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BRING YOUR DOGMA TO WORK DAY: THE WORKPLACE RELIGIOUS FREEDOM ACT OF 2007 AND THE PUBLIC WORKPLACE

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INTRODUCTION

The proposed Workplace Religious Freedom Act of 2007 ("WRFA"),¹ one incarnation of a bill that has come before Congress repeatedly for more than a decade,² would amend Title VII of the Civil Rights Act of 1964 in ways that would almost certainly implicate serious Establishment Clause challenges.³ In particular, the language of the

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3. The text of H.R. 1431, 110th Cong. (2007) in its entirety is as follows:

   Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

   SECTION I. SHORT TITLE.
   This Act may be cited as the 'Workplace Religious Freedom Act of 2007'.

   SEC. 2. AMENDMENTS
(a) DEFINITIONS—Section 701(j) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(j)) is amended—
(1) by inserting '(1)' after '(j)';
(2) by inserting ', after initiating and engaging in an affirmative and bona fide effort,' after 'unable';
(3) by striking 'an employee's' and all that follows through 'religious' and inserting 'an employee's religious'; and
(4) by adding at the end the following:

'(2)(A) In this subsection, the term 'employee' includes an employee (as defined in subsection (f)), or a prospective employee, who, with or without reasonable accommodation, is qualified to perform the essential functions of the employment position that such individual holds or desires.

'(B) In this paragraph, the term 'perform the essential functions' includes carrying out the core requirements of an employment position and does not include carrying out practices relating to clothing, practices relating to taking time off, or other practices that may have a temporary or tangential impact on the ability to perform job functions, if any of the practices described in this subparagraph restrict the ability to wear religious clothing, to take time off for a holy day, or to participate in a religious observance or practice.

'(3) In this subsection, the term 'undue hardship' means an accommodation requiring significant difficulty or expense. For purposes of determining whether an accommodation requires significant difficulty or expense, factors to be considered in making the determination shall include—

'(A) the identifiable cost of the accommodation, including the costs of loss of productivity and of retraining or hiring employees or transferring employees from I facility to another;

'(B) the overall financial resources and size of the employer involved, relative to the number of its employees; and

'(C) for an employer with multiple facilities, the geographic separateness of administrative or fiscal relationship of the facilities.'.

(b) EMPLOYMENT PRACTICES—Section 703 of such Act (42 U.S.C. 2000e-2) is amended by adding at the end the following:

'(o)(1) In this subsection:

'(A) The term 'employee' has the meaning given in 701(j)(2).
WRFA ensures inevitable excessive entanglement of government and religion in the context of public employers and religious employees. The Act would accomplish this end by placing a near-absolute, affirmative burden of accommodation on employers where a workplace conflict arises due to an employee’s faith or beliefs. Its practical effects would essentially grant every individual employee status as a religious entity unto him or herself. This is especially problematic for public employers.³ The favorably heightened status of religious employees

‘(B) The term ‘leave of general usage’ means leave provided under the policy or program of an employer, under which—

‘(i) an employee may take leave by adjusting or altering the work schedule or assignment of the employee according to criteria determined by the employer; and

‘(ii) the employee may determine the purpose for which the leave is to be utilized.

‘(2) For purposes of determining whether an employer has committed an unlawful employment practice under this title by failing to provide a reasonable accommodation to the religious observance or practice of an employee, for an accommodation to be considered to be reasonable, the accommodation shall remove the conflict between employment requirements and the religious observance or practice of the employee.

‘(3) An employer shall be considered to commit such a practice by failing to provide such a reasonable accommodation for an employee if the employer refuses to permit the employee to utilize leave of a general usage to remove such a conflict solely because the leave will be used to accommodate the religious observance or practice of the employee.’.

SEC. 3. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

(a) EFFECTIVE DATE—Except as provided in subsection (b), this Act and the amendments made by section 2 take effect on the date of enactment of this Act.

(b) APPLICATION OF AMENDMENTS—The amendments made by section 2 do not apply with respect to conduct occurring before the date of enactment of this Act.

4. In its revised Guideline Manual on Religious Discrimination in the Workplace, the Equal Employment Opportunity Commission (“EEOC”) has recognized the tension between the constitutional duties of public employers and the constitutional rights of public employees, noting that while “a government employer
under the WRFA necessarily involves highly subjective standards of personal faith. If enacted it would lead to impermissible inquiry by public employers and eventually by courts as to what constitutes statutorily “valid” religious expression and what does not. Courts have long resisted these kinds of probative assessments, as evidenced by the so-called “ministerial exception” to Title VII. Moreover, the WRFA may contend that granting a requested religious accommodation would pose an undue hardship because it would constitute government endorsement of religion in violation of the Establishment Clause of the First Amendment,” “government employees’ religious expression is protected by both the First Amendment and Title VII.” EEOC Directives Transmittal No. 915.003 at 4 & n.11 (issued 7/22/08), available at http://www.eeoc.gov/policy/docs/religion.pdf (covering the issuance of § 12 of the new Compliance Manual on “Religious Discrimination,” providing “guidance and instructions for investigating and analyzing charges alleging discrimination based on religion”).

5. The current statutory definition of religion “includes all aspects of religious observance and practice, as well as belief, unless an employee demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” 42 U.S.C. 2000e(j) (2006). The EEOC advises that:

[b]ecause the definition of religion is broad and protects beliefs with which the employer may be unfamiliar, the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely-held religious belief. If, however, an employee requests religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief or practice, the employer would be justified in seeking additional supporting information.

EEOC Directives Transmittal No. 915.003, supra note 4, at 14.

6. The “ministerial exception” is an internal affairs doctrine that holds that courts will generally decline review of church actions or decisions because doing so would require impermissible judicial inquiry into ecclesiastical matters. It maintains that secular authorities’ involvement in evaluating or interpreting religious doctrine impinges on practitioners’ rights under the Religion Clauses, and leads to excessive entanglement in violation of the Establishment Clause. In the employment context, the ministerial exception recognizes that an employee’s relationship to his or her employer may be “so pervasively religious” that judicial interference based on a Title VII claim becomes impossible without offending the Establishment Clause. DeMarco v. Holy Cross High Sch., 4 F.3d 166, 172 (2d Cir. 1993) (See generally Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008) (affirming the vitality of the
would promote the kind of continuing state surveillance repudiated in *Lemon v. Kurtzman* by requiring public employers to constantly monitor and undertake (potentially drastic) measures in accommodating religious employees — to the likely disadvantage of co-workers and the public at large.

**PART I. THE LEMON LEGACY**

It was in the landmark *Lemon* decision that the United States Supreme Court set forth a three-part test to be applied in evaluating Establishment Clause challenges. That test has proven to be anything but bright-line. Still, even Chief Justice Burger, writing for the *Lemon* ministerial exception to Title VII of the Civil Rights Act of 1964)); *see also* EEOC Directives Transmittal No. 915.003, *supra* note 4, at 19-20.


8. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

9. See *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (striking down an Alabama statute authorizing voluntary silent prayer in public schools on grounds that the legislature's "sole purpose [for passing the statute was] expressing the State's endorsement of prayer activities for one minute at the beginning of each schoolday [sic]. The addition of 'or voluntary prayer' indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion." In a protracted dissenting opinion, however, Justice Rehnquist called the notion of a rigid wall between church and state a "misleading metaphor" upon which "the Establishment Clause [had] been expressly freighted ... for nearly 40 years." *Id.* at 92 (Rehnquist, J., dissenting). Rehnquist went on to note that "[o]ne of the difficulties with the entanglement prong is that, when divorced from the logic of *Walz* [Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding state property tax exemptions to church property used in worship on grounds of historical acceptance)], it creates an 'insoluble paradox' in school aid cases: we have required aid to parochial schools to be closely watched lest it be put to sectarian use, yet this close supervision itself will create an entanglement (quoting *Roemer v. Md. Bd. of Pub. Works*, 426 U.S. 736, 768-69 (1976) (White, J., concurring))." *Id.* at 109 (Rehnquist, J., dissenting). Further, Rehnquist opined that 

[T]he entanglement test ... also ignores the myriad state administrative regulations properly placed upon sectarian institutions such as curriculum, attendance, and certification
Court, acknowledged the elusive nature of this "extraordinarily sensitive area of constitutional law".¹⁰

The language of the Religion Clauses of the First Amendment is at best opaque, particularly when requirements for sectarian schools, or fire and safety regulations for churches. Avoiding entanglement between church and State may be an important consideration in a case like Walz, but if the entanglement prong were applied to all state and church relations in the automatic manner in which it has been applied to school aid cases, the State could hardly require anything of church-related institutions as a condition for receipt of financial assistance. These difficulties arise because the Lemon test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. The three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service. The three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize. Even worse, the Lemon test has caused this Court to fracture into unworkable plurality opinions... depending upon how each of the three factors applies to a certain state action. The results from our school services cases show the difficulty we have encountered in making the Lemon test yield principled results.

Id. at 110 (Rehnquist, J., dissenting). He concluded,

[N]otwithstanding the absence of a historical basis for this theory of rigid separation, the wall idea might well have served as a useful albeit misguided analytical concept, had it led this Court to unified and principled results in Establishment Clause cases. The opposite, unfortunately, has been true; in the 38 years since Everson our Establishment Clause cases have been neither principled nor unified. Our recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor conceded that the 'wall of separation' is merely a 'blurred, indistinct, and variable barrier,' which 'is not wholly accurate' and can only be 'dimly perceived.'


