NOTE

The Third Circuit's Massacre of Title VII's Undue Hardship Test

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INTRODUCTION

Suppose PrisonManager, a private corporation that runs both state and federal prisons, institutes a dress policy at one of its facilities this year.[1] The policy provides that employees cannot wear hats or caps in the facility unless issued with the uniform.[2] Three Jewish employees at the facility protest, claiming that their religion requires them to wear a yarmulke.[3] The employees seek an exception to the policy, arguing that they wore yarmulkes prior to the policy's institution.[4] All three employees have been working at the prison facility for a number of years and have minimal contact with prisoners.[5] Ari dispenses medicine, Ebenezer is an intake officer, and Ahab is a correctional officer.[6] The facility's wardens threaten to fire them if they continue to wear yarmulkes at work.[7] Eventually, the wardens fire Ari for wearing a yarmulke to work.[8] The three employees complain to the Equal Employment Opportunity Commission ("EEOC") that PrisonManager's actions violate Title VII of the Civil Rights Act of 1964 ("Title VII").[9] Can the EEOC bring a successful religious discrimination action on behalf of the employees?[10]

If the presiding court follows *EEOC v. Geo Group, Inc.*, a recent Third Circuit Court of Appeals decision, the answer is likely no.[11] PrisonManager's assertion that yarmulkes create a safety risk could bar recovery for the employees.[12] As a general rule, Title VII prohibits employers from discriminating based on an employee's religious observance or practice.[13] Employers must provide reasonable accommodations for religious observance and practice. However, if a specific observance creates an undue hardship for the employer, the

[1] This hypothetical is based on the fact pattern of *EEOC v. Geo Group, Inc.*, 616 F.3d 265 (3d Cir. 2010), and all parties are fictitious.

[2] *See supra* note 1.

[3] *See supra* note 1.

[4] *See supra* note 1.

[5] *See supra* note 1.

[6] *See supra* note 1.

[7] *See supra* note 1.

[8] *See supra* note 1.

[9] *See supra* note 1.

[10] *See* EEOC v. Geo Group, Inc., 616 F.3d 265, 267 (3d Cir. 2010), (discussing plaintiff's suit against Geo Group, Inc. alleging religious discrimination).

[11] *See infra* Part III (discussing Third Circuit's decision in *Geo Group, Inc.*).

[12] *See Geo Group, Inc.*, 616 F.3d at 275 (rejecting plaintiffs' religious discrimination claim based on safety risk created by head covering).

[13] *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006).

employer may ask the employee to forsake religious observance.[14] If the employee refuses to comply, the employer will not be liable for discrimination under Title VII if it decides to terminate the employee. Previous Third Circuit cases shift the burden of proving undue hardship to the employer.[15] If the employer proves undue hardship and asks the employee to comply, the employee must forsake religious observance or risk being subject to an adverse employment action by the employer.

This Note argues that the Third Circuit erred in holding that a religious headscarf, often called a khimar in the Islamic faith, poses a safety risk and undoubtedly creates an undue hardship for a prison.[16] Part I describes summary judgment standards, Title VII, burden shifting in Title VII cases, and the importance of safety to the employer.[17] Part II examines the Third Circuit's decision in *EEOC v. Geo Group, Inc.*,[18] where the court granted summary judgment to the employer.[19] Part III argues that the Third Circuit erred in its analysis.[20] First, the court misapplied the standard for granting summary judgment.[21] Second, the court should have raised the issue that the employer's policy may have a disparate impact on females practicing the Islamic faith.[22] Finally, the Third Circuit's decision opened up a Pandora's Box because it did not provide guidance for resolving religious discrimination cases.[23] Therefore, the Supreme Court should overturn *Geo Group*.[24]

I. BACKGROUND

The Third Circuit's decision in *Geo Group* raises questions about the burden shifting standard under Title VII.[25] To evaluate the decision,

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[14] *See id.* § 2000e(j).

[15] *See* Webb v. City of Phila., 562 F.3d 256, 256 (3d Cir. 2009); Protos v. Volkswagen of Am., Inc., 797 F.2d 129, 129 (3d Cir. 1986).

[16] *See infra* Part III.

[17] *See infra* Part I.

[18] *See infra* Part II.

[19] *See infra* Part II.

[20] *See infra* Part III.

[21] *See infra* Part III.A.

[22] *See infra* Part III.B.

[23] *See infra* Part III.C.

[24] *See infra* Part III.

[25] *See generally* EEOC v. Geo Group, Inc., 616 F.3d 265 (3d Cir. 2010) (granting summary judgment without requiring employer to meet burden of showing undue hardship).

this Part first describes the standards of summary judgment.[26] It then provides an explanation of Title VII and relevant case precedent.[27] With this basis in place, this Part then summarizes the function of a khimar.[28] Finally, this Part examines the Third Circuit's application of the undue hardship test and applicable free exercise doctrine.[29]

A. Summary Judgment Standards

The Federal Rules stipulate that a party can win without a trial by demonstrating that there is no genuine issue of material fact.[30] The movant bears the initial burden of production.[31] Specifically, the movant must show that the existing record contains no evidence that will allow the other side to prove the essential elements of its case.[32] However, the movant cannot obtain summary judgment if there is any evidence allowing a reasonable inference in the nonmoving party's favor.[33] Moreover, courts construe all evidence in favor of the party opposing summary judgment.[34]

Judges do not weigh evidence or make findings of fact at the summary judgment stage.[35] Rather, their job is simply to determine whether there is a genuine issue for trial.[36] They must ask whether a reasonable jury could rule in favor of the plaintiff based on the

[26] *See infra* Part I.A.

[27] *See infra* Part I.B.

[28] *See infra* Part I.C.

[29] *See infra* Part I.D.

[30] FED. R. CIV. P. 56(c).

[31] *See id.*

[32] *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

[33] *See id.* at 331 n.2 (discussing moving party's stringent burden of persuasion); *see also In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 258 (1983).

[34] *See* Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 601 (1986); *see also* Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 456 (1992); Peters v. Del. River Port Auth., 16 F.3d 1346, 1349 (3d Cir. 1994); Transmodal Corp. v. EMH Assocs., No. 09-3057, 2010 U.S. Dist. LEXIS 104991, at *8 (D.N.J. Oct. 1, 2010).

[35] *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) (stating that judge does not weigh evidence or make findings of fact); *see also* Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150 (2000) (citing *Liberty Lobby, Inc.*); Lytle v. Household Mfg., Inc., 494 U.S. 545, 554-55 (1990) (same).

[36] *See Liberty Lobby, Inc.*, 477 U.S. at 249 (noting that judge's function is to determine if genuine issue exists); *see also* Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992); Gray v. York Newspapers, Inc., 957 F.2d 1070, 1087 (3d Cir. 1992).

evidence.[37] Discussion of these summary judgment standards is common in Title VII litigation.[38]

B. Understanding Title VII

In 1964, rampant employment discrimination garnered national attention, spurring Congress to enact Title VII.[39] This Act prohibits employment discrimination based on race, color, religion, sex, or national origin.[40] The Act defines religion as any aspect of observance or practice, including beliefs.[41]

In addition to the prohibition against religious discrimination, employers must provide a reasonable accommodation for the employee's religious practices. If accommodation of an employee's religious observance causes undue hardship to the employer's business, the employer may ask the employee to forsake the practice.[42] The employer must demonstrate the undue hardship.[43] Title VII is silent on how an employer may satisfy this undue hardship

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[37] *Liberty Lobby, Inc.*, 477 U.S. at 252.

