%20of%20Veracity.pdf.

[225] Blumenthal, *supra* note 221, at 1165 (quoting Wellborn, *supra* note 221, at 1075).

[226] *See generally* Elizabeth A. LeVan, *Nonverbal Communication in the Courtroom: Attorney Beware*, 8 LAW & PSYCHOL. REV. 83 (1984) (discussing the subtle importance of nonverbal cues).

that animate the face.[227] These studies allow one to conclude that fact-finders can even *more* accurately assess the credibility of testimony from a woman wearing a *niqab* because potentially misleading facial indicators will not be present.[228] Judge Paruk, who asked Ginnah Muhammad to remove her *niqab* so that he could judge her demeanor,[229] is unlikely to have done a better job than if he had allowed it to remain on. One study indicates that most experienced judges can determine veracity based on facial expressions by little better than random chance.[230]

The Second Circuit's opinion in *Morales v. Artuz*[231] reflects this reality. There, the court reasoned that a witness in dark sunglasses could testify because jurors still "had an entirely unimpaired opportunity to assess the delivery of [the witness's] testimony, notice any evident nervousness, and observe her body language."[232] It further concluded that the jury could "combine these fully observable aspects of demeanor with their consideration of the substance of [the] testimony."[233] A jury can similarly assess a veiled woman's credibility.

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[227] *See* Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AM. PSYCHOLOGIST 913, 914 (1991) (examining different methods of lie detection). For a more thorough analysis of this point, see Williams, *supra* note 210, at 288-90.

[228] *See* Paul Ekman & Wallace V. Friesen, *Nonverbal Leakage and Clues to Deception*, 32 PSYCHIATRY 88, 98 (1969) ("In a sense the face is equipped to lie the most and leak the most, and thus can be a very confusing source of information during deception."); Paul Ekman & Wallace V. Friesen, *The Repertoire of Nonverbal Behavior: Categories, Origins, Usage, and Coding*, 1 SEMIOTICA 49, 76-77 (1969) (describing people's ability to "monitor, inhibit and dissimulate" with the face). Blumenthal's analysis is also instructive. After surveying all the data cited in his article, he emphasizes that "[t]he important conclusion from these findings is that those behaviors which are popularly believed to manifest a speaker's deception are *qualitatively* and *quantitatively* different than those which are actually observed during deception." Blumenthal, *supra* note 221, at 1194. Such behaviors include "smiling," "furtive or meaning glances," and body movements ("shifty" behavior). *Id.* Consequently, "where a trier of fact maintains dependence on the cues, he or she is actually misled into identifying deception where it may not have occurred." *Id.* at 1195. "Reliance on the vocal evidence, however, appears to be more valuable. Most of the behaviors received through the auditory channel that were associated with perceptions of deception were also observed during actual deception: increases in speech hesitations, speech errors, and in the pitch of a speaker's voice." *Id.*

[229] *See* Transcript of Record, *supra* note 2.

[230] Ekman & O'Sullivan, *supra* note 227, at 916.

[231] 281 F.3d 55 (2d Cir. 2002).

[232] *Id.* at 61.

[233] *Id.* at 62. This conclusion also aligns well with model jury instructions in the states and federal circuits, most of which say nothing about any evaluative gain resulting from the ability to see facial expressions. *See, e.g.*, PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT § 1.06 (Pattern Criminal Jury Instructions Drafting Comm. 1997) ("In deciding what to believe, you may consider a number of factors, including the following: (1) the witness's ability to see or hear or know the things the witness testifies to; (2) the quality of the witness's memory;

Because seeing a witness's face does not significantly aid accurate credibility assessment and may even diminish it, and in light of the many existing exceptions that allow testimony without the factfinder's seeing the face of the declarant, the state's interest is less compelling than a woman's interest in freely exercising her religion in the courtroom. Thus, allowing *niqab*-wearing women to testify in court will not undermine the purpose and function of the judicial process.[234]