¹⁰ Lemon, 403 U.S. at 612.
compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be ‘no law respecting an establishment of religion.’ A law may be one ‘respecting’ the forbidden objective while falling short of its total realization. A law ‘respecting’ the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not establish a state religion but nevertheless be one ‘respecting’ that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.\textsuperscript{11}

Despite, or perhaps owing to, such uncertainty, \textit{Lemon} drew upon a number of threads in case law precedent\textsuperscript{12} to identify three “cumulative criteria” of Establishment Clause comportment.\textsuperscript{13} Applying this test, the \textit{Lemon} Court invalidated Rhode Island and Pennsylvania

\begin{itemize}
\item \textsuperscript{11} \textit{Id.} (quoting U.S. \textsc{Const.} amend. I.) (emphasis omitted).
\item \textsuperscript{12} See generally \textit{Walz v. Tax Comm’n}, 397 U.S. 664 (1970) (holding that tax exemptions for religious institutions were not facially invalid and did not advance or inhibit religion as long as the exemptions were applied neutrally, \textit{i.e.}, also granted to other non-profit charitable or educational, quasi-public organizations); \textit{Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen}, 392 U.S. 236 (1968) (upholding a government loan program of secular textbooks to students attending religious and other private schools because the program had a secular purpose of promoting education and it was the students, not the religious or private institutions, that received the governmentally subsidized benefit); \textit{Sch. Dist. of Abington Twp. v. Schempp}, 374 U.S. 203 (1963) (holding that a Pennsylvania statute compelling public schoolchildren to read from the Bible and recite the Lord’s Prayer each morning violated the Establishment Clause because the children were required by law to attend school).
\item \textsuperscript{13} Thus, per \textit{Lemon}, a statute will withstand Establishment Clause challenge only if “first, [it is found to] have a secular legislative purpose; second, its principal or primary effect [is] one that neither advances nor inhibits religion; and finally, [it does] not foster an excessive government entanglement with religion. \textit{Lemon}, 403 U.S. at 612-13 (quoting \textit{Walz}, 397 U.S. at 674).
\end{itemize}
statutes that made supplemental state funding available to private, religiously affiliated elementary and secondary schools.\textsuperscript{14}

Ultimately, the outcome in \textit{Lemon} turned upon the Court's determination that the statutes created an unconstitutionally excessive entanglement between government and religion. In its discussion, the Court noted that while "[j]udicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship,"\textsuperscript{15} this did not preclude judicial uniformity altogether. Rather, courts "must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."

Chief Justice Burger identified a number of problems that rendered the two statutes at issue constitutionally void.\textsuperscript{17} For instance, both statutes required strict separation of secular and non-secular educational instruction and purported to fund only those with no religious content.\textsuperscript{18} Notwithstanding genuine legislative intent to supplement secular education in nonpublic schools, this statutory scheme was not constitutionally viable. Firstly, the \textit{Lemon} Court "recognize[d] that a dedicated religious person . . . will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals."\textsuperscript{19} Justice Burger stressed that the mere "potential for impermissible fostering of religion"\textsuperscript{20} ran afoul of

\begin{itemize}
\item \textsuperscript{14} \textit{Id.} at 624-25.
\item \textsuperscript{15} \textit{Id.} at 614.
\item \textsuperscript{16} \textit{Id.} at 615.
\item \textsuperscript{17} \textit{Id.} at 615-24.
\item \textsuperscript{18} \textit{Id.}
\item \textsuperscript{19} \textit{Id.} at 618.
\item \textsuperscript{20} \textit{Id.} at 619. \textit{See also} Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 778 (1973) (making an analogous argument, in the school aid context, that:
\begin{quote}
\text{a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education. In Earley v. DiCenso, a companion case to Lemon v. Kurtzman, the Court struck down a Rhode Island law authorizing salary supplements to teachers of secular subjects. The grants were not to exceed 15% of any teacher's}
\end{quote}
Establishment Clause mandates. The Court also noted that "unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment."\textsuperscript{21} Additionally, the statutes required extensive state monitoring of school records, which the Court found only bolstered entanglement by forcing governmental bodies to make judgments differentiating schools' secular versus sectarian expenses.\textsuperscript{22} Finally, Chief Justice Burger pointed to the statutes' "divisive political potential" as fostering a "broader base of entanglement" between religious and governmental entities.\textsuperscript{23}

In summary, the state aid provided to sectarian schools in Rhode Island and Pennsylvania violated the Establishment Clause because it created excessive entanglement in three particular ways: it placed teachers of faith in the precarious position of differentiating between religious and secular instruction, which not only unfairly burdened individual teachers but also involved impossibly subjective standards of evaluation; it implicated "pervasive monitoring" of church organizations annual salary. Although the law was invalidated on entanglement grounds, the Court made clear that the State could not have avoided violating the Establishment Clause by merely assuming that its teachers would succeed in segregating 'their religious beliefs from their secular educational responsibilities.' (quoting \textit{Lemon}, 403 U.S. at 619).

\textsuperscript{21} \textit{Lemon}, 403 U.S. at 619.
\textsuperscript{22} Chief Justice Burger concluded,

\begin{quote}
This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction . . . \textdash[and] the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological [sic] role give rise to entanglements between church and state . . . . [T]he government's post-audit power to inspect and evaluate . . . which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state.
\end{quote}

\textit{Id.} at 620-22.

\textsuperscript{23} \textit{Id.} at 622.
by secular authorities; and it ensured divisive political conflict along religious lines since taxpayers of any number of faiths (or no faith at all) ultimately bore the costs of the programs. Although it has since been subsumed under the primary effects inquiry, Lemon's excessive entanglement criterion has remained informative in Establishment Clause jurisprudence. Each concern mentioned above arises by analogy at the cross-section of employment and religion and is, as this article argues, equally constitutionally suspect.

PART II. THE GENESIS OF REASONABLE ACCOMMODATION AND THE UNDUE HARDSHIP STANDARD

A. The Civil Rights Act of 1964

As originally enacted, Title VII of the Civil Rights Act of 1964 barred employment discrimination on the basis of race, color, religion, sex, or national origin. It has been suggested that the arguably voluntary nature of religious observance renders its 1964 inclusion—among otherwise immutable characteristics like race or gender—somewhat anomalous. Michael Moberly has argued that employees asserting religious discrimination under Title VII actually receive more favorable treatment than the other protected classes because while the

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24. Id. at 627 (Douglas, J., concurring).
Act prohibits religious discrimination to an extent comparable to that for racial and other types of discrimination, it goes one step further by placing an affirmative obligation on employers to accommodate their religious beliefs and practices. The 1964 Act did not define “religion” for its purposes and made no mention of an employer’s duty to “reasonably accommodate” employee religious practices.

This latter concept appeared in promulgations issued by the Equal Employment Opportunity Commission (EEOC) shortly after the 1964 enactment. In 1966 the EEOC issued guidelines establishing an employer duty to reasonably accommodate employees’ religious practices where the accommodation did not involve “serious inconvenience” to the employer. Just one year later, in 1967, the EEOC replaced the “serious inconvenience” standard to exempt an employer from reasonable accommodation only where the employer could show “undue hardship.” These elements of “reasonable accommodation” absent “undue hardship” were incorporated into Title VII by way of a 1972 amendment.

While “undue hardship” remains a determinant criterion in employer accommodation, that phrase has yet to be statutorily defined—a primary aim of the WRFA. Though the statutory language may be

32. Id. at 252 (citing Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1(a)(2) (1966)).
33. Id. (citing Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1(a)(2) (1967)).
34. Id. (noting that in at least two cases between 1967-72, courts questioned the EEOC’s authority to place the burden of proving “undue hardship” upon employers).
ambiguous, a robust body of case law has developed in which federal courts have shied away from absolutes in determining whether an employer has met the requisite reasonable accommodation standard, opting instead for more balanced totality-of-the-circumstances approaches. The WRFA proposes to dramatically circumscribe both well-developed principles of workplace religious expression: reasonable accommodation by employers and the standard of undue hardship they must demonstrate. The ramifications are especially questionable in the context of public employers, yet the WRFA does not address any distinction between the public and private job sectors.

B. The Supreme Court Speaks: Hardison and Ansonia

The first case to come before the Supreme Court involving an employee challenge on the grounds of religious reasonable accommodation under Title VII was Trans World Airlines, Inc. v. Hardison. The significance of Hardison, as the seminal authority for determining the extent of an employer’s § 2000e(j) obligation to reasonably accommodate employees’ religious practices or beliefs, is difficult to overstate. Hardison was an airline employee whose religious beliefs prohibited him from working from sunset on Friday until sunset remarked “it ha[d] been interpreted so narrowly as to place little restraint on an employer’s refusal to provide religious accommodation. The Workplace Religious Freedom Act will restore to the religious accommodation provision the weight that Congress originally intended and help assure that employers have a meaningful obligation to reasonably accommodate their employee’s religious practices.”). In fact, James Sonne has noted that “the scant record of legislative history on the [1972 amendment to Title VII, which expanded the statutory definition of ‘religion’ and incorporated the language of ‘reasonable accommodation’ absent ‘undue hardship’] yielded significant uncertainty as to its exact meaning, a fate seemingly shared by the inclusion of religion in the 1964 Act in the first place.” Sonne, supra note 28, at 1040.

36. See Gawlik, supra note 31, at 264 (“[T]he accommodation of ‘mutual’ compromise—one not always requiring complete conflict removal to the extent that the employee is burden-free—is the concept that the [Supreme] Court prefers.” (internal footnotes omitted)).

on Saturday, and on certain religious holidays. Hardison informed his department manager of these religious observances, and Hardison was transferred to a more compatible shift. Soon after that transfer Hardison bid for and received a transfer from one operations building to another. The new building, however, had entirely distinct seniority rankings and Hardison was placed at the low end. Ultimately, no accommodation was made; Hardison refused to work on Saturdays, and he was discharged for insubordination. Hardison brought suit in U.S. district court seeking injunctive relief against Trans World Airlines (TWA) on the basis of religious discrimination under Title VII. Although the lower court and the Eighth Circuit Court of Appeals agreed on constitutional questions, the district court held that TWA had properly met its duties of reasonable accommodation while the Eighth Circuit reversed the judgment for TWA.

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38. Hardison was hired by TWA on June 5, 1967, as a clerk in TWA's Kansas City Stores Department. He began studying the teachings of the Worldwide Church of God during the spring of 1968, subsequent to his hiring. Id. at 66-67.

39. Id. at 68. Because all TWA employees were bound by a union collective-bargaining agreement, they were subject to a seniority system that allowed more senior workers priority of choice for, inter alia, job and shift assignments. Hardison had more senior standing at his prior building, which enabled him to observe the Sabbath. Although "TWA agreed to permit the union to seek a change of work assignments for Hardison," the union was unwilling "to violate the seniority provisions set out in the collective-bargaining contract, and Hardison had insufficient seniority to bid for a shift having Saturdays off." Id. at 67.

40. Id. at 69. TWA rejected a proposed arrangement under which Hardison would work four days per week. The Court noted a number of reasons why it was critical to TWA's business operation that Hardison work the weekend shifts: "Hardison's job was essential, and on weekends he was the only available person on his shift to perform it. To leave the position empty would have impaired supply shop functions, which were critical to airline operations; to fill Hardison's position with a supervisor or an employee from another area would simply have undermanned another operation; and to employ someone not regularly assigned to work Saturdays would have required TWA to pay premium wages." Id. at 68-69.

41. The District Court rejected outright TWA's argument that "requiring it in any way to accommodate the religious needs of its employees would constitute an unconstitutional establishment of religion." Id. at 70.