[38] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2006); *see* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (noting that Congress enacted Title VII to eliminate discriminatory practices); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (observing that Congress enacted Title VII to respond to racially stratified job environments); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (stating Congress enacted Title VII to remove barriers that favor white employees); Joan M. Savage, *Adopting the EEOC Deterrence Approach to the Adverse Employment Action Prong in a Prima Facie Case for Title VII Retaliation*, 46 B.C. L. REV. 215, 218 (2004) (noting that Congress enacted Title VII to achieve equality of employment opportunities).

[39] *See* sources cited *supra* note 38.

[40] *See* 42 U.S.C. § 2000e-2(a); David A. Brennan, *The Power of the Treasury: Racial Discrimination, Public Policy, and "Charity" in Contemporary Society*, 33 UC DAVIS L. REV. 389, 440 (2000) (discussing historical application of civil rights laws); John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 FORDHAM L. REV. 423, 473 (2002).

[41] *See* 42 U.S.C. § 2000e(j); Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 411 (1997); Marion K. McDonald, *Establishment Clause Challenge to Mandatory Religious Accommodation in the Workplace*, 36 HASTINGS L.J. 121, 123 (1984) (discussing inclusion of beliefs).

[42] *See* 42 U.S.C. § 2000e(j); Laurel A. Bedig, *The Supreme Court Narrows an Employer's Duty to Accommodate an Employee's Religious Practices Under Title VII:* Ansonia Board of Education v. Philbrook, 53 BROOK. L. REV. 245, 245-46 (1987).

[43] *See* sources cited *supra* note 42.

requirement,[44] however, the Supreme Court has stated that undue hardship is not a difficult threshold to pass.[45]

Title VII's objective is to ensure equality of employment opportunities and remove barriers that favor one group of employees over others.[46] The Supreme Court interprets Congress's intent as requiring removal of arbitrary, unnecessary, and artificial barriers to employment.[47] Moreover, the Court prohibits employers from implementing any practice, procedure, or test that is unrelated to job performance.[48] Good intent will not excuse the employer's practice if it discriminates against minorities and does not measure job capability.[49]

The Supreme Court recognizes two types of Title VII claims: disparate impact claims[50] and disparate treatment claims.[51] The complainant in a traditional disparate treatment case must first establish a prima facie case of discrimination.[52] If the complainant meets this requirement, the burden then shifts to the employer to express a legitimate, nondiscriminatory reason for rejecting

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[44] *See* Bedig, *supra* note 42, at 246 (discussing lack of definition for undue hardship); Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575, 585 (2000) (discussing Supreme Court's interpretation of undue hardship).

[45] *See* Trans World Airlines v. Hardison, 432 U.S. 63, 84 (1977) (discussing additional costs to employer as minimal threshold of undue hardship test).

[46] *See* Connecticut v. Teal, 457 U.S. 440, 448 (1982) (discussing Congress's objectives in enacting Title VII); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975) (discussing purpose of Title VII); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971); D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent*, 60 S. CAL. L. REV. 734, 750 (1987) (discussing Supreme Court's comments on Title VII's purpose); Claude Platton, Note, *Title VII Disparate Impact Suits Against State Governments After* Hibbs *and* Lane, 55 DUKE L.J. 641, 651 (2005) (citing *Griggs*'s understanding of statute's purpose).

[47] *See Griggs*, 401 U.S. at 430-31.

[48] *See id.* at 431.

[49] *See id.* at 432.

[50] *See, e.g.*, *Griggs*, 401 U.S. at 431 (1971) (discussing prohibition on practices that are fair in form, but discriminatory in operation).

[51] *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801-02 (1973) (discussing Title VII's prohibition of racial discrimination and unequal treatment).

[52] *See McDonnell Douglas Corp.*, 411 U.S. at 802; Nicole J. DeSario, Note, *Reconceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law*, 38 HARV. C.R.-C.L. L. REV. 479, 483 (2003) (discussing parties' respective burdens); Margaret E. Johnson, Comment, *A Unified Approach to Causation in Disparate Treatment Cases: Using Sexual Harassment by Supervisors as the Causal Nexus for the Discriminatory Motivating Factor in Mixed Motive Cases*, 1993 WIS. L. REV. 231, 234 (discussing complainant's burden to establish prima facie case).

accommodation.[53] The employer's legitimate reasons must be clear and reasonably specific,[54] and these reasons must be set forth via introduction of admissible evidence.[55] After an employer introduces a legitimate, nondiscriminatory reason for rejecting accommodation, the employee can demonstrate that the employer's reasons are a pretext for true discriminatory motivation.[56]

In a disparate impact case, the plaintiff attempts to demonstrate that a neutral rule, fair on its face, has a disproportionate effect on persons protected under Title VII compared to the majority group.[57] The Supreme Court addressed the disparate impact method of proving a Title VII violation in *Griggs v. Duke Power Company*.[58] In *Griggs*, the plaintiff showed that the employer's neutral policies, an employment qualification test, had a disproportionate impact on African-Americans by eliminating far more African-Americans than Caucasians from jobs.[59] Typically, a showing of disproportionate impact is sufficient to require the employer to explain that the rule or practice relates to job performance.[60] According to *Griggs*, the defendant has the burden of proof once the plaintiff demonstrates disparate impact. Thus, in the next stage of the analysis, courts will examine whether the alleged

[53] *See McDonnell Douglas Corp.*, 411 U.S. at 802; *see also* Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1060-62 (9th Cir. 2002) (discussing employer's legitimate nondiscriminatory reason of damage caused to aircraft for firing airline ground personnel who brought sex-discrimination and retaliatory discrimination charges).

[54] *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 (1981); Loeb v. Textron, Inc., 600 F.2d 1003, 1011 n.5 (1st Cir. 1979) (discussing defendant's obligation to provide specific reasons); *see also* Julia Lamber, *Alternatives to Challenged Employee Selection Criteria: The Significance of Nonstatistical Evidence in Disparate Impact Cases Under Title VII*, 1985 WIS. L. REV. 1, 14 n.45 (discussing specificity requirement).

[55] *See Burdine*, 450 U.S. at 255.

[56] *See McDonnell Douglas Corp.*, 411 U.S. at 807. *See generally* Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation:* St. Mary's Honor Center v. Hicks*, Pretext, and the "Personality" Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183 (1997) (discussing role of pretext); Leland Ware, *Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMP. RTS. & EMP. POL'Y J. 37 (2000) (discussing pretext as adequate foundation for inference of discriminatory motive).

[57] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971) (discussing whether diploma and intelligence test requirement had disproportionate impact on African-American applicants).

[58] *Id.* at 424.

[59] *See id.* at 430 n.6.

[60] *Id.* at 431.

discriminatory employment practice bears "a demonstrable relationship to successful performance of the job."[61]

It is important to note that the plaintiffs in *Geo Group* brought the action as a *reasonable accommodation* case. The plaintiffs did not claim that the prison was discriminating against them in the traditional sense. Rather, they brought this suit because the employer would not provide reasonable accommodations for their religious practices.[62] There is a different proof structure for reasonable accommodation cases. An employee who seeks religious accommodation must notify the employer of the need for accommodation and demonstrate that the need is due to a conflict between religion and work.[63] The employee must explain the religious nature of the belief or practice at issue; the employee cannot assume that the employer will already know or understand it.[64] Once the employer is aware of the employee's religious conflict, the employer should obtain additional information, if needed, to determine whether an accommodation is available without posing an undue hardship on the operation of the employer's business.[65] The employer must either provide accommodation or prove that the accommodation would result in an undue hardship on the employer.[66]

C. What Is a Khimar?

In the case at hand, it is important to understand the function of a khimar because the employees seek an exception from the employer's dress policy in order to wear the khimar to observe their faith. Muslim women wear a traditional headscarf called a khimar.[67] The khimar

[61] *Id.*

[62] EEOC v. Geo Group, Inc., 616 F.3d 265, 270 (3d Cir. 2010).