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(3) the witness's manner while testifying; (4) whether the witness has an interest in the outcome of the case or any motive, bias or prejudice; (5) whether the witness is contradicted by anything the witness said or wrote before trial or by other evidence; and (6) how reasonable the witness's testimony is when considered in the light of other evidence which you believe."); NORTH DAKOTA PATTERN JURY INSTRUCTIONS—CRIMINAL, § K-5.04 (State Bar Ass'n of N.D. 1999) ("[Y]ou may consider any facts or circumstances in the case which tend to strengthen, weaken, or contradict a witness's testimony. You may consider age, intelligence, and experience; strength or weakness of recollection; how a witness came to know the facts to which the witness testified; possible interest in the outcome of the trial; any bias or prejudice a witness may have; manner and appearance; whether a witness was frank or evasive; and whether the testimony was reasonable or unreasonable.").

[234] Some critics assert that allowing this exemption would unleash a parade of horribles that should compel a contrary result. These criticisms exaggerate the problems this exemption would raise. Allowing veiled Muslim women to testify will not "create a slippery slope that may lead to the admission of even more troublesome testimony," Houchin, *supra* note 212, at 866, as this concern ignores the fact that accommodations are only necessary for individuals who profess sincerely held religious beliefs. *See supra* Section I.C (defining what constitutes "religion" for constitutional purposes). Beliefs that are not religious, no matter how sincerely held, will not be accorded the same deference. Second, the idea that a woman wearing religious garb in court will give off "a great appearance of impropriety, which may shake the public's confidence in America's criminal justice system," *id.* at 867 (footnote omitted), is simply another way of stating that religious practices that are outside the traditional, mainstream Protestant belief system have no place in American public life. "[T]he limits of religious freedom should not be understood to be the limits of toleration expressed by the dominant culture; they should rather be seen as the limits of a civil society's ability to maintain itself without fragmenting into camps and factions." ERIC MICHAEL MAZUR, THE AMERICANIZATION OF RELIGIOUS MINORITIES 142 (1999). Moreover, courts have held that

> [a]lthough considerations of proper attire may go beyond the mere maintenance of a dress code, a trial judge's desire simply to maintain a general dress code cannot justify an infringement of a criminal defendant's right to present an exculpatory witness, unless the attire worn by a witness would be disruptive or would create an atmosphere of unfairness.

State v. Allen, 832 P.2d 1248, 1249 (Or. Ct. App. 1992). The *niqab* is not disruptive, and it does not create an atmosphere of unfairness. Third, judges can limit the abuse of exemptions. Prosecutors would not be able to "take their most unbelievable witnesses and cover them up at will," Houchin, *supra* note 212, at 867, because such witnesses would not be holding sincerely held religious beliefs, and judges and defense attorneys can sort individuals who wear the *niqab* every day of their lives from people who throw them on before they enter the courtroom. *See* United States v. Ballard, 322 U.S. 78, 84 (1944) (noting that the fact-finder, whether the court or a jury, may not

C. *The Confrontation Clause*

The final justification for banning the *niqab* is that a veiled witness would violate the Sixth Amendment, which guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[235] The Confrontation Clause only applies to nondefendants testifying in the criminal context.[236] It presents no bar in a civil case like Muhammad's or where a defendant testifies on her own behalf in criminal court. It would still apply, however, to a Muslim woman who might be the victim of a crime and be called upon to testify. A recent law review comment argues that "a veiled woman's testimony in trial interferes with the defendant's right to physical 'face-to-face' confrontation."[237] Applying the test the Supreme Court articulated in *Maryland v. Craig*[238] to the veiled woman, Houchin argues that allowing a veiled woman to testify in a criminal proceeding violates the Confrontation Clause.[239]

This argument fails because it ignores the Supreme Court's holding in *Crawford v. Washington*,[240] a more recent decision whose reason-

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assess the truth or falsity of a religious belief, but may determine whether the claimant's religious belief is sincerely held). The negative public policy consequences that proponents of the *niqab* ban claim this exemption will create are not persuasive.

[235] U.S. CONST. amend. VI.