The Supreme Court disagreed and reversed the appellate decision. Writing for the Court, Justice White acknowledged the scant legislative history and dearth of case precedent indicating, respectively, any congressional intent or judicial interpretation regarding the 1972 amendment requiring reasonable accommodation short of undue hardship. Justice White noted that in order to accommodate Hardison’s religious practices to the extent Hardison sought, TWA would have had to unilaterally breach the seniority provisions of its contractual collective-bargaining agreement with the union, thereby abrogating the seniority rights of other employees for Hardison’s sole advantage. The Court noted that in negotiating an agreement to govern the allocation of weekend shifts, TWA and the union had few options to accomplish this neutrally. The seniority system was preferable, wrote Justice White, because allocating those shifts in accordance with employees’ religious needs would have ensured Hardison the necessary days off “only at the expense of others who had strong, but perhaps nonreligious, reasons for

44. For example, Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), was not informative even when considered in tandem with the 1972 amendment to § 701(j) that followed. In Dewey, an equally divided Sixth Circuit held that where an employee was fired after refusing to work on Sunday for religious reasons, the discharge was not unlawful because the manner in which the employer allocated Sunday work assignments was not discriminatory in either its purpose or effect, and the employer had met the reasonable accommodation requirement (then only embodied in the 1967 EEOC guidelines) by offering the employee the chance to find a substitute for his Sunday work. Hardison, 432 U.S. at 73. In response to Dewey, Congress enacted the 1972 amendment to incorporate the EEOC guidelines, but the Hardison Court pointed out that in doing so, “Congress did not indicate that ‘reasonable accommodation’ requires an employer to do more than was done in Dewey, apparently preferring to leave that question open for future resolution by the EEOC.” Id. at 75 n.10.

45. Hardison, 432 U.S. at 79. Justice White concluded that, absent “a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances.” Id. See also Debbie N. Kaminer, Title VII’s Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment, 21 BERKELEY J. EMP. & LAB. L. 575, 588 (2000) (“The Hardison Court’s hesitance to require differential treatment of Hardison can be understood in the context of the courts’ general reluctance to require much more than neutrality in interpreting Title VII.”).
not working on weekends.\textsuperscript{46} Such resultant "unequal treatment", the Court concluded, was not contemplated under Title VII:

[It] would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.\textsuperscript{47}

The \textit{Hardison} Court therefore held that anything more than a \textit{de minimus} cost upon an employer, in efforts to reasonably accommodate religious employees' practices or beliefs, would suffice to show undue hardship.\textsuperscript{48} In the absence of express statutory language to the contrary, the Court continued, the statute was not to be construed as "[requiring] an employer to discriminate against some employees in order to enable others to observe their Sabbath."\textsuperscript{49}

In \textit{Ansonia Board of Education v. Philbrook},\textsuperscript{50} the only other Title VII "reasonable accommodation" case to come before the Supreme Court, the Court further narrowed its \textit{Hardison} decision by holding that an employer need not demonstrate that more than one alternative means of reasonable accommodation proposed by a religious employee would result in undue hardship: "We find no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation . . . . [W]here the employer has already

\begin{itemize}
  \item \textsuperscript{46} \textit{Hardison}, 432 U.S. at 81.
  \item \textsuperscript{47} \textit{Id.} In \textit{Hardison}, "it was coincidental that . . . the seniority system acted to compound his problems in exercising his religion." \textit{Id.} at 82.
  \item \textsuperscript{48} \textit{Id.} at 84. In an attempt to limit \textit{Hardison}, the EEOC issued revised guidelines in 1980, which included, \textit{inter alia}, a \textit{per se} rule that a "mere assumption" that more than one religious employee would require similar religious accommodation was not sufficient to establish undue hardship. Further, the 1980 guidelines stated that if multiple means of accommodation were available to an employer, the employer had an affirmative obligation to offer the alternative least disadvantageous to the employee. Caplen, \textit{supra} note 30, at 595.
  \item \textsuperscript{49} \textit{Hardison}, 432 U.S. at 85.
  \item \textsuperscript{50} 479 U.S. 60 (1986).
\end{itemize}
reasonably accommodated the employee’s religious needs, the statutory inquiry is at an end.”

The Court emphasized that “‘bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee’s religion and the exigencies of the employer's business.’”

Otherwise, opined the Ansonia Court, employees would have every reason “to hold out for the most beneficial accommodation, despite the fact that an employer offers a reasonable resolution of the conflict.”


The WRFA proposes a radical departure from the principles of Hardison and Ansonia, as well as from the substantial body of case law that has developed in their wake. This note is concerned with the ramifications of the Act for public employers in particular, and concludes that if enacted, the WRFA would inevitably engender the kind of excessive entanglement of government and religion, first identified in Lemon as antithetical to First Amendment mandates, and which courts continue to reject unequivocally. Specifically, the WRFA requirement that “for an accommodation to be considered reasonable, [it] shall remove the conflict between the employment requirements and the religious observances or practice of the employee” is irreconcilable with the practical reality that, simply put, this may not always be possible.

51. Id. at 68.
52. Id. at 69 (quoting Brener v. Diagnostic Center Hospital, 671 F.2d. 141, 145-46 (5th Cir. 1982)).
53. Id.
54. Respectively, the de minimus threshold an employer must meet to establish undue hardship; and the notion that an employer must demonstrate only one reasonable accommodation in doing so.
55. Gregory Gawlik has argued the WRFA’s stipulation that an employer’s duty of reasonable accommodation must remove the conflict altogether unconstitutionally distorts the word “accommodation” and transmutes “reasonable” into the kind of absolutism forbidden by Lemon. Further, he contends the WRFA would enable religious employees to “unilaterally designate which accommodation the employer will implement”, thereby overruling Ansonia and stripping employers of their discretion in offering a means of accommodation that incorporates employers’ legitimate interests. See Gawlik, supra note 31, at 260, 263-66.
This is especially true in the context of public employers who provide governmentally subsidized services. In combination with the WRFA’s imposition upon employers of an affirmative duty of near-absolute accommodation, the Act could require that employers accept as legitimate (and, in turn, accommodate) any subjective definition of "sincere religious belief" that an individual employee may assert, even where that employee provides public services. The language lends itself to "an almost limitless definition of religion" that could differ for "virtually every member of the workforce." Essentially, the WRFA could render every employee the constructive equivalent of a religious institution unto him- or herself. In one clause, the WRFA stipulates that an employee’s ability to "perform the essential functions" of employment, which the Act defines as "carrying out the core requirements of an employment position," does not involve "carrying out practices relating to clothing, practices relating to taking time off, or other practices that may have a temporary or tangential impact on the ability to perform job functions." The hopelessly ambiguous notion of "a temporary or tangential impact on the ability to perform job functions" is not always immune from governmental regulation: ‘[A] determination of what is a ‘religious’ belief or practice entitled to constitutional protection may present a most delicate question, [but] the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.’” Guinn v. Church of Christ of Collinsville, 775 P.2d 766 (Okla. 1989) (quoting Wisconsin v. Yoder, 406 U.S. 205, 215-216 (1972) and removing emphasis); see also Testimony of Michael J. Gray, supra note 2, at 3-4 (“Courts though remain reluctant to inquire into whether a certain belief or practice is, in fact, ‘religious.’ Most courts limit their analysis to whether the belief is ‘sincerely held’ by the employee. And other courts avoid even that admittedly ‘thorny issue’ when circumstances permit. In the workplace, however, employers may not simply dodge the issue. Instead, they must evaluate the particular facts and circumstances and decide whether to accommodate requests, which may be controversial. Accordingly, it is imperative that employers be permitted flexibility to carry out this important mission and not be burdened with impractical blanket restrictions like those mandated under WRFA.” (internal citations omitted)).

56. “Conduct conforming to and motivated by one’s religious beliefs is not always immune from governmental regulation: ‘[A] determination of what is a ‘religious’ belief or practice entitled to constitutional protection may present a most delicate question, [but] the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.’” Guinn v. Church of Christ of Collinsville, 775 P.2d 766 (Okla. 1989) (quoting Wisconsin v. Yoder, 406 U.S. 205, 215-216 (1972) and removing emphasis); see also Testimony of Michael J. Gray, supra note 2, at 3-4 (“Courts though remain reluctant to inquire into whether a certain belief or practice is, in fact, ‘religious.’ Most courts limit their analysis to whether the belief is ‘sincerely held’ by the employee. And other courts avoid even that admittedly ‘thorny issue’ when circumstances permit. In the workplace, however, employers may not simply dodge the issue. Instead, they must evaluate the particular facts and circumstances and decide whether to accommodate requests, which may be controversial. Accordingly, it is imperative that employers be permitted flexibility to carry out this important mission and not be burdened with impractical blanket restrictions like those mandated under WRFA.” (internal citations omitted)).

57. Sonne, supra note 28 at 1024.

58. See supra note 6 (defining “ministerial exception”).

functions” is regressive rather than clarifying. It also assumes its own uniform applicability across all types of employment, failing to take into account the range of methods and demands in different lines of work. That is, accommodating employees’ religious practices will likely be more feasible or more difficult depending upon the specific religious practices or beliefs in contention, the particular workplace setting, and the nature of the work to be performed.

Notwithstanding the fact that the WRFA version of “reasonable accommodation” flies in the face of well-articulated case law spanning U.S. court decisions involving public and private employers alike, its proposed scheme is particularly unworkable in the realm of public employment. Its enforcement in this setting would require constant monitoring by governmental authorities to ensure public employers’ compliance—just the type of “intimate and continuing relationship between church and state” repudiated in Lemon. The Act’s vague

60. “WRFA presumes that practices relating to clothing, taking time off, ‘or other practices that may have a temporary or tangential impact on the ability to perform job functions’ cannot be ‘essential.’ Even though an employer may be obligated to modify a job requirement for religion there is no clarity for employers seeking to comply with WRFA on how to do so. This is particularly necessary given the highly subjective nature of religion beliefs and practices.” Testimony of Michael J. Gray, supra note 2, at 7.

61. “Religion does not exist in a vacuum in the workplace. Rather, it coexists, both with intensely secular arrangements such as collective bargaining agreements and with the intensely secular pressures of the marketplace. Hence the import of the statutory term ‘accommodate.’ The provision’s use of the terms ‘reasonably’ and ‘undue hardship’ likewise indicates that this is a field of degrees, not a matter for extremes. Both terms are ‘variable ones,’ dependent on the extent of the employee’s religious obligations and the nature of the employer’s work requirements.” EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 313 (2008) (citing EEOC v. Ithaca Indus., Inc., 849 F.2d 116, 120 (4th Cir. 1988)). See also Testimony of Michael J. Gray, supra note 2, at 7 (“Whereas accommodations under the ADA [a model for the proposed WRFA] generally involve architectural alterations or equipment purchases with identifiable costs, accommodations for religious practices have consequences that often cannot be so easily quantified. . . . WRFA’s ‘undue hardship’ standard does not contemplate this inability to weigh such pertinent factors and employers will face inevitable confusion in trying to apply the standard.”).