[63] *See* Seshadri v. Kasraian, 130 F.3d 798, 800 (7th Cir. 1997) (employee who seeks accommodation need not belong to established church but cannot preclude inquiry into whether he has religion); Chrysler Corp. v. Mann, 561 F.2d 1282, 1285 (8th Cir. 1977) (observing that plaintiff "did little to acquaint Chrysler with his religion and its potential impact upon his ability to perform his job").

[64] *See* cases cited *supra* note 63.

[65] *See* Kenner v. Domtar Indus., No. 04-CV-4021, 2006 WL 662466, at *1 (W.D. Ark. Mar. 13, 2006) ("Title VII's reasonable accommodation provisions contemplate an interactive process, with cooperation between the employer and the employee, but which must be initiated by the employer"); Cosme v. Henderson, No. 98 CIV. 2754(VM), 2000 WL 1682755, at *6 (S.D.N.Y. Nov. 9, 2000) ("The process of finding a reasonable [religious] accommodation is intended to be interactive process in which both employer and employee participate."), *aff'd*, 287 F.3d 152 (3d Cir. 2002).

[66] *See supra* notes 42-44.

[67] Webb v. City of Phila., 562 F.3d 256, 258 (3d Cir. 2009).

covers a woman's hair and the back of her neck, but does not cover her face or ears.[68] Many Muslim women believe that the Islamic faith requires them to wear a khimar.[69] The *Koran*, which Muslims believe is the word of God, conveys the significance of the headscarf in the Islamic tradition.[70] Women who choose to wear the headscarf point to the *Koran* as the source of God's command.[71]

Alternatively, some women see the headscarf as a freedom of religion issue.[72] To these women, wearing the headscarf is a manifestation of a woman's right to freedom of religion and expression. The Supreme Court has yet to address the issue of headscarves in its free exercise of religion jurisprudence.[73] The Third Circuit, however, has addressed headscarves in the employment context.[74]

D. The Undue Hardship Test in the Third Circuit

The Third Circuit has considered Title VII reasonable accommodation cases on numerous occasions. Its approach is inconsistent, as evidenced by the following two cases.

1. Fact and Magnitude of Hardship — *Protos v. Volkswagen of America, Inc.*

The court in *Protos v. Volkswagen of America, Inc.* considered religious accommodation and Title VII's undue hardship test.[75] The plaintiff, Angeline Protos, was a member of a church that prohibited work during the Saturday Sabbath.[76] Failure to observe the Sabbath was, in fact, cause for excommunication.[77] Volkswagen, Protos' employer, assigned Protos mandatory overtime work on a significant

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68 *See id.*

69 *See* EEOC v. Geo Group, Inc., 616 F.3d 265, 266 (3d Cir. 2010). *See generally* Adrien K. Wing & Monica N. Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban*, 39 UC DAVIS L. REV. 743 (2006) (discussing headscarf's significance in Islam).

70 *See* Wing & Smith, *supra* note 69, at 750.

71 *See id.* (citing KORAN 7:26).

72 *See id.* at 760 (discussing headscarf as freedom of religion issue in democracies).

73 *See id.* at 775-76 (stating that Supreme Court has not addressed headscarf issue in its jurisprudence).

74 *See infra* Part I.D.

75 Protos v. Volkswagen of Am., Inc., 797 F.2d 129, 129 (3d Cir. 1986).

76 *Id.* at 131.

77 *Id.*

number of Saturdays.[78] Protos submitted a note to Volkswagen from her minister explaining that no exceptions existed for the prohibition on labor during the Sabbath.[79] Volkswagen continued to schedule Protos to work on Saturdays, and she missed each shift.[80] Ultimately, Volkswagen fired Protos.[81] Protos brought suit, claiming that Volkswagen could accommodate her religious practice without undue hardship.[82]

The district court held that Volkswagen could accommodate Protos without undue hardship and at no cost;[83] therefore, Volkswagen violated Title VII.[84] The Third Circuit reviewed to determine if accommodation would incur a *de minimis* cost to Volkswagen.[85] Specifically, the court looked at the fact and magnitude of hardship on Volkswagen[86] by analyzing the regulation's impact on workplace efficiency.[87] The Third Circuit affirmed, holding that the employer could accommodate the plaintiff without incurring more than a *de minimis* cost.[88] The court noted that Volkswagen could simply replace the plaintiff with other workers on Saturdays.[89] *Protos*'s impact, however, is unclear since the Third Circuit's decision in *Webb v. City of Philadelphia*.[90]

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[78] *See id.* at 131-32.

[79] *See id.*

[80] *See id.*

[81] *See id.* at 132.

[82] *See id.*

[83] *See id.*

[84] *See id.*

[85] *See id.* at 133-34 (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)).

[86] *See id.* at 134 (determining that whether particular accommodation creates hardship on employer constitutes fact-specific inquiry that considers both magnitude and fact of hardship).

[87] *See id.* at 135 (discussing whether efficiency decreased).

[88] *See id.*

[89] *See id.*; *cf.* Brown v. Gen. Motors Corp., 601 F.2d 956, 960-61 (8th Cir. 1979) (explaining that GM did not incur any additional costs in form of overtime or wages from plaintiff's absence due to available personnel "filling in," and moreover, stating that employer testified that plaintiff's absence was "drop in the bucket" in terms of lost efficiency on assembly line). *But cf.* Jordan v. N.C. Nat'l Bank, 565 F.2d 72, 76 (4th Cir. 1977) (holding that demand to take every Saturday off was unreasonable).

[90] *See infra* Part I.D.2.

2. Need for Uniformity — *Webb v. City of Philadelphia*

Webb v. City of Philadelphia represents the Third Circuit's most recent decision on religious accommodation in the employment context.[91] In *Webb*, the plaintiff was a Muslim woman employed as a city police officer since 1995.[92] In 2003, she requested permission to wear a khimar while on duty and in uniform.[93] The police department refused, citing that its dress code policy does not authorize wearing religious symbols or garb.[94] In 2005, Webb filed suit against the City of Philadelphia, asserting a Title VII religious discrimination claim, among others.[95]

The district court granted summary judgment to the City on the Title VII claim, holding that religious accommodation would create an undue hardship for the employer.[96] The court reasoned that the police dress code promotes the need for uniformity and enhances cohesiveness, cooperation, and the *esprit de corp*s of the police.[97]

In its analysis, the Third Circuit examined the police commissioner's testimony[98] and concluded that the commissioner's reasons for denying accommodation were sufficient to show more than a *de minimis* cost and, thus, demonstrated undue hardship.[99] Moreover, the Third Circuit stated that safety is of the utmost importance in the police context.[100] It reasoned that uniform requirements are essential to the safety of officers.[101] Using this rationale, the Third Circuit affirmed the district court's grant of summary judgment on the Title VII claim.[102] As evidenced by these two cases, the application of the undue hardship test in the Third Circuit is inconsistent — it may turn on economic cost to the

[91] Webb v. City of Phila., 562 F.3d 256 (3d Cir. 2009).