[236] *See, e.g.*, Mattox v. United States, 156 U.S. 237, 260 (1895) (describing "the right of *the accused*" to confront the witnesses against him).

[237] *See* Houchin, *supra* note 212, at 859.

[238] 497 U.S. 836, 857-58 (1990) ("[A]lthough face-to-face confrontation is not an absolute constitutional requirement, it may be abridged only where there is a 'case-specific finding of necessity.'" (quoting Craig v. State, 560 A.2d 1120, 1126 (Md. 1989))). In *Craig*, the defendant was charged with child abuse, among other offenses. *Id.* at 840. The trial judge allowed several children to testify at trial using a closed-circuit television to protect them from suffering the "serious emotional distress" that would result from testifying in Craig's presence. *Id.* at 858. Craig objected to this procedure, claiming it violated the Confrontation Clause, but the judge overruled her objection, the procedure was allowed, and Craig was convicted on all counts. *Id.* at 842-43. The Supreme Court upheld the constitutionality of the procedure, concluding that the Clause's purposes can be achieved without a literal "face-to-face confrontation." *Id.* at 849-50.

[239] Houchin, *supra* note 212, at 868.

[240] 541 U.S. 36 (2004). The case has been called a "bombshell," People v. Cage, 15 Cal. Rptr. 3d 846, 854 (Cal. Ct. App. 2004), *judgment aff'd*, 155 P.3d 205 (Cal. 2007), signaling that "a new day has dawned for Confrontation Clause jurisprudence." State v. Hale, 691 N.W.2d 637, 646 (Wis. 2005). Another court declared that, after *Crawford*, courts view the Confrontation Clause though a "newly shaped lens." State v. Alvarez-Lopez, 98 P.3d 699, 707 (N.M. 2004). Professor Richard D. Friedman, an expert on the Confrontation Clause who maintains a blog exclusively devoted to *Crawford*-related developments, also noted that "*Craig* is of doubtful continuing vitality after *Crawford*." Richard D. Friedman, *Confrontation and the Niqab*, CONFRONTATION BLOG (Feb. 4, 2009,

ing provides a *niqab*-wearing plaintiff a stronger argument. There, the Court held "the principal evil at which the Confrontation Clause was directed was the civil law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[241] Justice Scalia's majority opinion emphasized that the dispositive factor was the ability to cross-examine witnesses, noting that the Sixth Amendment requires the factfinder to assess reliability "by testing in the crucible of cross-examination."[242] A Muslim woman's *niqab* does not prevent a full and intensive cross-examination. Therefore, the *niqab*'s presence does not violate the Confrontation Clause's procedural guarantee.

Opponents might counter that *Crawford* does not disturb the Supreme Court's rule that a criminal defendant has the right to a physical "face-to-face" confrontation.[243] Yet a literalist interpretation of the words "face-to-face" disregards the Supreme Court's functional interpretation of this requirement in earlier cases.[244] In *Coy* and *Craig*, witnesses testified in another room or behind a screen.[245] In both those cases, the defendant was denied the ability to physically confront the witness before him. A veiled woman testifying in court is physically present before the defendant and displays as much of her face—her eyes—as her religion allows. Experts on the Confrontation Clause have

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2:33 PM), http://www.confrontationright.blogspot.com/2009/02/confrontation-and-niqab.html.

[241] *Crawford*, 541 U.S. at 50; *see also Craig*, 497 U.S. at 845 ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.").

[242] *Crawford*, 541 U.S. at 61; *see also id.* at 57-69 (discussing the importance of cross-examination).

[243] *See Craig*, 497 U.S. 836 (using the phrase "face-to-face" twenty-five times in the majority opinion); Coy v. Iowa, 487 U.S. 1012, 1015-20 (1988) (discussing the importance of face-to-face confrontation in the Western legal tradition).