62. See EEOC Directives Transmittal No. 915.003, supra note 4, at 9 n.29; see also Testimony of Michael J. Gray, supra note 2, at nn. 7-8.

63. 403 U.S. 602 (1971).
language, which only further obfuscates any statutory meaning of "religious practice or belief," would require ongoing governmental inquiry into and assessment of employees' religious lives and the difficult decisions public employers must make in balancing employees' rights to religious expression with the interests of the public whom those employees serve. Courts have emphasized the inherent need for balancing tests and public employer discretion depending on the specific circumstances in which an employee's religious expression has interfered with the provision of religiously neutral public services. The absolutist nature of "reasonable accommodation" under the WRFA would demand governmental concessions for religious public employees—most likely at the expense of fellow employees', as well as public clientele, rights—in ways that would unconstitutionally blur the lines of church-state separation.

64. See infra note 97; infra note 100. See also Testimony of Michael J. Gray, supra note 2, at 5 ("The body of recent Title VII case law indicates that courts, when faced with religious accommodation questions, weigh the rights of the individual against those of fellow employees and third parties . . . . [W]hen faced with more difficult scenarios that require consideration of more significant impact on fellow employees or the overall business, courts demonstrate appropriate reluctance to create disturbances in the workplace and analyze the competing factors in reaching a decision . . . . [C]ourts [use] the flexibility of the current standard to evaluate the employee's right to perform religious acts within the overall objective of maintaining a discrimination-free workplace."). See also Gawlik, supra note 31, at 264 ("the accommodation of 'mutual' compromise—one not always requiring complete conflict removal to the extent that the employee is burden-free—is the concept that the [Supreme] Court prefers.").

65. See Gawlik, supra note 31, at 263-64 ("The more non-negotiable orders that an amendment like WRFA is seen to give employers in the name of religion, the more Title VII gets pushed toward an 'absolute' burden—a constitutionally unacceptable degree." (Emphasis in original)); see also Testimony of Professor Helen Norton before the Subcommittee on Health, Employment, Labor, and Pensions of the U.S. House of Representatives' Committee on Education and Labor, Feb. 12, 2008, at 3 (Text available at http://edlabor.house.gov/testimony/2008-02-12-HelenNorton.pdf) [hereinafter Testimony of Professor Helen Norton] ("These are very difficult cases because they involve direct clashes between interests that are protected by Title VII and other constitutional and legal rights . . . . To be sure, the plaintiffs' religious beliefs in these cases are no less sincere and deeply felt than those in any others. These cases are different because of the requested accommodations' effect on third parties' civil rights, religious liberties . . . and other important health care needs.").
These possibilities are perhaps best illustrated by a number of recent state and federal court decisions involving employee claims against their public (or government-affiliated) employers on grounds of Title VII religious accommodation in the workplace. In considering how the following cases may have come out differently under the WRFA, it becomes apparent the Act is fraught with constitutional inconsistencies.

PART IV. PUBLIC EMPLOYERS AND REASONABLE ACCOMMODATION UNDER CURRENT LAW AND POSSIBLE WRFA RAMIFICATIONS

A. The Guidelines on Religious Exercise and Religious Expression in the Federal Workplace

In August 1997 the Clinton White House released the Guidelines on Religious Exercise and Religious Expression in the Federal Workplace in an effort to “address employees' religious exercise and religious expression when the employees are acting in their personal capacity within the Federal workplace and the public does not have regular exposure to the workplace.” The Guidelines recognized the need to counterbalance the First Amendment and Title VII rights of federal employees with the constitutional constraints by which federal employers are bound. They provided illustrative examples regarding religious expression in private work areas; expression among or directed at fellow employees; expression in areas accessible to the public; religious discrimination; hostile work environment and harassment scenarios; and the accommodation of religious exercise. Still, the Guidelines acknowledged from the outset they do not comprehensively address whether and when the government and its employees may engage in

66. Three of the four cases discussed were decided in or since 2000.
67. Following the decision in Everson v. Board of Education, 330 U.S. 1 (1947), the Establishment Clause was incorporated into the 14th Amendment and thus made applicable to the states.
69. Id.
religious speech directed at the public . . . . Although these Guidelines, including the examples cited in them, should answer the most frequently encountered questions in the Federal workplace, actual cases sometimes will be complicated by additional facts and circumstances that may require a different result from the one the Guidelines indicate. 70

The Guidelines affirmed that the Establishment Clause "prohibits the Government—including its employees—from acting in a manner that would lead a reasonable observer to conclude that the Government is sponsoring, endorsing, or inhibiting religion generally or favoring or disfavoring a particular religion." 71 By way of example, they provided that:

where the public has access to the Federal workplace, employee religious expression should be prohibited where the public reasonably would perceive that the employee is acting in an official, rather than a private, capacity, or under circumstances that would lead a reasonable observer to conclude that the Government is endorsing or disparaging religion. 72

The Guidelines required that all federal employers be sensitive to avoid the creation of such an impression and emphasized the federal government's authority to regulate employees' religious speech "where the employee's interest in that speech is outweighed by the government's interest in promoting the efficiency of the public services it performs." 73 Summarily, "[f]ederal employees are paid to perform official work, not to engage in personal religious or ideological campaigns during work hours." 74 These Guidelines remain applicable to federal employers. Nevertheless, Stephen Kao has contended that among other insufficiencies, the Guidelines "repeatedly and incorrectly defer to the

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70. Id.
71. Id.
72. Id.
73. Id.
74. Id.
Establishment Clause as the ultimate standard for evaluating the rights of federal employees to engage in religious expression and other religious activities. According to Kao, the Guidelines frustrate the congressional intent that Title VII of the Civil Rights Act "be the primary recourse for addressing religious rights in the federal workplace.

In part, Kao argues, "where the Establishment Clause applies to the federal workplace, the President should have referred to the commonly used Establishment Clause test introduced by the Supreme Court in Lemon v. Kurtzman . . . " Kao also criticizes the Guidelines' omission of any reference to Title VII "reasonable accommodation." Without accepting or rebutting Kao's observations, it seems fair to conclude that the legal rights of federal employees, and the legal responsibilities of federal employers, remain gray areas in the law.

B. Case Studies

1. Spratt v. County of Kent

In an earlier case involving reasonable accommodation under Title VII § 701(j), plaintiff Robert Spratt filed suit against both his employer, a county sheriff, and his immediate work supervisor. Spratt, a Pentecostal Christian, was a county-paid social worker hired to provide counseling and therapy for prison inmates. Spratt had initially been placed as a counselor at a juvenile correction facility, but was transferred to the prison because his "evangelically religious methods of counseling had alienated many of the youths at the camp." His methods of counseling included reading from a Bible, prayer, addressing spiritual issues, and the "casting out of demons." After Spratt's transfer to the

76. Id.
77. Id. at 257-8.
78. Id. at 259-61.
80. Id. at 596.
81. Id.
82. Id.
prison, he was advised by the sheriff that his religiously motivated counseling techniques were inappropriate for a county-paid employee to perform, and that they should be discontinued. The sheriff maintained a policy that counselors were not to use religion in their counseling under any circumstances. Social workers were instructed to refer inmates with spiritual needs to jail chaplains, provided but not paid by the county.

After receiving inmate complaints that Spratt continued using his spiritual methods in counseling, and a number of reprimands regarding Spratt's refusal to comply with county policy, the sheriff terminated Spratt's employment. At trial Spratt testified that it was not possible to separate his religious beliefs from his role as counselor. On the other hand, the sheriff testified that though he had considered means of accommodating Spratt's religious beliefs, it was simply not possible in the plaintiff's case. In moving for summary judgment, among other arguments, the defendants asserted they had not violated Title VII because they had accommodated Spratt's religious beliefs to the extent possible under the circumstances and in the legitimate pursuit of maintaining religious neutrality in the county prison. The Michigan district court agreed:

Sheriff Heffron had very limited flexibility with which to accommodate plaintiff's religious practices. The sheriff had an obligation under the establishment clause of the constitution to maintain a

83. Id. at 598.
84. Id. at 596-97.
85. Id. at 598. But note that plaintiff also testified that his religion did not "require him to read the Bible or pray with co-workers. He testified further that it was not inconsistent with his religious beliefs to give non-religious treatment if that is what the inmate asked for." Id.
86. The sheriff testified that he "did not ask [the] plaintiff to shed his Christian beliefs . . . but he did ask [Spratt] to leave them out of his counseling." Id.
87. Id.
88. A lieutenant sheriff and Spratt's prison supervisor were also named as individual defendants.
89. In light of such conflicting interests, the sheriff concluded the only solution was to absolutely prohibit religious counseling. Spratt, 621 F. Supp. at 598.
policy of neutrality on religious matters.\textsuperscript{90} . . . He was required to avoid the appearance of favoring one religion over others or religion over nonreligion . . . . Within these narrow straits, the sheriff made what this Court considers to be reasonable efforts\textsuperscript{91} to accommodate plaintiff’s religious practices.\textsuperscript{92}

Kent County was not required to allow Spratt to “speak on religious issues if that speech violate[d] the establishment clause or the free exercise rights of inmates.”\textsuperscript{93} It is worth noting that the court concluded it was sufficient to forbid plaintiff’s use of religious counseling even where it was only “potentially violative of the establishment clause.”\textsuperscript{94} Thus, in \textit{Spratt}, the lower court found the sheriff’s policy against religious counseling by county employees was acceptable in light of the mere possibility that “the County could be accused of violating the establishment clause” where “the individual bringing the religious message to the inmates was an employee of the county.”\textsuperscript{95}

If \textit{Spratt} had been decided under the WRFA, the court’s task may have been far less straightforward. The decision rightfully recognized that Spratt’s supervising sheriff, as a public employer, had very little leeway in accommodating Spratt’s religious practices, especially to the extent Spratt desired. This was directly attributable to Establishment Clause obligations. The WRFA seeks myopically to define terms like “reasonable accommodation,” “undue hardship,” and even “employee.” Those definitions quickly prove meaningless in the

\begin{footnotes}

91. The Court cited, as evidence of the sheriff’s good faith attempts at reasonable accommodation, that plaintiff was expressly notified of the county policy prohibiting county social workers from using religious counseling techniques; that plaintiff was repeatedly warned when it was discovered he continued to practice spiritual therapy on inmates; that the sheriff sought legal advice to determine whether it was possible to accommodate plaintiff’s religious beliefs; and that plaintiff was given numerous opportunities to change his verboten tactics. \textit{Id.}

92. \textit{Id.}

93. \textit{Id.} at 601.