[92] *See id.* at 258.

[93] *Id.*

[94] *Id.*

[95] *See id.* (Webb asserted three causes of action under Title VII — religious discrimination, retaliatory or hostile work-environment, and sex discrimination).

[96] *See id.* at 258-59.

[97] *See id.* at 258.

[98] *See id.* at 261-62 (discussing Commissioner Johnson's statements about religious neutrality as vital in dealing with public and working cooperatively).

[99] *See id.* at 262.

[100] *See id.* (citing Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999)).

[101] *See id.*

[102] *See id.*

employer, or, alternatively, on whether a lack of uniformity may lead to additional, non-economic costs.

E. Free Exercise in the Third Circuit

In addition to religious discrimination claims under Title VII, employees can also bring claims under the First Amendment's Free Exercise Clause. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark* is an influential case involving free exercise principles and an employer's concerns for uniformity.[103] In *Fraternal Order*, the plaintiffs were officers in the Newark Police Department.[104] The police department had a grooming policy that prohibited beards.[105] The policy contained exemptions for undercover officers and those with a medical need.[106] Officers Abdul-Aziz and Mustafa were Muslims who believed they had a religious obligation to grow beards.[107] The police department threatened disciplinary action for the officers' noncompliance with the grooming policy.[108] The officers subsequently filed a complaint alleging violation of their rights under the Free Exercise Clause of the First Amendment.[109] The district court held that the police department's policy was unconstitutional because it allowed secular exemptions but not religious exemptions.[110] The court permanently enjoined the department from disciplining the two officers.[111]

The Third Circuit reviewed to determine if the department's policy unconstitutionally devalued the officers' religious beliefs.[112] The court looked at the department's reason for having a secular exemption and found that it existed to comply with federal law, namely the Americans with Disabilities Act.[113] The court stated that Title VII places an identical legal obligation on employers to accommodate

[103] Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 359 (3d Cir. 1999).

[104] *See id.* at 360.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *See id.* at 361.

[109] *Id.*

[110] *See id.* at 360.

[111] *Id.*

[112] *See id.* at 365.

[113] *See id.* (finding that police department has secular exemption to comply with Americans with Disabilities Act).

religious beliefs.[114] The Third Circuit affirmed the district court's disposition and held that the secular exemption undermined the department's interest in uniform appearance.[115] *Fraternal Order*'s juxtaposition of free exercise principles with the interest in uniformity was influential in the Third Circuit's recent decision in *EEOC v. Geo Group, Inc*.[116]

II. *EEOC v. Geo Group, Inc.*

The Third Circuit's recent ruling in *EEOC v. Geo Group, Inc.* highlights the application of Title VII's undue hardship test.[117] In *Geo Group*, the court discussed whether accommodating the plaintiff's religious practices would cause more than a *de minimis* cost to the employer.[118] The Third Circuit concluded that Geo Group's interest in safety trumped religious accommodation for its employees.[119]

In *Geo Group*, the Third Circuit examined a religious discrimination claim brought by the EEOC against a private corporation operating prison facilities.[120] The EEOC represented a group of three Muslim women employed by Geo Group at the Hill Facility in Pennsylvania.[121] In April 2005, the Hill Facility adopted a dress policy that prohibited wearing hats or caps unless issued with the uniform.[122] The prison instituted the policy for safety and security reasons.[123] The rationale behind the policy was to prevent the introduction of contraband into the facility and to avoid misidentification.[124] After implementing this policy, Geo Group allowed employees to wear black baseball hats with the company's logo.[125] Any exceptions required authorization by the prison's warden.[126]

Three Muslim women employees protested,[127] claiming that the Islamic faith requires women to wear a khimar.[128] They asked for an

[114] *Id.*
[115] *See id.* at 366-67.
[116] *See* EEOC v. Geo Group, Inc., 616 F.3d 265, 274-75 (3d Cir. 2010).
[117] *See id.* at 273.
[118] *Id.*
[119] *Id.*
[120] *Id.* at 265.
[121] *Id.*
[122] *Id.* at 267-68.
[123] *Id.* at 272.
[124] *Id.*
[125] *Id.* at 267-68.
[126] *Id.* at 268.
[127] *Id.*

exception to the policy, noting that they all wore a khimar prior to the policy's adoption.[129] The prison warden refused their request and threatened to fire two of the women if they did not remove their khimars.[130] Both of these women had minimal contact with the prison inmates.[131] The warden threatened the third employee with suspension.[132]

On behalf of the plaintiffs, the EEOC filed an action against Geo Group in the U.S. District Court for the Eastern District of Pennsylvania.[133] Geo Group moved for summary judgment, asserting that accommodating its employees would pose an undue hardship.[134] The district court granted Geo Group's motion, relying on the Third Circuit's reasoning in *Webb*.[135] The court found no significant difference existed between prison employees and police officers.[136] Thus, the court held that a uniform dress code enhances cohesiveness, cooperation, and the *esprit de corps* of the prison employees. The EEOC then appealed the district court's decision.[137]

The Third Circuit affirmed the district court's grant of summary judgment.[138] The court held that religious accommodations creating a safety or security risk constitute an undue hardship for an employer-prison.[139] The court also stated that *Webb* was relevant by analogy because the police force's uniformity interests also arise in a prison setting.[140] However, the court withheld its reasoning as to why prison employees with varying jobs have similar interests to police officers in the line of duty.

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[128] *Id.*

[129] *Id.*

[130] *See id.* at 269.

[131] *See id.* at 268-69 (noting that Sharpe-Allen dispenses medicine and King does paperwork).

[132] *Id.* at 269 (noting that Moss was correctional officer who had limited contact with inmates).

[133] EEOC v. Geo Group, Inc., No. 07-cv-04043-JF, 2009 WL 1382914, at *1 (E.D. Pa. May 18, 2009).

[134] *Geo Group, Inc.*, 616 F.3d at 267.

[135] *Id.* at 270 (finding that the need for uniformity exists in the prison context because there is no meaningful distinction between prison employees and police officers).

[136] *Id.*

[137] *Id.* at 265.

[138] *Id.* at 274.

[139] *Id.*

[140] *Id.* at 273.

The prison warden's rationale for denying the religious accommodation was the safety risk posed by the khimars — namely, contraband smuggling and attacks on employees.[141] The Third Circuit acknowledged, however, that Geo Group had no reports of contraband smuggling, misidentification, or attacks on employees.[142] Nevertheless, the court concluded that accommodating the Muslim women posed these risks.[143] The court may have determined that these potential risks were reasonable and sufficient to satisfy the employer's minimal burden under the undue hardship test. Therefore, the court held that preventing Geo Group's ability to counter the risks was inappropriate because employee safety was a top priority.[144] However, the Third Circuit was wrong because there was no evidence of contraband smuggling and the employees in this case had minimal contact with prison inmates.