[244] It must be conceded that some lower-court cases applying *Craig* have held that objects that obstruct the face in the courtroom, such as a full face-mask, People v. Sammons, 478 N.W.2d 901, 909 (Mich. Ct. App. 1991), or dark sunglasses combined with a baseball cap and upturned collar, Romero v. State, 173 S.W.3d 502, 505-06 (Tex. Crim. App. 2005), interfere with the "face-to-face" aspect of confrontation and are therefore unconstitutional. Other courts, however, have reasoned that *Craig* only applies in situations where there is a complete physical separation between the witness and defendant, rather than where the witness is physically present in court but disguised. *See, e.g.*, Morales v. Artuz, 281 F.3d 55, 62 (2d Cir. 2002) (stating that a witness who testified in "dark sunglasses" did not violate the defendant's Confrontation Clause rights). Moreover, the Supreme Court's subsequent decision in *Crawford* calls the strength of *Sammons* and *Romero* into question. *See supra* text accompanying notes 240-45.

[245] *See Craig*, 497 U.S. at 840-43 (describing the closed-circuit television procedure); *Coy*, 487 U.S. at 1014-15 (describing the screen procedure).

concluded that this physical presence satisfies *Crawford*.[246] In such a situation, the Sixth Amendment's essential purpose—"to place the witness under the sometimes hostile glare of the defendant"[247]—is upheld.[248]

CONCLUSION

In a large and diverse country, neutral, generally applicable laws will inevitably conflict with the religious practices and beliefs of individuals. In *Smith*, the Supreme Court concluded that in most of those situations, the secular goals of the state override the religious objections of the individual so long as the government can advance a rational basis for its actions.[249] *Smith* itself acknowledges that this will not always be the case, however.[250] In certain limited circumstances, neutral, generally applicable laws will be subject to strict scrutiny. The ban on the *niqab* in the courtroom is one such case. Such a rule violates a Muslim woman's free exercise rights and her right of access to the courts, creating a "hybrid situation" meriting strict review. Because states' interests in *niqab* bans are not sufficiently compelling and narrowly tailored, the bans are unconstitutional.

The salience of the arguments presented in this Comment is intensified when one takes a broader view of the right to wear traditional religious garb in the courtroom, including but not limited to *hijabs*, *kippahs*, turbans, and habits. Across America, individuals are excluded from courtrooms for refusing to remove these forms of religious

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[246] As Professor Friedman explains,

> [t]he aspect of confrontation that is essential is the presence of the accused with the witness when she gives her testimony. . . . The witness can still look the accused in the eye when she gives her testimony; presumably her view is unobstructed, and if his presence carries with it a reminder of her obligation to tell the truth I don't believe the niqab lessens that message. And he can see her eyes and hear her voice. I think he's getting an opportunity to be confronted with her.

See Friedman, *supra* note 240.

[247] *Craig*, 497 U.S. at 866 (Scalia, J., dissenting).

[248] Justice Scalia explained the functional considerations underlying this right in *Coy*, writing that

> [a] witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is." It is always more difficult to tell a lie about a person "to his face" than "behind his back."

Coy, 487 U.S. at 1019 (quoting Jay v. Boyd, 351 U.S. 345, 375-76 (1956)).

[249] *See supra* Section II.A.

[250] *See supra* Section II.B.

headgear.[251] All of the arguments made herein apply with even greater force in those cases; absent the compelling interests that animate the *niqab* ban, such actions could never withstand heightened judicial review. By showing why individuals at the outer edges of the law have a strong claim for a religious exemption, this Comment has shown that religious adherents should enjoy fair and equal treatment within the halls of American justice.

[251] In December 2008, a Muslim woman was thrown in jail after being found in contempt of court for refusing to remove her *hijab* in the courtroom. *See* Abdul-Malik Ryan, *Outrageous: Muslim Woman, Lisa Valentine, Jailed for "Hijab Contempt" in Georgia!*, MUSLIM MATTERS (Dec. 17, 2008), http://muslimmatters.org/2008/12/17/outrageous-muslim-woman-lisa-valentine-jailed-for-hijab-contempt-in-georgia. Other Muslim women report that the same judge has ordered them to remove their *hijabs* as well and that they were also imprisoned for refusing to comply. *Id.*