94. \textit{Id.}

95. \textit{Id.}
\end{footnotes}
context of public employment. For example, the WRFA purports to define “perform the essential functions” as

- carrying out the core requirements of an employment position and [not including] . . . other practices that may have a temporary or tangential impact on the ability to perform job functions, if any of the [employer] practices described in this subparagraph restrict the ability . . . to participate in a religious observance or practice. 96

Arguably, this language would afford Spratt a colorable claim: that his spiritual counseling only impacted his job performance ‘temporarily or tangentially.’ Spratt testified that when he began therapy with an inmate, he usually spent the first several sessions gauging the patient’s mental health, and that he only used his religious treatment approach upon an inmate’s request, though he conceded that in some instances he encouraged inmates to choose that method over other treatment options. 97

The WRFA fails to indicate the meaning of “temporary or tangential impact on the ability to perform job functions.” 98 Beyond the most obvious examples 99 the phrase has almost no meaning in the context of public employment where, as in Spratt, an employee engages in repeated, unsolicited, and objectionable or offensive religious practices.

96. H.R. 1431, supra note 1.
98. See H.R. 1431, supra n.1.
99. To be sure, there is no suggestion a public employee would be prohibited from praying privately without eliciting or disturbing clients or co-workers. This practice might be described as one having only a ‘temporary or tangential’ impact on the ability to otherwise perform job functions. Likewise, it seems evident that for the most part, religious practices involving wearing certain clothing or hairstyles have very little impact on an employee’s ‘core’ job performance. These kind of cases are unlikely to implicate constitutional questions because they do not involve projection of an employee’s religious practices or beliefs onto clients or co-workers and most likely do not interfere with work productivity; moreover, accommodation usually comes at no cost to the employer. The case law suggests the courts will find discrimination on such grounds clearly unreasonable and rule in favor of the employee. Baxter, supra 35 at paras. 17-27 (concluding the WRFA is unnecessary since under these kind of circumstances, “courts generally seem to reach the correct result.”).
expression. As courts have consistently held, there is no 'tangential or temporary' exception to the Establishment Clause. A public employer has a constitutional duty to anticipate even potential excessive entanglement, and the mere possibility thereof triggers preemptive safeguards that may limit incidentally employees’ freedom of religious expression at work. Such restrictions will, of course, be at an employer’s, or perhaps a court’s, discretion, and must be meted out based on the facts and circumstances of a given situation. This calls for a sensitive balancing of all interests concerned. Contrarily, the WRFA gives employees a decided advantage, without accounting for the delicate decision-making that public employers face in juggling employees’ rights, the public interest, and Establishment Clause strictures.

2. Rodriguez v. City of Chicago

More than a decade after Spratt, the Seventh Circuit affirmed a lower court decision granting summary judgment to the city of Chicago where a police officer sued under Title VII. Plaintiff Rodriguez alleged the city had not satisfied its duty to reasonably accommodate his religious beliefs. In 1993, after a rise in protestor demonstrations outside abortion clinics, the Chicago Police Department (“CPD”) began assigning officers to guard clinics throughout the city, usually on Saturday mornings only. The purposes of these assignments were to protect the clinics’ property and employees and to maintain the peace. There were two clinics in Rodriguez’s district, and after the CPD

100. "There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute." Zorach v. Clauson, 343 U.S. 306, 312 (1952).
101. Cf EEOC Directives Transmittal No. 915.003, supra note 4, at 57 (“An employer cannot rely on potential or hypothetical hardship when faced with a religious obligation that conflicts with scheduled work, but rather should rely on objective information.”). 102. See Testimony of Michael J. Gray, supra note 2. 103. Rodriguez v. City of Chicago, 156 F.3d 771 (7th Cir. 1998). 104. Id. Appellant before the Seventh Circuit. 105. Id. at 773.
implemented this procedure, Rodriguez was assigned several shifts guarding those facilities on a number of occasions.\textsuperscript{106} Rodriguez, a lifelong Roman Catholic, increasingly felt that by guarding the clinics he was facilitating the abortions performed therein and considered this antithetical to his pro-life religious beliefs.\textsuperscript{107}

Rodriguez initially informed his immediate commanding officer that he objected to clinic duty assignment and was told that while efforts would be undertaken to accommodate his needs, a formal exemption was not available.\textsuperscript{108} Later, Rodriguez wrote to the commanding officer of his district in an attempt to ensure he would not be assigned clinic duty.\textsuperscript{109} Both Rodriguez's immediate superior officer and the district commanding officer agreed that while they would attempt to avoid assigning Rodriguez clinic duty whenever possible, Rodriguez was not at liberty to refuse such an assignment.\textsuperscript{110} Eventually, Rodriguez was briefly assigned clinic duty as a substitute for a fellow officer, which he accepted under protest.\textsuperscript{111}

In affirming the lower court's ruling for the defendant City, the Seventh Circuit noted that Rodriguez at all times had the option, pursuant to a collective bargaining agreement, of transferring—without any reduction in pay or benefits—to a different district that did not have an abortion clinic.\textsuperscript{112} By providing this option, the City had met its duty of reasonable accommodation. Remaining in the same district was merely Rodriguez's personal preference,\textsuperscript{113} and in declining to exercise that option he alone became responsible for the persisting conflict.\textsuperscript{114}

\begin{itemize}
\item \textsuperscript{106} \textit{Id.}
\item \textsuperscript{107} \textit{Id.}
\item \textsuperscript{108} \textit{Id.}
\item \textsuperscript{109} \textit{Id.} at 773-74.
\item \textsuperscript{110} \textit{Id.} at 774.
\item \textsuperscript{111} \textit{Id.} The EEOC currently provides that "Title VII is violated by an employer's failure to accommodate even if to avoid adverse consequences an employee continues to work after his accommodation request is denied." EEOC Directives Transmittal No. 915.003, \textit{supra} note 4, at 55.
\item \textsuperscript{112} \textit{Rodriguez}, 156 F.3d at 775.
\item \textsuperscript{113} Rodriguez had served as a police officer in the same district for nearly two decades. \textit{Id.} at 773-74.
\item \textsuperscript{114} \textit{Id.} at 776 (citing Wright v. Runyon, 2 F.3d 214, 217 (7th Cir. 1993)). The \textit{Rodriguez} court concluded, "the fact that Officer Rodriguez may prefer an
Following *Ansonia* and citing other precedent, the Seventh Circuit reemphasized that Title VII "reasonable accommodation" does not amount to "satisfaction of an employee's every desire," and that where an employer has offered one reasonable accommodation, the employer "need not further show that each of the employee's alternative accommodations would result in undue hardship." Furthermore, the Court stressed that "determination of whether an accommodation is reasonable in a particular case must be made in the context of the unique facts and circumstances of that case."

In a concurring opinion, Judge Posner went even further, discussing in detail the fact that the public nature of a police officer's work sets it apart regarding the reasonable accommodation of employees' religious beliefs. In his view,

\[\ldots\ \text{[P]olice officers and firefighters have no right under Title VII of the Civil Rights Act of 1964 to recuse themselves from having to protect persons of whose activities they disapprove for religious (or any other) reasons \ldots. The objection to recusal [by public safety officers] is not the [employer's] inconvenience \ldots [but] to the loss of public confidence in governmental protective services if the accommodation that allows him to remain in the 14th District does not render a transfer 'unreasonable.'} \]

*Id.*

115. *Id.* at 777 (quoting *Wright*, 2 F.3d at 217.).
116. *Id.* (citing *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1968)). Where there is more than one reasonable accommodation that would not pose an undue hardship, the employer is not obliged to provide the accommodation preferred by the employee. However, the employer's proposed accommodation will not be 'reasonable' if a more favorable accommodation is provided to other employees for non-religious purposes, or, for example, if it requires the employee to accept a reduction in pay rate or some other loss of a benefit or privilege of employment and there is an alternative accommodation that does not do so.

public knows that its protectors are at liberty to pick and choose whom to protect.\footnote{118}

Posner encouraged other courts to recognize religious neutrality as a component indispensable in the effective provision and administration of public services.

As the \textit{Rodriguez} court indicated, there is little practicality in a statutorily-prescribed, one-size-fits-all definition of "reasonable accommodation." Whether a given accommodation will be found reasonable is a determination to be made in light of the circumstances of a case. Yet the WRFA flouts \textit{Ansonia}'s explicit holding, followed in \textit{Rodriguez}, that an employer need only offer one acceptable means of accommodation, without obligation to cater to an employee's preferred alternative. Officer Rodriguez had spent his entire career in the same district and in the process had grown attached to it. When he began to feel strongly that his official assignments were irreconcilable with his religious beliefs, he had the option of transferring to another district

\footnote{118. \textit{Id.} at 779 (Posner, J., concurring). Judge Posner continued, The public knows that its protectors have a private agenda; everyone does. But it would like to think that they leave that agenda at home when they are on duty—that Jewish policemen protect neo-Nazi demonstrators, that Roman Catholic policemen protect abortion clinics, that Black Muslim policemen protect Christians and Jews, that fundamentalist Christian policemen protect noisy atheists and white-hating Rastafarians, that Mormon policemen protect Scientologists, and that Greek-Orthodox policemen of Serbian ethnicity protect Roman Catholic Croats .... The importance of public confidence in the neutrality of its protectors is so great that a police department or fire department or equivalent public-safety agency that decides not to allow recusal by its employees should be able to plead 'undue hardship' and thus escape any duty of accommodation .... When the business of the employer is to protect the public safety, the maintenance of public confidence in the neutrality of the protectors is central to effective performance, and the erosion of that confidence by recognition of a right of recusal by public safety officers so undermines the agency's effective performance as to constitute undue hardship within the meaning of the statute. \textit{Id.} at 779-80.}
where no abortion clinics were located. Instead, he felt entitled to stay in his own district and dictate others’ shift assignment scheduling around his own abstention. This result hardly seems reasonable; but under the WRFA, “for an accommodation to be considered reasonable, the accommodation shall remove the conflict between employment requirements and the religious observance or practice of the employee.”\(^{119}\) This could supplant the more flexible \textit{Ansonia} rule by placing the onus upon employers to do whatever necessary to “remove the conflict”—even if that means satisfying an employee’s personal preference in terms of accommodation. As Professor Helen Norton has indicated:

\begin{quote}
[T]he holdings in cases under current law involving conflicts with third parties' civil and reproductive rights frequently rest on courts’ conclusion that an employer’s accommodation need not completely remove the conflict with the employee’s religious beliefs to be considered reasonable. Indeed, in many of these cases, the only way truly to remove the conflict with the employee’s sincerely-held religious beliefs is for the employer to stop providing certain health care services that the employee finds inconsistent with his faith or for the employer to permit the employee to engage in religiously-compelled witnessing or proselytizing activities regardless of the effect on others’ beliefs or the employer’s antidiscrimination policies. Again, without clarification, this change in the law \([\text{wrought by the WRFA}]\) may well result in different outcomes in cases involving conflicts with other workers’ civil rights or patients’ important health care needs.\(^{120}\)
\end{quote}

The \textit{Ansonia} rule, that an employer is not required to indulge an employee’s choice among a number of alternatives, is critical for public and private employers alike. Public employers, however, are even more constrained in their ability to accommodate employee religious

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120. Testimony of Professor Helen Norton, supra note 65 at 6-7.
\end{flushright}
expression or belief as a result of the number of competing interests and the narrow constitutional mandates they must balance.\textsuperscript{121} The WRFA proposes a watertight rule of strict accommodation that simply cannot meet these needs.