III. ANALYSIS

The Third Circuit, in *EEOC v. Geo Group, Inc.*, incorrectly held that khimars undoubtedly create an undue hardship for the prison facility.[145] First, the Third Circuit misapplied the standard for granting summary judgment, and the case is distinguishable from *Webb*.[146] Second, the Third Circuit should have raised, *sua sponte*, the issue of disparate impact on females practicing the Islamic faith.[147] Finally, the Third Circuit's analysis creates a generalized rule that contradicts Title VII's policy of removing barriers that favor one group of employees over others.[148]

A. *The Third Circuit Erroneously Relied on* Webb *and Misapplied the Standard of Review for Summary Judgment*

In order to win on summary judgment, the movant must show that the existing record contains no evidence that will allow the other side to prove the essential elements of its case.[149] In *Geo Group*, the Third Circuit held that *Webb*'s uniformity rationale is dispositive and no

[141] *Id.*
[142] *Id.* at 274.
[143] *Id.*
[144] *Id.*
[145] *See infra* Part III.
[146] *See infra* Part III.A.
[147] *See infra* Part III.B.
[148] *See infra* Part III.C.
[149] *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); *supra* Part I.A.

significant difference between prison guards and police officers exists.[150] As a result, the court erred in automatically evaluating the facts under *Webb*'s "uniformity and cohesiveness" standard.[151] The court should not have assumed that prison guards must be uniform in appearance and act cohesively, as police officers must.[152] In *Webb*, the court found that allowing female officers to wear khimars compromises the police's interest in promoting its values, thus creating an undue hardship.[153] These values were impartiality, religious neutrality, uniformity, and the subordination of personal preference to better serve and protect the public.[154] However, the *Geo Group* court simply did not consider enough evidence to support the same finding as *Webb*.[155] The court simply considered the warden's statements that accommodating khimars poses a safety risk to all employees.[156] In doing so, the court failed to apply the correct standard for summary judgment.[157]

The court in *Geo Group* determined that no genuine issue of material fact existed over which a factfinder could disagree.[158] Its decision misapplied summary judgment standards. The Supreme Court, in *Celotex v. Catrett*, clearly described the instances when summary judgment is inappropriate: where there exists a disputed

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[150] *See* EEOC v. Geo Group, Inc., 616 F.3d 265, 273-74 (3d Cir. 2010).

[151] *Compare id.* at 273 (stating court's belief that same issues exist in private prison and police context), *with* Webb v. City of Phila., 562 F.3d 256, 261 (3d Cir. 2009) (noting uniformity as symbol of neutral government authority), *and* Sami Hasan, Comment, *Veiling Religion In The Force: The Validity of "Religion-Neutral Appearance" As An Employer*, 9 UCLA J. ISLAMIC & NEAR E.L. 87, 90 (2010) (describing police as most visible arm of government).

[152] *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) (discussing that judge's function is to not make assumptions); Hasan, *supra* note 151, at 92 (same); *see also* Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150 (2000) (citing *Liberty Lobby, Inc.*).

[153] *See Webb*, 562 F.3d at 261-62 (discussing police department's mission).

[154] *Id.*

[155] *Compare Geo Group, Inc.*, 616 F.3d 265 (relying on speculative statements regarding prison's interests), *with* Price Waterhouse v. Hopkins, 490 U.S. 228, 241-42 (1989) (stating that stereotyping can create inference of discrimination under Title VII), *and* Courtney T. Nguyen, Note, *Employment Discrimination and the Evidentiary Standard for Establishing Pretext:* Weinstock v. Columbia University, 35 UC DAVIS L. REV. 1305, 1339 (2002) (discussing evidentiary standards).

[156] *See Geo Group, Inc.*, 616 F.3d at 281.

[157] *Compare Geo Group, Inc.*, 616 F.3d 265 (weighing evidence and drawing inferences), *with Liberty Lobby, Inc.*, 477 U.S. 242 (prohibiting judges from weighing evidence and drawing inferences), *and* Cook v. Chrysler Corp., 981 F.2d 336, 339 (8th Cir. 1992) (comparing speculative evidence with tangible evidence).

[158] *See Geo Group, Inc.*, 616 F.3d at 274.

question of fact.[159] In *Geo Group*, the plaintiffs raised a disputed question of fact — whether accommodating the wearing of a headscarf is an undue hardship on the employer.[160] For example, the plaintiffs introduced evidence that other employees wore hats, such as baseball caps, despite the policy's ban on any head covering aside from those issued with a uniform. Thus, the *Geo Group* court should have treated the wardens' statements asserting the presence of undue hardship as disputed questions of fact.[161] Instead, the court improperly weighed the evidence and drew inferences.[162] The court improperly inferred that khimars will increase contraband smuggling and are potentially a choking device that an inmate may use against the women.[163]

Furthermore, analogizing to *Webb*, the court concluded that the prison has a legitimate interest in uniformity of appearance.[164] Surprisingly, the prison itself did not make this argument — the court drew this inference on its own. This inferential leap is a deviation from the Supreme Court's summary judgment precedent. In *Anderson v. Liberty Lobby*, the Supreme Court prohibited judges from drawing such inferences at the summary judgment stage.[165] Accordingly, the *Geo Group* court failed to follow the standard of review set out by the Supreme Court.[166]

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[159] *See* Celotex Corp. v. Catrett, 477 U.S. 317, 330 n.2 (1986) (citing Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (stating that existence of evidence from which reasonable inference in plaintiffs' favor may be drawn precludes moving party from obtaining summary judgment)); United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

[160] *See Geo Group, Inc.*, 616 F.3d at 267.

[161] *Compare id.* at 272 (discussing EEOC's argument that wardens' statements are speculative and conclusory), *with* Smith v. Pyro Mining Co., 827 F.2d 1081, 1086 (6th Cir. 1987) (discussing skepticism of hypothetical hardships), *and* Brown v. Gen. Motors Corp., 601 F.2d 956, 961 (8th Cir. 1979) (criticizing speculation).

[162] *See Geo Group, Inc.*, 616 F.3d at 270-74.

[163] *See id.* at 272-73 (discussing court's belief that warden's statements are true).

[164] *See id.* at 273 (discussing court's assumption that warden's testimony concerning lack of uniformity translates to need for uniformity).

[165] *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986) (discussing role of judges at summary judgment stage); *see also* Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150 (2000) (citing *Liberty Lobby, Inc.*); Lytle v. Household Mfg., Inc., 494 U.S. 545, 554-55 (1990) (same); Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 64 (1991) (discussing court's role at summary judgment stage); Ware, *supra* note 56, at 41 (discussing that court must refrain from making credibility determinations at summary judgment stage); Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead, Whither* McDonnell Douglas?, 53 EMORY L.J. 1887, 1946 (2004) (discussing judge's role at summary judgment stage).

[166] *Compare Geo Group, Inc.*, 616 F.3d at 270-74 (employing activist approach to

Proponents of the Third Circuit's decision in *Geo Group* may argue that reliance on *Webb* is appropriate.[167] Both decisions dealt with khimar-wearing women working in a law enforcement context.[168] Further, the values of impartiality, religious neutrality, and uniformity noted in *Webb* are essential in the prison context as well.[169] Moreover, the police department in *Webb* was concerned about the safety of its officers because safety affects police morale.[170] Similarly, the prison wardens were concerned about the safety of their employees because they dealt with dangerous criminals.[171]

The argument for adhering to *Webb* fails, however, because the interests of the prison did not mirror the interests of the police department.[172] Both cases involved employers who asked employees to cover their heads while working among criminals or potential criminals; yet, the prison context is different from a police force.[173] Women working at prison are not in a public setting.[174] People easily identify police officers and develop confidence in them based on the police's uniform appearance in public.[175] The police department's

summary judgment), *with Reeves*, 530 U.S. at 150 (discussing limited role of judges at summary judgment stage), *and Lytle*, 494 U.S. at 554-55 (same).