3. \textit{Quental v. Connecticut Commission on the Deaf and Hearing Impaired}

In \textit{Quental v. Connecticut Commission on the Deaf and Hearing Impaired},\textsuperscript{122} a U.S. district court again granted summary judgment in favor of a public employer challenged by a state employee. There, plaintiff Nicole Quental worked as an interpreter for a state agency ("the Commission") that provided interpreting services for deaf and hearing impaired clients, some of whom also had mental health disabilities.\textsuperscript{123} Pursuant to a collective bargaining agreement that governed Quental's employment with the Commission, Quental took and passed an examination on the national Registry of Interpreters for the Deaf Code of Ethics.\textsuperscript{124} In part, the code of ethics explicitly stipulated that in providing such services, an interpreter was not to "counsel, advise or interject personal opinions," and further that "the interpreter/translator's only function is to facilitate communication."\textsuperscript{125} Nonetheless, in at least two instances, Quental discussed her personal religious beliefs with clients while on interpreting assignments. Both clients, one of whom suffered from mental illness which may have involved especially negative associations with religion,\textsuperscript{126} later complained. Quental received a letter of reprimand\textsuperscript{127} from the Commission and subsequently filed suit.

\textsuperscript{121} See Newman v. City of East Point, 181 F. Supp. 2d 1374, 1379, 1380 (citing Adler v. Duvel County Sch. Bd., 250 F.3d 1330, 1336 (11th Cir. 2001)) ("'[W]hether a government activity violates the Establishment Clause is in large part a legal question to be answered on the basis of judicial interpretation of social facts. ... Every government practice must be judged in its unique circumstances.'").

\textsuperscript{122} 122 F. Supp. 2d 133 (D. Conn. 2000).

\textsuperscript{123} Id. at 136.

\textsuperscript{124} Id.

\textsuperscript{125} Id.

\textsuperscript{126} In one instance, during a break in an interpreting session, Quental talked with a client about smoking. She told the client that she had smoked at one time but that "the Lord delivered her from smoking" and proceeded to verbally pray for the
In granting summary judgment for the defendants, the Quental court emphasized Quental’s precarious position, as a state employee, when interacting with clients. Citing other precedent, the court observed that “government inculcation of religious beliefs has the impermissible effect of advancing religion,”128 that “[t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief . . .”129 and that government efforts130 to avoid Establishment Clause violations do not necessarily require that a government employer demonstrate the conduct it forbids would “inevitably . . . violate the Establishment Clause . . .”.131 As in Spratt, client in his presence. The client complained the following day. Id. at 137. In the second instance, during an interpreting assignment on behalf of the Commission at the University of Connecticut Health Center, when a mental health client confided in Quental about suffering past sexual abuse, Quental responded by sharing Quental’s own personal religious beliefs and giving the client certain religious reading materials that bore the address of a First Assembly of God church. It was after this latter assignment that a representative of the Connecticut Mental Health Association contacted the Commission to inform them that the mental health patient had found Quental’s discussion of religion very upsetting. Id.

127. The letter stipulated that Quental was “free to hold [her] religious beliefs and live by [her] religious convictions, [but that] during the time [she was] being paid by the State of Connecticut to provide interpreting services, [she] should not promote [her] religious beliefs.” Id. at 137. Further, the letter noted that the Commission appreciated the depth and importance of Quental’s beliefs, and that it was willing to make scheduling adjustments as needed to accommodate any religious activities Quental might undertake outside her capacity as an interpreter. Id. Finally, it stated that any further incidences of the objectionable behavior would render Quental subject to disciplinary action, including possible dismissal. Id.

128. Id. at 139 (quoting Agostini v. Felton, 521 U.S. 203, 223 (1997)).

129. Id. (quoting County of Allegheny v. ACLU, 492 U.S. 573, 592-94 (1989)).

130. Id. at 140

131. Id. (quoting Marchi v. Bd. of Coop. Educ. Servs., 173 F.3d. 469, 476 (2d Cir. 1999)). “When government endeavors to police itself and its employees in an effort to avoid transgressing the Establishment Clause, it must be accorded some leeway, even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause and the limitations it imposes might restrict an individual’s conduct that might well be protected by the Free Exercise Clause if the individual were not acting as an agent of government.” Id.
the Quental court held that a merely potential, though unrealized, Establishment Clause violation justified certain government restrictions on employee conduct while acting within the scope of employment. Quental was a state employee who engaged with the public in the course of her interpreting duties. This alone gave rise to "a risk that at least some of these clients . . . could confuse Quental’s statements concerning her religious beliefs and distribution of religious tracts . . . as the Commission’s endorsement of religion . . . " The Commission had reasonably accommodated Quental’s religious beliefs by recognizing them as deeply-held and important, by offering to adjust Quental’s work schedule to allow for private religious practices, and by prohibiting Quental’s religious expression only in the context of providing interpreting services to clients. It would have resulted in undue hardship for the Commission had it allowed Quental to promote her religious beliefs to clients.


Quental appealed the decision to the Second Circuit Court of Appeals, in tandem with an appeal by Jo Ann Knight. Knight was a Nurse Consultant for the Connecticut Department of Public Health ("the Department") whose professional responsibilities included overseeing the provision of home health care by various Medicare agencies. One aspect of this was interviewing individual patients in their homes. Knight, a self-described born-again Christian, had conducted an

132. "[T]he Establishment Clause, at the very least, prohibits the government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person’s standing in the political community." County of Allegheny v. ACLU, 492 U.S. 573, 594 (1989) (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring)).
133. Quental, 122 F. Supp. 2d at 140.
134. Id. at 142.
135. In addition to the risk that clients might interpret Quental’s religious beliefs as Commission-endorsed, allowing Quental to proselytize clients would have violated the national code of ethics by which defendant-appellee was bound. Id.
interview at the home of a homosexual couple. One partner was dying from AIDS. She testified that during this interview session, she felt overcome by the Holy Spirit to share her beliefs about salvation with the clients. During part of the conversation, Knight informed the couple that “[God] doesn’t like the homosexual lifestyle” and it was alleged at the lower court trial that Knight insinuated to her clients “that their lifestyle would condemn them ‘to hell.’” As a result of this incident, Knight was suspended by the Department for four weeks (subsequently reduced to two weeks) without pay.

In dismissing Knight’s Title VII claims, the district court, citing Hardison, held that under the Act, “[a] reasonable accommodation does not include the accommodation which is ‘most beneficial’ to the employee, but rather ‘an acceptable reconciliation of the needs of the employee’s religion and the exigencies of the employer’s business.’” The court further held that the defendant had reasonably accommodated Knight’s religious beliefs, going so far as allowing her to pray during staff meetings. Permitting Knight to “evangelize to a patient population that includes persons of alternate life styles and differing religious beliefs,” however, would have placed an undue hardship on the state hospital because it would inevitably offend some patients and possibly subject Knight’s employers to further legal liability.

The duty of reasonable accommodation did not implicitly include allowing an employee to impose religious beliefs on others.

137. Id. at *3.
138. Id. at *13-14 (quoting Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 69 (1977)). Note that while the WRFA appears to focus exclusively on financial aspects of a business upon which a religious accommodation may come to bear, the “exigencies of the [public] employer’s business” is largely a constitutional inquiry.
139. Id. at *14.
140. See Marianne C. Delpo, Never on Sunday: Workplace Religious Freedom in the New Millenium, 51 ME. L. REV. 341, 349 (1999) (“[A]ccommodation of proselytizing employee’s religious practice of preaching or attempting to convert—in addition to whatever direct costs this may entail—risks claims of harassment by other employees. As indicated by the Eighth Circuit, this risk may itself constitute an undue hardship.”) (citing Wilson v. U.S. West Communications, Inc., 58 F.3d 1337, 1339 (8th Cir. 1995)).
141. Knight, 2000 U.S. Dist. LEXIS 21120 at *14-15 (citing Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1021 (4th Cir. 1996)).
With Quental, Knight brought her case before the Second Circuit.\textsuperscript{142} Both appellants challenged the lower courts’ grants of summary judgment in favor of their respective state employers. In affirming both district court judgments, the Second Circuit focused on appellants’ Title VII claims that their state employers had failed to reasonably accommodate their religious beliefs. As an initial matter, neither Quental nor Knight had established prima facie religious discrimination.\textsuperscript{143} Beyond this, the Court concluded that the public employers had reasonably accommodated the plaintiffs’ religious beliefs because the restrictions on their religious expressions applied only while conducting state business and interacting with clients.\textsuperscript{144} Most significantly, even assuming plaintiffs’ had made out prima facie cases of religious discrimination, and that the state had not reasonably accommodated their religious beliefs, the Second Circuit held that “the accommodation [plaintiffs sought was] not reasonable. Permitting appellants to evangelize while providing services to clients would jeopardize the state’s ability to provide services in a religion-neutral matter.”\textsuperscript{145} The state thus could not have accommodated plaintiffs’ need to proselytize clients on state assignments without incurring undue hardship.

The WRFA does not contemplate public employers’ duty to provide religion-neutral services, though both \textit{Quental} and \textit{Knight} found that accommodating either plaintiff’s religious practices would have

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143. To establish \textit{prima facie} religious discrimination, a plaintiff must demonstrate that “(1) they held a \textit{bona fide} religious belief conflicting with an employment requirement; (2) they informed their employers of this belief; and (3) they were disciplined for failure to comply with the conflicting employment requirement.” Ansonia Bd. of Educ. v. Philbrook, 757 F.2d 476, 481 (1985). In the instant case, the Second Circuit opined, neither Quental nor Knight requested any accommodation of their need to evangelize clients: “Knowledge that [appellants] are born-again Christians is insufficient to put their employers on notice of their need to evangelize their clients. To hold otherwise would place a heavy burden on employers, making them responsible for being aware of every aspect of every employees’ religion which could require an accommodation.” \textit{Knight and Quental}, 275 F.3d at 168.
144. \textit{Knight and Quental}, 275 F.3d at 168.
145. \textit{Id}. 
\end{flushright}
resulted in undue hardship for their public employers. The WRFA offers an attenuated definition of "undue hardship" as an accommodation "requiring significant difficulty or expense." It goes on to enumerate three factors to take into account when considering whether a given accommodation entails significant difficulty or expense. Each of those factors addresses exclusively financial burdens on an employer. This emphasis is misplaced in the context of public employers seeking to avoid excessive entanglement between their public services and the religious beliefs of the employees who carry out those services. Indeed, neither Quental nor Knight concerned fiscal costs related to the defendant employers' decisions. The mere possibility of a public entity sending conflicting messages to clients was sufficient to establish the employers' legitimate interests in restricting the employees' religious expression and in ultimately taking disciplinary or termination actions. Financial costs in the public employment context were addressed largely only in relation to the possibility of future litigation for Establishment Clause violations. The WRFA thus misses this point in framing "undue hardship" as a solely pecuniary analysis.

147. Those factors are "the identifiable cost of the accommodation, including the costs of loss of productivity and of retraining or hiring employees or transferring employees from one facility to another; the overall financial resources and size of the employer involved, relative to the number of its employees; and, for an employer with multiple facilities, the geographic separateness or administrative or fiscal relationship of the facilities." H.R. 1431, 110th Cong., § 2(a)(3)(A)-(C) (2007).
148. Many legal scholars have noted that while the language of WRFA is modeled after an entirely different employment law, the Americans with Disabilities Act, those ADA terms and standards are ill-equipped to address religious accommodation issues: "WRFA's adoption of the ADA's economic standard of 'undue hardship' is a prime example. WRFA's definition of 'undue hardship' only permits an employer to deny an accommodation request if it can show it would incur 'identifiable increased costs.' This standard provides an employer little guidance. Whereas accommodations under the ADA generally involve architectural alterations or equipment purchases with identifiable costs, accommodations for religious practices have consequences that often cannot be so easily quantified . . . WRFA's 'undue hardship' standard does not contemplate this inability to weigh such pertinent factors and employers will face inevitable confusion in trying to apply the standard." Testimony of Michael J. Gray, supra note 2, at 6-7. See also Sonne, supra note 28, at 1051-59 (discussing the practical implications of WRFA's Disability Model).
149. See supra note 143.
5. Berry v. Department of Social Services

Finally, in an even more recent decision, the Ninth Circuit upheld summary judgment for an employer, a county Department of Social Services ("the Department"), on a Title VII claim instituted by Daniel Berry. Berry, an evangelical Christian, worked for the Department's employment services division, where he conducted frequent interviews with unemployed and underemployed clients to assist in their transition out of welfare programs. The Department maintained a policy, of which Berry was made aware, that employees were not permitted to discuss religion with clients or other persons in the scope of their employment. While Berry had the option of conducting client interviews outside his office cubicle, he chose to carry out over ninety percent of his client exchanges there. On more than one occasion, Berry was reprimanded by supervisors for displaying religious messages in his cubicle and placing a Bible visibly on his desk while interviewing clients. In affirming summary judgment for the Department, the Ninth Circuit stressed the importance of a balancing approach, citing the test first delineated in Pickering v. Board of Education:

151. Id. at 646.
152. The Supreme Court makes clear that the government or a governmental entity need not demonstrate a compelling interest in maintaining a law or policy of neutrality and general applicability, even if the burden to religion is substantial. See Christian Legal Soc'y v. Kane, 2006 U.S. Dist. LEXIS 27347, *79 (N.D. Cal., Apr. 17, 2006) (citing San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024, 1030 (9th Cir. 2004)).
153. Berry, 447 F.3d at 646.
154. Id.
155. Id. at 647.
156. Id. at 648-649. Pickering, 391 U.S. 563 (1968). In Pickering, a public school teacher was dismissed after writing a letter to the editor that criticized the board of education and other school administrators. The Court held that, absent any evidence the letter contained false statements, the teacher’s speech was protected by the First Amendment because it touched on a matter of public concern and the teacher exercised his right to free speech in his capacity as a citizen taxpayer rather than as a public school teacher. In its analysis, the Court noted that “[t]he problem in
Mr. Berry, of course, is entitled to seek the greatest latitude possible for expressing his religious beliefs at work. The Department, however, must run the gauntlet of either being sued for not respecting an employee’s rights . . . or being sued for violating the Establishment Clause of the First Amendment by appearing to endorse its employee’s religious expression. 157

Berry was not prohibited from discussing his religious beliefs with co-workers or displaying religious messages, praying, or reading the Bible in his cubicle when he alone occupied that space.

Rather, Berry was not permitted to undertake these activities in the presence of his clients. The Court pointed out that the “Department’s clients seek assistance from Mr. Berry in his capacity as an agent of the state . . . . It follows that any discussion by Mr. Berry of his religion runs a real danger of entangling the Department with religion.” 158 The Department had a legitimate interest in restricting Berry’s religious displays or expressions to clients to avoid giving any impression of government endorsement of those religious messages, which clients might otherwise reasonably infer. 159 Addressing the question of undue hardship, the Court acknowledged that without any statutory definition in Title VII, courts have interpreted this element on case-by-case bases. 160 Significantly, the Court went on to say that in this instance, it was not necessary to quibble over “the outer limits of ‘undue hardship’” because [t]he Department has clearly demonstrated that it cannot accommodate either Mr. Berry’s desire to discuss religion with the Department’s clients or his preference for displaying religious items in his cubicle [during client interviews]. As we have

any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” Id. at 568.

157. Berry, 447 F.3d at 650.
158. Id. at 650-51.
159. Id. at 651.
160. Id. at 655.
noted, allowing Mr. Berry to discuss religion with the Department’s clients would create a danger of violations of the Establishment Clause of the First Amendment. This constitutes an undue hardship.161

In its conclusion, the Berry Court reiterated that “[p]ublic employers such as the Department face the difficult task of charting a course between infringing on employees’ rights to the free exercise of their religions . . . and violating the Establishment Clause of the First Amendment by appearing to endorse their employees’ religious expressions.”162 A balancing test, like that in Pickering,163 was best suited to resolve “these sometimes conflicting constitutional rights by recognizing the legitimacy of the interests asserted by both sides [and providing] a chart by which a public employer may navigate a safe course.”164

PART V. ANALYSIS

As these cases illustrate, courts have developed a solid body of Title VII case law articulating flexible reasonable accommodation and undue hardship standards in the public employment sphere. In that context, religious discrimination claims have generally been decided in favor of public employers where accommodation would risk excessive entanglement. The Lemon test, including its third prong proscribing excessive church-state entanglement, remains a critical and viable standard in assessing the constitutionality of government actions intermingling with religion.165 The proposed WRFA fails to account for the particular sensitivity of public employers’ obligation to avoid any actual or apparent government endorsement of religious practices or beliefs when accommodating employees’ right to free religious

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161. Id.
162. Id. at 657.
164. Berry, 447 F.3d at 657.
165. See Vasquez v. L.A. County, 487 F.3d 1246, 1254 (9th Cir. 2007). See also Newman v. City of East Point, 181 F. Supp. 2d 1374, 1378 (N.D. Ga. 2002) (The Lemon three-part test “remains, with one notable exception, the controlling standard for Establishment Clause jurisprudence.”).
expression in the public workplace. Obviously, WRFA passage would not subordinate or supersede the heightened scrutiny accorded in the courts to First Amendment claims, and it may not wholly preclude courts from continuing to employ necessary flexibility in Title VII claims against public employers. Still, it is not clear that this area of jurisprudence would escape the WRFA unscathed. The Act’s provisions would certainly place a greater burden of accommodation on employers, to the decided advantage of religious employees. As civil rights attorney Michael J. Gray testified before a U.S. House of Representatives subcommittee,

[i]f enacted, WRFA’s more rigid accommodation standards would leave many employers without flexibility to protect appropriate religious expression of the requesting party as well as the religious beliefs of other employees. The Act arguably may create an environment ripe for reverse religious discrimination which, even if constitutional, is hardly a desired result for any interested parties.\(^\text{166}\)

Moreover, the proposed amendment runs the risk of repealing the Ansonia\(^\text{167}\) rule. In its effort to define core statutory concepts, the WRFA belies the reality that in most instances of alleged employer-employee Title VII discrimination, the specific facts of a case will be outcome determinative. This restricts employers’ and courts’ ability to pursue more flexible totality-of-the-circumstances analyses. Most worrisome is that there is nothing to suggest public employers will be immunized from possible fallout despite their good-faith efforts to comply.

The WRFA would amend Title VII by adding that to be considered reasonable an employer’s accommodation “shall remove the conflict between employment requirements and the religious observances or practice of the employee.”\(^\text{168}\) This promises to eviscerate the meaning of “reasonable,” and supplant it with a standard of absolute accommodation. At the highly sensitive crossroads of public employment and the Establishment Clause, this standard will simply not

\(^{166}\) Testimony of Michael J. Gray, \textit{supra} note 2 at 9.
\(^{167}\) \textit{479 U.S. 60} (1986).
be uniformly achievable. Consider the gridlock instance where a public employer has accommodated an employee’s religious practices or beliefs to an extent reasonable *under the circumstances* but the employee insists he or she either be permitted to continue the objectionable religious behavior or be provided with a preferred alternative. In either instance, the public employer’s constitutional duty to avoid excessive entanglement will render it impossible to “remove the conflict,” other than by disciplining or dismissing such employee. Under the WRFA, however, those actions may be considered insufficient reasonable accommodation and subject the employer to liability.

The WRFA seeks to expand the current statutory definition of “employee” to include one “who, with or without reasonable

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169. See Gawlik, *supra* note 31, at 264 (“the accommodation of ‘mutual’ compromise—one not always requiring complete removal to the extent that the employee is burden free—is the concept that the [Supreme] Court prefers.”).