[167] *See Geo Group, Inc.*, 616 F.3d at 270-73 (stressing paramilitary context and similar fact scenario); *see also* Karipidis v. Ace Gaming LLC, No. 09-3321, 2010 U.S. Dist. LEXIS 56617, at *16 (D.N.J. June 9, 2010) (following *Webb*); Wallace v. City of Phila., No. 06-4236, 2010 U.S. Dist. LEXIS 42437, at *22 (E.D. Pa. Apr. 26, 2010) (same).

[168] *See generally Geo Group, Inc.*, 616 F.3d 265 (discussing khimar-wearing prison employees); Webb v. City of Phila., 562 F.3d 256 (3d Cir. 2009) (discussing khimar-wearing police officer).

[169] *See Geo Group, Inc.*, 616 F.3d at 272 (discussing values implicated in prison context); *see also* Stephen Lewis Rabinowitz, Note, Goldman v. Secretary of Defense*: Restricting the Religious Rights of Military Servicemembers*, 34 AM. U. L. REV. 881, 890-91 (1985) (discussing importance of uniformity in prison context); Jeri Nazary Sute, Comment, *Reviving RFRA: Congressional Use of Treaty-Implementing Powers to Protect Religious Exercise Rights*, 12 EMORY INT'L L. REV. 1535, 1545 (1998) (discussing interest in uniformity of appearance).

[170] *See Webb*, 562 F.3d at 262 (discussing importance of safety interest).

[171] *See Geo Group, Inc.*, 616 F.3d at 273 (discussing safety of employees as top priority).

[172] *Compare id.* at 271-73 (discussing concerns about smuggling of contraband and narcotics), *with Webb*, 562 F.3d at 261-62 (discussing values and overall policing mission), *and* Hasan, *supra* note 151, at 90 (discussing policing mission).

[173] *See* sources cited *supra* note 172.

[174] *See generally Geo Group, Inc.*, 616 F.3d 265 (discussing minimal contact between women employees at hand and inmates, and no contact with public).

[175] *See Webb*, 562 F.3d at 262 (citing Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999)) (discussing benefits of uniform appearance in police context).

concern in *Webb* was to ensure that police officers were identifiable to the public.[176] On the other hand, testimony indicated that Geo Group was concerned that their employees looked sloppy — a subjective concern not comparable to the public identification of officers and one that is not correlated with employee safety.[177] Furthermore, Geo Group did not establish any evidence that prison employees require the same morale and cohesiveness of an organization such as the police department.[178] These are genuine issues of fact over which a jury could disagree.[179] At the summary judgment stage, case law indicates that the judges in *Geo Group* should not have weighed the evidence and drawn inferences.[180] Rather, the court should have simply determined that a genuine issue of fact existed and let the case proceed past summary judgment.[181]

B. The Third Circuit Should Have Raised the Issue of Disparate Impact on Females Practicing the Islamic Faith

Appellate courts often confront cases with un-argued legal issues.[182] The court must decide whether to judge the litigation narrowly by only resolving issues argued by the parties, or independently analyze issues not raised.[183] This latter action is well known as *sua sponte*

[176] *See id.* at 261 (discussing importance of identifiable and impartial police force).

[177] *See Geo Group, Inc.*, 616 F.3d at 272 (discussing warden's concerns about employees wearing hats backwards or sideways).

[178] *See id.* at 273 (discussing EEOC's arguments).

[179] *See* David J. Ignall, *Making Sense of Qualified Immunity: Summary Judgment and Issues for the Trier of Fact*, 30 CAL. W. L. REV. 201, 204 (1994); Jeffrey A. Van Detta & Dan Gallipeau, *Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before a Jury? A Response to Professor Colker*, 19 REV. LITIG. 505, 566 (2000) (discussing jury questions); *see also* Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. Rev. 759, 760 (2009) (discussing reasonable jury).

[180] *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986) (discussing role of judges at summary judgment stage); *see also* Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150 (2000) (citing *Liberty Lobby, Inc.*); Lanctot, *supra* note 165, at 64; Ware, *supra* note 56, at 41 (discussing court's obligation to refrain from making credibility determinations at summary judgment stage); Zimmer, *supra* note 165, at 1946 (discussing judge's role at summary judgment stage).

[181] *See Liberty Lobby, Inc.*, 477 U.S. at 249-50; Lanctot, *supra* note 165, at 64; Zimmer, *supra* note 165, at 1947.

[182] *See, e.g.*, Allan D. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477, 477-78 (1958) (stating that un-argued legal issues often arise and one should not assume that an appellate court will never go beyond facts in the record).

[183] *See id.* (distinguishing *sua sponte* — articulation of legal principle not urged by

consideration. Such independent decision-making authority has both proponents and opponents.[184] Yet summary dispositions deprive the parties of a fair opportunity to a hearing on the merits and increase the risk of erroneous decisions that will confuse lower courts.[185] A summary disposition in *Geo Group* solidifies the Third Circuit's view that khimar-wearing employees — females practicing the Islamic faith — pose an undue hardship on employers.

The court in *Geo Group* should have raised the issue of disparate impact *sua sponte*. In this case, the court likely would have found a disparate impact because the employer did not provide clear and specific reasons for their policy.[186] For instance, the court should have prodded the employer to explain why the headgear policy either

litigants — from dicta).

[184] *See* Sherman v. United States, 356 U.S. 369, 379 n.2 (1958) (Frankfurter, J., concurring) (stating that "it is of course not a rigid rule of this Court to restrict consideration of a case merely to arguments advanced by counsel"); City of Dearborn v. Bacila, 90 N.W.2d 863, 873 (Mich. 1958) (Black, J., concurring) (stating that "there is no hard and fast rule that appellate courts, sitting either in law or equity, cannot and hence do not raise and decide important questions *sua sponte*. Indeed, a mere glance at available precedent will disclose the contrary. True, the power is exercised sparingly and with full realization of the restrictions and limitations inherent in the employment thereof"). *But see* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 388 (1978) (arguing that *sua sponte* decisions make adjudicative process sham); Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 1, 18-26 (2002) (discussing overreaching by appellate courts).

[185] *See* Hildwin v. Florida, 490 U.S. 638, 641 (1989) (Marshall, J., dissenting); Olden v. Kentucky, 488 U.S. 227, 233 (1988) (Marshall, J., dissenting) ("The Rules of this Court urge litigants filing petitions for certiorari to focus on the exceptional need for this Court's review rather than on the merits of the underlying case. Summary disposition thus flies in the face of legitimate expectations of the parties seeking redress in this Court and deprives them of any opportunity to argue the merits of their claims before judgment. Moreover, briefing on the merits should be encouraged not only because parties expect and deserve it, but because it leads to greater accuracy in our decisions. Briefing helps this Court to reduce as much as possible the inevitable incidence of error and confusion in our opinions each Term. Finally, the practice of summary disposition demonstrates insufficient respect for lower court judges and for our own dissenting colleagues on this Court"); Pennsylvania v. Bruder, 488 U.S. 9, 11-12 (1988) (Marshall, J., dissenting); Rhodes v. Stewart, 488 U.S. 1, 4-5 (1988) (Marshall, J., dissenting); Buchanan v. Stanships, Inc., 485 U.S. 265, 269 (1988) (Marshall, J., dissenting) ("It is my ongoing view that when the Court is considering a summary disposition of a case, it should at a minimum so inform the litigants and invite them to submit supplemental briefs on the merits. Such modest steps are necessary to ensure fair and reasoned decisionmaking").