170. An employer may be subject to and bound by a collective bargaining agreement or seniority system which it is not required to violate for the purpose of accommodating an employees’ religious practices. Other binding circumstances may exist as well. In *Quental*, the Connecticut Commission on the Deaf and Hearing Impaired adhered to a national code of ethics, of which the plaintiff was aware and by which she had agreed to be bound; the Commission was not required to violate these national standards in order to accommodate Quental’s religious practices while interpreting assignments. 122 F. Supp. 2d 133, 136.

171. In *Spratt*, for example, the sheriff employer maintained that accommodating was not possible in plaintiff’s case because the sheriff felt he was compelled by law not to allow religious counseling by a county social worker. 621 F. Supp. 594, 598 (W.D. Mich. 1985). The sheriff “did not ask plaintiff to shed his Christian beliefs when he came to work, but he did ask him to leave them out of his counseling.” *Id.* The court agreed: “Considering the facts of this case and the constitutional law in the area of religious practice in public institutions, Sheriff Heffron had very limited flexibility with which to accommodate plaintiff’s religious practices.” *Id.* at 600.

172. The term ‘employee’ means an individual employed by an employer, except that the term ‘employee’ shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State.
accommodation, is qualified to perform the essential functions of the employment that such individual holds or desires.\textsuperscript{173} The "essential functions" of any job will vary in every instance depending on the type of work involved, and such vague language is not instructive for employers or courts.\textsuperscript{174} It is of utmost importance that public employers in particular have some concrete idea of their constitutional duties in this area in order to act accordingly and not be penalized for their good faith efforts to comply, since difficult decisions will remain discretionary.

The cases above did not concern the public employees' literal competence to perform the jobs for which they had been hired. Robert Spratt, the prison therapist, had obtained a Bachelor of Science Degree and a Masters Degree in Social Sciences from Michigan State University.\textsuperscript{175} Angelo Rodriguez had served as an officer for the city of Chicago for nearly two decades at the time he filed his Title VII suit against the Chicago Police Department.\textsuperscript{176} Nicole Quental passed a national examination on the ethical obligations expected in providing interpreting services to the deaf.\textsuperscript{177} There is little question that each of these individuals' possessed the ability to "perform the essential functions" their jobs required. Instead, they were unable to do so without injecting personal religious beliefs into their public work, in ways that implicated actual or perceived government endorsement of religion.

The case law on reasonable accommodation under Title VII has been clear that to achieve the requisite accommodation an employer is not obligated to adopt employees' mere personal preferences. This guideline is especially crucial for public employers who face Establishment Clause duties of great consequence even as they attempt to respect religious employees' Title VII rights. While public employment \textit{per se} does not amount to the forfeiture of First Amendment or Title VII

government, governmental agency or political subdivision.
With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

\textsuperscript{174} See supra note 59.
\textsuperscript{175} Spratt, 621 F. Supp. at 596.
\textsuperscript{176} Rodriguez, 156 F.3d 771, 773-74 (7th Cir. 1998).
\textsuperscript{177} Quental, 122 F. Supp. 2d 133, 136 (D. Conn. 2000).
rights or protections, a public employee acting pursuant to official duties is not insulated from employer restraints or disciplinary measures that may be otherwise unconstitutional. In accepting public employment, an employee implicitly abdicates those rights to some degree while acting within the scope of employment (though certainly not as a private citizen). The compelling interest of avoiding entanglement leaves public employers with fewer options in accommodating employees' religious practices and beliefs in the workplace.

This is not to say public employers have no options whatsoever. Whether reasonable accommodation is possible will depend largely on considerable breadth and flexibility in public employer discretion standards. The goals of compromise and balance in the public workplace are more likely attainable if such standards remain workable. Greater flexibility sheds light on blatant abuses by employers, on the one hand, and unreasonable employee expectations on the other. Contrarily, the WRFA's unyielding definitions of "reasonable accommodation," undue hardship," and even "employee" promise less flexibility than ever for employers—public or private. Courts have tended to grant public employers sizeable latitude when presented with excessive entanglement defenses, often where only a possible misperception by the public is at stake. In this respect, the pro-employee WRFA could actually have the perverse effect of disfavoring public employees or eliminating any religious expression from the public workplace whatsoever. It may prompt public employers to become more wary in hiring practices or to adopt more restrictive, uniform workplace religious policies to avoid employee assertions of Title VII entitlement to a preferred accommodation. If a public employer knows it will not be able to remove a conflict between an employee's job requirements and that employee's religious practices altogether, the employer may be disinclined to extend employment in the first place. In turn, it may be more difficult for an employee to prove a Title VII claim for


discriminatory hiring practices than for wrongful termination. Whatever the outcome, it seems apparent the WRFA would restrict the public employer's already limited ability to promote free religious expression, as far as the Constitution permits, in the public workplace.

James Standish, the executive director of the North American Religious Liberty Association, is a prominent Seventh-Day Adventist and outspoken WRFA proponent. In the Act's defense, Standish has written:

[T]he courts may well find . . . the WRFA does not justify the refusal of essential personnel, like police officers or fire fighters, to protect individuals or entities with whom they have moral differences. But, even to the extent that a court may find that a task-based accommodation is in order in a particular case, such accommodation could not, by any stretch, be required if it meant that the services in question were no longer available to the public. Otherwise, the employer would patently be faced with an undue hardship.

Standish's argument, like the WRFA itself, does not comport with the proactive Establishment Clause mandates with which public employers must comply. Standish likewise promotes an absolutist understanding of "reasonable accommodation" even in directly addressing public protection services. He makes an exception only where "the services in question were no longer available to the public." The Quental facts reveal the inadequacy of this argument. Quental's religious beliefs did not render her interpreting services "no longer available." Rather, she insisted on injecting her beliefs in the course of providing those services. As a representative of a public

183. Id.
agency, Quental’s proselytizing was clearly outside the scope of her employment. More damning is the well-established preeminence of Establishment Clause strictures over conflicting statutory requirements. Standish appears to expect the WRFA would reach public employers and employees to some extent. There is little room, however, for imposing such heightened religious accommodation burdens upon public employers who must first and foremost repel excessive entanglement, real or perceived. The schizophrenic result under the WRFA could thus be one that thwarts public employer openness, even as it raises religious employees’ expectations of accommodation and threatens to afford favorable protection that could come only at the disadvantage of other employees or the broader public.

PART VI. CONCLUSION

It appears the WRFA’s pragmatic flaws have not gone unnoted in Congress. As this article was being written, in late September 2008, Senator John Kerry introduced the Workplace Religious Freedom Act 2008—a bill bearing little more than titular resemblance to its

184. See, e.g., Lee v. York County Sch. Div., 418 F. Supp. 2d. 816, 829 (E.D. Va. 2006) (A public school teacher’s First Amendment rights were not violated when religious messages he posted on his classroom walls were taken down, because the messages were not protected expression. In reaching this conclusion, the district court noted, “As a public school teacher, Lee used these materials to help perform his job and teach his students . . . [He did not] choose a private channel in which to express his views . . . [and] [f]urthermore, the intended audience was only his students—the very individuals around whom his employment duties revolve . . .”).

185. The text of S. 3628, 110th Cong. (2008) in its entirety is as follows:

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE
This Act may be cited as the ‘Workplace Religious Freedom Act of 2008’.

SECTION 2. AMENDMENTS
(a) Definitions—Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended—
(1) in subsection (j)—
(A) by inserting ‘(1)’ after ‘(j)’; and
(B) by adding at the end the following:
(2) For purposes of paragraph (1), the practice of wearing religious clothing or a religious hairstyle, or of taking time off for a religious reason, imposes an undue hardship on the conduct of the employer’s business in accommodating such practice only if the accommodation imposes a significant difficulty or expense on the conduct of the employer’s business when considered in light of factors set forth in section 101(10)(B) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111(10)(B)).; and
(2) by adding at the end the following:
‘(o) The term ‘taking time off for a religious reason’ means taking time off for a holy day or to participate in a religious observance.
‘(2) The term ‘wearing religious clothing or a religious hairstyle’ means—
‘(A) wearing religious apparel (as defined in section 774 of title 10, United States Code);
‘(B) wearing jewelry or other ornament as a religious practice or an expression of religious belief;
‘(C) carrying a symbolic object as required by religious observance; or
‘(D) adopting the presence, absence, or style of a person’s hair or beard as a religious practice or an expression of religious belief.’.

SECTION 3. EFFECTIVE DATE; APPLICATION OF AMENDMENTS; SEVERABILITY.
(a) Effective Date—Except as provided in subsection (b), this Act and the amendments made by section 2 take effect on the date of enactment of this Act.
(b) Application of Amendments—This Act and the amendments made by section 2 do not apply with respect to conduct occurring before the date of enactment of this Act.
(c) Severability—
(1) IN GENERAL.—If any provision of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of the amendments made by this Act and the application of the provision to any other person or circumstance shall not be affected.
(2) DEFINITION OF RELIGION.—If, in the course of determining a claim brought under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), a court holds that the application of the provision described in paragraph (1) to a person or circumstance is unconstitutional, the court shall
While the relative merits of that bill are outside the scope of this article, certain conspicuous omissions are worth pointing out. First, WRFA 2008 makes no attempt to provide a statutory definition for the terms "employee," "perform the essential functions," or "undue hardship." It dispenses with the notion of a "temporary or tangential impact on the ability to perform job functions." Second, gone is the WRFA 2007 stipulation that "to be considered to be reasonable, [an] accommodation shall remove the conflict between employment requirements and the religious observance or practice of the employee." The WRFA 2008 instead identifies two practices—wearing religious clothing or hairstyles, and taking time off for a religious reason—as ones that will amount to undue hardship only if they impose significant difficulty or expense, a determination the WRFA 2008 indicates is still to be modeled after the ADA. It goes on to define the meanings of those two practices. If nothing else, the WRFA 2008 suggests some concession that the WRFA measures proposed throughout the past 15 years were ill-suited for clarifying religious employer rights law. To be sure, the "overarching goal of amending Title VII to provide greater protections for workers' religious practices" is commendable. That protection, however, must not subordinate the civil rights of fellow employees or the public at large, and in the public sector, it cannot evade
government's Establishment Clause obligations. Any amendment to Title VII addressing religion in the workplace should account for the heightened constitutional concerns of public employers in seeking a flexible middle ground for government employees' religious expression rights, the wider public whom they serve, and the Constitution.