[186] *See* EEOC v. Geo Group, Inc., 616 F.3d 265, 271-73 (3d Cir. 2010) (discussing variety of reasons for policy, none of them related to job performance, nor fully developed).

relates to successful job performance or is a business necessity.[187] If the court had raised the issue, its reliance on the wardens' blanket statements would not adhere to the disparate impact proof structure.[188] If the employer could show the policy's relation to job performance or its business necessity, the court would need to give the plaintiff an opportunity to rebut — to allow the plaintiff a chance to show that there was a less discriminatory, equally effective alternative employment practice available.[189] This approach would adhere to the Supreme Court's precedent in disparate impact cases.[190]

Proponents of the Third Circuit's decision may argue that, even if the court had raised the disparate impact issue, the plaintiffs could not overcome the fact that the headgear policy at issue ensured safety and was, thus, a business necessity.[191] According to these proponents, prisoner and employee safety is one of the central concerns to a prison. Moreover, proponents would point to the fact that raising this issue *sua sponte* is not an obligation on the court and that analysis independent of the arguments proposed by counsel is unnecessary judicial activism.[192]

Assertions that the prison's policy was related to job performance or necessary to its business fail, however, because the burden was on the employer to show "that any given requirement [has] a manifest relationship to the employment in question."[193] It is reasonable to expect that the Supreme Court's rigorous burden of proving job-relatedness in testing cases like *Griggs* would extend to other disparate

[187] *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.9 (1981) (discussing prerequisite of admissible evidence for making decision based on Title VII). *See generally* Lamber, *supra* note 54 (discussing strength of evidence).

[188] *Cf.* George Rutherglen, Ricci v. DeStefano*: Affirmative Action and the Lessons of Adversity*, 2009 SUP. CT. REV. 83, 97 (discussing how plaintiff can show intentional discrimination); Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL'Y REV. 95, 105 (2006) (discussing plaintiff's ability to show intentional discrimination); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 287 (1997) (discussing Supreme Court's handling of intentional discrimination).

[189] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (providing plaintiff opportunity to show lesser-impacting alternatives); Albermarle Paper Co. v. Moody, 422 U.S. 405, 428 (1975) (granting plaintiff in disparate impact case opportunity to rebut employer's defenses with showing of pretext and lesser-impacting alternatives).

[190] *See* sources cited *supra* note 189.

[191] 42 U.S.C. § 2000e-2(k)(1)(A) (2006); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 665, 671 (1989) (discussing business necessity and disparate impact proof structure generally).

[192] *See* Fuller, *supra* note 184, at 388; Milani & Smith, *supra* note 184, at 18-26.

[193] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

impact cases.[194] Even if the burden is not hard to meet, the *Geo Group* court's handling of the facts was questionable — the case lacked evidence that employees using the head covering are prone to attacks.[195] Moreover, the prison did not experience any increase in contraband through employees since the women started wearing their khimars.[196] The plaintiffs' expert witness testified to the lack of contraband smuggling or other incidents relating to the wearing of khimars.[197] The expert also testified that other jurisdictions allow individuals to wear khimars in correctional systems.[198] Furthermore, while not an obligation, raising the issue *sua sponte* is allowable and may clarify accommodations available to females practicing the Islamic faith. Lastly, allegations of judicial activism are unmerited because the *sua sponte* raising of disparate impact is based on existing law, not personal considerations of the judges.[199]

C. Ignoring Judicial Policies

Scholars categorize arguments made by judges into six modalities.[200] The Third Circuit in *Geo Group* ignored these forms of argument — specifically, prudence and national ethos.

1. Prudence

As a policy matter, if courts apply the Third Circuit's decision in *Geo Group*, claims of religious discrimination will likely always fail.[201]

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[194] *See, e.g.*, Hannah A. Furnish, *A Path through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After* Beazer *and* Burdine, 23 B.C. L. REV. 419, 427 (1982) (discussing cases subsequent to *Griggs* in which burden on employer was high).

[195] *See* EEOC v. Geo Group, Inc., 616 F.3d 265, 274 (3d Cir. 2010) (discussing that there were no occasions of attacks on khimar-wearing employees).

[196] *See id.* at 268-70 (noting that women wore khimar for years leading up to policy's institution with no consequences).

[197] *See id.* at 284.

[198] *See id.*

[199] *See generally* Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism*," 92 CAL. L. REV. 1441 (2004) (discussing ulterior motives and other considerations that judicial activists employ).

[200] *See* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 54-55 (5th ed. 2006) (discussing six modalities of appeals to constitutional text, theory and structure of government, prudential arguments, appeals to history, precedent, and national ethos).

[201] *See Geo Group, Inc.*, 616 F.3d at 274 (discussing safety concerns as dispositive); Scott E. Schaffer, Note, Echazabal v. Chevron, Inc.*: Conquering the Final Frontier of Paternalistic Employment Practices*, 33 CONN. L. REV. 1441, 1447 (2001) (discussing

The court's decision created a generalized rule that ignores the facts of each case.[202] Judicial policy dictates that judges keep a holding's consequences at the forefront of decision-making.[203] The Third Circuit's holding is not prudential because it creates a shortcut for employers.[204] Its rule enables an employer to assert safety concerns without producing evidence in order to avoid providing religious accommodations.[205] Essentially, this means that an employer does not need to show that undue hardship exists.[206] The court's new rule fundamentally conflicts with Title VII because it provides too much deference to the employer and too little protection to religious observances.[207]

Another consequence of the Third Circuit's decision is that it has a disparate impact on Muslim women.[208] In this case, the prison's

safety concerns); *see also* Ariel Graff, Comment, *Calibrating the Balance of Free Exercise, Religious Establishment, and Land Use Regulation: Is RLUIPA an Unconstitutional Response to an Overstated Problem?*, 53 UCLA L. REV. 485, 509 (2005) (discussing Third Circuit's handling of religious discrimination).

[202] *See Geo Group, Inc.*, 616 F.3d at 274 (holding broadly that safety risk constitutes undue hardship).

[203] *See* BREST ET AL., *supra* note 200, at 54-55 (discussing that judges often are concerned with political or public reaction to decisions); Christopher A. Ford, *Judicial Discretion in International Jurisprudence: Article 38(1)(C) and "General Principles of Law*," 5 DUKE J. COMP. & INT'L L. 35, 39-40 (1994) (discussing justices' responsibility to shape national ethos). *See generally* Philip Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695 (1980) (discussing categorization of constitutional arguments into modalities that include prudence — asking judges whether their decisions will have negative consequences in long run).

[204] *See generally* Riley v. Shinseki, No. 09-4345, 2011 U.S. App. LEXIS 209 (3d Cir. 2011) (granting employer summary judgment despite issue that employer may have retaliatory motive); Florence v. Bd. of Chosen Freeholders, 621 F.3d 296 (3d Cir. 2010) (discussing deference to prison employer due to task of preserving safety and order in difficult circumstances).

[205] *See Geo Group, Inc.*, 616 F.3d at 271-73.

[206] *See id.*; *see also* Trans World Airlines, Inc., v. Hardison, 432 U.S. 63, 92 n.6 (1977) (Marshall, J., dissenting) (questioning majority's impact on Title VII as matter of law); Sarah Abigail Wolkinson, Comment, *A Critical Historical and Legal Reappraisal of* Bhatia v. Chevron U.S.A., Inc.*: Judicial Emasculation of the Duty of Accommodation*, 12 U. PA. J. BUS. L. 1185, 1192-93 (2010) (discussing safety concerns precluding religious accommodation).

[207] *Compare* Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006) (requiring employer to show undue hardship), *and* Brown v. Gen. Motors Corp., 601 F.2d 956, 961 (8th Cir. 1979) (stating that speculation is not sufficient to discharge employer's burden of proving undue hardship), *with Geo Group, Inc.*, 616 F.3d at 273 (holding that assertions in pleadings are dispositive of undue hardship).

[208] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); Aliah Abdo, Note, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 HASTINGS RACE & POVERTY L.J. 441, 477

neutral dress policy has a disproportionate disparate impact on Muslim women, and potentially followers of any religion that requires one to wear a garment on their head. Yet the Third Circuit's decision discourages a claimant from alleging disparate impact discrimination if the employer asserts a safety concern because, as was the case in *Geo Group*, the employer will easily be able to prove that the practice in question is job related and consistent with business necessity.[209] As a result, Muslim women that wish to express their faith by wearing headscarves cannot expect reasonable accommodation in the work environment that prohibits head coverings for safety reasons. The decision in *Geo Group* failed to keep such a consequence and, therefore, the judicial policy of prudence, in mind.[210]

2. National Ethos

The Third Circuit's decision is also unfaithful to an important aspect of national character, namely freedom from religious persecution.[211] Muslims in the United States currently experience increasing anti-Muslim sentiment in their daily lives.[212] Many Americans view Muslims as a threat and associate them with terrorist activity.[213] The

(2008). *See generally* Welch, *supra* note 46 (discussing disparate impact).

[209] *See Geo Group, Inc.*, 616 F.3d at 275 (holding that safety concerns constitute undue hardship at summary judgment stage and thus prevent employee from introducing evidence at trial).

[210] *See id.* at 273 (resulting in per se rule); Jamie Goetz, Comment, *Whose Opinion Really Matters? Admitting EEOC Reasonable Cause Determinations as Evidence of Discrimination*, 76 U. CIN. L. REV. 995, 1015 (2008) (discussing problems with per se rules in Title VII cases). *See generally* Bobbitt, *supra* note 203 (discussing importance of prudence in judicial decisions).

[211] *See* BREST, *supra* note 200, at 58 (discussing importance of national ethos in judicial arguments).

[212] *See* Christina A. Baker, Note, *French Headscarves and the U.S. Constitution: Parents, Children, and Free Exercise of Religion*, 13 CARDOZO J.L. & GENDER 341, 351 (2007); *see also* COUNCIL ON AM.-ISLAMIC RELATIONS, THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES: UNEQUAL PROTECTION 5-6 (2005), *available at* http://www.cair.com/CivilRights/CivilRightsReports/2005Report.aspx (discussing statistical rise in cases of discrimination, harassment, and violence against Muslim Americans).

[213] *See supra* note 212; *see also* Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1279-80 (2004) (discussing assumptions that all Muslims are terrorists); Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 UC DAVIS L. REV. 609, 612 (2005) (discussing portrayal of Muslims as terrorists or negative characters); Nagwa Ibrahim, Comment, *The Origins of Muslim Racialization in U.S. Law*, 7 UCLA J. ISLAMIC & NEAR E.L. 121, 135 (2008) (discussing

Third Circuit's decision to adhere to the wardens' statements that khimars pose a safety risk is a gross example of this sentiment.[214]

The U.S. Constitution firmly embeds religious equality in the nation's character.[215] The Free Exercise Clause of the First Amendment arises in employment disputes when an employee must choose between religious belief and work.[216] In *Fraternal Order*, the Third Circuit held that a policy that prohibits Muslims from growing beards for religious reasons violates the Free Exercise Clause.[217] The court's holding indicates that the Free Exercise Clause requires employers to accommodate a religious belief where a secular exemption for the same action exists.[218] Juxtaposed to *Fraternal Order*, *Geo Group* should yield the same outcome for the Muslim women because the prison made secular exemptions for its own hats and for head coverings required in the kitchen to comply with food and health

projection of Muslims as terrorist enemy); Kathryn A. Ruff, Note, *Scared to Donate: An Examination of the Effects of Designating Muslim Charities as Terrorist Organizations on the First Amendment Rights of Muslim Donors*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 447, 448-49 (2006) (discussing attempt to correct assumptions that all Muslims are terrorist supporters).

[214] *See Geo Group, Inc.*, 616 F.3d at 273 (claiming that prison warden's prior experience adds weight to possibility of khimars becoming extremely problematic).

[215] *See* U.S. CONST. amend. I.

[216] *See* U.S. CONST. amend. I; Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 717 (1981) (noting choice between fidelity to religious belief or cessation of work); Sherbert v. Verner, 374 U.S. 398, 404 (1963) (discussing force placed on employee to forego religious practice); Ira C. Lupu, *Free Exercise Exemptions and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 417-18 (1987) (discussing when free exercise objections to secular obligations are sustained); *see also* Hernandez v. Comm'r, 490 U.S. 680, 697 (1989); Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829, 834 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987). *See generally* Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of Smith, Sherbert, Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178 (2005) (discussing free exercise jurisprudence in employment context); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (discussing threat to survival of free exercise exemptions).

[217] *See* Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 363 (3d Cir. 1999); Abdo, *supra* note 208, at 480.

[218] *See Fraternal Order of Police Newark Lodge No. 12*, 170 F.3d at 366-67 (discussing secular exemption's undermining of employer's rationale); *see also* Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 127 (2006) (stating secular exemptions help courts evaluate and weigh reasons for denying religious exemption); Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 628 (2003) (discussing religious claimant's ability to show discrimination via existence of secular exemption where no religious exemption exists).

regulations[219] This outcome would be consistent with the judicial policy of faith to the nation's deepest commitments.[220]

CONCLUSION

In *Geo Group*, the Third Circuit erred in holding that safety risks undoubtedly constitute undue hardship.[221] First, the Third Circuit should have applied the correct standard of review for summary judgment.[222] This approach preserves the Supreme Court's requirement that judges refrain from weighing evidence at the summary judgment stage.[223] Second, the Third Circuit should have raised the issue of a disparate impact on females practicing the Islamic faith, applying the Supreme Court's precedent set out in *Griggs*.[224] Third, applying the Third Circuit's decision enables employers to avoid religious accommodation by simply asserting safety concerns.[225] Moreover, the Third Circuit's decision is unfaithful to an important aspect of national character — freedom from religious persecution.[226] If presented with the opportunity, the Supreme Court should overturn *Geo Group* and require that employers meet their evidentiary burden of proving undue hardship.[227]

[219] *Compare Geo Group, Inc.*, 616 F.3d at 272 (discussing prison facility's exception for its own hats), *with Fraternal Order of Police Newark Lodge No. 12*, 170 F.3d 359 (discussing secular exception's importance in determining requirement of religious exception).

[220] *See* BREST, *supra* note 200, at 58 (discussing importance of national ethos in judicial arguments); Philip Bobbitt, *Is Law Politics? Red, White, and Blue: A Critical Analysis of Constitutional Law*, 41 STAN. L. REV. 1233, 1298 (1989) (discussing judiciary's role in shaping national ethos); Ford, *supra* note 203, at 39-40 (discussing justices' responsibility to shape national ethos).

[221] *See Geo Group, Inc.*, 616 F.3d at 275 (holding that safety concerns constitute undue hardship at summary judgment stage and thus prevent employee from introducing evidence at trial).

[222] *See supra* Part III.A (discussing judge's responsibility to determine only if genuine issue of material fact exists for trial).

[223] *See supra* Part III.A.

[224] *See supra* Part III.B.

[225] *See supra* Part III.C.1.

[226] *See supra* Part III.C.2.

[227] *See supra* Part III.